



Issue Date: 08 March 2016

Case No.: 2014-FRS-00068

In the Matter of

HOWARD McVAY

Complainant

v.

BNSF RAILWAY COMPANY

Respondent

DECISION AND ORDER DISMISSING COMPLAINT

This matter arises under the employee protection provisions of the Federal Rail Safety Act of 2007 (“FRSA” or the “Act”), Title 49 U.S.C. § 20109, as amended, and as implemented by 29 C.F.R. § 1982. Jurisdiction for this case is vested in the Office of Administrative Law Judges (“OALJ”) by this statute, under § 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 (“AIR 21”).

I. PROCEDURAL HISTORY

On March 2, 2012, Complainant filed a complaint with the Occupational Safety and Health Administration (“OSHA”).^{1, 2} In his complaint, Complainant alleged that Respondent took an adverse action against him by dismissing him from employment in September 2011.

In February 2014, OSHA found that Respondent violated the Act and issued a Preliminary Order directing Respondent to: provide Complainant’s back pay³; file paperwork

¹ The following abbreviations are used in this Decision: “JX” refers to Joint Exhibits; “CX” refers to Complainant’s Exhibits; “RX” refers to Respondent’s Exhibits; and “Tr.” refers to the transcript of the February 25, 2015 hearing. Additionally, many of the exhibit pages are separately “Bates” stamped JX, CX, or RX. This could easily create confusion as to whether the Tribunal was referring to an exhibit number or an exhibit page number. To avoid confusion, when necessary, this Tribunal will further identify an exhibit by referencing a page number in parentheses. For example, citation to RX 9 (p. RX 13), refers to Respondent’s Exhibit 9 at page number 13.

² RX 25 (pp. RX 97-RX 102).

with the Railroad Retirement Board to ensure that Complainant would be properly credited for the period of service at issue; pay reasonable attorney's fees; and post a Notice to Employees. CX 14. Respondent timely appealed to OALJ and the case was assigned to the undersigned on March 27, 2014.

I issued the Notice of Assignment and Conference Call in this matter on March 31, 2014. Complainant and Respondent submitted their respective responses to the Notice of Assignment on April 8, 2014. On April 22, 2014, I issued the Notice of Hearing and set the hearing for February 23, 2015 in Seattle, Washington. Pursuant to the Notice of Assignment, I held a teleconference with the parties on April 22, 2014. Respondent filed the parties' Agreed Protective Order on August 21, 2014, and subsequently filed a revised Agreed Protective Order on August 28, 2014. Respondent submitted its Pre-Hearing Statement on August 22, 2014. By Order issued September 15, 2014, I approved the parties' Agreed Protective Order, as confirmed in the October 9, 2014 Order. Complainant submitted his Pre-Hearing Statement on January 23, 2015. Respondent resubmitted a Pre-Hearing Statement on January 23, 2015. On February 3, 2015, Respondent submitted a Motion to Exclude Witnesses from being present in the courtroom during the testimony of the other witnesses. By Order issued February 9, 2015, I advised the parties that I would address Respondent's Motion at the hearing.

I held the hearing in this matter in Seattle, Washington on February 23 through 25, 2015, at which time the parties had full opportunity to present evidence and argument. All parties were present and the following exhibits were received into evidence: JX A through JX U; RX 1 through RX 34; and CX 2 through CX 12 and CX 14 through CX 22.⁴ Tr. at 20-31, 131, 164, 415, 438-440. Several witnesses, including Complainant, testified at the hearing.

The parties were granted leave to file post-hearing briefs. Complainant filed his brief on May 15, 2015 and Respondent filed its brief on July 30, 2015. Complainant filed his reply brief on August 17, 2015.⁵ On October 19, 2015, Complainant submitted a Notice of Important Intervening Decision of the Administrative Review Board ("ARB" or the "Board") and attached a copy of *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057 (Sept. 30, 2015). On November 16, 2015, Complainant submitted a Notice of Important Intervening Decision and attached the Department's November 9, 2015 Final Rule concerning 29 C.F.R. § 1982.

The parties' briefs, and the testimonial and documentary evidence submitted at the hearing were considered in rendering this decision.

³ Respondent reinstated Complainant on January 22, 2013; therefore, the period of back pay at issue is from September 2, 2011 until January 22, 2013.

⁴ CX 1 was initially accepted; however, Complainant later withdrew it at the hearing. Tr. at 439. CX 13 was offered and conditionally accepted; however, during the hearing I rejected CX 13, noting that Respondent had preserved its objection to its admissibility at the beginning of the hearing. Tr. at 356-57. In addition, the parties requested that the following documents be placed in a separate folder and not made part of the public record, per the protective order: CX 1, CX 8, CX 9, CX 12, RX 6, RX 29 and JX O. Tr. at 442.

⁵ At the hearing, the Tribunal permitted Complainant only to file a reply brief, as he has the burden of proof. Tr. at 376.

II. SUMMARY OF THE PARTIES' POSITIONS

A. Complainant's Position

Complainant suffered an elbow injury on April 22, 2010 when a locomotive door struck his elbow. Tr. at 41. Complainant reported the situation as a possible work-related injury. The following day, he became ill and called his doctor to request an immediate appointment, which his doctor accommodated. *Id.* at 44. At this doctor appointment, Complainant mentioned his injured elbow; the doctor drained some fluid from his elbow and prescribed antibiotics. *Id.* at 45. Immediately following the appointment, Complainant contacted the railroad to advise them that the doctor examined his elbow during this appointment. *Id.* Complainant asserts that this was protected activity as defined by the FRSA. Respondent held a hearing and found that Complainant violated its rules; Respondent issued a Level-S⁶ 30-day record suspension and further assessed a 36-month probation. On July 17, 2011, Complainant was involved in a train derailment in Spokane, Washington. Following an investigation, Respondent terminated Complainant's employment on September 1, 2011.

Complainant alleges that all of the investigations and discipline that resulted from these incidents constitute unfavorable personnel actions. Complainant asserts that he is not seeking remedies for the June 14, 2010 Level-S "and the resulting suspension *per se.*" Complainant Br. at 6. Rather he seeks remedies for the September 2011 termination. He asserts that the April 2010 incident was a contributing factor to Respondent's decision to terminate him. Complainant argues that Respondent's witnesses "consistently testified that the June 2010 Level-S was a factor in the September 2011 termination." Complainant Br. at 7. Thus, he argues, the June 2010 Level-S was a contributing factor to the ultimate termination of his employment. Complainant further argues that this satisfies his required *prima facie* showing, and that Respondent cannot meet its burden of rebuttal by clear and convincing evidence. Complainant seeks lost wages, interest on those wages, and compensation for pain and suffering, as well as litigation costs and reasonable attorneys' fees.

B. Respondent's Position

Respondent argues that Complainant's claims are time-barred by the statute of limitations. Respondent also argues that Complainant has failed to prove by a preponderance of evidence that the April 23, 2010 injury report was a contributing factor in his September 1, 2011 dismissal. Moreover, Respondent contends that it has demonstrated by clear and convincing evidence that it would have dismissed Complainant on September 1, 2011 even if Complainant had never reported the April 2010 injury. Respondent notes that Complainant twice attempted to amend his OSHA complaint to allege that he did not learn that the second Level-S⁷ was retaliatory until January 22, 2013. Respondent maintains that Complainant's April 23, 2010 injury report was not a contributing factor in Complainant's dismissal. Respondent also argues that there is no evidence of the following: temporal proximity between the two events; shifting or

⁶ A Level-S violation means a serious rule violation as defined by Respondent's Policy for Employee Performance Accountability ("PEPA") policy. JX O (pp. JX 160-61).

⁷ This concerns the April 2010 elbow incident. The first Level-S violation related to an earlier speeding incident. For a more thorough explanation, see the factual background section of this decision, *infra*.

false explanations; inconsistent application of Respondent's policies; or hostility toward Complainant's protected activity. Respondent asserts that, even if Complainant meets his burden, Respondent has shown by clear and convincing evidence that it would have taken the same action for the derailment, regardless of any protected activity.

III. APPLICABLE LAW

The purpose of the FRSA is to "promote safety in every area of railroad operations and reduce rail-road-related accidents and incidents." 49 U.S.C. § 20101. Section 20109(a) of the Act prohibits 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 (s)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 complaint 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; or (f) accurately reported hours on duty pursuant to 49 U.S.C. Chapter 211.

Additionally, Section 20109(b) prohibits 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 prohibits 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. However, 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 Federal Rail Administration medical standards, or the carrier's medical standards for fitness for duty.

Section 20109(d)(2) of the FRSA incorporates the investigatory proceedings and structure of the burdens of proof of AIR 21, 49 U.S.C. § 42121. Under AIR 21 and the FRSA, a complainant must establish by a preponderance of the evidence that he engaged in protected activity, the employer took an adverse action, and the protected activity was a "contributing factor" that motivated the respondent's adverse employment action. 49 U.S.C. § 42121(b)(2)(B)(i), (iii). Thereafter, a respondent can only rebut a complainant's *prima facie* case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of a complainant's protected activity. 49 U.S.C. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1982.109; *see also Powers v. Union Pac. R.R. Co.*, ARB No 13-034, slip op. at 10-11 (Mar. 20, 2015) (*en banc*)⁸; *Hamilton v. CSX Transp., Inc.* ARB No.12-022 (Apr. 30, 2013).

IV. ISSUES

- (1) Was Complainant's complaint timely?
- (2) Did Complainant engage in protected activity under the Act?
- (3) Was Complainant's protected activity a contributing factor, in whole or in part, in Respondent's adverse action, including the September 1, 2011 decision to dismiss Complainant from employment?
- (4) Has Respondent demonstrated, by clear and convincing evidence, that it would have taken the same unfavorable action in the absence of the protected activity?
- (5) If not, what compensatory damages, costs and expenses, or further relief, if any, are appropriate?

V. FACTUAL BACKGROUND AND TESTIMONIAL EVIDENCE

A. Findings of Fact

Respondent is a "railroad carrier" and Complainant is a covered "employee" within the meaning of 49 U.S.C. § 20109(a).

Complainant began working for Respondent in October 2006. JX R; Tr. at 32. He held a variety of positions including brakeman, switchman, engineer and conductor. JX R.

⁸ The Board in *Powers* noted that a complainant's *prima facie* case has, at times, been interpreted as requiring a fourth element, the requirement that the employer have knowledge of the protected activity; for the *prima facie* case, however, knowledge is not considered a separate element, but instead forms part of the causation analysis. *Powers*, slip op. at 11 n.2. The Board has consistently reiterated that there are only three essential elements to an FRSA whistleblower case: protected activity, adverse action and causation; the final decision-maker's "knowledge" and "animus" are only factors to consider in the causation analysis. *See Hamilton v. CSX Transp., Inc.*, ARB No.12-022 (Apr. 30, 2013); *see also Coates v. Grand Trunk W. R.R. Co.*, ARB No. 14-019 (July 17, 2015) (knowledge is not a separate element but instead forms part of the causation analysis); *Hutton v. Union Pac. R.R. Co.*, ARB No 11-091, slip op. at 5 (May 31, 2013).

On April 22, 2010, Complainant notified Respondent that he had a work-related elbow injury. In May 2010, Complainant received a record suspension for failing to reduce train speed. RX 3. In June 2010, Complainant received a Level-S 30-day record suspension for “failure to comply with instructions from supervisor regarding seeking medical attention.” RX 8.

Complainant was involved in a three-car train derailment on July 27, 2011; on August 25, 2011, Respondent held an investigation of Complainant’s alleged “failure to protect shoving movement”⁹ into the track, “which resulted in derailment and damage to equipment.” JX H (p. JX 36); JX P. Based on the investigation, Respondent concluded that Complainant was responsible for the shoving movement. JX P.

On September 1, 2011, Respondent terminated the Complainant’s employment following the investigation concerning the July 27, 2011 derailment (JX P), for failing to protect a shoving movement that resulted in a three car derailment.¹⁰ Complainant learned of this termination on September 2, 2011.

Complainant filed his OSHA complaint on March 2, 2012. RX 25.

B. Summary of Testimonial Evidence¹¹

1. Complainant (Tr. at 32-152)

Complainant testified under oath at the hearing. He has been a locomotive engineer for Respondent since October 23, 2006, and became a licensed locomotive engineer in May of 2008. Tr. at 103. Prior to working for Respondent, he owned and operated a mobile welding and fabricating business; in addition, he previously worked as a commercial fisherman for twenty years. When he came to work for Respondent, he received fifteen weeks of training,¹² and he first worked moving locomotives as a hostler. After gaining seniority, he moved from Seattle to Everett where he “spent about a year switching up there.”¹³ Tr. at 34. In May 2008, he entered Respondent’s program to become a locomotive engineer. He held that position until Respondent terminated his employment in Spokane. Retaining particular types of jobs depends on when the

⁹ A shoving movement is when the locomotive is at the back of the railcars pushing them, rather than pulling them. A shoving movement requires that point protection be provided by a crewmember. This requires the crewmember to visually determine that the track is clear. *See* 49 C.F.R. § 218.99. *See also* Tr. at 73. In this case, Complainant was the crewmember responsible for the movement. *See* RX 15 (p. RX 24), General Core of Operating Rules (“GCOR”) 6.5.

¹⁰ JX P (p. JX 163).

¹¹ The summary of hearing testimony is not intended to serve as a verbatim transcript, but merely to highlight certain relevant portions. In this Decision, I have considered all of the evidence of record, including the documentary evidence, whether or not I have specifically discussed it in the Decision. I have also considered the arguments of the parties.

¹² Part of Complainant’s training at Respondent during his career included complying with the “eight deadly decision” rules; one of those rules is failing to protect a shove. Tr. at 126-27. *See* RX 13. Complainant also received training with the “G core rules.” G core 6.5 provides: “The crew member must be in position and provide visual protection.” Tr. at 127; RX 15.

¹³ Complainant explained that “switching is moving cars and building and taking apart trains in the yard and the yard tracks....A hostler simply moves locomotives.” *Id.*

employee was hired, or when the employee became an engineer, as Respondent has a seniority-driven system.

Until 2010, Complainant had no disciplinary issues. He explained that his first infraction was a speeding incident on January 21, 2010. Tr. at 37-38. Complainant exceeded the track speed limit by 10 miles per hour. Tr. at 104. This infraction was handled by an alternative handling plan.¹⁴ Tr. at 37-38; RX 1. He understood that by proceeding in this fashion, he avoided a “Level-S”¹⁵ and the investigation process. Tr. at 38. This resulted in his decertification for 15 days, and he could not work as an engineer during that time. He had a second speeding incident in February 2010. He understood that this incident did result in a Level-S violation because it was within three months of the first speeding violation. Tr. at 39; *see also* RX 3. On this occasion, Complainant’s engineer’s license was suspended for a period of time and he was given three years of probation.¹⁶ Tr. at 106. Complainant acknowledged that if he had additional Level-S violations, he could be subject to progressive discipline. Tr. at 107; RX 3 (p. RX 4).

On a Thursday in April 2010,¹⁷ he suffered an elbow injury in Wenatchee while working on a locomotive, securing equipment.¹⁸ At the time, the elbow injury did not bother him, but on the trip back to Seattle, his elbow began to swell. Not wanting to get in any more trouble, he felt that he needed to report it as a work-related injury once he returned to Seattle. He reported the elbow injury to the trainmaster on Saturday after leaving work, and completed paperwork for the injury on Sunday.¹⁹ *See* JX A. On Monday, April 25, 2010, he called in sick because he “was sicker than a dog with a cold.” He went to the doctor for his cold, but mentioned his elbow injury to the doctor²⁰; the doctor looked at his elbow and drained some fluid from it. Tr. at 116.

¹⁴ The procedures for alternative handling are set out in RX 31.

¹⁵ Complainant testified that a “Level-S” violation is “for only the most serious safety violations on the railroad.” Tr. at 52.

¹⁶ Complainant was unclear as to his understanding of the length of his suspension. Complainant testified that the suspension was for 60 days. He later referenced a 30-day record suspension, in which he was given a suspension of record, but he was able to continue working. Tr. at 106-07; *see also* RX 3 (p. RX 4).

¹⁷ On the Report of Injury completed by Complainant, he wrote October 2010. JX A. However, that date entry was erroneous. *See* Tr. at 112, 148.

¹⁸ During cross-examination, he described the injury as resulting from banging his elbow on the locomotive door. Tr. at 108. Complainant also explained that on JX A, he indicated the location of the injury as Skykomish, Washington, which is on the west side of the Cascades, because that is when he realized that his elbow became swollen. Tr. at 110-11.

¹⁹ According to Ms. Moran (who was at that time the Seattle Terminal trainmaster), at the time Complainant was completing paperwork for the elbow injury, she told him that if he wanted to seek medical attention in the future, “he needed to let either the on-duty trainmaster or terminal manager know before seeing the doctor so that we could sent the necessary medical paperwork to the physician’s office.” JX C (p. JX 11).

²⁰ This is different from what he told the hearing officer during Respondent’s investigation. During the investigating officer’s hearing, the following colloquies occurred:

Complainant: We [Complainant and Ms. Moran] filled out the appropriate paperwork, signed all the forms. That was on a Saturday. The following Monday, the 26th, I laid off sick with a bit of a cold. That morning, I woke up, decided to give my doctor a call and

After leaving the doctor's office, he called Anthony Boldra, an official with Respondent, to let him know about his doctor visit.²¹ Later that day, he received a call from Alissa Moran who "indicated that I had been informed and had signed the paperwork stating that I would contact the railroad prior to seeking medical attention" because "they needed to be at the doctor's office at the time I was examined." Tr. at 46-47; *see also* Tr. at 114-15. He was told that his going to the doctor without a representative from Respondent present was serious; he then received an investigation letter.

The investigation letter he received indicated that he was eligible for alternative handling of the incident. JX B. He declined this opportunity, opting to participate in an investigation in this matter.²² As a result of this investigation, Complainant received a Level-S "for failure to follow instructions regarding seeking medical attention." Tr. at 50. He received a 30-day recorded suspension and three years of probation²³ for his "failure to comply with instructions from supervisor regarding seeking medical attention."²⁴ JX D; *see also* Tr. at 51, 118; JX B.

On June 22, 2011, Complainant reported to work at the Spokane railyard.²⁵ Because he lacked seniority to work as an engineer there, he worked as a conductor, mainly on the south run to Pasco, Washington. When he first arrived in Spokane, he was not familiar with any of the railyards there. Consequently, he checked in at the yard office at Yardley, a main hub in

see if there was an appointment that I could get in to see him with because I had been icing my elbow and taking some ibuprofen and that didn't seem to be resolving the issue, so I just thought that I would call and find out if there was anything available that, since I was off sick anyway.

JX C (p. JX 15) (emphasis added). Later, the hearing officer sought clarification regarding Complainant's motivation for seeing the doctor.

Hearing officer: [Complainant], was your scheduled appointment based on your injury or was it based on your cold condition?

Complainant: It was kind-of both. I went in to, to, *mainly to look at the elbow* and, asked them about my cold while I was there, so it was, it was both.

JX C (p. JX 17) (emphasis added).

Complainant's testimony at his hearing made it clear that the primary purpose of the medical appointment was for the elbow not the cold.

²¹ Complainant testified that this call occurred eight minutes after he left the doctor's office. Tr. at 53. At his investigatory hearing, Complainant testified that his doctor's appointment was at 8:30 a.m. and he called Respondent's representative at 9:02 a.m. JX C (p. JX 22).

²² RX 2 is a document that Complainant was offered to waive the investigation. Complainant declined to sign this document and the investigation proceeded. Tr. 51. The hearing occurred on June 1, 2010. JX C.

²³ On appeal, the Public Labor Board ultimately reduced this to a 20-day record suspension and two years of probation. RX 24 (p. RX 93).

²⁴ The underlying basis for this violation appears to be General Code of Operating Rule 1.13 which provides:

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.

RX 5 (p. RX 7); *see also* RX 10 (p. RX 14).

²⁵ Complainant testified that he moved from Seattle to the Spokane yard because he was having issues in Seattle, including the loss of a co-worker and problems with one of the road foreman. Tr. at 55.

Spokane, and had a conversation with Brad Williams (second in command there). Mr. Williams provided Complainant with a printout from his computer of all the track charts that he would need to familiarize himself with for the Spokane operation; those printouts were placed in a binder and Mr. Williams handed the binder filled with the printouts to Complainant. Those charts are contained in CX 19²⁶ and CX 3.²⁷ Tr. at 57-59, 64-68. Complainant kept the binder that Mr. Williams gave him in his car where he could reference the materials when needed. Tr. at 63.

On July 17, 2011, the day the derailment occurred, Complainant worked at the Erie Street Yard. This was the first time that he worked at this yard. *Id.* On this day, Complainant was a helper on a three-man switch job.²⁸ Tr. at 68. Prior to the movement of the cars that resulted in the derailment, Complainant and the other two members of the crew conducted a job briefing and consulted a map before entering the yard. Tr. at 71. The purpose of the work at that time was to shuffle rail cars around on various tracks in order to move cars back to the Erie Street yard; the crew needed to move the cars into the track, move the locomotive from the back of the cut using another track, and position it so that the locomotive could then pull the cars from its rear back to the Erie Street yard. Tr. at 73-75. To accomplish this, the crew needed a through track to perform a shoving movement, in which the locomotive and engineer are as far away from the leading edge of the cars that were being pushed as possible. Tr. at 130. Complainant recalled that the shove involved 23 rail cars. Complainant had a radio with which to communicate to the engineer during the shove. Tr. at 155 – 156. Track eight was selected by the foreman to shove the cars in to, which was empty. Tr. at 75. However, at that time, Complainant was not aware at that track eight ended because it was a stub-track. Tr. at 74, 130.

It was Complainant's job "to be in the position to watch the shove into Eight track." Tr. at 75. Complainant said he placed himself in a safe location where he could see the length of the yard and that he observed no obstructions on the track. Complainant "became the eyes and ears for the engineer and directed [sic] the movement via radio, giving him car counts so that he could safely make the move into the track on my guidance." Tr. at 76; *see also* tr. at 123. One can protect the shove by riding on one of the last cars (the car farthest from the pushing locomotive), but Complainant said the Respondent prefers that its employees find an alternative means to protect the shove. For example, another option would be to precede the move and walk down the track and move the shove at walking speed.²⁹ Tr. at 77. During the actual shove, Complainant was 750 to 900 feet from the front of the shove.³⁰ Tr. at 161. During the car count, "somewhere around 20 cars,"³¹ the engineer indicated that he was having trouble with the shove.

²⁶ The pages within CX 19 are individually marked CX 152 – CX 276.

²⁷ Complainant reiterated that CX 3 was part of the package provided to him by Mr. Williams. Tr. at 150, 152.

²⁸ Complainant explained that a conventional switch job involves using an engineer, a foreman and a helper. He was the helper on this occasion. Tr. at 68-69.

²⁹ Upon my questioning, Complainant stated that the maximum speed allowed on yard tracks was 10 miles per hours. However, that would require running, which is another one of the eight deadly sins; a walking speed would be about 2 to 2.5 miles per hour. Tr. at 156.

³⁰ Complainant stated he was 15 back from the front of the shove. Tr. at 76, 123-24, 127-28.

³¹ According to one of the witnesses, during the Respondent's investigatory hearing into this matter, Complainant told the trainmaster that the shove consisted of "about 26" rail cars. JX H (p. JX 48). In his

It is at this point that Complainant noticed the cars “had a weird angle at the far end.” Tr. at 76. He later discovered that the first three cars of the head of the shoving movement had derailed.³² Tr. at 122. At the yard, Complainant wrote a statement about the incident. Tr. at 125; *see* JX K.

As a result of this derailment, Complainant received a notice of investigation. JX E; Tr. at 70. An investigation ensued, and as a result, Respondent terminated Complainant’s employment. JX P; JX T. Complainant acknowledged that this was his third Level-S violation. Tr. at 134. His termination lasted from September 1, 2011 until he was reinstated in December 2012, following a ruling by the Public Law Board (“PLB”).³³ Tr. at 82-83. The PLB reinstated Complainant with full seniority, but he was not awarded back pay. Tr. at 137, 142; *see also* JX S. During this time period, Complainant collected railroad unemployment and worked for his brother’s welding company. Not counting his railroad unemployment, Complainant estimated that he earned about \$35,000 during this fourteen month period.³⁴ Tr. at 84. Complainant stated that not working for Respondent for fourteen months caused a lot of stress and anxiety.³⁵ Tr. at 98-99.

2. Alissa Moran (Tr. at 167-195)

Ms. Moran testified under oath at the hearing. She is the manager of transportation budgets for Respondent at its corporate headquarters in Fort Worth, Texas, and held that position for three weeks. Prior to this position, and since June 2011, she was the manager of safety business information at Fort Worth. In April 2010, she was the terminal trainmaster in Seattle, Washington. The position required her “to manage the day-to-day operations within the yard, manage the traffic flow in and out of the yard, plan trains, plan your crews.” Tr. at 169. The Complainant was one of the engineers that she supervised, but prior to his injury, she had very limited interaction with him. Tr. at 170.

She first became aware of his injury when he called and informed her that he had injured himself “like the day prior on a train to Wenatchee.” Tr. at 171. She inquired whether he needed to go to a doctor. He said no and that he just wanted to report the incident. She informed him that the next time he was called for a train, he should notify the trainmaster so that he could be given paperwork to fill out for the injury. The next morning, she noticed that Complainant was

written statement, Complainant recounted that the shove included approximately 24 cars. JX K (p. JX 1451). One of Complainant’s coworkers reported that they were shoving 27 cars. JX J (p. JX 147). When asked where he was located to protect the shove, Complainant said “four cars or so.” JX H (p. JX 48).

³² On cross-examination, Complainant acknowledged that he did not stop the shove 150 feet from the end of the spur track as required by Respondent’s rules. Tr. at 130; *see* RX 17.

³³ It was explained by another witness that the PLB consists of three members: one union representative; one railroad company representative and one neutral member. Tr. at 363.

³⁴ Complainant reported earning \$93,483.50 in 2013 and \$114,000 in 2014 while working for Respondent. Tr. at 89; *see also* CX 17. Complainant also offered evidence that his railroad retirement fund was not funded during these fourteen months. Tr. at 90, 97; CX 18; CX 14. However, on cross-examination, Complainant acknowledged that his earnings had actually increased as compared to before his discharge. Tr. at 141.

³⁵ On cross-examination, Complainant acknowledged that he did not have to undergo any psychiatric or psychological counseling as a result of this incident. Tr. at 144.

working, and after conducting a briefing to the entire crew, on the topic of “the eight deadly decisions” (Tr. at 178), she had a discussion with Complainant and had him fill out the paperwork. Tr. at 172; *see* JX A. As part of her discussion with Complainant, she told him that if he decided to seek medical treatment, he needed to call the trainmaster phone or the terminal manager, both of which are available 24 hours per day, so that the company could send the necessary forms to the doctor and get him working with a claims agent. Tr. at 174. Complainant did not comply with her instructions, and she explained, “I had specifically said to let us know before seeking treatment that he was going to seek treatment and he didn’t let us know until after he sought treatment.” Tr. at 175. This violated Safety Rule 1.13.³⁶ RX 5. As a result of Complainant’s failure to notify Respondent prior to seeking medical treatment, an investigation occurred and she was the primary witness. She has not had contact with Complainant since the investigation.

On cross-examination, Ms. Moran explained that prior to going to the doctor’s office, Complainant needed to obtain necessary paperwork, specifically a medical release form for the employee to sign and a request for information from the doctor’s office for Respondent’s medical and claims departments. However, she acknowledged that Complainant was not required to actually sign the paperwork prior to going to the doctor’s office, or even sign a medical release prior to going to the doctor’s office. Tr. at 180-81, 184-86. Further, although the paperwork would have to be signed prior to returning to work, it could be completed after a doctor’s visit. Tr. at 181. She also stated that had Complainant called five minutes prior to his doctor’s visit instead of five minutes after, he would not have violated the rules by disobeying his supervisor’s instructions. Tr. at 184. She affirmed that a violation of one of the eight deadly decisions would be a Level-S violation.³⁷ She also said that failure to comply with a supervisor’s instruction was a serious rule violation, but not of the same magnitude as a derailment. Tr. at 183.

3. John H. Williams, Jr. (Tr. at 197-218)

Mr. Williams testified under oath at the hearing. Mr. Williams worked for Respondent for thirty years and has served in various capacities, including as a hearing officer, and has

³⁶ Safety Rule 1.13 provides: “Reporting and complying with instructions: Employees will report to and comply with instructions from supervisors who have the proper jurisdictions. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.” Tr. at 175-176; RX 5.

³⁷ BNSF identifies its Eight Deadly Decisions as follows:

1. On and Off: Getting on or off equipment that is in motion.
2. Going Between: Going between coupled cars or locomotives, or working on the end of cars or locomotives without proper protection.
3. Separation: Failing to ensure 50-foot separation between cars or locomotive before working between equipment.
4. Riding End: Riding the end of a freight car.
5. Fouling: Fouling track before ensuring there is no movement.
6. Running: Running in the performance of duties.
7. Riding: Riding freight cars to a joint.
8. *Shoving: Improper protection for handling cars ahead of engines.*

RX 13 (p. RX 21) (emphasis added).

conducted approximately 50 disciplinary investigations over the course of his career. The hearings are conducted per collective bargaining agreements between Respondent and the various unions. Under this system, the general manager, and not the hearing officer, assesses the discipline. In June 2010, he presided over the investigation into Complainant's failure to follow a supervisor's instructions.³⁸ Complainant was found to have failed to comply with instructions and a Level-S violation was assessed, in addition to a 30-day record suspension and three years of probation. Tr. at 201; *see* JX D. The 30-day record suspension was an administrative suspension, during which time the employee continues to work. He has had no further dealing with Complainant since that investigation. Mr. Williams was aware that per Respondent's policy, a second Level-S violation within the three year period of review can result in the employee's termination from employment. Tr. at 206.

Mr. Williams was also familiar with the personal performance index ("PPI"). The PPI is a method to track incidents using a point system; however, he did not think that it was currently being used. Points were based on either an injury or a rule violation. Tr. at 213. The Northwest Safety Action Plan is a document used by Respondent to identify risks. *See* JX T. This document contains the PPI. Under this system, if a certain event in the index occurs, the employee is assessed a corresponding point total. Respondent stopped using that system within the last two or three years. Tr. at 218.

4. Ward Angelos (Tr. at 218-244, 297-313)

Mr. Angelos testified under oath at the hearing. He worked for Respondent since June 1976. He was the trainmaster in Pasco. He has served as a hearing officer in over 150 investigations. As a hearing officer, he does not decide discipline³⁹; his role is to take testimony and develop facts surrounding the alleged charge, as listed in the charge letter, and to create an accurate transcript for the deciding official. To assess a Level-S charge, the deciding official would need to be a general manager or higher. He served as the hearing officer in Complainant's Level-S hearing in August 2011. Prior to this hearing, which involved handling cars and a D-46.1 incident, he had no involvement with Complainant's employment.

He explained that the definition of a shoving movement is handling cars ahead of the engines. Per 6.5, "The employee protecting the shove is controlling the movement, either via radio or hand signals, to the engineer. And he's responsible for where that movement goes and where it stops. And he's responsible to give the engineer the correct car signs to control the movement." Tr. at 223; *see* RX 15 (p. RX 24). This person is also "responsible to know that the track that he's shoving cars into will take the movement that he's pushing in there." Tr. at 224.

³⁸ The witness indicated that JX C was a copy of the transcript of the investigation proceedings. Tr. at 204. He also stated that the testimony contained therein was not under oath. Tr. at 217.

³⁹ Mr. Angelos was shown JX P. This was the Notice of Dismissal letter from Respondent to Complainant. The electronic signature is Mr. Angelos'. He reaffirmed that he does not decide discipline as the hearing officer; he could not explain why the notice of dismissal was issued under his name, and stated that was not normal. Tr. at 238-239.

This person is required to stop moving into his spur track 150 feet short of the end of the track.⁴⁰ Failure to do so violates one of the eight deadly decisions. Tr. at 224.

During the August 2011 internal hearing,⁴¹ two maps of Erie Yard were introduced. CX 3 was introduced by the union representative for Complainant. Tr. at 225. Mr. Angelos was not certain, but he stated that the map may have been the current document from the Track Chart or Kootenai River Subdivision T Manual.⁴² Frequently, identical yard diagrams are found in both sources. Tr. at 227. It was not the correct depiction of the Erie Street Yard as it existed in July 2011. Mr. Angelos was provided JX N, which Respondent's representative originally presented during the investigation. JX N depicted the Erie Street Yard as it existed in July 2011. This document showed Track 708 (Track 8) as being a spur line. Tr. at 228. Mr. Angelos was shown pictures⁴³ on which he identified red track flags, Respondent's way of delineating the end of a track. Tr. at 229. It was Mr. Angelos' opinion that even if CX 3 had been in existence, and was being utilized by the crew, in July 2011, it did not eliminate the requirement to protect a shoving movement. Tr. at 231. He agreed that if an employee has had two Level-S violations within the three-year probation period, the employee can be subject to dismissal. In this case, Complainant was not terminated until his third Level-S. Tr. at 233; *see also* JX O. Further, Complainant did not qualify for an exception to this policy under the PEPA policy, because he did not have at least five years of service without injury or discipline. Tr. at 235. Mr. Angelos opined that, to his knowledge, the Complainant's reported personal injury in the spring of 2010 had nothing to do with his termination. Tr. at 240.

On cross-examination, Mr. Angelos agreed that hearing officers do not assess discipline and they are to be fair and impartial. Tr. at 298. When shown JX C, he acknowledged that his signature block was on the document, but denied that he was the decision-maker, or otherwise approved that letter, and his signature was not on the letter. He stated that Mr. Johnson dismissed the Complainant. Tr. at 299-301. The reason he raised Complainant's injury history on CX 2 was because it affected the probationary period pursuant to PEPA policy. Tr. at 302-03.

Mr. Angelos stated that some of the photographs in JX I (pp. JX-127-JX 139) show the derailment site sometime after the incident. He explained that each empty car weighed between 55,000 and 65,000 pounds. Tr. at 308. He also identified two photographs depicting two spur tracks with red flags on the end of the track, located at Tracks Seven and Eight in the Erie Street Yard. Tr. at 310.

⁴⁰ Mr. Angelos opined that whether one called it a stub track or a spur track, the track at issue was covered by the requirement under G-Core 1.47 to stopping 150 feet short of the end of the track. Tr. at 241; *see* RX 33.

⁴¹ A transcript of this hearing is located at JX H.

⁴² The witness explained that:

The track chart shows grade, curves, speed limits, the line segment of the subdivision, bridges, signals, crossings. The T manual is the document used by maintenance that indicate kind of the not-to-scale lay-out of the location the and click numbers for the tracks. And frequently documents out of the T Manual are inserted into the Track Chart. Usually documents that depict yards come from a T Manual and/or inserted into a Track Chart.

Tr. at 226.

⁴³ These pictures are identified as JX 144 and JX 145. The photographs are in JX I.

5. Robert Johnson (Tr. at 250-296)

Mr. Johnson testified under oath at the hearing. He is the Executive Vice President for the Canadian Pacific Railway, Southern Region. His railroad career began in 1981 with Respondent, and he worked for Respondent for 32.5 years.⁴⁴ He left Respondent's employ in June 2013. He was not involved with any discipline of Complainant in the spring of 2010, but did review a disciplinary case involving Complainant in September 2011. At that time, he was the General Manager of Respondent's Northwest Division, and his duties included disciplining or terminating employees. Tr. at 253. The director of labor relations provided him with a synopsis of the investigation⁴⁵ and a recommendation. CX 2. Her recommendation was to dismiss. Mr. Johnson agreed that failing to protect a shove was a serious violation of the rules and he has terminated other employees for failing to protect shoving movements. He explained that to protect a shove, one can precede the movement, ride the movement, be on the end of the movement, or "be at a vantage point where you create a triangle, so to speak, where you can clearly see the end of the car and the end of the track and there's no obstructions."⁴⁶ Tr. at 264. Respondent does not discourage employees from riding the end of the movement.

He stated that PPI points played no factor at the time of his decision on how to discipline Complainant.⁴⁷ Based on this incident, as well as Complainant's two prior Level-S violations, he made the decision to dismiss Complainant. Tr. at 256. After reviewing the relevant information and considering Complainant's admission that he did not adequately protect the shove, he determined that Complainant's conduct was willful "and I can't fix that." Tr. at 266. His decision to terminate Complainant had nothing to do with the fact that he reported a personal injury in April 2010.⁴⁸ Tr. at 263, 266. The most serious Level-S violations are contained in PEPA policy, Appendix B. Tr. at 262. These eleven enumerated violations, including derailment, are stand-alone grounds for dismissal. *See* JX O; Tr. at 262-63.

On cross-examination Mr. Johnson acknowledged that he was not aware of the circumstances of the two previous Level-S violations. Tr. at 283, 293. He also acknowledged that "failure to comply with instructions from supervisor regarding seeking medical attention," the violation alleged in Complainant's second Level-S violation (JX D), was not listed as a

⁴⁴ Mr. Johnson's employment history with Respondent included working in the engineering department, becoming a switchman/conductor, yard master, trainmaster, division trainmaster, terminal manager, superintendent of operations, General Director of Transportation, General Director of Service Excellence, and General Director of Transportation for the Northwest Division

⁴⁵ CX 2 references an attached transcript. Mr. Johnson admitted that he did not read the transcript of the hearing officer's investigation prior to making his decision. *See* Tr. at 259, 269.

⁴⁶ Mr. Johnson, on cross-examination, also stated that whether the crew possibly had the wrong map "is irrelevant," as "[Complainant] was dismissed because he failed to protect a shove and ultimately caused a derailment. Three cars of the end of a track, period. That's it." Tr. at 277.

⁴⁷ On cross-examination, Mr. Johnson acknowledged that the PPI was used by Respondent up until August 31, 2012 "to determine which individuals were more likely to have accidents." Tr. at 280-81; *see* CX 11.

⁴⁸ During my questioning of Mr. Johnson, he admitted that the fact that Complainant had two prior Level-S violations was a factor that he considered in determining whether or not to dismiss Complainant. Tr. at 291.

serious violation under PEPA policy, Appendix A (JX O).⁴⁹ Tr. at 286. However, Mr. Johnson commented that Appendix A was a non-exhaustive list of serious violations. *Id.*

6. Andrea Smith (Tr. at 322-375)

Ms. Smith testified under oath at the hearing. She is currently the General Director of Labor Relations for the Central Region for Respondent, based in Fort Worth, Texas. She has worked for Respondent since January 2004. In the summer of 2011, she was the Director of Employee Performance, which involved implementation of Respondent's PEPA policy. She supervised a team of three people, and they were responsible for reviewing all potential dismissal cases across the system. JX O was the PEPA policy in effect on March 1, 2011. This policy required supervisors to consult with the Director of Employee Performance, Ms. Smith's position during the summer of 2011, prior to issuing a dismissal. She received an email concerning Complainant's August 23, 2011 disciplinary investigation and gave a recommendation. She reviewed the discipline investigation transcript, all of the exhibits, the employee's personnel record,⁵⁰ the "employee transcript",⁵¹ and the PEPA policy. Tr. at 325. She recalled that Complainant had two prior disciplinary infractions, one assessed on May 17, 2010 for failure to reduce train speed, and one assessed on June 14, 2010 for failure to comply with instructions from a supervisor. Tr. at 326.

Under Respondent's progressive discipline policy for serious or Level-S violations, the first violation results in a 30-day record suspension with either a 12-month or 36-month probation period.⁵² If the employee gets a second Level-S, or a second serious rule violation within that period, the employee could be subject to dismissal. Tr. at 326-27. Under these guidelines, Complainant could have been dismissed for the second Level-S violation in June 2010. Additionally, under PEPA policy, Appendix B, number 7, the derailment was a stand-alone violation, meaning an employee can be dismissed for a single violation. Tr. at 330.

Based on Complainant's record, she recommended dismissal. Tr. at 328. However, Mr. Johnson made the final decision. Tr. at 325. Complainant appealed his dismissal and "[t]he PLB reinstated him on a leniency basis." Tr. at 332. The PLB agreed with the findings of rule violations, but found that dismissal was harsh and reinstated him without back pay. Tr. at 332; *see* JX S. Complainant also appealed his April 2010 discipline for failing to obey the

⁴⁹ I note that late reporting of an accident or injury is listed as a serious violation in Appendix A. *See* JX O (p. JX 161, item 8). A muscular-skeletal injury does not qualify as a serious violation "as long as the injury is reported within 72 hours of the probable triggering event, the employee notifies the supervisor before seeking medical attention, and the medical attention verifies that the injury was most likely linked to the event specified." *Id.* Based on the facts presented, Complainant was sanctioned because he did not notify his supervisor before seeking medical attention. This is a violation, albeit a technical one, of GCOR Rule 1.13. *See* RX 24 (p. RX 93).

⁵⁰ JX R; *see also* Tr. at 335.

⁵¹ Ms. Smith identified RX 32 as Complainant's employee transcript. She explained that this "is basically a quick snapshot of the employee's history or tenure with BNSF." Tr. at 326.

⁵² The witness later explained that the period of probation depended on whether the employee had five years of service at the time of the first Level-S violation. In this case, Complainant did not have five years of service. Tr. at 334. On cross-examination, she acknowledged that Complainant had 4 years, 10 months of total service. Tr. at 358.

instructions of his supervisor. RX 24; Tr. at 338. That Board affirmed the discipline. On cross-examination, she did not recall if she pulled information regarding similar violations to compare punishments. *See generally* Tr. at 352-54. On my questioning regarding JX R, Ms. Smith stated that the PLB determined that Complainant's "failure to comply with instructions" incident in June 2010 was not a Level-S violation, and that the 20-day record suspension imposed was more akin to a Standard violation under Respondent's disciplinary scheme. Tr. at 362-63.

7. Bradley Williams (Tr. at 381-437)

Mr. Williams testified under oath at the hearing. He is currently the Director of "Ag"⁵³ Operations for Respondent in Fort Worth, Texas. Prior to this position, he was Respondent's terminal manager in Spokane, Washington. He started working for Respondent in 1995. He was not involved in the investigations of Complainant in 2010, but he was involved in the investigation concerning the derailment at the Erie Street Yard in Spokane in July 2011. Once he learned of the derailment, he went to the Erie Street Yard. When he arrived, approximately 3 cars were off the end of the rails, but all cars were upright. Photographs of the scene were taken. Pictures contained in JX I (pp. JX 127-JX 139), accurately depict the conditions at the Erie Street Yard following the derailment. Tracks Seven and Eight are referred to as stub or spur tracks. Shoving is a reverse movement of equipment other than the locomotive forward, as the locomotive is pushing the cars. Rule 6.5 requires that an employee not be engaged in anything else during the time that he is protecting the movement. An employee protects the movement by preceding or being alongside the movement, where the employee is in a position to visibly protect the movement. An employee can also ride the equipment at the end of the car, which is called riding the point. The red flags shown in the photo (JX I (p. JX 145)) are standard red flags, though he did not think that they were the same signs that existed in July 2011. JX N appeared to be a track depiction of the Erie Street Yard as the yard existed in July 2011, and shows that Track Eight does not connect through, as it is a stub track. This document came from the Spokane play book. This play book is "an informational guide to try to assist employees with familiarity, understanding of processes, how we service customers, special details, including track diagrams." Tr. at 392. It is available to employees working in the Spokane area, or anyone with Respondent's internet access. However, reliance on this map is not an acceptable means of complying with the rules for protecting a shove; one has to be in position to visibly protect the movement, which requires physical observation. It was his opinion that Complainant failed to be in a position to be able to protect the movement. Initials E, F, and H appear on JX N; "H" stands for helper. The "H" on JX N represents the location of the helper's position during the shove. The helper during this shove was Complainant. Mr. Williams recognized CX 3 as a track chart, but could not tell when it was in effect and did not know the origin of the document.

He participated in the investigation hearing concerning the July 2011 derailment as a witness. He was aware that a second Level-S violation could result in termination, and that in certain circumstances, there are stand-alone offenses that warrant termination. Failing to protect a shove is one of the eight deadly decisions. On cross-examination, he acknowledged that he gathered the statements from the three members of the crew involved in the incident. He did not

⁵³ I infer this means Agricultural.

recall if the recorded data tapes from the locomotive were pulled.⁵⁴ Tr. at 417. He also admitted that CX 19 “looks similar to something I could have provided [Complainant]” (Tr. at 411), and that there is no office at the Erie Street Yard to print out yard maps (Tr. at 413).

VI. DISCUSSION

A. Timeliness of the Complaint

At the hearing, I expressly asked the parties to address the timeliness issue in their briefs (Tr. at 16), which they did, though in varying degrees of detail. Complainant concedes that he “is not seeking remedies for the June 14, 2010, Level-S and the resulting suspension *per se*. Rather, this action seeks remedies for the railroad’s termination of [Complainant’s] employment in September 2011, which is undisputedly within the FRSA’s 180-day statute of limitations.” Complainant Br. at 6. However, the question is whether the Complainant filed his complaint with OSHA within 180 days of when he had “final, definitive, and unequivocal knowledge of a discrete adverse act.”⁵⁵ 42 U.S.C.A. § 20109(d)(2)(A)(ii); 29 C.F.R. § 1982.103(d).

As an initial matter, this Tribunal notes that Complainant bears the burden to establish that his claim was timely filed. Respondent’s notice of termination was dated September 1, 2011. JX P. There is evidence that Complainant received actual notice of this termination on either September 1, or September 2, 2011.⁵⁶ Complainant admits to receiving his termination notice⁵⁷ (RX 34 at 113); unfortunately, neither party identified exactly when Complainant received the termination notice. When looking at the processing of the termination, it appears that it was still being deliberated as of 12:32 p.m. on September 1, 2011. CX 2 (p. CX 65). Further, the evidence suggests that Complainant reasonably should have been aware of the Respondent’s decision at or near that time.⁵⁸ It is reasonable to assume that Respondent would have communicated Complainant’s termination immediately after the decision was made. Since the record is unclear as to which of these two days Complainant received notice, this Tribunal errs on the side of caution, and finds that Complainant received notice of his termination on Friday, September 2, 2011.

Complainant did not file his complaint with OSHA until March 2, 2012⁵⁹; that equates to 182 days.⁶⁰ Complainant offered no evidence to contradict his own counsel’s attestation. There

⁵⁴ The witness later explained that the train tapes are information concerning, *inter alia*, direction of movement, sounding the horn, and application of emergency brakes; “kind of the equivalent of a black box.” These devices are less sophisticated on switch locomotives, they type used in this case. Tr. at 430-33.

⁵⁵ *Cante v. New York City Dep’t of Educ.*, ARB No. 08-012, slip op. at 10 (July 31, 2009).

⁵⁶ This Tribunal notes that September 1, 2011 was a Thursday. However, the OSHA findings make reference to this letter being postmarked September 2, 2011. CX 14 (p. CX 132). Unfortunately, there appears to be no evidence in the record to support this statement. The OSHA findings also state that Complainant was aware of the firing on or about September 2, 2011. CX 14 (p. CX 129).

⁵⁷ During his deposition, Complainant did not say exactly when he received the termination letter.

⁵⁸ See 80 Fed. Reg. 69,121 (Nov. 9, 2015).

⁵⁹ RX 25 (pp. RX 97, RX 101)

is one reference in the record that Complainant filed his complaint on February 29, 2012; OSHA letter, dated February 20, 2014, indicates that OSHA received Complainant's complaint on February 29, 2012, a Wednesday. CX 14 (p. CX 130). However, Complainant's counsel certified mailing of the complaint on March 2, 2012, a Friday. There is a stamp on the complaint in the record noting that OSHA received this Complaint on March 5, 2012, a Monday. Thus, the weight of the evidence supports a finding that Complainant filed his complaint on March 2, 2012, not February 29, 2012, as referenced in the OSHA letter.

The Board has made it clear that a FRSA claim must be filed within 180 days after the discrete adverse act occurred. *Williams v. Nat'l R.R. Passenger Corp.*, ARB No. 12-068, slip op. at 5 (Dec. 18, 2013). Here, there are three discrete adverse acts at issue: (1) a record suspension in May 2010 for "failure to reduce train speed"⁶¹; (2) a record suspension in June 2010 for "failure to comply with instructions from supervisor regarding seeking medical attention"⁶²; and (3) Complainant's termination of employment on September 1, 2011 for failing to protect a shoving movement.⁶³ Despite Complainant's contention, the 180-day period does not restart each time an alleged retaliatory action is taken by the employer. *Williams, supra*. Therefore, the April 2010 and June 2010 record suspensions are clearly beyond the 180-day period. Further, despite being specifically advised to address the timeliness issue in this case, Complainant offered no reason to apply equitable tolling in this matter.⁶⁴ Therefore, Complainant has not met his burden to justify application of this doctrine.

Despite Complainant's failure to raise equitable tolling, this Tribunal will address this doctrine briefly. Equitable tolling is a principle by which a court excuses a plaintiff's delay in filing an otherwise untimely complaint. *See Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010). "If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations

⁶⁰ Specifically, September 3 through 30 (28 days); October 1 through 31 (31 days); November 1 through 30 (30 days); December 1 through 31 (31 days); January 1 through 31 (31 days); February 1 through 29 (29 days); and March 1 through 2 (2 days). I note that 2012 was a leap year.

⁶¹ RX 3 (p. RX 4). As a result of this incident, Complainant's punishment was a 30-day record suspension and 3 years of probation. *Id.* This incident was actually Complainant's second "speeding" incident, the first occurred in January 2010. RX 1.

⁶² CX 7; JX D; RX 2 (p. RX 3).

⁶³ JX P.

⁶⁴ For whistleblower claims, the Board has recognized four principal, nonexclusive situations for equitable modification of the statute of limitations: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum; and (4) where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights. *Williams*, ARB No. 12-068 at 5 (citing *Woods v. Boeing-South Carolina*, ARB No. 11-067, slip op. at 8 (Dec. 10, 2012)); *Selig v. Aurora Flight Sciences*, ARB No.10-072, slip op. at 3 (Jan. 28, 2011). Although inability to demonstrate one of the abovementioned situations does not preclude entitlement to equitable tolling, the complainant bears the burden of justifying the application of equitable tolling principles. *Udvari v. US Airways, Inc.*, ALJ No. 2014-AIR-0069, slip op. at 3 (Jan. 17, 2014) (citing *Wilson v. Sec'y of Veterans Affairs*, 63 F.3d 402, 404 (5th Cir. 1995)); *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 661 (11th Cir. 1993). *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990); *Woods*, ARB No. 11-067, slip op. at 8.

for filing suit until the plaintiff can gather what information he needs." *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000), *overruled on other grounds by Socop-Gonzalez*, 272 F.3d at 1194-96. In the employment discrimination context, equitable tolling may serve to excuse a plaintiff's ignorance of the existence of a claim. *See Jenkins v. CSX Transp., Inc.*, ARB No. 13-029, slip op. at 5 (May 15, 2014). Whether a particular case or controversy warrants an application of equitable tolling is a factual determination: "Equitable tolling may be applied if, *despite all due diligence*, a plaintiff is unable to obtain vital information bearing on the existence of his claim." *Santa Maria*, 202 F. 3d at 1178 (emphasis added); *see also White v. Boston (In re White)*, 104 B.R. 951, 956-58 (S.D. Ind. 1989).

Equitable estoppel, on the other hand, "focuses primarily on the actions taken by the defendant in preventing a plaintiff from filing suit." *Santa Maria*, 202 F. 3d at 1176. Application of equitable estoppel is only warranted when "the defendant takes *active steps* to prevent the plaintiff from suing in time." *Id.* (emphasis added) (citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990)). In the employment discrimination context, equitable estoppel is warranted when a defendant has concealed or misrepresented facts necessary to file a discrimination claim. *See Coppinger-Martin*, 627 F.3d at 751; *see also Santa Maria*, 202 F.3d at 1177; *Bonham v. Dresser Indus.*, 569 F.2d 187, 193 (3d Cir. 1977) (finding in dicta that "cases may arise where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights"). "Equitable estoppel is also sometimes referred to as fraudulent concealment." *Santa Maria*, 202 F. 3d at 1176 (internal quotation marks omitted).

Furthermore, to invoke equitable estoppel, Complainant must show that Respondent's act of fraudulent concealment was separate and distinct from the alleged wrongdoing on which Complainant's complaint is grounded. *See Guerrero v. Gates*, 442 F.3d 697, 706 (9th Cir. 2006).⁶⁵ Otherwise, Complainant is in danger of merging "the substantive wrong with the tolling doctrine." *Lukovsky v. City & Cnty. of S.F.*, 535 F.3d 1044, 1052 (9th Cir. 2008) (citing *Cada*, 920 F.2d at 451). Such an assertion is prohibited, because it would eliminate the Respondent's statute of limitations defense altogether, and this right is afforded to Respondent under AIR 21's organic statute, 49 U.S.C. § 42121(b), and implementing regulations, 29 C.F.R. § 1979.103(d). To preserve this right, Complainant must "point to . . . some active conduct by the [Respondent]" other than the alleged discriminatory act that prevented the timely filing of his AIR 21 claim. *Guerrero*, 442 F. 3d at 706.

Here, Complainant presented no evidence that he would not have known of the existence of a possible claim within the limitations period. To the contrary, there is evidence that Complainant was aware of the claim and that he pursued other remedies within 180-day period. Less than three weeks after his termination, Complainant appealed his termination through the union. JX S. Further, no factors are present that would warrant application of equitable tolling. Thus, Complainant's complaint is untimely and should be dismissed on this basis alone.

⁶⁵ A hypothetical example of this principle is as follows: a fictional complainant blew the whistle on a safety issue and became a protected employee; the fictional employer fired the complainant; the employer then made repeated statements to the fictional complainant that his job would be restored; in the meantime, complainant's ninety-day window to file an AIR 21 claim had expired.

B. Alternative Findings

Out of an abundance of caution, this Tribunal will continue its analysis to determine whether Complainant would otherwise prevail on the merits of his claim.

1. Complainant's Prima Facie Case

As noted above, actions brought under FRSA are governed by the burden of proof structure set forth in the employee protection provisions of AIR 21. *See* 49 U.S.C. § 20109(d)(2)(A)(i). In addition to demonstrating that the complainant and the employer are covered under the Act,⁶⁶ the complainant must also demonstrate the following elements in order to prevail: (1) he engaged in protected activity, as statutorily defined⁶⁷; (2) he suffered an unfavorable personnel action⁶⁸; and (3) the protected activity was a contributing factor in the unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); *De Francesco v. Union R.R. Co.*, ARB No. 10-114, slip op. at 6 n.20 (Feb. 29, 2012) (citing *Williams v. Domino Pizza*, ARB No. 09-092, slip op. at 5 (Jan. 31, 2011)); *see also Clemmons v. Ameristar Airways Inc.*, ARB No. 05-048, (June 29, 2007). The term “demonstrate,” as used in AIR 21 and FRSA, means to prove by a preponderance of evidence. Thus, Complainant bears the burden of proving his case by a preponderance of the evidence. If Complainant establishes a *prima facie* case, Respondent may avoid liability only if it can prove by “clear and convincing evidence” that it would have taken the same unfavorable personnel action in the absence of Complainant’s protected activity. *See* 49 U.S.C. §§ 20109(d)(2)(A)(i); 49 U.S.C. 42121(b)(2)(B)(iii)-(iv).

a. Protected Activity

The FRSA unambiguously protects railroad employees from being disciplined in any fashion when notifying the railroad of a work related personal injury or requesting medical or first-aid treatment. 49 U.S.C. §§ 20109(a)(4) and (c)(2). The Complainant does not allege that his conduct during the derailment was protected activity. Instead, Complainant reaches back fourteen months to assert a protected activity. In this case, Complainant alleges that the protected activity was his seeking, and later reporting, medical treatment for a work-related elbow injury. Citing 49 U.S.C. §§ 20109(a)(4), (c)(2), Complainant argues: “Two examples of this statutorily-defined protected activity are (1) notifying (or attempting to notify) either the railroad or the Secretary of Transportation of a work-related personal injury or work-related illness and (2) requesting medical or first-air treatment.” Complainant Br. at 4. Here, there is no evidence that Complainant either suffered or reported a work-related injury due to the July 2011 derailment incident. Complainant instead focuses on his elbow injury suffered on April 23, 2010 that resulted in discipline in June 2010. There is little question that reporting his elbow injury,

⁶⁶ Here, there is no dispute that Respondent is a “railroad carrier” and Complainant is a covered “employee” within the meaning of 49 U.S.C. § 20109(a).

⁶⁷ By its terms, FRSA defines protected activities to include acts done “to notify, or attempt to notify, the railroad carrier or Secretary of Transportation of a work-related personal injury or work-related illness of an employee.”

⁶⁸ The term “unfavorable personnel action” includes making charges against an employee in a disciplinary proceeding and suspending, terminating, placing on probation or making notes of reprimand on an employee’s record.

and thereafter seeking treatment, was protected activity under the Act.⁶⁹ As such, I find that Complainant engaged in protected activity by seeking, receiving and reporting his medical treatment in April 2010.

b. Adverse Action

An adverse employment action must affect the terms and conditions of a complainant's employment. *Johnson v. Nat'l R.R. Passenger Corp. (AMTRAK)*, ARB No. 09-142, slip op. at 3-4 (Oct. 16, 2009). See also *Simpson United Parcel Service*, ARB No. 06-065 (Mar. 14, 2008); *Agee v. ABF Freight Sys., Inc.*, ARB No. 04-155, slip op. at 4 (Nov. 30, 2005). In *Melton v. Yellow Transp., Inc.*, ARB No. 06-052 (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. Under the *Burlington Northern* standard, the test is whether the employer's action could dissuade a similarly situated, reasonable worker from engaging in protected activity. See *Jenkins v. United States Environmental Protection Agency*, ARB No. 98146, slip op. at 20 (Feb. 28, 2003) (an action must constitute a tangible employment action, i.e., 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).

Here, there is no dispute that Complainant suffered an adverse action when Respondent issued a Level-S violation regarding the medical treatment and when Respondent terminated his employment. As discussed earlier, the April 2010 incident is time-barred and cannot, in and of itself, be considered the adverse action upon which Complainant can prevail. However, assuming *arguendo* that the September 1, 2011 termination falls within the statute of limitations, the issue becomes whether the termination relates back to the June 2010 Level-S discipline,⁷⁰ which will be discussed below in the causation analysis.

c. Contributing Factor Analysis

Finally, the complainant bears the burden of demonstrating that the respondent undertook the adverse action, "in whole or in part," because of the complainant's protected activity. 42 U.S.C. § 20109(a); see also 29 C.F.R. § 1982.109(a). The Board has held that a contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams v. Domino's Pizza*, ARB 09- 092, slip op. at 5 (Jan. 31, 2011). The Board has observed, "The 'contributing factor' standard was employed to remove

⁶⁹ Respondent essentially asserts that the protected activity must similarly occur within the prescribed period of limitations or it is waived; this Tribunal declines to take this position. Thus, the question before this Tribunal, and addressed above, is not whether the protected activity occurred within the statute of limitation period, but whether the adverse action that is the basis of the complaint occurred within that period. The language in the statute makes clear that the focus of the timeliness inquiry is on the date of the violation: "An action under paragraph (1) shall be commenced not later than 180 days after the date on which the alleged violation of subsection (a), (b) or (c) of this section occurs." 49 U.S.C. § 20109(d)(2)(A)(ii) (emphasis added).

⁷⁰ The June 2010 discipline relates to the April 2010 elbow injury.

any requirement on a whistleblower to prove that protected activity was a ‘significant’, ‘motivating’, ‘substantial’, or ‘predominant’ factor in a personnel action in order to overturn that action.” *Powers*, ARB No. 13-034 at 22 (internal quotation marks omitted). Therefore, the complainant “need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent’s reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant’s protected activity.” *Hutton v. Union Pac. R.R.*, ARB No. 11-091, slip op. at 8 (May 31, 2013). The Board explained, “Since proof of contributing factor does not require evidence of retaliatory motive . . . it stands to reason that complainant has no obligation to disprove evidence of a subjective non-retaliatory motive in the context of advancing evidence supporting a showing of contributing factor.” *Powers*, ARB No. 13-034 at 61.

A complainant may prove this element through direct evidence or circumstantial evidence. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, slip op. at 6-7 (Feb. 29, 2012). Protected activity and adverse employment actions are inextricably intertwined where the protected activity directly leads to the unfavorable employment decision or the decision cannot be explained without discussing the protected activity. See *Benjamin v. Citation Shares Mgmt., LLC.*, ARB Case No. 12-029, slip op. at 12 (Nov. 5, 2013). Though “[t]emporal proximity between protected activity and adverse personnel action ‘normally’ will satisfy the burden of making a *prima facie* showing of knowledge and causation,” and “may support an inference of retaliation, the inference is not necessarily dispositive.” *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, slip op. at 7 (Dec. 31, 2007); see also *Powers*, ARB No. 13-034 at 23 (explaining that at times, temporal proximity alone may be sufficient to demonstrate the element of contributing factor). Factors of circumstantial evidence that may be considered include:

[T]emporal proximity, indications of pretext, inconsistent application of an employer’s policies, an employer’s shifting explanations for its actions, antagonism or hostility toward a complainant’s protected activity, the falsity of an employer’s explanation for the adverse action taken, and a change in the employer’s attitude toward the complainant after he or she engages in protected activity.

Cain v. BNSF Ry. Co., ARB No. 13-006, slip op. at 13 (Sept. 18, 2014).

In addition, “where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee’s burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action.” *Barber v. Planet Airways, Inc.*, ARB No. 04-056, slip op. at 6-7 (Apr. 28, 2006). This is consistent with the Board’s reasoning in *Powers*, in which the Board revisited the “contributory factor” evidentiary analysis enunciated in *Fordham v. Fannie Mae*⁷¹:

⁷¹ ARB No. 12-96 (Oct. 9, 2014). In *Fordham*, a split panel of the Board ruled, *inter alia*, that a respondent’s evidence of a legitimate, non-retaliatory reason for an adverse action may not be weighed by the ALJ when determining whether the complainant met his or her burden of proving contributing factor causation by a preponderance of the evidence. The panel reasoned that permitting the employer to put on such evidence at the contributory factor stage would render the statutorily prescribed affirmative “clear and convincing” evidence defense meaningless.

While, as *Fordham* explains, the legal arguments advanced by a respondent in support of proving the statutory affirmative defense are different from defending against a complainant's proof of contributing factor causation, there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor causation as long as the evidence is relevant to that element of proof. 29 C.F.R. § 18.401. Thus, the *Fordham* majority properly acknowledged that "an ALJ may consider an employer's evidence challenging whether the complainant's actions were protected or whether the employer's action constituted an adverse action, as well the credibility of the complainant's causation evidence."

Powers, ARB No. 13-034 at 22 (quoting *Fordham*, ARB No. 12-061 at 23. Thus, the Board clarified that the employer's evidence must be relevant to the issues presented at the contributing factor stage of the analysis, and that proof of the respondent's statutory defense, by clear and convincing evidence, that it would have taken the same adverse action absent the protected activity, is legally distinguishable from the complainant's burden to show contributing factor causation. *See Powers*, ARB No. 13-034 at 22.

Here, the Complainant asks this Tribunal to refer back to an adverse action that occurred fourteen months prior to the termination; though the June 2010 discipline was adverse action related to a protected activity, Complainant must demonstrate some causal link or relevance to the termination. This Tribunal recognizes that there can be years between the protected activity and the employer's opportunity to retaliate sufficient to demonstrate causal connection. *See, e.g., Porter v. Cal. Dept't of Corrs.*, 419 F.3d 885, 895 (9th Cir. 2005). Arguably, the July 2011 derailment could be the first incident where such an opportunity could have arisen.

It is clear that Complainant's prior violation history was considered as a factor by Respondent in the decision-making process. The dismissal letter Complainant received contains the following statement: "In assessing the discipline, consideration was given to your personnel record and the discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA)." JX P (p. JX 163). Complainant's personnel record makes reference to his earlier disciplinary actions. RX 32 (p. RX 350). One of the disciplinary actions referenced in his personal record is the discipline associated with his reporting a work related elbow injury in April 2010⁷²; subsequently, in issuing the second Level-S discipline, Respondent asserted that it was not for seeking medical treatment, but that it was for Complainant's failure to report to a supervisor that he was going to seek medical treatment prior to obtaining it. Thus, the June 2010 discipline directly related to Complainant seeking medical treatment.

⁷² This Tribunal finds it disingenuous that Respondent disciplined Complainant for failing to follow its instructions to inform Respondent when he was seeking medical treatment. Respondent failed to provide any reasonable justification to impose this requirement. As Respondent acknowledged, it does not have the authority to deny treatment and there is no reason that the medical treatment records could not be obtained after initial care was provided. This Tribunal notes that the PLB reduced Complainant's punishment so that it was more consistent with a standard violation (not a Level-S). *See* RX 34 (p. RX 93); PEPA at JX O (p. JX 159).

Moreover, during Respondent's administrative processing of the action to the deciding official, there are consistent references to Complainant's two prior Level-S violations. CX 2 (p. CX 65). The email from Ms. Smith, the labor relations representative who transmitted the August 27, 2011 transcript to Mr. Johnson, the deciding official, is illuminating.⁷³ CX 2. Mr. Angelos, the investigating officer for this incident, wrote, "Third Level-S in 1 year, 3 months, and 1 reportable injury in 4 years, 10 months total service. Will LR support dismissal for this employee?"⁷⁴ Ms. Smith responded to Mr. Angelos' email by summarizing the findings of the investigation. However, before this summary, she wrote: "After reviewing the transcript, I support the dismissal of [Complainant] based on the second Level-S PEPA policy theory (it appears that this is actually [Complainant's] third active Level-S.)" CX 2. In addition, Mr. Johnson testified that, based on the shoving movement incident, as well as Complainant's two prior Level-S violations, he made the decision to dismiss Complainant.⁷⁵ Tr. at 256. Furthermore, during the appeal of Complainant's termination, Mr. Johnson wrote, "It should be noted that [Complainant] was shown leniency previously when he was not dismissed for a second Serious violation. His failure to change his behavior necessitated his dismissal." All of these comments demonstrate that Respondent considered the second Level-S violation, Complainant's elbow injury incident, as a factor in its decision.

Had Respondent not referenced Complainant's prior discipline in its decision to terminate Complainant, the causation issue might have been a closer question. However, the evidence concerning the decision to terminate Complainant's employment specifically references prior discipline that was the result of protected activity. Therefore, the evidence supports a finding that Complainant's protected activity of reporting medical treatment was a contributing factor in his dismissal.

2. Whether Respondent Would Have Taken the Same Unfavorable Action Absent Complainant's Protected Activity

Assuming Complainant establishes a *prima facie* case, the burden shifts to the employer to prove by clear and convincing evidence that it would have taken the same adverse action absent the protected activity. The clear and convincing evidence standard is the burden of proof between preponderance of the evidence and proof beyond a reasonable doubt. To meet this burden, the employer must show that the truth of its factual contentions is highly probable, or reasonably certain. *See Santiago v. Metro-North Commuter R.R. Co.*, ARB No. 2013-0062, slip

⁷³ Although the email in CX 2 was addressed to Mr. Angelos, Mr. Johnson (the deciding official) was on the courtesy copy line. Additionally, Mr. Johnson acknowledged receipt of the email and Ms. Smith's recommendation during his hearing testimony.

⁷⁴ It is somewhat troubling that the investigating officer, who is to develop facts around the alleged charged and who supposedly does not decide the Complainant's discipline, is inquiring about whether management would support termination.

⁷⁵ What is not clear from the record is whether Mr. Johnson knew the facts underlying the prior Level-S violations. Mr. Johnson admitted that he did not read the entire investigation transcript. Instead he read a synopsis of the transcript contained in an email by Ms. Smith. Tr. at 259-60. This email makes no mention of any of the facts pertaining to Complainant's prior discipline; it only references the fact that this was Complainant's second Level-S violation and may actually be his third. CX 2.

op. at 3 (June 12, 2015); *Clarke v. Navajo Express*, ARB No. 09-114, slip op. at 4 (June 29, 2011). Because proof of contributing factor does not require evidence of retaliatory motive, evidence of non-retaliatory motive, such as "self-serving testimony of Company managers," does not rebut a complainant's evidence of contribution; rather, such evidence is more relevant to a respondent's affirmative defense, *i.e.*, at the clear and convincing evidence stage of the analysis. *See Powers, supra* at 26-28.

Cain, supra, is instructive regarding the clear and convincing evidence defense in FRSA cases.⁷⁶ Regarding the respondent's burden of clear and convincing evidence, the ARB reiterated that this is a high burden of proof, and that the respondent is required to provide not what it "could have" done, but rather, what it "would have" done. *Cain*, ARB No. 13-006 at 7 (citing *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074 (Apr. 25, 2014)). Furthermore, the Board explained:

As we do not superimpose our opinion on the conclusions of a company's personnel office, our role is not to question whether the employer's decision to suspend Cain was wise or based on sufficient "cause" under BNSF personnel policies, but only whether all the evidence taken as a whole makes it —highly probable that BNSF "would have" suspended Cain for 30 days absent the protected activity.

Cain, ARB No. 13-006 at 7. The Board revisited its analysis of the clear and convincing evidence standard in *DeFrancesco*, ARB No. 13-057 at 10, and reasoned:

As in this case where the FRSA-protected activity involves the filing of an injury report ostensibly resulting from the employee's unsafe conduct, the focus in determining whether the respondent meets the required affirmative defense is on whether the employer has presented evidence that clearly and convincingly establishes that it would have taken the same personnel action against an uninjured employee engaged in identical unsafe conduct.

Ultimately, the ARB agreed with the ALJ's conclusion that the respondent failed to meet its burden of clear and convincing evidence. *Id.* at 14. Specifically, the ARB held it that it was not enough for Union Railroad to show that DeFrancesco violated its safety rules, that it had a legitimate motive for imposing the disciplinary action, or that it imposed "appropriate discipline" against employees for safety violations and unsafe behavior regardless of whether they reported

⁷⁶ In *Cain*, ARB No. 13-006, the complainant was involved a truck accident and filed an initial injury report. A few weeks later, he filed an amended injury report when he learned that the seat belt had caused more serious injury. Following an investigation of the accident by the respondent, the complainant was suspended and placed on probation for a violation of safety rules. Later, the respondent concluded that the complainant had violated a reporting rule by failing to report the extent of his injuries in a prompt manner, and notified the complainant he was dismissed from employment. The ALJ found that the respondent violated the FRSA, and the respondent appealed. The ARB affirmed the ALJ's findings of protected activity and that the protected activity contributed to both the investigation leading to the suspension, and to the imposition of probation and the charge of failure to file a timely report, which occurred during a probationary period and resulted in the Complainant's termination from employment.

an injury. *Id.* at 13. Rather, Union Railroad was required to demonstrate, through factors extrinsic to complainant’s protected activity, that the discipline to which the complainant was subjected was applied consistently, within clearly-established company policy, and in a non-disparate manner, consistent with discipline taken against employees who committed the same or similar violations, but were not injured.⁷⁷ *Id.* at 13-14.

Here, Respondent contends that its discipline of Complainant was warranted due to his prior Level-S violations, and also in light of the seriousness of the violation that resulted in the derailment. Though Complainant argues that the discretionary nature of Respondent’s PEPA policy weighs against finding that Respondent carried its burden of proof by clear and convincing evidence (*see* Complainant Br. at 10), Respondent presented compelling and consistent testimony that the failure to protect a shoving movement was one of its “Eight Deadly Decisions.” RX 13 (p. RX 21). The deciding official’s testimony was equally compelling; though Mr. Johnson testified that Complainant’s two prior Level-S violations were a factor in his decision, he explained that in his view, the synopsis of the incident and Complainant’s admission that he did not adequately protect the shove suggested that Complainant’s conduct was willful, “and I can’t fix that.” Tr. at 266. He further stated that his decision to terminate Complainant’s employment had nothing to do with the fact that he reported a personal injury in April 2010.⁷⁸ Tr. at 263, 266. Mr. Johnson further pointed out that not all Level-S violations are equal, noting that the most serious Level-S violations are contained in PEPA policy, Appendix B. Tr. at 262. These eleven violations, including derailment, are stand-alone grounds for dismissal.⁷⁹ Tr. at 262-63; *see* JX O (p. JX 162). In addition, the derailment incident caused by Complainant was costly to Respondent; during the Respondent’s investigation hearing into the matter, a

⁷⁷ In this matter, Respondent offered nine records of employees who purportedly committed the same or similar violations. RX 18. Respondent selected these samplers of employees disciplined for the same rule violation. Tr. at 344; *see generally* Tr. at 343-45. Two of the nine records offered by Respondent concern violations similar to the violations that Complainant committed. Respondent correctly observes that Complainant submitted no evidence that Employer applied its PEPA policy in an inconsistent manner in his case. Resp’t Br. at 16. However, Respondent, not Complainant, bears the burden to demonstrate that it would have taken the same action absent Complainant’s protected activity once Complainant has established a *prima facie* case; thus, Respondent may proffer evidence concerning the consistent application of its policy, but there is no requirement that Complainant make this showing. Complainant criticizes Respondent’s selection of comparators, arguing, “out of more than 40,000 employees,” Employer “only” presented four employee transcripts to support its assertion that it would have terminated Complainant’s employment. Complainant Br. at 10. This argument might have merit if there were evidence suggesting that those 40,000 employees were also conducting a shoving movement, or that they had a disciplinary history. Without such evidence, and contrary to Complainant’s criticism, it is not reasonable to assume that all of those 40,000 employees are similarly situated comparators. Regardless, there is sufficient evidence from the samples proffered by Respondent to show that Respondent applied its PEPA policy consistently where the employees’ discipline was related to a shoving movement violation.

⁷⁸ During my question of Mr. Johnson, he admitted that the fact that Complainant had two prior Level-S violations was a factor that he considered in determining whether or not to dismiss Complainant. Tr. at 291.

⁷⁹ PEPA policy, Appendix B lists violations that constitute stand-alone grounds for dismissal. Item number 7 provides: “Rule violation that results in serious collision and/or derailment, serious injury, fatality or extensive damage to company or public property.” JX O (p. JX 162).

trainmaster testified that all three cars had to have “all the wheel bearings and stacked in and everything.” JX H (p. JX 50). Complainant admitted that there was damage to Respondent’s property. Tr. at 128. Further, it is reasonable to assume that Respondent incurred the cost of obtaining equipment to use at the site to recover the cars themselves, as well as making repairs to track eight.⁸⁰

Moreover, Respondent uses a progressive disciplinary scheme. Under its policy, the first serious violation will result in a 30-day record suspension and a review period of 36 months. “A second serious violation committed within the applicable review period⁸¹ may result in dismissal.” JX O (p. JX 160). Complainant’s first Level-S violation was for his second speeding violation; Complainant does not assert that this was protected activity. Complainant’s second Level-S violation was for the elbow injury incident.⁸² Complainant asserts, and this Tribunal finds, that this was protected activity, and that Complainant’s failure to report treatment for the elbow injury was a minor infraction.⁸³ The third Level-S violation was for the derailment incident. Complainant acknowledges, and this Tribunal finds, that this was not protected activity. Notwithstanding the fact that the June 2010 suspension violates 49 U.S.C. § 20901(c), the Respondent did not take the additional step of dismissing Complainant, which it otherwise could have done under its policy. Instead, Respondent elected to continue Complainant’s employment. Contrary to Complainant’s assertion, the restraint that Respondent exercised in not terminating Complainant’s employment after the second Level-S violation weighs against an inference of discriminatory intent.⁸⁴ Thus, even without factoring in the second Level-S violation, under Respondent’s policy, the derailment incident would constitute Complainant’s second Level-S violation, which would justify dismissal.

In addition, derailment is a violation that is grounds for dismissal by itself. Here, the Respondent has identified those types of violations that it views are truly hazardous to the safe operation of its business. Those are contained in PEPA policy, Appendix B, and causing a derailment is listed as such a hazard. JX O (pp. JX 160, JX 162). Complainant’s actions caused a full three car derailment due to his failure to protect the shove. *See* JX I. This is a clear and egregious safety violation, which placed Respondent’s property and the safety of Complainant and his coworkers at risk.⁸⁵ The seriousness of his conduct pales in comparison to the infraction of not following the instructions of his supervisor when seeking medical treatment. It is because of the hazardous nature of a shoving movement that Respondent identifies improper protection for handling cars ahead of engines as one of its “eight deadly decisions.” Further, Respondent’s

⁸⁰ Photographs of the derailment and resultant damage are located at JX I (pp. JX 127-JX 139).

⁸¹ It is undisputed that Complainant was within the period of probation for either the speeding Level-S violation or the elbow injury Level-S violation.

⁸² Complainant Reply Br. at 3.

⁸³ *See also* footnote 72, *supra*.

⁸⁴ Respondent provided evidence that it dismissed employees in its Northwest Division (the region at issue here) for failing to protect a shoving movement. *See* RX 18; Tr. at 343-45. Complainant did not submit any evidence to demonstrate that Respondent applied its disciplinary policy in an inconsistent manner as part of his *prima facie* case, or to discredit Respondent’s defense that it would have taken the same action absent protected activity.

⁸⁵ Mr. Johnson testified: “[W]e’ve got an employee that made a willful violation, in my mind, *on something that could have catastrophic consequences is that he didn’t protect the shove.*” Tr. at 293 (emphasis added).

representative concluded that Complainant's actions were willful, and something that he believed could not be fixed. Tr. at 266. Mr. Johnson credibly testified that even without Complainant's April 2010 Level-S violation for failing to follow a supervisor's instruction, he would have terminated Complainant due to the egregious safety risks that resulted from Complainant's failure to protect the shove. *Id.* Mr. Johnson's comment that the situation could not be fixed also suggests that there was no animus or hostility towards the Complainant, but mere intolerance of the safety risk posed by Complainant's conduct in causing the derailment.

While there is no question that Respondent considered Complainant's prior violation history, as it is referenced on the termination letter itself, the facts of this case cannot be assessed in a vacuum, as Complainant aptly notes. Complainant Br. at 6. Taken as a whole, all the evidence in this case surrounding the derailment makes it highly probable that Respondent would have terminated Complainant absent the earlier protected activity. Thus, in light of Respondent's previous exercise of discretion in deciding not to dismiss Complainant, the seriousness of the derailment incident, and the evidence demonstrating the reasonable and equal application of Respondent's policies in situations involving derailments, I find that Respondent has demonstrated by clear and convincing evidence that it would have dismissed Complainant absent his protected activity.

VII. CONCLUSION

Complainant's complaint was untimely filed and should be dismissed on that basis alone. In the alternative, Complainant demonstrated by a preponderance of the evidence that he engaged in protected activity, of which Respondent had knowledge, he experienced an adverse action, and his protected activity was a contributing factor in the adverse action. However, Respondent demonstrated by clear and convincing evidence that it would have taken the adverse action in the absence of Complainant's protected activity. Respondent is therefore not liable under the FRSA.

VIII. ORDER

Accordingly, as Complainant has failed to establish timeliness, and in the alternative, as Respondent demonstrated by clear and convincing evidence that it would have taken the same action absent protected activity, it is hereby **ORDERED** that the claim and relief sought are **DENIED**. Accordingly, I **DISMISS** the Complainant's complaint.

SO ORDERED.

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

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

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

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

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

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

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

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

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

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