



Issue Date: 16 November 2017

Case No.: 2015-FRS-00041
OSHA Case No.: 5-1260-14-134

In the Matter of:

MARILEE TAYLOR,
Complainant,

v.

BNSF RAILWAY COMPANY,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

This matter arises under the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109 (the “Act” or “FRSA”), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, and the implementing regulations at 29 C.F.R. Part 1982.

PROCEDURAL BACKGROUND

On June 29, 2014, Marilee Taylor (“Complainant” or “Ms. Taylor”) filed a complaint with the Occupational Safety and Health Administration (“OSHA”) alleging that BNSF Railway Company (“Respondent” or “BNSF”) violated FRSA by retaliating against her for representing a coworker at a disciplinary hearing. Specifically, Complainant alleged that Respondent falsely charged her with running through a switch and failing to properly protect her train’s rearward movement, which resulted in a thirty-day Level S record suspension and a twelve-month review period.

After conducting an investigation, OSHA issued a determination letter dated February 11, 2015 dismissing the complaint. OSHA concluded that Complainant’s protected activity was not a contributing factor in the disciplinary action and that Respondent would have taken the same action in the absence of Complainant’s protected activity.

On March 16, 2015, Complainant objected to OSHA’s findings and requested a hearing before the U.S. Department of Labor’s Office of Administrative Law Judges (“OALJ”). I held a formal hearing in this matter in Chicago, Illinois on May 11, 2016. At the hearing, I admitted into evidence ALJ Exhibits (“ALJX”) 1-5; Joint Exhibit (“JX”) 1; Complainant’s Exhibits (“CX”) 2-12; and Respondent’s Exhibits (“RX”) 1-6 and 8-20.¹ I excluded CX 1 from evidence. At the hearing, Ms. Taylor, Randolph Purnell, Jr. (“Mr. Purnell”), Kevin G. Swanson (“Mr. Swanson”), and Timothy Merriweather (“Mr. Merriweather”) testified. Both parties gave closing statements in lieu of filing post-hearing briefs.

The findings and conclusions that follow are based on a complete review of the record in light of the arguments of the parties, the testimony and evidence submitted, applicable statutory provisions, regulations, and pertinent precedent.

APPLICABLE LAW

FRSA provides that a rail carrier engaged in interstate commerce may not retaliate against an employee for engaging in certain protected activities. *See* 49 U.S.C. § 20109. FRSA investigatory proceedings are governed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”), 49 U.S.C. § 42121(b). 49 U.S.C. § 20109(d)(2). AIR 21 prescribes different burdens of proof at different stages of the administrative process. Under AIR 21, a complainant must establish by a preponderance of the evidence that she engaged in a protected activity that was a “contributing factor” in the respondent taking an adverse employment action against her. Thereafter, a respondent can only rebut a complainant’s case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of the complainant’s protected activity. *See Powers v. Union Pac. R.R. Co.*, No. 13-034, ALJ No. 2010-FRS-00030, slip op. at 11-12 (ARB Jan. 6, 2017).

Consequently, in order to meet her burden of proof under FRSA, Ms. Taylor must prove by a preponderance of the evidence that: 1) she engaged in protected activity; 2) she suffered an adverse personnel action; and 3) such protected activity was a contributing factor in the adverse personnel action.² *Palmer v. Can. Nat’l Ry.*, No. 16-035, ALJ No. 2014-FRS-00154, slip op. at 16 and 52-53 (ARB Sept. 30, 2016) (en banc); *see also* 29 C.F.R. § 1982.109(a). If she meets her burden, Respondent can only avoid liability if it shows “by clear and convincing evidence that it would have taken same adverse action in the absence of any protected activity.” *Palmer*, slip op. at 52-53; *see also* 29 C.F.R. § 1982.109(b). The regulations governing cases brought under FRSA incorporate the General Rules of Practice and Procedure before the OALJ, which are found at 29 C.F.R. Part 18. *See* 29 C.F.R. § 1982.107(a).

¹ Respondent withdrew RX 7. Tr. at 43:19-25.

² At the hearing, the parties made arguments regarding a fourth element: whether the decision maker at BNSF responsible for disciplining Ms. Taylor had knowledge of her protected activity. The Administrative Review Board (“ARB”) has held, however, that whistleblower complaints arising under the AIR 21 framework have only three elements and that respondent’s knowledge of complainant’s protected activity is a factor to consider under the causation element. *See, e.g., Hamilton v. CSX Transp., Inc.*, No. 12-022, ALJ No. 2010-FRS-00025, n.7 (ARB Apr. 30, 2013).

ISSUES

The parties stipulate that: 1) Respondent is a railroad carrier engaged in interstate commerce and thus is subject to FRSA's employee protection provisions; 2) Complainant is an employee covered by FRSA's employee protection provisions; and 3) the thirty-day Level S Record Suspension constitutes an adverse employment action. JX 1 at 1-2. I find that the record supports these stipulations.

The parties dispute the following issues (*see* Tr. at 20-28):

1. Whether Complainant has proven by a preponderance of the evidence that she engaged in protected activity under FRSA;
2. If so, whether Complainant has proven by a preponderance of the evidence that her protected activity was a contributing factor in the issuance of a thirty-day Level S record suspension;
3. If so, whether Respondent has proven by clear and convincing evidence that it would have suspended Complainant notwithstanding her protected activity; and
4. As may be applicable, the amount of damages to be awarded.

SUMMARY OF EVIDENCE

BNSF Disciplinary Documents

On September 18, 2013, BNSF issued a notice of investigation against Marilee Taylor and conductor Kyle Smith in connection with a September 15, 2013 incident at the Cicero Terminal.³ RX 2. Specifically, Ms. Taylor was alleged to have 1) run through a switch;⁴ and 2) failed to visually monitor the rearward movement of her train (a movement alternately referred to as "making the shove"). *Id.* Kevin G. Swanson conducted an investigatory hearing on November 5, 2013, during which Ms. Taylor and a number of other witnesses testified. RX 3. On January 3, 2014, Mr. Swanson disciplined Ms. Taylor with a thirty-day Level S record suspension and a one-year review period. RX 4. In the disciplinary letter, Mr. Swanson determined that Ms. Taylor had violated General Code of Operating Rules ("GCOR") "1.6 Conduct, GCOR 6.5 Shoving Movements, GCOR 8.15 Switches Run Through, GCOR 6.28 Movement on other than Main Track and GCOR 7.1 Switching Safely and Efficiently." *Id.*

³ Ruth McCullum, Director of Administration Operations, signed the notice, but Mr. Merriweather testified at the hearing that he ordered the issuance of the notice. RX 2; Tr. at 182:7-12.

⁴ A switch is the point at which two train tracks meet. Tr. at 61:16-21; CX 8. The switch point mechanism can be opened or closed for movement. *Id.* If a train runs through a switch when it is closed for movement, it can damage the mechanism. *Id.* Ms. Taylor clarified that CX 8 is "simply a representation of what a switch looks like, not the specific switch that [Ms. Taylor] was alleged to have overrun." Tr. at 84:21-85:15.

The testimony below includes several references to the GCOR rules Ms. Taylor was alleged to have violated. For the sake of context, I will briefly excerpt the most relevant operating rules at issue.

GCOR 6.5, Shoving Movements, provides in pertinent part:

Cars or engines must not be shoved until the engineer knows who is protecting the movement and how protection will be provided. The employee providing protection for the movement shall not engage in any task unrelated to the movement.

When cars or engines are shoved, crew member must be in position and provide visual protection unless relieved by:

- Local instructions for tracks equipped with shove lights/cameras.
- Special instructions specific to tracks involved.
- Rule 6.6 (Back Up Movements).
- Pullout move within an activated Remote Control Zone (RCZ).

Minimum requirements when radio communication is used during shoving movements:

- Direction will be described in relationship to the front of the controlling locomotive (F stencil).
- . . .
- To instruct the engineer to move the locomotive backward use “backup”.
- To instruct the engineer to stop, use the work “stop”.

. . .

Note: Employees are encouraged to communicate additional information related to shoving movements (e.g. switch/derail position, close clearance conditions, stop signals, authority limits, etc.). . . .

RX 13 at 3.

GCOR 8.15, Switches Run Through, provides in pertinent part:

Do not run through switches, other than spring switches or variable switches. If a rigid type switch is run through, it is unsafe and must be protected by spiking the switch,⁵ unless a trackman or other employee takes charge.

An engine or car that partially runs through a switch must continue movement over the switch. The engine or car must not change direction over a damaged switch until it has been spiked or repaired.

⁵ To spike a switch means “using a railroad spike to make sure [the switch] is not going to be run through again.” Tr. at 126:23-25.

RX 13 at 6 (footnote added).

*Testimony of Marilee Taylor*⁶

Ms. Taylor began working in the railroad industry in 1987 for Norfolk Southern. Tr. at 53. BNSF hired Ms. Taylor as a switchman in 1993 and promoted her in 1994 to her current position as a locomotive engineer. Tr. at 53-54. Ms. Taylor stated that she is responsible for running freight and commuter train engines and conducting daily engine inspections. *Id.*

On September 11, 2013, Ms. Taylor represented her co-worker Michael Brousil at two disciplinary hearings. Tr. at 55; CX 11-12. The first resulted from a July 2013 incident in which an indicator light failed to establish that a commuter train's doors were closed. CX 11 at 6:22-7:7. Mr. Brousil faced discipline because he refused to use an alternative procedure to check the doors in order to operate the train. *Id.* The second hearing resulted from an August 2013 incident in which Mr. Brousil refused to activate a commuter train's head end power system within Chicago's Union Station due to concerns about the air quality of the tunnels. Tr. at 55; CX 12 at 11:3-26. Ms. Taylor's testimony before me focused primarily on her role at the second Brousil disciplinary hearing.

The August 2013 incident at issue in the second hearing began when Mr. Brousil stopped his commuter train about thirty feet short from the bump and post signal⁷ upon arriving at Union Station. Tr. at 55:22-25; CX 12 at 64:14-15. Mr. Brousil felt it was unsafe to move the train any farther because it would result in him not being able to see the signal. Tr. at 55:22-25; CX 12 at 64:16-65:1. A passenger with disabilities then requested assistance to depart the train. CX 12 at 6:22-26. While the train was equipped with an accessibility lift, the mechanism required additional power to operate. *Id.* at 11:3-26, 57:2-26. BNSF's normal procedures called for the train to be connected to an external power supply ("shore power") via an extension cord, but the cord could not reach the train because Mr. Brousil had stopped short of the signal. Tr. at 55:14-56:1; CX 12 at 11:5-6, 32:25-33:1, 34:15-18, 35:2-5, 55:17-20. Mr. Brousil was instructed to power the lift by activating the locomotive's head end power supply. *Id.* at 35:13-16, 58:11-17. During the disciplinary hearing, Ms. Taylor asked Mr. Brousil to explain why activating the head end power supply within Union Station's enclosed tunnels would be dangerous, to which he responded: "[t]he issues are the [] unsafe and unhealthy [] conditions that [] you incur from the diesel, the poisonous and toxic diesel admissions." *Id.* at 62:1-3. During his closing statement at the hearing, Mr. Brousil noted that "the concerns of unsafe and unhealthy working conditions that are derived from the poisonous and toxic gases along with the group one carcinogens from the diesel admissions [] are well documented . . . U.S. Senator Dick Durbin from Illinois has also expressed his concerns with the dangerous pollution level problems in Chicago Union Station tunnels." *Id.* at 79:17-20, 79:26-80:3.

Mr. Brousil first complained about Union Station's air quality in March 2011. *Id.* at 62:18-19. He also complained about the placement of the bump and post signal shortly after it was installed in April 2013. *Id.* at 55:20-56:1; CX 12 at 65:3-10. Mr. Brousil escalated the matter to BNSF's safety hotline in May 2013. *Id.* According to Mr. Brousil's testimony at his

⁶ Ms. Taylor was not represented by counsel. She gave her testimony in narrative form, prompted by my questions.

⁷ Ms. Taylor described this as essentially a stop signal. Tr. at 55:21-22.

disciplinary hearing, Superintendent Timothy Merriweather responded to the safety hotline complaint by promising to provide longer extension cords so that Mr. Brousil could stop his train before the signal became obscured and still connect to shore power. CX 12 at 65:13-66:26. This would reduce Mr. Brousil's exposure to diesel exhaust by eliminating the need to activate head end power. *Id.* While Mr. Merriweather closed the safety hotline complaint, Mr. Brousil testified at his disciplinary hearing that Mr. Merriweather never provided the longer cords. *Id.* at 61:3-5, 66:6-23. Mr. Brousil explained that he refused to utilize his train's head end power supply during the August 2013 incident because he wanted to "take the safe course and the healthy course" given the lack of long extension cords. *Id.* at 61:3-5.

Ms. Taylor testified that while she shared Mr. Brousil's concerns about Union Station's air quality and the placement of the signal, she did not state her personal opinions at the disciplinary hearing.⁸ Tr. at 58:1-13. According to Ms. Taylor, her role at the hearing was limited to bringing out the testimony of others in furtherance of Mr. Brousil's defense. *Id.* Specifically, Ms. Taylor stated that she elicited testimony from Mr. Brousil alleging that Mr. Merriweather did not abide by the promises he made when closing out the safety hotline complaint. *Id.* at 56:4-22.

On September 15, 2013, four days after Mr. Brousil's disciplinary hearings, Ms. Taylor was assigned to work on a train with conductor Kyle Smith. *Id.* at 58:17-23, 65:16-17.⁹ Mr. Smith "was a new guy [with] [l]ess than a year and a half" of experience. *Id.* at 66:14-15. Ms. Taylor stated that "the weight of lack of experience falls on the person with more experience ... I felt like it was going to be a long trip because I had to be on double duty as it were." *Id.* at 66:17-21. Upon receiving the assignment, Ms. Taylor inspected the engine and train cars. *Id.* at 58:24-59:10. Mr. Smith was not present in the engine at the same time as Ms. Taylor during the inspection process, which "grabbed [her] attention." *Id.* at 59:13-17. Ms. Taylor stated that she was in communication with Mr. Smith through hand signals during this period because "it's better to not be on the radio all that time." *Id.* at 59:20-21.

Shortly after her train began moving, Ms. Taylor noticed that two other nearby trains were also moving. *Id.* at 59:23-60:5. Ms. Taylor said that she could not determine "where [the trains] were going" and that she became concerned the other trains might be on her track due to the alignment of the switches. *Id.* Ms. Taylor explained that "after a period of time on the railroad, one of things that you develop is to know where everybody is by listening to the radio. So you know if somebody is going to come out and be in your way." *Id.* at 60:16-19. This time, however, Ms. Taylor "was wondering why . . . I hadn't heard anything" over the radio about the placement of the other trains. *Id.* at 60:15, 19. Ms. Taylor testified that "[i]t took a second to realize" that she was on the wrong radio channel and "that was why" she did not hear any information about the movement of the two nearby trains. *Id.* at 60:20. Ms. Taylor explained that "I momentarily forgot that we were on two different channels." *Id.* at 60:4-5.

⁸ Ms. Taylor testified, "I work in suburban service too, and I have been part of the discussion and part of the complaints as to the quality of air in that depot. It's like a tunnel. I don't know if you've ever been in it, but it's like a tunnel and it's not ventilated. Diesel emissions are not good for your health. That's the documented fact. I'm not the scientist. I just read them. Read the reports." Tr. at 57:9-15.

⁹ In many places in the transcript, there is reference to a "Mr. Schmidt." The conductor's name is Kyle Smith. Any transcript references to "Mr. Schmidt" in fact refer to Mr. Smith.

When Ms. Taylor realized that she was on the wrong radio channel, she “stopped [the train] with the intention of going to the other side of the cab” in order to determine whether her train could proceed. *Id.* at 60:20-24. Ms. Taylor testified that when she stopped the train, Mr. Smith “started screaming about running through a switch.” *Id.* at 60:25-61:1. According to Ms. Taylor, Mr. Smith continued to talk, but she could not determine whether Mr. Smith was talking to her or to someone on his cell phone. *Id.* at 65:13-15. Ms. Taylor contended that she did not run through a switch:

I said no [to Kyle Smith]. I mean, I’ve been doing this for a very long period of time and I certainly know if a switch is right or not right. . . . I didn’t even use the - there are two types of brakes on the train. There’s an engine brake; there’s brakes on each car that’s called a train brake. I didn’t have to stop with the train brake. I never stopped with it.

Id. at 65:19-21, 66:1-8. During her testimony, Ms. Taylor questioned whether Mr. Smith made a false statement about the train running through the switch. *Tr.* at 73:7-74:4. Ms. Taylor agreed it was possible Mr. Smith saw the front of the locomotive extend over the switch, but failed to realize the wheels had not reached the switch. *Id.* at 73:17-74:6. Ms. Taylor also testified “[i]t’s possible [Mr. Smith] had an entirely different agenda,” though she conceded this was speculation. *Id.*

Ms. Taylor testified that she was called into Mr. Merriweather’s office later in the day on September 15, 2013, whereupon he said, “who’s going to represent you now that you’re in trouble[?] And he laughed. [He] [d]id it not once, but twice.” *Id.* at 70:3-7, 103:7-10. Ms. Taylor testified that these comments led her to believe Mr. Merriweather was retaliating against her for representing Mr. Brousil. *Id.* at 69:20-70:7.

Ms. Taylor was subsequently investigated for allegedly overrunning the switch. *Id.* at 68:6-8. On January 3, 2014, Ms. Taylor was disciplined with a thirty day record suspension and a one year review period, a penalty that she characterized as “[j]ust short of dismissal.”¹⁰ *Id.* at 68:12-17, 69:16-19. When asked who imposed the discipline, Ms. Taylor stated: “[i]n my opinion, it’s Superintendent Merriweather.”¹¹ *Id.* at 69:8-9. Ms. Taylor testified that the discipline affected her in the following way:

To me, the entire episode up through and including the letter of discipline beginning with the investigation -- beginning with the charges, beginning with the events of that day, was to me an assault. It was no different than being an assault. It made me physically ill. It continues to make me ill as I think about it, as I have to go through this, read the transcript. It affected me in a deeply, deeply personal way and not for the better.

¹⁰ Ms. Taylor testified that while she did not suffer a reduction in pay or hours, her reputation was harmed at work. *Id.* at 72:9-25.

¹¹ Ms. Taylor noted, however, that BNSF disciplinary actions are subject to review by other officials and committees. *Id.* at 68:21-69:12.

As to my record, I stand on my record, Your Honor. I've worked on the railroad for all these years. I'm awful good. Not a good woman engineer, Your Honor. I'm a good engineer, and I will hold my capacity against anybody, and I believe on good day -- on a bad day I'm better than 90 percent. On a good day, way more than 90 percent.

Id. at 71:19-72:8.

At the close of Ms. Taylor's direct testimony, I asked if she had anything to add about whether 1) she engaged in protected activity; 2) the protected activity was a contributing factor in the unfavorable personnel action; and 3) Respondent would have taken the same personnel action in the absence of the protected activity. *Id.* at 74:7-16. Ms. Taylor responded:

Your Honor, falsification of testimony in the BNSF investigation is either day regular¹² for the BNSF or it was something different that they were able to accomplish. That is part of the retaliation. Nobody is going to come up and tell you I'm firing you because you're black, or I'm firing you because you're a woman, or I'm going after you because you did -- you brought up safety issues. This is 2013. Nobody does that. It's under different auspices that retaliation and harassment and everything else in this world occurs.

So the original thing I would have to ask you, Your Honor, if somebody had 20 years on your railroad, maybe a month shy, 20 years on your railroad and somebody else had a year and a half, wouldn't it be more reasonable to say look at my record, which is in evidence today, which we'll look at. Wouldn't it be more reasonable to just say what happened? And reasonableness was not any part of this. I have had no issue before like that and none since.

Id. at 74:17-75:9. Ms. Taylor also clarified that she had no other disciplinary marks on her record at BNSF or at Norfolk Southern. *Id.* at 75:13-15.

During cross-examination, Ms. Taylor testified that she represented BNSF employees at approximately twenty disciplinary hearings between 2008 and 2012. *Id.* at 76:16-23. Ms. Taylor reiterated that BNSF did not discipline her during this period, nor did she have reason to file a complaint with OSHA. *Id.* at 76:24-77:4. With respect to the Brousil disciplinary hearings, Ms. Taylor stated she elicited testimony about four issues: 1) the functionality of certain train door indicator lights; 2) excessive diesel exhaust in Union Station; 3) the length of shore power cables; and 4) the placement of the stop signal in Union Station. *Id.* at 80:6-25. Ms. Taylor confirmed she did not raise any of her own concerns during the hearing. *Id.*

Ms. Taylor then read excerpts from a February 25, 2015 deposition in which she recounted what happened immediately after Mr. Smith alleged she ran through the switch. According to the deposition transcript, Ms. Taylor exited the cab and told Mr. Smith she would demonstrate that she had not run through the switch by backing up the train. *Id.* at 86:16-87:1.

¹² The transcript notes the phrase "day regular" is a phonetic approximation of what Ms. Taylor said.

According to Ms. Taylor's testimony on cross-examination at the hearing, she also looked back at the train while outside of the cab in order to determine whether the track was clear for movement.¹³ *Id.* at 95:2-4, 20-96:17. Ms. Taylor stated in the deposition that her exchange with Mr. Smith lasted "about a minute." *Id.* at 87:15.

In order to more precisely determine how long Ms. Taylor spoke with Mr. Smith, Counsel for Respondent asked about technical information BNSF downloaded from the train after the incident.¹⁴ Ms. Taylor read from a BNSF hearing transcript in which foreman Robert Della-Pietra interpreted the downloads. According to the downloads, seven seconds elapsed between the time the train stopped and when the control mechanism was reversed; fifteen seconds elapsed between when the control mechanism was reversed and when the train's rearward movement began. *Id.* at 100:11-18; RX 3 at 87:3-8. When asked if "22 seconds ... passed between the time you stopped and the time you started moving backward," Ms. Taylor agreed. Tr. at 100:19-24.

Ms. Taylor insisted that this was enough time to exit the cab, confer with Mr. Smith, and check whether the track was clear. *Id.* at 100:25-103:2. Specifically, Ms. Taylor noted the favorable weather conditions and that her conversation with Mr. Smith occurred while she was descending from and ascending back into the train cab. *Id.* at 101:4-14, 102:17-103:2.

Ms. Taylor stated that upon returning to the cab, she used the mirrors to visually protect the train's movement while making the shove. *Id.* at 90:3-11. Mr. Smith remained at the front and did not guide the train; no other person protected the train's rearward movement. *Id.* at 91:17-92:5, 92:8-12, 93:11-22. In response to a question from opposing counsel, Ms. Taylor stated she could not see both sides of the end of her train, but argued she was "not required . . . to see the . . . entire back of the . . . rear car [while] shoving." *Id.* at 90:25-91:2. Ms. Taylor elaborated in the following exchange:

Q. But you're telling me that you never had sight of the leading edge of the train?

...

A. That's not at all what I'm saying. I'm saying I had sight of it entirely. The entire time I saw it when I broke it away from the cars that were left there. I didn't take the whole track. I saw when it broke. I -- I use my mirror so often

¹³ Ms. Taylor's October 15, 2015 Accident Incident Interview Form stated in pertinent part, "[m]y first switch was right for me. The next switch was wrong. I stopped clear of the second switch, back further from the first switch. Hand through it both ways. Looked fine. Nothing bent. Switched easily in each direction." CX 3 at 182; Tr. at 97:15-18. Ms. Taylor conceded that her initial statement made no reference to exiting the cab between stopping the train and making the shove, but she argued she did not include every pertinent detail in the Accident Incident Interview Form. Tr. at 97:21-22.

¹⁴ BNSF's trains are equipped with a device similar to an airplane's black box. "You plug in your computer and you get to see any sort of reverse, back-up, what position the throttle was in, how much brake pressure is applied. It's everything that is done in the controls of a locomotive." *Id.* at 132:21-133:3.

that the roundhouse is tired of me calling them out to tighten them up. So I never did not have visual.

Q. You were just watching one side of the train?

A. Oh, yes.

Q. You could not see what was happening on the other side of the train?

A. No, but I had -- as I explained to you earlier in the deposition, I had gotten on the ground and looked; and I looked where the wheels were. I double check lots of stuff.

Id. at 94:13-95:4.

When asked about the conversation she had with Mr. Merriweather on September 15, 2013, Ms. Taylor stated that Mr. Merriweather did not directly mention the Brousil investigations, but that she interpreted Mr. Merriweather's question about who would represent her at a disciplinary hearing to be a reference to her role in the Brousil investigations. *Id.* at 103:7-17. Counsel for Respondent also presented Ms. Taylor with an exchange from her deposition in which she expressed the belief that BNSF, through Mr. Merriweather, was attempting to retaliate against her:

Q. Now you told me at your deposition that you believed Mr. Merriweather had this plan in motion at this time -- he had this plan in motion to discipline you, is that correct?

A. Could you give me the page number?

Q. Sure. Page 61, lines 20 through 24. I'll read my question. Question: "So you're telling me like you felt at this point in time they already had a plan in motion to somehow discipline you as a result of your participation in the Brousil hearing?" What was your response?

A. My response is "Yes." I don't object to drug and alcohol testing. I don't have an issue with that if it's unclear.

Id. at 104:6-19. Counsel for Respondent asked Ms. Taylor to further explain how she understood the retaliation to have taken place:

Q. Prior to September 15th had you ever worked with Mr. Smith?

A. No.

Q. Do you believe Mr. Smith was involved in some sort of plan to retaliate against you?

A. I don't know what was in Mr. Smith's mind.

Q. What about Trainmaster Bond, do you believe that he was part of some plan to retaliate against you?

A. I don't think he was part of a plan to retaliate against me.

Q. Do you think that he retaliated against you in some way by virtue of this discipline?

A. He retaliated against me by presenting false testimony in that investigation. That was his retaliation.

Q. Okay. How about Mr. Della-Pietra? Was he part of a plan to retaliate against you?

A. I don't -- I'm not sure I'm following on this plan. I don't think that I'm trying to testify that there was a meeting in -- I'm envisioning a smoky room and someone came up with a plan. I'm not saying that. I certainly don't think Mr. Della-Pietra has anything other than what his testimony had to offer.

Q. Kevin Swanson was the conducting officer at the hearing. Was he involved in the Brousil investigation hearing?

A. The hearing, no.

Q. At your disciplinary investigation hearing did you mention your conversation with Timothy Merriweather?

A. I don't think so.

Q. And you never said that you thought that this whole thing was retaliatory?

A. No, not in the railroad investigation I did not.

Q. Did you have an opportunity to make a closing statement?

A. Yes, I did.

Q. And did your union representative have a conversation -- or an opportunity to make a closing statement?

A. Yes.

Id. at 104:24-106:7.

Finally, Ms. Taylor testified that while she was not asking for damages in this case, she was asking for:

my record be cleared. I'm asking for the Court to impose a fine, which [counsel for Respondent] has explained to me means punitive damages, on the railroad. That's part of my position, and I still feel this way I would like somehow in the resolution of this to really establish a way for people who have been retaliated against to have a process that does not just include this [type of litigation].

Id. at 106:25-107:9.

Testimony of Randolph Purnell, Jr.

BNSF hired Mr. Purnell in 1976 as a signal maintainer and transferred him to work as an engineer in 1978. *Id.* at 110:21-22. When asked whether BNSF's rules allowed an engineer to protect a rearward movement using only the engine's mirrors, Mr. Purnell testified:

In any situation, your experience and your knowledge of the rules determines what you do, and a lot has to do with the situation and the circumstances. So situations and circumstances are situational awareness. The circumstances have a lot to do with how you would apply a rule. . . . The GCOR, the General Code of Operating Rules, GCOR is general. It's general. There are a lot of things that come in to play. Some of the rules have a -- are differently interpreted depending on what terminal you go to.

Id. at 114:19-22, 115:6-18.

Testimony of Kevin G. Swanson

Mr. Swanson began working for BNSF in June 2011 as a trainmaster and was promoted in March 2013 to his current position as the terminal manager of BNSF's Chicago Command Center. *Id.* at 118:24-25, 119:7-12. Mr. Swanson reports directly to Mike Frisinger, but his position is ultimately subordinate to Mr. Merriweather's. *Id.* at 119:24-120:7, 148:5-15. Mr. Swanson is Ms. Taylor's direct supervisor. *Id.* at 120:8-19. While Mr. Swanson did not issue Ms. Taylor's notice of investigation, he conducted the investigatory hearing and was responsible for issuing the resulting discipline. *Id.* at 119:2-5, 120:21-121:1, 121:15-16, 123:18-19.

When asked about the two types of rules Ms. Taylor was alleged to have violated, Mr. Swanson said the "shoving violation would be a felony, for lack of a better term, compared to a misdemeanor, which would be the run-through switch." *Id.* at 124:17-19. The reason for this distinction is that "[t]here is a lot more risk to life, injury, and damage to property [when failing to protect a shove] compared to a run-through switch." *Id.* at 124:24-25. Mr. Swanson confirmed that when presiding over Ms. Taylor's disciplinary hearing, he was more focused on the shoving violation. *Id.* at 125:1-5.

In order to serve as a conducting officer at BNSF's disciplinary hearings, Mr. Swanson completed a formal training course and received informal on the job training. *Id.* at 121:23-122:11. Mr. Swanson testified that he did not make any determinations on whether Ms. Taylor had violated BNSF's operating rules prior to the hearing. *Id.* at 125:6-9. Mr. Swanson further testified that Ms. Taylor was afforded all opportunities for a fair hearing under BSNF's collective bargaining agreement, including union representation and the ability to call witnesses and present evidence. *Id.* at 123:10-124:4.

Mr. Swanson testified that based on his participation in the hearing and his review of the transcript and evidence, he determined that 1) Ms. Taylor "was indeed in violation of the shoving violation and the run-through switch;" and 2) Mr. Smith "ha[d] no culpability to the alleged violations." *Id.* at 125:21-25; RX 6 at 2. With respect to the run-through violation, Mr. Swanson noted that Ms. Taylor maintained during the disciplinary hearing that she had not run-through the switch. *Tr.* at 127:3-6. However, he found that the remainder of the evidence supported a finding that Ms. Taylor had run-through the switch. Specifically, Mr. Swanson relied on testimony from 1) Mr. Smith, who was the only other eye-witness to the incident; 2) Mr. Merriweather, who examined the switch; and 3) Trainmaster Jordan Bond, who testified about repairs made to the switch.¹⁵ *Id.* at 127:7-129:3.

With respect to the shoving violation, Mr. Swanson testified that Ms. Taylor could not adequately protect her train's movement while using only the cab's mirrors:

JUDGE ALMANZA: If the locomotive engineer could use the mirrors and see the back end of the train, would that be sufficient?

THE WITNESS: No, not if there was a conductor there. That is not something that is sufficient because the engineer is handicapped to one side of the locomotive, and they only have the mirrors as a way to see behind them. And there's -- in this specific case there is, I think 12 to 1300 feet of equipment behind the engine. So you really need another human being who can keep their head on the swivel and be at the point and inspect.

Id. at 130:22-131:7.

Mr. Swanson further testified that he relied on statements from Mr. Bond and Mr. Swanson in order to make his determination that Ms. Taylor failed to protect the shove in violation of BNSF's operating rules. *Id.* at 131:13-15. In particular, Mr. Swanson noted that Mr. Bond arrived at the scene of the incident and "got up in the cab of the locomotive, and looked from [Ms. Taylor's] perspective and stated that you could not properly protect the shove from the locomotive." *Id.* at 131:25-132:2. Mr. Swanson also testified that he did not believe it was possible for Ms. Taylor to exit the locomotive and visually inspect the train tracks within the twenty-two second period the downloads established the train was stopped. *Id.* at 132:11-16, 133:6-11. Furthermore, Mr. Swanson stated that Ms. Taylor would not have adequately protected her movement even if she had checked behind her train prior to making the shove:

¹⁵ Mr. Swanson explained that while the repairs were minor, they were nevertheless consistent with a run-through. *Id.* at 129:23-130:2.

Q. Let's assume for a minute that she did exit the locomotive and looked back and checked behind the rear of her train before making the shove. In your opinion, is that sufficient to provide visual protection?

A. No, it is not, because within the rule you need to be protecting your shove through the entirety of the shove, not just before or after, but throughout the entire shove process. So, no, that would not be adequate protection.

Id. at 133:13-20. Mr. Swanson's determination was also based on his training and personal experience. Mr. Swanson testified that he has been trained in BNSF's shoving procedures and that he is tested on a monthly basis; Mr. Swanson also stated that "50 percent of my day, if not all day" is spent observing field operations, during which time he has "never seen" anyone protect a shove in a manner described by Ms. Taylor. *Id.* at 134:6-135:11.

Mr. Swanson explained that he relied on the guidelines set forth in BNSF's Policy for Employee Performance Accountability ("Performance Accountability Policy") when determining what discipline to assess against Ms. Taylor. *Id.* at 135:22-24; RX12. Failing to protect a shove amounts to a "serious" violation under BNSF's rules. RX 19. According to the Performance Accountability Policy:

[t]he first Serious violation will result in a 30-day record suspension and a review period of 36 months. Exception: Employees qualify for a reduced review period of 12 months if they demonstrate a good work record, defined as having at least 5 years of service and having been discipline-free during the five years preceding the date of the violation in question.

RX 12 at 4; *see also* Tr. at 136:10-21. Mr. Swanson testified that it "was my decision" to discipline Ms. Taylor. Tr. at 136:22-24. In response to several follow-up questions, Mr. Swanson testified that no one else, including Mr. Merriweather, influenced his decision.¹⁶ *Id.* at 137:11-25, 142:9-12. Mr. Swanson testified that while he was aware Ms. Taylor was a union official who represented coworkers at disciplinary hearings, he was not aware of the Brousil hearings at the time he made the decision to discipline Ms. Taylor. *Id.* at 138:5-25. Because Mr. Swanson had no knowledge of the issues involved at the Brousil hearings or Ms. Taylor's role in those proceedings, Mr. Swanson testified that the Brousil incidents played no role in his decision to discipline Ms. Taylor. *Id.* at 138:14-139:4, 142:2-8.

Mr. Swanson further testified that BNSF's code of conduct and anti-discrimination policy prohibit retaliatory actions against employees who report safety concerns. *Id.* at 140:18-141:23; RX 14-15. Mr. Swanson testified that he complied with these policies when assessing discipline against Ms. Taylor. Tr. at 141:24-142:1. Mr. Swanson also testified that Mr. Merriweather did not violate these policies:

¹⁶ Mr. Swanson testified that he did not talk with Mr. Merriweather about Ms. Taylor's case between the period when the hearing ended and when the discipline was issued. *Id.* at 137:20-22.

Anybody who would know Tim Merriweather as a manager would know that he's a man who conducts his business with the utmost integrity. Anything that comes in front of his desk he takes care of.

I had the pleasure of working for Tim for some time like we talked about here. One of the best bosses I had in the railroad. There's nothing he wouldn't do for me. And I'm close friends with the current individual that works for him, the terminal manager at Cicero, and he states the same thing, that he's the best boss that he ever had. I can't say enough good things about Tim, and any sort of claim of discrimination or harassment or anything like that leveled against Tim is highly unlikely.

Id. at 142:22-143:9.

On cross-examination, Mr. Swanson explained why he would, in some cases, contact a union official about a disciplinary matter prior to issuing a notice of hearing:

you would just contact the local chairman just because you would -- you had a working rapport. The local chairman wouldn't want to be blindsided, hey, you got to be at this investigation hearing that you didn't know about because your principal forgot to tell you or many various reasons. But typically it would be for scheduling.

Id. at 145:12-21.

Mr. Swanson clarified that while Mr. Bond and Mr. Merriweather spoke at the disciplinary hearing about the damage done to the switch, no one who actually repaired the switch spoke at the hearing. *Id.* at 147:3-13. Ms. Taylor also asked a series of questions about how to properly protect a shove:

[Q.] Can a conductor protect a shove without being on the rear car?

A. Yes.

Q. Can a conductor protect a shove standing on the ground?

A. Yes, as outlined within GCOR Rule 6.5.

Id. at 149:8-13.

Mr. Swanson agreed that twenty-two seconds elapsed between the time when Ms. Taylor's train stopped and when the train began backing up. *Id.* at 154:19-22. Ms. Taylor then asked how Mr. Swanson could agree with the twenty-two second timeframe given that he sent an email to Mr. Merriweather and Mr. Frisinger on January 2, 2014 announcing discipline against Ms. Taylor that stated it was "highly unlikely" Ms. Taylor exited the train to check the tracks "when the downloads presented by Mr. Della Pietra had merely four seconds to complete this

action . . .” *Id.* at 156:12-14; RX 6 at 1. Mr. Swanson replied that while it took twenty-two seconds for the train to begin its rearward movement, the downloads established the control mechanism was moved from neutral to reverse four seconds after the train stopped;¹⁷ it therefore took the train another eighteen seconds to begin its movement, but Ms. Taylor would not have been able to exit the train and check the track during this time. Tr. at 157:7-159:12.

Mr. Swanson testified that when a switch is taken out of service, “[y]ou would first tag the switch out to be out of service, and then you would call the road master to get somebody out there.” *Id.* at 162:24-1. Ms. Taylor then asked, “[i]f you called out a road master or you called out a maintenance person and they made a minor adjustment on the switch, would that necessarily mean that switch had been run through?,” to which Mr. Swanson replied, “[n]o.” *Id.* at 163:5-9.

On redirect examination, Ms. Swanson clarified that he determined Ms. Taylor had run-through the switch on the basis of 1) Mr. Merriweather and Mr. Bond’s “firsthand testimony;” 2) Mr. Smith’s testimony; and 3) that minor adjustments were made to the switch after the incident. *Id.* at 163:16-21. Mr. Swanson also clarified that when a conductor protects a shove from the ground, he or she must stand at the rear of the train, not at the locomotive. *Id.* at 163:22-164:2. On recross, Mr. Swanson testified that a conductor need not ride the rear car in order to protect a shove. *Id.* at 164:13-18.

Testimony of Timothy Merriweather

Mr. Merriweather’s career in the railroad industry began in 1984 for a company that would later become BNSF. *Id.* at 166:18-23. After several years at a different railroad, Mr. Merriweather returned to BNSF in 2000 as a terminal superintendent, a position that he continues to hold. *Id.* at 166:10-11, 167:5-10. As a terminal superintendent, Mr. Merriweather oversees three distinct entities, including Metra suburban service, an intermodal service, and a manifest service. *Id.* at 167:13-23. The terminal managers of each of these entities report directly to Mr. Merriweather. Approximately 300 individuals, including Ms. Taylor, are employed across the three service entities Mr. Merriweather supervises. *Id.* at 168:3-6.

On September 15, 2013, Mr. Merriweather was at home when he received a call from trainmaster Jordan Bond about the alleged run-through incident. *Id.* at 168:9-19. Mr. Merriweather testified that Mr. Smith notified Mr. Bond of the incident. *Id.* at 168:24-169:5. According to Mr. Merriweather, run-through switch violations require a field investigation. *Id.* at 169:6-13. As Mr. Merriweather was the official on call that weekend, he traveled to the site of the incident to investigate. *Id.* at 168:12-19, 169:15-16.

Upon arriving at the scene, Mr. Merriweather took a picture of Ms. Taylor’s train and the relevant portion of the track. *Id.* at 170:4-6, 13-18; RX 3 at 179. Mr. Merriweather testified that he did not move Ms. Taylor’s train, nor did he see anyone move the train prior to the inspection. Tr. at 170:19-23. When asked if he was qualified to determine whether a switch has been run-through, Mr. Merriweather responded:

¹⁷ The downloads establish the mechanism was moved seven seconds after the train stopped. RX 3 at 87:3-8.

Am I qualified? I can look at a switch in some instances and tell whether it's been run through or not. It all depends on the situation.

There are times when there are external components of the switch that are damaged and you can tell -- so far as bent rods, and you can tell by the leading edge or the marks that are made by the wheels as they traverse through the switch that the switch has been run through.

There are other times when externally it's hard to visually determine whether a switch has been run through, and the reason for that is sometimes a switch can be run through and its external components that you can see that are damaged they are actually inside the switch stand itself.

There are gears and bolts and rods and things of that nature inside the switch. There are times when you can tell it externally and other times the maintenance-of-way foreman would have to open up the casing to determine whether it's been run through.

Id. at 171:1-18. Mr. Merriweather further testified that in the instant case, maintenance-of-way personnel took actions that led him to believe the switch was damaged. *Id.* at 171:23-172:18. Specifically, personnel "took the switch out of service . . . [b]ecause . . . adjustments needed to be made based on the run-through nature -- damage to the internal gears that had been caused by the run-through switch." *Id.* at 172:17-18, 20-22.

Mr. Merriweather testified that he returned to a nearby office building after completing his inspection in order to separately interview Mr. Smith and Ms. Taylor. *Id.* at 172:25-173:10. According to Mr. Merriweather, Mr. Smith said that "he knew the switch ahead . . . was improperly aligned . . . because [another engine] had come out in front of [Mr. Smith and Ms. Taylor] that had to line [the] switch in another direction in order" to exit the train yard. *Id.* at 174:16-20. Mr. Merriweather further described his interview with Mr. Smith as follows:

As they started to continue moving west, he stated that he informed Ms. Taylor that there was a switch lined against them up ahead. He said he stated that two or three times. She did not acknowledge any of those times that he told her. She did not acknowledge his warning.

Finally it got to the point I asked [Mr. Smith] why [he] didn't [activate the train's emergency brake]. He told me that finally it appeared that [Ms. Taylor] was going to stop the train, and he thought that it would stop prior to going through the improperly lined switch. At this point, the train finally did stop, but it had already proceeded through the switch that was not properly lined for their movement.

At that point, he stated he was starting to get down. He got on the floor board and was starting to get off of the locomotive, but suddenly the locomotive then started to back up in an eastward direction. He asked -- he stated that he told -- asked

Ms. Taylor what she was doing, and she said that she was getting back off the switch. I asked him did he have any -- did he take any actions as it related to the reverse move or the back-up move, and he -- the shove move. He said, no, he did not, she did that completely on her own.

...

He said that he stated to Ms. Taylor . . . I'm a relatively new employee and what I was taught in my training is any time there's an incident that occurs I am to contact the trainmaster. So in essence his statement to me was she tried to talk him out of reporting this incident. He said he could not do that, and that's when the phone call to Mr. Bond came about.

Id. at 174:21-176:7.

Mr. Merriweather testified that he informed Mr. Smith there would be a disciplinary hearing about the incident and then asked Mr. Smith who his union representative would be. *Id.* at 176:6-11. Mr. Merriweather stated "[i]t is customary for me any time I'm involved in an investigation" to ask employees who their union representative will be so that the employees know how the disciplinary process will proceed. *Id.* at 176:6-177:5.

Mr. Merriweather testified that Ms. Taylor provided statements that conflicted with Mr. Smith's account during her interview. *Id.* at 177:25-178:1. Specifically, Ms. Taylor stated that Mr. Smith was not onboard the engine during the incident, but was rather on the ground giving hand signals. *Id.* at 178:1-7. According to Mr. Merriweather:

I asked [Ms. Taylor] did she see the switch was lined properly. She told me "no."

She said -- about 20 feet prior to getting to that switch she stated that Mr. Schmidt then gave her a stop signal. I asked her did she run through the switch. Her words to me in the interview was, yes, she did run through the switch. However, she did get out and throw the switch a couple of times and she could not detect any damage.

So I then started to ask her about the back-up move or the shove move. I asked her who protected the shove, did Mr. Schmidt have any part in protecting the shove. She told me, no, he did not, she protected the shove.

Id. at 178:13-24.

Mr. Merriweather said he "knows that it's impossible to protect a shove in that manner from the location" of Ms. Taylor's train. *Id.* at 179:1-3. Specifically, Mr. Merriweather said that it would not be possible to look back from the cab and see both sides of the train given the length of the cars attached and the curvature of the track. *Id.* at 179:1-14. Mr. Merriweather elaborated in the following testimony:

So Ms. [Taylor] says that she got down and walked over to the south side which would have been the side she could not see [from the train cab] because of the curvature [of the track], and then she got back up in the locomotive and protected the shove. Well, the simple reason that you had to get down to walk around to go and take a look tells me right off the bat that you could not see [the back end from the cab from the engine]. Otherwise you would not have done that. . . . So there's no way she could have protected the shove in the manner in which she said she could. It's just simply impossible. You just cannot do it.

You heard testimony a little bit earlier from Mr. Swanson that the protection of the shove has to be continual. It has to be continual. So . . . once you get back up [into the train cab], it's no longer continual because you can no longer see what you're attempting to protect.

. . .

Where she was at with her train, she's in a location where there are trucks out there. There is vehicular traffic. There are all kind of things happening that could, in fact, come [behind] her train as she was shoving it that she would not have been able to see. She would not have been able to stop her train without possibly injuring, hitting somebody, killing somebody and things of that nature.

Id. at 179:15-180:7, 181:15-21.

Mr. Merriweather testified that even though Ms. Taylor was a "long-term employee," he still notified her about the disciplinary hearing and asked who her union representative would be because "it is customary for me to tell every employee that I'm involved with of what's coming up next as it relates to their incident." *Id.* at 182:7-12. Mr. Merriweather stated that he did not mention the Brousil hearings. Mr. Merriweather also denied that he said "who's going to represent you now that you're in trouble," testifying in pertinent part:

I did not. I heard her say I said that twice and laughed. I take seriously an employee's right to representation. I take very seriously an employee's ability to represent themselves and stand up for themselves in an investigation. I would never -- I did not then and I have never laughed at a situation in which an employee had possibly put themselves in as it relates to having to attend an investigation. That is utterly false. That did not occur.^[18]

Id. at 182:18-25 (footnote added). Mr. Merriweather said that he has provided similar notices in "somewhere between 70 and 100 investigations." *Id.* at 183:10-13.

Mr. Merriweather testified that he did not believe twenty-two seconds was enough time for Ms. Taylor to leave the engine, talk with Mr. Schmidt, check the back of her train, re-enter the engine, and shove backwards. *Id.* at 185:2-7.

¹⁸ I asked Mr. Merriweather if he could recall what words he used when speaking with Ms. Taylor and he responded, "I asked who would her representative be." *Id.* at 183:1-4.

Mr. Merriweather testified that while he issued the notice of hearing, he had no role in assessing discipline against Ms. Taylor. *Id.* at 185:8-10, 186:1-4. According to Mr. Merriweather, Kevin Swanson was the only person who decided whether to discipline Ms. Taylor. *Id.* at 186:1-11. Mr. Merriweather stated Mr. Swanson was trained to preside over Ms. Taylor's hearing and that it was common for Mr. Swanson to issue Level S thirty-day suspensions with a twelve month probationary period. *Id.* at 186:12-24, 187:2-13

Mr. Merriweather testified that he was not present at Mr. Brousil's disciplinary hearings on September 11, 2013. *Id.* at 187:19-20. Mr. Merriweather said that while he eventually reviewed the transcripts of those hearings, the earliest he could have done so was September 18, 2013 because the transcript service took at least seven days to return a finished product. *Id.* at 187:23-25, 192:9-23. Mr. Merriweather testified that he had not reviewed the Brousil transcripts when he made the decision to investigate Ms. Taylor and Mr. Smith on September 15, 2013.¹⁹ *Id.* at 193:6-9. He further testified that Ms. Taylor's role in the Brousil hearings did not factor into his decision to issue a notice of hearing, nor did the Brousil hearings influence his investigation of the incident or his testimony at Ms. Taylor's hearing. *Id.* at 193:10-19. Additionally, Mr. Merriweather said that he never talked with Mr. Swanson about the Brousil hearings. *Id.* at 194:1-6.

Mr. Merriweather then testified about three BNSF employees who were disciplined for failing to protect a shove. *Id.* at 194-198; *see also* RX 8. Mr. Merriweather said that the facts surrounding the first employee ("Employee 1") were similar in many ways to the facts of Ms. Taylor's incident. Tr. at 195:2-3. Specifically, Mr. Merriweather was called to the scene to investigate alleged shoving and switch run-through violations, drafted a notice of investigation, and was a witness at the resulting disciplinary hearing. *Id.* at 195:2-10. Employee 1 was found to have violated GCOR 1.6 (conduct), 6.5 (shoving movements), and 7.5 (switching safely and efficiently).²⁰ RX 8 at 5. Employee 1 was dismissed as a result of these violations on April 22, 2014. *Id.*; *see also* Tr. at 195:9. Unlike Ms. Taylor, Employee 1 never served as a union official or represented a co-worker at a disciplinary hearing. Tr. at 195:11-16. Mr. Merriweather testified that Employee 1 had not reported safety concerns around the period he was disciplined, nor had Employee 1 ever accused Mr. Merriweather of failing to address a safety concern. *Id.* at 195:17-22. Employee 1 also had a prior disciplinary record, which factored into the severity of the punishment. *Id.* at 196:2-15; RX 8 at 2.

The second employee ("Employee 2") received a Level S thirty-day record suspension and a three year probationary period on February 25, 2013 due to violating GCOR 6.28 (movement on other than main track) and 6.5 (shoving movements).²¹ RX 8 at 9. Employee 2 did not have a prior disciplinary record. *Id.* at 7. Mr. Merriweather testified that Employee 2 was not a union official, did not represent employees at disciplinary hearings, had not recently

¹⁹ Mr. Merriweather could not recall when he eventually read the transcripts. *Id.* at 203:9-13. In response to my question, Mr. Merriweather said he could not recall if he had read the Brousil transcripts by the time he gave testimony at Ms. Taylor's hearing. *Id.* at 203:14-18.

²⁰ Ms. Taylor was found to have violated these three rules, among others.

²¹ Ms. Taylor was found to have violated these two rules, among others.

reported safety concerns, and had never accused Mr. Merriweather of failing to address a safety concern. Tr. at 196:24-197:9. Mr. Merriweather was the BNSF official responsible for determining what level of discipline to assess against Employee 2. *Id.* at 196:21-23.

The third employee (“Employee 3”) received a Level S thirty-day record suspension and a three year probationary period on November 14, 2012 for violating GCOR 6.28 (movement on other than main track), 6.5 (shoving movements), and 8.2 (position of switches).²² RX 8 at 12. Mr. Merriweather testified that Employee 3 was not a union official, did not represent employees at disciplinary hearings, had not recently reported safety concerns, and had never accused Mr. Merriweather of failing to address a safety concern. Tr. at 197:22-198:7. Mr. Merriweather was the BNSF official responsible for determining what level of discipline to assess against Employee 3. *Id.* at 197:19-21.

Mr. Merriweather confirmed that Employees 1-3 and Ms. Taylor received Level-S discipline. *Id.* at 198:14-21. According to Mr. Merriweather, Level-S “stands for serious.” *Id.* at 198:22-23. He stated that failing to protect a shove is a serious violation because “[y]ou have no idea what is going on behind you. You cannot see what’s going on behind you. If, in fact, you had to stop your train because someone was in foul of track or something, you would not be able to see that in order to stop your movement before something catastrophic occurred.” *Id.* at 199:13-20. Mr. Merriweather reiterated that “[i]n 16 years, I have never seen” someone protect a shove in the manner described by Ms. Taylor. *Id.* at 200:17-20. Mr. Merriweather confirmed that he is certified in BNSF’s anti-retaliation policy and testified that he has never discriminated against an employee for reporting safety concerns. *Id.* at 201:3-13. Mr. Merriweather further testified that he did not have any negative opinions about Ms. Taylor for her role in the Brousil hearings, nor did her involvement in the Brousil hearings factor into his decision to issue a notice of investigation against Ms. Taylor. *Id.* at 201:21-202:6. Specifically, he stated:

Ms. Taylor was involved in an incident in which violations occurred. I treated that incident just like I would any other incident, and you can see examples of three of them here that we just went over. There was no malice or anything intended. Never was. Never will be.

Again, I take these things very seriously. As a terminal superintendent, my integrity is of utmost importance to me, so I simply would not and did not do this with malice. It was totally based on rule infractions . . .

Id. at 202:16-25.

I asked Mr. Merriweather if he would characterize Ms. Taylor as a good employee on the basis of her long period of employment with BNSF and her otherwise clean disciplinary record. *Id.* at 204:18-24. He responded:

Based on that record, I would say yes, based on that record. . . . That she -- if that’s all I had to look at, I would say, yes, she would be a good employee.

²² Ms. Taylor was found to have violated GCOR 6.28 and 6.5, among other rules. She was not found to have violated GCOR 8.2.

We look for employees not to have anything on their records. That would be an employee who is not getting involved in rail equipment incidents, who's coming to work on time, all of those things that would characterize what you would call a good employee.

Id. at 204:25-205:9.

On cross-examination, Mr. Merriweather testified that he has familiarity with the controls of various engines but that he not operated an engine. *Id.* at 206:11-23. When asked what a conductor would see while protecting a shove from the point of clearance, Mr. Merriweather replied “[h]e can see what’s behind the cars as they continue to move . . . Depending on which side he’s standing on, he can see the left side of the rear car.” *Id.* at 206:25-207:7. Ms. Taylor also asked whether different rules apply while shoving on a ramp, to which Mr. Merriweather responded, “[t]he shoving rule is the same 6.5 rule regardless of whether you’re shoving in the ramp or whether you're shoving in the yard.” *Id.* at 208:20-25.

Mr. Merriweather stated that he has had maintenance-of-way training, but that he does not have the same qualifications as maintenance-of-way personnel. *Id.* at 209:3-11. Ms. Taylor then asked a series of questions about the maintenance-of-way evidence that was presented at her disciplinary hearing:

Q. Mr. Merriweather, at the investigation itself did you present any evidence for maintenance of way beyond your own testimony as to the switch?

A. I presented the information at the investigation with my conversation with Mr. Garcia who showed up at the scene while I was there. He took the switch out of service -- he spiked the switch per my request. He took the switch out of service with me, and he also notified me at 17:35 that he had completed his repairs and adjustments and the switch was now back in service. So that was my conversation with Mr. Garcia.

Q. Mr. Garcia spiked the switch at your request –

A. That is correct.

Q. -- is that correct?

A. That’s correct.

Q. What was the monetary damage to that switch?

A. On adjustments, there is no monetary damage. The only time we have monetary damage is when there are parts or things of that nature that need to be replaced. That’s when they are charged back to maintenance-of-way costs. Since that’s strictly labor and they’re paid to come out and work, that labor cost is not something that's additional. That is their time, and they’re paid to perform that

task. There were no parts or anything that needed to be replaced. Therefore, the cost of the run-through switch was zero.

Id. at 211:6-212:4.

In response to questions from Ms. Taylor, Mr. Merriweather noted that Employees 2 and 3 signed disciplinary waivers, meaning that the employees conceded they had violated the rules and waived their right to a hearing. *Id.* at 209:18-210:6. Mr. Merriweather further noted that Employees 1-3 had all worked for BNSF for less than 10 years. *Id.* at 210:16-211:5.

Mr. Merriweather confirmed that Mr. Swanson and a number of other employees are his subordinates. *Id.* at 212:16-213:5. Mr. Merriweather noted that while the picture he took at the scene of the incident did not capture the engine number, this omission was not intentional, it was merely “where the picture cut off.” *Id.* at 216:3-9. When asked if it was possible Ms. Taylor’s train was moved prior to Mr. Merriweather arriving on the scene, he answered “I don’t know.” *Id.* at 219:1-6. Mr. Merriweather elaborated in the following exchange:

[Q.] [H]aving reviewed Mr. Della-Pietra’s testimony and having been the person who took the picture that’s at [RX 3 at 179], do you believe the train was at the location depicted on [RX 3 at 179] at the time that Della-Pietra got the download?

THE WITNESS: Judge, the only thing I can attest to is I took the picture when I arrived, and that’s where the train was sitting.

JUDGE ALMANZA: And you do not know where the train was before that, before you arrived?

THE WITNESS: No, I do not.

Id. at 220:15-25.

On redirect, Mr. Merriweather noted that GCOR 6.5, which requires that personnel maintain visual protection while making a shove, applies irrespective of the type of track involved. *Id.* at 221:20-24. Mr. Merriweather clarified, however, that different types of tracks require different types of visual protection. *Id.* at 222:1-7. Curvature, for instance, would require a different kind of visual protection. *Id.*

Mr. Merriweather testified that the length of an employee’s career does not influence what type of discipline the employee receives after being found to have violated a rule. *Id.* at 222:9-17. Mr. Merriweather noted that length of service can influence the length of probationary review that is assigned in conjunction with discipline. *Id.* at 222:18-21. Employees who have worked at least five years with BNSF and who have not been subject to prior disciplinary are eligible for a one-year review period instead of a three-year review period. *Id.* at 223:13-25. Mr. Merriweather testified that Employee 2 and 3 were not eligible for the reduced review period because they had not been employed for five years. *Id.* at 224:7-25; *see also* RX 8 at 7, 10. Mr. Merriweather noted that Ms. Taylor received the reduced probationary period. *Tr.* at 223:1-2.

Mr. Merriweather testified that it is common for subordinates like Mr. Swanson to issue discipline against employees who are more distant reports of Mr. Merriweather. *Id.* at 225:6-8. Mr. Merriweather said he did not issue the discipline in the instant case because he was a witness to the investigation. *Id.* at 225:9-20. When asked how he ensures that subordinates like Mr. Swanson arrive at fair and independent conclusions, Mr. Merriweather responded:

I never had any conversation as it relates to what I thought the discipline should be. That's all on him based on the testimony, the exhibits and everything else that were entered in the investigation. I had no part in that whatsoever. As the trainmaster, the division trainmaster, he has that ability just basically through his training. He did not have to consult with me, and I didn't have to consult with him as to which way I wanted it to go. It is immaterial.

Id. at 226:18-25. Mr. Merriweather added that hearing officers are aware that they can make independent decisions "through our investigation training." *Id.* at 227:1-7.

ARGUMENTS OF THE PARTIES

Ms. Taylor argues that she engaged in protected activity when she represented Mr. Brousil at his disciplinary hearings and elicited testimony about 1) the dangers of Union Station's air quality; and 2) Mr. Merriweather's failure to respond to a safety complaint related to the air quality issue.

Ms. Taylor argues her representation of Mr. Brousil was a contributing factor because it caused Mr. Merriweather and several other BNSF employees to make false statements against her, providing the justification for disciplinary action. Ms. Taylor argues that Mr. Smith falsely accused her of running through a switch when she stopped her train on September 15, 2013, just four days after she represented Mr. Brousil. *Tr.* at 73:7-74:4. Ms. Taylor argues the evidence gathered at the scene of the incident is not credible for two reasons. First, Ms. Taylor implies that her train was moved prior to Mr. Merriweather's arrival. *Id.* at 219:1-7. In support of this argument, Ms. Taylor notes that Mr. Merriweather's photo did not capture an engine number. *Id.* at 216:3-4. Ms. Taylor relies on this omission to allege that the picture was not of her engine. *Id.* at 231:18-20. Ms. Taylor also argues it was not possible for Mr. Merriweather to have taken a picture of her train at the scene of the incident because Mr. Della-Pietra downloaded the train's information after the engine had been moved. *Id.* at 219:22-220:25, 231:14-232:1. Second, Ms. Taylor alleges that Mr. Bond made false statements about damage done to the switch she was accused of running through. *Id.* at 105:8-9. In particular, she notes that none of the maintenance-of-way personnel who inspected the switch spoke at her disciplinary hearing. *Id.* at 230:21-24.

Ms. Taylor argues that Mr. Merriweather was the driving force behind her discipline. *Tr.* at 69:8-9. In support of this argument, she noted that Clayton Johanson and Christopher Motley, the conducting officers at the Brousil hearings, along with Mr. Swanson are all subordinates of Mr. Merriweather. *Id.* at 212:22-23. Ms. Taylor also argues that when Mr. Merriweather stated, "who's going to represent you now that you're in trouble[?]" during her interview on September 15, 2013, he was directly referencing her role in the Brousil hearings. *Id.* at 70:3-7, 103:7-10.

Ms. Taylor emphasized in her closing argument that she was singled out for eliciting testimony against Mr. Merriweather and that the damage to her reputation has been severe. *Id.* at 8-13.

Respondent argues that Ms. Taylor failed to establish that she engaged in protected activity because she did not report her own concerns, but rather facilitated the reporting of Mr. Brousil's concerns. *Id.* at 235:6-15. Respondent also contends that Mr. Swanson, who issued the suspension, had no knowledge of Ms. Taylor's involvement in the Brousil hearings. *Id.* at 235:16-21. Respondent further argues that it is common practice to ask employees who their union representative will be when issuing a notice of investigation. *Id.* at 234:20-25. With respect to its affirmative defense, Respondent contends that the documentation of similarly disciplined employees unambiguously establish that it would have disciplined Ms. Taylor even in the absence of any protected activity. *Id.* at 236:14-20.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protected Activity

The FRSA protects, *inter alia*, employees who:

provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security . . . if the information . . . is provided to . . . a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct.

49 U.S.C. § 20109(a)(1). The FRSA “does not require that an employee know the specific rules that he reasonably believes are being violated when he makes his report—the statute only requires that an employee have a reasonable belief in a violation of a Federal law, rule, or regulation related to railroad safety or security.” *Leiva v. Union Pacific Railroad Company, Inc.*, Nos. 14-016, 14-017; ALJ No. 2013-FRS-00019, slip op. at 6-7 (ARB May 29, 2015). In *Leiva*, the complainant reported a violation of his railroad's workplace violence policy to management. While the complainant could not identify a specific federal requirement to support his complaint, he testified that his railroad “taught him that to comply with federal regulations, he had to follow” the railroad's rules. *Id.* at 6. The respondent's safety director confirmed that “he taught engineers . . . that if they complied with Union Pacific's rules then they would be in compliance with the federal regulations because Union Pacific's rules were more stringent than the regulations.” *Id.* The ARB held that even though the complainant reported only a violation of railroad policy, he nevertheless reasonably believed that a violation of federal law had occurred because he was trained that following internal safety rules established compliance with federal requirements.

I find that Complainant represented Mr. Brousil at his disciplinary hearings on September 11, 2013 and elicited testimony about the air quality of Union Station. I find that in response to Ms. Taylor's questions, Mr. Brousil described the Union Station's air quality in stark terms. CX

12 at 62:1-3 (wherein Mr. Brousil characterized the diesel emissions as “unsafe,” “unhealthy,” “poisonous,” and “toxic”). Nevertheless, I find that at no point did Mr. Brousil or Ms. Taylor establish a nexus between these concerns and the violation of a federal law, regulation, or rule related to railroad safety or security. I find that the only federal requirements discussed at the hearings were those set forth in the Americans with Disabilities Act (“ADA”). Specifically, the parties disputed whether Mr. Brousil had violated the ADA by refusing to power a train lift to assist a passenger with disabilities. *See, e.g., id.* at 72:14-21. I find the discussion of the ADA to be unrelated to the issue of whether excessive diesel exhaust in Union Station violated federal railroad safety or security requirements. While Complainant has no obligation to identify specific statutory provisions, I find that the Brousil hearings did not reference, even indirectly, the violation of federal safety or security requirements.²³

Central to Ms. Taylor’s argument is that she also elicited testimony about Mr. Merriweather allegedly failing to resolve a safety complaint related to the air quality issue. Ms. Taylor framed Mr. Merriweather’s actions as being contrary to BNSF policy. While *Leiva* stands for the proposition that an employee may reasonably believe that the violation of an internal policy also amounts to the violation of a federal safety requirement, Ms. Taylor’s case is distinguishable. Unlike the complainant in *Leiva*, I find that Ms. Taylor has not put forth any evidence that BNSF’s employees were required to follow internal policies in order to maintain compliance with federal law. Without this nexus, I find cannot find that Ms. Taylor reasonably believed a violation of BNSF’s safety hotline resolution policy was also a violation of federal law.

Finally, in her testimony before me, Ms. Taylor explained that she had personal knowledge of all the safety concerns raised at the Brousil hearings. *Id.* at 57:2-25. I find that Ms. Taylor believed the diesel exhaust within Union Station to be dangerous. However, the FRSA does not protect against all safety concerns. Complainants must establish by a preponderance of the evidence that they reasonably believe a violation of federal law relating to railroad safety or security to have occurred. I find that at no point in Ms. Taylor’s testimony before me did she express a concern that BNSF’s conduct violated a federal law, regulation, or rule related to railroad safety or security. Accordingly, Ms. Taylor has not established that she engaged in protected activity under the FRSA.²⁴

²³ I find that the only other reference to the federal government at the disciplinary hearings occurred during Mr. Brousil’s closing statement when he said that Senator Richard Durbin was “concern[ed]” with Union Station’s air quality. Tr. at 79:17-20, 79:26-80:3. I find that this single passing reference to a U.S. senator by Mr. Brousil is not enough to establish by a preponderance of the evidence that Ms. Taylor reasonably believed that BNSF had violated federal law relating to railroad safety or security.

²⁴ BNSF submitted two pre-hearing statements. The first, dated May 3, 2016, did not identify as an issue for trial whether Ms. Taylor engaged in protected activity. Tr. at 21:23-22:7. The second, dated May 4, 2016, identified protected activity as an issue to be contested at the hearing. *Id.* at 22:8-12. A final hearing statement dated May 6, 2016 also identified protected activity as an issue for trial. *Id.* at 22:13-15. Ms. Taylor relied on the May 3, 2016 pre-hearing statement and “did not prepare to prove my case that I was involved in protected activity.” *Id.* at 23:18-21. I informed Ms. Taylor that when she filed her original OSHA complaint on August 13, 2014, she was on notice that she had the burden of establishing that she engaged in protected activity. *Id.* at 23:22-24:4. I asked Ms. Taylor if she would have called any additional witnesses at the hearing if she had relied on BNSF’s May 4, 2016 pre-hearing statement. *Id.* at 24:6-9. Ms. Taylor stated that she might have called Mr. Brousil to testify. *Id.* at 24:10-14. I offered Ms. Taylor the opportunity to question Mr. Brousil the following day, by conference call if necessary,

BNSF's Affirmative Defense

In the event an appellate body were to disagree with my conclusion that Complainant has not established that she engaged in protected activity, I find in the alternative that Respondent has shown by clear and convincing evidence that it would have taken the same adverse action against Complainant in the absence of any alleged protected activity.

When a complainant meets her burden by a preponderance of the evidence, a respondent may nevertheless prevail if it establishes “by clear and convincing evidence that [it] would have taken the same unfavorable personnel action in the absence of” the complainant’s protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv), incorporated into the FRSA by 49 U.S.C. § 20109(d)(2)(A)(i). The clear and convincing standard a respondent must meet is more rigorous than the preponderance of the evidence standard imposed on complainants. *Speegle v. Stone & Webster Construction, Inc.*, No. 13-074, ALJ No. 2005-ERA-00006, slip op. at 11 (ARB Apr. 25, 2014). Evidence is “clear” if it unambiguously explains the reason for the employer’s adverse action; evidence is “convincing” if it demonstrates that a proposed fact is highly probable. *Id.* at 11. Taken together, clear and convincing evidence “suggests that a fact is ‘highly probable’ and ‘immediately tilts’ the evidentiary scales in one direction.” *Id.*, citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

When determining whether Respondent has met its burden, I must assess “(1) the independent significance of the non-protected activity cited by the respondent in justification of the personnel action; (2) the facts that would change in the absence of the complainant’s protected activity; and (3) ‘the evidence that proves or disproves whether the employer would have taken the same adverse actions [in the absence of protected activity].’” *Armstrong v. Flowserve US, Inc.*, No. 14-023, ALJ No. 2012-ERA-00017, slip op. at 14 (ARB Sept. 14, 2016), quoting *Speegle*, slip op. at 12.

With respect to the first factor, I find that failing to protect a shove is a serious and significant violation of BNSF’s safety policy because of the risk to life and property that occurs when an engineer moves a train without being able to see what is on the track. *See, e.g.* Tr. at 124:17-25 (characterizing a shoving violation as a “felony”), Tr. at 181:15-21, 199:13-20 (describing the risks of shoving without maintaining visual protection); RX 19 (BNSF informational flyer that characterizes improper shoving as a “deadly decision”). As discussed below, BNSF has documented and disseminated this policy to its employees. I therefore find

if she felt his testimony was needed to establish her protected activity. *Id.* at 25:18-26:3. Ms. Taylor stated that this did not entirely address her concerns and requested that I “deem it stipulated that [she] engaged in protected activity.” *Id.* at 26:7-9. I denied Ms. Taylor’s request, stating “I don’t think it’s appropriate to prejudice the employer by simply decreeing that that element is established in this case.” *Id.* at 26:10-15. At the conclusion of Mr. Merriweather’s testimony, I asked Ms. Taylor if she wished to present any other testimony, including Mr. Brousil’s testimony by phone the following day. *Id.* at 228:23-229:3. Ms. Taylor stated, “I don’t think it’s necessary” and confirmed that she had no other witnesses to present. *Id.* at 229:4-8. I find that Ms. Taylor was on notice of the need to establish that she engaged in protected activity when she filed her initial complaint with OSHA on August 13, 2014. I find that Ms. Taylor was not prejudiced by BNSF’s May 3, 2016 pre-hearing statement given that she had notice of the burdens she was required to meet and because she had the opportunity to call Mr. Brousil as a witness, even though she chose not to.

that BNSF has established by clear and convincing evidence that failing to protect a shove is an independently significant event that would warrant disciplinary action.

With respect to the second prong of the analysis, I find that no salient facts would change in the absence of Ms. Taylor's allegedly protected activity. I make the following additional findings in support of my conclusion:

When Ms. Taylor left the train yard on September 15, 2013, she utilized the wrong radio channel and could not hear information pertinent to the movement of her train. Tr. at 60:4-5, 20. Conductor Kyle Smith attempted to warn Ms. Taylor by radio that the switch ahead was not properly aligned for movement, but Ms. Taylor could not hear him. RX 3 at 101:18-102:13. While Ms. Taylor believed that she did not run-through the switch, subsequent repairs establish that Ms. Taylor indeed ran-through the switch. Tr. at 128:17-129:3; RX 3 at 20:13-15.

Ms. Taylor stopped her train and moved it backward in order to establish that she had not run-through the switch. Ms. Taylor argues she protected her train's rearward movement by 1) exiting the engine to look at the track; and 2) watching one side of her train through the engine's mirrors while shoving. Tr. at 94:13-95:4.

I find, however, that it was not possible for Ms. Taylor to inspect the track within the timeframe the train was stopped. Ms. Taylor placed the train's control mechanism into an idle position once the train stopped. RX 3 at 115:11-12 ("I centered the reverser,^[25] because it's a habit" (footnote added)). On the basis of Mr. Della-Pietra's interpretation of the train downloads, I find that the control mechanism for Ms. Taylor's train was only idle for seven seconds. RX 3 at 87:3-8. I further find that Ms. Taylor placed the control mechanism into reverse after those seven seconds elapsed. Tr. at 99:21-23 (wherein Ms. Taylor testified that no one else was in a position to move the mechanism). While it took another fifteen seconds for the train to begin its rearward movement, this was not time during which Ms. Taylor could have been outside of the engine because she was operating the train's controls. RX 3 at 87:3-8.²⁶ Accordingly, Ms. Taylor had only seven seconds in which to exit the train, confer with Mr. Smith, inspect the track behind her, re-enter the train, and reverse the engine. I find that it was not possible for Ms. Taylor to complete these tasks within the span of seven seconds. While I find Ms. Taylor generally to be a credible witness, her recollections on this point are not supported by the evidence.

I further find that once the engine began moving, Ms. Taylor could only see one side of the train from the engine's mirrors. Tr. at 94:13-95:4 (Ms. Taylor testified that she could only see one side of her train). No one else monitored the train's rearward movement. Tr. at 91:17-92:5, 92:8-12, 93:11-22. The train yard where the incident took place experienced a high volume of personnel and equipment traffic. RX 3 at 33 (Mr. Bond stated that "it's a really . . . high

²⁵ A reverser is the engine's control mechanism. *Id.* at 98:15-99:6.

²⁶ At Ms. Taylor's disciplinary hearing, she speculated that "I may or may not have put the reverser into reverse position prior to dismounting the engine. I really don't remember." RX 3 at 115:12-14. However, she also said that she did not move the reverser prior to inspecting the track and that she did not hear the train's engine rev nor did she notice the engine moving while outside of the train. *Id.* at 115:20-26.

traffic volume area”); Tr. at 181:15-21. Assuming for the sake of argument that Ms. Taylor exited the engine and confirmed nothing was behind the train prior to shoving, I find that while the train was moving, there was still a risk that personnel or equipment could have crossed the track unbeknownst to Ms. Taylor due to the blind spot created by the engine’s mirrors.

Mr. Smith thereafter called Trainmaster Bond to report a run-through. RX 3 at 102:18-19. Mr. Smith and Mr. Bond did not participate in the Brousil hearings, and there is no reason to believe they had knowledge of what happened at the hearings. CX 11-12. Mr. Bond alerted Mr. Merriweather, who came to the scene to investigate. Tr. at 168:9-19, 169:15-16. No evidence suggests Ms. Taylor’s engine was moved prior to Mr. Merriweather’s arrival.

After Mr. Merriweather inspected the scene, he separately interviewed Mr. Smith and Ms. Taylor. *Id.* at 172:25-173:10. Mr. Smith told Mr. Merriweather that he believed Ms. Taylor ran-through the switch and reversed her train without assistance. *Id.* at 174:21-176:7. Mr. Merriweather informed Mr. Smith that a disciplinary hearing regarding his conduct would be forthcoming and asked who Mr. Smith’s union representative would be. *Id.* at 176:6-11.

At the conclusion of Ms. Taylor’s interview, Mr. Merriweather informed her that he was ordering a disciplinary hearing. *Id.* at 182:7-12. Mr. Merriweather then asked Ms. Taylor, “who would her representative be” at the hearing. Tr. 183:3-4. I find Mr. Merriweather’s testimony more credible than Ms. Taylor’s on the issue of whether he also said “now that you’re in trouble” and laughed twice. *Cf.* Tr. 70:3-7. In support of this credibility determination, I find that Mr. Merriweather was not motivated by retaliatory animus when issuing the notice of investigation, but rather by a genuine concern that Ms. Taylor had violated a safety rule. This finding is supported by the fact that in the case of Employee 1, Mr. Merriweather behaved nearly identically: he was called to the scene to investigate alleged shoving and switch run-through violations, drafted a notice of investigation, and was a witness at the resulting disciplinary hearing. *Id.* at 195:2-10. Thus, while Mr. Merriweather would have ordered a hearing against Ms. Taylor even in the absence of her alleged protected activity, he would not have referenced her role representing a coworker. I can find no evidence that Mr. Merriweather’s testimony at Ms. Taylor’s hearing was false or influenced by retaliatory animus. RX 3. Therefore, I find that no salient facts would change in the absence of Ms. Taylor’s allegedly protected activity.

Mr. Swanson conducted an investigatory hearing because Mr. Merriweather was a witness to the underlying event. *Id.* at 225:9-20. At the time Mr. Swanson conducted the disciplinary hearing and issued the suspension, he had no knowledge of the Brousil hearings or that Ms. Taylor had elicited testimony against Mr. Merriweather. *Id.* at 138:5-139:4, 142:2-8. Mr. Swanson made the decision to discipline Ms. Taylor independently and without any consideration of the Brousil hearings. *Id.* at 137:11-25, 138:14-139:4, 142:2-12.

In summary, when Ms. Taylor failed to use the correct radio channel while operating her train on September 15, 2013, she set off a chain of events that eventually led to her discipline. Ms. Taylor was not able to hear a warning from Mr. Smith, a person who had no connection to the Brousil hearings. Mr. Smith reported the incident to Mr. Bond, another BNSF employee who had no connection to the Brousil hearings. BNSF has thus established by clear and convincing evidence that Mr. Merriweather would have ordered a hearing regardless of Ms. Taylor’s

allegedly protected activity, given that he has done so in similar situations. There is no evidence Mr. Swanson's decision to issue discipline was in any way influenced by the Brousil hearings. Accordingly, I find that no salient facts would have changed in the absence of Ms. Taylor's allegedly protected activity.

For the third prong of the analysis, I must assess "the evidence that proves or disproves whether the employer would have taken the same adverse actions [in the absence of protected activity]." *Armstrong*, slip op. at 14, quoting *Speegle*, slip op. at 12. My analysis must consider whether the discipline "was applied consistently, within clearly-established company policy, and in a non-disparate manner consistent with discipline taken against employees who committed the same or similar violations." *DeFrancesco v. Union R.R. Co.*, No. 13-057, ALJ No. 2009-FRS-00009, slip op. at 13-14 (ARB Sept. 30, 2015).²⁷

I make the following findings of fact related to Ms. Taylor's discipline: BNSF has an established policy that requires engineers to visually protect a train's movement while shoving. RX 13 at 3. Failure to protect a shove constitutes a "serious" or "Level S" violation due to the attendant risk to life and property. RX 19; Tr. at 136:4-21. The text of GCOR 6.5 requires crew members to "provide visual protection" during a shove, though the exact type of protection varies depending on track circumstances and the rule itself does not provide much in the way of specifics. RX 13 at 3; Tr. at 115:6-8 (wherein Mr. Purnell testified that "the circumstances have a lot to do with how you would apply a rule. . . . The GCOR . . . is general"); Tr. at 222:1-7 (wherein Mr. Merriweather testified that curved tracks require heightened visual protection). While GCOR 6.5 lacks details about how engineers should provide visual protection in all circumstances, I find that the rule is not so vague as to be subject to manipulation in this particular case. Ms. Taylor conceded that she could not see one side of her train while shoving, thus creating the very risk GCOR 6.5 is designed to protect against. Accordingly, GCOR 6.5 was not used as a pretext for disciplining Ms. Taylor.

While Mr. Swanson determined Ms. Taylor violated several rules, the shoving violation was the principal factor that resulted in a thirty-day Level S record suspension. Tr. at 125:1-5; RX 4. Mr. Swanson relied on BNSF's Policy for Employee Performance Accountability when determining what type of discipline to issue against Ms. Taylor. Tr. at 135:22-24. That policy provides that an employee's "first Serious violation will result in a 30-day record suspension and a review period of 36 months." RX 12 at 4. The sole exception is that employees who have worked at least five years with BNSF and who have not been subject to prior discipline are eligible for a twelve-month review period. *Id.*; Tr. at 223:13-25. These disciplinary guidelines

²⁷ Among the factors I have considered are "(1) evidence of the temporal proximity between the non-protected conduct and the adverse actions; (2) the employee's work record; (3) statements contained in 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." *Speegle*, slip op. at 11. I have also considered whether 1) Respondent routinely monitors employee compliance with the rules at issue in this case; 2) Respondent consistently imposes equivalent discipline against employees; 3) the rules Complainant is charged with violating are routinely applied; 4) the rules Complainant is charged with violating are vague and subject to manipulation and use as pretext for unlawful discrimination; and 5) the evidence suggests that in conducting its investigation, Respondent was genuinely concerned about rooting out safety problems, or whether the evidence suggests that Respondent's conduct was a pretext designed to unearth some plausible basis on which to punish Complainant for engaging in protected activity. *DeFrancesco*, slip op. at 11-12.

are proportional given the safety risks created by improper shoving. Mr. Swanson considered Ms. Taylor's lengthy term of employment with BNSF and her otherwise exceptional disciplinary record and reduced her review period from thirty-six months to twelve months. Tr. at 135:15-20.

I find that disciplinary records establish that BNSF routinely monitors for shoving violations. Employee 1 was terminated on April 22, 2014 for failing to protect a shove. RX 8 at 5; Tr. at 195. Employee 2 was disciplined on February 25, 2013 with a thirty-day Level S record suspension and a thirty-six month review period for failing to protect a shove. RX 8 at 9; Tr. at 196. Employee 3 was disciplined on November 14, 2012 with a thirty-day Level S record suspension and a thirty-six month review for failing to protect a shove. RX at 12; Tr. at 197-198. These disciplinary actions, which occurred both before and after Ms. Taylor's discipline, establish that BNSF consistently enforces its shoving policy. The disciplinary records also establish that Ms. Taylor was subject to less stringent discipline relative to other employees.

Finally, I find that when conducting its investigation, Respondent was genuinely concerned about enforcing its safety policy and did not use the hearing as a pretext for punishing Ms. Taylor. Ms. Taylor objects to the fact that Mr. Bond and Mr. Merriweather testified about repairs made to the switch rather than the maintenance-of-way personnel who actually repaired the switch. I find that Ms. Taylor was afforded the opportunity to call witnesses from the maintenance-of-way department at her disciplinary hearing and present statements and evidence regarding the status of the switch.

Accordingly, even assuming for the sake of argument that Complainant had engaged in protected activity, Respondent has proven by clear and convincing evidence that it would have taken the same adverse action against Complainant in the absence of that allegedly protected activity.

CONCLUSION

Complainant has failed to establish that she engaged in protected activity. Even assuming for the sake of argument that Complainant had engaged in protected activity, Respondent has established by clear and convincing evidence that it would have taken the same adverse action against Complainant in the absence of that allegedly protected activity.

Accordingly, the complaint in this matter is **DISMISSED**.

SO ORDERED.

PAUL R. ALMANZA
Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within fourteen (14) days of the date of issuance of the administrative law judge’s decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210, for traditional paper filing.

Alternatively, the Board offers an Electronic File and Service Request (“EFSR”) system. The EFSR for electronic filing (“eFile”) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

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

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

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

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

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

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