

**U.S. Department of Labor**

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**Issue Date: 27 February 2017**

CASE NO.: 2015-FRS-00024

*In the Matter of:*

JOHN MEYER,  
Complainant,

vs.

BNSF RAILWAY COMPANY,  
Respondent.

Appearances: George A. Thornton, Esq.,  
For the Complainant

Paul S. Balanon, Esq.  
Jacob E. Godard, Esq.  
For the Respondent

Before: Jennifer Gee  
Administrative Law Judge

**DECISION AND ORDER DISMISSING COMPLAINT**

This matter arises out of the employee-protection provisions of the Federal Rail Safety Act ("FRSA"), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053, 121 Stat. 266, 444 (2007) and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848, 4892 (2008). 49 U.S.C. § 20109. John Meyer ("Complainant") alleges that his employer, BNSF Railway Company ("Respondent" or "BNSF"), violated the whistleblower protection provisions of the FRSA by disciplining him after he reported a work-related injury and treatment plan. This claim was initiated with the Office of Administrative Law Judges ("OALJ") on February 11, 2015, when OALJ received Respondent's timely objections to the Secretary's findings issued by the Occupational Safety and Health Administration's ("OSHA"). This case is before me *de novo*.

For the reasons stated below, Complainant's FRSA complaint is DISMISSED.

## I. Procedural History

Complainant filed his complaint with OSHA on August 5, 2011, alleging that Respondent had retaliated against him for reporting a work-related injury by assessing him a 30-day record suspension and 1 year probation on March 14, 2011. On January 12, 2015, the Assistant Regional Administrator of OSHA, acting on behalf of the Secretary of Labor, determined that there was reasonable cause to believe that BNSF had violated the FRSA. OSHA ordered expungement of Complainant's personnel files, directed BNSF to make information about the decision and whistleblower protections available to employees, and awarded Complainant \$768.54 in back pay, \$25,000.00 in compensatory emotional distress damages, and attorney's fees and costs. Respondent filed its request for a hearing with OALJ on February 11, 2015.<sup>1</sup>

This case was assigned to me on March 4, 2015, and on March 5, 2015, I issued a notice of hearing setting it for hearing on September 1-2, 2015, in Seattle, Washington. After being informed that the majority of the witnesses were located in Vancouver, Washington, on March 24, 2015, I transferred venue to Portland, Oregon, which is closer to Vancouver. Subsequent to a June 11, 2015, status conference, I issued a June 12, 2015, order changing the hearing to December 21-22, 2015. BNSF filed a motion for summary decision on November 24, 2015, arguing that since Complainant did not believe that his injury was work-related when he reported it, that report was not in good-faith and so not a protected activity under the FRSA. Complainant filed his response on December 14, 2015. On December 15, 2015, I denied Respondent's Motion for Summary Decision, reasoning that the good faith requirement applied to the act of reporting the injury, and on the particular facts of this case, Complainant did believe what he stated in his report and filed it properly because BNSF managers directed him to do so. He had thus *acted* in good faith and the report could a protected activity under the FRSA.

I held a pre-hearing conference on December 11, 2015. During this conference, it became evident that Complainant was also alleging that BNSF had retaliated against him for following the treatment plan of his treating physician. Respondent objected to this claim as untimely and unripe, since it had not been raised before OSHA. I issued two orders on December 11, 2015; the first summarized the pre-hearing conference and the second indicated that I would allow Complainant to pursue his additional claim of retaliation, since it arose out of the same set of facts. I ordered Complainant, however, to clarify the exact claim he was making. On December 17, 2015, Complainant filed a response to my order to clarifying his complaint, stating that he was echoing OSHA's findings that one reason for the discipline had been his adherence to a treatment plan. He maintained that his underlying knee condition was not work-related, but had manifested itself at work, thereby bringing it within FRSA protection.

Hearing was held on December 21, 2015, in Portland. Complainant, Complainant's counsel, and Respondent's counsels all appeared and were given a full and fair opportunity to present evidence and argument. At the hearing, I marked and admitted Complainant's Exhibits ("CX") 1 through 14, after Respondent indicated it had no objections.<sup>2</sup> (Hearing Transcript ("HT"), p. 5). Complainant raised no objections to Respondent's proposed exhibits, so I marked

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<sup>1</sup> The OSHA complaint, determination, and appeal are all part of the case file. A variety of material related to the OSHA investigation has also been entered into the record, for instance in Respondent's Exhibits ("RX") BB-HH.

<sup>2</sup> Complainant's Exhibits are Bates stamped with sequential numbering that carries across exhibits. I refer to these numbers, rather than any pagination internal to the exhibits.

and admitted Respondent's Exhibits ("RX") A through LLL.<sup>3</sup> (HT, p. 6.) I then heard testimony from Complainant, Christopher DeLargy, Mike Surina, and Kathleen Bausell Luce.

On December 22, 2015, I issued an order memorializing the agreement reached at the conclusion of the hearing, directing that closing briefs would be due on February 22, 2016, with reply briefs due on March 25, 2016. (*See also* HT, p. 216.) On February 22, 2016, Complainant filed his Closing Argument ("CCA") and Respondent filed its Post-Hearing Brief ("RPB"). Respondent filed its Post-Hearing Reply Brief ("RRB") on March 24, 2016. Complainant's Reply Brief ("CRB") was received on March 25, 2016. No further filings have been received.

## **II. Issues**

As indicated in my December 11, 2015, orders and confirmed at the hearing (*see* HT, pp. 4-5), the issues to be resolved in this case are:

1. Did the Complainant engage in a protected activity under the FRSA?
2. Did BNSF have knowledge of the protected activity?
3. Did the Complainant suffer an adverse disciplinary action?
4. If so, did the Complainant's protected activity contribute to the decision to discipline the Complainant?
5. Did BNSF retaliate against the Complainant for his protected activity in violation of the FRSA?
6. Would BNSF have taken the same action against the Complainant absent the protected activity?
7. If BNSF retaliated against the Complainant, what damages is he entitled to?
8. Did BNSF violate Section 20109(c)(2) of the FRSA?

## **III. Stipulations**

Based on the pre-hearing submissions of the parties, I identified stipulations agreed to and listed them in my December 11, 2015, order summarizing the pre-hearing conference. The parties raised no objections to my wording of the stipulations. They are as follows:

1. Respondent BNSF is a Common Carrier by railroad within the meaning of 49 U.S.C. § 20109 and 49 U.S.C. § 20102.
2. BNSF is engaged in interstate commerce within the meaning of 49 U.S.C. § 20109.
3. The Complainant at all times was an employee of BNSF in its railroad business.

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<sup>3</sup> Respondent's Exhibits are also Bates stamped with sequential pagination. I refer to this numbering rather than any pagination internal to the exhibits. For reasons unknown, pp. 403-28 are out of sequence, between p. 309 and p. 310. This puts these pages in RX EE, rather than in either RX YY, or RX ZZ. I refer to these pages as part of RX EE. Similarly, RX UU is paginated as pp. 618-94, which is well out of order in the sequence of surrounding exhibits. I refer to the stamped pagination. Though in the final organization of the exhibits some material was moved around, altering the sequence of pages, the Bates stamps do not repeat, making this numbering the best mode of reference. RX II-NN and RX EEE-LLL contain procedural material related to this matter at OALJ. Save for the agreement to mediate in RX LL, the case file contains all of these documents.

4. The Complainant is a covered “employee” within the meaning of 49 U.S.C. § 20109(a).
5. BNSF conducted a formal investigation hearing on March 2, 2011.
6. Subsequent to the March 2, 2011, hearing, the Complainant was notified by BNSF that it was assessing level S discipline against him.
7. On or about August 5, 2011, the Complainant filed an FRSA complaint with OSHA.
8. On January 12, 2015, OSHA issued its Findings.
9. On February 11, 2015, BNSF appealed OSHA’s findings and requested a hearing.

#### **IV. Factual Background**

##### ***A. Respondent’s Relevant Rules and Disciplinary Process***

A number of BNSF rules are relevant to this case. BNSF uses the General Code of Operating Rules, or “GCOR,” which is a standardized set of basic rules for working in the railroad industry. (HT, pp. 60-61, 146.) Employees at BNSF are required to be familiar with these rules, as well as the other rules governing their particular role, and are they trained and tested on them regularly. (*Id.* at 148-49.) For instance, on June 17, 2009, BNSF’s Northwest Division issued a general notice informing employees that they were “required to be familiar with and be governed by BNSF Policies.” (CX 5, p. 25; RX G, p. 87.)

GCOR 1.1.3 provides that employees should “[r]eport by the first means of communication any accidents; personal injuries; defects in tracks, bridge, or signals; or any unusual condition that may affect the safe and efficient operation of the railroad. Where required, furnish a written report promptly after reporting the incident. (CX 5, p. 22; RX G, p. 84; RX R, p. 114; *see also* HT, p. 63.) Mr. DeLargy, the Terminal Superintendent in Vancouver, explained that the first means of communication can vary by the situation. Other rules govern the particular instances where written reports are required. (HT, p. 147-48.)

GCOR 1.2.5 contains the “Reporting” rule for injuries:

All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed. A personal injury that occurs while off duty that will in any way affect employee performance of duties must be reported to the proper manager as soon as possible. The injured employee must also complete the prescribed written form before returning to service. If an employee receives a medical diagnosis of occupational illness, the employee must report it immediately to the proper manager.

(CX 5, p. 23; RX G, p. 85; RX S, p. 115; *see also* HT, pp. 63-64.) Mr. DeLargy testified that reporting on-duty injuries is important so that investigations can be done, medical care can be provided, and problems can be fixed. (HT, pp. 144-45.) Reporting off-duty injuries is important because they might affect employee performance and safety on the railroad. (*Id.* at 148.)

GCOR 1.2.7 requires that “Employees must not withhold information, or fail to give all the facts to those authorized to receive information regarding unusual events, accidents, personal injuries, or rule violations.” (CX 5, p. 23; RX G, p. 85; RX S, p. 115; *see also* HT, pp. 64-65.) GCOR 1.13 relates to “Reporting and Complying with Instructions” and states that “[e]mployees 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.” (CX 5, p. 27; RX G, p. 89; RX U, p. 117.) GCOR 1.6 requires that employees be truthful with the company. (*See* HT, p. 86.)

The TY&E Safety Rules are a more specialized set of rules that go beyond GCOR and apply specifically to conductors. (HT, p. 65.) TY&E refers to “Train Yard and Engine Employees” or those who are involved in the actual operation of the trains. Claimant was in this group at the relevant periods in this case. (*Id.* at 139-40, 143.) Safety Rule 1.2.8 requires that employees “[m]ake reports of incidents immediately to the proper manager.” (CX 5, p. 24; RX G, p. 86; RX T, p. 116; *see also* HT, p. 65.) Safety Rule 26.8 requires timely reporting of injuries and incidents and forbids retaliation for injury reports. (HT, pp. 65-66, 144; CX 5, p. 30; RX G, p. 92.) The rule specifies, in part, that “BNSF Safety Rules require timely reporting of all injuries and incidents. Every employee has an absolute right and obligation to report injuries and incidents to the appropriate BNSF authority. At no time shall any employee be subjected to harassment or intimidation to discourage or prevent such person from receiving proper medical treatment or from reporting an accident, incident, injury or illness.” (CX 5, p. 30; RX G, p. 92.)

The BNSF Code of Conduct also prohibits retaliating against an employee for reporting an injury. Violation of this rule can lead to dismissal. (HT, pp. 111-13; *see also* RX EE, pp. 406-11; RX AAA, pp. 611-13.) Per Mr. DeLargy, BNSF takes injury reports “very seriously” and does not retaliate against an employee who makes a report in good faith. (HT, pp. 142-43.) He added that the reporting rule itself prohibits any discouragement of injury reports. (*Id.* at 145-46.) In fact, in his experience, BNSF encourages reporting injuries. (*Id.* at 149.) Mr. Surina agreed that retaliation is not permitted and can lead to discipline of a manager. (*Id.* at 174.)

BNSF’s PEPA<sup>4</sup> policy is a guide to the assessment of discipline that works to ensure fair, consistent determinations. (HT, pp. 149-50, 198.) It “is designed to support BNSF’s vision of becoming injury and accident-free” by encouraging “safe work behaviors” and providing guidance as to how to redress rule violations. (CX 5, p. 14; RX G, p. 76.) Violations are divided into “Non-Serious Rule Violations,” “Serious Rule Violations,” “Dismissible Violations,” and “Attendance Violations.” (CX 5, pp. 15-16; RX G, pp. 76-77.) Non-serious rules violations are all of those not otherwise defined as serious or dismissible. The first such violation is eligible for “alternative handling,” a more informal process that does not result on any entries of the violation to the employee’s record. Subsequent non-serious violations in a specified time period can result in record suspensions and additional probationary period. Dismissal is also a potential consequence for a series of violations. (CX 5, p. 15; RX G, p. 77; *see also* RX EE, pp. 413-17 (alternative handling policy).) Alternative handling is not an option for late reporting of a personal injury. (RX EE, p. 413.) Serious violations are defined via a “non-exhaustive list” and result in a 30-day record suspension. A second serious violation within the review period leads to dismissal. “In some cases” alternative handling is possible. The review period is three years,

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<sup>4</sup> Policy for Employee Performance Accountability. (*See* CX 5, p.14; RX G, p. 76.)

unless the employee has completed at least 5 years of service and has been injury-free and discipline-free in the previous five years. When those conditions are met, the review period is reduced to one year. (CX 5, pp. 15-16; RX G, pp. 77-78.) Dismissible violations are defined by a list of “single aggravated” offences. Dismissal also results from two serious violations in the review period, five violations of any kind in a single year, and four attendance violations in a year or three such violations plus a serious violation in the review period. (CX 5, p. 16; RX G, p. 78.) Attendance violations are dealt with in a separate policy. (CX 5, p. 16; RX G, p. 78.)

PEPA contains an important clarification of the injury reporting rules that gives employees a 72 hour window from the triggering incident to report musculoskeletal injuries. This recognizes that such injuries are not always immediately apparent. (HT, p. 150.) But it still requires notifying a supervisor before seeking medical attention. This permits BNSF to insert its on-call nurse into the situation to offer guidance. (*Id.* at 150-51.) Mr. DeLargy stated that BNSF is very strict in enforcing its late reporting rule and very strict about the 72 hour reporting window. (*Id.* at 151.) This particular provision is part of the “General Information” in PEPA: “Employees will not be discipline for ‘late reporting’ of muscular-skeletal injuries, 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.” (CX 5, p. 14; RX G, p. 76.)

Complainant’s collective bargaining agreement entitles him to a formal hearing prior to any discipline. BNSF must produce witnesses and evidence to substantiate the allegations and employees are entitled to union representation. (*See* RX FF, pp. 323-25.) Rights of appeal are based on the collective bargaining agreement for each employee. Ms. Bausell Luce, BNSF’s Director of Employee Performance, explained that an employee like Complainant could appeal to the local division, then to labor relations, and then to the Public Law Board, which serves as a neutral arbitrator and renders a final decision. (HT, p. 206.) In this process, an employee is represented by a union representative, not an attorney of his or her own choosing. (*Id.* at 212.)

### ***B. Complainant’s Background and Employment with Respondent***

Complainant grew up in the Vancouver, Washington area and was 31 years old at the time of the hearing. (HT, p. 10.) After high school, he earned an AA from Clark College and then a BA from Washington State University, Vancouver. His degrees are in Business Administration. During college he worked at the Clark County Sheriff’s Office and then continued with them after graduation as a cadet. (*Id.* at 10, 52; *see also* RX Z, pp. 140-41.)

Complainant applied to BNSF on November 12, 2007. (*See* RX V, pp. 118-20; RX W, p. 121; RX AA, pp. 236-39; RX VV, pp. 384-93.) His father is now retired, but worked for BNSF. Complainant’s brother-in-law works for BNSF as well. In fact, members of his family going back three or four generations have worked for BNSF. (HT, p. 71.) Steven Matzdorff, who was the Terminal Manager in Vancouver, did the initial hiring test, or interview, with Complainant. (HT, pp. 55-56.) Mr. Surina, who was an engineer at the time but was subsequently promoted to a Terminal Trainmaster position, was on the interviewing board. (*Id.* at 56.) Mr. Surina believed that Complainant was qualified and recommended that BNSF hire him. (*Id.* at 175-76.)

On January 14, 2008, Complainant was officially hired by BNSF. After he was hired, he completed training. He began working in the yard on May 26, 2008. (HT, pp. 11-12; RX A, p. 1; RX AA, p. 246.) During his employment with BNSF, he has received numerous trainings, including a training review of the GCOR rules on April 1, 2010. (HT, pp. 59-60; RX A, pp. 2-3.) He testified that in the period in question, he was familiar with both the GCOR rules and the TY&E Safety Rules. (HT, pp. 64-67.) Shortly after Complainant was hired, there was not enough work at BNSF, so he was put on the Retention Board. This meant that he was on a list of employees who were ready to work and received some pay. (*Id.* at 12.) After about a month, BNSF took Complainant off of the Retention Board and furloughed him. He was not paid by BNSF while on furlough. During this period, he looked for some alternative employment and became more physically active to stay busy. (*Id.*; RX Z, p. 145-46.)

In April of 2010, Complainant returned to BNSF. He had his return to work physical on April 6, 2010, transitioned from furlough status to work status on April 14, 2010, and had his first day back on the job on April 22, 2010. (HT, pp. 12-13; RX A, p. 1; RX AA, p. 246; *see also* RX WW, pp. 394-97 (medical questionnaire indicating no knee injuries).) Complainant's supervisor varied by shift. He reported to the Trainmaster on-duty. Mr. DeLargy recalled that there were 7 Trainmasters in the Vancouver terminal in this period, including Mr. Surina and Kevin Stengem. The Trainmasters reported to the Terminal Master. During 2010-11, this was Mr. Matzdorff, but he was in the process of transitioning out. The Terminal Master reported to the Terminal Superintendent, Mr. DeLargy. (*Id.* at 151-52.) Mr. Surina believed that there were 7-8 Trainmasters at the time. His position was unique. He was a "downstairs trainmaster" who handled a lot of the administrative work, customer relations, and relationship with the Port of Vancouver. The other Trainmasters worked "the 24-hour desk upstairs" overseeing the real-time operation of the trains in the jurisdiction of the Vancouver Terminal. (*Id.* at 173.)

During this period, Complainant developed aches and pains in his knees. He perceived these to be "normal," but on May 27, 2010, he saw his family doctor, Dr. Gregory Saunders, about the pain. (HT, p. 13-14.) Dr. Saunders recorded that Complainant reported bilateral knee pain, right greater than left, that worsened with walking and other activity. Dr. Saunders diagnosed "an overuse injury or patellofemoral syndrome" but after discussing options, they opted to defer physical therapy and further diagnostics. Claimant was instructed to use anti-inflammatories and revise his home exercise program. (CX 14, pp. 102-03; RX AA, pp. 254-57; RX ZZ, pp. 552-54.) Complainant attributed his knee pain to recreational activities like running and playing basketball. When he was furloughed, he tried to stay active, and continued these activities when he returned to work. But before May 2010, Complainant didn't think he had any sort of injury. (HT, p. 15.) He had experienced knee pain intermittently over the years and attributed it to just normal aches and pains for an "oversized guy." (*Id.* at 78.)

Eventually Complainant completed some physical therapy. (HT, p. 14; RX AA, p. 246.) On November 23, 2010, Complainant reported a work-related injury that, per BNSF records, resulted in a bruise or contusion to Complainant's left hand but did not result in any lost time. (HT, p. 59; RX A, p. 2.) He did not experience any retaliation for that report. (HT, p. 59.) Over time, his knee pain returned and by December 2010, Complainant was feeling "pain in both my knees, primarily my right. Usually hurt standing up from a seated position, or going up and down stairs." (HT, p. 16.) He testified, however, that his knee injury was not in any way interfering with his ability to perform his duties at BNSF. (*Id.*) In December of 2010,

Complainant was a conductor with BNSF. As a conductor, he was in charge of the train and responsible for work on the train outside of the engine. The engineer was responsible for work and operations concerning the engine. As a conductor, he “would line the switches, couple of [sic] air hoses, knock off handbrakes and the like.” (*Id.*)

On December 17, 2010, Complainant returned to Dr. Saunders regarding his knees. (HT, p. 14.) Complainant had started to experience more knee pain on about December 14, 2010, though the pain had been an issue for some time. (*Id.* at 76-77.) Dr. Saunders recorded that Complainant complained of right knee pain that had returned several days earlier, but had no clear cause. It was more painful standing or going up stairs. X-rays were taken, but did not show any significant major abnormalities. Dr. Saunders referred Complainant for an MRI. (*Id.* at 14; CX 14, pp. 104-05; RX AA, pp. 258-61; RX ZZ, pp. 534-39.)

### ***C. Injury and Injury Report***

Complainant worked on December 18, 2010, and recollected that he might have gone out on a “dogcatch,” where a crew is transported to a train that is stranded out on the tracks somewhere because the crew that had been operating it ran out of service hours. (HT, pp. 77-78; *see also* RX Z, pp. 152-53; RX AA, p. 265) On December 19, 2010, BNSF called Complainant in to work as a conductor on the Z Portland/Chicago 919-B. (HT, p. 16.) When he reported to the yard, he felt “absolutely” physically able to work. (*Id.* at 19.) A “Z train” is a high priority freight train, second only in priority to Amtrak. (*Id.* at 16-17.) Complainant worked with an engineer, though he could not remember the engineer’s name. When he arrived, the train was in three “pieces” and it was their task to assemble it. One piece was the power component. There were two sets of cars that needed to be linked to the power component. The engineer stayed with power component while Complainant did the ground work in assembling the train. (*Id.* at 17-19.) Physically, this involved climbing ladders and steps, working the handbrakes, and moving around lining up the switches. (*Id.* at 19-20.) He would also have knelt down to tied-up the air hoses after they connected the segments of the train. He then repeated the process with the second segment of cars. (*Id.* at 20-21, 61-62; *see also id.* at 78-81.)

At the hearing, Complainant recalled that he didn’t have any trouble doing his job and didn’t have any unusual problems. (*Id.* at 20-21.) But when he was connecting the air hoses in the second set of cars, he felt a pain in his right knee while kneeling. Due to the pain, he had to help himself up by grabbing a lever. (*Id.* at 22.) He had been experiencing knee pain at work before this, but had gotten used to it. The pain he felt on December 19<sup>th</sup> was slightly more than in the past. (*Id.*) It was the first time he had experienced this sort of manifestation at work. (*Id.* at 121-22.) He continued working without incident and completed the tasks involved in assembling the train. (*Id.* at 22-23.) Complainant didn’t recall any additional groundwork or incidents during the rest of his shift. They took the train into Pasco, Washington, where the next crew was waiting to switch them out. (*Id.* at 23-24.) Complainant didn’t perceive anything improper or out of order with the equipment or working conditions on December 19<sup>th</sup>. (*Id.* at 24-25.) The pain he experienced was of the sort that he experienced from time to time doing other activities, like bending down or using stairs. (*Id.* at 98.)

Complainant testified that it was his understanding of a “workplace injury” that it involved something happening at work that directly resulted in some sort of injury, like “tripping over a tie-bud, messing up your shoulder or having an air hose come apart and knock you in the leg and cause a big bruise.” (HT, p. 28.) Nothing of this sort had occurred. (*Id.*) Since that time, however, Complainant has come to understand that “any pain that you feel while performing a certain task should be classified as a reportable on-duty injury.” (*Id.* at 29.) One of the reasons for the reporting rules is to identify safety hazards, but that nothing was hazardous on December 19<sup>th</sup> and nothing in particular at work caused an injury. If there had been some condition that caused the injury, he would have reported it immediately. (*Id.* at 117-18.)

About halfway between Vancouver and Pasco, Complainant came down with the flu. After he was replaced by the next crew, he spent a day in a hotel and then “deadheaded,” or paid his own way, back to Vancouver on Amtrak. (HT, pp. 25-26.) Complainant did not work during the next several days. He was on call, but was bumped by employees with higher seniority than him. When an employee is bumped, he or she has 48 hours to report for another position. At the time, Complainant was trying to arrange things so that he would be in Vancouver for his scheduled MRI, so he did not take any additional work. (*Id.* at 26.)

An MRI was completed on Complainant’s knees on December 23, 2010. (HT, p. 15.) The impression was “focal near full thickness central tear in the proximal patellar tendon, partial thickness tear/inflammation of the adjacent lateral patellar retinaculum and cartilaginous defect in the medial patellar facet, suggesting possible acute on [sic] chronic patellar instability.” (CX 14, p. 107; RX AA, p. 262 (emphasis removed).) Dr. Saunders called Complainant on the night of the 23<sup>rd</sup> and told him that he should not work anymore until after he had seen a specialist. Complainant understood that Dr. Saunders thought he had a tear in his patellar tendon and patellar tendinitis. (HT, pp. 26-27.) Complainant also believed that the injury had been caused by “playing basketball, running, and playing tennis.” (*Id.* at 27.) Complainant testified that the conversation with Dr. Saunders was the first time that he had any sense that his knee injury was going to interfere with work—he had been experiencing pain, but it did not impact his performance of his duties. Until that call, he was still available to work. (*Id.* at 27-28.)

Dr. Saunders and Complainant spoke at roughly 6:00 p.m. Complainant contacted the on-duty Trainmaster, Keven Stengem, at about 2:30 in the morning on December 24, 2010. He told Mr. Stengem that his doctor had pulled him from service. (HT, pp. 29, 83-84.) Complainant’s purpose was to seek a medical leave of absence, which would require talking to Mr. Surina or Mr. DeLargy. When he talked to Mr. Stengem on the 24<sup>th</sup>, however, Complainant just stated that he needed to be let off for medical reasons. (*Id.* at 30-31.) He did not inform Mr. Stengem that it was either an on-duty or off-duty injury or that it had anything to do with his knee. No treatment plans or doctor’s notes were provided to Mr. Stengem. (*Id.* at 49-50.) Complainant only had the verbal instructions from his doctor, and passed along to Mr. Stengem that his doctor had told him he needed to stop working. (*Id.* at 115-16.) After this conversation, Mr. Stengem sent an email to Mr. Surina and Mr. DeLargy stating that Complainant had called and “said his doctor submitted the paperwork yesterday for his FMLA but it was not available for him yet. His doctor told him not to work so he requested a LOS and I approved it since FMLA was not available to him yet.” (CX 5, p. 29; RX G, p. 91.)

Complainant went to the Vancouver office on December 27, 2010, to meet with Mr. Surina. (HT, p. 31.) He informed Mr. Surina about his knee pain and the events of December 19<sup>th</sup>. This was the first time he had informed anyone at BNSF about his knee problems or the events of December 19<sup>th</sup>. (*Id.* at 81-82.) He asked Mr. Surina for a medical leave, but Mr. Surina instructed him to fill out a personal injury report. Based on the conversation, Complainant believed that he was being asked to fill out the injury report as a “CYA” precaution, to be safe. Complainant did not know at this time whether it would be regarded as an on-duty or off-duty injury and did not recall whether Mr. Surina stated anything to that effect. (*Id.* at 32.) Complainant explained that Mr. Surina “told me that I needed to fill it out just to be safe...and I maintained that I wasn’t there to fill out an on-duty injury report, because I wasn’t injured on-duty, what I perceived to be injured on-duty.” (*Id.* at 32-33.)

Mr. Surina recalled that he was in his downstairs office when Complainant arrived. “He came in and said that he needed to be put off on a medical leave. I asked him, you know, what’s going on? And he went and specifically told me that he was working the Z Train, he had been over to tie and air hose [sic] and his knee hurt to the point where he needed help to stand back up.” (HT, p. 176.) Mr. Surina’s response was “to let him know that, you know, that sounded like an injury to me and if he understood that it was an injury.” (*Id.*) Since this was the first time Mr. Surina was in this sort of situation, he reached out to Mr. DeLargy to verify his understanding that what was being reported needed to be reported as a work-related injury. Mr. DeLargy agreed with his impression. (*Id.* at 176-77.) At that time, Complainant had not related that he had been experiencing the pain for a long period of time or that he had been to the doctor. Based on their conversation, Mr. Surina didn’t have any indication that this was an off-duty injury, so he proceeded with the reporting protocol. (*Id.* at 177-78.)

Mr. DeLargy learned about Complainant’s injury on December 27, 2010, when Mr. Surina called him while he was on vacation. Mr. Surina explained what Complainant had stated and on that basis Mr. DeLargy instructed Mr. Surina to go through the on-duty injury reporting process. (*Id.* at 153-54.) At that time, however, Mr. DeLargy stated that he had made no determination about whether the injury was an on-duty or off-duty injury. (*Id.* at 154.) He was not given any background information about prior events and injuries, just told that Complainant had reported a particular pain at a time while working at BNSF. (*Id.* at 165.)

Though Complainant didn’t believe at the time that he had sustained a work-related injury, because Mr. Surina insisted on it, he filled out an on-duty injury report on December 27, 2010. (*Id.* at 33-34.) While doing so, he still believed that he had not experienced an on-duty injury because he didn’t realize that BNSF was using a different definition of what constituted an on-duty injury. (*Id.* at 34.) He thought “that an on-duty injury was simply a fault of the workplace that caused myself to get injured.” (*Id.* at 34-35.) He has since come to understand that “they tend to take a more broader [sic] approach to it and feel that any injury or any symptoms you experience while performing a task on-duty would be considered an on-duty injury,” which includes manifestations of symptoms at work. (*Id.* at 35.)

The report completed by Complainant indicates that he suffered “pain in right knee” at 4:00 a.m. on December 19, 2010, while working in “Portland, or –Lakeyard.” He reported that “I noticed a pain in my right knee while coupling an air hose, while working the ZPTLCHC919B.” Complainant indicated that the injury was not caused by another person or

any defect/problem with the equipment or worksite, and it was unknown if he could have prevented it. He stated that he “went to doctor upon arrival back in Vancouver, referred to specialist,” that he was awaiting full diagnosis by a specialist, and that he was being treated by Dr. Saunders. (CX 5, p. 8; RX B, p. 4; RX G, p. 74; *see also* HT, pp. 35-37.) Complainant admitted that he never claimed on the form that it was an off-duty injury and that he did not include that he had been to the doctor on December 17, had been in pain since December 14, or that the problem went back to May 2010. (HT, pp. 86-88.) He explained that he omitted some of these details because he was flustered. (*Id.* at 89.) He also “mis-remembered” when he had gone to the doctor, but he corrected this mistake later in the investigation. (*Id.* at 91-92.) It was stressful and confusing—he had gone to the office to request a medical leave and then was transitioned into the process of reporting an on-duty injury, which isn’t how he understood the situation. (*Id.* at 122-23.)

Attached to the report is a statement by Complainant signed on December 27, 2010:

On 12/19/10 I was working on the ZPTLCHC9. I was putting the train together and while bent down coupling an air hose I noticed a pain in my right knee. Due to the pain, I helped myself up with the use of the draw bar and cut lever. I deadheaded home due to the flu and visited my doctor as soon as possible. I am awaiting an appointment with a specialist in order to get a full and complete diagnosis, the pain continues to be intermittent.

(CX 5, p. 13; RX B, p. 5; RX G, p. 75.) An edit is added below: “The pain had been occurring prior to the above incident for some time to a lesser degree. It only became a major hindrance, and painful while working on the Z9.” (CX 5, p. 13; RX B, p. 5; RX G, p. 75.)

Complainant testified that in the report he accurately stated what happened to him. (HT, p. 33, 35.) The edit on the form was completed on that day. (*Id.* at 36.) Mr. Surina told him to fill out the form, but did not instruct him what to put on the form or how to describe what happened. (*Id.* at 74, 178.) After Complainant finished the report and his statement, he and Mr. Surina talked some more about the circumstances of the injury. (*Id.* at 178-79.) Complainant then added the edit to the report that referenced an off-duty component. Mr. Surina did not recall whether they talked about that further, but did recall that he was confused as to why Complainant was adding to what he had written. (*Id.* at 179-80.) Mr. Surina testified that he did not force or pressure Complainant to fill out the report. Had Complainant refused, however, Mr. Surina would have had to escalate the situation to his supervisor and he still would have completed his portion of the injury reporting protocol. (*Id.* at 180-81.) Mr. Surina stated that Complainant’s report does not say that he experienced an on-duty injury, but the description of facts that he gave imply as much. (*Id.* at 184-85.) Mr. Surina admitted that he drew the conclusion that a work-related injury was being described, so he told Complainant that they needed to fill out the work-related injury report. (*Id.* at 185-86.) Mr. Surina explained that he was not in a position to make ultimate determinations about whether there was an on-duty injury—Complainant reported facts to him that sounded like an on-duty injury in need of a report, he checked with Mr. DeLargy, and then per instructions continued with the protocol. (*Id.* at 188-89, 191-92.)

During this meeting, Complainant requested time off for his injury, which was given to him by BNSF as requested. (HT, p. 154; *see also* RX AA, p. 248.) An “On Duty Injury Medical Leave” request was entered on Claimant’s behalf, with a beginning date retroactive to December 22, 2010, and a projected end date of January 22, 2011. The request contains a comment from Mr. Surina dated December 27, 2010, that “Employee injured knee and has been advised not to work until after a visit to a specialist.” (CX 1, p. 1; RX K, p. 105.)

After he filled out the injury report, Complainant followed up with his union and other people at BNSF. He recalled that Joan Costa, who is the regional medical contact for BNSF and manages employees with medical issues, explained to him that the claims department at BNSF might view what happened as an aggravation of a pre-existing condition while he was on duty. (HT, p. 37, 116) The only reason Complainant did not report his injury at an earlier date is that he did not understand that it could be considered work-related with BNSF’s broad understanding and thus did not realize that he was supposed to be reporting it. (*Id.* at 39.) Complainant also provided more information about the injury and treatment to Ms. Costa. She instructed him to forward all claims and costs to her. (RX AA, p. 248.) Later on December 27<sup>th</sup>, Mr. Surina asked Complainant to sign a medical release, but told Complainant that if he didn’t want to sign it, he shouldn’t sign it. Complainant elected not to sign the form. (*Id.*) Starting on the evening of December 27, 2010, Complainant started to keep written records of his conversations with BNSF officials, though not other people. He started to record conversations because he realized that he was potentially going to be in trouble. (HT, p. 49, 114-15; *see also* RX AA, pp. 248-51.)

#### ***D. Disciplinary Process***

Based on the facts available to BNSF, Mr. DeLargy decided that it was necessary to conduct further investigation into whether Complainant had violated the late reporting rules. Eight days had passed between the incident on the railroad and the report of the injury to Mr. Surina. Thus, in accordance with the Collective Bargaining Agreement, BNSF issued a Notice of Investigation. This was Mr. DeLargy’s decision, even though it was formally signed by another official. (HT, pp. 154-55.) Mr. Surina was not involved in the decision. (*Id.* at 181.) The Notice of Investigation is dated January 3, 2011, and is under the signature of Alice A. Ard, Director of Administration. It sets an investigative hearing for January 6, 2011, “for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged late reporting of a personal injury while working as Conductor on train Z-PTLCHC9-19B, December 19, 2010 at approximately 0400 hours, at MP 3.1 on the Fallbridge Subdivision and became known to this office on December 27, 2010.” (CX 2, p. 2; RX C, p. 6; RX G, p. 68; *see also* HT, pp. 39-40.) On January 4, 2011, the investigation was postponed by mutual agreement until February 8, 2011. (CX 5, p. 7; RX D, p. 7; RX G, p. 69.) On January 26, 2011, the investigation was delayed again to February 23, 2011. (CX 5, p. 9; RX E, p. 9; RX G, p. 71.)

On January 25, 2011, BNSF extended Complainant’s medical leave, retroactive to January 23, 2011, and continuing through February 1, 2011. (CX 3, p. 3; RX L, p. 106; *see also* RX AA, p. 249.) Complainant was first saw the specialist, Dr. Donald Roberts, on January 31, 2011. He was diagnosed with an overuse injury, “patellar tendonitis or jumper’s knee.” (RX Z, p. 179; RX AA, p. 246.) Complainant was then released to light duty, and on February 2, 2011, Ms. Costa entered a “Fitness for Duty Recommendation” releasing Complainant to “sedentary office work only.” (CX 4, p. 4; *see also* RX AA, p. 250.)

Complainant recalled that on February 2, 2011, he spoke with Mr. DeLargy about the reporting requirements. (HT, pp. 37-38.) Complainant attempted to explain the circumstances of the injury report in order to “maybe get a different outcome.” In his notes, Complainant indicates that Mr. DeLargy’s position was that since he reported a specific pain that occurred at work, it needed to be reported as a work-related injury and that it didn’t matter whether or not the pain could be attributed to something particular that happened at work. Complainant left after determining that they had reached an impasse and that his constant requests for clarification were not resolving the issue. (RX AA, pp. 250-51.) Mr. DeLargy didn’t remember a specific conversation on that date. (HT, p. 167.) But he testified that sometime in early 2011 both Complainant and Rich Madrid, the local union chairman, talked to him about the investigation. Mr. Madrid attempted to have Mr. DeLargy drop or reduce the charges. This sort of plea bargaining is part of the role of the union chairman and is normal in disciplinary matters at BNSF. Based on his conversations with Complainant, Mr. DeLargy came to believe that Complainant “didn’t really understand the reporting rules.” (*Id.* at 156, 167.) Mr. DeLargy testified that he had still not decided as to Complainant’s guilt, but that he rebuffed these requests because late reporting of an injury is serious to BNSF. (*Id.* at 156-57.)

Though Complainant and Mr. Madrid tried to explain that it was actually a prior, off-duty injury, in Mr. DeLargy’s view it was important that Complainant had nonetheless experienced a specific aggravated pain at a specific time while doing a specific task while on-duty: “if someone points to a specific time, to a specific place, regardless of what his preexisting case is, he re-aggravated something by doing something while he was on the property, we would have to record that. That’s something that we’re obligated to record.” (*Id.* at 165-66.) If Complainant had come to him and just reported that he had a long-standing injury that seemed to be getting worse and that he needed to take time off, Mr. DeLargy would have investigated further and asked more questions to determine whether anything at work caused the injury. Based on the answers, Mr. DeLargy might have asked Complainant to fill out an on-duty injury report form and if 72 hours had passed since the aggravating incident, pursued the disciplinary process. (*Id.* at 168-69.) On the facts here, the matter seemed clear to him. (*Id.* at 170.)

As part of his defense, Complainant contacted the Federal Railroad Administration (“FRA”) about his injury. He was informed that based on the FRA’s definition of what is a reportable injury, what happened to him is not reportable. (HT, p. 38; *see also* CX 5, pp. 32-33; RX G, pp. 94-95.) This aligned with his understanding, but he has since learned that BNSF has a different understanding of what needs to be reported as an on-duty injury than that used by the FRA or himself at the time of his injury. (HT, p. 38-39.) In a February 23, 2011, email, an employee at the FRA indicated that BNSF had not reported the injury as of yet. (CX 5, p. 31; RX G, p. 93.) Subsequently, Complainant learned that BNSF had reported his injury to the FRA, but there was a lag time in processing the report, which is why the FRA gave him incorrect information. BNSF submitted the report on December 28, 2010, one day after it learned of the injury. (HT, pp. 134-35; RX DDD, pp. 616-17; *see also* RX EE, pp. 423-26 (FRA report).) Complainant also called BNSF Rules Support to prepare his defense. Per his notes, he was told that something needed to be reported when it affected his ability to work. (RX AA, p. 251.)

On February 23, 2011, Complainant and BNSF agreed to delay the hearing for a third time. (CX 5, p. 11; RX G, p. 73.) The hearing was eventually held on March 2, 2011. It was conducted by Mr. Matzdorff and Complainant was represented by Mr. Madrid. Mr. Surina and

Mr. Stengem appeared as witnesses. (CX 5, p. 5; CX 6, p. 34; RX G, p. 67; RX F, p. 11; *see generally* CX 6; RX F (transcript).) Though Mr. Surina was a witness, he was not involved in any of the fact-finding or any of the decisions about discipline. (HT, pp. 181-82.)

During the hearing, Mr. Surina recounted his role at BNSF and the events of December 27, 2010, stating that Complainant connected the events of December 19<sup>th</sup> to the medical leave. (*See* CX 6, pp. 40-43, 49-54; RX F, pp. 17-20; 26-31.) Mr. Surina also reviewed the rules regarding reporting injuries. (*See* CX 6, pp. 43-48; RX F, pp. 20-25.) He opined that Complainant was not in compliance because more than 72 hours had passed between the injurious event and the report and because he believed Complainant had sought medical attention without reporting the injury. (CX 6, p. 46; RX F, p. 23.) Complainant had also violated GCOR 1.1.3 by not promptly reporting the on-duty injury. (CX 6, pp. 47-48; RX F, pp. 24-25.) Mr. Madrid's questioning pressed that Complainant had never stated that he was injured on duty and queried why Mr. Surina didn't address the off-duty nature of the injury; Mr. Surina's response to this line of questioning was that Complainant had come in and described an on-duty injury, so he completed a report. (CX 6, pp. 52-54, 57-59; RX F, pp. 29-31; 34-36.) Mr. Surina admitted that Complainant had told him multiple times on December 27, 2010, that he did not want to report an on-duty injury. (CX 6, p. 60; RX F, p. 37.) Mr. Stengem testified about the discussion he had with Complainant on December 24, 2010, reporting that Complainant did not report any on-duty injury, he did not inquire into the nature of Complainant's medical condition, and that he had emailed Mr. Surina and Mr. DeLargy notifying them that Complainant was off of work for medical reasons. (CX 6, pp. 62-65; RX F, pp. 39-42.)

In Complainant's testimony, he maintained that he had not reported a personal injury to Mr. Surina on December 27, 2010. Rather he averred that he had only stated he needed medical leave due to pain in his knee, that it was longstanding, and that it had become a hindrance on December 19, 2010. He did not report it previously because he hadn't been pulled out of service by his doctor and it was just a continuation of a previous condition. (CX 6, pp. 67-68; RX F, pp. 44-45.) He stated that he believed "that this investigation was caused or called because I did not report an FRA reportable injury in the eyes of the company." (CX 6, p. 73; RX F, p. 50.) He linked his pain to off-duty activities, indicating that no incident on the railroad was the cause of his pain. The incident on December 19, 2010, was just the time when he noticed the pain at work and it became a hindrance. (CX 6, pp. 73-74; RX F, pp. 50-51.) He testified that he contacted Mr. Stengem on December 24, 2010, because that was when he first learned that the injury would impact his work. When he reported to Mr. Surina on December 27, 2010, he sought to get a medical leave, not report an injury, but was transitioned into reporting an injury after he explained the issue to Mr. Surina. Complainant related that he did not want to fill out a report and that Mr. Surina had nodded in agreement when he asked whether this was just a "CYA sort of thing." (CX 6, pp. 76-77; RX F, pp. 53-54.)

Complainant also recounted his conversation with Mr. DeLargy on February 2, 2011, in which he attempted to resolve the investigation by maintaining that he didn't want to report a work-related injury. Complainant recalled that Mr. DeLargy informed him that if he had never indicated that he noticed the pain in particular while at work on December 19<sup>th</sup>, it never would have been reported. (CX 6, pp. 77-78; RX F, pp. 54-55.) Complainant characterized what happened on December 19<sup>th</sup> as his injury arising and making itself known, but could not say if there was any aggravation. (CX 6, p. 81; RX F, p. 58.) He believed he was in compliance with

all of the rules because he had not suffered an on-duty injury—he had an off duty injury that was reported once it was going to interfere with his work. (CX 6, pp. 83-89; RX F, pp. 60-66.)

Mr. DeLargy did not attend the investigation. He read the transcript, but not all the exhibits. Based on this review, he decided that discipline was warranted and elected for a serious rules violation with one year of probation. (HT, pp. 157-58.) In making this decision, he received some input from Mr. Matzdorff. (*Id.* at 158.) Mr. DeLargy explained that he opted to show leniency based on the facts of the case, and that based on the violation alone the probation period should have been significantly longer. He added, “I do feel that he didn’t understand the rule, as it was written. And the goal was with the current Level S and the one-year probation, that he would certainly learn from it. And in my mind, it wasn’t going to happen again.” (*Id.*)

BNSF informed Complainant of the discipline in a March 14, 2011, letter. Due to the late reporting of a personal injury that occurred at work on December 19, 2010, Complainant was found to have violated GCOR 1.1.3, 1.13, 1.2.5, 1.3.3 and TSR 1.2.8. As a result, he was assessed a “Level S 30 Day Record Suspension” with a one year review period. (CX 7, p. 90; RX H, p. 96; *see also* HT, p. 69; RX A, p. 2 (employee record noting the discipline).) Though this letter was signed by Mr. Matzdorff as the conducting officer, the decision was Mr. DeLargy’s. (HT, p. 158.) Ms. Bausell Luce indicated that Complainant was granted leniency in that with a Level S violation and less than five years of employment, the probationary period should have been 3 years. (*Id.* at 199-200.) Alternative handling was not available for this type of violation and so was not an option that the managers could have pursued for the late report of an injury. (*Id.* at 200-01.) The suspension was a “paper suspension” that was in his file, but didn’t result in any lost time. With any further discipline, it would have produced an actual suspension. (*Id.* at 41.) The “one year Level S” was a probation. It meant that if he were found guilty of a serious rules violation in the next year, he would be terminated. (*Id.* at 42.)

### ***E. Subsequent Events***

Complainant appealed the disciplinary decision through the process afforded to him by the collective bargaining agreement up to the Public Law Board. (*See* HT, pp. 205-11.) Mr. Madrid appealed the decision to the NW Division General Manager on April 13, 2011. (RX BBB, p. 614.) This appeal was denied on May 18, 2011, in part on the grounds that Complainant had suffered a clear aggravation of his knee injury and pain while working on December 19, 2010, necessitating a report. (RX CCC, p. 615.) On July 21, 2011, his union appealed the discipline to BNSF’s Assistant Vice-President of Labor Relations. (RX I, pp. 98-99.) This appeal was denied on August 18, 2011, for similar reasons, but also noting that even if Complainant had suffered an off-duty injury, he was still in violation of the timely reporting rules. (RX DDD, pp. 616-17.) On January 8, 2013, the Public Law Board issued a decision affirming BNSF’s determination and finding that Complainant had been properly disciplined for the late reporting of an on-duty injury. (RX J, pp. 100-04.)

On April 14, 2011, BNSF granted Complainant an additional “On-the-Job Injury Medical Leave of Absence” from April 15, 2011, to May 20, 2011. (CX 8, p. 91; CX 9, p. 92; RX M, p. 107.) On May 24, 2011, this was extended through June 1, 2011. (CX 10, p. 93; RX N, p. 108.)

It was subsequently extended through July 31, 2011.<sup>5</sup> (CX 11, p. 94; RX O, p. 109.) During this period, Complainant treated with Dr. Donald Roberts, who prescribed a physical therapy, including work-hardening. (CX 14, pp. 112-15.) Complainant recalled that after the injury, he did “a bunch of physical therapy.” He has now recovered, and is “back to 100 percent.” (HT, p. 116.) He made no claims against BNSF related to the injury. (*Id.* at 120.) On June 23, 2011, BNSF processed a Fitness for Duty Recommendation that returned him to work without restrictions.<sup>6</sup> (CX 12, p. 95.) BNSF records indicate that the injury was reportable to the FRA and resulted in a total of 67 lost days of work. (RX A, p. 2.)

On July 15, 2011, Complainant and a co-worker self-reported a safety violation involving exceeding the posted speed limit. BNSF offered Complainant alternative handling for this incident, which he accepted, and it resulted in no discipline or notation to his permanent record. (*See* RX AA, pp. 281-84; *see also* RX Z, p. 176.) He also accepted alternative handling after missing a call into work on January 3, 2012. (*See* RX AA, p. 286-87.)

Complainant testified that the discipline affected how he conducted himself: “I noticed that I began second guessing just the most basic things that I would do, especially in locations where I felt I would be more exposed to operations testing.” (HT, p. 42.) For example, in a location where management was known to sit on a hillside to covertly observe employees, Complainant found that he continually checked and re-checked simple things. (*Id.*) He felt like he was at risk, that “if I did one thing wrong that anybody viewed as a serious rules violation, I may end up losing my job.” (*Id.* at 43.) Eventually he sought out work where he was at less risk of being observed and moved into a helper job or switchman in the yard rather than working as a conductor, even though it resulted in less pay. (*Id.*) He continued in this vein for about 6 months, until he was accepted into the Yardmaster program. (*Id.* at 44.) Complainant admitted, however, that helper jobs have a more regular schedule because they are in the yard, whereas conductor jobs could involve being called in in the middle of the night. (*Id.* at 48.)

Furthermore, Claimant recalled “just being anxious and not being able to [f]all asleep at night, because I’d try to fall asleep and knew I was going to get called probably at 2:30 o’clock, in the morning to go to work. I knew I needed to be rested, couldn’t fall asleep, because who I might have been called with, if they were perceived as not being a safe engineer...” (HT, pp. 44-45.) He felt intimidated because of the way he was treated. (*Id.* at 45.) The investigation was “very much” known to his co-workers because it is a small community. (*Id.*) He clarified, however, that the increased operations testing was system-wide and that “I wasn’t walking around with a target on my back, no, not at all.” (*Id.* at 102-03; *see also* RX AA, pp. 278-79.)<sup>7</sup>

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<sup>5</sup> The record also contains FMLA approvals for intermittent leave between September 20, 2012, and September 19, 2013, and then extended through September 19, 2014. (RX P, pp. 110-11; RX Q, pp. 112-13; *see also* RX Z, pp. 176-77; RX AA, p. 292; RX ZZ.) This was not related to his knee injury and does not appear relevant to this case.

<sup>6</sup> Per the medical records, (*see generally* RX ZZ), Complainant’s knee caused no further serious problems. He reported knee pain on March 8, 2013, and then crepitus on May 17, 2013, but there was no other symptomatology. He was referred for a consultation. (RX ZZ, pp. 477-78, 83-84.) Given the absence of any further notes on the matter, this appears to have been a transient issue.

<sup>7</sup> Though it will not become an issue below, BNSF alleges that any emotional harms are unconnected with this case. (RPB, p. 21.) According to his medical records, Complainant has been treated for a depressive disorder, not otherwise classified, since July 2009 and for anxiety and depression since September 2014. (*E.g.* RX ZZ, pp. 430-

While working in Vancouver, Complainant successfully completed the Yardmaster program and was promoted to Yardmaster on September 2, 2012. He is currently a Trainmaster for BNSF in Lincoln, Nebraska. This is an exempt management decision. He has been in the position since October 1, 2014. (HT, pp. 51-52, 58) He was actually selected for the Yardmaster promotion in January 2012, during his probationary period, but didn't officially move into the position until September. In the meantime, he completed training and was on the Yardmaster Extra List, which meant he did Yardmaster work in addition to his normal duties. (*Id.* at 68-70.)

Over time, Complainant came to understand that Mr. Surina, Mr. DeLargy, Ms. Costa, and the Public Law Board had a different understanding of what needed to be reported as a work-related injury. Complainant followed his own understanding in this case, and he based his standard on what he was told by the union and his training. (HT, pp. 45-47.) The only reason he didn't report the injury is that he didn't understand the standards that management at BNSF were using. (*Id.* at 47.) Throughout the process, Complainant has maintained that he did not believe that his injury was work-related. (*Id.* at 51; *see also* RX Z, pp. 134, 168.) In fact, Complainant continues to believe, "to an extent," that he suffered an injury that didn't need to be reported, "[b]ut I understand now that the company has a differing view." (HT, p. 84.) He developed this understanding "very recently" and operates under it in his role as a company officer. (*Id.* at 85.)

Complainant related that there was no animosity or "bad blood" between himself and Mr. Surina, Mr. DeLargy, or Mr. Matzdorff. (HT, p. 56.) Complainant didn't recall that either Mr. Surina or Mr. DeLargy assisted him in advancing his career, but Mr. DeLargy was the official who had to give final approval to his becoming a yardmaster. (*Id.* at 70.) Mr. Surina believed that he retained a good working relationship with Complainant after the discipline. He never recommended Complainant for a promotion, but only because he was never asked for his opinion. Mr. Surina did help Complainant to prepare for the interview and the job by prepping him with questions, coaching him, and giving him some special projects to do. (*Id.* at 182-83.) Mr. Surina has no regrets about the way he handled the injury. (*Id.* at 183.)

Mr. DeLargy indicated that he felt like he had a good working relationship with Complainant after the discipline and that he had given Complainant the opportunity to complete the Yardmaster program and advance into management. He did so because Complainant was interested in the program and based on his performance, Mr. DeLargy felt like he deserved promotion. (*Id.* at 159.) When the superintendent in Lincoln contacted Mr. DeLargy about Complainant, Mr. DeLargy provided a "very good recommendation." He has always given Complainant high recommendations, and claimed he had no animosity towards him. Mr. DeLargy has no regrets about how the discipline in this case was handled. (*Id.* at 160-61.)

As a Trainmaster, Complainant oversees day to day operations of the Lincoln terminal, which including managing trains and employees and dealing with customers. He enjoys the position. His only complaints about his time with BNSF are his furlough and this discipline. (HT, pp. 70-71.) In his management role, he has "not even remotely" discouraged anyone from completing a personal injury report. He agreed that BNSF actually encourages such reports and that if an employee mentioned an on-duty injury he would not simply ignore it because it is

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31.) He was prescribed Effexor. Some of the side-effects of Effexor include sleeplessness and insomnia, though Complainant does not believe he suffered from them. (HT, pp. 104-05, 128; *see also* RX Z, pp. 175-76.)

important to immediately notify the company and make a report if it was an on-duty injury. (*Id.* at 71.-72.) As a manager, he plays no role in determining what is reported. His concern is to get the report promptly to get the employee any treatment that may be needed and to fix the problem so that other employees aren't injured. (*Id.* at 73-74.) He agreed that at this point in time BNSF "absolutely" places a priority on safety. (*Id.* at 71.)

Complainant agreed that his sole allegation against BNSF was that it retaliated against him by issuing a Level S 30-day record suspension and one-year probation for reporting his injury. (*Id.* at 84.) Asked whether his following a treatment plan resulted in any discipline, Complainant stated that he couldn't "say if it was or wasn't." But he clarified that he never recalled making such an allegation to OSHA. (*Id.* at 133.) He testified that he is satisfied with the award that OSHA made and explained that the point of pursuing this complaint, for him, has been "just to clear my name and my safety record." (*Id.* at 126-27.) In his closing brief, Complainant seeks an award of the damages allowed by OSHA, to include expungement of his record, emotional distress damages, and attorney's fees and costs. (CCA, p. 9.) In his reply brief, Complainant adds a request for punitive damages. (CRB, pp. 6-8.) Respondent maintains that even if Complainant prevails, he is entitled to no damages. (RRB, pp. 4-5.)

## **V. Credibility Determinations**

The Administrative Review Board ("ARB") prefers that ALJs "delineate the specific credibility determinations for each witness," though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). The finder of fact is entitled to determine the credibility of witnesses, to weigh evidence, to draw her own inferences from evidence, and is not bound to accept the opinion or theory of any particular witness. *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968), *reh'g denied*, 391 U.S. 929 (1968); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5<sup>th</sup> Cir. 1981). In weighing testimony, an ALJ may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome, demeanor while testifying, and opportunity to observe or acquire knowledge about the subject matter at issue. An ALJ may also consider the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006).

Having heard the witnesses' testimony, I have been able to observe their behavior, bearing, manner, and appearance. The Ninth Circuit has explained that credibility "involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *Carbo v. U.S.*, 314 F.2d 718, 749 (9<sup>th</sup> Cir. 1963); *see also Indiana Metal Prods. v. Nat'l Labor Relations Bd.*, 442 F.2d 46, 52 (7<sup>th</sup> Cir. 1971). I have based my credibility findings on a review of the entire record, according due regard to the demeanor of witnesses who testified before me, the logic of probability, and "the test of plausibility," in light the record as a whole. *Indiana Metal*, 442 F.2d at 52.

### ***A. Christopher DeLargy's Credibility***

Christopher DeLargy is the Terminal Superintendent for BNSF in Vancouver. In that capacity, he supervises all train movements and operations in the north-south corridor from Longview, Washington through the Port of Portland and then extended eastward into eastern Washington. (HT, p. 139.) This position is the most senior BNSF position in Vancouver. Mr. DeLargy has held it since 2008. (*Id.* at 141.) His duties include assessing discipline for employee misconduct. (*Id.* at 140.) He has been with BNSF, and one of its predecessors, the Santa Fe, for 21 years and working in Vancouver since 1998. (*Id.*) He is familiar with BNSF's code of conduct and certifies on it yearly, but is not familiar with the FRSA. (*Id.* at 141, 162.)

I found Mr. DeLargy to be credible. His testimony was straightforward and when he was unsure about a matter he frankly admitted it. (*See* HT, pp. 162-63, 166.) In addition, I found Mr. DeLargy to be knowledgeable of the relevant rules. At times he had difficulty explaining their requirements, (*see id.* at 168-69), but I find that this was a function of the rules themselves, and not Mr. DeLargy's comprehension. In addition, I find that Mr. DeLargy displayed no animus toward Complainant. Rather, he applied the rules as he understood them and opted to show Complainant leniency. Mr. DeLargy has also been instrumental in Complainant's career advancement, evidencing that there is no personal or professional animus toward Complainant.

### ***B. Mike Surina's Credibility***

Mike Surina has been with BNSF since 1996. He started out as a union employee in the track department, moved to a conductor/brakeman/switchman position in 2000, and became an engineer in 2003. In 2008, he was promoted to be a Trainmaster in the Vancouver terminal and was still in this role during the relevant period of this case 2010-11. Trainmasters supervise the operation of the trains in a particular region, but in a more "hands-on" way than Terminal Managers. In 2012, he was promoted to Road Foreman of Engines, in 2013, he became a Terminal Manager, and presently he is a Superintendent of Operating Practices overseeing engineer and conductor certification for BNSF. (HT, pp. 171-72.) He is familiar with the code of conduct and was certified on it, but is unfamiliar with the FRSA. (*Id.* at 174, 189-90.) Mr. Surina testified that he liked Complainant and thought that he was a good employee. He also knew Complainant a little bit in a personal capacity because Complainant's mother has been watching his kids for over 8 years. (*Id.* at 173-74.) In this case, Mr. Surina took Complainant's injury report and was involved in the initial processing of the report as a work-related injury. But he was not involved in the decisions to pursue or assess discipline.

I found Mr. Surina credible and give reasonable weight to his testimony. As with Mr. DeLargy, there is no indication of animus to Complainant. Based on the record, throughout the events in this case Mr. Surina was conscientiously attempting to do his job well, reporting what he believed needed to be reported and providing honest accounts of his accounts when asked. Complainant has at least implied an allegation that Mr. Surina forced him to file an injury report, but the record is clear that Complainant described his need for medical leave and on that basis, Mr. Surina came to the honest belief that an on-duty injury had just been described to him. He was prudent in proceeding, getting guidance from Mr. DeLargy and then continuing with the reporting process, as well as allowing Complainant to describe the events in his own words. It is notable, for instance, that when Complainant was reluctant to sign a medical release, Mr. Surina

exerted no pressure and simply told him not to sign the release. (RX AA, p. 248.) His testimony and conduct in this case show that he was simply trying to do his job as a company officer.

### ***C. Kathleen Bausell Luce's Credibility***

Kathleen Bausell Luce is the Director of Employee Performance in Labor Relations at BNSF. She has been in the position since 2013, and part of her duties include administering the PEPA policy. Before that she worked as a Trainmaster and then in Labor Relations, where she worked on collective bargaining agreements. (HT, pp. 195-97.) She played no role in the decision to discipline Complainant and had no personal knowledge of the events in this case. (*Id.* at 198, 212, 215.) I found Ms. Bausell Luce's testimony credible, though it plays little role in this decision. Most of her testimony related to the rules, which are independently in evidence.

### ***D. Complainant's Credibility***

I find Complainant for the most part credible. His testimony appeared honest, and he has been mostly consistent throughout this process. Some of the questions during his deposition and at the hearing probed some minor inconsistencies, which BNSF suggests are credibility problems. (*E.g.* RPB, pp. 8, 12.) But these were generally freely admitted/corrected and of such minor magnitude that they merely indicate honest mistakes. (*See also* CCA, pp. 6-7.) Respondents have called Complainant's good faith into question in making the injury report, but even if the contours of the FRSA were to entail that the report was not in good faith because he didn't think he had suffered a work-related injury, there is no real question that he acted properly in making the report. He was directed to do so, and if he had not, would have faced discipline for failing to report an on-duty injury, and perhaps insubordination as well. I do find that as this case has progressed Complainant has changed the emphasis in his account of his injury, stressing the pre-existing aspect and downplaying the events of December 19, 2010. But this appears to be a natural, honest shift in understanding in response to the investigations, litigation, and his career advancement, not a basic change in his account.

Thus, I give reasonable weight to Complainant's testimony. As a result, I have found all of the witnesses who appeared before me credible. This is not a case that turns sharply on competing credibility determinations. Indeed, while the parties disagree on the inferences and legal conclusions to be drawn from the facts, there is little dispute over the basic, underlying facts that would require a determination that one witness is more credible than another.

## **VI. Legal Analysis and Findings**

The FRSA provides that railroad carriers "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part" to any protected activities. 49 U.S.C. § 20109(a). Actions brought under the FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century ("AIR 21"). *See* 49 U.S.C. § 20109(d)(2)(A)(i). In order to prevail, a complainant must demonstrate that: (1) he engaged in protected activity (protected activity); (2) the employer knew that he engaged in protected activity (knowledge); (3) he suffered an unfavorable personnel action (adverse action); and (4) the protected activity was a contributing factor in the unfavorable personnel action

(contribution). 49 U.S.C. § 42121(b); *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *see also Kuduk v. BNSF Ry. Co.*, 768 F. 3d 786, 789 (8<sup>th</sup> Cir. 2014). The complaining employee bears the initial burden, and must show “by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.” 29 C.F.R. § 1982.109(a); *see also Palmer v. Canadian Nat’l Ry.*, ARB No. 16-036, ALJ No. 2014-FRS-00154, slip op. at 14 (ARB Sept. 30, 2016; reissued Jan. 4, 2017) (en banc) (Complainant must “prove, by a preponderance of the evidence, that protected activity was a contributing factor in the unfavorable personnel action”).

The burden then shifts to the respondent employer, which in order to avoid liability must demonstrate “by clear and convincing evidence, that [it] would have taken the same [adverse] action in the absence of that [protected] behavior.” 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1982.109(b); *Araujo*, 708 F.3d at 157; *Beatty v. Inman Trucking Mgmt., Inc.*, ARB No. 13-039; ALJ Nos. 2008-STA-020, 2008-STA-020, slip op. at 7-11 (ARB May 13, 2014); *see also Addis v. Dep’t of Labor*, 575 F.3d 688, 691 (7<sup>th</sup> Cir. 2009) (noting that AIR-21 language overrules traditional case law and allows an employee to shift the burden to the employer with a “lesser showing”); *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1572 (11<sup>th</sup> Cir. 1997) (“For employers, this is a tough standard, and not by accident”). Clear and convincing evidence is evidence that shows “that the thing to be proved is highly probable or reasonably certain.” *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015) (“*DeFrancesco II*”) (citing *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011)); *see also Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 10-13 (ARB Apr. 25, 2014).

## **A. Complainant’s Case For Retaliation**

### **1. Did Complainant Engage in Protected Activity?**

To establish a case for retaliation, a complainant must first show that he or she engaged in some protected activity. *Araujo*, 708 F.3d at 157. The FRSA contains three sets of employee protections. Section 20109(a) of the FRSA identifies a variety of general protected activities including providing information or assisting in an investigation regarding potential violations of law, refusing to violate the law, filing a complaint related to railroad safety or security, notifying the railroad carrier of an injury, cooperating with a federal safety or security investigation, furnishing information to a governing body, or accurately reporting hours. 49 U.S.C. §§ 20109(a)(1)-(7). Section 20109(b) lays out additional protected activities, including reporting a hazardous safety condition, refusing to work under hazardous conditions, or refusing to authorize the use of hazardous or unsafe equipment. 49 U.S.C. §§ 20109(b)(1)-(3). Finally, Section 20109(c)(2) protects employees who seek medical treatment or follow the treatment instructions for a work-related injury.<sup>8</sup> 49 U.S.C. § 20109(c)(2). Complainant has asserted two protected activities. First, he alleges activity protection by § 20109(a)(4) in reporting an injury to Mr. Surina on December 27, 2010 (“Injury Report complaint”). Second, he contends that when he sought medical leave on December 24, 2010, and on December 27, 2010, he was

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<sup>8</sup> 49 U.S.C. § 20109(c)(1) prohibits interference with medical care for a work-related injury. Though analyzed in a similar framework as the FRSA anti-retaliation provisions, *see Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB Case No. 10-147 (ARB July 25, 2012), it is a straightforward prohibition of conduct, not retaliatory motive.

complying with a treatment plan, an activity protected under § 20109(c)(2) (“Treatment Plan complaint).

a. Injury Report

The FRSA provides that a covered employer “may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee’s lawful, good faith act done, or perceived by the employer to have been done or about to be done...to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or a work-related illness of an employee.” 49 U.S.C. §§ 20109(a), (a)(4). To be protected, the report of injury must be made in good faith. *See, e.g., Ray v. Union Pac. R.R. Co.* 971 F. Supp. 2d 869 (S.D. Iowa 2013); *Davis v. Union Pac. R.R. Co.*, 2014 U.S. Dist. LEXIS 101708 (W.D. La. July 14, 2014). It is undisputed that Complainant filed a report of a work-related injury on December 27, 2010. (*See* CX 5, pp. 12-13; RX B, pp. 4-5; RX G, pp. 74-75.) Complainant sought a medical leave and in the course of his explanation, Mr. Surina came to believe that there had been a work-related injury. Mr. DeLargy shared this impression, and Complainant was asked to complete an injury report. Complainant did not wish to do so, but he followed instructions and filed the report.

The wrinkle in this case has been that even though Complainant clearly filed a report within the ambit of § 20109(a)(4), he did not believe that he had actually suffered a work-related injury. In its Motion for Summary Decision, BNSF argued that the absence of this belief entailed that the report was not made in good-faith. It continues to argue that Complainant did not report a work-related injury in good faith because he never believed that he had a work-related injury. (RPB, pp. 11-13; RRB, p. 1.) Complainant stresses that BNSF treated the report as a report of an on-duty injury, so Complainant’s particular understanding at a given time is irrelevant because the FRSA protects an act that was perceived to have been done to report an injury. (CCA, pp. 4-5; CRB, pp. 2-3.) Complainant also argues that good faith is a subjective standard and that when he reported the injury he stated the truth as he believed it and has been consistent in his accounts, showing that he was acting in good faith. (CCA, pp. 5-6.) Moreover, he had no improper motive and stood to gain nothing by making the report. He followed BNSF’s instructions and truthfully made the report as directed. (*Id.* at 7; CRB, pp. 5-6.)

In reference to the point about managers pressing Complainant to complete the report, BNSF argues that its actions are not at issue—what is at issue is Complainant’s good or bad faith in making the injury report. (RRB, pp. 3-4.) It also speculates that Complainant may have harbored improper motives due to the possibility of needing prolonged medical care and not being able to work due to his injury. (*Id.* at 4.) I agree with BNSF that the mental states of BNSF managers are not relevant to the good faith analysis. They are certainly relevant to the protected activity—it was the understandings of Mr. Surina and Mr. DeLargy that led Complainant to file the injury report. But on the narrower issue of whether Complainant acted in good faith in filing the report, it is Complainant’s state of mind and actions that are relevant.

In Complainant’s reply brief, he avers that “[t]he only serious factual dispute in this case is whether Complainant made the injury report in good faith.” (CRB, p. 3.) I disagree. There are good faith issues in this case, but they are minor wrinkles, not the crux of the analysis. At this point in the litigation, BNSF’s challenges fall into two categories. First, it maintains that

Complainant's belief that he had not suffered a work-related injury in and of itself defeats Complainant's good faith. This was the subject of the motion for summary decision, and was briefed far more extensively in that motion. I denied the motion. Though Complainant did not believe his injury was work-related, the good-faith requirement applies to the act, here filing the report. As discussed when I denied the motion, if Complainant believed what he reported and reported it on the particular form he did because he was instructed to do so by BNSF, he acted in good faith, even if he believed that he was making the report on the improper form. He deferred to his managers, and if he had failed to do so the situation would have been escalated. This conclusion was reached after some detailed analysis of the relevant case law and trends therein. There is no need to repeat that analysis here. Rather, the discussion in the December 15, 2015, Order Denying Respondent's Motion for Summary Decision is incorporated herein, and I find that Complainant could have acted in good faith despite his belief that his injury did not qualify as work-related.

The second prong of BNSF's challenge presses other aspects of Complainant's actions in reporting the injury on December 27, 2010, implicating factual conclusions that were presumed to be true in the Order Denying Respondent's Motion for Summary Decision. First, it argues that Complainant was not honest and truthful in what he reported. (*See* RPB, pp. 11-13.) Though BNSF points to a number of alleged inconsistencies, I do not find its argument convincing. It can only point to quibbles procured after lengthy examination during a deposition and hearing testimony years after the fact. Complainant has admitted that he was inaccurate in some of the details he reported, but that does not mean that he was not honest. He was flustered, confused, and uncertain about what was going on. Minor mistakes are not indications of dishonesty—especially, as here, when they are forthrightly corrected upon discovery.

BNSF also points to findings by the Public Law Board to the effect that Complainant's correction evidences second-thoughts, which BNSF reads as indicia of dishonesty. I do not afford deference to the analysis of the Public Law Board. But even if I did, it would not show dishonesty on Complainant's part. I agree that in this case Complainant has been attempting to tread a fine line and walk back some of his statements regarding the pain he suffered on December 19, 2010. Based on the record before me, this is a relevant point, but does not go to the good faith analysis. The tension between the report and the edit made within it reflects Complainant's confusion about the process and what constituted a work-related injury. He didn't change his story, he added more information he deemed relevant. Complainant's confusion over the rules and situation he was in does not make him dishonest and it does not somehow convert otherwise forthright actions into bad faith acts.

In its Reply Brief, BNSF speculates that Complainant had improper motives in making his report. (RRB, p. 4.) Its idea appears to be that he may have believed that his injury could lead to significant medical expenses and so was hedging his position, giving himself an option of pursuing a claim against BNSF later, if it became expedient. (*Id.*) This argument is poorly thought through. One can imagine an employee acting in this way, but it is entirely inconsistent with the facts of this case. Complainant didn't want to report a work-related injury—he did so only because he was pressed by Mr. Surina (and derivatively Mr. DeLargy). Complainant's only motive in making the report was to follow his supervisor's instructions. BNSF would now have me imagine that Complainant went to BNSF on December 27, 2010, with the intent to file a work-related injury report to protect himself from the possibility of future medical expenses and

disability (all hypothetical at this point) by describing something he didn't believe was a work-related injury and then telling Mr. Surina, multiple times, that he did not wish to file a work-related injury report. This would be too clever by half, except it isn't clever at all. As a fiendish scheme to protect future claims, it is an awful plan. BNSF's speculations have no merit.

I conclude that Complainant acted in good faith when he filed a work-related injury report on December 27, 2010. This act is protected by 49 U.S.C. § 20109(a)(4) and Complainant has thus established the first element of his case for retaliation on the Injury Report complaint.

b. Treatment Plan

The second potential protected activity in this case is Complainant's compliance with a treatment plan. 49 U.S.C. § 20109(c)(2) protects requests for medical care as well as "following orders or a treatment plan of a treating physician." Complainant's theory is that when he asked Mr. Stengem to lay him off as sick on December 24, 2010, and subsequently sought a medical leave from Mr. Surina on December 27, 2010, he was following his treating physician's treatment plan and thus engaging in protected activity.

i. Is the Treatment Plan Claim Properly Before Me?

Respondent contends that Complainant has failed to exhaust his administrative remedies and that the issue is unripe for review. It points to Complainant's testimony to the effect that this was not an issue he pressed with OSHA, (*see* HT, p. 133), arguing that since Complainant did not pursue a complaint premised on the "treatment plan" protected activity there, he cannot pursue such a theory here. The original complaint filed with OSHA does not refer to a treatment plan, instead focusing on the protected activity of filing an injury report. (*See* RPB, pp. 18-19.) This was an issue broached at the pre-hearing conference in this case. Initially I determined that the issue was not ripe because it had not been raised earlier. This was reflected in my December 11, 2015, Order Summarizing Pre-Hearing Conference. Later that day, however, I issued a second Order Re: Complainant's Amendment to Complaint. There, after reconsideration, I determined that the issue could be pursued in this hearing since the allegation arose out of the same set of facts and involved the same adverse actions.

That the original complaint does not make explicit reference to this protected activity is not dispositive. FRSA complaints to OSHA are not akin to formal pleading one would file in a court. The process is informal. A form completed by the complainant initiates the process, which is then developed during the investigation.<sup>9</sup> While it would certainly be easier for OALJ (and the parties once engaged in more formal litigation) to have strict pleading requirements that clearly define what the complaint is, that is not how the whistleblower process has been structured. Complainant may not raise new claims here not brought before OSHA. In this instance, Complainant still is alleging that he was retaliated against with the Level S discipline due to the exact same course of events. What is added is that Complainant makes explicit that his request for leave was adherence to a treatment plan, and thus protected activity. Notably, Complainant is not adding any facts to his complaint—that he asked for leave in accordance with his doctor's orders has always been a part of his account of what transpired and BNSF has not

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<sup>9</sup> Per 49 U.S.C. § 20109(d)(2)(A)(ii) the statute of limitations runs from the date of the adverse action, so it is more important that the original complaint identify the adverse action at issue.

suggested otherwise. What has been added, and what BNSF objects to, is the legal contention that this factual occurrence is a protected activity.

The best guide to what OSHA investigated is OSHA's decision, not the original complaint. In its decision (p. 3), OSHA concluded that "Respondent subjected Complainant to the following adverse actions in retaliation for following a physician's orders and filing a work-related injury report..." Respondent downplays this as "an oblique reference." That does not eliminate the fact that to some degree a § 20109(c)(2) allegation was pursued at OSHA. The rest of the findings stress the role of the injury report, but I cannot ignore this reference and conclude that the issue is new. Whether or not Complainant stressed or even discussed it with OSHA, it was a core part of the facts he related and the legal framing of those facts as a protected activity was done by OSHA. It is thus an issue that is properly before me here.

ii. Was Complainant Following a Protected Treatment Plan?

I now turn to the substantive issue of whether Complainant actually engaged in the activity protected by § 20109(c)(2). Complainant argues that "[t]here can be no serious question that this case involved a treatment plan." (CRB, p. 2, 4.) In the December 11, 2015, order that permitted Complaint to pursue this allegation at the hearing, I ordered Complainant to clarify exactly what he was claiming. Complainant has maintained that he was not pursuing treatment for a work-related injury. 49 U.S.C. § 20109(c)(2) contains no explicit requirement that the treatment plan in question derive from a work-related injury. In *Port Authority Trans-Hudson Corp. v. Sec'y, U.S. Dep't of Labor*, the Third Circuit overturned the ARB and held that to be protected under § 20109(c)(2), the treatment plan adhered to must be one instituted for a work-related injury. 776 F.3d 157, 160 (3<sup>d</sup> Cir. 2015). That was the state of the law at the time of the hearing, and the rationale for my order to clarify the nature of the claim. In response, Complainant contended that his injury was not work-related but became manifest at work, thus following a treatment plan was protected by 49 U.S.C. § 20109(c)(2). (*See, e.g., CCA*, p. 9.)

This potentially difficult point need not be pursued. Nor must I discern whether the "work-related" qualification attaches to what the employee believes about the injury, what the employer believes about the injury, or what is in fact the case about the injury. Since the hearing, the state of the law has changed. In *Williams v. Grand Trunk W. R.R. Co.*, the ARB rejected the Third Circuit's interpretation of 49 U.S.C. § 20109(c)(2) and held, once again, that adherence to *any* treatment plan is protected activity under the FRSA, whether or not the injury it derives from is work-related. ARB Nos. 14-092, 15-008; ALJ No. 2013-FRS-033 (ARB Dec. 5, 2016; reissued Dec. 8, 2016). *Williams* remains good law and thus, outside of the Third Circuit, there is no work-related requirement in 49 U.S.C. § 20109(c)(2). This case arises in the Ninth Circuit, so if Complainant was adhering to a treatment plan in his discussions with BNSF managers in December 2010, then he engaged in protected activity regardless of how his injury is classified and which perspective matters in making the classification.

Respondents argue that there was no treatment plan because Complainant had not seen a specialist who would provide such a plan and BNSF managers did not think he had seen a doctor at all. They contend that a treatment plan was not a part of the relevant discussions. Complainant asked for time off, both to Mr. Stengem on December 24, 2010, and Mr. Surina on December 27, 2010, but at no point did he provide any sort of treatment plan. In fact, he never

produced any such treatment plan. (RPB, pp. 19-20; RRB, pp. 1, 4.) Complainant responds that he had a verbal treatment plan that he communicated to his managers. (CRB pp. 4-5.)

49 U.S.C. § 20109(c)(2) only requires that the treatment plan be one imposed by a treating physician. It does not set out the formal requirements of a treatment plan. BNSF's arguments that there was no plan because Complainant had not yet seen a specialist fail completely. Dr. Saunders was Complainant's treating physician. Following Dr. Saunders' treatment plan, then, would be protected activity. The rest of BNSF's position come down to the presupposition that a treatment plan must be some formal, written document. It cites no authority for such a requirement, and I find no reason to impose it. Plans can be verbal and open-ended. After December 17, 2010, the plan was to do an MRI and move forward from there. Once Dr. Saunders viewed the MRI results, the plan changed. He decided that Complainant should cease work until such time as he could see a specialist and develop further plans on that basis. Complainant complied with doctor's orders, taking steps to remove himself from work by communicating the instructions to Mr. Stengem and Mr. Surina.

At the relevant time, there was no detailed plan and no formal course of treatment. But there were instructions setting forth a course of action. Dr. Saunders identified an injury and issued preliminary, precautionary instructions for its treatment. That included ceasing work. In following those instructions and communicating them to BNSF, Complainant was engaged in protected activity and has thus established the first element of his Treatment Plan complaint.

## 2. *Did Respondent Know About Complainant's Protected Activity?*

A complainant must also show that the respondent knew about his protected activity. *See Araujo*, 708 F.3d at 157. It is not enough for a complainant to show that his employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the decision-makers who subjected him to the alleged adverse actions were aware of his protected activity. *See Conrad v. CSX Transp.*, 824 F.3d 103, 107-08 (4<sup>th</sup> Cir. 2016); *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). Case law differs on whether this factor is an independent showing or if it is subsumed in the causal showing that a complainant must make. *See Coates v. Grand Trunk Western R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 2 n.5 (ARB July 17, 2015) (citing *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op at 13 (ARB June 24, 2011) ("*Bobreski I*"); *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6<sup>th</sup> Cir. 1987)); *see also Folger v. SimplexGrinnell, LLC*, ARB No. 15-021, ALJ No. 2013-SOX-42 (ARB Feb. 18, 2016) (knowledge not a distinct element in a complainant's required showing under Sarbanes-Oxley); *DeFrancesco II*, ARB No. 13-057 at 5 (knowledge omitted as separate element in FRSA claim). Regardless, if knowledge is omitted as an element, it is still part of the contribution showing: if a respondent does not have knowledge of a protected activity, it is hard to imagine that the protected activity will contribute to the respondent's decision to take an adverse action.

There is no serious dispute as to BNSF's knowledge of Complainant's protected activities in this case. It clearly knew that Complainant reported a work-related injury—Mr. Surina procured the form. BNSF does contend, briefly, that it had no knowledge of Complainant's treatment plan. (RPB, p. 20.) This argument, however, is premised on the supposition that to be

covered, adherence to a treatment plan must involve a written treatment plan. I rejected this suggested addition to the text of the FRSA above. There is no dispute that the managers knew that Complainant had been instructed to cease work due to his injury. Hence, Complainant has satisfied the knowledge element in both the Injury Report and Treatment Plan complaints.

### 3. *Did Respondent Take Adverse Action Against Complainant?*

Third, a complainant must show by a preponderance of the evidence that the respondent took some adverse action against him or her. *Araujo*, 708 F.3d at 157. The FRSA specifies that a railroad carrier may not “discharge, demote, suspend, reprimand, or in any other way discriminate against an employee” on the basis of protected activity. 49 U.S.C. § 20109(a); *see also* 29 C.F.R. § 1982.102(b)(1). Whistleblower standards are meant to be interpreted expansively, as they have “consistently been recognized as remedial statutes warranting broad interpretation and application.” *Menendez v. Halliburton*, ARB Nos. 09-002 and 09-003, ALJ No. 2007-SOX-2005, slip op. at 15 (ARB Sept. 13, 2011). Cautioning against applying the more stringent standards of Title VII cases, the ARB has stressed the safety issues present in “hazard-laden, regulated industries” and in particular the FRSA’s extensive legislative history citing the rampant practices of abuse and intimidation inflicted on railroad workers who reported work-related injuries. *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 12 (ARB Dec. 29, 2010); *Vernace v. Port Auth. Trans-Hudson Corp.*, ARB No. 12-003, ALJ No. 2010-FRS-018, slip op. at 3 (Arb Dec. 21, 2012); *Santiago I*, ARB No. 10-137 at 8-10; *see also Blackorby v. BNSF Ry. Co.*, 2015 U.S. Dist. LEXIS 266, \*8 (W.D. Mo. Jan. 5, 2015).

In *Burlington Northern & Santa Fe Ry. v. White*, the Supreme Court held that an adverse action under Title VII need only be “harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination.” 548 U.S. 53, 68 (2006). Drawing on this rule, the ARB has held that in whistleblower claims, the starting point is any action that “would dissuade a reasonable employee from engaging in protected activity.” *Menendez*, ARB Nos. 09-002 and 09-003 at 20. Employer actions must be considered in the aggregate to determine if together they rise to the level of an actionable adverse action. *Id.* at 20-21. Based on the similar language in the statutes, the ARB has applied the same broad definition of an adverse action under the FRSA as it previously articulated under AIR-21 and Sarbanes-Oxley: a railroad engages in adverse action if it engages in “unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” *Fricka v. Nat’l R.R. Passenger Corp.*, ARB No. 14-047, ALJ No. 2013-FRS-035, slip op. at 7 (ARB Nov. 24, 2015) (quoting *Williams*, ARB No. 09-018 at 7).

The parties stipulated that BNSF assessed Complainant with Level-S discipline. The March 14, 2011, letter levies a 30 day record suspension and one year probationary period. (CX 7, p. 90; RX H, p. 96.) The Level-S discipline remains a part of Complainant’s employee record. (*See* RX A, p. 2.) In its Post-Hearing Brief, BNSF allows that this Level-S discipline is an adverse action, though it contends that no other adverse actions are at issue. (RPB, p. 13.) This is consistent with the original complaint and Complainant’s testimony at the hearing. (*See* HT, p. 84.) In its findings, OSHA did mention several other adverse actions (p. 3), though all are related to the process of the Level-S discipline. Complainant’s pre-hearing statement also indicated the potential for other adverse actions. But the post-hearing briefs make clear that the alleged adverse action in this case is the Level-S discipline, not another of the other related

actions. (See CCB, pp. 7-9; CRB, pp. 1-3.) There is thus no dispute on this point and I find that BNSF took adverse action against Complainant in assessing the Level-S discipline, establishing the third element of both the Injury Report and Treatment Plan complaints.

4. *Was Complainant's Protective Activity a Contributing Factor in Respondent's Adverse Action?*

a. Legal Framework

The final element in a complainant's case for retaliation is a showing of contribution. *Araujo*, 708 F.3d at 157. The ARB has recently clarified the contributing factor inquiry for whistleblower complaints under the FRSA in *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-036, ALJ No. 2014-FRS-00154 (ARB Sept. 30, 2016; reissued Jan. 4, 2017) (en banc). To prevail, a complainant must make a showing, "by a preponderance of the evidence, that protected activity was a contributing factor in the unfavorable personnel action." *Id.* at 14. *Palmer* stressed that contribution is a minimal amount of causation, requiring only a showing that the protected activity played some role. But it rejected prior ARB case law that created an evidentiary rule for the contribution inquiry. Hence, there are "no limits" on the evidence I may consider, and I should consider all relevant evidence. *Id.* at 14-15, 51-52. In so doing, however, I must avoid weighing reasons for the adverse action and must not require that the complainant show that the protected activity was a substantial, significant, motivating, or predominant factor. *Id.* at 53-55. A contributing factor is *any* role given to a protected activity. Consideration of other factors and the particular roles played by each of the factors belong in the next stage, where a respondent can make out its "same-action" defense. So long as the complainant establishes that the protected activity played some role in the decision by the employer to take adverse action, contribution has been shown and I move forward with the analysis. The question now is simple: "did the employee's protected activity play a role, any role in the adverse action? On that question the complainant has the burden of proof, and the standard of proof is by a preponderance." *Id.* at 52.

Contribution not meant to be a difficult or arduous showing. *E.g. Ledure v. BNSF Ry. Co.*, ARB No. 13-044, ALJ No. 2012-FRS-020, slip op. at 8 (ARB June 2, 2015); *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ Case No. 2010-FRS-020, slip op. at 7 (ARB May 31, 2013); *Rookaird v. BNSF Ry. Co.*, 2016 U.S. Dist. LEXIS 147950, \*16 (W.D. Wash. Oct. 29, 2015). 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." *Araujo*, 708 F.3d at 158 (quoting *Ameristar Airways Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 563, 567 (5<sup>th</sup> Cir. 2011)); *see also Addis v. Dep't of Labor*, 575 F.3d 688, 691 (7<sup>th</sup> Cir. 2009); *Marano v. Dep't of Justice*, 2 F.3d 1137, 1150 (Fed. Cir. 1993); *Williams*, ARB No. 09-092 at 5. Contribution may be established by direct evidence or by circumstantial evidence. *See, e.g., Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13 (ARB Sept. 30, 2011) (citing *Sylvester v. Paraxel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, slip op. at 27 (ARB May 25, 2011)). It is not necessary for a complainant to establish any retaliatory motive in order to show the contributory factor element. *See Marano*, 2 F.3d at 1141; *see also Coppinger-Martin v. Solis*, 627 F. 3d 745, 750 (9<sup>th</sup> Cir. 2010). Nor is it necessary to show any animus. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Feb. 29, 2012) ("*DeFrancesco I*") In some cases, contribution might be shown simply

by the presence of a protected activity in a chain of causation leading to the adverse action. *E.g. Hutton*, ARB No. 11-091 at 6-7.

A complainant may establish contribution by credible direct evidence. In assessing the credibility of the evidence, it may be necessary to weigh competing evidence, but this is not a final evaluation or weighing of the reasons involved. The task is more difficult when contribution is shown by circumstantial evidence. Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, relationships among the parties, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation of the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. *See DeFrancesco I*, ARB No. 10-114 at 6-7; *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op at 17 (ARB Aug. 29, 2014) ("*Bobreski II*"); *Bechtel*, ARB No. 09-052 at 13; *Bobreski I*, ARB No. 09-057 at 13. Contribution might be shown by an absence of any plausible reasons for the adverse action or any reasons at all—employers do not simply take random adverse actions, so a paucity of reasons invites an inference of contribution. *See, e.g., Palmer*, ARB No. 16-035 at 53-54. In some of these inquiries, it will be necessary to consider a respondent's stated rationale for the adverse action in order to determine if some shortcoming in or surrounding it makes out a case for contribution by the protected activity. *E.g. Ledure*, ARB Case No. 13-044. It may be necessary to critically examine the employer's stated reasons and ask whether the reason would merit to action by a prudent, rational supervisor—or whether it leaves something wanting, suggesting that the protected activity played some role. *Id.* at 8-9; *see also Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002, slip op. at 19-21 (ARB Mar. 30, 2016) (contribution established by temporal proximity, evidence of pretext, and inconsistent application of policy/personnel actions).

To evaluate a complainant's case for contribution, the ALJ must examine different ways in which contribution might be shown. Further, an ALJ must consider the circumstantial evidence *as a whole*. Evidence that individually might be insufficient can together make a very strong case—for instance where there is temporal proximity, evidence of animus by some decision-makers, evidence of pretext, significant inconsistencies in a respondent's evidence, shifting explanations and policies, etc. *Bobreski II*, ARB No. 13-001 at 17-22. Consideration of the strength of a respondent's evidence for its proffered reasons for an adverse action will be rare because "the complainant need establish only that the protected activity affected *in any way* the adverse action taken, notwithstanding other factors an employer cites in defense of its action." *DeFrancesco II*, ARB Case No. 13-057 at 6 (emphasis in original). Simple weighing is inappropriate because "[u]nder the contributing factor causation standard, protected activity and non-retaliatory reasons can coexist; therefore, [a complainant] is not required to prove the [respondent's] reasons are pretext." *Coates*, ARB Case No. 14-019 at 3-4.

Temporal proximity is one form of acceptable circumstantial evidence in the contributing factor analysis. *Bobreski I*, ARB No. 09-057 at 13; *Bechtel*, ARB No. 09-052 at 13 & n.69. In some instances temporal proximity alone can license an inference to contribution. *See Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1003 (9<sup>th</sup> Cir. 2009); *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1136 (7<sup>th</sup> Cir. 2013); *Dietz*, ARB No. 15-017 at 20. In evaluating the importance of temporal proximity, however, an ALJ must consider the overall circumstances and

the nexus between the protected activity and the chain of events leading to the adverse action. *Compare Kuduk*, 768 F.3d at 792 with *Mosby v. Kan. City S. Ry.*, 2015 U.S. Dist. LEXIS 93869, \*19-20 (E.D. Okla. July 20, 2015). A finding of no contribution may be sustained despite temporal proximity when there is countervailing evidence. *See Folger*, ARB No. 15-021 at 3-6. The AIR-21 framework contains no per se knowledge/timing rule and the temporal proximity inference to contribution is permissive, not mandatory. *Palmer*, ARB No. 16-035 at 55-56.

Where the content of a protected report or disclosure gives an employer the reasons for the adverse action, the protected activity is inextricably intertwined with the adverse action. *E.g. Hutton*, ARB No. 11-091 at 6-7; *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024 (ARB Apr. 25, 2013); *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 12 (ARB Oct. 26, 2012) (citing *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012)). In such a case, the consideration of the respondent's non-discriminatory rationale occurs in the context of its affirmative defense to liability. *DeFrancesco I*, ARB No. 10-114 at 7-8; *see also Rudolph v. Nat'l R.R. Passenger Corp. (Amtrak)*, ARB Nos. 14-053 and 14-056, ALJ No. 2009-FRS-015, slip op. at 10 (ARB Apr. 5, 2016) ("*Rudolph II*"). When there are intervening events that might explain the adverse action, "the only question" at this stage of the analysis "is whether the intervening events...negate a find that [the complainant's] protected activity was a contributing factor in [the respondent's] adverse action." *Rudolph v. Nat'l R.R. Passenger Corp. (Amtrak)*, ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 21 (ARB Mar. 29, 2013) ("*Rudolph I*"); *see also Carter v. BNSF Ry. Co.*, ARB Nos. 14-089, 15-016, 15-022; ALJ No. 2013-FRS-082; slip op. at 4 n.20 (ARB June 21, 2016) (not all connection via a chain of events establishes contribution). The ARB was particularly clear on this point in *Palmer*: to be inextricably intertwined means that it is not "possible, even on the employer's theory of the facts, to explain the basis for the adverse action without reference to the protected activity." ARB No. 16-035 at 58. If this holds, contribution is established, and the employer's permissible reasons for the adverse action are considered as part of the next step.

In applying the AIR-21 framework, an adjudicator must be mindful that there are two inquiries into causation: whether the protected activity was a contributing factor in the adverse action, where the complainant has the burden of proof by a preponderance of the evidence, and whether the respondent would have taken the same adverse action even absent the protected activity, where the respondent has the burden of clear and convincing evidence. These are naturally overlapping inquiries, but must be treated as separate and distinct. A contributing factor need not be a necessary or sufficient condition. But it is more than a reason for an action in the abstract—it must have *actually* played some role. Other reasons may be sufficient for the adverse action, even though the protected activity was, in fact, another reason on the "heap" of reasons in play. In that event, the protected activity is a contributing factor, but then the respondent will escape liability if it can show, by clear and convincing evidence, that the protected activity, despite being an actual contributing factor, was not a *necessary* factor in that other, non-discriminatory factors were *sufficient* to cause that exact adverse action. Evidence relevant to the two inquiries overlap, and they are both causal inquiries. But the questions being posed are quite different. Weighing reasons belongs only to the second question—in the first inquiry the issue is not *comparative* weight but whether the protected activity is a reason with *any* actual weight.

b. Did Complainant's Injury Report Contribute to Respondent's Disciplinary Decision?

Complainant contends that the injury report and the discipline had a clear relationship that is not open to question. (CRB, p. 3.) Though he does not develop the argument explicitly, the contention is plain: he reported an injury, an investigation was almost immediately noticed about the circumstances of his report, and he was thereafter assessed the Level-S discipline that is at issue in this case. The facts here present what looks to be a straightforward chain of causation from the injury report to the discipline, which would indicate, initially, that the injury report contributed, in some way, to BNSF's decision to discipline Complainant.

BNSF resists this natural understanding with a variety of arguments. The predominant theme is that even though the amount of evidence necessary to make a showing of contribution is less than in other causal showings and a complainant need not "conclusively establish" retaliatory intent, a complainant must still make out a showing of intentional discrimination. (See RPB, pp. 13-15.) This is correct: the protected activity must have played some actual role in the decision to take the adverse action. Given its discussion, BNSF means something more. It makes repeated stress of "intentional" discrimination throughout the argument. Understanding the required sort of intent as contribution, this stress is correct, as the law cited by BNSF makes out. But quickly BNSF moves from the somewhat uninteresting point about anti-retaliation statutes focusing on intent (in the sense of some actual role in the employer's decision) to the idea that Complainant must make out a much stronger causal showing of intent in the more colloquial sense of motivation or cause: "A plaintiff need not produce enough evidence, either prima facie or ultimately, to 'conclusively' prove a retaliatory motive, but the only evidence that counts toward establishing liability—the only evidence entitled to be weighed—is evidence of *intentional* retaliation, evidence of the decision-makers animus against the protected activity." (RPB, p. 14.)

There are two basic problems here. First, BNSF seems to read *intent* as a proxy for *motivation*, and thereby can only acknowledge the lower contributory factor standard as requiring less evidence, rather than requiring less of a causal role. But protected activity is one small reason among many for an adverse action, one of the intents of the action was to retaliate for protected activity. On a motivating factor analysis this goes nowhere—even if there was some minimal retaliatory intent, it didn't motivate the action, other, permissible factors did. But on a contributory factor analysis this small retaliatory intent suffices for the needed showing. Though the difference has evidentiary implications, it is not an evidentiary point. A complainant could have direct, foolproof, absolutely convincing evidence of retaliatory intent that sufficed to show contribution and yet fail to even tend to show motivation. There is a sense of "motive" in which if a factor plays any role in the employer's process of taking the adverse action, it is a motive of that action. If the point about the lesser causal role of a contributing factor is made as a gloss on "motive," then the use remains proper. Where this gets dangerous, however, is when "motive" in this minimal sense is stretched into the sort of motive we normally talk about when assigning motives or motivating factors to actions. At no point must a complainant show that the protected activity was *the* motive for the action. So while BNSF's usage can be correct, it must

be employed with great care. We don't need to talk this way: we can instead simply ask whether the protected activity played any role in BNSF's decision to take the adverse action.<sup>10</sup>

Furthermore, BNSF's argument also moves quickly from the point about retaliatory intent to a conclusion about the need to show animus by a decision-maker. This does not follow. Animus as a mental-state that may, but need not, accompany intent. It may often coincide with the sort of intent that establishes a motivating factor showing, but this needn't hold for the different sort of contributory factor showing. Tellingly, the case that BNSF is ultimately relying on (through *Kuduk*) to link *animus* with *intent* is a motivating factor case. See *Kuduk*, 768 F.3d at 791 (citing *Staub v. Proctor Hosp.*, 131 S.Ct. 1186, 1193 (2011)). Moreover, it is the intent of the *employer*, not any particular decision-maker, that matters. Often the two can be treated as one, but that need not be so. If BNSF had a rule whereby managers were to discipline all employees who file injury reports, BNSF would be intentionally retaliating against employees who filed injury reports. This would be so even if the particular decision-makers in a given case are mere mechanical cogs with little intent to speak of other than to follow the rules.

More directly responding to Complainant's required showing here, BNSF contends that temporal proximity alone is insufficient. (RPB, p. 15.) I agree, but the point must be qualified. Temporal proximity alone is not enough to show contribution—but if I infer from temporal proximity and other circumstantial evidence about the case (e.g. an absence of other explanations for the adverse action), it could be the basis for an inferential finding of contribution. Actually, BNSF takes this point a step further, arguing that there is no temporal proximity in this case because three months passed between the protected activity and the adverse action. (*Id.* at 16-17.) This is an ill-considered argument. Three months did pass, but this time was filled with events leading directly from one to the other. BNSF almost immediately decided to investigate Complainant after the injury report was filed, and it is *that* temporal proximity that matters. While I do not infer from temporal proximity alone to contribution, the temporal proximity factor supports a finding of contribution in this case.

Next, BNSF points out that anti-retaliation statutes do not immunize misconduct that is coupled with protected activity, suggesting that finding contribution in a case like this would mean that any sort of malfeasance accompanying an injury report would be excused. (*Id.* at 15-16.) BNSF is certainly correct that malfeasance coupled with protected activity can be lawfully punished under the FRSA. But that does not mean that the imagined FRSA complaint in such cases will always fail at the contribution showing. Often the complainant will not be able to show good-faith protected activity. In other instances, he or she will not show contribution, since a survey of the evidence will lead to the conclusion that the protected activity played no role at all. See *Powers*, ARB No. 13-034. In other cases, however, the respondent will have to justify its punishment of the malfeasance in its affirmative defense. If the good-faith protected

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<sup>10</sup> BNSF is structuring the issue to lead into error, something that is evidenced several lines later when all of a sudden it declares that Complainant must show that it “consciously (*i.e.*, deliberately) acted because of the protected activity or characteristic.” (RPB, p. 15.) This is not a contributory factor inquiry; it is a motivating factor inquiry, using the sense of “because of” that seeks *the* motivation or reason for an action. Tellingly, the support BNSF cites for this passage is a classic Title VII motivating factor case: *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

activity<sup>11</sup> is inextricably intertwined with the adverse action, contribution will follow. But BNSF's imagined parade of horrors does not follow with it—a respondent need only show that if the complainant had committed the malfeasance without the protected activity, it would have taken the same adverse action. Contribution is only *part* of the analysis, it is not its completion.

BNSF makes a number of additional arguments concerning the absence of animus, Complainant's subsequent advancement, and its entitlement to, and need for, late-reporting rules. (See RPB, pp. 16-17.) These will be considered below. BNSF has misunderstood the structure of the FRSA analysis, and so has included these points as part of its contribution discussion. They are certainly relevant, but must be postponed. BNSF's error is in framing the analysis. On the proper understanding of the contribution inquiry, this is an easy case for Complainant.

As the ARB succinctly stated in *Palmer*, the protected activity and adverse action are inextricably intertwined if it is not “possible, even on the employer's theory of the facts, to explain the basis for the adverse action without reference to the protected activity.” ARB No. 16-035 at 58. BNSF's theory in this case is straightforward: it assessed a Level-S discipline against Complainant solely because he reported a work-related injury late. This may well be so, and BNSF may establish its affirmative defense. But neither BNSF nor I can describe permissible discipline for filing a late report of a work-related injury without making reference to the fact that Complainant made a report of a work-related injury. Necessarily, a “late report of a work-related injury” (BNSF's proffered permissible basis for the discipline) *is* a “report of a personal injury” (the protected activity).

On the facts of this case, the protected activity and the alleged malfeasance cannot be decoupled. Therefore, I find that the protected activity contributed to the adverse action: filing an injury report was a factor in BNSF's decision to assess a Level-S discipline for filing the injury report too late. Other considerations as to BNSF's reasons must be deferred. I am not to weigh reasons—instead, having found that the protected activity played a role, I conclude that Complainant has made his required showing as to the Injury Report complaint.

c. Did Complainant's Adherence to a Treatment Plan Contribute to Respondent's Disciplinary Decision?

Next, I turn to the Treatment Plan complaint. Complainant “suggest[s] the facts submitted at the hearing support that discipline was given to [him] both for reporting an injury that Respondent believed was work related and also for disclosing and seeking accommodation for a physician ordered medical plan.” (CCA, p. 8.) Complainant, however, does not explain exactly how they do so. Respondent contends that Complainant has failed to show contribution, arguing that no evidence of contribution was introduced and what was introduced showed that the treatment plan played no role in the adverse action. (RPB, p. 20.)

On the facts before me, Complainant's adherence to a treatment plan, and communication to BNSF managers that he needed to be taken off of work due to his injury, has no evident connection to the adverse action. The report on December 24, 2010, led Mr. Stengem to lay Complainant off sick and send a note to Mr. Surina and Mr. DeLargy clarifying that

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<sup>11</sup> This is a bit of misnomer, since to be protected, the activity must be done in good-faith. I include the qualifier simply to make that point explicit.

Complainant was not merely playing sick to get a longer Christmas holiday. The subsequent report of the need to cease work on December 27, 2010, led Mr. Surina to arrange for Claimant to go on a leave of absence. BNSF thereafter extended and adjusted the leave as requested. This was all a matter of course, done absent any resistance. From all appearances, BNSF was indifferent to Complainant's need to be off of work, and in fact supportive of it to ensure that he would be able to recover. The consequences of the communication of the requirement of the treatment plan (to cease work) stopped at BNSF's accommodation of the plan.

It is very convincing that Complainant has refused to make any connection between his adherence to a treatment plan and the adverse action. Above I found that this theory of the case could be pursued because it arose from the same core of facts and OSHA made investigative findings on point. Yet, this appears to be something OSHA found in addition to Complainant's understanding of the situation. It was not part of the original complaint. Complainant had no recollection of pursuing the theory with OSHA. (HT, p. 133.) At the hearing, he would not go so far as to outright say that he knew that it played no role, but he was also unwilling to even allege that it played any role at all. (*Id.*) In framing his understanding of the complaint, the role of the treatment plan was entirely omitted. (*Id.* at 84.) While the theory was not waived, Complainant's failure to offer evidence that might support it and frank unwillingness to even speculatively endorse the theory seriously undermines any plausible inference to contribution.

There is, of course, temporal proximity between Complainant's communication to BNSF managers that he needed to take a medical leave from work on doctor's orders and the adverse action in this case. This proximity mimics the above since the adherence to the treatment plan came almost at the same time as the injury report. There is one important difference: Complainant communicated to Mr. Stengem on December 24, 2010, that he needed to leave work on doctor's orders and this was quickly passed along to both Mr. Surina and Mr. DeLargy. Nothing else happened and there were no indications or hints of possible discipline. Complainant was simply taken off of work. Discipline became an issue on December 27, 2010, when Complainant was informed he needed to report a work-related injury and submitted the report. Notably, it was only at that point the Complainant started to worry about potential discipline. (*See* HT, pp. 49, 114-15.) This three day gap is small but important because any suggestive temporal proximity between the communication of the treatment plan and the adverse action is undermined by the overlapping, and better fitting, temporal proximity of the injury report in the adverse action. The injury report spawned the process that led to the discipline, and in the minds of everyone involved (BNSF managers, union officials, Complainant) was the issue.

Nor is the adherence to the treatment plan inextricably intertwined with the discipline in this case. On Respondent's theory, Complainant was disciplined because he reported an injury late in violation of BNSF rules. One cannot state this theory without reference to an injury report. But the theory makes no reference to a treatment plan. The connection is accidental. Complainant may have needed to adhere to a treatment plan, but not report a work-related injury. Going into the meeting with Mr. Surina on December 27, 2010, this is what he believed to be the case. And he may have reported a work-related injury but had no treatment plan because he needed no treatment. Here the injury report, its lateness, and the treatment plan are all connected, but the treatment plan is not *inextricably* intertwined. Respondent's theory, and even Complainant's *only* theory at the hearing and predominant theory post-hearing, all can be stated and evaluated without reference to any treatment plan. *See Palmer*, ARB No. 16-035 at 58.

Therefore, I conclude that Complainant has failed to show that his adherence to a treatment plan as protected by 49 U.S.C. § 20109(c)(2) contributed in any way to the Level S discipline that was assessed against him. The Treatment Plan complaint is therefore dismissed.

***B. Has Respondent Shown by Clear and Convincing Evidence that it Would Have Taken the Same Adverse Action Absent the Protected Activity?***

Complainant failed to establish his case for retaliation as to his Treatment Plan complaint. But he made out his case for retaliation as to his Injury Report complaint: he filed a report of a work-related injury in good faith, BNSF assessed a Level-S discipline, and BNSF's rationale for the discipline makes the protected activity and adverse action inextricably intertwined. This does not result in a finding of retaliation, and *no* relief, even declaratory relief, may be ordered, if BNSF makes out its affirmative defense.<sup>12</sup> In a case involving inextricably intertwined protected activity and adverse action, this is where the evidence of permissible motives is analyzed. To prevail, Respondent must establish, "by clear and convincing evidence, that, 'in the absence of' the protected activity, it would have taken the same adverse action." *Palmer*, ARB No. 16-035 at 56 (quoting 49 U.S.C. § 42121(b)(2)(B)(iv)).

The discussion below proceeds in three parts. First, I consider the legal framework and various ways in which the question for the "same-action" defense might be analyzed. Next, I consider the evidence regarding the actions and motivations of the managers in question, finding that the record clearly establishes that they were mechanically applying the rules, indifferent to the protected activity, and would have acted in the same manner regardless of whether Complainant was, per the rules, late in reporting a work-related injury or something similar that was not protected. This does not quite establish the defense, because the query is whether BNSF would have taken the same action. Though the managers may have been mechanically applying rules, if BNSF has adopted a rule concerning the timing of injury reports that, in the circumstances of this case, functions to punish the protected activity regardless of timing or singles out protected activity for discipline, then the rule itself undermines the same-action defense. I must look to both the managers applying the rule and the rule itself. I conclude, however, that on these facts, while application of the rule may be unfair, it does not manifest any retaliatory intent. Thus, the record clearly and convincingly establishes that in this situation BNSF would have taken the same actions in a suitably similar situation absent the protected activity.

*1. Legal Framework*

Relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any

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<sup>12</sup> AIR-21 phrases the complainant's showing as the basis on which a violation "may" be found and the respondents showing as a bar to any relief for a violation. See 49 U.S.C. § 42121(b)(2)(B)(iii), (iv). In *Palmer* the ARB discussed the relationship of the two clauses in some detail, concluding that the language creates a "conundrum" that didn't need to be solved. The relevant point is that no matter whether the complainant's showing alone establishes a violation or if a violation only occurs if the respondent cannot make its responsive showing, legally the distinction is meaningless, since *nothing* follows from the complainant's showing if the respondent makes the out the "same-action" defense. An ALJ could not even call the respondent a violator. See *Palmer*, ARB No. 16-035, slip op. at 23-29. Here I describe the "same-action" defense as an affirmative defense, since it requires that the respondent make an affirmative showing and, if successful, is a defense against all possible forms of liability.

protected behavior. 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1982.109(b); *see also* *Dietz*, ARB No. 15-017 at 6-7. Clear and convincing evidence is “evidence indicating that the thing to be proved is highly probable or reasonably certain.” *Williams*, ARB No. 09-092 at 6 (citing *Brune v. Horizon Air Indus., Inc.*, ARB Case No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006)). It is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. *See* 5 C.F.R. § 1209.4(d). To prevail under this standard, the respondent must show that its factual contentions are highly probable—it is a burden of proof more demanding than the preponderance of the evidence standard, residing in between “preponderance of the evidence” and “proof beyond a reasonable doubt.” *See Araujo*, 708 F.3d at 159 (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *Addington v. Texas*, 441 U.S. 418, 525 (1979)); *DeFrancesco I*, ARB No. 10-11. Evidence is clear when the employer has presented an unambiguous explanation for the adverse action. It is convincing when based on the evidence the proffered conclusion is highly probable. *DeFrancesco II*, ARB No. 13-057 at 7-8 (citing *Speegle*, ARB No. 13-074 at 6; *Williams*, ARB 09-092 at 5). This is a difficult standard for employers, signaling Congressional concern with past industry practice and the importance of the interests at stake. *See Araujo*, 708 F.3d at 159 (citing *Herman*, 115 F.3d at 1572); *see also DeFrancesco II*, ARB No. 13-057 at 8.

To evaluate a respondent’s “same-action” affirmative defense, an ALJ must first construct the counterfactual scenario in which the protected activity is absent, but all else remains the same. Then it is necessary to ask whether the evidence of record is such that it is “highly probable or reasonably certain” that the respondent would have acted in the same way in that imagined scenario as it did in the actual course of events. When there are multiple, independent contributing factors, the inquiry is fairly straightforward. For example, if a complainant reported an injury but also had multiple absences without excuse, I would ask if the respondent would have imposed the same discipline on the employee if he had multiple absences without excuse but did not report an injury. When the protected activity and adverse action are inherently intertwined, however, things are not so easy. I cannot ask whether or not BNSF would have imposed the same discipline on Complainant if he reported his work-related injury late but had not reported it at all. Absent the protected activity, BNSF’s permissible rationale for the discipline does not exist. The simple statement of the “same-action” defense becomes nonsense. So how, exactly, am I to proceed?

Complainant does not address the question. Presumably he would opt for some form of strict liability in these sorts of cases whereby if the protected activity is inextricably intertwined, the defense cannot be raised. But as BNSF convincingly argues, (RPB, p. 15),<sup>13</sup> this approach can’t be right. Such a rule would permit an employee to immunize misconduct by intertwining it with protected activity. It would for instance, be impossible for BNSF to have rules about how and when an employee is to engage in protected activity—such as a rule requiring prompt reports of work-related injuries. But surely BNSF has a legitimate interest in such rules—they are entirely in keeping with the purpose of the FRSA. Injury reports are protected because they are important to rail safety and security. For the same reasons, BNSF is justified in incentivizing making injury reports in a timely manner. Further, the ARB has rejected an interpretation that

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<sup>13</sup> This discussion occurs in BNSF’s briefing of the contribution question, but as stated above, BNSF’s framing of the inquiry led it to include points pertinent to its affirmative defense in its contribution discussion. Above I found this argument unavailing; here it is convincing.

would undermine rational internal rules regarding the manner and timing of protected activity, holding that the “same-action” defense is still possible in cases involving inextricably intertwined protected activity and adverse action. *See Speegle*, ARB No. 13-074 at 10.

Based on BNSF’s evidence and argument on its affirmative defense, it views the required inquiry as directed to what happens when there is protected activity but none of the malfeasance alleged to be the basis of the discipline. (*See RPB*, pp.17-18; RX UU.) Indeed, BNSF captions this section of its brief, “BNSF has Proven With Clear and Convincing Evidence That It Does not Discipline Employees for Reporting Injuries.” (*RPB*, p. 17.) That is a nice showing to make, except that isn’t what BNSF is directed to establish. This approach to the “same-action” defense flips the counterfactual: rather than asking if *E* would still have done *AA* if there were no *PA*, it asks if *E* would have done *AA* if there had *only* been *PA*.<sup>14</sup> It is a tempting route, insofar as it isolates the protected activity from the malfeasance and tries to determine the precise causal role of the protected activity. But it is clearly incorrect. In flipping the counterfactual, it flips the causal standards chosen by Congress. If I bracket all of the other alleged malfeasance and ask whether BNSF would have terminated Complainant *solely* based on the protected activity, then I am really asking whether the protected activity alone was a sufficient condition for the adverse action. That, however, is not what Congress directs. The question is not whether the protected activity alone is a sufficient condition; it is whether it was a contributing factor. What I am supposed to be asking in the “same-action” defense is whether or not the alleged malfeasance alone was a sufficient condition for the adverse action, or whether the protected activity was a necessary condition as well. It is possible that if Complainant only engaged in the protected activity, BNSF would not have disciplined him, while at the same time the protected activity was a necessary contribution to the discipline. The complainant might contend that BNSF grudgingly forbears from disciplining injury reports alone out of fear of FRSA liability, but throws the book at employees who make injury reports but also engage in any sort of minor malfeasance, giving BNSF “cover” for its retaliation. The affirmative defense inquiry asks me to sort these possibilities out. Congress imposed a high burden on railroads in making out its defense to liability after contribution is shown. Any proper construction of the affirmative defense inquiry must respect that choice of a high burden.

Two other constructions of the inquiry are attractive. First, I could engage in a literal examination of whether a complainant would have suffered the same adverse action absent the protected activity. In this case, I would look at the circumstances of the injury report and ask if discipline would have followed if Complainant had refused to report the injury. This is a helpful exercise insofar as it helps to isolate what the decision-makers found objectionable. But it must be treated with care since it is knowledge-dependent. On the facts of this case, for example, I could ask what would have happened if Complainant had relayed the same information to Mr. Surina on December 27, 2010, but then refused to complete the injury report. Or I could ask what would have happened if Complainant had decided not to relay the events of December 19, 2010, to Mr. Surina. The answers to these questions are likely to differ because the result turns on the knowledge of Mr. Surina, and derivatively BNSF. Hence while this sort of approach can helpfully guide an inquiry into the particular motivations of the supervisors, it cannot define the nature of the affirmative defense inquiry. Whether BNSF would have taken the same action

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<sup>14</sup> This flipped version of the analysis is in keeping with BNSF’s earlier transformation of the contribution analysis into a motivating factor analysis.

depends on what BNSF would have known, but its knowledge may come from, or be significantly affected by, the protected activity. Whether the employer would have had the same knowledge is relevant to the affirmative defense inquiry, but it is “neither the sole nor necessarily a decisive basis” on which to resolve the issue. *DeFrancesco II*, ARB No. 13-057 at 9.

Finally, the affirmative defense inquiry in a case involving inherently intertwined protected activity and adverse action could proceed by constructing the closest coherent comparator involving the same sort of actions by an employee but absent the features of those actions that make them protected. I cannot ask whether BNSF would have disciplined Complainant for late reporting of a work-related injury if he had not reported a work-related injury. But BNSF rules also require reporting injuries that are not work-related but interfere with job performance. (*See* CX 5, p. 23; RX G, p. 85; RX 2, p. 115.) Those reports are not protected. I can query what would have happened had Complainant been late on making this sort of report. Confronting a similar sort of intertwining of an injury report that related facts prompting investigation and discipline of unsafe conduct, the *DeFrancesco II* ARB asked whether the railroad would have taken the same adverse action against an uninjured employee who engaged in the same unsafe conduct. ARB No. 13-057 at 9-14. This sort of “closest unprotected comparator” analysis is the best way to approach the affirmative defense in a case where the protected activity and adverse action are inherently intertwined. Punishment of a late injury report is permissible, but punishment of an injury report is not. The task before me is to untangle the two and reach conclusions about what BNSF was really punishing—was it *just* the lateness that drove the discipline? This inquiry requires weighing the employer’s reasons to ascertain whether there is a rational, non-discriminatory basis for that action that powerfully compels a conclusion that the action would have taken place apart from the protected activity. *Id.* at 9-10.

To prevail, a respondent must show not just that it *could* have taken the same action but that it *would* have done so. *Speegle*, ARB No. 13-074 at 11. The showing can be made by direct evidence or circumstantial evidence, which may include “(1) evidence of the temporal proximity between the unprotected activities and the adverse actions; (2) the employee’s work record; (3) statements contained in the relevant office policies; (4) evidence of other similarly situated employees who suffered the same fate; and (5) the proportional relationship between the adverse actions and the bases for the actions.” *Id.* An ALJ must examine the independent significance of the alleged malfeasance, evidence of the employer’s likely actions in alternative scenarios, and the way that the absence of the protected activity would have altered the surrounding context of the alleged malfeasance and adverse action. *Id.* at 12. These must be considered and applied “flexibly on a case-by-case basis.” *Id.*

In *DeFrancesco II* the ARB offered a series of questions to consider. Does the employer routinely monitor or investigate compliance with the rules absent protected activity? Does the employer consistently impose equivalent discipline to employees who violate the rule but engage in no protected activity? Are the rules charged routinely applied? Are those rules vague and subject to manipulation? Does the evidence show that the investigation was designed to further the purpose of the rule rather than as a way to punish the employee? *Id.* at 11-12. To prevail, an employer must show more than that a rule was violated, that it had a legitimate motive for the adverse action, and that it imposes discipline generally whenever it determines a rule has been broken. Instead, it is necessary to establish the more particular point that the rule is applied consistently such that employees who engage in substantially similar conduct absent the

protected activity are also investigated and punished in the same manner. *Id.* at 13-14. It is also important to consider evidence of discipline in other cases, insofar as those cases are suitably similar to the case at hand. *See Cain*, ARB No. 13-006 at 8.

## 2. *Application: Conduct of the Managers*

BNSF's basic argument is that it punished Complainant for reporting an injury late, not for reporting an injury, and that it may lawfully punish late reports of injury. (*E.g.* RRB, pp. 1-2.) BNSF avers that it encourages injury reports and has strict, harsh policies that prohibit retaliation for reporting injuries. (RPB, pp. 2-3; RRB, pp. 2-3.) This is relevant and a starting point, but as BNSF recognizes, does not settle the question. The issue here is what happened in this case, not publically stated corporate policy. It is possible BNSF deviated from the policy here, that it was a culture that departs from the policy, or that other rules and policies actually work against the policies in question. Anti-discrimination and anti-retaliation policies do not immunize an employer from suit. Policies are easy to change, cultures are not.

In support of its affirmative defense, BNSF has introduced two sets of employee records. (*See* RX UU; *see also* HT, pp. 201-05.) The first batch includes workers who have reported injuries but have never been disciplined.<sup>15</sup> (RX UU, pp. 618-59.) The second batch of employee records includes employees with a disciplinary and injury reporting record, but who reported injuries proximate to Complainant but received no discipline related to that incident.<sup>16</sup> (*Id.* at

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<sup>15</sup> One, employee #822, is a carman in Vancouver and has been with BNSF since 1968. This employee has reported 8 on-duty injuries, but only one resulted in lost time. This injury occurred on August 11, 2010, and involved a right wrist fracture and surgery. The mechanism of injury is not clear. The employee has never been disciplined. (RX UU, p. 618.) A second employee, #687, was hired in 1990, and beginning in July 2009 was a machine operator on a mobile gang in the northwest. This employee has never been disciplined and on March 7, 2011, suffered an on-duty injury resulting in a right rib fracture and a cervical sprain/strain. (*Id.* at 626-28.) Next, BNSF offers employee #575. This employee reported a minor crushing injury to the right hand on April 29, 2012, while working as a carman in Vancouver. BNSF has assessed no discipline against this employee. (*Id.* at 633.) Employee #189 has been working as a brakeman/switchman/conductor in Vancouver since 2004, has never been disciplined, and reported a neck, back, and shoulder injury on November 14, 2005, as well as a left foot pain on November 21, 2012. (*Id.* at 638.) Another employee, #218, has been working in a variety of capacities in the northwest since 2009 and reported a right hand bruise and contusion on March 22, 2011. No discipline has been assessed against this employee. (*Id.* at 641.) Additionally, employee #756 reported three injuries while working in the Northwest, including neck pain on March 13, 2011. No discipline has been assessed against this employee. (*Id.* at 644.) Employee #843 has been a machine operator in Vancouver since 2003 and has reported 7 injuries in a career between 1977 and retirement in 2013, including a hearing loss injury in March 2010. This employee was never disciplined. (*Id.* at 648-49.) Employee #218 reported 10 injuries between 1978 and 2010, including orthopedic injuries to the back, neck, shoulders, feet, wrists and hearing loss in January 2010. The employee resigned in 2015 and was never disciplined. (*Id.* at 654-55.) Last, a signal maintainer in Vancouver reported a right finger crushing injury on March 12, 2012, but no discipline was ever assessed by BNSF. (*Id.* at 658.)

<sup>16</sup> An engineer in Vancouver reported asbestosis on August 15, 2012, but was not injured. (RX UU, p. 660.) A gang trackman in Vancouver reported hearing loss on January 4, 2010, but the only discipline on record was a suspension in 1980 for sleeping on the job. This example is not thought through, however, since the employee retired in 2007, and so no discipline was possible. (*Id.* at 662.) The same holds for the next example—a carman in Vancouver who reported carpal tunnel in April 2011, but was already on permanent disability due to a degenerative back condition reported in April 2009. (*Id.* at 667.) Employee 819 reported left elbow pain on June 13, 2012, while working as a maintenance welder in Vancouver, but received no discipline. (*Id.* at 673-74.) Next, employee #043 reported a right knee injury on March 23, 2010, and a right shoulder injury on May 18, 2011, while working as a carman in Vancouver, but received no related discipline. (*Id.* at 681.) Finally, another maintenance welder in

660-94.) According to BNSF, “[t]hese examples constitute clear and convincing evidence that BNSF does not discipline employees for reporting injuries.” (RPB, p. 18.)

Three deficiencies deserve mention. First, though the examples are drawn from employees in the same region as Complainant, there is no indication that the same managers were involved or that other circumstances were suitably similar. Second, Ms. Bausell Luce, who selected these examples, admitted that they are not based on any full review though she denied that she purposely procured examples that would just be of benefit to BNSF. (HT, p. 214.) Even so, without an indication that the files are a representative sampling, their evidentiary value is quite diminished. Finally, as discussed above, BNSF misunderstands what it needs to show. On point comparators would have been subjected to discipline for late reports, but not reported a work-related injury. Instead, BNSF has provided employees who reported an injury but were not subject to discipline. Such comparators are relevant to a degree and do support the required point, but they are weak evidence of that point. They might show that the protected activity isn’t alone sufficient for the adverse action, but BNSF needs the point that the alleged malfeasance is sufficient alone, a much stronger and more particular point.

In its rendition of the facts, BNSF stresses the Public Law Board decision in this case that affirmed the discipline imposed. (RPB, pp. 9-10; *see also* RX J.) Complainant responds that the records in the two cases are different and the Public Law Board should not be given deference here. (CRB, p. 3.) I agree. I am not bound by their decisions, possess a different record, and, most importantly, am tasked with answering an entirely different question. This matter is not another sort of appeal. The Public Law Board was concerned with the ultimate propriety of the discipline. I am concerned with the reasons behind the discipline. BNSF could well have improperly disciplined Complainant, either due to incorrect findings or inadequate procedure, but not violated the FRSA. And it might have disciplined him justifiably yet chosen to do so for improper reasons, in violation of the FRSA.

BNSF’s strongest arguments for its affirmative defense are presented in its discussion of contribution. (*See* RPB, pp. 15-17.) In this case there is no evidence of hostility or animus towards Complainant or the injury-report. Mr. Surina took the report professionally. He believed that Complainant was describing a work-related injury that the rules required be reported. Mr. DeLargy took the same stance once informed of the report. Complainant may have honestly believed that he did not have to report the events of December 19, 2010, but I am convinced that the managers in question, once apprised of those events by Complainant, honestly believed that a work-related injury had to be reported per BNSF rules. Complainant contends that the rule as applied in this circumstance served no purpose—there were no defects or unsafe conditions; no medical care was immediately needed. (CCA, p. 8.) This may well be so, but BNSF has rigid rules that do not permit deviations when managers discern that the rule’s underlying purpose is not served by an application. If it is to apply discipline consistently, and ensure that its managers are punishing violations of legitimate rules rather than playing favorites or unlawfully retaliating, it needs managers to behave exactly as they did here: mechanically applying rules to a situation.

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Vancouver reported back, neck, knee, and foot pain in August 2010 as well as hearing loss, but was not assessed any contemporaneous discipline. (*Id.* at 688.)

The explanation offered by BNSF for the discipline has been consistent and the application of that discipline has been quite straightforward. There is nothing funny or odd about the process in this case that would suggest something untoward or anything more than a very mechanical process of assessing discipline per the collective bargaining agreement and company rules. There are no “red flags” in the process or behavior of the managers. They were almost over-zealous in sticking to their assigned roles in the process. Mr. Surina took the report but as soon as decisions advanced above his position, he ceased to have any involvement beyond consistently reporting what happened, to the best of his recollection. Mr. DeLargy exercised more discretion, but I am convinced that he saw his role and duty to be a straightforward application of BNSF rules regarding timely reports. He did exercise some discretion in imposing the discipline, but in doing so applied a *downward* departure, considerably shortening the length or the probationary period because he determined Complainant had accidentally run afoul of rigid reporting rules that put him in an unfortunate situation.

Complainant makes much of the fact that the managers involved were not trained specifically in the FRSA. (*See* CCA, pp. 2-3.) As BNSF points out, however, the managers were familiar with rules against retaliation, even if they were not trained in the FRSA. (RRA, p. 1.) Complainant points to no requirement mandating such training, and it may well have been ineffective. The managers in question aren’t lawyers; their jobs are to run a railroad. The FRSA requires that they not retaliate against protected activity. BNSF has lawyers and apparently determined that the best way to ensure compliance is through company rules forbidding retaliation coupled with harsh sanctions for violations, not some particularized training in the FRSA. That is a rational choice, and if ultimately unwise, BNSF will likely suffer the consequences in the form of unfavorable FRSA actions. But as relevant here, the managers in question knew that retaliation was forbidden. They also knew that BNSF required making injury reports (both by managers and injured employees). Further, they knew that BNSF had strict rules against late reporting. The record in this case convinces me that the managers were simply mechanically applying the rules and would have done the same for any perceived violation.

Complainant is not the only one caught up in a web of rules in this case—Mr. Surina and Mr. DeLargy also are subject to rules, and if they failed to report an injury or engaged in any retaliation against complainant, their jobs would be put into jeopardy. The record shows they took their duties seriously. Notably, despite long legal proceedings in which Complainant has asserted allegations that could well end their careers, the managers have isolated this administrative process, which is also a protected activity, from any managerial actions. Due in part to their assistance (whether acknowledged or not), Complainant’s career has advanced. Neither Mr. Surina nor Mr. DeLargy merit some special award for this insulation—it is required by BNSF rules and the FRSA. But the fact that they have done so convinces me that they are committed to following BNSF rules against retaliation to the letter, and strictly adhering to the rules generally. It is extraordinarily unlikely that they would be upset by Complainant’s protected injury report, which caused them no evident harm, and so retaliated by treating him differently than any other employee who fell afoul of the rules, yet then immediately cease any further adverse action when presented with protected activity that could cause them very serious harm. Again, this is the way BNSF managers are *required* to act. But Complainant would have me believe that they breached that requirement with little evident motivation to do so yet immediately switched course and adhered to that requirement despite having clear, even if improper, motivation.

Perhaps the most notable feature of this case is that BNSF managers actually *pressed* Complainant to engage in protected activity. It was Complainant who did not want to make the report of the work-related injury, even when told he should do so. Complainant gave a history of his knee problem in the course of procuring medical leave (which was liberally granted). Mr. Surina and then Mr. DeLargy then concluded that Complainant *should* engage in the protected activity, and encouraged him to do so. This is completely backwards from a logical case of retaliation. If the managers don't like the protected activity and will punish it so as to discourage it, then they certainly aren't going to actively encourage an employee to engage in the activity. If they don't want injury reports, the status quo in this case was perfect for them.

Complainant would have me believe that BNSF pressured him into engaging in protected activity and then turned around and punished him for that very activity. That has no support in this record. The managers displayed no animosity toward Complainant, in fact it was quite the opposite. No rationale has been suggested for why they would want to entrap Complainant in this way. In fact, if the underlying aim was to punish Complainant, Mr. Surina and Mr. DeLargy had everything they needed absent the injury report. Once they learned about what had happened on December 19, 2010, they could have simply proceeded to discipline him for *not* reporting a work-related injury. This is one of the ways the affirmative defense query can be posed. Mr. Surina and Mr. DeLargy obviously believed that a report needed to be made. Complainant hadn't done so and was reluctant to do so. Failure to report would be a violation of the rules, and likely a more serious violation with more serious discipline. If the aim was to punish Complainant, it was absurd to push him into engaging in protected activity. It added nothing to their basis for discipline and immediately created the possibility that they could be accused of retaliation in contravention of BNSF rules and the FRSA. If they disliked protected activity, the obvious course of action was to do nothing since Complainant was averse to filing the report. If they disliked Complainant, the obvious course of action was to punish him for failure to report, prompting the same or more serious discipline without procuring protected activity that created a possible retaliation complaint. They did neither—believing an injury occurred, they pressed Complainant to engage in the protected activity and then mechanically pursued discipline per the rules, with Mr. DeLargy showing leniency along the way and later assisting with Complainant's career advancement. Given their understanding of the events of December 19, 2010, BNSF managers were doing Complainant a favor, bringing him into closer compliance with the requirements of the rules. I am convinced they would not have done so if the fact of the report, rather than its lateness, was the driving force of the discipline.

Another possible angle for Complainant is that the managers acted the way they did to protect themselves. (*See, e.g.,* HT, p. 32.) On this theory, BNSF managers were adverse to injury reports, but felt compelled to have Complainant complete one because covering it up could harm them down the road, if Complainant changed his mind or the cover-up otherwise failed. While this was not the only dynamic in play, I do find that one of the reasons Mr. Surina and Mr. DeLargy proceeded with the injury report was potential harm to their careers. BNSF rules are strict, and failure to report an on-duty injury that they knew about could have cost Mr. Surina and Mr. DeLargy their livelihoods. But what of it? BNSF has policies that incentivize reporting injuries when they occur. If its managers act out of fear in seeking out injury reports, they are still seeking out injury reports. It doesn't matter why Mr. Surina and Mr. DeLargy pressed Complainant to engage in protected activity—the fact is that they did so. Again, they could adequately “cover their asses” regardless of whether Complainant made the injury report.

Once Complainant discussed the events of December 19, 2010, with Mr. Surina and Mr. Surina spoke with Mr. DeLargy to clarify what should happen next, the injury was going to get reported whether or not Complainant engaged in protected activity. If he hadn't, Mr. Surina would have done his part of the reporting process and escalated the situation up. Complainant would almost certainly have been in more trouble, not less.

To evaluate the "same-action" defense, the ARB has directed consideration of the independent significance of the alleged malfeasance, evidence of the employer's likely actions in alternative scenarios, and the way that the absence of the protected activity would have altered the surrounding context of the alleged malfeasance and adverse action. *Speegle*, ARB No. 13-074 at 12. Here, the significance of the malfeasance is basic: BNSF has a hard rule about when an injury must be reported, and based on what Complainant said, the managers believed it had been violated. In alternative scenarios the managers could have easily "suppressed" the report by not prompting Complainant to go through the process or, if worried about their obligations to report the injury, could have simply done so on their own without pressing Complainant to engage in protected activity. The protected activity in this case is an isolated event—what it changes about the surrounding context is that it makes the malfeasance the managers believed Complainant had committed less serious while at the same time creates potential difficulties for the managers via potential retaliation complaints. All of these considerations support a conclusion that the managers would have acted in a similar manner if the report was not protected—they would have mechanically applied the rules as they understood them.

Therefore, I am convinced that the individual decision-makers in this case were attempting to punish the lateness of Complainant's report, not the fact that he had made it. Explanations have been consistent, no animus has been evidenced, and their testimony and actions demonstrate that they sought out the protected activity in question, doing their best to minimize the harm it would do to Complainant's career. They determined that Complainant misunderstood the rules about what needed to be reported and had accidentally run afoul of the timely reporting rules. They sought a report because they believed it was required and then pursued discipline because that is what the rules required on these facts. The process was almost mechanical, a necessity if BNSF is going to have consistent rules consistently enforced, whether or not protected activity is involved. In applying the standard rules and process, Complainant was given leniency and the managers supported his later career advancement. Mr. DeLargy explained his motives quite well: "I do feel that he didn't understand the rule, as it was written. And the goal was with the current Level S and the one-year probation, that he would certainly learn from it. And in my mind, it wasn't going to happen again." (HT, p. 158.) It hasn't happened again and Complainant now understands the rules. His career has advanced so that now he is trusted with enforcing those roles. In terms of the individual managers here, the discipline in this case wasn't retaliation.

### *3. Application: Structure of the Rule*

This is not quite the end of the matter. Though I find that the managers involved were simply applying the late reporting rule and would have acted the same regardless of what Complainant was reporting late in contravention of the rules, it remains possible the BNSF's *rules* are retaliatory of injury reports as applied to this situation. Complainant does have an intuitive case that he was treated unfairly: he didn't realize that he had something to report until

December 27, 2010, but by that time he was already in violation of the late reporting rule. Employers are entitled to their rules, even if they are unwise or silly. Courts do not sit as super-personnel departments re-evaluating the propriety of business decisions and employer rules. *See Douglas v. Anderson*, 656 F.2d 528, 535 (9<sup>th</sup> Cir. 1981); *Scaria v. Rubin*, 117 F.3d 652, 655 (2d Cir. 1997); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7<sup>th</sup> Cir. 1986); *see also Kuduk*, 768 F.3d at 792; (RPB, p. 16). But if a rule as applied works to punish *all* protected activity of a given sort, that rule isn't just punishing the malfeasant manner or timing of engaging in protected activity, it is punishing the protected activity itself, no matter the motivations of the managers. Moreover, BNSF's late reporting rule for injuries that are not work-related differs in an important way—it contains no hard deadline, instead indexing the time of the report to the time at which the injury impacts the performance of duties. (*See CX 5*, p. 23; *RX G*, p. 85; *RX 2*, p. 115.) So BNSF *does* treat violations of late reporting rules differently when they are work-related, and thus protected. For the affirmative defense to hold based on the motivations of the managers, it must be the case that this difference is not retaliatory, that it is not targeting protected activity differently as an implicit attempt at suppression.

Complainant presents an argument to the effect that BNSF's rule is in fact non-compliant with the FRSA because it doesn't contain a safe harbor for workers who don't make a timely report of an injury because they don't realize that the injury needs to be reported until after the time has run. (*CCA*, pp. 1-2.) Here, he never wanted to report a work-related injury and does not believe he should have been asked to because he only experienced symptoms of an off-duty injury at work. (*CRB*, p. 4.) Respondent acknowledges the potential issue, but argues that the rule is compliant because PEPA gives a 72 hour window for the report of musculoskeletal injuries that might not be immediately apparent. (*RRB*, pp. 1-2.) Moreover, the rule as applied does not discourage injury reports and did not discourage Complainant here—BNSF actively sought out the injury report. (*RRB*, p. 2.)

One of the rationales for the expanded protection of injury reports in the FRSA is Congress' determination that there was chronic underreporting of injuries in the industry and harassment of employees reporting work-related injuries. There was evidence of management use of policies to deter employees from reporting injuries and then finding ways of punishing them if they did so. *See Henderson*, ARB No. 11-013 at 6-7; *Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-11, slip op. at 12-14 (ARB July 25, 2012); *see also Araujo*, 708 F.3d at 159-60. Railroads have a legitimate interest in rules requiring timely and accurate reports of injury, but cases involving these rules deserve scrutiny to ensure that the rules in question are rational and not covert ways of punishing protected activity. *See Smith-Bunge*, 60 F. Supp. 3d at 1041. To be rational, these rules and their application should recognize that employees do not always realize they are injured immediately or understand that their injury is work-related. Railroading is strenuous work and feeling stiff and sore is a common, normal part of employment that may signal injury or may not. With muscular-skeletal injuries in particular, an employee may not realize that an injury has occurred for some time after the injurious event, and rules regarding prompt reporting should not be used as a means to chill such reports in full. *Id.* Even seemingly beneficial injury policies to mask retaliation for reports of work-related injuries in cases where the policies involve rules so confusing and overlapping that they entangle employees in violations, prompting discipline. *Hutton*, ARB No. 11-091 at 10-11. In a recent case involving the same rule, I found that the affirmative defense failed, in part, because the structure of the various rules made it impossible

for the complainant to comply. In such a circumstance, the rule was discriminatory, and the affirmative defense could not be sustained on its basis. *See Brough v. BNSF Ry. Co.*, ALJ No. 2014-FRS-00103, slip op. at. 75-81 (ALJ Aug 18, 2016).

The rule used to punish Complainant here required an injury report within 72 hours of the triggering incident. From the outside, this is a poorly crafted rule.<sup>17</sup> An employee may not be aware that there is anything in need of a report until after the deadline has passed. If an employee initially suffers only everyday aches and pains not in need of report and only learns later that there is an injury, the rule puts him or her in an impossible situation, unable to engage in protected activity without facing punishment. Importantly, the timing rule for non-work-related injuries does not create this trap since it indexes the time of the report to the point at which job performance is compromised. This might not happen until well after the triggering event, but so long as the employee is zealous of reporting the off-duty injury as soon as it he is or should be aware that his performance has been impacted, he can avoid discipline. For a work-related injury, however, the clock has already been running, and may well have passed, so even if an employee makes a report as soon as she realizes she has suffered more than workaday aches and pains, it may already be too late.

But that is not this case. In *Brough*, for example, there were a number of factors not present here: irregular procedure, decisions made before investigation, animus to the employee, inconsistent explanations both in the testimony and in the formal charging and disciplinary documents, etc. None of that is part of this case—the process and behavior of BNSF officers is remarkably “clean” and free of indications suggesting anything more than mechanical application. Moreover, in this case, Complainant *did* have something to report on December 19, 2010. This was not an injury that Complainant only became aware of after the fact. I credit that Complainant only became aware that he had to report the injury after the 72 hours had run. Mr. DeLargy reached the same conclusion and opted to show leniency. But the lack of awareness here was as to the requirements of the rule, not the underlying facts that triggered the rule.

Complainant reported that on December 19, 2010, he felt a particularly sharp pain while at work and completing a particular task, bending down to couple an air hose. It was significant enough that he had to help himself up and remembered the event for days afterward. Per BNSF’s understanding of an injury, this needed to be reported. It was not just a normal ache and pain that Complainant brought on the property; it was an acute event that stuck out as a notable manifestation, and perhaps aggravation, of the underlying condition. As Complainant’s career has progressed and he has learned from this situation, he has come to understand what the rule required of him, even though at the time he had a different understanding. (*See* HT, 84-85.)

As this matter developed, Complainant has attempted to downplay the significance of what happened on December 19, 2010, and stress the pre-existing, non-work-related, aspect of the injury. This was his defense in the disciplinary hearing and appeals. It failed, largely

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<sup>17</sup> From an outside perspective, an “awareness” based rule pegged to actual or reasonable awareness would make much better sense. Determining the time of awareness can be a tricky matter, and creates adjudicatory difficulties in an industrial setting. BNSF might be legitimately worried that if it adopts an awareness rule, malfeasant employees will escape discipline, either in the first instance or on appeal, by pleading a lack of awareness. My concern in this section is whether such a rule, as applied to a fact pattern of this sort, results in retaliation against protected activity rather than malfeasant late reporting.

because, as he recognizes now, BNSF operates with a lower threshold of what needs to be reported as an on-duty injury.<sup>18</sup> In making this shift, Complainant has been honest—he has never denied that there was something special about December 19, 2010, that stuck out. That it “stuck out” makes an important difference. Moreover, even if his later levels of emphasis on the importance of various events is correct, when he spoke with Mr. Surina on December 27, 2010, Complainant clearly placed significant stress on the particular pain he felt on December 19, 2010. Mr. Surina didn’t invent this incident and had no reasons to do so. When Complainant sought leave, *he* connected it to the acute pain on December 19, 2010, with the medical condition added later. The events of December 19, 2010, then, were notable and memorable such that if Complainant had better understood the rule, as he does now as a manager, he could and would have reported his injury in a timely fashion. Thus, from Mr. Surina’s and Mr. DeLargy’s perspective, there was something that occurred on December 19, 2010, that Complainant, if he properly understood the rule, would have reported. This made an important difference to them, as Mr. DeLargy explained to Complainant. (*See* HT, pp. 37-38, 156, 167; RX AA, pp. 250-51.)

That fact about the injury and what Complainant reported to his managers allows me to distinguish between protected activity that would not have been disciplined and protected activity that would be disciplined because it came too late. I can, therefore, reach conclusions as to *what* was driving the discipline from BNSF (its managers and rules operating in tandem) and what would have happened in the event of a late, but un-protected, report. The rule as applied to this sort of case is somewhat unfair, but it is not retaliatory because it doesn’t, it merely structures the right to report a work-related injury rather than covertly undermining that right.

Yet the December 27, 2010, report might not have been punished if it didn’t involve a work-related injury. BNSF’s reporting rule for non-work-related injuries doesn’t have a rigid, hard deadline such that Complainant would have violated it. In the course of an appeal, one BNSF manager argued that Complainant would have violated the timing rule for non-work-related injuries, (*see* RX DDD, pp. 616-17), but the evidence is not convincing on this point. The rule turns on when the injury impacted work-performance, and the managers might have concluded that he was compliant because shortly after Complainant realized that this was so, he reached out to Mr. Stengem and asked to be laid off due to an unspecified medical condition. Nonetheless, the difference between the rules has a rational, compelling justification. BNSF has much more of an interest in work-related injuries than in non-work-related injuries. Work-related injuries might signal safety concerns in need of immediate redress, so it is rational for BNSF to craft a rule with a hard deadline that requires employees to err on the side of reporting when something acute happens while working. BNSF has an interest in non-work-related injuries as well, but only when they pose possible safety hazards or impact an employee’s ability to do his or her job. It is perfectly sensible, then, to index the time of the report differently in the two rules. I thus conclude that the difference is not an implicit sort of retaliation against protected activity, so long as it remains possible for an injured employee to comply with the rule.

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<sup>18</sup> With good reason: it is a basic principle of workers’ compensation law that a pre-existing condition can become work-related “if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought. This sometimes expressed by saying that the employer takes the employee as it finds that employee.” *See* 1.9 Larson’s Workers’ Compensation Law § 9.02[1] (2015).

Thus, I find that on the facts of this case, BNSF's late reporting rule does not, in effect, punish the protected activity. BNSF and its managers in this case had a clear idea of what Complainant was supposed to do to report the injury. Complainant could have complied with these requirements by reporting the particular event on December 19, 2010, or shortly thereafter. The discipline in this case came not from the report but from the fact that Complainant made it late. I tend to agree with Complainant's intuitive objection that this seems a bit unfair. He had a reasonable misunderstanding of a rule that is incredibly rigid. It puts employees who suffer acute pains of the sort Complainant experienced in a bit of a box: do they go to the trouble of reporting an injury or shoulder the risk that if something more develops, they will be late in making the report? BNSF, however, is entitled to impose rigid rules that applied to some situations result in harsh results that feel unfair, it just cannot adopt and apply rules that are retaliatory against protected activity in a given case. Here it has not done so because its expectations were rational and clear and Complainant could have met them.

#### *4. Conclusion*

The record convincingly shows that there was no animus towards or effort at suppression of Complainant's injury report—it was exactly the opposite. Complainant, not understanding the rules in question, saw no need to file an injury report. His managers, based on Complainant's rendition of the situation, determined that a report needed to be filed and solicited the protected activity in question.

Above I determined that Complainant engaged in protected activity by reporting a work-related injury on December 27, 2010. He was subjected to adverse action in the assessment of the Level-S discipline. These events were inextricably intertwined, since on BNSF's theory of the case it is essential to make reference to the protected activity of filing an injury report. This makes out a showing of contribution, shifting the burden to BNSF to show by clear and convincing evidence that it would have taken the same adverse action absent the protected activity. I find that BNSF has sustained this showing on the record before me.

In this case, there is a clear difference between protected activity that would subject Complainant to discipline and protected activity that would not. I am convinced that the decision-makers here were simply applying a late reporting rule and attempting to discipline a late report in the way they believed that the rules required. I am also convinced that they would have engaged in the same course of action for any sort of late report, regardless of whether or not the report constituted a protected activity. Therefore, I find that BNSF has established its affirmative defense as to the Injury Report complaint: despite the "inextricable" contribution of the protected activity/injury report, the adverse action/Level-S discipline was driven, in terms of the rules applied and the managers applying them, by the fact that Complainant was late in making the report and that the same course of action would have been taken if a late, un-protected, report had been made. Therefore, BNSF is not liable for retaliation under 49 U.S.C. § 20109(a)(4) as alleged in Complainant's Injury Report complaint.

## **VII. ORDER**

For the reasons stated above, it is hereby ORDERED that Complainant's August 5, 2011, complaint is DISMISSED.

JENNIFER GEE  
Administrative Law Judge

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

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

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