

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)



Issue Date: 18 August 2016

CASE NO.: 2014-FRS-00103

In the Matter of:

STEVE BROUGH,
Complainant,

v.

BNSF RAILWAY COMPANY,
Respondent.

Appearances: James Carey, Esq.
For the Complainant

Kristen Smith, Esq.
Jennifer L. Willingham, Esq.
For the Respondent

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER GRANTING CLAIM

This matter arises out of the employee-protection provisions of the Federal Rail Safety Act (“FRSA” or “Act”), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053, 121 Stat. 266, 444 (2007) and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848, 4892 (2008). 49 U.S.C. § 20109. Steve Brough (“Complainant”) alleges that his former employer, BNSF Railway Company (“Respondent” or “BNSF”), violated the whistleblower protection provisions of the FRSA by disciplining and then terminating him after he provided information in the course of an accident investigation and reported a work-related injury. This claim was initiated with the Office of Administrative Law Judges (“OALJ”) on May 22, 2014, when OALJ received Complainant’s timely objections to the findings of the Regional Administrator of the Occupational Safety and Health Administration’s (“OSHA”). This case is before me *de novo*.

For the reasons stated below, Complainant's FRSA complaint is GRANTED.

I. Procedural History

Complainant filed his complaint with OSHA on June 13, 2011, alleging that Respondent retaliated against him for reporting a work-related injury. (Respondent's Exhibit ("RX") Q.) BNSF responded to the complaint on July 29, 2011. (*See* RX R.) On April 22, 2014, OSHA completed its investigation and the Regional Administration of OSHA, acting on behalf of the Secretary of Labor, determined there was no reasonable cause to find that Respondent had violated the FRSA. (RX S, pp. 1-3.) On May 22, 2014, Complainant timely appealed the OSHA's findings, requesting a hearing before an administrative law judge ("ALJ").

On June 5, 2014, the case was assigned to me and I issued a Notice of Hearing setting this case for hearing on November 13, 2014, in Great Falls, Montana. On October 8, 2014, Respondent filed a motion for summary decision or, in the alternative, for partial summary judgment. Complainant filed his reply on October 21, 2014. Respondent filed a motion for a continuance on October 23, 2014, which Complainant opposed on October 27, 2014. After conducting a conference call with the parties on October 28, 2014, I denied Respondent's motion for a continuance. On October 31, 2014, I denied Respondent's Motion for Summary Decision.

Respondent filed objections to Complainant's proposed evidence on November 3, 2014, moving to pre-emptively strike the testimony of some of Complainant's witnesses and objecting to some of his proposed exhibits. During the November 4, 2014, pre-hearing conference these objections were discussed and resolved, with some witnesses and exhibits being withdrawn, some objections being withdrawn, and rulings on some evidence delayed until hearing. During the pre-hearing conference the parties also agreed to the issues in the case. On November 6, 2014, Complainant filed joint stipulations between the parties.¹

The hearing was held November 13-14, 2014, in Great Falls, Montana. Complainant's Exhibit's ("CX") 1-70 were marked and after hearing additional argument I admitted CX 1-5, CX 8, CX 11-20, CX 22-31, CX 35-39, CX 46-59, CX 61, CX 66, and CX 69-70 into evidence.² (Hearing Transcript ("HT"), pp. 11-12.) CX 6-7, CX 32-34, CX 60, and CX 62-65 were excluded. (*Id.*) CX 9-10, CX 21, and CX 40-44 were withdrawn. (*Id.*) I deferred ruling on CX 45.³ (*Id.* at 13.) Respondent's Exhibits A-W were marked and admitted.⁴ (*Id.* at 12.) Later on

¹ Also on November 6, 2014, Complainant filed a response to Respondent's objections, though this was rendered moot by the November 4, 2014, pre-hearing conference.

² Complainant's Exhibits are generally bates stamped with numbering that restarts in each exhibit. When referring to page numbers in referencing these exhibits, I refer to these stamped numbers rather than any numbering otherwise internal to the exhibit itself.

³ Per the hearing transcript, CX 45 was admitted, (*see* HT, p. 12), but immediately thereafter Respondent pointed out that per the earlier teleconference I was going to delay ruling on CX 45, and so it should not have been listed. (HT, p. 13.) The transcript still lists CX 45 as admitted, but the issue is moot, given that Complainant eventually withdrew CX 45. It contains only pictures of the Power Desk office and would have no impact on my decision here.

⁴ Respondent's Exhibits are generally numbered in the same manner as Complainant's Exhibits, with Bates stamping that begins anew in each exhibit. I refer to these numbers rather than other numbering internal to an exhibit. RX X and RX Y are not paginated. RX X is only one page and I refer to RX Y as if it were paginated in the same manner as the other exhibits. Some of Respondent's Exhibits are composed of sub-exhibits delineated by numbers. I refer to these exhibits by letter and number, so, for example, RX D(1).

during the first day of the hearing I admitted RX X and RX Y. (*Id.* at 245, 256.) On November 13, 2014, I heard testimony from Robert Pitkanen, Lowell C. Alcock, Chad Lee Shubert, Robert West, Kim Hickman, Complainant, Brandon Marby, and Dixie Leah Brough. Joseph Heenan, Wes Anderson, and Beau D. Price testified on November 14, 2014. I also admitted CX 71 into evidence on the second day of the hearing. (*Id.* at 543.)

On November 14, 2014, I issued an order setting the briefing schedule agreed to at the end of the hearing, (*see id.* at 544), with post-hearing briefs due on January 30, 2015, and reply briefs due on February 27, 2015. On November 18, 2014, I ordered briefing on the admissibility of CX 45, which I had yet to rule on, but on December 2, 2014, Complainant withdrew CX 45. The record, then, consists of the case file, the hearing transcript, CX 1-5, CX 8, CX 11-20⁵, CX 22-31, CX 35-39, , CX 46-59, CX 61, CX 66, CX 69-71⁶, and RX A-Y.

Complainant's Post-Hearing Brief ("CPB") and Respondent's Post-Hearing Brief ("RPB") were both dated January 30, 2015, and were received on February 2, 2015. Complainant's Reply Brief ("CRB") was received on March 2, 2015. Respondent's Reply Brief ("RRB") was received on March 9, 2015. No further filings have been received.

II. Issues

As listed in my November 4, 2014 Order Summarizing Telephonic Pre-Hearing Conference, the issues to be decided in this case are:

1. Did Complainant engage in a protected activity?
2. Did Complainant engage in a protected activity in good faith?
3. Was Complainant's alleged protected activity a contributing factor to the adverse action taken against him?
4. Would Respondent have taken the same adverse action even if the Complainant had not engaged in his alleged protected activity?
5. If Respondent retaliated against Complainant for engaging in a protected activity, what remedy is the Complainant entitled to?

III. Stipulations

Prior to the hearing the parties stipulated to the following, as reflected in their Joint Stipulations of November 6, 2014:

Coverage

1. Respondent is a "railroad carrier engaged in interstate commerce," and as such is a covered employer under the FRSA.

⁵ In the tabs for CX 13 and CX 14, Complainant inserted only a red sheet of paper indicating that the exhibit was withdrawn. CX 13 is described as "BNSF 4/12/11 letter to Hofer advising no rules violation." CX 14 is described as "BNSF 4/12/11 letter to McLean advising no rules violation." The parties stipulated to the facts that could be established by the contents of these letters, namely, that neither employee was disciplined.

⁶ CX 69 ("Impeachment Exhibits") and CX 70 ("Other documents produced in discovery up through the date of hearing, not otherwise provided") are both empty.

2. Complainant was, for purposes of the events giving rise to his FRSA complaint, a covered employee within the meaning of 42 U.S.C. § 20109.

Timeliness and Procedural Context

3. Complainant filed an FRSA complaint with OSHA on June 13, 2011, alleging that he was terminated for reporting a workplace injury.
4. Complainant's FRSA claim regarding his dismissal, which occurred on May 25, 2011, is timely because he filed a complaint with OSHA within 180 days of his dismissal.
5. Following an investigation, the Regional Administrator for OSHA, Region VIII, dismissed the Complainant's complaint on April 22, 2014.
6. Complainant timely filed his objections and request for a hearing before an Administrative Law Judge on May 22, 2014.

Jurisdiction

7. Pursuant to 49 U.S.C. § 20109(d) and 29 C.F.R. § 1982.106, this Court has jurisdiction over Complainant's claim that he was dismissed for reporting a workplace injury.

Elements of 20109 Claim

8. In January 2008, BNSF revised its injury reporting policy. Under former policy, an employee who sustained minor aches and pains due to work related activity and did not request medical attention was not required to complete an injury report form. Under the revised policy, employees are required to complete an injury report form for any work related injury, including an injury where only first aid is administered and no medical treatment is required.
9. On February 21, 2011, Complainant was operating a piece of equipment known as a skid steer when he was involved in a collision with a locomotive.
10. On March 1, 2011, and March 7, 2011, Complainant was seen by Curtis Kostelecky, D.C.
11. On April 14, 2011, Complainant was seen by Bruce Richardson, M.D..
12. An investigation was held on March 30, 2011, to determine whether Complainant committed rule violations in connection with the February 21, 2011 incident.
13. An investigation was held on March 29, 2011, to determine whether the operators of the locomotive—Nick McLean and Joe Hofer—committed rule violations in connection with the February 21, 2011, incident.
14. On April 18, 2011, BNSF disciplined Complainant with a Level S 30 Day Record Suspension and placed Complainant on a one-year review period “for your failure to be alert and attentive while moving snow with John Deere skid steer between Diesel 4 and Diesel 5 striking the BNSF 5283 resulting in physical damage to both the John Deere and the BNSF 5283.”

15. The discipline issued to Complainant on April 18, 2011, rises to the level of an adverse employment action.
16. Mr. McLean and Mr. Hofer were not disciplined as a result of the February 21, 2011, incident, pursuant to a letter sent to each of them from Beau Price dated April 12, 2011.
17. On April 19, 2011, Complainant reported an injury stemming from the February 21, 2011, collision.
18. On May 11, 2011, a hearing was held to determine whether Complainant committed rule violations in the report of his injury.
19. On May 25, 2011, BNSF dismissed the Complainant “for failure to report a personal injury to the proper manager on February 21, 2011 at approximately 1220 hours...and your dishonesty and immoral conduct when you reported an injury on April 19, 2011, at approximately 0900 hours.”
20. Complainant’s dismissal on May 25, 2011, rises to the level of an adverse employment action.

Damages

21. Complainant received unemployment and disability benefits from the Railroad Retirement Board.
22. On May 7, 2014, pursuant to Public Law Board 7573, Complainant was reinstated but was not awarded lost wages and was placed on a twelve-month review period.
23. On June 2, 2014, Complainant retired from the service.

Undisputed Facts

24. Dates, Positions, Union Affiliation
 - a. BNSF hired Complainant on May 2, 1972.
 - b. Complainant is a member of an employee union, the National Conference of Firemen and Oilers.
 - c. At the time of his dismissal, Complainant was working as a laborer on BNSF’s Montana Division.
 - d. Complainant’s chain-of-command at the time of his dismissal, was as follows:
 - i. Complainant reported to several supervisors including General Foreman Paul McLeod.
 - ii. Mr. McLeod reported to Shop Superintendent Beau Price.
 - iii. Mr. Price reported to Assistant Vice President and Chief Mechanical Officer Brandon Mabry.

IV. Factual Background

A. *Complainant's Background and Employment with Respondent*

Complainant lives near Havre, Montana with his wife of 21 years, Dixie Brough. (HT, p. 147-48, 192.) They have two daughters who, at the time of the hearing, were 15 and 19 years old. (*Id.* at 148.) Complainant worked for BNSF for 39.5 years at the Havre Diesel Shop. (*Id.*) He held numerous positions, including laborer, sand crane operator, electrician helper, crane operator, hostler, and hostler helper.⁷ (*Id.*) BNSF records indicate that he was hired on May 2, 1972. His only discipline on record before this case was an unspecified suspension in April 1974. He suffered back pain in November 1980, an object in his eye in September 1982, and neck pain in 1984, none of which were reportable to the Federal Railroad Administration ("FRA"). (CX 26, p. 1; RX A, p. 1.) Between February 2009 and March 2011 Complainant passed all 12 operations tests he was given. (CX 27, p. 1.) Wes Anderson, a Mechanical Foreman-2 who would be Complainant's direct supervisor depending on the shift, testified that whenever he had a question and Complainant was available, he would ask Complainant, since he had spent his whole career at the Diesel Shop. (HT, p. 402.) On occasion Complainant worked overtime as a laborer and did jobs like clearing snow. (*Id.* at 148.)

Within BNSF, Complainant worked in the Mechanical Division. The division includes roughly 3,200 employees who work on the maintenance and repair of the locomotives and rolling stock. Brandon Marby was and is the Chief Mechanical Officer. (*Id.* at 268-69.) Complainant reported to front line supervisors, like Mr. Anderson, who would report to one of the general foreman at the shop, like Paul McLeod, who would report to the superintendent at his shop, Beau Price, who then reported to Mr. Mabry. (*Id.*; *see also id.* at 436-37.) There were between 150 and 180 employees at the Havre Diesel Shop, including about 20 supervisors. Complainant was one of about 30 to 40 laborers at the facility. (*Id.* at 436-37.)

The Havre Diesel Shop is a BNSF facility that services and repairs locomotives. Robert, Pitkanen, a machinist at the shop, described it as "a great big Jiffy Lube" for locomotives where they "change they oil, the filters, we service them, make sure they're functioning." (HT, pp. 29-30.) The shop has nine stalls. Two are on thru tracks and the other seven enter the shop only on tracks coming in from the west side of the facility. (*Id.* at 30.) On the north side of the shop there are 6 tracks: North-1, four service tracks, and then a sand track. Next are the 9 tracks that enter the diesel shop, with Stall 1 and Stall 2 being the through tracks on the north end of the

⁷ A hostler is someone who is operating a locomotive around the yard. A hostler-helper assists the hostler by being "the driver's eyes on the ground" looking for obstructions on the tracks and anything that the hostler can't see from the cab. Most of the time the hostler-helper is positioned on the steps and gives signals from there because it affords a better view of the path of the locomotive than from the cab, which is obstructed by the nose of the locomotive.⁷ (HT, p. 36-38, 160-61; *see also* CX 49, pp. 1-2 (picture of front of locomotive and position of hostler-helper); CX 66, pp. 3-4 (Mr. McLeod's testimony regarding the correct position of the hostler helper).) Complainant was entrusted by BNSF to train hostler helpers and hostlers. (HT, p. 159.) He explained that a hostler helper's primary job is "riding the point of movement" and make sure there are no obstacles in the pathway of the locomotives. (HT, pp. 159-60.)

shop and then stalls 3-9 coming in order from north to south, each entering only on the west side of the shop. (*Id.* at 31; CX 46, p. 1.)⁸

At the shop, the “Power Desk” foreman on duty is in charge of managing movements in the shop and on the service tracks, authorizes all movements, and assigns employees to the correct work. (HT, pp. 401-02.) The main part of the Power Desk room is about 12x12 but part of it extends down to a printer and restroom. After the safety briefing and stretching, employees who will be working in the yard gather in the Power Desk room for an additional briefing on what is going on in the yard and shop that day and anything else they should watch out for. The Power Desk is equipped with two computers, several phones, and radio communications equipment. Working at the desk is similar in function to aircraft control. (*Id.* at 416-18.)

B. Respondent’s Rules and Policies

BNSF has extensive sets of rules that employees are required to follow. Several are relevant to this case. Mechanical Safety Rule S-1.2.3 requires an employee to “[a]ssure you are alert and attentive when performing duties.” (CX 3, p. 3; RX D(4), p. 1.) Mechanical Safety Rule S-10.2 governs moving and spotting locomotives and includes provisions that when moving locomotives workers are to “[m]ake sure all personnel are clear of movement,” “[p]ersonnel must protect the point of movement,” and “[g]ive and receive the proper signal before moving.”⁹ (CX 3, p. 21; RX D(14), p. 1.)

Mechanical Safety Rule S-28.2.5(A), “Reporting – Injuries to Employees,” Provides that:

[a]ll cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed. If after the initial report of an injury, employees seek medical attention for a work-related injury, they must contact the appropriate supervisor and update their status. A personal injury that occurs while off duty that will in any way affect employee performance of duties must be reported to the proper manager as soon as possible. The injured employee must also complete the prescribed written form before returning to service.

(CX 23, p. 7; RX H(4), p. 1.) In addition, Rule 33 of the agreement between BNSF and Complainant’s union, the National Conference of Firemen and Oilers, requires that “[e]mployees injured while at work will be required to make a written report of the circumstances of the accident just as soon as they are able to do so after receiving medical attention.” (CX 23, p. 10; RX H(6), p. 1.) Neither the BNSF rule nor the collective bargaining agreement defines an injury.

In January 2008, BNSF revised its injury reporting policy. Under former policy, an employee who sustained minor aches and pains due to work related activity and did not request medical attention was not required to complete an injury report form. In 2008, BNSF altered the

⁸ CX 46 is a map of the tracks surrounding the Diesel Shop. CX 47 and CX 48 contain the same map, except that Mr. McLeod and Mr. Anderson, respectively, made markings on it indicating where the accident in question occurred.

⁹ Failure of a hostler helper to protect the point of movement and make sure the path of the locomotive is clear would be a “Seven Safety Absolute” violation and would be subject to “Level S” discipline. (CX 66, p. 4.)

rule so that all injuries, not just injuries that resulted in first aid treatment, had to be reported. (CX 66, p. 19.) The revised policy is stated in BNSF's 2008 Havre Diesel Shop Mechanical Safety Action Plan, which contains a section on accidents and injuries. (See CX 55.) The subsection "Reporting the injury," located in subpart IV entitled "Accident and Injury Handling," states, in part: "[w]hen an employee reports ANY injury, including an injury where only first aid is administered or no medical treatment is required, you must complete a Web-based Supervisor Report of Injury. The employee must also complete an Employee Personal Injury/Occupational Illness Report (form 51662) for any type of injury." It allows that an employee need not be required to fill out a form when in immediate need of medical care. Supervisors are also directed to accept written or verbal reports of injury. All injuries are to be reported, but an employee does not have to fill out the written employee injury report form unless medical attention is sought. An employee is given a 72 hour window to report aches and pains that result from routine work so long as they notify a supervisor before seeking medical attention. The document does not define an injury. (CX 23, pp. 8-9, 12-17; CX 55, pp. 14-16; RX H(5), pp. 1-2; RX H(9), pp. 1-2; see also CX 54, pp. 14-15 (2007 correlate).)

Mr. Marby testified that the purpose of these rules is safety, so BNSF can fix any problems and notice any trends, as well as so the railroad can make its required reports. (HT, p. 281.) He admitted, however, that the required reports to the FRA must come within 30 days of the date they receive the injury report. (*Id.* at 321-22.) Supervisors are trained to be proactive in obtaining injury reports and to accept late reports of injury. (*Id.* at 318-20.) But if an employee responds to queries by indicating that he or she does not wish to report an injury at that time, the supervisors press no further. (*Id.* at 325.) In 2011, 14 injuries were reported in the Havre diesel shop and only one, Complainant's, resulted in discipline. (*Id.*) BNSF has a "No Retaliation Policy" that forbids managers from retaliating against injury reports. (*Id.* at 304-05.) Mr. Anderson, a line supervisor, testified that he would report an injury if he believed one had occurred since if he failed to do so he could be terminated from employment. (*Id.* at 418-19.)

Mr. Pitkanen testified that he has reported a couple of minor injuries to BNSF in his time with the railroad and was never disciplined, though he was "yelled at a little bit." (*Id.* at 58.) That was from a prior general foreman. In that instance Mr. Pitkanen had attempted to wait and not go to the hospital, but the swelling wouldn't go down so he made a report. He gave the foreman credit, however, because he came to the hospital and apologized. (*Id.* at 61.) In his experience, management at the Diesel Shop is not happy about injury reports. (*Id.* at 62.) This was based, however, on that particular general foreman, who was not one of the managers involved in this case. (*Id.* at 65-66.) Laborer Kim Hickman testified that he was afraid for his job when he heard that Complainant was terminated after reporting an injury. (*Id.* at 130.) In his experience, management overreacted to injuries. He recalled that he had once hit his head by accident and was forced to report it, after which management accused him of hitting his head on purpose and attempted to discipline him for being at fault. (*Id.* at 132-34.)

Mechanical Safety Rule S-28.6 is entitled "Conduct" and states:

Employees must not be: (1) Careless of the safety of themselves or others, (2) Negligent, (3) Insubordinate, (4) Dishonest, (5) Immoral, (6) Quarrelsome, or (7) Discourteous. Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and

must be reported. Indifference to duty or to the performance of duty will not be tolerated.

(CX 23, pp. 18, 21; RX H(11), p. 1.) According to Mr. Marby, BNSF has zero-tolerance for conduct rule violations involving dishonesty. (HT, p. 271.)

The 2011 Code of Conduct for BNSF requires all employees to “report actual or apparent violations of the law, this Code of Conduct, and any BNSF policy. Employees are also required to report suspected or known instances of retaliation, fraud, theft, misuse of Company assets, conflicts of interest, or issues involving questionable accounting practices or internal accounting controls.” (RX O, p. 2.) It also prohibits retaliation for reporting violations of law, the Code of Conduct, or any BNSF policy and for participating in an investigation. (RX P, p. 2.) In 2011, the Mechanical organization dismissed 55 employees, 21 for conduct violations. Conduct violations are stand-alone causes for dismissal. (HT, pp. 301.)

BNSF established the Policy for Employee Performance Accountability (“PEPA”), which became effective March 1, 2011. (CX 52, p. 2; RX N, p. 2; *see also* RX T (prior PEPA policy).) This progressive disciplinary policy classifies employee violations into three categories: standard violations, serious violations, and stand-alone dismissible violations. Standard violations are those that do not “subject an employee or others to potentially serious injury or fatality” and do not meet other specified criteria. One standard violations results in a reprimand with a review period of a year, with additional violations leading to suspensions and dismissal. Serious violations (Level-S violations) are defined by a non-exhaustive list and results in a 30 day suspension plus 3 year review period, subject to a reduction to only a year review period if the employee has at least a five year good work record and has been reportable-injury and discipline free in the five years before the infraction. Two Level-S violations are required before an employee is dismissed. Stand-alone dismissible offenses are defined by a non-exhaustive list and may result in immediate dismissal from service. (CX 52, pp. 3-4 RX N, pp.3-4; *see also* HT, pp. 302, 362-63.) Appendix A of PEPA defines serious violations as a violation “of any work procedure that is designed to protect employees, the public and/or others from potentially serious injury(ies) and fatality(ies).” It lists “late reporting of accident or injury” as a serious violation. (CX 52, p. 5; RX N, p. 5.) Appendix B lists “dishonesty about any job-related subject including, but not limited to, falsification or misrepresentation of an injury...” as well as insubordination and failure to report accident or injury as a standalone dismissible violation. (CX 52, p. 6; RX N, p. 6.) The earlier policy, in place before March 1, 2011, and the later policy both provide that there would be no discipline for late reporting of a muscular-skeletal injury so long as it was reported within 72 hours of the probable triggering event and the report was made before medical attention was sought. The policy does not specify that this safe harbor only applies when the injury is the result of “routine” work. (CX 52, p. 5; RX N, p. 5; RX T, p. 2.)

The rules for investigations are specified in the collective bargaining agreement between BNSF and the unions. For Complainant’s union, the agreement requires a “fair and impartial investigation” and sets short deadlines for holding hearings and making decisions. At least 5 days’ notice must be given to the employee and union representative. Employees may be held out of service when there are allegations of serious rules infractions, though the employee must be told why he or she is being held out of service and the hearings must be expedited. (RX M, p. 2.) Charges are dismissed if the timeline is not followed, but by mutual agreement hearings may

be postponed. (*Id.* at 3.) Settlement via waiver is available. (*Id.*) The discipline is set aside “[i]f it is subsequently found that an employee has been unjustly disciplined or dismissed.” (*Id.*)

Whenever discipline results in termination or a suspension over 30 days, BNSF’s Labor Relations department reviews the recommendation before the discipline is issued. At the relevant period in this case, the review was conducted by Joseph Heenan, who was the Director of Employee Performance. This is done to ensure consistency and compliance with PEPA. Mr. Heenan would review the transcript, the exhibits with it, as well as the rules and PEPA, looking for whether or not the charges could survive substantial evidence review as well as to identify any aggravating or mitigating circumstances and procedural irregularities. (HT, pp. 349-51.) BNSF uses the substantial evidence standard in determining when discipline is warranted because it is what is used by arbitrators on appeal. (*Id.* at 351.) Mr. Heenan testified that investigatory hearings are supposed to be fair and impartial, but only meant by this that the conducting officer makes sure that the contractual due process rights are adhered to. Conducting officers often know about the case, have talked to witnesses, and have preconceived ideas about the outcome, though they should not decide the case until all of the evidence and defenses are presented. (*Id.* at 386-87.) In pursuing charges and making determinations, BNSF supervisors are supposed to look at situations objectively. (*Id.* at 388; *see also id.* at 276-77.)

Mr. Marby testified that employees are trained in the rules, can access them online, and are informed when there are rule changes. (HT, pp. 269-70.) BNSF has a Safety Action Plan and “rollout” event/presentation that, among other things, provides guidelines for reporting injuries. (*See* CX 55, pp. 14-16; *see also* CX 53 (2008 rollout presentation); CX 54 (2007 Safety Action Plan); CX 55 (2008 Safety Action Plan); CX 66, pp. 37-41 (portions of 2011 Safety Action Plan); CX 66, pp. 19-20 (description of the rollout event).) The 2008 rollout presentation stresses management’s goal of having an injury-free facility. (CX 53, p. 3.) BNSF tests its employees periodically on the Mechanical Safety Rules. (HT, p. 233.) According to the training roster, Complainant participated in the Safety Action Plan Rollout Training held on February 17, 2011. (RX H(7); HT, p. 233.) Complainant was also given a copy of the Safety Action Plan, which includes the rules outlined above. (HT, p. 234.) BNSF records indicate that Complainant was trained in “Safety Rules Review/Mechanical” on February 22, 2010, and in the “Safety Action Plan Roll-Out” on January 15, 2010 and February 17, 2011. (CX 23, pp. 24-25; CX 25, pp. 3-4; RX A, pp. 3-4; RX H(7), p. 1; RX H(8), pp. 3-4.)

C. Accident of February 21, 2011

On February 21, 2011, Complainant arrived at work before his normal shift to work overtime as a laborer. (HT, p. 163.) He was assigned by floor foreman Mike Palmer to remove snow around the diesel shop. (*Id.* at 150.) To do so, he would use whatever was on hand (e.g. shovel, blower) that best helped him do the job. He used a John Deere skid-steer with a rotating-drum sweeper attachment to clear pathways, parking lots, walkways, and other areas around the shop.¹⁰ This included areas between the tracks. (*Id.* at 149-150) The skid steer had an enclosed cab, and its engine was behind the operator. (*Id.* at 154.) It did not have a radio. (*Id.* at 151.)

¹⁰ RX D(13), RX D(15), and CX 3, pp. 18-2 contain pictures of and information about the skid steer and sweeper attachment.

As Complainant was clearing snow in the skid-steer, he arrived at the south end of the west side of the diesel shop, where the tracks come in and out of the shop. (*Id.* at 150.) In this area he would clear walkways up to the blue flag protection at the west end of the tracks. (*Id.* at 151.) He noticed movement on track 6. (*Id.*) Per standard procedure, he stopped and acknowledged the hostler helper on that track, who then waved him through to proceed. (*Id.*) He travelled north past tracks 5 and 6 to clear snow between tracks 4 and 5. (*Id.* at 151-52.) He saw two stationary locomotives outside door 4 of the shop. (*Id.*) He did not see anyone inside the locomotives or have information from supervisors that anyone was inside. (*Id.*)

Mr. Anderson was the Power Desk foreman on duty on February 21, 2011. (*Id.* at 403.) Shortly after 12:00 pm, Mr. Anderson authorized Mr. Hofer and Mr. McLean to move two locomotives on track 4. (*Id.*) Mr. Anderson was aware that Complainant was going to be clearing snow somewhere around the shop, but unaware that Complainant would be following a track. (*Id.* at 404-05.) Complainant did not notify anyone that he would be in that specific area and hadn't been directed to clear snow at that exact location. (*Id.* at 197-98.) Since the skid-steer was not equipped with a radio, there was no way for Mr. Anderson to communicate with Complainant. Sweeping snow in this manner was something that was regularly done at the shop, but if Mr. Anderson had known exactly where Complainant was working, he would have taken steps to protect Complainant. (*Id.* at 421-22.)

Complainant cleared a pathway of snow while moving west, parallel to the locomotives, which were located north of his skid steer. He continued driving alongside the locomotives until he began to pass the front end of the lead locomotive. (*Id.* at 153.) He claimed that he looked back and saw that they were still parked and stationary. (*Id.* at 153-54.) He continued sweeping snow until he thought he had cleared enough walkway, somewhere between 20 and 40 feet in front of where the locomotives had been. He then began to turn the skid steer around, but as he was executing the turn he was struck from behind by the two locomotives. (*Id.* at 154-55.) He did not hear a bell or any other warning. He was inside the enclosed skid steer and wearing hearing protection, as required. (*Id.* at 155.) He admitted that he had "fouled" the tracks, which means that he had come within the area that could be struck by a train that was moving along the tracks. Complainant explained, however, that at the diesel shop they constantly fouled the tracks to do their work. (*Id.* at 155-56.) Though the flags were down, indicating that there could be movement, he didn't see anyone in or around the locomotives and believed them to be idle. (*Id.* at 198-200.) During the collision, the locomotive rolled the skid steer around 180 degrees, wedged it between the tracks, and popped the two right tires. (*Id.* at 155.) Complainant recollected that the locomotive "kind of bounced [him] along" and "acted like it wanted to tip [the skid steer] over." (*Id.*)

Mr. Pitkanen witnessed the accident. (*See id.* at 29; CX 35, p. 1 (statement given to Mr. Palmer).) He and his electrician were going to get a locomotive to back it into stall 6 so that it could be used to move the locomotive they had been working on back out of the shop. (HT, p. 31.) They encountered Complainant on their way to the locomotive. He was moving about 2 miles per hour, but stopped and then moved on after they motioned for him to do so. (*Id.* at 31, 46.) Complainant was alert and attentive. (*Id.* at 32.) Mr. Pitkanen and his electrician moved their locomotive into the shop and while the electrician was working to prepare the next movement of both locomotives out of the shop Mr. Pitkanen saw Complainant working alongside track 4. (*Id.*) Mr. Pitkanen was about 60-70 feet from Complainant, in the cab of the

locomotive he had just moved, on track 6 just outside the diesel shop. (*Id.* at 32-33.) Track 5 was clear but there were two locomotives on track 4. Mr. Pitkanen couldn't see anybody, but knew that there were people working on those locomotives because they were on the radio. (*Id.* at 33.) Complainant was sweeping alongside of track 4 when the two locomotives started to move and hit the back of the skid steer. They weren't moving fast, but when they hit the skid-steer they "actually picked [it] up, slammed it, picked it up, slammed it, picked it up one more time and brought it back down." (*Id.* at 34.) The locomotives had not been moving when Complainant passed them but caught up to him from behind. (*Id.* at 34-35.) Mr. Pitkanen couldn't leave his locomotive since it was live, but watched as others went to help Complainant. (*Id.* at 35.) Later he asked Complainant how he was doing and Complainant told him that he was sore. (*Id.* at 35-36.) Based on his experience, he thought a correctly positioned hostler-helper would have been able to see Complainant's skid-steer and would have given the immediate stop sign. (*Id.* at 39-40.) Though he was somewhat unsure of the exact timing, he recalled that when Complainant passed the locomotives, "they weren't moving, they hit him." (*Id.* at 49.) Complainant might have slowed down to make his turn before the collision, but this wasn't unsafe if Complainant didn't know that the locomotives behind him had started moving. (*Id.* at 51.) They foul tracks all the time at the diesel shop. (*Id.*)

Mr. Hofer, the hostler-helper on the locomotive, was first to the scene. (*Id.* at 157.) Complainant was able to get out of the cab of the skid-steer and was quite "shook up." Mr. Hofer asked Complainant if he was okay, and Complainant responded affirmatively. (*Id.* at 157-58.) Others, including Paul McLeod and Mr. Anderson came to the scene and asked Complainant how he was doing. He didn't remember everyone who was there and thought he told everyone that he was okay, but was somewhat in shock and his memory was blurry. He didn't recall asking for medical attention. (*Id.* at 158.) Complainant believed that the accident was a clear failure by the hostler-helper to keep track of the point of movement insofar as the skid-steer would have been easily visible to a correctly positioned hostler-helper. (*Id.* at 161.)

Mr. Anderson learned about the accident when Mr. Hofer contacted him over the radio. (*Id.* at 407.) He immediately went to the scene and asked Complainant if he needed medical attention. Complainant said that he was fine and was not bleeding or disoriented. Mr. Anderson then checked on Mr. Hofer. Mr. Anderson informed Mr. McLeod, the general foreman, of the accident. Mr. McLeod drove to the shop and took over the scene. Mr. Anderson gave a verbal statement to Mr. McLeod and again checked with Complainant to see if he was okay. Mr. McLeod investigated the scene, took photographs and instructed Mr. Anderson to take statements from Mr. Hofer, Mr. McLain, and Complainant. (*Id.* at 407-09; CX 66, pp. 1-2) Complainant and the others were escorted to the office for statements and urinalysis testing. (HT, p. 162.) While in BNSF offices, Complainant explained that he was struck from behind while clearing snow. (*Id.*) He also provided a short, handwritten statement regarding the incident. The statement reads that "at approximately 12:30 p.m. Feb 21, 2011 while operating John Deere skid steer with broom attachment I was struck from behind with locomotive #4283. I was sweeping west of shop moving west alongside Diesel 4 track." (CX 36, p. 1; RX D(5), p. 1; *see also* CX 3, p. 4.) Mr. Pitkanen, Mr. McLean, and Mr. Hofer also wrote statements describing the collision. (CX 66, pp. 2, 26-28; CX 35; RX D(6)-(8); *see also* CX 3, pp. 5-7.) Mr. Anderson testified that there was no question that the skid-steer was hit from behind and that it would be expected that an injury might result from the accident. (HT, pp. 421-23.)

Beau Price, the Shop Superintendent and highest-ranking BNSF official at the shop, was not at work on February 21, 2011. He was informed of the accident by Mr. McLeod and came to understand that a skid-steer had “run afoul” of the track and struck a locomotive, causing damage to both the skid-steer and locomotive. (*Id.* at 438-39.) After ascertaining that there were no injuries, he went to the scene and talked to everyone. Complainant appeared oriented, so Mr. Price permitted him to work the rest of his shift. Mr. Price stayed until they moved the skid-steer, decided on repairs, and the situation was resolved. (*Id.* at 439-41.) Complainant did not tell Mr. Price that he was injured that day or at any other point thereafter. (*Id.* at 441-42.)

D. Events to the First Investigatory Hearings

After the collision and subsequent interviews, Complainant returned to work and completed his regular shift, which started at 3:00 pm and ended at 11:00 pm. (HT, p. 163.) He began his shift in the Power Desk room for briefing, where Mr. Anderson was also present. (*Id.*) At the beginning of each shift, and after safety briefing in the lunchroom, those assigned to work in the yard and on the service track meet in the Power Desk office for a line-up briefing about planned movements and activities around the facility. (*Id.* at 409.) On the day of the accident, the safety briefing included a statement about the collision that happened earlier in the day involving Complainant. (*Id.* at 410.) Mr. Anderson testified that he explained the incident and then commented that whatever had happened to the locomotive or skid steer was fine so long as Complainant was okay. According to Mr. Anderson, Complainant responded, “Oh I don’t know about that” while placing his hand on his neck, and then proceeded to laugh. (*Id.*) Mr. Anderson testified that he thereafter asked if Complainant was okay various times that day and he responded that he was fine. (*Id.* at 411.) Mr. Anderson did not report this to any of his superiors because he interpreted Complainant’s statement and gesture as a joke. (*Id.* at 411-12.) Mr. Anderson admitted, however, that Complainant was a happy-go-lucky kind of guy who laughed and smiled a lot. (*Id.* at 424.) He did not believe that Complainant was reporting an injury and so did not follow the protocol for injury reports. He didn’t inquire any further and Complainant never approached him to make an injury report. (*Id.* at 412-13.)

Complainant testified that Mr. Anderson asked, later on the day of the collision, how he was doing, and Complainant responded that he was “a little stiff and sore.” (*Id.* at 163.) Complainant admitted that he may have smirked or laughed when answering Mr. Anderson’s question, but he stated that was not joking while giving his response. (*Id.*) At that point, Complainant didn’t believe that he was seriously injured. (*Id.*) Over the next week he continued to feel stiff and sore and told those who asked him about it. He felt like he was getting worse, “slowly but surely.” (*Id.*) Complainant testified that he again told Mr. Anderson about his physical condition on February 28, 2011, though later he admitted that he was only absolutely sure about the first time. (*Id.* at 164, 210-11.) Complainant stated he was “a little stiff and sore” and that his physical condition “seems to be progressing” whenever he was asked. (*Id.* at 165.) He didn’t initiate a reporting process because he was hoping it would all just go away with time. (*Id.* at 212-13.) He was never asked to fill out a report. Neither the accident nor his symptoms were a secret. If someone asked how he was feeling, he told them. (*Id.* at 165-66, 216-17.)

Lowell C. Alcock, a machinist and co-worker of Complainant, was at the briefing in the Power Desk office after the accident. Mr. Anderson stated that there had been a collision and then Complainant expressed that he was stiff and sore and put his hand up to his neck. (HT, pp.

70-71.) Complainant was only 7 feet from Mr. Anderson. Complainant smiled when he made his report, but Complainant always kind of smiled. Mr. Alcock didn't think there was any joking since the accident was a serious event. Mr. Anderson did not respond. (*Id.* at 71-72.) Mr. Alcock also recalled other statements from Complainant about stiffness and soreness that would have been in the presence of BNSF managers, but couldn't remember specifics related to them. (*Id.* at 73-74, 19-80.) Mr. Alcock didn't think the exchange was important, but believed that Complainant was being serious. (*Id.* at 77-78.) Complainant said that his neck was stiff and sore, not that he was injured. (*Id.* at 85.)¹¹

Mr. Hickman learned about the accident on February 21st when he encountered Mr. Anderson before his shift started and noticed that he wasn't doing very well. Mr. Anderson explained that there had been an accident. (*Id.* at 121-22.) During the Power Desk briefing that day, Mr. Hickman heard Complainant tell Mr. Anderson that his back and neck seemed "a little stiff." (*Id.* at 123; CX 32.) Though Complainant smiled, Mr. Hickman did not believe he was joking. (HT, pp. 123-24, 137.) Mr. Hickman also remembered that Complainant described his physical condition on February 28, 2011, in the Power Desk room after he asked him how he was doing, but he couldn't remember which supervisor was present that day. (*Id.* at 124-25, CX 32.)

Stationery Engineer Chad Lee Shubert heard Complainant tell Mr. Hickman that his neck was sore and stiff on February 28, 2011, during the briefing at the beginning of a shift. (HT, p. 90; CX 33.) Mr. Shubert testified that Mr. Anderson was present at the meeting and would have heard Complainant since he was approximately four feet away. (HT, pp. 90-91.) Mr. Shubert believed he would probably have been at the February 21st briefing, but couldn't recall if Complainant had mentioned being stiff and sore at that time.¹² (*Id.* at 95-96.)

On February 27, 2011, and February 28, 2011, Machinist Robert West heard Complainant comment that he was not feeling well and that his back was sore. (*Id.* at 106.) Mr. West heard this in the Power Desk office, where Mr. Anderson was also present. He believed Mr. Anderson heard Complainant's statements regarding his physical condition. (*Id.* at 106-08.) Mr. West did not think Complainant was joking when talking about his condition. (*Id.* at 107-08.) He didn't think he needed to report anything, despite rules requiring BNSF employees to report injuries of other employees, since Mr. Anderson was in the room as well and heard the comments so if any further action needed to be taken the foreman would be the one to initiate it. (*Id.* at 117-18.)

Mr. Anderson denied hearing Complainant mention that he was stiff and sore. (*Id.* at 416.) Before briefings began, he would have been focused on his work at the Power Desk, not the conversations between the employees who were gathering. (*Id.* at 418-19.) He never inquired into Complainant's condition again and didn't instruct him to keep BNSF informed or to file an injury report if anything changed, though he was aware that individuals who suffer rear-end collisions sometimes don't develop symptoms immediately. (*Id.* at 425-26, 434.)

¹¹ Mr. Alcock also provided Complainant with a statement indicating that he remembered Complainant telling Mr. Anderson that he had neck pain after the accident, either on the 22nd or 23rd in the power desk room at the start of their shift. (CX 31, p. 1.)

¹² Mr. Shubert provided a written statement containing this same information but did not give copies of the statement to anyone other than Complainant or his union representative. (HT, p. 99, CX 33.)

Complainant's wife, Dixie Brough, recalled that when she inquired into his condition when she learned about the accident that evening he told her that he was "a little roughed up" and that his "neck and back are a little sore, but that should get better." (*Id.* at 327.) Over the next few days he was sore and upset over what had happened. (*Id.* at 327-28.) Complainant recalled that he was just hoping his condition would get better and heal with time. He received two chiropractic treatments from Curtis Kostelecky, on March 1st and March 7, 2011. (*Id.* at 166; CX 30, pp. 3-4.) He did not inform his supervisors that he planned to visit a chiropractor. (HT, p. 166, 213.) He hoped the chiropractor would "just snap everything back into shape" and he would feel better and move on. (*Id.*) Ms. Brough remembered that after visiting the chiropractor, Complainant was still sore but thought that it would improve with time. He had been to the chiropractor in the past with soreness. (*Id.* at 327-28.)

The accident was a hot topic at the Diesel Shop and in the Power Desk briefings for a period of time. (*Id.* at 425-27.) It was Mr. McLeod's task, as the general foreman, to conduct a fact-finding investigation into the incident. (*Id.* at 443.) Mr. McLeod prepared an "On Track Equipment Accident/Incident Report" on the day of the collision. (CX 8; RX B.) In preparing this report, he investigated the scene, reviewed the photographs and employee statements, and talked with Mr. Price. Mr. McLeod would also have reviewed the personnel files of the involved employees. (CX 66, pp. 2-3.) At the time, Mr. Hofer was on probation for a prior Level S infraction in which he had moved a locomotive without a grounds person. Another Level S infraction could have led to Mr. Hofer's termination. (*Id.*) The report categorizes the collision as an "obstruction incident." (CX 8, p. 2; RX B, p. 2.) The incident description is as follows: "Diesel-4 track was fouled by the John Deere 320D skid steer, while employee was clearing snow and struck by BNSF 5283 causing \$1,557.78 in damage to the John Deere and \$1,340.73 in damage to the BNSF 5283. No personal injuries were reported at the time of the incident." (CX 8, p. 4; RX B, p. 4; *see also* CX 3, pp. 13-15 (receipts for repairs); CX 11, pp. 1-4 (photographs after accident); RX D(10) (receipts); RX D(9) (photographs); RX E (color photographs).)¹³

As a potential human factor in the accident, Mr. McLeod identified Complainant's being in the path of the locomotive. (CX 8, p. 7; RX B, p. 7.) After discussing the incident with Mr. McLeod, Mr. Price decided to proceed with investigatory hearings for all three employees involved in the accident. Mr. Price would be the conducting officer for the investigations because he was the only manager on-site trained properly in conducting the hearings, though at that point he had conducted less than 10 hearings. (HT, pp. 445-48.) He decided to do two separate hearings because two different work groups were involved. (*Id.* at 449.) No formal investigation was conducted of Mr. Anderson—Mr. McLeod talked with him informally about what had occurred, but did not take a written statement or pursue matters further. (CX 66, p. 5.) Mr. McLeod recalled that the lesson drawn from the investigation was that the accident was due to a fouling of the track, though he admitted that workers at the shop standardly foul the track in the course of their duties and do not violate a rule so long as they are alert and attentive. Mr. McLeod could recall no procedures or protections for employees operating the skid-steer. (*Id.* at 6-7, 22-23) In his view, it wasn't wise for Complainant to be sweeping in that area because it was a "pinch point" where the two tracks came together and snow would have better been removed there with a different bucket attachment. (*Id.* at 8.) Mr. McLeod simply believed that

¹³ Interestingly, the portion of the report addressing Complainant indicates, however, that he suffered a non-reportable injury. (CX 8, p. 7; RX B, p. 7.)

Complainant shouldn't have been where he was, though he admitted that if there hadn't been an accident, there would have been no rules violation by Complainant. (*Id.* at 9.)

Mr. Hofer and Mr. McLean each received a Notice of Investigation from BNSF on March 5, 2011. The notice informed Mr. Hofer and Mr. McLean that BNSF was charging them with violating Mechanical Safety Rule S-1.2.3 for failing to be alert while operating BNSF 5283 on February 21, 2011. (CX 4, p. 1; CX 5, p. 1.) Complainant received a Notice of Investigation dated March 9, 2011, signed by Ray Inhofer, the Director of Administration for the Montana division of BNSF. (HT, p. 167; CX 1, p. 1; RX D(2), p. 1; *see also* CX 3, p. 1.) Mr. Inhofer had no role in the decision to investigate Complainant or the disciplinary process—Mr. McLeod and Mr. Price made the determinations. (CX 66, pp. 7-8.) Complainant's hearing was scheduled for March 22, 2011, to investigate whether he violated Mechanical Safety Rule S-1.2.3 by failing to be alert and attentive while driving the skid-steer and striking the locomotive. (CX 1, p. 1; RX D(2), p. 1.) The notices were phrased differently in terms of who was alleged to have not been alert and attentive and whether the locomotive and struck the skid-steer or the skid-steer had struck the locomotive. (HT, pp. 504-05.) Complainant was upset and found the charge unusual because he had been alert and attentive and believed that the collision was due to negligence by the hostler helper. (*Id.* at 167, 329.) On March 17, 2011, the investigation of Complainant was postponed to March 30, 2011. (CX 3, p. 2; RX D(3), p. 1.)

E. Investigatory Hearing and First Discipline of Complainant

Complainant's investigatory hearing was held on March 30, 2011, at the Havre Diesel Shop. (CX 2, p. 1; *see also* HT 168-74 (Complainant's recollection of the hearing).)¹⁴ The purpose was to determine if "employee Steve Brough failed to be alert and attentive while moving snow resulting in contact between a John Deere skid steer and locomotive BNSF 5283 resulting in damage to both pieces of equipment." (RX D(1).) Mr. Price, the conducting officer, claimed that he gave Complainant a fair and impartial hearing and the opportunity to present witnesses and evidence.¹⁵ (HT, pp. 452-53.)

Mr. McLeod testified first about his investigation and determination that Complainant was at fault because he was in foul of the track, though he allowed that the damage was to the rear of the skid steer. (*See* CX 2, pp. 10-22.) Complainant raised the point that he was in front of the locomotive and so should have been seen, but Mr. Price responded by ascertaining testimony that the locomotive could not have struck anything not in its path, stressing that Complainant had to have fouled the track. (*Id.* at 23-26.) Mr. Pitkanen testified to his observation of the accident, stating that Complainant was alert and attentive and was ahead of the locomotives when they started moving. He also stated that a properly positioned hostler could

¹⁴ The "Investigation Data Worksheet" containing the hearing transcript is contained in both CX 2 and RX C. For ease of reference, I cite only to CX 2. The pagination is the same, except that the bates stamped numbers in RX C are one less than the bates stamped numbers in CX 2.

¹⁵ At the start of the hearing Complainant objected to the presence and potential testimony of Mr. McLeod and Mr. Anderson on the grounds that he hadn't been informed that they would be testifying and so could not prepare. Mr. Price overruled the objection on the grounds that BNSF routinely has its supervisors present and testifying at hearings without informing the employees that they will testify. (CX 2, p. 5.) A later objection that the investigatory evidence had not been provided to Complainant was also rejected on the grounds that BNSF generally withholds its evidence from the accused employee. (*Id.* at 13-14.)

not have seen the skid steer but that a properly placed hostler helper would have seen it.¹⁶ (*See id.* at 34-51.) Next Mr. Anderson testified about authorizing the movement of the locomotives and claimed that anyone who was going to foul the track should have notified the Power Desk foreman. He admitted that the hostler helper was responsible for making sure the point of movement was clear, but Mr. Price then interjected to make the point that the locomotives couldn't stop as easily as a skid-steer. Mr. Anderson admitted that he was informed that Complainant was sweeping snow, that the skid-steer was not equipped with a radio, and that there were no rules or policies restricting where the skid-steer could be driven. In response, Mr. Price elicited testimony that it was standard for them not to equip the skid-steer with a radio, that it would be the operator's fault if the skid-steer hit the side of the locomotive, that for the locomotive to hit something, it would have to be in the path of the locomotive, and that there were a lot of other areas for Complainant to be sweeping snow. (*See id.* at 52-79.)

Mr. Hofer then testified about his role in the accident. He initially seemed to admit that he had seen the skid-steer near track 6, but after Mr. Price suggested that he clarify this testimony, corrected himself and said that he only had learned later that the skid-steer was in that location. He stated that he could not have seen the skid-steer even if it was in front of the locomotive because it was on the other side and he was focused further down the track on the switches ahead. Though he did not witness the accident, Mr. Hofer claimed that the skid-steer was struck on the right front tire and then whipped around, and that was why most of the damage was in the rear. Mr. Price then rehabilitated him by stressing that Complainant had not personally told him that he would be moving snow and that he could not have seen the skid-steer. Mr. Price then explicated Mr. Hofer's theory of the damage for the record. Mr. Price would only permit Complainant to ask Mr. Hofer whether he had past rules violations, pre-emptively rejecting any other questioning of Mr. Hofer's safety history. (*See id.* at 79-109.) Mr. McLean then testified, stating that he was not informed that Complainant was sweeping snow and relied on the hostler helper to direct the movement of the locomotives. (*See id.* at 110-22.)

The cab camera video from the locomotive was located and Mr. McLeod testified that the skid-steer was not visible from the camera location initially and that the bell was operational. Mr. Price then described the video and asked Mr. McLeod to agree that Complainant should have seen that the locomotive was moving at some point. Mr. McLeod duly agreed. After some questioning by Mr. Kuntz, Mr. McLeod admitted that the hostler helper "might probably should have seen" the skid-steer. He also agreed that the skid-steer was struck from behind. (*See id.* at 123-31; *see also* CX 66, pp. 12-13, 21.) Mr. Hofer was recalled and after viewing the video stated that he had not seen the skid-steer because his focus was on the switches ahead. Mr. Price then asserted that the video showed that the locomotive was moving when the skid-steer overtook it and got Mr. Hofer to agree to his appraisal. (CX 2, p. 133-41.)

Complainant testified last. In his questioning, Mr. Price focused on Complainant's responsibility for the operation of the skid-steer and having fouled the track without informing Mr. Hofer, Mr. McLean, or Mr. Anderson. Mr. Kuntz elicited testimony that there was no practice of informing the Power Desk foreman as to exactly where snow was being swept, the

¹⁶ Complainant moved for dismissal on the grounds that the eyewitness established that he was alert and attentive and in front of the locomotives. He argued that the investigative notice charged him with striking the locomotive but it was undisputed that the locomotive struck him. Mr. Price summarily rejected the request. (*Id.* at 51.-52.)

lack of a radio, and Complainant's conformance with standard procedures and rules. In response to probing by Mr. Price, Complainant explained that the cab camera's line of sight would not display the area immediately in front of the locomotive. (*See id.* at 142-58.) In his closing, Mr. Kuntz stressed that the evidence showed that Complainant was alert and attentive and had been struck from behind and that the fault was with the hostler helper who was tasked with guarding the point of movement and the railroad for failure to equip the skid steer with a radio. (*Id.* at 160-61.) Complainant also testified that he had no reportable injuries in his 39 years of service. (*Id.* at 147.) During the hearing in this matter, however, Complainant recalled that his neck and back pain had progressively gotten worse and his headaches were worsening at this point in time. (HT, p. 174-75.) He said he was injury-free on March 30, 2011, because he was still hoping that his stiffness and soreness "would go away and there would be no injuries." (*Id.* at 218-19.)

In the video, it is a clear, sunny day. It begins with the locomotive just starting to inch forward. The warning bell is sounding. Roughly 4 seconds into the video the snow being displaced by the skid-steer comes into the view to the left on the locomotive. The skid-steer comes into full view of the camera in the next several seconds and remains in view for roughly 15 seconds before the locomotive, which appears to be increasing speed slightly, gains ground on it and it recedes from view. The skid-steer appears to slow as it approaches the area where tracks 4 and 5 come together. What may be the reverse alarm on the skid steer comes on, but a second or so later the first sound of impact is heard. The impact is not on tape. About 4-5 seconds pass between when the skid steer recedes from view and the first sound of impact. The sounds of impact last only a few seconds, and the locomotive appears to come to a stop roughly 5 seconds later. At that point the video freezes. (CX 12; RX D(11).)

After the hearing Complainant was upset about the way that it had gone and believed that it was a joke. (HT, pp. 219-20.) He complained to Mr. Anderson. (*Id.* at 220-21.) He believed that Mr. Hofer's job should have been in jeopardy because he was on probation and had multiple past violations. In Complainant's words, Mr. Hofer had "been a walking violation since he's been on the property." (*Id.* at 223-24.) Complainant believed BNSF was protecting Mr. Hofer: "he had numerous complaints over the years, in the shop, being a safety hazard, non-complying with all the safety rules, in every way, shape and form." (*Id.* at 262.) He didn't think that Mr. Hofer had ever been trained as a hostler helper since he had been asked to train Mr. Hofer once and replied that he wouldn't do it unless he had to. The training includes instruction on each shift, and Mr. Hofer never got instruction on the afternoon shift. (*Id.* at 264-65.) Before Mr. Hofer worked as a laborer for BNSF he was a supervisor at the Diesel Shop for General Electric, which also employs workers at the facility. (CX 66, p. 20.)

Since his neck pain, back pain, and headaches were getting increasingly worse, Complainant decided to see his physician, Dr. Bruce W. Richardson, but was unable to get an appointment until April 14, 2011. At the appointment, Complainant reported that he had no immediate pain in his neck or lower back after the accident, but had developed the pain since. Dr. Richardson ordered x-rays and directed Complainant to follow-up in a month. (HT, pp. 175-76; CX 28, pp. 1-2.) The x-ray of his lumbar spine showed "[s]evere degenerative disc disease at L5-S1 and pronounced facet arthropathy at L4-L5 and L5-S1. (CX 28, p. 3.) The x-ray of Complainant's cervical spine showed "[m]oderate to severe degenerative disc disease at C3-C4 and C4-C5" with foraminal narrowing at those levels. (*Id.* at 5.) Dr. Richardson diagnosed "cervical strain with myospasm, lumbosacral strain and associated headaches, and lumbosacral

strain with some myospasm intermittently.” (*Id.* at 2.) Dr. Richardson and Complainant discussed the option of physical therapy instead of chiropractic therapy, but Complainant indicated that he only wanted to receive four to six more chiropractic treatments. (*Id.*)

Once Complainant had seen the doctor, he decided that he had an obligation to report the injury and treatment. He was concerned about doing so because he knew that his superiors would be upset since it would interfere with their injury and safety records. (HT, p. 176.) He believed he had to report it anyway, and planned to do so as soon as he could get his local union chairman to accompany him. (*Id.* at 177; *see also id.* at 330-31 (Ms. Brough’s recollection).) After seeing Dr. Richardson on Thursday the 14th he had Friday and Saturday off. He worked on Sunday, but no managers worked on the weekend. He worked on Monday, April 18th, but his local chairman was not at work. (*Id.* at 178.) Complainant wasn’t sure if he needed a union representative present to report an injury, but believed that having one present so was the best option because whenever an employee went to management about anything in the Diesel Shop it was good to bring a witness along so that ”things don’t get twisted around.” (*Id.* at 221-22.)

In the meantime, Mr. Price formalized his determinations. He claimed that he did not make a decision until after reviewing the evidence. He determined that Complainant was at fault because he fouled the track, which due to the accident was failure to be alert and attentive:

It’s not a rule violation to foul a track. And in this situation, though, because he wasn’t alert to where he was at, and because he had put himself in front of a moving locomotive, he had not been alert and attentive when he was doing that task. And in doing what he had done, even if he didn’t do it by choice, he had put both himself an [sic] that crew at risk, and there was damage to both the skid steer and to the locomotive, as a result of him getting in front of a moving locomotive.

(HT, p. 464.) He also decided that Mr. Hofer and Mr. McLain wouldn’t have seen Complainant and so were not at fault. It was Complainant’s duty to have heightened awareness anywhere near where a locomotive might be moving.¹⁷ (*Id.* at 464-65.) Complainant had admitted at the hearing that he knew the track was live, and so might have movement on it, because the flags had been placed down. (*Id.* at 466.) Mr. Price allowed, however, that the flags being down did not signify movement was imminent—they were just a signal to the locomotive operators that there wasn’t any active work on or around the track. (*Id.* at 506-07.) Mr. Price rejected the contention that Mr. Anderson or supervisors should have alerted employees that Complainant was removing snow because it is a big facility and Complainant would most likely have been in another part, away from where the locomotives might be moving. (*Id.* at 468.) Complainant’s injury was not a factor in Mr. Price’s decision because no injury had been reported. (*Id.* at 469-70.)

After determining that Complainant had violated a rule, Mr. Price decided on the discipline to be assessed. Given the rule violated and the fact that it resulted in substantial damage to company equipment, Complainant was given a serious violation. (*Id.* at 471.) It could have been a stand-alone dismissible offense, but Mr. Price declined to terminate Complainant because he didn’t think the damage to company property was intentional. (*Id.* at

¹⁷ Mr. Price argued further that Complainant also should have flagged the track to indicate that he was working around it, but they hadn’t charged him with that originally and so decided not to add anything more than the violation for failure to be alert and attentive. (HT, pp. 465-66.)

472-73.) Mr. Price consulted no one about the discipline. (*Id.* at 473.) He denied giving special treatment to Mr. Hofer to protect him from a second Level-S violation and added that he “was forced to” give Mr. Hofer a second Level-S and terminate him within a year. (*Id.* at 488.) Mr. Price admitted, however, that there were other factors that contributed to the incident, including perhaps the lack of the radio, lack of attentiveness by Mr. Hofer, and lack of communication between supervisors. But he maintained that Complainant “was responsible for the damage, because he had gotten in front of the locomotive, on a live track.” (*Id.* at 513.) Complainant had violated a rule by putting himself in a place where he could potentially be struck. (*Id.* at 535.)

On April 18, 2011, Mr. Price called Complainant into his office to deliver the results of the investigation. (*Id.* at 178.) According to Mr. Price, he sent Mr. McLeod to get Complainant. (*Id.* at 474, 515; *but see* CX 66, pp. 13, 18 (Mr. McLeod not certain he was even present).) Mr. Price presented Complainant a letter indicating that he was receiving a Level S 30 day record with a one year record review for violating Mechanical Safety Rule S-1.2.3 by failing to be alert and attentive.¹⁸ The letter was signed by Mr. Inhofer. (HT, p. 178; CX 56, p. 1; RX F, p. 1.) Mr. Price asked Complainant to sign a letter. (HT, pp. 178, 474; CX 22, pp. 8-9.) Complainant, however, declined to do so and requested that his Local Chairman be present during the signing to serve as a witness. (HT, pp. 179, 475, 516.) Complainant also asked Mr. Price about the results of the investigation as they pertained to Mr. Hofer and Mr. McLean. (HT, p. 179-80; CX 22, p. 9.) Mr. Price did not disclose the results of their investigations. (HT, p. 180.) As a matter of fact, neither was disciplined. (CX 66, p. 4.)

Mr. Price recalled that Complainant was visibly upset and agitated. He did not report any injuries during the meeting. (HT, pp. 475-76.) After refusing to sign the letter, Complainant told Mr. Price something to the effect of, “they probably weren’t going to like the results or they weren’t, probably, going to like what was going to happen next” or that Mr. Price “wasn’t going to like the results of what [Complainant] was going to do.” (*Id.* at 179, 475.) Complainant testified that the comment just referred to the dissatisfaction he knew reporting his injury would cause BNSF and was not intended as a threat. (*Id.* at 179.) Mr. Price testified that this statement constituted a veiled threat to BNSF, since he was unsure what Complainant was referring to. (*Id.* at 517.) But he didn’t conclude anything at the time other than that Complainant was angry and upset. (*Id.* at 518.) After this meeting, Complainant returned to work. (*Id.* at 180.)

F. Injury Report and Second Investigation

On April 19, 2011, Complainant was called into Mr. McLeod’s office to again receive the results of the investigation. (HT, p. 180.) Complainant’s union representative, Mr. Kuntz, was present during this meeting. (*Id.* at 180-81.) Mr. Price was traveling. (*Id.* at 476.) Mr. McLeod asked Complainant to sign the discipline letter from the day before, but Complainant did not want to admit any wrongdoing by signing. There was some discussion about whether his signature was necessary before Mr. McLeod stated that it probably was not. (*Id.* at 181.) Complainant then told Mr. McLeod that he had visited a doctor, so they switched gears and moved into the injury reporting process. (*Id.*; CX 66, p. 14.) Mr. McLeod asked him to sign

¹⁸ Complainant testified that he didn’t consider the probation very serious or really understand the discipline program since it had changed over the years. Discipline used to involve suspensions of up to 30 days and so probation just seemed like “paperwork” since he had a clean record. (HT, pp. 222-24.)

various papers for an injury report. (HT, pp. 181-82.) As Complainant recalled, what happened next was kind of a blur as Mr. McLeod talked to different people and did various tasks. At one point he talked to a nurse of some sort on the phone. (*Id.* at 182.)

Complainant completed an Employee Personal Injury/Occupational Illness Report stating that he had been injured in the collision on February 21, 2011, when he was struck by a locomotive. He first noticed symptoms at some point after the incident and was suffering from a stiff neck and lower back as well as headaches. (CX 15, p. 1; RX H(10), p. 1.) Mr. McLeod completed a Supervisor's Report of BNSF Employee Injury/Illness. (CX 16, p. 2.) The report states that Complainant visited Mr. Kostelecky for chiropractic treatment. (*Id.* at 3; *see also* CX 19, p. 1.) A medical triage was conducted with a nurse via telephone. (CX 17, p. 1.) A wire report was made of the injury. (*See* CX 20, pp. 1-3.) BNSF thereafter kept case reports indicating treatment events and changes in status. (*See* CX 18.) Complainant also gave a signed statement stating that he had told mentioned to Mr. Anderson "on at least 2 occasions of having a sore neck." (CX 37, p. 1.) He then returned to work. (HT, p. 182.)

Mr. Anderson was contacted, since Complainant had claimed he had informed Mr. Anderson about being stiff and sore. This was the first Mr. Anderson had heard of an injury. Mr. McLeod asked Mr. Anderson to prepare a statement about what he had heard from Complainant on February 21, 2011, and thereafter. (*Id.* at 428-30.) Mr. Anderson recorded that he had asked if Complainant was okay several times and each time had been told that he was fine. Mr. Anderson recalled that Complainant had made a comment to the effect of "well I don't know" after Mr. Anderson had said "at least Steve was OK," but added that Complaint grabbed his neck and said he was fine while laughing. (CX 38, p. 1.) Mr. Anderson didn't recall that Complainant told him that he was stiff and sore, though he admitted that if Complainant had told him that, in the context of the investigation that developed he would have been at risk for discipline. (HT, pp. 431-32.) Based on Mr. Anderson's statement, Mr. McLeod determined that Complainant had not reported an injury to Mr. Anderson on February 21, 2011. (CX 66, p. 17.) Mr. McLeod did not pursue the question any further or seek out any potential witnesses. (*Id.* at 17-18, 21.) Mr. McLeod also had Mr. Anderson give a statement regarding Complainant's venting about the first investigatory hearing. (HT, pp. 430-31.) Mr. Anderson recalled that Complainant had told him that the investigation was a joke with rehearsed statements and doctored video. He believed they were protecting Mr. Hofer. Though Complainant was angry, Mr. Anderson just thought he was venting and did not ever feel threatened. (CX 39, p. 1.)

Mr. McLeod emailed Mr. Price at 10:14¹⁹ indicating that Complainant had elected not to sign his disciplinary letter and that he had reported an injury from February 21, 2010. He indicated that he had gone through the injury report protocol with Complainant and that Complainant had claimed he told Mr. Anderson that he was stiff and sore, but that Mr. Anderson had denied being informed of an injury. (CX 24, pp. 2, 4-5, 9.) At 10:46, Mr. McLeod forwarded this message to Mr. Marby, adding that "Mr. Brough is claiming that his injury is a result of an incident that took place on 02/21/2011 where he fouled the track with a 320D John Deere skid steer while sweeping snow and was struck from behind by a locomotive." (*Id.* at 2-3,

¹⁹ BNSF email stamps for some of the employees use central time (the time zone of Fort Worth), but I have adjusted the times to mountain time to reflect the local time at the Havre Diesel Shop.

4-5, 7-8.) Mr. McLeod did so because Mr. Price was on a flight and it would be standard procedure to pass the report of an injury up the chain of command. (CX 66, p. 14.)

This was Mr. Marby's first detailed exposure to this matter. (HT, pp. 307-08.) He didn't know about the circumstances of the prior discipline other than discipline had been issued and he surmised that it would have been a Level-S violation. (*Id.* at 311-12.) At 10:57, Mr. Mabry instructed Mr. McLeod to draft an investigation letter alleging that Complainant was insubordinate when refusing to sign the discipline letter, dishonest when stating that he reported his injury previously when Mr. McLeod had followed up with Mr. Anderson and been told there was no report, and noncompliant with safety rules requiring prompt reporting of injuries. He copied Mr. Price and Mr. Heenan and indicated he wanted Mr. Heenan's input. Mr. Marby stated "I would like to pursue dismissal." (CX 24, pp. 1, 4, 6, 8; HT, pp. 271-74.) Mr. Marby elected to take this direction within 12 minutes of being informed and did not discuss the matter with Mr. McLeod at all before reaching his decision. (HT, pp. 213-14; CX 66, p. 15.) Mr. McLeod replied to Mr. Marby, copying Mr. Price and Mr. Heenan, at 11:07, saying "Yes Sir" and stating that he would get started on the letter but would have to wait for Mr. Anderson's written statement. (CX 24, p. 6.) At 11:09 Mr. Marby responded: "Yes, [I]et's get statements. We will want LR support on this event!" (*Id.* at 6.)

Mr. Price responded to the thread at 11:07, indicating that he had just deplaned in Chicago but agreed with Mr. Marby "that Mr. Brough has put himself in a very dire situation with respect to his employment." (*Id.* at 8.) Mr. Price testified that when he received Mr. McLeod's email he understood what Complainant had told him the day before. (HT, pp. 476-77.) Mr. Price determined that Complainant was late in reporting an injury and had been dishonest about telling a supervisor. (*Id.* at 477.) This was the first Mr. Price had heard about an injury and he deemed the report retaliatory against them for the prior discipline. (*Id.* at 478.)

Mr. Marby forwarded the string to Chris Roberts, the Vice President of Mechanical and his superior at BNSF, at 11:28 "[a]s information." Mr. Roberts replied at 11:36, commenting:

If I read this right rules violation should be level S. I would not worry about whether he signed discipline letter or not would just give it to him. The matter of the injury you should schedule investigation for late report of injury and if facts coming out of it indicate he did not report it to Mr. Anderson as he states then issue 2nd level S for late reporting which would end up in dismissal. I wouldn't get into a bunch of conduct issues that muddy up the process.

(CX 24, pp. 1, 3.) Mr. Marby understood the feedback from Mr. Roberts to be that there was no need to throw every rule violation at Complainant because it would just complicate the process of terminating him. But he thought they should pursue the conduct charges as to dishonesty anyway and that Mr. Roberts' input only removed the insubordination charge. (HT, p. 315-16.)

Mr. Heenan first became aware of the matter on April 19th. It is "not uncommon" for supervisors to include him in these discussions since he is familiar with the collective bargaining agreements and can assist in "navigating those waters." (HT, pp. 275, 351-52.) At 11:47 Mr. Heenan agreed that "the signing of the letter is immaterial" and added that "[s]ending an investigation notice for failing to sign a discipline letter will likely be perceived as too

aggressive.” He asked about the first disciplinary outcome and then recommended issuing “another investigation notice containing 2 charges: Late reporting of a PI and dishonesty in communicating with a Company officer with regards to the alleged reporting of the PI.” (*Id.* at 351-52; CX 24, p. 3) Mr. McLeod provided Mr. Heenan with a timeline of events he had prepared, Mr. Anderson’s statements of April 19, 2011, the injury report, the April 18, 2011, discipline letter, and Complainant’s April 19, 2011, statement. (*See* RX I.) Mr. Heenan helped to craft the charges in this case, providing the language incorporating both charges into one investigation. (HT, pp. 352-53; CX 24, p. 10.) Mr. Marby replied to the thread at 11:52 indicating that they would “issue the second letter with both charges.” (CX 24, p. 3.)

As this was going on, Mr. McLeod called Complainant and Mr. Kuntz back to his office. (HT, p. 182). Complainant was told that he was being escorted off of the property because he hadn’t signed the results of the investigation. (*Id.*) This occurred at about 10:55. (*See* RX I, p. 2.) Mr. McLeod admitted that he erred in removing Complainant from service for insubordination and that this should have been done in reference to the other charges. (CX 66, p. 16.) BNSF later paid Complainant for the time he was taken off of work due to insubordination, since it had determined this was an improper charge and an improper basis to remove him from service. (HT, pp. 275-76.) According to the timeline Mr. McLeod prepared, he asked Complainant why he was turning the injury in now and was told “that he thought the out come [sic] of his investigation would have been different and by turning in an injury it will bring it all to a head. The entire investigation was a conspiracy and this will bring it to light. (*E.g.* RX I, p. 2.) Complainant denied saying anything to Mr. McLeod about a conspiracy or reporting the injury to bring matters to a head. (HT, pp. 183, 226.)

Complainant returned home on April 19, 2011, and was not in contact with anyone from BNSF until he received an Investigation Notice by certified mail. (*Id.* at 184.) Ms. Brough recalled that Complainant was very upset about being walked off the job and couldn’t believe that no one else was receiving discipline. (*Id.* at 331.) The Investigation Notice is dated April 20, 2011, and alleges that Complainant violated BNSF policies by failing to report a personal injury immediately to the proper manager on February 21, 2011, and by conducting himself dishonestly and immorally when he reported his personal injury on April 19, 2011. BNSF scheduled a hearing for April 28, 2011. (CX 23, p. 1; RX H(2), p. 1.) On April 27, 2011, Complainant and BNSF agreed to postpone the hearing to May 11, 2011. (CX 23, p. 4; RX H(3), p. 1.) Complainant was shocked when he received this notice because they were going to an extreme, accusing him of violations that hadn’t been mentioned before. When he was escorted off of company property he was told it was all because he wouldn’t sign the disciplinary letter, but now that allegation had disappeared and was replaced by a variety of others. (HT, pp. 185.)

G. Investigatory Hearing and Termination of Complainant

On May 11, 2011, BNSF held an investigatory hearing regarding Complainant’s alleged failure to report his personal injury on February 21, 2011, and alleged dishonest and immoral conduct in reporting his injury on April 19, 2011. (RX H(1), p. 1; CX 22, p. 2.)²⁰ Complainant’s position was that he had alerted Mr. Anderson to being stiff and sore and that if that required an

²⁰ The “Investigation Data Worksheet” containing this hearing transcript is also contained in RX G. The stamped bates pagination is identical for the exhibits. For ease of citation in the text, I refer only to CX 22.

injury report, Mr. Anderson should have been given him the forms.²¹ In the past whenever he had any sort of off-duty injury of any sort the supervisors were giving him all sorts of forms to fill out, but in this instance that didn't happen. He wasn't sure about the injury reporting rules or where the forms even were, though he had been trained and tested on the rules. (HT, pp. 231-33.) BNSF handed out a variety of different rules and many that didn't even pertain at all to work at the Diesel Shop. Complainant tried to keep track of what he thought the important, enforced rules were, but couldn't keep track of them all. (*Id.* at 234-36.)

BNSF brought in Mike Collier, a General Foreman from Denver, to conduct the hearing because he was not a part of any of the events that had led to the hearing and Mr. Price would be a witness. (*Id.* at 277.) Complainant was represented by Mike Wood, the General Chairman of his union. (CX 22, pp. 4, 7.) Mr. Price testified first, recounting their interactions from April 18th as well as the rules in question and how he believed Complainant had violated them.²² (*Id.* at 8-21.) He was pressed by Mr. Wood on accepting verbal reports of injury and the meaning of the reporting rules. (*Id.* at 22-26.) Mr. McLeod then testified about the events of April 19th, the injury report, Complainant's prior treatment, the rules in question, and his opinion that Complainant had violated those rules. (*Id.* at 27-38.) Mr. McLeod testified that Complainant told him that he had told Mr. Anderson that his neck was stiff and sore but that Mr. Anderson had denied that Complainant had reported an injury. (*Id.* at 33.) Mr. McLeod also reported Complainant's statement that he was making the report due to the outcome of the prior investigation. (*Id.* at 33-34.)

Next, Mr. Anderson testified about the events of February 21st, his learning of the injury from Mr. McLeod on April 19th, and any recollection of comments from Complainant about being injured or stiff and sore, which was limited to the comment on the briefing on February 21st that Mr. Anderson believed was made in jest. (*Id.* at 38-45.) Mr. Alcock then gave his recollection of Complainant's comments about being stiff and sore on the day of the accident and then again several days later. (*Id.* at 46-50.) Mr. Kuntz testified about the February 21st accident and stated that he had approached Complainant on the 22nd and asked how he was doing. Complainant said he was still a little stiff and sore and after Mr. Kuntz asked if he had told anyone at the company, Complainant mentioned that he had told Mr. Anderson. Mr. Kuntz opined that Complainant complied with the injury reporting requirements by speaking to Mr. Anderson. (*Id.* at 51-58.) Complainant testified last, claiming that he was in compliance because he reported his pain to Mr. Anderson. (*Id.* at 59-62.) As to Mr. McLeod's statements about reporting the injury in order to bring the prior investigation to a head, Complainant only recollected the conversation "vaguely" and didn't recall exactly what he said. (*Id.* at 62-63.) He stated that he reported the injury to Mr. McLeod on April 19th because he had just recently seen his doctor and gotten x-rays. (*Id.* at 67.) In closing, Mr. Wood argued Complainant had reported his injury to Mr. Anderson, reiterated the objections made throughout, and objected that it was clear that the railroad had already pre-determined Complainant's guilt. (*Id.* at 69-71.)

²¹ Complainant was prepared to call co-workers to testify that he had been complaining about being sore and stiff, but he and his union representative decided to only give their statements and the testimony of Mr. Alcock. (HT, pp. 185-86.)

²² Mr. Wood objected to references to rule numbers, since Complainant hadn't been informed of the rules he was charged with violating. Mr. Collier rejected this on the grounds that BNSF doesn't have to inform employees which rules they are charged of violating, just the general nature of the charges. (CX 22, pp. 10-12.)

On May 17, 2011, Mr. Price contacted Mr. Collier about the transcript and asked him to copy Mr. Heenan and Mr. Marby with the transcript “since the potential discipline is a ‘dismissal.’” (CX 24, pp. 12-13; RX W, pp. 1-2.)²³ Mr. Price followed-up on May 19th and had arranged for Mr. Marby and Mr. Heenan to review the transcript so BNSF could discipline Complainant in the required time limit. On that point, Mr. Collier commented, “we should [sic] be good to go.” (CX 24, pp. 14-15.) Mr. Collier emailed his findings along with the transcript to Mr. Price, Mr. Marby, and Mr. Heenan on May 20, 2011. He made four findings with references to the transcript. First, “Mr. Brough admitted violating Rule S-28.2.5 by not filing a written report of the injury and not notifying management when he sought medical attention.” Second, “Mr. Brough admitted violating the CBA between BNSF and NCF&O. In particular Rule 33—Personal Injuries which requires the reporting to be written.” Next, “Mr. McLeod recounts the dishonest reason for the reporting of the injury at a late date.” Finally, “Mr. Brough recalls the conversation with Mr. McLeod, but says he cannot recall the exact wording. He became very nervous and quit looking me in the eye while answering this question, leading me to believe that Mr. McLeod’s testimony is accurate.” (CX 57, p. 19; RX W, p. 1.) No further explanation or reasoning is provided. No conclusions are drawn and no recommendation is made.

Mr. Price agreed with the subsequent decisions regarding discipline, but he was not involved in that decision-making process. (HT, p. 478.) Mr. Price could not have terminated Complainant on his own authority. (*Id.* at 299.) He had already indicated that he believed Complainant should be terminated and believed, after reviewing the hearing transcript, that termination was the appropriate result. (*Id.* at 531-32.)

On the afternoon of May 20, 2011, Mr. Marby emailed Mr. Price and Mr. Heenan, writing only “I support Termination [sic].” (CX 58, p. 1; RX J, p. 1.) Before any dismissal, he reviews the file to make sure it is warranted and BNSF is acting consistently. (HT, pp. 277-79.) Here Mr. Marby found that the rule requires immediate reporting of an injury, or as soon as the employee is able, but Complainant had not reported the injury until almost two months after the accident and had received chiropractic treatment in early March. (*Id.* at 281-83.) Even had Complainant argued that he didn’t have a diagnosis until April 14th, Mr. Marby would have terminated him because the delay between the 14th and 19th is a violation. (*Id.* at 284.) Mr. Marby discredited Complainant’s claims of earlier comments to Mr. Anderson and deemed them insufficient to comply with the rule. (*Id.* at 284-85.) He credited the testimony of Mr. Anderson and discredited that of Complainant and so found that Complainant had been dishonest. Mr. Marby allowed Complainant had complained about his neck, but this was insufficient.²⁴ Even if the supervisors weren’t doing their duty in investigating and reporting an injury, Complainant has an independent obligation to report it on his own through other means. Queried as to the possibility that the supervisors discouraged injury reports, Mr. Marby recalled that the Union General Chairman had called him in another case with a supervisor who was behaving inappropriately as to injury reports, and concluded from the fact that no call came in this case that there was not similar problem. (*Id.* at 287-91.)

²³ The exchanges discussed in this paragraph are also contained at CX 57, pp. 14-18.)

²⁴ Statements from Complainant’s co-workers were not part of the transcript, but would not have altered his determination. (HT, pp. 292-93.)

In addition, Mr. Marby determined that Complainant's statement to Mr. Price on April 18, 2011, was a threat. He credited Mr. McLeod's testimony about Complainant stating that he reported the injury because of the prior investigatory results, which he viewed as key evidence favoring termination. (*Id.* at 295.) He did not consider the possibility that Complainant was unclear about the reporting requirements since employees are trained in the rules and expected to know them. (*Id.* at 296-97.) Mr. Marby also placed weight on Mr. Collier's impression that Complainant was not credible when discussing the conversation with Mr. McLeod about why he was just now reporting the injury. (*Id.* at 297-98.) Thus, Mr. Marby decided dismissal was appropriate. (*Id.* at 298.) He claimed his decision to terminate Complainant was not based on the injury report but was instead based on "the conduct involved in the late reporting of the injury, the misrepresentation of facts, and the dishonesty." (*Id.* at 305.)

On May 24, 2011, Mr. Heenan responded to Mr. Marby and Mr. Price indicating that he had reviewed the transcript and recommended dismissal. He later responded to a query from Mr. Price indicating that he had already reviewed the "law dept's recommendation." (CX 24, p. 18; CX 58, p. 1; RX J, p. 1.; *see also* HT, pp. 300, 360.) At the hearing he explained that his review determined that substantial evidence supported the conclusion that there had been rule violations. (HT, p. 355.) Complainant hadn't reported his injury for almost two months, had received treatment, and that he should have been fully aware of the reporting rules. (*Id.* at 355-57.) Mr. Heenan accepted the dishonesty charge because he credited the supervisors and did not find Complainant's claims of prior reports of feeling stiff and sore very sincere. (*Id.* at 357-58.) Even if Complainant was serious, he was still noncompliant in reporting the injury and any failure by the supervisors would not excuse his failure to report it on his own. (*Id.* at 359.) Mr. Heenan found support for the misconduct in reporting charge because he determined that Complainant had reported the injury in retaliation for the prior discipline and was attempting to manipulate the process. (*Id.* at 359-60.) He took the fact that Complainant didn't specifically deny comments to Mr. McLeod about his reasons for reporting the injury as a tacit admission. (*Id.* at 360.) He also accepted the credibility finding of Mr. Collier. (*Id.* at 361.) Under PEPA, failure to report an injury, dishonesty, and misconduct in reporting the injury could each be a stand-alone dismissible offenses. Considering Complainant already had a Level-S offense, was on probation, and there were no mitigating circumstances, Mr. Heenan recommended dismissal. He did so because he believed there was substantial evidence supporting the charges and an arbitrator would uphold the decision. (*Id.* at 364-66.)

BNSF terminated Complainant in a May 25, 2011, letter under Mr. Collier's signature. BNSF concluded that Complainant violated Mechanical Safety Rule 28.2.5 "Reporting – Injuries to Employees" and Mechanical Safety Rule 28.6 "Conduct." The termination letter states that the reason for Complainant's termination is due to his "failure to report a personal injury to the proper manager on February 21, 2011, at approximately 1220 hours" and "dishonesty and immoral conduct when [he] reported an injury on April 19, 2011, at approximately 0900 hours." (CX 25, p. 1; RX U, p. 1; HT, pp. 186-87.)

H. Events Since Complainant's Termination

After being terminated in this manner after over 39 years of service, Complainant was simply shocked. (HT, p. 187.) He felt very depressed over the situation, though he was not diagnosed with depression and did not seek treatment from a mental health provider. (*Id.* at

246.) Complainant's wife observed his emotional distress. She testified that after his termination, "he was devastated, because he had been there for years and that was his life...He was just totally devastated and stressed, very depressed." It was similar to his emotional state when his father passed away. (*Id.* at 332-33.) Complainant's termination also had an emotional impact on his daughters, who were 12 and 16 at the time. Complainant testified that "it was devastating for them" and "they didn't know what was going to happen." (*Id.* at 187.) Complainant quickly learned that word of his termination spread through the city of Havre within a matter of days. His daughters attended school with some of his co-workers' children and they had somehow learned that he had been terminated and told his daughters. (*Id.*) Mr. Price denied personally spreading word of Complainant's dismissal. When he learned that employees were even talking about the dismissal he issued a Notice of Investigation on Mr. Alcock because he discussed with others what had happened to Complainant. (*Id.* at 489-90.)

Through this period, Complainant continued to have symptoms from his injury. (*Id.* at 191.) He initially treated with Dr. Richardson but then was sent to a neck and back specialist, Dr. Patrick Galvas, who treated him over the next several years and gave him the facet injections. (*Id.* at 258-60.) He went to a follow up appointment with Dr. Richardson on May 2, 2011. (CX 28, p. 7.) Dr. Richardson noted that: "The patient's pain is markedly decreased. He has nearly full range of motion of the neck; although, he does have crepitus when he does that. He is able to walk, with his low back pain markedly better, also." (*Id.*) On June 23, 2011, Complainant returned to Dr. Richardson and was experiencing more pain. (CX 28, p. 9.) Dr. Richardson certified that Complainant was disabled and unable to work in his usual employment. (*Id.* at 9-11.) On June 24, 2011, Dr. Richardson reached out to Dr. Patrick Galvas, a specialist, for his opinion. (*Id.* at 12.) Complainant visited Dr. Richardson on August 19, 2011, and October 27, 2011, to fill out workers compensation paperwork and reported continued neck and lower back pain. (*Id.* at 13-15.) On October 27, 2011, Dr. Richardson completed the US. Railroad Retirement Board's Supplemental Doctor's Statement. (*Id.* at 16.) Dr. Richardson indicated that he did not believe Complainant was able to work without restriction in his last occupation and estimated that he would be able to return to work sometime in 2016. (*Id.*)

Complainant first saw Dr. Patrick Galvas on August 1, 2011. He reported dull lower back and neck pain as well as daily headaches. Dr. Galvas diagnosed a cervicothoracic strain and lumbrosacral strain resulting from the February 21, 2011, accident along with cervicogenic headaches caused by the cervicothoracic strain. They planned acupuncture and "asides therapy." (CX 29, pp. 1-3.) Complainant returned for a follow-up on August 29, 2011, and Rodney Lutes, Dr. Galvas' certified physician's assistant, recommended an MRI due to continued pain. (*Id.* at 6.) An MRI on Complainant's cervical spine was conducted on September 28, 2011. The results were mostly normal, with multilevel degenerative disc disease resulting in mild canal stenosis and moderately advanced multilevel foraminal stenosis noted. (*Id.* at 4-5.) Mr. Lutes discussed the results with Complainant, and recommended he consider epidural injections. (*Id.* at 7.) Mr. Lutes filled out a statement for the U.S. Railroad Retirement Board on October 27, 2011, estimating a return to duty date of December 15, 2011. (*Id.* at 8.)

Dr. Galvas examined Complainant on December 13, 2011, adjusted his medications, and approved Complainant's desire to seek chiropractic treatment. Based on how the treatment progressed, they planned to consider facet injections. (*Id.* at 9-10.) He estimated Complainant could return to duty on July 1, 2012. (*Id.* at 11.) Complainant received 12 chiropractic

adjustments over the next 6 weeks. (*See* CX 30, pp. 6-7.) Scott Coleman, another physician's assistant for Dr. Galvas, saw Complainant on February 7, 2012. Complainant was still in pain and the chiropractic treatment had not helped. His medication was adjusted and facet injections were planned. (CX 29, p. 14.) Facet injections bilaterally at C2-3 and C3-4 were conducted on February 13, 2012, by Dr. Michael Walters of the Benefits Health System. (*Id.* at 14-15.) Mr. Coleman saw Complainant on February 28, 2012. Complainant reported relief from the injections. (*Id.* at 17.) When Complainant saw Dr. Galvas on May 22, 2012, he reported that the relief from the injections had lasted about a month. They discussed options for future injections. (*Id.* at 19.) On June 26, 2012, Complainant received bilateral facet injections from Dr. Walters at C2-3 and C3-4. (*Id.* at 20-21.) Additional injections were provided by Dr. Gary Schumacher on July 3, 2012, and by Dr. Walters on July 10, 2012. (*Id.* at 22-23.) On July 17, 2012, Dr. Galvas completed a "Statement of Sickness" estimating the Complainant would be able to return to work in December 2012. (*Id.* at 25.) At a July 24, 2012, follow-up with Mr. Lutes, Complainant reported some relief from the injections and with his medications. They elected to wait to see if the therapeutic effects of the injections increased before planning anything new. (*Id.* at 26-27.) Complainant reported continued headache and soreness to Mr. Lutes on August 28, 2012, but elected to wait before trying new procedures. (*Id.* at 28-30.) Eventually Complainant's condition improved. His last treatments were facet injections sometime in January or March of 2013. (HT, p. 191.) He believed that he could have returned to work by that point and was trying to be ready to return by December 2012. (*Id.* at 191-92, 260.)

BNSF paid Complainant through his termination on May, 25, 2011. (HT, p. 241.) He thereafter didn't seek additional work because of his injury.²⁵ (*Id.* at 192, 245-46.) In 2010, the last full year before his termination, Complainant earned a total of \$52,935.00 from BNSF. (HT, p. 188; *see also* CX 50, pp. 2-3 (BNSF pay records); CX 51 (Brough tax records).) He speculated that had he continued working he would have received raises when the union contracts were renewed, which in the past had been about 3% paid in a lump sum for the years in which they had worked without a contract. (HT, p. 189.) He couldn't recall when, but testified that at some point his former co-workers had received back-pay raises with a new contract. (*Id.* at 248.) After his termination, Complainant received unemployment and disability benefits from the Railroad Retirement Board. He received \$9,636.00 in unemployment and sickness benefits from June 23, 2011, to December 28, 2011, and \$12,738.00 in sickness benefits from January 10, 2012, to December 26, 2012. (CX 61, pp. 2-5 *see also* HT, pp. 240-43, 337-38.)

The loss of income was distressful for his family because they were dependent on the income from both him and his wife. To make ends meet, they had to deplete their savings. (HT, pp. 332-33.) Complainant took money out of his savings to provide for his family and cover medical expenses. (HT, pp. 191, 335.) He depleted his 401(K) retirement account, which had a balance of \$39,746.86, because he had no other source of income. (*Id.* at 191; CX 59, p. 2.) He also withdrew \$4,000 from his Roth IRA. (HT, p. 191; CX 59, p. 2.) Complainant testified that he still had payments and maintenance bills, making it a very difficult time for his family. (HT, p. 187.) Had Complainant continued working for BNSF, he expected to continue earning what he had earned previously and to receive raises pursuant to his union agreement. (*Id.* at 189.)

²⁵ The only work he performed was related to a pasture agreement in which since early 2014, Complainant helped remodel of a friend's kitchen in exchange for pasturing cows. This was a barter arrangement and Complainant did not receive income for his work. (HT, pp. 193, 339.)

When Complainant was terminated, he also lost his health insurance benefits. Complainant, his wife, and children had all been covered by the plan and all lost their health insurance. Complainant's wife was able to add Complainant and the children to her policy through her employment with the State of Montana, but doing so increased the deductions in her paychecks by between \$200 and \$300. Given the family's loss of Complainant's earnings, they didn't have the money to afford those additional deductions. (*Id.* at 191-93, 224, 334-35.) In addition to the amount of money deducted from Complainant's wife's paycheck for health insurance, she incurred medical bills of approximately \$2,800 after an ATV accident that they were still paying off at the time of the hearing. (*Id.* at 194, 334-35.)

At some point after Complainant's termination, BNSF indicated to "Railroad Enrollment Services" that he had stopped working because he was disabled. (RX X.) This allowed Complainant to keep health coverage so long as he sent in proof of disability. On September 9, 2011, one of Complainant's doctors certified that he was disabled from performing his regular occupation due to back pain starting on May 25, 2011, and continuing. (*Id.*) According to November 2014 emails from BNSF's benefits department, Complainant received dental/vision and dependent coverage through the end of 2012 and his personal medical and prescription coverage through the end of 2013. (RX Y, p. 1.) This was based on the date of Complainant's last vacation pay and policy language in the benefits program. (*Id.* at 1-3.)

On May 1, 2014, Public Law Board No. 7537 issued two awards as to Complainant's discipline for the accident and termination. (*See* RX K; RX V.) In a terse order, it denied the claim as to Complainant's discipline for the accident, finding he had been given his due process rights and that he "made some poor assumptions that placed him, and others [sic] in harms [sic] way and ultimately resulted in damages to the [equipment]." (RX V, p. 5.) As to Complainant's termination, it determined that Complainant had been afforded due process rights and that BNSF had a proper basis for terminating Complainant since the decision required a credibility finding and the Board deferred to the Hearing Officer. (RX K, pp. 4-6.) However, the Board found that Complainant should be returned to work "on a last chance basis" considering his enviable and exemplary employment history. (*Id.* at 6-7.) No back pay was awarded and the one year probationary period was retained. (*Id.*) On May 7, 2014, Complainant was reinstated on these terms. Complainant was not at all involved in those proceedings and didn't understand the determinations the Public Law Board made about due process. (HT, p. 261.)

After receiving this notice, Complainant considered his options and worried about all of the stipulations that had been placed on his return to work, including no back pay and retaining the Level-S discipline and probation. He felt that if he returned, he "would be walking around down there with a target on my back." (*Id.* at 194-95.) He decided that the best thing to do would be to retire. (*Id.* at 195; *see also id.* at 338-39.) On June 2, 2014, Complainant retired from the service. His retirement was backdated to November 2013. (*Id.* at 240-42.)

V. Credibility Determinations

In arriving at a decision, the finder of fact is entitled to determine the credibility of witnesses, to weigh evidence, to draw her own inferences from evidence, and is not bound to accept the opinion or theory of any particular witness. *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968), *reh'g denied*, 391 U.S. 929 (1968); *Atlantic Marine, Inc. v. Bruce*,

661 F.2d 898, 900 (5th Cir. 1981); *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98, 101 (1997), *aff'd*, 169 F.3d 615 (9th Cir. 1999). An ALJ is not bound to believe or disbelieve the entirety of a witness' testimony, but may choose to believe only certain portions of it. *Altemose Constr. Co. v. Nat'l Labor Relations Bd.*, 514 F.2d 8, 16 n.5 (3^d Cir. 1975).

The ARB has stated its preference that ALJs “delineate the specific credibility determinations for each witness,” though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006).

Having heard the witnesses' testimony, I have been able to observe their behavior, bearing, manner and appearance. The Ninth Circuit has explained that credibility “involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence.” *Carbo v. U.S.*, 314 F.2d 718, 749 (9th Cir. 1963); *see also Indiana Metal Prods. v. Nat'l Labor Relations Bd.*, 442 F.2d 46, 52 (7th Cir. 1971). I have based my credibility findings on a review of the entire testimonial record and exhibits, according due regard to the demeanor of witnesses who testified before me, the logic of probability, and “the test of plausibility,” in light of all circumstances apparent to me from the record. *Indiana Metal*, 442 F.2d at 52.

A. Credibility of Dixie Leah Brough

Dixie Leah Brough is Complainant's wife of 21 years. (HT, p. 147-48.) She testified about Complainant's reaction to the collision, investigation, and discipline as well as the impact that his termination had on their finances and family. Though I find Ms. Brough credible, her testimony was limited in scope and contained little detail. This appears to be partly a function of limited communication between Complainant and his wife. For example, Complainant only told his wife that he was going to the chiropractor on the day of the appointment. (*Id.* at 327.) After his termination, Complainant, in his Ms. Brough's words, “was very protective and was always making sure [their family] had enough money....” (HT, p. 335.) She has a condition that requires managing stress levels—if she becomes too stressed she has an attack and then she cannot work. To help, Complainant worked to ensure they had enough money to get way and provide a sense of stability for the family after his termination. (*Id.*) As a result, Ms. Brough could not offer a great deal of detail. When her testimony adds to the material in the record, I credit it, but generally her evidence only reinforces what Complainant stated in more detail.

B. Credibility of Complainant's Co-Workers

Five of Complainant's co-workers testified briefly at the hearing. Robert Pitkanen is a machinist for BNSF in the Havre Diesel Shop, where he has been employed for 17 years. (HT, pp. 28-29.) He knew Complainant as a laborer on the afternoon shift, though they didn't work together very often. (*Id.* at 29, 44.) Mr. Pitkanen considers Complainant a friend, though they

did not socialize outside of work and he hasn't kept up with Complainant since he was terminated. (*Id.* at 45.) He witnessed the February 21, 2011, accident.

Lowell C. Alcock is currently retired but spent the last 36 years of his career working as a machinist for BNSF at the Havre Diesel Shop. (*Id.* at 67.) He has known Complainant casually since they went to school together and worked with him four days a week from 2003 until Complainant's termination. (*Id.* at 68.) He was not present when the accident occurred but worked later that day. (*Id.* at 69.) He heard about the collision when he arrived and was later present at the briefing in the Power Desk office with Mr. Anderson and Complainant. (*Id.* at 71.)

Kim Hickman is a laborer at the Havre Diesel Shop of BNSF. He has been with BNSF for 9.5 years. (*Id.* at 120-21.) He worked with Complainant and Complainant helped to train him. (*Id.* at 121.) He did not witness the collision. (*Id.*) Mr. Hickman testified that he respected Complainant as a great worker with a lot of experience who was impressive and knowledgeable, "probably as good a laborer as I've ever worked with." (*Id.* at 129.)

Chad Lee Shubert is a stationary engineer for BNSF at the Havre Diesel Shop. He was trained by Complainant and worked with him. He found Complainant to be a great and very insightful co-worker. (HT, pp. 89.) He considered Complainant a mentor and a friend, but did not socialize with him outside of work or make an effort to stay in contact after Complainant was terminated. (*Id.* at 93-94.) He did not witness the accident. (*Id.* at 89-90.)

Robert West is a 17-year machinist at the Havre Diesel Shop. (*Id.* at 103-04.) He worked with Complainant on occasion and believed he was a good worker. (*Id.* at 104.) He did not witness the accident but learned about it at a briefing later on February 21st. (*Id.*) He considers Complainant an acquaintance, not a friend, and hasn't kept in touch with Complainant other than saying hello when they would run into each other running errands. (*Id.* at 111-12.)

I find Complainant's co-workers generally credible. All were quite matter of fact in their testimony and didn't display indications that they were attempting to tailor their testimony to aide Complainant. Disturbingly, during the cross-examination of each of these subpoenaed witnesses—four of whom still work for BNSF—BNSF engaged in not-so-subtle allusions to disciplinary action connected to the content of their testimony. Essentially, BNSF informed each employee that if his testimony was correct about what Complainant had said, *he* would be in violation of BNSF reporting rules because he had not reported Complainant's injury to a supervisor. (*See id.* at 57 (Mr. Pitkanen); *id.* at 82-83 (Mr. Alcock); *id.* at 99-100 (Mr. Shubert); *id.* at 117-18 (Mr. West); *id.* at 141 (Mr. Hickman).) As a credibility issue, this is nonsense. Though BNSF could twist its myriad rules to punish these employees if it so desired, that is a function more of the malleability of those rules and BNSF's apparent policy of construing rules against its employees, not a function of any malfeasance. They all simply testified that Complainant said he was stiff and sore, not that he told them he had an injury that would need to be reported. They generally believed that a supervisor heard the same remarks and sensibly deferred to the supervisor's implicit determination about reporting. The only point of such question could be to intimidate the witnesses into hedging their testimony.²⁶ None did.

²⁶ That BNSF would repeatedly engage in this tactic during an FRSA hearing is astounding—and quite revelatory.

These witnesses were not consistent about what exactly was said when. I attribute this to frayed memories of events years earlier that at the time would have seemed quite insignificant. The point I draw from their testimony is that Complainant did make verbal reports that he was stiff and sore and that on the day of the accident he grabbed his neck, while smiling, and indicated, in response to Mr. Anderson, that he wasn't so sure he hadn't been injured. How exactly he meant that, how Mr. Anderson took that, and if Mr. Anderson or any other manager heard later reports that were made are matters beyond the testimony of these co-workers.

Mr. Pitkanen also testified about the February 21, 2011, accident. I find him credible on that point. While his vantage wasn't ideal, it afforded him a view of both the skid steer and the locomotive. (*Id.* at 32-33.) He was the only eyewitness to the accident and crucially could observe both movements. His testimony on the matter was straightforward and remained consistent from the initial written statement, through the investigatory hearing, and to the hearing in this case. When the video evidence cannot address the exact sequence of events, I find that Mr. Pitkanen is the best source of information about the accident.

C. Credibility of BNSF Managers

1. Wes Anderson

Wes Anderson is a Mechanical Foreman-2 for BNSF at the Havre Diesel Shop. He started with BNSF as a laborer in 1998 and became a supervisor in 2004. (HT, pp. 400-01.) His job involves working at the Power Desk, controlling the movements of locomotives, flow of the shop, and the assignments of the workers. (*Id.* at 401-02.) He has worked with Complainant since he joined BNSF in 1998 and thought they had a good working relationship. (*Id.* at 402.) Mr. Alcock, who has known Mr. Anderson since he was a child, testified that Mr. Anderson is "a very good man, a good honest person, a good worker." (*Id.* at 76.) Mr. Anderson had no role in the decision to investigate or to discipline Complainant on either occasion at issue here. (*Id.* at 433-34.) I have not found any evidence that includes him in the discussions surrounding the discipline or the formulation of charges. He appears to have simply been a source of evidence.

I find Mr. Anderson credible for the most part, though his testimony does not play a prominent role in this decision. He clearly has conflicts of interests in both investigations. He was the Power Desk foreman on duty at the time of the accident and, as such, ultimately responsible for movements in the area surrounding the Diesel Shop. Shifting blame to Complainant (or Mr. Hofer for that matter) would protect him from further scrutiny. In addition, one of the apparent factual disputes at the center of Complainant's termination concerned what Complainant did, or did not, report to Mr. Anderson and how he reported it. On this point, Mr. Anderson candidly admitted that if Complainant had reported an injury to him and he had not taken action, he could face discipline himself. (*Id.* at 451-52.)

Despite these conflicts of interest, Mr. Anderson's statements were generally matter of the fact and did not attempt to obfuscate or elide the points in contention. He was honest about his actions surrounding the movement of the locomotive and the circumstances of the accident. Though he had an interest in shifting blame, he seems to have simply reported what happened. Potential managerial responsibility relates not so much to Mr. Anderson's actions as Power Desk foreman, but likely with his superiors for not equipping the skid steer with a radio and not

devising rules and procedures to protect against accidents of this sort. In any case, I do not find that Mr. Anderson's conflicts of interest compromised his testimony in this case.

As to what Complainant reported to Mr. Anderson, the record provides no clear answer. Obviously something was said at the Power Desk briefing after the accident, but there are disagreements about how serious the comments were. There is, however, no real credibility issue on this point. Given the testimony, Complainant's statement and actions are susceptible to different reasonable interpretations. Complainant did not want to initiate any formal process and Mr. Anderson interpreted his comments as non-serious. He may have been ultimately incorrect in so doing, but he was not unreasonable. Similarly, the record suggests that Complainant mentioned on later occasions that he was stiff and sore, perhaps in the hearing of Mr. Anderson. Mr. Anderson didn't recall hearing this, but again, there is no contradiction to resolve. Something might well have been said in the Power Desk area while Mr. Anderson did not hear it. I credit his testimony that when he is at the Power Desk before a briefing he is focused on his work, not the various conversations of others in the room. (*See id.* at 418-19.)

Furthermore, there is not even a contradiction between the statements supposedly at the bottom of the dishonesty charge. Complainant stated that he had told Mr. Anderson about a sore neck. (CX 37, p. 1.) Mr. Anderson stated that he had asked if Complainant was OK and been told that he was and that Complainant did not report an injury. (CX 38, p. 1.) Both could be correct. The crucial distinction is between feeling stiff and sore and being injured. Once that distinction is acknowledged, the supposed credibility conflict between Complainant and Mr. Anderson dissipates.

2. *Paul Scott McLeod*

Paul Scott McLeod did not testify at the hearing, but his testimony was provided in the form of a September 11, 2014, deposition. (*See* CX 66.) At the time of the hearing Mr. McLeod was the general foreman at BNSF's Topeka, Kansas mechanical shop, but from 2008 through 2011 he was the general foreman at BNSF's Havre Mechanical Shop. (*Id.* at 1.) In his deposition, Mr. McLeod periodically indicated that his memory had faded about the details of the events that concern this case. (*See generally id.* at 1-23.) During his testimony, however, he appeared quite candid and honest in his responses, appropriately indicating when he did not recall or did not understand a question and not attempting to argue with or evade the questions. Hence I credit his testimony, with three caveats.

First, like Mr. Anderson, Mr. McLeod had a conflict of interest in the investigation of the February 21, 2011, accident. He was the general foreman and the accident could indicate his failure to better plan for areas for the skid-steer to operate, to better manage employees moving locomotives when the skid-steer was in use, or to better provide for communication between the skid-steer and others. While, like Mr. Anderson, Mr. McLeod was not a decision-maker, unlike Mr. Anderson, he played an active investigatory and prosecutorial role.

Second, it was Mr. McLeod who initially missed the important difference discussed above between a statement that one is stiff and sore and a report of an injury. Complainant claimed to have done the former, (*see* CX 37, p. 1), Mr. McLeod treated it as a claim to have done the latter or at least failed to ascertain that the situation, and the application of BNSF's

rules, was more complex than it appeared at first blush. This formed the basis for the dishonesty charge in the second discipline. This point is important insofar as it suggests that Mr. McLeod was not being careful with crucial distinctions. This leads me to treat his views with some care.

Finally, it bears repeating that in the sworn testimony in this case, Mr. McLeod's memory was very poor. Often he was merely walked through emails and documents from years before that he had prepared or read without adding any independent recollection. So for example, Mr. McLeod did not testify under oath as to what exactly Complainant told him when, on April 19, 2011, he asked Complainant why he hadn't reported the injury. Instead, the record has Mr. McLeod's general recall and then a timeline he prepared that day. (*See* RX I, p. 2.) This timeline, however, was prepared *after* Mr. Marby decided to pursue termination and with the purpose of facilitating the formulation of charges leading to that end. It is an argumentative timeline created to terminate Complaint, and I treat as such, rather than a plain rendering of facts.

3. *Mike Collier*

Mike Collier was the conducting officer for Complainant's second investigatory hearing. (*Id.* at 277.) Though not affiliated with the Havre Diesel Shop, he reports to Mr. Marby. (*Id.* at 306.) Mr. Price, in consultation with Mr. Marby, chose Mr. Collier as the conducting officer and provided him with information and evidence. (*Id.* at 478-79; CX 57, pp. 2-13.) The materials sent to Mr. Collier included Mr. McLeod's timeline. (CX 57, p. 8; *see also* RX I, p. 2.) Mr. Price did not provide Mr. Collier with the supervisor's report of injury form that indicated that Complainant had only been diagnosed with an injury 5 days prior to the report. (*Id.* at 530.)

Mr. Collier did not testify. Based on the course of the second investigatory hearing, he was skilled at conducting the proceedings and permitted the witnesses to provide their evidence in their own terms. He also permitted Complainant to present his defense. Comparing the two hearings at issue in this case, the second hearing was conducted in a far more impartial manner. Though Mr. Collier officially terminated Complainant, no formal explanation of his reasoning and determination has been provided. The record contains only a May 20, 2011, email to Mr. Price, Mr. Marby, and Mr. Heenan making four discrete findings with references to the record. (*See* CX 57, p. 19; RX W, p. 1.) This is an incredibly odd way for a conducting officer to make a determination. In fact, it is not really a determination at all. In reality it is just the points that one would need to support finding Complainant guilty of the accusations and terminating him, coupled with a credibility finding on a point necessary to sustain the immoral conduct charge as to Complainant's reasons for making the report.

Based on this email and the absence of any genuine findings, in this case Mr. Collier was not making determinations. He was conducting a hearing in accordance with Complainant's rights under the collective bargaining agreement in order to provide BNSF with the ammunition it needed to terminate Complainant and defend against an appeal to the Public Law Board. On that score, Mr. Collier appears to have done his job quite well. But here I attach little weight to Mr. Collier's findings. He was not there to make decisions about adverse actions—he was there to equip the decision makers with the transcript to do so. While his points, coupled with a credibility finding, might carry weight in the context of the very deferential review conducted by the Public Law Board, I afford no deference to the decisions of BNSF managers. Without that

sort of deference, Mr. Collier is hardly even making findings, and I can give his opinions, insofar as they are apparent, little weight.

4. *Beau D. Price*

Beau Dana Price was the Shop Superintendent at the Havre Diesel Shop in 2011 and senior BNSF manager onsite. He supervised 150-180 workers, including about 20 supervisors and 4 general foremen. (HT, p. 436.) He started working for BNSF in 2005 as a Senior General Foreman at a different diesel shop. (*Id.*) Laborers like Complainant reported to a direct supervisor, who reported to a general foreman, who then reported to Mr. Price. (*Id.* at 436-37.)

I find Mr. Price only moderately credible. First, though BNSF investigatory hearings are not at all like, and not meant to be like, any sort of judicial hearing, the course of Complainant's first hearing under Mr. Price is particularly troubling. The deficiencies were evident in the description above. Throughout the transcript, it is clear how Mr. Price wants the hearing to come out. At multiple points he intervenes to ask suggestive questions to elicit testimony that could be damaging to Complainant. (*E.g.* CX 2, pp. 25-26.) He presses Mr. McLeod to reach firmer conclusions about what the video shows. (*Id.* at 126-28.) With Mr. Hofer, Mr. Price helps to clarify an apparent statement that he knew the skid-steer was outside of door six and then later helps to explicate Mr. Hofer's theory of the accident. (*Id.* at 86-87, 102-03.) Mr. Price later simply tells Mr. Hofer what to say about the video, stating his conclusions in the form of a questions and walking Mr. Hofer through the points he wants for the record. (*Id.* at 137-38.) Though I do not expect judicial standards of impartiality, Mr. Price's conduct is particularly biased against Complainant in this hearing.

Mr. Price should probably have never been conducting those hearings in the first place. He may have been the only one in Havre qualified to do so, but that did not stop BNSF from procuring Mr. Collier for the second hearing. The accident of February 21, 2011, was a bit of a freak accident. The chances were incredibly low that the skid-steer would happen to be clearing snow in that particular part of the property and that it would move past the blind-side of a locomotive at the exact moment it started moving. It was possible that Mr. Hofer failed to be alert and attentive, it was possible that Complainant failed to be alert and attentive, and it was possible that neither was at fault. The circumstances of the accident were simply not anticipated by management. There were no rules that specified where the skid-steer was to be clearing snow, no procedures to prevent this particular sort of situation, and, in fact, the skid steer wasn't even equipped with a radio that would have easily prevented the whole accident and unfortunate series of events that is the subject of this case. Fault could have very well resided solely with management, to include Mr. Price. If there was going to be a fair, objective hearing to ascertain the facts, Mr. Price should not have been running the show. By taking sole control of the investigatory hearings, Mr. Price insured that neither he nor his managers would have to answer difficult questions about the way they created the potentially dangerous situation.

Finally, during the hearing in this matter Mr. Price's defense of his decisions was shifty and at times hard to believe. He asserted that Complainant was disciplined because he was in foul of the tracks, even though workers at the shop standardly foul the tracks and no rule of procedure specified that Complainant shouldn't have been doing what he was doing where he was doing it. When this was pointed out, he retreated to the point that Complainant was not alert

and attentive, but he had no real evidence of this. He admitted that the video couldn't show that the locomotive was moving when Complainant passed it and the only eyewitness testified that it was not. He then shifted back to the claim that Complainant shouldn't have been where he was. He argued that Complainant should have been in communication with supervisors about where he was clearing snow, ignoring the fact that Complainant had no way to communicate with his supervisors, but also held that the supervisors had no obligation to have any idea where Complainant was or to instruct others to watch out for him. (*See* HT, pp. 460-65, 493-99, 510-12). Mr. Price's explanations simply did not add up. Although I found him generally honest, I do not place any great weight on the judgments he made in this case.

5. *Joseph Heenan*

Joseph Ryan Heenan is the Director of Labor Relations at BNSF. In 2011, he was the Director of Employee Performance. In that position he oversaw the administration of PEPA and reviewed all discipline involving termination or suspension longer than 30 days. (HT, p. 349.) I found his testimony generally credible and of all of the potential decision-makers in this case, he appears to have engaged in the most searching review of the record. But for three reasons, I do not give his testimony any great weight in this decision.

First, Mr. Heenan's testimony about BNSF's practices in other cases, policies about not disciplining employees who report injuries, and rules against retaliation was conclusory. (HT, pp. 367-71.) It is also somewhat irrelevant: the concern is this case, not BNSF policies and rules. Similarly, Mr. Heenan's opinion based on his training that there was no retaliation in violation of the FRSA, (*id.* at 371), attempts to speak to the ultimate matter and warrants no weight.

Second, Mr. Heenan's explanations for the termination were somewhat slippery. When it was pointed out to him that there was no strict contradiction between Complainant's statement that he had reported a stiff and sore neck and Mr. Anderson's statement that Complainant hadn't reported an injury, Mr. Heenan simply declared that his understanding of the record as a whole led him to believe that Complainant really meant that he was reporting an injury. (*See* HT, pp. 374-77.) Complainant later took a litigation position that his report constituted an injury report, but this did not alter his account of what he said. Mr. Heenan, like Mr. McLeod, didn't pay careful attention to the difference between being injured and being stiff and sore. But that is a difference that is crucial for any fair appraisal of the dishonesty charge. To fill in the gap between the two statements, Mr. Heenan just asserted that Complainant had really claimed more than what he put in his statement.

Most importantly, the sort of review conducted by Mr. Heenan renders his testimony of little value in this matter. He is an HR representative. He was not tasked with making a determination. Instead, his role was to ascertain whether there was substantial evidence to support the decision favored by the actual decision makers. (*Id.* at 373.) In so doing, he was really just trying to make sure that BNSF could defend its actions on appeal, with the benefit of the deference reviewing bodies like the Public Law Board give to company representatives.

Substantial evidence review is incredibly deferential. In the Supreme Court case alluded to by Mr. Heenan, (*see id.* at 351), substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v.*

NLRB, 305 U.S. 197, 229 (1938). The Ninth Circuit has explained that this standard of review is “extremely deferential” and will result in affirmance “unless the evidence presented would *compel* a reasonable factfinder to reach a contrary result.” *Monjaraz-Munoz v. INS*, 327 F.3d 892, 895 (9th Cir.), *amended by* 339 F.3d 1012 (9th Cir. 2003) (internal quotation marks and citations omitted). So long as the determination in question is one of the *possible* rational interpretations of the evidence, that determination is supported by substantial evidence. *See Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008.)

One does not make a decision based on the substantial evidence standard. One *cannot* do so—it is a deferential standard for evaluating determinations that have already been made, not guidance on how to make a decision. In most cases, multiple contradictory conclusions could all be supported by substantial evidence. Yet that is the sort of review Mr. Heenan is conducting. It may be appropriate in his station as an HR liaison, but it implies that his views can be given no great weight in this decision. Contrary to the Public Law Board, I am not reviewing BNSF’s decisions with *any* deference. I am not actually properly *reviewing* their decision at all. Rather, I am examining whether protected activity contributed to the decision making process and, if so, whether BNSF has established its affirmative defense. In this task, Mr. Heenan’s determinations are irrelevant and at cross-purposes. He only ever looked at this case from the perspective of substantial evidence review. That is a sort of look I am never asked to take.

6. *Brandon Marby*

Brandon Marby is the Chief Mechanical Officer for BNSF and oversees all of the operations in the Mechanical Division, including conduct and discipline. In that capacity, he was involved in the termination of Complainant. (HT, pp. 267-68.) He advised the course of action in Complainant’s second disciplinary charge and hearing, but was not involved in the hearing itself. He did review the transcript and file after the hearing and before the dismissal was issued. (*Id.* at 277-78.) He was not involved at all in Complainant’s first discipline.

Within 12 minutes of learning of this matter, Mr. Marby decided that Complainant, a 39 year employee of BNSF, should be terminated. (HT, pp. 213-14, 271-74, 307-08.) Mr. Marby was Mr. Price’s, and Mr. Collier’s superior, and this determination set in motion the rest of the events in this case. While the quickness of Mr. Marby’s determination is not per se a credibility issue, it does raise some questions regarding his judgment and the circumspection with which he acted. Indeed, the apparent glee that Mr. Marby took in the opportunity to terminate Complainant—someone he had never met—is rather disturbing. Not only did he quickly decide to terminate Complainant, in his next email he wrote, excitedly, “Yes, Let’s get statement. We will want LR support on this event!” (CX 24, p. 6.) His superior, Mr. Roberts, opined that they should focus solely on the late report of the injury and not focus on conduct issues. (*Id.* at 1-3.) Mr. Marby, however, read these instructions as narrowly as possible, dropping the insubordination charge but insisting on pursuing conduct violations for dishonesty and immoral conduct. (HT, pp. 315-16.) The transcript became available for review on May 20, 2011. Mr. Marby needed at most the afternoon to “review” the evidence and announce only “I support Termination [sic].” (CX 58, p. 1; RX J, p. 1.)

This behavior suggests that Mr. Marby was intent on terminating Complainant from the start. He ultimately phrased his view as “support” of a decision to terminate and at the hearing described his role as a review of the file for consistency purposes. (*See* HT, pp. 277-79.) But the decision was his to make. Mr. Collier didn’t even state what discipline he believed to be appropriate, Mr. Heenan only was conducting a substantial evidence review, and Mr. Price wasn’t authorized to make the determination. It was for Mr. Marby to make the decision, subject to approval by Mr. Heenan and the law department as to whether he *could* do what he wanted to do. In this light, Mr. Marby’s cavalier attitude is disturbing and calls his judgment into doubt.

Mr. Marby’s explanation of the discipline at the hearing confirmed this worry. He was intent on justificatory overkill sketching out a variety of factual scenarios but always finding that the rules had been violated. (HT, pp. 277-91.) It is one thing to argue in the alternative, but it is quite another to have decided on action and then go looking for a variety of justifications. As the decision-maker, Mr. Marby had to decide what had happened and whether a rule was broken, and if so how. Yet here, Mr. Marby was still entertaining multiple factual findings. In addition, his adverse determination was immune to further evidence—despite having deemed Complainant dishonest, Mr. Marby declared that corroborating statements from other co-workers would have been irrelevant. (*Id.* at 292-93.) The possibility that injury reports were discouraged was dismissed on laughingly weak grounds: he recalled that the Union General Chairman had called him in another case with a supervisor who was behaving inappropriately as to injury reports, and concluded from the fact that no call came in this case that there was not similar problem. (*Id.* at 287-891.) He seems to think that if the union doesn’t take extraordinary action, that is proof that there is no hostility to injury reports. This is not a sound course of reasoning.

I do not find that Mr. Marby was dishonest—his testimony was generally candid. But I do not place great weight on his various arguments and post-hoc justifications of his actions. Rather, the record reflects that he made his decision in this matter very quickly and that everything that followed was simply an attempt to justify that decision. His explanation for his decision has the quality of rationalization rather than explanation, arguments developed to justify a decision already reached. This does not independently establish a violation, but it does entail that I treat Mr. Marby’s various proffered explanations with great care.

D. Complainant’s Credibility

I find Complainant for the most part credible. During this hearing I found his testimony honest and forthright. Mr. Alcock, Complainant’s co-worker testified that he was honest and good at his job. He always completed his job safely. (HT, p. 85.) BNSF trusted Complainant enough to use him in training other employees in the safe performance of duties at the facility. (*Id.* at 159.) Mr. Anderson trusted Complainant enough to seek his advice and respected his experience and wisdom regarding work at the Diesel Shop. (*Id.* at 402.)

As to the events of February 21, 2011, his account has remained consistent throughout the various hearings. Though some of his beliefs turned out to be false—i.e. his belief that the warning bell on the locomotive was not ringing—this augurs no dishonesty. He simply didn’t hear the bell, which is understandable given he was wearing ear plugs in an enclosed skid steer while sweeping snow. Once the video was provided and the bell was heard, he made no efforts to retain his prior belief, properly adjusting his views with the evidence as it became available.

There are several potential concerns for Complainant's credibility. First, BNSF determined that he reported his injury on April 19, 2011, in retaliation for his discipline. If true, this could implicate some malevolence. The issue will be considered in more detail in discussing whether Complainant engaged in protected activity in good faith. For present purposes, I find that it does not pose a credibility problem for Complainant. Whether or not his motivations for making the report were proper, the content of the report itself was honest: he was, in fact, injured. The report and surrounding statements does not misrepresent the nature or mechanism of the injury or Complainant's prior course of treatment. Whether or not Complainant's motivations were pure in telling the truth about his injury, he told the truth. So there was no dishonesty on that score. The charge relating to Complainant's reason for making the injury report was immoral conduct, not dishonesty. Mr. McLeod did collapse the two at the hearing, (*see* CX 22, p. 34), and even Mr. Collier, in his "findings" referred to a retaliatory reason as a "dishonest reason." (*See* CX 57, p. 19; RX W, p. 1.) That is an incorrect equivalence—a point that Mr. Marby saw quite clearly, at least at the hearing. (*See* HT, pp. 322-23.) Per Mr. McLeod's account, Complainant was *not* dishonest when asked for his reason—he just gave an improper reason, implicating immoral conduct in an honest report.

BNSF also alleged and determined that Complainant was dishonest in making his report in that he falsely claimed to have reported the injury at an earlier time to Mr. Anderson. This point was discussed above in reference to the credibility of Complainant's co-workers and Mr. Anderson. Though there is some uncertainty, years after the events, as to what *exactly* was said, when it was said, who heard it, and how serious Complainant was, there is no deep dispute that Complainant did in fact mention being stiff and sore and did state, during a Power Desk briefing that he wasn't sure if it was correct that he wasn't injured. Complainant clearly did not want to be injured and simply hoped that his soreness would resolve. He didn't go out of his way to inform supervisors, or anyone, or his condition. But when queried, he gave honest reports. He didn't go out of his way to conceal anything. Placed in context and paying attention to the recollections of Complainant and Mr. Anderson, as well as those of his co-workers, there is no real dishonesty in the reports.²⁷ Hence, I do not find a credibility problem on that issue.

Complainant's litigation position in his second BNSF hearing did take the further position that he had reported an injury to Mr. Anderson. But in so doing, he did not alter his account of the facts or claims as to what was said. Instead he argued that what he said constituted an injury report. Whether or not this was a plausible position is not relevant. BNSF doesn't define an injury and what constitutes an injury report is not entirely clear either. Faced with a hearing on violation of a reporting rule, Complainant as represented by his union decided his best position was to argue that what he said rose to the level of an injury report. There was no dishonesty in doing so since the factual basis for the claim was consistent with prior representations and his factual claims in this litigation. What changed was the theory of the case and interpretation of the facts in the light of BNSF rules.

²⁷ This is not a finding that BNSF implicated the FRSA in disciplining Complainant for dishonesty. That is yet to be determined. For the purposes of the FRSA, it is not essential that the discipline assessed be ultimately justified. Rather, the question is whether that discipline, justified or not, implicated protected activities impermissibly. So, if BNSF genuinely believed that Complainant was dishonest and that was the sole reason for the discipline, it would not have violated the FRSA, even if, in fact, Complainant was not dishonest and so the discipline was unjustified.

Finally, there is the adverse credibility determination of Complainant that was made by Mr. Collier. After the hearing, Mr. Collier's finding included a determination that Complainant was not being honest about his conversation with Mr. McLeod after he reported his injury and was asked why he was doing so. According to Mr. Collier, Complainant "became nervous and quit looking me in the eye while answering this question, leading me to believe that Mr. McLeod's testimony is accurate." (CX 57, p. 19; RX W, p. 1.) The testimony itself was only that he didn't remember the exact course of the conversation, (*see* CX 22, pp. 63-62), which is hardly a contradiction of what Mr. McLeod stated. If there is a credibility problem on the point, it is due solely to Mr. Collier's impressions, not what Complainant said.

I place no weight on Mr. Collier's credibility determinations. The Public Law Board may defer to the conducting officer as a matter of course. In hearing a case under the FRSA, I do not. Mr. Collier did not testify before me or even sit for a deposition. His adverse credibility determination is, on the record before me, a bare assertion. What is more, as discussed above, Mr. Collier's role in this matter was to produce the record that would sustain Complainant's termination from further review. He was not a true fact-finder—he was tasked with producing a record to support a finding. In this light, the adverse credibility determination is simply self-serving for BNSF, a way to fill in a gap in BNSF's argument that Complainant was engaged in immoral conduct. In context, then, the credibility finding is highly suspect. Without any testimony from Mr. Collier that would further explain and justify his determination outside of the context of providing BNSF with just what was needed to terminated Complainant, I will not make any adverse credibility inferences against Complainant in this matter.

VI. Legal Analysis and Findings

***A. Did BNSF Retaliate Against Complainant?*²⁸**

The FRSA provides that railroad carriers "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 any protected activities. 49 U.S.C. § 20109(a). Actions brought under the FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). *See* 49 U.S.C. § 20109(d)(2)(A)(i). In order to prevail, a complainant must demonstrate that: (1) he engaged in protected activity (protected activity); (2) the employer knew that he engaged in protected activity (knowledge); (3) he suffered an unfavorable personnel action (adverse action); and (4) the protected activity was a contributing factor in the unfavorable personnel action (contribution). 49 U.S.C. § 42121(b); *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *see also Kuduk v. BNSF Ry. Co.*, 768 F. 3d 786, 789 (8th Cir.

²⁸ Respondent argues as to the April 18, 2011, discipline that Complainant did not exhaust his administrative remedies with OSHA and that his complaints are time-barred. (RPB, pp. 2-3, 24-30.) As Complainant points out, (CRB, p. 2), Respondent made the same arguments in its motion for summary decision. The basic issue is whether a complainant may amend complaints as the administrative process proceeds or whether he or she is "locked in" based on what is presented to OSHA. Respondent would first have me declare new theories off limits and then prevent Complainant from raising those theories at OSHA because as a new claim they would be time barred. I denied Respondents motion for summary decision on this point. This is a hearing at OALJ and we are still engaged in the administrative process that Respondent asserts Complainant has failed to exhaust. In any case, given the findings below as to whether any protected activity contributed to the April 18, 2011, adverse action, the issue is moot.

2014). The complaining employee bears the initial burden, and must show “by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.” 29 C.F.R. § 1982.109(a).

The burden then shifts to the respondent employer, which in order to avoid liability must demonstrate “by clear and convincing evidence, that [it] would have taken the same [adverse] action in the absence of that [protected] behavior.” 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1982.109(b); *Araujo*, 708 F.3d at 157; *Beatty v. Inman Trucking Mgmt., Inc.*, ARB No. 13-039; ALJ Nos. 2008-STA-020, 2008-STA-020, slip op. at 7-11 (ARB May 13, 2014); *see also Addis v. Dep’t of Labor*, 575 F.3d 688, 691 (7th Cir. 2009) (AIR-21 language overrules traditional case law and allows an employee to shift the burden to the employer with a “lesser showing”); *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (“For employers, this is a tough standard, and not by accident”). Clear and convincing evidence is evidence that shows “that the thing to be proved is highly probable or reasonably certain.” *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015) (“*DeFrancesco II*”) (citing *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011)); *see also Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 6 (ARB Apr. 25, 2014); *Brune v. Horizon Air Indus., Inc.*, ARB Case No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006).

1. Complainant’s Case For Retaliation

a. Did Complainant Engage in Protected Activity?

To establish a case for retaliation, a complainant must first show that he or she engaged in some protected activity. *Araujo*, 708 F.3d at 157. The FRSA contains three sets of employee protections. Section 20109(a) of the FRSA identifies a variety of general protected activities including providing information or assisting in an investigation regarding potential violations of law, refusing to violate the law, filing a complaint applicable to railroad safety or security, notifying the railroad carrier of an injury, cooperating with a federal safety or security investigation, furnishing information to a governing body, or accurately reporting hours. 49 U.S.C. §§ 20109(a)(1)-(7). Section 20109(b) lays out additional protected activities, including reporting a hazardous safety condition, refusing to work under hazardous conditions, or refusing to authorize the use of hazardous or unsafe equipment. 49 U.S.C. §§ 20109(b)(1)-(3). Finally, Section 20109(c)(2) protects employees who seek medical treatment or follow the treatment instructions for a work-related injury. 49 U.S.C. § 20109(c)(2).

Complainant claims three protected activities. The first concerns his participation in and providing information to BNSF’s investigation of the February 21, 2011, accident. (CPB, p. 21.) One of the enumerated activities in the FRSA is “to provide information...or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of Federal law, rule, or regulation relating to railroad safety of security...” 49 U.S.C. § 20109(a)(1). 49 U.S.C. § 20109(a)(1)(C) applies this protection to investigations conducted by “a person with supervisory authority over the employee...” Complainant argues that he participated in the investigatory hearings regarding the accident, the accident implicated a number of regulations touching on railroad safety, and he had an objectively reasonable belief that he was reporting/assisting in the investigation of safety violations. (CPB, pp. 21-24.)

Respondent allows that Complainant participated in the March 30, 2011, investigation but contends that his participation was not in good faith and that in order for his participation to be protected he needed to cite to the regulations or safety rules at issue. (RPB, pp. 3, 30-32.) BNSF argues that Complainant's reason for participating was that he was facing discipline and his statements were offered in an attempt to defend himself and his actions, hence, they were not in good faith. (*Id.* at 3, 32.) This is a non sequitur. Complainant was surely defending himself against allegations, but that does not entail that he was acting in bad faith or dishonestly in so doing. He believed he was not at fault and that others were to blame. He made statements to that effect. There is nothing untoward here. (*See also* CRB, p. 8.) Respondent's further contention that Complainant "was attempting to use his alleged safety concerns as a sword to intimidate BNSF," (RPB, p. 32), is patently ridiculous. On BNSF's reading, the good faith requirement would eviscerate the FRSA, making any activity engaged in where the employee has an interest in the activity in question fall outside the ambit of the statute. Reporting a safety violations, even in the context of hearing where one is at risk, is *not* a form of "intimidation" that railroads must be protected against.²⁹

BNSF also argues that since Complainant did not cite to the regulations in making his reports, those reports are not protected. (*Id.* at 30; *see also* RRB, pp. 8-9.) This is confused.³⁰ BNSF relies on a case that was resolved on a motion to dismiss, *Stinson v. BNSF Railway Co.*, No. 14-00143 (C.D. Cal. Jan. 14, 2015), that is not available for public retrieval. Based on BNSF's argument, however, the complaint was dismissed because *counsel* for the complainant could refer only to general OSHA guidelines rather than to specific regulations. (RPB, p. 30.) The case *Stinson* cited in support makes only the same point: that in order to plead a protected activity under 49 U.S.C. § 20109(a)(1) it is necessary to identify the rule or regulation implicated by the report of complaint. *See Kuduk v. BNSF Ry. Co.*, 758 F.3d 786, 789 n.3 (8th Cir. 2014). That is nothing groundbreaking—to state a cognizable complaint under 49 U.S.C. § 20109(a)(1) the complaining party must be able to identify the regulation or rule at issue. If there isn't such a regulation or rule at issue, there can be no violation and the case can be dismissed for failure to state a claim. Here, Complainant has been able to articulate which regulations are implicated by his concerns, (*see* CPB, pp. 4, 6, 22; CRB, pp. 7-8), something the complaining party in *Stinson* apparently could not do. The point BNSF is urging, however, is entirely different—that a complainant must have cited chapter and verse from the C.F.R. at the time of the protected activity to have even engaged in protected activity. *No* case stands for that rather shocking proposition. At the time of the report, a complainant must have made reports that touched on relevant rules and regulations, but he or she need not explain to the railroad with legal precision exactly how its conduct implicates any number of the myriad regulations governing railroads.

Participating in an investigatory hearing and offering reports of safety concerns that, as a matter of fact, touch on rules and regulations concerning railway safety is paradigmatic protected activity under 49 U.S.C. § 20109(a)(1)(C). This, of course, would not prevent BNSF from disciplining Complainant as a result of that hearing. It may do so, for any number of reasons, including of course any rule violations on his part in the events precipitating the hearing. But it may not include in those reasons the fact that Complainant made statements related to railway

²⁹ That BNSF considers an employee defending himself in a hearing and making reports that safety rules are being violated as a form of intimidation tends to show that BNSF views protected activity generally with great animosity.

³⁰ Complainant argues along these lines at CRB, pp. 5-8.

safety at the hearing itself. Put otherwise, BNSF can discipline Complainant for what he did, it cannot discipline him for what he said about safety in the course of an honest attempt to defend himself. That hardly gives employees a “sword” to “intimidate” BNSF—it is a simple Congressional instruction to not punish employees for reports about railway safety.

Complainant’s second and third protected activities both pertain to injury reports. The FRSA protects good faith acts done “to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or a work-related illness of an employee.” 49 U.S.C. § 20109(a)(4). Complainant asserts that his reports to Mr. Anderson “of neck and back soreness and stiffness due to the collision, on February 21, 22 or 23, 27 and 28” is protected under this provision. (CPB, p. 21.) He also claims that his April 19, 2011, report of an injury to Mr. McLeod is protected activity. (*Id.*)

The reports to Mr. Anderson were discussed with reference to Complainant’s and Mr. Anderson’s credibility (§§ V.C.1, V.D). Complainant is incorrect to claim that he made reports on all of these days. The record is clear that some sort of report was made on the afternoon of February 21, 2011, though it is unclear exactly what was said and the manner in which it was said. The record also shows that Complainant at least made statements later of being stiff and sore in the presence of Mr. Anderson, or possibly another supervisor, though it is unclear when this occurred, who it was said to, the context of the conversation, and whether Mr. Anderson, or another supervisor, would have heard the report. The multiplicity of dates of reports is not due to many reports, but rather inconsistencies in the record as to when reports were made. This creates a factual difficulty in identifying when exactly the alleged protected activity occurred.

The factual difficulty is ultimately immaterial. Complainant admits that he “did not believe at that time he was injured—he hoped and assumed the stiffness and soreness would go away—but he nonetheless informed, or attempted to inform, [Mr.] Anderson of his condition.” (CPB, p. 24; *see also* CRB, pp. 10-11; RRB, pp. 7-8.) The record supports that claim. (*See* HT, p. 163, 212-13.) 49 U.S.C. § 20109(a)(4), however, does not protect attempts to inform anyone about one’s “condition”—it protects attempts to inform the carrier “of a work-related personal injury or a work-related illness.” Complainant did not believe he was injured, so he cannot have been attempting to inform anyone of being injured. Nor did he believe he suffered from an illness. He believed he was stiff and sore after the accident, but there was no injury and the symptoms would fade. He may well have reported that, but reporting that one is stiff or sore is not protected by the FRSA. As such, there was no protected activity on those dates.³¹

Complainant’s final claimed protected activity is his injury report to Mr. McLeod on April 19, 2011. (CPB, pp. 21, 25.) Respondent acknowledges that this was an injury report, but argues that it was not made in good faith and so does not constitute protected activity. (RPB, pp. 43-49.) Black’s Law Dictionary defines “good faith” as “[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of

³¹ Even if these were protected they would not form the basis for a retaliation claim. Complainant can only argue that Mr. Anderson “was aware, or should have been aware” of these reports. (CPB, p. 24.) For this theory to work, Mr. Anderson had to actually be aware of the reports. And the evidence suggests that he was not, or did not appreciate what the reports were. Whether he should have been aware or should have investigated further is another question, but not one that can help Complainant’s theory. Moreover, I do not see how contribution could be shown with regards to these activities.

reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.” Black’s Law Dictionary (10th ed. 2014). Bad faith, on the contrary is “[d]ishonesty of belief, purpose, or motive.” *Id.*

The FRSA “does not apply the good faith requirement to all of an employee’s interactions with a railroad. Rather, the phrase ‘good faith’ applies directly to a singular ‘act done...to notify...the railroad carrier...of a work-related personal injury.’” *Ray v. Union Pac. R.R. Co.*, 971 F. Supp. 2d 869, 883-84 (S.D. Iowa 2013) (quoting 49 U.S.C. § 20109(a)(4)). Hence, “the relevant inquiry remains whether, *at the time he reported his injury* to Defendant, Plaintiff genuinely believed the injury he was reporting was work-related.” *Id.* at 884 (emphasis in original). The report would be in bad faith if the employee did not believe that he had suffered a work-related injury when he reported it. *Id.* at 883-84 (discussing *Walker v. American Airlines*, ARB Case No. 05-028, ALJ Case No. 2003-AIR-17 (ARB Mar. 30, 2007)). Even if the employee has denied that he was injured or it was work-related before, so long as there is an explanation of why he now has a different understanding, the report may be in good faith. *See Davis v. Union Pac. R.R. Co.*, 2014 U.S. Dist. LEXIS 101708, *19 (W.D. La. July 14, 2014); *see also Cash v. Norfolk S. Ry. Co.*, 2015 U.S. Dist. LEXIS 4293, *28-29 (W.D. Va. Jan. 14, 2015). Even a report that is retracted almost immediately can satisfy the good faith requirement. *See Miller v. SCX Transp., Inc.*, 2015 U.S. Dist. LEXIS 1122507 (S.D. Ohio Aug. 25, 2015).

Some courts have added that in order for the act of reporting a work-related injury to be done in good faith the complainant must have an objectively reasonable belief, and not just a subjectively genuine belief. *See Koziara v. BNSF Ry. Co.*, 2015 U.S. Dist. LEXIS 2382 (W.D. Wis. Jan. 9, 2015); *see also Worcester v. Springfield Terminal Ry. Co.*, 2014 U.S. Dist. LEXIS 42954 (D. Maine Mar. 31, 2014) (discussing parallel “good faith” requirement in 49 U.S.C. 20109(b)(1)(A)); *Armstrong v. BNSF Ry. Co.*, 2015 U.S. Dist. LEXIS 118224, *21-27 (N.D. Ill. Sept. 4, 2015) (applying two-facet genuine and objectively reasonable belief test).

Neither of these points is at issue in this case. When Complainant reported a work-related injury on April 19, 2011, he genuinely believed that he had suffered a work-related injury. His prior beliefs otherwise can be sensibly attributed to his belief that he was not injured and that his stiffness and soreness would resolve as usual. Moreover, his belief was objectively reasonable. It is to be expected that someone in a skid-steer hit by a locomotive, even at slow speed, will suffer an injury. His symptoms had persisted and a doctor told him that he had suffered an injury in the accident. So if Complainant has run afoul of the good faith requirement, it is not due to his beliefs at the time of the report or the reasonableness of those beliefs.

Delay in reporting is not a violation of the good faith requirement. In *Smith-Bunge v. Wis. Cent. Ltd.* a district court granted *plaintiff* partial summary judgment on the question of a good faith report. In August 2012 the plaintiff suffered a work-place back injury, but believed that it was just an aggravation of an injury from 2009 and though he told supervisors that his back hurt, did not report any work-related injury. He reported the injury a week later after the learning from an MRI that he had actually suffered a new injury and then being told to file the report. 60 F. Supp. 3d 1034, 1037 (D. Minn. 2014). The court found that the plaintiff had consistently believed that his injury was not work-related until he got the MRI results, and thereafter had acted in good faith in telling his superiors about the injury and filling out the requested forms. *Id.* at 1039-40.

There is an additional facet to good faith explored by some courts. In *Murphy v. Norfolk S. R.R. Co.* the employee injured himself when a chainsaw he was using kicked back and struck his leg while he was not wearing protective leg chaps and caused a severe cut. He reported it to his supervisor, but then convinced his supervisor not to report it further. The plaintiff successfully covered up the work-related injury for over nine months, until an anonymous tip was made and the railroad investigated. During the investigation, plaintiff reported the injury and filled out an injury report form. 2015 U.S. Dist. LEXIS 25631 (S.D. Ohio Mar. 3, 2015). The railroad argued that this was not a good faith report, but the plaintiff maintained that since he had believed that he had suffered a work-related injury when he reported it, as he had always believed, it was a good faith report as a matter of law. *Id.* at *12-18. The District Court left it to the jury, reasoning that even though the plaintiff had believed that his injury was work-related, a reasonable jury could conclude that the act of reporting it after covering it up for nearly a year and only after the company learned of it from another source was not an act in good faith. *Id.* The court explained that the good-faith requirement in the FRSA incorporates both the subjective belief that the injury was work-related and the manner in which the report of injury was made. *Id.* at *17-18, n.3. The inquiry, then, looks to whether or not the complainant believes what he is reporting and his motives and intentions in acting to report. If there is a deficiency, it is in the manner in which Complainant reported the injury and has rationale for doing so. Respondent argues that Complainant's reason for making (the truthful) report of an injury was retaliatory and for that reason is not protected. He was attempting to conceal his injury from BNSF, but once facing discipline, struck back. (RPB, pp. 43-47; RRB, pp. 9-11.)

Complainant believed that BNSF would not like his injury report. BNSF, insofar as it considers an injury report a form of retaliation against it, admits that this belief was well-founded. The testimony of Complainant's co-workers, as well as the course of events after the report, corroborate this impression of hostility. This belief supports both readings of the events: that Complainant would think it was retaliatory to file an injury report and that Complainant would hold off on filing a report for fear of retaliation. On the first, he acted to retaliate himself: knowing that BNSF and its managers were upset and apparently harmed by injury reports, he filed to get back at them for his discipline in the accident. On the second, he made a truthful report when he thought he no longer had anything to lose, or alternatively, once he was disciplined he ceased doing what he perceived as a favor to BNSF in concealing his injury.

Respondent contends that the "key inquiry" in this case is whether Complainant can show that he reported an injury in good faith. (RPB p. 43.) Complainant did not report his injury for almost two months after the accident, denying injury after the accident and at his hearing. (*Id.* at 43-44.) The first inkling of a report came on April 18, 2011, when Complainant told Mr. Price that they weren't going to like what happened next. The report comes the next day, when the discipline is given again and when Mr. McLeod asked Complainant why he had delayed and was told it was because he believed the investigation would come out different and that the report would bring things to a head. Complainant did not deny this at the May 11, 2011 investigation. Respondent argues that the report was retaliation and thus not a good faith act. (*Id.* at 45-47.)

Complainant focuses on the line of cases that address the sort of belief that a complainant must possess to make a report in good faith. (CPB, pp. 27-30.) It is undisputed that Complainant genuinely and reasonably believed that he had suffered a work-related injury. These points do not, however, address the central question in this case. The FRSA attaches the

good faith requirement to the act done, not to a belief. *See* 49 U.S.C. § 20109(a). His beliefs are relevant in determining if the act of reporting an injury was done in good faith. But there are other ways an act can fail to be done in good faith. So if Complainant reasonably believed he had an injury and what he reported but his motivation for making the report was purely retaliatory, then the *act* would not have been done in good faith. That is what Respondent contends.

Complainant also argues that there is a reasonable explanation for the delay. He did not realize he was injured and only came to that conclusion over time. (CPB, pp. 26-27, 30.) Further, once he received an indication from the doctor he was injured he formed an intention to report the injury, an intention that preceded any discipline. He acted on that intention at the next available opportunity when both he, a manager, and a union representative were onsite. (*Id.* at 27.) The first point is correct, though not at the heart of this issue. I countenance that Complainant only realized he was injured over time, which is an explanation for some of the delay. Respondent's argument, however, targets not delay generally, but the decision to report the injury immediately following the discipline.

Respondent writes off as "nonsensical" the argument that Complainant acted as soon as he had determined he had something that needed to be reported and when he, a manager, and a union representative were all present. (RPB, p. 47.) It points out he had received chiropractic treatment, did not need to have a union representative present, and told Mr. McLeod that he was reporting the injury because of the outcome of the discipline. (*Id.* at 47-48.) This overstates the point. I reject the position that the injury report came after the discipline by mere coincidence. But at the same time, the discipline was not the only reason or even the predominant reason for the injury report. The record reflects that Complainant only developed the belief that he was injured over time, so delay by itself is not evidence of bad faith. Additionally, whether he *needed* a union representative to report the injury is not as important as whether he *wanted* one present.³² The delay between the doctor's appointment and diagnosis and the report was only 5 days, and Complainant's reasons for not acting in this time are cognizable, not nonsensical. He genuinely feared what would happen to him when he reported his injury. It was not unreasonable for him, then, to want a union representative present when he made the report.

There is some dispute over exactly what transpired between Complainant and Mr. McLeod after Complainant reported his injury and Mr. McLeod asked why he had waited to do so. According to the timeline that Mr. McLeod prepared and at the May 11, 2011, hearing Mr. McLeod represented that Complainant had told him that he had delayed because he thought the investigation would come out differently and the report would bring matters to a head. (CX 22, p. 33; RX I, p. 2.) In his deposition, however, Mr. McLeod had no independent recollection of the exchange. When Mr. Collier questioned Complainant about this, he only said that he vaguely recalled the conversation, neither affirming nor denying any details. (CX 22, p. 62.) At the hearing in this case, Complainant denied telling Mr. McLeod that it was all a conspiracy and he was making the report to bring things to a head, but he allowed that the disciplinary result played a role in his decision to report the injury at that time. (HT, p. 183, 226-27.)

³² The opposite could be true of the question of whether the lack of a union representative at the shop justified his delay in reporting. Here the question is Complainant's reasons for delay, not whether those were good reasons.

Mr. McLeod's timeline was created after Mr. Marby—his boss' boss—had told him to pursue dismissal and it was created for the purpose of establishing the charges and record that would lead to Complainant's dismissal. Given the timeline and the emails in evidence, Mr. McLeod received the instructions from Mr. Marby to pursue dismissal while Complainant was in his office, and it is during this time that he asked Complainant why he had delayed in reporting injury. (RX I, p. 2; CX 24, p. 6.) Mr. McLeod was paraphrasing Complainant to begin with, and I am skeptical that his doing so in a document meant to motivate the case for termination would exactly represent the content of color of the actual statements. I do conclude that Complainant did, in some manner, reference the investigation as a reason for his injury report. Even on Mr. McLeod's prepared account, however, the question was not why the report was being filed but why it wasn't filed earlier. (RX I, p. 2.) The act in question is the report, not the delay in reporting. So to determine whether the act was done in good faith, I must look at the reasons for the report, not just the reasons for the delay.

There are mixed motives for reporting this injury. I find that Complainant did honestly believe that he should report the injury and was disposed to do so. He had suffered a work-related injury and knew once he got a diagnosis from the doctor that his injury had to be reported. I also partially credit his account of why he waited until April 19th. Respondent is correct that Complainant did not need a union representative to report an injury, but Complainant clearly believed that it was necessary for him to do so to protect himself from BNSF. This was a rational belief. If the report had been purely retaliatory, Complainant would have made it to Mr. Price on April 18, 2011. Instead he waited a day. So it was genuinely important to him that he have a union representative with him. At the same time, the fact that the injury report was made right after the discipline was assessed was not a mere coincidence. They were connected and Complainant obviously saw them as such. He chose to make his report in the context of a discussion of the discipline rather than pursuing the injury report separately. BNSF would have me conclude that this shows he was *just* retaliating with his report. But that cannot be right—the report was true and Complainant had formed an intention to make it earlier, once he had seen the doctor. He had also decided to delay slightly. The question, then, is why.

I find two reasons for this delay connected to the impending discipline. First, Complainant was worried that an injury report would adversely affect the results from the disciplinary hearing. He had stated at the hearing that he wasn't injured because at that point he believed or hoped it would just go away. Coming back two weeks later and admitting he was wrong in his testimony would do him no favors. He also had good reason to believe that managers at BNSF would not be happy about an injury report. He feared retaliation, and so delayed reporting. Even if he had to report eventually, it would be better to do so after the determinations as to the accident were made.³³

³³ Though Complainant did not appreciate the complexities in BNSF's various rules, it would appear that they quite plainly punish injury reports. Under PEPA, serious violations result in a 30 day suspension plus 3 year review period. But if the employee has at least a five year good work record and has been reportable-injury free and discipline year in the five years before the infraction, then the review period is reduced to one year. (*See* CX 52, p. 3; RX N, p.3.) When a violation during probation results in termination, the length of probation matters a great deal. By the terms of this rule, if Complainant had reported his injury and it had been reportable (which it was) then he would have received harsher discipline, simply for the fact that he reported the injury.

The second evident reason that Complainant waited until after the discipline to report the injury is that he believed that he was doing BNSF and the management in Havre a favor in concealing the injury. He admitted to as much at the hearing, though he disavowed that exact wording. (*See* HT, p. 227.) In context, however, this makes good sense. Complainant believed that reporting an injury would have adverse consequences for his managers and BNSF. He had been with BNSF for almost 40 years. He knew how important it was to managers to have positive safety records. He knew that having to report an injury to the FRA was not beneficial to BNSF and that it sought to minimize the need to make such reports. On this basis he decided to not report his injury and delayed doing so, even when he started to realize it would be necessary.

I find bad faith in neither reason for delay. Complainant feared what BNSF would do in the pending discipline if he reported the injury and he thought he was helping his superiors by concealing the injury. Once the discipline was issued, the first reason disappeared. And the fact that the findings were adverse to him removed the second reason: he no longer had motivation to (wrongfully) protect BNSF and his managers from the adverse effects of an honest injury report. BNSF gave Complainant good reasons not to report his injury. It is incongruous, then, for BNSF to declare that once those reasons are overcome, it is bad faith to report an injury because the employee hesitated. Similarly, Complainant had a genuine desire to do benefit to BNSF and his managers. That caused him to delay. To say that a report once that good will dissipated is bad faith, gets things the wrong way around. Ill-will did not create the reason to report the injury—the injury and recent diagnosis did. Good-will helped to delay the report despite that reason, but that does not mean that the report itself, once made, is in bad faith.

This is not a case where the disciplinary action gives Complainant his reason for filing the injury report. That would be bad faith. Here, Complainant filed an injury report because he had suffered a work-related injury that he had come to believe, over time, needed to be reported. That is a good faith reason to file a report. The report itself did incorporate good faith reports of what Complainant believed. The twist here is that the pending discipline gave Complainant a reason to conceal his injury or to at least delay filing his report. Once the discipline was issued, the impediment was removed. With the impediment removed, his good faith reason for filing the report motivated the action. There is an important difference between discipline providing an employee with the reason for filing an injury report and discipline removing an impediment to filing an injury report. This case is in the latter mold. Though the fact that Complainant delayed for fear of what would happen to him or out of desire to do benefit to his superiors would not, in of itself, justify the delay, neither does it make the eventual report itself one made in bad faith.

To put the point otherwise, in reporting his injury Complainant acted in good faith. His reasons were proper: he reasonably and correctly believed that he had suffered a work-related injury that needed to be reported since his symptoms had worsened, not faded, and he had now seen a doctor and been told he was injured. His reasons for reporting his injury exactly when and how he reported it implicate some questionable motives: the exact timing and context was partly a function of the fact that he had been disciplined and that both removed the worry that the pending investigation would be adversely affected by his report and the good-will he harbored towards BNSF and his superiors. But under the FRSA, the protected activity is defined as just the report of an injury. *That* is what must be done in good faith to be protected. Of course the circumstances of the report matter, but those are best considered later in the inquiry by examining the respective causal roles of the protected activity, the injury report, and the

surrounding circumstances of the that protected activity. At this stage, the question is just whether the injury was reported in good faith. Since Complainant had a reasonable belief that he suffered a work-related injury, the content of the report he submitted was, per his understanding, true, and his underlying reason for submitting the injury report (not to include ancillary reasons related to the particular time and manner) was proper, the injury report itself was made in good faith. It is hence protected activity. BNSF may punish the manner and timing of an otherwise good faith injury report. But it must do so while complying with the causal standards and burdens of the FRSA, not by shifting its reasons for punishing an employee into a broad conception of what it means to report an injury in good faith. To read the good faith requirement to demand completely “pure” actions by a complainant related to the report would do just that, and shoulder a complainant with the burden of establishing that he gave respondent no reason to discipline him at all in the manner of reporting the injury.

b. Did Respondent Know about Complainant’s Protected Activity?

A complainant must also show that the respondent knew about his protected activity. *See Araujo*, 708 F.3d at 157. It is not enough for a complainant to show that his employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the decision-makers who subjected him to the alleged adverse actions were aware of his protected activity. *See Conrad v. CSX Transp.*, -- F.3d --, 2016 U.S. App. LEXIS 9570, *9; 2016 WL 3006097, *3 (4th Cir. May 25, 2016); *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). Case law differs on whether this factor is a required independent showing or if it is subsumed in the causal showing that a complainant must make. *See Coates v. Grand Trunk Western R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 2 n.5 (ARB July 17, 2015) (citing *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op at 13 (ARB June 24, 2011) (“*Bobreski I*”); *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987)); *see also Folger v. SimplexGrinnell, LLC*, ARB No. 15-021, ALJ No. 2013-SOX-42 (ARB Feb. 18, 2016) (knowledge not a distinct element in a complainant’s required showing under Sarbanes-Oxley); *DeFrancesco II*, ARB No. 13-057 at 5 (knowledge omitted as separate element in FRSA claim). But whether analyzed independently or not, some knowledge of the protected activity must be shown at some point. It is hard to imagine how a protected activity could contribute to an adverse action if the employer and its agents lack any knowledge of the protected activity.

As to the March 30, 2011, protected activity of participating in the investigatory hearing and the April 19, 2011, protected activity of reporting an injury, there is no dispute that Respondent and the relevant decision-makers at BNSF had knowledge of the protected activity. Mr. Price conducted that March 30, 2011, hearing at which Mr. McLeod and Mr. Anderson both testified. Complainant reported his injury to Mr. McLeod and within a few hours Mr. Anderson, Mr. Price, Mr. Heenan, and Mr. Marby were all aware. Thus, this issue is not in dispute.

c. Did Respondent Take Adverse Action Against Complainant?

Third, a complainant must show by a preponderance of the evidence that the respondent took some adverse action against him or her. *Araujo*, 708 F.3d at 157. The FRSA specifies that a railroad carrier may not “discharge, demote, suspend, reprimand, or in any other way

discriminate against an employee” on the basis of protected activity. 49 U.S.C. § 20109(a). The ARB has indicated that whistleblower standards are meant to be interpreted expansively, as they have “consistently been recognized as remedial statutes warranting broad interpretation and application.” *Menendez v. Halliburton*, ARB Nos. 09-002 and 09-003, ALJ No. 2007-SOX-2005, slip op. at 15 (ARB Sept. 13, 2011). In *Burlington Northern & Santa Fe Ry. v. White*, the Supreme Court held that an adverse action in the Title VII context need only be “harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination.” 548 U.S. 53, 68 (2006). Drawing on this rule, the ARB has held that in whistleblower claims, the *starting point* for an adverse action is any action that “would dissuade a reasonable employee from engaging in protected activity.” *Menendez*, ARB Nos. 09-002 and 09-003 at 20. Employer actions must be considered in the aggregate to determine if together they rise to the level of an actionable adverse action. *Id.* at 20-21. Based on the similar language in the statutes, the ARB has applied the same broad definition of an adverse action under the FRSA as it previously articulated under AIR-21 and Sarbanes-Oxley: a railroad engages in adverse action if it engages in “unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” *Fricka v. Nat’l R.R. Passenger Corp.*, ARB No. 14-047, ALJ No. 2013-FRS-035, slip op. at 7 (ARB Nov. 24, 2015) (quoting *Williams*, ARB No. 09-018 at 7).

Complainant alleges two adverse actions. First, he was disciplined on April 18, 2011, with a 30 day record suspension and 1 year probationary period. This derived from the March 30, 2011, hearing into the February 21, 2011, accident. Second, he was terminated by BNSF on May 25, 2011, following the May 11, 2011, investigatory hearing into his actions of April 19, 2011, and his claimed actions in the aftermath of the February 21, 2011, accident. (CPB, p. 30.) The parties stipulated to these points, and Respondent does not contest them.

d. Was Complainant’s Protective Activity a Contributing Factor in Respondent’s Adverse Action?

i. Legal Framework

The final question in Complainant’s case for retaliation is whether he has shown by a preponderance of the evidence that the protected activity contributed to the decision to take the adverse action. This is not meant to be a difficult or arduous showing. *E.g. Ledure v. BNSF Ry. Co.*, ARB No. 13-044, ALJ No. 2012-FRS-020, slip op. at 8 (ARB June 2, 2015); *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ Case No. 2010-FRS-020, slip op. at 7 (ARB May 31, 2013); *Rookaird v. BNSF Ry. Co.*, 2016 U.S. Dist. LEXIS 147950, *16 (W.D. Wash. Oct. 29, 2015). A “contributing factor” is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Araujo*, 708 F.3d at 158 (quoting *Ameristar Airways Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 563, 567 (5th Cir. 2011)); *see also Addis v. Dep’t of Labor*, 575 F.3d 688, 691 (7th Cir. 2009); *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1150 (Fed. Cir. 1993); *Williams*, ARB No. 09-092 at 5.

The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. *See, e.g., Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13 (ARB Sept. 30, 2011) (citing *Sylvester v. Paraxel Int’l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, slip op. at 27 (ARB

May 25, 2011)). It is not necessary for a complainant to establish any retaliatory motive in order to show the contributory factor element. *See Marano*, 2 F.3d at 1141; *see also Coppinger-Martin v. Solis*, 627 F. 3d 745, 750 (9th Cir. 2010). Nor is it necessary to show any animus. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Feb. 29, 2012) (“*DeFrancesco I*”) Contribution might be shown simply by the presence of a protected activity in a chain of causation leading to the adverse action, even when there is no evidence of retaliatory animus or motive. *E.g. Hutton*, ARB No. 11-091 at 6-7. “Quite simply, ‘any weight given to the protected [activity], either alone or even in combination with other factors, can satisfy the ‘contributing factor’ test.’” *Powers v. Union Pac. R.R. Co.*, ARB Case No. 13-034, ALJ Case No. 2010-FRS-030, slip op. at 11 (ARB Apr. 21, 2015) (reissue with full dissent) (vacated on other grounds) (quoting *Marano*, 2 F.3d at 1140).

The contributing factor inquiry is very different from the causal inquiries that courts engage in when deciding Title VII and related discrimination/retaliation claims. The question here is *only* whether a particular factor played *any* role at all in bringing about the adverse outcome. This is a minimal causal standard, far more lenient than showing *the* cause, substantial cause, or the motivating factor. Presently, however, the framework for the contribution inquiry, and in particular what evidence is to be considered, is a matter of some lack of clarity and dispute at the ARB. *See, e.g., Powers*, ARB No. 13-034.

In *Bobreski v. J. Givoo Consultants, Inc.*, an ARB panel articulated a fairly clear structure:

...the ALJ must consider “all” the evidence “as a whole” to determine if the protected activity did or did not “contribute.” By “all” of the evidence, we mean all the evidence that is relevant to the question of causation. This requires collecting the complainant’s evidence on causation, assessing the weight of each piece, and then determining its collective weight. The same must be done with all of the employer’s evidence offered to rebut the complainant’s claim of contributory factor. For the complainant to prove contributory factor before the ALJ, all of his circumstantial evidence weighted together against the defendant’s countervailing evidence must not only permit the conclusion, but also convince the ALJ, that his protected activity did in fact contribute to the unfavorable personnel action.

ARB No. 13-001, ALJ No. 2008-ERA-003, slip op at 17 (ARB Aug. 29, 2014) (“*Bobreski II*”).

A little over a month later in *Fordham v. Fannie Mae*, however, the ARB sketched a very different sort of contribution inquiry. ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014). There the ARB held that it was reversible error to weigh evidence offered in support of a non-discriminatory basis for the adverse action against the complainant’s evidence of contribution. That evidence goes to a respondent’s affirmative defense and is evaluated later in the analysis and under a different burden of proof that is imposed on the respondent. *Id.* at 2.

Consequently, a respondent's evidence of a legitimate, non-retaliatory reason or basis for its decision or action is not weighed against a complainant's causation evidence in the determination of whether a SOX complainant³⁴ has met his or her burden of proving 'contributing factor' causation. The determination whether a complainant has met his or her initial burden of proving that protected activity was a contributing factor in the adverse personnel action at issue is required to be made based on the evidence submitted by the complainant, in disregard of any evidence submitted by the respondent in support of its affirmative defense...

Id. at 3; *see also id.* 16-17, 20-37.³⁵

Powers, in which the ARB sat *en banc*, offered the potential for a resolution of this tension with the statement, endorsed, in fact, by the majority and dissent, that "there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor *as long as the evidence is relevant to that element of proof.*" ARB 13-034 at 21 (emphasis in original); *id.* at 32 (Corchado, J. dissenting). There has been little agreement, however, on what this means. Moreover, on May 23, 2016, the ARB issued an order vacating its decision in *Powers* due to an *ex parte* communication. *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB May 23, 2016). The ARB is in the process of reviewing the question *en banc*, *see Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB June 17, 2016), but at present there is no clear appellate guidance.

Post-*Powers* ARB decisions have not clearly decided the issue. The *DeFrancesco II* ARB held that "an employer's affirmative defense evidence...is, with rare exception, not to be considered at the initial causation stage..." ARB Case No. 13-057 at 6. Yet the *Ledure* ARB, writing between *Powers* and *DeFrancesco II*, affirmed a finding of no showing of contribution that was premised on a run of the mill consideration of evidence favoring contribution and evidence favoring non-discriminatory reasons to determine if contribution was shown—a model of the inquiry that would make evidence favoring the respondent's reasoning relevant in most cases. ARB No. 13-044 at 8-9. In one of its latest decisions, the ARB has candidly recognized that it is deeply split. *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002, slip op. at 20 (ARB Mar. 30, 2016.)

Presently I must arrive at a way to consider the question of contribution in this case. It is difficult to make sense of a *per se* rule that would forbid consideration of any of a "respondent's evidence" at this stage of the inquiry. Evidence is simply evidence. Different parties offer different evidence, but the decision is on the record as a whole. Evidence offered by one party may favor the other, or more likely, favor both parties in various ways. A categorical rule could mean that at this stage only evidence favoring a complainant is to be considered, but such a rule would be perplexing insofar as it would dispense with any fact-*finding*—if only evidence favoring one conclusion may be considered in "finding" a fact, the "showing" will have been

³⁴ Sarbanes-Oxley incorporates the same AIR-21 framework used in FRSA cases. *See* 18 U.S.C. § 1514A(b)(2)(C).

³⁵ Though the *Fordham* ARB panel two-judge majority acknowledged *Bobreski* and a number of other cases addressing the issue in different ways, it stated simply that "[g]iven the inconclusiveness of the case law on this subject, we treat this issue as a matter of first impression." *Id.* at 20-21.

made so long as *any* evidence is produced.³⁶ The core point of *Fordham*, however, does not require such an absolute rule; rather it stands for the proposition that the contribution inquiry “does not involve the weighing of the respondent’s evidence of lawful, non-retaliatory reasons for its action against the complainant’s evidence of causation under the ‘preponderance of evidence’ test.” ARB No. 12-061 at 21. This is an injunction against weighing evidence to decide the question of causation, *not* an injunction against what evidence *could* become relevant in a properly conducted contribution inquiry. Evidence may often speak to multiple conclusions, respond to many different questions. The issue, then, is not so much whether such evidence may be considered at all, but to *how* and *when* it may be considered at this stage of the analysis.

A contributing factor doesn't need to be a necessary condition for an action or a sufficient condition for an action. In the anti-retaliation context, it may be that other reasons are sufficient for the adverse action, even though the protected activity was, in fact, another reason on the heap of reasons in play. In that case, the protected activity is a contributing factor and the complainant has the burden of showing as much by a preponderance of the evidence. But then the respondent will escape liability if it can show, by clear and convincing evidence, that the protected activity, despite being an actual contributing factor, was not a *necessary* factor in that other, non-discriminatory factors were *sufficient* to cause that exact adverse action.

In a more obvious case, the shifting inquiry may be easy: if an employee engages in protected activity and a decision maker credibly tells her that adverse action will be taken because of the protected activity, then the protected activity is a contributing factor. But a respondent could still escape liability if other, unconnected misconduct by the employee was going to produce that adverse action regardless of the protected activity and the attitude of the one supervisor. If the employee complained about safety with great vulgarity and then punched out her boss, it is rather easy to imagine that protected activity contributed to the termination likely to follow, but also that the employer would have terminated the employee absent the protected activity—employees who use vulgarity and punch out their bosses are generally terminated, regardless of whether or not they make any complaints related to safety.

On the opposite end of the spectrum are cases with protected activity, adverse action, and an absence of any good, plausible reasons for the adverse action. Here contribution could follow quite easily as well: adverse actions aren't taken absent any reason, and a particular absence of non-discriminatory rationale is good evidence that discriminatory rationale played some role. In such a case, however, the complainant’s case for contribution will turn on deficiencies in the respondent’s explanation of the action, so the evidence to be considered will overlap in the two inquiries. To know whether contribution follows because of a deficiency in the explanation otherwise, one must examine the evidence for the explanation, even though this examination is different in kind than the similar evaluation in the first case above in which the question is whether the respondent’s reasons are such that they would have motivated the action absent the protected activity. In the inquiry now imagined, the question is only whether there is a particular

³⁶ Administrative Appeals Judge Corchado, dissenting in *Fordham*, made a similar point as a *reductio ad absurdum* of what he took to be the rule of the majority: so long as there was some temporal proximity, properly ordered, then contribution would *always* be shown, even when the evidence as a whole decisively showed no contribution, for instance by showing financial collapse led to the termination of *all* employees. See *Fordham*, ARB No, 12-061 at 43 (Corchado, J. dissenting). The majority didn’t engage the example, either embrace it or explain it away.

deficiency in the explanation that shows contribution by the protected activity of some sort, even if in the final analysis the respondent still would have taken the same adverse action.

So although the contributing factor inquiry and affirmative defense inquiry are distinct, they overlap in important ways and the same sorts of evidence *could* become relevant. Yet the *questions* being posed are quite different. Weighing reasons belongs only to the second question—whether the protected activity was a necessary condition of the adverse action or if the adverse action would have followed absent the protected activity. In the first inquiry the issue is not *comparative* weight but whether the protected activity is a reason with *any* actual weight. Insofar as the non-discriminatory rationale is weighed at this step, it is only in order to determine whether or not its insufficiency, lack of credibility, or inextricable connection to the protected activity is such that the complainant has shown that the protected activity did contribute in some part. A respondent's argument and favorable evidence can go to defeat a showing of contribution by undermining the circumstantial evidence favoring contribution, but no such evidence could dispose of the contribution inquiry.

The following is a bad argument:

Premise: R would have taken the adverse action even if C didn't engage in the protected activity
Conclusion: C's protected activity was not a contributory factor in R's adverse action.

This is a bad argument because of the logic of a contributing, as opposed to motivating, factor. So a respondent can show that premise with some evidence and it would be a mistake to reach the conclusion. Moreover, the same will hold for a whole group of premises: R had sufficient non-discriminatory reasons for its adverse action, R had no bias or animus against C or C's protected activity, R has offered consistent explanations for its adverse action, R standardly takes the same adverse action in circumstances of this sort absent the protected activity, R conducted an objective investigation, the proximate causes were non-discriminatory, a reasonable employer would have taken the same action, and a whole host of others. Moreover, even all of these together do not establish that there was no contribution. Contribution is a minimal showing, so evidence favoring other explanations just isn't going to establish no contribution. But, of course, a respondent does not bear the burden of showing no contribution. Rather, the complainant bears the burden of showing contribution by a preponderance of the evidence. It is hence incumbent on a complainant to make some showing. What is to be established is a minimal causal role, but it must be established by a preponderance of the evidence. Consider the following argument, somewhat similar to that above.

Premise 1: C argues that C's protected activity contributed to R's adverse action because R's adverse action lacks sufficient explanation otherwise.

Premise 2: R would have taken the adverse action even if C didn't engage in the protected activity.

Conclusion: C's argument that C's protected activity contributed to R's adverse action because R's adverse action lacks sufficient explanation otherwise fails.

In contrast to the above, this is a good argument, and if the respondent can point to evidence establishing premise 2 while premise 1 is true in virtue of the complainant's proffered case for contribution, then the respondent will have a good argument not against contribution, but against

the complainant's proffered *showing* of contribution. The same will hold for the whole host of other alternatives for premise 2 where a respondent might point to evidence: bias animus, shifting explanations, inconsistent action, etc.

Since AIR-21 places the burden on a complainant to show contribution, arguments of the second form are quite appropriate to consider in the contribution phase. Arguments of the first form are not. The difficulty is that evidence that would establish the second premise in the second argument (as well as the substitutes) is the same as the evidence that would establish the premise in the first argument (as well as the substitutes) because those two premises are identical. So that evidence can be relevant to the contribution inquiry, but only if and when it is considered as part of a rebuttal to an argument or claim made by (on imagined on behalf of) the complainant to establish contribution. The error to be avoided is transitioning from the cabined inquiry into evidence favoring a respondent's explanation *solely* as it would undermine an argument of the complainant to a broader inquiry into contribution generally. If that is done, one is drawn into arguments of the first, unacceptable form and inappropriate weighing of reasons. That is the danger the ARB guards against.³⁷

When contribution is shown by direct evidence, the inquiry is simple: one considers that evidence and if credible, contribution is shown. In determining the credibility of the evidence, it may be necessary to weigh competing evidence, but only in determining the value of the evidence, not the ultimate issue of causation. The task is more difficult when contribution is shown by circumstantial evidence. Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, work pressures, relationships among the parties, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation of the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. *See DeFrancesco I*, ARB No. 10-114 at 6-7; *Bobreski II*, ARB No. 13-001 at 17; *Bechtel*, ARB No. 09-052 at 13; *Bobreski I*, ARB No. 09-057 at 13. In some of these inquiries it will be necessary to consider a respondent's stated rationale for the adverse action in order to determine if some shortcoming makes out a case for contribution. *E.g. Ledure*, ARB Case No. 13-044, pp. 8-9.

Noting its recent disagreement as to what evidence is relevant in examination of contribution, the ARB added that "we all agree that ALJs are not precluded from considering evidence of pretext, inconsistent application of an employer's policies, and inconsistent explanations for the adverse personnel actions to support a finding that a complainant has met his burden to show that his protected activity was a contributing factor." *Dietz*, ARB No. 15-017 at 20-21. It would appear to follow as a matter of course that evidence undermining those showings and others can be relevant as well, insofar as in the particular factual situation and the arguments being advanced by the complainant the case for contribution turns on one of those factors that pertains to a respondent's rationale. Again, the error is to transform one of many possible inquiries into an *argument* for contribution into a legal rule for all showings of

³⁷ The *Fordham* majority recognized as much, holding that it would be permissible to examine an employer's reasons for actions when the complainant's circumstantial case for contribution turns on a claim that those reasons are pretext. But it warned against the error of taking this point to mean that the inquiry was defined by a weighing of competing causal stories or a requirement that pretext be shown, features appropriate in the Title VII context but not in the distinct AIR-21 framework. ARB No. 12-061 at 25-26.

contribution because it is that transformation that would turn an examination of contribution into a weighing of alternative reasons for the adverse action.

A complainant is not required to show any of the particular circumstances or indications of contribution individually—in a contributing factor inquiry there is no decisive examination of pretext, animus, sufficiency, etc. that drives the analysis because the burden on the complainant, albeit a burden by a preponderance of the evidence, is only to show contribution. So it is error to focus the contribution inquiry on a particular aspect or on respondent’s articulated reasons because those reasons could well be true or the animus, retaliatory motive, or pretext could well be absent, but *at the same time* the protected activity also contributed. Instead, insofar as a complainant’s argument for contribution is premised on one or more of the circumstances that involves a respondent’s reasons, those reasons and evidence favoring them become relevant to the contribution inquiry since those reasons and evidence are relevant to the circumstantial case for contribution. *Fordham* ARB No. 12-061 at 23; *see also Zurcher v. Southern Air, Inc.*, ARB No. 11-002, ALJ No. 2009-AIR-007 (ARB June 27, 2012); *Franchini v. Argonne Nat’l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 10 (ARB Sept. 26, 2012).

To evaluate a complainant’s case for contribution, the ALJ must thus look at a variety of different ways in which contribution might be shown and the evidence for each. Furthermore, an ALJ must consider the circumstantial evidence *as a whole* and not in discrete pieces when asking whether the evidence establishes contribution. *Bobreski II*, ARB No. 13-001 at 17-18. Evidence that individually might be insufficient can together make a very strong case. A case where there is temporal proximity, evidence of animus by some decision-makers, evidence of pretext, significant inconsistencies in a respondent’s evidence, and shifting explanations and policies could be an obvious and strong instance of contribution, even if individually no one point would be convincing. *Id.* at 19-22, 30. Consideration of the strength of a respondent’s evidence for its proffered reasons for an adverse action will be rare because “the complainant need establish only that the protected activity affected *in any way* the adverse action taken, notwithstanding other factors an employer cites in defense of its action.” *DeFrancesco II*, ARB Case No. 13-057 at 6 (emphasis in original). A court may not simply weigh evidence in favor of one reason or another, because “[u]nder the contributing factor causation standard, protected activity and non-retaliatory reasons can coexist; therefore, [a complainant] is not required to prove the [respondent’s] reasons are pretext.” *Coates*, ARB Case No. 14-019 at 3-4.

Where the content of a report or disclosure (the filing of which constitutes the protected activity) gives an employer the reasons for personnel action against a complainant, the protected activity is inextricably intertwined with the adverse action. *E.g. Hutton*, ARB No. 11-091 at 6-7; *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024 (ARB Apr. 25, 2013); *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 12 (ARB Oct. 26, 2012) (citing *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012)). For example, if a protected report of an injury triggers a record review or an investigation and this leads to disciplinary action, the protected activity and investigation are inextricably intertwined, even when the employer asserts a non-discriminatory basis for the adverse action, and contributing factor follows as a matter of law. *DeFrancesco I*, ARB No. 10-114 at 7-8.

In such a case, the consideration and weighing of the respondent's non-discriminatory rationale occurs in the context of its affirmative defense to liability. *Id.* at 8. It is at that stage that it is proper to weigh the strength of the non-discriminatory rationale articulated by a respondent as against the complainant's evidence of contribution, and to do so in an inquiry in which the respondent has a clear and convincing evidence burden rather than the complainant possessing a preponderance of the evidence burden. Explaining the point recently, the ARB found that a complainant's showing of contribution can be accomplished simply via the presence of protected activity in a causal chain leading to the adverse action. So long as that protected activity is "inextricably intertwined," contribution follows as a matter of course and a respondent may only prevail in the later analysis of its affirmative defense. See *Rudolph v. Nat'l R.R. Passenger Corp. (Amtrak)*, ARB Nos. 14-053 and 14-056, ALJ No. 2009-FRS-015, slip op. at 10 (ARB Apr. 5, 2016) ("*Rudolph II*"). When there are intervening events that might explain the adverse action, "the only question" at this stage of the analysis "is whether the intervening events...negate a find that [the complainant's] protected activity was a contributing factor in [the respondent's] adverse action." *Rudolph v. Nat'l R.R. Passenger Corp. (Amtrak)*, ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 21 (ARB Mar. 29, 2013) ("*Rudolph I*"); see also *Carter v. BNSF Ry. Co.*, ARB Nos. 14-089, 15-016, 15-022; ALJ No. 2013-FRS-082; slip op. at 4 n.20 (ARB June 21, 2016) (not all connection via a chain of events establishes contribution)..

Temporal proximity is one form of acceptable circumstantial evidence in the contributing factor analysis. *Bobreski I*, ARB No. 09-057 at 13; *Bechtel*, ARB No. 09-052 at 13 & n.69; *Zinn v. American Commercial Lines*, ALJ No. 2009-SOX-025, slip op. at 19 (ALJ Nov. 19, 2012) In some instances temporal proximity alone can suffice. See *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2009); *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1136 (10th Cir. 2013); *Dietz*, ARB No. 15-017 at 20. In evaluating the importance of temporal proximity, however, a court must consider the overall circumstances and the nexus between the protected activity and the chain of events leading to the adverse action. *Compare Kuduk*, 768 F.3d at 792 with *Mosby v. Kan. City S. Ry.*, 2015 U.S. Dist. LEXIS 93869, *19-20 (E.D. Okla. July 20, 2015). So a finding of no contribution may be sustained despite temporal proximity when there countervailing evidence against contribution, including evidence of compelling non-discriminatory rationale for the adverse action, a larger timeline disfavoring contribution, and the existence of a plausible non-retaliatory intervening cause. *Folger*, ARB No. 15-021 at 3-6.

A complainant may also show contribution a cat's paw theory. See *Kuduk*, 768 F.3d at 790-91; *Lockheed Martin*, 717 F.3d at 1137-38. This theory applies when the impermissible consideration has no bearing on the decision-maker, suggesting no discrimination, but does bear on the actions of another supervisor who in turns acts to bring about the ultimate adverse action in some way. See *Staub v. Proctor Hosp.*, 562 U.S. 411, 422-23 (2011). If the impermissible factor contributed to actions of one supervisor, and those actions contributed to the ultimate decision resulting in the adverse action, then the impermissible factor was a contributing factor in the adverse action. The complainant need only show that one individual among multiple decision makers influenced the final decision and acted, in part, because of the protected activity. *Rudolph I*, ARB No. 11-037 at 16-17 (citing *Bobreski I*, ARB No. 09-057 at 13-14).

This discussion has been long, reflecting the current uncertainty as to what the proper contribution inquiry is supposed to look like. In light of that uncertainty, I have attempted to explicate the way in which evidence favoring a respondent's non-retaliatory rationale can be both relevant and irrelevant to the analysis of contribution. I conclude that the proper mode of analyzing contribution is to look at all of a complainant's arguments, actual and those he could have made based on the record, and then to examine whether those arguments sustain, individually or together, the complainant's burden. This may include consideration of temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation of the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity, and anything else a complainant produces as an indication of contribution. One does not weigh conflicting evidence of non-retaliatory explanations since that evidence is not relevant to the question of contribution. But, depending on the context of the case, that same evidence may become relevant to a complainant's *showing* of contribution. When this occurs, it is proper to consider that evidence, but only in the context of evaluating whether a complainant has met his burden in the particular way suggested.

ii. Contribution as to the April 18, 2011, Discipline

Much of the effort in this case has been directed at the propriety of Complainant's April 18, 2011, discipline derivative from the February 21, 2011, accident and the March 30, 2011, disciplinary hearing. Complainant devotes a substantial portion of his post-hearing brief to the propriety of this discipline. (CPB, pp. 3-9; 33-45; *see also* CRB, pp. 9-10.) Respondent defends the propriety of the investigation at some length. (RPB, pp. 32-42; *see also* RRB, p. 11.)

Based on the record before me (as opposed to the record before BNSF at the time of discipline or the Public Law Board or an unspecified ideal record), it is quite clear that this discipline was unfair. There were serious problems with the investigation and the hearing. The investigation appears to have been cursory and omitted any serious consideration of whether managerial failure may have been involved. The conduct of the hearing was discussed with reference to Mr. Price's credibility (§ V.C.4). Rather than an independent airing of evidence, the hearing was conducted to implicate Complainant, with Mr. Price asking pointed questions, clarifying, and offering evidence himself to aid witnesses in stating the preferred conclusions. Whether to protect Mr. Hofer, to protect themselves, or out of simply incompetence, BNSF managers improperly shifted blame for a freak accident to Complainant when the evidence indicated that he was struck from behind, passed the locomotives when they were not moving, had no way of knowing of the impending movement, would have likely been visible to a properly positioned Mr. Hofer, was being alert and attentive, and was operating the skid steer in an area he was supposed to clear of snow in a manner in accordance with the rules. Insofar as blame attaches, BNSF managers, the very managers who investigated and then conducted the hearing are implicated for not anticipating the potential danger based on their instructions to employees, not equipping the skid-steer with a radio, and not having rules or procedures in place to protect Complainant while he was doing his job.

Mr. Price was the sole decision-maker on this discipline. Mr. McLeod had no role in determining who should be assessed discipline and what that discipline would be. (CX 66, p. 13.) Mr. Price attempted to explain some of his reasoning at the hearing. He rejected the contention that Mr. Hofer would have been able to see Complainant because he was standing on the right side of the locomotive and the tracks curved to the right. Complainant drove up on the left, and would have been in the large blind spot of the employees moving the locomotive. (HT, pp. 456-60.) He acknowledged that the video might not have shown Complainant out in front of the locomotives even though he was there, but then also insisted that the locomotives had to have been moving when Complainant drove alongside them based on that video. (*Id.* at 460-62.) But he admitted that the camera could not establish where or when Complainant had passed the locomotive. (*Id.* at 503; *see also* CX 71.) This testimony simply doesn't add up. It is obvious that there is a sizeable blind spot in the camera view simply from the fact that the accident itself is not on tape and there is a 4-5 second gap before impact when the skid steer is not in view. So Mr. Price cannot have rationally determined that the locomotives were moving when Complainant passed it. Yet he seemed quite sure of this.

Pressed on whether the hostler helper would have been able to see the skid-steer, Mr. Price disagreed and stated that "I wasn't there, I can't tell you." (*Id.* at 504.) Such a guarded approach to making determinations is entirely absent from the consideration of Complainant's conduct. BNSF had phrased the investigative notices differently, for Complainant that he had failed to be alert and attentive and struck the locomotive and for the other two workers as failure to be alert and attentive and striking the skid-steer. Mr. Price acknowledged that the locomotive had struck the skid-steer from behind, but nonetheless he disciplined Complainant. (*Id.* at 504-05.) The hearing testimony, video, and damage to the skid-steer showed that the locomotive had hit the skid steer from behind, not that the skid steer had veered into the locomotive. Nonetheless, Mr. Price was not dissuaded from holding Complainant responsible.

Mr. Price speculated that Complainant would have heard the bell ringing on the train even while operating the skid-steer and wearing earplugs. (*Id.* at 462-63.) He admitted, however, that he had never been in a similar situation. (*Id.* at 506.) Mr. Price acknowledged that the only witnesses to the accident, Mr. Pitkanen and Complainant, both testified that the locomotives were not moving when Complainant passed them and that Complainant was alert and attentive. He also acknowledged that the skid-steer was hit from the behind and lacked a radio. (*Id.* at 493-99.) Mr. Price claimed that there were areas that the skid-steer wasn't supposed to be used because they were too narrow, but admitted that there was no rule to that effect, instead referencing "awareness of your surroundings and the equipment you're using." (*Id.* at 510.) There was no procedure at the time of the accident for directing the method of snow removal or communication about it. (*Id.* at 510-11.) He thought Complainant should have been communicating to people where he was removing snow. (*Id.* at 511-12.) Yet he well knew that management had made that impossible insofar as there was no radio in the skid steer.

Mr. Price claimed that he did not make a decision until after reviewing the evidence. Ultimately he fell back to the justification that Complainant was in foul of the track, even though there was no rule against being in foul of the track and it was often done. Rather, by being where he was and having been struck, he was somehow per se in violation in the rule requiring being alert and attentive. (*Id.* at 464.) This is an entirely unsatisfactory explanation. The reasoning simply doesn't add up. All of the evidence indicated that Complainant was alert and attentive.

No rule specified that he wasn't supposed to be where he was. Managers told him to clear snow, and he did so in the manner instructed. Managers knew he was clearing snow. No one anticipated the freak accident that occurred—that the skid-steer might happen to be plowing alongside a train at the exact moment it started moving and when the hostler and hostler helper were on the other side. If there was a failure here, it was likely with management for not having more particular rules, giving better instructions, actively ensuring where the skid steer would be, equipping the skid-steer with a radio, or alerting all employees to be on the lookout for it. Rather than accepting this failure, local management made Complainant the scapegoat, creating a new rule out of thin air about where Complainant was supposed to be and then shoehorning the violation into a breach of the amorphous rule requiring employees to be alert and attentive.

As Respondent points out, however, it does not carry the burden of defending and justifying its disciplinary decisions. (RPB, pp. 39-40; RRB, p. 12.) Courts do not sit as a sort of “super-personnel department” evaluating the wisdom of business decisions. *See Scaria v. Rubin*, 117 F.3d 652, 655 (2d Cir. 1997); *see also Kuduk*, 768 F.3d at 792 (citing *Kipp v. Mo. Highway & Transp. Comm’n*, 280 F.3d 893, 898 (8th Cir. 2002)). The FRSA does not require a railroad to have good, proper, or sufficient reasons for its disciplinary decisions.³⁸ The FRSA is implicated only when the reasons for an adverse action include one of the enumerated protected activities. The FRSA does not require that the railroad have *sound* reasons for its decision to take adverse action, it only requires that its reasons not include any *retaliatory* reasons.

Therefore, what appears for Complainant to be a central issue in this case, whether or not his April 18, 2011, discipline was justified, is in fact not a matter of central concern to the FRSA analysis. The problem for Complainant is with the timeline. (*See* RPB, pp. 41-42.) I have rejected the proposition that his mentioning of being stiff and sore within earshot of a supervisor was protected activity. The April 19, 2011, injury report comes after the adverse action in question. So it cannot have contributed to the decision to take that adverse action. That leaves Complainant’s protected activity of March 30, 2011, in the disciplinary hearing itself, during which he made reports/complaints of safety violations by others. The potential violations of Mr. Hofer and BNSF managers most certainly contributed to the decision to take adverse action against Complainant, insofar as they are an integral part of the accident itself and the course of the investigation. But what is protected by the FRSA is only the participation in the investigation. So to show contribution, Complainant must show that his statements in the hearing contributed to the adverse action taken against him.

I find that he has failed to do so. Based on the text of the “hearing” and the way the investigation developed, I find that the decision to discipline Complainant was already taken before the hearing occurred. The fix was in, and nothing Complainant stated or showed (absent some shocking revelation or admission) was going to alter the outcome. Complainant, in fact, came to the same conclusion about the discipline. His position through most of this case was that BNSF had decided to punish him from the start. (*See* HT, pp. 219-24; CX 39, p.1.) The evidence and argument he presents tends to show that the process was a sham. He was set up as the fall guy for the accident. That may be quite unfair, but it means that his statements at the

³⁸ If, for example, the record established that Complainant was terminated because Mr. Marby was having a bad day or simply enjoys terminating employees, there would have been an improper reasons for the adverse action. But they would not implicate the FRSA.

hearing were not contributing to the decision to take adverse action against him. To prevail on his FRSA claim, Complainant needs to show not that the hearing was unfair, but that BNSF did countenance his statements at the hearing and that those statements themselves were a reason for the subsequent disciplinary action. Evidence to that end would tend to show that something he said changed the direction of the discipline or gave a reason to the managers to discipline that they did not have before. But no such evidence has been introduced.

Complainant's arguments for contribution are unconvincing. He cites to the temporal proximity, (CPB, p. 34), but that alone is unconvincing on these facts. Temporal proximity is convincing as to contribution when the adverse action is inadequately explained. Here the adverse action may be unjustified, but it is amply explained without reference to what Complainant said at the hearing: there was an accident that may have involved safety violations by Complainant and he was the scapegoat, taking the blame for a freak accident and the potential misconduct and mismanagement of others. Most of the rest of Complainant's argument concerns allegations targeting the hearing and discipline process itself, claims that he was disparately treated in comparison to Mr. Hofer and others and that the rationale for the discipline against him was pretextual. (*Id.* at 35-43.) He further contends BNSF offered shifting explanations for the discipline (*Id.* at 43-44.) I have found that the investigation and discipline itself was deficient. But that is not a showing of contribution in these circumstances. What Complainant needs is some indication that his protected statements at the hearing, on their own, contributed to the decision to discipline him. The evidence he has marshalled tends the other way—the fact that the hearing showed that BNSF was already biased against him, determined to hold him responsible, and were making things up and shifting explanations as they went along all tends to show that the decision was already made.³⁹ The protected activity comes too late to have contributed to the decision to discipline.

Complainant has made out a good case that the April 18, 2011, discipline was problematic. But that is not the inquiry in this case. I am only concerned with whether the protected activity at issue impacted the decision to take adverse action. The only protected activity that might be relevant is the participation in the March 30, 2011 hearing. But Complainant's evidence challenging the propriety of the discipline actually tends to show that the result was pre-ordained and what he said at the hearing was irrelevant to any of the actions taken against him. As such, the evidence effectively undermines his case for contribution. I find no indication that what was said at the hearing had any impact on the decision-makers or any tendency to lead them to adverse actions against him. As such, complainant has not shown that his protected activity was a contributory factor in his April 18, 2011 discipline.

iii. Contribution as to the May 25, 2011, Termination

Complainant's termination on May 25, 2011, came after a May 11, 2011, investigatory hearing. The stated reasons for dismissal were failure to report his injury on February 21, 2011, and dishonest and immoral conduct when he did report it on April 19, 2011. (CX 25, p. 1; RX U, p. 1.) Complainant argues that the stated charges that were made, the focus of the investigation, and the reasons for dismissal all centered on his protected activity. (CPB, pp. 46-47.) This is certainly correct. The discipline centered on the protected activity, and in particular

³⁹ BNSF makes this sound point at RRB, p. 13.

the manner and timing with which he engaged in it. Though ultimately BNSF stated its discipline as being for a failure to report, it is uncontroverted that he did report the injury, he just did so too late to comply with BNSF's reporting rule. BNSF disciplined Claimant, by their account, because he did so much too late and did so in a dishonest and retaliatory manner. The question at present is only whether the protected activity itself, reporting the injury, contributed in any way to the ultimate termination.

In addition to the basic point that the investigation and termination flowed directly from the protected activity, Complainant argues that there was obvious temporal proximity—within 12 minutes of Mr. Marby learning of protected activity he made the decision to pursue dismissal. (*Id.* at 47.) He points out that there were shifting explanations for the adverse action, with the disappearing insubordination charge. (*Id.* at 47-48.) Complainant further argues that BNSF's explanations and justifications for the discipline itself were shifting, with the allegations not standing up to scrutiny. (*Id.* at 48-50.) These points have been discussed above with respect to the credibility of Mr. Marby, Mr. Heenan, and Mr. Price. Further, Complainant avers that there is evidence of hostility to him based on the prior events in this case and the highly charged atmosphere in the Diesel Shop after the accident. (*Id.* at 50-51.)

These are all fair points, but I need not examine them in detail in this case. Complainant's best argument is simply that the protected activity and adverse action are inextricably intertwined. (CPB, pp. 51-52.) When the protected activity itself triggers the adverse action or investigation that leads to it, the protected activity is inextricably intertwined with the adverse action. *DeFrancesco I*, ARB No. 10-114 at 7-8, *see also Hutton*, ARB No. 11-091 at 6-7, 9-11 (clear, direct chain of events from protected activity to adverse action shows contribution). The simple presence of the protected activity in a causal chain leading to the adverse action can also make the two inextricably intertwined. *Rudolph II*, ARB Nos. 14-053 and 14-056 at 10; *see also Hutton*, ARB No. 11-091 at 6-7. As discussed in both *DeFrancesco I* and *Rudolph II*, the relevant inquiry is into the actual causal story and the role played by the protected activity in the Respondent's adverse action. If it is intertwined in actuality, then contribution follows. Consideration of whether that actually intertwined role was *necessary*, or whether absent the protected activity the other factors about the situation would have been *sufficient* to produce the *same* discipline belongs to the respondent's affirmative defense, not a discussion of contribution. Again, contribution is not meant to be a difficult showing. *Ledure*, ARB No. 13-044 at 8; *see also Lockheed Martin*, 717 F.3d at 1136; *Rookaird*, 2015 U.S. Dist. LEXIS 147950 at *16.

The ARB has recognized that railroads are in a "bind" when the stated reasons for discipline involve rules that concern the manner of engaging in protected activity. But that is just a bind that the FRSA puts railroads in—where the stated reasons for discipline make reference to the protected activity, the investigation focused on the protected activity, and the rules involved address the manner of engaging in protected activity the protected activity is inextricably intertwined with the adverse action and no matter how compelling the railroad's reasons may be, they do not defeat contribution. *See Henderson*, ARB No. 11-013 at 12; *see also Rookaird*, 2015 U.S. Dist. LEXIS 147950 at *16-17 (contribution follows when protected activity cannot be "unwound" from adverse action). Under the FRSA the railroad must defend its actions as part of its affirmative defense, and subject to the shifted and heightened burden of proof imposed by Congress. As the ARB explained in *Henderson*, cases like this create a

“difficult obstacle for employers” because inextricable intertwinement creates a “presumptive inference” of contribution. *Id.* at 13-14 (citing *DeFrancesco I*, ARB No. 10-114 at 5-8. In *DeFrancesco I*, the ARB went further, finding that when circumstantial evidence shows that the manner of the protected activity provides the grounds for the adverse action, contribution is shown as a matter of law. ARB No. 10-114 at 6. In *DeFrancesco II* the ARB explained that contribution only requires that the protected activity influence, in any way, the adverse action. The substantive inquiry into the weight of the railroads reasons belongs in the affirmative defense. ARB No. 13-057 at 6-7.

This is a paradigm case of inextricable intertwinement: the discipline flows from the manner in which Complainant engaged in protected activity: that he did so too late, dishonestly, and for immoral motives. In such cases, the adverse action is “directly linked” to the protected activity, and contribution follows as a matter of course. *See Cain v. BNSF Ry. Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019, slip op. at 6 (ARB Sept. 18, 2014). One cannot separate the protected activity from the alleged permissible bases for taking the adverse action. This does not mean that Respondents are liable, but it does, on its own, establish contribution and suffice to shift the burden to Respondents. The FRSA does not forbid punishing the manner in which an employee engages in protected activity, but it requires that if a carrier is to do so lawfully, it must be able to withstand great scrutiny to ensure that it is really punishing the manner of the protected activity and not the protected activity itself.

Respondent’s argument against contribution stresses its stated reasons for terminating Complainant and the rules he was alleged to have breached requiring immediate reporting of injuries, honesty, and moral conduct. (RPB, pp. 49-52.) It further argues that Complainant’s defenses to the charges—that he really reported the injury, that he hadn’t really sought medical treatment, that he didn’t know he was injured, that he didn’t understand the rule—do not excuse his conduct. (*Id.* at 52-63.) These arguments largely miss the mark. As with Complainant’s first discipline, I am not directly concerned with whether or not a particular disciplinary action was justified. The FRSA only directs me to the question of the role played by a protected activity in a disciplinary action, whether justified or not. So, discipline might, on the record, be completely unjustified, yet not implicate the FRSA because no protected activity contributed to the decision to take the adverse action. Conversely, discipline might be justified on the record but trigger heightened scrutiny and a shifted burden because protected activity contributed to the reasons for discipline. A respondent has a full opportunity to defend its action in such a case, but that occurs as part of its affirmative defense. The ARB has been zealous in ensuring that the inquiry into contribution is not a weighing of reasons or an evaluation of the propriety of the adverse action in question. Rather, it is limited to the simple issue of whether the protected activity contributed to the adverse action.⁴⁰

⁴⁰ In its reply brief BNSF makes similar, though extended arguments, first contending that a late injury report is not in good faith because it is in violation of a rule and second arguing that the fact that the ARB has allowed that late injury reports may be punished defeats the claim that they are inextricably intertwined. (RRB, pp. 20-21) I reject both arguments. The good faith point was discussed above. This is just an attempt to illegitimately alter the burdens of proof by transporting points better made in its affirmative defense into an untenably overlarge conception of the requirements of a good faith act done. The argument that anytime a report violates a rule it is in bad faith is just an attempt to eviscerate the protections of the FRSA. The point that a railroad may legitimately punish a late injury report is a nullity here. Of course it can, but to do so it must satisfy the burdens of the affirmative defense.

Here it most certainly did because the two are inextricably intertwined. It is the protected activity that is the reason for the discipline and the ultimate adverse action flows directly from that protected activity, and throughout the process the investigation is focused on the circumstances of the protected activity. With that, the contribution inquiry is completed.

2. *Have Respondent Shown by Clear and Convincing Evidence that it would Have Taken the Same Adverse Action Absent the Protected Activity?*

a. Legal Framework

Relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1982.109(b); *see also Dietz*, ARB No. 15-017 at 6-7. Clear and convincing evidence is “evidence indicating that the thing to be proved is highly probable or reasonably certain.” *Williams*, ARB No. 09-092 at 6 (citing *Brune*, ARB No. 04-037 at 14). It is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. *See* 5 C.F.R. § 1209.4(d). To prevail under this standard, the respondent must show that its factual contentions are highly probable—it is a burden of proof more demanding than the preponderance of the evidence standard, residing in between “preponderance of the evidence” and “proof beyond a reasonable doubt.” *See Araujo*, 708 F.3d at 159 (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *Addington v. Texas*, 441 U.S. 418, 525 (1979)); *DeFrancesco I*, ARB No. 10-11. Evidence is clear when the employer has presented an unambiguous explanation for the adverse action. It is convincing when based on the evidence the proffered conclusion is highly probable. *DeFrancesco II*, ARB No. 13-057 at 7-8 (citing *Speegle, Inc.*, ARB No. 13-074 at 6; *Williams*, ARB 09-092 at 5). This is a difficult standard for employers, signaling Congressional concern with past industry practice and the importance of the interests at stake. *See Araujo*, 708 F.3d at 159 (citing *Herman*, 115 F.3d at 1572); *see also DeFrancesco II*, ARB No. 13-057 at 8.

The inquiry here is counterfactual. An ALJ must somehow factor the protected activity out of the situation and ask whether the respondent has shown that it is highly probable or reasonably certain that the exact adverse action would still have been taken.⁴¹ When there are multiple, independent contributing factors, the inquiry is fairly straightforward. If an employee reported an injury but was concurrently chronically tardy, the question at this stage would be whether an employee who was chronically tardy but had not reported an injury would have been subject to the same adverse action.⁴² When the protected activity and adverse action are inherently intertwined, however, things are not so easy. In this case, for example, the non-retaliatory reasons for the adverse action are part and parcel with the protected activity. BNSF claims Complainant was terminated because of a late report of an injury that was made in a dishonest, retaliatory manner. One cannot bracket the protected activity and pose the question from AIR-21—I cannot ask whether BNSF would have terminated Complainant if he reported an

⁴¹ It is important, of course, to ask if the *same* adverse action would have been taken, not just whether *any* adverse action would have been taken.

⁴² *Kuduk* presents an easy case of framing the affirmative defense: the protected activity involved safety complaints and the non-discriminatory reason for the discipline was a separate incident of walking between the tracks in violation of a rule. To evaluate the affirmative defense, it was a simple matter of determining whether the unrelated safety violation alone was sufficient to motivate the discipline. 768 F.3d at 792-93.

injury late and in a dishonest, retaliatory manner but hadn't reported an injury at all. If he hadn't reported an injury, he could not have reported it late or in any manner. The plain statement of the question becomes nonsense in this context. So it is somewhat unclear how to proceed.

There are at least six ways the inquiry might go forward. First, there could just be strict liability. On the actual facts as they developed, the protected activity is inextricably intertwined with the adverse action. If the protected activity is removed from the situation, as a matter of actual fact the non-retaliatory reasons would be removed as well. Hence, the affirmative defense must fail. This approach is too simplistic and can't be right. Such a rule would permit an employee to immunize any misconduct by committing the infraction coupled with protected activity. An employee who reported an injury and then punched out the supervisor in the ensuing "discussion" would have a viable claim—after all, had he not reported the injury there would have been no occasion to punch out the supervisor. But surely a railroad can discipline an employee for violence, even if that violence arose in the course of protected activity.

A second form of inquiry would keep the strict liability, but limit to cases in which the protected activity and adverse action are inextricably intertwined conceptually. So, in the hypothetical just imagined, though as the facts developed the injury report and resort to physical violence were inextricably intertwined, the two are not connected conceptually. One can easily imagine the conduct absent the protected activity. This is not so in a case like this. It is conceptually impossible to report an injury late but also not report an injury. So there is no way to simply bracket the protected activity from the rest of the conduct and ask whether the same adverse action would have been taken. A rule that imposed strict liability in this class of cases would be narrower than the above, but it still poses problems insofar as railroads have a legitimate interest in rules requiring timely reports of injury in a particular manner, and this way of formulating the analysis of the affirmative defense would undermine those rules entirely.⁴³

Third, it is possible to engage in a literal examination of whether a complainant would have suffered the same adverse action absent the protected activity. Here that would mean asking whether or not BNSF would have terminated Complainant at the time that it did even if he had never reported an injury. The question would be first, whether it would have learned of his injury otherwise, and second whether with that knowledge BNSF would have terminated Complainant for failure to report. The second question creates some difficulties—the answer might well depend on *how* the managers found out about the injury. In the present case, if a supervisor learned of the injury, it is possible that BNSF would have done nothing—the supervisor might well have decided to not report it. But if a co-worker filed a formal report, it is far more likely that BNSF would have disciplined him insofar as turning a blind eye to the unreported injury would no longer be an option. Here this difficulty could be overcome: if the question is whether BNSF would have discovered the injury absent Complainant's report, the answer is almost certainly negative. As a matter of fact, Complainant's co-workers didn't report an injury. BNSF showed interest in Complainant's condition on the day of the accident, but thereafter was willfully ignorant of any possible injury. No supervisor seems to have asked him about it again—they did their duty that day, but then became entirely oblivious and uninterested.

⁴³ BNSF makes a similar point at RRB, pp. 23-24.

This literal approach to the affirmative defense is bound to seem unfair to a respondent. In any case in which the unprotected malfeasance becomes known due to a protected activity, it is almost certain that absent the protected activity the respondent would not have known or discovered the unprotected malfeasance, and thus wouldn't have taken the *same* adverse action. Perhaps it could be shown that they would have discovered the malfeasance at a later date, but even so the later discovery would mean they would have taken a different adverse action. Moreover, any *manner* of protected activity would still be immunized. As above, this approach leads to the over-broad immunization of malfeasance whenever it is linked to protected activity. So long as an employee couples them together, the malfeasance will go unpunished. The FRSA imposes a high burden, but a successful affirmative defense should be possible, even where the protected activity and adverse action are inextricably intertwined.

To correct for this worry, the same question could be posed but with the presumption that the respondent possessed perfect knowledge of the facts. As above, however, whether or not the same adverse action would have been taken depends on the source of the knowledge and so there may be no clear answer if it is just presumed that the respondent knew that the employee was injured. Moreover, actual knowledge matters in that a respondent may make out an affirmative defense based on its perspective, not the actual facts. For example, if the railroad genuinely believed that the employee had committed certain malfeasance, when in fact he had not, it can still defend its adverse action based on its beliefs. There is no requirement that it establish the ultimate propriety of any adverse action—it must only show that it still would have been taken absent the protected activity. It would be incongruous, then, to construct the hypothetical question about what the railroad would have done to give it perfect knowledge only insofar as that helps it make out its affirmative defense. Further, focusing on a situation of perfect knowledge would depart from the focus on the actual reasons for the adverse action, instead leading to an evaluation of the ultimate propriety of the discipline from the perspective of the ALJ, which is not the sort of inquiry that Congress imagined. Had it wished to do so, there would have been a much clearer way to construct the standards in the Act.

This “perfect knowledge” approach also creates a blind spot evident in this case. BNSF was willfully ignorant of Complainant's injury. Given the nature of the accident, it is highly likely that some injury would result. Management queried him on the day of the accident, but then avoided asking him again, showing no concern or interest. BNSF is correct that Complainant was not proactive, but neither was he hiding his condition. I credit that when he was asked about his condition, he told the truth to whomever wanted to know. BNSF just didn't want to know. In such circumstances, it would be inappropriate to examine the alternative defense by affording BNSF perfect knowledge. If it had known, it might well have disciplined him in some way. But it did not want to know. Their willful ignorance was compromised by Complainant's report, the protected activity. Once Complainant burst their bubble as to his injury, management went on to discipline him. Thinking about the case from the vantage of perfect knowledge obscures that important point. Finally, as above, this formulation the affirmative defense would not apply to discipline of the manner of protected activity.

Fifth, one could construct the affirmative defense inquiry in cases where the protected activity and adverse action are inherently intertwined by flipping the counterfactual. Here there is an injury report that is late and perceived as retaliatory and dishonest. AIR-21 asks that I examine whether BNSF would have terminated Complainant if he had filed a late injury report

that was perceived as retaliatory and dishonest but had not filed an injury report. This cannot be done. But one can ask what would have occurred if there had been protected activity but none of the alleged malfeasance in timing and manner. It is possible to ask whether or not BNSF would have terminated Complainant if he had filed an injury report but that report had not been late and was not perceived as retaliatory and dishonest. This is a tempting route, insofar as it isolates the protected activity from the malfeasance and tries to determine the precise causal role of the protected activity. Here I would need to look at whether BNSF generally terminates employees who file injury reports, even when they timely and perceived as honest and genuine.

Though tempting, this approach is clearly incorrect. In flipping the counterfactual it flips the causal standards chosen by Congress. If I bracket all of the other alleged malfeasance and ask whether BNSF would have terminated Complainant *solely* based on the protected activity, then I am really asking whether the protected activity alone was a sufficient condition for the adverse action. That, however, is not what Congress directs in the AIR-21 framework. The question is not whether the protected activity alone is a sufficient condition; it is whether it was a contributing factor. What I am supposed to be asking in the affirmative defense is whether or not the alleged malfeasance alone was a sufficient condition for the adverse action, or whether the protected activity was a necessary condition as well. There is a crucial difference between a sufficient and necessary condition. It is perfectly possible that though if Complainant had only engaged in protected activity BNSF would not have terminated him, the fact that he engaged in protected activity was a necessary condition for the termination in that it was the combination of the protected activity and the unprotected malfeasance that led to the termination. In such a case, the affirmative defense must fail. Yet on the imagined construction, it would succeed since the protected activity was insufficient for the adverse action. Congress imposed a high burden on railroads in making out its defense to liability after contribution is shown—they must show that even though the protected activity played some role, that role is causally irrelevant or a wheel that does not turn because even absent its presence, the same result would follow. Any proper construction of the affirmative defense inquiry must respect that choice of a high burden.

Lastly, countenancing the attractiveness of the fifth inquiry as well as its ultimate unacceptability, the affirmative defense inquiry in a case involving inherently intertwined protected activity and adverse action could proceed by constructing the closest coherent comparator involving the same sort of actions by an employee but absent the features of those actions that make them protected. One cannot coherently ask whether BNSF would have terminated Complainant for the late reporting of a work-related injury that was perceived as retaliatory and dishonest if Complainant had not reported a work-related injury. But it is possible to alter the activity so that it is no longer protected, and then ask the relevant question. For instance, reporting non-work-related injuries is not protected by the FRSA, but it is required by the injury reporting rules. (*See* CX 23, p. 7; RX H(4), p. 1.) One can ask whether BNSF would have terminated Complainant if he made a late report of a non-work-related injury that was perceived as dishonest and retaliatory. The question isn't exactly on point in that the perceived malfeasance is slightly altered. BNSF has more of an interest in work-related than non-work-related injuries. Nonetheless, no inquiry is going to be exactly on point when the adverse action and protected activity are inherently intertwined. By definition there is no clean way to disentangle them. The *DeFrancesco II* ARB considered the nature of the affirmative defense inquiry at some length in a similar case, and ended up with the sort of inquiry imagined here. When the injury report prompts investigation and discipline for allegedly unsafe conduct,

the relevant question is whether or not the railroad would have taken the same adverse action against an uninjured employee who engaged in the same conduct. ARB No. 13-057 at 10.

Some cases suggest a sort of strict liability inquiry, though they do not contain detailed discussion and could be read to favor a factually based strict liability as in option 1, a conceptually based strict liability as in option 2, or something akin to option 3 where the focus is on alternative ways in which the railroad might have learned of the injury. *See, e.g., Rudolph II*, ARB Nos. 14-053, 14-056 at 11; *Smith-Bunge*, 60 F. Supp. 3d at 1042. Complainant structures part of his argument against BNSF's affirmative defense along these lines. (CPB, pp. 53-56.) More detailed discussions, however, favor the last sort of inquiry. *E.g. DeFrancesco II*, ARB No. 13-057 at 9-14; *Cain*, ARB No. 13-006 at 7-8.⁴⁴ I find that it is the best way of approaching the affirmative defense in cases involving inextricable intertwinement. It preserves the proper burdens and demanding standard placed on railroads, but also makes it possible to raise the affirmative defense. Thinking in terms of the closest unprotected comparator case also properly focuses the question on the underlying rationale of the actual adverse action, probing whether the railroad was punishing just the manner and timing of the activity or the activity itself.

This inquiry requires weighing the employer's reasons to ascertain whether there is a rational, non-discriminatory basis for that action that powerfully compels a conclusion that the action would have taken place apart from the protected activity. I must also consider a complainant's rationale or evidence of disparate treatment in the application of the rules. *DeFrancesco II*, ARB No. 13-057 at 9-10. The analysis is essentially subjunctive, asking whether "the employer has presented evidence that clearly and convincingly establishes that it would have taken the same personnel action against" an employee who engaged in the same conduct absent the protected activity. *Id.* at 10. In *DeFrancesco II* the ARB offered a series of questions to consider. Does the employer routinely monitor or investigate compliance with the rules absent protected activity? Does the employer consistently impose equivalent discipline to employees who violate the rule but engage in no protected activity? Are the rules charged routinely applied? Are those rules vague and subject to manipulation? Does the evidence show that the investigation was designed to further the purpose of the rule rather than as a way to punish the employee? *Id.* at 11-12. To prevail, an employer must show more than that a rule was violated, that it had a legitimate motive for the adverse action, and that it imposes discipline generally whenever it determines a rule has been broken. Instead, it is necessary to establish the more particular point that the rule is applied consistently such that employees who engage in substantially similar conduct absent the protected activity are also investigated and punished in the same manner. *Id.* at 13-14. It is also important to consider evidence of discipline in other cases, insofar as those cases are suitably similar to the case at hand. *See Cain*, ARB No. 13-006 at 8 (evidence of uniform discipline in all similar cases sufficient to meet standard).

⁴⁴ *Cain* is interesting, however, because though the framing discussing suggests the sort of hypothetical inquiry into similar cases absent the protected activity, the later application to the second instance of contribution in the case, where the protected activity and adverse action were inextricably intertwined, starts to look more like one of the strict liability sorts of inquiries. *See* ARB No. 13-006 at 9.

b. Application

To evaluate whether BNSF would have disciplined a similarly situated employee who did not engage in protected activity, I must critically examine the non-retaliatory reasons given by BNSF, including looking at the structure of the rules, the attitudes of the decision-makers towards protected activity, evidence of discipline meted out to other employees, and the strength of BNSF's case against Complainant. Ultimately it is the perspective of the decision-makers that matters, not the validity of the discipline. But if a particular reason for an adverse action is wanting or poorly thought through, that is an indication that it alone was insufficient for the adverse action and the focus of the decision-makers was elsewhere.

With regards to the April 18, 2011, discipline, I did not conduct this sort of review, since I found because there was no showing of contribution. Though the stated reasons appeared to be pretext and an effort to make Complainant the scapegoat, they were not pretext for retaliation. With no showing of contribution, the FRSA inquiry is at an end. The Act does not require that the railroad have sound reasons for discipline, just reasons that don't include protected activity. Once the FRSA is implicated, however, the review is particularly demanding, completely different from the extraordinarily deferential review conducted by the Public Law Board. I do not defer to BNSF or its managers. Once Complainant has made out his case, the burden shifts to BNSF *and* rises. Review of employment decisions under the FRSA is limited to cases that implicate protected activity. But when that review is conducted, it is a searching, demanding review, reflecting Congressional concern with retaliation in the industry. Ordinary HR review of a decision, like that conducted by Mr. Heenan, is not pertinent to the analysis under the FRSA. I am not concerned with whether BNSF had a legitimate business reason for the discipline or if substantial evidence supports the decision of BNSF. *See Henderson*, ARB No. 11-013 at 10-11; *Zinn v. Am. Commercial Lines Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 11 (ARB Mar. 28, 2012). In *Henderson* the ARB explained that the ALJ must not just "confirm the rational basis of [the railroad's] employment policies and decisions" but must "assess whether they are so powerful and clear that termination would have occurred apart from the protected activity." ARB No. 11-013 at 14-15; *see also Araujo*, 708 F.3d at 162-63 (focus is on actual reasons for discipline, not legitimate, compelling reasons that might have been offered). BNSF does not have to show that its decision was ultimately correct. Yet it is also not enough that BNSF managers *believed* Complainant had violated a rule and when other employees *actually* violated the same rule they were disciplined in the same manner. It also must be shown that a similarly situated employee who engaged in similar conduct but did not actually violate the rule and did not engage in protected activity would also be subject to discipline because the decision-makers would have still incorrectly believed that he violated the rule.

The charges as stated at the May 11, 2011, disciplinary hearing were Complainant's "alleged failure to report a personal injury immediately to the proper manager on February 21, 2011, at approximately 1220 hours and alleged dishonest and immoral conduct when you reported an injury on April 19, 2011, at approximately 0900 hours." (CX 22, p. 2.) BNSF terminated Complainant in a May 25, 2011, letter under Mr. Collier's signature. BNSF concluded that Complainant violated Mechanical Safety Rule 28.2.5 "Reporting – Injuries to Employees" and Mechanical Safety Rule 28.6 "Conduct." The termination letter states that the reason for Complainant's termination is due to his "failure to report a personal injury to the proper manager on February 21, 2011, at approximately 1220 hours" and "dishonesty and

immoral conduct when [he] reported an injury on April 19, 2011, at approximately 0900 hours.” (CX 25, p. 1; RX U, p. 1; HT, pp. 186-87.)

BNSF argues⁴⁵ that Complainant was terminated for violations of its rules, not protected activity. BNSF, like most railroads, has rules requiring prompt reporting of injuries. These rules promote safety insofar as they allow immediate remedy of unsafe conditions. BNSF also has rules against dishonest and immoral conduct. Complainant was disciplined for violations of these rules: he waited almost two months to report the injury and sought medical treatment in the interim, he was dishonest in his claims about his reports to Mr. Anderson, and his reason for reporting was retaliatory and thus immoral.⁴⁶ (RPB, pp. 49-52; *see also* RRB, pp. 16-23.)

Complainant responds that each of the disciplinary charges “ring hollow.” (CPB, p. 56.) The immoral conduct charge was dropped at the hearing but then resurrected on insufficient grounds. (*Id.*) The dishonesty charge cannot survive scrutiny. (*Id.*) Finally, the late reporting/not reporting charge is suspect because it was based on three different reporting rules that he was not properly informed about and that don’t address the factual circumstances of his injury. He reported his condition to supervisors after the accident, but then filed a formal report after he saw a doctor and came to know that he was injured. (*Id.* at 57-58.) Any purpose served by the prompt reporting rule was served by the prompt reporting of the accident. (*Id.* at 58.) Moreover, the rule itself is inconsistent with the medical reality of the injury Complainant suffered. (*Id.*) Moreover, BNSF’s shifting explanations and Mr. Marby’s decision to terminate Complainant within 12 minutes of learning of the protected activity undermine any potential argument in favor of the affirmative defense. (*Id.* at 58-59; *see also* CRB, pp. 10-14.)

There are three reasons given for discipline: dishonesty in reporting the injury, late reporting/not reporting the injury, and immoral conduct in reporting the injury. I first discuss the process of discipline and then consider each of the proffered reasons for discipline.

i. The Process of the Termination Decision

The letter terminating Complainant was under the signature of Mr. Collier. (CX 25, p. 1; RX U, p. 1.) As discussed above (§ V.C.3), however, Mr. Collier was not a decision-maker. He was tasked with conducting the hearing, but when he issued his “findings” he only pointed to places in the record that would support a finding by someone else that Complainant had violated the rules and should be dismissed. (CX 57, p. 19; RX W, p. 1.) The local managers, Mr. Anderson, Mr. McLeod, and Mr. Price, were not decision-makers regarding Complainant’s termination. Mr. Anderson appears to have played no role beyond being a witness. Mr. McLeod’s role is more substantial in that he took the injury report and sent information up the chain of command, providing the others with their understanding of the situation and then later

⁴⁵ I discuss BNSF’s arguments on both contribution and in favor of its affirmative defense here. The arguments on contribution focus on motivating its non-discriminatory reasons for disciplining Complainant. As discussed above (§ VI.A.1.d.i), consideration of a respondent’s rationale for discipline is only relevant to contribution insofar as Complainant’s case for contribution implicates those reasons and arguments. Here, that did not occur, since contribution was shown quite simply by the inextricable intertwinement of the adverse action and protected activity. The proper place to consider BNSF’s arguments in favor of its discipline is at this point in the analysis.

⁴⁶ BNSF also argues at length that Complainant failed to report an injury in the week following the injury, but that even if he had done so, he would still have failed to comply with the rules. (RPB, pp. 52-61.)

helping to develop the charges and case against Complainant. Mr. Price, like Mr. McLeod, was involved in the discussions about the discipline and the preparation and presentation of the evidence. He also had a firm view that Complainant should be terminated, and had expressed those views. (HT, pp. 531-32.) But though Mr. Price agreed with the termination, he didn't have authority to terminate Complainant and was not involved in that process. (*Id.* at 299, 478.)

This leaves Mr. Marby and Mr. Heenan. Mr. Marby emailed Mr. Price and Mr. Heenan soon after receiving the transcript, stating only that he favored termination. (CX 58, p. 1; RX J, p. 1.) On May 24, 2011, Mr. Heenan responded stating that he had reviewed the transcript and recommended dismissal, later adding that he had also reviewed the recommendation from the law department. (CX 24, p. 18; CX 58, p. 1; RX J, p. 1.; *see also* HT, p. 300.) But again, Mr. Heenan only engaged in substantial evidence review of the decision. (HT, p. 373.) He was thus an advisor, but not a decision-maker. The ultimate decision-maker was Mr. Marby. The views of the others are relevant as well, insofar as they informed the process. Both Mr. McLeod and Mr. Price are potential sources of cat's paw liability since they were the sources of information. *See, e.g., Kuduk*, 768 F.3d at 790-91; *Lockheed Martin*, 717 F.3d at 1137-38. Ultimately, however, in determining whether the same discipline would have been issued absent the protected activity, I focus on Mr. Marby.

Within 12 minutes of learning of this matter, Mr. Marby decided that Complainant should be terminated. (CX 24, pp. 1-2; HT, pp. 213-14, 271-74, 307-08.) Mr. Marby was Mr. Price's and Mr. Collier's superior, and this determination set in motion the rest of the events in this case. It is after he states his determination that Mr. McLeod switches gears, removes Complainant from duty, and starts preparing the multi-count disciplinary charge. Mr. Marby did involve his supervisor, Mr. Roberts, but only "as information" and Mr. Roberts only gave input on focusing on the late report of the injury rather than conduct issues. (CX 24, pp. 1-3.) Mr. Marby, however, read these instructions as narrowly as possible, dropping the insubordination charge but pursuing conduct violations for dishonesty and immoral conduct. (HT, pp. 315-16.) This course was followed, the hearing was held, Mr. Collier procured and identified the evidence, Mr. Marby quickly confirmed his initial determination, and then Mr. Heenan, consulting with the law department, approved the decision.

Shockingly, the only BNSF employee who seemed to show an interest in whether or not the charges levelled against Complainant were actually correct is Mr. Roberts. He recommended scheduling "an investigation for late report of injury and if the facts coming out of it indicate that he did not report it to Mr. Anderson as he states then issue 2nd level S for late reporting which would end up in dismissal." (CX 24, p. 1.) Mr. Roberts was not correctly apprised of all the facts, including that Complainant only claimed to have told Mr. Anderson that he was stiff and sore and that he may not have been aware of a genuine injury until having gone to the doctor. Nonetheless, he was at least concerned with the question of whether or not Complainant had actually violated the rule and saw the hearing as a way to procure evidence and make the correct determination. This attitude is missing elsewhere and Mr. Roberts had no further involvement.

BNSF argues that it did not pre-determine Complainant's discipline. It contends that Mr. Marby's initial email was more of a question than conclusion and that Mr. Marby, Mr. Heenan, and the law department all reviewed the discipline to ensure that it was appropriate. (RPB, pp. 66-67.) The testimony BNSF cites to support this conclusion is not on point—rather it is a claim

by Mr. Heenan that *although* Mr. Marby reached the decision quickly, he was open to input and that he reached the appropriate conclusion because he was well-versed in the PEPA policy. (*See* HT, pp. 397-98.) The fact remains that Mr. Marby reached the initial determination in a still developing case very quickly. In fact, he reached his determination *before* Mr. McLeod even asked Complainant why he hadn't reported the injury until April 19th and allegedly been told that it was because of the discipline. All that Mr. Marby knew at this point was that Complainant had been in an accident on February 21, 2011, had refused to sign his discipline, had just reported an injury had sought some medical treatment, and had stated that he had reported a stiff and sore neck, but that Mr. Anderson had denied this account verbally. (*See* CX 24, p. 2; RX I, p. 2.)

I do not conclude that Mr. Marby reached a final conclusion at this point. His determination was subject to reconsideration. But the initial determination came immediately, and at a point when one of the few pieces of information he possessed was that Complainant had just engaged in protected activity. His decision was subject to review, but contrary to what BNSF contends, the fact that BNSF has a system of review of this sort, even if uniform, does not serve to buttress the disciplinary decisions or show that it would have acted in the same manner absent the protected activity. (*See* RPB, pp. 70-71.) The review is simply far too deferential.⁴⁷

BNSF's handling of this case is highly suspect. Complainant was involved in an accident that implicated possible safety violations. This investigation stayed in-house. Mr. Marby had only a passing familiarity with the events because BNSF property had been damaged. (HT, pp. 307-08.) Almost two months passed involving investigations, hearings, deliberation, and the assessment of discipline. Mr. Marby was not in the loop, despite the fact that an actual accident raises clear safety issues that would need to be addressed. As soon as Complainant reports an injury, however, Mr. Marby is informed immediately. Mr. McLeod testified that he did so because "protocol" is to pass along the information up the chain of command. (CX 66, p. 14.) An actual accident is not so important to require protocol escalating the issue. Yet somehow a mere injury report triggers such escalation. Apparently, it is so important that it couldn't wait for Mr. Price to get off an airplane and pass the information along. Mr. Marby then takes the lead, deciding to pursue termination. It is only after this point that Mr. McLeod asks Complainant why he delayed reporting the injury and is apparently told it is because of the discipline and that Mr. Price passes along Complainant's alleged threat from the day before. Something is out of sorts here. The Diesel Shop could go almost two months after an accident and through two disciplinary hearing keeping things in-house. On April 19th, however, this matter immediately becomes an issue for Mr. Marby at headquarters and he immediately decides to pursue dismissal. What changed? Complainant reported an injury. After this date Complainant is afforded a hearing, as required, but the hearing officer isn't even the decision-maker and the point of the hearing only appears to be to assemble the necessary record to comply with the contract and survive review. Mr. Marby makes the ultimate decision disguised as a review of the transcript, but the entire trajectory of the case changed the moment an injury was reported.

⁴⁷ Nor is BNSF's passing reference to PEPA as a uniform policy convincing. (RPB, pp. 68-69.) PEPA is highly malleable and any uniformity it could provide depends on the conduct of the decision-makers who operate within it.

The decision-making process in this matter is questionable and weighs against Respondent's required showing. Mr. Marby reached his preliminary determination very quickly and knowing very little about the case. What he did know was that Complainant had just reported an injury. Though I allow that Mr. Marby had not finalized his decision, there is no evidence that at any point he seriously reviewed the charges and the evidence. This would generally weigh against any showing that the discipline would have been the same absent the protected activity insofar as the discipline wasn't driven by the evidence. If anything, the desired discipline drove the charges, collection of evidence, the conduct of the hearing, and the quick, cursory review.

The process of the actual discipline is not dispositive. The issue is whether BNSF would have terminated Complainant absent the protected activity, which is not directly an examination of the propriety of the discipline or the manner in which it was assessed. But process is relevant in that it helps to frame the question of what would have happened in a similar case absent the protected aspect of the activity. Ultimately BNSF's affirmative defense will turn on the strength of its non-discriminatory reasons and evidence of uniform action in cases not involving protected activity. The suspect process, however, makes an already arduous showing all the more difficult.

ii. The Dishonesty Charge

One of BNSF's reasons for terminating Complainant was his alleged dishonesty in reporting his injury on April 19, 2011. Mr. Marby claimed that BNSF has zero-tolerance for dishonesty. (HT, p. 271.) He explained that the basis for the dishonesty charge was their belief that Complainant had falsely represented his reports to Mr. Anderson about his neck. (*Id.* at 322.) Mr. Heenan accepted the dishonesty charge because he credited the supervisors and did not find Complainant's claims of prior reports of feeling stiff and sore very sincere. (*Id.* at 357-58.) He admitted that Complainant's written statement to Mr. McLeod only claimed that he had told Mr. Anderson he had a stiff and sore neck, not that he had reported an injury, but claimed that Complainant had really claimed he had reported an injury based on his understanding of the whole record. That is why the dishonesty charge was sustained. (*Id.* at 374-77.) This reasoning is difficult to countenance. The basis for the dishonesty charge is the contradiction between Mr. Anderson and Complainant. Mr. Heenan cannot simply read words into Complainant's mouth based on his later litigation position to find that Complainant was being dishonest. The validity of the dishonesty charge is highly suspect. As discussed with reference to Complainant's and Mr. Anderson's credibility (§§ V.C.1, V.D) and as persuasively argued by Complainant, (*see* CRB, pp. 10-12), there is not a clear contradiction between their accounts. Differing representations of the course events is likely a product of frayed memories, difficulty discerning what exactly was meant by what was said, and what was heard by Mr. Anderson.⁴⁸ The essential question presented to BNSF in the discipline was whether Complainant's statements, and the manner in which they were made, amounted to an injury report, not whether Complainant had made particular statements.

⁴⁸ BNSF's argument on the point acknowledges that the context is important, (RRB, pp. 19-20), but it does not seem to realize that if the issue is not what was said, but what it meant in context, the dishonesty charge wasn't really important or appropriate. Rather, the point would get folded into the late reporting charge.

The soundness of the charge, however, is not as important as the reason for the discipline. If BNSF decision-makers genuinely believed that Complainant was dishonest and disciplined him like any other dishonest employee, then it might make out its affirmative defense. BNSF contends that it consistently terminates employees when it finds that they engaged in dishonesty, regardless of whether they have reported an injury. (RPB, pp. 69-70.) Mr. Heenan claimed to have reviewed roughly 800 cases involving potential dismissal, including many involving charges of dishonesty. He reviewed cases he deemed similar to Complainant's and found they resulted in dismissal. There were no injuries reported in those cases. Mr. Heenan concluded that Complainant wasn't being singled out because it is very common for BNSF to dismiss employees for dishonesty. (HT, pp. 367-69.) BNSF also submitted records showing discipline for dishonesty in other cases where no injury was reported. (*See* RX L.) On March 25, 2011, an employee in Barstow, California was dismissed for fraudulent use of leave under the Family and Medical Leave Act. (RX L, pp. 1-3.) An employee in Kansas City, Kansas was dismissed on March 25, 2011, for misrepresenting facts to a supervisor about a television that had been set up on a locomotive at a Diesel Shop. (*Id.* at 4-7.) Finally, BNSF dismissed a third employee (from Independence, Missouri) on April 29, 2011, for leaving the property and then providing conflicting statements to management about his whereabouts. (*Id.* at 8-14.)

I find this argument unconvincing for three reasons. First, Mr. Heenan's generalized reflections based on an unspecified review of cases are insufficient to carry BNSF's burden. Second, as Complainant points out, (CRB, pp. 17-19), the proposed comparators fail to approximate the alleged dishonesty here. The alleged dishonesty is very narrow—whether Complainant falsely represented on April 19, 2011, what he recalled saying to Mr. Anderson on and shortly after February 21, 2011. Dishonesty requires more than being wrong, it requires intent to deceive. It is questionable that Complainant would have any clear memory at all of what he said to who almost two months earlier, yet BNSF was holding him accountable for falsely stating the exact content of conversations. There was clear disagreement about the significance of the interaction, but this was not a case with two clearly opposed representations of the facts. It is far different than lying about FMLA leave, falsely representing information about a TV on a locomotive, and giving inconsistent accounts about one's whereabouts. These are all matters it is reasonable to expect any individual to remember, and in the last case the mere fact of inconsistency alone is good evidence of dishonesty. To draw a general conclusion that BNSF disciplines the sort of alleged dishonesty even when there is no protected activity, it would be necessary to show that BNSF applies its dishonesty rule very strictly to even minor points and with the presumption that employees have exact memories of rather insignificant events in the somewhat distant past. No evidence to that effect has been provided.

Furthermore, I find that the dishonesty charge was not a predominant concern or the impetus behind the discipline in this case. The charge is quite weak, and while it is BNSF's, and in particular Mr. Marby's, state of mind that matters, when the case for a rule violation is extraordinarily weak that is a good indication that is not the real impetus behind the discipline. The problem with the charge is apparent from the slightest inquiry into the charge and became obvious at the hearing—Mr. Anderson and Complainant aren't even directly contradicting each other and so there is no dishonesty by one or the other that needs to be resolved. The tension between their accounts can be explained easily without needing to conclude that Complainant was being outright dishonest. The underlying point at issue was really what needed to be done by Complainant to comply with BNSF injury reporting rules. The dishonesty charge arose

because of a short-sighted understanding of that more important question. The fact that the charge lingered and that Mr. Heenan went to the length of putting words into Complainant's mouth to accuse him of being dishonest is a very strong indication that the dishonesty charge was not central. If it had been the driving force of the discipline, one would expect more inquiry into it and a tighter analysis of why it applied. Since I find that the dishonesty charge was neither substantiated nor crucial in the decision-making process, it does not aid a showing that BNSF would have taken the same adverse action absent the protected activity.

iii. Late Reporting/Not Reporting Injury

The second non-discriminatory rationale for Complainant's termination was that he reported his injury late or didn't report it at all. Complainant has raised a variety of defenses to this charge, including that he had in fact reported the injury and that his failure to report should be excused because he was ignorant of the rules and procedures. (CPB, p. 57.) The first point has been discussed in some detail above in reference to whether reporting his "condition" was a protected activity. I determined that the earlier statements about how he was feeling were not injury reports. In any case, the issue here would be BNSF's determination, and I find that BNSF genuinely (and correctly) believed that Complainant had not reported his injury prior to April 19, 2011. As to the second point, BNSF contends that Complainant's arguments based on lack of knowledge of the reporting rules are meritless. (RPB, pp. 61-63.) I agree. Even if Complainant was ignorant about the reporting requirements, BNSF generally expects its employees to know and comply with the rules. I am convinced BNSF would not have found this defense plausible in any case, so the point does not impact the viability of BNSF's affirmative defense.

In support of the affirmative defense, BNSF argues that it does not make a practice of disciplining employees who report injuries. (RPB, pp. 67-68.) Mr. Heenan's inquiries have supported this conclusion, with only 4.6% of employees who report injuries receiving discipline related to those injuries. (HT, pp. 369-70.) He has been trained in the Code of Conduct, which prohibits retaliation, as well as the FRSA, and based on that training believes there was no violation in this case. (*Id.* at 370-71.) Mr. Heenan opined that Complainant might have been disciplined even if he hadn't reported an injury, because if BNSF had found out from another employee that he was injured, based on his comments to them, they would have still punished him. (*Id.* at 389.) In addition, Mr. Marby testified that 14 employees in the Havre Diesel Shop reported injuries in 2011, but only one, Complainant, was disciplined. (*Id.* at 302.)

I do not find these arguments compelling. The evidence offered was stated briefly and conclusory, without detailed documentation. No context was provided, and it is hard for me to attach general meaning to these particularized statistics. BNSF bears the burden of showing by clear and convincing evidence that it would have taken the same action absent the protected activity. Even if this evidence did establish that BNSF does not usually discipline employees who report injuries, it would not come near to the required showing under the Act. The issue for me is this case, not BNSF's general practices. Finally, I do not give any weight to Mr. Heenan's testimony on the ultimate questions before me.

Focusing on the merits of this particular charge, BNSF has what seems like a fairly straightforward case that could motivate the conclusion that it would have terminated Complainant absent the protected activity, which in this instance would mean something like

terminating Complainant for late reporting/not reporting a non-work-related injury. Complainant didn't report his injury for almost two months after the accident and in the intervening period sought treatment twice from a chiropractor and once from a doctor. (*See, e.g., RRB, pp. 22-25.*)

The record, however, shows a troubling shift in the explanation of Complainant's misconduct. Initially the alleged violation was clearly that Complainant failed to report his injury in a timely manner. When he was terminated, however, the violation was that he had failed to report an injury at all. (CX 25, p. 1; RX U, p. 1.) Both are violations of Mechanical Safety Rule S-28.2.5(A), but they are very different sorts of violations: in the first one reports an injury, just not on time, while in the other one doesn't report an injury at all. BNSF argues that its explanations for the discipline have remained mostly constant, but this argument focuses mostly on explaining why the insubordination charge was dropped. (RPB, pp. 64-65.) I credit that there is nothing inherently suspect about adjusting charges after receiving input from superiors and human resources. But this cannot explain the far more suspect alteration in the aspect of the injury reporting rule that Complainant was deemed to have violated.

There is no doubt that Complainant reported his injury on April 19, 2011. He cannot, then, have violated the rule by failing to report. Mr. Heenan argued otherwise, contending that employees are instructed to report an injury before seeking medical treatment and by not doing so, Complainant failed to report an injury. (HT, pp. 377-78.) This is an astounding piece of logical gymnastics. BNSF may well require that injuries be reported before medical treatment is sought. Yet if an employee fails to do so but then reports the injury later, the violation is late reporting of an injury, not failure to report an injury. By Mr. Heenan's argument, there would be no distinct violation for late reporting: whenever a report was late, BNSF could just charge an employee for failure to report at all, since it wasn't reported at the proper time.

The official reason for discipline cannot be the actual reason insofar as no one really believed that Complainant hadn't reported his injury at all. BNSF could only rationally hold him accountable for late reporting. Why did the termination letter make the bizarre shift? Under PEPA, late reporting of an injury is a serious offense. (CX 52, p. 5; RX N, p. 5.) Failure to report an injury is a stand-alone dismissible offense. (CX 52, p. 6; RX N, p. 6.) Since Complainant had just been disciplined for a serious offense, he could have been terminated with a second serious offense. Termination on those grounds, however, would have incorporated the propriety of the first discipline. If Complainant successfully challenged that discipline, then his termination would be undermined as well if the violation was just late reporting of an injury. By changing the misconduct in the termination letter, BNSF insulated the termination from any improprieties in the first discipline, ensuring that if the second discipline alone as to the injury report could stand, the decision to terminate Complainant would stand as well.

Bracketing this inconsistency and focusing solely on the question of the late report of the injury, there are still problems since the BNSF managers were not consistent as to what exactly the injury reporting rules required. Mr. McLeod didn't think medical documentation or diagnosis were important, instead focusing on the fact that Complainant had sought chiropractic care and had seen his family physician before reporting the injury. He stated that if Complainant had actually told Mr. Anderson that he was injured on February 21, 2011, he would have been "fine" but also stated that to comply with the new rules the whole process had to be completed, including the written report and talking with a nurse. Any injury, not just first-aid injuries had to

be reported, and the 72 hour grace period did not apply because Complainant was injured in a specific incident, not routine work. (CX 66, pp. 18-19.)

Like Mr. McLeod, Mr. Price opined that Complainant was in violation of the injury reporting policy in place at the time because it requires reports even when medical attention isn't required and requires that if there is any change in the severity of the condition that it be reported immediately. (HT, pp. 485-87.) They also seem to agree that if Complainant had earnestly told Mr. Anderson that he was stiff and sore because of the accident, then he would have been in compliance, though Mr. Price was not as concerned with all of the formal requirements of a report. (*Id.* at 514-15.) On this approach it should have been a matter of great concern what exactly Complainant said to Mr. Anderson, when he said it, and the tone in which it was said, since this would determine whether or not Complainant had reported the injury and complied with the rule. Despite this view, Mr. Price made no effort to find evidence that would resolve the apparent dispute between Mr. Anderson and Complainant or clarify exactly what had happened. (*Id.* at 519-21.) Instead, he expected Complainant to find witnesses to establish his version. (*Id.* at 536-37.) This is puzzling. Given the statements and the evidence available to Mr. McLeod and Mr. Price, there is a gap that needs to be filled in to establish the failure to report charge. Mr. Anderson's statement that no injury was reported because he didn't think Complainant was serious is not, on its own, dispositive. Inquiry needs to be made into Complainant's intent and what Mr. Anderson perhaps *should* have taken from their interaction. Yet instead of attempting to discern whether the rule as they understood it had actually been violated, they simply sat on Mr. Anderson's impression that no injury had been reported and added a dishonesty charge to the mix for good measure.

Mr. Marby opined that the rules require immediate reporting of an injury, or as soon as the employee is able, but Complainant had not reported the injury until almost two months after the accident and had received chiropractic treatment in early March. (*Id.* at 281-83.) Even had Complainant argued that he didn't have a diagnosis until April 14th, Mr. Marby would have terminated him because the delay between the 14th and 19th is a violation of the rule. (*Id.* at 284.) Mr. Marby discredited Complainant's claims of earlier comments to Mr. Anderson and deemed them insufficient in any case to comply with the rule. (*Id.* at 284-85.) He allowed Complainant had complained about his neck, but deemed this insufficient. Even if the supervisors weren't doing their duty in investigating and reporting an injury, Complainant has an independent obligation to report it on his own, through other means. (*Id.* at 287-891.)

Initially, this is a far more stringent understanding of what was required to comply. For Mr. Marby, an earnest statement that he was stiff and sore because of the accident would have been insufficient. There is some flexibility in Mr. Marby's understanding, but only insofar as Complainant can be deemed to have violated the rule in multiple, inconsistent ways. Complainant had to do more than make a statement to Mr. Anderson to comply with the rule, but even if the rule didn't require more than an informal report, Mr. Marby discredited Complainant for good measure. It isn't clear to me when, on Mr. Marby's view, Complainant had an obligation to report the injury. It appears important to Mr. Marby that Complainant saw a chiropractor but did not report an injury, yet he is flexible enough to allow that the diagnosis on the 14th could have triggered the obligation to report as well. Nonetheless, Complainant is still in violation, though Mr. Marby never seems to have considered whether or not Complainant's reasons for not reporting until the 19th would suffice as a report as soon as he was able. On that

score, it would seem that the only earlier date was the 18th—Complainant was not at work on the 15th and no supervisors were at work on the 16th or 17th and so Complainant was unable to report the injury on those days. Whether Complainant’s belief that he needed to have a union representative present and so was not really able to report the injury on the 18th is an open question. But none of these are questions that ever occupied Mr. Marby.

Mr. Heenan also took a flexible approach in which Complainant violated the rule in multiple ways. (HT, pp. 355-57.) Like Mr. Marby, Mr. Heenan determined that even if Complainant had been serious in his statements about being stiff and sore, he was still noncompliant in reporting the injury and any failure by the supervisors would not excuse his failure to report it on his own. (*Id.* at 359.) I have difficulty in this scattershot approach to the rule. Mr. Heenan testified that he wasn’t sure if a chiropractor was a medical doctor but opined that in terms of the relevant rule an employee had to report an injury before seeing a chiropractor. (*Id.* at 379.) He admitted that none of the rules defined what an injury was or what medical treatment would require a report. But he decided that if Complainant had a sore back it would be a violation not to report it. (*Id.* at 379-80.) This all has the feel of BNSF managers making things up as they go along. BNSF does not define whether chiropractic treatment triggers an obligation to make a report, but construes the ambiguity against its employee. An injury isn’t defined, yet Mr. Heenan confidently asserts that in this case Complainant was injured as soon as he was stiff and sore. Both Mr. Heenan’s and Mr. Marby’s testimony on the violation didn’t provide simple explanations of what the rule required and why Complainant didn’t comply. Instead they expounded various theories of a violation, filling in gaps in the meaning of the rule in alternative ways that always worked against Complainant.

This sort of exposition does not make me confident in a reasonable, consistent application of the rule. Mr. Heenan was only deferentially reviewing the decision, and that makes sense of some of the flexibility in his explanation. But Mr. Marby had to be the one to make a decision, and in his testimony he was intent on justificatory overkill as well. (*See* HT, pp. 277-91.) Moreover, the determination that a violation had occurred was immune to further evidence—despite having deemed Complainant dishonest, Mr. Marby declared that corroborating statements from other co-workers would have been irrelevant. (*Id.* at 292-93.) On the record before me, despite being the decision-maker as to whether a violation had occurred and what discipline was appropriate if it did, Mr. Marby was not particularly concerned with the exact requirements of the rule or the exact facts. Instead, he just argued that however he interpreted the rule, Complainant was in violation. This is unpersuasive when I must determine what would have happened with substantially similar conduct absent the protected activity. The rule is much too flexible as applied in this case, so I cannot be confident about how the rule would have been applied in a similar situation absent the protected activity.

I do not find that Complainant was in compliance with the rule or that no discipline was merited. It is quite possible that a clearly constructed, understood, and applied prompt reporting rule could clearly and convincingly show that BNSF would have terminated Complainant in these circumstances.⁴⁹ But that is not the sort of rule, managerial understanding, and application

⁴⁹ In some way, though not necessarily the same way, which is the required showing. The other issues identified in this section, and in regards to the process and other charges, would each undermine the required showing independently. Here I am focused solely on issues with the late reporting of the injury charge.

that is revealed in the record. To reach firm conclusions, I need to be able to understand exactly what BNSF deems an injury and exactly what is required of an injury report. This would tell me what exactly was required. With that information, it would then be fairly easy to determine whether Complainant violated the rule and how exactly he did so, how egregious the violation was. Then I could potentially reach a conclusion as to what would have occurred in a similar case absent the protected activity and be able to confidently ascertain whether BNSF was punishing the protected activity or the timing. Such development of an affirmative defense along these lines, however, is not possible on the evidence of record in this case.

Finally, the late reporting charge is problematic because I cannot discern how exactly Complainant even *could have* complied with the rule given the way his injury came to light. An unreasonable rule regarding the timing or manner or reporting an injury can be, in some cases, simply a rule that deters and licenses retaliation against protected activity.⁵⁰ BNSF certainly has an interest in timely injury reports, but if in pursuing that interest it adopts rules that as applied in a class of cases work to deter and punish the protected activity itself, then it is not furthering that legitimate end, it is pursuing the illegitimate end of deterring and punishing protected activity. Put otherwise, a legitimate rule about the timing or manner or protected activity must be one that a worker could reasonably comply with in a particular fact pattern.

One of the rationales for the expanded protection of injury reports in the FRSA is Congress' determination that there was chronic underreporting of injuries in the industry and harassment of employees reporting work-related injuries. There was evidence of management use of policies to deter employees from reporting injuries and then finding ways of punishing them if they did so. *See Henderson*, ARB No. 11-013 at 6-7; *Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-11, slip op. at 12-14 (ARB July 25, 2012); *see also Araujo*, 708 F.3d at 159-60. Railroads have a legitimate interest in rules requiring timely and accurate reports of injury, but cases involving these rules deserve scrutiny to ensure that the rules in question are rational and not covert ways of punishing protected activity. *See Smith-Bunge*, 60 F. Supp. 3d at 1041. To be rational, these rules and their application should recognize that employees do not always realize they are injured immediately or understand that their injury is work-related. Railroading is strenuous work and feeling stiff and sore is a common, normal part of employment that may signal injury or may not. With muscular-skeletal injuries in particular, an employee may not realize that an injury has occurred for some time after the injurious event, and rules regarding prompt reporting should not be used as a means to chill such reports in full. *Id.* The rationale for such rules deserves scrutiny as

⁵⁰ In its recent publication of a final rule related to tracking workplace injuries and illnesses, OSHA points out that injury reporting processes and rules must be reasonable for employees and not work to discourage injury reports or trigger retaliation once a reasonable report is made. *Improving Tracking of Workplace Injuries and Illnesses*, 81 FR 29623, 29624 (May 12, 2016) (to be codified at 29 CFR Parts 1904 and 1902). In particular, OSHA has clarified "the existing implicitly requirement that an employer's procedures for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting." *Id.* at 29669. As a basis for making the requirement more explicit, OSHA cited to documented problems with injury-reporting procedures that were too difficult to navigate and prompt reporting rules that could not reasonably be complied with when an employee had suffered the sort of musculoskeletal injury that only develops and becomes apparent over time. *Id.* at 29670. To be reasonable, a policy must allow for a period of timely reporting *after* the employee comes to realize that he or she has suffered a work-related injury. *Id.* An employer's interest in timely reports must be balanced against fairness to employees. *Id.* These regulations are not directly on point insofar as they are not issued under the FRSA, and in any case are not yet in effect. But they highlight the point in the text.

well—for instance, prompt reporting rules premised on FRA reporting requirements are suspect because the FRA makes allowances for delayed reports and the need to make amendments. *Id.*

The problem in this case is partially with the rule itself, or at least how the managers applied the rule. In another context, the ARB has held that an employer may not use a benign and even beneficial injury policy to mask retaliation for reports of work-related injuries. *Hutton*, ARB No. 11-091 at 10. In *Hutton* the employer had a set of confusing, vague rules in overlapping back to work programs that an employee had run afoul of, triggering the discipline. Though on the surface this appeared quite proper, further examination revealed that once an injury was reported the employee became subject to a set of rules so confusing and vague that he was almost bound to end up violating them in some way, and thus being subject to discipline. *Id.* at 10-11. Similarly, as Complainant points out, here BNSF has a variety of overlapping rules about reporting injuries in a timely manner. (CPB, p. 48.) BNSF has not defined an injury or an injury report. The managers here don't seem to agree on what exactly was required of Complainant and when it was required. No allowances are made for delayed reports when an employee only realizes that he is injured over time. An employee must report an injury before seeking medical attention, but the rule is unclear on what constitutes medical attention.

More alarmingly, it is quite possible that with these sorts of injuries and employee might not even realize that he is injured or the etiology of his injury until after he has seen the doctor and received a diagnosis. In such a case, BNSF apparently makes it *impossible* to properly report an injury. Since the employee was injured and it was work-related, it had to be reported before medical attention was sought. But a complainant may not know that he is injured and/or that it is work related, and hence that there is anything to report, until after medical attention is sought and a doctor provides a diagnosis. Complainant suffered a whiplash type injury in a rear end collision. Symptoms often take time to fully materialize in these accidents, as they did here. Complainant believed that his stiffness and soreness would just fade with time, as it had apparently in the past. Only when he saw a doctor and was given a diagnosis did he know that he was injured. By that time, it was too late to comply with the rule. Perhaps Complainant should have put the pieces together sooner and reached the conclusion that he had an injury that needed to be reported, but it would be unreasonable for a timely reporting rule to require an employee to display medical acumen in diagnosing his own condition.

It may be impossible to construct a tightly defined reporting rule free of ambiguity and mechanical in application. But if BNSF is going to enforce ambiguous, over-lapping rules governing the timing and manner of protected activity, it should not do so by construing the rules against the employee at every juncture. As applied here, that is just what happened. The affirmative defense fails, in part, because of the rule itself. As structured and applied, the rule is retaliatory against protected activity in a situation like this. Hence, the rule cannot serve as a basis in this case that BNSF would have taken the same adverse action against an employee who did not engage in protected activity but engaged in otherwise similar conduct (e.g. an employee who reported a non-work related injury late). If the rule as applied to an injury of this sort would punish all protected activity regardless of when it could have been reported, then the rule is punishing protected activity, not its timing. In such circumstances, the rule is just a pretext to allow managers to retaliate against protected activity and a way to chill injury reports.

For all of the above reasons, I cannot conclude by any standard, let alone by clear and convincing evidence, that BNSF would have disciplined a similarly situated employee who hadn't engaged in protected activity. The rules are so vague and undefined that managers cannot even come to a conclusion as to what was required. When the injury is of the nature that becomes apparent only over time, such a rule, applied in the sloppy manner here, is simply a way to punish injury reports across the board, whenever managers decide that they wish to do so. BNSF cannot apply a rule regarding the manner and timing of protected activity that in the circumstances cannot be complied with and then proclaim that it is only punishing the timing of the activity, not the activity itself. Without knowing *how* exactly Complainant was supposed to report his injury in these circumstances, I cannot reach the conclusion that BNSF was really punishing the timing of the report rather than the report itself.

iv. Immoral conduct

The final stated ground for termination was that in reporting his injury Complainant engaged in immoral conduct. Mr. Marby explained that the basis for immoral conduct charge was their belief that Complainant was engaged in a "conspiracy" to retaliate against the railroad for his prior discipline by reporting an injury. (HT, pp. 322-23.) He acknowledged, however, that at the disciplinary hearing Mr. McLeod collapsed this into the dishonesty charge. (*Id.* at 323.) In sustaining this charge, Mr. Marby determined that Complainant's statement to Mr. Price on April 18, 2011, was a threat. He credited Mr. McLeod's testimony about Complainant stating that he reported the injury because of the prior investigatory results. (*Id.* at 295.) Mr. Marby also placed weight on Mr. Collier's impression that Complainant was not credible when discussing the conversation with Mr. McLeod about why he was just now reporting the injury. (*Id.* at 297-98.) Mr. Heenan found support for the misconduct in reporting charge because he determined that Complainant had reported the injury in retaliation for the prior discipline and was attempting to manipulate the process. (*Id.* at 359-60.) He took the fact that Complainant didn't specifically deny comments to Mr. McLeod about his reasons for reporting the injury as a tacit admission. (*Id.* at 360.) He also accepted Mr. Collier's credibility findings. (*Id.* at 361.)

This charge is in some ways straightforward. BNSF managers came to the conclusion that Complainant reported his injury to retaliate for the prior discipline and thus was acting with hostility towards BNSF and has managers. Whether or not this was ultimately correct, this is what they believed. Their basis for the belief ultimately came down to Mr. Price's testimony, not disputed by Complainant, that Complainant had mentioned on April 18th the BNSF would not like what would happen next, and Mr. McLeod's testimony, disputed to some degree by Complainant, that Complainant had stated that his reason for reporting the injury on April 19th was the discipline assessed on April 18th. These points are corroborated, in part, by Mr. Anderson's testimony, not disputed in general by Complainant, that Complainant was very upset over the way the first hearing was conducted as well as the obvious fact that Complainant had just been disciplined and was very upset.

When Mr. Marby made his initial determination to pursue termination, he could not have operated on this understanding—he did not know about what had been said to Mr. Price on April 18th and Mr. McLeod had yet to ask Complainant why he was only making the injury report on April 19th. At the time of that first email, Mr. Marby knew that Complainant had been disciplined and had reported an injury. He may have believed that the report was retaliatory

because it was false—it would be reasonable to think that Complainant had not been injured based solely on what Mr. McLeod represented to Mr. Marby at the outset. But if this was his reasoning, its rationale quickly disappeared. There is no doubt that Complainant was really injured and Mr. Marby did not maintain or believe otherwise. Apparently, then, insofar as generalized “immoral conduct” was a consistent rationale for the discipline, its basis in Mr. Marby’s mind either changed over time or only took shape over time. Mr. Marby’s initial email evidences this—instead of an immoral conduct charge it references the insubordination charge that was then replaced by the immoral conduct charge. (CX 24, p. 1.)

The rule in question, Mechanical Safety Rule S-28.6 clause 5, forbids immoral conduct. This is a highly malleable rule. BNSF does not specify what counts as immoral conduct or who gets to decide, though apparently it is up to the decision-making manager to discern the content of a moral code and then punish employees accordingly. Hence, the type of rule involved weighs against Respondent’s showing insofar as it is hard to tell exactly when it would be violated and easily affords BNSF the opportunity to covertly retaliate against protected activity.

On the facts of this case, this point alone does not defeat BNSF’s case. Here it is fairly easy to discern what exactly BNSF found objectionably immoral. What appears to have so exercised Mr. McLeod, Mr. Price, and Mr. Marby was the impression that Complainant was using an injury report to challenge them and retaliate for his first discipline. Though insubordination was not an ultimate basis for discipline, these managers clearly thought Complainant was being insubordinate in not signing the first discipline and then reporting an injury—that is, after all, why they removed him from work, even if eventually cooler heads in the form of Mr. Heenan and Mr. Roberts prevailed and the charge was dropped. It morphed into the immoral conduct charge: what remained a driving force of the discipline was the view that Complainant was not acting in good faith and had reported his injury to retaliate against BNSF and his managers specifically. My impression of the record as a whole is that in the events that followed BNSF was most concerned with this point, incensed that an injury report was being used to challenge them and to retaliate for the prior discipline.

Above I determined that, as a matter of fact, the report was made in good faith—Complainant believed he had suffered a work-related injury, believed the content of what he reported, and his motive for reporting the injury was that that he had suffered a work-related injury, even if his reasons for reporting it at that time included the prior discipline since it removed the impediments to the report—worry over retaliation and good will to BNSF managers. Here, however, the same issue returns in a different form. Above the question was factual. But whether or not Complainant was really acting in good faith or not, BNSF managers clearly *perceived* that he was acting in bad faith, and that was a driving rationale for the discipline. When addressing BNSF’s affirmative defense, it is ultimately the reasons of BNSF, not the correctness of those reasons, that matter. BNSF managers believed that Complainant was acting to retaliate against BNSF by reporting the injury. So the question now is whether BNSF would have also terminated an employee who was perceived to be acting to retaliate against the company and particular managers by engaging in conduct that was not protected.

Though the evidence doesn’t speak directly to this question, there is a very strong intuitive case that BNSF would have also terminated an employee who managers believed was acting to retaliate against the company and them for engaging in any activity, protected or not. If

Complainant had done something else that was not protected, say reported a non-work related injury, but they similarly perceived (correctly or not) that it was being done to retaliate against them and the company, they almost certainly would have taken the same action and terminated Complainant. Both actions would have been perceived as hostile: a challenge to their authority and effort to harm BNSF and its managers. Both would have likely been deemed immoral.

Put in this way, it appears that BNSF can make out its affirmative defense. But there is an important lurking issue: it is clear that the BNSF managers perceived that an injury report was hostile to them and the company and was a way to retaliate—but *why* did they do so? A work-related injury report is protected activity. Why is the immediate reaction of BNSF managers to view it as an attack? Any impression that Complainant was lying about being injured quickly dissipated. Complainant *was* injured at work and by reporting the injury, even if doing so late, he was doing what he had a duty to do. For the managers to conclude that the protected activity in this case was hostile and retaliatory, they had to believe that protected activity was a way to retaliate and in and of itself hostile to them and BNSF. This is nothing more than a generalized hostility by BNSF and its managers to protected activity, a presumption that an injury report is somehow an attack upon them and the company. The argument it would appear, is that BNSF punishes actions that it deems hostile and retaliatory and it deems protected activity as hostile and retaliatory, therefore, it can punish protected activity—not because of the content of the activity, but because BNSF is hostile to this variety of protected activity.

This is an astoundingly bad argument, but once the facts and claims are fully understood, it permeates BNSF's approach to this case. It is telling that immediately upon receiving an injury report, BNSF reacted as if it was being attacked by Complainant. BNSF's rhetoric has been over the top—referring to the act of engaging in protected activity as “retaliatory,” premeditated retaliation,” “a sword” being used to “intimidate” BNSF. (*See* RPB, pp. 5, 32, 43, 47) Such immediate and deep-seated hostility to an injury report appears to have prevented clear-thinking about this case. BNSF found the fact that Complainant reported the truth, that he suffered a work-related injury, irrelevant, lingering on the view that such a report must be an attack against them. Complainant seemed to think it would harm them as well (insofar as he worried of retaliation and delayed the report out of good will towards his managers), evidencing a culture of hostility to injury reports. For the managers, an injury report was a very big deal that was immediately deemed an act of aggression. This colored the entire course of events, from Mr. Marby's initial, extraordinarily quick determination to pursue termination knowing only that Complainant had reported an injury after receiving discipline, to the assiduous work to procure a record that would survive review to achieve that end (including bringing in an outside conducting officer, something that was for some reason simply not possible in the first hearing), to reviewing the record only for substantial evidence or to confirm a preconceived outcome, to the sloppy manner in which Complainant was deemed to have violated the rules: a poorly explored and poorly thought-through dishonesty charge, a dismissal for not reporting an injury at all when the injury had only been reported late, and an understanding of the late reporting rules that was inconsistent, designed to serve as a basis for discipline, and was likely impossible for him to comply with.

The FRSA protects making injury reports. If BNSF views injury reports in such a negative manner, then it is manifesting animus toward protected activity. It may not detach the animus from the protected activity to defend itself on the grounds that whenever its managers

perceive that an employee is attacking them, they respond with termination. The FRSA does not require that BNSF favor protected activity, but it cannot punish it or adopt an attitude of such hostility that a true injury report is deemed retaliation against the company and punished as such. Rather than showing that it would have acted in the same way absent the protected activity, the reaction of BNSF managers who perceived hostility to and retaliation against them and the company in Complainant's actions demonstrates the opposite, that the protected activity itself is the driving force of the discipline because that is what it deems hostile and retaliatory against it.

Even assuming that BNSF would terminate any employee that it perceived to be attacking it or its managers and retaliating against it for prior discipline, that point would not establish BNSF's affirmative defense. On the record before me, the *reason* that BNSF managers believed that Complainant was hostile, attacking the company, and retaliating against BNSF was that he had filed an injury report, a protected activity. I cannot conclude that an employee who didn't engage in protected activity but engaged in substantially similar conduct, say by filing a non-work-related injury report, would have engendered the same over-the-top reaction. Managers reacted the way they did, even after ascertaining that the report was true, because of a generalized hostility to protected activity. If the protected activity is removed, this hostility goes as well, and BNSF cannot demonstrate that it would have taken the same adverse action.

v. Has BNSF Sustained Its Affirmative Defense?

The FRSA places a high burden on a railroad in cases like this. BNSF disciplined Complainant for the time and manner in which he engaged in protected activity. Thus, the protected activity and adverse action are inextricably intertwined and contribution follows as a matter of course. BNSF then bears the burden of showing by clear and convincing evidence that it would have taken the same adverse action absent the protected activity. The inquiry is difficult to structure in a case like the present, but I have examined the defense in terms of whether or not a hypothetical employee who engaged in no protected activity but substantively similar actions would have been disciplined in the same manner. To address this question I examined the process employed by BNSF and each of the rationales articulated by BNSF, including the evidence offered to show that employees who engage in similar conduct are also terminated. For the reasons stated above, I find this evidence insufficient to establish by clear and convincing evidence that the adverse action, termination, would have been taken absent the protected activity, the injury report. Hence, BNSF has failed to sustain its affirmative defense.

3. *Conclusion*

Therefore, I find that BNSF violated the FRSA when it terminated Complainant on May 25, 2011. Complainant engaged in protected activity by testifying at his first hearing and by reporting an injury. His injury report, though perceived otherwise, was made in good faith because he reasonably (and truthfully) believed he was injured, reported what he believed to be the truth, and his motive for reporting it was that he was in fact injured. His reasons for delay included a desire to avoid retaliation from BNSF and good-will toward BNSF managers. Those impediments for reporting were removed by the April 18, 2011, discipline. But that does not compromise the good-faith act done since Complainant was acting out of a recognized duty to report a work-related injury. BNSF knew of these protected activities and it took adverse action against him with discipline on April 18, 2011, and termination on May 25, 2011.

Complainant failed to carry his burden of showing that any protected activity contributed to his April 18, 2011, discipline. The only potential protected activity in play was his testimony at the March 30, 2011, hearing. Though I countenanced evidence showing serious issues with that hearing and subsequent discipline, these all tended to suggest that Complainant was unfairly being made the scapegoat for the February 21, 2011, accident. On this account, however, the protected activity had no bearing on the adverse action, even if the adverse action was not proper for other reasons. Since there was no contribution shown, there was no violation of the FRSA.

Contribution was shown as to the May 25, 2011, termination because that adverse action was inherently intertwined with the protected activity of the April 19, 2011, injury report. The investigation, charges, hearing, and termination all flowed directly from the injury report and all of the stated non-discriminatory reasons for the discipline involved Complainant's protected injury report, focusing on the timing, manner, and motivation for that report. With this showing, the burden shifts to BNSF to show by clear and convincing evidence that it would have terminated Complainant absent the protected activity. After examining the process of the discipline and the basis for each of the non-discriminatory reasons for discipline, I concluded that BNSF failed to make this difficult showing. Therefore, it is liable for retaliation under the FRSA.

B. Remedies

Under the FRSA a successful complainant is entitled to be made whole. 49 U.S.C. § 20109(e)(1). Four types of damages are specifically included. First, a complainant is entitled to reinstatement with the same seniority he or she would have enjoyed absent the discrimination. 49 U.S.C. § 20109(e)(2)(A). A successful complainant is also entitled to back pay with interest. 49 U.S.C. § 20109(e)(2)(B). The FRSA further provides for "compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." 49 U.S.C. § 20109(e)(2)(C). Finally, punitive damages up to \$250,000.00 are authorized. 49 U.S.C. § 20109(e)(3).

Complainant requests expungement of the discipline from his disciplinary record, back pay from May 25, 2011, to June 2, 2014, with interest, compensatory damages to included \$52,546.86 in out of pocket expenses and \$75,000.00 for emotional distress, attorney's fees and costs, and punitive damages at the statutory maximum of \$250,000.00. (CPB, pp. 59-69) Respondent contests Complainant's entitlement to back pay, both types of compensatory damages, and punitive damages. (RPB, pp. 71-83, RRB, pp. 25-36.)

1. Equitable Relief

Reinstatement, as authorized by 49 U.S.C. § 20109(e)(2)(A), is inappropriate in this case since Complainant was already reinstated by the Public Law Board and chose to retire. Complainant nonetheless asks for equitable relief in the form of expungement of the discipline related to the events of both February 21, 2011, and April 19, 2011, from his record. (CPB, p. 60.) The FRSA does not specifically list expungement as a remedy, but 49 U.S.C. § 20109(e)(1) directs an award of "all relief necessary to make the employee whole" and the list of damages in § 20109(e)(2) is only a list of what an award "shall include." BNSF does not address this relief.

I have found that BNSF violated the FRSA only as to the termination of May 25, 2011, which flowed from the events of April 19, 2011. Therefore, Complainant is only entitled to have the discipline related to the events of April 19, 2011, expunged from his record. Though the Public Law Board already ordered reinstatement as to this discipline, its decision does not direct any expungement. (*See* RX K, pp. 6-7.) Below, I shall order BNSF to expunge any employment records retained regarding Complainant of the discipline issued on May 25, 2011.

2. *Back Pay*

49 U.S.C. § 20109(e)(2)(B) specifies that a prevailing complainant under the FRSA shall be awarded “any back pay, with interest.” BNSF paid Complainant through his termination on May 25, 2011. (HT, p. 241.) He retired on June 2, 2014, but his retirement was backdated to November 2013. (*Id.* at 242.) Additionally, the parties stipulated the Railroad Retirement Board awarded Complainant disability and unemployment benefits during his period of unemployment. Complainant nonetheless seeks full back pay from May 25, 2011, to June 2, 2014. (CPB, p. 60.) Respondent does not dispute the general entitlement to back pay (beyond disputing all liability, of course), but argues that it should be reduced or eliminated on several grounds. I address each in turn, considering Complainant’s arguments for full back pay in the process.

First, Respondent argues that Complainant is not entitled to back pay during the periods of time in which he was disabled. (RPB, p. 71-72; RRB, pp. 25-27.) Complainant agrees with this general rule, but points to an exception whereby if the discriminatory conduct causes the disability, back pay can still be recovered despite the disability. (CPB, pp. 63-64; CRB, pp. 15-16.) I need not explore the legal intricacies here. This exception simply does not apply and Complainant’s argument otherwise is a non sequitur. Complainant’s disability was caused by the injury sustained on February 21, 2011. The discrimination in this case occurred in the May 25, 2011, termination. The termination had no role whatsoever in causing the disability, even though the two can be traced back to the same event, the February 21, 2011, accident. Even on the approach advocated by Complainant, on the facts of this case he is not entitled to back pay during the period of his disability. Complainant is entitled to be made whole. During the period of his disability, he was unable to work, and so would not have been able to collect pay.⁵¹ He would have been entitled to disability benefits, but here he was paid disability benefits and no evidence has been introduced to show that the amount of those benefits would have been greater had Complainant been employed.⁵²

⁵¹ In his response brief Complainant argues that since he was both terminated and disabled and the loss of income is “not reasonably divisible between these two interrelated factors” he should receive back pay even though he was disabled. (CRB, pp. 19-20.) This gets things the wrong way around. During the period of his disability, his loss of income was overdetermined, not incapable of being divisible. The disability, by itself, was sufficient to deprive him of his income (and replace it with the disability compensation he received). To be made whole he must be put in the same situation he would have been but for the discrimination. Absent the discrimination he still would have lost his income due to disability. Thus, no back pay is warranted.

⁵² Complainant also contends that he should be paid back pay through the period of his disability because “BNSF should derive no benefit, and Mr. Brough should suffer no deficit, due to his period of disability.” (CPB, p. 64.) I do not fully follow this reasoning. Complainant was disabled and could not work. The aim of the statute is to make him whole. This means restoring him to the position he would have been in absent the retaliation. During his period of disability, whether he was employed by BNSF or not, he has represented that he was unable to work and thus

Next, what exactly was the period of Complainant's disability? Dr. Richardson first determined that Complainant was totally disabled on June 23, 2011. (CX 28, p. 11.) I find that this is the start date of Complainant's disability. At the hearing, Complainant testified that he could have returned to work in January or March of 2013. (HT, p. 191.) Complainant locates his disability end date in December 2012 based on a July 17, 2012, report from Dr. Galvas that anticipated the end of Complainant's disability at that time. (CPB, p. 61; CX 29, p. 25.) No medical records give a date when a doctor opined that Complainant could have returned to work. Based on the July 2012 opinion of Dr. Galvas as well as Complainant's testimony, I find that his disability ceased as of January 2013.⁵³ Thus, Complainant was disabled from June 23, 2011, to, but not including January 1, 2013, and is not entitled to back pay in that period.

BNSF argues that Complainant's back pay should be reduced because he failed to mitigate his damages by finding alternative work. (RPB, p. 74.) Complainant did not seek out alternative employment. (HT, p. 191.) Nonetheless, I do not find Respondent's argument compelling. During the period of his period of disability, the point is irrelevant, so it could only apply after January 2013. As Complainant points out, (CRB, pp. 16-17), BNSF has introduced no evidence showing that Complainant could have mitigated his damages in this period and what his earnings might have been. I can thus reach no conclusion as to whether mitigation was possible or determine an amount.

Next BNSF contends that Complainant's award should be reduced by \$3,696.00 in unemployment benefits that he received from the Railroad Retirement Board. (RPB, p. 74; RRB, pp. 28-30.) Complainant argues that these benefits are subject to a statutory right of reimbursement from an award of back pay so they should not be reduced to benefit BNSF.⁵⁴ (CPB, p. 64; CRB, p. 16.) The statutory provision, however, pertains only to periods for which back pay is awarded. 45 U.S.C. § 352(f)(ii). All of the unemployment benefits were paid during Complainant's period of disability. (*See* CX 61, p. 2.) This point, however, cuts against BNSF's position. Since Complainant is not being awarded back pay for the period in question, it would be incongruous to further reduce his back pay for other periods because of unemployment compensation here. Moreover, the Railroad Retirement Board records submitted indicated that Complainant was also awarded disability benefits for this period, but since the disability award was not made until October 2011, it resulted in no additional payments for the earlier period, instead being subsumed into the unemployment already paid. (*Id.*) So even were Complainant not to have been paid his unemployment, he would have received the same amount in disability benefits. BNSF has not argued that those disability benefits are grounds for a further deduction.

There is also dispute over the end date of the period of Complainant's back pay. Complainant advocates June 2, 2014, the actual date of his retirement. (CPB, p. 64.) BNSF contends that the end date should be November 2013, the date to which his retirement was

entitled to disability benefits. Declining to award back pay for such a period is not imposing a benefit or a deficit. It is tailoring the award to make Complainant whole.

⁵³ Respondent advocates a later date on the grounds that Complainant represented to Aetna that he was disabled through the end of 2013. (RPB, p. 72.) It does not provide any citation to the record to substantiate this argument and it is given in the barest of detail. Hence I do not consider it here. If Complainant has represented different facts to third parties, those parties can pursue relief. There is no reason to shoehorn those points into this matter.

⁵⁴ BNSF also argues the language applies to only FELA, not FRSA back pay. (RRB, pp. 28-30.) I do not need to address this issue since Complainant is not being awarded back pay for the period in question, mooted the dispute.

backdated and when those benefits were paid from. (RPB, p. 73.) Complainant did not chose to retire until June 2, 2014, so that is the date to which his back pay should continue. Since he chose at that time to increase his instant benefits by backdating his retirement, however, the retirement benefits received for the time up to June 2, 2014, should be deducted from the back pay award. Those figures are not in the record, but should be easily available to the parties. This method of calculation will make Complainant whole—providing him with the pay he would have received up until the date of his actual retirement, but not providing double compensation in the form of backdated retirement benefits as well as full back pay.

Finally, to fashion a back pay award I must determine the amount of Complainant's prospective salary during the relevant periods. Complainant earned \$52,935.00 in his last full year before termination. (HT, p. 188; CX 50, pp. 2-3.) Complainant rounds this figure to \$53,000.00 and then applies yearly increase of 3%. (CPB, pp. 62-63.) At the hearing, Complainant speculated that this would have been his wage increase if he had remained at work. (HT, p. 189.) BNSF does not specify a definite figure, but argues that back pay is meant to remedy actual, not speculative losses and it is Complainant's responsibility to establish the amount of back pay owed. (RPB, p. 73; RRB p. 27.) Complainant cites to case law to the effect that that calculation uncertainties should be resolved in favor of the complainant (CPB, p. 64), but this inapplicable—there is not a calculation uncertainty, there is just bare speculation about future wages. I find that insufficient to show an increase in future earnings. If Complainant wishes to depart from his actual earnings, he should provide evidence showing the actual increase in wages, in the form of union contracts, testimony from co-workers, or documentation garnered from BNSF. Instead, the only evidence of record is a rough, speculative estimate by Complainant. I find this insufficient and thus award a back pay rate of \$52,925.00 per year.

Putting the various pieces together, Complainant is entitled to back pay from May 25, 2011, up to, but not including June 23, 2011, and January 1, 2013 up to but not including June 2, 2014, at a rate of \$52,925 per year, less retirement benefits received for the backdated period of retirement, November 1, 2013, up to, but not including June 2, 2014. The first period of back pay includes 29 days, which is .0795 of a year. At \$52,925.00 per year, this award equals \$4,207.54. The second period of back pay constitutes 517 days, which is 1.4164 years. At \$52,925.00 per year, this computes to an award of \$74,962.97. This figure must, however, be reduced by the retirement benefits paid between November 2013 and June 2, 2014. Complainant is entitled to interest on these benefits, which shall be paid on each back pay installment from the date payment would have been made if Complainant had been employed until the date of actual payment, at the rates prescribed by 28 U.S.C. § 1961.

3. Compensatory Damages

The FRSA provides that relief shall include “compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.” 49 U.S.C. § 20109(e)(2)(C). Complainant seeks out-of-pocket expenses totaling \$52,546.86. He argues that due to his termination he was forced to withdraw \$39,746.86 from his 401K and \$4,000 from his Roth IRA. (CPB, p. 66.) BNSF, however, correctly points out that the 401K was almost entirely

depleted during the period of Complainant's disability.⁵⁵ (RPB, p. 75.) According to the financial records submitted, almost the entirety of the withdrawals came prior to 2013. (CX 59, p. 2.) Since Complainant would have been forced to withdraw the money while on disability regardless of his employment status, he is not entitled to these damages. Based on the graph contained in CX 59 that tracks the amount of money in the account, the best estimate of money withdrawn after January 1, 2013, is \$1,000.00. I credit Complainant's testimony that these withdrawals were necessary due to his loss in income. (See HT, pp. 190-91.) Since but for the FRSA violation he would have been able to return to work, I award Complainant \$1,000.00 in compensatory damages. As for Complainant's Roth IRA, the evidence consists only in a handwritten note on the 401K account statement as well as testimony repeating the content of the note. (See *id.* at 191; CX 59, p. 2.) Presuming this is sufficient, to make the award I must know when the withdrawal was made. That information is not provided, so I make no award.

Complainant also seeks damages related to his loss of insurance. (CPB p. 66.) Ms. Brough was able to add Complainant and the children to her insurance, but at an additional cost of \$200-\$300 per month. (HT, pp. 191-93, 224, 334-35.) Evidence of record indicates that Complainant received dependent coverage through the end of 2012 and for himself through the end of 2013. (RX Y, p. 1.) Had Complainant been employed, he would have received coverage through June 2, 2014, his actual date of retirement. For the additional deductions Complainant allocates \$200.00 per month to dependent coverage and \$100.00 per month to his coverage. (See CPB, p. 66.) I find this reasonable.⁵⁶ Between January 2013 and June 2014, 17 full months passed. At \$200.00 per month for the Brough children, this amounts to a cost of \$3,400.00.⁵⁷ Five months passed between Complainant's loss of coverage in January 2014 and his retirement at the start of June 2014. At \$100.00 per month, the total additional cost is \$500.00 I therefore award \$3,900.00 for additional insurance expenses.⁵⁸

Finally, Complainant seeks damages of \$2,800.00 for medical bills related to Ms. Brough's ATV accident. (CPB, p. 66.) BNSF argues that no evidence has been submitted to substantiate these damages or show that BNSF's insurance would have paid them. (RPB, p. 76.) Moreover, it points out that Ms. Brough testified that she was covered by her own insurance. (*Id.*) Complainant did testify that they were adversely impacted after the accident because the additional insurance did not help to make the payments. (HT, p. 194.) But Respondent is

⁵⁵ BNSF also argues that awarding these damages as well as back pay would be a form of double recovery. (RPB, p. 74.) The point is largely moot given my findings in the text. As to the amount I do award, Complainant persuasively argues that since but for the discrimination Complainant would have had the pay and the replenished and growing retirement investments, there is no double recovery. (CRB, p. 19.)

⁵⁶ Though I find Complainant's attempt to calculate benefits to the present unreasonable since he retired in June 2014. (See CPB, p. 66.) Here, I agree with BNSF's point that these damages are temporally limited to the time he actually would have been insured. (See RRB, p. 30.)

⁵⁷ I reject BNSF's argument that this expense is not recoverable because it pertains to Complainant's dependents. (RRB, pp. 30-31.) The children were insured, but the cost fell on Complainant.

⁵⁸ BNSF mostly argues that the insurance damages should be limited due to continued coverage, as I have done. (RPB, pp. 75-76; see also RRB, pp. 30-31.) It also claims that the amounts are too speculative and must be reduced by the amount that would have been deducted from Complainant's paycheck for this coverage. (*Id.*) Though inexact, the testimony from Ms. Brough was not merely speculative and is sufficient to make a rough award. It establishes an additional expense that was incurred due to Complainant's termination. Insofar as BNSF wishes to provide more exactitude based on what it would have deducted for similar coverage, it should have provided records of those amounts, which should have been easily available to it. If BNSF is not willing to provide evidence that more exactly fix the damages, it cannot object to the use of credible estimates of those damages.

correct—Ms. Brough clearly stated that she had been insured under her insurance, not Complainant’s insurance. (*Id.* at 334.) Absent clarification, I agree with BNSF that these damages are not recoverable in this action. Complainant must show that if he had been employed, they would not have incurred these out of pocket expenses related to his wife’s accident. He has failed to do so.

In sum, I award \$1,000.00 in lost savings in Complainants 401K after January 1, 2013, and a total of \$3,900.00 in increased health insurance deductions from Ms. Brough’s paycheck after it became necessary to add the Brough children and then Complainant to her health insurance. Complainant’s other claims for out-of-pocket expenses are denied. Complainant is awarded \$4,900.00 in out-of-pocket compensatory damages.

Compensatory damages are designed to compensate whistleblowers not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress. *Simon v. Sancken Trucking Co.*, ARB No. 06-039, ALJ No. 2005-STA-040 (ARB Nov. 30, 2007), citing *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, -169, ALJ No. 1990-ERA-030, at 33 (ARB Feb. 9, 2001). Though not explicitly stated in the FRSA, the Board has found that damages for emotional distress are available under language identical to § 20109(e)(2)(C). *Vernace v. PATH*, ALJ No. 2010-FRS-018 (OALJ Sept. 23, 2011), *aff’d.*, *Vernace v. PATH*, ARB No. 12-003, ALJ No. 2010-FRS-018 (ARB Dec. 21, 2012); *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-00047 at 7-8 (ARB Aug. 21, 2011) (interpreting 49 U.S.C. § 31105(b)(3)(A)(iii)); *see also Mercier v. Union Pac. R.R. Co.*, ARB Nos. 09-101, -121, ALJ Nos. 2008-FRS-003, -004 at 8 (ARB Sept. 29, 2011) (noting complainant may seek damages for mental hardship under the Act).

Complainant asks for \$75,000.00 for emotional distress. He argues that he was wrongfully terminated after almost four decades of work, which devastated him emotionally. BNSF first wrongfully made him a scapegoat for an accident and then terminated him, claiming that he was dishonest and immoral. Moreover, the news of his termination was spread all over the community so that his daughters learned that he had been terminated from their schoolmates. The financial difficulty and uncertainty added to the distress. (CPB, p. 67.) BNSF allows that damages for emotional distress are available under the FRSA, but contends that Complainant must establish his damages with more than terse statements and has failed to do so. (RPB, pp. 76-77; *see also* RRB, pp. 32-33.) Furthermore, it argues that emotional distress caused to Complainant’s family members is not recoverable under the FRSA and there is no evidence that BNSF was responsible for spreading the news of Complainant’s termination. (RPB, pp. 77-78.)

I do not find this last point convincing—BNSF managers and Complainant were the only people who knew initially, yet somehow the information spread very quickly. In any case, whether or not BNSF was responsible for spreading the news through Havre, it would not have occurred but for the termination in violation of the FRSA. The point is limited, however, since Respondent is correct that the FRSA awards damages “necessary to make the employee whole.” 49 U.S.C. § 20109(e)(1). Thus, only Complainant’s emotional distress is recoverable here.

To recover damages for emotional distress, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused mental suffering or emotional anguish. *Testa v. Consol. Edison Co., Inc.*, ARB No. 08-029, ALJ No. 2007-STA-027, slip op.

at 11 (ARB Mar. 19, 2010). An award is “warranted only when a sufficient causal connection exists between the statutory violation and the alleged injury.” *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938 (5th Cir. 1996). A complainant’s credible testimony alone is sufficient to establish emotional distress. *Hobson v. Combined Transport Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-035, slip op. at 8 (ARB Jan. 31, 2008). Testimony from a medical professional is not necessary—a complainant need only show the he experienced emotional distress due to the adverse action. *See Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-003, slip op. at 22 (ARB Sept. 29, 1998). But emotional distress is not presumed, it must be proven. A bare statement of emotional distress will not suffice. *Dixon v. U.S. Dep’t of Interior, Bureau of Land Mgmt.*, ARB Nos. 06-147, 06-160; ALJ No. 2005-SDW-008, slip op. at 16 (ARB Aug. 28 2008).

I find that Complainant has established entitlement to compensatory damages for emotional distress for four reasons. First, his testimony, while not extraordinary detailed, was more than a bare statement that he was distressed. He stated that he was shocked and surprised when he found out that BNSF was going to the extreme of accusing him of being dishonest and immoral. (HT, p. 185.) He described the shock of being terminated after almost 40 years, the financial uncertainty that made life difficult for him and his family, and the shock of learning that somehow his termination had been spread throughout the city. (*Id.* at 187-88.) He may never have procured treatment for distress, (*id.* at 246), but my impression of the record is that Complainant is generally reticent to seek medical care.

Second, Complainant’s wife was able to offer additional testimony about the emotional impact of his termination, describing him as “devastated, because he had been there for years and that was his life” as well as “stressed, very depressed.” (*Id.* at 332-33.) I found Ms. Brough credible, and she has been married to Complainant for 21 years. She compared the impact of the termination to the impact of Complainant’s father passing away. (*Id.* at 333.) This is convincing evidence of compensable emotional distress.

Third, Mr. Price and Mr. McLeod both indicated that Complainant was distressed after receiving his first discipline. According to Mr. Price, Complainant was visibly upset and agitated when told of his suspension. (*Id.* at 475-76.) Mr. McLeod’s description shows Complainant was still upset the next day. (RX I, p. 2.) Complainant is not entitled to any emotional distress resulting from his first discipline and neither do I find that this distress rises to the level of compensability. But Complainant didn’t even think that the suspension was anything serious, calling it just “paperwork.” (HT, pp. 222-24.) Complainant clearly took a great deal of pride in his work, and was upset to be told, wrongfully in his view, that he had violated safety rules, even if he didn’t think the punishment was significant. This reading is corroborated by Mr. Anderson’s recollections at the distress of Complainant after the first hearing, when no discipline had been assessed but it was clear that he was being blamed. (CX 39, p. 1.) Given this reaction, it is a fair inference that after the much more severe termination Complainant would suffer much more intense and long-lasting emotional distress.

Finally, it is very reasonable to conclude that someone in Complainant’s position would experience a great deal of emotional distress. This is decidedly not a case in which the complainant is claiming distress out of proportion to the harm at issue. Complainant had been with BNSF almost 40 years. His work at the Diesel Shop was not a passing job, it was his life’s

career and one he took great pride in it. He was well-respected for his work and expertise. His work for BNSF was a large part of his identity. Very quickly this all fell apart and was taken away, partly due to the fact that he filed a work-related injury report. Hit from behind while plowing snow, as instructed, and following the rules and procedures for doing so, he was unfairly made the scapegoat for an accident that implicated, at the least, a failure by local management to anticipate the potential problem created by the manner they decided to clear snow and their failure to equip the skid-steer with a radio. When after this unfair discipline he truthfully reported an injury in good faith, he was escorted from the property, accused of dishonest and immoral conduct, and quickly terminated after a formalistic hearing with a foregone conclusion. Career ruined, he was left with a family to support, nearing the age of retirement, his termination spread throughout the town, and summarily discarded from the only job he had worked as an adult, and had worked quite well. His claims of emotional distress, then, are very convincing in context: the termination greatly tarnished his life's work and reputation.

I conclude that Complainant is entitled to damages for emotional distress. The next question is the amount of those damages. “[A] key step in determining the amount of compensatory damages is a comparison with awards made in similar cases.” *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 169, ALJ No. 1990-ERA-030, slip op. at 32 (ARB Feb. 9, 2001). Recent awards for emotional distress in whistleblower cases, however, have ranged from less than \$10,000.00 to up to \$250,000.00.⁵⁹ Most recently in *Rudolph II*, the ARB sustained emotional distress damages of \$25,000 when there was testimony that the railroad's adverse actions had caused anxiety, loss of appetite, and sleep disruption and had “caused [the complainant's] financial and personal life to be ‘turned upside down.’” But it rejected complainant's argument that more was warranted. ARB Nos. 15-053, 15-056 at 14-15.

In one recent case involving an investigation and termination of a complainant after he filed an injury report, I awarded \$25,000.00 in emotional distress damages where there was credible evidence that the complainant suffered serious financial and emotional stress, especially related to health problems of his dependents, who had relied on his insurance. *See Harvey v. Union Pac. R.R. Co.*, ALJ No. 2011-FRS-00039, slip op. at 39-40 (ALJ Feb. 12, 2015). In a case where the railroad terminated the complainant, leaving his family without any income, severely impacting their financial security, and leaving the complainant distraught, I awarded \$50,000.00 in damages for emotional distress. There, the complainant's family could not afford groceries or

⁵⁹ See *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047 (ARB Aug. 31, 2011) (awarding \$50,000 in compensatory damages for emotional distress); *Smith v. Lake City Enterprises, Inc.*, ARB Nos. 09-033, 08-091, ALJ No. 2006-STA-032 (ARB Sept. 28, 2010) (\$20,000 in compensatory damages for emotional distress); *Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101, -159, ALJ No. 2005-STA-063 (ARB June 30, 2008) (\$10,000); *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-035 (ARB Jan. 31, 2008) (\$5,000); *Waechter v. J.W. Roach & Sons Logging & Hauling*, ARB No. 04-183, ALJ No. 04-STA-43 (ARB Dec. 29, 2005) (\$20,000); *Jackson v. Butler & Co.*, ARB Nos. 03-116, 144, ALJ No. 2003-STA-026 (ARB Aug. 31, 2004) (\$4,000); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 095, ALJ No. 02-STA-035 (ARB Aug. 6, 2004) (\$10,000); *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, -169, ALJ No. 90-ERA-030 (ARB Feb. 9, 2001) (\$250,000); *Jones v. EG&G Defense Materials*, ARB No. 97-129, ALJ No. 95-CAA-003 (ARB Sept. 29, 1998) (\$50,000); *Van Der Meer v. Western Kentucky Univ.*, ARB No. 97-078, ALJ No. 95-ERA-038 (ARB Apr. 20, 1998) (\$40,000); *Michaud v. BSP Transport, Inc.*, ARB No. 97-113, ALJ No. 95-STA-029 (ARB Oct. 9, 1997) (\$75,000); *Bigham v. Guaranteed Overnight Delivery*, ARB No. 96-108, ALJ No. 95-STA-037 (ARB Sept. 5, 1996) (\$20,000); *Creekmore v. ABB Power Systems Energy Services, Inc.*, ALJ No. 93-ERA-024 (Dep. Sec. Dec. and Rem. Ord. Feb. 14, 1996) (\$40,000).

Christmas presents, were forced to hunt for food, and were collecting firewood to heat their residence. *Schow v. Union Pac. R.R. Co.*, ALJ No. 2013-FRS-00043, slip op. at 38-39 (ALJ Apr. 15, 2015). This case is more like *Harvey* than *Schow*. Complainant's distress was significant, but his family retained income from his wife and from his unemployment and disability payments. Their financial distress was real, but not severe. And unlike both cases, here the family was forced to increase the deductions from Ms. Brough's paycheck, but did not have to go without health insurance.

Awards at the high end of the spectrum tend to involve much more traumatic events. The ARB sustained an award of \$75,000.00 in a case where the complainant lost his home to foreclosure and was forced onto public assistance due to the termination. *See Michaud v. BSP Transport*, ARB No. 97-113, ALJ Jo. 1995-STA-029 (ARB Oct. 9, 1997). In a case where a complainant had his reputation seriously damaged and was blackballed from a promising and lucrative career, resulting in 8 years of unemployment, the ARB affirmed an emotional distress award of \$250,000.00. *See Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 98-169; ALJ No. 1990-ERA-030 (ARB Feb. 9, 2001). Here Complainant suffered financial stress and the significant emotional impact of the loss of a career. Nonetheless, he and his family were able to mitigate their losses and maintain a stable financial situation. Complainant was able to eventually retire with benefits.

At the other end of the spectrum, the minimal emotional distress caused by being sent home in front of one's peers for making a health and safety complainant merited only a nominal emotional distress award of \$500.00. *Jackson v. Union Pac. R.R. Co.*, ARB No. 13-042, ALJ No. 2012-FRS-017, slip op. at 6 (ARB Mar. 20, 2015). In cases where there is emotional distress, but little detail that would tend to show that the distress was severe, awards have been \$10,000.00 or less. *See, e.g., Hobson v. Combined Transport, Inc.*, ALJ No. 2005-STA-035 slip op. at 12 (ALJ Nov. 10, 2005) (\$5,000 for "increased anxiety and stress"), *aff'd*. ARB Nos. 06-016, 053, ALJ No. 2005-STA-035 (ARB Jan. 31, 2008); *Jackson v. Butler & Co.*, ALJ No. 2003-STA-026 at 10 (ALJ June 25, 2003) (\$4,000 based on feeling "moody, depressed, and short tempered with a low self-esteem and sense of embarrassment"), *aff'd*. ARB Nos. 03-116, -144, ALJ No. 2003-STA-026 (ARB Aug. 31, 2004); *Roberts v. Marshall Durbin Co.*, ALJ No. 2002-STA-035, slip op. at 41-42 (ALJ Mar. 6, 2003) (\$10,000 in emotional distress due to marital strain and financial insecurity), *aff'd*., ARB Nos. 03-071, -095 (ARB Aug. 6, 2004).

This case falls in the middle. Complainant suffered financial stress, a tarnished reputation in the community as word of his termination somehow spread immediately, and the sudden loss of a nearly four-decade career that had defined his professional life and identity. In *Smith v. Lake City Enters., Inc.*, the ARB affirmed \$20,000 in emotional distress that resulted in irregular sleep and eating patterns, anxiety, and marital stress. Here, Ms. Brough compared Complainant's emotional state to the loss of his father. In comparison with other cases in this range, Complainant has presented less evidence of concrete manifestations of emotional distress, but on the other hand differs in that he lost a nearly 40 year career that had defined his adult life. I credit Ms. Brough's testimony that Complainant was completely devastated. (HT, pp. 332-33.) Balancing these factors, I find that this case warrants an award of \$25,000.00 in emotional distress damages. It is similar to both *Harvey* and *Smith*. I also find the loss of a long career comparable to having one's life turned upside down, and thus the recent *Rudolph II* decision, which also awarded \$25,000.00, is a proper comparator.

Therefore, I award Complainant \$25,000.00 for emotional distress. With the prior award of \$4,900.00 in out-of-pocket damages, Complainant is awarded a total of \$29,900.00 in compensatory damages under 49 U.S.C. § 20109(e)(2)(C).

4. *Attorney's Fees and Costs*

The FRSA provides that a successful complainant shall be awarded reasonable attorney's fees and costs. 49 U.S.C. § 20109(e)(2)(C). Complainant has been successful here, and thus is entitled to attorney's fees and costs. The parties will be directed to pursue briefing of the amount of fees and costs to be awarded per a schedule below.

5. *Punitive Damages*

The FRSA authorizes punitive damages "in an amount not to exceed \$250,000." 49 U.S.C. § 20109(e)(3). Punitive damages are to punish unlawful conduct and deter its repetition. *BMW v. Gore*, 517 U.S. 559, 568 (1996); *Smith v. Wade*, 461 U.S. 30, 51 (1983). Relevant factors when determining whether to assess punitive damages and in what amount include: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the respondent's actions; and (3) the sanctions imposed in other cases for comparable misconduct. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434–35 (2001). In whistleblower cases, punitive damages are appropriate to punish wanton or reckless conduct and to deter such conduct in the future. *Johnson v. Old Dominion Security*, ALJ Nos. 86-CAA-003, 004, 005 (Sec'y May 29, 1991). The ARB further requires that an ALJ weigh whether punitive damages are required to deter further violations of the statute and consider whether the illegal behavior reflected corporate policy. *Ferguson*, ARB No. 10-075 at 5. An illegal motive is not necessary to justify punitive damages. "An award of punitive damages may be merited where there has been reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law." *Leiva v. Union Pac. R.R. Co., Inc.*, ARB Nos. 14-016, -017; ALJ No. 2013-FRS-019, slip op. at 8 (ARB May 29, 2015) (internal quotation marks omitted) (quoting *Petersen v. Union Pac. R.R. Co.*, ARB No. 13-090, ALJ No. 2011-FRS-017, slip op. at 5 (ARB Nov. 20, 2015)). To merit punitive damages, then, the record must manifest some culpable state of mind on behalf of the respondent or its agents showing reckless indifference or callous disregard for the rights of the employee under the FRSA or intentional disregard for federal law. *Jackson*, ARB Case No. 14-042 at 6-7 (citing *Youngermann v. United Parcel Serv., Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 6 (ARB Feb. 27, 2013); see also *Griebel v. Union Pac. R.R. Co.*, ARB No. 13-038, ALJ No. 2011-FRS-011, slip op. at 2 (ARB Mar. 18, 2014).

Complainant asks for the maximum award of \$250,000.00 on the grounds that BNSF rushed to judgment in both instances and relentlessly pursued dismissal to the point of ignoring material facts and misapplying its own rules to justify the ordained result. (CPB, pp. 68-69.) Respondent contends that no such damages are warranted, pointing out that they are appropriate not just when there is a violation but when that violation is wanton or reckless and punitive damages are necessary to deter future misconduct. BNSF contends it displayed no such disregard for Complainant's rights and the discipline went through several levels of review. It contends deterrence is not necessary insofar as it has a review process and an anti-retaliation policy in which managers are trained. (RPB, pp. 79-82.) BNSF further argues that Complainant

has not shown a pattern or practice of similar misconduct. (*Id.* at 82.) Finally, BNSF claims it made a good faith effort to comply with the FRSA in that all of the managers recognized the importance of not retaliating against work-related injuries and the company has procedures to prevent such retaliation.⁶⁰ (*Id.* at 82-83.)

To begin with, I reject the contention that BNSF's vaunted review demonstrates good faith effort to comply with the Act. Mr. Marby's role can be described as a review, but in reality he was making the decision. Mr. Heenan conducted a genuine review, but it had little to do with an attempt to comply with the FRSA. Instead, it was geared to ensure that the record would survive substantial evidence review from the Public Law Board. Mr. Heenan's substantial evidence approach simply could not respond to the particular concerns of the FRSA. Indeed, on the record in this case, it is evident that the whole disciplinary process, from the initial charges, through the investigatory hearing and findings, all the way to the review and institution of discipline is specially tailored to ensure only that the discipline will survive the deferential review by the Public Law Board. Little concern was shown with reaching the right result through the process, let alone serious concern with the burdens imposed by the FRSA.

Above I found fault with the process for both disciplinary actions. It is also bothersome that BNSF managers elected to make Complainant a scapegoat for an accident, tarnishing and setting in motion the events that ended Complainant's long, loyal, and largely exemplary career with the company. BNSF's reaction to the accident and decision to make Complainant a scapegoat, however, are not grounds for punitive damages in this case. Here punitive damages are warranted only in relation to BNSF's conduct relative to the FRSA. *E.g. Rudolph II*, ARB Nos. 14-053, -056 at 15. . In addition, reviewing decisions and acts of the managers in this case, I find no intentional violation of the FRSA. I credit that they genuinely believed they were punishing unprotected misconduct and not attempting to directly punish protected activity.

Nonetheless, I find that punitive damages are warranted for three reasons. First, the process and procedure in the second "investigation" and hearing are troubling. The decision to terminate Complainant was made almost immediately by Mr. Marby, and everything that followed was directed at justifying and implementing that decision. Little, if any, regard was paid to whether or not Complainant had actually violated the rules or to the fact that Complainant had engaged in activity protected by the FRSA. The conducting officer at the hearing wasn't even a decision-maker. Instead, the hearing was a formal exercise completed only because it had to be done, with Mr. Collier charged with producing a record that would survive review and allow BNSF to do what it had already decided to do before even properly investigating the facts.

⁶⁰ In its reply brief BNSF raises a constitutional argument against punitive damages pursuant to *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). (RRB, pp. 33-35.) BNSF made the same argument in *Cain* and the ARB rejected it. ARB No. 13-006 at 10-11. On appeal the Tenth Circuit held that *Campbell* is relevant to the FRSA and to be used to evaluate the constitutionality of the damages awarded. *BNSF Ry. Co. v. Cain*, 816 F.3d 628 (10th Cir. 2016). This case arises in the Ninth Circuit, but in any event, the argument is premature. Insofar as BNSF wishes to challenge punitive damages generally, this is a trial-level adjudication before an ALJ and that argument will need to be pursued in another forum. Insofar as BNSF is challenging the amount of the award in this case, BNSF cannot cogently argue that a particular award of punitive damages is unconstitutional when the award hasn't been made.

Second, the injury reporting rules as applied in this case are extremely troubling. This is a case where an employee could only realize that he was injured over time. Complainant, an individual who had been working a physically demanding job for almost 40 years, suffered a whiplash injury and it would naturally take some time for him to realize that the soreness and stiffness he was experiencing was different from his past aches and pains and signaled an injury. It is reasonable that such an employee, especially in a work-environment that discourages injuries, would not come to know that he was injured until he had seen a doctor. Nonetheless, the rules at issue don't define an injury and were wielded in a manner that made it impossible for Complainant to comply. Given the injury he suffered and how he came to realize he was injured, he could not engage in protected activity without running afoul of a supposedly benign rule requiring prompt reporting. The rule may be valid on its face, but as applied here it became simply a tool to punish protected activity no matter how and when Complainant might have engaged in it. Such an approach to a prompt reporting rule is in itself a reckless indifference and callous disregard for the rights of employees under the FRSA that merits both punishment and deterrence.

Third, the reaction of BNSF to Complainant's protected activity, discussed above (§ VI.2.b.iv), demonstrates a troubling culture of hostility to injury reports. Institutionally, the injury report immediately made the case a matter of company-wide concern. Immediately BNSF managers presumed that that they were under attack and proceeded to overreact, compounding the disciplinary charges against Complainant without thinking them through. The only voice in the mix concerned with the question of whether Complainant actually *had* violated a rule was Mr. Roberts, but his instructions were largely ignored. The result was a pro forma hearing with a conducting officer who wasn't the decision maker and a quick confirmation of Mr. Marby's initial determination in favor of termination. This was premised on a dishonesty charge that wasn't thought through insofar as BNSF never attempted to determine if there was a genuine contradiction in the accounts of what had happened (rather than the interpretations offered of the events), a late reporting charge that unjustifiably morphed into a no reporting charge, and an immoral conduct charge that was really centered on the perception by BNSF managers that the injury report was inherently hostile to them and so needed to be punished.

Lost in this whole milieu was the fact that Complainant had truthfully reported a work-related injury, something that is protected by the FRSA. A culture of hostility to injury reports overwhelmed what should have been a fairly straightforward response, even if it had involved disciplinary investigation along the lines suggested by Mr. Roberts and with particular attention paid to when Complainant could have been reasonably expected to understand that he had an injury to report. While such a course of action may well have resulted in discipline and no FRSA violation, that isn't what happened here. Instead things spun out of control, resulting in the unfortunate termination of a long-time, loyal, and effective employee. At bottom, this case developed the way that it did because of a managerial culture that is hostile to injury reports. Such a culture shows reckless indifference and callous disregard for the rights of workers under the FRSA and merits deterrence.

Next, what punitive damages are warranted? "The size of a punitive award 'is fundamentally a fact-based determination.'" *Leiva*, ARB Nos. 14-016, -017 at 8 (quoting *Petersen*, ARB No. 13-090 at 5). The amount of punitive damages turns on the nature of the employer's conduct, and whether it calls for deterrence and punishment. *Cain*, ARB No. 13-006

at 10 (citing *Youngermann*, ARB No. 11-056 at 10), *see also Griebel*, ARB No. 13-038 at 2. In other cases where punitive damages have been assessed the amount has ranged from \$1,000 to \$250,000.⁶¹ Amounts towards the bottom of the range tend to be applied when the reckless disregard for the Act is isolated. In *Rudolph II*, for example, the ARB affirmed a punitive damage award of only \$5,000.00 where the only conduct found to be qualifying was one threat by a manager to pursue discipline if the complainant continued to engage in protected activity. ARB No. 14-053, -056 at 15-16.

High-end awards have been made where there is broad-based or extended intentional interference with the employee's rights. In *Cain* the ARB sustained punitive damages assessed against BNSF of \$125,000.00 where a number of managers had conspired to retaliate against the complainant.⁶² ARB No. 13-006 at 10-11. In *Raye v. Pan Am Railways Inc.* the respondent was assessed the statutory maximum of \$250,000.00 in punitive damages where it had "consciously disregarded" and "intentionally interfered with" the complainant's rights under the FRSA and where it had used its disciplinary process "to intimidate and discourage protected activity." ALJ No. 2013-FRS-084, slip op. at 18-19 (ALJ June 25, 2014).

I recently awarded punitive damages of \$100,000.00 and \$150,000.00 in cases where the violations were more egregious than the one here. In *Harvey I* I awarded \$100,000.00 when where managers rushed to judgement and I found that "[r]espondent's policies and culture have created an atmosphere of fear and discouragement surrounding the reporting of injuries and locomotive defects, and this atmosphere has resulted in a chilling effect on employees' decisions to engage in protected activity." ALJ No. 2011-FRS-039 at 42-46. I awarded \$150,000.00 in *Schow* where the railroad punished an employee who reported an injury for failing to report a safety hazard that didn't even exist and I determined that the railroad's "official policies discourage injury reporting" and "there is a culture of hostility and animus towards injury reporting" at the railroad. ALJ No. 2013-FRS-00043 at 42-45. There are similarities here, in particular that the culture at BNSF, as manifested in this case, is itself hostile to injury reports and the managers rushed to judgment. But there are differences as well—in particular that I have found no conscious intent by managers to directly punish protected activity, instead implicit hostility to protected activity along with the conscious intent to punish Claimant for challenging the first discipline led to the violation of the FRSA in this case. A lower award of punitive damages relative to the FRSA violation, then, is justified.

This case falls between the extremes. There was no extended, intentional effort to interfere with Complainant's statutory rights. But the offending conduct is not a one-off instance where a supervisor showed reckless indifference or callous disregard for Complainant's rights either. Rather, here it is the corporate culture and approach to enforcement of an ambiguous set

⁶¹ *See Winch v. CSX Transportation, Inc.*, ALJ No. 2013-FRS-014 (ALJ Dec. 4, 2014) (\$5,000 in punitive damages); *Raye v. Pan Am Railways Inc.*, ALJ No. 2013-FRS-084 (ALJ June 25, 2014) (\$250,000 in punitive damages); *Nagra v. National Railroad Passenger Corp. (Amtrak)*, ALJ No. 2012-FRS-074 (ALJ Oct. 29, 2013) (\$35,000 in punitive damages); *Vernace v. PATH*, ALJ No. 2010-FRS-018 (ALJ Sept. 23, 2011) (\$1,000 in punitive damages); *Anderson v. Amtrak*, ALJ No. 2009-FRS-003 (ALJ Aug. 26, 2010) (\$100,000 in punitive damages); *Santiago v. Metro-North Commuter Railroad Co., Inc.*, ALJ No. 2009-FRS-011 (ALJ May 16, 2013) (\$40,000 in punitive damages); *Cain v. BNSF Railway Co.*, ALJ No. 2012-FRS-019 (ALJ Oct. 9, 2012), ARB No. 13-006 (ARB Sept. 18, 2014) (\$250,000 in punitive damages reduced to \$125,000 on appeal).

⁶² The ARB reduced the ALJ award of \$250,000.00 by half where roughly half of the analysis on punitive damages related to adverse actions that had not been raised or adjudicated. *Cain*, ARB No. 13-006 at 11-12.

of prompt reporting rules that merits punitive damages because they resulted in conduct that showed reckless indifference or callous disregard to Complainant's right under the FRSA to report an injury without facing retaliation. In addition, the process used by BNSF in the second discipline showed disregard for both Complainant's long, successful career with the company and Complainant's rights under the FRSA.

In March 2015, BNSF was assessed a punitive damage award of \$25,000.00 in a case where one manager had made a "snap, personal assumption" that a report was made in bad faith. *D'Hooge v. BNSF Rys.*, ALJ No. 2014-FRS-2, slip op. at 65 (ALJ Mar. 25, 2015). The violation here was more egregious, involving the application of company rules and company culture. This suggests a higher award. Very recently, the ARB affirmed a punitive damages award against BNSF of \$50,000.00 in a case where the complainant had been twice fired for protected activity and the ALJ determined that managers were engaged in intentional retaliation. *See Carter v. BNSF Railway, Co.*, ARB Nos. 14-089, 15-016, 15-022; ALJ No. 2013-FRS-082, slip op. at 6-9 (ARB June 21, 2016). Insofar as this case does not involve intentional retaliation against protected activity, it is slightly less egregious. But I find that a roughly similar award is warranted given that this case does involve company rules and culture hostile to the FRSA's goal of ensuring that injured workers could file injury reports without fear of retaliation. The rush to judgment and grave procedural deficiencies in Complainant's second discipline merit further deterrence.

Considering the need to punish and deter the culture and approach to discipline that led to the FRSA violation in this case, the fact that both reflect corporate culture, the troubling process through which BNSF investigated and terminated Complainant, the mitigating factor that none of the managers displayed intent to retaliate against protected activity, and the awards made in a range of cases under the FRSA, I find that a total punitive damage award of \$75,000.00 is warranted in this case. First, I award \$25,000 in punitive damages for the manner in which BNSF investigated and conducted the second hearing, which was driven entirely by a desired endpoint rather than any regard for the fact of the matter or Complainant's rights. I award an additional \$50,000 based on \$25,000.00 each for the application of the prompt reporting rule in an unreasonable fashion and for the corporate culture of hostility to injury reports that led to the over-reaction to Complainant's injury report here. Neither represents the egregious, intentional content meriting damages near the statutory maximum, but both are reflections of corporate policy and culture, warranting an award sizable enough to serve as a deterrent.

VII. ORDER

For the reasons stated above, it is hereby ORDERED that Complainant's June 13, 2011, complaint is GRANTED. It is hereby ORDERED that:

1. Respondent, BNSF Railway Company, shall expunge any employment records referencing Complainant's discipline issued on May 25, 2011.
2. Respondent, BNSF Railway Company, shall pay to Complainant, Steve Brough, back pay for the period from May 25, 2011, to June 23, 2011, at a rate of \$52,925.00 per year, for a total award of \$4,207.54.

3. Respondent, BNSF Railway Company, shall pay to Complainant, Steve Brough, back pay for the period from January 1, 2013, to June 2, 2014, at a rate of \$52,925.00 per year, for a total award of \$74,962.97, less the amount of retirement benefits received by Complainant for the period from November 1, 2013, to June 2, 2014.
4. Respondent, BNSF Railway Company, shall pay to Complainant, Steve Brough, interest on each back pay installment from the date payment would have been made if Complainant had been employed until the date of actual payment, at the rates prescribed by 28 U.S.C. § 1961.
5. Respondent, BNSF Railway Company, and Complainant, Steve Brough, shall cooperate to determine the amount of retirement benefits paid to Complainant for the period between November 1, 2013, and June 2, 2014, that shall be used to reduce the back pay award for that period and to determine the appropriate award of interest on the award of back pay. If the parties are unable to reach agreement on the amount of the award, both parties shall submit statements with attached exhibits specifying, with particularity, the source of the figures used in their calculation of the back pay and interest and award and the method employed to make the calculations.
6. Respondent, BNSF Railway Company, shall pay to Complainant, Steve Brough, out-of-pocket compensatory damages of \$4,900.00.
7. Respondent, BNSF Railway Company, shall pay to Complainant, Steve Brough, compensatory damages for emotional distress of \$25,000.00.
8. Complainant, Steve Brough, is entitled to reasonable attorney's fees and costs paid by Respondent, BNSF Railway Company. If this decision is not appealed, Counsel for Complainant shall file and serve by **September 12, 2016**, a fully supported application for costs and fees to Respondents' Counsel and to the undersigned Administrative Law Judge. Within 20 days thereafter, Respondent's Counsel shall initiate a verbal discussion with Complainant's Counsel in an effort to amicably resolve any dispute concerning the amounts requested. If the two parties agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes, the Complainant's Counsel shall file and serve by **October 12, 2016**, changes agreed to during discussions with Respondent's Counsel and shall set forth in the Final Application the final amounts he requests as fees and costs. Respondent's Counsel shall file and serve by **October 26, 2016**, a Statement of Final Objections. The Complainant's Counsel may file a reply by **November 8, 2016**. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.

9. Respondent, BNSF Railway Company, shall pay to Complainant, Steve Brough, punitive damages of \$75,000.00.
10. The parties are ordered to notify this Office immediately upon the filing of an appeal.

JENNIFER GEE
Administrative Law Judge

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

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

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

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

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

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

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

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

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