



**Issue Date: 15 April 2015**

Case No.: 2014 FRS 17

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In the Matter of  
FRED S. KAUL,  
Complainant

v.

BNSF Railways,  
Respondent

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Appearances: Mr. James P. Carey, Attorney  
For the Complainant

Mr. Ben Rechtsfertig, Attorney  
Ms. Jill Lundvall, Attorney  
For the Respondent

Before: Richard T. Stansell-Gamm  
Administrative Law Judge

**DECISION AND ORDER –  
DISMISSAL OF COMPLAINT**

This case arises under the employee protection provisions of the Federal Rail Safety Act of 2007 (“FRS” and “Act”), 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.”

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 discriminating 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 March 27, 2012, Mr. Kaul filed a complaint with the Occupational Safety & Health Administration (“OSHA”), U.S. Department of Labor (“DOL”), under the FRS employee protection provisions. Mr. Kaul alleged that BNSF Railways (“BNSF”) wrongfully terminated his employment on January 27, 2012 for going home sick on January 1, 2012, RX 31.<sup>1</sup>

On September 9, 2013, the OSHA Regional Administrator dismissed Mr. Kaul’s complaint on the basis that his January 1, 2012 work refusal was not a protected activity. On October 23, 2013, through counsel, Mr. Kaul appealed the adverse decision and dismissal of his FRS whistleblower complaint.

Pursuant to a Revised Notice of Hearing, dated April 18, 2014, (ALJ II), I conducted a hearing in Great Falls, Montana on May 20 and 21, 2014, with Mr. Kaul, Mr. Carey, Mr. Beau Price, Mr. Rechtfertig, and Ms. Lundvall.

After being advised in July 2014 that 82 minutes of the May 20, 2014 hearing involving a portion of the Complainant’s testimony had been lost in transcription, I conducted a telephone conference call on August 4, 2014 with Mr. Kaul, Mr. Carey, and Mr. Rechtfertig to re-accomplish that portion of Mr. Kaul’s testimony.

My decision in this case is based on the hearing testimony, and the following exhibits admitted into evidence: JX 1, CX 1 to CX 5; CX 7; CX 8; CX 9, p. 11; CX 11 to CX 16; CX 17, pp. 2-28; CX 18 to CX 20; RX 1 to RX 17; RX 20 to RX 34; and RX 36 to RX 38.

## **Parties’ Positions**

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

Mr. Kaul has proven that several of his protected activities were contributing factors in BNSF’s termination of his employment on January 27, 2012.

In terms of prior injuries, between February 2001 and June 2010, Mr. Kaul injured his neck and shoulder in two incidents, but he returned to work without any medical issues. In February 2011, he experienced another injury, which lead to neck surgery and medical leave in April and May 2011. On June 16, 2011, while still off work, he had a heart attack. Following cardiac surgery, he was released to work full-time on July 14, 2011.

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<sup>1</sup>The following notations appear in this decision: ALJ – Administrative Law Judge exhibit; JX – Joint exhibit; CX – Complainant exhibit; RX – Respondent; TR I – Transcript of May 20 and 21, 2014 hearing; and, TR II – Transcript of August 4, 2014 conference call..

<sup>2</sup>TR I, pp. 38-47; and October 9, 2014 closing brief

As to a disciplinary record, based on the union's recommendation, Mr. Kaul accepted a waiver of an investigation for a alleged vehicle accident in March 2011, involving a bent rim on an ATV vehicle, and received a 30 day record suspension and one year probation for a Level S serious rule violation.

As a result of his discipline and most recent work-related injury, BNSF placed Mr. Kaul him into its Employee Review Program ("ERP"), which was used to track employees who due to disciplinary and/or injuries may represent potential safety risks.

On January 1, 2012, with 13 years as a machinist with BNSF, after experiencing two dizzy spells within 30 minutes of reporting to work, once during the pre-work stretch and again climbing stairs, and after being assigned to a job that would require operating locomotives on the service track, Mr. Kaul determined that it would be unsafe for himself and co-workers if he accepted his assignment in his condition. He informed the supervisor who gave him the assignment that he could not do that job, would not do the job, and was going home sick. Mr. Kaul was neither angry nor insubordinate. At home, Mr. Kaul told his wife that he didn't feel good, but he decided that he didn't need to seek medical attention.

The following day, feeling better, Mr. Kaul returned to work but was called into the general foreman's office to write a statement. At that time, he told the foreman about his safety concern the day before and the basis for that concern. However, Mr. Kaul was charged with failure to comply with instructions, insubordination, and indifference to duty; and BNSF initiated investigative proceedings. During the investigation, none of the co-workers present when Mr. Kaul went home reported him using profanity; they corroborated his testimony that he did not feel like his normal self that day. When the superintendent reviewed the investigation report, he became aware of Mr. Kaul's January 1, 2012 safety concerns as well as his January 2, 2012 safety-related statement. The general foreman also advised the superintendent that Mr. Kaul should be removed. On January 27, 2012, BNSF fired Mr. Kaul.

Mr. Kaul engaged in protected activities in 2001, 2010, and 2011, when he reported work-related personal injuries. On January 1, 2012, he engaged in protected activities by: a) refusing a job assignment requiring the operation of a locomotives while he was suffering from episodes of dizziness which would create a safety hazard, and b) refusing to violate the BNSF safety rule requiring employees to be alert and attentive since his dizziness would interfere with his ability to comply with that standard. On January 2, 2012, he engaged in a protected activity by providing a statement to his supervisor about a hazardous safety condition on January 1, 2012. And, on January 10, 2012, he engaged in a protected activity by providing testimony during an investigation about a hazardous safety condition on January 1, 2012.

Mr. Kaul's January 1, 2012 safety concern was objectively reasonable since operation of a 400,000 pound diesel engine requires constant attention and alertness to the surrounding environment, including radio commands, ground signals, and hand signals. It is one of the most safety-sensitive jobs a machinist can perform. Although he was usually assigned to "turn crew" work, Mr. Kaul also periodically worked on the "service track" crew, and never refused or complained about any work assignment.

Mr. Kaul's subjective concern about the adverse effect of his dizziness episodes on his ability to safely operate a BNSF locomotive was also reasonable. Although first suggesting Mr. Kaul's dizziness spells may have been hypotensive episodes, Mr. Kaul's cardiologist subsequently opined that the problem was mostly due to dehydration.

His refusal to work on January 1, 2012 was made in good faith. He had no alternative but to leave because he was the only worker present at the time who was qualified under the federal hours of service to perform the assigned work of operating locomotives on the service track that day. And, any notice of a safety aspect concerning his own fitness to work would have been futile since his dizziness was not a condition within the control of BNSF that they could fix. That is, had he provided such notice, BNSF could not have corrected it.

Under the present causation legal standard, including the legal principal of cat's paw, Mr. Kaul's protected activities were contributing factors in his termination. Mr. Kaul's protected work refusal, and his subsequent statement and testimony regarding the safety basis for his actions, were clearly contributing factors, being inextricably intertwined with investigation that led to his termination. Circumstantial evidence also demonstrates that Mr. Kaul's enrollment in the ERP which was related to his protected activity of reporting work-related injuries was also a contributing factor. And, notably, in addition to initiating the investigation, the general foreman who was well aware of all of Mr. Kaul's protected activities advised Mr. Price, the superintendent who made the termination decision, to remove Mr. Kaul from service.

Based on the sequence of events, BNSF had knowledge of Mr. Kaul's protected activities and his loss of employment is an adverse personnel action.

In January 2012, Mr. Kaul was earning \$25 an hour, plus benefits including health insurance, for an annual earnings of about \$60,000. Due to the loss of his job, Mr. Kaul's family nearly lost their home. He had to borrow money from relatives. They no longer had his health insurance coverage. His search for re-employment was unsuccessful until he became a night-shift worker at Walmart restocking shelves, earning about \$10.00 an hour. He also found seasonal work as a heavy equipment operator.

Under the facts of this case, including evidence demonstrating that Mr. Kaul's protected activities were contributing factors in the termination decision, BNSF cannot establish that it would have taken the same adverse action in the absence of his protected activities.

Having established all the requisite elements, Mr. Kaul seeks the following relief: a) reinstatement, b) back pay from January 28, 2012 to September 28, 2014, amounting to \$159,066, and continuing through the date of reinstatement, offset by \$26,832 in mitigation wages; c) compensatory damages of \$12,600 for out-of-pocket expenses and \$75,000 for emotional distress, d) attorney fees, and e) punitive damages in the amount of \$250,000 for BNSF's egregious conduct of rushing to judgment in this case and its pre-textual explanation for Mr. Kaul's dismissal.

## Respondent<sup>3</sup>

Mr. Kaul's FRS complaint should be dismissed because he failed to establish that he engaged in a protected activity in good faith; the supervisor who took the adverse action was aware that he engaged in a protected activity; and any protected activity was a contributing factor in his dismissal. Further, BNSF has proven by clear and convincing evidence that it would have made the same dismissal decision absent any protected activity by Mr. Kaul.

Concerning his principal alleged protected activity, Mr. Kaul's work refusal on January 1, 2012 is not protected under 49 U.S.C. § 20109(b) because it was not made in good faith, and he failed to notify BNSF of any hazardous condition either before, or at the time, he refused work.

The circumstances surrounding Mr. Kaul's work refusal leads to a determination that it was not made in good faith. When he arrived for work in Havre on January 1, 2012, Mr. Kaul was not feeling sick. In his first alleged dizziness spell, he only felt lightheaded for a second or two. He did not lose his balance. He did not mention the incident at that time to the other 12 co-workers who were present. And, after stretching, he felt better. When he went to get his work assignment in the upstairs office, and having filled out his time card for the turn crew, Mr. Kaul believed that he would be working on the turn crew. Mr. Kaul claims that while climbing the stairs he experienced a second dizzy spell, but again, he didn't slip, fall, or grasp anything. After turning in his time card for the shift at the supervisor's desk, Mr. Kaul waited for his job assignment without saying anything about dizziness spells. Yet, upon being assigned the service track, which involved working with only one other person and the operation of locomotives, Mr. Kaul asked the foreman to repeat the assignment. When he was again told to work the service track, Mr. Kaul replied "F --- this, I'm not going to work the service track, I'm going home sick." He then threw down the lineup sheet, and stormed out of the office door. And, before leaving the property, he simply advised Mr. Palmer that he was going home sick.

Notably during these events, Mr. Kaul did not report the dizziness spells to anyone, including the power desk supervisor at that time of his work refusal. Prior to being informed of his service track assignment, Mr. Kaul's actions clearly demonstrated his intention to work on January 1, 2012. His silence and behavior prior to being assigned the service track make no sense if he actually believed that he had suffered dizziness spells sufficient to cause a safety concern. Mr. Kaul's decision to drive himself home, rather than seek assistance, is also not understandable if he honestly believed that he was suffering dizziness spells so disorienting that they would compromise his ability to operate a locomotive.

Mr. Kaul's subsequent admission also undermines a finding of good faith. Specifically, after stating that he would have stayed and worked on the turn crew, Mr. Kaul indicated that he would have advised the turn crew of his dizziness. If so, no reasonable explanation exists for his decision not to provide his co-workers the same information after being assigned to the service track.

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<sup>3</sup>TRI, pp. 47-60; and October 10, 2014 closing brief.

Mr. Kaul's claimed protection for his January 1, 2012 work refusal also fails because he did not inform anyone at the BNSF of any alleged hazardous condition or safety concern on that day despite having multiple opportunities to do so. Consequently, none of the BNSF managers and supervisors were aware on that day of either his dizziness spells or his safety concern. His silence is most significant because 49 U.S.C. §§ 20109(b)(2)(B) and (C) specifically require an employee seeking protection for a work refusal to notify the employer of the existence of the claimed hazardous condition where possible and give the employer an opportunity to immediately correct the situation. Mr. Kaul's testimony shows that nothing prevented him on January 1, 2012 from notifying BNSF of his concern about his dizziness if he was required to operate locomotives on the service track. He had ample opportunity to provide such notice; his failure to do so precludes protection of his work refusal under the FRS. His subsequent explanation for his work refusal 24 hours later does not restore protection because his delayed explanation did not provide BNSF an opportunity to address his hazardous safety concern before he declared his intention not to perform his assigned work.

The subsequent formal investigation was conducted according to the collective bargaining agreement. Mr. Kaul was given the opportunity to testify and the record included the statements of the six co-workers who were present. The co-workers provided credible evidence that Mr. Kaul was irritated when he left the power desk.

BNSF's empowerment policy involves an interactive process with supervisors and doesn't permit an employee to simply walk off the job. Mr. Kaul did not comply with that policy in refusing to work without an explanation. Had Mr. McLeod been informed on January 1, 2012 that Mr. Kaul did not consider himself safe to operate the locomotives, the supervisor would have offered medical assistance and made sure he had a ride home. With proper notice, Mr. McLeod would have had the opportunity to remove Mr. Kaul from an unsafe situation.

Additionally, the events in January 2012 do not constitute the protected activity of reporting a work-related injury because there is no evidence that the alleged dizziness was work-related.

Following a fair and reasonable investigative process, which provided Mr. Kaul an opportunity to explain his actions, Mr. Price, Mr. McLeod, and Mr. Heenan discussed the situation, which included Mr. Kaul's probationary status. Following BNSF's progressive disciplinary policy, they ultimately concluded that Mr. Kaul should be dismissed. During this process, neither Mr. Kaul's prior injury record, nor his involvement in the ERP, were considered. Mr. McLeod determined that Mr. Kaul's conduct constituted a second Level S serious rule violation while on probation, and dismissal was appropriate. While also considering that Mr. Kaul was still on a one year probation for a Level S serious rule violation, and in particular finding the acts of throwing down paperwork, telling a supervisor that he was not going to do the work, and walking off the property to be a malicious rule violation, Mr. Heenan reached similar dismissal decision. Based on a thorough review of the record and consideration of all the testimony and statements, Mr. Price, the ultimate decision-maker, determined dismissal was warranted given the incident was the second Level S serious rule violation in 12 months. And, even absent Mr. Kaul's subsequent notice of the safety basis for his actions, Mr. Price would have reached the same decision in light of Mr. Kaul's inappropriate actions on January 1, 2012.

As another consideration, Mr. Kaul did not seek medical attention for his dizziness spells, and first informed a doctor of the episodes during a regularly scheduled medical appointment with his cardiologist on February 16, 2012. Based on Mr. Kaul's presentation, and without any tests, Dr. Rowe could only speculate as to the cause and opined it was caused by dehydration rather than an underlying cardiac problem.

Mr. Kaul's participation in the Employee Assistance Program ("EAP") and ERP was not contributing factors. In particular, BNSF only became aware of Mr. Kaul's involvement in the EAP for help in expressing himself in a confrontation when the union representative questioned Mr. Kaul about his participation during the January 10, 2012 investigation hearing.

Mr. Kaul's report of a non-work-related cardiac condition, his participation in the EAP, and assignment to the ERP are not FRS protected activities.

Although his "distant" February 11, 2011 report of a shoulder injury at work was a protected activity, it was not a factor in his termination. In particular, the investigation process that led to Mr. Kaul's termination was initiated on January 1, 2012 based on his actions that day. Though the investigation record contained information on Mr. Kaul's injury history, and involvement in the ERP, that information was not considered. The credible testimony of the decision-makers in this case, including Mr. Price, clearly establish that Mr. Kaul's termination was based solely on his second Level S serious rule violation on January 1, 2012.

In terms of disparate treatment, Mr. Sparks called in prior to the start of his shift and laid off sick when told no one had signed up for his holiday shift on January 1, 2012. Although he was not punished, he was not similarly situated because he took these actions before clocking in and did not angrily confront a supervisor at the power desk in front of several co-workers. His actions were also understandable because if a co-worker had signed up for the shift, there would have no reason for him to go out sick. On the other hand, BNSF has terminated the employment of an individual, who like Mr. Kaul, committed a second Level S serious rule violation.

In light of Mr. Kaul's behavior, reinstatement would be inappropriate. Mr. Kaul also failed to mitigate his lost of income, and has not provided documentation concerning his claim for compensatory damages including emotional distress. Punitive damage are not justified since the record contains no evidence that BNSF acted with a reckless or callous disregard for Mr. Kaul's right under the FRS.

Finally, even in the absence of Mr. Kaul's claimed illness on January 1, 2012, his cardiac condition, his work-related shoulder injury, his participation in the EAP, and involvement in the ERP, BNSF has established by clear and convincing evidence that it would still have decided to terminate his employment because his "egregious and demonstrably out-of-bounds" behavior on January 1, 2012, which represented a second Level S serious rule violation that warranted termination. Consequently, Mr. Kaul is not entitled to any damages or other relief under the FRS.

## Issues

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

## Summary of Evidence

### **Mr. Fred Scott Kaul**

(TR I, pp. 63-149 and TR II, pp. 6-61)

[Direct examination] In 1998, Mr. Kaul joined BNSF as a laborer. After two years, he became a machinist apprentice. After three years, he became a “carded” machinist and continued working for the railroad in the capacity. Some of the work involves scheduled locomotive maintenance inside the diesel shop in Havre. The other portion of the work occurs outside in two categories. The turn crew works “uptown” in the rail yard. The other work occurs on the “service track” which is located behind the diesel shop; and used to bring in a locomotive (or “power”) scheduled for regular maintenance and take it out of the consist<sup>4</sup> for service. Refueling is also done on the service track. The uptown track section is used to perform maintenance on locomotives still attached to a train. It is also used for refueling. The noticeable distinction between the two areas involves who is responsible for the movement of the locomotives. On the service track, the machinists operate the locomotives and move the power to wherever the power desk foreman directs for repair or maintenance. In the uptown area, the train crew moves the locomotives, and the turn crew (machinists/laborers) conducts inspections, performs small repairs, refuels the engines, and cleans the cab. On the service track, they just handle locomotives and consists, putting them where they need to be. In the uptown area, the turn crew works in the rail yard mainline with full trains. CX 12 shows the track layout.

Usually, Mr. Kaul worked more often on the turn crew than on service track crew. Since he preferred outside work, he volunteered for more of the work in the past two years. Mr. Kaul enjoyed working outside as a turn crew member and a service track crew member. He also volunteered for overtime and holidays. Mr. Kaul volunteered to work on New Year’s Day, January 1, 2012.

In March 2011, Mr. Kaul and three other laborers were assigned to fix a toilet on a locomotive located on the far side of the yard. They used a Kubota service vehicle with a tank to dump the toilet as part of the servicing. Somehow in getting the Kubota to the front of the locomotive they crossed a track and caused damage. According to Mr. Kaul, he “was not driving the Kubota,” but didn’t recall who was driving. The turn crew drove out in two Kubotas. Mr.

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<sup>4</sup>A consist is two or more locomotives joined together to pull a train.

Bob West was with him in one Kubota. On the way out to the train, Mr. Kaul did not notice anything happen to the Kubota. After the servicing was complete, they went to the “shack” to wait for more trains to come into the yard. Mr. Kaul did not notice anything happen to the Kubota on the way to the shack. Later, a foreman asked them about a bent wheel on the Kubota. Neither he nor Mr. West knew anything about it. A picture showed a dent in the front wheel of the Kubota; the wheel rim was bent inward. It was noticeable in the picture, but they did not notice it driving the Kubota. Apparently, the third shift found it after Mr. Kaul and Mr. West had been on the second shift. Mr. Kaul and Mr. West told the foreman that they did not remember doing it. Based on the union representative’s recommendation, they ended up signing an investigation waiver stating that they agreed with what BNSF said had happened, RX 33. The Notice of Investigation is CX 17, p. 27. They were put on probation for damaging railroad equipment. Even though he didn’t recall doing the damage, Mr. Kaul signed the waiver because the company had figured out it must have happened during their shift.

Several months earlier, while climbing onto a locomotive, Mr. Kaul had a popping sensation in his right shoulder. He reported the injury to his supervisor but did not need medical attention. Earlier, during his apprenticeship, while using a four-foot long torque wrench, he also experienced a pop in his “right side,” which subsequently was determined to be a herniated cervical disc, that later resolved without surgery after three months. BNSF documentation shows the first injury occurred on February 7, 2001 and the right shoulder injury happened on June 13, 2010, CX 17, pp. 2. The documentation also shows a third right shoulder injury on February 20, 2011. That injury again involved his right shoulder popping and led to surgery on two cervical discs in June 2011. He was out for three months for that surgery.

While recovering from the neck surgery, Mr. Kaul suffered a heart attack, and underwent cardiac stent surgery in June 2011. At the end of July 2011, he was released to work full duty. Upon his return to work, he became part of the ERP.

From the end of July 2011 through January 1, 2012, Mr. Kaul worked a little bit of everything, including turn crew, service track crew, and inside shop machinist. He was able to accomplish all tasks and voiced no complaints to any supervisor.

Mr. McLeod told Mr. Kaul that he was in the ERP due to his surgeries, with 68 points, CX 17, pp. 6-8. The program enabled supervisors to watch their employees to make sure they were doing okay.

An operational test, OPTS, involves a supervisor periodically evaluating an employee’s ability to do his job to make sure all the rules and responsibilities are being followed. The employee is given feedback and the OPTS is filed. While on the ERP, Mr. Kaul passed all his OPTS.

Mr. Kaul informed BNSF medical case managers, or nurses, including Ms. Lisa Gladley, about his neck and heart treatments. The nurse would call and ask how he was doing after the surgeries.

After he returned to work following his heart attack, Mr. Kaul did not notice any changes in the level of his supervision. However, he received calls from the BNSF nurses, about a month apart. He also met with floor foremen about three times before January 2012. They checked to see how he was doing and whether he was feeling alright

Prior to January 1, 2012, Mr. Kaul had not experienced any dizziness episodes.

On New Year's eve, 2011, he spent the night at home with his family. At midnight, they set off some fireworks. He did not drink any alcoholic beverages. He got up the next morning between 8:00 and 10:00 a.m. Later, he had New Year's Day dinner with his family.

On January 1, 2012, Mr. Kaul arrived around 2:30 p.m. for work at his normally scheduled time of 3:00 p.m.; his shift ended at 11:00 p.m. Due to the holiday, he was going to receive double time and a half. Regularly, he earned \$25 an hour.

He went to the locker room, dressed out, and clocked-in with his individual card. Then, he proceeded to the cafeteria, or stretch room. He was feeling a little off, "just not like my normal self, but nothing seemed major." He was just not quite 100%. As he was sitting, waiting for the start of his shift, "I just had a little dizzy spell." It lasted "a couple of seconds," and felt like "if you stand up too quick." Then, the foreman talked a little and they started stretching.

Mr. Kaul, and other employees, were instructed to the power desk upstairs. He was dressed in winter gear because based on his expressed preference he expected to work outside. As usual, he also filled out his time card prior to going up to the power desk because people working on the turn crew usually completed the time card at the beginning of the shift and turned it into the power desk. Because he had normally been on the turn crew for the past two years, Mr. Kaul put "TC " on the time card, RX 30. He had only been assigned to the service track once or twice a month. On those occasions, he never refused, or complained about, the service track assignment.

In the cafeteria, Mr. Kaul had no concern about his ability to work due to the dizzy spell. He did not indicate to anyone that he had suffered the dizzy spell.

CX 12 is a map of the Havre Diesel Shop.

Mr. Kaul walked about 100 feet from the cafeteria located in the basement to the stairs to the first floor, walked to the other side of the shop, and then climbed two flights of stairs, CX 11, p. 3, to the power desk. While climbing the stairs, with hands on both rails, Mr. Kaul felt a second dizzy spell like the first episode, stopped for a second, and wondered what was going on. He then walked into the power desk area, CX 11, pp. 1-2.

Mr. Vant Hul was at the power desk. Mr. Scott Oleson, Mr. John McLaughlin, Mr. Schnittgen, Mr. Knoles, and two laborers were present and scattered around the room, waiting for their job assignments. Normally, after walking in, they pick up from the desk a copy of the lineup, which has various tasks for the day. The power desk foreman then goes over the lineup

of the trains with the group. Since the lineup does not contain specific job assignments, each individual gets his job assignment from the power desk foreman. In addition to Mr. Kaul, only two other machinist were present. Because the other two machinists had not been present for the stretch at 3:00 p.m., he assumed that they had already worked the prior eight hour shift and were there for overtime; but he didn't know for sure. The federal hours of service limit on operating a locomotive motive is 12 hours.<sup>5</sup>

After picking up the lineup, Mr. Kaul waited five to ten minutes for his job assignment. During this period, he was concerned that if he was assigned to the service track it would be safest if he did not do that job. BNSF had taught the importance of safety in moving locomotives, and ensuring the safety of himself and others. He did not want to hurt or possibly kill anyone, or damage railroad property.

Mr. Vant Hul then told Mr. Kaul that he was going to work the service track. Seeking verification, Mr. Kaul asked, "Are you putting me on the service track?" Mr. Vant Hul replied, "Yes." At that point, Mr. Kaul said that he couldn't do it and commented that if he had to work the service track he was going to have to go home sick. Mr. Vant Hul did not respond, and Mr. Kaul exited the power desk, went downstairs, changed out of his work clothes, told the floor foreman, Mr. Palmer, that he was going home sick, and then clocked out about 10 to 15 minutes after he left the power desk.

During his conversation in the power desk, Mr. Kaul did not curse. And, he was not angry.

Mr. Kaul drove himself home. He did not have any concerns about making the 20 to 30 minute drive.

When he got home, Mr. Kaul was not feeling 100%. Upon his arrival, he told his wife that he was not feeling good. "I went back to my room, changed out of my clothes into sleeping clothes, and I believe I laid down at that point." He does not recall doing anything else that evening, and "eventually fell asleep." Mr. Kaul slept through the night.

He did not call a doctor because "I didn't see it as a major situation, I had a scheduled doctor's appointment with my cardiologist the following month, and I figured I would be talking to him."

The next day, Mr. Kaul felt "good," like his normal self. He did not have any dizzy spells. In the afternoon, he went to work for his regularly scheduled 3:00 p.m. to 11:00 p.m. shift. He wasn't sure if anything would be brought up about the day before. He intend to talk to the supervisors and tell them what had happened – that he had had dizzy spells and didn't feel was able to operate locomotives.

Mr. Kaul did not provide any explanation the afternoon before because "all that was on my mind was to go home to my, what you might call, comfort area, to relax . . . if it happened

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<sup>5</sup>At this point, a break in Mr. Kaul's testimony occurred due to a transcript error; and, the following testimony was obtained during an August 4, 2014 conference call.

again, or whatever. Just try to get through whatever it was.” He thought medication might be causing the problems and he intended to discuss the issue with his doctor at his next appointment. Mr. Kaul’s kids had been sick so he thought that might have something to do with it.

Upon his arrival, Mr. Kaul went to the locker room and was met by Mr. McLeod and escorted to Mr. McLeod’s office. He was asked to write out a handwritten note on what happened, which he did. He signed and dated the statement, CX 3, p. 14. He was given a Notice of Investigation. Mr. McLeod then escorted Mr. Kaul to his car and watched while he left the yard.

During the January 10, 2012 investigation hearing, a number of co-workers and supervisors testified. Mr. Kaul also testified. Statements from co-workers and Mr. Vant Hul were also presented. Contrary to Mr. Vant Hul’s e-mail, Mr. Kaul did not say, “F --- this, I’m going home sick.” Mr. Kaul did not swear at the power desk. He was not angry about his job assignment. He was not angry about anything. Contrary to co-workers’ testimony, he was not frustrated or irritated

At the January 10, 2012 hearing, CX 2 and RX 37, he testified about his safety concern with operating locomotives having suffered dizziness spells.

Mr. Kaul received written notice of the investigation result, CX 4 and RX 34, which was termination of his employment.

Getting fired by BNSF had a impact on Mr. Kaul and his family, including his four children. Prior to his termination, Mr. Kaul made \$25 an hour, and had fringe benefits, including health insurance. About three months after he was fired, his health care insurance lapsed. Just last year, they were able to obtain health insurance through his wife’s work at Walmart.

CX 15 shows Mr. Kaul’s earning in 2009 and 2010. In 2010, he made \$59,650. In 2011, his earnings were less because he was off-duty due to his medical condition.

Following his separation, Mr. Kaul went to a job service company to seek re-employment. He registered for their program and applied for jobs. His efforts were unsuccessful.

In return for a load of water, Mr. Kaul delivered potable water to homes.

In May or July of 2013, Mr. Kaul worked as a night stocker at Walmart, earning about \$9.50 an hour. Since July 2014, he has worked as a part-time seasonal worker in construction with Ready Mix, with a base salary of \$13 an hour.

They also nearly lost their property and had to arrange with the bank for lower monthly payments. They had difficulty just covering monthly expenses, including utility bills, school lunches, and grocery bills. They could no longer afford a summer vacation. The financial crisis

put a strain on his marriage; his wife had worked more hours. The loss of his job was the first big crisis they had to face.

Mr. Kaul talked to a counselor to improve his communication skills with his kids and wife. He previously participated in the EAP.

On January 1, 2012, Mr. Kaul was feeling ill and dizzy at work. He had a safety concern about working on the service track and operating locomotives based on how he was feeling. The following day, he expressed that concern to his supervisor. He also expressed that concern in his testimony at the investigative hearing.

Mr. Kaul doesn't recall his conversation with Dr. Rowe in February 2012, but he believes the cardiologist changed, or removed, one of his prescriptions. Since seeing Dr. Rowe, Mr. Kaul has not experienced another dizziness spell.

Mr. Kaul feels physically capable of returning to his job at BNSF.

Mr. Kaul had a retirement plan with BNSF but he doesn't recall the details.

[Cross examination] Mr. Kaul did not report either dizzy spell to any person or BNSF employee on January 1, 2012. Mr. Kaul was not feeling normal even before he came to work; but he was not sick. He did not tell anyone that day that he was not feeling normal. When he submitted his January 2, 2012 statement, Mr. Kaul did not mention not feeling normal the day before. During the January 10, 2012 investigation hearing, Mr. Kaul stated that he started to feel sick as he entered the cafeteria/break room after clocking in and changing into his work clothes. Mr. Kaul did not mention not feeling normal on January 1, 2012 until his March 25, 2014 deposition.

While sitting in the cafeteria, Mr. Kaul experienced his first dizzy spell. After he started stretching, he felt better. The dizziness was similar to what happens when you stand up too quickly. He did not fall down, pass out, lose his balance, or experience the need to grab something. Mr. Kaul had not experienced dizziness before; it surprised him. He wasn't expecting it, and felt a little disoriented.

Mr. Kaul agreed that during the dizziness episode, he was not able to be alert and attentive to what was going on around him.

About 12 people were in the cafeteria with Mr. Kaul. The two machinists, Mr. John McLaughlin and Mr. Scott Oleson, were not present. The mechanical foreman, Mr. Mike Palmer, who was a supervisor of Mr. Kaul, conducted a safety briefing and led the stretching exercises, which lasted about 15 minutes. In total, Mr. Kaul spent about 25 minutes in the cafeteria without telling anyone about his dizziness.

After Mr. Palmer told him to report upstairs, Mr. Kaul assumed that he would be on the turn crew at that time. So, while still in the cafeteria, he filled out his time card for the entire turn crew shift from 3:00 p.m. to 11:00 p.m., RX 30. At that point, even after his first dizzy

spell, he had no concern about his ability to work that day. Even if he were assigned to the service track. If he had been concerned, he would have said something to Mr. Palmer. There was no reason he could not have told Mr. Palmer about such a concern in the cafeteria.

When going to the power desk, Mr. Kaul experienced the second dizzy spell, which was similar to the first one. It lasted just a few seconds. He was able to continue walking and holding the handrail going up the stairs. It was “just a light dizziness.” During the second spell, he was unable to be alert and attentive.

At the top of the stairs, about 15 second after his second dizzy spell, he immediately went into the power desk office, which was about 12 feet by 12 feet in size. The following people were present: Mr. John McLaughlin, machinist; Mr. Scott Oleson, machinist; Mr. Kim Hickman, laborer; Mr. Robert Taylor, laborer; Mr. Matt Schnittgen, laborer; Mr. Brandon Knoles, laborer; and Mr. Vant Hul, relief power desk foreman, who was an electrician working as a fill-in supervisor.

Upon his arrival, Mr. Kaul placed his time card on the table, RX 30, and grabbed a lineup off the table, which showed the list of trains coming into the yard during the shift and what needed to be done on each train. At the time, although he had had two dizzy spells, he was still planning to work uptown on the turn crew for a full shift. As soon as he walked into the power desk room, he saw only two other machinists, Mr. McLaughlin and Mr. Oleson, and then became aware of the possibility that he’d be assigned to the service track because neither Mr. McLaughlin nor Mr. Oleson had not been downstairs at the beginning of his shift which meant they probably worked the prior shift and would not be able to operate the locomotives for the upcoming shift. At that moment, Mr. Kaul did not advise Mr. Vant Hul about his two dizzy spells. He also did not pick up his timecard and change it to the service track.

After arrival, everyone was looking at that lineup and waiting for Mr. Vant Hul’s instructions. Again, he didn’t mention his dizzy spells to anyone in the room.

When working on the turn crew uptown, the crew “for the most part” consists of two machinists and two laborers. The service track crew usually has one machinist and two laborers.

After he received the lineup, Mr. Vant Hul told Mr. Kaul that he would be working the service track. Mr. Kaul asked, “So you’re going to put me on the service track tonight.” Mr. Vant Hul responded “Yes, that’s where you’re going to have to go.” Mr. Kaul then said, “I cannot. I’m going home sick.” Mr. Kaul did not ask if there were any other jobs or positions available. He “toss[ed] my lineup onto the table and asked Mr. McLaughlin if he could please excuse me so I could exit the room.”

Mr. Kaul made his decision in his mind not to work the service track immediately after the second dizzy spell, before the assignments were announced.

Mr. Vant Hul’s January 1, 2012 e-mail, RX 22, was sent 3:47 p.m., close to about 20 minutes after Mr. Kaul left the power desk. In the e-mail, Mr. Vant Hul states that Mr. Kaul said, “F--- this. I’m not going to work the service track. I’m going home sick.” Mr. Kaul

believed Mr. Vant Hul sent the e-mail to honestly prove what happened. Nevertheless, Mr. Kaul did not make that statement. That statement would have been a violation of the BNSF conduct rule against swearing. If said, it would also be discourteous and could be taken as hostile. And, if said to a supervisor, it would be insubordinate. Under no circumstances would that statement be appropriate.

When Mr. Kaul left the room, Mr. Vant Hul would not have known that his departure was based on an illness. He provided no further explanation to anyone in the power desk room. And, he didn't think to change his time card which he had left in the power desk room. His concern was that the same several-second dizziness episode would occur again. But, he didn't tell Mr. Vant Hul that working the service track would be unsafe. In hindsight, Mr. Kaul wishes that he had spent more time expressing himself. Mr. Kaul agrees that it makes common sense that if an employee is refusing to perform at task at work that he provide the reasoning why.

Mr. Kaul has reviewed the co-workers' statements and believes that each of them testified truthfully at the investigation hearing. He doesn't take issues with the statements of Mr. Oleson, RX 23, Mr. Knoles, RX 24, Mr. Schnittgen, RX 26, and Mr. Taylor, RX 27. They made an accurate representation of what they remembers.

Mr. Kaul does not believe that he was discourteous to Mr. Vant Hul, but he has apologized. He agrees that there is no reason why he could not have told Mr. Vant Hul the reasons he refused to work the service track.

If Mr. Kaul had been assigned the turn crew, there would have been no immediate need for him to exit the BNSF property on January 1, 2012. He would have worked the full shift that day if he had been assigned to the turn crew, but he would still not have felt safe to operate a locomotive. While on the turn crew, machinists operate Kubotas, which are golf-cart sized ATVs that operate at a maximum of 25 miles per hour. Despite his dizziness spells, Mr. Kaul would have felt safe on the turn crew working around locomotives and other heavy equipment in the industrial setting of the rail yard. "I would have done my job to the best of my ability, without taking any chances." He also "would have talked with my co-workers told them what is going on with me."

Had Mr. Kaul been assigned to the shop, he also would not have left work due to his dizzy spells. If he had any concerns about a task, he would have informed his supervisor that it would not be best for him to perform the task.

Mr. Kaul agrees that safety is the number one priority for every railroad employee. Mr. Kaul agrees that feeling dizzy, no matter the job, could adversely affect the safety of himself and others. A machinist is required to always be alert, especially due to the movement of trains and locomotives on any track, in either direction. As a machinist, he always worked around moving equipment.

After leaving the power desk, Mr. Kaul went to locker room, changed clothes, and walked from the basement to the main floor and into Mr. Palmer's office. He told Mr. Palmer that he was going home sick. Mr. Palmer replied, "ok." Mr. Kaul didn't tell Mr. Palmer what

happened in the power desk office or that he had experienced dizziness. He didn't express his belief that working the service track would create a hazardous condition or that he was well enough to work other jobs. There was nothing stopping Mr. Kaul from making those statements to Mr. Palmer. After their exchange, Mr. Palmer would not have had any clue that Mr. Kaul believed a hazardous condition existed or that he had a safety concern.

After leaving Mr. Palmer's office, Mr. Kaul did not seek medical treatment from anyone at BNSF. He didn't call a family member for a ride home. He didn't ask a supervisor or co-worker for a ride home. Instead, Mr. Kaul drove his personal car about 10 miles back home.

At home, in the later part of the day, Mr. Kaul may have relaxed with his family. He doesn't recall if he went straight home and then to sleep. He assumes that may have been when he told his wife that he was going to lay down.

His present job as a cement truck driver is seasonal work because cement can not be poured when it is cold outside. The job may last into September or October. Afterwards, he hopes to get a full-time job, which would be better than his part-time job at Walmart.<sup>6</sup>

In his deposition, Mr. Kaul stated that after he returned home, he sat with his family and watched a movie. That's what happened. The kids were out of school due to the holiday.

On January 1, 2012, for the rest of the day, Mr. Kaul did not contact anyone at BNSF about what happened or to provide further explanation.

Later that evening, Mr. Kaul experienced another dizzy spell while watching the movie. He still did not seek medical attention.

Through January 27, 2012, when he was dismissed, Mr. Kaul still had not seen a doctor about the dizzy spells.

At the BNSF investigation, Mr. Kaul opined that his dizziness spells were due a flu bug that was going around.

On January 2, 2012, when Mr. Kaul reported to work the mechanical foreman, Mr. Paul McLeod, informed him that he was being withheld from service with pay, and gave him a Notice of Investigation. Mr. McLeod also asked him to provide a statement, RX 29.

With regard to the Kubota wheel incident, Mr. Kaul could have challenged the charges and gone to an investigation. Mr. Kaul signed the waiver.

An daily inspection log is completed at the start of each shift which shows any pre-existing damage. The crew on the shift immediately after Mr. Kaul's shift reported the bent rim when they inspected the Kubota. Both Mr. Kaul and his co-worker admitted driving the Kubota that day. He doesn't recall driving over tracks, and is not sure why he admitted doing so. Mr.

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<sup>6</sup>At this point, the record returns to Mr. Kaul's cross-examination on May 20, 2012.

Kaul understood the charge was failure to cross tracks at a crossing, causing damage to the vehicle.

By federal law, BNSF is required to do OPTS. Being OPTS- tested has nothing to do with whether a person is in the ERP program. It was a regular event.

Mr. Kaul was trained by BNSF to empower himself not to perform tasks that he believed posed a safety hazard. Empowerment involves an interactive process with a supervisor. The program doesn't simply permit an employee to refuse work on the basis of illness and leave. On January 1, 2012, Mr. Kaul did not comply with BNSF's empowerment policy.

Mr. Kaul did not see Dr. Rowe until his previously scheduled follow-up appointment on February 16, 2012. After he informed Dr. Rowe that he experienced dizziness spells about a month and a half earlier, the physician did not conduct any tests. Mr. Kaul assumes Mr. McLeod and Mr. Price had access to his medical records.

Information about Mr. Kaul's participation in the EAP was presented at the investigation hearing by his union representative for consideration by BNSF in reaching its decision on his case. The representative presented information about Mr. Kaul's problems with expressing himself during confrontations while under stress. His involvement in the EAP consisted of one phone call.

Mr. Kaul received pay from BNSF until his January 27, 2012 dismissal. He then collected railroad unemployment benefits for about nine months. The amount was about \$600 every couple of weeks. During a discussion with an OSHA investigator, Mr. Kaul advised that he had driven a truck for a few days, but he was collecting railroad unemployment.

Currently, his family is covered by his wife's medical insurance.

While part of the emotional stress he suffered due to lost of his job involved martial difficulties, Mr. Kaul and his wife have previously had other difficulties. Even before his dismissal, he was seeking professional help for family-related issues. Mr. Kaul is not taking medication for emotional distress or depression.

He has not had to liquidate any of his major belongings since his dismissal.

Mr. Kaul holds a commercial driver's license.

[ALJ examination] The only time a person on the turn crew would move locomotives was if he was asked to go down to the service track to help. So, on January 1, 2012, Mr. Kaul didn't know whether as part of the turn crew, he might be asked to help on the service track. In that situation, he would not have been able to operate the locomotive; he could only inspect, and do ground work on, the engines.

Mr. Kaul did not want to operate a locomotive on January 1, 2012 because he didn't want to experience a dizzy spells "while I was behind the controls." While he shouldn't have driven his car that day, he was just thinking, "I've got to get home, figure out what's going on."

After experiencing his third dizzy spell, Mr. Kaul did not seek medical care. He told his wife about the dizzy spells at work when he came home. He also told her about the third dizzy spell that evening. She didn't take him to a doctor.

Both in his January 2, 2012 statement and the January 10, 2012 hearing, Mr. Kaul advised BNSF of his safety concern associated with the events on January 1, 2012.

[Re-direct examination] Several of the employees that were in the power desk room testified at the January 10, 2012 hearing. Neither their testimony nor the employees' statement said the Mr. Kaul swore.

When Mr. Kaul drove his car home on January 1, 2012, there was another working car at his home at that time.

**Mrs. Sherry L. Kaul**  
(TR I, pp. 150-161)

[Direct examination] The Kauls have been married for 24 years.

On New Year's eve, the family stayed home and played games. The next day, Mr. Kaul returned home shortly after leaving for work. When she asked why he was home, Mr. Kaul said that he didn't feel good, "he was feeling dizzy, and he had come home, just needed to come home and lay down." And, "for the most part," that's it; "he went and laid down." Mr. Kaul didn't look well; he was "really quiet." Because he didn't look himself, Mrs. Kaul told him to lie down. She didn't think that a doctor was needed because "he had had his medicines" and she figured that was an issue. Or, maybe he hadn't eaten right. "Nothing really stood out to call a doctor."

The next day, Mrs. Kaul saw Mr. Kaul again when she returned home from work at 4:00 p.m. He told her the company sent him home since there was an investigation because they didn't believe that he was sick. Mrs. Kaul was upset because she knew from her friends that a railroad investigation usually doesn't turn out well.

Mr. Kaul told her that he thought the investigation hearing went well because he had told them everything. But as a person who thinks ahead, Mrs. Kaul was "very concerned."

A couple weeks later, he was fired. Mrs. Kaul had to figure out how they were going to pay their bills and became very upset about the unfairness of the situation. They had to develop a Plan B.

As part of Plan B, Mrs. Kaul asked for overtime, "as much as I could get." They also had to get loans from family members to pay taxes and utilities. They also almost lost their home

and had to refinance their mortgage. Legal expenses associated with the foreclosure and late fees totaled over \$5,000. They also had to wait several months for open enrollment in order to obtain health insurance through her employer, Walmart, which cost \$330 a month. Groceries were scarce and “everything fell on me to pay.” The situation strained their marriage but “we’re healing” with a lot of communication and hard work.

Mr. Kaul loved working on the railroad. “That’s the happiest I’ve seen him.”

[Cross examination] As best she can remember, Mr. Kaul came home early on January 1, 2012 and went straight to bed. She doesn’t recall spending much time with him. She can’t say for sure whether he had another dizzy spell after he got home.

No one else in the house was sick at the time.

Mr. Kaul received railroad unemployment of about \$300 every two weeks, for at least nine months.

**Mr. Steve Brough**  
(TR I, pp. 162-172)

[Direct examination] Mr. Brough has over 39 years of railroad experience, and has worked the service track for about 10 years. In that job, he would move locomotives in and out of the diesel shop for servicing and other work. During these operations, other workers were around the shop and on the ground.

While operating a locomotive, Mr. Brough would have radio or visual communication with other personnel. The power desk foreman would provide orders, and coordinate all movements.

Blue flag protection acts as a stop sign. You never bump into, or have contact with, anything that has a blue flag on it.

Diesel train engines weigh about 400,000 pounds; “they don’t stop every quickly.” Over the course of his career, he has observed numerous locomotive accidents and derailments. The operation of a locomotive requires attention and alertness. “You have to be very alert operating locomotives . . . the potential for injury, or damage, or death is probably greater operating a locomotive than it would be with operating a vehicle . . . you, probably, have to be very alert, very attentive.”

Safety is number one and they always try to error on the side of safety.

It would not be safe to operate a locomotive if you were ill or dizzy because your attention would not be 100% on the task at hand.

Mr. Brough worked with Mr. Kaul and experienced no problems. Mr. Kaul “did his job well. He wasn’t a slacker.” He never complained about working anywhere in the rail yard.

[Cross examination] You always have to take the safe course on the railroad. Every job requires that. Employees have to expect movement of locomotives in the rail yard. Whether on the service track or uptown, an employee has to be aware of moving cars, locomotives, and equipment.

**Mr. Paul S. McLeod**  
(TR I, pp.219-342)

[Direct examination] In January 2012, Mr. McLeod was the general foreman at the Havre Diesel Shop. In that capacity, he was one of Mr. Kaul's supervisor. Mr. Kaul's direct supervisor was Mr. Vant Hul. Mr. Mike Palmer was the first line supervisor, and at the same level as Mr. Vant Hul.

About 3:00 p.m., on January 1, 2012, Mr. McLeod received a call from Mr. Vant Hul, who advised that when Mr. Kaul was assigned to work the service track, he got upset, threw his time card on the table, and stormed out of the room. Mr. McLeod asked Mr. Vant Hul to send him an e-mail with the specific details of what happened. About 20 minutes later, at 3:47 p.m., Mr. Vant Hul sent the e-mail, RX 22.

In the e-mail, Mr. Vant Hul recalled that when he assigned Mr. Kaul to the service track, Mr. Kaul asked if he was assigned to the service track. When Mr. Vant Hul confirmed he assignment, Mr. Kaul became irritated, used foul language, tossed either his time card or lineup on the table and stormed out of the room, saying he was going home sick. Mr. Vant Hul also advised that no other machinist assigned to the turn crew or service track that day was qualified. The other machinists were working overtime and were unable to operate or move locomotives due to the federal hours of service that limits the operation of a locomotive to a 12-hour period. Mr. Vant Hul also indicated that nine trains were on the mainline, or A-track, uptown, and 14 locomotives were coming into the shop, or the service track. One machinist and one laborer would be on the service track; two laborers and two machinists would be on the turn crew. Only two people are assigned to the service track because it's not as time-sensitive; whereas the turn crew has to get the trains in and out in order to keep things on schedule. The four people on the turn crew are split into two teams, but since only so many local trains can be moved uptown at one time, the two crews have more built-in breaks. The turn crew teams have to work rapidly, but they get breaks as the trains move in and out. That division of labor has been in place for at least 16 years.

Mr. McLeod has worked as a machinist on both the turn crew and service track. On January 1, 2012, the work "would have been busier on the service track" based on Mr. Vant Hul's summary of the trains in his e-mail.

Mr. McLeod was concerned about Mr. Vant Hul's e-mail due to the way Mr. Kaul had conducted himself. Mr. Kaul was angry and used foul language according to Mr. Vant Hul. After receiving the call, Mr. McLeod went to the shop and instructed Mr. Vant Hul to collect statements from the employees who were present while the incident was fresh in their minds.

Mr. Vant Hul got the following statements almost right away: Mr. Oleson, Mr. Knoles, Mr. Hickman, Mr. Schnittgen, Mr. Taylor, and Mr. McLaughlin.

After reading the statements as soon as he received them, Mr. McLeod concluded that an investigation into the alleged conduct was necessary. In practice, Mr. McLeod doesn't call employees at home. As a result, he decided to get Mr. Kaul's statement the next day when he came to work. Mr. McLeod contacted his supervisor, Mr. Price. The intended verbiage for the Notice of Investigation was drafted by 8:29 a.m., January 2, 2012, RX 8. Mr. Kaul's shift on January 2, 2012 started at 3:00 p.m. The notice indicates that an investigation will be conducted to ascertain the facts associated with allegations of failure to comply with instructions; and insubordinate, quarrelsome, discourteous, hostile, and dishonest conduct by using unsuitable language; and leaving an assignment without proper authority. This language comes from the company's Mechanical Safety Rules ("MSR") S-28.6, S-28.61, and S-28.13, RX 38. Based on the statements he had reviewed, Mr. McLeod thought there was a possibility that Mr. Kaul had violated the rules.

During the investigation, Mr. Kaul would have an opportunity to tell his side of the story and provide information on whether a violation of the rules occurred. The actual Notice of Investigation, RX 20, contains the same language as the e-mail.

Prior to his return to January 2, 2012, Mr. Kaul had not contacted Mr. McLeod. When Mr. Kaul arrived that day, Mr. McLeod asked him to come to his office. Mr. McLeod had asked a supervisor, Mr. Bob Mantle, to get Mr. Kaul. Upon Mr. Kaul's arrival, Mr. McLeod had Mr. Kaul write a statement, RX 29. Mr. McLeod also gave Mr. Kaul the Notice of Investigation, and read it to him. Mr. Kaul did not have any questions. The union representative, Mr. Clint Ophus, was present at their meeting.

Prior to the January 2, 2012 written statement, to the best of Mr. McLeod's knowledge, Mr. Kaul had not informed Mr. McLeod or anyone of his dizziness or safety concern. Prior to his statement, Mr. Kaul had not informed Mr. McLeod that he believed working the service track on January 1, 2012 could cause a safety concern. At their meeting, in addition to his written statement, Mr. Kaul told Mr. McLeod that he was feeling dizzy the day before, felt he was unsafe, and went home although he didn't feel he was sick. He explained that his children and his family were sick at home, and that he had a little touch of the flu; that's what caused his dizziness.

Mr. McLeod considered Mr. Kaul's explanation a "little odd" because Mr. Kaul was able to explain what happened to him to Mr. McLeod yet on the day prior, "he . . . just left." Mr. Kaul was sent home with pay.

On January 10, 2012, Mr. David Nilsen, the Havre roadmaster, conducted the investigation hearing under the procedures in the collective bargaining agreement. Mr. Nilsen did not have supervisory authority over Mr. Kaul. Mr. Kaul was present during the investigation with his union representative.

During the hearing, Mr. Kaul again stated that his family at home had the flu and he thought that he caught a little touch of it.

On January 1, 2012, Mr. Kaul turned in his time card at the power desk, RX 30. It's marked, "TC," for turn crew, and shows a full work shift of eight hours, indicating an intention to work the entire shift.

For January 1, 2012, Mr. Kaul received 27 minutes of time and a half, and eight hours of holiday pay, which is straight time. So, when Mr. Kaul left the shop, he left almost eight hours of time and a half on the table. When an employee works on a holiday, he receives holiday pay plus one and a half times regular pay for overtime.

According to MSR S-1.2.3, machinists are required to be alert and attentive at all times on all jobs when performing their work. On January 1, 2012, that rule applied to both the service track crew and turn crew. All machinists work on and around heavy equipment, and are trained to expect the movement of engines, cars, and other equipment at anytime on any track, in either direction, MSR S-1.6.1. This rule also applies to both the service track crew and turn crew. On January 1, 2012, Mr. Kaul was current, and up-to-date, on the MSRs.

After the investigation, in which he testified, Mr. McLeod reviewed the transcript and the co-workers' statements. The investigating officer recommended dismissal. Mr. Price was the decision maker. Mr. McLeod also concluded that Mr. Kaul acted in a discourteous, insubordinate, and hostile manner. As a result, he recommended dismissal. One of the factors he considered was that according to Mr. Vant Hul on occasions when he called the turn crew to assist on the service track, Mr. Kaul would not respond. At the same time, Mr. Kaul was not written up for his failure to help out. Mr. McLeod does not know whether Mr. Vant Hul gave Mr. Kaul an opportunity to explain why he didn't respond to the requests for help.

Mr. McLeod believed Mr. Vant Hul's version of the events on January 1, 2012, including his statement that Mr. Kaul used foul language. Mr. McLeod recognized that none of the co-workers indicated that Mr. Kaul swore; however, they weren't specifically asked about Mr. Kaul's language and simply provided statements "in their own way." Also, at the hearing, Mr. Kaul did not challenge Mr. Vant Hul's assertion about his use of profanity.

Mr. Vant Hul is an electrician, a craft employee, and a union member.

Mr. Kaul apologized to Mr. Vant Hul at the hearing.

If truly sick, an employee can go home at anytime. However, he can't wait for his assignment and then claim that he needs to go home sick. When going out sick, an employee should tell the supervisor what's wrong with him. That way, a supervisor can provide assistance if needed, such as medical attention or a drive home. That requirement also permits a supervisor to document the illness. That's the usual practice for BNSF, and on several occasions, Mr. McLeod has actually provided assistance to a sick employee.

In particular, if an employee has a safety-related concern due to how he is feeling, he should “absolutely” inform a supervisor. The supervisor needs to know if the situation will generate a safety concern for the employee and others so action can be taken to help, by putting the employee in a less safety-sensitive position, or obtaining medical attention. Mr. Kaul did not provide any information about why he had to go home sick.

On January 2, 2012, Mr. Kaul advised Mr. McLeod that the reason for his action was a safety concern. He provided the same information during the January 10, 2012 investigation hearing. However, had Mr. Kaul informed Mr. McLeod on January 1, 2012 that he felt dizzy and did not feel safe to operate locomotives or drive Kubotas, Mr. McLeod would have offered medical attention and definitely given him a ride home. Mr. McLeod would not have permitted him to work that day. And, the information would have given Mr. McLeod the opportunity to remove Mr. Kaul from an unsafe condition.

On January 19, 2012, Mr. Price sent the hearing transcript to Mr. Mabry, corporate management officer, Mr. Heenan, director of labor relations, Mr. Freshour, human resources (“HR”) director, and Mr. Nilsen, investigation officer, RX 6. Mr. Price observed that Mr. Kaul was already on a Level S for damaging a Kubota by driving it over rails rather than the proper crossing. A Level S means a serious rule violation that involves the “Seven Safety Absolutes.”

The Kubota incident occurred when Mr. Kaul and another employee were working locomotives in the A-track area. They needed to drain a locomotive toilet. Instead of going 100 yards down and around the engine to use a track crossing, they chose to drive over the tracks, damaging the Kubota. They caused a bent rim and ruined a tire. The next assigned crew found the damage during a pre-inspection and reported it to a supervisor. Mr. Kaul had signed the Kubota inspection on the prior shift. Mr. McLeod discussed the situation with Mr. Kaul and Mr. West. According to their account, they had driven the Kubota across the tracks to dump the toilet; one had driven it in, and the other drove the Kubota out. Mr. Kaul signed an investigation waiver, RX 33, which means he accepted responsibility for the stated allegation of failure to cross tracks at a crossing, causing damage to a vehicle on March 7, 2011 at 8:00 p.m., which was a violation of MSR S-8.2.3. The punishment was a 30 day paper suspension, without a loss of time or pay, and a one year review period. The disciplinary action was not in retaliation for Mr. Kaul’s earlier report of a shoulder injury. Under the company’s accountability guideline, Policy for Employee Performance and Accountability (“PEPA”), RX 4, Mr. Kaul should have received a three year review period. During the review period, if there is any other rule violation, the earlier violation which led to the review period may be considered in assessing discipline for the subsequent violation.

In his e-mail, RX 6, Mr. Price also indicated that Mr. Kaul had contacted EAP for his anger issues. Mr. Price became aware of the participation when the union representative referenced the EAP in his closing statement. Typically, a supervisor is unaware of an employee’s participation in the EAP. Mr. McLeod believed it was brought up to show that Mr. Kaul was trying to get help with his anger issue. Mr. McLeod did not consider the EAP information because “it had no bearing on the day of the incident.”

In the e-mail chain, RX 6, after a review of Mr. Kaul's personal injury and disciplinary record, "the employee's transcript," Mr. McLeod recommended Mr. Kaul be removed from service with pay pending the outcome of the formal investigation. He only used the term "personal injury" as a means to identify the employee transcript. And, the portion of the employee transcript to which he was referring was the disciplinary record. Mr. Kaul's prior injuries were not a factor in Mr. McLeod's recommendation.

Mr. Kaul's refusal to accept an assignment which he later explained was due to a safety concern was not a Level S violation. Instead, "it was the conduct in which he portrayed it or exhibited; that was the Level S violation." Specifically, his action of throwing down his time card or lineup on the table and his language were disrespectful, insubordinate, and demonstrated an indifference to duty. Even absent the foul language, Mr. McLeod considered his conduct disrespectful to the supervisor and demonstrative of indifference to his duties.

Mr. McLeod did not consider Mr. Kaul's involvement in the ERP. BNSF designed the ERP to help employees become safer through training and counseling. Mr. McLeod also did not consider Mr. Kaul's off-duty heart condition. Mr. McLeod became aware of Mr. Kaul's heart issues through outside activities, including coaching Mr. Kaul's children in softball. Mr. McLeod did not have access to Mr. Kaul's medical records.

Near the end of the e-mail, RX 6, Mr. McLeod recommended that they move forward with a dismissal based on a second Level S violation. Mr. Price eventually made that decision and Mr. McLeod concurred.

During the investigation, Mr. Kaul did not allege that his dizziness was related to his heart condition.

In another situation, an employee was given an assignment to work on a locomotive. When he refused to complete the assignment, he was given a Notice of Investigation for indifference to duty. After signing an investigation waiver, he received a 30 day record suspension, and was placed on a three-year review period for a Level S violation. Although the employee had a prior Level S violation, he was no longer on probation so the earlier incident was not considered.

[Cross examination] Mr. McLeod believes some workers fill out their time cards before getting their assignments at the power desk. When he worked on turn crew, on occasion, Mr. McLeod filled out his time card before the shift started.

Although Mr. McLeod mentioned placing a sick employee in a less safety sensitive job, if Mr. Kaul had told him about the dizziness spells, Mr. McLeod would not have given him another job that day.

Operating a locomotive is a "very safety conscious job."

On January 1, 2012, Mr. Vant Hul was responsible for timely and efficient operations on the service track, and the turn crew. If there were any interruptions or delay in those operations, he would have to provide an explanation.

In a January 1, 2012 e-mail, RX 21, Mr. Palmer advised Mr. McLeod that Mr. Sparks, who was a machinist and assigned for the 3:00 p.m. shift that day, called and asked if anyone had signed up to work for him. That is, he was inquiring whether someone had volunteered to take his place. When Mr. Palmer said no, Mr. Sparks said he was laying off sick. Mr. Sparks' not showing up for work reduced the crew size for the 3:00 p.m. shift. If he had shown up, Mr. Sparks would have had sufficient hours of service to operate locomotives on the service track.

Mr. Sparks was not investigated. Mr. Sparks called from home. He hadn't punched in; he wasn't at the power desk; he didn't claim to go out sick after receiving an assignment. That is, Mr. Sparks called in sick prior to his shift, rather than reporting to work and then refusing an assignment due to illness. Mr. Spark's calling in sick was not a Level S violation. In Mr. Kaul's case, Mr. McLeod was concerned about how Mr. Kaul conducted himself, his discourteous behavior and indifference to duty. Mr. Sparks' calling in sick after learning that no one had volunteer to take his shift was not indifference to duty.

One of the co-workers noted the Mr. Vant Hul was irritated prior to giving anyone an assignment on January 1, 2012.

Rather than receiving a three year review period for the Kubota incident, Mr. Kaul was placed on a one year review period under the exception based on a good work record and absence of prior disciplinary in the preceding five years.

On July 1, 2011, Ms. Gladney, a BNSF nurse, advised that Mr. Kaul was eligible for return to work from his neck/shoulder injury which occurred on February 2, 2011. However, he remained ineligible due to his heart condition, CX 17, p. 28. Mr. Kaul became eligible for return to work without restrictions effective July 14, 2011.

Shortly after his return to work, Mr. Kaul was enrolled in the ERP on August 7, 2011, CX 17, p. 9, in part due his shoulder injury and the discipline associated with the Kubota damage. The points in the ERP were probably for his injuries.

Under OPTS, each employee receives two operational tests each year. When an employee is in the ERP, the OPTS are conducted monthly. Mr. McLeod recorded the January 10, 2012 investigation hearing as an OPTS meeting because the subject of the hearing was Mr. Kaul's conduct and safety concerns. He also included the initiation of the investigation on January 1, 2012 as an OPTS "natural" failure.

On January 1, 2012, Mr. McLeod received the co-workers' statements.

RX 17, pp. 2-5, is Mr. Kaul's employee transcript. The discipline portion shows the March 7, 2011 Kubota incident. The transcript also shows three injuries involving his shoulder and neck.

Mr. McLeod's recommendation to investigate Mr. Kaul was not based in part on his prior discipline record. However, when he recommended putting Mr. Kaul off-duty with pay pending the outcome of the investigation, Mr. Kaul's discipline record was a consideration. Usually, about 90 to 95% of the time, an employee will remain on duty while under investigation.

Mr. McLeod agrees that it is unsafe for an employee to operate a locomotive while sick and dizzy, with dizziness being the primary issue.

Other than the January 1, 2012 situation, Mr. McLeod is not aware of any incident at work involving Mr. Kaul's use of profanity. He is also unaware of Mr. Kaul refusing a job assignment.

An employee who is sick may tell a supervisor that he is sick and go home. However, the employee can not do so in a discourteous and hostile manner. If Mr. Kaul had actually been ill and dizzy on January 1, 2012, that would have been a valid reason for refusing work involving the operation of locomotives. If true, he would have complied with the MSRs.

Mr. McLeod had a good working relationship with Mr. Kaul. Mr. McLeod has been a BNSF supervisor since 2007. During that period, he has terminated the employment of about seven employees.

Dismissal based on a second Level S violation while on probation is discretionary. Based on Mr. Kaul's conduct on January 1, 2012, Mr. McLeod believed termination was warranted.

[Re-direct examination] BNSF has an absenteeism process. After so many absences, there can be disciplinary action. Mr. McLeod met with Mr. Sparks when he returned.

Participation in the ERP is not punishment; it's a benefit to help the employee become more safety-minded. It was not a consideration in Mr. Kaul's case. He did not consider the personal injury information in Mr. Kaul's employee transcript in accessing discipline.

An employee is not complying with the empowerment policy when he just says he can't do a task, that he's sick, and he's leaving. Empowerment gives an employee the ability to call out a safety-sensitive situation or safety issue related to a task and his determination that he can't do the task. But the policy also involves communicating the safety issue to the supervisor. Mr. Kaul did not follow the policy requirements on January 1, 2012. His after-the-fact explanation occurred after he had refused work and left the property.

Mr. McLeod has received annual training on whistleblower provisions and retaliation.

**Mr. Joseph R. Heenan**  
(TR I, pp. 343-384)

[Direct examination] Mr. Heenan has been the Director of Human Relations since 2009. In January 2012, he was also the PEPA director. As part of his duties, Mr. Heenan reviewed all potential dismissal actions, and cases involving lengthy actual suspensions.

In that capacity, he reviewed Mr. Kaul's case, which included the investigation transcript, RX 37, the attached exhibits, CX 3, and his employee transcript, CX 17, pp. 2-5. The employee transcript is an important consideration given the company's progressive discipline policy, in terms of a prior disciplinary record. The employee transcript is also called a "hard card" and "Employee Personal Injury and Discipline Record."

One of basis for the dismissal determination was Mr. Kaul being in the review period for a prior Level S, or serious, rule violation, and having received a 30-day record suspension. The record suspension is used to put an employee on notice.

Additionally, in Mr. Kaul's case, besides being a serious rule violation, his indifference to duty, insubordination, and arguably malicious conduct in throwing paperwork down, telling the supervisor that he's not going to do the assignment, and walking off the property would support a stand-alone dismissal.

Based on his review of the record, and the co-workers' statements, Mr. Heenan found substantial evidence to establish that Mr. Kaul engaged in the alleged misconduct. Even Mr. Kaul's union representative admitted that a reasonable person could find a rule violation in this situation. Mr. Kaul was found to have violated the following MSR rules: S-28.13 – failure to comply with instructions because he refused the service track assignment, S-28.6 – quarrelsome and discourteous conduct based on his tone and demeanor at the time of his work refusal, and S-28.6.1 – use of profanity based on his language.

Mr. Price asked for Mr. Heenan's input prior to making his decision. RX 14 contains his recommendation, which was dismissal. In the absence of compelling mitigating circumstances, and based on the two previously discussed justifications, a possibly stand-alone offense, and a second Level S serious rule violation within the probation period of a prior Level S violation, dismissal was appropriate. Mr. Price's e-mail chain did not influence his decision.

Mr. Heenan did not consider Mr. Kaul's injuries in reaching his dismissal recommendation.

Mr. Kaul's EAP participation was brought up during the hearing by his representative. That's the only reason Mr. Heenan became aware of his involvement.

The level of discipline, the dismissal, was consistent with PEPA policy. Mr. Heenan has reviewed about 800 of these types of cases over a four-year period.

The absence of profanity would not have changed Mr. Heenan's dismissal recommendation. The primary focus of the rules violation was his deliberate failure not follow a specific instruction. "It was an outright refusal to work and abandonment of his job, when he walked off the property." And, he made that refusal in front of co-workers.

In another employee's case which involved a confrontation with a supervisor about a work assignment, the employee claimed he was being harassed, declared that he was sick, and walked off the property, RX 32. In that case, Mr. Heenan also recommended dismissal.

RX 2 is BNSF's non-retaliation policy, which prohibits retaliation. RX 1 sets out the general reporting requirements and contains whistleblower provisions. Mr. Heenan has received training in these areas.

Mr. Kaul was not dismissed for reporting a safety condition on January 2, 2012. He also was not dismissed for reporting that he was sick. Mr. Heenan's concern was Mr. Kaul's conduct and manner in which he refused the work assignment.

[Cross examination] Usually Mr. Heenan becomes involved in a case after the investigation is completed. He wasn't involved in Mr. McLeod's decision to initiate an investigation. Investigations are conducted for alleged rules violations and not prior injuries or discipline. In determining the level of discipline, when a rule violation has been determined, prior discipline is considered.

Mr. Heenan has no association with the ERP.

Without completely knowing Mr. Sparks' situation, Mr. Heenan doesn't think his calling in sick would be an indifference to duty. If someone had volunteered for his job, then Mr. Sparks would have no need to go out sick. But, since no one had volunteered, and he's not feeling well, then he acted appropriately calling in sick before his shift started.

[ALJ examination] Mr. Heenan did not consider Mr. Kaul's January 2, 2012 explanation for his actions the day before to be mitigating. In his experience, employees will subsequently explain their conduct by claiming not have been feeling well at the time. Such statements are compelling only if there is supporting documentation. Mr. Kaul did not seek medical attention. There was no evidence corroborating his claim that he was sick. Mr. Heenan also noted that Mr. Kaul's refusal was conditional; that is if he was assigned to the service track, he was going out sick. And, finally, storming out on a supervisor is inconsistent with Mr. Kaul having a safety concern. To the contrary, he arguably left an unsafe condition for his co-workers if the cause of his dizziness was environmental, such as diesel fumes. He failed to follow the empowerment policy.

[Re-direct examination] Although he may have received Mr. Price's e-mail chain, based on his case load, Mr. Heenan focuses on the transcript and exhibits and his recommendation is based on that evidence.

Consideration of prior discipline is a consideration in the PEPA policy. The employee's disciplinary history is relevant in determining whether escalation of discipline for subsequent violations is appropriate.

**Mr. Beau D. Price**  
(TR I, pp. 387-430)

[Direct examination] On January 1, 2012, Mr. Price was the shop superintendent at the Havre Diesel Shop. In that capacity, Mr. Price was a second level supervisor for Mr. Kaul. On January 1, 2012, Mr. Price was on travel in Minnesota. As a result, Mr. McLeod was highest level supervisor in the Havre area that day.

On the day of the investigation hearing, Mr. Kaul's representative asked if the case could be handled with an alternative process. Mr. Price didn't recall whether he also asked about a waiver. Mr. Price declined because Mr. Kaul's case involved a serious rule violation and conduct.

After the hearing, Mr. Price reviewed the transcript, the exhibits, and Mr. Kaul's employee transcript. In particular, Mr. Price noted that the nearly contemporaneous statements, and subsequent testimony, of the co-workers who were present were "very consistent" with Mr. Vant Hul's description of the events that occurred in his office. Mr. Price also gave great weight to Mr. Vant Hul's testimony because he was a craft employee working as a relief supervisor. In the role, he's a supervisor one day and then a co-worker the next day. "So, for him to take exception immediately to what happened and contact the general foreman, who wasn't at the shop, it would have had to have made a very big impact on him." Mr. Vant Hul had no advantage in making up something that didn't happen. So, he believed Mr. Vant Hul's testimony that confrontation occurred with "some heat" and tension. Further, at the hearing, Mr. Kaul had an opportunity to confront the witnesses, and Mr. Vant Hul in particular, but he didn't do that. In fact, he apologized to Mr. Vant Hul for the way things transpired that day.

RX 5 contains Mr. Price's markings and notes he made while reading the hearing transcript. He did not reference the ERP, EAP, or personal injuries.

On January 19, 2012, according to company policy, he forward the transcript to HR and senior leadership for their review, RX 10. That e-mail referenced Mr. Kaul's involvement in the EAP because his representative mentioned it in his closing statement as supporting evidence of Mr. Kaul's attempt to get help for his ability to deal with stress and people. Mr. Price did not use the EAP in assessing discipline. The e-mail reference to the Personal Injury and Discipline Record is another name for Mr. Kaul's employee transcript. Mr. Kaul's personal injury history had no bearing in his dismissal. Mr. Price recommended dismissal because the January 1, 2012 incident was the second Level S in 12 months. He forwarded his recommendation for review in case there may have been any error.

Mr. Price did not consider Mr. Kaul's heart condition and he did not have access to Mr. Kaul's medical record or his OPTS record. Mr. Kaul's participation in the ERP had no bearing on his decision.

If Mr. Kaul had informed Mr. Price that he wasn't feeling well enough to operate a locomotive, and that he was dizzy, Mr. Price would have not have allowed him to work any position as a machinist. With dizziness, a person could lose his ability to be conscious and coherent. Additionally, that condition certainly would require a medical assessment to see if he could return to work.

Mr. Price considered Mr. Kaul's January 2, 2012 explanation for his actions but it did not play a role in his dismissal determination. Mr. Kaul abandoned his job, he walked out. And, his use of profanity in that office setting was unprofessional. His excuse, "I'm sick" was "all after the fact" that he refused to do what the supervisor assigned. Mr. Price would have reached the same decision even if Mr. Kaul didn't use profanity. "His demeanor and attitude was conveyed by more than just his use of profanity." The timing in this situation was very important, because he had already received his assignment, and his subsequent manner "didn't even offer the supervisor a chance to talk through the issue . . . he just walked out and left."

Mr. Price has been trained in the BNSF Code of Conduct, RX 1 and RX 2.

Mr. Sparks' situation was completely different. January 1, 2012 was a holiday. On a holiday, the union will post a list of who will be working. Other employees can cross out a name and write their name in as a substitute. Mr. Sparks was on the list but he wouldn't know before his shift whether anyone had crossed out his name. So, his call to find out if he was still on the holiday list was "very normal." When he found out that he was still on the list, then he said he needed to call in sick. If his name had been crossed out he would not have been expected to work that day and he'd have no reason to call in sick. And, significantly, Mr. Sparks' behavior wasn't confrontational.

Had Mr. Kaul presented medical documentation at the hearing, it would not have altered the severity of his conduct on January 1, 2012, but it would have added to his credibility about his dizziness and could have been a factor to consider in mitigation. Mr. Price was surprised that Mr. Kaul didn't present a doctor's note.

[Cross examination] Mr. Price considered Mr. Kaul's statement of a safety concern during the investigation, and evaluation of the investigation that lead to his disciplinary decision.

Mr. Price was aware that Mr. Kaul had released back to work after his heart attack. He may have been aware of Mr. Kaul's neck surgery. He was also aware of Mr. Kaul's enrollment in ERP.

Mr. McLeod probably selected Mr. Nilsen to be the investigating officer. It's not unusual for an investigating officer to make a recommendation.

Since one of the issues was whether or not Mr. Kaul reacted angrily, his seeking help through EAP related to the anger issue, and he's being upset on January 1, 2012. Mr. Price acknowledged that neither Mr. Kaul nor his representative said "anger." But they did mention his ability to deal with stress.

Mr. Price was present at the start of the investigation hearing but did not stay.

[ALJ examination] Mr. Price believes the trade employees did not want to make things worse for Mr. Kaul by including his language. They provided statements about what they saw but not necessarily what they heard.

Having dizzy spells at work is a safety concern. Prior to taking disciplinary action, Mr. Price was aware that Mr. Kaul had reported a safety concern on January 2, 2012.

[Re-direct examination] Upon review of RX 37, pp. 115 and 119, Mr. Price recalls that the reference to EAP involved stress situations and Mr. Kaul's ability to express himself.

**Notice of Investigation Hearing<sup>7</sup>**  
(CX 1, CX 3, and RX 20)

On January 2, 2012, Mr. Kaul was advised to attend a formal hearing on January 10, 2012 for the purpose of determining facts and responsibility for his alleged failure to comply with instructions, indifference to duty, insubordination, quarrelsomeness and discourteous behavior, and hostile and dishonest conduct when he used unsuitable language and left his assignment on January 1, 2012 at approximately 3:20 p.m. Mr. Kaul was being held from service with pay. Mr. McLeod signed the notice. Mr. Kaul and Mr. Ophus acknowledged receipt.

**Investigation Hearing Transcript and Exhibits**  
(CX 2, CX 3, RX 5, RX 21 to RX 29, and RX 37)

Preliminaries

On January 10, 2012, Mr. David Nilsen conducted an investigation into the allegations in the Notice of Investigation which represented violations of MSR S-28.2.7 – furnishing information; MSR S-28.6 – conduct; MSR S-28.9 – respect of railroad company; MSR S-28.13 – reporting and complying with instructions; and MSR S-28.14 – duty, reporting or absence.

Mr. Kaul was represented by Mr. Clint Ophus, the Local Chairman. Besides Mr. McLeod, Mr. Price was also present.

At the start of the proceedings, Mr. Ophus objected to the validity of the investigation because he had not been provided access to any of the witnesses' statements and the notice failed to specify the which MSRs had been allegedly violated. "It's hard to build a defense if I don't even know what I'm dealing with." In response, Mr. Nilsen gave Mr. Ophus 20 minutes to review the statements.

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<sup>7</sup>While I have read/reviewed all the admitted exhibits, I have only summarized the potentially relevant content that was not unduly repetitious of the hearing testimony.

Mr. McLeod

On January 1, 2012, Mr. Vant Hul advised that Mr. Kaul had gotten upset with his job assignment, threw his lineup card and time card on the table, used profane language, and said he was going home. In response, Mr. McLeod came down to the shop, spoke with Mr. Vant Hul, and directed that witness statements be obtained.

According to Mr. Palmer, Mr. Kaul came into his office at 3:28 p.m., dropped off his time card, and said he was going home sick.

Any machinist can be assigned to the service track. The tasks may include inspecting locomotives, building outbound power (locomotives), making round house moves, and repositioning locomotives around the shop area.

Under MSR S-28.6, an employee must not be insubordinate, dishonest, quarrelsome, or discourteous. Further, any act of hostility, misconduct, or disregard may be grounds for dismissal. And, indifference to duty will not be tolerated.

MSR S-28.6.1 indicates that while on duty employees must refrain from using profane language.

MSR S-28.9 requires employees behave in such a way that BNSF will not be criticized for their actions. By leaving with no notification, Mr. Kaul put BNSF in a position that could have adversely affected the delivery of freight to its customers.

And, MSR S-28.13 requires employees to report to, and follow the instructions of, supervisors. Mr. Kaul became upset and angry and left his duties as a machinist rather than perform his assignment as instructed.

Finally, MSR S-28.14 states that employees must not be absent, or leave their assignments, without proper authority.

Mr. Kaul is required to know these rules and be certified annually.

During their initial telephone conversation, Mr. McLeod asked Mr. Vant Hul to send him an e-mail detailing what happened. Mr. Vant Hul sent the e-mail at 3:47 p.m.

If someone felt a bit dizzy, or unsure of himself, it would not be in the best interest of BNSF for that person to be moving locomotives. If a person is sick, there is no time requirement for how long he must be on duty before he can go home.

Safety is BNSF's number one priority.

Depending on the nature of his presentation, an employee may be quarrelsome even if he is saying that he is sick.

Under the empowerment policy, an employee is empowered to review a situation, and remove himself if he does not feel that it is safe.

If Mr. Kaul was indeed sick, he could tell the supervisor that he is going home sick after receiving his assignment. However, in Mr. McLeod's opinion, and based on Mr. Kaul's actions, including his anger, Mr. Kaul was "angry at this job assignment rather than ill." Mr. Kaul was supplied with his work duty assignment before he left.

Mr. Scott A. Oleson

In his statement, Mr. Oleson indicated that when Mr. Kaul was informed that he would be working the service track, he threw his lineup on the desk and said, "Well, I'm going home sick then." Mr. Kaul then walked out of the power desk.

Based on Mr. Kaul's statement, Mr. Oleson believed that he was irritated or frustrated. He had worked with Mr. Kaul on and off for six months. During that period, Mr. Kaul had not gotten irritated or frustrated. January 1, 2012 was the first time that he had seen Mr. Kaul irritated or frustrated, and it surprised him because "it didn't fit with his behavior previous to that point." Mr. Oleson can't say for certain whether Mr. Kaul was irritated or frustrated during the five minutes before the foreman made the assignments. He really didn't pay attention to the mood swings of his co-workers. Mr. Kaul's statement just caught his attention.

Mr. Kaul had previously worked the service track. Periodically, that was his job.

The power desk room is not very big. With six people and the foreman that day, it was tight quarters.

Mr. Mike Palmer

About 3:28 p.m., January 1, 2012, Mr. Kaul came into his office and said that he was leaving sick.

In his e-mail to Mr. McLeod, Mr. Palmer indicated that around noon, Mr. Sparks, a machinist on the second shift, called to see if anyone had signed up to work for him. When Mr. Palmer told him no, Mr. Sparks said that he was laying off sick. At 3:28 p.m., Mr. Kaul had dropped off his time card and said he was going home sick. It was a good thing they called for a full crew. He had just received a e-mail from Mark (Mr. Vant Hul) about the rest of the story. Mr. Palmer confirmed that Mr. Kaul had left the property.

By laying off sick, Mr. Sparks was indicating that he was not taking a vacation day. Instead, he was calling in sick. "If they lay off sick, they don't get paid for it. If they burn a day of vacation they would be paid for it if we accepted that."

Although he said in his e-mail that Mr. Kaul gave him his time card, Mr. Palmer believes Mr. Kaul actually left his time card at the power desk.

As he was typing his e-mail to Mr. McLeod, Mr. Palmer received Mr. Vant Hul's e-mail about what happened with Mr. Kaul at the power desk.

Mr. Palmer may have seen Mr. Kaul at the start of the shift during the normal safety briefing and stretch. Afterwards, the people that worked the power desk were dismissed; and they left to see that foreman. He didn't notice whether Mr. Kaul was irritated or frustrated.

Mr. Palmer has worked with Mr. Kaul for about 10 years.

Mr. Kaul just open Mr. Palmer's door, stuck his head in, and said he was leaving.

Mr. Palmer does not know whether Mr. Sparks is being investigated for laying off sick. He doesn't know of any pending investigation.

All turn crew personnel turn their time cards into the power desk foreman. When Mr. Kaul came to his office he put his hand on the counter. At the time, Mr. Palmer was typing at his computer and assumed that Mr. Kaul had put a time card down. He was mistaken.

At that time, Mr. Palmer did not know about the power desk incident. In response to Mr. Kaul's statement, he replied okay.

Mr. Palmer has been a supervisor to six years. If someone came to him while he was a foreman and said he was feeling sick and dizzy, Mr. Palmer would not let him move power.

#### Mr. Mark A. Vant Hul

Mr. Vant Hul is an electrician and for the past six years has filled in as a relief supervisor on the floor and power desk about six times a month when a supervisor is on vacation or gone.

On January 1, 2012, Mr. Vant Hul was working as the relief supervisor on the power desk. In that capacity, he was Mr. Kaul's direct supervisor. He has worked with Mr. Kaul for about eight years.

In his e-mail to Mr. McLeod, Mr. Vant Hul stated that when Mr. Kaul found out that he would be assigned the service track that shift, he "threw his time card on the table and said ' F--- this, I'm not going to work the service track. I'm going home sick.'" Mr. Kaul was being assigned to the service track because he was the only machinist that was not on a second shift of the day and thus was the only one qualified to move power on and off the service track. The inbound traffic to the service track was 14 failures. Nine trains uptown required maintenance work.

Mr. Kaul had filled out his time card, and he threw it on table.

At the time, based on his demeanor when he found out that he was going to be assigned to the service track, Mr. Vant Hul did not believe Mr. Kaul appeared to be sick. Instead, Mr. Kaul was frustrated. "After I gave the lineup and the job assignments, we went through a few

other things. Mr. Kaul then looked at me and said, ‘So, you mean I’m going to be assigned the service track the rest of the night?’ That’s when I said yes. And that’s when he used profanity, and said, ‘I’m going home sick.’ and threw his time card on the desk.”

In his experience as a supervisor, the majority of people call in sick prior to their shift. “They never left at the beginning or in the middle of any shift that I have supervised.”

Once Mr. Kaul got his assignment, he became irritated. Mr. Kaul has never behaved that way before with Mr. Vant Hul. Based on that history and his experience as a supervisor, Mr. Vant Hul’s behavior on January 1, 2012 was fairly abnormal in terms of other employees being sick.

On occasion, when Mr. Vant Hul called the uptown crews to help out on the service track, only one crew would come back, while Mr. Kaul and his laborer stayed uptown. Mr. Vant Hul is unable to provide any further details.

Mr. Vant Hul considers that Mr. Kaul violated MSR S-28.6 because he was negligent, insubordinate, quarrelsome, and discourteous. Specifically, he did not say he was sick until the found out what his duties were going to be for the rest of the shift, and threw down his time card.

As Mr. Kaul arrived at the power desk, Mr. Vant Hul was having a discussion with an employee from the prior shift.

Safety is a number one priority. If a person is feeling dizzy or sickly, he should not operate a locomotive.

Mr. Vant Hul is certain Mr. Kaul threw down the time card. “He was standing over by the door, next to the microwave. He had filled it out, he was standing there. We were discussing the lineup, giving job assignments. And that’s when he said, ‘You mean I’m going to be out on service track all night?’ And, when I said, “That’s affirmative,” that’s when he cussed and threw down his time card and said, ‘I’m going home sick.’”

[At the end of Mr. Vant Hul’s testimony, Mr. Kaul said “I just want to say that I’m sorry for the way that day seemed and the way it came . . .” At that moment, Mr. Nilsen interrupted Mr. Kaul, indicating that Mr. Kaul’s comments could be made in a closing statement.]

#### Mr. Brandon Knoles

Mr. Knoles has worked for BNSF as a laborer since 2010.

On January 1, 2012, they were getting their briefing at the power desk with Mr. Vant Hul. Mr. Knoles believes that in order to prevent the two machinists who were working a double shift from getting an hours of service violation, “Mr. Kaul was elected to work the service track.” According to Mr. Knoles, “I don’t know if he didn’t want to work the service or what that was, but [he] just said that if he had to work the service track, he was going to call in sick, and left.”

In his statement, Mr. Knoles indicated that shortly after positions were assigned, Mr. Kaul “stormed out saying, ‘If I have to work service track, then I’m going to go home sick.’ He threw his lineup either at me or near me on the table before exiting the power desk into the shop.”

Since Mr. Knoles was not Mr. Kaul, he doesn’t know if he was upset. Mr. Kaul “wasn’t overly irritated, but slightly” and was “possibly” frustrated.

To the best of his knowledge, Mr. Kaul threw a folded lineup.

It would not be a good idea to move power while dizzy, sick, or sleepy.

On one occasion, Mr. Knoles had to go home sick.

#### Mr. Kim M. Hickman

Mr. Hickman has worked as a railroad laborer for seven years. On January 1, 2012, he had worked the first shift and come up to the power desk for the second shift. He was talking with the foreman when the second shift crew showed up. When they were given their work assignments, Mr. Kaul asked if he was going to be on the service track. Mr. Vant Hul said yes. “Then I saw him throw his card down and say, then he was sick. And, he walked out.

In his statement Mr. Hickman recalled that at the turnover when the assignments were given and the jobs that needed to be done were discussed, Mr. Kaul was told that he was going to have to cover the service track. Mr. Kaul asked if he was on the service track. When he was told yes, he said, “Then, I’m going home sick” and he left the power desk.

Mr. Hickman has worked with Mr. Kaul and likes him.

In Mr. Hickman’s opinion, Mr. Kaul was not happy about his assignment.

Safety is a number one priority for BNSF. If Mr. Hickman was feeling dizzy, he would ask the foreman to disqualify him from operating a locomotive.

As Mr. Kaul arrived at the power desk, Mr. Hickman and Mr. Vant Hul were having a discussion about refueling. Their conversation was not heated. Mr. Vant Hul may have been a little upset about someone not doing what they had been told. Mr. Vant Hul was questioning him. While it may have been perceived as an argument, Mr. Hickman disagrees; they were talking about a refueling situation. Mr. Vant Hul then went into the lineups. It was the holiday with a holiday work force, and it was busy.

Mr. Kaul has worked the service track before.

Mr. Matt Schnittgen

On January 1, 2012, they were given their lineup and Mr. Kaul asked if he was going to be on the service track. "He was told he would be. He said he was sick, and that he was out of there."

In his statement, Mr. Schnittgen recalled that after getting their lineup and Mr. Vant Hul was assigning everybody, Mr. Kaul asked where he was going to be put, and if it was the service track. "When Mark (Mr. Vant Hul) said yes, Scott (Mr. Kaul) threw down his lineup, said he was out of her, and walked out."

Mr. Kaul didn't look like his normal self. Normally, he's a "happy joking guy. He wasn't that guy that day." He wasn't happy but he wasn't extremely angry either. He seemed like that the whole way through the lineup – from the time he got there until he left.

Mr. Schnittgen believed Mr. Vant Hul was getting frustrated with Mr. Hickman who was asking why he had made him drive a fuel truck. Mr. Vant Hul appeared to be a little frustrated.

Mr. John P. McLaughlin

Mr. McLaughlin did not write out a statement about what happened in the power desk room because he was too busy doing his lineup and didn't hear what was said.

In his statement, Mr. McLaughlin indicated that he had no statement other than to say that he saw Mr. Kaul leave.

When Mr. Kaul left, he seemed a little irritated because he was going to be on the service track. "We kind of knew it for a fact" because Mr. McLaughlin and the other machinist had worked "16s."

Because Mr. McLaughlin was in his way, Mr. Kaul said "excuse me" at he tried to leave. That didn't sound hostile.

Mr. Kaul has worked the service track, but not too many times.

Mr. Kaul

In his statement, Mr. Kaul explained that after dressing out in the morning, he sat down in the lunchroom and “started to feel dizzy.” Subsequently stretching, he “seemed to get better.” Then, “while walking up to the power desk,” he “started feeling dizzy again.” After he got his lineup and assignment to the service track, Mr. Kaul decided to go home “on account of safety reasons for myself and others.” He told Mr. Vant Hul that if he was being put on the service track that “I can’t and won’t do it,” and that he was going home sick. Mr. Kaul then left the power desk, dressed out, clocked out, and left.

Because he was “feeling bad and the fact that I was kind of being dizzy,” and based on his experience with locomotives on the service track, he knew operating power in his condition “would be a possible, very threat to myself and anybody around us.” He was mostly concerned about the service track because moving power requires that “you watch yourself” and if you’re feeling bad you just don’t do things that are a safety risk.

[When Mr. Nilsen queried that if Mr. Kaul was feeling ill prior to starting his shift, it was only if he had to work the service track that he wouldn’t work, Mr. Kaul said] “Yeah, well no. It’s would really be only that. The reason for it being that it was used in this manner is simply because of the safety of myself and my co-workers, which is what my facility has taught me, is number one priority in our system, is safety for yourself and other who you work with.”

Mr. Kaul agreed that his job has some safety risk factors regardless of the assigned duty. He didn’t call in sick because he only became ill at work while getting ready for his shift. Mr. Kaul acknowledged that a supervisor was present in the lunchroom and stretch area. He didn’t report his dizziness then because he thought that he might feel better once he got going. Additionally, based on his abilities and what he knew about himself, Mr. Kaul believed at that time he could still perform the duties he normally did on a daily basis.

Mr. Kaul has only had a “couple” dizzy” spells “period.” He “had one other one, one day at work.”

Mr. Kaul agreed that if a company required an employee to be safe 100% of the time, then if a person is suffering dizzy spells it wouldn’t be safe for him to work, no matter the assigned duty.

Although Mr. Kaul was not aware of a specific cause for his dizziness on January 1, 2012, he noted, “we had a flu virus going around that had affected two of my family members.”

Mr. Kaul has never seen a physician about his dizzy spells. And, he did not think the dizziness on January 1 was an issue that needed medical attention because it only happened a few times. “The first time it happened, it was only for, it hit me, as you might say, and I kind of sat there, and it went away. And then this, during this incident here, are the only ones.” He did not feel that he needed medical attention.

Mr. Kaul considers dizzy spells serious.

Mr. Kaul did not seek a doctor for being ill on January 1, 2012. He had one more dizzy spell later in the day. But, he still did not seek medical attention.

Although Mr. Kaul's time card for January 1, 2012 shows completion of his shift from 3:00 p.m. to 11:00 p.m., he did not expect to get paid for more than the 30 minutes he was there. He completed his time card before he received his assignment and put it on the power desk foreman's table next to his computer where everyone put them at the beginning of the shift. At the time he turned in his time card, he expected to work the whole shift.

Mr. Kaul did not use profane language in his exchange with Mr. Van Hul.

Mr. Kaul agreed that everything that BNSF employees do, from moving a locomotive to operating a forklift, is safety-sensitive no matter the assigned duty. He also agreed that feeling dizzy could adversely affect the safety of everyone no matter the job function. However, he noted that with jobs not involving locomotives, he would tell a co-worker that he was feeling dizzy and then sit down for a minute. The co-worker would cover for him briefly; they would work together, and the job would get done.

Mr. Kaul agreed that it would be safer if you're feeling dizzy to just go home no matter what duties have been assigned.

Concerning the flu, "It was my two youngest children. They got sick to the point they vomited." And, the school system had a virus going around. His children were sick for a day and a half. He believed he was getting the flu.

[When asked whether the dizziness in the lunchroom lasted a couple of seconds, Mr. Kaul said] "May 30 seconds, if that."

Mr. Kaul was not quarrelsome, insubordinate, or dishonest with Mr. Vant Hul. He was not indifferent to his duties. He was sick.

If Mr. Kaul had been dizzy at home, he would have called in sick then.

The argument between Mr. Vant Hul and Mr. Hickman used up the time that Mr. Kaul could have used to tell Mr. Vant Hul that he was not feeling 100%.

Mr. Kaul had no problem with working the service track; he had worked that job within the last month.

Mr. Kaul believes what happened on January 1, 2012 was an unfortunate incident.

The turning point that led to his decision to go home was the second dizzy spell. If they had put him on the turn crew uptown, he probably would have let people know that he was not feeling well.

His "quick" dizziness lasted "maybe 30 seconds, a minute."

Mr. Kaul did not appear happy that day because he was not feeling well.

Mr. Kaul agreed that once he found out that his duties were to be on the service track, he decided to go home sick.

Mr. Kaul sometimes has a problem expressing himself in a confrontation. As a result, he asked for help through the EAP. He wants to get better and continue his career with BNSF.

The flu or whatever he had lasted 18 to 20 hours. When he came to work on January 2, and since, he has not felt anything like the way he felt on January 1, 2012. He is 100% now.

Mr. Rob Taylor<sup>8</sup>

In his statement, Mr. Taylor indicated that when Mr. Kaul was notified that he would be on the service track to move power because the other machinists had worked overtime and would be unable to move power, he abruptly said he was sick and stormed out.

**Dismissal Letter**  
(CX 4 and RX 34)

On January 27, 2012, Mr. Nilsen advised that as the result of the January 10, 2012 investigation hearing which lead to a determination that he violated MSR S-28.13, S-28.6, and S-28.6.1, Mr. Kaul was dismissed effective immediately. In assessing the discipline, consideration had been give to his personnel record in accordance with PEPA.

**EAP Contact Record**  
(CX 5)

On January 8, 2012, Mr. Kaul called EAP about work relationship issues and work performance. He was advised to contact a local counselor for support.

**E-Mails**  
(CX 7, and RX 6 to RX 15)

On January 1, 2012, 3:47 p.m., Mr. Vant Hul indicated that after Mr. Kaul was assigned the service track he threw his time card on the table and said, "F--- this I am not going to work service track, I am going home sick." Mr. Kaul was assigned the service track because he was the only machinist qualified on that shift to move power on and off the service track. Inbound units were 19, and maintenance was needed on 9 trains.

In response, and in light of his April 2011 Level S 30-day suspension and 12 month review period, and upon review of his Personal Injury and Discipline Record, Mr. McLeod recommended that Mr. Kaul be withheld from service with pay upon his return to work on January 2, 2012. Mr. McLeod also proposed language for the Notice of Investigation.

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<sup>8</sup>Mr. Taylor did not testify at the investigation hearing.

On January 19, 2012, early afternoon, Mr. Price sent Mr. Brandon Mabry, Mr. Joe Heenan, and Mr. Dane Freshour, with copies to Mr. Nilsen and Mr. McLeod, the investigation hearing transcript concerning Mr. Kaul's "2nd Level S in 12 month review period." After summarizing the contents, including Mr. Kaul's contact with EAP for anger issues, which supported witnesses' statement that he had stormed out in response to being assigned the service track, and noting that incident represented a second Level S violation in 12 months, Mr. Price recommended that Mr. Kaul be dismissed.

On January 19, 2012, late afternoon, Mr. Freshour and Mr. Mabry concurred with Mr. Price's recommendation. Mr. Heenan had no procedural objections.

On January 20, 2012, Mr. Nilsen approved the transcript with no changes.

On January 25, 2012, Mr. Heenan recommended dismissal on the basis of a second Level S violation.

On January 26, 2012, Mr. McLeod directed Mr. Nilsen to move forward with the dismissal of Mr. Kaul.

**Dr. William D. Rowe**  
(CX 8 and CX 19)

Between June 11 and 12, 2011, Dr. Rowe hospitalized Mr. Kaul for a myocardial infarction. His medical history included a cervical disc fusion on May 12, 2011. During his stay, Mr. Kaul underwent a cardiac catheterization with a stent placement.

In July 12, 2011 follow-up assessment, Mr. Kaul was doing well

During a February 16, 2012 follow-up visit, according to Dr. Rowe, Mr. Kaul reported:

he had two brief episodes of dizziness occurring on the same day about a month and a half ago. The first occurred while doing exercise in a warm room, over dressed. The second occurred shortly thereafter, still dressed warmly, but while walking outside. Episodes of lightheadedness lasted 3-5 seconds, and are described as similar to the feeling when one has with standing too quickly.

Dr. Rowe opined the two episodes were representative of a hypotensive episode attributable to either volume depletion, orthostatic change, or arrhythmia. While unable to ascertain the exact cause, Dr. Rowe favored arrhythmia based on Mr. Kaul's medical history. An exercise stress echocardiogram was notable for a right bundle branch block, which was unchanged since July 2011. Nevertheless, Mr. Kaul had normal exercise capacity.

In a May 13, 2014 deposition, Dr. Rowe recalled that during their discussion about the two episodes, Mr. Kaul stated that they came on very sudden and he had a feeling that if he wasn't careful, he might pass out. "But they passed fairly quickly." Dr. Rowe speculated about the causes but thought heart arrhythmia may be more likely. As a result, he adjusted Mr. Kaul's

medications. However, since Mr. Kaul said he was dressed warmly a more common cause might be dehydration. Regardless of the cause, the symptoms caused Mr. Kaul to think he was potentially impaired. He thought they were serious. Dr. Rowe also took them seriously but as time has passed, and there has been no reoccurrence, it's less likely that the original explanation of cardiac arrhythmia was correct. Dr. Rowe now believes the cause was dehydration. Mr. Kaul has continued to do well.

Acknowledging that he is not a railroad man, and that it was difficult to comment, Dr. Rowe opined that if Mr. Kaul was dizzy he should not operate a locomotive. But, under his work protocol, "I think he was obligated to report his symptoms and not operate a locomotive." Further, "from a medical point of view, I guess it would depend on how severe the symptom was and exactly what he felt. But that is really total speculation."

Dr. Rowe's understanding about Mr. Kaul's dizziness comes from Mr. Kaul's report of the incidents. The only report of dizziness occurred during the February 16, 2012 office visit.

Since Mr. Kaul would have had an opportunity to drive slow and pull over if necessary, Dr. Rowe doesn't believe that he should not have driven home after experiencing dizziness spells.

#### **Empowerment Policy** (CX 9)

A March 2005 safety briefing advises that all BNSF employees are responsible for safety, and empowered to stop work activities they feel might compromise their personal safety, the safety of co-workers, or the safety of the entire work group. One of the empowerment steps is to "work together" to eliminate or reduce the safety risk.

#### **Fitness for Duty Recommendation** (CX 14)

On July 14, 2011, Mr. Kaul was cleared to return to unrestricted duties and cleared from his on-duty and off-duty medical issues.

#### **Wage Summary** (CX 15)

In 2010, Mr. Kaul's gross wages were \$59,650.02. In 2011, with no wages in May, June, and July, Mr. Kaul earned \$42,916.02.

**Policy for Employee Performance and Accountability**  
(CX 16 and RX 4)

PEPA supports BNSF's vision of becoming injury and accident free by encouraging all employees to demonstrate safe work behavior and ensure a safe work environment.

A record suspension is only recorded in an employee's personal record, it is not actually served. At the same time, an actual suspension may be imposed.

A standard violation is a violation which does not subject an employee or others to potentially serious injury or death.

A serious violation includes a violation of any work procedure designed to protect employees from serious injury or death, and unauthorized absence.

Stand-alone dismissal violations includes dishonesty about work-related subject, a rule violation leading to extensive damage to company property, and failure to report an accident.

**Employee Transcript – Mr. Kaul**  
(CX 17)

The transcript shows a 30-day record suspension and a 12 month review period for a March 7, 2011 Level S violation for failing to cross tracks at a crossing which caused vehicle damage.

On February 7, 2001, Mr. Kaul suffered an on-duty neck strain/sprain that was non-reportable.

On June 6, 2010, Mr. Kaul suffered an on-duty right shoulder strain/sprain that was non-reportable.

On February 20, 2011, Mr. Kaul suffered an on-duty right shoulder injury that was reportable, and led to cervical surgery for disc herniation in May 2011.

On March 29, 2011, Mr. Kaul was notified of an investigation to be conducted to ascertain the facts and determine responsibility in connected with his alleged failure on March 7, 2011 to cross tracks only at designated crossings with a Kubota ATV which caused vehicle damaged.

On July 14, 2011, Mr. Kaul returned to work after suffering off-duty myocardial infarction which led to cardiac catheterization.

On October 26, 2011 Mr. McLeod discussed with Mr. Kaul his entry into the ERP.

**Deposition of Mr. Wes Anderson**  
(CX 18)

In a September 22, 2011 deposition from an un-related lawsuit, Mr. Anderson testified to his work as a relief supervisor and explained his multiple responsibilities and BNSF's velocity program designed to improve task efficiency without waste. In that work environment, if a person got in a hurry, he was going to miss things and not make good decisions. At times, the power desk job could become overwhelming. In his opinion, a little tension existed between the BNSF velocity policy and safety. Safety is a priority. At the same time, "without trains moving, the customers aren't happy."

**Deposition of Ms. Diane Legate**  
(CX 20)

In July 22, 2009 deposition, Ms. Legate testified that she is a medical care manager who works principally with BNSF. In that capacity, she serves as an information source for BNSF particularly concerning an employee's return to service. She uses OPUS, which is case management software. BNSF personnel have access to an injured worker's file through that computer program.

**BNSF Policies**  
(RX 1 to RX 3)

Under the 2001 BNSF Code of Conduct, all employees are required to report actual and apparent violations of law to any BNSF supervisor, the chief compliance officer, and the vice president and chief HR officer. A BNSF hotline is also available. Retaliation for good faith report of an apparent or actual violation of law or the Code of Conduct is prohibited.

According to BNSF's Equal Employment Opportunity policy, BNSF provides equal opportunity to all employees.

**Mechanical Safety Rules**  
(RX 16 and RX 38)

Rule S-1.2.3 requires all employees to be "alert and attentive when performing duties."

Rule S-1.6.1 notifies employees that while working on or about tracks, they should expect the movement of trains, engines, cars or other equipment at any time, on any track, and in either direction.

Rule S-8.3.2 requires the vehicles cross tracks only at designated crossings.

Rule S-28.2.7 prohibits employees withholding information from, or failing to give all the facts to, persons authorized to receive information regarding unusual events, accidents, personal injuries, or rule violations.

Rule S-28.6 states employees must not be careless of the safety of themselves and others, negligent, insubordinate, dishonest, immoral, quarrelsome, or discourteous. Additionally, “indifference to duty will not be tolerated.”

Rule S-28.6.1 mandates that employees on duty must refrain from using boisterous, profane, sexist, or vulgar language.

Rule S-28.9 directs that employees behave in a manner that precludes BNSF being criticized for their actions.

Rule S-28.13 requires employees to report to, and comply with, instructions from supervisors.

Rule S-28.14 states in part that “Employees must not leave their assignment, exchange duties, or allow others to fill their assignments without proper authority.”

### **Havre Diesel Shop Mechanical Safety Action Plan**

(RX 17)

The BNSF safety vision is that BNSF will operate free of accidents and injuries in part through a culture that makes safety the highest priority and providing a work environment that is safe and accident free where all known hazards will be eliminated or safeguarded.

### **Time Card**

(RX 30)

Mr. Kaul’s time card for January 1, 2012 shows “TC” from 1500 (3:00 p.m.) to 2300 (11:00 p.m.).

### **Disciplinary Letters**

(RX 32)

On September 24, 2010, a BNSF laborer was dismissed for failure to comply with MSR S-28.6, S-28.10, and S-28.13 because: a) he was reading a newspaper in the lunchroom during a period in which he had been assigned work in the Diesel Shop; and b) he was quarrelsome and discourteous when he was questioned later in the day about his failure to comply with his work instructions.

On August 8, 2012, a BNSF machinist was assessed a Level S 30-day record suspension and placed in a three year review period for insubordinate, quarrelsome, and discourteous conduct, indifference to duty, and failure to comply with instructions when he refused to complete assigned tasks.

**Investigation Waiver**  
(RX 33)

On April 6, 2011, Mr. Kaul accepted a Level S 30-day record suspension, with a one year review period, and voluntarily waived his right to a formal investigation concerning his violation of MSR S-8.2.3 [sic]<sup>9</sup> by failing to cross tracks at a crossing, causing damage to a vehicle.

**MOA – BNSF and IAMAW**  
(RX 36)

The October 1, 2006 Memorandum of Agreement between BNSF and the machinist union contains procedures for the conduct of disciplinary investigations. Under Section 35, fair and impartial investigations are required.

Section 45 requires that work around locomotives and cars where there is a likelihood of the equipment being moved be properly protected in conformance with BNSF safety rules. BNSF recognizes the right of an employee to protect himself in all circumstances in conformity with BNSF safety rules.

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<sup>9</sup>The actual rule is MSR S-8.3.2.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Stipulations of Fact<sup>10</sup>

At the May 20, 2014 hearing, TR I, p. 31-32, the parties stipulated to the following facts: a) BNSF hired Mr. Fred Kaul on or about September 8, 1989; b) throughout his employment with BNSF, Mr. Kaul worked as a laborer, and/or machinist at the diesel shop in Havre, Montana; c) on January 2, 2012, Mr. Kaul received a Notice of Formal Investigation; d) On January 10, 2012, BNSF held a formal investigation hearing to ascertain facts and determine Mr. Kaul's responsibility, if any, in connection with his alleged failure to comply with instructions; indifference to duties; and insubordinate, quarrelsome, discourteous, hostile and dishonest conduct; e) following the investigation, BNSF dismissed Mr. Kaul effective January 27, 2012; f) BNSF is a railroad carrier within the meaning of 49 U.S.C. § 20109(a); and g) Mr. Kaul is a covered employee within the meaning of 49 U.S.C. § 20109(a).

### Issue No. 1 – Protected Activity

The first requisite element to establish unlawful retaliation against a whistleblower is the existence of a protected activity. Through counsel, both during the hearing and in the closing brief, Mr. Kaul asserts that he engaged in five activities protected under Act: reporting work-related personal injuries, refusing to work due to an unsafe condition, refusing to violate a safety standard, reporting an unsafe condition, and participating in an investigation related to railroad safety.

### **Personal Work-Related Injuries**

Section 20109(a)(4) of the FRS, and 29 C.F.R. § 1982.102(b)(1)(iv), prohibit a railroad carrier from taking adverse action against an employee because he notified the railroad carrier in good faith<sup>11</sup> of a work-related personal injury of an employee.

On February 7, 2001, while using a four foot long torque wrench as an apprentice machinist, Mr. Kaul felt a pop on his right side and reported the injury to BNSF; the injury resolved within three months without surgery. On June 13, 2010, while climbing into a locomotive, Mr. Kaul experienced a popping sensation in his right shoulder. He reported the injury to his supervisor, but the injury did not require medical attention. And, on February 20, 2011, Mr. Kaul again experienced popping in his right shoulder at work which he reported to BNSF. The third injury led to surgery for a herniated cervical disc.

Based on the stated circumstances, absent any contrary evidence, and since the injuries were recorded in Mr. Kaul's BNSF employee transcript, I find that Mr. Kaul engaged in three activities protected under Section 20109(a)(4) while he reported to BNSF work-related personal injuries which occurred on February 7, 2001, June 13, 2010, and February 20, 2011

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<sup>10</sup>See JX 1.

<sup>11</sup>“[g]ood faith act done.”

## Work Refusal

Sections 20109(b)(1)(B) and (2) of the Act, and 29 C.F.R §§ 1982.102(b)(2)(i)(B) and (ii), prohibit a railroad carrier from taking adverse action against an employee because he refused to work when confronted by a hazardous safety condition related to the performance of the employee's duties, provided: a) the refusal was made in good faith with no available reasonable alternative to refusal, b) a reasonable person in the circumstances then confronting the employee would conclude – 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 c) the employee, where possible, notified the railroad carrier of the existence of the hazardous condition; and his intention not to perform further work unless the condition is corrected immediately.

### Good Faith Refusal

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>12</sup> the court concluded that “good faith” requires a complainant to actually believe in the alleged violation that he is reporting.

Based on the statutory language, and in light of the above principles, in order to invoke employee protection under the work refusal section, Mr. Kaul must first establish he actually believed on January 1, 2012 that whatever he experienced during the two sudden episodes in the lunchroom and on the power desk stairs was sufficiently severe to impair his alertness, attention, and ability to safely operate a locomotive; and that he had no reasonable alternative but to refuse the service track assignment. Consequently, I must determine whether Mr. Kaul's assertion that he refused his work assignment on January 1, 2012 in good faith was subjectively honest.

As an obvious starting point, Mr. Kaul was in the best position to provide probative testimony regarding what he experienced and believed on January 1, 2012. And, during the May 2014 hearing, he presented a credible demeanor, appeared sincere, especially when describing the hardship of his termination on his family, and was generally straightforward in his responses. At the same time, as set out below, the evidentiary record also contains substantial probative contrary evidence, including testimonial inconsistencies and conflicts, and Mr. Kaul's behavior, actions, and inactions on January 1, 2012 as manifestations of what he honestly and actually believed that day,<sup>13</sup> which calls into question the veracity of his hearing testimony concerning his state of mind at the time that he refused his work assignment.

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<sup>12</sup>See *Walker v. American Airlines*, Case No. 05-028 (ARB Mar. 30, 2007).

<sup>13</sup>At times, what person does may be more probative than what he says.

The first notable testimonial inconsistency to raise a concern about the veracity of Mr. Kaul's hearing testimony involves a bent wheel rim on a Kubota ATV in March 2011. During direct examination at the May 2014 hearing, Mr. Kaul indicated that somehow when he and Mr. West crossed a rail track on the Kubota the wheel was damaged.<sup>14</sup> Although he later accepted responsibility when he signed an investigation waiver upon the advice of the union representative, Mr. Kaul testified that he wasn't driving the Kubota, and they told the foreman that neither one knew how the wheel rim had been bent. When I asked Mr. Kaul if he caused the damage, Mr. Kaul replied, "I don't recall doing it, no." However, upon cross examination, while he indicated he wasn't sure why he made the admission, Mr. Kaul acknowledged he admitted to the foreman that he, as well as Mr. West, had driven the Kubota. Mr. McLeod also credibly testified<sup>15</sup> that when he discussed the incident with Mr. Kaul and Mr. West in March 2011, they stated that on their way to dump a locomotive toilet, instead of going 100 yards from the engine to use a track crossing, they drove the Kubota across the tracks near the engine, damaging the wheel rim; one of them had driven the Kubota in, and the other crew member drove it out.

Another adverse testimonial conflict involved Mr. Kaul's recollection concerning the potential cause of his dizziness. During his January 2, 2012 meeting with Mr. McLeod, Mr. Kaul explained that he been dizzy the day before because his children and family were sick at home and he had a little touch of the flu. At the January 10, 2012 investigation hearing, Mr. Kaul again noted that due to a virus going around at school his two youngest children had been sick for a day and a half to the point they vomited. And, during the May 2014 hearing, Mr. Kaul testified that he was not feeling 100% on January 1, 2012 due to either his medication or the fact that his children had been sick. However, at the May 2014 hearing, Mrs. Kaul credibly testified<sup>16</sup> that no one in the house was sick at that time.

Mr. Kaul also presented varying testimony about the duration and number of his dizzy spells, which calls into question the accuracy of his recollection about the nature and extent of his dizzy spells in terms of subjective belief. At the May 2014 hearing, Mr. Kaul testified that the first spell lasted "a couple of seconds" similar to what a person would experience if he stood up too quickly; and the second dizzy spell on the power desk stairs was similar to the first episode. And, in February 2012, he told Dr. Rowe that he had episodes of lightheadedness that lasted three to five seconds. Yet, at the January 10, 2012 investigation hearing, when asked whether the dizziness in the lunchroom lasted a couple of seconds, Mr. Kaul said, "maybe 30 seconds, if that;" his "quick" dizziness lasted "maybe 30 seconds, a minute." In terms of frequency, during the investigation hearing, after first indicating that he only had a "couple" dizzy" spells "period," Mr. Kaul stated that he had one more dizziness spell later in the day on January 1, 2012. Likewise, at the hearing before me, Mr. Kaul testified that he suffered a third

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<sup>14</sup>Notably absent in his recollection was the BNSF requirement (MSR S-8.3.2) that vehicles cross tracks only at designated crossings.

<sup>15</sup>Based on his hearing demeanor, direct answers, and lack of equivocation, I found Mr. McLeod to be a credible witness. And, based on the specific detail he provided concerning the March 2011 vehicle damage, I consider his recollection of the incident to be more accurate.

<sup>16</sup>While Mrs. Kaul presented terse answers, her demeanor remained candid and she responded to questioning without hesitation; as a result, I found Mrs. Kaul to be a credible witness.

dizzy spell at home the evening of January 1, 2012.<sup>17</sup> Yet again, when he saw Dr. Rowe on February 16, 2012, he reported only two brief episodes of dizziness.

As a predicate to his refusal to work on the service track due to his dizziness spells, Mr. Kaul testified after his second episode on the power desk stairs he knew immediately he would be unsafe to operate a locomotive that day. Yet, that statement is problematic given the context of his situation at that moment. Although Mr. Kaul had periodically been assigned to, and worked, the service track without any complaint during his regularly scheduled duty days, January 1, 2012 involved a different situation because, rather than being assigned, he volunteered to work on New Year's Day in the place of a scheduled employee for essentially double time and half pay. This distinction is notable because considering his usual duties, Mr. Kaul was essentially volunteering to work the turn crew on this holiday. So, after dressing out, and experiencing his first dizziness spell, he filled in his time card for the turn crew based on the reasonable assumption that turn crew would be his assignment on this volunteer day. Then, after experiencing a second sudden episode on the power desk stairs, Mr. Kaul clearly still intend at that moment to work on the turn crew, such that right after the second dizzy spell he had no reason to think about operating a locomotive. Consequently, his purported concern about his ability to operate a locomotive safely would not have occurred on the power desk stairs, and would only have possibly arisen after he was actually in the power desk room, had learned that the lineup showed a heavier workload for the service track crew, and realized that the other two machinists on the shift were probably working overtime and would not have sufficient hours of service to operate locomotives on the service track.

Another adverse reflection on the truthfulness of his recollection about his state of mind on January 1, 2012 is the nearly irreconcilable conflict between his stated belief about the adverse impact of his dizziness spells on safety,<sup>18</sup> and his continued intention to work on the turn crew on the uptown tracks as a machinist after experiencing two sudden dizzy episodes.

Both at the investigation hearing and the May 2014 hearing, Mr. Kaul recalled that the lunchroom dizziness spell surprised and momentarily disoriented him. And, in February 2012, he informed Dr. Rowe that his dizziness spells came on very suddenly, and he had a feeling that if he wasn't careful, he might pass out. Nevertheless, after the first dizziness episode, based on his abilities and what he knew about himself, Mr. Kaul testified that he believed that he could still perform his duties on the turn crew and be safe working around locomotives and other heavy equipment in the rail yard if he didn't take any chances; he also believed that he could work safely on the service track. Only after second dizziness episode did he become concerned about working on the service track because moving power requires a person to watch himself. BNSF had taught him the importance of safety in moving locomotives, and ensuring the safety of himself and others. And, he did not want to hurt or possibly kill anyone, or damage railroad property, because during his dizzy episodes he was not able to be alert and attentive to what was

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<sup>17</sup>I note that Mr. Kaul also testified that he told his wife about the third dizzy spell at home. Yet, Mrs. Kaul subsequently testified that she wasn't sure whether Mr. Kaul had another dizziness episode after he got home on January 1, 2012.

<sup>18</sup>As Dr. Rowe observed, the extent to which the dizziness adversely affected Mr. Kaul's ability to perform his work, "from a medical point of view . . . [depended] on how severe the symptom was and exactly what he felt."

going on around him. His second dizziness spell was the critical factor since he became concerned that he might experience another sudden episode, which would rendered him unsafe to operate locomotives. At the same time, he believed he remained capable of working safely on the turn crew.

However, during the course of two hearings, Mr. Kaul also agreed that: a) BNSF required its employees to be safe 100% of the time;<sup>19</sup> b) if a person is suffering dizzy spells, it wouldn't be safe for him to work, no matter the assigned duty; c) Mr. Kaul's work as a BNSF machinist had safety risks regardless of his duty assignment and required him to be alert because he was always working around moving trains, cars, and equipment; d) it would be safer if you're feeling dizzy to just go home no matter what duties have been assigned; e) everything that BNSF employees do, from moving a locomotive to operating a forklift, is safety-sensitive no mater the assigned duty, and f) feeling dizzy could adversely affect the safety of himself and others no matter the job function. In light of these acknowledgements, which reflect Mr. Kaul's understanding of the safety requirements of his work as a BNSF machinist, and in particular, his stated understanding that dizziness was a safety issue no matter the job in the rail yard, coupled with his description of the purported alertness and attention impairment he suffered during his dizziness, his continued intention to work on the turn crew in the uptown area of the rail yard after both sudden and disorienting dizzy episodes was either irrational,<sup>20</sup> or indicates Mr. Kaul's determination at the time that the two dizzy episodes were not actually severe enough to impede his ability to work safely 100% of the time as a machinist.<sup>21</sup> The second, and more likely, explanation undermines Mr. Kaul's representation that he honestly believed that what he momentarily experienced in the lunch room and on the power desk stairs severely impaired his ability to be 100% alert, and represented a hazardous safety condition that caused him to refuse his work assignment to the service track on January 1, 2012.

Closely related, the apparent conditional nature of Mr. Kaul's work refusal also undermines his representation as to the severity of the two episodes and their adverse impact on his ability to work safely as a machinist. Specifically, as Mr. Kaul's testimony<sup>22</sup> and actions demonstrate, his refusal to work as a machinist on January 1, 2012 due a concern about a hazardous safety condition was predicated solely on his assignment to the service track. While he explained this discrimination was based on his requirement to operate locomotives on the service track, Mr. Kaul also acknowledged that his work as machinist, regardless of assignment in the rail yard, required him to be continually alert and attentive. In that case, it appears Mr. Kaul held two incongruous beliefs on January 1, 2012: a) his two sudden and disorienting

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<sup>19</sup>See MSR S-1.2.3. and MSR S-1.6.1.

<sup>20</sup>His persistent intention to work the turn crew as indicated by his placing his time card marked "TC" on the power desk table, even after both dizzy episodes, makes no sense if he actually believed that he had suffered dizziness spells sufficient to adversely affect his ability to be alert and attentive 100% of the time.

<sup>21</sup>I will subsequent address a third explanation presented by Mr. Kaul for his belief that he could still work on the turn crew safety – that he would tell his co-workers on the turn crew about his dizziness. At this point, I simply note that advising his co-workers of his dizziness would still not have rendered Mr. Kaul 100% alert on the uptown track.

<sup>22</sup>At the May 2014 hearing, Mr. Kaul agreed that once he found out his assignment was to be the service track, he decided to go home.

dizziness spells were not so severe as to interfere with his ability to work on the turn crew which requires 100% alertness, and may also involve a request to provide temporary help on the service track; and, b) at the same time, the two episodes were sufficiently severe that they would have adversely affected his ability to be 100% alert while operating a locomotive on the service track. Further, when asked at the investigation hearing to confirm that he was too ill only for work on the service track, Mr. Kaul provided the following less-than-coherent response, “Yeah, well no. It’s would really be only that. The reason for it being that it was used in this manner is simply because of the safety of myself and my co-workers, which is what my facility has taught me, is number one priority in our system, is safety for yourself and other who you work with.” Finally, in explaining why he suddenly left work and went home, Mr. Kaul explained that he just wanted to have a comfort zone to relax and get through his dizzy spells at home – “Just try to get through it.” Yet, apparently, whatever was compelling his need to go home to get through his dizziness spells was not so severe as to preclude staying at work on the turn crew.

One of Mr. Kaul’s two inactions on January 1, 2012 appears to impeach his testimony that he suffered dizziness spells so severe that he could not safely operate locomotive –he did not seek immediate medical attention. Mr. Kaul explained that he did not think the dizziness was an issue that needed medical attention because it only happened a few times and he believed it might be attributable to his medication or the flu. However, according to his testimony, Mr. Kaul had suffered two sudden and unusual dizziness spells so severe that they impaired his ability to operate a locomotive and forced him to leave work. Under those circumstances, his failure to seek prompt medical attention, and instead wait six weeks to describe the incidents to a physician, undermines the purported seriousness of the two dizziness episodes, especially considering that while infrequent, Mr. Kaul still remained subject to periodic assignment to the service track as a BNSF machinist.

Another important consideration relating to Mr. Kaul’s subjective belief is his behavior in the power desk room on January 1, 2012, which preliminarily requires my resolution of significant testimonial conflict.

In his January 2, 2012 statement, Mr. Kaul stated that after he got his service track assignment, he told Mr. Vant Hul that if he was being put on the service track he couldn’t and wouldn’t do it; he was going home sick. Mr. Kaul then left the power desk and went home after advising Mr. Palmer. At the investigation hearing, Mr. Kaul denied that he was quarrelsome, insubordinate, or dishonest with Mr. Vant Hul. He also maintained that he did not use profane language. And, at the May 2014 hearing, Mr. Kaul recalled that when Mr. Vant Hul told him that he was going to work the service track, Mr. Kaul sought verification by asking, “Are you putting me on the service track?” After Mr. Vant Hul replied, “Yes,” Mr. Kaul said he couldn’t do it; and if he had to work the service track he was going to go home sick. Mr. Vant Hul did not respond. Mr. Kaul then “toss[ed]” his lineup onto the table, exited the power desk, went downstairs, changed out of his work clothes, told Mr. Palmer that he was going home sick, and left. During his conversation in the power desk, Mr. Kaul did not curse. And, he was not angry about anything, irritated, or frustrated.

In contrast, Mr. Vant Hul stated that after he gave the shift members the lineup and job assignments, Mr. Kaul said, ‘So, you mean I’m going to be assigned the service track the rest of the night?’ When Mr. Vant Hul said yes, Mr. Kaul threw his time card<sup>23</sup> on the table and said “F--- this, I’m not going to work the service track. I’m going home sick.” Mr. Kaul then stormed out of the room. At the time, Mr. Kaul appeared frustrated and irritated, rather than sick.

The other individuals present during the exchange between Mr. Kaul and Mr. Vant Hul in the power desk room had somewhat varied recollections. Mr. Oleson recalled that when Mr. Kaul was informed that he would be working the service track, he threw his lineup on the desk and said, “Well, I’m going home sick then.” Mr. Kaul then walked out of the power desk. Based on Mr. Kaul’s statement, Mr. Oleson believed that Mr. Kaul was irritated or frustrated.

Mr. Knoles stated that in order to prevent the two machinists who were working a double shift from getting an hours of service violation, Mr. Kaul was elected to work the service track. Mr. Kaul responded that if he had to work the service track, he was going to go home sick. He threw his lineup on the table, and stormed out of the shop. Mr. Kaul appeared to be slightly irritated and possibly frustrated.

Mr. Hickman remembered that when the shift was given their work assignments, and Mr. Kaul was told that he had to cover the service track, Mr. Kaul asked if he was on the service track. When he was told yes, Mr. Kaul responded, “then, I’m going home sick, ” threw his card down, and walked out. Mr. Kaul did not appear to be happy about his assignment.

Mr. Schnittgen stated that after they received the lineup, Mr. Kaul asked where he was going to be put, and if it was the service track. When Mr. Vant Hul said yes, Mr. Kaul threw down his lineup, said he was sick and “out of here,” and walked out. Mr. Kaul did not appear to be his normal self; instead he seemed unhappy the “whole way through the lineup.”

Mr. McLaughlin indicated that when Mr. Kaul left the power desk room, he seemed “a little irritated.”

And, Mr. Taylor recalled that when Mr. Kaul was notified that he would be on the service track to move power because the other machinists had worked overtime and would be unable to move power, he abruptly said he was sick and stormed out.

In resolving this testimonial conflict, I first note that, as Mr. Kaul acknowledged, there is no basis to doubt the trustworthiness of co-workers’ statements. Similarly, with the exception of the statement about cursing, Mr. Kaul believed Mr. Vant Hul was attempting to accurately summarize what happened from his perspective. I agree, based on the contemporaneous nature of Mr. Vant Hul’s initial notification to Mr. McLeod about the incident and his e-mail less than an hour after it occurred.

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<sup>23</sup>Although Mr. Vant Hul was certain that it was the time card that was thrown down, the testimony of co-workers demonstrate that it was actually the lineup. Part of Mr. Vant Hul’s confusion may be explained by Mr. Knoles’ observation that Mr. Kaul threw down a “folded lineup”.

Despite Mr. Kaul's denial, most of the participants (Mr. Oleson, Mr. Knoles, Mr. Schnittgen, and Mr. Taylor) agree with Mr. Vant Hul's report that Mr. Kaul appeared to be irritated with his assignment. And, in response to his service track assignment, Mr. Kaul declared that he was sick and stormed out of the room.<sup>24</sup> Mr. Kaul's irritated response and abrupt departure from the power desk room after being assigned to the service track hardly supports a determination that basis for his refusal was his dizziness. Mr. Kaul had no apparent basis to be irritated based on his physical condition with Mr. Vant Hul's decision to assign him to the service track since Mr. Vant Hul had no idea when he gave Mr. Kaul the service track assignment that Mr. Kaul had just suffered two dizziness spells. Instead, Mr. Kaul's reaction is more consistent within context of the day as previously discussed – Mr. Kaul had volunteered to work the holiday believing that he would be on the turn crew and then discovered in the power desk office that he'd been on the service track with 19 locomotives. His demonstrative irritation with the service desk assignment, and his act of storming out of the power desk, renders the claim of a hazardous safety condition due to a severe impairment caused by two dizziness spells an unlikely reason for his behavior in the power desk room.

Finally, and perhaps most significant, Mr. Kaul's second inaction of the day – his failure to notify Mr. Vant Hul, Mr. Palmer, any co-worker, or any other BNSF employee that his dizziness spells precluded his ability to safely operate a locomotive – provides strong evidence that Mr. Kaul did not honestly believe that this lunchroom and power desk stairs dizziness episodes were serious and represented a hazardous safety condition if assigned to the service track. Given Mr. Kaul's description of the two dizziness episodes as being sudden, disorienting, and producing a feeling that if he wasn't careful, he might pass out, his failure to inform anyone of the problem in part because he still felt capable of safely working on the turn crew uptown in the rail yard with moving locomotives, trains, cars, and equipment again does not make sense<sup>25</sup> if he honestly believed that his dizziness spells compromised his ability to remain 100% alert that day as a machinist.

I have considered Mr. Kaul's three potential explanations for his silence. First, Mr. Kaul testified that he believed he could work on the turn crew in part because he would advise his co-workers of his dizziness problem. If that's the case, then his unwillingness to likewise share the same information with Mr. Vant Hul and the other co-workers in the power desk room as an explanation for his inability to accept the service track assignment is not understandable. Second, Mr. Kaul has some difficulty expressing himself during a confrontation; as a result, he was only able to refuse the service track assignment and walk out. However, any potential confrontation only developed after Mr. Kaul asked Mr. Vant Hul to repeat his service track

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<sup>24</sup>Regarding the cursing allegation, Mr. Kaul has consistently denied using any foul language, while Mr. Vant Hul's nearly contemporaneous e-mail sets out Mr. Kaul's words in detail. Although none of the co-workers' statements contained any reference to foul language, their terse statements only addressed the principal actions that occurred at the power desk, and during the investigation hearing the co-workers were not questioned about the use of any foul language. Nevertheless, I really don't have to resolve this testimonial dispute regarding any cursing by Mr. Kaul because the co-workers' statements generally corroborate Mr. Van Hul's description that Mr. Kaul was irritated with his assignment and stormed out of the power desk room.

<sup>25</sup>At the May 2014 hearing, Mr. Kaul agreed that it makes common sense that if an employee is refusing to perform a task at work, he should provide the reason why.

assignment for the day. Up until then, and prior to the assignment, Mr. Kaul could have advised Mr. Vant Hul of his impaired condition without a confrontation. Further, no confrontation existed when Mr. Kaul stopped by Mr. Palmer's office on the way home<sup>26</sup> and yet he didn't advise the general foreman of his dizziness impairment. Third, according to Mr. Kaul, as soon as he entered the power desk room he knew he might be assigned to the service track since the other two machinists present were probably not qualified; but at that moment, Mr. Vant Hul was not available because he was already engaged in a conversation with Mr. Hickman. But, Mr. Kaul's hearing testimony also shows that after that conversation, the shift then went over the tasks on the lineup for five to ten minutes prior to any assignment, at which time Mr. Kaul could have made known his inability to operate a locomotive on the service track.

In summary, as discussed above, the evidentiary record contains testimonial conflicts, varied testimony concerning the number and duration of Mr. Kaul's dizziness episodes, a significant conflict between the stated severity of his dizziness spells and continued intention to work on the turn crew, a conditional work refusal, an irritated and abrupt reaction to being assigned to the service track, and two inactions of not seeking medical attention, and not reporting his dizziness episode to anyone at BNSF on January 1, 2012. Each of these factors standing alone may be insufficient probative contrary evidence to Mr. Kaul's sworn testimony that he suffered two dizzy spells at work that rendered him unable to safely operate a locomotive on January 1, 2012. However, cumulatively, the testimonial issues, and Mr. Kaul's actions, behavior, and inactions significantly undermine my confidence in the veracity of Mr. Kaul's testimony about his subjective belief on that day about the severity of the dizziness spells and their adverse impact on his ability to safely operate a locomotive on January 1, 2012, which in turn diminishes the probative value of his testimony in establishing that he acted in good faith when he refused to work on the service track. Accordingly, I find that Mr. Kaul has failed to establish through the preponderance of the probative evidence that he actually believed his dizziness spells represented a hazardous safety condition when Mr. Vant Hul assigned him to the service track on January 1, 2012, such that his refusal of that work assignment was made in good faith.

#### Reasonable Person Assessment

Another requisite for invocation of statutory protection for a work refusal is that a reasonable person similarly situated in circumstances confronting Mr. Kaul on January 1, 2012 would conclude: a) a hazardous condition existed which presented an imminent danger of death or serious injury; and, b) the urgency of the situation did not allow sufficient time to eliminate the danger without refusal.

Certainly, based on the consensus of Mr. Kaul, Mr. Brough, Mr. McLeod, Mr. Price, Mr. Palmer, and Mr. Vant Hul, I find that a reasonable person who has experienced two sudden dizzy spells sufficient to impair his ability to be 100% alert and attentive while on the job as a machinist would conclude that operation of a BNSF locomotive on the Havre service track in

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<sup>26</sup>At the May 2014 hearing, Mr. Kaul also agreed there was nothing stopping him from telling Mr. Palmer about why he was going home sick.

that condition represented a hazardous safety condition which presented an imminent danger of at least serious injury to himself and others.<sup>27</sup>

The objective standard also requires that a reasonable person in similar circumstances would conclude that the urgency of the situation did not allow sufficient time to eliminate the situation without a refusal to work. Under the circumstances confronting Mr. Kaul on January 1, 2012, I find that a reasonable person who experienced two dizziness episodes so severe as to impair his ability to be 100% attentive and alert, thereby rendering him unable to operate a locomotive that day, would have reported his condition right after he arrived in the power desk room, recognized that he was the only qualified machinist for that shift, and Mr. Vant Hul finished his conversation with Mr. Hickman. Mr. Kaul's situation only became so urgent that his only recourse was to refuse the service track assignment because he waited until after Mr. Vant Hul finished the lineup discussion and actually assigned him to the service track. If Mr. Kaul had advised Mr. Vant Hul as soon as possible after he arrived at the power desk that he was unfit to operate a locomotive due to dizziness, and Mr. Vant had nevertheless insisted that Mr. Kaul report to the service track as assigned, only then would his situation have been so urgent that a reasonable person would conclude that he had no other choice but to refuse the service track assignment and leave work. Further, if the dizziness episodes were sufficiently serious to impair the ability to be 100% alert and attentive, a reasonable person would also have concluded that he was unfit for any work in the Havre rail yard that day after the first episode and immediately reported that situation to Mr. Palmer in the lunch room which would have also precluded the development of an urgent situation.

#### Notification

The final requirement under this employee protection provision is that, where possible, the employee notify the railroad carrier of the existence of the hazardous condition and his intention not to work until the condition is corrected immediately.

Clearly, even if he made his work refusal in good faith, Mr. Kaul he did not satisfy this requisite element on January 1, 2012. As previously discussed, Mr. Kaul had opportunities to notify Mr. Palmer in the lunchroom and Mr. Van Hul at the power desk of the hazardous safety condition before he refused the service track assignment and actually left the BNSF rail yard. That is, under the circumstances on January 1, 2012, it was possible for Mr. Kaul to notify BNSF of the hazardous safety condition and provide the company an opportunity to correct the condition.

Mr. Kaul asserts that notification was not required in his case because the hazardous safety condition involved his personal condition which could not be corrected by BNSF. However, the hazardous condition confronting Mr. Kaul on January 1, 2012 had two parts, his dizziness spells and his assignment to the service track which required the operation of locomotives. While BNSF could not alter any susceptibility Mr. Kaul may have had to additional dizziness spells, his work assignment to the service track for January 1, 2012 was a condition within the control of the railroad company which it could correct immediately upon

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<sup>27</sup>As I have previously determined, Mr. Kaul has not established that this was the circumstance confronting him on January 1, 2012.

notification from Mr. Kaul's safety concerns arising from his dizziness spells before he left the rail yard that day. That is, even though the other two machinists on his shift may not have had sufficient hours of service to replace him on the service track, with proper notice of Mr. Kaul's concerns about his alertness impairment, Mr. Vant Hul would have had the opportunity to remove Mr. Kaul from an unsafe assignment to the service track. Instead, Mr. Kaul's failure to provide notice of the hazardous safety condition prior to his work refusal and going home effectively prevented BNSF from being able to address a hazardous safety condition that could be corrected without requiring Mr. Kaul to refuse his work assignment.<sup>28</sup>

### Conclusion

Mr. Kaul has failed to establish that his refusal to work the service track on January 1, 2012 was made in good faith. A reasonable person in the same circumstances confronting Mr. Kaul on January 1, 2012 would not have concluded that urgency of the situation did not allow sufficient time to eliminate the hazardous condition without a work refusal. And, Mr. Kaul failed to notify BNSF of the hazardous condition before he refused the service track assignment. Accordingly, having failed to establish the statutory requisites, Mr. Kaul's work refusal on January 1, 2012 was not a protected activity under the FRS.

### **Refusal to Violate a Safety Standard**

Under Section 20109(a)(2), an employee's good faith act of refusing to violate any federal law, rule, or regulation relating to a violation of any federal law, rule, or regulation relating to railroad safety is a protected activity.

Mr. Kaul maintains that his refusal to accept the service track assignment on January 1, 2012 due to his dizziness also effectively represented his refusal to violate BNSF's safety requirement that an employee who operates a locomotive must be fully alert and attentive.

Even under the reasonable assumption that BNSF's safety standard for the safe operation of its locomotives which required an employee to be alert and attentive at all times actually incorporates a federal law, rule or regulation relating to railroad safety, for the reasons just discussed above concerning Mr. Kaul's subjective belief about the severity of his dizziness episodes and their adverse effect on his ability to be alert, I find his refusal on January 1, 2012 to accept an assignment which required him to operate a locomotive on the basis that in his condition it would violate a safety standard was not a "good faith act," which precludes his invocation of employee protection under Section 20109(a)(2).

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<sup>28</sup>Mr. McLeod also observed that notification of a hazardous safety condition related to an employee's physical condition also enables a supervisor to provide appropriate medical attention, as well as document the employee's illness. Mr. Price further noted that notification of an employee's dizziness spells would permit BNSF to obtain a medical assessment to determine if the employee could return and work safely.

## **Report of Hazardous Safety Condition**

Section 20109(b)(1)(A) protects an employee's activity of reporting in good faith a hazardous safety condition.

Mr. Kaul asserts that he engaged in this protected activity on January 2, 2012, and January 10, 2012. Specifically, on January 2, 2012, in a statement, and during his conversation with Mr. McLeod, in explaining why he refused his service track assignment on January 1, 2012, Mr. Kaul reported that due to his two dizzy spells shortly after arriving at work that day, and his concern for the safety of himself and others, his operation of locomotives on the service track would have been a hazardous safety condition. And, on January 10, 2012, Mr. Kaul again reported the same hazardous safety condition when he explained that due to his dizziness and experience with locomotives on the service track, he knew operating power in his condition on January 1, 2012 would be a serious safety threat to himself and co-workers

For two reasons, neither of these actions were protected under the FRS. First, on both occasions, Mr. Kaul was reporting about a hazardous safety condition that occurred once, and only then if Mr. Kaul had actually operated a locomotive on January 1, 2012, such that at the time of his two subsequent reports the hazardous safety condition no longer existed. Neither of his reports involved a present, on-going, or potential safety hazard since Mr. Kaul wasn't asserting that he continued to have dizzy spells that would render his operation of locomotive unsafe. To the contrary, according to Mr. Kaul, when he reported to work at the BNSF rail yard on January 2, 2012, he was feeling better, "100%," and fully capable of working as a machinist on any assignment. Second, this statutory provision requires that the report of a hazardous safety condition be made in good faith. Because I have previously determined that Mr. Kaul did not establish his work refusal on January 1, 2012 was made in good faith, I similarly find that his two hazardous safety condition reports on January 2, 2012 and January 10, 2012 which involved the same underlying physical condition were not made in good faith.<sup>29</sup>

## **Participating in an Investigation**

Section 20109(a)(1)(C) protects an employee who in good faith provides information, or assists, in any investigation conducted by a person with authority to investigate conduct which the employee reasonably believes constitutes a violation of any federal law, rule, or regulation relating to railroad safety.

Mr. Kaul maintains that on January 10, 2012 he engaged in an FRS protected activity by providing testimony about his safety concern associated with his dizziness episodes and assignment to the service track which required the operation of locomotives during an investigation by BNSF into his work refusal on January 1, 2012.

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<sup>29</sup>I also find that Mr. Kaul's notification on January 2, 2012 and January 10, 2012 of a hazardous safety condition on January 1, 2012 doesn't satisfy the notification requirement under Sections 20109(b)(1)(B) and (2) for protection of a work refusal since the statutory language clearly requires than an employee advise the employer of the safety basis for his work refusal if possible, which it was in this case, prior to leaving work, and not the next day, or nine days later.

Again, for two reasons, I find Mr. Kaul's participation in the January 10, 2012 investigation was not a protected activity. First, under this statutory provision, the subject matter of the investigation must involve conduct with constitutes a violation of a federal railroad safety law, rule, or regulation. However, the January 10, 2012 investigation conducted by Mr. Nilsen involved determining facts and responsibility for Mr. Kaul's alleged failure to comply with instructions; indifference to duty; insubordination, quarrelsomeness and discourteous behavior; and, hostile and dishonest conduct when he used unsuitable language and left work. None of those allegations represent a violation of a law, rule, or regulation concerning railroad safety. Additionally, none of Mr. Kaul's action of January 1, 2012 represented a violation of a railroad safety law, rule, or regulation.

Second, to the extent the investigation into Mr. Kaul's conduct in the power desk room and his walking off the job on January 1, 2012 might be considered to be inextricably intertwined with his claimed FRS protected work refusal and refusal to violate a safety regulation my determinations that neither claimed protected activity was made in good faith also precludes whistleblower protection for his participation in the January 10, 2012 investigation.

### **Issue No. 2 – 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>30</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>31</sup>

Clearly, on January 27, 2012, Mr. Kaul suffered the ultimate adverse action for an employee, the termination of his employment with BNSF.

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<sup>30</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>31</sup>*Id.* at slip op. 19-20.

### Issue No. 3 – 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>32</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 of reporting work-related personal injuries in 2001, 2010, and 2011, and suffered the significant adverse action of loss of employment, to obtain relief under the FRS employee protection provisions, Mr. Kaul must establish that one of his protected activities was a contributing factor in the recommendations of Mr. Mabry, Mr. Heenan, Mr. Nilsen, Mr. McLeod to terminate his employment, and Mr. Price’s decision to dismiss Mr. Kaul from BNSF’s employment effective January 27, 2012.

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<sup>32</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).

In terms of knowledge, the evidentiary record is not clear whether Mr. Mabry and Mr. Nilsen were aware of Mr. Kaul's three work-related personal injuries. On the other hand, Mr. Heenan, Mr. McLeod, and Mr. Price testified at the May 2014 hearing that they reviewed Mr. Kaul's employee transcript. Page one of that transcript shows that Mr. Kaul suffered work-related personal injuries on February 7, 2001, June 13, 2010, and February 20, 2011. Additionally, Mr. McLeod and Mr. Price also knew Mr. Kaul was in the ERP. And, his placement in ERP was due in part on his most recent injury in February 2011.

Considering circumstantial evidence of causation, the remoteness of the February 7, 2001 injury does not support a finding of causation based on temporal proximity. In contrast, the temporal proximity between Mr. Kaul's January 27, 2012 employment termination and his two reports of work-related personal injuries in the prior 18 months, the later of which led in part to Mr. Kaul's placement on the ERP, provides some circumstantial evidence of causation. However, the probative force of that temporal connection is significantly diminished due to a major intervening event unrelated to his injuries – Mr. Kaul's conduct in the power desk room, and the abandonment of his job on January 1, 2012 which eventually led to an investigative determination that he had committed a second Level S rule violation while on probation.

In consideration of pretext, Mr. McLeod, Mr. Heenan, and Mr. Price testified that they did not consider Mr. Kaul's work-related personal injuries, and the ERP, in reaching their termination recommendations and decision; and, their conclusions were based solely on Mr. Kaul's actions on January 1, 2012. In considering whether their representations maybe pretextual, I note the investigative record they reviewed provided a firm foundation for termination based on Mr. Kaul's behavior on January 1, 2012, which included: a) leaving work only after being assigned to the service track, b) being abrupt with his supervisor, Mr. Vant Hul, in the presence of co-workers when he refused the assignment, and c) showing an indifference to duty, which BNSF has specifically advised its employees will not be tolerated, and represented Mr. Kaul's second Level S rule violation within 12 months.

In summary, the only potentially probative circumstantial evidence that Mr. Kaul's June 2010 and February 20, 2011 reports of work-related personal injuries were contributing factors in the adverse action he suffered is the simple fact that the injuries occurred 18 months, and seven months, before his January 27, 2012 termination. Further, any potential contributing factor causative connection was sufficiently severed by Mr. Kaul's conduct on January 1, 2012 that represented an indifference to duty, and a second Level S rule violation while still on probation for a Level S rule violation of damaging the Kubota. Additionally, a thorough investigation into the events of January 1, 2012 provided Mr. Heenan, Mr. McLeod, and Mr. Price a non-pretextual basis upon which to conclude that Mr. Kaul's employment termination was warranted since his indifference to duty on January 1, 2012 was a second Level S rule violation during the 12 month review period for another Level S rule violation. And, I find as credible the testimony of Mr. McLeod, Mr. Heenan, and Mr. Price that in reaching their dismissal recommendations and decision they did not consider Mr. Kaul's work-related injuries listed in his employee transcript. Consequently, I find the preponderance of the probative evidence demonstrates that none of Mr. Kaul's protected activities of reporting a work-related personal injury was a contributing factor in the termination of his employment on January 27, 2012.

## Conclusion

Mr. Kaul has proven that he engaged in FRS protected activities when he reported work-related personal injuries which occurred on February 7, 2001, June 13, 2010, and February 20, 2011.

Mr. Kaul has failed to establish by the preponderance of the probative evidence that he engaged in FRS protected activities on January 1, 2012 when he refused a service track assignment which required the operation of a locomotive; provided a statement on January 2, 2012 about the reason for his work refusal the day before; participated in a January 10, 2012 investigation into his actions on January 1, 2012; and, again explained at the January 10, 2012 investigation hearing the basis for his work refusal on January 1, 2012.

Mr. Kaul has proven that he suffered an adverse action when his employment was terminated by BNSF on January 27, 2012.

And, Mr. Kaul has failed to establish by a preponderance of the probative evidence that any of his FRS protected activities was a contributing factor in the termination of his employment on January 27, 2012.

Accordingly, having failed to establish the requisite element of causation necessary to obtain relief under the FRS whistleblower protection provisions, Mr. Kaul's FRS complaint must be dismissed.<sup>33</sup>

## **ORDER**

Accordingly, the FRS complaint of Mr. Fred S. Kaul is **DISMISSED**.

**SO ORDERED:**

RICHARD T. STANSELL-GAMM  
Administrative Law Judge

Date Signed: April 14, 2015  
Washington, D.C.

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<sup>33</sup>Since Mr. Kaul's FRS must be dismissed, I need not address BNSF's affirmative defense, and damages.

**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).