



Issue Date: 25 November 2015

In the Matter of
MICHAEL J. BROUSIL
Complainant

v.

Case No **2014-FRS-00163**

BNSF RAILWAY COMPANY
Respondent

Kenneth E. Rudd, Esquire
For Complainant

Paul Balanon, Esquire and Noah K. Garcia, Esquire
For Respondent

DECISION AND ORDER

DISMISSAL OF THE COMPLAINT

This case was heard from July 14 to July 16, 2015 in Chicago, Illinois under Section 1521 of the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109. At that time, I entered one joint exhibit (“JX” 1), 26 Complainant’s exhibits (“CX” 1 - CX 26) and 50 Respondent’s exhibits (“RX” 1 – RX 50) into evidence.¹

Complainant Michael J. Brousil testified and he called:

- Marilee Taylor, formerly a union local vice chairman and legislative representative, who had represented employees in approximately 25 disciplinary cases.

The respondent called:

- David Leahy, Respondent’s Terminal Manager for Suburban Services, called as an adverse witness,
- Christopher Motley, Senior Trainmaster Road Foreman in Suburban Operations,
- Timothy Ivan Merriweather, Terminal Superintendent,
- Jim Garrison, trainmaster on duty at Union Station at the time of one incident,
- Johnny C. Manning, senior trainmaster road foreman of engines,
- Clayton Johanson, a terminal manager of Suburban Services,
- Jason Jenkins, general manager, responsible for operation of the Chicago Division, which is one of our 12 operating divisions of Respondent. He was overall in charge of Union Station, the situs of this fact pattern.
- Kathleen Bausell-Luce, a director of employee performance in labor relations, at corporate

¹ The transcript of the hearing (“TR”) consists of 3 volumes.

headquarters, Fort Worth, Texas.

PROCEDURAL HISTORY

This case is heard *de novo*, so I will not discuss the OSHA evaluation. On June 6, 2015, Respondent filed a Motion for Partial Summary Decision. Complainant filed a Response. The parties also submitted a Motion for Protective Order setting forth by stipulation that confidential information shall not be disclosed by any recipient to any person, with some exceptions.

Respondent's Motion for Partial Summary Decision referred to certain "undisputed" facts:

1. BNSF hired Complainant in 1988, over his career with BNSF he has been disciplined 11 times. The discipline he complains of here is a Standard Formal Reprimand (August 2, 2013) and three serious rule violations ("Level S").
2. Brousil filed his OSHA complaint on or about January 28, 2014. *See* Exhibit A (OSHA Findings and Case Activity Worksheet). The OSHA Case Activity Worksheet states, "Complainant alleged that Respondent issued him discipline in retaliation for raising safety concerns about unsafe conditions." *Id.*
3. OSHA dismissed Brousil's complaint on August 27, 2014. *Id.* OSHA noted the preponderance of the evidence supports that his claimed protected activity was not a contributing factor in the issuance of his discipline, and absent the protected activities BNSF would have taken the same adverse action.
4. In his OSHA complaint, Mr. Brousil asserted four adverse employment actions, including discipline for an attendance guidelines violation, and three serious rule violations. *See*, Exhibit A; *see also*, *Brousil Dep.* at 119:20-120:22.
5. Even though it was not raised before OSHA and the following claims would be untimely, Mr. Brousil is seeking compensation for the following dates for claimed harassment and intimidation for being sent home for work on April 30, May 7, May 9, June 15, and June 22 of 2013. *Brousil Dep.* at 123:21-124:2.
6. Complainant alleges he reported a safety complaint on March 9, 2011 regarding his concern of diesel emissions. *Id.* at 10:23-11:7. According to Complainant, his next report of a safety concern occurred, over two years later, on or about May 7, 2013. *Id.* at 12:22 – 13:7; *see also* at 14:8 – 15:6.
7. The rule, Passenger Operations Manual 1.2.4., states an engineer needs to have a door light before departing. *Brousil Dep.* at 153:13-16.
8. On February 11, 2013 Complainant received a notice of investigation; indicated BNSF was investigating potential misconduct and rules violations regarding Complainant operating a passenger train without indication that all doors were shut. Exhibit B.

9. The investigation is a bargained-for proceeding that allows the employee an opportunity to have a hearing before any discipline is assessed. Exhibit C, *Motley Aff.* ¶ 4.

10. Complainant, through his union representation, agreed to all hearing postponements. *Brousil Dep.* at 228:20 – 229:2.

11. The hearing was held on August 14, 2013 – at the hearing the event recorder data was entered into the disciplinary record. The records show that the train departed Chicago Union Station at 6:15 PM without indication that all doors were closed, and reached speeds upwards of 68 miles per hour. The door was finally shut after 14 minutes, and no stops were made in that time period. Exhibit C, *Motley Aff.* ¶¶8-10.

12. The event recorder data also show at 7:11 PM the train, again, departed a station – Route 59 – without indication that all doors were closed. The train reached speeds upwards of 26 miles per hour. The doors were shut after approximately 40 seconds of operation. Exhibit C, *Motley Aff.* ¶11.

13. Complainant admits that on February 5, 2013 at – Route 59 – Complainant departed without having a door indicator light illuminated. *Brousil Dep.* at 156: 11-13; *see also*, 147:3-7; 148:8-11.

14. An employee can stand for dismissal on the basis of having two Level S disciplines; it is a unique and rare situation for an employee to have three Level S disciplines. *Brousil Dep.* at 137:22 – 138: 11; 236:4-12.

In his Affidavit and in the Response, Complainant alleged the following time line:

1) Wednesday, March 9, 2011: Complainant stays downtown to talk with BNSF, Mr. Johanson in his office and Mr. Leahy on speakerphone, to discuss the safety issue of plugging into shore power at Chicago Union Station (CSU) due to the unsafe conditions with the diesel emissions exposure.

2) January, 2013: BNSF Conductor R. W. Mitchell asks Complainant why his train gets to plug into shore power with only a few minutes or less till train departure time and his train has 6-8 minutes till his departure and he cannot plug into shore power. Complainant tells him that he received authority to proceed in this manner from Mr. Johanson and Mr. Leahy.

3) February 5, 2013: Investigation notice on allegedly leaving Chicago Union Station without locomotive cab door indicator light being illuminated. Above investigation scheduled for August 14, 2013.

4) April 18, 2013: Chicago Union Station bumping post signal relocation.

- 5) April 30, 2013: Memorandum of Terminal Manager Dave Leahy; discussion with Mr. Leahy on longer extension cables.
- 6) May 2, 2013 (approximately): Memorandum of Engineer Leo Rocha.
- 7) May 7, 2013: Complainant requests longer cable and not to run head-end power due to the diesel exhaust safety hazards; Mr. Johanson and Mr. Motley relieved Brousil from afternoon service -- trains of 1249, 1282, 1283; Complainant never received his scheduled compensation for this date. Memorandum of Terminal Clayton Johanson and Trainmaster Chris Motley.
- 8) May 8, 2013: Complainant scheduled for engineer recertification. Complainant places hotline call on the safety of diesel emissions, Chicago Union Station signal relocation & need for longer connection cords to plug into shore power.
- 9) May 9, 2013: Complainant again requests longer cables and not to run head-end power due to the diesel exhaust safety hazards; Mr. Johanson & Mr. Motley relieved Brousil from afternoon service -- trains of 1249, 1282, 1283; Complainant never received his scheduled compensation for this date. #1 memorandum of Trainmaster John Manning and #2 memorandum of Terminal Manager Clayton Johanson.
- 10) May 10 & 11: Complainant properly marks off duty due to emotional fatigue from the increasing hostile reaction to his safety related reports and the threatening and intimidation to take his job due to his hotline calls and memorandums.
- 11) May 13, 2013: There was only one track that had long enough cable (about 30 feet) and this was Track #8. Memorandum of Superintendent Tim Merriweather and Terminal Manager Dave Leahy.
- 12) May 24, 2013: No cables on #2 track to plug train into shore power for passengers to board safely without the diesel emissions. Mr. Brousil emotionally fatigued and stressed.
- 13) May 27, 2013: Follow up memorandum and closure by Superintendent Tim Merriweather on Complainant's May 8, 2013 hotline call.
- 14) May 28, 2013: memorandum of Terminal Manager Clayton Johanson.
- 15) June 2, 2013: hotline call to address new report on harassment, intimidation, and threatening of his job by Terminal Managers Dave Leahy and Clayton Johanson.
- 16) June 7, 2013: Complainant speaks with Keith Evans from BNSF Chicago HR.
- 17) June 22, 2013: Complainant attempts to follow up on hotline call made on June 2, 2013, and was unable to access hotline account of report because the key number given to Brousil was invalid.

- 18) June 22, 2013: memorandum of 1312 door light failure.
- 19) June 26, 2013: memorandum of hotline call/fax on Trainmaster John Manning.
- 20) July 2, 2013: memorandum of Mr. Wazney, Superintendent of Operating Practices.
- 21) July 20, 2013: followed up on 6/26/13 hotline call on Trainmaster John Manning; BNSF's response from BNSF HR Rep Hanna Stadheim was that it was closed out.
- 22) July 29, 2013: memorandum of 1240.
- 23) August 1, 2013: Complainant never refuses to turn on power, he was simply again raising safety and hazardous concerns; subsequent investigation fails to establish this charge of insubordination, which is a terminable offense. Memorandum of 1282/1283.
- 24) August 2, 2013: memorandum of 1249

Neither party stated when the Complaint in this case was filed with OSHA; however I found from the exhibit lists that it was January 30, 2014. In its response, Complainant accepts that back pay or damages for six days (April 30, 2013, May 7, 2013, May 9, 2013, June 15, 2013, June 22, 2013 and July 29, 2013) before August of 2013 is not contested. These are contained in paragraph 5 of Respondent's "uncontested issues" set forth above. I am advised: "The ALJ may consider that issue "moot" or grant the motion for partial summary decision on that single point, alone."

Complainant did not directly respond to these factual allegations. After a review of the record before me, I accepted these facts as a stipulation and granted partial summary decision on this issue.

Respondent also alleged that Complainant is pursuing untimely claims that occurred "273 days, 266 days, 264 days, 227 days, 220 days, and 183 days before Complainant filed a complaint with OSHA timely."

The FRS has a 180 day statute of limitations. 29 C.F.R. § 1980.103 Filing of retaliation complaints in part states:

(d) Time for filing. Within 180 days after an alleged violation of the Act occurs or after the date on which the employee became aware of the alleged violation of the Act, any employee who believes that he or she has been retaliated against in violation of the Act may file, or have filed on the employee's behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, email communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person

filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law.

Complainant's response did not address this allegation. However, a review of the affidavit finds that it alleges notice to Respondent in February, 2013.

Respondent alleged:

Here, Complainant claims he spoke with BNSF management on March 9, 2011 about diesel exhaust concerns. The next event in this story occurs on February 5, 2013 when Complainant operated a passenger train with a door open on two occasions that day. The decision to begin disciplinary proceedings for his misconduct occurred on February 11, 2013. His union representative requested and received multiple extensions to postpone the hearing. The disciplinary proceedings were held on August 14, 2014 and ultimately led to Complainant being assessed a Level S for his serious rules violation on August 29, 2014.

The Complainant addressed the 2011 date in the time line set forth above but a review of the Response shows that it does not address the statute of limitations for this incident.²

I found that Respondent was entitled to partial summary decision on the March 9, 2011 statute of limitation issue.

Complainant did not address equitable estoppel or tolling of the statute of limitations for the matters beginning in February, 2013, but I noted that from the deposition, Complainant transferred from passenger to freight work in October, 2013. He alleges that he placed Respondent on notice in February, 2014. However, the rules require notice to OSHA. I found that he did that within the specified statute of limitation period, on January 30, 2014.

Therefore, I found that for the transfer to freight work the complaint does not invoke the statute of limitations and this claim remained viable.

Respondent alleged that protected activity that occurred 699 days prior to the initiation of disciplinary proceedings for serious rules violations - without anything more - is insufficient to prove a prima facie case of retaliation.

When a complainant relies solely on temporal proximity to prove causation, the protected activity and the adverse action must be very close in time, a lapse of 2.5 to 3 months has been found to preclude temporal proximity as the sole causal proof. However, where an employee provides other evidence indicating a connection between protected activity and an adverse personnel action courts generally permit a more relaxed temporal proximity.

² Please note that the Complainant did not provide me with a complete deposition. On the bottom of p. 12, he was asked, "...when was the next time [after March 8, 2011] you can recall reporting safety concerns regarding...."

Temporal analysis is one of several factors “which, alone or in connection with other factors, tends[sic] to affect in any way the outcome of the decision.” *Powers v. Union Pacific Railroad Company*, ARB Case No. 13-034, ALJ Case No. 2010-FRS-030 (March 20, 2015), slip op. 10. In reviewing the Complainant’s brief and attached documents, I am advised that Complainant’s request to BNSF Suburban Services management that he be allowed to plug into shore power, in lieu of running the HEP, every time his locomotive was sitting in Chicago Union Station, not just when he was sitting for more than six minutes, was an ongoing issue. (Affidavit of Brousil, Pars. 4-6). Complainant considered the six minute rule absurd. (Brousil Dep. 211: 13-15). Brousil needed to shut down his engine and plug-in shore power “every time” he came in there. (Brousil Dep. 11:12-14). “[E]verybody needs to plug-in . . . there shouldn’t be no prerequisite to plugging in . . . like a 10 minute turnaround period where they don’t want to plug you in”. (Brousil Dep. 12: 10-15) This issue arose repeatedly and specifically again in January 2013. (BNSF’s Ex. A, pp. 8; Affidavit of Brousil, Pars. 5-6).

Complainant left that position in October, 2013. He argued that he began working for BNSF as a passenger service engineer in the Suburban Services in 2008. (Brousil Dep. 27:2-4). In this position during 2013, Brousil earned \$373.00/day (Brousil Dep. 48: 15-18) and during the year 2012, his last full year working in Suburban Services, earned \$105,053.00 according to the BNSF issued W-2. (Ex. CX-F, p. 1). He alleged Respondent’s “serial charging, investigating, and disciplining [Complainant] was the result of [his] engaging in protected activity under 49 U.S.C. § 20109” (BNSF Ex. A, p. 3, Par. 11) and, thereby, “BNSF . . . succeeded in creating a pervasive and intense climate of fear among employees: the employees know they will be fired and otherwise harassed if they [engage in protected activity]”. (BNSF Ex. A, p. 3, Par. 16).

Respondent also alleged that Complainant did not raise an issue of constructive demotion before OSHA and did not properly preserve this issue for trial.

Respondent argued that a claim for constructive demotion should not be permitted for two reasons:

- 1) A claim for constructive demotion was not raised in his OSHA complaint; complainant testified he only complained to OSHA about the discipline he received (one standard formal reprimand and three level S disciplines);
- 2) Complainant is still employed, has received a wage increase every year, has the same job title, receives the same benefits, and voluntarily exercised his seniority to obtain his current position. He cannot meet the burdensome standard required to support a constructive demotion claim.

Complainant cited to *Fenney v. Dakota, Minnesota & Eastern Railroad Company*, 327 F.3d 707 (8th Cir. 2003). A review shows that Fenney's original pleadings alleged a failure-to-accommodate claim and a disparate treatment claim. This case requires a filing of a complaint with OSHA. There is no valid analogy. Complainant did not direct me to any

language in the complaint that would generate (or infer) a constructive or *de facto* demotion by either notice pleading or fact pleading.

There are three principal situations where equitable modification may apply: 1) when the defendant has actively misled the plaintiff regarding the cause of action; 2) when the plaintiff has in some extraordinary way been prevented from filing his action; and, 3) when the complainant has raised the right statutory claim in issue but has done so in the wrong forum. *Moldauer v. Canandaigua Wine Co.*, ARB Case No. 04-022, ALJ Case No. 2003-SOX-00026, slip op. at 5 (Dec. 30, 2005). The timelines are not jurisdictional and are subject to equitable modification. *Woods v. Boeing-South Carolina*, ARB Case No. 11-067, ALJ Case No. 2011-AIR-00009, slip op. at 8 (Dec. 10, 2012); *Selig v. Aurora Flight Sciences*, ARB No.10-072, ALJ No. 2010-AIR-010, slip op. at 3 (ARB Jan. 28, 2011). However, equitable tolling should be used sparingly and the party seeking to toll the filing period bears the burden of justifying the application of equitable modification principles. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990); *Woods*, ARB Case No. 11-067, slip op. at 8.

Section 1982.106 of the FRSA regulations states that I can conduct a *de novo* review of only those claims that an FRSA complainant has administratively exhausted.³ From the exhibit lists provided, at the time that the Motion for Partial Summary Decision was being decided, I noted that the Claimant filed his OSHA complaint on January 30, 2014. Neither party submitted a copy of the complaint.

After having been fully advised I determined:

1. Partial summary decision was granted to Respondent because back pay or damages for six days (April 30, 2013, May 7, 2013, May 9, 2013, June 15, 2013, June 22, 2013 and July 29, 2013) is not viable in this claim.
2. Partial summary decision was granted to Respondent because a March 9, 2011 issue is not viable as it is barred by the 180 day statute of limitations.
3. Partial summary decision was not granted as to the transfer from passenger to freight work, the complaint does not invoke the statute of limitations and this claim remained viable.
4. Partial summary decision was not granted based on temporal proximity.
5. An issue of constructive demotion was not brought before OSHA, and because Complainant did not proffer any evidence of equitable tolling or any other basis for the failure, partial summary decision was granted to Respondent as to that issue.
6. The joint Motion for Protective Order was granted.

³ 29 C.F.R. § 1982.106 (explaining that a party may seek review before an ALJ only after the Assistant Secretary has issued “finding and a preliminary order”).

7. The parties were ordered by July 6, 2015, to show cause in writing why the “undisputed facts” in Respondent’s Motion and the time line set forth by Complainant’s Affidavit should not be considered as stipulations in this case.

The Complainant did not object to the undisputed facts.

LAW AND REGULATIONS

The FRSA provides that a rail carrier “may not discharge . . . or in any other way discriminate” against an employee because he lawfully and in good faith provided information relating to, or directly assisted investigation of, conduct the employee reasonably believed violated a Federal law relating to railroad safety, or for “reporting, in good faith, a hazardous safety or security condition.” 49 U.S.C. §§ 20109(a)(1) and (b)(1)(A).

To prevail, Complainant must establish a prima facie case by showing (i) he engaged in a protected activity; (ii) BNSF knew or suspected, actually or constructively, that he engaged in the protected activity; (iii) he suffered an adverse action; and (iv) the circumstances raise an inference that the protected activity was a contributing factor in the adverse action. See 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. § 1982.104(e)(2).

If Complainant makes this showing, Respondent BNSF is nonetheless not liable if it “demonstrates, by clear and convincing evidence, that [it] would have taken the same unfavorable personnel action in the absence of the protected activity.” § 42121(b)(2)(B)(ii).

FINDINGS OF FACT

In addition to the findings I rendered relative to the Motion for Partial Summary Decision, the “undisputed facts” are stipulations. The parties also stipulated that three “Level S 30 Day Record Suspensions” (one issued on August 29, 2013 and two on October 11, 2013) constitute adverse employment actions within the meaning of the FRSA. They also agreed:

- The date of the formal reprimand investigation was July 25, 2013; and the decision to issue discipline was made on August 2, 2013.
- For the first Level S, the date of investigation was August 14, 2013; and the decision to issue discipline was August 29, 2013. And the first Level S was the February 5, 2013 incident.
- For the July 29, 2013 incident, the investigation was held on September 11, 2013; and the decision to issue discipline was communicated to Mr. Brousil on October 11, 2013.
- For the August 1, 2013 incident, the investigation was held on September 11, 2013; and the decision to issue discipline to Mr. Brousil was communicated on October 11, 2013. TR 253-254.

The Complainant made allegations, which I find are reasonably based, regarding ambient air quality and safety within the confines of a terminal controlled by Respondent. He alleged that Respondent violated several Federal laws relating to railroad safety, or for “reporting, in good faith, a hazardous safety or security condition.” There is no doubt that Respondent BNSF was

aware of the allegations regarding safety. There is no doubt he received the suspensions. Based on the stipulations, I find that the Complainant had engaged in protected activity, and that an adverse employment action in the nature of the three Level S 30 Day Record Suspensions had occurred.

At the same time that he was in protected activity status, I must note that the Complainant did violate the Respondent's disciplinary rules in some manner as set forth below.

Although there may be a dispute regarding whether there was causation, after listening to the witnesses, reviewing the exhibits but again referring to the stipulations, the circumstances raise an inference that the protected activity was a contributing factor in at least two of the adverse actions.

As a predicate, although it is not actionable as a protected activity in this case (see the stipulations above), because it was not filed within the statute of limitations period, Respondent cannot deny that in March of 2011, long before any of the adverse employment actions involved in this case were contemplated, Complainant had placed Respondent on notice that noxious diesel exhaust was being produced in Chicago Union Station. He referred to publications, including Respondent BNSF publications, that diesel exhaust – particularly in tunnels or other enclosed areas – posed health hazards including cancer. TR 24. He considered the terminal to be like a tunnel, because of its low ceiling. “The low ceiling in the CUS caused diesel exhaust from the locomotives to deflect off the ceiling, settle down, and enter the Metra passenger cars through their ventilation systems.” TR 32.

The primary issue raised was the need to plug all arriving locomotives into “shore power” to reduce the diesel exhaust emissions. TR 30. Respondent had a practice that if a train's projected turnaround time was less than 10 minutes (the “10 minute rule” or “6 minute rule”), the BNSF utility men would not plug the locomotive into shore power. TR 32.

The parties stipulated that three Level S 30 Day Record Suspensions (the first issued on August 29, 2013 and two on October 11, 2013) constitute adverse employment actions within the meaning of the FRSA. Apparently these amount to formal reprimands as the Complainant does not claim that he lost any pay as a result. Respondent argues that the discipline administered was lenient and it would have taken the same actions absent any protected activity, invoking 49 U.S.C. § 42121(b)(2)(B)(ii).

Complainant alleges that none of the three 30 day record suspensions and the associated 3 year “probationary” periods can be justified. See Complainant's Brief.

From a philosophical standpoint, at the initial level of evaluation, the fact that there was discipline in the nature of formal reprimands is more important than the fact that the discipline was lenient.⁴ This in logic is the “pregnant negative,” as “one can't be a little bit pregnant.”

⁴ See *Powers v. Union Pacific Railroad Co.* *supra*. I note that although I cited to *Powers* in the Order on Partial Summary Decision, and again on the record at TR 604 et. al. and ordered the parties to address it, Respondent did not cite to *Powers* as to the nature of a *prima facie* case. Respondent's analysis of the *prima facie* case cites to at best a minority view and constitutes what I consider to be specious arguments as to the state of the law and the

These become part of Complainant's permanent record. Although there can be no dispute that Complainant was held out of service from August 2 - October 25, 2013, Respondent made him whole for this time interval.

By definition, a reprimand, such as the ones Complainant received may be actionable.⁵ However, Respondent argues that it disciplined him not because he engaged in any protected activity, but because he violated written safety rules. Each of the incidents involved actions, as proven by Respondent that could have been considered as the basis for a termination. Respondent argues that Complainant has no evidence to demonstrate otherwise.

INCIDENT NUMBER 1

Respondent argues that the first episode dated February 5, 2013 was due to Complainant's failure to take leave properly. During the month of April 2013, he had taken 240 weekday hours (10 days) and 96 weekend hours (4 days) to use for vacation (layoff code "VAC"). RX 3 at 7. In light of his actual availability, Complainant was allowed two weekend days to lay off in addition to his scheduled rest days during the three-month, March through May 2013, period. RX 3 at 8. However, he laid off on four weekend days. RX3 at 7 (the column titled "UNAVAIL" and its sub-column "WE", when compared to the column titled "THRESHOLD" and its sub-column "WE"). Complainant had over 60 "banked" personal leave days when he laid off due to fatigue. RX 48 at 256. At the time he laid off, he also had 42 days of vacation to use. Id., at 24. Respondent maintains that "for some inexplicable reason, he opted to violate the Attendance Guidelines rather than take the reasonable approach and rely on personal leave or vacation days. It was his choice."

With respect to this allegation, I accept Complainant's argument that the Respondent did not have to suspend Complainant. However, Complainant could have avoided the suspension.

INCIDENT NUMBER 2

The second incident occurred July 29, 2013, when the door indicator light in the cab of the locomotive did not illuminate. RX 8. Complainant's supervisor Mr. Motley instructed him to take the train, and advised him to proceed pursuant to POM 1.2.4. TR 279. POM 1.2.4 is a reasonable alternative method to a door indicator light, but Complainant "steadfastly" refused to take the train. Id., at 279. Despite "going the old way" previously, and having the crew perform a manual inspection to ensure all doors were closed he refused to comply with instructions. See RX 8. Moreover, he refused to offer any reasonable alternatives or participate in a discussion to determine how to make the work safe, even after being informed of POM 1.2.4. See RX 8. Mr. Motley testified that he found it unusual Complainant claimed to have "gone the old way" only once; the door indicator lights were not installed until late 2010-2011, and he would have proceeded under POM 1.2.4 each shift he worked prior to those dates. TR 280.

proof required under the FSA and under the other whistleblower acts.

⁵ As to an allegation that he is in a 3 year "probationary" period as retaliation, the Complainant entered only argument but no proof.

INCIDENT NUMBER 3

On August 1, 2013, Complainant stopped his train 30 feet from the stopping point. He then turned off the locomotive power and according to Respondent refused to pull the train close enough to be plugged into shore power. See RX 11. Trainmaster Jim Garrison instructed him to turn the locomotive on so the conductor could use the mechanical lift to assist in boarding a disabled passenger. *Id.*; TR 74. Complainant refused. He made no effort to assist the passenger, and violated POM 1.16.1, which states: “[E]very effort must be made to provide service and transportation to persons with disability and/or special needs.” See BNSF TR 12 at 8. Due to his deliberate action, the disabled passenger was unable to use the wheelchair lift to board the train. According to Respondent, he did not offer an alternative nor did he participate in a discussion to determine how to facilitate boarding the disabled passenger – instead, he walked away from the train.

Although I found allegations about the transfer from passenger work in the complaint did not invoke the statute of limitations and the allegation was due to whistleblower status remained viable, after hearing all of the evidence, I now find that the Complainant has not established that the transfer was due to conduct of the Respondent.

At the time I decided the Motion for Partial Summary Decision, I reviewed the evidence in best light of Complainant’s argument. After now having heard all of the evidence, I find that the Complainant is not persuasive that he had to switch jobs. In his brief Complainant argues that “repetitive noticing of investigations and hearings -- including leveling serious career threatening charges such as insubordination” -- convinced him that he had no stable or secure future in Suburban Services, so he gave up his financially more remunerative work and “returned to freight service with a concomitant loss of income to the tune of approximately \$12,500.00.” In the ad damnum request, Complainant alleges that he lost that income for two years and “respectfully requests that - as a minimum - he be awarded \$25,000.00 for his lost income.” Actually, I find that the record shows that Complainant “earns more money per mile and more [per] hour than in 2013 and 2014.” TR 8 to 9. He admitted in testimony that he has not suffered any loss of pay. TR 127. Therefore, I find that the transfer is not an adverse employment action.

He also failed to establish a hostile work environment caused the transfer. By stipulation, the protected activity and adverse personnel actions relate solely to the three periods set forth above. He continues to work for the same employer albeit in a different division. He did not establish an employment difference among the two divisions. At this point, he bears the burden to prove that the transfer was actually a demotion, and he has alleged no facts to show that he was demoted from an economic standpoint. I had an opportunity to listen and observe the Complainant as he testified on two separate occasions. I found that he is generally credible, but I do not accept that his emotional state was caused by Respondent’s conduct or he was forced into the transfer. If the Complainant were under job pressure to switch jobs, there is no substantiating evidence. He does not identify anyone who might have suggested that he do so. He did begin treatment with Brian Rzepczynski, Ph.D., who first saw him August 19, 2013, but Dr. Rzepczynski was not asked whether to a reasonable degree of probability or certainty whether stress was induced by the job or whether the Complainant’s transfer was beneficial emotionally.⁶

⁶ I note that Complainant argues: Brousil’s treatment by the BNSF was the only significant source of any stress to

Complainant transferred from passenger to freight work in October, 2013. Without further proof, I find it more reasonable that he decided to transfer unilaterally.

However, I do find that Standard Formal Reprimand (August 2, 2013) and three serious rule violations (“Level S”) accepted by stipulation establish (i) at all times during the three incidents he engaged in a protected activity; (ii) BNSF knew or suspected, actually or constructively, that he engaged in the protected activity; (iii) he suffered an adverse action; and (iv) the circumstances raise an inference that the protected activity was a contributing factor in the adverse action. See 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. § 1982.104(e)(2). Because this case has been fully tried, theoretically there is an inference that a prima facie case has been made. *Kester v. Carolina Power & Light Co*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 5-8 (ARB Sept. 30, 2003) (“[W]e continue to discourage the unnecessary discussion of whether or not a whistleblower has established a prima facie case when a case has been fully tried.”).

As to the inference of contributing factor, besides the stipulations, I find from the Complainant’s credible testimony that he felt he had been harassed and from testimony of the Respondent’s witnesses that the facts taken together show that the Complainant’s status as whistleblower was evident. See *Powers, supra*. I accept the Complainant’s allegation that in most instances, the witnesses did not seem to know that the whistleblowing began with the accusations about ambient air quality, which led to the discussions about “shore power” which led to discussions about where to stop a train in the terminal and how long the extension cables should have been. Respondent’s position is that it did what it could to correct the environmental conditions and give Complainant sufficient “shore power,” but this implicates the fact that he was a whistleblower when he protested in incidents 2 and 3. 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. *Williams v. Domino’s Pizza*, ARB 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011).

AFFIRMATIVE DEFENSE

Complainant alleged that he was disciplined because he was considered to be “a thorn in [Respondent’s] side” and because he made demands about safety and refused to perform work because the equipment was malfunctioning and unsafe or management failed to purchase and obtain equipment needed “to avoid spewing toxic diesel exhaust in the air...”

Respondent argues that it has shown by clear and convincing evidence it would have taken the same actions at issue absent any purported protected activity. In his brief, Complainant did not discuss this argument.

Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to

Brousil and Therapist Rzepczynski diagnosed Brousil with an adjustment disorder with depressed and anxious mood. The burden of proof is on Complainant. There is no allegation that the Complainant relied on competent medical advice to transfer. Unfortunately, I am not permitted to “play doctor” and without qualifying Dr. Rzepczynski and providing cross examination on the issue, I must make a ruling consistent with the Administrative Procedure Act requirement that I articulate a legitimate reason to accept the allegation.

be proved is highly probable or reasonably certain. *DeFrancesco v. Union Railroad Company*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB February 29, 2012). The burden of proof under the clear-and-convincing standard is more rigorous than the preponderance-of-the-evidence standard.

I find, as set forth above, that there was probable cause for Respondent to investigate the three stipulated incidents.⁷ In essence, Complainant argues that because he was engaged in protected activity, he should not have been investigated. I reject this argument.

Again, the record shows that although there can be no dispute that Complainant was held out of service from August 2 - October 25, 2013, Respondent made him whole for this time interval by paying him as if he had worked. Also again, as to an allegation that he is in a 3 year “probationary” period as retaliation for whistleblowing, the Complainant entered only argument but no proof.

Respondent argues that its internal employee discipline system, “PEPA,” the BNSF Policy for Employee Performance Accountability, provides that an employee who commits a stand-alone dismissible offense or a serious rule violation while on probation for another serious rule violation is subject to dismissal. It argues that Complainant had both.

Failure to comply with instructions and failing to comply with rules regarding accommodating a disabled passenger are serious rule violations. Complainant was already on probation for the February 5, 2013, incident, he was subject to dismissal for the July 29, 2013, incident. As for the August 1, 2013, incident he had two active Level S suspensions on his record. BNSF, again, elected to exercise leniency and issued a third Level S 30 day Record Suspension, removing any notion of discriminatory animus.

See Respondent’s Brief.

In the context of its argument regarding protected activity, notice, adverse employment action and inference of causation, the Respondent is wrong about the law. Animus is not a factor. See. *Powers, supra*. However, in the context whether it would have done otherwise despite the presence of a *prima facie* case, lenience is a factor, to a clear and convincing degree in this fact pattern.⁸

Respondent submitted evidence of other employees who violated the same rules and were more severely disciplined. See RX 15, RX 21 (at 60-69), and RX 42. I am reminded that PEPA Director Luce testified attendance violations are very common. TR. 548. In the Chicago division, alone, there were approximately 250 attendance guidelines violations in 2013. *Id.*, at 549. Mrs. Luce reviewed a list of all attendance guidelines violations in the Chicago Division in 2013, and randomly selected three transcripts to review. *Id.*, at 549:5-

⁷ There is some question whether there was a fourth incident, but the penalties are reprimands for all.

⁸ This does not mean that every time a responsible Respondent in a whistleblower case exhibits lenience in the penalty phase of evaluation, it should be exonerated from liability.

24; EX 42. All three employees received a standard formal reprimand for their first attendance guidelines violation. *Id.*, at 549 to 551. In addition, other employees who have failed to comply with instructions received dismissals (unlike Complainant, who was given leniency and never dismissed). RX 50; TR 553 to 554.

Therefore for the first suspension, because Complainant despite his status did violate the Respondent's rules, I accept that Respondent would have given the same discipline if the *prima facie* case had not been made by Complainant.

With respect to the second stipulated qualifying incident, according to Respondent, Complainant failed to comply with instructions and was charged with insubordination. RX 10. There is no dispute that the train was operated with the door open. Respondent argues that it disciplined Complainant, in part, due to a violation of GCOR 1.6, which covers insubordination. See *id.*; see also RX 9. The PEPA provides that insubordination is a stand-alone dismissible violation. See RX 16 at 6. The PEPA also provides that a second Level S violation could result in dismissal (and this would have been the second Level S). See *id.*, at 4 ("A second Serious violation committed within the applicable review period may result in dismissal.").

In the third incident, there is no dispute that Complainant refused to remain at his post. Respondent opted not to dismiss Complainant. The record established that because this violation could have been his third active Level S, he could have been terminated from his job.⁹ RX 16 ("A second serious violation committed within the applicable review period may result in dismissal."). PEPA Director Kathleen Bausell Luce testified she believed substantial evidence supported discipline. TR 544. Complainant was charged with failing provide electricity to the train so the ramp could be supplied with electricity to allow the disabled passenger to board, but he refused and the train was delayed. *Id.*, at 545.

But, General Manager Jason Jenkins considered Complainant's seniority and tenure with the company in making the decision to grant leniency. TR. 508.

Respondent established that PEPA policy is a progressive discipline policy. *Id.*, at 534 to 535 The policy states an employee stands for a dismissal if the employee has two active Level S disciplines. *Id.* The policy is flexible and allows for leniency. *Id.*, 536. If an employee has more than two active Level S discipline, the employee received leniency. *Id.*, at 536:21-537:2. In this case, Complainant stood for discipline for the July 29 and August 1 incidents. *Id.*, at 547. I am advised that BNSF exercised leniency and did not dismiss Complainant. *Id.*, at 547:1-22; 555 to 556.

I accept that the Respondent has established that, in terms of its disciplinary policy, as Complainant could have been terminated for violations in incidents 2 and 3 in the penalty phase of its internal proceeding, in this context, the discipline was lenient. The Complainant did not address this issue in his brief.

⁹ There is also another July 29 charge of insubordination but in reviewing the testimony, it was merged with incident two for the disciplinary phase.

The burden under the clear and convincing standard is very strict, but I find that, in essence, the Respondent proved that although Complainant is a whistleblower, and there is an inference that a reaction to the whistleblowing caused an adverse personnel action, to a clear and convincing degree of proof, Complainant would have received the lenient discipline anyway. *DeFrancesco v. Union Railroad Company, supra.*

CONCLUSION

As the Respondent/Employer BNSF has proven by clear and convincing evidence that it would have reprimanded Complainant absent any instances of protected activity, this claim for benefits must be **DENIED**.

ORDER

The complaint is **DENIED**.

DANIEL F. SOLOMON
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).

