



**Issue Date: 25 March 2015**

---

In the Matter of  
GERALD E. D’HOOGHE,  
Complainant

Case No.: 2014 FRS 2

v.

BNSF Railways,  
Respondent

---

Appearances: Mr. John A. Kutzman, Attorney  
For the Complainant

Ms. Michelle T. Friend, Attorney  
Ms. Jennifer Willingham, Attorney  
For the Respondent

Before: Richard T. Stansell-Gamm  
Administrative Law Judge

**DECISION AND ORDER –  
PARTIAL APPROVAL OF COMPLAINT**

This case arises under the employee protection provisions of the Federal Rail Safety Act of 2007 (“FRS”), Title 49 U.S.C. § 20109, as amended, and as implemented by 29 C.F.R. Part 1982. Jurisdiction for this case is vested in the Office of Administrative Law Judges (“OALJ”) by this statute, under subsection 20109(c)(2)(a), which applies the rules and procedures set forth in 49 U.S.C. § 42121 (b), relating to whistleblower complaints under the Aviation Investment and Reform Act for the 21st Century, known as “Air 21,” and 29 C.F.R. § 1982.107,

In general, Section 20109(a) of the FRS act, and 29 C.F.R. § 1982.102(b)(1), prohibit a railroad carrier, a contractor or subcontractor of a railroad carrier, or an officer or employee of a railroad carrier from discharging, demoting, suspending, reprimanding, or in any other way discriminate against an employee because he: a) provided information regarding any conduct the employee reasonably believes constitutes a violation of any federal law, rule, or regulation relating to railroad safety, or security, or gross fraud, waste, and abuse of federal grants or other public funds intended to be used for railroad safety or security, if the information is provided, to a federal, state, or local regulatory or law enforcement agency; any member of congress; or person with supervisory authority over the employee; or a person with authority to investigate, discover, or terminate the misconduct; b) refused to violate any federal law, rule, or regulation regarding railroad safety or security; c) filed a complainant related to the enforcement of provisions of the Act; d) notified the railroad carrier or the Secretary of Labor of a work-related

personal injury or work-related illness of an employee; e) cooperated with a safety or security investigation relating to any accident or incident resulting in an injury or death to an individual or damage to property occurring in connection with railroad transportation; and f) accurately reported hours on duty pursuant to 49 U.S.C. Chapter 211.

Additionally, Section 20109(b)(1) of the act, and 29 C.F.R § 1982.102(b)(2), prohibit a railroad carrier, or an officer or employee of a railroad carrier from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee because he: a) reported in good faith a hazardous safety or security condition; b) refused to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, provided the refusal was made in good faith and no reasonable alternative to refusal was available, and a reasonable person in the circumstances then confronting the employee would conclude that the hazardous condition presented an imminent danger of death or serious injury, and the urgency of the situation did not allow sufficient time to eliminate the danger without refusal, and the employee, where possible, notified the railroad carrier of the existence of the hazardous condition and his intention not to perform further work, or not authorize the use of the hazardous equipment, track, or structures unless the condition is corrected immediately, or the equipment, track, or structures are repaired properly or replaced; and c) refused to authorize the use of any safety-related equipment, track, or structures if the employee believes they are in a hazardous safety or security condition, subject to the same qualifying provisions just discussed above.

Finally, Section 20109(c) of the act, and 29 C.F.R. § 1982.102(b)(3), prohibit a railroad carrier, or an officer or employee of a railroad carrier from disciplining or threatening to discipline an employee for requesting medical or first aid treatment, or for following the order or treatment plan of a treating physician, except a railroad carrier's refusal to permit an employee's return to work following medical treatment shall not be considered a violation of the act if the refusal is pursuant to the Federal Rail Administration medical standards, or the carrier's medical standards for fitness for duty.

## **Procedural History**

On September 12, 2012, Mr. D’Hooge filed a complaint with the Occupational Safety & Health Administration (“OSHA”), U.S. Department of Labor (“DOL”) under the FRS employee protection provisions. Mr. D’Hooge alleged that his job was abolished for filing a safety complaint, RX 11.<sup>1</sup> On November 5, 2012, Mr. D’Hooge amended his FRS whistleblower complaint by alleging his job was abolished for reporting safety issues with locomotives, problems with track conditions, and a work injury, RX 11.

On September 30, 2013, the OSHA Regional Administrator dismissed Mr. D’Hooge’s complaint on the basis that his protected activities were not contributing factors in the abolishment of his job, and the Respondent would have taken the same action because the crew members were not completing their daily assignments. On October 17, 2013, through counsel, Mr. D’Hooge appealed the adverse decision and dismissal of his FRS whistleblower complaint.

Pursuant to a Revised Notice of Hearing, dated March 5, 2014, (ALJ D), I conducted a hearing in Great Falls, Montana on April 1 and 2, 2014, with Mr. D’Hooge, Mr. Kutzman, Ms. Friend, and Ms. Willingham. My decision in this case is based on the hearing testimony, JX 1, CX 3 to CX 5, CX 9, CX 10(a), CX 11 to CX 15, CX 16, CX 16(a), CX 17, CX 18, CX 20 to CX 22, RX 1 to RX 3, RX 7, RX 8, RX 11, RX 13, RX 14, RX 16, RX 17 (a to c), and RX 19 (a to c).

## **Parties’ Positions**

### **Complainant<sup>2</sup>**

Since the BNSF Railways (“BNSF”) official acknowledged that he would have not changed Mr. D’Hooge’s working conditions by abolishing the “Lost Local”<sup>3</sup> job if Mr. D’Hooge had not reported unsafe locomotives on April 5, 2012, the only issues in this case are whether Mr. D’Hooge made his safety complaint in good faith, and damages.

Mr. D’Hooge engaged in several activities protected by the Act. First, on March 28, 2012, he reported in good faith a personal injury related to rough-riding locomotives on rough track. Second, on April 5, 2012, in good faith, Mr. D’Hooge reported a hazardous condition when he advised the BNSF dispatcher that the north siding switch at Hobson was rough. Third, on April 5, 2012, in good faith, Mr. D’Hooge reported that all three locomotives in his “consist”<sup>4</sup> were rough-riding, which is a safety issue.

---

<sup>1</sup>The following notations appear in this decision: ALJ – Administrative Law Judge exhibit; JX – Joint exhibit; CX – Complainant exhibit; RX – Respondent; and TR – Transcript.

<sup>2</sup>TR, pp. 30-48, 55-57; and June 30, 2014 closing brief.

<sup>3</sup>The train used several branch lines radiating out of Great Falls, Montana.

<sup>4</sup>Three locomotives linked together to pull a train, and operated by an engineer, conductor, and at times a brakeman.

Concerning the third protected activity, “good faith” requires that the person subjectively hold a genuine belief about his safety report. Mr. D’Hooge held that requisite belief regarding the rough-riding consist. Although he had not personally ridden in the middle locomotive, his brakeman reported that engine was also riding rough. And, to the extent an objective standard must also be met, his safety report was objectively reasonable because it was based on his direct experience with two of the three engines, and reliable information from his brakeman. Additionally, on March 28, 2012, having previously reported one of the locomotive as rough-riding, Mr. D’Hooge filed a report of a cumulative injury to his back due to rough-riding locomotives on rough track.

In terms of causation, in early 2012, Mr. Moler, who was Mr. D’Hooge’s supervisor, became concerned and irritated by the Lost Local crew’s performance and inability to get work completed. In particular, he believed that they failed to pick up cars in Conrad, Montana; left a loaded fertilizer car in the wrong location; and went past parked track maintenance ballast cars which Mr. Moler wanted picked up. By the end of March 2012, Mr. Moler warned the crew that if they didn’t change their behavior he would abolish the Lost Local job. However, he took no steps to abolish the job at that time.

On April 5, 2012, on the way back from Moore, Mr. D’Hooge reported a rough track conditions at a siding switch. Later in the day, he also reported that all three locomotives in the consist were unacceptably rough-riding. When Mr. Moler found out about Mr. D’Hooge’s consist safety report, based in part on its timing, he assumed the report about the middle locomotive was made in bad faith, and believed the crew intended to get the next day off. After an e-mail exchange with his supervisor, Ms. Grabofsky, he and Ms. Grabofsky decided to abolish the Lost Local job and instead pull a crew off the “extra board,” which consisted of crews being assigned on a rotating basis.

When Mr. D’Hooge made the consist safety report on April 5th, he did not know whether the affected locomotives were needed the next day. All three crew members reported to work on April 6, 2012. They did not call first to see if they had the day off. Further, since the rough-riding report came in at 10:21 a.m., Mr. Moler’s assumption about the timing of the report was incorrect. Additionally, Mr. Moler also admitted that the middle engine had been placed in that position in the consist due to a report on March 28th that it was riding rough, which coincides with Mr. D’Hooge’s injury report. Further, Mr. D’Hooge was the engineer who had previously reported the engine, which demonstrates he had a personal basis for believing the middle locomotive was a rough-riding engine.

Additionally, based on Mr. Moler’s testimony that “bad-ordering” of the consist was the last straw and final trigger, it is undisputed that the April 5, 2012 rough-riding report was at least a contributing factor in Mr. Moler’s April 5, 2012 decision to abolish the Lost Local assignment as a regularly scheduled job. As result, Mr. D’Hooge has established this element in regards to his third protected activity.

Right after Mr. Moler advised Ms. Grabofsky about his decision to terminate the job, which required her approval, Ms. Grabofsky advised Mr. Moler that Mr. D’Hooge’s crew had

also reported a rough siding switch that day, which reflects that she considered the second protected activity to be a contributing factor.

And, temporal proximity between the March 28, 2012 personal injury report and the elimination of the Lost Local job supports a determination that the first protected activity also contributed to Mr. Moler's decision.

In terms of adverse action, Mr. D'Hooge spent most of his railroading career being on telephone standby and not knowing when he would be called to work. He could be told to work within 40 minutes at anytime and typically had to remain overnight in a hotel. However, by 2009, he had gained enough seniority to get the Lost Local job at Great Falls. The Lost Local job was unique in BNSF. It was the best job and very desirable because the crew worked Monday through Friday, starting at 7:00 a.m. and ending by 7:00 p.m.. The crew went home everyday to sleep in their own beds, already knowing what they would do the next day. And, they had weekends off. The Lost Local train traveled over branch lines at slower speeds, which was more comfortable for Mr. D'Hooge, and significant because by 2012, Mr. D'Hooge started to develop neck, shoulder, and back pain.

Termination of the Lost Local job adversely changed Mr. D'Hooge's work conditions and forced him to obtain work from the extra board, which had the same pay. However, once again, he was on telephone standby with unpredictable start times; and some trips required him spend the night in a hotel. After two weeks working the main lines at faster speeds, his neck and back pain worsened. And, on May 1, 2012, his physician advised that he end his railroading career. So, Mr. D'Hooge spent a month on the "work retention" list. Then, he applied for disability retirement.

Mr. Moler and Ms. Grabofsky considered abolishing the Lost Local job as a lenient alternative to a formal disciplinary investigation. When they decided to bring back the Lost Local job in early May, they already knew Mr. D'Hooge was out on work retention.

In light of the admission by Mr. Moler and Ms. Grabofsky concerning Mr. D'Hooge's protected activity, BNSF can not establish by clear and convincing evidence that it would have abolished the Lost Local job absent Mr. D'Hooge's protected complaint about rough-riding locomotives.

Mr. Moler suffered a loss of over \$6,000 in lost wages for April and May 2012. Since it is no longer feasible for him to return to work, Mr. D'Hooge is seeking front pay from May 1, 2012 through his planned retirement in July of 2015, which when coupled with 15% in fringe benefit equates to nearly \$350,000. In terms of emotional distress, Mr. D'Hooge was visibly shaken during his testimony about the effect the loss of the Lost Local job had on his ability to be with his grandchildren. Since in response to Mr. D'Hooge's protected activity, Mr. Moler abolished the Lost Local job immediately in anger and based on a hunch, prior to determining through an investigation whether the rough-riding complaint could be substantiated, punitive damages are warranted. Punitive damages in this case will also help deter other angry supervisors from taking adverse action in response to safety complaints. If successful, Mr. D'Hooge will seek reimbursement of reasonable attorney fees.

## Respondent<sup>5</sup>

Mr. D’Hooge’s FRS complaint should be dismissed because he did not report a safety concern in good faith; his personal injury report was untimely; and no protected activity contributed to the Respondent’s decision to abolish the Lost Local job as a specific bid position. Additionally, the abolishment of the Lost Local job on April 6, 2012 was not an adverse action since it did not affect Mr. D’Hooge’s pay, benefits, seniority, or ability to bid on other work. Even if Mr. D’Hooge meets his preponderance of the proof burden in establishing all the requisite elements for an actionable complaint, BNSF has established by clear and convincing evidence that it would have abolished the Lost Local job absent any protected activity. Notably, by May 9, 2012, the job had changed from the day shift to early morning hours upon which Mr. D’Hooge never bid. Finally, Mr. D’Hooge suffered no damages since he successfully bid on a job that he was previously considering without a loss of pay. His inability to work on May 12, 2012 was due to a medical condition that was unrelated to his discrimination claim. And, he has not proved entitlement to compensatory or punitive damages.

Over a period of several months in early 2012, Mr. D’Hooge and other members of the crew had not been performing their work satisfactorily. As a result, they were warned on several occasions that their continued failure to complete job assignments in a satisfactory manner would result in the abolishment of the Lost Local job. Despite these warnings, the crew continued their poor performance. As a result, based on non-discriminatory reasons, the job was abolished. Neither Mr. D’Hooge’s March 28, 2012 personal injury report nor his alleged safety complaints were a cause of, or contributing factor in, BNSF’s decision to abolish the job.

Mr. D’Hooge’s assertion that he engaged in protected activities consisting of March 28, 2012 personal injury report and alleged safety complaints were not protected activities. His personal injury report causation complaint amendment was untimely and his safety complaints were not made in good faith. Instead, his allegations are an attempt to divert attention from the real reason for the abolishment of the Lost Local job – his failure to complete the required work.

In particular, Mr. D’Hooge’s “bad-ordering” the entire three locomotive “consist” was not done in good faith. Even though Mr. D’Hooge had driven the consist for several days and believed the engines were rough-riding, he only bad-ordered the consist on the return trip on April 5, 2012. The report was not presented in good faith because Mr. D’Hooge had not ridden in one of the three locomotives, and yet he knew the bad-ordering the entire consist would put all three locomotives out of service. Significantly, when the engines were subsequently inspected, the two lead locomotives were found not to have any defects or problems.

Mr. D’Hooge and Mr. Moler, his supervisor, had a good work relationship. Mr. Moler helped Mr. D’Hooge on multiple occasions, and Mr. D’Hooge indicated Mr. Moler treated him fairly. In the spring of 2012, Mr. Moler noted a number of distinct events that demonstrated the Lost Local’s crew failure to perform their job duties. During this same period, Mr. Cotton, a yardmaster, received calls from customers weekly about the work the Lost Local crew was not completing, mis-spotted railcars, and repeated failure to pick up ballast cars. Mr. Cotton further noted that the Lost Local crew was completing jobs slower than usual. As a result, Mr. Cotton

---

<sup>5</sup>TR, pp. 48-55, 57-72; and June 30, 2014 closing brief.

had to bring in other crews to complete their work. Both Mr. Moler and Mr. Cotton spoke to the crew about these performance issues and advised them of the risk that the job would be abolished. Due to this continuing pattern of unsatisfactory performance, Mr. Cotton spoke with Mr. Moler several times about abolishing the Lost Local job. Ms. Grabofsky, Mr. Moler's supervisor, was also informed of the crew's failure to pick up ballast cars, and other performance issues. Eventually, as the customer complaints continued, and before April 6, 2012, Mr. Moler told Mr. D'Hooge and the crew members that if they didn't get the work done, he was going to abolish the job.

On March 28, 2012, Mr. D'Hooge filed a form with Mr. Moler, claiming an cumulative injury from rough-riding locomotive on rough track. At that time, Mr. Moler in no way attempted to discourage Mr. D'Hooge from filing the injury report. In fact, Mr. Moler helped Mr. D'Hooge to ensure that he reported the injury properly as a cumulative injury since Mr. D'Hooge was required to report personal injuries immediately to a supervisor, yet his pain symptoms in his neck, upper extremities, and back began in the fall of 2011. In a deposition, Mr. D'Hooge denied that he felt the injury report affected the decision to abolish the Lost Local job. Nevertheless, Mr. D'Hooge amended his FRS complaint on November 5, 2012 to include this protected activity. However, 180 days had already elapsed, so his discrimination complaint based on the March 28, 2012 injury report is untimely.

Although Mr. D'Hooge reported a bad siding switch early on April 5, 2012, Mr. Moler did not become aware of the report until after he had decided that evening to abolish the Lost Local job. After Mr. Moler advised Ms. Grabofsky of his decision, she responded with information about the rough track report. She concurred with his decision.

In the evening of April 5, 2012, Mr. Moler learned that the Lost Local crew had bad-ordered the consist. Since Mr. D'Hooge would not have ridden in the middle engine, and according to company rules no one should have been in the middle locomotive, Mr. Moler though the bad-ordering of all three locomotive was unusual. When Ms. Grabofsky learned of the report, she asked Mr. Moler what was going on since she likewise had never heard of all the locomotives in a consist being bad-ordered. Mr. Moler likewise had never experienced an entire consist being bad-ordered. And, since the report came in at the end of the day, he believed the crew and Mr. D'Hooge were trying to get out of work the next day. As a result, Mr. Moler concluded bad-ordering the consist was not done in good faith, and decided that he had had enough of the crew's performance issues. Since he was unable to abolish only one crew member, had been unsuccessful with coaching and counseling, and believed that a formal investigation would not resolve the performance issues, Mr. Moler decided instead to abolish the Lost Local job on April 6, 2012. Ms. Grabofsky concurred. Mr. Cotton also subsequently agreed with the decision. Mr. Moler did not abolish the Lost Local job due to any safety complaint or because of the bad-ordering; and when he abolished the Lost Local job, he had no knowledge of Mr. D'Hooge's report concerning rough track conditions. Instead, he abolished it due to the crew's continued failure to perform.

The decision to eliminate the Lost Local job and instead use the extra board to fill the crew positions was not a disciplinary event. When the Lost Local job was restored in May 2012 to stabilize the crew base, it was moved to a 4:00 a.m. start time due to weather conditions, which was usually done each year due to potential track problems associated with increasing heat. At that time, Mr. D'Hooge had an opportunity to bid on it.

After being advised that the Lost Local job was gone, Mr. D'Hooge chose other work, bumping another employee due to seniority. While the Laurel pool he chose did not have set regular hours, the pay was approximately the same.

Since May 1, 2012, due to his neck and back pain, Mr. D'Hooge has not been able to perform his job as a BNSF engineer due to physical issues unrelated to his whistleblower complaint, and currently receives \$4,100.00 in disability compensation. He remains an employee of BNSF, and still has insurance benefits. The abolishment of the Lost Local job did not affect his seniority or employment status.

Mr. D'Hooge has failed to establish damages for his claimed loss of retirement. And, while he was upset about the loss of the Lost Local job, he never sought counseling and has been able to sleep, eat, and get through the days. He did not suffer depression. Any emotional distress stems from his inability to work for BNSF, which is not related to his whistleblower complaint. Consequently, he has not established emotional damages. And, since Mr. D'Hooge is unable to return to work due to an unrelated medical condition, he is not entitled to reinstatement or front pay. Further, because Mr. Moler did not engage in any activity that showed callous or reckless disregard for Mr. D'Hooge's rights, and instead simply made a business decision, punitive damages are not warranted.

Finally, even if Mr. D'Hooge proves the requisite elements, BNSF had demonstrated by clear and convincing evidence that the company was in the process of abolishing the Lost Local job since Mr. D'Hooge was continuing his pattern of unsatisfactory work, which demonstrates that absent the protected activity BNSF would have still have abolished the Lost Local job due to the crew's continued practice of not completing their work. Additionally, due to warm weather conditions, the Lost Local job was abolished every year at the start of the summer.

### Issues

1. Timeliness.
2. Protected activity.
3. Adverse personnel action.
4. Contributing factor.
5. Affirmative defense
6. Damages.

## Summary of Evidence

**Mr. Gerald (Jerry) E. D’Hooge**  
(TR, pp. 73-319, 648-652, and 655-663)

[Direct examination] After high school, Mr. D’Hooge heard about job opportunities with BNSF (then just Burlington Northern), and was hired on the day he applied as a maintenance worker for buildings and bridges in 1974. About four years later, on October 2, 1978, he became an engineer. During a subsequent recession, he was cut back to the position of fireman, but continued his engineer training.

In 2012, for a train working “over the road” from Great Falls to Shelby or Laurel, the crew would usually have a conductor and an engineer. However, if the train had cars to pick up, which might require stopping, reversing, and starting the train, then a brakeman would be added to assist the conductor. The engineer is responsible for the operation of the train. The conductor is responsible for managing the cars and their contents, operates siding switches, and handles all the paperwork. They share joint responsibility.

When switching cars, the engineer is located in the cab of the locomotive, while the brakeman and conductor are on the ground, operating switches and separating or picking up cars. Once a car’s “knuckle” connection is unpinned or pinned, the conductor signals the engineer over the radio when to pull forward or move back.

Early in his career as an engineer, Mr. D’Hooge obtained work from the “extra board pool,” which is a pool of reserve workers who rotate on a first in, first out basis as needed. A person is on 24/7 telephonic standby and had one hour to report to work when called. Mr. D’Hooge spent about five years in the extra board pool. Then, based on seniority, he was able to obtain a pool job. Although the pool job still required responding within one hour, it was better because you could anticipate based on the crew rotations when you were going to get work; it was more regular. They could work up to 12 hours, and if they were not finished with a job at the end of the shift, the train was tied down for another crew. The “west pool” also contained routes over the continental divide in the Rocky Mountains which required more expertise due to the varying railroad grades. The trains could have 108 cars, and be “12,000 to 13,000 ton trains.” In these pools, you never knew when you get a day off, or have a weekend free. And, at the expiration of the allowable 12 hour shift, a person could be caught out away from home and have to spend his time off in a hotel.

Over the course of years, to about 2004, Mr. D’Hooge worked out of pools in various locations.

Then, after moving to Great Falls around 2004, and based on seniority, he got the Lost Local<sup>6</sup> job, which was a very desirable job. Work started at 7:00 in the morning, and could go up to 12 hours. However, they could get some jobs done in four hours. And, if the job required more than 12 hours, they would stop and go back out the next day to finish. Essentially, “you

---

<sup>6</sup>According to Mr. D’Hooge, the name arose because due to the nature of the variable assignments, the crew did not know exactly where it would be going each day.

went to work at 7:00 o'clock in the morning, so you were done by 7:00 o'clock at night, " Monday through Friday. This schedule was "just totally unheard of in the railroad industry."

Due to the poor condition of the branch tracks upon which the Lost Local ran, trains could not operate on those rails when the temperature was greater than 85 degrees. As a result, seasonally, when the temperature rose above 85 degrees around July, the Lost Local job would change to early morning or nights. During that period, Mr. D'Hooge would bid on other jobs. When the Lost Local job returned to the normal day shift hours around September, he would return to the Lost Local job.

About once a week, Mr. D'Hooge and the Lost Local crew would be dispatched through train work orders to pick up cars, usually containing barley, at Conrad. They never turned down a notification to pick up cars at Conrad. Prior to this litigation, Mr. D'Hooge never heard Mr. Moler complain about his refusing to pick up cars at Conrad. He was never counseled for a refusal to pick up cars at Conrad. Neither he nor the other crew members ever responded, "that's not our work."

The term "spotting a car" refers to a crew putting a car in a specific location so a customer can load or unload it. The conductor usually gets the spotting instructions. In early 2012, the crew had a work order to spot a fertilizer car in Fairfield, which was the usual destination. In that particular incident, since the work order did not specify a particular track, and the facility had three tracks, they spotted the car in the usual fertilizer spot for the fertilizer facility. They didn't ask for clarification because based on their years of experience, they knew where to spot the fertilizer car. They learned the next day from Mr. Moler that the car was not suppose to go to the fertilizer facility. Instead, an individual had ordered the car and wanted it placed in a different location for unloading. The individual was not at the location when they arrived. Mr. Moler reprimanded them for improper spotting because he had to send out another crew to re-spot the car to the correct location. The conductor responded that they didn't have specific spotting instructions for the car and were unaware the car was not for the fertilizer facility.

After spotting issue, again in early 2012, several railroad company maintenance ballast cars for rail bed rock were located at Vaughn. The cars had been sent to Vaughn in the late fall of 2011. Mr. D'Hooge and his crew were instructed to pick up these cars. However, had they stopped for the cars they would have run out of hours for their shift. They decided they were not going to have enough time left in their 12 hour shift to pick the cars up. When the conductor informed the yardmaster about the hours of service issue, the conductor was instructed that they should not pick of the cars; instead, they were to bring the train to Great Falls. The next day, Mr. Moler told the crew that he had wanted them to pick up the ballast cars and he was agitated that they didn't pick them up. When the conductor explained why they left the cars, Mr. Moler noted the cars were only 10 miles out of town; and he questioned why they didn't have time to complete the task. They had an hour and a half left; picking up the cars would take less than a hour; and to run the 10 miles in would take less than an hour. Mr. Moler was not wrong. However, Mr. D'Hooge can only estimate that amount of time it would have taken. It was the conductor who didn't believe that they had sufficient time remaining to pick up the cars. It was his call, but Mr. D'Hooge did not disagree. Although there may have been another incident

involving these ballast cars, Mr. D'Hooge wasn't aware of it. Specifically, he does not recall any instance when they passed the ballast cars without picking them up without calling ahead to the yardmaster about an hours of service issue. Prior to the litigation, he was unaware of another incident involving the ballast cars.

From 2004 up until 2012, the Lost Local job was never abolished other than to make the seasonal change for the times of the job. Mr. Moler never told Mr. D'Hooge that he intended to abolish the job prior to the usual time of June or July. The Lost Local job was never abolished and then called off the extra board. However, after a discussion with Mr. Moler, the union representative came out of the office, looked at Mr. D'Hooge and advised him that Mr. Moler warned that if they did not "knock this shit off," he was going to pull, or abolish, the Lost Local job. At the time, Mr. D'Hooge thought Mr. Moler was referring to his injury report that he filed at the end of March 2012.

On Wednesday, March 28, 2012, Mr. D'Hooge filed a personal injury report with Mr. Moler, CX 21. Mr. D'Hooge started having issues with pain in his neck, base of his neck, and lower back around November 2011. The neck pain radiated down both arms and caused numbness in his hands and fingers. The low back pain involved stiffness. After seeking orthopedic treatment including injections, the problems still worsened. So, suspecting the pain was work-related, he filed the report in order to protect himself.

When Mr. D'Hooge talked to Mr. Moler about filing the report, which occurred prior to the union representative's warning about Mr. Moler abolishing the Lost Local job, he advised Mr. D'Hooge to make a change so that he wouldn't be fired. Mr. D'Hooge does not specially recall Mr. Moler's exception. But, they re-accomplished the report. Mr. Moler was not angry with Mr. D'Hooge and he did not threaten or discipline him. In the report, Mr. D'Hooge alleged his condition arose due to rough-riding locomotives over rough track.

On March 29 and 30, 2012, Mr. D'Hooge did not have any confrontations with Mr. Moler about work performance. Mr. D'Hooge was then off work over the next two days on the weekend. Likewise, between April 2 and April 5, 2012, he did not have any work performance confrontations with Mr. Moler.

On April 5, 2012, the Lost Local crew went south of Great Falls to Moore, Montana, for delivery and pick-up of cars. The crew included Mr. D'Hooge as engineer, Mr. Greg Nicholson as the conductor, and Mr. Greg Sattoriva as the brakeman. They were operating a consist of three GP- 38 locomotives. Mr. D'Hooge operated the consist in the right-hand seat of the cab in the lead locomotive. The conductor rode in the left-hand seat of the same locomotive. While the cab had three seats, due to the small size of the cab, the brakeman was in the cab of the middle locomotive. Although there may be a rule that all crew members should be in the lead locomotive, Mr. D'Hooge has no doubt that the brakeman was in the middle locomotive on that day because he saw him in that middle locomotive cab and Mr. Sattoriva always rode in that location. The third locomotive in the rear was empty.

The trip to Moore was about 125 miles. Going south, the lead engine, locomotive # 2901, that he was operating was “rough-riding,” with excessive lateral movement – “you would just rock [sideways, left and right] back and forth. . . it’s not comfortable being tossed back and forth like that.” At times, the motion would cause his head to hit the side window. Some lateral motion is acceptable, but if it tosses a person more than a couple inches off-center, it’s unacceptable. The excessive lateral movement is usually caused by worn shocks, springs, and truck assemblies, or pedestals. He had reported that problem with that locomotive, and other engines, several times over months to the diesel shop foreman and employees. The shop foreman indicated they would look at the problem, which Mr. D’Hooge would expect to happen within the next 24 hours. Despite his complaints, #2901 continued to be rough-riding.

After several unsuccessful attempts to obtain radio contact with the Fort Worth Mechanical Desk, on the return trip, having moved to the rear locomotive which was now the lead locomotive on the northbound return, and while crossing the Hobson switch, Mr. D’Hooge experienced an “exceptionally bad” rough ride and called the dispatcher about a rough track condition at the switch. Although he had crossed the switch going south, the switch was curved and the lateral movement was more pronounced northbound.

While stopped, the brakeman came forward and stated that he could not ride in the middle locomotive because it was too rough. So, Mr. D’Hooge decided that since he didn’t not get any response to his prior complaints that he had had enough and indicated that they would “bad-order” the whole consist, which meant the engines were no longer fit for operation would be taken out of service. The conductor agreed with the decision. Mr. D’Hooge then advised the dispatcher that all three locomotives in the consist were riding rough and bad-ordered the consist. The dispatcher responded that he would get the problem handled.

Although Mr. D’Hooge had made complaints about rough-riding engines since 2004, April 5, 2012 was the first time he had bad-ordered a consist.

Mr. D’Hooge did not bad-order to consist to get off work Friday. At the time he made the report about the consist, Mr. D’Hooge had no idea whether enough locomotives would be available the next day. To the contrary, he worked the next day with a different set of locomotives. All of the crew reported to work that day and were not surprised or angry about having to work.

The “malt” job involves taking cars of barley to a malt plant and returning with empty grain cars. It usually started at 8:00 a.m.

Mr. Moler did not call Mr. D’Hooge in the evening of April 5, 2012 and ask him why: a) he didn’t report the engines while going south, b) why he reported the middle engine when he hadn’t ridden in it that day, or c) why he waited so long to report all three locomotives. He had no conversation with Mr. Moler that evening.

On the following Sunday, Mr. D’Hooge was advised that the Lost Local job had been abolished. The various jobs previously handled by the Lost Local crew went to the extra boards for engineers, conductors, and brakemen. Mr. D’Hooge didn’t go on the extra board because it

covered all vacancies, first in, first out, and there was no assurance he would catch a former Lost Local route. And, he had no idea when he would be working and where he would be going.

Rather than use the extra board, and because the “work” train wasn’t available, Mr. D’Hooge bumped into the Laurel pool with six other engineers, and went to work the next Tuesday or Wednesday. As a result, Mr. D’Hooge was back on telephone standby. He went out on every sixth train south to Laurel. And, he spent time in Laurel, sometimes overnight. Mr. D’Hooge had to catch another train to return to Great Falls. He could also be called on weekends. The pay was about the same; although he only got paid if he ran a train since he was now paid by the mile. Whereas, with the Lost Local, he was paid for five workdays whether they worked or not.

On May 1, 2012, Mr. D’Hooge went to the work retention board and he was no longer going into the station.

While working the Lost Local job, Mr. D’Hooge steadily grossed about \$9,200 a month. Afterwards, although he received about the same pay, the amount week by week was variable. Mr. D’Hooge’s fringe benefits did not change.

Mr. D’Hooge’s back and neck pain did not stop him from working. At the beginning of April 2012, Mr. D’Hooge intended to work to August of 2015 because after February 2015 he would be eligible for full retirement.

However, because the track conditions on the Laurel run were “horrendous,” Mr. D’Hooge was constantly bouncing around. The trains operated at higher speed, which caused the their movements to be more violent.

On April 24, 2012, Mr. D’Hooge filed another personal injury report, CX 4, indicating that on a return trip from Laurel the day before he experienced an extremely rough track condition at milepost 105.9 when the engine bottomed out and caused shooting pain in his lower back. Mr. Moler accepted the report and was fair on that occasion.

Mr. D’Hooge then switched to the north Shelby pool. But, he continued to experience rough track at higher speeds, and rough-riding locomotives. He subsequently concluded that he couldn’t take the pain anymore.

Mr. D’Hooge sought a medical opinion. On May 1, 2012, Dr. Bloemendaal advised that if Mr. D’Hooge wanted to avoid neck surgery, he needed to stop railroading, EX 5. As a result, Mr. D’Hooge elected to go to the work retention board. While in that status, Mr. D’Hooge was paid a minimum amount to remain an employee for possible rehire. It was also a “seniority type pool” which enabled younger workers to keep working. Mr. D’Hooge received a flat monthly rate of \$2,000. He chose this action to give himself time to consider what to do next.

In month of June, Mr. D’Hooge had to vacate the work retention board in order to take previously scheduled leave. During his vacation he received 1/52 of the prior year’s gross. When he returned at the end of June from vacation, Mr. D’Hooge decided to seek occupational

disability through the Railroad Retirement Board and asked to be placed on a medical leave of absence.

Although a switch engine job in the yard remained available, it only paid 2/3 of the Lost Local job.

Mr. D'Hooge was very upset when the Lost Local job was abolished. He worked years to obtain the engineer position on the Lost Local crew, which had fixed hours, fixed days off, and regular hours – it was the best job in the division. With predictable hours, he could make family plans and see his grandchildren played sports, which he wasn't able to do with his children when he worked pools.

His retirement annuity is less than if he had been able to work 41 years. "They took that away." The man who abolished the job, Mr. Moler, had minimal railroad experience compared to Mr. D'Hooge's 38 years of service.

He was distress by the whole situation.

Mr. D'Hooge receives \$4,100 a month in disability benefits.

He is able to sleep and eat; and get though his normal day.

[Cross examination] Mr. D'Hooge had a good working relationship with Mr. Moler. Overall, he pretty much liked him as a supervisor. He could talk honestly to Mr. Moler about his problems. He could discuss improvements. He wasn't intimidated by Mr. Moler. On occasion, Mr. Moler helped him avoid discipline due to missed calls in December 2010. Mr. D'Hooge believed Mr. Moler treated him fairly. Except for the abolishment of the Lost Local job, Mr. D'Hooge thought Mr. Moler had been very helpful. Mr. Moler didn't initiate investigations or fire people for no reason.

Mr. D'Hooge did not like it when BNSF started hiring supervisors who hadn't come up the ranks. He believed it was a bad idea. Mr. Moler fit into that category.

Mr. D'Hooge had worked in other jobs that had been abolished and he worked in the majority of his railroading career in Havre. He also worked a variety of jobs out of Great Falls. For a time, he considered working in the Whitefish area which involved commuting.

When the Lost Local job changed to early morning or nights in the summer, Mr. D'Hooge bid on other jobs.

When he came to Great Falls, the most senior engineer didn't necessarily hold the Lost Local job. Mr. D'Hooge occasionally bid on other jobs which had better hours.

According to BNSF's General Code of Operating Rules ("GCOR") 1.47, the engineer and conductor are jointly responsible for the safety of the train.

As an engineer, Mr. D’Hooge was required to report safety issues, which included crew safety.

After the mis-spotting at Fairfield, Mr. Moler did not just talk to Mr. D’Hooge. Instead, he spoke to the whole crew the next day. Mr. Moler also spoke to them about the Vaughn incident. Mr. D’Hooge had face-to-face meetings with Mr. Moler two to three times a week, typically in the morning. The conversations were always with his crew members. Mr. D’Hooge was not singled out.

Mr. D’Hooge operated on mountain time, while the dispatchers in Fort Worth worked on central time.

When the crew reported to work in the morning, the conductor would obtain the work orders and give them to Mr. D’Hooge. That task would take about 45 minutes. Then, Mr. D’Hooge and the brakeman would go to the round house and get the locomotives and track assignments from the yardmaster. After about two hours of preparation, which included an air test for the cars’ brakes, the train would leave the yard. Generally, the Lost Local job had a dedicated set of locomotives.

A dispatcher controls track authority; while the mechanical desk addressed problems that might develop with locomotives. On at least two occasions, Mr. D’Hooge made complaints about rough-riding locomotives to Mr. Moler when he filed his two personal injury reports. Other than those two occasions, Mr. D’Hooge did not make any other direct rough-riding complaints to Mr. Moler. Likewise, he doesn’t recall making rough track complaints to Mr. Moler.

On April 5, 2012, Mr. D’Hooge reported the rough-riding locomotives on the return trip from Moore, which is about 120 miles from Great Falls. The report was fairly close to the end of his work day, around 2 or 3 mountain time in the afternoon. They tied up in Great Falls that day at 5:00 p.m. The one-way trip took about four hours, but they left Moore at about 11:00 a.m. so the return trip that day was six hours.

While heading down to Moore, Mr. D’Hooge was aware that locomotive #2901 was rough-riding. Coming back after switching to rear engine which became the lead locomotive on the return trip, that engine was also riding rough. Although Mr. D’Hooge hadn’t ridden in the middle locomotives, the brakeman, Mr. Sattoriva, also reported that the middle locomotives was rough-riding. In his deposition, he may have testified that the brakeman was in the middle engine because there were only two seats in the lead locomotive cab. Nevertheless, Mr. Sattoriva “was in the middle locomotive.”

The work order shows the locomotives’ numbers. He wasn’t aware that the orders also showed the direction the engines were facing. The number of the lead locomotive coming back from Moore was “2700 something.” In the dispatcher call, when he referenced locomotive #2901, he did so because that was the identifying number for the track warrants that day.

If the conductor received a change in the work order for the day, Mr. D'Hooge would generally be informed; but, not always. He usually just followed the instructions of the conductor, either by hand signal<sup>7</sup> or radio. As a result, he wouldn't dispute the actual contents of the work order for April 5, 2012.

RX 14 shows the tracks route in the territory, including the tracks and stops to Moore.

Mr. D'Hooge did not report the rough track condition on April 5, 2012 to Mr. Moler. Likewise, he also didn't directly report the rough-riding locomotives to Mr. Moler.

Mr. D'Hooge can't explain why during his deposition he didn't believe that he had reported a rough track condition on April 5, 2012.

During this deposition, when he stated that the only conversation that he had with Mr. Moler about work not getting down involved the ballast cars at Vaughn, he didn't mention the mis-spotting at Fairfield because at that time he was being asked about Vaughn.

When he reported the rough-riding locomotives, Mr. D'Hooge may not have used the term "bad-order." He also didn't use the term during his deposition. While he may not have used the term in his report, "the result was exactly that;" and that was the term he used during his discussion with the crew. He could have called in the rough-riding problem to the mechanical desk. He is not actually sure who finally answered the radio that day.

Mr. D'Hooge had ridden the same consist for three days before April 5, 2012 and he thought the engines had been rough-riding all week. It just didn't become apparent how bad it was until they headed down to Moore on April 5. On that day, he decided that he had had enough. He is aware that locomotives are inspected in Havre.

Had Mr. D'Hooge been required to operate the consist the next day, he could have done that.

He believes that the conversation he had with the union representative, Mr. Nick Etherege, occurred on April 1, 2012. He later became aware that Mr. Moler was in Fort Worth the week of April 5, 2012. Mr. D'Hooge believes the warning that Mr. Etherege passed on was directed at him because the union representative was "looking right at me" when he made the comment after exiting Mr. Moler's office. Mr. D'Hooge didn't see Mr. Moler, he just assumed Mr. Moler he was in his office. At his deposition, Mr. D'Hooge thought the comment was made after he reported the rough-riding consist, but he was confused at the deposition; it couldn't have been after April 5th.

The lead locomotive heading back to Great Falls was worse than the lead locomotive going down to Moore.

Prior to April 5, 2012, Mr. D'Hooge had never reported an entire consist for rough-riding.

---

<sup>7</sup>"Follow the dirty glove."

Since Mr. D'Hooge called in his FRS complaint, he doesn't recognized the written summary, RX 11. During his call to OSHA, he reported that his job had been abolished because he turned in a safety sensitive report. RX 11 summarizes what he told the OSHA investigator.

Mr. D'Hooge filed a personal injury report on March 28, 2012, CX 3. He was neither disciplined, threatened, nor reprimanded for filing the report. He did not feel intimidated when he filed that report or during his initial conversation with Mr. Moler about the report. Mr. Moler was very helpful since he advised Mr. D'Hooge to revise the initial report to prevent him from being fired. However, believing the term "shit" in the union representative's comment referenced his personal injury report, Mr. D'Hooge concluded that the report did contribute to Mr. Moler's decision to abolish his job.

Mr. D'Hooge again acknowledged that on March 28, 2012, Mr. Moler did not show any intimidation and instead was helpful. Mr. D'Hooge just assumed "shit" meant his personal injury report, but he did ask the union representative for clarification.

On April 24, 2012, Mr. D'Hooge submitted a second personal injury report, CX 4, associated with rough track. At that time, Mr. Moler again treated him in a professional manner. The abolishment of the Lost Local job did not prevent Mr. Moler from filing that report. His cumulative trauma claim happened after the Lost Local job was abolished.

Although the Greats Falls to Laurel run did not pay the same as the Lost Local for a round trip, over the period of about a month, both jobs paid about the same; they produced comparable earnings. RX 16 are his pay stubs, from January to July of 2012.

Mr. D'Hooge is currently on disability. As a result, he is not eligible under union rules to bid on jobs, including the restored Lost Local job. Mr. D'Hooge made the decision to go on disability. In his deposition, he agreed that he was no longer able to work for BNSF as of May 1, 2012 because of his medical condition. When he was on the work retention board, Mr. D'Hooge was still being paid, but at a reduced rate. He came off the board due to previously scheduled leave in June. As of the date of the hearing, Mr. D'Hooge did not plan to seek any other job.

Mr. D'Hooge has not sought counseling for emotional distress or anxiety. He had experienced stress due to a personal relationship. However, that was not an issue when he lost the Lost Local job. While he does not suffer from depression, it is depressing to Mr. D'Hooge that he can no longer go out and do his job. Some of his emotional distress is due to the fact that a person with only four to five years of railroad experience decided to terminate his job without considering his 38 years of experience. It hurt his feelings.

Mr. D'Hooge was not investigated, demoted, or suspended due to his personal injury complaint.

Mr. D'Hooge had a radio in the locomotive cab. The dispatcher telephone calls are recorded. Use of a cell phone is not allowed. If within range of Great Falls, radio contact can be made with the yardmaster.

Mr. D'Hooge was unaware of a GCOR that requires a personal injury be reported within 72 hours of the injury. Instead, he thought the injury had to be reported immediately.

In the week before April 5, Mr. D'Hooge considered taking a job in the rail yard but he declined due to the extreme loss of wages.

In fall of 2011, Mr. D'Hooge spoke with Mr. Jacobsen in the claims department about compensation for his back and neck because his physician had recommended physical therapy twice a week. He was also concerned about violating the availability requirement and compensation for loss of work.

Mr. D'Hooge did not report to anyone that he had hit his head on the window when he went over the Hobson switch.

Mr. D'Hooge believed the three locomotives in the April 5th consist would have been unsafe to operate the next day. If he had to operate them he would have, but they were still unsafe.

In his deposition, Mr. D'Hooge indicated that he believed he didn't specifically report the locomotives as unsafe to operate.

Some of Mr. D'Hooge's sleep problem related to his pain.

[Redirect examination] Although jobs have been abolished, Mr. D'Hooge does not recall any incident other than the Lost Local job where the job has been abolished while customers were still needed to be serviced.

Mr. D'Hooge had not heard the dispatcher recording at the time of his deposition. Similarly, he had not seen Mr. Moler's e-mails with Ms. Grabofsky.

Mr. D'Hooge spoke with the company nurse about a yard job after she called him and asked how he was doing. He had responded that he wasn't doing very well and was thinking about going into the rail yard.

RX 16 is Mr. D'Hooge's leave and earning statement. The pay statement for the second half of May 2012 is missing but it would have been the same pay as indicated for the first half of May 2012. He was on the work retention board for the month of May.

The second payment he received in January 2012 was for profit sharing from 2011. His pay was lower in May 2012 because he was on the work retention board.

Mr. D'Hooge did not contact Mr. Cotton on the radio and refuse work in Conrad. Any such radio transmission must have come from some other crew. His crew would never have refused work.

Concerning the fertilizer cars in Fairfield, based on the Lost Local crew's experience, all the fertilizer cars were placed on the fertilizer spot. They only learned later that the fertilizer car was for another customer.

In regards to the ballast cars, Mr. D'Hooge doesn't remember going by those cars as early as 3:00 p.m. without calling anyone.

He doesn't recall Mr. Cotton talking to him about the ballast cars; Mr. Cotton didn't ask three times. He is not aware whether Mr. Cotton asked any of the other crew members to pick up the ballast cars. Mr. D'Hooge had a conversation with Mr. Moler about the ballast cars but only after they hadn't done the work and were told to run in due to being short on hours.

Mr. D'Hooge truthfully reported the rough-riding locomotives. He had reported them on more than one occasion.

[Recross examination] Mr. D'Hooge's seniority covers all of the Montana division crew bases.

**Mr. Connan L. Moler**  
(TR, pp. 322-437 and 574-648)

[Direct examination – Complainant's counsel] From 2010 through the spring of 2012, Mr. Moler was employed by BNSF as the Great Falls trainmaster. At that time, he was Mr. D'Hooge's supervisor, and he supervised 90 other employees. Mr. Moler's direct supervisor was Ms. Grabofsky, superintendent of operations. She was located in Havre. Mr. Moler left BNSF in February 2014.

Concerning the Conrad incident, which occurred in the first part of 2012, the yardmaster, Mr. Cotton, came to Mr. Moler upset because the Lost Local crew called in on the radio and told the yardmaster they were not going to pick up the grain cars because it wasn't their job, it was the X train's job. The X train was an empty grain car train. Mr. Moler doesn't recall whether the yardmaster stated who on the Lost Local crew made the radio call. Mr. Moler believed the incident was an adverse reflection on the Lost Local crew, which had been causing problems. The yardmaster reports to Mr. Moler. Eventually, the grain cars were picked up, but Mr. Moler doesn't recall who did it.

Due to problems with the Lost Local crew Mr. Moler talked with Mr. Cotton in February 2012 about abolishing the Lost Local job. The recent problems consisted of not getting cars to the customer, taking three days to accomplish two days work, and fighting assignments. In comparison, in 2011, the job was "running like clockwork." Mr. D'Hooge was on the Lost Local crew in 2011. Mr. Moler had communicated his job performance concerns to the Lost Local crew, Mr. D'Hooge, Mr. Nicholson, and Mr. Sattoriva.

Concerning Fairfield, the loaded fertilizer car was going to a different customer. Instead of delivering the car to the customer, they told Mr. Moler the car was left were they usually spotted the fertilizer cars. Typically, each customer has a "CDI," which is used on work orders

to identify the customer name, track, and spot for delivery. The Lost Local crew had a work order which identified the specific spot for the new customer that was different than the usual spot in Fairfield for fertilizer car deliveries. Contrary to Mr. D'Hooge's testimony, Mr. Moler believed the work order had specific delivery instructions. In his subsequent conversation with the Lost Local crew, everyone understood that the car had been mis-spotted and he made clear his frustration with the customer not getting the delivery. They didn't claim the work order didn't have the correct spot; instead their excuse was that they never dealt with the new customer before; that's why they left the car in the usual spot. When Mr. Moler reviewed the computer record, he found the work order was correct for the new customer's CDI. The conductor did not claim the work order was incomplete.

In Vaughn, the Lost Local crew went past the track maintenance ballast cars at least twice. Mr. Moler advised the yardmaster that the cars needed to be picked up because the maintenance desk was calling for them. When he followed up with Mr. Crockston, the yardmaster, Mr. Moler was told that the Lost Local crew said they didn't have enough time to bring in the cars; they were short on hours of service. On the first occasion, Mr. Moler talked to the Lost Local crew the next day. The Lost Local crew went to Vaughn twice a week. And, before their next run, Mr. Moler specifically asked them to get the cars. But, they came back a second time without the maintenance cars, with the excuse that the pick-up was not on their work orders. The maintenance cars were not on the work orders but he had clearly directed them to pick up the cars.

Mr. Moler did not have a conversation with the crew after the first failure to pick up the maintenance cars in which he stated his belief that they had plenty of time to bring in the cars; and he didn't express any displeasure. Instead, before their next trip, he told them that he needed the maintenance cars pulled in that day. This incident was a basis for his subsequent statement that if they weren't going to get the work done, he would abolish the job.

The next incident was the locomotive consist being bad-ordered on April 5, 2012. If Mr. Moler had been unaware of that incident, he would not have abolished the Lost Local job that day.

When someone bad-orders railroad equipment, it does not always involve a safety issue. For example, if a person doesn't want to work, he bad-orders the equipment. At the same time, a bad order reported in good faith would involve a safety issue.

A few days before the bad-ordered consist, Mr. D'Hooge submitted a personal injury report that involved rough-riding locomotives and bad track. Mr. Moler did not make a judgment call concerning that report. He followed procedures and contacted the nurse. Mr. Moler did not initiate an investigation concerning the personal injury report.

The first week of April, Mr. Moler was in Fort Worth for leadership training. Between April 2 and April 4, 2012, he did not receive any calls from Great Falls about work performance issues.

On Thursday, April 5, 2012, Mr. Moler received an e-mail from the chief dispatcher, CX 10(a), indicating that the Lost Local crew had bad-ordered three locomotives, #2982, #2723, and #2901. Consequently the locomotives needed to be sent to Havre and the dispatcher needed replacements “bad.” At that time, the Lost Local crew was usually Mr. D’Hooge, Mr. Nicholson, and Mr. Sattoriva. Mr. Moler assumed, “that the bad-order of the consist, the locomotives, was made in bad faith, due to wanting to get out of work Friday, because typically, we don’t have power<sup>8</sup> to replace it.” He did not make assumption about who on the crew made the report. Normally, the engineer, conductor, or both make the bad-order report. On that day, it was possible that all three members of the crew participated in the report. The initial e-mail was sent at 6:49 p.m. central time because the dispatcher and server were located in Fort Worth. Based on the timing of the report, Mr. Moler’s reaction to the e-mail was that the “consist was bad-ordered in bad faith . . . it was a way to get out of working Friday.” A ride quality protocol exists for a bad-ordered locomotive. However, because the crew called the report in when they were just about done, “they wouldn’t have to do any extra work. They wouldn’t have to follow the ride protocol. We would struggle to get power the next day.” Mr. Moler didn’t seek any further clarification about his bad faith assumption because “by rule they should have notified the dispatcher on the way down that the lead locomotive was bad” and they should never have been on the second locomotive on the return trip if it was rough-riding.”

When he received the e-mail, Mr. Moler didn’t know whether the locomotives were bad. He just assumed it was a bad faith complaint.

If BNSF can’t come up with a replacement locomotive, the crew would be paid to stay home. The Lost Local crew has a pattern of providing excuses why they couldn’t do work. There was a pattern of incidents where one or more members of the crew provided false information in an attempt to get out of work. However, Mr. Moler can not recall any of those incidents in detail. But, for example, the crew would take three days for a trip to Fairfield and Choteau when on a bad day it takes a day and half and on a good day the trip takes only a day. He didn’t ask the crew for an explanation for their lengthy trips. He did not document this performance issue.

Mr. Moler can’t identify the problem that caused him to conclude something started happening with the crew in 2012.

Mr. Moler did not advise Ms. Grabofsky about the Conrad, Fairfield, and Vaughn incidents.

Mr. Moler’s bad faith assumption about the bad-order complaint was further based on his additional assumption that the dispatcher sent the e-mail right after he received the crew’s complaint. He also could not determine how the second unit could have been reported. Mr. Moler did not call Mr. D’Hooge because Mr. D’Hooge was in his 10 hours of uninterrupted rest. After that 10 hour period, Mr. Moler did not attempt to contact Mr. D’Hooge or other members of the crew because:

---

<sup>8</sup>Locomotives.

at the point this happened, I was done with customers not getting serviced; that work was not getting done. This was the straw that broke the camel's back. I was done. I needed people that could do the job.”

The bad-order report was the final trigger. If he had not received the e-mail on April 5th, he would not have terminated the Lost Local job that evening.

Mr. Moler has received training concerning an employee's right to report safety concerns without retaliation. But, he didn't believe the crews' report was made in good faith because “you don't bad-order a consist.” In his nine years with the railroad, other than the April 5, 2012 report, Mr. Moler had never received report of a bad-ordered consist. A single locomotive bad-order does not involve three locomotives lining up. This consideration drove his termination decision.

Even if only one member of the crew was responsible for the bad-order, Mr. Moler was still going to abolish the Lost Local job because he had coached and counseled the crew and the only way to get rid of the crew was to get rid of the job. Due to the length of the process, and because he had been receiving customer complaints, Mr. Moler decided not to initiate an investigation. Instead, he based his termination decision on the content of the e-mail. He held the crew jointly liable. He was not very happy with the report. And, because the bad-order involved all three locomotives, he believed the report could not possibly be true.

Ms. Grabofsky replied to the e-mail at 7:03 p.m. Fort Worth time. However, she was in Montana so in her time zone it was 6:03 p.m. At 8:23 p.m., Mr. Moler provided a response concerning replacement of the locomotives with the engines from the malt train. So, the sequence of events for Mr. Moler was: a) he's going to get rid of the Lost Local job, and b) he needs to find a solution. Finally, Ms. Grabofsky asked whether there was going to be an injury associated with the report. She also advised that the track inspector took no exception to the report of a rough switch at Hobson, which means it was not an issue. During track inspection, a person drives a truck over the track. However, at times, Mr. Moler will want to verify what the track inspector found because rough track can be subjective.

Mr. Moler was periodically evaluated for performance and part of his overall responsibility included safety. The company keeps track of the number of injuries and accidents.

CX 9 is the e-mail notification abolishing the Lost Local job as of Friday, April 6, 2012. Instead, the work would be run off the extra boards. Mr. Moler sent it out in the evening of April 5 at 8:34 p.m., CX 9.

Mr. Moler needed Ms. Grabofsky to support his decision to abolish the job. At the time, through other e-mails, Ms. Grabofsky was aware of the bad-ordered consist. Her response was “good plan.”

In response to the first e-mail about the bad-ordered consist, Ms. Grabofsky asked what was going on and how that affected work the next day.

When Mr. Moler abolished that job, he was only aware of the bad-ordered locomotives.

He made the decision that night in Fort Worth, rather than waiting to return to Great Falls because he “was tired of the customer complaints . . . of the work not getting done . . . of the job not running how it had and should, which is problem free, serving the customers when they’re supposed to be served.” The Lost Local had customers the next day on April 6th. He expected the Lost Local crew to arrive for work on the 6th and then be notified of the abolishment. The crew has to be on-duty to be notified. He had made his decision that Thursday night and decided to implement his decision at that time. It would have been possible to wait until the next Monday.

A “shine” job means the crew has a regular start time, rather than having to be called in, so that they arrive “shiny” on time, every time.

After he abolished the Lost Local job, the customers were serviced by trains off the extra board about a month. Then, in May, due to rising temperatures, the job returned with a 4:00 a.m. start time. However, the Lost Local job was usually moved to early morning hours in June. And, in 2010, due to a mild summer, the starting time was never changed.

During the month in 2012 that the Lost Local job was abolished, “the work got done, the cars got spotted . . . all the excuses were gone.” The Lost Local job was returned a month later due in part to a union complaint about the loss of the job. When he re-instated the Lost Local job, he did not know whether Mr. D’Hooge would return on the crew.

Mr. Moler believed that abolishing the job in April 2012 would solve his problem because the Lost Local had previously run “extremely smooth to the first part of 2012.” If the same crew came back to the Lost Local job after it was reinstated, then Mr. Moler probably would have initiated an investigation and go after their jobs.

[Direct examination – Respondent’s counsel] After working in various industries, Mr. Moler joined the railroad in April 2005. After a year of training, he was assigned to Havre, Montana for three years and came to Great Falls in August of 2009. As a trainmaster, he managed and supervised personnel and deal with customers. He left BNSF in February 2014.

At Great Falls, he supervised the south pool to Laurel, the north pool to Shelby and Sweetgrass, four or five switch crews, a mill line run crew, a night switch job, and the Lost Local crew. He also supervised the yardmasters.

Mr. Moler first met Mr. D’Hooge within a couple months of his arrival in August 2009. At that time, Mr. D’Hooge was on the south pool. He bid into the Lost Local crew shortly thereafter. When Mr. Moler mentioned to Mr. D’Hooge that he went to the Lost Local because they couldn’t download his trip tapes remotely, Mr. D’Hooge laughed and said, “yeah.”

He had a good relationship with Mr. D’Hooge. On at least three occasions in 2010 and 2011, Mr. D’Hooge placed himself in situations that could have been detrimental to his employment and Mr. Moler helped him out of those problems because he liked Mr. D’Hooge

and thought he was a good employee. Absent Mr. Moler's help, Mr. D'Hooge would have suffered adverse employment consequences, up to termination. They both benefited. Mr. D'Hooge kept his job and Mr. Moler kept a good employee.

Mr. Cotton's interaction with crews to ensure an understanding of their work orders was a typical, or standard, practice. During their exchanges, the work orders were clarified. Due to varied nature and frequencies of its routes, the Lost Local job did not fit well into the usual day-to-day work order system. Nevertheless, up to 2012, the Lost Local job worked "rather well."

In 2012, Mr. Moler had frequent discussions with Mr. Cotton about the difficulties they were experiencing with the Lost Local crew. He felt the "full force" of Mr. Cotton's frustrations. Before April 6, 2012, Mr. Moler told the Lost Local crew directly that if the work was not getting done, he was going to have to change crews by abolishing the Lost Local job and run the job off the extra board.

He also discussed the Lost Local problems with Ms. Grabofsky in order not to blind-side her if a customer called. At that time, even though he spent a lot of time making a good schedule for the Lost Local job, Mr. Moler was receiving customer complaints about not getting cars when or where they wanted them.

Recognizing the people have bad days, Mr. Moler took a lenient or soft approach with the crew. He tried to give the Lost Local crew an opportunity to work out their own problems and start serving the customers.

When he arrived in Great Falls in 2009, during the economic downturn, poor customer service and unhappy crews were the norm. Through hard work, and with an increase in the crew base, Mr. Moler was able to fix these issues and the terminal was working well.

Then, in 2012, the Lost Local crew started requiring most of his attention which reduced his focus on other areas, including customer relations, billing, and car usage. The Lost Local crew problems took an inordinate amount of his time.

Based on the number of miles and compensation levels, the union sets the number of people who can work in a pool. More people means more days off.

Although the federal statute provides two days off following a set period of continuous service, an employee usually doesn't know when those two days will occur. Through union negotiations, engineers also got a rest cycle – work seven days, get three days off.

Concerning the personal injury report, CX 3, Mr. D'Hooge arrived in Mr. Moler's office in the afternoon of March 28, 2012 to turn in an injury report. Mr. Moler printed out the form and discussed it with Mr. D'Hooge. He knew Mr. D'Hooge might visit him because the nurse had sent Mr. Moler an e-mail, RX 7.

Mr. Moler doesn't recall the specifics of their conversation about the report. However, if Mr. D'Hooge came in and said he'd been injured during a specific event in October 2011, that

would be a violation of the 72 hour reporting rule, which might jeopardize his job. So, Mr. Moler made sure that Mr. D’Hooge filled out the form in a manner that did not threaten his job. That is, Mr. D’Hooge had been experiencing pain since October 2011 which was a cumulative injury. Mr. D’Hooge was complaining about neck and back pain. Mr. D’Hooge’s report to the nurse wasn’t sufficient because under company rules a personal injury report must be filed with a supervisor.

The personal injury role, CX 3, did not form any basis for his decision to abolish the Lost Local job.

Mr. Moler is “95%” certain that his discussion with the union representative about the Lost Local crew’s inability to get the work done occurred before the Mr. D’Hooge filed his personal injury report. Mr. D’Hooge was in his office on Wednesday and was not at work on Friday, March 30th; he was on paid leave, RX 8. So, in Mr. D’Hooge’s version he would have had to have had the union representative conversation on Thursday, before Mr. Moler went to Fort Worth the next week.

Mr. Moler made the decision to abolish the Lost Local job in the evening of April 5, 2012 because “I had had enough of my attention spent on this job. The problem was ongoing, ongoing, . . . and continuing.” He did not abolish the job due to a reported specific safety complaint. Instead, he “made the decision due to the fact that it was not reported in good faith – you don’t just bad-order three locomotives.” If Mr. D’Hooge had reported both lead locomotives then it wouldn’t have been an issue. But, the bad-ordering of all three engines didn’t make any sense. From his perspective, there was no reason for any member of the Lost Local crew to have ridden in the middle locomotive. And, based in part on his assumption that the crew made the report in bad faith, he abolished the Lost Local job on April 5, 2012.

Mr. Moler acknowledged that his characterization of the bad-ordering of the consist was based on an assumption rather than any information from the crew members on whether that assumption was correct. However, since the locomotives came back after the inspection at Havre with no problems the following Monday, Mr. Moler believed in hindsight that his assumption was correct.

Mr. Moler is familiar with a single locomotive being bad-ordered for rough-riding. That’s not an unusual event. The problem in this case is all three engines in a consist riding rough at the same time.

Mr. Moler could have taken a hard stance and initiated an investigation into the bad-ordering of the consist, which might have led to their termination. But, he took a more lenient approach. He believed that sometimes separation from a job will cause a senior employee to improve his work.

RX 19(a) is the defect log for locomotive #2723. On April 5, 2012, it was reported at 11:21 a.m., or 10:21 a.m. mountain time, by the crew for an extreme rough ride at Judith Gap. The report shows the defect was repaired and a comment indicates the defect was closed to more severe or earlier reporting. The report doesn’t demonstrate the absence of a defect.

RX 19(b) is the defect log for locomotive #2901. It shows a “safety alert” based on a crew’s report of rough-riding. But, after inspection, the defect was cleared. Mr. Moler believes that report shows that locomotive #2901 was okay.

RX 19(c) is the defect log for locomotive #2982. It shows the same rough-riding and repaired status, and clearance. The inspection notes no defects found on inspection. That comment is not present on RX 19(a) for the middle engine.

By abolishing the Lost Local job, Mr. Moler did not retaliate against Mr. D’Hooge in any way. Retaliation is not a good business practice.

Every year, Mr. Moler had to certify his compliance with BNSF’s code of conduct and non-discrimination standards. In regards to his dealings with Mr. D’Hooge, Mr. Moler believes that he complied with those standards.

In his mind, retaliation would have been an intention to fire Mr. D’Hooge for a report. Mr. Moler finds the claim of retaliation difficult to understand because he went “above and beyond to treat all my employees well.” He doesn’t retaliate.

[Cross examination – Complainant’s counsel] At the time, based on when he received the dispatcher’s e-mail, part of his thought process was that the crew waited until the end of the day to report the consist. If the crew reported the problem at 10:21 a.m., Mr. Moler can’t explain why the dispatcher waited six hours to send the e-mail to Mr. Moler about a Level 8 defect, which would have required the consist to stop at that time.

CX 22 is a more complete defect log for locomotive #2723 and contains an entry dated March 28, 2012 noting a rough-riding defect and that it shouldn’t be used as a lead engine, which meant it had to be used as a middle engine in a consist. The defect was reported by the Lost Local crew, “LM18661.” Eventually, the mechanical shop cleared the locomotive. “No dyno” means no dynamic braking.

Mr. Moler agreed that whether a locomotive is rough-riding is a subjective call to be made by the engineer.

Mr. Moler can not prevent a senior employee from working by abolishing a job.

Mr. Moler believes the Lost Local crew members were lying about the consist.

**Mr. David E. Cotton**  
(TR, pp. 438-514)

[Direct examination] Mr. Cotton is a yardmaster for BNSF in Great Falls. As a yardmaster, Mr. Cotton informs crews how to build a train, provides work orders, and advises the crew of any changes to work orders. He is a union employee. He has previously worked as a conductor or brakeman on the Lost Local about 20 to 30 times when he was called off the extra board to replace a crew member who was sick or on vacation.

Mr. Cotton knows Mr. D'Hooge and has worked with him in the past. He believes Mr. D'Hooge started with the Lost Local job around 2005. In the early spring of 2012, the Lost Local crew consisted of Mr. D'Hooge, Mr. Nicholson as conductor, and Mr. Sattoriva as brakeman. Around that period, Mr. Cotton started having problems with the crew not delivering cars, failing to properly spot cars, and refusing work on the basis that it wasn't their job. Also, on jobs that took other crews a day or two to complete, the Lost Local crew took two to three days. As a supervisor and scheduler, he spoke to them on several occasions about these issues. They usually responded with that was just the way it was.

On one occasion, a customer saw that the cars were present and asked the crew to wait three or four minutes for a track machine to clear. However, the Lost Local crew just left the cars where they were and didn't spot them up. As a result, Mr. Cotton had to send them out the next day to spot the cars.

On other occasions when the Lost Local crew didn't finish work, Mr. Cotton would have to call out another crew for the night shift, or on the weekends, to complete the work.

In addition to begging the crew to get the work done, he also talked to Mr. Moler about the performance issues. The crew would respond that they would see what they could do. He spoke to all three members of the crew and did not deal with just one individual.

During the day, Mr. Cotton can contact the crews through the dispatcher on the radio. Usually, he speaks with the engineer.

At times, he would see the Lost Local crew return early in the afternoon to the yard by van claiming they came back because they did not have enough time to finish the route without going dead, when they still had a few hours left on their shift.

Several times, Mr. Cotton told the Lost Local crew that if they weren't going to get the work done, then the job would be abolish and he would use the extra board. He sought immediate improvement but the problems stretched on for about a month with Mr. Cotton advising Mr. Moler that they were going to improve. In their conversations, Mr. Moler said they should just get rid of Lost Local job. However, while he agreed, Mr. Cotton would still respond with his hope that the Lost Local crew would get better. He also hoped they could make it to the summer change of hours which would lead to a different crew running the Lost Local. And, then hopefully in the fall, someone else would get the job.

Finally, after being particularly frustrated when the Lost Local crew refused work at Conrad because they believed the grain train should pick up the empty cars, Mr. Cotton told Mr. Moler to go ahead and cut the job because they ignored his clear instructions and consequently failed to serve a customer. The refusal wasn't based on lack of hours or any conflict.

He received several phone calls on at least a weekly basis from upset customers about the service the Lost Local was providing. He passed those complaints on to the crew at their morning briefing.

Concerning an incident about spotting cars, Mr. Cotton contacted the crew as he received the customer's complaint that the crew was unwilling to spot the cars because the customer was not ready and they refused wait four minutes for the customer to clear the track. The crew advised that they were already on the way back. When Mr. Cotton spoke with the Lost Local crew the next day, they again explained that since the customer wasn't ready, they just left the cars. Nevertheless, Mr. Cotton expected that they should have waited a few minutes for the customer to get ready. Other crews have waited up to an hour. So, that was not an unusual request by any means. The Lost Local crew's explanation was not acceptable. They should have done it right and provided service to the customer. As a result, Mr. Cotton had to send a crew out the next day to spot up the cars, and the customer got his cars late.

Their attitude appeared to be getting as little done as possible. So, the work wasn't getting done.

One day, in Fairfield, a fertilizer car needed to be spotted in a special location. It was a two day trip with the crew returning to Great Falls in between. Although they had specific spotting instructions to a different customer, they shoved all the cars into another customer's usual delivery location and left. After the affected customer complained, Mr. Cotton had to send the crew back out for a third day to fix the problem. Mr. Cotton is 90% certain that the crew should have known the correct spot because it would have been on the work order. When he talked to the crew about the incident, they provided a nonsensical answer - how where they suppose to know where to spot it?

Mr. Cotton's job became very stressful due to the increase in customer complaints. He was frustrated and losing his interest in keeping the Lost Local job. When Mr. Cotton had had enough, Mr. Moler said he was going to talk to them and see if he could get them to do better. In hindsight, the job should have been cut months earlier.

On another occasion, past the middle of March 2012, the Lost Local crew was asked to pick up empty ballast cars in Vaughn which had been sitting in storage for several months. But, with the weather warming, the cars needed to be filled for upcoming ballast work. So, Mr. Cotton asked the crew to pick up the cars. The crew didn't do it. Mr. Cotton again asked the crew that although the cars were not on the work order to please pick up the empty ballast cars listed on a printed sheet of paper on their way back. They didn't do it. The sequence happened again the following week. Finally, on the fourth trip, they picked up the cars. Every time that they didn't bring the cars in, the Lost Local crew claimed they were short on time, even though "they'd come in with three to four hours to spare, more than enough time to make it." Mr. Cotton specifically responded to their excuse by asking, "How could you not have made it? You're only half an hour out of town, it only takes an hour, and you guys tied up with three to four hours to spare."

This series of events was unacceptable, especially considering his daily pleas for the crew to pick up the cars.

Mr. Cotton denied ever telling them even once to just run the work and return without the cars.

RX 17(a), page 8; (b), pages 9 and 10; and (c), page 9 are work orders for March 19, 20, and 26, which shows the order to pick up 49 ballast cars in Vaughn. Since the cars were already lined up, it was a one hour job at most.

Mr. Cotton spoke to Mr. Moler about these incidents. He also told the union representative about his concerns and that the Lost Local job was close to being cut. The union would not want to lose that regularly scheduled job.

Throughout his career since 1996, Mr. Cotton has never heard of an entire consist being bad-ordered. He was shocked because that situation would be very unusual. Since the crew is required to be in the front, or head, engine and would not have been riding in the middle engine, he couldn't figure out how the crew bad-ordered the center locomotive. At the same time, Mr. Cotton acknowledged that he didn't actually know what happened with the three locomotives on that day or what the crew actually experienced.

RX 13 is the Lost Local's work order for April 5, 2012. The order shows on page 7, that locomotive #2901 is the lead engine going south. The middle engine is locomotive #2723. And the rear engine in the consist heading south is locomotive #2982, which would be the lead engine going back north.

Mr. Cotton supported Mr. Moler's decision to abolish the Lost Local job because the problems with getting the work done had persisted for months. And, when they bad-ordered the consist, there would not be any power to run the Lost Local job the next day at 7:00 a.m. He learned of the decision the following Sunday night when he talked to Mr. Moler.

A bad-ordered engine removes the locomotive from service because to operate it would be unsafe.

By Sunday, the locomotives had been inspected and they were still good engines.

After the Lost Local job was abolished, its work was run off the extra board. The customers were pleased with the work getting done. From a customer service perspective, the abolishment of the Lost Local job was a good business decision.

[ALJ examination] Although the work was going well using crews off the extra board, the Lost Local job was still brought back after the summer months because manpower off the extra board was tight and they weren't sure they could get a full crew everyday. That wasn't an issue with the regularly assigned Lost Local job; it could run five days a week.

[Cross examination] When the Lost Local job was restored in May for the early morning hours, Mr. Cotton was unaware that Mr. D'Hooze was on the work retention board. The minimum stay on the work retention board is 30 days. After that period, he would have had a chance to get back on the Lost Local job.

Mr. Cotton felt that he had some influence but the decision to abolish the Lost Local job was to be made by Mr. Moler with consultation with Ms. Grabofsky.

Based on their different schedules, at times, the Lost Local crew returned to the rail yard after Mr. Cotton left work.

On April 5, the Lost Local crew did not decline a task that was not on the work order; they performed the work. Considering the train's route that day, any reference to Kershaw on the work order was incorrect. Mr. Cotton talked with the conductor that day about that issue. The work orders are not always correct or reliable.

Picking up the ballast cars in Vaughn involves several steps: a) back the train onto a siding, b) set the handbrake of each car in the train, c) uncouple the locomotive, d) couple and air test the ballast cars, e) pull out the ballast cars, f) couple the train, and g) inspect the train. This process takes 30 minutes to an hour for 49 cars.

BNSF employees are expected to report any safety hazards that they encounter.

[Redirect examination] Even though Mr. Cotton may have left the yard before the Lost Local crew returned, computer records provided information about when they tied up at the end of the day.

On a daily basis, Mr. Cotton and the Lost Local conductor would go over the work order and specifically address what work actually had to be accomplished. If necessary, he augmented the work order with a printed list of additional cars that needed to be delivered or picked up.

Every time Mr. Cotton asked the Lost Local crew to pick up the ballast cars, he determined they had sufficient time to make it in before the end of their shift.

[Recross examination] Had the crew radioed in after 2:00 p.m., they would have spoken to someone other than Mr. Cotton.

**Ms. Grace S. Grabofsky**  
(TR, pp. 514-572)

[Direct examination] Ms. Grabofsky started her railroading career in 1989 as a switchman/brakeman. Since then, she has worked various jobs including conductor, engineer, trainmaster, terminal manager, and superintendent of operations. She is presently the manager of transportation training. For a period of time, she was called off the extra board in Great Falls to fill in on the Lost Local job. In the spring of 2012, Ms. Grabofsky was the superintendent of operations. In that capacity, she hired and placed individuals in positions to handle day-to-day operations, and supervised trainmasters in several locations, including Mr. Moler in Great Falls. In that professional relationship, Ms. Grabofsky expected to be advised of any problems with customers and getting traffic over the road. She spoke to Mr. Moler a couple times a week.

In the first couple of months of 2012, Mr. Moler began bringing issues to Ms. Grabofsky's attention concerning the Lost Local crew. He was receiving customer complaints about cars not being delivered and the crew dragging their feet. Mr. Moler and Ms. Grabofsky discussed that

with summer months coming they could re-bulletin the job and be “ahead of the game” in making sure the traffic continued to move.

Ms. Grabofsky was aware of the Vaughn ballast car issue because maintenance had advised her the cars were needed and asked, “Where’s my cars?”

Ms. Grabofsky also knew about the bad-ordered consist.

Ms. Grabofsky advised Mr. Moler to work with the Lost Local crew and the local union to resolve the performance issues. Due to seniority, the crew can remain, so one way to deal with the issue is to abolish the job as a last resort. However, they brought back the Lost Local job because they were running out of people in Great Falls. Even though the same individuals might return to the crew, management could again note that if they did not get their work done the job would not remain. Another process involves an investigation of an employee to see if the person is doing his or her job properly. In this case, because Mr. Moler had already talked about getting ready for the summer hour change, they abolished it, used the extra board for the crew, and then brought the job back with summer hours. An investigation can subject an employee to discipline that would be reflected on his or her employment record. So, abolishing the job rather than conducting an investigation was a form of leniency. Mr. Moler worked with the union throughout this process.

On occasion, jobs are abolished if circumstances change. For example, the change in hours for the Great Falls Lost Local job. The Lost Local job was one of the best, and highest paying, jobs coming out of Great Falls.

Ms. Grabofsky learned of the bad-order locomotives by e-mail, CX 10(a). She didn’t understand how all three locomotives in the consist could be bad-ordered – “it doesn’t happen.” While a bad-ordered consist was feasible, according to the rules, the crew only rides in the lead locomotive if it has three seats. In the event there are not enough seats, since the conductor and the engineer should always be in the lead locomotive, the brakeman could go back to the second, or middle, power unit. However, in her experience, the locomotives have three seats. Consequently, no one in the Lost Local crew should have been in the middle locomotive.

Ms. Grabofsky acknowledged that she was not on the Lost Local consist on April 5, 2012. So, she doesn’t know whether the crew experienced rough-riding in those three locomotives that day. Ms. Grabofsky is aware that on some crews the brakeman rides in the middle engine. However, if she discovered that situation, Ms. Grabofsky would explain that by rule they can’t ride in the third (middle) unit if there are enough seats in the lead locomotive. If they violated the rule during a random operations test, it would be cited as a failure; a second violation would lead to an investigation.

Ms. Grabofsky asked about the work the next day because if no replacements were available, it was going to be a shuffle and require waiting for available power. Mr. Moler's solution was to use the malt train locomotives.

Additionally, if the crew was reporting rough track, she wanted Mr. Moler to have paperwork ready to go in case there was an associated injury due to the ride quality of the bad-ordered locomotives. Bad-ordering of an engine has a safety component.

CX 9 is Mr. Moler e-mail notification that he was abolishing the Lost Local job. He was not required to get Ms. Grabofsky's direct approval; however she retained the authority to stop the abolishment. But, she believed Mr. Moler had a good plan in place. He had explained what he was going to do and how he was going to run the work on the Lost Local route and service the customers once the bad-ordered locomotives were returned. Consequently, she responded, "good plan."

During these e-mail exchanges, Ms. Grabofsky was in Montana. As a result, the time stamps on her responses are mountain time, an hour earlier than central time. When Mr. Moler sent out the e-mail abolishing the job, Ms. Grabofsky had not yet advised him of the rough switch incident. The first e-mail chain started with the dispatcher notice of the bad-ordered engines. The second e-mail chain involves the bad switch at Hobson which she initiated.

Ms. Grabofsky supported Mr. Moler's plan to abolish the job because due to the loss of three locomotives, they were going to have to service the Lost Local customers after the malt train came in with crews off the extra board. In that situation, the Lost Local job with a morning start time was no longer possible. The route was run from the extra board from April 6 to May. During that period, the customers were served and the yardmaster received no complaints.

The Lost Local job was brought back on May 8th in the early morning due to crew issues associated with the small terminal at Great Falls. They decided to get regular people back on the job with a regular schedule. That way, they could make better use of the extra board. It was brought back with a 4:00 a.m. start time because of warm weather restrictions. The branch lines were old tracks and were adversely affected by summer heat over 85 degrees.

The abolishment of the Lost Local job did not cause the crew to lose seniority and they were allowed to exercise a bump and take another job. The crew's intangible benefits also were not affected. The switch job at Great Falls had the same regular hours as the Lost Local crew, but it paid less.

RX 1 is BNSF's Code of Conduct. It requires employees to be honest and report what they see. It also contains a non-retaliation provision, RX 2. If an employee reports something, it can't be held against him. The company wants employees to report safety issues so the company can correct them. Bad-ordering an engine is "absolutely" a safety issue. The disciplinary guide, RX 3, is also applicable to BNSF employees.

While on occupational disability, Mr. D'Hooge remains a BNSF employee.

Another reason that she agreed with Mr. Moler about abolishing the Lost Local job was that the crew was not getting the work done. Mr. Moler was having issues with job performance and Ms. Grabofsky supported his decisions. The job was not abolished for a safety concern. Mr. Moler did not abolish the job due to any type of retaliation. It was just a business decision – “we have to service our customers” and “get this work done.” For BNSF, safety is more important than business.

[Cross examination] After the job was abolished, the crew for the Lost Local route on April 9th came from the extra board.

The decision to abolish the job was made on Thursday night so that when the crew came on-duty on Friday morning, they would be notified according to the union agreement.

“We didn’t abolish the job because they bad-ordered the engines. We abolished the job because they weren’t getting the job done.”

Ms. Grabofsky has presided over a couple of investigations. An investigation was an viable option instead of abolishing the job. However, they wanted to handle the situation in-house with Mr. Moler. She did not feel strongly enough about an investigation to countermand Mr. Moler’s decision to abolish the job.

BNSF provides training on handling safety complaints. The supervisor who receives the report does not get to decide whether it was made in good faith. Instead, it’s handled as a safety complaint.

Mr. Moler decided to abolish the Lost Local job and she left the decision to him. He didn’t need her approval.

At the time she was receiving Mr. Moler’s e-mails on April 5, 2012, she was aware of the report of the rough switch at Hobson.

As part of BNSF’s coaching and counseling process concerning performance problems, supervisors are expected to document their efforts.

In the 1990s, BNSF abolished a job on which Ms. Grabofsky was the engineer even though customers still needed to be serviced. And, they abolished the Lost Local job every summer to move the work to cooler hours.

An employee must remain on the work retention list for 30 days.

**Employee Personal Injury/Occupational Illness Reports<sup>9</sup>**  
(CX 1 and CX 4)

On March 28, 2012, Mr. D’Hooge reported that due to rough-riding locomotives over the course of six months, he first noticed soreness in his neck and low back pain in October 2011 and had been treated by Dr. Bloemendaal for the condition in December 2011.

On April 24, 2012, Mr. D’Hooge reported that on April 23, 2012 he experienced shooting pain in his lower neck and back at milepost 105.9 when passing over rough track the locomotive bounced violently up and down, bottoming out the spring travel.

**Dr. J. W. Bloemendaal Letter**  
(CX 5)

On May 1, 2012, Dr. Bloemendaal summarized Mr. D’Hooge’s medical treatment for neck and right shoulder pain.

Initially, in that the “latter part of 2011,” Mr. D’Hooge, who worked on the railroad for 38 years, presented with right shoulder and neck pain and received an injection in his right shoulder which at best provided minimal relief. When Mr. D’Hooge returned in December 2011, x-rays revealed degenerative changes in his cervical spine. Suspecting a herniation, Dr. Chung ordered a cervical MRI which showed “rather severe” degenerative disc disease at C4 through C7-T1, with significant stenosis at C6 and C7. Since Mr. D’Hooge had also reported significant low back pain, a lumbar MRI was also accomplished and disclosed degenerative changes in the low lumbar spine with a small disc protrusion at L5-S1.

Although Mr. D’Hooge would receive therapy for his neck and shoulder, Dr. Bloemendaal opined that Mr. D’Hooge was “certainly not a candidate to continue to work on the railroad as an engineer” due to the “fair amount” of associated “rough-riding and vibration.”

**E-Mail- April 5, 2012**  
(CX 9)

At 8:34 p.m. (central time), Mr. Moler advised the Great Falls’ operation group that he needed someone to notify the Lost Local crew the next day that he had annulled the Lost Local job as of Friday, April 6, 2012. He further directed that the Malt power (locomotives) be used with a crew off the extra board until the bad-ordered locomotives were returned. After return of the Lost Local engines, the job would still run off the extra board.

At 7:36 p.m. (mountain time), Ms. Grabofsky replied “good plan.”

---

<sup>9</sup>While I have read/reviewed all the admitted exhibits, I have only summarized the potentially relevant content.

**E-Mail – April 5, 2012**  
(CX 10(a))

At 6:49 p.m. (central time), Mr. Herseim advised the Great Falls' operations group that the Lost Local crew had bad-ordered locomotive #2982, locomotive #2723, and locomotive #2901. All three locomotives were "level 8" and being sent to Havre. He added, "need replacements bad."

At 7:03 p.m. (mountain time), Ms. Grabofsky asked whether all three locomotives were bad-ordered; what was going on; and what was available for the next day?

At 8:23 p.m. (central time), Mr. Moler responded that the Malt power could be used.

At 7:36 p.m. (mountain time), Ms. Grabofsky asked if the situation would lead to an injury. She also noted that a rough switch had been reported at Hobson but the inspector took no exception.

**E-Mail – April 7, 2012**  
(CX 11)

At 6:29 a.m., Ms. Martin advised multiple individuals and operation groups the division's availability was 70% - engineers, 71% - conductors, and 68% - brakeman.

At 9:48 a.m., Mr. Moler advised that the Lost Local had been abolished on Friday and queried what needed to be done to get the crew off the job.

Ms. Marin thanked Mr. Moler and directed "Admin." to remove the crew off the job since it was abolished on Friday.

Mr. Crookston responded that the crew had been removed and placed on the bump board.

**E-Mail – April 25, 2012**  
(CX 12)

On April 25, 2012, Mr. Akins, the BNSF Mountain Division crew manager, asked Ms. Grabofsky whether there would be an extra local everyday. He observed "seems like we've run a lot of them off the extra board – maybe it's time to bulletin the job there."

Ms. Grabofsky responded that since the Lost Local was abolished they had to run off the extra board. They were considering possibly running the Lost Local at night.

**E-Mail – May 8, 2012**  
(CX 13)

Mr. Moler announced to the Great Falls' operations group that the Lost Local would be called at 4:00 a.m., starting the next day, May 9. The decision was not negotiable with the crews.

**E-Mail – April 26, 2012**  
(CX 14)

Mr. Moler informed Mr. Akins that Mr. D'Hooge was going to the work retention board on May 1, 2012.

**E-Mail – October 22, 2012**  
(CX 15)

Mr. Akins advises that Mr. D'Hooge has requested payment for his 11 "PLDs" in lieu of time off.

**April 5, 2012 Radio Transmission**  
(CX 16)

At 12:52 p.m., Mr. D'Hooge in locomotive #2901 reported to the BNSF Branchline dispatcher rough track conditions at the Hobson<sup>10</sup> north switch. After confirming the location was about Milepost 130, the dispatcher indicated that he will call-in the report.

**E – Mail – June 26, 2013**  
(CX 17)

Mr. Moler advised Mr. Akins that it was time to change the Lost Local start time to 4:00 a.m. to begin as close as possible to July 1.

**E – Mail – November 19, 2013**  
(CX 18)

Mr. Moler asked whether the Lost Local could be set up as a shine job. Mr. Akins responded that he had set the work as a shine job.

---

<sup>10</sup>Hobson is located at milepost 129.9; Great Falls is located at milepost 224.5, RX 14.

**Defect Report – Locomotive #2723**  
(CX 22 and RX 19(a))

On March 28, 2012, at 11:56 p.m., a level 8 safety alert was issued at “DUTTON MT” because the crew reported that the unit was extremely rough-riding and should not be used as a lead locomotive. An inspection was needed.

On April 5, 2012, at 11:21 a.m. (mountain time),<sup>11</sup> another safety alert was issued at “JUDGAP MT”<sup>12</sup> because the crew again reported an extremely rough ride. This report was closed by maintenance at the same time and date due to the earlier, and apparently still pending, March 28, 2012 defect report.

On April 9, 2012, maintenance at Havre reported that an inspection of the springs, wheels, bolster pads, and side bearing clearance had been conducted and equipment was found to be “ok.” No defects were found.

**2011 Code of Conduct (Sections 3 and 4) and BNSF EEOC Policy**  
(RX 1 to RX 3)

BNSF employees are required to report actual or apparent violations of the law, and the BNSF Code of Conduct; as well as suspected or known instances of retaliation. Reports may be made to supervisors, company officials, the BNSF hotline, and federal agencies. In addition to being a violation of law, retaliation for good faith reporting also violates the BNSF Code of Conduct.

**E-Mail – December 28/31, 2011**  
(RX 7)

Ms. Carrie Wallace left a voice mail for Mr. Scott Jacobsen, claims manager, on December 28, 2011. On December 31, Mr. Jacobsen informed Mr. Moler that Mr. D’Hooge indicated he was being treated for cervical pain which he related to his work on BNSF. However, the company had no report of injury in their system. Mr. D’Hooge’s physician ordered physical therapy twice a week. Mr. D’Hooge was concerned about lost pay and his work availability. If physical therapy doesn’t succeed, an MRI would be obtained. Mr. Jacobsen told Mr. D’Hooge that he needed to discuss his concerns with Mr. Moler.

**Crew Work History – Mr. D’Hooge**  
(RX 8)

On March 30, 2012, Mr. D’Hooge was on leave.

---

<sup>11</sup>Based on Mr. D’Hooge’s credible testimony that the Lost Local crew left Moore around 11:00 a.m., mountain time, and that the evidentiary record establishes that all three locomotives were bad-ordered on the return trip north, I find the appropriate time zone is mountain time.

<sup>12</sup>Judith Gap is located at milepost 102.1, RX 14.

**Lost Local Work Orders – March and April 2012**  
(RX 13 and RX 17)

On March 19, 2012, the work order for the Lost Local included picking up 49 ballast cars at Vaughn.

On March 20, 2012, the work order for the Lost Local included picking up 49 ballast cars at Vaughn.

On March 29, 2012, the work order for the Lost Local included picking up 49 ballast cars at Vaughn

On April 5, 2012, the work order for the Lost Local listed a consist with the following power: Locomotive #2901, Locomotive #2723, and Locomotive #2982.

**BNSF Earning Statements – Mr. D’Hooge**  
(RX 16)

In January, February, and March 2012, Mr. D’Hooge’s monthly pay averaged \$8,195.<sup>13</sup> In April 2012, his monthly pay was \$7,289.<sup>14</sup> In the month of May 2012, Mr. D’Hooge received \$2,110<sup>15</sup> as ”extra board guarantee,” and \$609 for personal leave. In June 2012, Mr. D’Hooge received \$6,890<sup>16</sup> in vacation pay. In his last pay period, July 1 to 15, 2012, Mr. D’Hooge received \$255 in vacation pay.

**Defect Report – Locomotive #2901**  
(RX 19(b))

On April 5, 2012, at 11:14 a.m. (mountain time), a level 8 safety alert was issued at “JUDGAP MT” because the crew reported an extremely rough ride.

On April 10, 2012, under the “repaired” column, maintenance at Havre annotated the following: “inspect wheels, sprin[g]s, shocks, bolster pads, [and] side bearing clearance.”

---

<sup>13</sup>(\$4,626 + \$4,172) + (\$3,799 + \$3,904) + (\$4,167 + \$3,917)/3.

<sup>14</sup>\$3,528 + \$3,761.

<sup>15</sup>Based in part on Mr. D’Hooge’s testimony, \$1,055 x 2.

<sup>16</sup>\$3,062 + \$3,828.

**Defect Report – Locomotive #2982**  
(RX 19(c))

On April 5, 2012, at 11:21 a.m. (mountain time), a level 8 safety alert was issued at “JUDGAP MT” because the crew reported an extremely rough ride.

On April 9, 2012, maintenance at Havre indicated that an inspection of the shocks, wheels, bolster pads, and side bearing clearance for rough-riding revealed no defects; the items were “ok.”

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**Credibility Determinations**

Based on their demeanor, direct answers, and lack of equivocation, I find the sworn testimony of Mr. Moler, Mr. Cotton, and Ms. Grabofsky probative. Further, I consider any associated testimonial inconsistencies to be attributable to incomplete recollections rather than purposeful inaccuracies.

Concerning Mr. D’Hooge’s demeanor, on one or two occasions during Respondent’s counsel’s cross-examination, he became agitated, professed confusion with the inquiry, and then used inappropriate language.<sup>17</sup> Upon review of these exchanges, due to the periodic absence of specificity and associated rapid questioning, I find Mr. D’Hooge’s confusion, albeit not his language, was warranted. As a result, I do not consider these infrequent outbursts to be an adverse reflection on his credibility.

I have also considered a significant incongruity in his testimony. Specifically, Mr. D’Hooge acknowledged that he and Mr. Moler had a good working relationship; and when he filed his March 28, 2012 personal injury report Mr. Moler did not intimidate, threaten, or reprimand him at that time for submitting the report. Instead, Mr. D’Hooge testified that Mr. Moler was very helpful with his personal injury report. Yet, during the hearing, and contrary to his deposition testimony, based on the union representative’s statement to him that Mr. Moler said to knock this “shit” off or he would abolish the Lost Local job, Mr. D’Hooge nevertheless adamantly insisted that the personal injury report was a contributing factor in Mr. Moler’s decision.

On its face, Mr. D’Hooge’s testimony appears to be referring to two starkly different Mr. Molers: a supervisor who helped him file that personal injury report, and a supervisor who subsequently threatened his job for filing the same report. While considering the temporal proximity between the two events, and Mr. D’Hooge’s explanation that the union representative was looking right at him, I reconcile the conflict on the basis that although Mr. D’Hooge sincerely believed he had been indirectly threatened by Mr. Moler, Mr. D’Hooge misinterpreted the actual meaning of the union representative’ “shit” reference, and incorrectly assumed the representative was only talking to him when he addressed the whole Lost Local crew.

---

<sup>17</sup>He was promptly counseled by his attorney and apologized.

Consequently, I do not consider this testimonial conflict to be an adverse reflection on Mr. D’Hooge’s veracity.

Finally, I have considered other inconsistencies between Mr. D’Hooge’s deposition and hearing testimony, concerning the number of seats in the lead locomotive, and the rough track report. Within the context of the entire litigation, I attribute these testimonial disconnects to incomplete recollection rather than deceit.

Accordingly, in light of the above discussion, and based on his earnest demeanor and usually straightforward answers, I conclude that Mr. D’Hooge’s hearing testimony was credible.

### **Testimonial and Evidence Conflicts**

On a few occasions, the record contains varied recollections of conversations and events. To the extent that a conflict in testimony, or other inconsistency, requires a detailed assessment and resolution, I will render a discussion of the issue in *[[italics]]*.

### **Stipulations of Fact**

At the April 1, 2014 hearing, TR, p.10,<sup>18</sup> the parties stipulated to the following facts: a) BNSF is a “railroad carrier” within the meaning of 49 U.S.C. § 20109(a); b) Mr. D’Hooge is a covered “employee” with the meaning of 49 U.S.C. § 20109(a); c) Mr. D’Hooge engaged in activity protected under 49 U.S.C. § 20109(a)(4) when he notified BNSF of an alleged work-related personal injury on or about March 28, 2012; d) Mr. D’Hooge timely filed a complaint with OSHA challenging his job abolishment on September 12, 2012; and e) Mr. D’Hooge appealed the Secretary’s Findings, and filed his objections and request for a hearing on or around October 17, 2013.

### **Specific Findings**

#### **1974 to 2003**

During this period, Mr. D’Hooge acquires nearly 30 years of railroad experience with BNSF and its predecessor Burlington Northern in Montana. He works as an engineer operating diesel locomotives, and shares responsibility for the safe operation of the train with the conductor. Mr. D’Hooge remains on telephone standby, working from a board, or in a pool, of rotating crew members. He works irregular hours, including weekends; and is frequently required to spend nights away from home in a hotel waiting for a return trip to Great Falls. Mr. D’Hooge never knows when he will have a day off or a free weekend. His pay is based on mileage.

---

<sup>18</sup>See also JX 1.

## 2004 to 2011

In 2004, Mr. D'Hooge moves to Great Falls. Subsequently, based on seniority, he becomes the engineer on the Lost Local job. In that capacity, he has regular hours from 7:00 a.m. to 7:00 p.m., Monday thru Friday, with weekends off. He very seldom has to spend a night away from home. And, rather than mileage or by the hour, he is paid for each scheduled workday. Typically, during the summer months, when the starting time for the Lost Local job is changed to the early morning hours due to track limitations caused by high temperatures, Mr. D'Hooge bids on other jobs. However, around September, when the Lost Local job's start time returns to 7:00 a.m., he bids back on the Lost Local.

Typically, when the Lost Local crew reports to work in the morning, the conductor obtains the train's work orders and gives them to Mr. D'Hooge. Then, Mr. D'Hooge and the brakeman get the locomotives, usually a dedicated set, or consist, from the round house and obtain track assignments from the yardmaster. After about two hours of preparation, the train leaves the yard.

In August 2009, with one year of training and three years of railroad experience, Mr. Moler arrives in Great Falls as the trainmaster and supervises 50 people, including Mr. D'Hooge. Mr. Moler and Mr. D'Hooge have a good working relationship. Un-intimidated, Mr. D'Hooge is able to talk honestly with Mr. Moler about his problems. On occasions, Mr. Moler helps Mr. D'Hooge with difficult situations that could have led to detrimental employment consequences. Although Mr. Moler has little railroad experience and did not come up through the ranks, Mr. D'Hooge finds that Mr. Moler treats him fairly and is very helpful. Mr. D'Hooge typically sees Mr. Moler about two to three times week.

BNSF employees are required to report actual or apparent violations of the law, and the BNSF Code of Conduct; as well as suspected or known instances of retaliation. Reports may be made to supervisors, company officials, the BNSF hotline, and federal agencies. In addition to being a violation of law, retaliation for good faith reporting also violates the BNSF Code of Conduct.

## 2011

October Due to rough-riding locomotives and rough track conditions during the last six months, Mr. D'Hooge experiences soreness in his neck and right shoulder, and low back pain. The neck pain radiates down both arms and cause numbness in his hands and fingers. The low back pain is associated with stiffness.

November – December Mr. D'Hooge seeks orthopedic treatment for his neck and shoulder pain. After a shoulder injection provides no more than minimal relief and his problems worsened, his physician, Dr. Chung, orders an x-ray which reveals degenerative changes in the cervical spine. A subsequent cervical MRI establishes the presence of "rather severe" degenerative disc disease at C4 through C7-T1, with significant stenosis at C6 and C7. In response to low back pain, the physician also orders a lumbar MRI which discloses degenerative

changes in the lumbar spine and a small disc protrusion at L5-S1. Subsequently, Dr. Bloemendaal recommends physical therapy for Mr. D’Hooge’s neck and shoulder.

After a conversation with a company nurse, Mr. Scott Jacobsen, claims manager, informs Mr. Moler that Mr. D’Hooge has advised he is being treated for cervical pain which he relates to his work on BNSF. Because his physician has ordered physical therapy twice a week, Mr. D’Hooge is concerned about lost of pay and his work availability. However, the company has no report of injury by Mr. D’Hooge in their system. As a result, Mr. Jacobsen tells Mr. D’Hooge that he needs to discuss his concerns with Mr. Moler.

## 2012

January to March As a Lost Local engineer, Mr. D’Hooge’s monthly pay averages \$8,195.

While the Lost Local job ran like clockwork in 2011, due to recent problems with the crew consisting of not getting cars to customers, taking three days to accomplish two days work, and fighting assignments, Mr. Moler talks with Mr. Cotton about abolishing the Lost Local job.

About once a week, Mr. D’Hooge and the Lost Local crew are dispatched through train work orders to pick up cars, usually containing barley, at Conrad.

*[[According to Mr. D’Hooge, neither he nor his crew ever indicated that picking up grain cars in Conrad was not their job; they never refused work. He never told Mr. Cotton that picking up the grain cars was not their job. If Mr. Cotton actually received such radio communication, it must have come from another crew. Additionally, they were never counseled for refusing work at Conrad.]]*

*Mr. Moler recalls that Mr. Cotton came to him the first part of 2012 upset because the Lost Local crew had called in on the radio and told the yardmaster they were not going to pick up the grain cars because it wasn’t their job, it was the X train’s job.*

*In resolving the conflict between Mr. D’Hooge and Mr. Moler,<sup>19</sup> I first find that Mr. D’Hooge did not make that radio transmission. However, on a daily basis, the Lost Local conductor worked with Mr. Cotton, who was the yardmaster, concerning changes to their work order. Consequently, Mr. D’Hooge’s testimony does not negate the possibility that during a conversation with the yardmaster, the conductor refused to pick up the grain cars. In contrast, Mr. Moler provided fairly specific testimony about his conversation with Mr. Cotton and the content of Mr. Cotton’s concern about the Lost Local crew’s refusal to pick up the grain cars. Consequently, I find Mr. Moler’s recollection more probative about this incident.]]*

---

<sup>19</sup>At the hearing, Mr. Cotton was not questioned about his event.

In the early spring, Mr. Cotton advises Mr. Moler that he is upset with the Lost Local crew because they called in on the radio and told him they were not going to pick up the grain cars at Conrad because it wasn't their job, it was the X train's job.

Another usual job for the Lost Local crew is the delivery of fertilizers cars to Fairfield.

*[[Mr. D'Hooge explained that the Lost Local crew mis-spotted a fertilizer car for a customer in Fairfield because they were unaware of the new customer and the work order did not provide a specific track number. As a result, based on their experience, they left the car in the usual spot for fertilizer car deliveries in Fairfield.*

*Acknowledging that the Lost Local crew was dealing with a new customer, Mr. Moler determined during a computer search that the work order for that date nevertheless set out the specific track location for the new customer's fertilizer car. Rather than follow the specific spotting instruction, and without seeking any clarification, the Lost Local crew mis-spotted the new customer's fertilizer car in the usual spot for fertilizer car deliveries in Fairfield.*

*Mr. Cotton was fairly certain that the Lost Local crew had specific spotting instructions for the new customer's fertilizer car delivery. Rather than follow those instructions, the Lost Local crew shoved the car into to the usual delivery location and left. Due to their mis-spotting error, the new customer complained and Mr. Cotton had to send the Lost Local crew back to Fairfield the next day to correct their mistake.*

*The consensus of Mr. Moler and Mr. Cotton represents the preponderance of the probative testimony, outweighs Mr. D'Hooge's contrary recollection, and establishes that despite specific spotting instructions in their work order, the Lost Local crew mis-spotted a fertilizer car for a new customer in Fairfield.]]*

Although the Lost Local crew's work order contain specific spotting instructions for a new customer's delivery in Fairfield, the Lost Local crew mis-spots the new customer's fertilizer car by leaving it in the usual delivery location for fertilizer car deliveries in Fairfield. Following the customer's complaint, Mr. Cotton sends the Lost Local crew back to Fairfield the next day to correct the mis-delivery. Making clear his frustration with the customer not getting his delivery, Mr. Moler reprimands the crew members for improper spotting.

March 19 Several empty railroad maintenance ballast cars have been sitting in Vaughn through the winter. With the weather warming, BNSF needs the ballast cars to be filled with stone/rock for upcoming repairs on the railroad beds. As a result, track maintenance asks Mr. Moler to make arrangements for the ballast cars to be move, and the Lost Local crew's work order includes picking up 49 ballast cars at Vaughn.

*[[According to Mr. D’Hooge, although the crew was instructed to pick up the ballast cars, the conductor determined that they did not have enough time left in their 12 hour shift to bring in the cars. When the conductor contacted the yardmaster, he was instructed to bring the train into Great Falls without the ballast cars. The next day, Mr. Moler told them that he was agitated with their failure to bring in the ballast cars because the ballast cars were sitting only 10 miles out of Great Falls, the task would have taken no more than an hour, and they had an hour and a half left on their shift. Mr. D’Hooge agreed that Mr. Moler was not wrong, but the conductor made the estimation they would run out of time. Mr. D’Hooge did not recall any other incident involving the pickup of ballast cars or conversations with Mr. Cotton about the pick up.*

*Mr. Moler recalled that the Lost Local crew went past the ballast cars at least twice without bringing them in to Great Falls. On the first occasion, when he asked the yardmaster, Mr. Crockston, about the non-delivery, he was told the Lost Local crew said they didn’t have enough time. He did not have a conversation with the Lost Local crew about having enough time to bring them in. Mr. Moler then talked with the Lost Local crew the next day about the situation and specifically asked them to pick up the ballast cars. When they didn’t return with the ballast cars the second time despite his specific instruction, the Lost Local crew asserted the ballast cars were not on their work order.*

*Mr. Cotton never told the Lost Local to run back to Great Falls without the ballast cars, but he may not have been on shift when they called in. He asked them several times to pick up the cars, which they did the fourth time out. Every time that they didn’t bring the ballast cars in, the Lost Local crew claimed they were short on time, even though “they’d come in with three to four hours to spare, more than enough time to make it.” Mr. Cotton specifically responded to their excuse by asking, “How could you not have made it? You’re only half an hour out of town, it only takes an hour, and you guys tied up with three to four hours to spare.”*

*The Lost Local’s work orders for March 19, 20, and 27 contained instructions to pick up 49 ballast cars in Vaughn.*

*Mr. D’Hooge’s testimony establishes what occurred the first time the Lost Local crew did not pick up the ballast cars. Absent his specific recollection of any other incidents concerning the ballast cars, the testimony of Mr. Moler and Mr. Cotton, as well as the associated work orders, demonstrate that at least twice, the Lost Local crew did not pick up the ballast cars as directed. And, the combined testimony of the three witnesses, coupled with Mr. Moler’s credible denial, shows that Mr. Cotton, rather than Mr. Moler, expressed his opinion about the crew having sufficient time at the end of their shifts to pick up the cars.]]*

In the morning, the Lost Local receives a work order which includes instructions to pick up 49 ballast cars at Vaughn. Later in the day, on their return trip to Great Falls, the conductor determines that they do not have enough time left in their shift to pick up the cars. When the conductor he contacts Mr. Crockston, the yardmaster, he is instructed to bring the train into Great Falls without the ballast cars.

March 20 Track maintenance calls Ms. Grabofsky and asks “Where’s my cars?” Mr. Cotton express his agitation to the Lost Local crew for their failure to bring in the ballast cars. Mr. Cotton asks, “How could you not have made it? You’re only half an hour out of town, it only takes an hour, and you guys tied up with three to four hours to spare.” Mr. Moler specifically asks the Lost Local crew to bring in the ballast cars. The Lost Local work order includes picking up 49 ballast cars at Vaughn.

At the end of the day, in part on the basis that they were short of time, the Lost Local crew does not pick up the ballast cars.

### Spring

*[[Mr. D’Hooge asserted that Mr. Moler never told him that he intended to abolish the Lost Local job prior to the usual time of June or July.*

*According to Mr. Moler, prior to abolishing the Lost Local job in April, and most likely after the ballast car problem, he told the Lost Local crew that if they were not going to get the work done, he would change crews by abolishing the Lost Local job and run it off the extra board.*

*Mr. Cotton testified that he told the Lost Local crew several times that if they weren’t going to get the work done, then the Lost Local job would be abolished and he would use the extra board.*

*Since all three witnesses appear credible, I reach two conclusions. First, in the absence of any other factors, I am unable to resolve the testimonial conflict between Mr. D’Hooge and Mr. Moler on whether Mr. Moler directly advised the Lost Local crew that their job was at risk due to performance issues. Second, Mr. Cotton’s uncontested testimony nevertheless establishes that he advised the Lost Local crew during the spring of 2012 the Lost Local might be abolished and the work run off the extra board if they didn’t show improvement.]]*

On occasions, when the Lost Local crew doesn’t finish their work, Mr. Cotton has to call out another crew for the night shift or weekends to complete the work. Mr. Cotton’s stress and frustration increases as he begins to receive weekly complaints from customers, one of which includes a customer’s disappointment with the Lost Local crew’s refusal to wait a few minutes for him to clear a track for spotting his cars. Mr. Cotton passes the customers’ complaints on to the Lost Local crew. When Mr. Cotton asks the Lost Local crew to get the work done, they respond that they will see what they can do. Several times, Mr. Cotton tells the Lost Local crew that if they weren’t going to get the work done, then the job would be abolished and he would use the extra board. He also tells the union representatives about his concerns and that the Lost Local job was close to being cut.

In discussions about the Lost Local crew’s performance issues with Mr. Moler, Mr. Cotton agrees that the job may need to be abolished. But, hoping for improvement, he opines that the crew may get better. However, following the grain car incident, Mr. Cotton becomes particularly frustrated and tells Mr. Moler that he should go ahead and cut the job because the Lost Local crew ignored his clear instructions and consequently failed to serve a customer. Mr.

Moler responds that he is going to talk with the crew and see if he can get them to do better. During this period, Mr. Moler also informs his supervisor, Ms. Grabofsky, about the customer complaints and the Lost Local crew's work performance issues. They discuss the possibility that with summer months coming up they could re-bulletin the job and be "ahead of the game" in making sure the rail traffic continues to move.

March 28, Wednesday

11:56 p.m. – At Dutton, Montana, the Lost Local crew reports locomotive #2723 as extremely rough-riding, which generates a level 8 safety alert and require an inspection. The shop foreman indicates that he will look into the problem. Until then, locomotive #2723 will not be used as a lead locomotive.

Afternoon - Suspecting that his neck, shoulder, and low back pain are work-related, Mr. D'Hooge meets with Mr. Moler to file a work-related personal injury report in order to protect himself. After a discussion with Mr. Moler, and with Mr. Moler's helpful assistance in making sure the report is submitted as a cumulative injury, Mr. D'Hooge files a work-related personal cumulative injury report indicating that due to rough-riding locomotives over the course of six months he noticed soreness in his neck and low back pain beginning in October 2011 that lead to treatment by Dr. Bloemendaal in December 2011. During this meeting, Mr. D'Hooge does not feel intimidated. Following procedures, Mr. Moler contacts the company nurse about the report.

March 29, Thursday The work order for the Lost Local includes picking up 49 ballast cars at Vaughn.

*[[According to Mr. D'Hooge, after the union representative came out of Mr. Moler's office, the representative informed the Lost Local crew that Mr. Moler said he was going to pull or abolish the job if they didn't "knock this shit off." For two reasons, although he didn't know specifically and also assumed Mr. Moler had been in his office, Mr. D'Hooge believed the referenced "shit" was his personal injury report. First, this exchange occurred on April 1, 2012 after he made his personal injury report. Second, while making his statement, the union representative looked directly at Mr. D'Hooge.*

*Mr. Moler is "95%" certain that his discussion with the union representative about the Lost Local crew's inability to get the work done occurred before the Mr. D'Hooge filed his personal injury report because otherwise the exchange could only have happened on March 29th since Mr. D'Hooge was off the next three days due to leave and the weekend, and Mr. Moler traveled to Fort Worth on Monday, April 2.*

*Although in the credibility determination, I concluded Mr. D'Hooge misinterpreted what "shit" meant, based on an otherwise fairly detailed explanation for his reaction to the comment, I find his testimony that the event occurred after he filed the personal injury report to be more credible. And, since Mr. D'Hooge was away from work on March 30, March 31, and April 1, and Mr. Moler traveled on April 2nd, this conversation must have occurred on March 29th]]*

After the union representative leaves Mr. Moler's office, he tells that Lost Local crew that Mr. Moler stated that he would pull or abolish the Lost Local job if the crew did not knock this shit off.

April Mr. D'Hooge's monthly pay is \$7,289. Because his neck and low back pain does not stop him from working on the Lost Local job, Mr. D'Hooge intends to continue working on the Lost Local until he retires at the end of July 2015.

April 2 Mr. Moler travels to Fort Worth for leadership training.

April 5

Early morning – The Lost Local work order lists a consist with the following power: locomotive #2901, locomotive #2723, and locomotive #2982; all three engines are GP-38 locomotives. The crew includes Mr. D'Hooge as engineer, Mr. Greg Nicholson as the conductor, and Mr. Greg Sattoriva as the brakeman. As the engineer, Mr. D'Hooge sits in right-hand seat of the cab in lead locomotive, which going south to Moore, Montana, is locomotive #2901; the conductor rides in the left-hand seat in the cab. Although the cab has three seats that BNSF expects all three crew members to use, due to the small size of the cab, the brakeman follows his usual practice and rides in the middle engine in the consist, locomotive #2723. The rear engine on the southbound trip, locomotive #2982 is empty. During the southbound trip, Mr. D'Hooge and Mr. Nicholson experience a rough ride in locomotive #2901, and Mr. D'Hooge unsuccessfully attempts to make radio contact.

About 11:00 a.m. to 11:13 a.m. (mountain time) – The Lost Local crew leaves Moore, Montana, heading northbound to Great Falls. On the return trip, since locomotive #2982 has become the lead locomotive, Mr. D'Hooge and Mr. Nicholson again occupy the right and left seats in the cab. Their ride in locomotive #2982 is even rougher than the ride down in locomotive #2901. Shortly thereafter, Mr. Sattoriva comes forward to the lead locomotive and states that he can not ride in the middle engine, locomotive #2723, because its ride is too rough. Because their prior rough-ride report about locomotive #2723 has not yet been resolved, and based on his experience that day with the other two lead engines, Mr. D'Hooge decides that he has had enough and tells the crew that he intends to bad-order the entire consist. They agree with his decision.

11:14 to 11:21 a.m. (mountain time) – At Judith Gap, Montana, mile marker 102.1, due to an extremely rough ride, the Lost Local crew reports a level 8 safety alert for locomotive #2901 and locomotive #2982. The Lost Local crew also reports a level 8 safety alert for locomotive #2723 due to an extremely rough ride. Because the March 28th safety report about locomotive #2723 rough-riding is still pending, this second safety report for the same defect for locomotive #2723 is closed by maintenance.

11:52 a.m. (mountain time), 12:52 p.m. (central time) – while crossing the north switch at Hobson, mile marker 129.9, Mr. D'Hooge experiences an “exceptionally bad” rough ride. Due to the curve of the switch, the lateral movement of the locomotive going over the switch

northbound is more pronounced than the southbound crossing. In consist #2901,<sup>20</sup> Mr. D’Hooge reports to the BNSF Branchline dispatcher that he experienced rough track conditions at the Hobson north switch. After confirming the location of the rough track is about Milepost 130, the dispatcher indicates that he will call in the report.

Afternoon/early evening – Ms. Grabofsky is advised that the Lost Local crew called in a rough track switch at Hobson, and subsequently an inspector took no exception.

About 5:00 p.m. (mountain time), 6:00 p.m. (central time) – The Lost Local crew ties up in Great Falls and ends their shift.

5:49 p.m. (mountain time), 6:49 p.m. (central time) – Mr. Herseim advises the Great Falls’ operations group that the Lost Local crew has bad-ordered locomotive #2982, locomotive #2723, and locomotive #2901. All three locomotives are “level 8” and being sent to Havre. He adds that he badly needs replacement locomotives.

7:03 p.m. (mountain time), 8:03 p.m. (central time) – Not understanding how all three locomotives in the consist could be bad-ordered since that never happens, and considering that based on company rules no one should have been riding in the middle locomotive Ms. Grabofsky asks three questions: a) are all three locomotives bad-ordered, b) what is going on, and c) what is available for the next day?

7:23 p.m. (mountain time), 8:23 p.m. (central time) – Mr. Moler responds that the Malt power can be used.

About 7:25 p.m. (mountain time), 8:30 p.m. (central time) – Because the crew members are in their 10 hours of uninterrupted rest, Mr. Moler does not attempt to contact them. Having never heard of a bad-ordered consist, and due the timing of the bad-ordered report near the end of the crew’s shift, the failure of the crew to bad-order the lead locomotive during the first part of their trip southbound, and considering that no crew member would have been riding in the middle locomotive, Mr. Moler assumes the Lost Local crew bad-ordered the consist at that time of day both to avoid having to conduct a ride quality protocol, and to get out of work the next day with pay, which was Friday, since the company would struggle to find a replacement consist. He concludes their report was made in bad faith.

Mr. Moler is tired of customers not getting serviced by the Lost Local crew, the associated customer complaints, and the Lost Local crew not getting work done. He needs people who can do the job. While well aware of an employee’s right to render a safety complaint without retaliation, Mr. Moler doesn’t believe the crews’ bad-ordered consist report was made in good faith. Since their report could not possibly be true, it is the last straw and final trigger. Mr. Moler has had enough and decides at the moment to abolish the Lost Local job.

---

<sup>20</sup>Although Mr. D’Hooge was actually operating locomotive #2982 as the lead locomotive northbound to Great Falls when he called in the report, the train/consist was identified by the lead locomotive at the start of the trip, #2901.

7:34 p.m. (mountain time), 8:34 p.m. (central time) – Mr. Moler advises the Great Falls’ operation group that he needs someone to notify the Lost Local crew the next day that he has annulled the Lost Local job as of Friday, April 6, 2012. He directs that the Malt power be used with a crew off the extra board until the bad-ordered locomotives are returned. After return of the Lost Local engines, the Lost Local job will continue to run off the extra board.

7:36 p.m. (mountain time), 8:36 p.m. (central time) - Ms. Grabofsky responds “good plan.” She also asks if the situation lead to an injury. She further notes that a rough switch had been reported by the Lost Local crew at Hobson but the inspector took no exception.

April 6 The Lost Local crew reports to work at 7:00 a.m. After being advised that the Lost Local job has been abolished, they continue their work-day with a different set of locomotives.

April 7 to 23 Mr. D’Hooge bumps into the Laurel pool with six other engineers, and continues to work on every sixth train south to Laurel, He is back on telephone standby, with irregular days off, and sometimes has to spend the night in Laurel. Because the trains in the Laurel pool operate at higher speeds, Mr. D’Hooge experiences more violent train movement in the engineer cab.

April 9 Maintenance at Havre inspects locomotive #2723’s springs, wheels, bolster pads, and side bearing clearance, and determines the equipment is “ok,” with no defects noted. Similarly for locomotive #2982, after an inspection of the shocks, wheels, bolster pads, side bearing clearance for rough-riding, maintenance finds no defects and determines the equipment is “ok.”

April 10 Maintenance inspects locomotive #2901’s wheels, sprin[g]s, shocks, bolster pads, and side bearing clearance, but does not annotate its findings.

April 23 On a return trip from Laurel, Mr. D’Hooge experiences an extremely rough track condition at milepost 105.9. The engine bounces violently up and down and bottoms out, causing shooting pain in his lower back.

April 24 Mr. D’Hooge files a personal injury report concerning the rough track incident the day before. Mr. Moler accepts the report and reacts professionally.

April 25 Mr. Akins, the BNSF Mountain Division crew manager, asks Ms. Grabofsky whether there would be an extra local everyday. He observes “seems like we’ve run a lot of them off the extra board – maybe it’s time to bulletin the job there.” Ms. Grabofsky responds that since the Lost Local was abolished they had to run off the extra board. At the same time, they were considering possibly running the Lost Local at night.

April 25 to 30 Mr. D’Hooge switches to the north Shelby pool. However, he continues to experience rough track at higher speeds, and rough-riding locomotives. Mr. D’Hooge eventually concludes that he can’t continue to work due to his neck, shoulder and low back pain.

May 1 Dr. Bloemendaal reports that Mr. D’Hooge is experiencing right shoulder and neck pain associated with degenerative changes in his cervical spine, including “rather severe” degenerative disc disease at C4 through C7-T1, with significant stenosis at C6 and C7. Mr. D’Hooge also has significant low back pain associated with degenerative changes and a small disc protrusion at L5-S1. Although Mr. D’Hooge will receive therapy for his neck and shoulder, Dr. Bloemendaal concludes that Mr. D’Hooge is “certainly not a candidate to continue to work on the railroad as an engineer” due to the “fair amount” of associated “rough-riding and vibration.”

Dr. Bloemendaal also tells Mr. D’Hooge wants to avoid neck surgery, he needs to stop railroading.

Concluding that he is no longer able to work due to his medical condition, Mr. D’Hooge elects to go on the work retention board to give himself time to think about what he wants to do with his situation. While on the work retention board, Mr. D’Hooge receives a flat monthly rate of about \$2,100.

May 8 Due in part to a union complaint, and crew availability issues with running the Lost Local work off the extra board, as well as rising temperatures, Mr. Moler decides to get a regular crew with a regular schedule, and announces to the Great Falls’ operations group that the Lost Local will be called at 4:00 a.m. (mountain time) starting the next day, May 9th.

May 9 The Lost Local job starts operating again with a start time at 4:00 a.m.

June Mr. D’Hooge takes previously scheduled leave, and receives \$6,890 in vacation pay.

July Mr. D’Hooge applies for occupational disability through the Railroad Retirement Board and asks to be placed on a medical leave of absence. Eventually, he receives \$4,100 a month in disability benefits.

Mr. D’Hooge remains very upset about the abolishment of the Lost Local job for which he worked years to obtain. It is the best job in the division, with fixed, regular hours, and fixed days off, that enabled him to make personal plans and see his grandchildren play sports, which he wasn’t able to do with his children. Mr. D’Hooge is able eat, sleep, and get through his days normally. He does not seek counsel or treatment for emotional or physical distress.

Early Fall The Lost Local returns to its non-summer operating hours.

## **2013**

June 26 Mr. Moler advises Mr. Akins that it is time to change the Lost Local start time to 4:00 a.m. to begin as close as possible to July 1.

### **Issue No. 1 – Timeliness**

The FRS, 49 USC § 20901(d)(2)(A)(ii), and 29 C.F.R § 1982.103(d), provide that an allegation of impermissible discrimination under Act and request for relief “shall be commenced” within 180 days after the date on which the alleged FRS violation occurred.

The alleged violation in this case is employment discrimination associated with the abolishment of Lost Local job on April 5, 2012.

As the parties stipulated, Mr. D’Hooge filed a timely FRS complaint with OSHA on September 12, 2012 about the loss of the Lost Local job due to his filing a safety complaint.

Subsequently, on November 5, 2012, Mr. D’Hooge contacted OSHA and further alleged that his job was abolished also because he reported back track conditions, and a work-related injury.

Respondent asserts that because by the time of the November 5, 2012 correspondence more than 180 days had elapsed since the abolishment of the Lost Local job on April 5, 2012, Mr. D’Hooge’s FRS discrimination complaint based on his report of a work-related injury is untimely.<sup>21</sup>

The alleged FRS violation in this case is the abolishment of the Lost Local job on April 5, 2012. Mr. D’Hooge rendered a timely FRS complaint regarding that alleged discriminatory violation. His subsequent November 5, 2012 correspondence with OSHA clearly relates to that timely FRS employment discrimination complaint, and acts as an amendment to the complaint, alleging an additional protected activity as a contributing factor, rather than a new, separate FRS complaint of a new discriminatory violation of the Act by the Respondent. Further, because the amendment was made well before the OSHA completed its investigation, and was addressed in the September 20, 2013 OSHA dismissal of Mr. D’Hooge’s complaint, the Respondent was well aware of the additional alleged protected activity, and has demonstrated no actual prejudice due to the November 5, 2012 amendment.

Accordingly, the Respondent timeliness objection is overruled.

### **Issue No. 2 – Protected Activity**

The second requisite element to establish unlawful retaliation against a whistleblower is the existence of a protected activity. As previously discussed, the FRS protects the following actions which are relevant in this case: Section 20109(a)(4) –notifying in good faith<sup>22</sup> a railroad carrier of a work-related personal injury, and Section 20109(b)(1)(A) –reporting in good faith a hazardous safety condition. Under these provisions, Mr. D’Hooge has alleged that he engaged in

---

<sup>21</sup>“Mr. D’Hooge asserted this report of injury more than 180 days after the job was abolished and it was not timely asserted.”

<sup>22</sup>“[g]ood faith act done.”

three protected activities, the report of a work-related personal injury and two reports of hazardous safety conditions, which contributed to the abolishment of the Lost Local job.<sup>23</sup>

### **March 28, 2012 Report of Work-Related Personal Injury**

Based on the parties' stipulation, Mr. D'Hooge engaged in a protected activity under 49 U.S.C. § 20109(a)(4) when he informed BNSF on March 28, 2012 of an alleged personal injury. Specifically, Mr. D'Hooge notified BNSF through Mr. Moler that he suffered a cumulative injury to his neck and low back with associated stiffness and pain due to his work-related operation of rough-riding locomotives over the course of at least six months, which became first noticeable in October 2011. Additionally, on its face, Mr. D'Hooge's cumulative injury report is clearly work-related and his credible testimony demonstrates that it was made in good faith. His personal injury report is further supported by Dr. Bloemendaal's May 1, 2012 letter which indicates Mr. D'Hooge had degenerative disc disease that would be aggravated by his continued work on rough-riding locomotives. Accordingly, I find Mr. D'Hooge's March 28, 2012 personal injury report was a 49 U.S.C. § 20109(a)(4) protected activity.

### **April 5, 2012 Report of Three Rough-Riding Locomotives & April 5, 2012 Report of Rough Track**

On April 5, 2012, Mr. D'Hooge, as part of the Lost Local crew, called in two reports to the BNSF dispatcher about a rough-riding consist and rough track at the Hobson north switch. To be protected under the FRS, the reports have to involve a hazardous safety condition, and be made in good faith.

The testimony of Mr. D'Hooge, Mr. Moler,<sup>24</sup> and Ms. Grabofsky<sup>25</sup> establish that a rough-riding locomotive notification represents a report of a hazardous safety condition. Likewise, Mr. D'Hooge's description of the rough track he experienced traveling northbound on the curved the north switch at Hobson is sufficient to establish that his report of a rough track was a hazardous safety condition report.

The second requisite component – good faith – is the principal issue in this case because Mr. D'Hooge's rough track and rough-riding consist hazardous safety reports are protected under the FRS only if he reported those conditions in good faith.

---

<sup>23</sup>The evidentiary record also demonstrates a fourth potential protected activity in this case, the Lost Local crew's March 28, 2012 hazardous safety condition report that locomotive #2723 was rough-riding.

<sup>24</sup>A bad-ordered locomotive reported in good faith would involve a safety issue.

<sup>25</sup>Bad-ordering an engine is "absolutely" a safety issue.

In *Davis v. Union Pacific Railroad Co.*, No. 12-CV-2738 (W.D.La. July 14, 2014) (2014 WL 3499228), in an FRS personal injury protected activity case, the court addressed the parameters of “good faith” under the FRS and determined that a plaintiff had to “actually” believe at the time of the protected report the validity of its contents. According to the court, “if the plaintiff did so believe, then his activities were in good faith and protected under the Act.” Likewise, in *Ray v. Union Pacific RR. Co.*, 971 F.Supp.2d 869, 882-883 (S.D.Iowa 2013), relying on ARB dicta,<sup>26</sup> the court concluded that “good faith” requires a complainant to actually believe in the alleged violation that he is reporting. However, in a case concerning an FRS safety violation report under 49 U.S.C. § 20109(a)(1)(A), another federal court in *Worcester v. Springfield Terminal Railway Co.*, No. 2:12-CV-328-NT, slip op. n. 10 (D.Me. March 31, 2014) (2014 WL 1321114), observed “good faith” can mean either: a) the belief must be honestly held,<sup>27</sup> or b) the belief must be subjectively honest and objectively reasonable.<sup>28</sup> After noting two apparent good faith standards in the FRS protected activity provisions, and without determining which definition of good faith was applicable, the court found that under either definition the defendant’s motion to dismiss should be denied.

To resolve this interpretative conflict, I focus on the different, but specific, statutory language of various FRS protected activity provisions. First, 49 U.S.C. § 20109(a)(1) protects an employee’s good faith act of providing information only if the employee also “reasonably believes” the information constitutes a violation of any Federal law, rule, or regulation relating to railroad safety. Likewise, 49 U.S.C. § 20109(b)(1)(B) and (C) protect an employee’s work refusal, and refusal to authorize the use of equipment, due to a hazardous safety condition only if the refusal was made in good faith and a “reasonable” individual in the circumstances then confronting the employee would conclude that the hazardous condition presents an imminent danger of death or serious injury. In contrast, however, 49 U.S.C. § 20109(a)(4), which is applicable in Mr. D’Hooge’s case, protects a good faith report of a work-related injury without adding the objectively reasonable language. Similarly, 49 U.S.C. § 20109(b)(1)(A), which is also applicable in Mr. D’Hooge’s case, protects an employee who reports in good faith a hazardous safety condition without also specifically requiring that the belief be objectively reasonable.

While one federal court noted that the term “good faith” in the FRS may be interpreted two ways, I find the specific language of the various FRS protected activity provisions, coupled with Congress’ apparent deliberative application of the objective reasonableness standard in only three of several protected activity sections, demonstrates a legislative determination that to be protected under the FRS the report of a hazardous safety condition need only to have been presented in good faith. Consequently, to establish that subjective belief component, Mr. D’Hooge must demonstrate that he actually believed the contents of his safety report.<sup>29</sup> As a

---

<sup>26</sup>See *Walker v. American Airlines*, Case No. 05-028 (ARB Mar. 30, 2007).

<sup>27</sup>See *Cheek v. United States*, 498 U.S. 192, 203 (1991).

<sup>28</sup>See *Reid v. Key Bank of S. Me., Inc.*, 821 F.2d 9, 15 n. 2 (1st Cir. 1987).

<sup>29</sup>See *Sylvester v. Paraxel Int’l*, at 14, ARB No. 07-123, ALJ Nos. 2007-SOX-39, 2007-SOX-42 (ARB May 25, 2011), slip op. at 14-15, citing *Harp v. Charter Commc’ns*, 558 F.3d 722, 723 (7th Cir. 2009).

result, I must determine whether D’Hooge’s two reports of hazardous safety conditions were subjectively honest.

Probative evidence of subjective honesty concerning his two safety reports is Mr. D’Hooge’s testimony that he believed the three locomotives in the April 5th consist would have been unsafe to operate the next day, and due to the extra curvature, the Hobson north switch was an unsafe rough track. At the same time, the evidentiary record in this case also contains potentially probative contrary evidence that his reports were not honest and instead were presented in bad faith.

As an initial consideration, Mr. Moler and Ms. Grabofsky asserted that timing, basis, and nature of the bad-ordered consist showed the April 5, 2012 hazardous safety report about the three locomotives was presented in bad faith.

Since he received notice of the bad-ordered consist, which included the lead engine on the southbound leg, after 5:30 p.m., Mr. Moler observed that instead of bad-ordering the lead locomotive as soon as the Lost Local crew became aware of its rough-riding condition while heading southbound to Moore, which would have required the engine to be pulled out of service immediately due the level 8 safety report,<sup>30</sup> the Lost Local crew instead waited until the end of their shift to report the entire consist, including the southbound lead engine. In his opinion, this sequence of events, and in particular the delayed report about the lead southbound engine, showed that the crew acted in bad faith and waited till the end of the day to bad-order the consist so they wouldn’t have time to complete a quality ride protocol before their shift ended, and possibly might be able to get the next day off if BNSF didn’t have enough time to find replacement engines.<sup>31</sup>

However, although Mr. Moler received an unexplained, delayed notice of the hazardous safety condition report, the Lost Local crew actually bad-ordered the consist about half way through their shift, between 11:14 and 11:21 a.m., and not as Mr. Moler assumed at the end of their shift. Further, Mr. D’Hooge credibly explained the timing of the bad-ordering of all three locomotives. First, while southbound and experiencing a rough ride in locomotive #2901, Mr. D’Hooge unsuccessfully attempted to make radio contact. Second, just after leaving Moore and going northbound, the new lead engine, locomotive #2982, was riding even rougher than locomotive #2901 had been coming down to Moore. Third, and significantly, about the same time after leaving Moore, the brakeman, Mr. Sattoriva, announced that he could no longer ride in the middle engine, locomotive #2723, due to its rough-riding condition. Under these circumstances, I find the delayed report of the rough-riding locomotive #2901 is insufficient in probative terms to demonstrate the Lost Local crew’s late-morning rough riding report about the Lost Local consist was made in bad faith.

---

<sup>30</sup>At this point I note that although locomotive #2723 was the subject of a level 8 rough-riding hazardous condition safety report on March 28, 2012, it still remained in service pending an inspection, albeit restricted to use as a middle locomotive in a consist.

<sup>31</sup>“It was a way to get out of working Friday.”

Mr. Moler and Ms. Grabofsky also questioned the integrity of the report based on a BNSF rule that no crew member should have been riding in the middle engine, locomotive #2723, of the Lost Local consist. Consequently, upon learning of the report, they concluded the bad-ordered consist was false on its face since the Lost Local crew would have no knowledge of about the riding condition of the middle power, locomotive, #2723 and thus there was no basis for the crew to bad-order locomotive #2723.

Once again however, their assumption was incorrect since contrary to company rules, Mr. Sattoriva, the brakeman, was actually riding in the middle engine, locomotive #2723, and certainly had a sufficient foundation to report to Mr. D'Hooge as they left Moore hearing northbound that locomotive #2723 was riding so rough that he could no longer tolerate sitting in the engine. As a result, the inclusion of a rough-riding report for the middle engine, locomotive #2723, in the April 5, 2012 hazardous safety condition report does not support a determination that the report was false.

Closely related to the above discussion, neither Ms. Grabofsky, who had nearly as much railroad experience as Mr. D'Hooge, nor Mr. Moler had ever heard of a bad-ordered consist.<sup>32</sup> As a result, in their opinion by its very nature, the Lost Local crew's report of a bad-ordered consist was highly suspect.

Yet, again, these two supervisors made an incorrect assumption because the middle engine, locomotive #2723, had already been bad-ordered on March 28, 2012 and was still pending a maintenance inspection. Thus, in actuality, the Lost Local crew's April 5, 2012 report only contained two new rough-riding complaints about the lead engines, locomotive #2901 and #2982. Based on the Lost Local crew's earlier March 28, 2012 hazardous safety condition report, BNSF maintenance was already aware that the middle engine, locomotive #2723, was rough-riding.<sup>33</sup> On April 5, 2012, Mr. Sattoriva again experienced the previously reported, and apparently unresolved, rough-riding issue with locomotive #2723 that caused its rough-riding safety condition to be again reported that day by inclusion with the two new rough-riding complaints about the lead locomotives in the Lost Local crew's hazardous safety condition report, producing the incorrect appearance that they were bad-ordering all three locomotives in the consist for the first time. Accordingly, the fact that the April 5, 2012 report included all three engines in the Lost Local consist is not particularly probative that it was made in bad faith.

As another consideration, when BNSF maintenance at Havre inspected the three diesel engines, they did not find any defects on at least two of the engines, locomotive #2723 and #2982. Similarly, upon inspection, the track maintenance took no exception to the north switch at Hobson. On an objective level, the inability upon inspection to find any apparent cause for the rough-riding safety report on two of the engines, and rough track at Hobson, may have some probative value.

---

<sup>32</sup>Mr. D'Hooge also acknowledged that he had never before bad-ordered a consist.

<sup>33</sup>Which appears to explain BNSF maintenance's April 5, 2012 annotation reference for locomotive #2723 to an earlier report.

However, as previously discussed, “good faith” does not require that the complaints be objectively reasonable. That is, the inability of Havre maintenance to find a reason for the rough-riding hazardous safety condition report doesn’t establish that Mr. D’Hooge and the other two members of the Lost Local crew did not actually experience an extremely rough ride on locomotive #2901, locomotive #2723, and locomotive #2982 riding down to, and coming back from, Moore, Montana on April 5, 2012. Additionally, as noted by Mr. Moler the determination concerning rough-riding locomotives, as well as rough track, can be subjective. Consequently, I find the inability of BNSF maintenance to determine a cause for the report of rough-riding locomotives and rough track has insufficient probative value to establish that at the time Mr. D’Hooge called in the two hazardous safety condition reports he did not actually believe the north switch at Hobson was extremely rough and all three engines in the consist were riding extremely rough.

Finally, Mr. D’Hooge’s March 28, 2012 cumulative injury report due to rough-riding locomotives may have given him a motive to report about a week later, an entire consist as being rough-riding to further support any potential claim concerning his reported neck and low back injuries.

Yet, Mr. D’Hooge did not make the April 5, 2012 hazardous safety condition report on his own. While Mr. D’Hooge made the radio call, it was Mr. Sattoriva, the brakeman, who found the motion of locomotive #2723 so rough that he was unable to continue riding in it. And, Mr. Nicholson, the conductor, concurred with Mr. D’Hooge’s assessment that the ride of the two lead engines was also unsafe due to rough-riding.

In summary, the potentially contrary evidence, either individually or cumulatively, has insufficient probative value to show that Mr. D’Hooge acted in anything less than good faith when he called in his two hazardous safety reports on April 5, 2012. Accordingly, based on Mr. D’Hooge’s credible testimony, and in the absence of sufficient contrary probative evidence, I find the April 5, 2012 report of rough track at the Hobson north switch and the April 5, 2012 report of three extremely rough-riding locomotives were made in good faith and thus FRS protected activities under 49 U.S.C. § 20109(b)(1)(A).

### **Issue No. 3 – Adverse Action**

Concerning an adverse personnel action or event, in *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008), the ARB determined that the deterrence standard established by the U. S. Supreme Court in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) was applicable in whistleblower cases adjudicated by the U. S. Department of Labor. Previously, a "tangible employment consequence" test had been applied.<sup>34</sup> However, under the *Burlington Northern* adverse standard, to be deemed "materially adverse," an action must be such that it "would well dissuade a reasonable worker from making or supporting a charge of discrimination." Consequently, since the purpose of the employee protection provision is to encourage employees to freely report non-compliance with statutory requirement, the test is whether the employer's action could dissuade a similarly situated reasonable worker from engaging in protected activity.<sup>35</sup>

Respondent asserts the abolishment of the Lost Local job was not an adverse action because Mr. D'Hooge: a) remained a BNSF employee and successfully bid on another job; b) effectively suffered no loss in pay; and c) would have voluntarily relinquished the Lost Local job when its start time changed to the early morning in a few weeks for the summer.

The evidentiary record demonstrates that the terms and condition of the Lost Local job, including regular hours, no overnight stays away from home, and weekends free made that job the "best" in the division. As a result, due to the abolishment of the Lost Local job, in addition to the some loss of pay for the month of April 2012, Mr. D'Hooge's employment situation as BNSF employee worsened because in his follow-on job, he returned to telephone standby on a rotational basis, was subject to working on the weekends, and potentially required to remain overnight away from home. In comparison with the Lost Local job, I find these changed conditions in Mr. D'Hooge's employment sufficiently significant that they would dissuade a reasonable BNSF worker in the Lost Local job from filing a safety report. Consequently, the abolishment of the Lost Local job on April 5, 2012 by Mr. Moler was a materially adverse action.<sup>36</sup>

---

<sup>34</sup>See *Jenkins v. United States Environmental Protection Agency*, ARB No. 98 146, ALJ No. 1988 SWD 2, slip op. at 20 (ARB Feb. 28, 2003) (to be actionable, an action must constitute a tangible employment action; that is, a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits); *Ilgenfritz v. U.S. Coast Guard Academy*, ARB No. 99-066, ALJ No. 1999-WPC-3 (ARB Aug. 28, 2001) (a negative performance evaluation, absent tangible job consequences, is not an adverse action).

<sup>35</sup>*Id.* at slip op. 19-20.

<sup>36</sup>I certainly recognize that Mr. D'Hooge may have subsequently elected to relinquish the Lost Local job, and its associated favorable working conditions, in June or July 2012 for a couple months when it moved to early morning hours for the summer. However, that consideration does not alter the fact that he suffered an adverse action on April 5, 2012 when he was involuntarily forced out of Lost Local job.

#### **Issue No. 4 – Causation**

The ARB recently confirmed that “contributing factor” is “any factor which, alone or in connection with other factors, tends to affect in any way” the decision concerning the adverse personnel action, *Bechtel v. Competitive Technologies, Inc.*, ARB No. 09-952, ALJ No. 2005-SOX-33, slip op. at 12 (ARB Sept. 30, 2011) (citing *Marano v. U. S. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)), *aff'd sub. nom. Bechtel v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 2d Cir., No. 11-4918 (2d Cir. Mar. 15, 2013). In the absence of direct evidence of causation, contributing factor may be proven through circumstantial evidence which may include temporal proximity, indications of pretext, inconsistent application of employer’s policies, and shifting explanations for an employer’s actions. *Bechtel*, ARB No. 09-952, at 13. If a complainant shows evidence of pretext, he may rely on inferences drawn from such pretext to establish by a preponderance of the evidence that protected activity was a contributing factor in the unfavorable personnel action. *Bechtel*, ARB No. 09-952, at 13. Although the ARB has stated that “proof of causation or ‘contributing factor’ is not a demanding standard,” *Rudolph v. National Railroad Passenger Corp.*, ARB No. 11-037, ALJ No. 2009 FRS 015, slip op. at 15, (Mar. 29, 2013), the implementing regulation, 29 C.F.R. § 1982.109(a), definitively states “a determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that a protected activity was a contributing factor in the adverse action alleged in the complainant (emphasis added).”

The determination of contributing factor essentially has two components: knowledge and causation.<sup>37</sup> In other words, the employer must have been aware of the protected activity (knowledge) and the protected activity was a contributing factor in the decision to take the adverse personnel action (causation). Further, knowledge of a protected activity may be either actual or imputed. Regarding the latter category, relying on the “cat’s paw” legal concept of liability recognized in *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011), the ARB has concluded a complainant need not prove the decision maker responsible for the adverse action actually knew of the protected activity if he can establish that any person advising the decision maker on the adverse action was aware of the protected activity. *Rudolph*, slip op at 17.

Notably, under these adjudication principles, “[N]either motive nor animus is required to prove causation under [FRS] as long as protected activity contributed in any way to the adverse action.” *Petersen v. Union Pacific Railroad Co.*, ARB No. 13-090, ALJ No. 2011-FRS-17 (ARB Nov. 20, 2014).

Having established that he engaged in protected activities and suffered an adverse action, to obtain relief under the FRS employee protection provisions, Mr. D’Hooge must establish that one of his three protected activities, March 28, 2012 work-related personal injury report, April 5, 2012 rough track hazardous safety condition report, and April 5, 2012 rough-riding consist hazardous safety condition report, was a contributing factor in Mr. Moler’s decision to abolish the Lost Local job on April 5, 2012.

---

<sup>37</sup>See *Bechtel*, slip op. at 13 (the four elements that a claimant must prove by a preponderance of the evidence are: a) statutorily protected activity, b) employer's knowledge of the protected activity, c) adverse action, and d) contributing factor).

### **March 28, 2012 Work-Related Personal Injury Report**

In terms of knowledge, since Mr. Moler received Mr. D’Hooge’s work-related personal injury report, he obviously had knowledge of that protected activity.

Turning to causation, in the absence of direct evidence, the circumstantial evidence in this case consists of: a) the one-week temporal proximity of this protected activity and the April 5, 2012 adverse action that provides support for a determination that the two events were connected; and b) Mr. D’Hooge’s impression that Mr. Moler was angry about his report because before April 5, 2012 the union representative advised him that Mr. Moler advise that he should knock this shit off.

However, as previously discussed, I believe Mr. D’Hooge misinterpreted the “shit” to which Mr. Moler may have been referring in his conversation with the union representative. Additionally, based on the credible, and more significantly similar, testimony of Mr. Moler and Mr. D’Hooge about what happened in Mr. Moler’s office on March 28, 2012, and while impermissible motive, or intention to discriminate, are not requisite elements, Mr. Moler’s actions on March 28, 20102 in regards to the personal injury report render nonsensical a finding that just a week later he later reacted adversely to the same report. Specifically, according to Mr. Moler and Mr. D’Hooge, Mr. Moler made a significant and professional effort in his office to ensure that Mr. D’Hooge’s work-related personal injury report was prepared in terms of a cumulative injury, rather than a traumatic injury which would have caused the report to be untimely, in order that Mr. D’Hooge would not suffer an adverse action for its submission. Consequently, I find no probative basis including temporal proximity, as well as the union representative’s “shit” statement, to conclude March 28, 2012 work-related personal injury report that Mr. Moler took a major role in preparing became a contributing factor on April 5, 2012 in his decision to abolish the Lost Local job.

### **April 5, 2012 Report of Rough Track**

Based on the credible testimony of Mr. Moler and Ms. Grabofsky, as corroborated by the BNSF e-mails, I find Mr. Moler did not have knowledge of Mr. D’Hooge’s April 5, 2012 report of a rough track at the Hobson north switch when he abolished the job on April 5, 20120.

Concerning animal appendages (cat’s paws), Ms. Grabofsky was aware of Mr. D’Hooge’s rough track report prior to Mr. Moler’s decision to abolish the Lost Local job. But, she neither informed Mr. Moler of the report nor recommended a course of action before he made his decision. Instead, Mr. Moler had authority as the Great Falls trainmaster to abolish the Lost Local job without Ms. Grabofsky’s permission, or subsequent affirmation,<sup>38</sup> and he exercised that authority without knowing about this protected activity. Mr. D’Hooge April 5, 2012 report of rough track was not a contributing factor in the abolishment of the Lost Local job.

---

<sup>38</sup>While Ms. Grabofsky retained the authority to override Mr. Moler’s decision, I do not consider that her “good plan” response requires a separate causation analysis since it had no effect in this case on Mr. Moler’s decision.

## **April 5, 2012 Report of Three Rough-Riding Locomotives**

Early in the evening of April 5, 2012, Mr. Moler became aware of Mr. D’Hooge’s hazardous safety condition report concerning the Lost Local consist. Then, due to several incorrect assumptions, the on-going work performance issues with the Lost Local crew, and his personal determination that the Lost Local crew, and Mr. D’Hooge, had submitted the report in bad faith, Mr. Moler had had enough and abolished the Lost Local job. In explaining the timing of his decision, which he made that night in Fort Worth, Mr. Moler candidly testified that Mr. D’Hooge’s consist hazardous safety condition report was “the straw that broke the camel’s back.” It was the final trigger that led to his deciding, and then acting on that decision, on April 5, 2012 to abolish the Lost Local job. Mr. Moler also truthfully acknowledged that if he not received the April 5 e-mail informing him of Mr. D’Hooge’s hazardous safety condition report, he would have not terminated that Lost Local job that evening. His credible testimony is direct evidence that Mr. D’Hooge’s protected activity of reporting three rough-riding locomotives for an extremely rough ride was a contributing factor in the abolishment of the Lost Local job on the same day.

### **Conclusion**

Although neither the March 28, 2012 report of a work-related personal injury nor the April 5, 2012 report of rough track at the Hobson north switch were contributing factors, Mr. D’Hooge has proven through the preponderance of the probative evidence that his April 5, 2012 FRS protected activity of reporting a hazardous safety condition involving three extremely rough-riding locomotives was a contributing factor in Mr. Moler’s decision the same day to abolish the Lost Local job, which is an adverse personnel action.

### **Issue No. 5 – Affirmative Defense**

As previously discussed, under AIR 21 adjudication provisions, 49 U.S.C. § 42121(b)(2)(B)(iv), and 29 C.F.R. § 1982.109(b), even if a complainant satisfies his burden of proof under 29 C.F.R. § 1982.109(a), he may not be entitled to relief if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.

BNSF asserts that it would have taken the same action, abolishing the Lost Local job in 2012, even absent Mr. D’Hooge’s protected activities due to the change of the starting time attributable to increased summer heat. However, the focus for the affirmative defense in this case is whether Mr. Moler would have abolished the Lost Local job when he did – the evening of April 5, 2012 – absent Mr. D’Hooge’s April 5, 2012 consist hazardous safety condition report. As previously discussed, Mr. Moler acknowledged that report was the final straw that led him to pull the trigger on the Lost Local job that night, causing an immediate impact on the Lost Local crew members well before the arrival of 85 degree weather in Montana. Accordingly, BNSF can not establish by clear and convincing evidence that absent the protected activity, Mr. Moler would still have abolished the Lost Local job in the evening of April 5, 2012.

## **Issue No. 6 – Damages**

Having proved all three requisite elements for invocation of the FRS employee protection provisions, and since BNSF is unable to establish an affirmative defense, Mr. D’Hooge is entitled to all applicable relief. According to 49 USC § 20109(e), as implemented by 29 C.F.R. § 1982.109(d)(1), in the event that an administrative law judge concludes that a respondent violated the FRS employee protection provisions, the judge may direct the following affirmative actions to make the prevailing complainant whole: a) abatement of the violations; b) reinstatement with the same seniority status the employee would have had but for the retaliation, or in its place, front pay; c) back pay with interest; and d) compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney fees. Additionally, if appropriate, a judge may also order the payment of punitive damages up to \$250,000.

### **Abatement**

Since Mr. Moler is no longer employed by BNSF, and in the absence of any evidence of continuing adverse personnel actions in Mr. D’Hooge’s case, an abatement order is not warranted.

### **Reinstatement/Front Pay**

Reinstatement is considered to be the default, or presumptive, remedy under the Act. *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 169, ALJ No. 1990 ERA 30 (ARB Feb. 9, 2001). In the event reinstatement is not a viable remedy, then front pay may be warranted. *Id.*, ARB No. 98-166 at 8.

Because he went on the work retention board on May 1, 2012 due in part to his medical condition, and applied for occupational disability through the Railroad Retirement Board in July 2012, Mr. D’Hooge does not seek reinstatement as an engineer on the Lost Local job. Instead, he claims nearly \$350,000 in front pay from May 2012 through his planned retirement in July 2015 on the basis that the abolishment of the Lost Local job forced him to obtain work on locomotives traveling at faster speeds which caused his neck and back pain to worsen and led to Dr. Bloemendaal advising Mr. D’Hooge on May 1, 2012 to end his railroad career.

For several reasons, I deny Mr. D’Hooge’s claim for over three years of front pay based on the April 5, 2012 abolishment of the Lost Local job, as well as his claim for damages associated with his inability to reach full retirement in 2015. First, I note that Mr. D’Hooge wasn’t terminated as a BNSF employee when Mr. Moler abolished the Lost Local job on April 5, 2012. Instead, he remained a senior engineer with the opportunity to bid on, and obtain, perhaps the next best engineer job out of Great Falls. And, in fact, he first tried Laurel pool after the Lost Local job was terminated and then went to the Shelby pool later in April 2012. Mr. D’Hooge further testified that several of the jobs out of Great Fall produced about the same monthly pay.

Second, and closely related, in practical terms, termination of the Lost Local job on April 5, 2012 did not mean the end of the “best job in the division” because the Lost Local job was back by May 9, 2012 with summer hours, and returned to its regular hours that fall. Thus, by the end of May 2012, when he came off the work retention board, and prior to his disability application, based on his seniority, the Lost Local job had returned as a viable employment opportunity in terms of professional qualifications for Mr. D’Hooge.

Third, an underlying premise of Mr. D’Hooge’s claim for front pay and damages associated with his inability to reach full retirement in 2015 is that absent abolishment of the Lost Local job on April 5, 2012, he could have managed his neck and low back pain working as an engineer until his retirement in July 2015 because he would only be operating slower moving Lost Local locomotives. Yet, the termination of the Lost Local job on April 5, 2012, which forced Mr. D’Hooge to bid on other BNSF engineer jobs with faster trains, was a two-month premature, but otherwise anticipated, event. Historically, nearly every summer around June, the Lost Local job was abolished in order to change the start time to the early morning hours, which led Mr. D’Hooge to choose to work for several months on other jobs similar to the Laurel and Shelby pools with locomotives operating at much higher speeds, and exposure to increased violent movement in the cab. Thus, absent the April 2012 early abolishment of the Lost Local job, Mr. D’Hooge would still have left the Lost Local every summer when it moved to early morning hours, and had experience three more summers (2012, 2013, and 2014) of increased neck and low back pain operating locomotives moving at higher speeds.

Fourth, Mr. D’Hooge essentially asserts that the abolishment of the Lost Local job on April 5, 2012 caused him to suffer increased neck and low back pain due to faster moving locomotives that he rode out of the Laurel and Shelby pools, which in turn led to Dr. Bloemendaal’s May 1, 2012 determination that left him with no alternative other than to go on the work retention board and subsequently apply for occupational disability compensation. Yet, given the nature and onset of Mr. D’Hooge neck and low back pain, and the specifics of Dr. Bloemendaal’s letter, Mr. D’Hooge’s causation assertion is highly speculative.

Prior to abolishment of the Lost Local job at the start of April 2012, and while still operating Lost Local locomotives, Mr. D’Hooge filed notice of an occupational injury involving neck and back pain which became apparent in October 2011. His pain symptoms at that time led to medical evaluation in December 2011, a diagnosis of severe degenerative cervical disc disease and a ruptured lumbar disc, and a recommendation for physical therapy. Well aware of that medical record, in his May 1, 2012 correspondence, Dr. Bloemendaal neither attributed Mr. D’Hooge’s degenerative disc disease and associated neck and low back pain to Mr. D’Hooge’s change of work conditions in April 2012 after he left the Lost Local, nor excepted the Lost Local job from his recommendation that Mr. D’Hooge stop working on the railroad. Dr. Bloemendaal’s May 1, 2012 recommendation demonstrates that Mr. D’Hooge’s medical inability to continue working as a BNSF engineer and reach full retirement in 2015 was not due to the abolishment of the Lost Local job on April 5, 2012. Instead, Dr. Bloemendaal concluded that Mr. D’Hooge’s 38 years of railroading, which included his time on the Lost Local job, had to come to an end in May 2012 due to his degenerative disc disease in order to avoid neck surgery. That recommendation also clearly undermines Mr. D’Hooge’s representation that he could have medically endured his work as a Lost Local engineer until July 2015.

## Back Pay

The purpose of back pay is to make a prevailing complainant whole by restoring the earnings he would have received but for the impermissible discrimination. *Blackburn v. Metric Constructors, Inc.*, 86 ERA 4 (Sec'y Oct. 30, 1991). Such an award should include associated losses such as interest, overtime, and increases in wages. *See Tipton v. Indiana Michigan Power Co.*, ARB No. 04-147, ALJ No. 2002 ERA 30 (ARB Sept. 29, 2006); *Pillow v. Bechtel Constr. Inc.*, 87 ERA 35, slip op. at 14, (Sec'y July 19, 1993). In computing back pay, unrealistic accuracy is not required. *Johnson v. Bechtel Constr. Co.*, 95 ERA 11, slip op. at 2 (Sec'y Sept. 11, 1995). Any uncertainty should be resolved in favor of the complainant. *See Tipton*, ARB No. 04-147 at 9.

A respondent's liability ends when the employee's employment would have ended for reasons independent of any violation found. *Artrip v. EBASCO Ser., Inc.*, 89 ERA 23, slip op. at 4 (ARB Sept. 27, 1996). If not based on a permanent disability, workers' compensation benefit payments covering lost wages may be deducted from a back pay award. *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004 AIR 11 (ARB May 26, 2010).

Evidence that a complainant failed to mitigate his damages will reduce the amount of back pay. *West v. Systems Applications International*, 94 CAA 15 (Sec'y Apr. 19, 1995). At the same time, the respondent bears the burden of establishing a mitigation failure by showing substantially equivalent positions were available and the complainant failed to use reasonable diligence in seeking such positions. *Timmons v. Franklin Electric Corp.*, 1997 SWD 2 (ARB Dec. 1, 1998).

Finally, in order to make a complainant whole, prejudgment interest on back pay is awarded based on the interest rate for the underpayment of federal taxes, set out in 26 U.S.C. § 6621(a)(2) (short term Federal rate plus three percentage points), compounded quarterly. *Doyle v. Hydro Nuclear Servc.*, ARB Nos. 99-041, 99-042, and 00-12, ALJ No. 1989 ERA 22, slip op at 18-19 (ARB May 17, 2000).

Mr. D'Hooge seeks back pay for two periods. First, while typically earning a monthly average of \$8,195 in January through March 2012, due to his change of jobs after the abolishment of the Lost Local job, he only received \$7,289 for April 2012. Second, while on the work retention board in May 2012, he only received \$2,100.

In addition to significantly altering the terms and conditions of Mr. D'Hooge's work as a BNSF engineer, the April 5, 2012 abolishment of the Lost Local job reduced his income that month from a previous average of \$8,195 to \$7,289. Consequently, I find Mr. D'Hooge is entitled to back pay for April 2012 of \$906.<sup>39</sup>

---

<sup>39</sup>\$8,195 - \$7,289.

However, as previously discussed in regards to front pay, I find an insufficient causative basis to conclude that the abolishment of the Lost Local job on April 5, 2012 caused Mr. D’Hooge to go on the work retention board on May 1, 2012. As a result, his request for back pay for May 2012 is denied.

### **Compensatory Damages**

An employer who violates the FRS employee protection provision may also be held liable for compensatory damages associated with mental and emotional distress. To receive compensatory damages, a complainant must demonstrate both: 1) objective manifestation of distress, such as sleeplessness, anxiety, embarrassment, and depression, and b) a causal connection between a violation of the Act and the distress. *Martin v. Dep’t of the Army*, ARB No. 96-131, ALJ No. 1993 SWD 001, slip op. at 17 (ARB July 30, 1999).

Mr. D’Hooge remains very upset about the abolishment of the Lost Local job which took him years to obtain. And, when testifying about how the loss of Lost Local job caused him to be absent for some of his grandchildren’s activities, Mr. D’Hooge became visibly grieved for that lost time when considering how often he had been unavailable for his own children’s events.

Nevertheless, he also testified that he has been able to sleep, eat, and get through his days normally. And, while feeling hurt by the adverse action and his inability to return to railroading, he does not suffer from depression. Finally, his emotional distress and anxiety about the change in his life have not been severe enough to require counseling or treatment.

Consequently, I find an insufficient evidentiary basis for a monetary award for mental and emotional distress

### **Punitive Damages**

Punitive damages are appropriate in whistleblower cases to punish wanton or reckless conduct and to deter such conduct in the future. *Johnson v. Old Dominion Security*, 86-CAA-3/4/5 (Sec’y May 29, 1991). Such deterrence may be necessary if the amount of lost wages for which the Respondent is liable is insufficient to have a deterrent effect on the Respondent. *See Cain v. BNSF Railway Co.*, ARB No. 13-006, ALJ No. 2012-FRS-19 (ARB Sept. 18, 2014). In determining whether punitive damages should be awarded, the supervisor’s state of mind should be considered, as well as whether the employer acted with deliberate and reckless disregard for the complainant’s rights. *See also Smith v. Wade*, 461 U.S. 30, 51 (1983). On the other hand, since the decision to award punitive damages involves a discretionary moral judgment, mere indifference to the purposes of the employee protection provisions is not sufficient to establish the requisite state of mind. *Jones v. EG & G Defense Materials, Inc.*, Case No. 97-129, 1995-CAA-003 (ARB Sept. 29, 1998). The FRS does not, however, require "illegal motive" to sustain a punitive damage award. An award of punitive damages may be warranted where there has been "reckless or callous disregard for the plaintiff’s rights, as well as intentional violations of federal law." *Petersen v. Union Pacific Railroad Co.*, ARB No. 13-090, ALJ No. 2011-FRS-17 (ARB Nov. 20, 2014).

Consequently, consideration is first given to the wrongdoer's state of mind. *See Jones* 1995-CAA-3, slip op. at 24. Then, when the requisite state of mind is determined, the inquiry proceeds to whether an award is necessary for deterrence. *Id.*, n. 20.

Turning to Mr. Moler's state of mind, on April 5, 2012, he made a snap, personal assumption that Mr. D'Hooge's hazardous safety condition report was made in bad faith, and then took immediate adverse personnel action without waiting for the return of the Lost Local crew to work the next day to ask them about the report. Had he done so, Mr. Moler would have learned that Mr. Sattoriva actually rode in the middle engine, the middle locomotive had been previously reported as rough-riding, and the hazardous safety condition report for the Lost Local consist had actually been called in by 11:30 in the morning. This readily available information the next day would have seriously called into question the basis for his bad faith determination and resulting use of the report as a final trigger for an adverse personnel action. Under these circumstances, by immediately reacting to, and acting upon, a senior BNSF employee's hazardous safety condition report as the last straw that caused him to abolish the Lost Local job in evening of April 5, 2012, effectively punishing all three Lost Local crew members for submitting a hazardous safety condition report involving locomotives #2901, #2723, and #2982, I find Mr. Moler acted with a reckless disregard of an employee's FRS protected right to report a good faith hazardous safety condition report without fear of suffering an immediate adverse personnel action,

In terms of deterrence, I recognize that Mr. Moler did not intend to violate the FRS employee protection provision when he abolished the Lost Local job, and that he no longer works for BNSF. However, even after six years experience as a trainmaster, he jumped to an incorrect conclusion based on unfounded assumptions and immediately responded with an adverse action without obtaining additional, critical information from the Lost Local crew. His inappropriate reflexive response clearly establishes that the safety report training he had received as a BNSF supervisor was insufficient in either content or frequency to make him fully understand: a) the special, and protected, character of hazardous safety condition reports under the FRS, and b) that even in times of operational stress and great customer demand his inherent supervisory responsibility to ensure safe railroad operations at Great Falls required a response to a hazardous safety condition report be based on facts, not assumptions. His decision-making process and actions the evening of April 5, 2012 also demonstrated a lack of awareness that taking immediate adverse action affecting an employee's terms and conditions of employment based in part on an assumption of bad faith actually poses a significant risk to railroad safety itself by discouraging other BNSF employees from making hazardous safety condition reports. Accordingly, to deter other BNSF supervisors from making a personal assumption of bad faith and taking immediate adverse personnel action in response to an employee's hazardous safety condition report, due to insufficient supervisory railroad safety training, and considering that the amount of back pay for which BNSF is liable in this case is *de minimis*, I find an award of \$25,000 in punitive damages is warranted.

### **Attorney Fees**

Since I have determined an issue in favor of Mr. D'Hooge, his counsel is entitled to submit a petition to recoup fees and costs associated with his professional work before the Office of Administrative Law Judges within 30 days of receipt of this Decision and Order. Respondent's counsel has 30 days from receipt of such attorney fee petition to respond.

Since Mr. D'Hooge was only partially successful in terms of damages, both parties must address the application of the analysis set out by the U.S. Supreme Court, in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

### **ORDER**

The FRS complaint of Mr. Gerald E. D'Hooge is **PARTIALLY APPROVED**.

BNSF shall pay Mr. Gerald E. D'Hooge: a) back pay for April 2012, in the amount of \$906.00, plus prejudgment interest based on the interest rate for the underpayment of federal taxes, set out in 26 U.S.C. § 6621(a)(2) (short term Federal rate plus three percentage points), compounded quarterly; and b) punitive damages in the amount of \$25,000.

**SO ORDERED:**

RICHARD T. STANSELL-GAMM  
Administrative Law Judge

Date Signed: March 25, 2015  
Washington, D.C.

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business 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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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).

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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.

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 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).