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Issue Date: 29 June 2020

Case No.: **2014-FRS-00163**
ARB Nos.: **16-025**
16-031
OWCP No.: **5-1260-14-045**

In the Matter of:

MICHAEL J. BROUSIL,
Complainant,

v.

BNSF RAILWAY COMPANY,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT ON REMAND

This proceeding arises under the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 (Aug. 3, 2007), and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432 (Oct. 16, 2008) (“FRSA”), and the FRSA regulations issued at 29 C.F.R. Part 1982. Section 20109 protects railroad carrier employees from discrimination based on their prior protected activity pertaining to railroad safety or security.

I. PROCEDURAL HISTORY

Michael J. Brousil (“Complainant”) filed a complaint with the Occupational Safety and Health Administration (“OSHA”) in January 2014 alleging that his employer, BNSF Railway Company (“BNSF” or “Respondent”), retaliated against him on 3 separate occasions in violation of the FRSA’s whistleblower provisions. *Complaint Pursuant to the Federal Rail Safety Act 49 United States Code § 20109* at 1–4. OSHA dismissed the complaint in August 2014 (“*OSHA Dismissal*”), finding the preponderance of the evidence supported the finding that Complainant’s protected activities were not contributing factors to the discipline issued by Respondent, and that Respondent would have taken the same adverse action against Complainant absent his protected activities. *Id.* at 4. In September 2014, Complainant requested a formal evidentiary hearing, which was held from July 14–16, 2015 before Department of Labor Administrative Law Judge (“ALJ”) Daniel F. Solomon in Chicago, Illinois.

On November 25, 2015, ALJ Solomon issued *Decision and Order Dismissal of the Complaint*, concluding that Respondent met its burden of establishing, by clear and convincing

evidence, that it “would have reprimanded Complainant absent any instances of protected activity,” an affirmative defense to liability under the FRSA. *Brousil v. BNSF Ry. Co.*, 2014-FRS-00163, slip op. at 16 (ALJ Nov. 25, 2015) [hereinafter *Solomon Decision and Order*]. On December 16, 2015, Complainant filed a *Petition for Review to the Administrative Review Board of Decision and Order of Dismissal of the Complaint Issued November 25, 2015*. On July 9, 2018, the Administrative Review Board (“ARB” or “Board”) issued a *Final Decision and Order*, affirming the *Decision and Order* in part, reversing in part, and remanding to this Court for further consideration.¹ *Michael J. Brousil v. BNSF Ry. Co.*, ARB No. 16-025/031, ALJ No. 2014-FRS-00163, slip op. at 2, 8 (ARB July 9, 2018) [hereinafter *ARB Final Decision and Order*].

Following the Board’s *Final Decision and Order*, the parties requested briefing on certain issues on remand. On July 26, 2018, Complainant filed a *Motion/Request for Leave to File Supplemental Brief* (“*Complainant’s Motion*”), requesting this court to set up a briefing schedule allowing the parties to brief the issues addressed by several cases decided by the ARB after Judge Solomon issued his 2015 *Decision and Order*, most notably *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-00009, slip op. (ARB Sept. 30, 2015) [hereinafter *DeFrancesco II*] and subsequent cases addressing its application. *Complainant’s Motion* ¶¶ 1–4. Complainant also noted additional post-2015 ARB decisions that will impact this court’s decision on remand. *Id.* ¶ 5. On July 31, 2018, Respondent filed *BNSF Railway Company’s Motion and Memorandum for Consideration – and Leave to Submit Briefing – as to the Protected Activity and Contributing Factor Elements* (“*Respondent’s Motion*”), requesting that this Court allow briefing on the protected activity and contributing factor elements of Complainant’s allegations. *See Respondent’s Motion* at 3–7.

On August 7, 2018, Complainant filed *Complainant Michael Brousil’s Response and Opposition to Respondent BNSF’s Request for Leave to File Supplemental Brief on Issues of Protected Activity and Contributing Factor* (“*Complainant’s Opp.*”), stating, in pertinent part, that Judge Solomon ruled in favor of Complaint “on the issue of his protected activity being a contributing factor for Complainant’s adverse employment actions,” which Respondent did not contest on appeal, resulting in the ARB affirming Judge Solomon’s rulings on these issues as unchallenged. *Complainant’s Opp.* ¶ 1–4. Complainant, therefore, concluded that Judge Solomon’s rulings “on protected activity and contributing factor are final and not subject to further review.” *Id.* ¶ 5.

Following these respective motions, on October 9, 2018, I issued an *Order Allowing Briefs on Remand Addressing Respondent’s Burden of Establishing, By Clear and Convincing Evidence, that it Would Have Taken an Adverse Action Against Claimant in the Absence of Any Protected Activity and the Inextricably Intertwined Concept* (“*Order Allowing Briefs on Remand*”). Citing 29 C.F.R. § 1982.110(a), I found that “Respondent did not appeal Judge Solomon’s findings on these issues within the applicable time frame, so the Board treated the issue of causation as final.” *Order Allowing Briefs on Remand* at 6. I also found that the Board, in its July 9, 2018 *Final Decision and Order*, limited the issues on remand “to applying the correct legal standard regarding Respondent’s affirmative defense and the impact of the

¹ Judge Solomon has retired from the Office of Administrative Law Judges. On remand, this case was reassigned to the undersigned for adjudication.

‘inextricably intertwined’ concept.” *Id.* I, therefore, denied *Respondent’s Motion*, granted *Complainant’s Motion*, and allowed the parties to brief these issues within forty-five (45) days. *Id.*

On November 26, 2018, Respondent filed *BNSF Railway Company’s Post-Remand Brief* (“*Respondent’s Brief*”), arguing, *inter alia*, that Respondent met its affirmative defense, because: (1) it honestly believed that Complainant’s misconduct violated Respondent’s policies; (2) it imposed discipline that “was related” to his protected activities² or it would not similarly discipline another employee committing comparable rule violations; (3) it imposed a lenient punishment; (5) and OSHA dismissed Complainant’s FRSA complaint.³ *Respondent’s Brief* at 4–5, 7–8, 14–18.

On November 28, 2019, Complainant filed *Complainant Michael J. Brousil’s Brief After Remand* (“*Complainant’s Brief*”), arguing that Respondent has fallen short of its burden of proving it would have taken the same adverse employment action against Complainant in the absence of his protected activity. *Complainant’s Brief* at 2. Complainant asserts that the latter two instances of discipline were inextricably intertwined with Complainant’s protected activity such that “the same action affirmative defense should be considered unavailable” to Respondent. *Id.* at 6–18, 27. As to the first incident on February 5, 2013, Complainant does not contend that the charges levied against him were inextricably intertwined with his protected activity, but rather that the latter two, and other, whistleblowing activities occurring between May 2013 and July 2013 “corrupted the conduct of and the evidence considered”⁴ at the August 14, 2013 hearing and the hearing officer’s determinations, which constituted retaliation against Complainant. *Id.* at 19. Complainant moreover argues that there is no credible evidence that Respondent acted leniently in responding to the three incidents at issue. *Id.* at 25–26.

I have thoroughly reviewed the evidence, briefs, and contentions of the parties in the above-captioned matter. The following opinion is based on all relevant evidence of record.

II. ISSUES ON REMAND

The Board provided the following guidance on remand:

In assessing Respondent’s burden, the Board uses a case-by-case balancing of a variety of factors including: (1) how “clear and convincing” the independent

² Respondent argues that the “inextricably intertwined” concept “holds no water” in analyzing its affirmative defense, but even if it did, Complainant’s protected activity—reporting diesel exhaust emissions concerns in Chicago Union Station to BNSF management—“can be divorced from any alleged adverse action because [Respondent] addressed the alleged safety concern [which was] . . . not at issue in the discipline decisions.” *Respondent’s Brief* at 9.

³ Respondent cites to *Koziara v. BNSF Ry. Co.*, 840 F.3d 873 (7th Cir. 2016) and *Dafoe v. BNSF Ry. Co.*, 164 F. Supp. 3d 1101 (D. Minn. 2016) as supplying the above factors in assessing its affirmative defense. *Respondent’s Brief* at 4.

⁴ Complainant argues that Respondent falsified a locomotive event recorder printout that was “purportedly from the . . . locomotive that [Complainant] was operating on February 5, 2013” and “singl[ed Complainant] out and treat[ed] him in a disparate and discriminatory manner.” *Complainant’s Brief* at 20–22; *see also* Section IV.C.i.a (discussing Complainant’s allegation that Respondent tampered with the event recorder download).

significance is of the non-protected activity; (2) the evidence that proves or disproves whether the employer “would have” taken the same adverse actions; (3) the existence and strength of any motive to retaliate on the part of the agency officials involved in the decision; and (4) the facts that would change in the “absence of” the protected activity.

In *DeFrancesco II*, the ARB further elaborated that:

[A]nalysis of the employer’s affirmative defense should also carefully assess the employer’s asserted lawful reasons for its action. Such an assessment requires not only a determination of whether there exists a rational basis for the employer’s decision, such as the existence of employment rules or policies supporting the decision, but also a determination of whether the basis for the employer’s decision is “so powerful and clear that [the personnel action] would have occurred apart from the protected activity.”

[Judge Solomon] failed to follow the applicable legal standard as set forth above and must apply the correct factors on remand. [Judge Solomon] found that there was “probable cause for Respondent to investigate the three stipulated incidents” that led to discipline. But “probable cause” is not the standard to be applied to determine whether the employer established by clear and convincing proof that it would have taken the same discipline in the absence of the protected activity. . . .⁵ In the same vein, [Judge Solomon] focused on the severity of discipline that “could” have been applied to Brousil given his alleged misconduct. But Respondent’s high affirmative defense standard requires proof of what the employer “would have done” not simply what it “could have” done.

. . . .

[Judge Solomon] vaguely acknowledged that [Complainant] “was a whistleblower when he protested in incidents 2 and 3” as additional evidence supporting his finding that [Complainant’s] protected activity contributed to the adverse actions taken against him. But, in our view, [Judge Solomon] did not recognize or adequately analyze the legal significance of the concept of “inextricably intertwined” on [Respondent’s] affirmative defense burden of proof. . . .

The Board has stated that in cases, such as this, where the protected activity is virtually inseparable from the basis for the imposition of discipline, the fact finder must be careful to assure that the employer has met the high clear and convincing affirmative defense standard. Since the protected activity here directly led to the discipline, it makes no sense to inquire whether discipline would have occurred in the absence of the protected activity. These cases therefore present a challenge for literal application of the affirmative defense.

⁵ Judge Solomon opined that Respondent had probable cause to investigate the incidents in question, which the ARB acknowledged in its *Final Decision and Order*. *Decision and Order* at 14; *Final Decision and Order* at 5–6.

When evaluated against the affirmative defense standard and factors identified above, particularly in light of the challenging presence of the inextricably intertwined concept, the ALJ's affirmative defense finding does not withstand scrutiny. His analysis of BNSF's affirmative defense relied too heavily on his finding that there was a rational basis for the employer's decision. And he failed to explain how this finding clearly or convincingly extinguished his earlier finding that BNSF harassed Brousil because of his protected activity.

Accordingly, we vacate [Judge Solomon's] conclusion that [Respondent] proved that it would have taken the same adverse action against [Complainant] absent any protected activity by clear and convincing evidence. We thus vacate [Judge Solomon's] dismissal of [Complainant's] whistleblower complaint and remand this case for application of the correct legal standard to the pertinent facts of this case.

Final Decision and Order at 4–7 (internal citations omitted).

III. FINDINGS OF FACT

A. Prior Findings of Fact

The facts accepted as stipulations regarding Respondent's Motion for Partial Summary Decision, the Findings of Fact detailed in Judge Solomon's November 25, 2015 *Decision and Order*, and the facts adduced in the Board's July 9, 2018 *Final Decision and Order* are hereby adopted except to the extent that any findings or conclusions are inconsistent with those expressed here. See *Decision and Order* at 2–5, 9–12. The following facts are largely undisputed and were not appealed by either party. For the purposes of this remand, I will summarize these prior findings that pertain to the issues on remand.

Respondent hired Complainant in 1988. *Decision and Order* at 2; *Final Decision and Order* at 2. Complainant, a locomotive engineer, reported a safety complaint to his managers on March 9, 2011, expressing his concern of diesel emissions exposure at Chicago Union Station. *Decision and Order* at 2–3; *Final Decision and Order* at 2.

In early-February 2013, Respondent notified Complainant that it was investigating potential misconduct and rule violations stemming from a February 5, 2013 incident where Complainant operated a passenger train without an indication that all doors were shut (the "February 5, 2013 incident").⁶ *Decision and Order* at 2–3; *Final Decision and Order* at 2. A disciplinary hearing was held on August 14, 2013. *Decision and Order* at 3; TR at 253. At the hearing, an event recorder data showed that the train departed Chicago Union Station without an indication that all doors were closed. TR at 253. The train reached speeds of approximately 68 miles per hour. *Id.* The door was shut after 14 minutes, and no stops were made during this time. *Id.* The event recorded data also showed that, later, the train departed another station

⁶ Judge Solomon mistakenly found that the February 5, 2013 incident "was due to Complainant's failure to take leave properly." *Decision and Order* at 11. This incident involved a non-functional door indicator light.

without an indication that all doors were closed. *Id.* The train reached speeds of 26 miles per hour before the doors were shut, after approximately 40 seconds of travel. *Id.* Complainant denied the first incident, but admitted to making the second departure without having a door indicator light illuminated.⁷ *Id.* On August 29, 2013, Respondent issued a “Level S 30 Day Record Suspension” with a three-year review period as a result of the February 5, 2013 incident. Respondent’s Exhibit (“RX”) 10; Complainant’s Exhibits (“CX”) 3; *Final Decision and Order* at 2; TR at 80.

On October 11, 2013, Respondent issued 2 additional Level S 30 Day Record Suspensions with a 3-year review period for the following 2 incidents: a July 29, 2013 incident involving insubordination when he refused to follow his supervisor’s instructions to use an alternative method to assure rail car doors were closed when the door indicator light was not working (the “July 29, 2013 incident”)⁸ and an August 1, 2013 incident in which Complainant stopped his train 30 feet from a “bumping post” and refused instructions to pull the train up close enough to plug into “shore power,”⁹ which momentarily prevented a disabled individual from boarding the train (the “August 1, 2013 incident”).¹⁰ *Final Decision and Order* at 2–3; TR at 254; RX 10, 13; CX 4–5. A disciplinary hearing regarding these 2 incidents was held on September 11, 2013. TR at 80, 254.

Complainant filed his OSHA complaint on January 28, 2014, asserting 4 adverse employment actions—discipline for an attendance guideline violation¹¹ and 3, Level S 30 Day Record Suspensions arising from the February 5, 2013, July 29, 2013, and August 1, 2013 incidents. *Decision and Order* at 2. OSHA dismissed Complainant’s OSHA complaint on August 27, 2014, finding that the preponderance of the evidence supported the conclusion that Complainant’s protected activity was not a contributing factor in the disciplinary measures taken by Respondent, and that Respondent would have taken the same adverse action absent Complainant’s protected activities. *Id.*

⁷ A “door indicator light is an indicator that gives the [locomotive e]ngineer . . . permission to proceed, that the doors have been closed on all cars in his train, and it illuminates green when the doors have been closed and that initiates movement.” RX 5 at 29–30.

⁸ I consider the July 29, 2013 incident the second instance of Complainant’s protected activity.

⁹ “Shore power” is power supplied by the train station by connecting a large electrical cord to the train. TR at 30–31.

¹⁰ I consider the August 1, 2013 incident the third instance of Complainant’s protected activity.

¹¹ On August 2, 2013, Complainant received a “formal reprimand” under BNSF’s Policy for Employee Performance and Accountability (“PEPA”) for attendance violations occurring between March 2013 and May 2013. *See Brousil v. BNSF Ry. Co.*, 2014-FRS-00163 Hearing Transcript (July 14–16, 2015) (“TR”) at 152–53, 223, 227, 230, 340; RX 1–2, 21; CX 2. Complainant, however, effectively withdrew any arguments regarding these violations, because they were “inconsequential” given the three formal Level S discipline violations assessed against Complainant. *See Opening Brief of Complainant Michael Brousil* (Apr. 27, 2016) (“*Complainant’s Pre-Remand Brief*”) at 11. Although this violation is the “lowest level of discipline” under PEPA and was not discussed either in Judge Solomon’s *Decision and Order* or the Board’s *Final Decision and Order*, it will be briefly discussed here because PEPA is a progressive disciplinary policy and Complainant had an active attendance guideline violation at the time of the hearings involving the February 5, 2013, July 29, 2013, and August 1, 2013 incidents. TR at 547.

B. Additional Findings of Fact on Remand

While the pertinent facts guiding the opinions of Judge Solomon and the Board are outlined above, they are insufficient for the purposes of the following discussion. Additional background information regarding each incident is necessary.

Diesel exhaust emissions from locomotives coming and going from Chicago Union Station have long been a concern of the public, Complainant, and Respondent. *See Complainant's Brief* at 14; CX 9, 11, 13, 15–21; TR at 28–30, 74, 82, 211, 438, 510, 586. Complainant first expressed concerns about potential elevated levels of diesel exhaust emissions to BNSF management on March 9, 2011 (“the March 9, 2011 report”); he did not express any safety complaints again for approximately 18 months. TR at 28–30; 91, 103. BNSF’s Industrial Hygiene Department has tested the air quality at Chicago Union Station on a quarterly basis for at least 10 years prior to the July 2015 hearing. *Id.* at 510. BNSF also “brings in an outside consultant” to test the air quality once per year. *Id.* at 211. Although Mike Stoddart, a BNSF industrial hygienist who generally conducts air quality testing at Chicago Union Station, stated that while “there is exhaust inside [Chicago] Union Station[,] . . . the levels are [not] harmful enough to be concerned about.” *Id.* at 286, 442. David Leahy, a BNSF terminal manager, testified that BNSF’s results were always “within the federal guidelines for . . . [diesel exhaust] emissions.” *Id.* at 211. Jason Jenkins, a BNSF general manager, testified that he was never informed that excessive levels of diesel exhaust emissions were present at Chicago Union Station; rather, he stated that emissions levels were always within the limits. *Id.* at 510. No evidence suggests that the diesel exhaust in and around Chicago Union Station has ever approached harmful levels. BNSF publishes the results of its air quality testing on its website, which Complainant acknowledged that he has reviewed. *Id.* at 24, 126; RX 44 (detailing the results of air quality testing at Chicago Union Station during morning and evening rush hour); *see also* CX 9, 11, 13, 15–21.

On August 2, 2013, Complainant was assessed a “Standard Formal Reprimand” and a “One (1) Year Review Period”¹² for violating Respondent’s Attendance Guidelines between March 2013 and May 2013 for taking 2 “more days off than he was allocated to have off based upon his assigned service” (Complainant’s “Attendance Guideline Violation”). TR at 226, 230; CX 1 at 2. Although Employees may take measures to avoid violating Respondent’s Attendance Guidelines, such as “using vacation days and personal days,” Complainant did not “take any steps to avoid violating” the Attendance Guidelines. TR at 230–31. Attendance Guideline violations are very common at BNSF. *See* RX 21 at 60–62 (detailing standard formal reprimands for more than 100 BNSF employees during 2013); TR at 548. Even Level S 30 Day Record Suspensions and dismissals are not uncommon. *See* RX 21 at 64–65 (listing 25 Level S 30 Day Record Suspensions and 15 dismissals issued in 2013).

Although PEPA is a “progressive discipline policy,” some rule violations, such as “Insubordination,” are standalone dismissible violations. TR at 343, 547; RX 16 at 6. An employee with two active Level S violations is subject to dismissal at the discretion of BNSF management. TR at 458, 536. An employee with two active Level S violations “has received

¹² A “Review Period” is the length of time that a suspension remains on a BNSF employee’s record. TR at 339. Additional rule violations while a BNSF employee is in a Review Period “could result in further disciplinary action.” CX 2–6; RX 4, 7, 10, 13.

leniency” if he or she is not dismissed. *Id.* at 347, 352, 354, 458, 536. It is “not common” and “unusual” for an employee to have three Level S violations on his or her record. *Id.* at 352, 537.

BNSF has a “Code of Conduct” that, in part, prohibits retaliating against or harassing an employee. *Id.* at 233–36, 287. Employees are required to be certified in the Code of Conduct, and must re-certify yearly. *Id.* at 286, 357, 419, 462, 511–12, 556. Respondent’s Code of Conduct clearly states that retaliation and harassment are grounds for discipline, including dismissal. *Id.* at 358, 419–20, 462, 511–12, 556; RX 17 at 8, 16–17.

BNSF safety rules are in place for employee and passenger safety. *Id.* at 106. BNSF rules allow an employee to invoke the “empowerment rule,” a two-step process allowing an employee to voice a safety complaint with a supervisor and “com[e] to an agreement and working out a safe way to do the work . . . [or] achieve the desired result.” *Id.* at 106, 537–38, 570–71. Empowerment can “turn into subordination” if a BNSF employee “goes past [empowerment by] refus[ing] to engage[,] . . . comply[,] . . . or discuss the issue[, which] would be completely separate from the initial empowerment.” *Id.* at 343, 561.

BNSF operates a “safety hotline” where employees can report safety concerns. *Id.* at 102–03, 409. In approximately May 2013, Complainant called the safety hotline, stating that he was retaliated against and being harassed by Mr. Manning and that longer shore power cables needed to be purchased because it was “unsafe to pull . . . close to the [absolute] signal.” *Id.* at 124, 398. Complainant made 3 calls to the hotline between April and July 2013. *Id.* at 584. While the safety hotline is more widely used, Respondent, as additional “safety aspects,” holds “monthly safety marathons[] and safety stand-downs in case of incidents,” employs the Safety Initiative Resolution Program, where BNSF employees can report safety issues encountered in the course of their duties, and conducts “Ops Testing,” which ensures safety rules are followed and crew members are safe in performing their job duties. *Id.* at 409. BNSF ops tests all of their employees. *Id.* at 310. Complainant has never failed an ops test. *Id.* at 590.

BNSF employees are entitled to a hearing before a “conducting officer” prior to receiving discipline for potential rule violations. *Id.* at 259–60. A conducting officer is a neutral party who “facilitate[s] a fair and impartial hearing into the facts and circumstances of a particular event.” *Id.* at 336, 455. During the hearing, a conducting officer ensures that objections to evidence or testimony is noted for the record, asks witnesses questions, and, generally, facilitates the hearing as a neutral party. *Id.* The employee may seek representation, call and question witnesses, enter exhibits, and make closing arguments during a hearing. *Id.* at 254. After the hearing, the conducting officer reviews the evidence presented by the employee—who is represented by a union official—¹³ and employer, and issues a disciplinary decision after consulting “the superintendent for the territory, . . . the PEPA team, . . . [and] labor relations.” *Id.* at 107–08, 508. As a result of the charges and subsequent violations assessed post-hearing, Complainant was held “out of service” from August 2, 2013 to October 25, 2013. *Id.* At the

¹³ Marilee Taylor, a BNSF locomotive engineer and union official, represented Complainant at the hearings of all three incidents and the July 25, 2013 hearing regarding Complainant’s attendance guidelines violation. TR at 155–59; RX 2 at 3.

time of the July 2015 formal hearing, Complainant still worked for BNSF as a locomotive engineer. *Id.* at 18–19.

Christopher Motley, a senior trainmaster road foreman for BNSF Suburban Services, was a company witness, and Clayton Johanson, a terminal manager of BNSF Suburban Services, was the conducting officer for the February 5, 2013 incident.¹⁴ *Id.* at 255–56, 260, 441, 455. Timothy Merriweather, a BNSF terminal superintendent, drafted the investigation notice and rule violations regarding the February 5, 2013 incident. *Id.* at 332. Marilee Taylor, a BNSF locomotive engineer and union official, represented Complainant. *Id.* at 155–59; RX 5 at 3. Mr. Merriweather issued a Level S 30 Day Record Suspension and a three year review period for the February 5, 2013 incident. TR at 339. Employees on record suspensions are not actually suspended; they may continue to work. *Id.*; RX 7. Complainant furthermore “did not stand for dismissal” after he received his Level S record suspension stemming from the February 5, 2013 incident. TR at 340. Complainant “accepts responsibility” for leaving the train station without a door indicator light on February 5, 2013. *Id.* at 591.

On July 29, 2013, the door indicator light failed on the train that Complainant was operating. RX 8 at 4; *Respondent’s Brief* at 6; *Complainant’s Brief* at 6–7; *see also* CX 24 at 2–12 (detailing various pictures of an illuminated door indicator light). Complainant, citing the pending investigation from the February 5, 2013 incident, refused to operate the train without an operable door indicator light. RX 8 at 4; TR at 110. Electricians were unable to repair the light. TR at 60. Complainant relayed the issue to his supervisor, Mr. Motley, over the phone, who instructed him to verify the doors were closed using the alternative method, *i.e.*, “going the old way,” pursuant to Passenger Operations Manual (“POM”) Rule 1.2.4 Door Light Failure (“POM 1.2.4”).¹⁵ RX 8 at 4; TR at 109. After a safety briefing between crew members onboard the train, Complainant was the only crew member who refused to operate the train under POM 1.2.4, stating that it was “unsafe to take a train without a door light indicator,” even after the crew members verified that all doors on the train were closed and the train could be operated safely. *Id.* at 109–10, 278–79, 460. Complainant did not offer any alternatives. *Id.* at 459–62. Approximately 2,500 commuters were delayed more than 20 minutes due to this incident. *Id.* at 282. Mr. Johanson served as the conducting officer for the July 29, 2013 incident. RX 8 at 1; TR at 459. Mr. Motley, Johnny C. Manning, Brad G. Kobliska, Laangela A. Thompkins, James H. Schultz, and Abraham Lott were company witnesses to the July 29, 2013 incident. RX 8 at 3–6; TR at 165–66. Ms. Taylor represented Complainant. RX 8 at 5.

At the time of the February 5, 2013 and July 29, 2013 incidents, the General Code of Operating Rules (“GCOR”), a component of Respondent’s safety rules, requires trains to be equipped with, and engineers to check for, an illuminated door indicator light prior to departure. TR at 280. If the door indicator light is not illuminated or malfunctions, POM 1.2.4 requires

¹⁴ I find that Judge Solomon’s findings of fact regarding the February 5, 2013 incident are adequate for the purposes of the following discussion. They will, therefore, not be restated here, but will be elaborated upon in Section IV.C.i.a, *infra*.

¹⁵ POM 1.2.4 states, in pertinent part: “If there is a failure of the door light indication in the engineer’s compartment, the train may proceed under the authorization of the Conductor, only after a full understanding on an alternative method for assuring the doors are closed has been reached by all crew members through a supplemental job briefing.” RX 6 at 61. BNSF employees believe that proceeding under POM 1.2.4 is a reasonable alternative to operating a train without a functional door indicator light. TR at 279.

BNSF employees to “go the old way” by conducting a safety briefing between crew members to verify that all doors are indeed shut. *Id.* at 91, 430–32. The purpose of POM 1.2.4 is to safely operate a train with a door indicator light that does not illuminate, which signals either a malfunction with the door indicator light or that the doors will not shut without a crew member manually, rather than remotely, closing it. *Id.* at 431–32. Complainant has previously “gone the old way,” and understands that BNSF safety rules require an illuminated door light prior to departure, but if it is not functional, a safety briefing between crew members to verify that all doors are shut is required under POM 1.2.4. *Id.* at 91, 107, 280, 459, 587. Door indicator lights were not installed on BNSF locomotives until approximately 2010 or 2011. *Id.* at 280. Before the rules were amended to require door indicator lights in locomotives, the past practice for verifying all doors were closed consisted of “going the old way” in that the crew would manually verify that the doors were closed: “. . . the conductors would have to highball each conductor. There’s 3 on each train. So the rear guy would highball the middle guy. The middle guy would wave to the conductor[, who] . . . would then close the doors. Then the engineer would look for a wave from the conductor.” *Id.* at 280. The door indicator light is solely the locomotive engineer’s responsibility. *Id.* at 144.

The August 1, 2013 incident involved Complainant’s concern over diesel emission exposure at Chicago Union Station and potential decertification due to the placement of an “absolute signal”¹⁶ relative to the “bumping post.”¹⁷ *Id.* at 74. Amtrak, the owners of Chicago Union Station, repositioned the absolute signals in approximately April 2013 from the top of the bumping post to next to, but in front of, the bumping post on ground level. *Id.* at 112, 437; *see also* RX 23 at 1–6; CX 24 at 14. The location of the bumping post remained the same. TR at 449; *see also* CX 24 at 14. Amtrak did not consult BNSF prior to repositioning the absolute signal. *Id.* at 326. Prior to the relocation of the absolute signals, an engineer could strike the bumping post, and it “would not be considered a decertifying event;”¹⁸ however, once the absolute signal was relocated, an engineer who struck the bumping post was a decertifying event under Federal Railroad Administration (“FRA”) regulations. *Id.* at 322–23, 448. Amtrak made the change as a safety measure and to address engineer accountability: “the idea behind it was that if an employee could be decertified for hitting the bumping post, the employee would pay more attention” *Id.* at 213–14, 484.

Prior to the absolute signal relocation, it was Complainant’s practice to plug the train into shore power and not use the train’s “head end power.”¹⁹ Complainant was concerned about absolute signal relocation because he lost sight of it when pulling into Chicago Union Station, which “made it difficult for him to get . . . close enough” to plug into shore power.” *Id.* at 214. As a result, Complainant stopped the train when he lost sight of the absolute signal from a sitting

¹⁶ An “absolute signal” is a large, illuminated red stoplight positioned on or near a bumping post that serves to warn an incoming train that it is reaching the end of the track. *See* RX 23 at 1–6; CX 24 at 14.

¹⁷ A “bumping post” marks the end of the track and serves to stop a train that comes too close to the end of the track. TR at 449, 592; *see also* RX 23 at 1–6; CX 24 at 14.

¹⁸ A “decertifying event” results in an engineer being removed from engineer service without compensation until his or her license is renewed. TR at 143, 322–23.

¹⁹ The “head end power” is power that is supplied to the train by the train’s engines. TR at 25–26.

position, which was approximately thirty feet from the bumping post; however, the platforms Complainant operated on only had ten-to-twelve-foot cables. *Id.* at 117–18, 327–28. Complainant voiced his concern to Mr. Merriweather and the BNSF safety hotline. Mr. Merriweather committed to equipping all BNSF platforms with thirty-foot cables so all BNSF engineers would be able to plug into shore power at thirty feet from the bumping post. *Id.* In all, Respondent ordered 8 30-foot shore power cables totaling \$11,548.98 on July 19, 2013. RX 43. The extended cables were delivered in September or October 2013; however, the shipments were slow because the cables were manufactured to order and at least one of the cables was defective upon arrival. TR at 242–43, 329–30.

On August 1, 2013, when arriving at Chicago Union Station, Complainant stopped the train after losing sight of the absolute signal approximately 30 feet from the bumping post. *Id.* at 69, 117, 366. At that point, Complainant turned off the head end power and refused to pull the train any closer to plug into shore power despite instructions from Jim Garrison, a senior trainmaster and road foreman of engines, to activate the head end power on the train to allow an ADA lift to load a disabled passenger onto the train. RX 12 at 1; TR at 348–49. Complainant did not offer alternatives or assist his fellow crew members; he instead left the train and walked down the platform “for ventilation.” TR at 545; RX 11 at 11–12. Jeff Miner, a “utility man,” then boarded the train and turned on the head end power to activate the ADA lift. TR at 134, 546; RX 11 at 11–12. The disabled passenger was successfully loaded; however, the train departed approximately fifteen minutes late. RX 11 at 12. Although the ADA lift was operated by head end power during the August 1, 2013 incident, it can also be operated manually, and BNSF requires its employees to be trained in manual operation of the ADA lift. TR at 73, 201–02.

The disciplinary hearings for the July 29, 2013 and August 1, 2013 incidents took place on September 11, 2013. *Id.* at 80. On October 11, 2013, Claimant was assessed a Level S record suspension and a 3-year Review Period for each incident. *Id.* at 80, 254; RX 10, 13. Complainant, however, was dismissed from work after completing his shift on August 1, 2013 pending the results of the investigations of the July 29, 2013 and August 1, 2013 incidents. TR at 75–76. Claimant did not return to work until after October 25, 2013. *Id.* at 80. At that time, Claimant voluntarily transferred from passenger service to freight service because he felt “intimidate[ed]” and “targeted” based on the Level S disciplines assessed for the three incidents. *Id.* at 80, 82. Complainant’s last day with Suburban Services was August 2, 2013. *Id.* at 254.

IV. CONCLUSIONS OF LAW

A. Applicable Legal Standards

The FRSA protects an employee who engages in three categories of protected activities. First, 49 U.S.C. § 20109(a) protects an employee who: (1) provides information to Federal, State, or local regulatory and enforcement agencies, a member of Congress, or a supervisory authority regarding any conduct which he reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security; (2) refuses to violate or assist in the violation of any Federal law, rule or regulation relating to railroad safety or security; (3) files an FRSA complaint or participates in an FRSA proceeding; (4) notifies the railroad carrier or Secretary of Transportation of a work-related personal injury or illness; (5) cooperates with a

safety or security investigation; (6) furnishes information to Federal, State, or local authorities relating to any railroad transportation accident resulting in injury or death, or damage to property; and (7) accurately reports hours on duty.

Second, 49 U.S.C. § 20109(b) provides protection for an employee who reasonably refuses to work when confronted with hazardous safety or security conditions related to the performance of his duties or refuses to authorize use of equipment, track or structures in hazardous safety or security conditions. Under this provision, railroad security personnel are also protected when reporting a hazardous safety or security condition.

Third, 49 U.S.C. § 20109(c)(2) protects an employee who requests medical or first aid treatment or follows orders or a treatment plan of a treating physician. A railroad carrier's refusal to permit an employee to return to work following medical treatment, however, is not considered a violation of this provision if the refusal is pursuant to FSA medical standards for fitness-of-duty or a railroad carrier's medical standards for fitness-for-duty. *Id.*

The regulatory definition of adverse action encompasses a broad range of activity, "including, but not limited to, intimidating, threatening, restraining, coercing, blacklisting or disciplining, any employee with respect to the employee's compensation, terms, conditions, or privileges of employment . . ." 20 C.F.R. § 1980.102(a). The Board has held that "the term 'adverse action[]' refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Menendez* at 17 (quoting *Williams v. Am. Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-00004, slip op. at 15 (ARB Dec. 29, 2010)). An adverse employment action must actually affect the terms and conditions of a complainant's employment. *Johnson v. Nat'l R.R. Passenger Corp.*, ARB No. 09-142, ALJ No. 2009-FRS-00006, slip op. at 3-4 (ARB Oct. 16, 2009); *see also Simpson United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-00031 (ARB Mar. 14, 2008); *Agee v. ABF Freight Sys., Inc.*, ARB No. 04-155, ALJ No. 2004-STA-00034, slip op. at 4 (ARB Nov. 30, 2005).

The Board has articulated the following applicable standards for a complaint under the whistleblower protection provisions of the FRSA:

The AIR-21 burden-of-proof provision requires the factfinder – here, the ALJ – to make two determinations. The first involves answering a question about what happened: did the employee's protected activity play a role, any role, in the adverse action? On that question, the complainant has the burden of proof, and the standard of proof is by a preponderance. For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action.

The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of

proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.

Palmer v. Canadian Nat'l Ry., ARB Case No. 16-035, ALJ No. 2014-FRS-00154, slip op. at 31 (ARB Sept. 30, 2016) (reissued with full dissent Jan. 4, 2017).

Consequently, in order for Complainant to meet his burden of proving a claim under the FRSA, Complainant must prove by a preponderance of the evidence that: (1) Complainant engaged in protected activity, (2) Respondent knew of the protected activity, (3) Complainant suffered an adverse employment action, and (4) such protected activity was a contributing factor in the adverse employment action.²⁰ See, e.g., *Thompson*, ALJ No. 2005-AIR-00032; *Lockhart v. Long Island R.R. Co.*, 266 F. Supp. 3d 659, 663 (S.D.N.Y. 2017); *Bechtel v. Admin. Review Bd.*, 710 F.3d 443, 447 (2d Cir. 2013); *Conrad v. CSX Transp., Inc.*, 824 F.3d 103, 107 (4th Cir. 2016); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013). A “contributing factor” includes “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, slip op. at 6 (ARB Feb. 29, 2012) [hereinafter *DeFrancesco I*].²¹ As the ARB said in *Palmer*, “The protected activity need only play some role, and even an ‘[in]significant’ or ‘[in]substantial’ role suffices.” Slip op. at 53.

B. Complainant’s FRSA Claim for Retaliation

In its *Final Decision and Order*, the ARB affirmed Judge Solomon’s findings that Complainant engaged in protected activity that was a contributing factor to Respondent’s motivation to take an adverse action against the Complainant because these issues were either stipulated to by the parties or were unchallenged on appeal. Specifically, Judge Solomon:

²⁰ Although I list the knowledge requirement as a separate element, I note that the ARB has said repeatedly that there are only three essential elements to an FRSA whistleblower case – protected activity, adverse action, and causation, and that the final decision-maker’s “knowledge” and “animus” are only factors to consider in the causation analysis. See *Coates v. Grand Trunk W. R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-00003 (ARB July 17, 2015).

²¹ In *Araujo*, the court held that the employee “need only show that his protected activity was a ‘contributing factor’ in the retaliatory discharge or discrimination, not the sole or even predominant cause.” 708 F.3d at 158. In addition, an employee “need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action.” *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993) (emphasis in original) (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)) (emphasis added by Federal Circuit); see also *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002,-003; ALJ No. 2007-SOX-00005 (ARB Sept. 13, 2011), at 31–32; *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014) (“[A] prima facie case does not require that the employee conclusively demonstrate the employer’s retaliatory motive. But the contributing factor the employee must prove is intentional retaliation prompted by the employee engaging in protected activity.”).

. . . found that: (1) [Complainant] engaged in protected activity when he made allegations about “ambient air quality and safety within the confines of a terminal controlled by [Respondent],” and by alleging that [Respondent] “violated several Federal laws relating to railroad safety, or for “reporting, in good faith, a hazardous safety or security condition[;] . . . (2) that [Respondent] knew about [Complainant’s] protected activity; (3) that [Respondent] imposed three suspensions (with no loss of pay); (4) that the parties stipulated that the suspensions constituted adverse actions under the FRSA; and (5) that [Complainant’s] protected activity was a contributing factor in these adverse actions.

Final Decision and Order at 4. Therefore, for the purposes of the following discussion, I find that Complainant has met his burden of proving a claim under the FRSA by a preponderance of the evidence regarding the July 29, 2013 and August 1, 2013 incidents.²²

C. Respondent’s Burden on Rebuttal

The remaining issue, as articulated by the Board, is whether Respondent has met its burden on rebuttal by clear and convincing evidence that it would have taken the same adverse action against Complainant in the absence of his protected activity. *Id.* at 7. The Board also noted that the investigation and discipline resulting from the July 29, 2013 and August 1, 2013 incidents were inextricably intertwined with Complainant’s protected activity, and enunciated a legal standard in assessing Respondent’s burden in light of the inextricably intertwined concept.²³

In an en banc decision, *Thorstenson v. BNSF Railway Co.*, ARB Nos. 2018-0059, -0060, ALJ No. 2015-FRS-00052 (ARB Nov. 25, 2019) (en banc) (per curiam), the ARB announced that it was overturning its prior rulings on “inextricably intertwined” and “chain of events” causation analysis.²⁴ *See, e.g., DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-00009 (ARB Feb. 29, 2012).

²² While the March 9, 2011 report and subsequent reports regarding the ambient air quality in and around Chicago Union Station involved protected activity, there is no evidence linking Complainant’s reports to any adverse action taken by Respondent. *See* Section IV.C.ii, *infra*. Respondent’s discipline was a direct result of the February 5, 2013, July 29, 2013, and August 1, 2013 incidents and the March 2013 to May 2013 Attendance Guideline Violation.

²³ Although the ARB stated in its *Final Decision and Order* that “since the protected activity here directly led to the discipline, it makes no sense to inquire whether discipline would have occurred in the absence of the protected activity,” the ARB has held that the “same action” defense is still available in cases involving protected activity that is inextricably intertwined with an adverse action. *Final Decision and Order* at 7; *Speegle*, ARB No. 13-074, slip op. at 9–11; *Meyer v. Canadian Nat’l Ry./Ill. Cent. R.R. Co.*, ARB No. 16-035, ALJ No. 2014-FRS-00154, slip op. at 35 (ALJ Feb. 27, 2017); *Palmer*, ARB No. 16-035, slip op. at 56; *see also* 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1982.109(b); *Menefee*, ARB No. 09-046, slip op. at 6 (citing *Brune*, ARB No. 04-037, slip op. at 13); *Thompson*, ALJ No. 2005-AIR-00032. Furthermore, the standard articulated by the Board in its *Final Decision and Order* also requires analysis of Respondent’s “same action” defense.

²⁴ The ARB stated:

We take this opportunity to clarify that we no longer require that ALJs apply the “inextricably intertwined” or “chain of events” analysis. We note that the plain language of the statute does not

In *Yowell v. Fort Worth & Western R.R.*, ARB No. 2019-0039, ALJ No. 2018-FRS-00009 (ARB Feb. 5, 2020) (per curiam), the ARB cited *Kuduk* favorably in discussing contributory factor analysis:

To establish a violation under the FRSA, a complainant must show that the protected activity was a ‘contributing factor’ in the adverse employment action. 49 U.S.C. § 20109(d)(2)(A), referring to 49 U.S.C. § 42121(b)(2)(B)(i). A ‘contributing factor’ includes ‘any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision.’ *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 461–62 (9th Cir. 2018), quoting *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017). “[T]he contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity.” *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014). In satisfying this statutory standard, a complainant need not prove a retaliatory motive beyond showing that the employee's protected activity was a contributing factor in the adverse action. *Araujo u. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013).

Yowell, slip op. at 7.

include the term “inextricably intertwined.” Rather, this is a construction that substitutes for, and in some cases circumvents, the ALJ’s contributing factor or affirmative defense analyses.

By placing the focus on how the employer came to learn of the employee’s wrongdoing rather than the employer’s actions based on that wrongdoing or protected activity, “chain of events” causation departs from the statute’s “contributing factor” text. In *Gunderson v. BNSF Ry. Co.*, the Eighth Circuit noted that Congress did not intend to insulate wrongdoing because the employee engaged in protected activity. 850 F.3d 962, 969–70 (8th Cir. 2017) (“An employee who engages in protected activity is not insulated from adverse action for violating workplace rules, and an employer’s belief that the employee committed misconduct is a legitimate, non-discriminatory reason for adverse action.”). The Seventh Circuit has also criticized the inextricably intertwined doctrine, noting that reporting the injury is not a proximate cause to the termination when the employee is terminated for carelessness in creating the injury or for some other conduct discovered as part of the review process initiated by the report of the injury. *Koziara v. BNSF Ry. Co.*, 840 F.3d 873, 877 (7th Cir. 2016) (“[p]roximate causation creates legal liability, ‘proximate’ denoting in law a relation that has legal significance”). We agree with this analysis.

This is not to say that an ALJ may not find that an adverse action and protected activity are intertwined such that contributing factor causation is factually established. For these cases, the ALJ must explain how the protected activity is a proximate cause of the adverse action, not merely an initiating event. *Koziara*, 840 F.3d at 877 (finding that the district court erred in relying on the fact that the “injury report initiated the events that led to his discipline”). In *Koziara*, the Seventh Circuit held that the “[the district court] failed to distinguish between causation and proximate causation. The former term embraces causes that have no legal significance. Had the plaintiff never been born or never worked for BNSF he would neither have been hurt by the plank flung at him by the energetic front-end loader nor have stolen railroad ties from the railroad. But that doesn’t mean that his being born or his being employed by the railroad were legally cognizable [proximate] causes of his being fired.” *Id.* at 877.

Thorstenson, slip op. at 10–11 (footnote omitted).

Applying the Eight Circuit's *Kuduk* intentional retaliation standard to the facts of this case, I find that Respondent has established by clear and convincing evidence that it would have disciplined Complainant the same way in the absence of his protected activity.²⁵

i. Respondent's Motive to Retaliate Against Complainant

Respondent has demonstrated no retaliatory motive in issuing a Standard Formal Reprimand and three Level S 30 Day Record Suspensions against Complainant. *See Pattenaude v. Tri-Am Transp. LLC*, ARB No. 15-007, ALJ No. 2013-STA-00037, slip op. at 16 n.93, 20–22 (ARB Jan. 12, 2017).

a. Respondent Disciplined Complainant in Accordance with Respondent's Operation and Safety Rules²⁶

As stated above, Complainant did not sufficiently address the Standard Formal Reprimand resulting from his Attendance Guideline Violation given the severity of the three Level S 30 Day Record Suspensions resulting from the February 5, 2013, July 29, 2013, and August 1, 2013 incidents. *Complainant's Pre-Remand Brief* at 11. *See generally Complainant's Brief*. The evidence, however, firmly establishes that Complainant was aware of Respondent's attendance policy, but took two more days off than he was allocated and did not take any measures to avoid violating Respondent's attendance policy. TR at 226–27, 230–31; CX 1 at 2; RX 1 at 2; RX 2 at 2; CX 2. A Standard Formal Reprimand is the lowest level of discipline under PEPA. TR at 189. Complainant was not withheld from service, and did not lose pay, benefits, or seniority. TR at 189. In 2013, every employee who violated Respondent's Attendance Guidelines received a Standard Formal Reprimand. TR at 549; RX 21 at 60–62.

Complainant was issued one Level S 30 Day Record Suspension as a result of the February 5, 2013 incident. TR at 253, 340; RX 7; CX 3. After an investigation, Mr. Merriweather, in consultation with Mr. Johanson, found that substantial evidence supported charging Complainant with violating "1.2.4 Chicago Passenger Operations Manual POM, GCOR 1.13, GCOR 1.3.3, and GCOR 1.6 Conduct."²⁷ RX 7 at 1; CX 3. Complainant indeed did not mention any malfunction with the door indicator light or that it was not illuminated on February 5, 2013. The record clearly establishes that a door remained opened after Complainant departed Chicago Union Station, and Complainant admitted to departing Route 59 without an illuminated door indicator light. TR at 98–99, 476; RX 24. PEPA policy dictates that failure to follow rules designed to protect employees and the public, for example, GCOR 1.6 and POM 1.2.4, is

²⁵ At the outset, I find that Respondent's safety rules do not punish the activity that Complainant engaged in. Respondent and its managers clearly knew the proper course to take during the incidents in question. Complainant chose to ignore the rules he testified he was familiar with. The discipline in this case flowed not from Complainant's protected activity, but his failure to act in accordance with Respondent's operating and safety rules. Respondent's rules are not in and of themselves retaliatory. Rather, Respondent's rules and expectations were rational and unambiguous. Complainant chose not to comply with them.

²⁶ I further find that the discipline assessed against Complainant was consistent with PEPA, GCOR, and POM for the reasons set forth in IV.C.ii, *supra*.

²⁷ The record makes clear that, regarding the "GCOR 1.6 Conduct" violation, Complainant was found to be negligent on February 5, 2013. RX 7; CX 3

considered a serious violation, stating, in pertinent part: “Violation of any work procedure that is designed to protect employees, the public and/or others from potentially serious injury(ies) and fatality(ies).” RX 16 at 5. Because this was Complainant’s first Level S 30 Day Record Suspension and this violation was not a standalone dismissal offense. RX 16 at 3–4, 6; CX 3; TR at 340. Although three other BNSF employees were charged after the February 5, 2013 incident, the investigation proved that Complainant was the only employee who violated BNSF rules. TR at 386.

Complainant was issued a second Level S 30 Day Record Suspension as a result of the July 29, 2013 incident. Complainant cited the February 5, 2013 incident as the basis for his refusal to depart Chicago Union Station on July 29, 2013, stating that it was “unsafe to take the train” without a functional door indicator light. RX 8 at 4; TR at 109–10, 278–79, 460. Here, Complainant was under PEPA’s obligation to comply with instructions from his supervisor, Mr. Motley. TR at 109–10. He refused to do so, and further refused to comply with POM 1.2.4, which is regarded as the “safer course” when confronted with a door indicator light that does not illuminate. *Id.* at 279, 384. Complainant’s argument that he empowered himself during the July 29, 2013 incident is unavailing because he did not work through the issue with his supervisor and colleagues; he simply refused to operate the train despite instructions from his supervisor that he could safely operate under POM 1.2.4 and confirmation from the crew and conductor that all doors had been checked and were indeed securely closed. *Id.* at 58, 100, 109–10, 278–79, 458–62. I found that Complainant’s safety concern largely stemmed from unfounded self-preservation rather than the safety of crew members or passengers or the feasibility of safely operating under POM 1.2.4. Like the February 5, 2013 incident, Complainant clearly violated PEPA²⁸, the GCOR, and POM on July 29, 2013.

Complainant was issued his third and final Level S 30 Day Record Suspension as a result of the August 1, 2013 incident. Although Complainant’s protected activity was most clearly inexplicably intertwined with the discipline issued by Respondent, I found that Respondent would have taken the same adverse action against Complainant. Like the July 29, 2013 incident, Complainant empowered himself to “operate safely” by refusing to turn on the head end power to be able to load a disabled passenger on the train. Although crew members are required to know how to operate the ADA lift manually, I find that the discipline assessed against Complainant was issued in accordance with PEPA. Complainant again refused to work towards plugging into shore power or to assist the disabled passenger; he left his post and walked down the platform, and did not object when told that either Mr. Garrison or Mr. Miner start the head end power to power the ADA lift. Although Mr. Merriweather did not find that Complainant was insubordinate after reviewing the investigation hearing transcript and associated exhibits, Complainant was charged with three violations under POM and the GCOR, each of which would support a Level S 30 Day Record suspension.

Although Complainant was involved in several disciplinary proceedings over a short time period, the disciplinary proceedings were consistent with BNSF safety rules and clearly resulted from Complainant’s conduct over a short time period rather than any motive to harass or

²⁸ Although Claimant was insubordinate pursuant to PEPA 1.6 Conduct, Respondent did not dismiss Complainant after the investigation following the July 29, 2013 incident, which I find offers further support of Respondent’s non-retaliatory motive. *See* Section IV.iii.b, *infra*.

intimidate Complainant. Ms. Bausalle-Luce testified that she has “seen situations before with an employee was subject to [four] disciplinary hearings in a period of less than 45 days[, which] . . . will happen when an employee violates [four] different rules in 45 days . . . [that person] will be subject to those investigations.” *Id.* at 558.

b. Respondent Appropriately Disciplined Complainant

The record evidence establishes that Respondent exercised managerial leniency regarding Complainant’s discipline resulting from the February 5, 2013, July 29, 2013, and August 1, 2013 incidents. The February 5, 2013 incident involved 2 separate events—1 at Chicago Union Station and another at Route 59—where Complainant clearly violated BNSF rules; however, in the letter of investigation issued to Complainant shortly after the incident, these 2 events were combined into a single disciplinary hearing. *Id.* at 459. As a result, Complainant could only be assessed a single violation instead of two, which would subject him to dismissal if Respondent chose to hold two separate hearings involving two discrete events that were Level S violations. TR at 459; *see also* RX 16 at 6 (noting that “[m]ultiple [s]erious violations committed during the same tour of duty . . . may result in immediate dismissal”). Complainant’s second Level S 30 Day Record Suspension subjected him to dismissal. Under PEPA, a Level S 30 Day Record Suspension remains on an employee’s record for 36 months. TR at 339; RX 16 at 4. A BNSF employee stands for termination after receiving a second Level S 30 Day Record Suspension if there is already one on his record, *i.e.*, one that has been issued within the past 36 months. TR at 339; RX 16 at 4.

Mr. Jenkins, a BNSF general manager who never met Complainant prior to the July 29, 2013 investigation, was responsible for determining the discipline that should be issued to Complainant. TR at 502. Mr. Jenkins credibly testified that Complainant’s seniority and lengthy service²⁹ was “absolutely” a consideration in issuing discipline because those factors are “certainly . . . things . . . [Respondent] considers” in deciding whether to issue a Level S 30 Day Record Suspension or dismiss the employee. *Id.* at 508. Mr. Jenkins also considered Complainant’s title, locomotive engineer, because engineers operating in Suburban Services have “additional . . . , specialized training, above and beyond what a normal freight locomotive engineer would have[,]” because Suburban Services is a “unique service” of BNSF. *Id.* at 509. In all, Mr. Jenkins considers “the investment [BNSF has] . . . made in our employees, [which] goes along with tenure[,]” in issuing discipline. *Id.*

Mr. Johanson, the conducting officer involving the February 5, 2013 and July 29, 2013 incidents, testified that he recommended a “standalone dismissal [under PEPA] for a Level S” due to the evidence supporting the insubordination charge related to the July 29, 2013 incident. TR at 461–62. Complainant was indeed found to be insubordinate after the July 29, 2013 incident; however, Complainant was instead issued a second Level S 30 Day Record Suspension, which Mr. Merriweather considered “an exercise of managerial leniency.” RX 10; TR at 347. Mr. Merriweather further testified that Complainant receiving his third Level S 30 Day Record Suspension as a result of the August 1, 2013 incident instead of being dismissed was “an unusual circumstance” also showing “managerial leniency.” TR at 352.

²⁹ Respondent hired Complainant in 1979. TR at 22.

In 2013, 15 BNSF employees were dismissed for violating safety rules, including one employee who was found to be insubordinate on April 30, 2013 for, in part, “fail[ing] to comply with the Yardmasters instructions.” RX 21 at 63–64; RX 50 at 1. On May 8, 2013, an employee was dismissed for “fail[ing] to comply with instructions in a letter sent . . . on March 28, 2013, when you failed to provide documentation to get approved for medical leave authorization.” RX 50 at 4. On August 21, 2013, an employee was dismissed for “indifference to duty and dishonesty” for requesting pay “while not performing service.” RX 50 at 3. The April 30, 2013 and August 21, 2013 dismissals,³⁰ like Complainant’s July 29, 2013 violation, stemmed from GCOR 1.6 Conduct violations. RX 50 at 1, 3.

On October 11, 2013, Complainant was issued his third Level S 30 Day Record Suspension as a result of the August 1, 2013 incident. RX 10, 13; TR at 254, 276; *Final Decision and Order* at 2–3. Ms. Bausell-Luce testified that any BNSF employee “has received leniency if that employee has two active level S[violations] on [his or her] record.” TR at 536. Ms. Bausell-Luce has reviewed over 1,000 disciplinary transcripts, and testified that is very uncommon for an employee to receive 3 Level S violations without being dismissed. *Id.* at 537. While Ms. Bausell-Luce’s duties require her to be a neutral party in assessing rule violations during disciplinary proceedings, she does not make the final decision as to what level of discipline is issued; rather, “the field” decides what discipline should be issued and whether to grant leniency on a case-by-case basis. *Id.* at 548. She found that Complainant received leniency regarding the July 29, 2013 and August 1, 2013 incidents, and the leniency Complainant received by being issued his third Level S 30 Day Record Suspension within a review period instead of outright dismissal was *inconsistent* with PEPA. *Id.* at 547. She further found that an “Actual Suspension,” which would have resulted in loss of pay without back pay eligibility, rather than a Record Suspension, could have supported the July 1, 2013 and August 1, 2013 incidents. *Id.* at 556.

c. Respondent Acted Appropriately

BNSF has a “zero tolerance” policy for workplace retaliation, harassment, or discrimination, all of which are grounds for dismissal. TR at 233–36, 358, 286–287; RX 17 at 8, 16–17. The Code of Conduct outlines these policies, among others, and states the following regarding its “No Retaliation” policy: “Retaliation for the good faith reporting of an apparent or actual violation of the law, this Code of Conduct, any BNSF policy or for participating in any investigation of a suspected violation is prohibited. Acts of retaliation could lead to disciplinary action, up to and including termination.” RX 17 at 8. The Code of Conduct states the following regarding its “Workplace Harassment – Zero Tolerance” policy:

BNSF is committed to maintaining a workplace free from harassment based upon race, color, religion, national origin, disability, sexual orientation, pregnancy, or any status protected by federal, state and local laws. This policy applies to all

³⁰ I note that the August 21, 2013 dismissal involved particularly egregious conduct where the employee “chased a private citizen back to his place of residence where a physical altercation ensued, resulting in [the employee’s] hospitalization.” RX 50 at 3.

employees, applicants, guests, customers and other persons visiting [BNSF] property.

Harassment is unacceptable and will not be tolerated. . . . Such conduct violated BNSF's policies and can subject [BNSF] to serious legal consequences. The individual practicing the harassment may be terminated, and in an aggravated case, may be personally liable. [BNSF] takes very seriously harassment complaints. . . . Any report of harassment will be investigated in a timely manner and any violation of this policy will result in prompt appropriate corrective action.

RX 17 at 17. Furthermore, BNSF policy requires its employees to complete an annual certification in the Code of Conduct, which, in part, outlines Respondent's policy on workplace retaliation, harassment, and discrimination. TR at 357, 511; *see generally* RX 17 (detailing the reasons BNSF requires its employees to undergo an annual certification in the Code of Conduct).

Ms. Bausell-Luce is a director of employee performance for BNSF labor relations³¹ who is responsible for independently reviewing employee and disciplinary investigation transcripts as a neutral third party. TR at 519–20, 532–33. Ms. Bausell-Luce oversees the “conducting officer training program,” and trains conducting officers herself, which “consists of educating the field about the [investigation review] process and the arbitration process. And how to conduct an investigation and be fair and impartial in an investigation.” *Id.* at 541–42. Her office conducts periodic reviews to ensure that all BNSF employees are treated consistently. *Id.* at 560. Part of her duties requires the individuals investigating rule violations to send her a “transcript of the investigation so that [she and the PEPA review team] can be a neutral review and ensure consistency across the system with [BNSF] discipline policies.” *Id.* at 532. She and her team then “determine[s whether] . . . the rule violation was proven and what level of discipline it would support under . . . PEPA.” *Id.* at 534. She does not consider employee tenure or seniority when recommending discipline; rather, she determines if the conduct in question supports the stated charge based on her review of the investigation transcript and evidence. *Id.* at 536. A team that neutrally reviews employee discipline recommendations is not required under the collective bargaining agreement, but Respondent instituted this policy to ensure that employees are treated fairly by giving them the right to have a neutral third party review their case prior to issuing discipline, including dismissals. *Id.* at 533. Ms. Bausell-Luce testified that Respondent does not want to “take a step that[is as] . . . serious [as a dismissal] without having an additional level of review.” *Id.* Ms. Bausell-Luce found “substantial evidence”³² supported the charged violations regarding the July 29, 2013 and August 1, 2013 incidents.³³ *Id.* at 542–545. Ms. Bausell-Luce acknowledged Respondent's policy against workplace retaliation, harassment, or discrimination. *Id.* at 556. She was certified in the Code of Conduct at the time of the

³¹ Ms. Bausell-Luce described this job as “PEPA review.” TR at 532.

³² Ms. Bausell-Luce testified that “substantial evidence” is required to prove BNSF safety rule violations, and described this standard as “more than a mere scintilla” and enough for a reasonable person to support a conclusion. TR at 540. She acknowledged that this is the standard enunciated by the Supreme Court in evaluating administrative compliance. TR at 540.

³³ Ms. Bausell-Luce testified credibly and spoke in detail regarding each incident, the proper invocation of the empowerment rule, and the reasons supporting her decision to concur with the recommended discipline. *See* TR at 540, 542–547.

investigations; she testified that was in compliance with the Code of Conduct at all times, and did not retaliate against Complainant. *Id.*

Mr. Jenkins was responsible for determining what, if any, violations Complainant committed during the July 29, 2013 and August 1, 2013 incidents. *Id.* at 502. He testified that he bases disciplinary decisions on the evidence garnered from the investigation hearing and the employee's seniority and length of service, and does not make a decision until he received input from "the superintendent for the territory, . . . the PEPA team, . . . [and] labor relations." *Id.* at 508. Mr. Jenkins testified that he had no animus toward Complainant. *Id.* at 510. He further testified that he had no intent to discriminate against, intimidate, or harass Complainant or deprive him of his livelihood, and "absolutely [did] not" retaliate against Complainant. *Id.* at 510, 512. Mr. Jenkins was aware of Respondent's policy for workplace retaliation, harassment, or discrimination when he issued the two Level S 30 Day Record Suspensions as a result of the July 29, 2013 and August 1, 2013 incidents. *Id.* at 511. Mr. Jenkins was certified in Respondent's Code of Conduct at the time of the investigations, which he believes he complied with in disciplining Complainant. *Id.* at 512. Mr. Jenkins testified that the PEPA review team agreed with his recommendation to issue Complainant a Level S 30 Day Record Suspension resulting from the July 29, 2013 and August 1, 2013 incidents. *Id.* at 519.

Mr. Leahy was responsible for issuing Complainant a Standard Formal Reprimand for his Attendance Guideline Violation. *Id.* at 223–24. Mr. Leahy testified that he "absolutely [did] not" intend to deprive Complainant of his livelihood, intimidate, or harass Complainant. *Id.* at 231. Mr. Leahy testified that he was aware of Respondent's policy against workplace retaliation, harassment, or discrimination, and knew he could be dismissed if he retaliated against another employee. *Id.* at 235. Mr. Leahy was certified on Respondent's Code of Conduct at the time of the investigations, which he testified that he complied with in issuing Complainant a Standard Formal Reprimand. *Id.* at 236. Mr. Leahy could not recall any person in BNSF management ever being disciplined for violating the Code of Conduct or a BNSF employee accusing another of violating the Code of Conduct. *Id.* at 237.

Mr. Manning, the conducting officer during Complainant's Attendance Guideline investigation, was certified in Respondent's Code of Conduct at the time of the investigations and the potential for dismissal if an employee retaliates against another. *Id.* at 434. Mr. Manning testified that he did not retaliate against Complainant. *Id.* at 435. While Mr. Manning recalls telling Complainant that "supervision would be watching him," he stated that Respondent supervises all of its employees, which is consistent with Respondent's various safety policies rather than harassment, intimidation, or retaliation.

Similarly, Mr. Merriweather testified that he did not discriminate against Complainant "in any of [his] dealings" with him. *Id.* at 358. Mr. Motley reiterated his familiarity with Respondent's policy for workplace retaliation, harassment, and discrimination, stating that he complied with, and was certified in, the Code of Conduct at all times when he was a company witness and conducting officer in relation to the investigations. *Id.* at 286–87. He testified that at no time did he seek to deprive Complainant of his livelihood, nor did he seek to retaliate or discriminate against Complainant. *Id.* at 287.

Mr. Garrison, senior trainmaster and road foreman of engines for BNSF Suburban Operations, testified that Respondent employs many safety programs, such as the safety hotline, that other rail operators do not. *Id.* at 407, 409. Respondent also administers “monthly safety marathons, and safety stand-downs in case of incidents” and the Safety Initiative Response Program (“SIRP”), an additional resource for employees to utilize to address issues they believe affect the safety of themselves or others in the performance of their duties. *Id.* at 409. Mr. Garrison met with and performed “check rides”³⁴ with other locomotive engineers who had concerns about the absolute signal relocation. *Id.* at 410–11. Respondent addressed all of the locomotive engineers’ concerns, but Complainant was the only one to continue to have issues with the absolute signal relocation. *Id.* at 411. Respondent has also been very concerned about diesel exhaust emissions for many years, regularly testing the air quality in and around Chicago Union Station and, at one point, refusing to operate its trains into the station with its employees unless Metra and Amtrak also addressed air quality for the sake of train station employees and passengers. *Id.* at 445–46; *see also* Section IV.C.ii.b.2, *supra*.

Mr. Jenkins, Respondent’s employee ultimately responsible for issuing discipline regarding the July 29, 2013 and August 1, 2013 incidents, found that Complainant was not insubordinate during the August 1, 2013 incident, and indeed did not find charge him with insubordination. TR at 507; RX 13; CX 4. After reviewing the transcript and associated exhibits related to the August 1, 2013 incident, Mr. Merriweather independently agreed, finding that the “insubordination charge was not proven.” TR at 351. I agree, and find that, given Complainant’s conduct during the July 29, 2013 incident, Complainant’s conduct during the August 1, 2013 incident did not support a finding of insubordination under Respondent’s Rules of Conduct.

Complainant was held out of service beginning August 2, 2013 pending the results of the investigations of the July 29, 2013 and August 1, 2013 incidents. *Id.* at 80. On October 11, 2013, Respondent allowed Complainant to return to work after determining that he would be assessed two additional Level S 30 Day Record Suspensions as a result of the July 29, 2013 and August 1, 2013 incidents rather than be dismissed. *Id.* at 355, 395. Respondent, however, had difficulty contacting Complainant. *Id.* at 355. Complainant was sent a certified letter, which informed Claimant that he could return to work. *Id.* Mr. Merriweather called Complainant several times and left numerous messages stating the same, but Complainant did not return his calls. *Id.* Mr. Merriweather testified that he also called Ms. Taylor for assistance contacting Complainant, but she also did not return his calls.³⁵ *Id.* It was after these efforts that Mr. Merriweather personally visited Complainant’s home to inform him that he could come back to work. *Id.* When Complainant returned to work, he received back pay for the time he was held out of service. *Id.* at 356.

³⁴ Mr. Garrison was responsible for supervising approximately 32 locomotive engineers for their qualifications and certifications. TR at 411. One of Mr. Garrison’s job duties involved “check rides.” *Id.* During check rides, he would accompany locomotive engineers on duty, evaluate their performance, and determine if they qualified to continue working as a locomotive engineers for Respondent. *Id.* Mr. Garrison described the check rides regarding the signal relocation, however, as a courtesy to determine if there was anything Respondent could do to make locomotive engineers more comfortable with the change. *Id.*

³⁵ Mr. Merriweather testified that he did not call Ms. Taylor during her “rest period” because he was aware of BNSF’s policy of not calling employees during this time. TR at 356.

ii. Complainant Would Have Been Disciplined in The Same Way in The Absence of His Protected Activities³⁶

As stated above, I find that Complainant engaged in the following four instances of protected activity contemplated by 49 U.S.C. § 20109(a)–(c). On March 9, 2011, Complainant expressed concerns about diesel exhaust emissions in and around Chicago Union Station to BNSF management. *Id.* at 28–30; 91, 103. On July 29, 2013, Complainant, citing the pending investigation from the February 5, 2013 incident, refused to operate a train without an operable door indicator light. RX 8 at 4; CX 5; TR at 110. On August 1, 2013, Complainant refused to turn on the head end power to allow an ADA life to load a disabled passenger onto the train. RX 12 at 1; CX 4; TR at 348–49. In approximately May 2013, Complainant called the BNSF safety hotline, stating that he was retaliated against and being harassed by Mr. Manning and that longer shore power cables needed to be purchased because it was unsafe to operate with the cables Respondent currently had after the absolute signals were relocated. TR at 124, 398.

If Complainant did not state his concerns on March 9, 2011, I find that Respondent’s approach to air quality in and around Chicago Union Station would not have changed. BNSF’s Industrial Hygiene Department has performed quarterly air quality tests since at least 2006, seven years before Complainant expressed concerns of diesel emissions exhaust. *Id.* at 510. BNSF also brings in outside consultants once a year to test the air quality. *Id.* at 211. The record contains no evidence showing that the air quality in and around Chicago Union Station was unsafe or that BNSF harbored animosity that might give rise to a retaliatory event as contemplated by the FRSA. BNSF, independently of Complainant’s protected activity, took a “firm approach” to air quality by refusing to operate past its property unless Metra or Amtrak instituted measures to test air quality and mitigate diesel exhaust emissions in and around Chicago Union Station. *Id.* at 446. Complainant did not voice his concern over air quality for at least another 18 months. *Id.* at 91. The March 9, 2011 incident was simply unconnected to discipline that Complainant received as a result of his protected activity. Similarly, the record is devoid of any evidence that Complainant’s calls to the BNSF safety hotline prompted any ill will toward Complainant. The facts related to these events are simply too attenuated to make that determination. I find the evidence clear and convincing that no facts related to these incidents would change in the absence of Complainant’s protected activity.

Although Complainant cited the pending investigation from the February 5, 2013 incident for his refusal to operate the train on July 29, 2013, Complainant’s concerns presumably stemmed from the lack of safety operating a train without a door indicator light. I, however, find that Complainant’s conduct was also an attempt to not make the same error he made on February 5, 2013. Thus, there were two bases for Complainant’s action: one stemming from self-preservation and another stemming from protected activity, both occurring in conjunction with one another at the same time. They are, therefore, inextricably intertwined; however, the logical connection to the February 5, 2013 incident does not change the factual predicate for Complainant’s actions on the July 29, 2013 incident because the February 5, 2013 incident

³⁶ “The task of going back in time to change facts and then deciding what would have happened is a daunting one. . . . [R]emoving not just the protected activity, but all logically related events (even if not within a chain of causation) would send factual ripples through the future whose impact is impossible to discern.” *Speegle*, No. 2001-ERA-00006, slip op. at 9 n.31 (ALJ July 9, 2014).

existed independently of—and occurred before—the July 29, 2013 incident. In other words, removing Complainant’s protected activity on July 29, 2013 does not remove the February 5, 2013 incident and associated facts. These two incidents are, therefore, not connected in a causal sense. Furthermore, assuming that Complainant did *not* have an alternative basis, *i.e.*, his only basis for refusing to operate the train stemmed from safety concerns, I find the evidence clear and convincing that Complainant still would not have followed instructions from his supervisors and POM 1.2.4, an unambiguous rule that provides the “safe course” in the event of an issue with the door indicator light, which would have resulted in a Level S 30 Day Record Suspension under Respondent’s safety rules.

Complainant testified that the August 1, 2013 incident stemmed from his concern regarding diesel emission exposure at Chicago Union Station and the potential for decertification if a locomotive engineer struck the bumping post after it was relocated. *Id.* at 74, 117. Even considering Complainant’s testimony that proceeding further after losing sight of the absolute signal was “unsafe” for those aboard the train and on the platform near the bumping post because a train could strike it; Complainant’s concern, like the July 29, 2013 incident, stemmed from both self-preservation, *i.e.*, decertification, and safety. Complainant provided both bases as justification for his actions on August 1, 2013. As outlined above, I find Complainant’s primary justification for his conduct on August 1, 2013 was the potential for decertification, while his ancillary justification was safety. I find that the facts surrounding the August 1, 2013 incident, Complainant’s actions, and discipline assessed, would not change even in the absence of his protected activity. The evidence, therefore, is clear and convincing that Complainant would have been issued a Level S 30 Day Record Suspension, a violation in accordance with PEPA, as a result of his actions on August 1, 2013.

Accordingly, based on the record before me, I find that Complainant would have been disciplined in the same way absent his protected activities.

V. CONCLUSION

I find that Complainant engaged in protected activity (1) on March 9, 2011 when he expressed concern to supervisors about diesel exhaust exposure; (2) on July 29, 2013 when he refused to operate a train without a functional door indicator light; (3) on August 1, 2013 when he refused to turn on the head end power to operate the ADA lift; and (4) his numerous calls to the BNSF safety hotline. The record shows that Respondent had no animus toward Complainant at any point as a result of his protected activity beginning in 2011, and did not retaliate against Complainant as a result of any protected activity. Rather, Complainant, at least with regard to the July 29, 2013 and August 1, 2013 incidents, showed a lack of understanding of Respondent’s safety rules, committing violations that were all serious enough to warrant a Level S 30 Day Record Suspension under PEPA.

Complainant offered several justifications for his conduct, or lack thereof, which were primarily motivated by concerns for himself rather than safety. Because Complainant has made a showing that his protected activity was a contributing factor to Respondent’s adverse employment action, BNSF bears the heavy burden to show by clear and convincing evidence that it would have taken the same adverse action absent Complainant’s protected activity. 49 U.S.C. §

42121(b)(2)(B); 29 C.F.R. § 1982.109(b); *see also Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-00055, slip op. at 6 (ARB Apr. 30, 2010) (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, slip op. at 13 (ARB Jan. 31, 2006)); *Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-00032 (ALJ Dec. 11, 2007). I find the record and foregoing discussion on this issue clear: the basis for the disciplinary decisions that Respondent issued to Complainant is “so powerful and clear that [it] would have occurred apart from [Complainant’s] protected activity.” *Final Decision and Order* at 6 (quoting *DeFrancisco II*, No. 13-057, slip op. at 10). Given the justification for the lenient treatment of Complainant due to his position and tenure with Respondent, I thus find that Respondent has shown by clear and convincing evidence that it would have disciplined Complainant in the same way in the absence of Complainant’s protected activity.

ORDER

Accordingly, based on the foregoing, **IT IS HEREBY ORDERED** that Complainant's FRSA complaint is **DISMISSED**.

LARRY S. MERCK
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).