

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 August 2018

CASE NO: 2013-FRS-00070

In the Matter of:

ROBERT K. BRUCKER,
Complainant,

v.

BNSF RAILWAY COMPANY,
Respondent.

Appearances: Joseph L. Bauer, Esq.
for Complainant

Christopher C. Confer, Esq.
for Respondent

Before: PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

DECISION AND ORDER DENYING COMPLAINT

This matter arises under the employee-protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109 (“FRSA”), and its implementing regulations at 29 C.F.R. Part 1982. Complainant Robert K. Brucker alleges that he was harassed by supervisors while on duty, walked on and off Respondent’s property in a humiliating way, and terminated from employment, in retaliation for having reported a work-related injury. Respondent BNSF replies that Mr. Brucker was terminated for falsely stating on his employment application that he had never been convicted of a crime. BNSF further argues that Complainant’s report of a work-related injury did not contribute to walking Complainant on or off property or to its decision to terminate him, and that it did not subject Mr. Brucker to supervisory harassment. For the reasons that follow, I find that BNSF did not violate FRSA, and Mr. Brucker’s complaint will be denied.

PROCEDURAL HISTORY

On January 9, 2013, Respondent filed a complaint with the Occupational Safety and Health Administration (“OSHA”) alleging he had been subjected to adverse employment actions beginning May 17, 2010, because he had filed a personal injury report with Respondent. (CX 116). After investigating, the OSHA Acting Regional Administrator issued the Secretary’s

findings that there was no reasonable cause to conclude that Respondent had violated FRSA. (RX 108). Complainant filed a timely objection and request for a hearing, and the matter was docketed with the Office of Administrative Law Judges (“OALJ”) on July 11, 2013.

On May 1, 2014, I issued an Order Granting Employer’s Motion for Summary Decision. On June 25, 2014, Complainant appealed that determination to the Administrative Review Board (“ARB”). On July 29, 2016, the ARB issued a Decision and Order of Remand. A hearing in this matter was held on February 28 to March 2, 2017 in Kansas City, Kansas. At the hearing, I denied Respondent’s Motion in Limine to preclude Complainant from testifying as to his conversation with Mr. Underwood and I granted the Motion in Limine to exclude the deposition testimony of Mr. Webber. (TR at 8-11). Respondent also filed a motion to exclude the deposition testimony of various witnesses. I determined that I would consider the deposition testimony of Mr. Wright, Mr. Patterson, Mr. Tate, Dr. Chinnaswamy, Mr. Reppond, Mr. Bossolono, Mr. Smith, Mr. Dominguez, and Mr. Fultz. *Id.* at 25 and 476. I determined I would not consider the deposition testimony of Mr. Fultz, Mr. Palmer, Mr. Rogers, Mr. Krause, Mr. Zagalik, and Mr. Daniel. *Id.* at 25.

The parties submitted timely post-hearing briefs. On August 18, 2017, Respondent filed a motion to supplement its post-hearing brief. Complainant did not respond to the motion; accordingly, it is granted, and Respondent’s additional arguments will be considered.

PARTY CONTENTIONS

Complainant’s Position

Complainant contends he engaged in protected activity by reporting a personal injury to his shoulders to the Employer on January 26, 2010, and that Respondent was aware of the protected activity because he reported the personal injury to Respondent. Complainant contends he suffered the following adverse employment actions: (1) termination; (2) supervisory harassment; (3) being subject to two separate disciplinary investigations in 2010 and 2011; and (4) being “paraded” on and off Respondent’s property in front of other employees.

Complainant states that Respondent would not have known of his criminal conviction and therefore would have had no reason to dismiss him from employment if he had not reported his injury. Therefore, the adverse actions taken against Complainant were a result of his personal injury complaint.

Complainant argues that once he has shown that protected activity was a contributing factor in the adverse employment action, the burden is on Respondent to prove by clear and convincing evidence that it would have taken the same action absent the protected activity. Complainant asserts that Respondent has presented no credible evidence that it would have discharged him had he not reported the personal injury. Complainant notes that for 19 years Respondent did not verify his response to the criminal conviction question on his employment application and did not conduct a background investigation. Considering this and Respondent’s other actions following Complainant’s personal injury report, Complainant asserts Respondent violated the Act by disciplining Complainant on unproven charges, retaliating against him, and ultimately dismissing him.

He contends he suffered a total wage loss of \$330,422. Complainant argues he suffered other economic losses as a result of his dismissal including taking all \$50,000 out of his IRA/401(k), selling his house for \$10,000 less than its value, rental of a storage unit, selling his motorcycle and road bike, and loss of the fringe benefit package from Respondent. Therefore, Complainant asserts he is entitled to \$110,236.20 in fringe benefits. Complainant argues he is entitled to compensatory damages for mental anguish and upset as a result of his dismissal. Finally, Complainant argues he is entitled to \$250,000 in punitive damages.

Respondent's Position

Respondent argues the Railway Labor Act (“RLA”) provides a compulsory remedy to resolve “minor disputes” that involves the interpretation or application of existing labor agreements. Respondent asserts that since Rule 42(b) of the Collective Bargaining Agreement (“CBA”) applies to this claim, the question of whether Complainant “falsified” his employment application is a matter for arbitration. Therefore, Respondent argues this court does not have jurisdiction of the matter of whether Complainant falsified his employment application. Alternatively, Respondent argues that if jurisdiction is established, the Public Law Board’s (“PLB”) ruling is *res judicata* in this matter.

Respondent argues Complainant timely filed his complaint with OSHA as regards his dismissal. However, Respondent asserts the other allegedly unfavorable personnel actions taken against Complainant are time-barred and cannot form the basis of an FRSA complaint.

Respondent asserts that at the time of the filing of his FRSA complaint, Complainant worked and lived in Missouri. Therefore, this case arises within the jurisdiction of the United States Court of Appeals for the Eighth Circuit and therefore must prove the contributing factor to the unfavorable personnel action was intentional retaliation in response to the protected activity.

Respondent contends Complainant lacks credibility because he lied on his employment application with Respondent and with Wheeling & Lake Erie Railway Company (“Wheeling”) about his past criminal conviction and signed statements certifying the information was correct. Respondent states Complainant lied about his medical history when applying for the job with Wheeling, lied about his criminal history and medical history when he applied for a job with C.R. England after being fired by Respondent, and submitted job applications to other employers in which he lied about his employment history.

Respondent argues Complainant admitted the only protected activity he is claiming is turning in a personal injury report in January 2010. It asserts Complainant is not claiming that the letter sent by his attorney to Respondent indicating he had been retained to represent Complainant in his personal injury claim was protected activity. Respondent contends that while submitting a personal injury report would normally satisfy the protected activity element, in this case Complainant is prevented by collateral estoppel from re-litigating the issue of whether he had a work-related injury. Specifically, Respondent argues Complainant’s FELA lawsuit in which the court granted Respondent’s Motion for Summary Judgment and dismissed the case was based on Complainant’s failure to prove his injuries were work-related and therefore that judgment is final. Respondent asserts the sending of a notice of representation and filing of a

FELA claim is not protected activity because it concerned Complainant's retention of an attorney, not notifying Respondent of a work-related personal injury. Alternatively, Respondent asserts that Complainant confirmed his only protected activity is the submission of the personal injury report. Respondent asserts that Complainant has not claimed that the filing of his FELA claim was a protected activity and that it is irrelevant that Respondent learned of Complainant's dishonesty based on documents received as part of the FELA lawsuit.

Respondent contends Complainant has not proven that the relevant decision-makers had knowledge of his protected activity when issuing the dismissal decision. Specifically, Respondent argues the ultimate decision-maker on whether to terminate Complainant was Mr. Bossolono who did not know Complainant had filed an injury report. Similarly, Mr. Suttles, the officer who conducted the disciplinary investigation into the employment application, did not know Complainant had been injured, filed an injury report, or retained counsel until after the investigation was complete. Additionally, Mr. Cargill based his decision to dismiss Complainant on his dishonesty, with consideration of other infractions, and did not consider Complainant's personal injury or FELA claim. Finally, while Mr. Fultz knew of Complainant's personal injury report, he had no knowledge that Complainant had retained an attorney and he was not involved in the decision to terminate Complainant.

Respondent asserts that Complainant has not established that it acted with intent or retaliation in its decision to terminate him. Respondent argues Complainant has not established that the offered reason for his dismissal was pretext for the true reason because the relevant matter is Respondent's good faith belief the Complainant had violated its policies, not whether he actually was in violation. Respondent argues Complainant has not established that the dismissal was in any way related to the filing of the injury report. Respondent argues Complainant has failed to show temporal proximity between the filing of the injury report in January 2010 and his dismissal from the company in August 2012. Respondent asserts Complainant cannot explain why the relevant decision-makers took over two years to retaliate against him for submitting the injury report in 2010 particularly when he could have been dismissed when he received his second Level S violation. Respondent argues that the Level S violation incidents also do not establish temporal proximity because too much time elapsed between the filing of the personal injury report and the violations. Finally, Respondent argues Complainant has failed to establish that Respondent has provided shifting explanations for his termination.

Respondent asserts that intervening events break the causal chain between protected activity and adverse employment action because the 2010 Level S violation and the 2011 Level S violation break the causal connection and Respondent could have terminated Complainant on those reasons alone. Additionally, Respondent asserts that the discovery of Complainant's dishonesty on the employment application was an independent justification for the adverse disciplinary action under Respondent's rules and the CBA.

Respondent argues Complainant has not established there is any antagonism or hostility by it towards Complainant's protected activity. Complainant stated that Mr. Frey and Mr. Parrish were hostile towards him after filing his injury report but Respondent contends there is no evidence that either man was involved in or influenced the decision to terminate Complainant. Although Complainant alleged that Mr. Frey and Mr. Parrish exhibited a change in attitude after

he filed his personal injury report, Respondent contends Complainant admitted they were not watching him the whole time he worked, they had work to do in his area during the times they were purportedly watching him, that part of managers' jobs is to watch employees to ensure work is getting done, and that they had a legitimate reason to be in the areas they were in. Additionally, Respondent contends Complainant conceded there may have been a change in Respondent's policy or procedure that had nothing to do with him.

Respondent argues multiple disinterested individuals reviewed the decision to terminate Complainant including the PLB and the OSHA investigator and all have found that the decision was appropriate. Respondent states it has presented evidence that it routinely terminates employees who have been dishonest with the company and Complainant failed to present any evidence of employees who had not been fired after dishonesty on employment applications was discovered.

Respondent argues that even if Complainant proves the elements of his claim, it would not be liable because it has established by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the alleged protected activity. Respondent contends Complainant violated the rules by lying on his employment application, the dishonesty was fully investigated and in compliance with established procedures, and multiple individuals reviewed the matter and recommended dismissal.

Respondent asserts Complainant is not entitled to damages for emotional distress because he did not prove the existence and magnitude of emotional distress and has not separated the extent and scope of any emotional distress post-adverse action from before. Respondent asserts Complainant should not be reinstated because he is an attempted murderer who has expressed desires to cause bodily harm to others. Respondent also relies on the testimony of Mr. Suttles who stated he would not be comfortable working around Complainant again and he would have concerns about the safety of other employees. Respondent contends back pay, front pay, and reinstatement are not appropriate in this case because Complainant has unclean hands by continuing to lie following his dismissal from employment. Alternatively, Respondent argues any damages should be offset by earnings from Complainant's other jobs since his dismissal and front pay should be restricted to a short time period.

Respondent asserts Complainant is not entitled to punitive damages because he has submitted no evidence to support such an award. Additionally, Respondent has made good efforts by emphasizing written policies, training employees, and having an impartial employee conduct an independent review prior to Complainant's dismissal. Respondent also argues it did not engage in reckless or callous disregard for Complainant's rights.

SUMMARY OF RELEVANT EVIDENCE¹

Testimony

A. Complainant Hearing Testimony (TR at 57-410)

¹ Evidentiary summaries are not to be construed as findings of fact, but merely summaries. Findings of fact are set forth below. With regard to testimony, the reader should assume "the witness testified" throughout the summary.

Direct Examination (TR at 57-152)

At the time of the hearing, Mr. Brucker was 59 years old. He was 52 years old when he submitted his injury report in 2010. Before beginning his railroad employment, Complainant worked on automobiles as a mechanic for about 20 years. In 1985, he had a fight with his brother. He was arrested for assault, and pled guilty to assault in the third degree in Clay County, Missouri.

Mr. Brucker applied for employment with the Atchison Topeka Santa Fe Railway (ATSF) in June 1993 at the Argentine locomotive maintenance facility. ATSF later merged with Burlington Northern to become BNSF. When he applied for work, Mr. Brucker met with Assistant Superintendent David Underwood. Mr. Underwood gave Complainant an application and at one point Complainant asked Mr. Underwood about the question concerning prior convictions. Mr. Underwood told him the railroad was only looking for felony convictions and to answer "no" to the question whether he had ever been convicted of a crime. Mr. Brucker was hired as a journeyman machinist because he had experience as a mechanic on automobiles. Mr. Brucker first worked at the railroad's facility in Argentine, Kansas but has worked in both Kansas and Missouri.

From 1993 to 2005, Mr. Brucker had no disciplinary problems at the railroad. In December 2005, he signed a waiver for being absent for 30 days without authority and failing to follow instructions from November 30-December 15, 2005.

Mr. Brucker filled out an injury report on January 26, 2010, while he was on railroad property. At that time, he had already had surgery on both his shoulders. He missed about three months of work per shoulder. Mr. Brucker thought he reported the injury to John Reppond, who was the general supervisor at the Murray Yard in Missouri.

After Mr. Brucker submitted his personal injury report, Respondent's attitude toward him changed drastically. Supervisors followed him around and watched him ("kind of peeking around corners and stuff like that") to see if he did anything wrong. After Mr. Brucker submitted his injury report, operations tests, which are used to evaluate employees as they work, were being performed more often. He was followed and watched every day after he reported his injury. Prior to his injury report, operations tests were done 2-3 times per year on anybody.

On May 4, 2010, Mr. Brucker received an operations test ticket for not wearing a seat belt in a moving yard truck. It was dark out at the time and Mr. Brucker was on the passenger side of a BNSF work truck. Gary Paterson was driving the truck. Mr. Brucker was wearing his seat belt. The seat belt was black and Mr. Brucker was wearing a black t-shirt at the time. The supervisors who said Mr. Brucker was not wearing his seat belt were on the driver's side and about 25-50 yards away at the time.

After he got out of the truck, one of the supervisors was jumping and yelling and waving his arms. Mr. Brucker did not know who he was but knew he was an employee of EMD which makes locomotives. Mr. Frey and the EMD supervisor followed him around and then issued the operations test ticket. There is a rule requiring employees to wear a seat belt when they are in a work truck that is moving. Mr. Brucker always obeyed that rule. Mr. Brucker received a letter

dated May 17, 2010 from Earl Bunce, notifying him that a hearing was to be held regarding the alleged seat belt violation. Mr. Bunce was the general foreman at the time and was Mr. Brucker's supervisor's supervisor. The letter stated that Mr. Brucker was operating the yard truck but he was not. He did not know what alternative handling was.

Mr. Brucker and his union representative, Mr. Dominguez, planned to have Mr. Paterson testify. Mr. Paterson was not at the investigation but he prepared a statement. Mr. Dominguez requested that Mr. Paterson's statement be admitted into evidence, but it was not allowed. Mr. Brucker did not recall whether this exchange happened on or off the record. Mr. Dominguez mentioned the statement at the beginning. Mr. Brucker believed that he requested a continuance so Mr. Paterson could attend.

Complainant received a letter dated June 29, 2010 from Mr. Reppond assessing a Level S 30-day record suspension, and a three-year probation commencing on May 4, 2010. Mr. Brucker was also given a copy of the investigation transcript and the exhibits, which did not include Mr. Paterson's statement. He did not receive any time off or time without pay. After the 2010 investigation, Mr. Brucker continued to be watched by supervisors on a daily basis.

Mr. Brucker received a letter dated July 6, 2011 from Mark Scott, general foreman, informing him of another investigation. Mr. Brucker still did not know what alternative handling meant at that point. Larry Smith testified at the investigation that he had failed to put the locomotive's hand brake on. Mr. Brucker relied on Mr. Smith following the instructions and rules in applying the hand brake. Mr. Brucker's job was to attach or detach locomotives and check the brake systems. Complainant went up into the cab of one of the locomotives in order to check the brake system. He needed to enable or disable the brake controls because you only want one locomotive in control when multiple locomotives are attached together. When he went into the cab the locomotive had gone into emergency because the hoses were disconnected. Mr. Brucker reset the brakes and the locomotives moved. They would not have moved if the hand brake had been set. A letter dated August 27, 2011 informed Mr. Brucker he was disciplined a Level S 30-day suspension for this incident.

Mr. Brucker was aware that a lawsuit was filed on his behalf after he submitted his injury report.

A letter dated February 7, 2012, informed Mr. Brucker that he had been absent on four occasions between February 7, 2011 and February 7, 2012. He was asked to sign the letter. He asked to have his union representative present, as he believed he was entitled to do under the CBA, but he was not allowed to have his union representative present. He signed the letter under protest because he did not agree with it. He does not remember who the supervisor was who also signed the letter.

Complainant received a letter dated July 19, 2012 informing him that an investigation had been scheduled into alleged dishonesty on his employment application. He was called into the office on that date between shift change, at about 3:00 p.m., and gave the same explanation about what Mr. Underwood had told him to do. Mr. Brucker pled guilty to third-degree assault, a misdemeanor, in May 1985, but he did not spend two years in jail for third-degree assault. Mr.

Brucker did not work after July 19, 2012, and has not been paid for any work done after that date.

When he received the letter, Mr. Brucker was walked off the property by Mr. Bunce. There were a lot of co-workers that saw him being walked off the property. This made him feel humiliated and embarrassed. Between July 19 and the date of the hearing on August 8, 2012, the railroad contacted him to return railroad property. He returned the tools in between shift change at about the same time of day. He was escorted by Mr. Bunce and Kenny Krause, the union representative. They took him to four different buildings. There were a lot of co-workers around. Being escorted on and off the property made him feel very humiliated and embarrassed.

Mr. Brucker feels dumbfounded and in shock about being dismissed. He has not completely recovered. Mr. Brucker also received insurance in addition to his wages from BNSF. He lost his fringe benefits as of July 19, 2012. He has not been able to obtain his own health insurance since then. His wife also lost her insurance as a result of his dismissal. After his dismissal, Mr. Brucker went to Maplewood Community College where there was a place to help prepare resumes and submit applications online. He does not remember how many applications he completed. It took him about two years before he found a job with C.R. England, and attended a trucking school in Dallas sponsored by that company. He worked for C.R. England for nine months but left because he was told he had too many accidents. He had a lot of accidents because he had a lot of anxiety and could not focus on what he was doing. Mr. Brucker next worked for R&W, another trucking company. He worked there for three months. Then he went to Gold Star Solutions. He worked for Gold Star for one year before they filed for bankruptcy and went out of business. It was set up so that he could go to the other company, Schnell Express. He started working for Schnell two years prior to the hearing.

Complainant had been diagnosed as being bipolar before he applied to work at the railroad. He also has an anxiety disorder. Dr. Chinnaswamy is his psychiatrist. He sees her 2-3 times per year. She gives him a special rate since he does not have insurance.

Mr. Brucker had an IRA or 401-K with the railroad and he had to take money out of it after his dismissal. He eventually took all of it out. He had to sell his house after his dismissal because he was no longer able to keep up the payments on it, and moved into his old barn storage. He would not have sold his house if he had not been dismissed by the railroad. Some of his belongings are in a storage unit because they will not fit in the barn. Complainant is not making as much money as a truck driver as he did at the railroad. At the time of the hearing, Mr. Brucker did not have any savings and he did not have an IRA or a 401-K.

Cross-Examination (TR at 152-278)

Mr. Brucker did not have a union representative present when he was given the 2012 absenteeism letter. Nate Teasley also signed the letter where it said assistant chairman but Mr. Brucker contended "assistant chairman" was written by the supervisor and that Mr. Teasley is just another employee. Mr. Brucker received some money for "vacation time or something" after he stopped working on July 19, 2012. He does not consider that income since he did not work for it. Mr. Brucker believes that Mr. Krause was his union representative when he was dismissed for

dishonesty. The investigation worksheet shows Mark Schmidt was his union representative. Mr. Brucker cannot recall if Mr. Krause ever said anything at the investigation.

Mr. Brucker has not applied for health insurance through the Affordable Care Act. He does not know whether he was required to have health insurance. He does not remember if he sold his house before or after his lawsuit was dismissed. He did not receive any money from the FELA lawsuit. Mr. Brucker now has running water and plumbing in the barn.

Mr. Brucker previously testified that he did not know why the locomotives went into emergency in 2011 but said it might have been because of the air lines. He was responsible for making sure all the air was flowing correctly which caused one or more of the locomotives to go into emergency.

Mr. Brucker pled guilty to a misdemeanor in the Clay County Circuit Court in Missouri after a fight with his brother in January 1985. He was originally charged with a felony and spent 112 days in jail. When he pled guilty to the misdemeanor he was sentenced to one year in jail suspended for two years of probation. Mr. Brucker contended it was one year of probation but testified at his deposition it was two years.

Complainant filled out the employment application and signed it. He does not recall whether he read the paragraph above his signature that stated he had answered all the questions to the best of his ability, and that providing false information could be grounds for dismissal at any time. Mr. Brucker has reading, and was never taught to read past a third grade level. Mr. Brucker left school in his junior year of high school and later got his GED. He had to pass a written test to get his GED. When applied at ATSF, he correctly filled out information on what position he was applying for, his Social Security number, his date of birth, that he had never worked under another name, his address and phone number, that he was over the age of 18, that at the time, he had never been employed by a railroad before, and that he was physically capable of performing the duties of the position. The question about criminal convictions was hard for him to understand and he had to ask for clarification. Mr. Brucker's "no" answer was not correct. Mr. Underwood told him to check the "no" box after he explained what had happened between Mr. Brucker and his brother. When he checked it he thought it was the correct answer.

Mr. Brucker made a statement under oath to OSHA. He signed and dated this statement. The box above his signature said he had the opportunity to correct his statement and that the facts were true to the best of his knowledge and belief and that it was a criminal offense to knowingly make false statements or misrepresentations in the statement. He does not remember whether he needed to have the statement done within a certain period of time. He could have put as much detail as he wanted in the statement. According to this statement, Mr. Underwood did not ask any details about the conviction, his plea, the charged crimes, or the details of the incident with Complainant's brother. Mr. Brucker volunteered that information. There are no details in the OSHA statement about his conversation with Mr. Underwood.

Mr. Brucker filled out the job application on the second floor at Argentine. He was in a conference type room or in the lobby. Mr. Underwood was not present the entire time Mr. Brucker was filling out the application. He told Mr. Underwood everything that happened between him and his brother and did not leave anything out. Complainant told him that he had

pled guilty to a misdemeanor and that it was for assault in the third degree in 1985. He does not recall whether he told Mr. Underwood he had a fight with his brother or that he stabbed his brother, but thought he probably said he had a fight. He told Mr. Underwood that he was initially charged with a felony and was sentenced to one year in jail suspended and two years' probation. He does not recall whether he told Mr. Underwood that he was required to undergo a mental health evaluation. He does not remember if he actually told Mr. Underwood all the details. Mr. Brucker did not list these details in his OSHA statement because it was a stressful situation filling out his statement to OSHA, because he cannot write or read well and was in an unfamiliar environment. Mr. Brucker does not remember where he filled out the OSHA statement or how many people were in the room.

Mr. Brucker did not know whether Mr. Underwood was deceased. He never asked Mr. Underwood to initial that he had told Mr. Brucker to answer the question "no" or asked him to make any notes that he had told Mr. Brucker to do that. Mr. Underwood introduced himself to Mr. Brucker when he gave him the application. Complainant does not recall how he ended up asking Mr. Underwood about the question but assumed he went to his office.

In 1997, Mr. Brucker spent some time on an in-patient basis at the North Kansas City Hospital. He did not remember whether he had a lot of rage at the time. A section of his medical records noting that he said he used drugs is not true. He does not remember saying that.

Mr. Brucker does not know who decided to remove him from service. He doesn't know that part of the procedure agreed to between the union and the railroad under the CBA is to pull someone out of service. He does not know what BNSF's anti-retaliation policy, injury reporting policy, or Policy for Employee Performance Accountability ("PEPA") policy were. Mr. Brucker does not know if his dismissal was appealed. He did not know whether the PLB affirmed his dismissal. He did not know that the OSHA investigator denied his claim in this case. He did not know that one of the reasons he lost his FELA claim for his shoulder injuries is the court found that he could not prove his injuries were caused by any of his work tasks or jobs at the railroad.

Mr. Brucker is not sure whether the seat belt investigation was for two separate occasions on the day in question where he was observed not wearing his seat belt. The hearing in that case was continued twice and one of the continuances was so that Mr. Paterson could be available to testify. Mr. Dominguez asked to have Mr. Paterson's statement admitted before the investigation started or right after it started. He does not know if it went in the record. Chris Martin was the EMD technician who observed him not wearing a seat belt along with Mr. Frey. Mr. Brucker thinks Mr. Martin had a vendetta against him because Complainant had turned him in for blue flag rule violations in the past. At the 2012 formal investigation, Mr. Brucker testified that he had never talked to Mr. Martin before and had no idea what his job was or his title. At the time he turned Mr. Martin in for the blue flag violation he did not know who he was. He believes that Mr. Martin had a vendetta against him because he knew that Complainant was the one who turned him in. He does not remember how he knew that Mr. Martin knew that Complainant had turned him in.

Complainant did not make a claim with OSHA or a whistleblower claim following the 2010 disciplinary incident. He could have been terminated for the 2010 incident. Mr. Brucker's

anxiety has been building up. Mr. Brucker currently has prescriptions for anxiety and depression. He took his anti-anxiety medication within the last 24 hours.

During the 2011 incident, the locomotives rolled under blue flag protection. Locomotives may roll under blue flag protection if you are doing a test on them. Mr. Brucker was not doing a test on them at the time of the incident. Movement of the locomotives in this case was a serious rules violation. Mr. Brucker was not aware and his co-workers were not warned that the locomotives were going to move. There were three other BNSF employees who were eventually charged with potential rules violations. Mr. Smith was charged for not setting the hand brake and Mr. Palmer was also charged. Mr. Smith and Mr. Brucker were both assessed discipline. He was not terminated after the 2011 incident but he could have been because it was a serious violation that could have caused an injury and caused damage to Respondent's property. It also caused fuel to spill. He also could have been dismissed because he was still under probation for the 2010 incident at the time. He was given leniency and Respondent used managerial discretion to not fire him and keep him at work.

Mr. Brucker was not disciplined for the absenteeism in 2012. Discipline does not even come into play until the sixth absence in a rolling calendar year. Mr. Brucker does not know whether the letter he received rises to the level of a formal reprimand. The letter was really just a warning. Mr. Brucker made no whistleblower claim for this incident and he did not make this claim or address the absenteeism issue with OSHA when he did file his complaint. All of the supervisors on Mr. Brucker's shift would watch him while he worked including Mr. Frey and Dan Parrish. He does not know how many times supervisors would peek around corners watching him while he worked. Complainant never told anyone that Mr. Frey and Mr. Parrish were watching him. He is not familiar with the employee hotline. He did not call the office in Fort Worth, tell a shop superintendent, tell an assistant superintendent, or tell a direct supervisor. He was afraid to tell anyone about what was happening. These employees who were watching him were doing other work so they had a legitimate basis to be in the area where he was. At Mr. Brucker's deposition he told Respondent's counsel he could give him a list of other machinists who told him BNSF was watching Complainant. He has not provided this list.

BNSF employees have things to do and managers are obligated to ensure that happens. Mr. Brucker worked at least five days a week but sometimes also worked overtime and holidays. He does not know whether managers watched him even 99 times during that two-and-a-half-year period. He does not think they were watching him every single day. They were watching him more than normal. Normal would be "them just walking through there and watching or talking to everybody or whatever." Despite all this heightened attention he only got two disciplinary incidents in that two and a half year period.

When Complainant was walked on and off the property in relation to the 2012 dismissal, Mr. Bunce used the most direct route to walk him on and off the property, but he did not need to go to some of the places where they went. Mr. Bunce took him to the service track where the tool lockers were; he did not need to go there because he did not have any tools there and did not have to return any tools. He had a locker at the service track but he did not have anything in the locker.

Mr. Brucker has only worked for the four trucking companies since being terminated from BNSF. He has not done any self-employment or been involved in a handyman company or worked as a landscaper. The people at the truck driving school in Dallas told him how to answer questions on the job application for C.R. England. The school told him to say that he was self-employed and doing handyman type work if he had periods of unemployment in his employment history. People at Maplewood Community College also told him to fill in gaps in his employment history with handyman or self-employment work. If he put on job applications that he had worked as a handyman, in a landscaping business, or been in self-employment that would not be true. He does not know the names of the people at the truck driving school or the community college that told him to do this.

On Mr. Brucker's employment application to Union Pacific Railroad there is an entry showing "self-employment" in Kansas City from 2012 to present. There are five bullet points showing the tasks Mr. Brucker performed as a contractor for self-employment. Mr. Brucker did not do those tasks and does not know how to put bullet points in. He was never self-employed and this entry is false. Maplewood Community College told him to put that on his application and put the bullet points in. One question on the application was whether Mr. Brucker had ever been fired, asked to resign, forced to leave, or had his employment involuntarily terminated in the last two years. Mr. Brucker answered no because he thought the union was doing something and the issue was not fully resolved. He was terminated in August 2012. He was still on terminated status when he completed the application in March 2014. At the end of the application was a paragraph saying "I certify that all information provided in the employment application is true and complete. I understand that any false information, misrepresentation or omission ... will disqualify me for further consideration for employment, and will result in my dismissal, if discovered at a later date." Mr. Brucker is not sure he read this statement.

On another application to Union Pacific, Mr. Brucker again stated he had worked as a contractor and the job description said he took in bids, lined up workers, performed general labor, bought materials, and did payroll. He listed his personal phone number to call and verify employment. Mr. Brucker did not do any of these jobs. He submitted the application with the false information on it. He said he was still working in this position. He also said he had not been dismissed or fired from Respondent. This was not a true answer; he answered that way because Maplewood told him to. He said he left his position with Respondent because he was seeking work as a conductor or engineer utilizing the skills obtained while working for Wheeling. This was not why he left employment with Respondent. He answered "no" again to the question of whether he had involuntarily left a position in the preceding two years. He signed the same certification that everything on the application was true. Mr. Brucker did not read the certification paragraph.

Mr. Brucker filled out an application to Schnell Express by hand on June 26, 2016. Mr. Brucker said he left employment with Respondent to start his own company. This was not true. Mr. Brucker answered "no" to a question of whether he had been denied a license, permit, or privilege to operate a motor vehicle. This was not true. Mr. Brucker was trying to go by memory. He answered "no" to a question of whether he had had any license, permit, or privilege suspended or revoked. This was also not true. Mr. Brucker could not remember, so he answered "no." When he applied to C.R. England in 2014 he said his license had been suspended or revoked. Mr. Brucker lost his license as a teenager and again later on. He signed a statement that

all the answers were true and complete to the best of his knowledge and that false or misleading information could result in discharge. Mr. Brucker did not read it because it was small print and he has trouble reading so he did not bother.

Complainant also had to fill out a medical questionnaire for Schnell Express. All of the handwriting on it is Mr. Brucker's own. He signed a statement certifying that the information was accurate and complete and that false or misleading information was a violation of 49 C.F.R. Section 390.35 and may be subject to civil or criminal penalties. Mr. Brucker said he had never had head/brain injuries or illnesses or a concussion but that was not true. He said he did not have anxiety, depression, nervousness, or other mental health problems which was not true because he has an ongoing diagnosis of anxiety, depression, and bipolar disorder. He is not sure whether he still has bipolar disorder. He also said he did not have dizziness, headaches, numbness, tingling, or memory loss. Everyone has had a headache; and he does not know if he had ever had dizziness, numbness, tingling, or memory loss. He also said he never had neck or back problems, but he had fusion surgery as a teenager. Mr. Brucker forgot about that. He said he had not had bone, muscle, joint, or nerve problems or shoulder problems in the bones, but he has had back and shoulder problems. He said he had not had sleep disorders, problems breathing while asleep, daytime sleepiness, or loud snoring, but Mr. Brucker has had sleep apnea in the past. He answered "no" to the question whether he has ever had sleep tests (e.g. sleep apnea), but he has had a test for sleep apnea. Mr. Brucker said he has never spent the night in the hospital but he has spent multiple nights in the hospital. He said he had never used tobacco but he used to smoke. Mr. Brucker answered "no" to whether he had any other health conditions and did not identify bipolar disorder, anxiety, depression, fusion, bilateral shoulder injuries, or having a concussion and mental health problems after being mugged in 1993. Despite this false information, Mr. Brucker signed a section certifying the information was accurate and complete.

Mr. Brucker worked for Wheeling for about two and a half years beginning in 2001. He filled out a job application for Wheeling and all the handwriting was his own. He signed the application certifying the information was true, correct, and complete and that if it had a misstatement or omission those would be grounds for termination when discovered. He did not read this statement. Mr. Brucker was a walk-in when he applied. He answered "no" to the question whether he had ever been convicted of violating the law, not including minor traffic offenses. He was not instructed to check the no box for this question when he applied to Wheeling. Mr. Brucker did not give a reason for leaving Respondent. He did not tell Wheeling that he had been pulled from service at Respondent for mental health problems and was no longer able to complete the job of machinist. Respondent's medical officer pulled him from service, but even though a doctor released him to full duty, a supervisor told him he could not come back because he was not released by their doctor. On the medical questionnaire Mr. Brucker denied having been in the hospital or having a nervous breakdown or mental upset. This was not true because he had a number of mental health problems. He said he never had a concussion or head injury. He said he never had back trouble or bone-related injuries. He answered "yes" to the question whether that he had had an operation. He said he was not undergoing treatment for any other injuries not listed, but had been undergoing treatment for more than a month for his mental health disorder. Complainant was not using any medications or drugs, and he was not on any when he was working for Wheeling. Mr. Brucker has never used illegal drugs, and records indicating the contrary are incorrect. He answered "no" to a question of whether he had ever been restricted in employment because he had been pulled from service

based on a supervisor's determination, and not on the statements of a qualified doctor. He had received information that the medical officer for Respondent had medically disqualified him from performing his job but his personal doctor released him to full service. Mr. Brucker misunderstood the question. He signed a statement certifying that the information was true and complete.

Mr. Brucker had a medical examination on January 26, 2004. He answered "yes" to the question whether he had ever had a concussion or head injury occurring in 1993; that was when he had been mugged. He answered "no" to the question whether he had ever had back trouble, sciatica, or lumbago; this was not true because he had a fusion. He said he never had bone or joint injury which was not true. He said he had no other illnesses or injuries for which he was treated for more than one month. He indicated that he said he had no family history of nervous trouble, diabetes, or epilepsy but had answered "yes" to the same question on his prior medical questionnaire. Mr. Brucker had received workers' compensation for a car accident in the 1970's, but on the prior questionnaire he answered no to that question because he did not remember it at the time.

On another document dated July 29, 2004, he again answered "no" when asked whether he had had a nervous breakdown or mental upset; this was not true. He said he had not had any illnesses or injuries not mentioned, which also was not true. He answered "yes" when asked whether he had a family history of nervous trouble, diabetes, or epilepsy. He answered "no" to the question whether he had ever received workers' compensation. He again certified that this information was true. No one from Wheeling went over his application as to the truthfulness of his answers. He did not ask anyone at Wheeling what they wanted to learn from the criminal conviction question.

On Mr. Brucker's application for C.R. England, he gave a work history of "under the table work" as a "landscaper/handyman" from July 2, 2012 to June 22, 2014. A separate entry says he was unemployed from July 1, 2012 to June 1, 2014. Mr. Brucker cannot type and people at the trucking school made these entries. They told him to cover these periods of unemployment by coming up with other stuff he was doing. Mr. Brucker does not know whether he reviewed these entries and made changes to them. On the application it was originally typed as "BNS" and Mr. Brucker crossed it out and handwrote "BNSF" and initialed it because they typed it wrong. He also made a change to his job title. Mr. Brucker also signed and dated the application. On the application it asked if he had been convicted of a crime and he answered "yes," but did not list anything. He was not finished with the application and does not know how it got to C.R. England. There is a separate copy of the application that Mr. Brucker did sign and he entered nothing in the criminal history box. He put a question mark there because he did not know how to answer. There is, however, no question mark in the criminal history section; the question mark is in the DUI section. Mr. Brucker signed the application under a section certifying that he personally completed the application and it was all accurate and complete. He did not read the paragraph but signed it.

On the medical questionnaire for C.R. England, Mr. Brucker checked "no" to all the medical conditions. At his deposition, Mr. Brucker contended he could not read the document so he answered no to all the questions. Mr. Brucker can read English and he signed the document certifying the information was accurate. For his period of unemployment, Mr. Brucker initialed a

statement verifying that he did not collect unemployment during this period but he did collect unemployment from the Railroad Retirement Board in 2013 and 2014. This was a false answer.

Based on Mr. Brucker's tax returns and a check from Schnell Express, he earned about \$2,765.00 every two weeks. In 2017, his first full year working for Schnell, he would make about \$66,360.00. He never earned more than \$62,000.00 from Respondent.

Redirect Examination (TR at 365-393)

Mr. Brucker obtained a copy of his 2016 W-2 from Schnell Express. He earned \$18,357.31 in 2016. He did not receive W-2's from any other employers. Mr. Brucker made some changes to the barn home in 2016. The floor is concrete now and he had electricity and indoor plumbing installed. Some drywall and partitions were also put in. They also put space heaters in.

Mr. Brucker had inaccurate information on some of his job applications because that was how he was told to do it. He also was told to fill in gaps in employment. He did not incorporate or establish a company with the State of Missouri as a contractor during this period. He was familiar with the use of the tools and equipment mentioned on his resume and applications. He left some information off on some questions probably because he did not understand the question at the time and needed clarification.

When Complainant was walked on and off the property, he met Mr. Bunce and Mr. Krause in the parking lot. They went into the locker room next to the parking lot and there were people there changing their clothes going on and off duty. He did not have anything in the locker room. They went from the locker room to the shop. They went to the basement of the shop where the lockers were and he gave them his tools. The locker had a lock on it and he had the combination. They then went to the service track because there was a locker there where they thought there might be more stuff, because he had worked at the service track at one time. Mr. Brucker knew there was nothing in the locker and told them that. They then went to the building where the yard trucks leave from. Mr. Brucker had some clothing there. After they went to the yard truck building they walked him to the parking lot and he left. They drove to the yard truck building. There were people at the building. At that time he had not yet been dismissed but an investigation was scheduled.

Re-Cross Examination (TR at 393-410)

Mr. Brucker's 2016 W-2 says he earned \$18,357.31 and then it says under wages, salaries, tips, etc. \$36,916.00. Mr. Brucker thought it was money his wife took out of her savings and he thought that was considered "wages, salaries, and tips." His wife was not working at a job and did not earn any wages, salaries, or tips in 2016. He did not fill out the form and the tax preparer had not filed it yet.

Mr. Brucker has not had the barn home appraised and does not know whether the value has gone up since the improvements were made. They built the shed the same year his wife bought the property. He does not remember when she bought the property but it was before he was terminated from BNSF. The shed was built before he was terminated. The barn was

purchased for storage, and not in order to have some place to live after he was terminated. He sold his home for \$130,000. He does not remember how much he owed on it at the time. He bought the house in 2006 and made regular payments on it until August 2012. All the money from the sale went to the bank. He did not sell his house to buy the land the barn is on. His wife still owns the 20 acres that the barn is on. On transfer on death the acreage goes to Mr. Brucker. He does not know how much was spent to improve the property. The improvements were made from the money Mr. Brucker has made, they refinanced for some money, and his wife used some of her money.

Mr. Brucker needed to get a job and was willing to lie on his applications in order to get the job. Mr. Paterson's statement on the seat belt incident was not a sworn statement made under penalty of perjury. Mr. Patterson's deposition was under oath. Mr. Brucker assumes that he was wearing his seat belt. Mr. Paterson is a friend of Mr. Brucker's inside the railroad. Mr. Zagalik was a friend of his inside and outside the railroad. Complainant signed the 2012 absenteeism letter under protest because a union representative was not present and because he did not think he had the absenteeism because he was taking care of his mother's medical conditions under the Family and Medical Leave Act.

B. Larry Zagalik Hearing Testimony (TR at 410-448)

Direct Examination (TR at 410-428)

Mr. Zagalik is retired from BNSF. He first worked for Missouri Pacific as a switchman and yard master. He worked for that railroad for ten years beginning in 1978. He started working for Respondent's predecessor around 1991-1992. He hired in as a laborer and worked in that position for 2-3 months. He worked in Argentine, Kansas. He then became a machinist and held that position for the rest of his career. He retired in October 2016.

He was working as a lead man in June 2011. His duty with regard to the locomotives was telling people if they needed anything extra done to them. He did the job briefing at the beginning of the shift. He was slightly south of where the locomotives that rolled were parked. He could not see the locomotives from his office. Mr. Smith, Jordan Palmer, Mr. Brucker, and Bill Rogers were on the crew at the time. Mr. Zagalik was familiar with the job of the machinist working bottoms versus tops. The bottom changes the brake shoes and inspects the wheels, while the top would check for water leaks, the water levels, and daily cards. Someone came into his office and told him about the incident. Mr. Zagalik reported it to his supervisor, Fred LeBlanc. Mr. Zagalik went to where the incident had occurred. He saw a fuel spill. He was not involved in the investigation to determine how the locomotives moved. If a machinist is going to release brakes, this is not an activity where a job briefing should be held to warn the co-workers. When the brakes are applied, if someone is working on the brakes they could get their fingers or hands caught in the braking mechanism. When a locomotive is in emergency and the brakes are released, Mr. Zagalik would not expect the locomotives to move because the hand brake should be set. The movers and laborers are supposed to set the hand brake. In this case that would be Mr. Smith and Mr. Palmer. Mr. Zagalik had been involved in another incident where a locomotive moved because the hand brakes had not been set by Mr. Smith. There was not an investigation or discipline in that case. This event was 2-3 years before the June 2011 event. Mr. Zagalik testified at Mr. Brucker's investigation. Mr. Smith was also charged.

Mr. Zagalik worked for the railroad at the same time as Mr. Reppond. Mr. Reppond told Mr. Zagalik that they have a score card to keep track of attendance and injuries which led Mr. Zagalik to believe that it reflected on the bonuses they received. He assumed their bonuses would be greater if they had fewer injuries but he was not sure. Mr. Zagalik talked to Mr. Brucker about his testimony at the hearing. Mr. Zagalik knew about the seat belt incident. Mr. Zagalik was out in the yard when Mr. Brucker was escorted on and off the property.

He knew Mr. Brucker reported a shoulder injury. Mr. Zagalik also had a shoulder injury and had surgery with the same doctor. He believed his shoulder problems were partially caused by his work. He did not report the injury to the railroad because he did not want to get fired. He did not report it because he believes that Mr. Brucker got fired for reporting his injury. Mr. Zagalik knows other employees who were disciplined for reporting injuries. Ronnie Billings had a problem with his ears. Mr. Zagalik tripped on a step and pushed a horn which sounded in Mr. Billings' ears. He filed a report. Mr. Zagalik was not investigated for this incident. He was not sure whether Mr. Billings was investigated.

Cross-Examination (TR at 428-443)

The investigation cover sheet from the 2011 incident shows the witnesses as Mr. Palmer, Mr. Smith, and Mr. LeBlanc. Mr. Zagalik is not listed as a witness. Mr. Zagalik assumes he was at Mr. Brucker's investigation related to that incident. Mr. Zagalik does not know whether Mr. Reppond's score cards measured efficiency at the yard. There were a lot of things that went into it, but Mr. Reppond only mentioned two. Mr. Zagalik does not know the deficiencies or limiting factors that the score card measured. Mr. Reppond did not tell him that their bonuses were greater if there were no injuries; Mr. Zagalik just assumed as much.

Mr. Zagalik's shoulder injury occurred about three years prior to the hearing. Mr. Zagalik has previously reported injuries to the company and not received discipline for them. He reported an injury in October 1997 and received no direct discipline as a result of reporting it. Mr. Zagalik was harassed because they "had me scrubbing the walls with a pole, a long pole and a brass with a cut off finger ... and it hurt." In March 1998 he reported an abrasion injury. Mr. Zagalik did not recall the abrasion injury but contended "[t]hey tried to get me for not reporting it, that I hit my hand." In June 1998 he reported another injury. Mr. Zagalik was disciplined three times prior to his first injury on October 19, 1997. On October 7, 1997 he was issued a formal reprimand for excessive absenteeism. On October 13, 1997, he was issued a formal reprimand for excessive absenteeism. On October 18, 1997, he received a suspension for failing to follow instructions after picking up material he drove by his ex-wife's house, delaying production. That was not true; he had certain days off. The only other discipline on his record was a record suspension on May 1, 2012.

Mr. Zagalik was disciplined in relation to an incident with Mr. Billings. He was placed on phase one, part of a policy obtained from DuPont. He was denied his right to an investigation, and went to the Public Law Board. He beat it after three years, and then BNSF got rid of the policy. This occurred before the merger in 1995. Mr. Zagalik never reported an injury in relation to this incident. Mr. Zagalik's son works for the railroad. He encouraged him to apply for work there.

As of Mr. Zagalik's deposition in April 2014 he did not know why Mr. Brucker was dismissed. His understanding then was that Mr. Brucker was dismissed because he turned in for surgery, and then they tried to find a reason to fire him. Mr. Zagalik did not know that Mr. Brucker was dishonest on his application. He understood if someone was dishonest with the railroad that that could lead to dismissal. His father also worked for the railroad and told him that you could get fired for being dishonest on your application.

Blue flag protection is when you place a blue flag on the side of the locomotive, and the locomotive is not supposed to move until the flag is removed. Mr. Zagalik thinks that Mr. Brucker mentioned that he thought Respondent managers were "after him." He does not recall Mr. Brucker saying that to anyone, it was common knowledge. He does not recall Mr. Brucker telling him that managers were paying extra attention to him. He is sure that Mr. Brucker told him that Respondent was trying to intimidate him. He does not remember whether he said at his deposition that Mr. Brucker never told him that he thought managers were watching him work.

Redirect Examination (TR at 443-448)

The transcript from the 2011 investigation shows Mr. Zagalik identifying himself as a witness. He was asked questions at the investigation. It was common knowledge that Respondent was intimidating Mr. Brucker because everybody was talking about it and everyone knew he had turned in an injury report. He does not know whether everyone knew that Mr. Brucker believed management was trying to intimidate him. It was common knowledge that he had been escorted off the property.

C. Joe Fultz Hearing Testimony (TR at 448-480)

Direct Examination (TR at 448-457)

Mr. Fultz has worked for Respondent for 22 years. He started in July 1993 as a general clerk. He took a job in the claims department in February 1997 in Seattle and then was transferred to Beaumont, Texas in 2000. He came to Kansas City in February 2008. His current title is Director of Claims. In 2010, his title was Manager of Claims. Mr. Fultz only knows Mr. Brucker through the claims process.

Mr. Fultz took over work on Mr. Brucker's FELA claim at some point. In the summer of 2012, he was notified by an email from Employer's FELA counsel's paralegal that Mr. Brucker's medical records showed he had spent 112 days in jail. It is a normal part of the claims process to pull an employee's application to get background on the individual. When looking through Mr. Brucker's application, Mr. Fultz found it was inconsistent with the record that he was in jail. They hired a third party to track down the criminal records. The third party eventually told them that they had found some records regarding Complainant's incarceration. The report stated that Mr. Brucker had been convicted of a felony. Employer's counsel also provided them with records from North Kansas City Hospital which contained information that Mr. Brucker had spent time in jail. When he had this information, Mr. Fultz provided it to Mr. Brucker's supervisors in the locomotive shop, specifically to Mr. Reppond and Mr. Bossolono.

Before June 2012, Mr. Fultz had never received a request or instruction from mechanical department management or any other Respondent department to be on the lookout for evidence that Mr. Brucker had been dishonest in order to fire him. His actions arose solely out of the information in the medical record indicating Mr. Brucker had been in jail. He provided the information to Mr. Bossolono and Mr. Reppond because, as an officer of the company, he is required to turn that information over any time they find out an employee is dishonest, and because of a lawsuit that occurred in 2009. In 2009, Steven Dowood sued Respondent in state court in Kansas because at some point Respondent had learned that the aggressor towards Mr. Dowood had a history of past aggressive behavior towards others and the railroad fired him. The basis for the FELA lawsuit was that the railroad knew about this individual's history of violent propensities and did not do anything in response. Therefore, as an officer of the company, Mr. Fultz was on notice that they had an employee who may have a violent history and that he needed to turn this information over to his supervisors.

Mr. Fultz had no role in the decision to terminate Mr. Brucker. He does not answer to Mr. Bossolono and has never been in his chain of command. He has never been in the chain of command of Mr. Reppond. The claims and law department are completely separate from the mechanical department. Mr. Fultz only knows about the seat belt incident from what he has heard subsequent to the lawsuit. He had no involvement in that incident or the 2011 incident or the 2012 absenteeism letter.

Mr. Fultz's department gets involved when they receive notice someone has or is going to file a FELA claim. They are not involved when someone files a personal injury report. When an employee tries to turn in a personal injury report to the claims department, they are redirected to their supervisor. The claims department is notified of a personal injury report by the safety department, whether or not the employee has indicated they are going to file a FELA lawsuit.

Cross-Examination (TR at 457-478)

At the time of Mr. Fultz's deposition in 2014, he was the claims manager. He has since received a promotion. The former Director of Claims was Mr. Newell who retired. Complainant's counsel sent a letter in late 2009 to Mr. Hawk in the claims department informing him of Mr. Brucker's injury. Mr. Fultz was Mr. Hawk's supervisor at that time, and later took over representing the railroad's interest in the FELA claim from Mr. Hawk. He does not recall when the case was transferred to him. Mr. Fultz does not know why the case was transferred to him other than caseloads would sometimes dictate transferring cases to someone else.

It is normal to obtain medical authorization for a claimant's medical records. At his deposition, Mr. Fultz did not recall whether they had authorization to review Mr. Brucker's medical records before the FELA lawsuit was filed. It depends on the case for how long it takes for the claims department to receive an injury report from an employee. When Mr. Fultz took over the file the injury report was already in it. The claims department did not obtain Mr. Brucker's medical records separate and independent from its attorneys. Mr. Fultz provided Mr. Reppond with the medical record stating that Mr. Brucker had spent 112 days in jail. He provided it to Mr. Reppond as part of the requirement that if he received notice of an individual that may have a propensity or a violent past, he needed to notify someone in his chain of

command. At his deposition, Mr. Fultz testified that he did not recall whether he got the initial report on the background check before or after he obtained the medical record.

Redirect Examination (TR at 478)

The letter dated December 10, 2009 would have been sent to the claims/law department, not the mechanical department. Mr. Fultz did not recall seeing the letter before.

Re-Cross Examination (TR at 478)

The claims department and the mechanical department communicate.

D. Linda Brucker Hearing Testimony (TR at 480-507)

Direct Examination (TR at 480-495)

Ms. Brucker has been married to Complainant for about 20 years. Mr. Brucker could not afford his house after he was dismissed from the railroad. The property where they are currently residing was bought by Ms. Brucker before she met her husband. Complainant called Ms. Brucker the day he was walked off the railroad property and told her what happened. Mr. Brucker was embarrassed and angry when he had to return to the property to return his tools. Ms. Brucker retired in 2015. She does not recall what her husband told her about how the 2012 investigation went.

Ms. Brucker did not go with her husband to Dallas when he went to truck driving school. When he started working for C.R. England he was away from home a lot. He was also gone a lot while working for Gold Star. In his current position with Schnell he is home one night a week and does not come home for two weeks. Ms. Brucker does not know whether her husband's medications from Dr. Chinnaswamy changed after he lost his job. She and her husband no longer have health insurance.

Cross-Examination (TR at 495-507)

The night Mr. Brucker was walked off the property he told Ms. Brucker that it was over his application. Mr. Brucker told her that he had been told to answer "no" to the application question because he just had a misdemeanor. He told Ms. Brucker that Mr. Underwood was deceased. Mr. Brucker was numb over the whole thing at first. He does not keep his emotions to himself generally. Ms. Brucker does not recall saying that her husband appeared to have more energy after he was fired or saying that he seemed not to be worrying about anything in particular.

Since he was dismissed, Mr. Brucker has not indicated he could not work due to his shoulder injuries. The night he was walked off the property Mr. Brucker told Ms. Brucker that he had lied on his application about the fight he had with his brother. He did not say that he stabbed his brother seven times. He told Ms. Brucker that it was not that important. Mr. Brucker has never told his wife that he stabbed his brother seven times. He told her that he spent 112 days in jail. She does not remember if he told her that he was on probation for two years. He never told

her that he pled guilty to an assault charge. Mr. Brucker did not tell her that Mr. Underwood had passed away because he wanted to get a hold of Mr. Underwood. She does not think he told her anything that night about the fight with his brother because he was mostly concerned that he had lost his job. She testified at her deposition that they discussed his fight with his brother that night.

E. Derek Cargill Hearing Testimony (TR at 507-618)

Direct Examination (TR at 507-544)

Mr. Cargill started working for Respondent in April 2011. He was promoted to Director of Labor Relations in May 2012. A PEPA team is a team Mr. Cargill currently leads. He and two employees who report to Mr. Cargill administer the discipline process for all scheduled employees at Respondent. Part of this involves administering the PEPA policy which applies to all scheduled employees in terms of discipline. Part of the PEPA policy is that any time a discipline investigation has a possible outcome of dismissal, Mr. Cargill or someone on the team is required to review the investigation transcript to ensure that the charges were proven and that dismissal would be in compliance with the PEPA policy, and consistent with how BNSF has issued similar discipline across the system in all locations and for all crafts.

In 2012, Mr. Cargill reported to Ali Whitt, whose title at the time was General Director. Mr. Cargill has never reported to Mr. Bossolono, Mr. Reppond, or Mr. Suttles because all three of them are in a different department. Mr. Cargill has never reported to any management officials at the Argentine or Murray yards. The PEPA team is based in Fort Worth and falls within the labor relations department.

The disciplinary process is governed by the applicable CBA which can vary depending on the type of employee and where they work. The CBA provides time limits for when an investigation notice should be sent, how soon the investigation should be held, the requirements of the investigation, and the time limits for when discipline should be issued after the investigation. Before discipline can be issued, almost all of the CBAs require a fair and impartial investigation to determine the facts and circumstances surrounding what the employee has been charged with. There are 13-14 unions at Respondent. Each CBA contains approved discipline and notice of investigations prior to issuing discipline. Mr. Cargill is familiar with the CBA that was in place in 2012 between Respondent and the IAMAW union. Prior to September 2013, there were two separate agreements, one for employees working in the end territory and another for employees working in what was referred to as the MTSF territory. These two agreements were consolidated in September 2013. Section 442(b) of the agreement is a provision relating to Respondent's ability to dismiss an individual who falsified an employment application. The rule says that an individual, who falsifies an application, once an investigation is held and the charges proven, can be terminated. There is a specific rule related to falsifying an application due to the serious nature of the violation. It can be a stand-alone dismissal.

Under the PEPA policy there are three levels of discipline as to the severity of discipline. The first is a standard violation, the second is a serious ("Level S") violation, and the third is stand-alone dismissible violations. Stand-alone dismissible violations are the most serious violations, where an employee can be dismissed regardless of their disciplinary record. The

PEPA policy contains a list of stand-alone dismissible violations. The second one is dishonesty about any job-related subject including, but not limited to, falsification or misrepresentation of an injury or abuse of FMLA or other leave privileges. When an employee has two or more active Level S violations, they can be dismissed.

Mr. Brucker's employee transcript shows that on August 27, 2011 he received a second Level S violation with a 36-month review period. Under the PEPA policy, Mr. Brucker could have been dismissed for this particular rule violation because it was a second Level S violation within a review period. As he was not dismissed in August 2011, this shows that Respondent provided leniency. Mr. Cargill reviewed the investigation related to Mr. Brucker's dishonesty. He recommended dismissal based on his review of the transcript of the investigation and the exhibits. He recommended dismissal because the charge that Mr. Brucker was dishonest on his employment transcript had been proven, he had two active Level S violations at the time, and because dishonesty is a stand-alone dismissible offense.

Mr. Cargill remembered Mr. Brucker's story about what Mr. Underwood told him, and first wondered why Mr. Underwood was not a witness at the investigation. Mr. Cargill contacted somebody and found out that Mr. Underwood was deceased. Mr. Cargill found it difficult to believe based on his experience that a supervisor would give that advice considering the nature of the question and the nature of the crime at issue because a supervisor who gave that advice would be putting their job at risk. HR would want to know about a criminal conviction for a violent incident during the hiring process. Respondent does not tolerate workplace violence and it is taken very seriously. He considered this in recommending Mr. Brucker's dismissal.

In Mr. Cargill's email recommending dismissal he noted that Mr. Brucker admitted to pleading guilty to first degree assault. It would not have made a difference to Mr. Cargill's decision whether Mr. Brucker had pled guilty to first degree assault or third degree assault because the question on the application did not differentiate between first degree and third degree; it just asked whether he was ever convicted of a crime. Mr. Cargill was involved in Mr. Brucker's attempts to have his discipline removed. An employee files an initial claim at the local level and eventually it gets up to the labor relations level in the form of an appeal. Mr. Cargill was involved in drafting the response to Mr. Brucker's appeal. After that, an employee can request a conference and progress the claim to arbitration. Mr. Cargill was involved in drafting the company's submission. The arbitrator is the PLB. Mr. Cargill argued Mr. Brucker's case before the PLB, which later denied the claim. Mr. Cargill included PLB awards from other cases in Respondent's submission because the PLB often relies on precedent so he wanted to point out that it was a well-accepted principle that termination is an acceptable decision when the rule violation is dishonesty. The union argued that Mr. Brucker should be given special consideration considering his length of service. The Board stated in its decision that in the case of dishonesty, dismissal was appropriate regardless of the employee's length of service. At the arbitration hearing, the union representative had the opportunity to have an executive session with the arbitrator. Mr. Cargill did not recall that the union actually took advantage of the opportunity to have the executive session.

Mr. Cargill has reviewed other cases of dishonesty for long-term employees of Respondent. One case was an electrician in Minnesota with 20 years of service and a clean disciplinary record. He was found to have used his phone to videotape the questions and answers

on an apprentice proficiency test and relay it to other employees. He was dismissed on a stand-alone basis for that conduct. Another case was a machinist in Nebraska with 39 years of service. This employee was dishonest in reporting that she had done certain tasks when she had not done any work activities. She had four prior disciplinary events before this incident. Another case was a machine operator in Allosee with 17 years of service. He had an investigation scheduled for absenteeism and brought in a fraudulent doctor's note to excuse those absences. He had 3-4 disciplinary events prior to that.

Exhibit 73 is an employee transcript of an unidentified employee. The individual had no injuries in their transcript. The individual was dismissed for dishonest conduct. Exhibit 75, the transcript for employee 671 shows no injuries and this employee was dismissed for falsification of an employment application. Another individual had no injuries and was dismissed for making false or misleading statements on his/her application.

Mr. Cargill has been trained on the Act. Part of it is in the Code of Conduct which prohibits retaliation. All Respondent employees have to certify the Code of Conduct on a yearly basis. His understanding is that the Act prohibits retaliation from the railroad against employees for certain protected activities. Mr. Cargill does not believe he retaliated against Mr. Brucker. It is Mr. Cargill's honest belief that Mr. Brucker violated a rule and was dishonest on his job application.

Cross-Examination (544-580)

Mr. Cargill would have seen the notice of investigation sent to Mr. Brucker by Mr. Suttles after the investigation was complete when he reviewed the transcript and exhibits. Mr. Suttles conducted the investigation. Mr. Reppond testified at the investigation. The transcript was reviewed by Mr. Suttles because he is the charging officer. Mr. Cargill does not know whether Mr. Suttles participated in the decision to dismiss Mr. Brucker. Mr. Bossolono also reviewed the transcript. Mr. Cargill does not know when they reviewed the transcript. Mr. Cargill does not know whether he knew before he conducted his own review that the people in Kansas City were recommending dismissal. Mr. Cargill does not recall knowing that the union requested a copy of Mr. Brucker's application prior to the hearing and was denied that request. Mr. Cargill does not know whether Respondent would have obtained Mr. Brucker's medical records before medically disqualifying him in 2001. He does not know whether the railroad would medically disqualify someone without looking at their medical records.

Mr. Cargill considered Mr. Brucker's prior Level S rule violations in recommending his dismissal. Mr. Cargill talked to someone in the Kansas City area about Mr. Underwood's status prior to making his recommendation. He does not know how Mr. Bossolono, Mr. Reppond, or Mr. Suttles learned that Mr. Underwood was deceased. Mr. Cargill did not know whether first-degree assault was a felony or a misdemeanor in Missouri. Mr. Cargill thinks when he wrote his email saying Mr. Brucker pled guilty to first degree assault that he was thinking that Mr. Brucker had been charged with first degree assault but pled guilty to third degree assault.

Mr. Cargill is familiar with the Mechanical Safety Rules ("MSR"). Rule S-28.6.2 is the notification of felony convictions and requires employees to notify the proper authority that they had been convicted of a felony within 48 hours of receiving notice of the conviction. There is no

mention of reporting a misdemeanor conviction. The job application does not distinguish between felonies and misdemeanors. The degree of assault that Mr. Brucker pled guilty to would have made no difference in his decision to recommend dismissal of Mr. Brucker.

The Federal Railway Administration has passed rules and regulations that require the railroad to report certain injuries to it. Mr. Cargill does not know what the criteria are. Mr. Cargill did not review anything else besides the investigation transcript, the exhibits, and Mr. Brucker's transcript. There was no indication on Mr. Brucker's transcript of workplace violence. Mr. Cargill cannot recall any cases where an employee was dishonest on a job application and was not dismissed. The cases Mr. Cargill referred to on direct examination all involved employees who were dismissed for dishonesty and did not have an injury report. It is the policy of Respondent to have an employee return their property to the company. He does not know whether it was policy to have employees who retire to return company property. He believes property would not be returned by an employee until after dismissal because that is when you know he is not coming back. There are times where an employee can be withheld from service or go on a leave of absence and in those situations they may be required to turn over company property until he comes back. Mr. Cargill did not inquire into the details surrounding the 2010 and 2011 incidents. Mr. Cargill's recommendation would have been the same even if the two Level S violations were not there.

Mr. Cargill does not know whether the union requested the opportunity to review Mr. Brucker's job application before the investigation was held. He does not know whether such a request was denied. If such a request were denied that would be in compliance with the CBA. There is an investigation rule in the agreement that does not provide for discovery prior to the investigation. The rule is silent on discovery. It is the railroad and various arbitrators' interpretation that there is no right of discovery.

Redirect Examination (580-586)

Mr. Cargill considered Mr. Brucker's hire date and disciplinary history when he reviewed the transcript and made his recommendation. Past discipline is relevant when considering dismissal because you want to know if an employee has past discipline and it can become relevant under the PEPA policy. MSR Rule 28.6.2 on felony convictions makes no reference to a job applicant versus an employee. If Mr. Brucker committed a crime in 1985 and was not an employee until 1993 he would not have fallen under this rule. The labor relations file on Mr. Brucker contains the transcript of the 2011 incident. Those documents are ordinarily kept in the course of business at the labor relations department.

All Respondent employees, including scheduled employees, have access to the labor relations website. There is a section on the website called "Federal Railway Safety Act." The link takes the user to a fact sheet which provides information on whistleblower protection under the FRSA and describes Section 20109 in detail.

Re-Cross Examination (586-596)

Mr. Cargill was not involved in preparing the FRSA fact sheet and he does not know who was. He does not recall whether it was already there when he started in 2011. Mr. Cargill did not

review Mr. Smith's employee transcript and was not aware of the hand brake incident in 2011. At the hearing, Mr. Cargill looked at Mr. Smith's transcript and said Mr. Smith was given a review period of only 12 months because he qualified for a reduced review period based on his record pursuant to the PEPA policy. Under the PEPA policy, an employee can qualify for a reduced review period if they have five years of service and five consecutive years without discipline. Mr. Smith did not receive a reduced review period because he waived the investigation and admitted he was at fault. There was a different PEPA policy in place prior to August 1, 2012. Under the prior policy, the progression for violations said an employee could qualify for a reduced review period if they had five years of service and five years discipline-free or had five years injury-free. The latter part was removed in the 2012 policy.

F. Joe Borley Hearing Testimony (TR at 596-619)

Direct Examination (TR at 596-606)

Mr. Borley is vice president of human resources for Wheeling. He has worked for Wheeling since May 1990. He started as a manager and then moved into human resources. He was director of human resources during the 2001-2003 timeframe. He is based out of Brewster, Ohio.

Mr. Borley interviewed Mr. Brucker when he applied for a job at Wheeling. Mr. Brucker applied for a job on November 27, 2002 and started working around January 2003. At that time, Wheeling allowed walk-in applications. The application questions are completed before an applicant has an interview. Wheeling has a question on its application about criminal convictions. Mr. Brucker answered "no" to this question. Wheeling asks this question to have an idea of the background of an individual. Certain federal regulations are relevant if someone has a DUI in their record. There is a place to explain a yes answer for this question. Mr. Brucker did not provide an explanation.

During the interview with Mr. Brucker, Mr. Borley went over his application questions and answers. Applicants can always provide additional information during the interview. Mr. Brucker never asked Mr. Borley for information on what Wheeling wanted to learn by the criminal conviction question. Wheeling takes the certification statement on the application seriously because there has to be a level of trust and the railroad has to be able to take someone filling out an application at their word. Wheeling requires applicants to complete medical questionnaires to ensure they are medically qualified to perform the essential functions of the position. Wheeling takes the certification that answers are true on the medical questionnaire seriously because they rely on this information to ensure an individual can perform the job.

Cross-Examination (TR at 606-618)

Mr. Borley remembers Mr. Brucker's application and interview because it was unusual that he was coming from a class one railroad to a class two railroad. Wheeling is a class two, regional railroad. Class one railroads are larger and the rates of pay are typically higher. Mr. Borley confirmed that Mr. Brucker was employed by Respondent because when Mr. Brucker transferred into the transportation department they had to confirm, under federal regulations, for

drug and alcohol testing. He would typically just call the prior employer to confirm that the individual worked there and the employer will confirm dates of employment and rates of pay.

A letter to Mr. Brucker from James L. Northcraft dated November 11, 2003, informed him an investigation was being held to ascertain facts related to alleged failures while Mr. Brucker was on duty as a brakeman. When Wheeling has a personal injury they will go through the process in the labor agreement to determine what happened. Mr. Borley believed that Mr. Brucker was not disciplined for this incident. If an individual is injured and has to see an outside doctor the specialist will provide the records with the billing documents. The specialist may have to get a release from the employee but the railroad is not involved in that.

G. Darrin Suttles Hearing Testimony (TR at 619-700)

Direct Examination (TR at 619-671)

Mr. Suttles started working for Respondent on April 9, 2007 as mechanical foreman one. He worked until 2012 as an assistant general foreman then in 2013 became a manager, mechanical safety, mechanical service excellence in Texas. In 2015 he was promoted to general foreman one and in 2016 to general foreman two. All of his positions have involved supervising employees that service and repair locomotives. Mr. Suttles is trained on the MSR every year.

Discrimination and retaliation are prohibited under Respondent's injury policy. Prior to his deposition in April 2014, Mr. Suttles had never seen the letter from Complainant's counsel to Respondent informing it of his shoulder injuries. Prior to the hearing, Mr. Suttles had never seen Mr. Brucker's personal injury report. Mr. Suttles has no information on what injuries Mr. Brucker was claiming.

Mr. Suttles was the presiding officer at the formal investigation for the 2010 seat belt incident. His understanding of the 2010 incident was that Mr. Brucker was returning from a yard call and a supervisor tried to get his attention. The investigation was postponed a couple times. Mr. Suttles granted these postponements. It was postponed at one point because the union representative and Mr. Brucker wanted Mr. Paterson to testify. Mr. Suttles never saw a statement from Mr. Paterson. He does not recall whether anyone requested that the statement be admitted into evidence. The purpose of the formal investigation is to ascertain the facts and determine responsibility for an alleged rule violation. He cannot cross-examine a statement on a piece of paper or assess the credibility or demeanor of the author. Mr. Suttles had been a presiding officer in investigations before Mr. Brucker's and had received training on how to be a presiding officer. Mr. Paterson's statement was not presented at the investigation. Not wearing a seat belt while in a motor vehicle is a serious violation because it is part of Respondent's seven safety absolutes. Mr. Martin worked for EMD, not Respondent. His reporting chain of command was separate and distinct from Respondent. Mr. Martin never told Mr. Suttles anything about a personal injury report or Complainant's counsel's letter sent in December 2009. Mr. Frey never said anything about either of these documents.

Mr. Suttles was not involved in the locomotive rolling incident. A job briefing in the mechanical department is to discuss what cautions and hazards may occur with the job and, when conditions change, there is another job safety briefing. The job safety briefing is supposed to take

place as job tasks change or conditions change during the course of tasks being performed. At the time, Mr. Brucker's direct supervisor was Mr. Frey. Mr. Frey's direct supervisor was Mr. Bunce, whose direct supervisor was Mr. Reppond. Mr. Reppond's direct supervisor was Mr. Bossolono. Mr. Parrish and Mr. LeBlanc were under Mr. Bunce. None of these individuals ever said anything to Mr. Suttles about a personal injury report submitted in December 2009 or January 2010.

Mr. Suttles had no knowledge of an absenteeism letter received by Mr. Brucker in February 2012. The absenteeism letter was signed by Nate Tinsley. At the time, Mr. Tinsley was a union representative and may have been an assistant local chairman. At the time, the union was going through a transition as far as the local chairman. The purpose of the absenteeism letter is just to document a conversation letting the employee know where they are concerning their attendance within the 12-month rolling period. The letter deals with attendance only and is not disciplinary.

Mr. Suttles was the presiding officer at the 2012 formal investigation regarding Mr. Brucker's dishonesty on his employment application. The railroad presented two documents showing Mr. Brucker had been charged with a crime and another document from the Sheriff showing a conviction. BNSF also had a medical record indicating incarceration and a report from Factual Photo indicating he had been convicted of a crime. Mr. Brucker testified that he had been convicted of a crime. At the investigation, Mr. Brucker stated that he told Mr. Underwood what had happened, and Mr. Underwood told him to check "no." In reviewing the transcript and talking to Mr. Bossolono, Mr. Suttles learned that Mr. Underwood was deceased. At the time of the investigation, Mr. Suttles did not know who Mr. Underwood was. He did not believe Mr. Brucker's story about Mr. Underwood because, as a hiring manager, Mr. Suttles has sat in on some of Respondent's hiring sessions and he could not imagine hearing a hiring manager say to check the "no" box. Mr. Suttles thought it was convenient for Mr. Brucker that Mr. Underwood was deceased. He did not find Mr. Brucker's story plausible. Mr. Suttles did not think it made sense that Mr. Underwood would have brought someone on the property with Mr. Brucker's kind of history if he knew everything related to his criminal conviction. Respondent has a policy on workplace violence and that played in his mind in making his decision on what to do with Mr. Brucker because he was dishonest on the application and it had been a violent episode.

Respondent's counsel asked Mr. Suttles to do research on historical rules at ATSF and BNSF on violence and workplace hostilities. ATSF had a rule in April 1988 saying that an employee must not be careless, negligent, dishonest, quarrelsome, immoral, or commit any act of hostility, misconduct, or willful disregard or negligence. The general safety rules at ATSF, dated June 30, 1993, Rule 107 is virtually identical to the 1988 rule. These rules were put in place right before Mr. Brucker started working there.

During the course of the 2012 investigation, Mr. Suttles asked Mr. Brucker whether or not he utilized the space adjacent to the criminal conviction question. Mr. Brucker said there was not enough room. The application shows he did not write anything. The application discussed the ramifications of providing false information including displace and termination. At the investigation, HR testified that this was true from 1993 up through 2012, the time of the investigation. Mr. Suttles has known since coming to the railroad that if you are dishonest with the railroad you can be terminated. This concept is widely known among employees.

It is standard operating procedure to walk someone off the property when being pulled out of service to ensure the employee does not take anything or damage equipment. This is standard procedure regardless whether someone has a pending personal injury. It is standard procedure to allow an employee back on the property to return tools or take home personal items and to ensure they do not damage any property and that all properties are returned to the railroad. Mr. Suttles did not believe walking someone on and off the property was designed to intimidate Mr. Brucker or any other employee this would happen to. The time when the employee returns property to the railroad is mutually agreed upon usually whatever time is convenient for the employee. If they have nothing to return and just have personal effects they do not have to return to get it.

Mr. Suttles believes that Respondent is consistent with its policy in treating individuals fairly whether they have an injury or not. The Code of Conduct is a policy that employees have to certify every year that includes talking about race abuse, retaliation, harassment, and reporting any crimes an employee is convicted of. Mr. Suttles has been stationed at Murray and Argentine. He would sometimes cover for other managers at Murray or to talk to other managers. He is familiar with the culture and operations at Murray. It is not common knowledge at Murray and Argentine that if you report an injury you get fired.

The personal injury report for L.L. Billings, another employee, shows seven injuries from 1978 to 2012. He retired on June 1, 2012. He may have been dismissed in 1996 but was called back to work. He was not dismissed again after 1996. Alternative handling is part of the safety summit agreement signed by support craft and union employees that offers employees the opportunity, in lieu of discipline, to come up with a better process concerning an alleged rule violation. Mr. Brucker's 2010 notice of investigation said he was ineligible for alternative handling. This is because the violation was of a critical work practice, one of the seven safety absolutes. The 2011 incident was not eligible for alternative handling because it was a critical work practice, blue signal protection. The 2012 dishonesty was not eligible for alternative handling because it was dishonesty, which does not fall under alternative handling.

Mr. Suttles is not aware of any plan by management to try to get rid of Mr. Brucker after he reported his injury. Mr. Suttles has no knowledge of managers watching Mr. Brucker, trying to catch him breaking rules, trying to intimidate him, or discriminating against him. If Mr. Suttles had learned of such a scheme he would tell the employee to call the 1-800 number and would run it up his chain of command. Doing that would be part of what he certified to under the Code of Conduct not to turn a blind eye to that activity. Mr. Brucker never told him that he thought managers were paying extra attention to him, trying to intimidate him, or trying to catch him violating rules. Mr. Suttles is not aware of employees who provided false information on a job application and were not terminated or individuals who were disciplined for reporting personal injuries.

Mr. Suttles reviewed the investigation transcript and discussed it with Mr. Bossolono and recommended that Mr. Brucker be dismissed. He recommended dismissal because Mr. Brucker admitted at the investigation he had been convicted of a crime and been dishonest on his application. He honestly believed that Mr. Brucker had violated Respondent's rules, including

the CBA. Mr. Suttles would not feel safe around Mr. Brucker or comfortable with him returning to work for the railroad. That feeling would also apply to protecting other BNSF employees.

Cross-Examination (TR at 671-696)

Mr. Suttles did not work for Respondent in the 1990's and was therefore not familiar with the culture at that time or at ATSF. During the relevant period, Mr. Bossolono was the highest ranking officer in the Kansas City area for the mechanical department. At the time, Mr. Suttles reported to Mr. Reppond at Argentine.

Mr. Billings was dismissed in 1996 for not following instructions and insubordination. He came back but Mr. Suttles does not know how he came back. A dismissal can be appealed which sometimes results in someone being returned to work and sometimes does not. Mr. Suttles does not know definitively whether Mr. Brucker stabbed his brother seven times. There is nothing in Mr. Brucker's employment transcript suggestive of workplace violence during his employment.

MSR Rule 28.6.2 requires employees to notify the railroad within 48 hours of a felony conviction. There is no place in the rules requiring notification of a misdemeanor conviction. Mr. Suttles interprets the question on the job application to include all crimes other than traffic violations. He does not know if the rule on felony convictions was in effect in 1993. Mr. Suttles never knew Mr. Underwood. He would not know about conversations amongst management at Murray yard in 2010-2012.

Mr. Suttles could have postponed the 2010 investigation until Mr. Paterson was available. Mr. Martin's permanent station was at Murray in the diesel shop. He worked there every day and would have spent most of his time with the managers there. Mr. Bossolono told Mr. Suttles that Mr. Underwood was deceased, but did not tell Mr. Suttles how he knew that. Mr. Suttles would not know how much detail Mr. Underwood would have asked Mr. Brucker to provide on his assault conviction. It is standard procedure to consult with labor relations on dismissals. The final decision to dismiss Mr. Brucker would have come from Mr. Bossolono based off of labor relations recommendation.

Redirect Examination (TR at 696-700)

The rule on reporting felony convictions would not apply to someone who was not yet an employee of the railroad. Mr. Suttles thought that rule went into effect for the first time in 2005 or 2006.

H. Complainant Deposition Testimony – March 27, 2013 (RX 60)

Mr. Brucker lives with his wife and they have been married for five years. Mr. Brucker has been married three times. While working for Respondent he worked at the Murray Yard for about 12 years and the rest of his time at Argentine. In his position as a machinist, Mr. Brucker performed a variety of duties including checking fluid levels and adding fluid, taking wheel measurements, changing brake shoes, pulling iron, heads, assemblies, water pumps, oil pumps, governors, air compressors, radiators, exhaust systems, traction motors, taking out and putting in

traction motors, couplers, and knuckles. He also took out draft gears, brake linkage, worked the wheel machine, and moved locomotives from one place to another. Mr. Brucker also inspected locomotives and performed brake tests.

Mr. Brucker knew he was obligated in his employment with Respondent to perform his work safely and report any condition in the workplace that was unsafe. He was asked to perform tasks which he had not been trained and authorized to do such as helping pipefitters and electricians perform their duties. Management directed him to help in these tasks. Mr. Brucker does not remember a rule saying he was to only do tasks when he was authorized or trained to do them. He does remember a rule making sure he was alert and attentive when doing his job and warning co-workers about safe practices or job tasks. He attended testing and safety training while working for Respondent. He never contacted the hotline about safety issues or reported them to his supervisor or at union meetings.

While Mr. Brucker worked for Respondent the number of machinists stayed about the same. As a machinist he did not have a production quota or a certain number of tasks to get done in a certain day but he would try to get a task done in the period of time he had. Prior to his shoulder surgeries, Mr. Brucker did not complain to anyone about his work as a machinist bothering either shoulders because it was periodic. He did not make any complaints to a railroad manager prior to his personal injury report about his shoulders. After his shoulder surgeries, he did not do any tasks in his job that he had not done before.

Mr. Brucker injured his thumb while working for Wheeling in Ohio. He had no problem with his shoulders as a result of this injury and did physical therapy and then returned to work. His physical therapy notes state "Complains of left shoulder pain, reports popping with reaching forward." Mr. Brucker does not recall any shoulder problems similar to that reference and said it was "not really a problem" in that January 2004 to January 2005 period. Physical therapy notes from December 2007 state Complainant complained of "intermittent left shoulder blade numbness." This was related to headaches he was suffering which caused his neck muscles to tighten. He does not recall exactly where that numbness was located. On August 29, 2008, Mr. Brucker's regular doctor noted he complained of right shoulder and neck pain that had been going on for about six months. Mr. Brucker does not recall telling his doctor this. The doctor also recorded that Complainant reported that he used to have similar pain at the base of the neck on the left. This may have been when he was having allergy problems. The doctor did an exam and opined that Mr. Brucker had "[r]ight shoulder pain suggestive of possible mild rotator cuff injury." Mr. Brucker does not recall being told that. Mr. Brucker does not remember being referred to physical therapy three times per week for two weeks and prescribed a painkiller. A physical therapy note dated September 4, 2008, indicated Mr. Brucker had cervical pain with radiculopathy and right shoulder pain and weakness. The note indicated Mr. Brucker felt his pain was related to "a history of repetitively stressing his arm." Mr. Brucker does not recall telling the physical therapist this. He does not remember reporting sharp constant pain in the shoulder blade and superior shoulder radiating down his arm, numbness and tingling in his whole arm and hand, and intermittent painful popping. He does not recall complaining prior to October 2008 of having trouble turning his head to look for oncoming traffic while driving. He does not recall making complaints about shoulder and neck pain preventing him from performing his occupational duties.

Mr. Brucker had an MRI on September 26, 2008, ordered by his family doctor. The MRI report stated Mr. Brucker had had right shoulder pain since February 2008 posterior and anterior that never went away. He also reported decreased range of motion. Mr. Brucker does not recall telling anyone this, and doesn't recall a doctor ever going over the MRI findings with him. He thinks his surgeon talked about the MRI report with him. Mr. Brucker does not think he had left shoulder pain before October 2008. He cannot recall whether his family doctor recommended he see his surgeon or if he went there on his own.

Mr. Brucker had right shoulder surgery on December 5, 2008. He did physical therapy after his surgery. A physical therapy note dated December 16, 2008 stated "patient felt a sharp pain in February of 2008 while working. Patient experienced discomfort since that time." Mr. Brucker does not recall making that statement. He had surgery on his left shoulder on February 6, 2009. Eventually, Mr. Brucker was returned to work without any restrictions. Complainant had to get a shot in his left shoulder on December 10, 2010 but since that time he has had no problems with either shoulder.

Complainant does not recall whether he ever received a warning from Respondent on the effects of repetitive, forceful, vibration or cumulative trauma or with the use of his arms overhead. He estimates he lost at least \$24,000 being out of work for the shoulder surgeries as well as some "RRB" benefits which he does not know the value of. He also had out-of-pocket expenses from buying medications and going to the doctor. He alleged emotional and psychological trauma from the shoulder surgeries because he felt like he had lost a limb for a while. He is not able to put his grandchild on his shoulders anymore or ride his motorcycle.

Respondent could have made his job safer, such as making it so he wouldn't have to reach above his head so much. Respondent did not give Complainant training on how to use any tools. He cannot use a push lawn mower anymore and has to use a riding or a propelled push mower.

He was pulled out of service by Respondent on July 19, 2012 and was dismissed on August 16, 2012. At the time of the deposition he was still appealing his dismissal.

I. Complainant Deposition Testimony – February 28, 2014 (RX 61)

Mr. Brucker was hired with Respondent's predecessor on July 7, 1993 as a machinist. He has worked for Respondent at Argentine, Kansas and the Murray Yard in North Kansas City. The Murray Yard is in Missouri and Argentine is in Kansas. His job duties involved working on locomotives doing inspections, changing brake shoes, adding and subtracting locomotives, doing air brake tests, and diagnosing problems. Mr. Brucker spent more of his time working for Respondent at the Murray site.

He went to Ohio to work for Wheeling in 2002 and was there until 2004. When he was pulled out of service in July 2012 he was working at the Murray Yard inspecting inbound and outbound trains. He had been doing that since about 2005. Mr. Bunce was Mr. Brucker's general foreman for about three years. Mr. Parrish and Mr. Frey were two of his supervisors but he had others. Mr. Parrish and Mr. Frey reported to Mr. Bunce. Mr. Reppond was acting assistant superintendent over Mr. Bunce, and Mr. Bossolono was superintendent.

On December 16, 2005, Mr. Brucker was disciplined for being absent without authority and failure to follow instructions from November 30 through December 15, 2005. Mr. Brucker said he was having surgery on his throat. Mr. Reppond gave him the forms to get medical clearance to be off work but he did not give Mr. Brucker the leave of absence paper. Mr. Brucker thought the forms had looked like he had leave of absence.

On October 7, 1998, Mr. Brucker injured his left rib when a pry bar slipped. He did not make a claim against the railroad and did not see a doctor for this injury. On July 20, 2005, Mr. Brucker was in the yards and a tire company had caught fire and he breathed in a lot of black tire smoke. He did not make a claim for this injury. On June 19, 2007, he had an abdomen injury when he strained his back from lifting a knuckle. He did not make a claim for that injury.

Mr. Brucker's application for employment with Respondent included an applicant statement requiring Complainant to sign that he had "answered all questions to the best of my ability. I realize false information will be grounds for dismissal at any time, regardless of when such information is discovered. I authorize any necessary inquiries as to my character, reputation, and ability and release those supplying any information from all liability." Complainant thoroughly reviewed his job application before signing it. Mr. Brucker checked the "no" box for the question, "Other than traffic violations, have you ever been convicted of a crime?" He checked the "no" box because Mr. Underwood told him they were only looking for felonies. However, he had been convicted of a crime at that time.

MSR Rule S-28.6, part four states that "Employees must not be dishonest." Mr. Brucker does not know whether this rule was covered as part of the hiring process. He did not become aware of this rule in the course of his employment with Respondent. MSR Rule S-28.2.7 prohibits employees from withholding information or failing to give information regarding "unusual events, accidents, personal injuries, or rule violations." During the course of his employment, Mr. Brucker did not become aware of this rule.

Mr. Bunce handed Mr. Brucker the letter suspending him from service pending an investigation. Complainant does not know who decided to remove him from service, or whether removing him from service pending an investigation was part of the CBA. Mr. Brucker believes the investigation was prompted by his claim on his shoulders. He cannot recall whether he was informed why Respondent did an investigation. He thinks the claims department prompted the investigation.

Mr. Brucker does not know what Respondent's anti-retaliation policy is or what its injury reporting policy is. During the course of the formal investigation he admitted he had been convicted of a crime before July 1993, that he pled guilty to a crime before July 1993, that he pled guilty to a Class A misdemeanor, that he had been incarcerated for 112 days awaiting trial, and that he was sentenced to one year in Clay County Jail with a suspended sentence based on completion of probation. He admitted he had checked the "no" box on the employment application question as to whether he had been convicted of a crime. The question on the application had an area to provide detailed information if the answer to the question was "yes." Mr. Brucker did not fill anything out in this space.

Complainant was held out of service for a couple of years in the early 2000s for a mental health issue until his doctor released him to full duty. His doctors were trying to straighten out his medication. He was off work for a leave of absence and when his doctor released him to return to work the railroad would not take him back. The union appealed that decision. During that time Mr. Brucker went to work for Wheeling in Ohio.

Mr. Brucker filled out the personal injury report for Mr. Bunce twice. Mr. Bunce tore up the first report in front of Mr. Brucker because "I guess he didn't like what it said." He then completed a second personal injury report and gave it to Mr. Bunce. He did not provide a notice of personal injury to the claims department. The personal injury report was dated January 26, 2010. A letter was sent by Complainant's counsel to Respondent on December 10, 2009 regarding the shoulder injuries. Mr. Brucker did not know he needed to fill out an injury report until his doctor told him his shoulder surgery was work-related.

As to the seat belt incident, there were some supervisors who were 30-40 feet away in the dark, and who thought he was not wearing his seat belt. Mr. Paterson was sitting next to him and wrote a letter to the investigation saying Complainant was wearing his seat belt. Respondent would not allow Mr. Paterson's statement to be presented at the investigation. Mr. Brucker cannot recall whether his union representative specifically requested on the record that Mr. Paterson's statement be admitted. Mr. Brucker has a copy of that statement. Mr. Brucker requested that the statement be admitted but did not know if it went on the transcript. Mr. Paterson signed the statement with his phone number and dated it. Complainant does not know whether the statement was made under penalty of perjury or in front of a notary, but Mr. Paterson "doesn't lie."

Mr. Brucker had his seat belt on. Mr. Martin "had a vendetta against me" because Mr. Brucker turned him in for a rules violation. He also turned in Mr. Martin's other EMD tech for violations. He cannot remember if he turned these incidents in in writing. He reported them to his supervisor. He does not know why Mr. Frey alleged he was not wearing his seat belt but believes that Mr. Frey "got in trouble over it," because Mr. Frey did not contact Mr. Brucker about not wearing his seat belt. Mr. Frey had a whole different attitude afterwards. Mr. Brucker thinks Mr. Dominguez got Mr. Frey in trouble because he did not get on the radio and contact Mr. Brucker about it. Mr. Brucker did not make a whistleblower claim or other OSHA claim arising from the seat belt incident.

As to the 2011 incident, Mr. Smith was supposed to set the hand brakes when he parked the locomotives. Mr. Smith was also disciplined for the incident. Mr. Palmer had no discipline assessed against him. Mr. Brucker knows they dropped the investigation against Mr. Palmer because he became a conductor. Mr. Smith was disciplined less severely than Mr. Brucker; Mr. Brucker had prior disciplinary action against him. He is not supposed to check that the hand brake is set before he does an air brake test because he is on the bottom and the machinist that goes through the tops is supposed to check that. Mr. Rogers was the machinist that was supposed to do that but he was not investigated. He did not do any of the steps of the air brake test out of order and he did not skip over any steps. He did not make a whistleblower claim or other OSHA claim arising from this incident.

In February 2012 there was a letter stating Complainant had three absences. Mr. Brucker did not have these absences because “after a year goes by, they drop off.” He was forced to sign the letter, and Respondent did not allow his union representative to be there. He was told if he did not sign the letter he was going to be “put in” for insubordination. He did not make a whistleblower claim or other OSHA claim arising from this incident.

All these events happened shortly after Complainant filled out the personal injury report, which was dated January 26, 2010. The first investigation was June 29, 2010. “They” were following Complainant around in the yards, kind of looking over his shoulder all the time. The second discipline was assessed in July 2011, which was more than a year after the first discipline. He was pulled out of service in July 2012 and dismissed in August 2012.

Mr. Brucker thinks Respondent was watching him because “they were always following me” and supervisors would sit several tracks over and watch him work. The managers did not do this before he turned in his personal injury report. He knew they were watching him because they would sit in their vehicles straight across from where he was working a couple tracks over and were not inspecting his work. He did not see them looking at him the whole time. He knew they were watching him because he could see them looking at him and they had no other purpose to be there; he knew they were not doing other work “because they weren’t.” He did not go look and see what they were doing or ask them why they were out there. Respondent changed their policy and told supervisors they needed to go out there after he filed his personal injury report. No one else was watched. Mr. Frey watched him most of the time and sometimes Mr. Parrish and other supervisors. He does not know the exact reason why the supervisors were going out in the yard, but it continued until Mr. Brucker was dismissed. No other employees saw managers out in the yard and other machinist trucks or the tower lead would call him and tell him a manager was coming. When managers watched him work no other employees were nearby in the yard doing other work. Mr. Brucker isn’t sure how many times he was watched during the two-year period, but estimates it was more than 25 times. He is not sure whether it was less than 50 times. He was never told by a supervisor or manager that they were instructed to watch him. He was never told why the policy or procedure changed.

Mr. Brucker is not aware of other employees of Respondent who were discharged for dishonesty on their employment application who turned in a personal injury report. He did not know of any employees who were discharged for dishonesty on their employment applications who did not turn in an injury report. Mr. Brucker knew of employees who were discharged for turning in a personal injury report. One individual put in a personal injury report and then was gone for a year or two after that. He does not know why this person was discharged.

Respondent discriminated against Complainant for filing the personal injury report. This included the investigations arising out of the incidents in 2010 and 2011 and the charge in 2012 that led to his dismissal. The heightened supervision and absentee letter were also discrimination. Mr. Brucker does not know what Respondent’s PEPA policy was. Mr. Brucker was walked on and off the property twice in relation to the 2012 disciplinary process. He doesn’t know if this was part of Respondent’s policies and procedures. They could have done it when there were no other people around; walking him on and off the property was done to harass and discriminate against him because they wanted to parade him in front of everyone, intimidate employees, and punish him for the incidents compared to other people. He has never seen anyone else walked

around like that. Respondent did not offer to have someone bring Complainant's stuff from his locker to him. He asked a co-worker to do so, but he declined because he was afraid of reprisals.

Mr. Brucker is not aware of employees who made injury reports and never had any discipline assessed against them. At the 2012 formal investigation, Respondent's evidence was missing pages and had lines blacked out. A lot of the information was incorrect. He cannot remember whether OSHA upheld the decision of the railroad to dismiss him.

Since his dismissal Mr. Brucker has applied to jobs with railroads, and at the time of the deposition was working on getting his CDL permit. He cannot afford to go to a truck driving school. His family doctor, Dr. McCormick, gave him medication for acid reflux which he believes is related to the stress of his dismissal. He has not been able to see his psychiatrist as much because of money, and the psychiatrist has had to increase his medications because of stress and anxiety. He is not taking some of his medications due to lack of money.

Mr. Underwood was present when Mr. Brucker filled out his employment application. He went to Mr. Underwood to ask for clarification on the incident with his brother. He told Mr. Underwood everything that happened with the fight with his brother and that he pled guilty to a misdemeanor. He handed the application directly to Mr. Underwood. He did an interview with Mr. Underwood and a separate interview with the union. He did not talk about the criminal conviction question during the interview. Mr. Underwood told him to check "no" to answer the question and he had not already checked a box before he asked Mr. Underwood about the question. He did not understand the question or how to answer it which is why he asked Mr. Underwood about it. Mr. Brucker knew Mr. Underwood got promoted to Fort Worth but did not know if he was deceased.

On his interrogatories, Mr. Brucker referred to individuals listed on another question as everyone who retaliated against him. Mr. Paterson did not retaliate against him because it was management that did the retaliation. On his interrogatories, he said the use of the PEPA policy was an adverse employment action but he did not know what that policy was so he is not sure how it was used against him. Mr. Brucker made a complaint to HR about how Mr. Reppond was treating him before he turned in his injury report.

J. Linda Brucker Deposition Testimony – February 28, 2014 (RX 63)

Mr. Brucker had been looking for a job on the Internet and took a class on how to do a resume and look for a job. He applied for jobs at Kansas City Southern and Union Pacific and others. He was also looking into trucking. Since he lost his job he has helped more with household duties and babysitting his granddaughter. Mr. Brucker told her he had been pulled out of service because Respondent found out that he lied about a question on his job application. He said he thought the railroad was wrong because someone told him that since his conviction was a misdemeanor he did not have to record that. Ms. Brucker did not know anything about this until her husband was walked off the property in July 2012.

Ms. Brucker has never met Mr. Underwood, Mr. Dominguez, or Greg Lederer. Ms. Brucker knew about Mr. Brucker's conviction prior to July 2012. She never told anyone working for Respondent about the conviction prior to July 2012. Complainant never told her that he lied

on his employment application. She has not reviewed any documents or records related to her husband's dismissal from Respondent or to his whistleblower claim.

Mr. Brucker has had trouble sleeping and emotional pain about finances. He has not explicitly stated that he has had trouble sleeping due to matters related to his whistleblower claim, but she thinks it is related to not working. Mr. Brucker has complained about having to learn how to use the Internet to find a new job. Ms. Brucker knows he takes medication for sleep and anxiety but she does not know what else. The anxiety and sleep medications have been beneficial to him since August 2012. He was taking medication for anxiety and sleep before August 2012. She does not know what medications he was taking before July or August 2012. She does not know how often he sees his psychiatrist.

Mr. Brucker was receiving benefits from the Railroad Retirement Board. She thought he was receiving a little over \$600 every two weeks. Between January 1, 2010 and July or August 2012, Mr. Brucker told Ms. Brucker that he felt people with Respondent were keeping a close watch on him. He told her that he thought supervisors were targeting him. He specifically mentioned Mr. Reppond. She does not know how often this line of conversation came up, but estimates it came up 4-6 times before he was fired. Mr. Brucker said he knew the managers and supervisors were keeping an eye on him because "of some of the verbal stuff that went on between the men." She cannot remember him telling her about supervisors sitting in trucks watching him work in the yard. Before August 2012, Mr. Brucker never told her about his discussion with Mr. Underwood regarding his job application.

Mr. Brucker was close with Mr. Zagalik and Mr. Paterson at the railroad. Mr. Brucker wants to get his job back out of this whistleblower claim. He has had job interviews with Kansas City Southern but he has not worked for pay since he lost his job. Mr. Brucker did not start going to Dr. Chinnaswamy until after he married Ms. Brucker. Before he was fired, Mr. Brucker did not have outbursts of anger, being unable to concentrate, startle easily, or seem depressed. Ms. Brucker does not know whether he has been depressed since he was fired but "he's not happy." Ms. Brucker has not noticed that he seems to be worrying about anything in particular since being fired or that he has low energy. She did not notice that Complainant had low energy before he was fired. Before being fired, he was not very social, but Ms. Brucker did not think he was socially withdrawn. Mr. Brucker has not been socially withdrawn or kept to himself since being fired; he is about the same. Ms. Brucker has not noticed impulsive behavior or failing memory before or after he was fired. Complainant has not been emotional or more emotional since being fired.

K. Darrin Suttles Deposition Testimony – April 10, 2014 (CX 95)

Direct Examination

Mr. Suttles started working for Respondent on April 9, 2007, and is a manager in mechanical service excellence at Respondent. His first job was as an experienced front-line supervisor until 2011 when he got promoted to assistant general foreman. Mr. Suttles has never been a member of the union while working for Respondent. In his position as front-line supervisor his job was to supervise employees working on the locomotives at the Argentine

locomotive maintenance inspection terminal. He supervised employees in all crafts. Mr. Suttles was a mechanical foreman before being promoted to assistant general foreman.

Mr. Frey and Mr. Martin reported the possible seat-belt rule violation to the senior leadership at their location, Mr. Bunce. Mr. Bunce was a general foreman at the Murray Yard at the time. Mr. Suttles does not recall who reported the rule violation to him. Mr. Bunce's position was higher than Mr. Suttles' position but at a different location. Mr. Suttles presided over the investigation of the seat belt violation. It is normal procedure to have the same person who sends the investigation notification letter conduct the investigation.

Mr. Brucker had four disciplinary actions in his employee record. The first was in December 2005 in which he received a record suspension for being absent without authority. No investigation was held in that case because Mr. Brucker admitted that he did what was charged with and agreed to the discipline. At the investigation Mr. Suttles presided over, a statement from Mr. Paterson was not admitted into evidence. Mr. Suttles did not recall reviewing this statement at the 2010 investigation.

The investigation notification letter sent to Mr. Brucker in 2011 was signed by Mark Stockman, a general foreman. Mr. Stockman was not Mr. Suttles' supervisor. Mr. Bunce was still a general foreman. Mr. Bunce sent the letter via email to Mr. Suttles but Mr. Stockman actually sent it to Mr. Brucker because he was the conducting officer. The conducting officer is determined based on a schedule; it is not a single person. Mr. Brucker did not work under Mr. Suttles.

Alternative handling is part of the safety summit agreement the unions agreed to. An employee can take responsibility for a rule violation and come up with a process to prevent it from happening again for him and other employees. Mr. Reppond decided there was going to be an investigation into Mr. Brucker's dishonesty on his employment application. Mr. Suttles was assigned to be the conducting officer. Mr. Reppond was a general foreman III meaning he had more authority than a general foreman II. Mr. Reppond had supervisory authority over the area where Mr. Suttles worked once he was promoted to general foreman III. Mr. Suttles knew that Mr. Brucker could be dismissed for this rule violation because it says so in the rule. Mr. Suttles did not deliver the investigation notification letter to Mr. Brucker and he was not around when he was escorted off the property but that would be standard procedure for being withheld from service.

After the investigation, Mr. Suttles reviewed the transcript and he recommended dismissal to the superintendent, Mr. Bossolono, and to Mr. Bossolono's supervisor, Mr. Bunce. The final decision to dismiss Mr. Brucker was made by a collection of individuals in consultation with Labor Relations, Legal, and HR. Anytime an employee has two Level S disciplines within their probationary period they are subject to dismissal based on the PEPA policy. Mr. Brucker's dismissal was decided in accordance with the PEPA policy.

Mr. Suttles has never seen a letter sent by Complainant's counsel to Respondent's claims representative regarding Mr. Brucker's personal injury allegation. Mr. Suttles has never seen Mr. Brucker's personal injury report. A personal injury report is usually turned into an individual's front-line supervisor. The front-line supervisor then reports the injury to the injury call report, a

1-800 number. Mr. Suttles does not know who Mr. Brucker's front-line supervisor was in January 2010.

Mr. Suttles is a salaried employee of Respondent. His salary is reviewed annually and he is sometimes given bonuses. A salary increase or a bonus does not depend on the number of injury reports turned in by the people he supervises. Mr. Suttles receives a written performance review annually. The performance review is looking forward and setting objectives.

Cross-Examination

Neither Mr. Brucker nor his union representatives requested that Mr. Paterson's statement be offered into evidence in the 2010 investigation. The purpose of the formal investigation is to determine the facts related to the charged conduct. Mr. Suttles doesn't know the cause of Mr. Brucker's injuries reported in his personal injury report.

L. Larry Smith Deposition Testimony – April 15, 2014 (CX 78)

Direct Examination

Larry Smith has worked for Respondent for about 40 years. He has worked doing cleaning and as a laborer, fireman and oiler. He is a general laborer in the mechanical department. He washes locomotives, runs a forklift, takes out trash, works around the shop, fuels locomotives, and services the lead locomotive. Servicing the lead locomotive means servicing with crew packs. Mr. Smith is based out of the Murray site in Missouri, only going to the Argentine side in Kansas to get parts.

Mr. Smith has had training on Respondent's MSR which he thinks happens every year. He has a copy of the MSR. He worked with Complainant for about 5-6 years. Mr. Smith has heard from others about how Mr. Brucker may have injured his shoulder but he does not know anything specific. He cannot remember when he first heard this. He doesn't know when Mr. Brucker reported his injuries to the railroad.

Mr. Palmer was Mr. Smith's hostler helper in 2011. Tony Daniel is a laborer. Mr. Leblanc is a supervisor. Mr. Zagalik is a machinist that worked the lead desk in 2011. He would tell everyone what needed to be done and would send people out on jobs. Mr. Bunce was the general boss. Mr. Parrish was a machinist and is now a supervisor. Mr. Tate is an electrician. Mr. Smith recalls Mr. Brucker, Mr. Palmer, Mr. Rogers, Mr. Tate, and Mr. Zagalik being present for the June 2011 incident. A job briefing is "where they talk about safety stuff before they start the shift." Job briefings occur when job tasks change during the course of work or there is a change in conditions once a task is started. A job briefing was held on the day of the June 2011 incident. No one in management ever told Mr. Smith that Mr. Brucker had turned in a personal injury report in December 2009.

Mr. Smith attended an investigation at Argentine on August 10, 2011 regarding the locomotive rolling incident on June 15, 2011. Mr. Smith testified at this formal investigation. On June 15, 2011, Mr. Palmer spotted Mr. Smith while he pulled the motors down. Everyone had blue flag tags and then everyone started working. Mr. Smith started cleaning, picking up trash,

and looking for everything the locomotive is supposed to have. At some point Mr. Smith noticed that the locomotives had moved but he never felt them moving. He came around and Mr. Palmer had a face shield and protection you have to wear to clean up; there was a big fuel spill he was cleaning up. Mr. Smith went up to Mr. Leblanc, whom he heard tell Mr. Brucker to make out an accident report. Mr. Smith then was sent by Mr. Zagalik to do some work elsewhere and he was tested for drugs and alcohol later that night. On June 15, 2011, Mr. Brucker was working as the machinist on the bottoms with Mr. Rogers working the tops. Mr. Smith does not know what caused the locomotives to roll because he did not see anything. Since then, he has heard from others what caused the locomotives to roll. Mr. Smith should have put the hand brake on when he first came out of the cab and he was disciplined for not doing so. There was no other job briefing that day beyond the one at the beginning of the shift. Mr. Brucker never told Mr. Smith he was going to reset the air brakes and Mr. Smith doesn't know whether he told anyone else that. If Mr. Brucker was going to release the emergency application, it was up to him whether to hold a job briefing to let the other guys know what he was going to do. Mr. Smith doesn't know whether there is a risk of the locomotives rolling if the air brakes are set up, the PCS is released, and the air is allowed to come back in. Mr. Smith does not know what kind of damage the locomotive did to the fuel hose; he just noticed Mr. Palmer cleaning up the fuel spill.

Mr. Brucker never told Mr. Smith that he felt that managers were watching him, trying to catch him violating rules, or paying extra attention to him. He never heard anyone say that Mr. Brucker thought Respondent was trying to intimidate him. He never heard Mr. Brucker say anything like that to anyone else. Mr. Smith heard about the 2010 seat belt incident but Mr. Brucker never talked to him about it. Mr. Smith did not know about a 2012 letter Mr. Brucker received regarding absenteeism.

Mr. Smith has had some on-the-job injuries during his career. The last injury he had was in 1997 for his fingers. He had no discipline assessed against him close to 1997. He was disciplined in 2001 but he did not recall a personal injury around this time. Mr. Smith has never felt intimidated anytime he has turned in a personal injury report to Respondent. He is not aware of any employees who gave false information on their job applications and were terminated for it. He does not really know about what the rule was for being dishonest with Respondent on the job application. Mr. Smith does not know any employees who have been disciplined for turning in a personal injury report. He doesn't know anything about the circumstances surrounding Mr. Brucker's dismissal.

Cross-Examination

Mr. Smith has had three disciplines over the course of his career. The first one was in January 1986 for which he received a 30-day suspension for an "altercation." In 2001, he received a record suspension for failure to properly drop the derail protection, causing a locomotive to derailed. Then, in 2011, he received a 12-month suspension for the locomotive rolling incident. There was no investigation because he admitted responsibility. Mr. Smith did not think the locomotives would have moved if he had put the hand brake on tight enough.

The first injury Mr. Smith had was in 1975 for an injury to his arm or forearm. He had an eye injury in September 1980, a knee injury in March 1983, a finger injury in February 1985, an

injury to his eye and face in December 1985, another eye injury in May 1987, an arm injury in February 1990, a wrist injury in February 1995, and another finger injury in March 1997.

Only Mr. Smith and Mr. Brucker were charged with rules violations arising from the 2011 incident.

M. Joe Dominguez Deposition Testimony – April 15, 2014 (CX 79)

Direct Examination

Mr. Dominguez retired on May 10, 2013. He first worked for Respondent's predecessor in November 1973. He first worked as a shop laborer and then became a journeyman machinist. All the positions he has held have been in the mechanical department. A machinist maintains a diesel engine of the locomotives and does some welding. Mr. Dominguez was based out of the Argentine facility in Kansas City, Kansas. He worked at the Murray yard on several occasions but did not hold a permanent position there. Mr. Dominguez received yearly training on the MSR. While working for the railroad he had a copy of the MSR. The bulk of the training was in the classroom with some hands-on training in the shop.

Mr. Dominguez knows Mr. Brucker because Mr. Dominguez was a representative of the local chairman for the machinist union. He was involved in the hiring process for about 25 years and he was one of the people who interviewed Mr. Brucker. Mr. Dominguez has no direct knowledge of on-the-job injuries Mr. Brucker suffered.

In 1993, when Mr. Brucker was hired, the railroad would put advertisements in the newspaper and with the Kansas and Missouri job service. Mr. Dominguez reviewed applicants' paperwork to see if they had a journeyman's card or, if not, to see if they had on-the-job training or work where they could give them a journeyman's card. If not, they could recommend an apprenticeship. He and the other committee members would give recommendations to supervisors and rate employees. They developed a hiring pool. Applicants would bring their resume to the business office and fill out and turn in their job application in the diesel shop area. The assistant superintendent or superintendent of the shop would take the applications. Applications were reviewed before interviews were granted. Applications were not in the office. Applicants would bring applications with them that they had obtained through the job service or that the railroad had mailed to them. Mr. Dominguez could not recall if they had applications at the shop but speculated it was likely since they were desperate for people at the time.

Mr. Dominguez could not recall how Mr. Brucker applied. Usually applications would be reviewed in 3-4 days. The superintendent in 1993 was Larry Sliger and the assistant was Bill Hobert. Mr. Underwood was an assistant superintendent. Mr. Underwood eventually retired or took a buyout. It was known in the shop that Mr. Underwood had been murdered. Mr. Martin was an EMD tech at the Murray Yard. Mr. Frey was a mechanical foreman at the Murray Yard. Mr. Dominguez knew Mr. Martin but did not know who Mr. Frey was.

Mr. Dominguez represented Mr. Brucker at the investigation for the seat-belt incident in May 2010 because the local chairman was on leave at the time. Mr. Brucker had a note from another employee stating Mr. Brucker was wearing his seat belt but it was not admitted at the

investigation because it would be hearsay since the individual was not there to testify. Mr. Dominguez spoke to Mr. Paterson on 3-4 occasions. Mr. Paterson had a family matter on the day of the investigation and Mr. Dominguez was granted an extension by Respondent. He had another situation when the second investigation came up. Mr. Dominguez cannot recall whether he asked for a second extension. Mr. Brucker did not tell Mr. Frey and Mr. Martin he was wearing his seat belt because he did not know what was going on at first. Mr. Frey and Mr. Martin never told Mr. Dominguez anything about a personal injury report filed by Mr. Brucker.

Greg Lederer was a local official in the machinist union in 1993 and was part of the screening committee. Mr. Dominguez signed a note to Mr. Underwood in 1993 after interviewing Mr. Brucker expressing concern about Mr. Brucker's level of experience because he was borderline qualified.

Mr. Brucker never told Mr. Dominguez after December 10, 2009 that he thought managers were watching him trying to catch him violating rules or were paying extra attention to him. Mr. Brucker told Mr. Dominguez after the seat-belt incident that he thought the two supervisors were "ganging up on him." Mr. Brucker did not explicitly say he thought they were trying to intimidate him.

Mr. Dominguez heard about the June 2011 incident with the air brake release but he did not know at the time that Mr. Brucker was involved. Mr. Dominguez does not know about a letter Mr. Brucker received in February 2012 concerning absenteeism. He knows Mr. Brucker has been dismissed, but does not know the reason.

Mr. Dominguez recalled an individual who lasted 2-3 days who was dismissed for falsification of an application. He is not aware of anyone who provided false information to the railroad and was not terminated. He understands that if you were dishonest with the railroad on your job application you could be terminated for that dishonesty. The job application says that you can be dismissed at any time for providing false information. This statement was on the job application in 1993 and well before that too. He doesn't know of anyone who was disciplined for turning in a personal injury report. It is possible for an employee who has submitted a personal injury report to later be disciplined for a rules violation meriting discipline.

Mr. Dominguez has never felt personally intimidated by the railroad, but he was a union official for over 20 years and had extensive training through his organizations, so they were not going to try to intimidate him. There was one injury in 2007 where an assistant superintendent questioned his honesty on whether he really got hurt. He had applied for a job that was given to someone with less seniority and more computer experience than he had, and Mr. Dominguez said that was not proper. The next day he hit his neck on a pipe in the basement and the e-mail questioned whether he was actually hurt or was just saying that because he was upset he did not get the job. An employee without training would have been more intimidated, but he was more disappointed in upper management.

As a representative, other employees have told him how they feel. "What they tell me is if it's not career ending, you better watch it when you turn it in ..." He was not intimidated, but thinks other employees were. The railroad should be fair and give consistent discipline to employees even if they have turned in personal injuries.

Mr. Dominguez called the hotline once because he felt an employee was getting favorable treatment working as a journeyman and also being a contractor. As a union representative, if an employee came to him claiming retaliation for reporting an injury and had specific facts he would go to shop superintendent to discuss the allegations. The employee hotline is usually posted in the shops. Mr. Dominguez discussed the existence of the hotline as a union representative with other employees.

Cross-Examination

“Exempt employees” are those in management as opposed to a union member.

N. John Wright Deposition Testimony – April 15, 2014 (CX 83)

Direct Examination

Mr. Wright has worked for Respondent for 18 years. He is a DSF lead man machinist. He was a general laborer from 1995 to 1997 and then took an apprenticeship. He became a full machinist in 2001. All of his jobs have been within the mechanical department, performing duties as a machinist, fixing broken locomotives. Mr. Wright is based out of the Argentine facility in Kansas City, Kansas. He previously worked at the Murray Yard in Kansas City, Missouri. Mr. Wright was trained on the MSR when he was first hired and then through annual certifications.

Mr. Wright is not familiar with any injuries Mr. Brucker alleged to have suffered. A job briefing is when a supervisor tells you what you are going to do. Under the MSR, you are supposed to have a job briefing anytime the work conditions change during the course of a task.

Mr. Wright represented Mr. Brucker in the June 2011 rolling locomotive incident but he was not actually present when it happened. Mr. Smith and Mr. Palmer were present. They parked the locomotives and did not set the hand brake. The locomotive rolled 2-3 feet. If the hand brake had been set, the locomotives would never have rolled. It would be a normal part of the job of a machinist working the bottoms, like Mr. Brucker was, to go into the cab of the locomotive, depending on what was going on. Mr. Wright would expect Mr. Brucker to tell other employees before he released the emergency application that he was going to do that. In Mr. Wright’s opinion, it was highly doubtful, but possible, that the locomotives would have rolled if the hand brake had been set. If they did a job briefing with everybody they would never get anything done. A job briefing is for an extreme change, while air brakes are normal stuff. Mr. Wright does not recall whether the rules said an extreme change or any change in the job.

No one ever said anything to Mr. Wright about turning in a personal injury report in December 2009.

Mr. Brucker never told Mr. Wright that he thought Respondent’s managers were trying to catch him committing rule violations. He contended “BNSF taught me that by his investigation. The laborer clearly stated it was his fault. If he had set the hand brake, it would have never happened, and Bob got nailed with one of the harshest penalties you can get when he wasn’t

guilty.” He can’t recall Mr. Brucker ever telling him that he thought managers were paying extra attention to him.

Mr. Wright doesn’t recall Mr. Brucker ever telling him he thought managers were trying to intimidate him but “You don’t have to tell anybody. They intimidate all of us.” Mr. Wright knows this because he was injured in 2007 and was fully released by his doctor in 2010 with no restrictions, but Respondent self-imposed a 35-pound restriction on him. This meant he had to work second shift and could not see his kids due to his injury, although there were other jobs he could have done on day shift. He also went to court for someone else last year and got two level S violations “right off the bat.” In addition, he missed a day to get his gallbladder removed and “they dinged me for that.” He also got “dinged” for missing two days of work with the flu. He had not been disciplined in ten years, and then got four investigations in six months after testifying for this other individual. One of the investigations was because the railroad said he missed too many days; but on one day he was in the hospital, on another he was in too much pain to drive, and on two others he had the stomach flu. He missed another day because he had to meet with his legal counsel regarding a “20109” case he has against Respondent.

Mr. Wright never heard Mr. Brucker allege that managers were watching him trying to catch him violating rules. He never heard him say he felt management was trying to intimidate him or paying special attention to him. Mr. Wright doesn’t know anything about Mr. Brucker’s 2010 seat belt incident or the 2012 letter on absenteeism. Mr. Wright’s only injury was in 2007. Adverse action was taken against him because he is “stuck in a job that I can’t see my kids and I’m going to lose my family.” A day job was available while he was injured, and when he came back he should have been allowed to bump the individual who filled that position because Mr. Wright had greater seniority.

Mr. Wright understands that being dishonest with the railroad can result in termination. Mr. Wright doesn’t recall whether any employees have been disciplined for turning in a personal injury report. Mr. Wright has called the hotline, but believes the hotline is used to gather information on employees. He does not know of any individuals who provided information to the hotline that was later used against them by the railroad.

Mr. Brucker should not have had to check to see if the hand brake were set before releasing the emergency application air brakes in 2011 because it was not his job.

Cross-Examination

Respondent does not provide training or information on the whistleblower provision of the FRSA.

O. Ronald Tate Deposition Testimony – April 15, 2014 (CX 86)

Direct Examination

Mr. Tate has worked for Respondent since October 1972. He first worked as a laborer and then did an electrical apprenticeship. Currently he is an electrician in the mechanical

department. He has worked at the Argentine and Murray Yard facilities. He has received classroom and hands-on training in the MSR.

Mr. Tate worked with Mr. Brucker at the Murray Yard. Mr. Tate has heard about Mr. Brucker's alleged job-related injuries from other people but not from Mr. Brucker.

A job briefing is going over what your job tasks are and telling everyone the safety of how to do it and what to look out for. A job briefing can be done anytime you ask for it.

Mr. Tate was present for the locomotive rolling incident. No one ever said anything to him about Mr. Brucker's personal injury report. Mr. Tate was in the cab and felt the locomotives roll. He first learned the locomotive had rolled when he looked outside and saw the fuel hose stanchion off. Mr. Brucker did not tell him prior to the roll that he was going to go into the cab and release the emergency application, let the air come back in, and release the brakes. He was surprised when he felt the locomotive roll. Mr. Brucker did not need to let everyone else know what he was going to do. If Mr. Brucker knew it was going to release, he probably would have waited until everybody was off of the locomotive. If the hand brake is not set, there is a chance the locomotive will roll. An employee should check to see if the hand brake is set before releasing brakes on a locomotive.

Mr. Brucker never told Mr. Tate that he thought managers were paying extra attention to him, intimidating him, or trying to catch him in rule violations. Mr. Tate heard about the seat-belt incident but never spoke with Mr. Brucker about it. Mr. Tate does not know about the letter regarding Mr. Brucker's absenteeism.

Mr. Tate has never had any discipline following reports of personal injuries. He never felt intimidated by the railroad after reporting his injuries. Mr. Tate understands that if you are dishonest the railroad can terminate you. Mr. Tate has met Mr. Brucker's attorney and attended cookouts sponsored by him or his firm where they provided information on what to do if they are injured.

Cross-Examination

Mr. Tate was working under a blue flag at the time the locomotives rolled. He had to put his ID card up on the blue flag. No investigation was held concerning Mr. Tate arising from that incident.

P. Gary Paterson Deposition Testimony – April 16, 2014 (CX 87)

Direct Examination

Mr. Paterson worked for Respondent for 13 years and retired in September 2011. He worked as a hostler helper, hostler, and truck driver. He worked at Argentine and the Murray Yard. He received classroom and on-the-job training in the MSR.

Mr. Paterson was with Mr. Brucker in 2010 returning from a yard call and as Mr. Brucker exited the vehicle he was approached by Mr. Frey and another person. Mr. Paterson later became

aware that Mr. Brucker was written up for violating the seat-belt rule. Mr. Paterson doesn't know the name of the person who was with Mr. Frey. He was not present for any conversation or interaction between Mr. Frey and Mr. Brucker. Mr. Frey and the other individual were calm when they approached Mr. Brucker. They were not yelling or screaming at him, and were not gesticulating wildly or motioning with their hands. Mr. Paterson had driven out and back from the yard call. The seat belts in the truck were a dark gray or black. Mr. Brucker was wearing a dark blue shirt with a t-shirt underneath a long-sleeved shirt. It was at least an hour after Mr. Brucker was approached by Mr. Frey before he told Mr. Paterson what happened. Mr. Paterson does not recall whether Mr. Brucker was wearing his seat belt.

Mr. Paterson did not attend the investigation and is not sure why; he wrote a letter. Mr. Brucker did not ask him to write the letter. Mr. Dominguez may have asked him to write the letter but he did not tell him what to put in the letter. The seat belt rule was a widely known rule in 2010. Mr. Paterson does not recall seeing Mr. Brucker fasten his seat belt. At the time he submitted his letter, he believed that he saw Mr. Brucker press the seat belt release button with his left thumb. Mr. Paterson does not know why Mr. Frey and the EMD technician were by the storeroom door when he pulled the truck up. He doesn't know whether or not they observed Mr. Brucker earlier in the day not wearing his seat belt.

Mr. Paterson does not recall Mr. Brucker ever telling him that he thought managers were watching him or trying to intimidate him. Mr. Paterson does not know anything about the 2011 rolling locomotives incident or the 2012 absenteeism letter. Mr. Paterson understood he could be fired from the railroad for dishonesty, and understood this when he filled out his job application. Mr. Paterson called the employee hotline once and did not suffer any negative employment repercussions as a result.

Cross-Examination

Mr. Paterson had a better recollection of the seat belt incident when he wrote the letter 16 days after the event than at the deposition.

Q. Dr. Chitra Chinnaswamy Deposition Testimony – April 16, 2014 (CX 88)

Direct Examination

Dr. Chinnaswamy is a medical doctor specializing in psychiatry. She treated Mr. Brucker at North Kansas City Hospital in July 1997 for mental health issues. Mr. Brucker had been prescribed lithium, a mood stabilizer. Zoloft is an antidepressant and trazodone is mainly used as a sleep medicine, but it is also an antidepressant. Mr. Brucker had previously been under the care of Dr. Olomon. Mr. Brucker had been diagnosed with bipolar disorder mixed type which means he can have both depression and manic items. The Global Assessment of Functioning (GAF) looks at how a person is functioning considering their psychiatric condition and how well they are coping with the stressors and adjusting and functioning. A score of 100 means they are completely functioning without any difficulties while a score of 0 is not functioning. On the 1997 record, Mr. Brucker's score was 35 with a past score of 65. Mr. Brucker and his counsel told Dr. Chinnaswamy prior to the deposition that his depression had been worse since he got fired.

In March 2001, Dr. Chinnaswamy's records show that Mr. Brucker complained of not sleeping well and increased anxiety and agitation. Since 2001, Dr. Chinnaswamy has been continuously treating Mr. Brucker for depression and sleep issues. For the entire time she has treated him he has been on an antidepressant and mood stabilizer and something for anxiety and sleep. Dr. Chinnaswamy has diagnosed Mr. Brucker with chronic bipolar disorder causing episodes of depression and mania and that sleep is part of that problem. His condition is chronic, and Dr. Chinnaswamy does not think it arose from being fired. Stress at work or dismissal from work can increase depression or sleep issues and it probably did in Mr. Brucker's case. His medical records show that his mood was mostly stable but he did have increased anxiety and sleep problems. His sleep problems increased by 10-25 percent since his dismissal. Dr. Chinnaswamy has not seen Mr. Brucker since April 2013 and does not know what his condition is. She did not prescribe Mr. Brucker any new medications after he was fired, but only increased the amount. She prescribed him Wellbutrin for depression, Lamictal for the depressive side of bipolar disorder and a mood stabilizer, and Ativan for sleep.

Dr. Chinnaswamy saw Mr. Brucker on June 22, 2012. His diagnosis was moderate bipolar disorder, depressed type and generalized anxiety disorder. His GAF score was current and past of 70. She saw him again on September 14, 2012, and he told her that he had been fired two weeks earlier. He talked about how he had a fight with his brother 20 years earlier and had pled guilty to assault. He also told her that his employer had done an investigation and found out. Dr. Chinnaswamy's diagnosis was the same at this appointment and his GAF score was 55. She increased his Lamictal for sleep and mood stabilization. She saw him again on October 26, 2012. He reported he was mostly stable and did not have his job back, but the union was working on it and he was coping well with his stress. He returned on April 10, 2013 and reported that he was feeling much better. He reported that he was worried about finances but was overall doing well. His anxiety had increased and he had trouble falling asleep and on many days, the Ativan was not helping him fall asleep. Anxiety is different from depression. Sleep is a symptom of bipolar disorder. The Ativan is an anti-anxiety medicine to treat the anxiety and is also sedating so it can help you sleep. Dr. Chinnaswamy increased his Ativan prescription. Over time Mr. Brucker's GAF score would fluctuate even before being fired.

In February 2008, Mr. Brucker reported a feeling of increased depression but no new stressors. On July 19, 2008, he reported that he stopped taking his medication over the weekend and noticed increasing depression but felt better when he started taking his medication again. This is evidence that the depressive condition is being controlled by the medication. It is also evidence the depressive condition would exist and be more pronounced but for the medication. On October 19, 2011, Mr. Brucker reported increased depression, feeling overwhelmed and anxious, and not being able to sleep for about two weeks. His GAF score was 50. Dr. Chinnaswamy increased his Wellbutrin prescription.

As of the last time Dr. Chinnaswamy saw Mr. Brucker, he had reached maximum psychological improvement assuming he continued his medications.

Cross-Examination

Coping strategies are how to look at what is going on in life realistically and how to act in the best interest. Dr. Chinnaswamy saw Mr. Brucker more frequently right after he was fired because of the additional stressor.

Redirect Examination

Dr. Chinnaswamy saw Mr. Brucker in September 2012 and in October 2012 after he was fired in August. At that point she recommended he see her again in six months because he did not have insurance and could not afford to see her so he agreed to call if needed. A single visit for Mr. Brucker is \$75, the minimum for patients without insurance.

Reexamination

Dr. Chinnaswamy was of the understanding Mr. Brucker had not been to see her in a year because he could not afford it.

R. Dennis Bossolono Deposition Testimony – April 29, 2014 (CX 91, RX 64)

Mr. Bossolono worked for Respondent for 36 years. When he left he was superintendent responsible for Argentine and Murray locomotive, and had held this position for a little over ten years. Mr. Bossolono first began working for the railroad in 1978 as a laborer. He also worked as a carman, relief supervisor, first line supervisor, general foreman, field superintendent, and shop superintendent. He first hired with the railroad in Barstow, California and moved to Kansas City in 2000. He first became a supervisor in September 1988. Mr. Bossolono did not start working in the shop in Kansas City until 2003.

Mr. Bossolono was involved in the decision to terminate Mr. Brucker's employment. He reviewed the transcript of the investigation with the investigating officer, Mr. Suttles, and Mr. Reppond. They all felt it warranted dismissal. He referred their recommendation to the labor relations department in Fort Worth and they read and reviewed the transcript. They also recommended dismissal. More specifically, Mr. Suttles and Mr. Reppond reviewed the transcript and made their recommendations to Mr. Bossolono and then he read the transcript and made his own decision and then made the recommendation to Fort Worth.

Mr. Bossolono was involved in the decision to hold an investigation into the possible rule violations related to Mr. Brucker's employment application. He reviewed the information alleging a rule violation and felt there was enough information to schedule the hearing to determine the facts and place any responsibility. The July 19, 2012, letter informing Mr. Brucker of the alleged rule violations stated "It is alleged that you were incarcerated on May 15, 1985, with a release date of May 11, 1987 for third-degree assault." It did not allege that he was actually convicted. The letter stated Mr. Brucker was ineligible for alternative handling which is when an employee can accept responsibility for the rule violation and go through a process to prevent recurrence. Under the alternative handling guidelines, conduct and dishonesty violations are not eligible for alternative handling.

Mr. Bossolono reviewed the letter informing Mr. Brucker of the investigation dated May 17, 2010 on the seat-belt violation. Complainant was not available for alternative handling for failing to wear his seat belt, because not wearing a seat belt is considered a serious rule violation and does not qualify for alternative handling. Mr. Bossolono reviewed the letter informing Mr. Brucker of the investigation into the brake release matter which stated he was ineligible for alternative handling. He was ineligible because blue signal and conduct violations are considered serious rule violations. Mr. Brucker's violation was a serious violation because the locomotive was under blue signal protection which is designed to protect other employees working on the locomotives. Another employee failing to set the hand brake would not be a serious violation because the locomotive would not be under blue signal protection until after the hand brake is applied. Setting the hand brake does not guarantee the equipment will not move. Setting the hand brake is a secondary securement to setting the air brakes.

When Mr. Bossolono sent the transcript and information to labor relations he stated what his recommendation was. Mr. Suttles was a supervisor at the time of the investigation. Mr. Bossolono could not remember if Mr. Suttles reported directly to him at that time but ultimately would have reported to him because he was the senior officer at the facility at the time. Mr. Reppond reported directly to Mr. Bossolono at the time. Mr. Bossolono took labor relations' opinion into account in deciding to dismiss Mr. Brucker. Mr. Bossolono is sure he took Mr. Brucker's prior violations into consideration when recommending dismissal but his dishonesty is a standalone dismissal and Mr. Brucker would have stood for dismissal with or without the prior two violations.

Mr. Bossolono is not sure whether Mr. Brucker actually pled guilty to first degree assault. He does not know the difference between first degree assault and third degree assault. He has a general idea of the difference between a felony and a misdemeanor. He agreed a felony was generally a more serious crime than a misdemeanor. It was not true that Respondent was only concerned with employees' felony convictions. Mr. Bossolono is not sure if there was a rule requiring employees to report misdemeanor convictions. MSR Rule 28.6.2 only requires notification of felonies for people already employed by Respondent.

The PEPA policy is intended to address rule and policy violations in a consistent and fair manner. The policy allows for an individuals' record to be taken into account when they are charged with a rules violation in determining discipline. Mr. Bossolono reviewed a non-exhaustive list of violations which may result in immediate dismissal. One was "dishonesty about any job-related subject, including but not limited to, falsification or misrepresentation of an injury, abuse of FMLA and/or other leave privileges." Mr. Brucker did not misrepresent an injury but he was dishonest, and a conduct violation is also a serious rule violation. This list is non-exhaustive and does not include everything an employee can be dismissed for. He was not immediately dismissed because Respondent did not find out until 19 years later that he was dishonest on his job application.

Mr. Fultz in the claims department notified Mr. Bossolono that Mr. Brucker may have had a prior conviction. Mr. Bossolono could not remember how long before the letter notifying Mr. Brucker of the allegation that he learned of the possible violation. He thought Mr. Fultz emailed him but he could not be sure.

Mr. Bossolono cannot remember whether the 2010 seat-belt incident was discussed with him prior to the investigation. Normally a recommendation for an investigation is made and, if Mr. Bossolono is out, it might be scheduled without his participation; but normally he would have been involved. He doesn't remember whether he was involved in the decision to have an investigation of the 2011 violation. He is not sure if he was aware that Mr. Brucker turned in a personal injury report. Mr. Bossolono's compensation did not relate to the number of injuries or severity of injuries reported by people under his supervision but safety was part of the goals.

Mr. Bossolono has no information or testimony that Mr. Brucker's description of his alleged conversation with Mr. Underwood was untrue. Mr. Cargill's email talked about risk of reinstatement or risk that the PLB or someone would review the matter and order Mr. Brucker to be reinstated. Mr. Cargill stated that, "An arbitrator may struggle with dismissal for an infraction so long ago." Mr. Bossolono does not recall whether he had any further discussions with Mr. Cargill regarding this matter.

Mr. Bossolono retired on December 10, 2013. Eric Weber is the director of safety reporting and analysis for Respondent in Fort Worth. Mr. Bossolono did not report to Mr. Weber. Mr. Bossolono reported to Steve Harris who was the chief mechanical officer, South. Mr. Harris was physically based out of Fort Worth.

An investigating officer decides whether a handwritten statement can be admitted into evidence if an individual cannot attend an investigation. Whether it can be admitted may be a question of being able to determine the validity of the document. There is not a blanket rule on whether any document would be allowed to be entered by either party in an investigation. Mr. Bossolono has not attended more than 100 investigations. He does not know how many investigations Respondent holds per year. Mr. Bossolono estimated that in his area of supervision investigations were scheduled about once per week, maybe more than once per week. In Mr. Bossolono's review of the transcript of Mr. Brucker's investigation he did not make an effort to verify the accuracy of the investigatory report from Factual Photo.

S. John Reppond Deposition Testimony – May 1, 2014 (CX 93, RX 58)

Mr. Reppond works for Respondent as a Shop Superintendent II. He last worked as a General Foreman III and reported to Mr. Bossolono. He took Mr. Bossolono's place as Shop Superintendent II. Mr. Reppond supervises about 630 scheduled employees and 54 managers at the Kansas City, Kansas, Argentine LMIT location. He also has supervisory duties at the Murray Yard.

Mr. Reppond has worked for Respondent or its predecessor for 41 years. He was first hired as a laborer in 1973 in San Bernardino, California. After a year and a half, he did a three-year apprenticeship as a machinist apprentice and then became a journeyman machinist. He was laid off in force reduction and later hired back as a journeyman sheet metal worker in about 1977. He then worked as a machinist until 1985, when he was promoted to frontline supervisor. He worked in that position until 1992, when he was transferred to Topeka as a frontline supervisor. In December 1994 he was promoted to General Foreman I at the Argentine location. He was promoted to General Foreman III in 2008. As General Foreman III he supervises more

managers and all the General Foreman I and II employees. He took his current position as Shop Superintendent II on December 1, 2013.

Mr. Brucker worked for Mr. Reppond for a period of time when Mr. Reppond was at the Murray Yard. Mr. Reppond does not remember if he was involved in Mr. Brucker's 2005 discipline. In 2010, Mr. Brucker was given a level S, 36-month review period, which means if he was disciplined during that 36 month period a 30-day record suspension could turn into a 30-day actual suspension. He reviewed the transcript of Mr. Brucker's 2010 discipline and then gave his recommendation to Mr. Bossolono. Once the investigation was complete, Mr. Reppond, Mr. Bossolono, and the conducting officer made a recommendation that would have gone to labor relations to get their feedback on. Mr. Reppond had the same level of participation when Mr. Brucker was disciplined in 2011.

Mr. Reppond was provided with information on the 2012 investigation from Mr. Fultz in the claims department. Mr. Reppond did not recall how Mr. Fultz contacted him but said he would have called, emailed, or hand-carried the documents to him. Mr. Fultz gave Mr. Reppond medical records and information from a private investigations firm that contracts with Respondent.

As part of the 2010 investigation, Mr. Brucker was notified he was not eligible for alternative handling. This is because it was a serious violation and alternative handling is not available for serious violations. The 2011 violation was also not eligible for alternative handling. Any time dismissal is recommended, it goes to labor relations. A disciplinary decision would not go to labor relations if it was a standard violation like work performance or absenteeism. In 2005, Mr. Brucker was assessed a level S violation for being absent without authority. This is not the same as absenteeism. Mr. Reppond doesn't know the details of Complainant's discipline, but he had to have been absent for more than eight hours for it to be considered a serious violation. The PEPA policy requires disciplinary decisions to consider an individual's personnel record. In Mr. Brucker's case, they considered his 2010 and 2011 Level S review periods which were still active at that time.

Mr. Reppond does not recall ever seeing the letter from Complainant's attorney to the claims department regarding his shoulder injuries. He is "sure" he has seen the personal injury report before. A personal injury report is usually filled out in the office with a manager, and then turned into the manager. Mr. Reppond does not recall whether Mr. Fultz discussed the injury report with him when he gave Mr. Reppond the information concerning Complainant's employment application. Once Mr. Brucker completed the personal injury report he would have completed a medical release and claims would have done their due diligence. The claims department would hire a private investigator if something in the medical records prompted it.

Mr. Reppond testified at the investigation that the entire background report was not pertinent to the investigation because it contained very personal information. He did not attempt to verify the information in the private investigator's report. The letter charging Mr. Brucker with dishonesty was dated July 19, 2012 and the private investigator's report was dated July 20, 2012. This was the date the private investigator's report was officially sent, but he is sure that Respondent had the information before actually receiving the written report. He does not know what information Respondent had before July 19. Mr. Reppond doesn't recall when Mr. Fultz

gave him Mr. Brucker's employment application, but it would normally happen within a week. Mr. Reppond is not aware of a rule requiring employees to notify the company of misdemeanor convictions but it is a question on the application.

Mr. Reppond's compensation does not depend on the number of injuries reported for people under his supervision or the severity of those injuries. Safety records are not taken into account for discussions of raises and bonuses. Performance of the railroad, velocity, on-time performance, efficient operation of maintenance and repairs would be taken into consideration when discussing raises and bonuses.

T. Dennis Bossolono Deposition Testimony – December 21, 2016 (CX 92, RX 65)

Direct Examination

Mr. Bossolono was a supervisor of Mr. Brucker but not his immediate supervisor. Mr. Brucker had yearly testing on the MSR. There was never a time while Mr. Bossolono was with Respondent or its predecessors where there was not a rule specifically prohibiting an employee from being dishonest with the company. The rule has always been taken seriously. Mr. Bossolono is aware of employees who were disciplined, including being terminated, for dishonesty. He is aware of employees who were disciplined, including terminated, for dishonesty on their job applications. The job applications used by Respondent and its predecessors contained a paragraph stating the signer agreed that false information would be grounds for dismissal no matter when the information was discovered. The railroad takes this language seriously. He has never heard a manager say the railroad was only interested in felony convictions for the question on criminal convictions. Mr. Bossolono has never heard an employee say they were told that the railroad was only interested in felony convictions. In Mr. Bossolono's experience, with that question the railroad wanted to know if someone violated a law or rule which is worth looking into because it has stringent rules and regulations for employees; if someone was not following the rules outside the company they would want to know. The company would also want to know if the individual had been involved in criminal activity that would create concern about the safety of other employees and/or the public. A misdemeanor conviction for assault is something the railroad would want to know about.

Mr. Bossolono knows who Mr. Underwood was but did not know him personally. When Mr. Bossolono took the job at Argentine he learned that Mr. Underwood was the assistant superintendent and that sometime after he left he was murdered by a family member. It was widely known throughout the employees at Argentine and Murray that Mr. Underwood had been murdered.

Mr. Bossolono was involved in the discipline issued after reviewing the transcript and exhibits from the formal investigation conducted in relation to the 2010 seat-belt incident. Driving without a seat belt is a serious and dismissible offense. In 2010, Mr. Martin was an EMD technician, a contractor hired by Respondent to supervise the maintenance and repair of EMD locomotives under contract. Mr. Martin is not an employee of the railroad. He reported to his own supervisors, not anyone at the railroad. In 2010, EMD techs worked independently of Respondent's supervision. EMD technicians were to be aware of employees' activities and report a violation to a Respondent supervisor if they saw it. Mr. Martin would not have the authority to

discipline an employee himself. An EMD tech like Mr. Martin may have knowledge of an employee's injury if it occurred under his direct supervision but he would not have access to an employee's records. An EMD tech would not have access to personnel files.

Mr. Bossolono was involved in the discipline issued for the June 2011 rolling locomotive incident. He recalled that Mr. Brucker manipulated the controls of the locomotive while it was under blue signal protection allowing it to move and expose employees to risk that were working on the consist and pulling down a locomotive fuel crane that was applying fuel. This is a serious violation and a dismissible offense. Before an air test is done and the air brakes are released, the person releasing the air brakes has an obligation to ensure the hand brake is set on a locomotive in a consist. Before the air test is done there would be a job briefing to identify any activities of risk, ensure employees involved understand their assignments and responsibilities, and ensure that if something changes, employees will get back together and conduct another job briefing. One of the reasons a job briefing is done to ensure that everyone is clear of the locomotive in case it rolls when the emergency brakes or air brakes are released. There is a possibility the locomotive will move even if the hand brake is set. If an individual applied the independent brake before releasing the air from an emergency brake application, even if the hand brake had not been set, that would help prevent the locomotive from moving. The independent brake valve is right next to the automatic brake valve on a locomotive. A person removing an emergency air brake application should make sure the hand brake is set prior to releasing the air brakes to prevent the locomotive from moving if it is under blue flag protection. An unexpected locomotive movement is dangerous because of the nature of the work being done under blue flag protection which could result in physical injury and damage to company property.

Mr. Brucker's transcript does not contain an entry for any discipline assessed related to absenteeism in 2012. Mr. Brucker alleged he was given a letter that he had three absences within the rolling calendar year. This is an awareness letter for the employee to ensure they are aware of the attendance guidelines and to discuss with them that they had three absences. It is not until the seventh absence that discipline comes into play.

Mr. Bossolono was involved in recommending that Mr. Brucker be dismissed. Mr. Bossolono honestly believed that Mr. Brucker had violated the rules. He did not believe Mr. Brucker's story about what Mr. Underwood told him. He thought it was "pretty convenient" that Mr. Underwood was deceased and he could not believe that a manager would make that statement to an employee.

He never told anyone to target Mr. Brucker because he had turned in a personal injury report and never heard someone make such a comment. He never told anyone to target Mr. Brucker to get him terminated or in trouble and he never heard someone make such a comment. He never ordered anyone to intimidate Mr. Brucker and never heard anyone make such a comment. He never retaliated against Mr. Brucker for turning in a personal injury report and never ordered a subordinate to do so. He never instructed anyone to watch Mr. Brucker in his work and never observed anyone try to catch him making mistakes or violating rules. If he retaliated or tried to make life more difficult for Mr. Brucker he would be putting his job at risk.

Mr. Brucker received a 30-day record Level S suspension for the seat-belt violation. This means it was on paper and there was no actual time lost or lost wages. The violation was a basis

for termination, but Mr. Brucker was not terminated. He was also assessed a 3-year probationary period. For the June 2011 rolling locomotive incident, Mr. Brucker was given a 30-day record suspension and a 3-year probationary period. This also was a basis for termination, and Mr. Brucker was not terminated. Two Level S violations within one probationary period would more often than not result in dismissal. Mr. Bossolono had experience with employees who had a pending probationary period and a subsequent serious rules violation; more often than not they were terminated. In his opinion Mr. Brucker was not terminated after the June 2011 incident because it is a manager's discretion and he would look at things like an employee's tenure, his previous discipline record, and his work ethic, and in some cases an employee may not be dismissed even if he stood for dismissal.

Mr. Bossolono worked with Mr. Reppond for ten years and believes him to be honest.

Cross-Examination

Mr. Bossolono did not consider whether Mr. Brucker's criminal conviction was a felony or a misdemeanor. He considered the dishonesty in not divulging the information and not answering the question honestly. Respondent's rules require employees to notify it if they are convicted of a felony. Mr. Bossolono could not recall a rule requiring employees to report a misdemeanor. It is possible Mr. Martin heard about an employee's injury report from an employee of Respondent.

Mr. Bossolono does not know if the railroad ever attempted to obtain Mr. Brucker's medical records during his employment. He does not know if the railroad ever attempted to determine if he had any misdemeanor or felony convictions. It would not make a difference to Mr. Bossolono's recommendation that Mr. Brucker be terminated if he was convicted of a felony or a misdemeanor.

Mr. Brucker was a member of the machinist union and the investigation that was held was pursuant to the procedure set out in the CBA. Alternative handling is an agreement that gives employees the opportunity to take responsibility for a rules violation and handle it alternative to discipline. The employee comes up with an action plan that would help him not to violate the rule and that would be meaningful to other employees at the facility. The disciplinary actions against Mr. Brucker were not eligible for alternative handling due to the seriousness of the charges.

Redirect Examination

Dishonesty standing alone is a dismissible violation.

U. John Reppond Deposition Testimony – December 21, 2016 (CX 94, RX 59)

Direct Examination

Mr. Reppond was a supervisor of Mr. Brucker but not his direct supervisor. Complainant would have been expected to follow the MSR. Every employee is required to go through annual safety certification. Mr. Reppond is aware of employees of Respondent who were disciplined or

terminated for dishonesty in the course of their work or that was found out in the course of their work. He is aware of employees who were disciplined or terminated for dishonesty on their job applications. MSR Rule 28.6 part 4 prohibits dishonesty by an employee. During his time working for Respondent's predecessor, ATSF, Mr. Reppond never heard any manager say ATSF was only looking for felony convictions on its job application.

Mr. Reppond worked for Mr. Underwood at one time. He never heard Mr. Underwood say ATSF was only looking for felony convictions in response to the criminal conviction question on its employment application. By asking that question, the railroad is looking for hostility, drug use, or other things that would affect the workforce at the railroad. The railroad would want to know if someone had a misdemeanor conviction for assault because the railroad would not hire somebody with issues like vicious propensities towards others because an employee with these issues could hurt a co-employee and the railroad could be liable.

Mr. Underwood was assistant superintendent of shops when Mr. Reppond arrived. He worked with Mr. Underwood for about three years and had daily or near-daily interaction with him. Mr. Underwood received a buyout and moved to Fort Worth, Texas. He was murdered and this was well-known throughout the railroad. Mr. Underwood's obituary was posted in the hallway of the railroad facilities.

Mr. Reppond testified at Mr. Brucker's 2012 disciplinary hearing regarding the medical and background check which he received from Mr. Fultz in the claims department. Mr. Fultz did not tell him how he got the information concerning Mr. Brucker's prior incarceration and criminal conviction history. Subsequent to Mr. Reppond's last deposition, he learned that the information concerning Mr. Brucker's prior incarceration was provided to Mr. Fultz by Respondent's legal counsel. He learned this from reading Mr. Fultz's deposition transcript. Specifically, Respondent learned of the conviction through medical discovery Respondent's counsel had done in the course of Mr. Brucker's FELA suit. Mr. Reppond just assumed Mr. Fultz obtained the information through Mr. Brucker's injury report.

Mr. Reppond was not involved in the investigation of Mr. Brucker's 2010 disciplinary proceeding. Not wearing a seat belt while riding in or operating a motor vehicle for Respondent is a serious violation and can be a dismissible offense. At the time of Mr. Brucker's violation, Mr. Reppond had supervisory responsibility for Murray Yard in North Kansas City, Missouri. Mr. Martin was an EMD technical advisor. Mr. Martin is not an employee of Respondent but a contractor working for EMD. Contractors do not report to Respondent managers. Mr. Martin was located in the shop, not the physical plant. EMD technicians have to be trained in Respondent's safety rules. If an EMD technical supervisor observes a Respondent employee violating a safety rule they have to report it to a Respondent manager. An EMD technician would not have any knowledge of an employee's injury history or a history of turning in a personal injury report. Mr. Marti would not have access to personnel files.

Mr. Reppond was not involved in the investigation of Mr. Brucker's 2011 disciplinary proceeding but was aware of the incident. He recalled that Mr. Brucker was working on the service track and went into the cab to recover air and manipulate the air brake valves. Releasing air brakes and having a locomotive roll and damage a fuel stanchion is a serious rules violation and can be a dismissible offense. A machinist working on the bottom of a locomotive would

have no reason to be in the cab of a locomotive. If an air test is done and the air brakes are released, the person releasing the air has an obligation to ensure the hand brake is set on the locomotives in the consist. Before the air test is done he is supposed to notify his coworkers that he is going to release the brakes to ensure the hand brake is set. In a situation like this there could be employees on a locomotive and down around the wheels. You want to inform all your coworkers before a brake test in case they are changing a brake shoe which could cause an amputation if the locomotive moves. If a locomotive goes into emergency on a fuel track under blue flag protection that is a significant change in circumstances that warrants notifying everyone else before the emergency air brake application is released because it is a significant event. An unexpected locomotive movement with employees working on or near it is a very dangerous condition because people could get maimed or equipment could get destroyed. This is why allowing air brakes to be released and having an unexpected movement is a serious rules violation. There is a rule prohibiting movement under blue flag protection for the safety of employees and equipment.

Machinists find out what work they need to do from the tower lead man who is a union employee. The tower lead man tells machinists that supervisors are headed towards their position. They would notify everyone if a management employee is headed there way, not just those with pending personal injury claims. Mr. Reppond has heard this type of information being relayed by the tower man himself.

Mr. Reppond has no information about Mr. Brucker's allegation that managers began watching him more closely after he filed his personal injury report. If a manger is sitting near Mr. Brucker's position in the yard they are there for reasons other than merely watching him do his work. These reasons could be doing operations testing, for a locomotive issue, to assist another employee, to meet an operations officer or track supervisor, or many other reasons.

An employee's transcript lists all discipline assessed against the employee. Mr. Brucker did not have any discipline assessed against him for absenteeism in 2012. Under an old policy, an employee would be issued a notification after three absences and the disciplinary process would have started after the seventh absence.

Mr. Reppond played no role in the recommendation to dismiss Mr. Brucker for dishonesty on his employment application because he was a witness in the investigation. He never told anyone at Respondent to go after or target Mr. Brucker because of his personal injury. No one at Respondent ever made such a comment in his presence. Neither Mr. Reppond nor anyone in his presence ordered a subordinate to go after or target Mr. Brucker for any reason with regard to his personal injury. He never heard or said anything about intimidating or retaliating against Mr. Brucker. There was never any communication about catching him in a mistake as retaliation, retribution, or intimidation or to make his job duties harder. Any activities such as this would violate Respondent's anti-retaliation policy, the MSR, and the code of conduct. Any such actions would put Mr. Reppond's job at risk.

Cross-Examination

Mr. Reppond has not talked to Mr. Fultz about where he obtained the information on Mr. Brucker's misdemeanor conviction. Mr. Reppond would not have been involved with

disciplinary actions against employees who lied on their employment applications until 2008. He did not recall how many employees there were but estimated five during that eight-year time period was fair. He did not remember the names of those people. Mr. Reppond recalled one employee who did not report previous medical issues with his back.

Mr. Reppond did not recall that Mr. Brucker's co-employee in the truck with him in 2010 submitted a statement that Mr. Brucker was wearing his seat belt. He did not recall that Mr. Brucker testified he was wearing his seat belt. Mr. Reppond remembered that one of Mr. Brucker's co-workers, Mr. Smith, stated that he released the brake, not Mr. Brucker. He did not recall that Mr. Brucker denied releasing the air brake.

Managers may be in the field to do operations testing which is where they go out and audit employees to see if they are following specific safety rules. An audit means they observe employees. A manager may drive up and see an employee and stop and watch him or notify an employee in advance. Each employee has to have two audits done per year. Once the operations test is done the employee's supervisor has to inform them an operations test was done and give them the results of the test. An operations test is not recorded in an employee's transcript unless they fail the test and discipline is assessed.

In July 1993 Mr. Underwood was assistant superintendent of shops. He would have taken job applications and answered questions from job applicants in this position.

Redirect Examination

Mr. Reppond really does not know whether Mr. Underwood's job involved taking job applications in 1993. Part of the application process also involves a medical questionnaire or screening process so individuals with mental health issues could be found out there.

V. Dr. Chitra Chinnaswamy Deposition Testimony – January 20, 2017 (CX 89)

Direct Examination

To be diagnosed with bipolar disorder, an individual must have at least one manic episode which has certain symptoms including difficulty with sleep or less than 3-4 hours of sleep at night, racing thoughts, and impulsive behavior lasting at least a week to ten days and periods of depression that affects functionality. Hypomania is a lesser degree of mania. Bipolar disorder is when you have a manic episode while bipolar disorder II is when you have the hypomanic side of depression but never have a manic episode. Anxious distress is a different condition that could coexist with bipolar disorder. Suicidal or homicidal ideation can be a symptom of depression. Paranoia or paranoid psychosis can be a complication of bipolar disorder. Psychosis is a lack of reality or being out of touch with reality while paranoia is excessive or unfounded suspiciousness. This can include thinking people are watching you or talking about you. Paranoia is not a typical symptom of bipolar; it is a symptom of psychosis. Only when someone has severe psychosis, severe depression, or severe mania will they get these symptoms. Psychosis is not a symptom of bipolar.

Dr. Chinnaswamy saw Mr. Brucker on September 26, 2013. He complained of anxiousness, depression, and mood swings. His irritability had improved but he was under a lot of stress with finances and his job situation. Dr. Chinnaswamy opined that Mr. Brucker was minimizing his symptoms at that appointment. She noted that his mood in September 2013 was mildly depressed with appropriate affect meaning his affect showed the degree of his depression. Her opinion of him at that time was he was under stress but his symptoms were maintained.

She saw him next on April 28, 2014. She noted his mood swings were stable with his medication meaning he was not suicidal and he had not deteriorated to the point where he was not functioning. The medications are effective but their effectiveness varies from month-to-month because he reported down days and feeling discouraged because he could not find a job. She contended his depression may have worsened but not enough to change his medication. Dr. Chinnaswamy also noted that Mr. Brucker reported getting overwhelmed often due to stress from finances. He reported that he and his wife were arguing a lot and there was a lot of frustration and they had discussed separation.

Dr. Chinnaswamy next saw him on October 22, 2014. His irritability had improved and his mood swings were better with medication. Mr. Brucker again reported he was under a lot of stress with finances and trying to find another job. Dr. Chinnaswamy opined he was minimizing some of his symptoms because he told her money was tight and he was under tremendous stress but coping fairly well. She reduced his Ativan prescription because she prescribed Trazodone.

Dr. Chinnaswamy next saw Mr. Brucker on April 27, 2015. At that time he had gotten a job and his anxiety improved as a result. His Ativan prescription was increased. She stopped the Trazodone because he could not tolerate the medication. She saw him again on May 1, 2015. He reported that his mood was overall okay but he had some down days due to stress with finances.

Mr. Brucker returned on August 31, 2015. He moved his appointment up because his mood was increasingly depressed and he was feeling overwhelmed. Dr. Chinnaswamy opined that at this time Mr. Brucker was in crisis. She opined his symptoms were escalating but he had been maintained on his medications because he cannot tolerate a lot of medications. She stated she thought he had lost his house or been foreclosed on his house and that was the crisis. He reported that losing his job had affected his self-esteem by making him feel inadequate that he could not find a job and be a provider for his family. Furthermore, he lost his house because he was not bringing in income. In August 2015, he had lost a job again. He was to return in three months and she prescribed Paxil to help with depression and anxiety and Trazodone.

Mr. Brucker returned on January 11, 2016. He tried Paxil but it made him sleepy and he could not function on it. He reported that his mood was better and that he and his wife had worked things out. His anxiety had been stable. He returned on July 18, 2016. Dr. Chinnaswamy determined that his depression was well-controlled and he had no manic symptoms or racing thoughts. She also determined his anxiety was stable and he had no new side effects to his medications. He reported he was doing better with his symptoms because he had gotten a job.

The last record was for January 9, 2017. His mood was mostly stable, he reported sleeping well, he had no depression or mania, and he had been feeling anxious but then found out his job was going to remain and the anxiety went away. He reported no new stressors other than

his legal case with the railroad and frustration of not knowing whether he would get his job back. His prognosis was fair as long as he stayed on his medication and nothing major happened. Since Dr. Chinnaswamy's last deposition in April 2014, Mr. Brucker's mental health condition worsened and then stabilized again. The GAF score was dropped in the DSM-5, released in 2013, because it is very hard to quantify and is very subjective. It would be hard to separate out the effect on him from being fired from the railroad from his pre-existing conditions. Individuals have a tendency to have the mental illness but stress in the environment and life changes make the symptoms become more prominent. Individuals can have fluctuations in their symptoms and experience break-through depression in spite of medication.

Cross-Examination

Dr. Chinnaswamy is not sure why she saw Mr. Brucker on April 27, 2015 and again on May 1, 2015. Being fired from the railroad resulted in increased depression and anxiety around his job loss and losing his house in August 2015 in addition to his issues with his wife. She opined that since he was able to find another job he is stabilizing. In her opinion, Mr. Brucker will never come back to complete full functioning, but if he continues with his medications and treatment plan his prognosis is fair.

W. Joe Fultz Deposition Testimony – April 16, 2014 (CX 90)

Direct Examination

Mr. Fultz is employed as a claim manager for BNSF. He first hired on with Atchison Topeka Santa Fe in 1993 in Topeka, Kansas as a clerk, and has served as a claim representative, senior claim representative, and claim manager. He became a BNSF claim manager in 2009 in Kansas City. As a claim representative, his duties include recognizing liabilities and claims as they are presented, and to investigate those claims. He is involved in settling claims, both directly with individuals and with attorneys.

At some point, Mr. Fultz became aware that Complainant's counsel's law firm was representing Mr. Brucker for an injury to his shoulders. There is a letter from counsel's partner to Chris Hawk dated December 10, 2009, indicating that the firm was representing Mr. Brucker. Mr. Hawk is a BNSF claim representative; he handled the claim at some point, and then, by 2012, Mr. Fultz transferred it to himself. He believes he took over the file after Mr. Brucker filed a lawsuit against BNSF.

During his handling of the claim, Mr. Fultz received information about medical records that were obtained pursuant to an authorization provided by Mr. Brucker. At some point, he also received a copy of Mr. Brucker's injury report dated January 26, 2010. The report indicates that Mr. Brucker had bone spurs, muscle tears, and arthritis, and had had surgery performed by Dr. Lingenfelter. The normal procedure for an employee to submit an injury report is that they report it to their supervisor. Mr. Fultz does not know whether Mr. Brucker turned in his injury report to his supervisor. After receiving an injury report, a supervisor should turn it into the safety department, who would notify the claims department of the injury. The claims department then obtains a copy of the injury report from the employee's supervisor.

Mr. Fultz took over the file after it became a lawsuit, and doesn't recall discussing the personal injury report with Mr. Brucker's supervisor.

The report of investigation that took place on August of 2012, resulting in Mr. Brucker's dismissal, includes an exhibit that is a record from North Kansas City Hospital for an admission date of July 28, 1997. Mr. Fultz provided that document to Mr. Reppond, who is a shop superintendent at the Argentine terminal. The record indicates that Mr. Brucker had spent some time in jail and, in reviewing Mr. Brucker's personnel record, that seemed inconsistent with what he had put on his employment application. It is part of Mr. Fultz's normal process to review an employment application when representing the railroad in a claim. At some point, BNSF hired Sedgwick Factual Photo to do a criminal and civil background check on Mr. Brucker, but Mr. Fultz does not recall whether he hired Sedgwick or at what point in the process they were hired.

Sedgwick Factual Photo provided a criminal and civil records check dated July 20, 2012. It is designated a "supplemental report," and Mr. Fultz assumes there was an original report as well. The July 20 report indicates that Sedgwick was told by representatives of the Missouri Department of Corrections that Mr. Brucker was on probation from May 15, 1985 to May 11, 1987 for third-degree assault. Sedgwick indicated that it was a felony conviction; Mr. Fultz does not know whether third-degree assault is a misdemeanor in Missouri. The Sedgwick report also indicates that the conduct leading to conviction was an assault on Complainant's brother, and that he had spent 112 days in county jail. Mr. Fultz contacted Mr. Reppond with this information because it was inconsistent with Mr. Brucker's employment application. He does not believe that the information gave BNSF any kind of advantage on the lawsuit, but thought that any supervisor should know information showing that an employee has a history of violent actions.

Mr. Fultz is aware that providing misleading or false information on an application can lead to termination, and he is not aware of any person who applied for work with BNSF or a predecessor who was not terminated after providing false or misleading information on an employment application.

The Sedgwick Factual Photo report includes a document indicating that Mr. Brucker entered the Clay County Jail on January 25, 1985, and was released on May 7, 1985, after being sentenced on May 7. Mr. Fultz does not recall that he provided that document to Mr. Reppond.

The letter to Mr. Brucker requiring him to report for the investigation that led to his termination is dated July 19, 2012, but the Sedgwick Factual Photo report is dated July 20, 2012. Mr. Fultz is not sure how the letter was issued before the date of the Sedgwick report, but believes that the information may have been received in a phone conversation before the Sedgwick report was prepared.

When Mr. Fultz provided the information concerning Mr. Brucker's conviction and/or incarceration to Mr. Reppond, he did not anticipate that BNSF would hold an investigation. He did not know what they would do with the information. He was not consulted and was not involved in the decision to terminate Mr. Brucker's employment. He cannot agree that without his having obtained the medical records showing that Mr. Brucker had been incarcerated, there would have been no reason to terminate Mr. Brucker. It was a result of Mr. Brucker's filing the

lawsuit that they investigated the claim and found the medical records, and the entire process began with Mr. Brucker filing an injury report on January 26, 2010.

X. Complainant Deposition Testimony – February 13, 2017 (CX 96, RX 62)

Since his last deposition, Mr. Brucker has been involved in several accidents while operating an 18-wheeler. For two of these accidents he agreed to pay for the damage. He has worked for four trucking companies since he worked for Respondent and since his last deposition. He went to truck driving school in Dallas and took some classes at a community college. The school told him if he had a gap in his employment history to say he was self-employed or available to do handyman type work. Mr. Brucker has not been self-employed since his last deposition and he has not been involved in a handyman business. Complainant agrees that when he stated on job applications that he was self-employed or had a handyman business, that was not true; but that was what he had been told to put down.

Complainant cannot remember the last time he applied for a job with a railroad. He can't recall whether the truck driving school gave instructions on how to answer employment applications on criminal or traffic violations or his medical history. The truck driving school or the community college he attended or other people he has talked to about answering job application questions told him to give false answers. This bothered him, but he wanted a job. He did not recall any job interviewers going over his application questions. He was instructed at least three times since his last deposition to answer job application questions falsely in order to get a job. Two of them were through a community college and the third time was at the trucking school. He does not remember when he took classes at the community college.

On an employment application Mr. Brucker submitted to Union Pacific Railroad he indicated self-employment from 2012 to present. This entry was false. The community college actually typed that part into his application. On another job application dated March 7, 2014, he answered "no" to the question whether he had been fired, asked to resign, forced to leave a position, or had his employment involuntarily terminated in the preceding two years. This answer was not true. He answered "no" again to the same question on another application, because the community college had told him to answer these questions in that way. On the application, Mr. Brucker stated that he left employment with Respondent in order to seek a conductor or engineer position; this was not why he left employment with Respondent. On another application he said he left employment with Respondent to start his own company; this also was not true. On the applications there was a statement that false or misleading information given on the application could be grounds for discharge. Mr. Brucker signed the application but did not read this statement. On another application he did not list any traffic violations for which he had been convicted or forfeited bond or collateral.

On a medical questionnaire Mr. Brucker answered "no" to the question asking whether he had ever had head or brain injuries or illnesses, including a concussion. He checked "no" as to whether he had anxiety, depression, nervousness, or other mental health problems, which was not true. He answered "no" to the question whether he had headaches, dizziness, numbness, tingling, or memory loss. Everyone has had headaches, and he does not know if he had other symptoms. He answered "no" to a question of whether he has had neck or back problems but he

had fusion surgery as a teenager. He cannot remember whether he had neck issues after being attacked in 1993. He said he had not had bone, muscle, joint, or nerve problems, but he has had back problems and shoulder problems in the bones. He said that he has not had sleep disorders, pauses in breathing while asleep, daytime sleepiness, or loud snoring, but he has had sleep apnea. He also answered “no” to the question whether he ever had a sleep test, e.g. for sleep apnea, but he has had a test for sleep apnea. He stated on the application that he had never spent a night in the hospital, but he has spent multiple nights in the hospital on more than one occasion. He said he had never had a broken bone, but has had a broken bone. He said he never used tobacco, but used to smoke. He said “no” to a question about other health conditions not described in the questions, and he did not identify bipolar disorder, anxiety, depression, fusion, bilateral shoulder injuries, or health problems arising from when he was mugged in 1993.

On Mr. Brucker’s application to Wheeling he said he had never been convicted of a violation of the law not including minor traffic offenses. This was not true. He did not read the certification statement that any misstatement or omission on the application was grounds for termination. On the medical questionnaire he answered “no” to a question whether he had ever had a nervous breakdown or mental upset; this was not true. He answered “no” to the question whether he had had a concussion or head injury; this was not true. He answered “no” to whether he had back trouble and whether he had bone or joint injuries. He checked the “no” box regarding other illnesses or injuries not mentioned above; this was not true. He answered “no” to the question whether he had been restricted in employment; this was true because he went to Ohio because he married someone who lived there, not because Respondent pulled him from service after he had been medically disqualified from his ability to perform his job. A supervisor made that determination, not a qualified doctor. Respondent’s doctor had medically disqualified him so he had been restricted from employment. Mr. Brucker misunderstood that question, but he did falsely answer similar questions on another job application.

Medical records from Complainant’s inpatient treatment in 1997 for mental health stating that he said he had used cocaine and marijuana were false. On another application he answered “no” as to whether he was using any medications or drugs, and answered “recently prescribed” to a question about whether he had ever taken any habit forming drugs. He checked “no” to the question whether he had ever been convicted of any violation of the law. Mr. Brucker does not know why he answered “no.” “I just go by my memory as it – as I filled it out.” Nobody from Wheeling ever told him to check the “no” box so he could get the job. He doesn’t remember whether he asked anyone at Wheeling what they were seeking to learn by that question.

Mr. Brucker completed an application for CR England, one of the trucking companies he has worked for since his last deposition. He listed under work history “Under the Table Work” as a “landscaper/handyman.” He did not know where that came from and that the trucking company school typed that in for him because he does not know how to type. The period of employment for this entry was July 2012 to June 22, 2014. Another entry said he was unemployed from July 1, 2012 to June 1, 2014. Mr. Brucker said the trucking school, “probably took the information that I wrote down and typed up their own thing.” He contended he did not list his misdemeanor conviction because he was not finished with the application and he does not know how it got submitted to CR England. He also answered no as to whether he had ever been convicted of a crime, felony, or misdemeanor which was not true. He answered no as to whether he had been convicted of any DUIs, DWIs, reckless or careless driving charges which was not true, and he

answered no to a question of whether he had ever been involved in a motor vehicle accident which was not true. He contended, "That's the way they wanted us to do it." For CR England's medical questionnaire Mr. Brucker contended he could not read it so he answered no to all the questions.

Mr. Brucker completed a work opportunity tax credit questionnaire. He answered no to a question of whether he had ever been in a vocational rehabilitation program. This answer was false because he did a vocational rehabilitation program before. He signed and dated the document declaring the information was true and correct to the best of his knowledge.

Exhibits

Mr. Brucker's Employment Application, June 24, 1993 (CX 118, RX 2)

Mr. Brucker completed an application for employment with Respondent's predecessor, ATSF, on June 24, 1993. (CX 118, RX 2). The application asked, "Other than traffic violations, have you ever been convicted of a crime? If yes, describe in detail." Mr. Brucker answered "No." The end of the application contains an Applicant Statement in which the applicant must sign certifying, "I have answered all questions to the best of my ability. If employed, I realize false information will be grounds for dismissal at any time, regardless when such information is discovered." Mr. Brucker signed the application.

Complainant's Transcript (CX 3, RX 1)

Mr. Brucker's employee transcript documents his employment history, discipline record personal injury record, employee leaves, and rules and safety training.

Mr. Brucker's employment history shows he was hired on July 7, 1993 as a machinist. He received a grade/title change on March 2, 1996 in Kansas City, Kansas. He changed locations on January 1, 1998 to Kansas City, Missouri. He was medically disqualified on November 27, 2001 in Kansas City, Kansas. He changed locations on June 10, 2003 in Kansas City, Missouri. Mr. Brucker was dismissed for cause on August 16, 2012 at Kansas City, Missouri.

Complainant's disciplinary record shows the following information:

- Violation Date: December 15, 2005
 - Discipline: December 16, 2005, Level S Record Suspension, 12-month review period.
 - 30 days for being absent without authority and failed to follow instructions during the period of November 30 through and including December 15, 2005.
 - No investigation conducted.
- Violation Date: May 4, 2010
 - Investigation: June 15, 2010
 - Discipline: June 29, 2010, Level S Record Suspension, 36-month review period.
 - Observed operating yard truck without a seat belt fastened driving north of the Murray diesel shop. MSR S-12.5.
- Violation Date: June 15, 2011

- Investigation: August 10, 2011
- Discipline: August 27, 2011, Level S Record Suspension, 36-month review period.
- “Resetting of the open PCS on a 3 locomotive consist which released brakes and allowed locomotives to move while being SVVCD causing damage to fuel stanchion. MSR 1.2.3, 1.2.4, 1.2.5, 24.2, 28.6.”
- Violation Date: July 10, 2012
 - Investigation: August 8, 2012
 - Discipline: August 16, 2012, Dismissal.
 - “Dishonesty and failure to furnish information when completing an initial employment application with BNSF-MSR 28.2.7, 28.6 Section 4.”

Mr. Brucker’s personal injury record shows he injured his left rib while on duty on October 7, 1998. He did not miss any days of work. He suffered acute congestion due to chemicals, dusts, gases, or fumes on July 20, 2005. He did not miss any days of work. He injured his abdomen while on duty on June 19, 2007 and did not miss any days of work. He reported cartilage damage/tear to his right and left shoulders and arthroscopic surgery on February 29, 2008. His employee transcript shows periodic safety training on various subjects multiple times per year over the course of his career working for Respondent.

Complainant’s Attorney Notice of Injury Letter to Respondent, December 10, 2009 (CX 2, RX 18)

A letter from Drew C. Baebler to Mr. Hawk, Claims Representative for Respondent, dated December 10, 2009, states that the firm of Bauer & Baebler, P.C. had been retained by Mr. Brucker in a claim for injuries sustained during his career working for Respondent, specifically, injuries to both of his shoulders. The letter states to consider it a notice of the firm’s lien to the claim and to direct all future communications regarding this injury to Mr. Baebler.

Employee Personal Injury/Occupational Illness Report, January 26, 2010 (CX 1, RX 3)

Complainant completed an employee personal injury/occupational illness report on January 26, 2010. He contended he had bone spurs, muscle tears, and arthritis arising “over my railroad career.” He first noticed symptoms and was first treated or diagnosed in December 2008.

2010 Disciplinary Investigation Documents (CX 4-7, 28, RX 19, 21)

On May 4, 2010, Mr. Brucker received a Mechanical Operations Tests (“OPT”) for failing the vehicle operations rule for not wearing his seat belt while driving in a yard truck. (CX 4, RX 21). The document was signed by Mr. Brucker and Mr. Martin.

The investigation was conducted on June 15, 2010. (RX 19, CX 6). Mr. Suttles was the Conducting Officer. Mr. Dominguez was the union local chairman representing Mr. Brucker. It was held in Kansas City, Kansas. Mr. Martin testified that he was at the Murray Shop and observed Mr. Brucker driving a yard truck without a seat belt. Mr. Martin tried to stop Mr. Brucker and put his hand up to wave him down but Mr. Brucker kept driving. Mr. Martin went and told Mr. Frey, the BNSF Foreman, about what happened. About 30 minutes later, Mr. Martin

and Mr. Frey were standing outside when Mr. Brucker returned in the yard truck as a passenger and was not wearing his seat belt. Mr. Martin approached him and told him he needed to wear his seat belt under Rule 32. Mr. Brucker ignored him. Mr. Martin and Mr. Frey wrote up an OPT Test Failure and pulled Mr. Brucker aside. He refused to sign the document. Mr. Martin handed him a copy of the test failure and Mr. Brucker wadded it up and threw it on the ground. Later, Mr. Bunce spoke with Mr. Brucker and he signed the test failure. Mr. Martin emailed a letter to Mr. Bunce explaining what happened.

Mr. Martin conceded it was possible Mr. Brucker interpreted him trying to wave his truck down as a friendly wave. Mr. Paterson was driving the truck when it returned. The seat belt in the truck is gray. Mr. Martin believed that Mr. Brucker was wearing a cream colored t-shirt. Mr. Frey did not say anything to Mr. Brucker. Mr. Martin started to approach the truck when it returned to discuss the first seat belt issue with Mr. Brucker. He noticed Complainant was not wearing his seat belt and did nothing to remove a seat belt when he got out of the truck. The incident took place at about 8:20 PM. It was not dark yet but was starting to get dusk. He was about 20 yards away when he noticed Mr. Brucker returning.

Mr. Frey was with Mr. Martin observing a move for EMD when a service truck in which Mr. Brucker was a passenger pulled up. Mr. Frey observed that Mr. Brucker was not wearing his seat belt. He went to talk to Complainant with Mr. Martin. Mr. Brucker was upset and did not wish to discuss the matter. Mr. Frey did not see what Complainant was wearing. The seat belt is gray. Mr. Martin had earlier come to Mr. Frey to tell him that Mr. Brucker had not been wearing a seat belt earlier. Mr. Martin came to Mr. Frey directly after observing the seat belt violation. Mr. Brucker was gone for 5-10 minutes.

Mr. Brucker denied operating a yard truck or being a passenger without wearing his seat belt. Mr. Brucker did not sign the test failure at the time because he thought it was something else which he was not obligated to sign. He did not see Mr. Martin trying to wave him down. No one communicated with him on the radio. Mr. Martin and Mr. Frey were standing about 25 feet away when he returned in the truck. When Mr. Martin approached him he was waving his arms and hopping. At the time it was nearly dark outside. When the truck was pulling up the headlights were pointed directly at Mr. Martin and Mr. Frey. He was wearing a black shirt at the time of the incident. Mr. Brucker did not explain to Mr. Martin that he was wearing his seat belt because, "I thought he was just joking and being a nut. I've never talked to the man before that time. I had no idea what his job was or his title ... I just ignored him and went on." Later on, Mr. Martin and Mr. Frey returned and presented him with the test failure. Mr. Frey agreed that Mr. Brucker did not have to sign it. The seat belts in the truck are black. Mr. Brucker contended he just had to hit a button to remove the seat belt so they could not see him removing it.

In a letter dated June 29, 2010, Mr. Brucker was notified in a letter from Mr. Reppond that as a result of the investigation he had been assessed a Level S 30 day Record Suspension for not wearing a seat belt, violating MSR Rule S-12.5. (CX 7). He was also assessed three years of probation. He was notified that another rules violation during the probationary period could result in further disciplinary action. He was notified that consideration was given to his personnel record and the discipline was assessed in accordance with the PEPA policy.

Gary Paterson Statement and Drawing (CX 28, CX 124)

Mr. Paterson wrote a handwritten statement dated May 20, 2010 in which he contends that Mr. Brucker was wearing his seat belt while in the yard truck. (CX 28). He believed that due to poor lighting, the time of day, and that Mr. Brucker was wearing dark clothing; the individuals honestly believed he was not wearing his seat belt but they were mistaken.

Mr. Paterson made a drawing while being deposed, described above, to show how far Mr. Martin and Mr. Frey were from the yard truck when Mr. Paterson and Mr. Brucker returned from the yard in 2010. (CX 124).

2011 Disciplinary Investigation Documents (CX 8-15, RX 20, 22)

On June 16, 2011, Mr. LeBlanc sent Mr. Bunce an email stating that on June 15, 2011, he met with Mr. Zagalik regarding an incident on the service track. (RX 20). Mr. LeBlanc and Mr. Zagalik went to the track and observed Mr. Palmer washing off the fuel rack and a fuel hose that had been ripped from its post. Mr. Palmer and Mr. Smith had spotted the 3-unit consist for service. Mr. LeBlanc noted the hand brake had not been set. Mr. Brucker was attempting to “train line the Consist to another unit” causing the locomotive to go into emergency. It started to roll back, removing the fuel hose from its post. On June 22, 2011, Mr. LeBlanc sent Mr. Bunce another email identifying what locomotive units were involved in the incident.

On June 23, 2011, Mr. Bunce set Mr. Suttles an email requesting that he schedule an investigation for Mr. Brucker for violation of MSR Rule S-24.2.11-movement in the engine servicing area. (RX 20, CX 8). Mr. Bunce stated that on June 15, 2011, Mr. Brucker released the air brakes allowing the locomotives to move on the service track damaging a fuel stanchion. Mr. Bunce contended Mr. Brucker violated all three bullet items under Rule S-24.2.11.

The investigation was held on August 10, 2011. (RX 20, CX 12). Mr. Stockman, a general foreman at Argentine, was the Conducting Officer. The investigation was held in Kansas City, Kansas. Mr. Brucker was represented by Mr. Wright, a Machinist Representative. Mr. LeBlanc read his email to Mr. Bunce into the record. Train lining a consist is taking the electrical and air between two or more locomotives and putting them together to make a consist. A locomotive goes into emergency causing it to dump its air. Recovering the consist is when the units will move. Mr. LeBlanc also submitted some photographs of the incident. He also submitted statements from Mr. Palmer, Mr. Smith, and Mr. Brucker. It is proper procedure to tie down a hand brake after a move. He did not know if the hand brake was set in this case.

Mr. Palmer testified that on the day in question he was fueling engines when the engines began to move. He yelled a couple of times when he noticed that where he was standing the fuel line would hit him if it snapped. He moved out of the way when the fuel line snapped and he hit the emergency fuel shut off. He had blue flag protection while fueling the locomotives.

Mr. Smith testified that he was cleaning one of the units and when he got off the unit he saw the fuel thing on the ground and Mr. Palmer wearing a face shield and cleaning up a diesel fuel spill. He did not know the locomotives had rolled. No one warned him they were going to

move but he had earplugs in. The entire time he was cleaning the units he was under blue flag protection. Mr. Smith did not put the hand brake on when he should have.

Mr. Daniels participated in a reenactment of the incident under investigation. During the reenactment they put the locomotives into emergency status and attempted to recover from emergency status at which point the locomotives rolled. The independent brake valve, which is adjacent to the automatic brake valve, can operate or apply the brakes if the locomotive is not in emergency. The reenactment was attempted at four different places and the locomotive rolled once.

Mr. Parrish participated in the reenactment of the incident under investigation. In the reenactment they did not have two units completely laced together and one that was just train lined because the reenactment was primarily to find the actual spot where the locomotives rolled. There had never been an incident like this before so the reenactment was to find out whether it really happened that way, or if there was something else involved.

Mr. Bunce participated in the reenactment of the incident under investigation. The reenactment was intended to determine if there was a geometry issue with the track allowing locomotives to roll.

Mr. Brucker contended the locomotives only moved inches. He and the other employees were working under the same blue signal protection at the time. If the hand brake were set the locomotives should not have rolled at all. He contended that he set the independent brake when the locomotives started to move and “prevented any other damage happening because of somebody else not doing their job correctly.” He did not warn his co-workers he was going to release the brakes. Mr. Brucker was charged with not being alert and attentive but he responded when the locomotives rolled so he contended he was alert and attentive. He was charged with not warning his co-workers. Mr. Brucker contended he did not cut out the brakes on the other two locomotives and that it was not his responsibility to set the hand brake on the other two units. Therefore, he did not have reason to warn his co-workers because they should not have moved because the north side was blue flagged indicating that was the lead locomotive. He was charged with violating the rule for blue signal protection for workmen. The locomotives were blue flagged. Mr. Brucker did not intend to move the locomotive. He was charged with careless of the safety of themselves or others. It was not Mr. Brucker’s job to set the hand brake and he did not neglect to set the hand brake. He contended he did not violate the safety rules and training policies.

You are not allowed to move locomotives under blue signal protection. Mr. Brucker contended a basement machinist working on a wheel would not have been injured in this scenario because the movement was so slight and quick someone would have pulled their hand away. It would be a safety concern if someone were moving between cars or trying to get on or off locomotives when they were moving.

Mr. LeBlanc contended that Mr. Brucker did not comply with the MSR because he touched the brakes and controls of the locomotive, he did not warn his co-workers he was going to be cutting the brakes, the locomotive moved while under blue signal protection, he was not alert and attentive, and he was careless of the safety of himself and others by moving the

locomotives. Mr. LeBlanc contended Mr. Brucker could have prevented the locomotives from rolling by keeping the brakes set while cutting the locomotive in and out. Mr. LeBlanc contended Mr. Brucker was not alert and attentive to the movement of the locomotive and that he should have warned his co-workers of what he was doing by having a job briefing.

At the close of the investigation Mr. Brucker contended it had not been conducted in a fair and impartial manner. He could not advise of anything that had not been covered and he had been afforded full opportunity to ask questions of all witnesses. Mr. Wright contended that if the hand brake had been set, if the fuel stanchion had not been pulled to its limit, or if the north locomotive had been blue flagged, the incident in question would not have occurred. Mr. Wright contended that this was a rare incident and that when the track was tested locomotives rolled only 25 percent of the time. He contended too many variables occurred to warrant discipline. He contended the investigation was not conducted in a fair and impartial manner.

On August 27, 2011, Mr. Brucker was sent a letter from Mr. Stockman notifying him that he had been assessed a Level S 30 day record suspension arising from the events on June 15, 2011. (CX 13). He was also assessed a 3-year review period and advised that further rule violations during this period could result in further disciplinary action. The letter notified Mr. Brucker he had been found to have violated MSR Rules 1.2.3-Alert and Attentive, 1.2.4-Co-Workers Warned, 1.2.5-Safety Rules, Training Practices, Policies, 24.2-Blue Signal Protection of Workmen, and 28.6-Conduct careless of the safety of themselves or others and negligent.

On October 25, 2011, the union sent a letter to Mr. Bossolono filing a claim on Mr. Brucker's behalf contending the disciplinary action taken was too harsh because the investigation showed other employees were guilty of actions leading up to the incident. (CX 14). Therefore, the union contended the investigation was not fair or impartial and that the railroad was "predisposed to imposing an unwarranted dismissal of employment."

On December 21, 2011, Mr. Bossolono sent a letter to the union and contended the formal investigation was fair, impartial, and was not prejudiced. (CX 15). Mr. Bossolono stated the investigation showed Mr. Brucker was in violation of the rules charged and declined to remove the disciplinary action from Mr. Brucker's personnel file.

2012 Absenteeism Notification, February 7, 2012 (CX 16, RX 23, 109)

On February 7, 2012 Mr. Brucker was sent a letter confirming a conversation held on February 4, 2012. (CX 16, RX 109). The letter informed Mr. Brucker he had been absent four times between February 7, 2011 and February 7, 2012 and that upon his sixth absence in a one year period he would be required to meet with the General Foreman. Mr. Brucker indicated that he signed the letter "under protest."

Respondent's Mechanical Attendance Guidelines, effective March 1, 2012, outline the company's attendance policies and the discipline that can result from failure to achieve regular attendance.

2012 Disciplinary Investigation Documents (CX 17-27, RX 24-27 and 85-88)

On July 10, 2012, Mr. Fultz sent an email to Mr. Bossolono and Mr. Reppond, cc'ing Patrick Newell, attaching a report from Factual Photo and Mr. Brucker's employment application. (RX 86). Mr. Fultz stated that the application showed that Mr. Brucker advised he had never been convicted of a crime other than traffic violations. Mr. Fultz stated that during the investigation of Mr. Brucker's FELA lawsuit, Respondent learned he had been incarcerated for Third Degree Assault and it was believed he had stabbed a family member. Mr. Fultz stated they were trying to obtain records from Clay County but that this may not be possible due to the age of the case. He stated they received notice of this information the day before and was passing it on to Mr. Bossolono and Mr. Reppond "for your handling as you deem appropriate in the event there are any Bargaining Agreement terms or conditions that must be followed."

On July 12, 2012, Mr. Bossolono emailed Ollie Wick, Joe Heenan, Mr. Harris, and Mr. Cargill asking what their thoughts were on the case. (RX 86). Mr. Bossolono noted that the event occurred "years ago" but that Mr. Brucker was dishonest on the application and asking whether discipline should be pursued. Mr. Heenan, Director Employee Performance, responded stating "Assuming we would not have hired him had we known of the felony assault/incarceration (we will need HR's testimony at the investigation), I would issue an investigation notice." Mr. Heenan recommended going to the court house to obtain any official records of the conviction.

On July 19, 2012, Mr. Brucker was sent a letter by Mr. Suttles informing him that an investigation had been scheduled to determine whether he had been dishonest and failed to furnish information on his employment application. (CX 17). Specifically, the investigation was to determine whether he had answered no to the question of, "Other than traffic violations, have you ever been convicted of a crime?" when it was alleged that Mr. Brucker had been incarcerated on May 15, 1985 and released on May 11, 1987 for Third Degree Assault.

On July 20, 2012, Mr. Brucker's union representative requested a copy of the employment application. (CX 18). On July 24, 2012, this request was denied by Mr. Suttles pursuant to Rule 40 of the Controlling Agreement which did not give the union a "right of discovery." (CX 19).

The investigation was held on August 8, 2012 in Kansas City, Kansas. (CX 23, RX 24). Mr. Suttles was the Conducting Officer. Mark Schmidt represented Mr. Brucker. Mr. Reppond received a notification from Mr. Fultz in the claims department following an investigation by a contractor of Respondent's. The investigation discovered criminal activity in Mr. Brucker's past. Mr. Reppond submitted the private investigator's reports and a document from North Kansas City Hospital dated July 28, 1997 stating Mr. Brucker had stabbed his brother at one time, was on probation, and that he had spent 112 days in jail for the assault. Mr. Reppond also provided Mr. Brucker's employment application. Mr. Schmidt asked Mr. Reppond how Respondent could issue a Notice of Investigation alleging violations related to a background check that was not received until the day after the Notice was issued. Mr. Reppond contended the background check was provided prior to July 20, 2012, and the report was just the written closeout. The entire report was not submitted as evidence in the investigation because the railroad determined it contained personal information that was not relevant to the investigation.

Ruth Huning is a Human Resources Generalist for Respondent. It is expected that an applicant personally complete an employment application and that they be forthcoming and accurate in answering questions. It is the applicant's responsibility to ensure the information is complete and accurate. During an interview applicants are given the opportunity to update or correct their application. Prior to July 10, 2012, Ms. Huning had no knowledge that Mr. Brucker had been convicted of a crime. Mr. Brucker signed a statement asserting that he realized false information would be grounds for dismissal at any time, regardless of when it was discovered.

Mr. Brucker filled out the application. He was never given an opportunity to make corrections to the application. His signature after the application statement indicates he understood and agreed to the terms of the statement. Mr. Brucker has been incarcerated, placed on probation, and convicted of a crime. The background check that states Mr. Brucker was incarcerated on May 15, 1985 and released on May 11, 1987 for Third Degree Assault is not correct. Mr. Brucker contended he had never been convicted of Third Degree Assault. When he first applied to the railroad he was told they were going to do a background check and he knew the railroad had contacted some of his previous employers.

Mr. Brucker contended he answered no to the criminal conviction question because Mr. Underwood, who was an Assistant Superintendent at the time, told him the railroad was only interested in felony convictions and to check the "no" box. The application does not ask for felony convictions.

Mr. Reppond was not aware of a MSR that required an employee to report misdemeanor convictions to the railroad. Mr. Brucker contended he complied with the rule because he did what Mr. Underwood told him to do.

At the close of the investigation Mr. Brucker contended it had not been conducted in a fair and impartial manner. Mr. Schmidt submitted a record from Clay County, Missouri stating Mr. Brucker pled guilty to a Class A Misdemeanor-One Year CC Jail, Supervised Probation on May 7, 1985. Mr. Brucker did not serve one year in the Clay County Jail but was placed on two years of supervised probation. Mr. Schmidt also submitted a document from the Clay County Sheriff's Office stating Mr. Brucker entered jail on January 25, 1985 and was released on May 7, 1985. Mr. Brucker stated he was in jail for 112 days waiting for court because he could not afford an attorney and he was sentenced to one year in jail if he did not complete two years of supervised probation.

Mr. Schmidt contended the investigation was not fair or impartial and that the background check was admitted into evidence that was incomplete. Mr. Schmidt contended Mr. Brucker did what Mr. Underwood told him to do and there were no grounds for bringing the charges.

On August 15, 2012, Mr. Cargill emailed Mr. Suttles, with a copy to Mr. Bossolono, stating he reviewed Mr. Brucker's investigation transcript, exhibits, and personnel record and noted he was a 19 year employee with two active Level S violations. (RX 85, 87, 88, CX 24). Mr. Cargill recommended Mr. Brucker be dismissed. He opined that substantial evidence was introduced at the investigation that Mr. Brucker was dishonest on his employment application and that he admitted he pled guilty to first degree assault and was incarcerated in the county jail

at the investigation. Mr. Cargill noted that Mr. Brucker answered “no” to the application question asking whether he had been convicted of a crime.

Mr. Cargill opined that the risk of reinstatement was “slightly elevated” because Mr. Brucker testified he had been instructed to answer the application question with “no” by the then Assistant Superintendent and there was no way to rebut the assertion since the Assistant Superintendent was deceased and about 19 years had passed since the time Mr. Brucker completed the application. Mr. Cargill opined that “An arbitrator may struggle with dismissal for an infraction so long ago.”

Mr. Bossolono forwarded Mr. Cargill’s email to Andrea Hyatt, General Attorney. (RX 87). She responded to Mr. Bossolono, copying Mr. Cargill. She stated that the email confirmed her earlier conversation with Mr. Bossolono that she agreed with Mr. Cargill’s recommendation. In her opinion, the facts established that Mr. Brucker was being disciplined for dishonesty which was a legitimate and nondiscriminatory basis. She stated there was a possibility he may allege that his dismissal was retaliation under the FRSA but she did not believe such a claim would be tenable and would “feel comfortable defending BNSF in the event of an FRSA complaint.”

Also on August 15, 2012, Mr. Bossolono emailed Mr. Harris, Assistant Vice President & Chief Mechanical Officer, and recommended dismissal. Mr. Bossolono noted that managerial discretion was used on Mr. Brucker’s last Level S and this would be his third active Level S. Mr. Harris responded that he agreed.

On August 16, 2012, Mr. Brucker was sent a dismissal letter signed by Mr. Suttles notifying him he had been dismissed from employment for violating MSR 28.2.7-Furnishing Information and MSR 28.6-Conduct, Section 4-Dishonesty. (CX 25, RX 26).

On September 4, 2012, the union submitted a claim to Mr. Bossolono on behalf of Mr. Brucker contending he was unjustly withheld from service and dismissed. (CX 26). The union contended Respondent had knowledge of Mr. Brucker’s record in 2009 when Mr. Brucker released his medical records to Respondent. Therefore, the union contended the investigation was null and void because it was not conducted within the time limits of the Controlling Agreement. The union also contended the background investigation was inaccurate and incomplete and contained unsubstantiated allegations, specifically, that Mr. Brucker was convicted of Third Degree Assault, that he was convicted of a felony, and that he was incarcerated for two years.

On October 1, 2012 Mr. Bossolono responded stating the investigation was found to be fair, impartial, and not prejudiced. (CX 27). Mr. Bossolono contended that Mr. Brucker admitted to having been convicted of a crime, incarcerated, and placed on probation prior to completing his employment application.

Following an unsuccessful conference, the parties submitted this matter to the PLB for final and binding arbitration. (RX 27). The PLB was composed of a representative from Respondent, a representative from the union, and a neutral member. The Board found that Mr. Brucker was afforded all contractual due process rights. On the merits, the Board found that the documentary evidence established that Mr. Brucker had been convicted of a crime and that

Respondent had the right to terminate employees for dishonesty on their employment applications regardless of length of service. Therefore, Mr. Brucker's claim was denied.

North Kansas City Hospital Mental Health Center Narrative Progress Notes (CX 127, RX 5)

The name and date on this record is illegible.² The record indicates the patient stated he stabbed his brother 7 times 15 years ago and spent 112 days in county jail and 2 years on probation.

Clay County Arrest and Conviction Records (CX 128-130, RX 9-10)

On January 25, 1985 Mr. Brucker was charged with assault in the first degree. (RX 9). Bond was set at \$25,000. (CX 129). On May 7, 1985, he pled guilty to misdemeanor assault. He was sentenced to one year in the Clay County Jail which was suspended during two years of supervised probation. (RX 9, CX 130).

Factual Photo Report (CX 126, RX 17)

This document is a criminal and civil records background check on Mr. Brucker conducted by Factual Photo on behalf of Mr. Fultz dated July 20, 2012. The background check looked at civil and criminal records in Missouri, Ohio, New Jersey, and Florida. The check noted that Mr. Brucker was incarcerated on May 15, 1985 and released on May 11, 1987 on charges of Third Degree Assault.

OSHA FRSA Complaint Documents (CX 116, RX 29, 66-68, 108)

- Mr. Brucker's Complaint (CX 116)
- Notice of Complaint (RX 66)
- Respondent's Answer to Complaint (RX 67)
- Complainant's Response to Respondent's Answer (RX 68)
- OSHA Claim Denial (RX 108)
- Respondent filed a Freedom of Information ("FOIA") request with OSHA for documents related to Mr. Brucker's complaint. (RX 29). The exhibit contains emails exchanged between the OSHA investigator and Complainant's counsel as well as exhibits submitted to support Complainant's claim that have been previously described above.

Wage and Tax Records (RX 12-13, CX 29, 31, 74-7, 98-104)

- Monthly Earnings History, January 1997- December 2009 (RX 12)
- Monthly Earning History, July 2009- August 2012 (RX 13, CX 29)
- Taxes and Fringe Benefits, 2003-2013 (CX 31).
- Tax Returns, 2013-2015 (CX 74-76, 103-104).
- Check Stub, Schnell Express, January 6, 2017 (CX 77, 102)
- 2014 W-2, CR England Inc. (CX 98)

² Although it is illegible, the parties apparently agree that the record pertains to Complainant, and I so find.

- 2015 W-2, CR England Inc. (CX 99)
- 2015 W-2, Goldstar Solutions LLC (CX 100)
- 2015 W-2, R & W Container LLC (CX 101)

Wheeling & Lake Erie Ry. Co. Records (RX 42)

This exhibit contains various records related to Mr. Brucker's time employed for Wheeling. The documents include:

- November 27, 2002 – Mr. Brucker's employment application (CX 109)
 - In response to a question, "Have you ever been convicted of any violation of the law (not including minor traffic offenses)?" Mr. Brucker answered no.
 - Mr. Brucker signed a statement certifying "the information provided in this application for Employment is true, correct and complete. If employed, any misstatement or omission of fact on this application shall be grounds for termination, whenever discovered."
- November 4, 2003 – Complainant submitted a personal injury report stating he sustained an injury to his thumb when a "locking mechanism switch came up with force and jammed my thumb."
- November 13, 2003 – Mr. Brucker is notified a formal investigation will be held in connection with the above incident in which it was alleged Mr. Brucker sustained an injury to his thumb by failing to exercise care in preventing injury to himself, failing to be alert and attentive when performing his duties, and failing to be familiar with and obey all rules and instructions.
 - Subsequent letters show this investigation was twice postponed at the request of Mr. Brucker's union representative.
- January 2, 2004 – A formal investigation into the above incident was held on December 10, 2003. In this letter Mr. Brucker was reminded "it is your responsibility to be alert and attentive at all times and plan your work to avoid injury. It is also imperative that you exercise care to prevent injury to yourself."
- April 5, 2004 – Mr. Brucker is notified he has 8 absent days and 1 compensated day.
 - The letter warned that the railroad would not tolerate excessive absenteeism. The attached record shows Mr. Brucker reported being sick on 4 of the days and having car trouble on 2 of the days.
- July 13, 2004 – Complainant submitted a personal injury report after he presented at the emergency room on July 11, 2004 for heat exhaustion.
- October 22, 2004 – Mr. Brucker resigned from the railroad.
- Various documents related to medical treatment for his injured thumb, physical exams, drug and alcohol screening, and vision and hearing exams.

Union Pacific R.R. Co. Records (RX 44)

This exhibit contains applications Mr. Brucker submitted for employment with Union Pacific Railroad Company following his dismissal from Respondent:

- February 12, 2014 – Application for Train Crew

- Mr. Brucker stated he was dismissed or fired from his job with Respondent because he “answered question on application incorrectly.”
 - “Have you been fired, asked to resign, forced to leave a position, or had your employment involuntarily terminated in the last two (2) years?” Mr. Brucker answered no.
- February 14, 2014 – Application for Train Crew
 - Mr. Brucker stated he was dismissed or fired from his job with Respondent because he “answered question incorrectly on application.”
 - “Have you been fired, asked to resign, forced to leave a position, or had your employment involuntarily terminated in the last two (2) years?” Mr. Brucker answered yes.
- March 1, 2014 – Application for Mechanical Serv Operator – Loc.
 - Mr. Brucker stated he was dismissed or fired from his job with Respondent because he “answered question on application incorrectly.”
 - “Have you been fired, asked to resign, forced to leave a position, or had your employment involuntarily terminated in the last two (2) years?” Mr. Brucker answered yes.
- March 2, 2014 – Application for position of Apprentice Diesel Mechanic
 - Mr. Brucker stated he was dismissed or fired from his job with Respondent because he “answered question on application incorrectly.”
 - “Have you been fired, asked to resign, forced to leave a position, or had your employment involuntarily terminated in the last two (2) years?” Mr. Brucker answered yes.
- March 2, 2014 – Application for Mechanic-Diesel Engines
 - Mr. Brucker stated he was dismissed or fired from his job with Respondent because he “was told I answered a question wrong on application.”
 - “Have you been fired, asked to resign, forced to leave a position, or had your employment involuntarily terminated in the last two (2) years?” Mr. Brucker answered yes.
- March 7, 2014 – Application for Train Crew (CX 106)
 - “Have you been fired, asked to resign, forced to leave a position, or had your employment involuntarily terminated in the last two (2) years?” Mr. Brucker answered no.
- April 29, 2014 – Application for position of Assistant Signal Person (CX 107)
 - Mr. Brucker denied being dismissed or fired from his job with Respondent. He stated his reason for change was “seeking to obtain a conductor or engineer position where skills I have obtained working for the Wheeling and Lake Erie Railway can be utilized.”
 - “Have you been fired, asked to resign, forced to leave a position, or had your employment involuntarily terminated in the last two (2) years?” Mr. Brucker answered no.

CR England Records (CX 110-13)

These exhibits contain records related to Mr. Brucker’s employment for CR England:

- Employment Application (CX 110)

- From July 2, 2012 to June 22, 2014, Mr. Brucker stated he did “under the table work” as a “landscaper/handyman.”
 - He did not provide a reason for leaving employment with Respondent.
- Medical Examination Report (CX 111)
 - Mr. Brucker denied using any prescription medications.
- Accident Evaluation, September 19, 2014 (CX 112)
 - Mr. Brucker reported he was backing into a dock and hit another trailer.
 - He received retraining, two points, and probation.
- Driver/Vehicle Examination Report, February 12, 2015 (CX 112)
 - While in Nebraska, Mr. Brucker’s truck was inspected and found to be in violation of laws on weight.
- Termination Evaluation, March 17, 2015 (CX 112)
 - Mr. Brucker was terminated on March 17, 2015 after 3 chargeable accidents in six months.

Schnell Express Records (CX 108)

This exhibit contains records related to Mr. Brucker’s employment with Schnell Express:

- Application for Employment
 - Mr. Brucker listed his reason for leaving employment with Respondent as “Start my own company.”
 - He listed his reason for leaving CR England was “local work.”
- Medical Examination Report Form
 - Mr. Brucker answered “no” to questions regarding whether he had ever had surgery or was currently taking medications, and all questions related to his health history.
- August 29, 2016 Disciplinary Action
 - Types of Problem or Violation: quality of work, safety, quantity of work, accidents
 - Mr. Brucker was involved in “backing” related accidents causing damage to other vehicles, property, and the company truck. There were three separate incidents where the damage exceeded \$2,500.
 - Expected Improvement: driver will train with lead driver and if he is re-certified a road test will be administered and he will be placed on six month probation. He will be accident free for 6 months. Further accidents will result in immediate termination. Driver agreed to indemnify company by making \$100 payments per month until a total of \$7,500 had been paid for out-of-pocket expenses.

Complainant’s Resume (CX 105)

This exhibit is Mr. Brucker’s resume since he was dismissed from his position with Respondent.

Complainant's Answers to Respondent's Interrogatories (RX 69-72)

Complainant's interrogatory answers described the allegations detailed above. He contended that he knew of other employees who had been disciplined for reporting injuries and that "This is common knowledge on the BNSF." (RX 69).

Cameron County Municipal Division Fine (CX 114-15)

Mr. Brucker entered a guilty plea and was fined for failing to register a vehicle.

Other Respondent Employee Cases (RX 31, 56, 113, 73-82, 120)

- A list of employees identified by employee number only who were injured in the course of employment and not disciplined. (RX 31).
- A list of employees disciplined for being dishonest or misrepresenting a matter. (RX 56).
- A list of five other employees who were fired for dishonesty and had not filed a personal injury report. (RX 113).
- Employee 158 (RX 73-74)
 - This employee was disciplined for failure to comply with instructions and subsequently for dishonest conduct by failing to disclose medical information on his/her pre-employment screening questionnaire. This dishonesty resulted in his/her dismissal.
 - This individual did not have a personal injury record.
 - The dishonesty occurred in June 2008 and Respondent discovered the dishonesty in September 2011. The dismissal letter stated the individual should "arrange to return all Company property and/or Amtrak transportation passes in your possession." (RX 74)
- Employee 671 (RX 75-76)
 - This employee was dismissed for falsification of an employment application. He/she did not have a personal injury record.
 - The violation occurred in November 2009 and the individual was dismissed in January 2010.
 - The dismissal letter stated the individual should "arrange to return all Company property and/or Amtrak transportation passes in your possession." (RX 76).
- Employee 728 (RX 77-78)
 - This employee applied for a position with Respondent in November 2009. His/her application had been disapproved for providing false information on the application.
 - The dismissal letter requested that the individual "return all company material that has been provided to you." (RX 78).
- Employee 434 (RX 79-80)
 - This employee applied and interviewed for a position in January 2008. He/she worked for 58 days before being terminated and was told to reapply in six months. He/she was eventually rehired. After trying to reclaim seniority, Human Resources reviewed his/her application and discovered he/she had lied on the application.
 - The individual did not have a personal injury record.

- This employee filed a complaint with OSHA under the Act for being unjustly discharged.
- OSHA determined employee 434 did not make a prima facie showing under the Act and the complaint was dismissed.
- Employee 708 (RX 81-82)
 - This employee was dismissed in 2002 for immoral conduct and sexual harassment of housekeeping personnel at a hotel while attending training in Kansas.
 - He/she was reinstated approximately one month later.
 - In 2003, this employee made a personal injury report for injuries to his/her neck and back.
 - In 2007, he/she received a record suspension for failing to wear a reflective vest while working at or near a crossing. No investigation was held.
 - In 2011, this employee resigned.
- Employee J.W. (RX 120)
 - Public Law Board Decision
 - The union filed a claim with the PLB alleging a May 1, 2013 investigation that resulted in a Level S 30 day record suspension with a one year review period was unjust. Respondent had alleged Employee J.W. did not comply with written instructions and failed to apply derail protection preventing unwanted locomotive movement. The Board denied the claim.
 - Public Law Board Decision
 - In a separate case the union filed a claim contending an investigation held on June 10, 2013 that resulted in a Level S 30 day record suspension with a 3 year review period was unjust. Respondent alleged Employee J.W. failed to comply with instructions when he dropped Blue Signal Protection on the wrong track where employees were working. The claim was denied.
 - OSHA Investigation Decision, June 30, 2013
 - Employee J.W. filed a complaint under the Act with OSHA alleging he was not allowed to return to his job in retaliation for reporting a work-related personal injury.
 - OSHA determined Respondent's decision not to reinstate Employee J.W. was based on its medical department's determination he would not be able to perform his machinist job duties without exacerbating his injury.

Larry Smith Employee Transcript (CX 117)

The transcript of Mr. Smith shows the following relevant personal injury and disciplinary information:

- September 8, 1975: Injury to forearm.
- September 25, 1980: Injury to eye
- March 14, 1983: Injury to right knee
- February 4, 1985: Injury to left finger
- December 12, 1985: Injury to left eye, face
- January 7, 1986: Actual Suspension, 30 days/Altercation
- May 9, 1987: Injury to eye

- February 2, 1990: Injury to left arm
- February 1, 1995: Injury to right wrist
- March 25, 1997: Injury to right hand, finger
- February 13, 2001: Record suspension with 36-month review period for failing to properly drop derail protection causing a locomotive to derail. Must complete training on blue signals within 30 days. No investigation held.
- July 19, 2011: Record suspension with 12-month review period for failure to secure hand brakes after re-spotting 3 locomotives for refueling. No investigation held.

FRA Audit Letters (RX 92)

This exhibit is two letters from the FRA to Respondent regarding its performance audit. The first letter is dated February 5, 2014 from Robert C. Lauby, Associate Administrator for Safety, Chief Safety Officer at the FRA to Mark Schulze, Vice President-Safety, Training and Operational Support at Respondent. The FRA found three unreported cases - two unreported trespasser fatalities and one unreported reportable rail equipment accident. The FRA did not find any unreported employee on-duty cases.

The second letter is dated November 4, 2011 from Jo Strang, Associate Administrator for Railroad Safety/Chief Safety Officer at the FRA to Mr. Schulze. The letter noted that Respondent had made significant improvements in compliance with employee on-duty injury reporting. The audit found four unreported employee on-duty injuries. The 2006 audit had found 106 unreported employee on-duty injury cases while the 2009 audit found 19 unreported cases.

Order, Frost v. BNSF Railway Company, United States District Court, The District of Montana, Missoula Division, December 14, 2016 (RX 93)

This exhibit is an order issued by the United States District Court for the District of Montana in the case of *Frost v. BNSF Railway Company* regarding the admissibility of evidence regarding Respondent's Incentive Compensation Plan. The Order states the Plan has "limited, if any, relevance to the motivations of the BNSF managers in charge of Frost's discipline." The Order also states the Personal Performance Index policy was not relevant because it was discontinued following the OSHA Accord, there was no evidence any points or remedial training had been assessed against the plaintiff, and it was of limited relevance. The Order also states the OSHA Accord is not relevant because the plaintiff was not part of the Accord and there was no evidence the Personal Performance Index and Compensation Plan affected his discipline.

Memorandum of Understanding between Respondent and the International Association of Machinists and Aerospace Workers, August 1, 2007 (RX 105)

This exhibit is an agreement between Respondent and the union on safety. This includes a description of the alternative handling program which is described as a "non-punitive response to rule violations that includes training and other non-disciplinary measures."

Brucker v. BNSF Railway Company, Case No. 11-CV-1707, District Court of Wyandotte County, Kansas Case File (RX 106)

This exhibit is a copy of various documents related to Mr. Brucker's FELA suit against Respondent. The exhibit includes Mr. Brucker's petition, Respondent's Motion for Summary Judgment, and evidence. Additionally, it includes the District Court of Wyandotte County, Kansas' Memorandum Decision on Motion for Summary Judgment by Respondent dated November 21, 2013. The Court determined that Mr. Brucker's claims were time barred and that prior to the end of September 2008 Mr. Brucker knew or reasonably should have known his pain was work-related. The Court also determined Mr. Brucker did not designate expert opinions for causation and therefore his cause of action lacked sufficient evidence and therefore the claim would fail absent the statute of limitations question.

Respondent Company Rules and Policies (CX119-123, 125, RX 39-41, 117)

- Respondent BNSF Hotline information (RX 39)
- OSHA Fact Sheet on Whistleblower Protection for Railroad Workers (RX 40)
- Respondent Injury Reporting Policy (effective November 16, 1998, revised January 2008) (RX 41)
- Policy for Employee Performance Accountability (2011 and 2012) (RX 117, CX 125)
 - Categories of Discipline
 - Standard Violations
 - Serious Violations
 - Appendix A-non-exhaustive list of Serious Violations
 - Stand Alone Dismissible Violations
 - Appendix B-non-exhaustive list of violations which may result in immediate dismissal
- Code of Conduct (2011 and 2012) (RX 117)
 - Reporting Violations
 - No Retaliation policy
- Equal Employment Opportunity Policy (effective March 1, 1976, revised April 1, 2009) (RX 117)
- Agreement between ATSF and the International Association of Machinists and Aerospace Workers (effective September 1, 1974) (RX 117)
 - Rule 40: Discipline
 - Rule 41: Representatives
 - Rule 42: Applications for Employment
 - Rule 43: Physical Reexaminations
- Agreement between BNSF and the International Association of Machinists and Aerospace Workers (effective December 1, 2008) (RX 117)
 - Rule 40: Discipline
 - Rule 41: Representatives
 - Rule 42: Applicants for Employment
 - Rule 43: Physical Reexaminations
- General Rules for the Guidance of Employees [sic] (effective 1978) (RX 117)
- Safety and General Rules for all employees (effective April 1, 1988) (RX 117)
- Safety and General Rules for all employees (effective June 30, 1993) (RX 117)
- Mechanical Safety Rules (effective January 31, 1999) (RX 117)
- General Code of Operating Rules (effective April 3, 2005) (RX 117)
- Mechanical Safety Rules and Polices (effective October 30, 2005) (RX 117)

- Mechanical Safety Rules (effective April 15, 2007) (CX 119, CX 122)
- Mechanical Safety Rules (effective June 24, 2009, revised April 22, 2010) (RX 117, CX 120, CX 121, CX 123)

Articles Related to Death of David Underwood (RX 118)

Mr. Underwood's obituary and two articles related to the circumstances surrounding his death, showing that he was stabbed to death on July 21, 2005.

Miscellaneous Photographs (CX 32-71)

Photographs of Mr. Brucker's former home and his current home.

Complainant Home Purchase/Sale Documents (CX 72-73)

Documents related to Complainant's purchase and sale of his former house.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

Mr. Brucker applied for employment with Respondent on June 24, 1993 and was hired on July 7, 1993 as a machinist. He was medically disqualified from employment with Respondent on November 27, 2001. He returned to employment with Respondent on June 10, 2003. His employment was terminated on August 16, 2012.

1. Respondent's Disciplinary Rules

Respondent's PEPA policy provides three categories of discipline. (RX 117). The first category is "Standard Violations" described as those violations that does not "subject an employee or others to potentially serious injury or fatality and does not meet other criteria for a Serious or Stand Alone Dismissible violation." *Id.* at 3. "Serious Violations" are those that result in a 30-day record suspension and a 36 month review period. *Id.* at 4. Examples of "Serious Violations" include violating a work procedure designed to protect employees and others from potentially serious injuries or fatalities, unauthorized absences, tampering with safety devices, EEO policy infractions, operating rule violations for which FRA decertification is mandated, first violation of Rule 1.5, failure to timely report a drunk driving conviction, or late reporting of an accident or injury. *Id.* at 5. This list is non-exhaustive. *Id.* "Stand Alone Dismissible Violations" are those that may result in immediate dismissal. *Id.* at 4. A non-exhaustive list includes theft, dishonesty about any job-related subject, conduct leading to a felony conviction, refusal to submit to drug or alcohol testing, violence in the workplace, conscious or reckless indifference for the safety of themselves or others, rule violation resulting in serious collision or injury, extended unauthorized absence, aggravated EEO policy infractions, failure to report accident or injury, or multiple serious violations during the same tour of duty. *Id.* at 6.

2. 2010 Seat Belt Incident

At the Murray Shop at dusk on May 4, 2010, Mr. Martin observed Complainant driving a yard truck without a seat belt. He attempted to wave Complainant down but Complainant kept driving. Approximately 30 minutes later, Mr. Martin and Mr. Frey observed Mr. Paterson driving a yard truck in which Mr. Brucker was the passenger. Mr. Brucker was observed not wearing a seat belt by Mr. Martin and Mr. Frey. Mr. Martin issued Complainant an OPT for failing the vehicle operations rule by not wearing a seat belt.

An investigation into this incident was held on June 15, 2010. Mr. Dominguez, Complainant's representative at the hearing, attempted to introduce a written statement signed by Mr. Paterson, who was unavailable to testify. Mr. Suttles, the conducting officer, declined to admit the written statement. Mr. Martin, Mr. Frey, and Complainant testified at the hearing as to the events of May 4, 2010. Complainant testified that he was wearing a seat belt. Mr. Martin and Mr. Frey testified that he was not wearing a seat belt. Mr. Paterson's statement stated that Complainant was wearing a seat belt. Complainant's testimony and Mr. Paterson's statement establish that Complainant was wearing a seat belt upon their return to the Murray Shop. Mr. Martin and Mr. Frey mistakenly believed Complainant was not wearing a seat belt due to distance from Complainant and poor lighting due to the time of day.

In a letter dated June 29, 2010, Mr. Brucker was assessed a Level S 30 day Record Suspension and three years of probation for not wearing a seat belt in violation of MSR Rule S-12.5 based on Mr. Frey and Mr. Martin's honest, but mistaken, testimony. As discussed above, a serious violation includes those which violate a work procedure to protect employees from serious injuries or fatalities. This reasonable includes wearing a seat belt while operating or riding in a vehicle on company property. The disciplinary action taken against Complainant was in compliance with Respondent's policies and procedures, even if it was based on mistaken testimony.

3. 2011 Locomotive Incident

On June 15, 2011 Complainant, Mr. Palmer, Mr. Rogers, Mr. Tate, and Mr. Smith were three individuals servicing 3 locomotive units attached together. Mr. Palmer was fueling the engines. Mr. Smith was cleaning the interiors of the units. The locomotive units were under blue flag protection. Blue flag protection signifies that workers are on, under, or between equipment and therefore that equipment may not be moved unless and until an employee operates the engine under the direction of the employee in charge, the blue signal has been removed, and all workers have been warned that the engine is being moved. A blue flag is hung on the lead locomotive and workers put their tags on the flag to signify they are working. The blue flag was hung on the north locomotive.

Part of Mr. Smith's job was setting the hand brake on the locomotives which he did not do. Complainant tried to "train line a consist" meaning he was taking the electrical and air between two locomotives and putting them together to make a "consist." In doing so, the locomotive went into emergency meaning it dumped its air. Complainant released the air brakes causing the locomotive units to roll. A fuel stanchion being used by Mr. Palmer to fuel the

engines snapped off due to the movement. The fuel stanchion was pulled at or near its limit. Complainant set the independent brake to stop the locomotives from moving.

The movement of the locomotives was caused by a combination of Mr. Smith's failure to set the hand brake and Complainant's actions. Complainant did not warn the other workers what he was going to do ahead of time. The locomotives are not supposed to move while under blue signal protection. Complainant caused this movement by releasing the air brakes. At the same time, the movement may not have occurred had Mr. Smith set the hand brake. Therefore, it was reasonable for Respondent to discipline both Mr. Smith and Complainant for their actions which violated company rules, put others at risk of injury, and damaged company property.

On August 27, 2011, Complainant was assessed a Level S 30 day Record Suspension and three years' probation for violating MSR Rules 1.2.3, 1.2.4, 1.2.5, 24.2, and 28.6 for failing to be alert and attentive, failing to warn his co-workers, violating safety rules, causing the locomotive to move while under blue signal protection, and for engaging in conduct careless to the safety of himself and others. Complainant's discipline was in compliance with Respondent's policies and procedures.

4. 2012 Disciplinary Action

On January 25, 1985, Complainant was arrested and charged with assault in the first degree. (RX 9). On May 7, 1985, he pled guilty to misdemeanor assault and was sentenced to one year in jail which was suspended during two years of supervised probation. *Id.*

Mr. Brucker applied for employment with Respondent's predecessor, ATSF, on June 24, 1993. (RX 2). The application asked, "Other than traffic violations, have you ever been convicted of a crime? If yes, describe in detail." Mr. Brucker answered "No." The end of the application contains an Applicant Statement the applicant must sign certifying, "I have answered all questions to the best of my ability. If employed, I realize false information will be grounds for dismissal at any time, regardless when such information is discovered." Since Mr. Brucker had been convicted of the crime of misdemeanor assault prior to completing his 1993 employment application, the answer he provided on the application was false.

Complainant's assertion that Mr. Underwood told him to answer no to the application question is unsupported by any evidence in the record. Mr. Underwood is deceased and therefore Complainant's assertion is unsupported. There is no notation or other indication on Mr. Brucker's application that he was told to answer this question in a certain way by Mr. Underwood. Respondent's representatives denied that they were only interested in felony convictions or that this was the practice of the company at the time of Complainant's application or at any other time during Complainant's career. Additionally, the record contains numerous other job applications completed by Mr. Brucker in which he also denied any prior criminal convictions. Therefore, I find Complainant knew Respondent's employment application was requesting information on all criminal convictions, including felonies and misdemeanors, and that he chose not to disclose his prior criminal conviction.

Respondent learned of Complainant's criminal conviction through discovery during Complainant's FELA suit. Mr. Reppond and Mr. Bossolono, Complainant's supervisors, learned

of his criminal conviction and the FELA suit by Mr. Fultz's July 10, 2012, email notifying them of what was discovered via Complainant's FELA lawsuit. Mr. Cargill and Mr. Harris learned of this information, and where Respondent gleaned it, when Mr. Bossolono forwarded Mr. Fultz's email on July 12, 2012.

Mr. Bossolono was informed of the discrepancies in whether Complainant actually spent time in jail for his criminal conviction and the exact nature of his conviction in Mr. Fultz's July 23, 2012 email. Mr. Cargill and Mr. Suttles were made aware of these issues when Mr. Bossolono forwarded them Mr. Fultz's email on July 24, 2012.

Mr. Bossolono, Mr. Suttles, Mr. Cargill, Ms. Hyatt, and Mr. Harris all participated in the decision to terminate Complainant's employment. While Mr. Bossolono testified that Mr. Reppond was also involved in this decision, Mr. Reppond was a witness at the investigation and there is no other evidence he participated in the decision to terminate Complainant's employment. Therefore, I find Mr. Reppond was not involved in the ultimate decision to fire Complainant.

On August 16, 2012, Mr. Brucker was sent a letter notifying him that he was being dismissed for violating MSR Rules 28.2.7 and 28.6. (CX 25). MSR 28.2.7 prohibits employees from withholding information or failing to provide all the facts to those authorized to receive such information "regarding unusual events, accidents, personal injuries, or rule violations." (CX 122). MSR 28.6 prohibits employees from being dishonest. (CX 123). Complainant admitted that he lied on the employment application, in violation of Respondent's rules.

Discussion

To prevail on this claim of discrimination under the FRSA, Mr. Brucker must demonstrate by a preponderance of the evidence that (1) he engaged in protected activity; (2) he suffered an unfavorable personnel action³; and (3) the protected activity was a contributing factor in the unfavorable personnel action.⁴ 49 U.S.C. § 20109(d)(2) (incorporating the burdens of proof set forth in 49 U.S.C. § 42121(b)); 29 C.F.R. §§ 1982.104(e)(2), 1982.109. *See Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-025, slip op. at p. 3 (Apr. 30, 2013). If Complainant satisfies his burden, Respondent may escape liability only if it can show by clear and convincing evidence that the same adverse actions would have taken in the absence of any protected behavior. 49 U.S.C. § 20109(b)(2)(B)(ii); 29 C.F.R. § 1982.109(b).

1. Jurisdiction

A threshold issue in this matter is whether this case arises in the U.S. Court of Appeals for the Eighth Circuit or the U.S. Court of Appeals for the Tenth Circuit. The Act at 49 U.S.C. § 20109(d)(4) states that the appropriate circuit court is the court "in which the violation, with

³ The terms "unfavorable personnel action," "adverse employment action," and "adverse action" appear in the FRSA, in the incorporated provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121, and the regulations implementing both statutes. They terms are used interchangeably in this Decision and Order.

⁴ 49 U.S.C. § 20109(d)(2) (incorporating the burdens of proof set forth in 49 U.S.C. § 42121(b)); 29 C.F.R. §§ 1982.104(e)(2), 1982.109. *See Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-025, slip op. at p. 3 (Apr. 30, 2013).

respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation.” It matters in this case with respect to the contributing-factor element of Complainant’s case. The Eighth Circuit has interpreted that element to mean that a complainant must show “intentional retaliation prompted by the employee engaging in protected activity.” *Gunderson v. BNSF Railway Co.*, 850 F.3d 962, 969 (8th Cir. 2017); *Kuduk v. BNSF Railway*, 768 F.3d 786, 791 (8th Cir. 2014). The Tenth Circuit has not explicitly adopted this aspect of *Kuduk*, and has not defined the meaning of a contributing factor in that Circuit. Two judges sitting in the U.S. District Court for the District of Kansas (within the Tenth Circuit) have held that a complainant must show that “discriminatory animus” contributed in some way to the adverse action. *Lincoln v. BNSF Railway Co.*, 2017 WL 1437302, at *30 (D. Kan. 2017); *see also Jones v. BNSF Railway Co.*, 2016 WL 183514, at *7 (D. Kan. 2017). Throughout its written closing brief, Respondent assumes that Eighth Circuit law applies, without providing any analysis, while Complainant does not address the issue.

The law of the Eighth Circuit may apply, because Complainant, as a resident of Missouri, may file any appeal in that Circuit. For other reasons, it is possible that the appeal may be filed in the Tenth Circuit, and the law of that Circuit would apply. Complainant filled out his employment application for Respondent’s predecessor in 1993 at the Argentine facility located in Kansas. (TR at 60, 65, 189). He worked in both Kansas and Missouri during the course of his career with Respondent. *Id.* at 65. At the time of his dismissal, Complainant had been working in Missouri since 2004. (RX 1-1). When Complainant submitted his personal injury report on January 26, 2010, he submitted it to his general supervisor at the Murray Yard in Missouri. (TR at 68-69). Mr. Brucker was notified of the investigation into his employment application by letter sent to his home address in Missouri. (RX 24-2). The investigation was held in Kansas. *Id.* Mr. Reppond and Mr. Suttles reviewed the transcript of the investigation and other documentation and recommended to Mr. Bossolono that Complainant’s employment be terminated. (RX 64-9). At the time of the investigation, Mr. Suttles reported to Mr. Reppond at the Argentine facility in Kansas. (TR at 673, 676). Mr. Bossolono then reviewed the investigation transcript and documentation and concurred. (RX 64-9). At the time, Mr. Bossolono was the highest ranking officer for Respondent in the Kansas City area for the mechanical department. (TR at 674).

The primary officials involved in the decision to terminate Complainant’s employment operated out of the Kansas and Missouri facilities. Mr. Brucker lived and worked in Missouri. He was notified of the investigation into his employment application and of his subsequent termination by letters sent to his home in Missouri. The letter to Complainant informing him of his termination is on letterhead that includes a Kansas address.

In the end, the choice of law issues need not be definitively addressed. If the law of the Eighth Circuit does not apply, Complainant does not need to establish a contributing factor that includes intentional retaliation prompted by his protected activity. And, as discussed below, I find that he has not, and cannot prevail on his complaint under any applicable law. If the law of the Eighth Circuit does apply, Complainant must show the additional factor, and he has not.

2. Statute of Limitations

Respondent asserts that Complainant’s allegations of unfavorable personnel actions other than his termination from employment are time-barred and cannot form the basis of his

complaint. (EB at 14). The Act provides that actions “shall be commenced not later than 180 days after the date on which the alleged violation” occurred. 49 U.S.C. § 20109(d)(2)(A)(ii). Complainant filed his OSHA complaint on January 9, 2013. (CX 116). Therefore, only matters which occurred after July 13, 2012, are within the statute of limitations in this matter. However, prior acts can constitute background evidence for a timely claim even when such acts are time-barred because such acts are relevant in “providing a complete picture of the relationship between [Brucker] and [BNSF] and whether [Brucker] was discriminated against because of his protected activity.” *Mercier v. U.S. Dep’t of Labor, Admin. Review Bd.*, 850 F.3d 382, 388 (2017) (citing *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002)). Therefore, I find that while Complainant’s claims that the 2010 and 2011 disciplinary investigations and the 2012 absenteeism letter are time-barred by the statute of limitations, evidence related to these events is relevant in determining whether Mr. Brucker was terminated because of his protected activity.

3. Railway Labor Act Preclusion

Respondent argues that the Railway Labor Act (“RLA”) precludes disputes that cannot be adjudicated without interpreting a CBA. (EB at 13). Specifically, Respondent argues that the CBA between Complainant’s union and Respondent contains a provision discussing the right to investigate an employee for falsifying an employment application and to dismiss that individual. Therefore, Respondent argues that the issue as to whether Mr. Brucker falsified his application and whether Respondent interpreted the term “falsified” in accordance with the CBA is precluded by the RLA because, for a right granted under the CBA, the RLA arbitration mechanism is the only method for resolving this matter.

State law claims are preempted when the claim depends on the interpretation of the CBA. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-406 (1988) (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962)). However, “‘purely factual questions’ about an employee’s conduct or an employer’s conduct and motives do not ‘requir[e] a court to interpret any term of a collective-bargaining agreement.’” *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 262 (1994) (quoting *Lingle* at 407). Similarly, an injury compensable under the Act caused by conduct that may be subject to RLA arbitration, does not deprive the employee from bringing an action for damages under the Act. *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 564 (1987).

In the instant case, Mr. Brucker alleges that he was fired in retaliation for filing a personal injury report while Respondent argues he was fired because it was discovered Complainant had lied on his employment application. The relevant provision of the CBA merely states that an employee may be relieved from service for falsifying an employment application. Whether Respondent has the right to fire an employee for falsifying an employment application is not the issue in this matter. Further, how Respondent defines “false” is not at issue in this matter. The issue is whether Mr. Brucker was dismissed for engaging in protected activity. The factual matter of whether Mr. Brucker lied on his employment application and his reasons for doing so does not require that I interpret how the CBA defines the term “false” or whether the CBA grants Respondent the right to fire an employee for falsifying an employment application. Therefore, I find the issue of whether Mr. Brucker falsified his employment application is not precluded by the arbitration provisions of the RLA.

The Employer also argues the PLB ruling is *res judicata* in this action. (EB at 13). The issue addressed by the PLB in its review of Respondent's decision to fire Mr. Brucker was based upon whether Complainant falsified his employment application and whether that granted Respondent the right to dismiss him. (RX 27). As discussed above, the matter of whether Mr. Brucker lied on his employment application is a purely factual question and does not require interpretation of a term of the CBA. Furthermore, the PLB did not consider whether Complainant was dismissed in retaliation for his personal injury report – the matter at issue here. Therefore, I find that the PLB decision is not *res judicata* to Complainant's claim in this case.

4. Protected Activity

As applicable to this matter, the FRSA provides that “[a] railroad carrier engaged in interstate or foreign commerce ... may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done to notify or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury.” 49 U.S.C. § 20109(a)(4).

A. *Notice of Injury-December 10, 2009*

On December 10, 2009, Complainant's counsel sent a letter to Respondent stating that his firm had been retained by Complainant to represent him in a claim for shoulder injuries sustained during the course of his career working for Respondent. (CX 2). The letter stated that it should be considered a notice of lien to the claim and requested that all future communications regarding this injury be directed to Complainant's counsel. Respondent asserts that this letter does not constitute protected activity because it was sent to its claims department, not anyone in Mr. Brucker's supervisory chain and was notification Complainant had hired an attorney, not notification of an injury. (EB at 18). The Act provides that an employee's conduct is protected activity when the employee notifies or attempts to notify “the railroad carrier or the Secretary of Transportation of a work-related personal injury.” 49 U.S.C. § 20109(a)(4). The Act does not require that an employee file a personal injury report with their supervisor, or an individual within their supervisory chain, in order to constitute protected activity. Therefore, that the letter from Complainant's counsel was sent to Respondent's claims department, rather than an individual in his supervisory chain, does not preclude a finding that this letter constitutes protected activity. The letter from Complainant's counsel states that Complainant has a claim for shoulder injuries sustained during his career with Respondent. (CX 2). Therefore, Complainant's counsel informed Respondent that he was alleging a work-related personal injury and this letter can properly be considered a lawful, good faith personal injury report constituting protected activity under the Act.

B. *Personal Injury Report-January 26, 2010*

On January 26, 2010, Complainant completed an employee personal injury/occupational illness report claiming he had sustained bone spurs, muscle tears, and arthritis over the course of his career for Respondent. (CX 1). Respondent argues that collateral estoppel prevents Complainant from arguing or re-litigating the issue of whether he engaged in protected activity

because Complainant's FELA suit was dismissed, in part, for failing to prove the shoulder injuries were work-related or the result of Respondent's negligence. (EB at 17-18). However, the court's Memorandum Decision on Motion for Summary Judgment by BNSF, in Complainant's FELA suit was granted based on a statute of limitations issue. (RX 106). And as an additional basis for its order, the court determined that Complainant did not disclose an expert opinion within the 90 days required by the applicable discovery statute. The court in Complainant's FELA suit did not make a determination that Claimant's alleged shoulder injuries were not work-related. Rather, the court determined Complainant did not provide information on its expert opinion within the statutory deadline and the case was dismissed pursuant to the applicable statute of limitations. Since there was no finding on the cause of Complainant's alleged shoulder injuries, I find the current claim is not collaterally estopped.

As discussed above, Respondent argues that Complainant has not established that his shoulder injuries are work-related and therefore the personal injury report is not protected activity. The Act does not require that Complainant know his injury was work-related. Rather, the employee's act must be lawful and in good faith. 49 U.S.C. § 20109(a). *See also Grimes v. BNSF Ry. Co.*, 746 F.3d 184, 185 (5th Cir. 2014). Complainant testified that he did not complain that his work as a machinist was bothering his shoulders because it was periodic. (RX 60). He asserted he did not know he needed to fill out an injury report for his shoulder injuries until his doctor told him that his shoulder surgery was work-related. (RX 61). Given the highly physical nature of Complainant's job, I find it is reasonable to conclude that Complainant reported his shoulder injuries to Respondent in the good faith belief that these injuries were caused in whole or in part by his employment for Respondent. Therefore, by making a lawful, good faith personal injury report to Respondent, I find Complainant engaged in protected activity under the Act.

C. FELA Lawsuit

Respondent argues that Complainant is not claiming that filing a FELA claim constitutes protected activity. (EB at 18). In the instant case, numerous individuals had knowledge of the Complainant's FELA lawsuit without evidence that they had direct knowledge of his personal injury report or the letter sent to the claims department. All of the relevant individuals involved in the decision to terminate Complainant's employment knew of Complainant's FELA lawsuit because Mr. Fultz informed them that the information on Complainant's criminal conviction was initially obtained in discovery of his FELA lawsuit. (RX 86-2). Complainant's FELA lawsuit was based on his injury report against the Respondent for his allegedly work-related shoulder injuries. Therefore, his FELA lawsuit was an extension of Complainant's protected activity in reporting a possible work-related injury. Furthermore, an individual working for Respondent and familiar with the laws and regulations governing work-related railroad injuries undoubtedly is well aware that a FELA lawsuit by definition necessitates an underlying personal injury. Thus, knowledge of Complainant's FELA lawsuit would also constitute knowledge of a personal injury report, even if the individual did not have direct knowledge of a separate personal injury report. As a result, an individual with knowledge of the FELA lawsuit could engage in retaliatory conduct for Complainant's personal injury report. Therefore, I find that Complainant's FELA lawsuit constitutes protected activity under the Act.

5. Knowledge

Complainant must establish that the individuals who decided to fire him had actual or constructive knowledge of his protected activity. *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014). Respondent contends that Complainant has not established that the relevant decision-makers knew that he had filed a personal injury report because Mr. Bossolono testified he did not know Mr. Brucker had filed a personal injury report, Mr. Suttles testified that no one in Mr. Brucker's supervisory chain knew he had filed a personal injury report, Mr. Cargill testified he had no knowledge of Mr. Brucker's personal injury report, and Mr. Fultz testified that the letter sent by Complainant's counsel to the claims department would not have been sent to the mechanical department. (EB at 19-20). The decision-makers involved in the decision to terminate Mr. Brucker's employment included Mr. Bossolono, Mr. Suttles, Mr. Cargill, Ms. Hyatt, and Mr. Harris. (RX 87).

A. *Notice of Claim/FELA Lawsuit*

Mr. Fultz works in the claims department and handled Claimant's FELA claim. (TR at 449). He was notified by a paralegal in Employer's counsel's firm that medical records obtained by Employer's counsel through discovery in Complainant's FELA claim indicated he had spent 112 days in jail. *Id.* Mr. Fultz stated that it is a normal part of the process when an employee makes a personal injury claim to pull the employee's job application. *Id.* at 450. In reviewing Mr. Brucker's employment application, Mr. Fultz discovered that the application was inconsistent with the medical record which indicated he had spent time in jail. *Id.* Respondent hired an outside firm to do a background check on Complainant and determined he had been convicted of a felony. *Id.* at 451. Mr. Fultz provided this information to Complainant's supervisors, Mr. Reppond and Mr. Bossolono. *Id.* at 451-452. In the email, Mr. Fultz stated, "[d]uring the investigation of his FELA lawsuit, BNSF has learned that Mr. Brucker was incarcerated." (RX 86-2). Mr. Fultz went on to state that he was providing the information to Mr. Reppond and Mr. Bossolono "for your handling as you deem appropriate in the event there are any Bargaining Agreement terms or conditions that must be followed." *Id.* On July 12, 2012, Mr. Bossolono forwarded Mr. Fultz's email to Mr. Wick, Mr. Heenan, Mr. Harris, and Mr. Cargill asking for their thoughts on the matter. *Id.* Therefore, it is reasonable to conclude that Mr. Bossolono, Mr. Reppond, Mr. Wick, Mr. Heenan, Mr. Harris, and Mr. Cargill were all aware of the Claimant's FELA claim at the latest upon viewing Mr. Fultz's July 12, 2012, email.

Furthermore, Mr. Bossolono, Mr. Cargill, Mr. Reppond, and Mr. Heenan were actively involved in crafting language for the notice of investigation ultimately sent to Complainant regarding his employment application. (RX 29-32-34). Additionally, Mr. Fultz continued to participate in the Respondent's preparation of evidence to present at the investigation against Mr. Brucker by advising Mr. Bossolono on the information the private investigator had learned regarding Complainant's alleged incarceration, even after the purportedly official background investigation report had been submitted. (RX 29-31-34). Specifically, Mr. Reppond testified that the background investigation report submitted at the Respondent's investigation into Mr. Brucker's employment application was the "written closeout" but that the background investigation was provided prior to that. (RX 24-38). However, while the background investigation report was dated July 20, 2012, (RX 24-11-13), Mr. Fultz notified Mr. Bossolono as late as July 23, 2012, that the private investigator was unsure of the contents of that report.

(RX 29-34). Mr. Fultz opined “[a]lthough there is no convincing evidence, I would guess that he did do some jail time given he stabbed another individual (112 days) but was on probation the rest of the time.” *Id.* He subsequently stated that he was attempting to find out more in discovery but that the discovery responses were not due until August 9. *Id.* As there was no discovery allowed for Respondent’s internal investigation into this matter, (CX 19), it is reasonable to conclude that Mr. Fultz was referring to discovery in Mr. Brucker’s FELA lawsuit. Mr. Bossolono forwarded Mr. Fultz’s email to Mr. Cargill and Mr. Suttles. (RX 29-34). Therefore, it is reasonable to conclude that all three were aware of Complainant’s FELA lawsuit and that Mr. Fultz was utilizing discovery in Complainant’s FELA lawsuit to find out information about his criminal conviction. Based on this information, Mr. Cargill, Mr. Suttles, Mr. Reppond, and Mr. Bossolono were all aware of Complainant’s FELA lawsuit prior to the decision to investigate and ultimately dismiss him from employment

Finally, Mr. Brucker testified during the investigation that he signed a medical release allowing Respondent to view his medical records “[i]n 2009 when I filed a lawsuit against BNSF.” (CX 23-27). Therefore, Mr. Cargill, Mr. Bossolono, Mr. Suttles, and anyone else who reviewed the transcript of the carrier’s investigation would have been aware of Complainant’s lawsuit and underlying personal injury claim.

Considering all of the evidence in the record, I find that the officials involved in the decision to investigate and ultimately terminate Complainant’s employment had knowledge of his FELA lawsuit prior to the decision to fire Complainant.

B. Personal Injury Report

Mr. Brucker’s employee transcript includes a “personal injury record.” (CX 3-1). This record includes a notation that Complainant had reported left and right shoulder injuries and arthroscopic surgery manifesting on February 29, 2008. *Id.*

Mr. Bossolono testified that he was not sure if he had been aware that Complainant had filed a personal injury report with Respondent. (RX 64-14). However, he subsequently testified that “We will always review an employee’s personnel record. That is standard procedure.” *Id.* at 25. He further testified that he would typically be notified by the claims department that someone was alleging an injury or an employee would come in to fill out a report directly. *Id.* at 36-37. He also testified that he was involved in the disciplinary action taken against Mr. Brucker in the 2010 and 2011 incidents. While Mr. Suttles testified that he had never seen Complainant’s personal injury report or the correspondence from Complainant’s counsel until his deposition, (TR at 624-625), if it is normal procedure to review the personnel record when considering disciplinary action, it would be reasonable to assume that Mr. Suttles and Mr. Bossolono saw his personnel record at least as early as the 2010 seat belt incident and decision to discipline Complainant.

An email dated August 15, 2012, from Mr. Cargill to Mr. Suttles and Mr. Bossolono states that Mr. Cargill reviewed Mr. Brucker’s personnel record, among other documents, and recommended dismissal. (CX 24). Therefore, Mr. Cargill’s review of Mr. Brucker’s employee transcript would have made him aware of his personal injury report. Furthermore, Mr. Cargill stated that he reviewed the transcript of the investigation into this matter. *Id.*

An email dated August 15, 2012, from Ms. Hyatt to Mr. Bossolono states, “This email confirms our earlier conversation ... [T]here is the possibility that he might *allege* that his dismissal implicates the FRSA’s anti-retaliation provision, I do not believe such a claim would be tenable. I would feel comfortable defending BNSF in the event of an FRSA complaint.” (emphasis in original) (RX 87-1). The implication of the Act and the possibility Mr. Brucker might allege retaliation clearly indicates that Ms. Hyatt and Mr. Bossolono knew of Complainant’s personal injury report because there would be no reason to discuss the possibility of a retaliation claim under the Act if there was not a possibility Complainant’s dismissal could be perceived as retaliation for a protected activity.

Considering all of the evidence in the record, I find that the officials involved in the decision to investigate and ultimately terminate Complainant’s employment had knowledge of his personal injury report prior to the decision to fire Complainant was made.

6. Adverse Employment Action

It is undisputed that Complainant suffered an adverse employment action when his employment was terminated on August 16, 2012. (EB at 20). Complainant alleges that Respondent’s actions in walking him on and off the property, and conducting an investigation under the CBA, also constitute an adverse employment action. This argument has some merit; it may well be the type of action that would dissuade a reasonable employee from reporting an injury. See *Rudolph v. National Railroad Transport Corp. (Amtrak)*, ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 12 (ARB Mar. 29, 2013); *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002 (ARB Sep. 30, 2008). All of the actions alleged to be adverse are bound up in the termination decision, and I find that together they establish that Complainant suffered an adverse employment action.

7. Contributing Factor

For cases that are not subject to the law of the Eight Circuit, a complainant must demonstrate by a preponderance of the evidence that his protected activity was a contributing factor in Respondent’s adverse action. 29 U.S.C. § 5851(b)(3)(C). Contributing factor includes “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at p. 6 (ARB), quoting *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, at 6 (ARB Jan 31, 2011)). “[A]ny weight given to the protected disclosure, either alone or in combination with other factors, can satisfy the ‘contributing factor’ test.” *Smith v. Duke Energy Carolinas, LLC, et al.*, ARB No. 11-003 (ARB June 20, 2012) (quoting *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). “Contributing factor” in a whistleblower case is “not a demanding standard.” *Menendez v. Halliburton, Inc.*, ARB No. 12-026, ALJ No. 2007-SOX-045, slip op. at p. 13 (ARB Mar. 15, 2013). “A complainant need only prove, by a preponderance of the evidence, that his protected activity, ‘alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision.’” *Id.*, slip op. at p. 14, quoting *Evans v. Miami Valley Hosp.*, ARB No. 07-118, ALJ No. 2006-AIR-022, slip op. at 17 (ARB June 30, 2009). In showing that protected activity was a contributing factor to the

adverse action, a complainant need not show retaliatory animus on the part of the employer. *DeFrancesco*, *supra*, slip op. at p. 6.

In the Eighth Circuit, although the Act does not require an employee to conclusively demonstrate the employer's retaliatory motive, *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (2014), *Lockheed Martin Corp. v. Admin. Rev. Bd.*, 717 F.3d 1121, 1137 (10th Cir. 2013), *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010), "[t]he essence of this intentional tort is 'discriminatory animus.'" *Kuduk* (citing *Staub v. Proctor Hosp.*, 562 U.S. 411, 131 S.Ct. 1186, 1193 (2011)). Complainant must submit evidence of "intentional retaliation prompted by the employee engaging in protected activity." *Id.* Evidence of the employer's nonretaliatory reasons must be considered with this element. *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (2017) (quoting *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, 2016 WL 5868560, *33 (DOL Admin. Rev. Bd. Sept. 30, 2016)).

In this case, several factors are significant. Complainant admitted at the 2012 investigation that he lied on his employment application about his criminal conviction. (RX 24-29-30). Additionally, Complainant had two prior serious violations on his employment record. (CX 3). Respondent's PEPA policy states that a second serious violation "committed within the applicable review period may result in dismissal." (RX 117-4). As discussed above, Respondent administered the investigation into the 2010 and 2011 incidents in accordance with its policies and procedures and the CBA in place with Complainant's union. Therefore, even if Respondent would not have dismissed Complainant for lying on his employment application alone, the fact that he had two prior serious violations on his employment record, in combination with this dishonesty, is highly probative to the decision to terminate his employment. Additionally, individuals inside and outside Mr. Brucker's supervisory chain, the mechanical department, and the Kansas City area were involved in the decision to terminate his employment. Finally, the fact the Respondent did not terminate Complainant's employment until over two years after he engaged in the protected activity is persuasive. In a retaliation case, "[a] gap in time between the protected activity and the adverse employment action weakens an inference of retaliatory motive." *Wells v. SCI Mgmt., L.P.*, 469 F.3d 697, 702 (8th Cir. 2006) (quotations omitted). *See Clark Cty. Sch. Dist. V. Breedon*, 532 U.S. 268, 274 (2001) (per curiam) ("Action taken (as here) 20 months later suggests, by itself, no causality at all."); *Gunderson*, 850 F.3d at 969 (adverse action was "remote in time" from protected activity). Had Complainant's supervisors wanted to terminate his employment in response to his protected activity, they could have done so at the time of the 2010 or 2011 incidents. That the Respondent chose to exercise leniency and give Complainant a lesser punishment than could have been properly given under the terms of the CBA and the Respondent's safety rules does not support – indeed, militates against – a finding of retaliation.

Following the investigation, emails between the decisionmakers show that consideration was given both to the time that had passed since the Complainant's employment application and his FELA lawsuit and underlying injury report. An email, the contents of which were not provided, was sent by Mr. Suttles to "PEPA" on August 13, 2012. (RX 87-2). On August 15, 2012, Mr. Cargill responded to Mr. Suttles and cc'd Mr. Bossolono agreeing with the dismissal recommendation. *Id.* Mr. Cargill opined that the "risk of reinstatement may be slightly elevated in this case for several reasons." *Id.* He noted Complainant's testimony about Mr. Underwood's instructions and "[p]erhaps more importantly, approximately 19 years have passed since the time

he filled out the application. An arbitrator may struggle with dismissal for an infraction so long ago.” *Id.* There is no record that Mr. Bossolono or Mr. Suttles addressed these concerns with Mr. Cargill further. Mr. Bossolono forwarded Mr. Cargill’s email to Ms. Hyatt stating “[t]his is the one we discussed.” *Id.* There is no record of Mr. Bossolono and Ms. Hyatt’s prior conversation(s) regarding Complainant’s dismissal in the record. Ms. Hyatt responded within 30 minutes of Mr. Cargill’s email to Mr. Bossolono “confirm[ing] our earlier conversation.” *Id.* at 1. Ms. Hyatt also recommended dismissal but noted Complainant may allege retaliation under the Act. *Id.* However, these emails merely show that the relevant decisionmakers were aware of Complainant’s protected activity and considered what effect terminating his employment may have. “To hold that protected activity is a ‘contributing factor’ to an adverse action simply because it ultimately led to the employer’s discovery of misconduct ‘is a further example of confusing a cause with a proximate cause.’” *Carter v. BNSF Ry. Co.*, No. 16-3093, 2017 WL 3469224, at *5 (8th Cir. Aug. 14, 2017) (quoting *Koziara v. BNSF Ry. Co.*, 840 F.3d 873, 878 (7th Cir. 2016), cert. denied, 137 S. Ct. 1449 (2017)). Therefore, the mere fact that Respondent learned Complainant lied on his job application by way of discovery during his FELA lawsuit, which was initiated by his personal injury report, a protected activity, and considered whether Complainant may file the retaliation claim at issue here, does not satisfy the FRSA’s contributing factor causation standard.

Based on the totality of the evidence, I find and conclude that Mr. Brucker’s notice to BNSF of his FELA lawsuit, and his subsequent injury report, did not contribute to Respondent’s decision to terminate his employment.

Additionally, there no evidence that the individuals involved in the decision to terminate Mr. Brucker’s employment did so out of discriminatory animus. Complainant admitted that he lied on his employment application regarding whether he had ever been convicted of a crime. This lie was discovered in the course of discovery pertaining to Complainant’s FELA lawsuit prompting an internal investigation that led to Complainant’s dismissal from employment with Respondent. While the evidence in the record shows that the relevant decisionmakers knew of Complainant’s protected activity and considered the implications of firing him in this context, Complainant has not established that Respondent was motivated by discriminatory animus in its decision to fire him or that the relevant decisionmakers intentionally fired him in response to his protected activities.

Based on the foregoing, I find that Complainant has failed to meet his burden to show that his protected activity was a contributing factor to the decision to terminate his employment. Because Complainant’s protected activities did not contribute to the adverse employment action taken against him, his complaint must be denied.

ORDER

For the reasons set forth above, IT IS ORDERED that the complaint filed by Complainant Robert K. Brucker under the FRSA is DENIED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ, Jr./ksw
Newport News, Virginia

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

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

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions

or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

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

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

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

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

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