



Issue Date: 31 July 2018

CASE NO. 2015-FRS-00052

In the Matter of

STEPHEN THORSTENSON,
Complainant,

v.

**BNSF RAILWAY COMPANY
AND CHRISTOPHER DELARGY,**
Respondents.

Appearances: Paul S. Bovarnick, Esq.
for Complainant

Noah K. Garcia, Esq.
Paul S. Balanon, Esq.
Jacob E. Godard, Esq.
for Respondent

Before: Steven B. Berlin
Administrative Law Judge

DECISION AND ORDER

This matter arises under the whistleblower-protection provisions of the Federal Rail Safety Act.¹ Complainant Stephen Thorstenson alleges that BNSF Railway Company violated the Act when it disciplined him and then terminated the employment in retaliation for his reporting a workplace injury. In addition to BNSF, Complainant names BNSF Terminal Superintendent Christopher DeLargy as an individual Respondent but states no specific allegations against him. OSHA issued "Secretary's Findings" on June 16, 2015. Respondents timely objected and requested a hearing.

During the hearing, I dismissed Respondent DeLargy. DeLargy testified that he was uninvolved in the alleged statutory violations and moved for a dismissal. Tr. 583, 588. Complainant conceded that the motion was meritorious. Tr. 607.

¹ 49 U.S.C. § 20109, and its implementing regulations, 29 C.F.R. Part 1982.

The case against BNSF turns on three pivotal events. Two are workplace injuries. On the second of these, BNSF disciplined Complainant for allegedly failing to report the injury timely. The existence of the first injury affected adversely the extent of the discipline BNSF imposed for Complainant's late report of the second injury. The third event occurred while Complainant (working as the train conductor) and a co-worker (the engineer) were operating a train. Complainant and his co-worker exceeded the speed limit, Complainant applied the emergency brake without warning the engineer that he was going to do so, and neither Complainant nor the engineer sounded the whistle as the train passed through a railroad crossing. All of this could have had serious consequences – both aboard the train and to anyone on the crossroad at the railroad crossing. Fortunately, none of these consequences occurred.

Following this last incident, BNSF terminated the employment of Complainant but not of the engineer. Complainant asserts that, in violation of the Act, the termination was in retaliation for his report of the earlier injuries. BNSF denies the allegation. It asserts that it properly applied its established progressive discipline policy and engaged in no retaliation.

I conducted a hearing in Portland, Oregon on June 6, 7, and 8, 2016. Complainant testified on his own behalf and called as witnesses: forensic economist Jeffrey Opp; union representatives Jay Schollmeyer and Richard Etienne; psychologist Roberta Ballard; and Complainant's daughters Erika and Nicole Thorstenson. BNSF called as witnesses Terminal Superintendent Christopher DeLargy; Mike Surina, who is the manager who conducted BNSF's in-house disciplinary hearing concerning Complainant's allegedly late injury report in January 2011; Michael Cart, the manager who conducted a disciplinary hearing concerning the emergency braking and failure to signal at the railroad crossing in August 2011; and labor relations manager Andrea Smith. I admitted numerous exhibits.² The parties filed post-hearing briefs.

Facts

BNSF is a rail carrier within the meaning of the Act. ALJ Ex. 1. At all relevant times Complainant was an employee of BNSF and was a covered employee within the meaning of the Act. *Id.*

Complainant began working for BNSF as a yardman in May 1989. ALJ Ex. 1. Over the years, he worked as a switchman and brakeman. R.Ex. 1 at 1. In 1996, BNSF promoted him into a conductor position. *Id.* That was his job at the time of the events relevant here (in 2010 and 2011). *Id.* Complainant worked in and around Vancouver, Washington. *Id.*

As part of its routine training program, BNSF trained Complainant on safety rules applicable to conductors, engineers, and switchmen. Tr. 587. It also trained Complainant and other workers on its "General Code of Operating Rules" ("GCOR"). Tr. 80. Much as the title implies, the GCOR rules address general operations, including work that Complainant did. *Id.* Complainant was trained on and familiar with these rules (both safety and GCOR) at the times relevant here. R.Ex. 1 at 3; Tr. 243-44.

² I admitted Complainant's Exhibits (C.Ex.) 1-5, 7-11, 13, 14, 16A-B, 19, 20A-D, 22-24, 25A-B, 26, and 27-47. I admitted Respondent's Exhibits (R.Ex.) 1-38 and 40-56.

Before the incidents that are the subject of this litigation, his most recent prior discipline had been about six years earlier, in 2004. R.Ex. 1. In the 15 years prior to that, there were four disciplinary incidents that BNSF treated as “serious” (so-called “Level S” infractions). *Id.*

February 2, 2009 injury. On February 2, 2009, Complainant injured his left knee when he slipped on steps while boarding a train. ALJ Ex. 1; Tr. 272. Generally, workers who sustain a workplace injury at BNSF must report the injury immediately. R.Ex. 5 at 15. But, as Complainant’s union representative testified and the written policies reflect, for “muscular-skeletal” injuries such as Complainant’s knee injury, BSNF allows 72 hours to report. R.Ex. 5 at 18; Tr. 99.

On the second day after the injury (*i.e.*, within the 72-hour limit), Complainant reported it. ALJ Ex. 1. He was off work for almost six months, until August 2009. Tr. 273-74. When he returned to work, he still had swelling, stiffness, and some pain in his left knee after he completed work trips. *Id.* at 273-74. He occasionally saw a doctor for these symptoms. *Id.* at 273-75.

As Complainant’s knee condition changed over time, he would give updates to BNSF manager Steve Matzdorff, claims manager Kris Osmus, and “medical manager” Joan Costa. Tr. 275. He said that he would call them when he had a medical appointment, “news” about how his knee was doing, and when he was having “problems” with his knee. Tr. at 275, 293. None of these managers asked Complainant to report any of this information as a new injury. *Id.* at 293.

Complainant saw Dr. Kevin Kahn at Rebound Orthopedics on October 20, 2010. R.Ex. 51 at 1. Dr. Khan noted Complainant as reporting occasional left knee discomfort without sensation of instability. *Id.* at 276. He characterized his knee condition as “just an annoyance” that didn’t stop him from working. *Id.* There was full range of motion with no pain. *Id.*

Complainant asked Dr. Kahn to close his medical file on the injury. R.Ex. 51. Dr. Kahn discharged Complainant from his care, stating that Complainant could return as needed. *Id.* at 3. He released Complainant to full duty without restriction. *Id.* The record is silent about whether either Dr. Kahn or Complainant informed BNSF of the release to return to work without restriction.

November 17, 2010 injury. On November 17, 2010, Complainant (working as the conductor) and an engineer were moving a train into a garage for refueling. Tr. 276-77. Complainant stood up for a moment and then sat again. *Id.* at 276. As he sat, he banged his left kneecap against something metal. *Id.*; R.Ex. 5 at 12. He felt pain but thought it might be just the injury he’d sustained in February 2009. Tr. 276-77, 329. He completed the shift without reporting the incident. *Id.* at 277-78.

The next day was a workday for Complainant. *Id.* at 278. He had more than his usual swelling, stiffness, and pain in his knee. *Id.*

Complainant was not scheduled for work the following day (November 19, 2010). He returned to Rebound Orthopedics and saw a physician's assistant. *Id.* at 332; R.Ex. 5 at 30. He reported "pain and difficulty with his left knee." R.Ex. 5 at 30. He said he'd bumped it against his (onboard) desk, thought that this was causing the pain, and was afraid that he'd "aggravated" his February 2, 2009 injury.³ Tr. 332-36; R.Ex. 5 at 30. The physician's assistant prescribed pain medication. R.Ex. 5 at 30.

Complainant returned to work on November 20, 2010. Tr. 337. By the end of the day, he had some swelling and pain in his left knee. Tr. 280. He worked again on November 21, 2010. *Id.* Toward the end of the day, he had severe stiffness, pain, and swelling. *Id.* On November 22, 2010, he returned to the doctor, who drained fluid from the knee, took x-rays, injected cortisone, and took Complainant off work. *Id.* at 280, 337-38, 340; R.Ex. 5 at 31.

Complainant returned to the doctor again on December 6, 2010. R.Ex. 5 at 32. The doctor diagnosed a torn meniscus and recommended an arthroscopy and partial meniscectomy that was scheduled for December 20, 2010. *Id.*; C.Ex. 4 at 3. The doctor continued Complainant off work until Complainant recovered from surgery for the tear. R.Ex. 5 at 32. He was returned to full duty on January 17, 2011. C.Ex. 4 at 3; Tr. 414.

Complainant's report to BNSF of the November 17, 2010 incident. In the interim, Complainant had failed to report the new injury to his knee timely within 72 hours of its occurrence.

Complainant offers varying and inconsistent accounts of when he first reported the November 17, 2010 incident to BNSF. BNSF contends that it was not until November 22, 2010 (five days after the incident). I will find that BNSF, more likely than not, is correct.

Complainant's accounts are as follows:

- At a disciplinary hearing on January 21, 2010 (two months after the injury), Complainant testified that he made the report to the medical staff and the claims department⁴ on November 11, 2010 or November 22, 2010. R.Ex. 4 at 23-24, 27. He said that both departments told him that they were going to treat this incident as a continuation of the 2009 injury. *Id.* at 24. But he admitted that the claims person also told him that he must "inform" the Trainmaster. *Id.*

Of the dates he identified, he could have reported the incident only on November 22, 2010: As the incident occurred on November 17, 2010, he couldn't have reported it on November 11, 2010, six days before it occurred. As I discuss below, other evidence corroborates that November 22, 2010 is the date on which Complainant contacted the trainmaster and filled out a report. *See id.* at 21, 24.

³ The doctor recorded the earlier incident as occurring on February 2, 2008. R.Ex. 5 at 30. This seems to be an error: the prior injury was on February 2, 2009, not 2008.

⁴ The functions of the "medical staff" and "claims department" are not defined on the record. It appears, however, that the BNSF medical staff include nurses and that the staff handles work-related medical issues as they arise. R.Ex. 23 at 30. The "claims department" seems to administer and keep records for claims of workplace injury.

- During the OSHA investigation more than six months after the workplace incident, Complainant told the investigator on May 6, 2011, that he saw the physician’s assistant on November 19, 2010, and she’d said Rebound Orthopedics would continue to bill its services on the claim file it opened in 2009. R.Ex. 23 at 30.

I view this as essentially irrelevant. It cannot reasonably be viewed as advice to Complainant that there had been no new injury that he needed to report to BNSF; it reflects no more than the billing practice of Complainant’s treating physician (not of BNSF).

Complainant also told the OSHA investigator that he called a BNSF nurse sometime between November 19 and 21, 2010. *Id.* Complainant did not say that he reached the nurse, talked with her or what she said; it appears that he did not. This is apparent because, as he told the OSHA investigator, he called again on November 22, 2010 and spoke to a different nurse, who said the first nurse no longer was handling Complainant’s claim. *Id.* at 30. The second nurse said the medical department would handle this as part of the same injury; it wouldn’t open a new file. *Id.* at 31. Complainant told the OSHA investigator he also called Kris Osmus in the claims department on the same day (November 22, 2010). She told Complainant that the claims department would treat the current medical issues as part of the same claim, but she added that Complainant must notify the trainmaster. *Id.* at 32. As I discuss below, that is when Complainant reported the incident to the trainmaster (November 22, 2010).

- Five years after the second knee incident, Complainant gave a deposition in this case on December 4, 2015. R.Ex. 20. He testified that he did not know when he called Joan Costa of BNSF’s medical staff, but “for some reason [he wanted] to say on Friday [which would be November 19, 2010].” R.Ex. 20 at 62. Costa was on vacation. *Id.* at 63-64. He was directed to call someone else, whose name he could not recall, and he called that person. *Id.* He also called the claims department and spoke with Osmus on November 22, 2010.⁵ *Id.* at 62.

Complainant said that both the person in the medical department and Osmus told him that his knee injury would be treated as a continuation of his 2009 claim. *Id.* at 63-64. In his testimony, he agreed that Osmus “encouraged” him to speak to “someone in management” about the incident. *Id.* at 63.

This testimony is readily reconciled with what Complainant told the OSHA investigator four and one-half years earlier: He called the medical department, didn’t reach anyone, was given another person to call, didn’t call that person until November 22, 2010, when he also called Osmus, who told him that he should report the incident to management.⁶

⁵ Complainant said he spoke to Osmus and the trainmaster on the same day. R.Ex. 20 at 68. Complainant said he filled out the injury report the same day he spoke with the trainmaster; the injury report is dated November 22, 2010. *Id.* at 67-68.

⁶ Also consistent with his statement to OSHA, Complainant testified at the deposition that he didn’t recall what day he first called the medical staff, but “for some reason [he wanted] to say on Friday.” *Id.* at 62. The first Friday after the November 17, 2010 injury was November 19, 2010, the same date that he gave OSHA. Complainant testified that he spoke to Osmus and the trainmaster on the same day. *Id.* at 68.

- Complainant gave another account at the June 2016 hearing on the merits in the present action. As before, he testified that on November 19, 2010, he called Costa in the medical department, who was on vacation. Tr. 278-79. This time, however, he stated that he called Osmus in the claim's department on the same day, November 19, 2010. *Id.* Complainant testified that he told Osmus and someone in Costa's office that his knee was hurting because he bumped it and that he had visited the doctor. *Id.* Complainant testified that neither Osmus nor the person in Costa's office told him to submit an injury report. *Id.*

Complainant testified that, after leaving the doctor on November 22, 2010, he again called Osmus and the BNSF nursing staff. Tr. 280-81. Both told him they were going to treat his current knee problem as a continuation of his 2009 injury. Tr. 281; R.Ex. 4 at 19, 23, 25-26. Complainant conceded, however, that Osmus also told him to call someone in Operations about the incident. Tr. at 181. Complainant called Trainmaster John Canavan that same day (November 22, 2010). *Id.*

There is some discrepancy between Complainant's and Canavan's accounts of their conversation (or conversations) on November 22, 2010; none of it consequential. There is no dispute that Complainant told Canavan that he'd had a work-related knee injury in 2009; a claim from that injury was still open; his knee had been acting up since the time of that injury; he had bumped the knee the week prior; and he'd seen a doctor, who had taken him off work. Tr. 282.

According to Complainant, Canavan said he was unsure whether Complainant needed to file a new injury report, and that Canavan would call Complainant back if he needed to file one. *Id.* Complainant conceded that Canavan called Complainant back the same day and told him to come in and submit a new injury complaint form. *Id.*; R.Ex. 4 at 23-24.

Canavan's testimony was somewhat different. He testified that, after asking Complainant if he was alright, he told Complainant to come in and complete the injury form; he didn't say he'd call back if Complainant needed to fill out the form. R.Ex. 4 at 7-8. This was the first Canavan learned of the November 17, 2010 incident.

Thus, most of Complainant's reporting is consistent until the last account: his trial testimony well over five years after the events he was describing. For the first time, he said that he reported the November 17, 2010 incident to Osmus in the claims department two days later, on November 19, 2010.

Considering all of the evidence on this point, I give more weight to Complainant's testimony at the disciplinary hearing two months after the knee injury, when he said that he first reported the November 17, 2010 incident to BNSF managers on November 22, 2010. Complainant's union represented him at the disciplinary hearing. The infraction under scrutiny was the timeliness of the injury report; Complainant had every reason to give as early a date as was truthful. The November 11, 2010 date that he mentioned as an alternative at the disciplinary hearing was clearly wrong because it was before the November 17, 2010 incident occurred. That leaves November 22, 2010 as the only viable date. Most of Complainant's other accounts are consistent with this description or can be reconciled consistent with it. It is only the trial testimony that cannot be squared with Complainant's almost contemporaneous report at the disciplinary

hearing. Given the large gap in time between the report date and Complainant's testimony at the hearing, I give little weight to the particular details of that last account. I therefore conclude that Complainant did not report to BNSF the incident of November 17, 2010 until he talked to the Osmus, the medical department, and Trainmaster Canavan on November 22, 2010.

Disciplinary process. On November 24, 2010, BNSF notified Complainant that it was investigating his apparent late report of the workplace injury on November 17, 2010. ALJ Ex. 1. Part of the process is a hearing conducted before a manager (the "conducting officer"), who presides, admits evidence, and can (along with the employee) call witnesses. R.Ex. 3-4; Tr. 525. Tr. 84-85. The hearing was held on January 21, 2011. *Id.*

Mike Surina was the conducting officer. R.Ex. 4 at 1. He called as witnesses Complainant, Trainmaster Canavan, and Christopher DeLargy, the terminal superintendent in Vancouver, Washington. R.Ex. 4. Local union chair Richard Madrid represented Complainant. *Id.*

Canavan testified, as described above, about his phone call with Complainant on November 22, 2010. *See* discussion *supra*. DeLargy testified to BNSF's rules about reporting a workplace injury, including the rule requiring an employee to report a muscular-skeletal injury within 72 hours of the probable triggering event.⁷ *Id.* at 14. He explained that the rule also required the employee to notify their supervisor before seeking medical attention. *Id.* Local union chair Madrid and Complainant each were given an opportunity to question Canavan and DeLargy but declined. *Id.*

During his testimony, Complainant described hitting his knee on November 17, 2010. *Id.* at 23. He said that he did not report the incident right away because he believed it was a continuation of his 2009 injury. *Id.* at 23. As discussed above, he said he called the BNSF claims and medical departments as well as Trainmaster Canavan. He never testified or argued (and his union did not argue) that he reported the incident to the trainmaster on duty within 72 hours. The disciplinary rule requires a report "to the proper manager and the prescribed form completed" within the 72-hour period. GCOR 1.2.5; *id.* at 27. Complainant conceded at the disciplinary hearing that the proper manager in this instance was the trainmaster on duty.

Surina concluded that the Company had sustained the charge of late reporting. He found that, in his injury report, Complainant described a specific incident when he bumped his knee, and more than 72 hours passed before Complainant reported the injury. Tr. 183. Nothing on the record, however, suggests that Surina expressed his conclusion to the manager who would ultimately decide the issue: General Manager Doug Jones. Tr. 184, R.Ex. 36.

Jones reviewed the hearing transcript and concluded that Complainant violated several provisions of the General Code of Operating Rules. R.Ex. 36 at 81.⁸ He concluded that the

⁷ *See* GCOR 1.2.5 (requiring that all personal injuries be immediately reported to the proper manager and a written report complete) R.Ex. 5 at 15; *see also* disciplinary policy (employees will not be disciplined for late reporting of muscular-skeletal injuries, as long as the injury is reported within 72 hours of the probable triggering event). *Id.* at 18.

⁸ Complainant was found to have violated GCOR 1.13 (comply with instructions issued by managers), GCOR 1.2.5 (on the job personal injuries must be immediately reported to the proper manager and the prescribed form must be

injury report was late in two ways: Complainant did not report the injury within 72 hours, and he did not report before going to the doctor. R.Ex. 36 at 81. As that was five days after the injury occurred, it was a violation.

BNSF's disciplinary policy at the time divided violations into "Non-Serious Rule Violations," "Serious Rule Violations," "Dismissible Violations," and "Attendance Violations." R.Ex. 5 at 19-20. It defined the "serious violations" in a "non-exhaustive list." *Id.* at 23. The list included violations such as tampering with safety devices, equal employment infractions, and a catch-all provision that extended to "any other serious violation of General Code of Operating Rules, Maintenance of Way Rules, Safety Rules, or General Instructions issued to employees." *Id.* For the catch-all provision, management decides what constitutes a serious violation. Tr. 191-92.

BNSF refers to serious violations as "Level S." Tr. 172; R.Ex. 5 at 19. They generally result in a 30-day "record suspension," in which the suspension is noted on the employee's work history in his personnel file, but he may work and earn regular wages. R.Ex. 5 at 19. The discipline for a Level S violation generally included at the relevant times and still includes a 36-month review period. *Id.*; C.Ex. 47 at 4. But at the times relevant here, BNSF imposed a shorter, 12-month review period if, during the preceding five years, the employee had been (1) "discipline-free" and (2) "injury-free." R.Ex. 5 at 19-20. BNSF has since changed the policy to allow a 12-month review period if the employee has been discipline-free during the previous five years, irrespective of any history of injuries. Tr. 613. But at the time relevant here, any injury in the preceding five years imposed the greater, 36-month review period.

Under its policies, BNSF may also consider factors in aggravation or mitigation when determining the discipline to be imposed.⁹ R.Ex. 5 at 18-20. For example, BNSF might impose an actual suspension with loss of pay (not a mere "record suspension") "where, in the opinion of management, employees' behavior threatens their own safety or the safety of their co-workers or community." *Id.* at 19. The policy gives no examples of factors in mitigation.

Jones concluded that Complainant had committed a Level S violation and that the appropriate discipline was the 30-day record suspension generally imposed for Level S violations. R.Ex. 36 at 39. Although Complainant had no history of discipline in the preceding five years, he did have a history of the knee injury within that time. R.Ex. 1 at 1. Jones therefore imposed a 36-month review period. R.Ex. 36 at 38, 81; R.Ex. 6. BNSF formally administered the Level S record suspension on January 28, 2011. C.Ex. 7; R.Ex. 6, ALJ Ex. 1.

Complainant's union grieved the disciplinary decision through the steps in the grievance procedure and ultimately to arbitration at a Public Law Board. Tr. 90-91, 615; R.Ex. 7. The

completed), GCOR 1.3.3 (employees are required to review BNSF Notices), and GCOR 1.1.3 (report by the first means of communication any personal injuries), and Safety Rule 1.2.8 (make reports of incidents immediately to the proper manager) ALJ Ex. 1; R.Ex. 6.

⁹ For some infractions, BNSF has an "alternative handling" program that it can use rather than a formal investigation; it appears to be similar to a diversion program in a criminal case. R.Ex. 5 at 19-20. By a negotiated agreement between the union and BNSF, however, alternative handling is not available for late-reported injuries. Tr. 153. Thus, the Notice of Investigation expressly stated that Complainant was "ineligible" for alternative handling. R.Ex. 3.

Railway Labor Act establishes the structure of the Public Law Board. Tr. 91-92. The Public Law Board arbitrators upheld the record suspension on February 27, 2013, finding that BNSF had not violated the collective bargaining agreement.¹⁰ R.Ex. 8.

Complainant filed an initial OSHA complaint on February 7, 2011, alleging that the suspension was in retaliation for requesting medical treatment, for following the orders of a treating physician, and for notifying BNSF of his work-related injury. ALJ Ex. 1; R.Ex. 21 at 32.¹¹ He would later amend the OSHA complaint after BNSF terminated the employment. I turn now to the events leading to the termination.

2011 train-handling incident. On June 26, 2011, five months after he received the Level S record suspension for late-reporting in November 2010, Complainant was working as a conductor aboard a train with engineer Walt Wasnoska. R.Ex. 10 at 18, 20-21; Tr. 263-68. Under BNSF rules, the engineer and conductor are jointly responsible for the operation of the train. Tr. 132-34; 210. Among the conductor's many duties are operating the emergency brake and the whistle (or horn); the engineer, among other duties, operates the throttle, whistle (or horn), and brakes. Tr. 132, 364, 566.

The engineer can increase or decrease the speed of the train by moving the throttle to a higher or lower position (or notch). Tr. 132. The throttle can be in the off position, the idle position, or any of positions 1-8, each of which supplies more power. R.Ex. 11 at 4. The engineer can apply normal braking to slow the train. Tr. 364.

As the conductor, Complainant's control of the train's speed – other than by talking to the engineer – was limited to pulling the emergency brake. Tr. 132. A conductor uses the emergency brake if the train's maximum authorized speed is exceeded by five miles an hour or more, and there is doubt that the throttle or the non-emergency brakes can control train speed. R.Ex. 45 (Air Brake and Train Handling Rules 103.8).

Communication is an important part of the conductor's and engineer's duties. Before the trip starts, the conductor and the engineer are supposed to have a conversation about the track bulletin, which has information about locations where speed is reduced (slow orders) and about

¹⁰ As the Public Law Board's function is to arbitrate disputes arising out of alleged violations of the collective bargaining agreement in individual cases, it does not directly address the elements and burdens in the Federal Rail Safety Act. For example, a railroad could impose discipline consistent with its collective bargaining agreement, and the Public Law Board would affirm. But if the employee's FRSA-protected activity was a contributing factor in the discipline, the administrative law judge would still decide an FRSA case for the employee unless the railroad could establish the affirmative defense by clear and convincing evidence. Thus, while a railroad's imposition of discipline *inconsistent* with the collective bargaining agreement might suggest pretext and weaken the defense case, the railroad's compliance with the requirements of the collective bargaining agreement assists the railroad only in that it does not produce evidence of pretext.

¹¹ In the OSHA complaint and his pre-hearing statement, Complainant also raised an issue about being assigned "points" for late reporting an injury. The undisputed evidence was that this resulted in no more than monthly counseling and does not make any future discipline more likely or more severe. Tr. 187; C.Ex. 16B at 8-9, 20B at 6. Complainant did not pursue the "points" issue in his closing brief and appears to have abandoned it. I conclude that (1) that the "points" can be considered along with the suspension and will be rejected for the same reason as the suspension, and in the alternative, (2) that the counseling was not an adverse action.

track maintenance. Tr. 245-47. During the trip, the conductor and engineer both call condition signals as they see them (*e.g.*, speed restrictions). *Id.* at 248-49, 251.

At the time of the incident on July 26, 2011, Wasnoska was eating lunch when the train exceeded the 55 miles-per-hour limit for 44 seconds, of which 12 seconds were at 60 miles-per-hour. Tr. 575, 676; R.Ex. 10 at 28, 33. The train is equipped with an “alerter” that alarms when the train is speeding and there has been no movement with the train’s controls, such as the throttle or brakes. *Id.* at 570-71. If the engineer does not turn the alerter off within a certain time, the system will engage the train’s brakes automatically. *Id.* at 677. Here, the alerter activated for the last six seconds the train was speeding, when Wasnoska moved the throttle down from position eight to position one. R.Ex. 11 at 4; C.Ex. 9; R.Ex. 10 at 47. About five seconds later, he moved the throttle from position one to idle. *Id.*

Reducing the throttle position is not a silent movement. Tr. 579. The engine’s sound changes audibly, and a person can feel the change in speed. *Id.*

About six or seven seconds after Wasnoska moved the throttle from position 8 to position 1 (or a second or two after he moved the throttle from position one to idle), Complainant said that he noticed the train was travelling at 60 mph. Tr. 362; R.Ex. 10 at 37; R.Ex. 11 at 4. Complainant pulled the emergency brake. R.Ex. 10 at 37. He understood that this would slow the train abruptly: The train cars could bunch together and throw people aboard the train forward or backward (“slack action”). Tr. 366. He braced himself but failed to tell Wasnoska to do the same. *Id.* at 367. As the train passed through a crossing, neither Complainant nor Wasnoska sounded the whistle. Tr. 566; R.Ex. 20 at 115-16; C.Ex. 11. Later that day, Trainmaster Ward Angelos interviewed Complainant and Wasnoska and got their written statements. R.Ex. 10 at 17-18.

On June 29, 2011, Chris Lucero, Superintendent of Operations in Vancouver, issued a notice of investigation to Complainant and Wasnoska regarding their alleged speeding violation and failure to sound the whistle at a crossing. R.Ex. 55 at 11; C.Ex. 8. The hearing was on August 18, 2011. R.Ex. 10. BNSF manager, Terminal Manager (Vancouver, WA) Michael Cart was the conducting officer. R.Ex. 10. The charges against each of the two employees were heard together. *Id.* at 4. The union provided each employee with a representative.¹² *Id.* The conducting officer called witnesses, questioned them, and gave both the union representatives and the two employees opportunity to question the witnesses (some of whom they questioned). The employees (and their union) chose not to call any witnesses. Cart called the two employees, Trainmaster Angelos (who had interviewed them and taken their statements), and an expert witness, Jason P. Denny. Denny is a BNSF employee whose duties include reading event recorders when there is an incident. R.Ex. 10 at 27.

Trainmaster Angelos read into the record the statements he had taken from the employees on the day of the incident. *Id.* at 17. He testified that, in his view, the employees’ behavior violated the rules against speeding, not sounding the whistle, and carelessness of safety. *Id.*; R.Ex. 11 at 8.

¹² Local Chairman Richard Madrid represented Complainant, and Local Chairman Rick Etienne represented Wasnoska. R.Ex. 10 at 4.

In the statements, Complainant said that Wasnoska got food and slowed the train while approaching Patterson from the west, then increased speed at the east end of Patterson to 60 mph in a 55 mph zone. R.Ex. 11 at 10. Wasnoska stated that the train reached 59 miles per hour, and he moved the throttle from position eight to position zero. *Id.* at 9. He also stated that Complainant was sleeping and pulled the emergency brake when he awakened. *Id.*

At the disciplinary hearing, Wasnoska testified that Complainant did not warn him before pulling the emergency brake and that he (Wasnoska) did not blow the whistle because he was busy trying to control the train and “ascertain what was going on.” R.Ex. 10 at 42-43. Wasnoska admitted that, contrary to his written statement and to his oral statement to Angelos that Complainant had been sleeping just before pulling the emergency brake, he had no idea if Complainant had been sleeping. *Id.* at 21, 44. Complainant denied that he was sleeping and said he’d been looking out the front window to make sure nothing was obstructing the rail ahead. *Id.* at 37. BNSF made no conclusion that Complainant had been sleeping and awakened just before pulling the emergency brake.

Complainant admitted to speeding and not sounding the whistle. *Id.* at 39. He said he didn’t sound the whistle because he had to concentrate on the emergency brake and the effect it was having on the train. *Id.* at 39. Asked why, before pulling the emergency brake, he didn’t tell Wasnoska to slow down, he testified: “It just happened . . . I closed the window on my side and I updated my conductor event recorder and my signal awareness form and I looked at the, at the crossing and the block was still clear, and I looked down at the speedometer and it was 60 miles an hour, so I, I felt unsafe so I, I pulled the air.” R.Ex. 10 at 36-37.

Complainant’s account conflicts with the reading of the event recorder. The expert on the event recorder, Jason Denny, testified that the train was speeding at 60 mph at which time Wasnoska pulled the throttle back from position eight to idle. R.Ex. 10 at 27-28; R.Ex. 11 at 3. This caused the train to slow one mile-per-hour (to 59 miles-per-hour) by the time Complainant pulled the emergency brake. R.Ex. 10 at 56; R.Ex. 11 at 3. Complainant could have read the reduced speed on his speedometer. R.Ex. 10 at 37. The difference is significant because the conductor pulls the emergency brake only when the train is 5 mph over the limit; here 60 mph). Given Denny’s expertise and that nothing on the record brings his fairness into question, I conclude that BNSF could reasonably rely on Denny’s opinion to resolve the dispute between Complainant and Wasnoska about the speed of the train when Complainant pulled the emergency brake.

Conducting Officer Cart told Superintendent of Operations Lucero that he thought the Company had shown the violation. C.Ex. 24 at 6. Lucero’s role was limited to giving a recommendation to Robert Johnson, the general manager who ultimately decided Complainant’s and Wasnoska’s discipline as well as advising human resources manager Andrea Smith. He was to opine on whether Complainant had violated the applicable rules and, if so, what discipline should be imposed.

Lucero’s conclusion was that BNSF should dismiss both Complainant and Wasnoska based solely on this incident, known at BNSF as a “standalone dismissal.” He focused on their taking the train through the crossing without blowing the whistle. R.Ex. 55 at 6, 11. But he later testified at a deposition (May 24, 2016) that, in addition to speeding and failure to blow the

whistle, Complainant and Wasnoska were also charged with negligent behavior (GCOR 1.6). R.Ex. 55 at 11. In Lucero's view, the failure of both Complainant and Wasnoska to communicate with each other was negligent behavior in violation of the rule, and Complainant was more blameworthy than Wasnoska. *Id.* As he said: "We constantly brief on [ensuring] that there's good in-car communication . . . there's just a lot of safety risk that's involved there; specific to a conductor just placing the train into emergency, without talking to his engineer. For one, the engineer, potentially, could have got the train under control, without having to place a turn into emergency." *Id.*

But Smith advised a different course. Analyzing Wasnoska's case, she concluded that it would be difficult to support a standalone dismissal for him. *Id.* Wasnoska's failures occurred when he allowed the train to operate above the speed limit and when he did not blow the whistle. C.Ex. 27 at 1. Smith said that the speeding violation on its own would be a standard (*i.e.*, non-serious) violation and that a failure to blow the whistle is normally assessed a Level S violation. *Id.* Together, the two would not necessarily equate to a stand-alone dismissible event. *Id.* Wasnoska's defense at the disciplinary hearing was that he did take action to reduce the train speed and that he did not blow the whistle because Complainant's pulling the emergency brake distracted him. *Id.* This defense, together with Wasnoska's status as a "fairly long-term employee (21 years)," left Smith thinking "there was a higher-level likelihood that an arbitrator might bring that employee back, based on the standalone." R.Ex. 55 at 6.

After reviewing both Wasnoska's and Complainant's records, Smith recommended treating this incident on June 26, 2011, as a Level S violation for both. Tr. 644-45. As she explained later in testimony in the present case, BNSF might have been able to support a standalone dismissal of Complainant had it better developed at the disciplinary hearing Complainant's other failures, such as his failure to communicate with Wasnoska, but it had not done that. Lucero considered Smith's advice and recommended to deciding official Johnson that BNSF discipline Complainant for a Level S violation, not a standalone dismissible offense. C.Ex. 24 at 15-16; C.Ex. 27 at 2.¹³

Provided with Lucero's recommendation and Smith's advice, General Manager Johnson accepted Smith's advice and assessed Level S violations against both Complainant and Wasnoska. But the impact on the two employees was different: BNSF terminated Complainant's employment under the progressive discipline policy, while it only imposed a 30-day record suspension against Wasnoska. C.Ex. 25A at 7, 25B at 2-4, 47; Tr. 137, 615.

This was because BNSF had imposed a Level S violation related to Complainant's late report of the November 17, 2010 injury. The current violation (related to the operation of a train) was about nine months after that earlier violation. The earlier violation thus was within the review period regardless of whether that period was the default 36 months or the shortened 12 months;

¹³ Lucero still recommended a standalone dismissal for Wasnoska. As he explained, Wasnoska (as had Complainant) also admitted to speeding and failing to whistle for a public crossing. But Wasnoska had failed to whistle at a public crossing on another occasion in the recent past, an incident for which BNSF had imposed Level S discipline. Given the two incidents, Lucero recommended a standalone dismissal for Wasnoska for conscious or reckless indifference to the safety of himself, others or the public. C.Ex. 27 at 2.

either would include an event that occurred only nine months earlier. Consequently, BNSF could terminate the employment consistent with the progressive discipline policy.

On the other hand, Wasnoska's most recent Level S violation was on December 3, 2009. Wasnoska thus had no previous Level S violation within the review period.¹⁴ Consistent with its policy, BNSF imposed on Wasnoska the default sanction for a Level S violation: a 30-day record suspension. C.Ex. 27 at 4.

On August 30, 2011, conducting officer Cart notified Complainant that BNSF was discharging him from employment. R.Ex. 12; Tr. 6. In his letter, Cart wrote that BNSF found that Complainant was in violation of its rules on: carelessness and negligence (GCOR 1.6), sounding the whistle (GCOR 5.8.2), and exceeding maximum authorized speed (GCOR 6.31).¹⁵ R.Ex. 12. Cart also wrote that BNSF had considered Complainant's "personnel record" (apparently a reference to the previous Level S violation). *Id.*

The applicable disciplinary policies do not mandate a discharge for two Level S violations within the review period; a discharge is discretionary. At the hearing, human resources manager Smith testified that, since a discharge under these circumstances is permitted (not required), it is part of her job to review these cases and recommend whether to dismiss. Tr. 647-48. Smith testified that it was not "uncommon" for her to recommend less than a dismissal for a second Level S. Tr. 652.

At the hearing, Smith testified that Complainant's violations were sufficiently serious that BNSF could have dismissed him on a standalone basis. Tr. 655-56. As she explained, her concern was that the Company would "probably not" be able to sustain the dismissal at an arbitration. *Id.* BNSF's personnel policies contain a "non-exhaustive" list of violations that can lead to a dismissal standing alone. C.Ex. 47 (PEPA Appendix B). These include conduct such as work-related theft, fraud, dishonesty, or violence; a felony conviction; drug and alcohol infractions; rule violations that lead to collisions or derailments; and failure to report accident or injury. *Id.* Other examples on the list most likely relevant here are: "conscious or reckless indifference to the safety of themselves, others or the public" and "[m]ultiple serious violations committed during the same tour of duty." *Id.*

When asked if Complainant would have been dismissed if he had not had the first Level S, Smith answered:

[B]ased on the investigation transcript, the way that it reads today, we likely would have had a hard time supporting standalone dismissal, solely because they did not really go into the misconduct relative to failure to communicate with the engineer as much as they could have. So, had the transcript read a little bit differently, and there had been some more focus on that, it still would have been a

¹⁴ Wasnoska's record doesn't explicitly state the length of the review period. As Smith stated that Wasnoska did not have an active Level S, he could not have had a 36-month review period. Were the review period that long, his Level S discipline from December 3, 2009, would have been active at this time.

¹⁵ Wasnoska's disciplinary letter cites the same violations. C.Ex. 8; Tr. 138.

standalone dismissal. But again, keeping in mind that part of my review was to also look at the arbitration risks, at the time they really didn't need it, because he was on an active Level S. So, had the transcript been developed more fully, I guess you could say, it would have likely have been a standalone dismissal in that context, as well. Because that conduct was still there, it just wasn't as developed as well as it should have been in the investigation.

Tr. 654-55. Smith added that, if Complainant did not have the earlier Level S on his record, she would not have done anything different. *Id.* at 656. That is, she would have recommended a Level S as a safer course at arbitration even if that meant that the discipline would be a record suspension and not a discharge.

On August 31, 2011, Complainant amended his OSHA complaint. He asserted that he would not have been terminated had he not been previously disciplined for late-filing of an injury report. C.Ex. 44 at 5; Tr. 7. As he said, "the August 30 termination was a result of combining the penalty for the earlier discipline for filing an injury report with the penalty for the more recent alleged speeding and failure to sound violation." C.Ex. 44 at 5; Tr. 7.

Through his Union, Complainant also pursued his rights under the collective bargaining agreement. The first step of the grievance procedure involves reconsideration by the deciding official. General Manager Johnson denied the grievance at this step. R.Ex. 44. He wrote:

[Complainant] was dismissed as a result of progressive discipline for a speeding violation . . . and for failure to whistle You [the Union] contend that the discipline was excessive, but this was [Complainant's] second serious infraction within the review period There is no indication of verbal communication from [Complainant] to the engineer asking him to slow down. In his testimony . . . he stated he knew where he was (signal mast going eastbound at Patterson). Therefore he should have known of the nearness of the crossing and could have discussed the speed with the engineer instead of throwing the train into emergency With a speed of 5 MPH over the limit, a normal brake pipe reduction would have sufficed, and would have been safer . . . In [Complainant's] 22 years he received 5 actual Level S suspensions, a Level S record suspension in January 2011 and this dismissal in August.

R.Ex. 44.

On February 27, 2012, Complainant (through the Union) went to arbitration before a Public Law Board. R.Ex. 13. The Public Law Board upheld the termination on May 30, 2013. R.Ex. 14; ALJ Ex. 1. In its decision, the Board discussed Complainant's admitted speeding, failure to blow the whistle, and failure to communicate with Wasnoska. *Id.* The Board found no basis to set aside BNSF's decision to terminate.

On June 16, 2015, OSHA issued "Secretary's Findings." BNSF timely objected and requested a hearing. ALJ Ex. 1.

Facts going to BNSF's affirmative defense. Other than some of the facts recited above, I will defer my findings of fact on BNSF's affirmative defense to the legal discussion below.

Complainant's credibility. I find Complainant generally, but not always, credible. There are inconsistencies in various accounts he's given on relevant facts, especially on how and when he reported the November 17, 2009 injury. The inconsistencies appear not to reflect on Complainant's honesty as much as on his unsurprising inability to recall details years after the events occurred. I discussed this in the factfinding above.

Discussion

The Federal Rail Safety Act forbids rail carriers from discharging or suspending an employee if it "is due, in whole or in part" to any protected activities. 49 U.S.C. § 20109(a). To prevail, a complainant must demonstrate that: (1) he engaged in protected activity; (2) the employer knew that he engaged in protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C. § 42121(b); *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014); *see also Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, slip op. at 1 (ARB Sept. 30, 2016; reissued Jan. 4, 2017) (*en banc*). The complaining employee bears the initial burden and must show "by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint." 29 C.F.R. § 1982.109(a); *Palmer*, ARB No. 16-035 at 16. The burden then shifts to the respondent employer, which in order to avoid liability must demonstrate "by clear and convincing evidence, that [it] would have taken the same [adverse] action in the absence of that [protected] behavior." 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1982.109(b); *Palmer*, ARB No. 16-035 at 52.¹⁶

I. Complainant Engaged in Protected Activity.

Complainant alleges that he engaged in three protected activities: (1) reporting the February 2, 2009 injury to BNSF; (2) reporting the November 17, 2010 injury to BNSF; and (3) filing the first of his two complaints with OSHA on February 7, 2011 – the complaint alleging retaliation related to the November 17, 2010 injury.

BNSF does not dispute that Complainant engaged in these activities and that the Act protects all three activities. As to Complainant's initial filing of an OSHA complaint (Feb. 7, 2011), however, BNSF contends that this is not properly before me because Complainant failed to raise it as part of his amended complaint at OSHA. The argument is without merit.

Congress provided that the procedures applicable to the Federal Rail Safety Act are those established in the Aviation Investment & Reform Act, 49 U.S.C. § 42121(b). 49 U.S.C. § 20109(c)(2). Those procedures require persons making complaints to file them, not with OSHA, but with the "Secretary of Labor." 49 U.S.C. § 42121(b)(1).

¹⁶ Actions brought under the FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21") (49 U.S.C. § 42121(b)). 49 U.S.C. § 20109(d)(2)(A)(i).

In turn the Secretary of Labor has promulgated implementing regulations for the processing of FRSA complaints filed with him. *See* 29 C.F.R. Part 1982. Employees alleging violations must file a complaint with OSHA. 29 C.F.R. § 1982.103. But the substantive requirements for the complaint are extremely limited. *Id.* A complainant may file a complaint orally or in writing and may do so in any language if she is unable to file in English. 29 C.F.R. § 1982.103(a). There are no specific requirements about what the complainant must include in the complaint. The remainder of the OSHA process is similarly loose.¹⁷

Very often, the result is that the parties' specific allegations and defenses surface later, either during the OSHA investigation or in discovery when the case is before an ALJ. Crucially, the ALJ may not remand the matter to OSHA for further investigation. *See* 29 C.F.R. § 1982.109(c). "Rather, if there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if the facts and circumstances warrant." While presiding, "The judge may allow parties to amend and supplement their filings." 29 C.F.R. § 18.36.

Here, when Complainant answered interrogatories that BNSF propounded, he stated that his filing of the initial OSHA complaint was a protected activity for which BNSF retaliated. R.Ex. 28 at 3. That is sufficient notice to BNSF that this is a subject of the litigation. BNSF does not contend that it was prejudiced in its ability to prepare a defense prior to the hearing.

To the extent that this is a pleading problem, I amend the pleadings to conform to the manner in which the parties litigated and tried the case. 29 C.F.R. § 18.36. I will consider Complainant's contention on the merits.

II. Respondent Knew about Some, but Not All, of Complainant's Protected Activity.

Whether viewed as an independent element or a part of the separate element of contributing factor causation, the employer's knowledge of the protected activity is a requirement of a complainant's *prima facie* case. *See Coates v. Grand Trunk Western R.R. Co.*, ARB No. 14-019, slip op. at 2 n.5 (ARB July 17, 2015). A complainant must show more than that his employer, as an entity, was aware of the protected activity; he must show that the decision-makers who subjected him to the alleged adverse actions were aware of the protected activity. *See Gary v. Chautauqua Airlines*, ARB No. 04-112 (ARB Jan 31, 2006); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028 (ARB Jan. 30, 2004). The complainant can satisfy this requirement if she shows that those advising the decision-maker knew of the protected activity even if the ultimate decision-maker did not. *Rudolph v. National R.R. Passenger Corp.*, ARB No. 11-037 (ARB Mar. 29 2013).

¹⁷ The complainant need not serve the respondent; OSHA does that. The respondent need not file an answer but may (if it chooses) file a position statement with supporting documentation. 29 C.F.R. § 1982.103(b). OSHA is to investigate the complaint, including by obtaining supplemental interviews, if needed. 29 C.F.R. § 1982.103(d). But, in practice, if a complainant is represented by counsel and requests that OSHA close the investigation so the complainant may pursue litigation at OALJ, OSHA often dismisses the complaint, allowing the complainant to request a hearing before an ALJ. *See also*, 29 C.F.R. § 1982.104(e) (re: dismissing complaint without completing an investigation). Following conclusion of the process at OSHA, either party may request a hearing before an ALJ. 29 C.F.R. § 1982.106(a). If that occurs, all provisions of OSHA's order are stayed (excepting any preliminary order of reinstatement). Hearings before the ALJ are on the record and de novo. 29 C.F.R. § 1982.107(b). OSHA's determination at this stage thus carries no weight.

BNSF does not dispute that its decision-makers knew of Complainant's 2009 and 2010 injury reports. It does, however, dispute that the decision-makers on the termination knew that Complainant had filed an OSHA complaint, which he'd done on February 7, 2011.¹⁸

On the disputed issue, Complainant offers no direct evidence that anyone involved in the discipline related to his operation of the train (*i.e.*, the termination from employment) knew that he had filed a complaint with OSHA. This includes Johnson, Smith, Lucero, Cart, Angelos, and even the witness Denny.¹⁹ The record shows no more than that BNSF as an entity must have had notice of the OSHA complaint by April 27, 2011, because it filed a position statement with OSHA to respond to the complaint on that date.

As circumstantial evidence, Complainant offers the proximity in time between his filing of his OSHA complaint on February 7, 2011, and the beginning of the disciplinary process on June 29, 2011, that led to the termination. What this neglects is a significant event that occurred between those dates: Complainant's admitted failure to operate a train within speed limits, sound a whistle when the train ran through a crossing, and communicate with the engineer about both the speeding and the hazard (of slack action) that Complainant created when he pulled the emergency brake. The disciplinary process began on the heels of that incident; that was the triggering event. I am not persuaded that I should infer from the timing anything more than that.

A showing of knowledge by BNSF personnel involved in the adverse action is Complainant's burden. As he failed to meet that burden, his claim based on filing the initial OSHA complaint fails.

In the alternative, I will conclude below that BNSF would have terminated the employment irrespective of Complainant's protected activity. The protected activity of filing the OSHA complaint at most could contribute to the termination; the other alleged adverse actions occurred *before* Complainant filed his initial OSHA complaint. Any claim of retaliation or discrimination based on his filing of the initial OSHA complaint therefore fails for the same reason that the claim based on the termination fails: BNSF established the affirmative defense. *See* below.

III. Respondent Took Adverse Actions Against Complainant.

A complainant must show by a preponderance of the evidence that the respondent took some adverse action against her. *Palmer*, ARB No. 16-036 at 56. BNSF stipulates that administering the record suspension on January 28, 2011, and the termination from employment on August 30, 2011, were adverse actions. Tr. 12. *See* 49 U.S.C. § 20109(a) (expressly identifying discharges and suspensions as adverse actions).

¹⁸ As Complainant filed the initial OSHA complaint after the Level S based on his late injury report, it could not have been a contributing factor to that first disciplinary action. Complainant asserts that it contributed to the second disciplinary action: the termination.

¹⁹ There is no dispute that DeLargy was uninvolved. Tr. 592.

Complainant also asserts that BNSF's notification that it was investigating the late injury report is an adverse action. The ARB has held that "the term 'adverse actions' refers to unfavorable employment actions that are more than trivial" and found that an employer's warnings about performance issues to be an adverse action because such warnings are usually the first step in progressive disciplinary policies. *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-00004, slip op. at 15 (ARB Dec. 29, 2010); see *Vernace v. Port Authority Trans-Hudson Corp.* ARB No. 12-003, ALJ No. 2010-FRS-018, slip op. at 2, n.4 (ARB Dec. 21, 2012) ("Where termination, discipline, and/or threatened discipline are involved, there is no need to consider the alternative question whether the employment action will dissuade other employees."); *Stallard v. Norfolk So. Ry. Co.*, ARB No. 16-028, ALJ No. 2014-FRS-00149 (ARB Sept 29, 2017). Complainant's notice of investigation for late reporting is likewise a step in BNSF's disciplinary policy and is consequently an adverse action.

IV. Complainant's Protected Activity Was a Contributing Factor in Respondent's Adverse Action.

To prevail, a complainant must make a showing, "by a preponderance of the evidence, that protected activity was a contributing factor in the unfavorable personnel action." *Palmer*, ARB No. 16-036 at 15. The "level of causation that a complainant needs to show is extremely low." *Id.* at 15. It requires only a showing by a preponderance that the protected activity played "some role." *Id.* at 55. That role need not be a substantial, significant, motivating, or predominant factor. *Id.* at 53-55. In cases in which the employer's theory of the facts will be that the protected activity played no role in the adverse action, "the ALJ must consider the employer's nonretaliatory reasons, but only to determine whether the protected activity played any role at all." *Id.* at 15.²⁰

BNSF disputes that the late injury report was a contributing factor in the Level S discipline and that Complainant's filing the OSHA complaint was a contributing factor in the termination.

Contribution to initial notice of investigation and Level S discipline for late-reporting. Complainant's report of the November 17, 2010 injury is what triggered the investigation that resulted in the notice of investigation and imposition of the first Level S discipline. When a protected report is a basis for the adverse action, the protected activity is inextricably intertwined with the adverse action, and the employee has established a *prima facie* case. *Hutton*, ARB No. 11-091 at 6-7; *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050 (ARB Apr. 25, 2013) (finding the report of faulty air lines in a truck contributed to and was inextricably intertwined with the termination for refusing to drive a route); *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013 (ARB Oct. 26, 2012), slip op. at 12 (injury report inextricably intertwined with his termination for, among other things, failing to exercise care to prevent injury) (citing *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003 (ARB June 20, 2012)). To be inextricably

²⁰ A complainant need not establish a retaliatory motive or animus. See *Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993); see also *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010); *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Feb. 29, 2012). In some cases, contribution might be shown simply by the presence of a protected activity in a chain of causation leading to the adverse action. *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ Case No. 2010-FRS-020, slip op. at 7 (ARB May 31, 2013).

intertwined means that it is not “possible, even on the employer’s theory of the facts, to explain the basis for the adverse action without reference to the protected activity.” *Palmer*, ARB No. 16-035 at 58-59. Where this occurs, the employer’s permissible reasons for the adverse action are considered in the next step of the analysis. *DeFrancesco I*, ARB No. 10-114 at 7-8 (as a matter of law, complainant’s injury report was a contributing factor to his suspension; thus, analysis moves to respondent’s affirmative defense that it would have suspended complainant absent protected activity).

For purposes of contributing factor causation, I am unable to separate Complainant’s reporting the injury and the resultant discipline. The protected report was essential to the process as it actually unfolded. BNSF did not learn of Complainant’s injury because another employee observed and reported it; BNSF learned of the injury when Complainant reported it. BNSF argues that the discipline was only imposed because Complainant reported late, not because he reported at all. But that neglects that there cannot be a late report unless there is a report, and the report is protected. The fact of reporting the injury and the timing of the injury report are inextricably intertwined. *See Riley v Dakota, Minnesota & Eastern RR Corp.*, ARB Nos. 16-010, 16-05 (July 6, 2018), slip op. at 5, citing *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013 (Oct. 26, 2012), slip op. at 14. That satisfies contributing factor causation.

Contribution to second Level S and termination. Smith admitted that, without the discipline imposed for the late injury report, she would still have recommended Level S discipline for the second disciplinary action. Based on Jones’ decision, BNSF in fact imposed only Level S discipline for Complainant’s safety failures when operating the train. BNSF does not dispute that the termination occurred only because, under BNSF’s progressive discipline policy, the prior Level S discipline for late-reporting an injury combined with the second Level S discipline to allow a dismissal. As Complainant’s protected activity (reporting the November 17, 2010 injury) contributed to the first Level S discipline, and the first Level S was necessary to BNSF’s decision to terminate the employment, the protected activity was a contributing factor in the chain of events leading to the termination. Complainant thus met his burden to establish contributing factor causation as to the termination.

In all, Complainant established a *prima facie* case as to all three adverse actions.

V. The Affirmative Defense.

Facts relevant to the affirmative defense. BNSF records show Complainant as reporting six work-related injuries in his career at BNSF before the two at issue here; he filed all of the reports timely. R.Ex. 1 at 1-2. BNSF never disciplined Complainant in connection with any of the reports. *Id.* at 1.

BNSF submitted personnel files of 17 workers (other than Complainant) who reported injuries in 2011 (about when Complainant reported his injury) and were not disciplined.²¹ R.Ex. 31 at 1-74.

²¹ There is one exception: an employee was disciplined for reasons unrelated to his injury report (failure to properly line crossover switch). Many of the employees listed are from cities in Washington (as was Complainant) and to a lesser extent, Oregon and Idaho.

Consistent with this, BNSF has a zero-tolerance policy to prohibit retaliation against employees who impose discipline.²²

BNSF also offered seven Public Law Board decisions that uphold its decisions to discipline employees for late reporting an injury. R.Ex. 31 at 75-98. Some employees were issued a Level S for late reporting with a 30-day record suspension; in one instance, BNSF dismissed the employee when he had two prior serious violations within the same year. *Id.* at 79, 88, 90, 95. As with Complainant, two of these employees were disciplined for late reporting when the injury occurred less than a week before the report. *Id.* at 90-91, 97. Also as with Complainant, one employee believed his pain had been an aggravation of a prior injury. *Id.* at 81-83. The Public Law Board affirmed Level S discipline with a 30-day record suspension, stating: “Even assuming, *arguendo*, as [complainant] would subsequently offer, that the pain he suffered on December 19, 2010 was [an] aggravation of a prior off-duty injury; such a contention did not excuse him from timely reporting such circumstances to the Carrier.” *Id.* at 82. BNSF dismissed another employee for late reporting when the employee had experienced severe pain for over two and a half months and not reported the injury at all. *Id.* at 87.²³

In one of the Public Law Board decisions, the Board observed: “A late report of an on-duty injury is a serious offense under BNSF’s disciplinary policy.” *Id.* at 91.

Finally, BNSF offered eight examples when it terminated the employment of employees who were found to have violated multiple GCOR rules during one incident. R.Ex. 31 at 99-156.

Despite the availability of the full gamut of discovery devices and discovery enforcement options as those generally available in civil litigation,²⁴ Complainant offered not a single example of an employee who reported an injury timely and was disciplined or an employee who reported an injury late and was not disciplined. He offered no example of discipline for late-reporting an injury set at anything less adverse than a Level S 30-day record suspension.

I conclude that at all relevant times, it was BNSF’s practice to impose at least Level S discipline for late-reporting injuries, both generally and under circumstances similar to those in Complainant’s case. Complainant offered no counterexamples. And I give great weight to the observation of the Public Law Board that this was BNSF’s practice. The board is an arbitration

²² Surina testified about the policy. Tr. 187. He also denied retaliating against Complainant for any reason. *Id.* As I will discuss in the text below, absent a showing of enforcement of the policy, I accord limited weight to the existence of the policy when I determine whether BNSF has established the affirmative defense. I give the policy more weight when I consider punitive damages.

²³ Union Chairman Schollmeyer testified that late-reporting is treated as a serious offense at BNSF, but he also testified that late reporting is enumerated as one of the serious offenses. At the times relevant here, late-reporting was not explicitly listed as a serious offense; it was expressly added to the policy in March 2011. C.Ex. 47 at 5. As I am uncertain whether Schollmeyer’s testimony focused on the wrong time period just as to the written policy or as to both that and BNSF’s practice of treating these violations as serious, I give the testimony on this point only limited weight. At the same time, nothing about this testimony refutes BNSF’s contention that it treats late-reporting of injuries as a serious violation of its policies.

²⁴ See 29 C.F.R. §§ 18.50-18.65.

panel composed for neutrality according to law, and it has expertise in railway disciplinary disputes (including those of BNSF in particular).²⁵

I similarly conclude that it was BNSF's practice not to pursue discipline when employees report injuries timely. Complainant offered no counterexamples to rebut the substantial sample that BNSF offered. And Complainant himself is a directly relevant example: he timely reported six different injuries during his employment before the two at issue here, and BNSF did not investigate or impose discipline for any of them.

Legal framework on the affirmative defense. Although Complainant has established a *prima facie* case, relief may not be ordered if BNSF demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel actions in the absence of any protected behavior. 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1982.109(b); *see Palmer*, ARB No. 16-035, slip op. at 56 (quoting statute and regulation).

Clear and convincing evidence is “evidence indicating that the thing to be proved is highly probable or reasonably certain.” *Williams v. Domino’s Pizza*, ARB No. 09-092 at 6 (Jan. 31, 2011) (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, slip op. at 14 (ARB Jan. 31, 2006)). It is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. *See* 5 C.F.R. § 1209.4(d). To prevail under this standard, a respondent must show that its factual contentions are highly probable—it is a burden of proof more demanding than the preponderance of the evidence standard, residing between “preponderance of the evidence” and “proof beyond a reasonable doubt.” *See Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 159 (3rd Cir. 2013) (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *Addington v. Texas*, 441 U.S. 418, 525 (1979)); *DeFrancesco I*, ARB No. 10-11. Evidence is clear when the employer has presented an unambiguous explanation for the adverse action; it is convincing when based on the evidence the proffered conclusion is highly probable. *DeFrancesco v. Union RR Co. II*, ARB No. 13-057 at 7-8 (citing *Speegle v. Stone & Webster Engineering Corp.*, ARB No. 13-074 at 6; *Williams*, ARB 09-092 at 5). This is a difficult standard for employers, signaling Congressional concern with past industry practice and the importance of the interests at stake. *See Araujo*, 708 F.3d at 159 (citing *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997)); *see also DeFrancesco v. Union R.R. Co. [DeFrancesco II]*, ARB No. 13-057 (Sept. 30, 2015) at 8.

“The ALJ must consider all relevant, admissible evidence when determining whether the employer has proven that it would have otherwise taken the same adverse action” *Palmer*, ARB No. 16-035 at 57. “It is not enough for the employer to show that it *could* have taken the same action; it must show that it *would* have.” *Id.* (emphasis in original).

²⁵ “A ‘Public Law Board’ is designated as the National Railroad Adjustment Board which arbitrates disputes between railway employers and unions on a range of issues, including employee discipline. *See Rosadillo v. Union Pac. R.R. Co.*, ARB No. 10-085 (Oct. 31, 2011), citing 45 U.S.C.A. § 153. Public Law Boards tend to be balanced with one member who is management-affiliated, a second who is union-affiliated, and a third who is neutral. *Id.* The members have considerable expertise in the narrow areas they arbitrate.

Here, BNSF must show by clear and convincing evidence that (1) on the late report of the injury, it would have noticed an investigation and imposed Level S 30-day record suspension with a 36-month review period absent protected activity, and (2) that it would have terminated the employment for the second Level S violation absent protected activity.

A. BNSF Failed to Establish the Affirmative Defense as to the 36-Month Review Period for the Late-Reported Injury.

The intertwined nature of the injury report and the late reporting makes this a difficult case in which to determine what BNSF would have done absent the protected activity. If there had been no protected activity, there would have been no injury report, and thus there could not have been an injury report that was late. But the ALJ must give effect to the statutory language providing employers with the affirmative defense. *See DeFrancesco II*, slip op. at 6.

Thus, in *DeFrancesco II*, after an employee reported an injury, the employer imposed discipline because it found the employee's failure to comply with the Railroad's safety rules was a cause of the injury. The ALJ held that the employer could not establish the affirmative defense because "the adverse action logically and literally would never have come about but for the protected activity." *Id.* at 4. That is, the ALJ was unable to fashion a relevant fact pattern in which the protected activity would be absent.

Reversing, the Board held that the ALJ must consider "the existence of extrinsic factors that the employer can clearly and convincingly prove would independently lead to the employer's decision to take the personnel action at issue." *Id.* at 6. For example, the ALJ could assess the employer's asserted lawful reasons for its action. This would require "not only a determination of whether there exists a rational basis for the employer's decision, such as the existence of employment rules or policies supporting the decision, but also a determination of whether the basis for the employer's decision is 'so powerful and clear that [the personnel action] would have occurred apart from the protested activity.'" *Id.* at 10.²⁶ Weighing against this could be "such evidence that the complainant suffered disparate treatment compared to other employees subject to the same company rules or policies . . . or evidence that those rules and policies were otherwise selectively enforced against complainant." *Id.*²⁷

As the ARB stated, "If employees do not feel free to report injuries or illnesses without fear of incurring discipline, dangerous conditions will go unreported resulting in putting the employer's entire workforce as well as the general public potentially at risk. At the same time, the railroad employer must be able to maintain and enforce legitimate workplace safety rules in order to eliminate or reduce workplace hazards and prevent injuries from occurring in the first place. Thus, assuring that employers are able to investigate reports of workplace injury for potential safety hazards must necessarily be balanced against the manipulation of such investigations as pretext for retaliation against employees who report workplace injuries." *Id.* at 7. As I cannot

²⁶ Quoting *Henderson v. Wheeling & Lake Erie RR*, ARB No. 11-013 (Oct. 6, 2012), slip op. at 14-15.

²⁷ Citing *Henderson* at 16-17.

consider a late injury report absent any injury report, I apply the teaching of *DeFrancesco II* here.²⁸

BNSF argues that it disciplined Complainant – not for reporting an injury – but for reporting it late, and that this is lawful. This is consistent with the policy discussion in *DeFrancesco II*, in which the ARB gives weight to a railroad’s need to know of unsafe conditions. When a worker reports an injury, the railroad is in a position to investigate to determine whether there are unsafe conditions that must be corrected for the protection of the public and of rail workers. Without notice of an injury, a railroad cannot take these steps. Yet I must balance the worker’s right to report an injury without fear of retaliation to facilitate the same result: increased safety and security in the rail industry. Thus, I must determine the basis for BNSF’s “decision is ‘so powerful and clear that [the personnel action] would have occurred apart from the protested activity.’” I must weigh against this any evidence such as of disparate treatment selective enforcement.

The overwhelming evidence on the record establishes that in cases involving employees who report workplace injuries, BNSF imposes no discipline when the report is timely and imposes discipline when the report is late. Timeliness is the distinguishing factor. Complainant offered no counterexamples, and he is personally an example of this practice in action: BNSF imposed no discipline on the seven occasions that he reported an injury timely, and it imposed discipline on the one occasion when he reported late. There is no evidence of pretext. There is no evidence of personal *animus*, and in fact, Complainant testified that Trainmaster Canavan did not seem upset with him when he went into the office to complete an injury report. Tr. 343. Both Conducting Officer Surina and decision-maker Jones described why they believed Complainant’s injury was a work-related injury that needed to be reported, those reasons were consistent with one another, and I find that they honestly held those beliefs.²⁹

²⁸ The Board cited with approval OSHA guidelines that advise its investigators to consider in this context such questions as:

Does the employer monitor for compliance with the work rule in the absence of an injury? Does the employer consistently impose equivalent discipline against employees who violate the work rule in the absence of an injury? The nature of the rule cited by the employer should also be considered. Vague rules, such as a requirement that employees “maintain situational awareness” or “work carefully” may be manipulated and used as a pretext for unlawful discrimination. Therefore, where such general rules are involved, the investigation must include an especially careful examination of whether and how the employer applies the rule in situations that do not involve an employee injury. Enforcing a rule more stringently against injured employees than non-injured employees may suggest that the rule is a pretext for discrimination against an injured employee in violation of [the] FRSA.

Id. The employer must establish that the rule on which it relies is applied consistently such that employees who engage in substantially similar conduct absent the protected activity are also investigated and punished in the same manner. *DeFrancesco II* at 13-14; *Echols, Grand Trunk Western Railway, Co.* ARB No. 16-022 (Oct. 5, 2017).

The parties offered no examples of discipline imposed for late submission of required reports that are *not* protected under the Act. There might very well be no other reporting requirement equally important to BNSF’s safe and secure operation of the railroad.

²⁹ Although (as I discussed in the footnote above), I give little weight for this purpose to BNSF’s anti-retaliation policy because there is no evidence of enforcement, it is of some limited value to BNSF that it has this policy, and it would weaken BNSF’s case for the affirmative defense if it did not.

I give some weight to the Public Law Board’s determination that the imposition of the Level S discipline with a 30-day record suspension and 36-month review period was consistent with the collective bargaining agreement and BNSF’s disciplinary policy. I also find that, having previously reported timely seven injuries and having been trained on the reporting requirements, Complainant was aware of the obligation to file an injury report immediately (as soon as practicable) or, if it was a muscular-skeletal injury, within 72 hours. He had no obligation to report doctor’s appointments or changes in symptoms from his prior injury (unless they affected his ability to work), yet he reported them all the time. Even if he thought his new injury was simply an aggravation of the pre-existing injury, it was his practice to report new symptoms. Yet, he did not. Moreover, the policy requires reports of injuries, not reports of changing symptoms. If Complainant had any question whether hitting his knee against a hard surface and the onset of serious symptoms requiring medical attention was a new injury, he could have asked his supervisor, his trainmaster, or his union. He did none of these. Asking a physician’s assistant how his doctor would bill treatment for the injury is scarcely sufficient to meet any BNSF notice requirement: the doctor was unaffiliated with BNSF, and Complainant never suggested any confusion about that. I find entirely persuasive BNSF’s evidence that, given these circumstances, the imposition of the standard discipline of a Level S 30-day record suspension for late reporting was appropriate. I find BNSF’s evidence powerful and clear that it disciplined Complainant because his report was late, not because he reported an injury.³⁰

Considering the policy factors to which the ARB referred in *DeFrancesco II*, I conclude that the evidence shows that, if fully informed of the evidence in this case, their concern should not be retaliation for reporting injuries, but rather it should be with discipline for reporting late (or not reporting an injury at all). I weigh this against the absence of any showing of disparate treatment, selective enforcement, or pretext. I conclude that BNSF has established the affirmative defense as to notifying Complainant that it was going to investigate his allegedly late injury report. I conclude as well that BNSF established its affirmative defense when it imposed a Level S violation with a 30-day record suspension for the late report of an injury. This leaves a single aspect of the discipline to be resolved: the 36-month review period.³¹

³⁰ I accept BNSF’s view that there were no mitigating factors that would justify a reduction in the length of the record suspension or the review period. Complainant knew about the policy, had complied with it before, and eventually took the steps needed to comply – but did so late. He conceded that, if he was confused about whether he had to file a new injury report, he could have contacted either management or his union within the 72-hour required reporting period. Tr. 325. He told his doctor on November 19, 2010, that he thought he aggravated his knee condition when he hit the knee against his desk. R.Ex. 5 at 30. That statement to his doctor was on the second day after the incident; Complainant could have made the same report to BNSF within the remaining time to meet the 72-hour deadline. At the least, he could have contacted management and asked whether he needed to report the new incident. He did neither. In any event, even if there were mitigating factors, they would at best result in either a shorter record suspension (which would be no less adverse), or a reduction to a 12-month review period, which would not have helped Complainant because his second Level S violation was within 12 months of his first. I will find the 36-month review period unlawful for other reasons that I discuss in the text below and will provide an appropriate remedy.

³¹ I reject Complainant’s argument that BNSF’s rules were arbitrary and confusing. Generally, so long as a rule is lawful, an employer is entitled to its disciplinary rules even if the rules are unwise, counterproductive, or arbitrary. “‘Courts do not sit as a super-personnel department that re-examines’ an employer’s disciplinary decisions.” See *Kuduk*, 768 F.3d at 792 (quoting *Kipp v. Mo. Highway & Transp. Comm’n*, 280 F.3d 893, 898 (8th Cir. 2002)); see also *Douglas v. Anderson*, 656 F.2d 528, 535 (9th Cir. 1981). Rules are subject to examination as to whether they

Unlike the other discipline imposed, BNSF has failed to establish the affirmative defense as to the imposition of a 36-month review period for the late report. A 12-month review period applies to workers given Level S discipline with no history of discipline or injury in the past five years. Complainant had no discipline in the past five years. He would have been assigned a 12-month review period – not a 36-month review period – if he did not have the knee injury months before the injury on which he reported late. Imposing greater discipline on an employee with any injury history in the past five years implicates adverse action for reporting an injury. BNSF knew of the earlier injury because Complainant reported it. BNSF has corrected its policy; for some time, it has assigned the 12-month review period to workers with no disciplinary history in the past five years, irrespective of any history of injury. But that was not the policy at the time relevant here. Applying the discussion in *Francesco II*, I find this policy – both on its face and as applied to Complainant in this instance – a violation of the Act. In its express terms, it discriminates against injured workers. That is a violation of the FRSA.

B. BNSF Established the Affirmative Defense on the Termination.

BNSF terminated Complainant under its progressive discipline policy. There is no dispute that – absent Complainant’s protected activities – BNSF would have imposed Level S discipline for Complainant’s safety violations when operating the train with Wasnoska. Whatever Complainant’s personal issues with Wasnoska, it remains that Complainant did not ask Wasnoska to slow the train; despite the hazard that slack action poses, Complainant pulled the emergency brake; Complainant did so without warning Wasnoska, who would also be subject to the slack action; the train was actually moving at 59 mph when Complainant pulled the emergency brake, which was only 4 mph over the speed limit and therefore not a reason to pull the emergency brake; and Complainant failed to blow the whistle at a crossing.

BNSF lists as an example of violations leading to a standalone dismissal multiple serious violations committed during the same tour of duty. C.Ex. 47 at 6. Lucero recommended a standalone dismissal. Although Smith recommended a lesser level of discipline at Level S, her reason was not that Complainant’s violations did not come under the standalone dismissal rule. Rather, her concern was defending a standalone dismissal before the arbitration panel. As she

adversely affect workers for protected activity. *Hutton*, ARB No. 11-091 at 10-11. I examine BNSF’s rules on that question in the text above.

Complainant is correct that, when employers have injury reporting requirements that are so confusing that the employee is faced with “conflicting directives,” this can be evidence that the rule is pretextual, and the real purpose (or at least effect) of the rule is to retaliate against workers who report injuries. *Id.* at 10 (finding the employer placed the complainant in the position of performing conflicting directives when it had several different ‘return to work’ programs of the same name, some of which were mandatory).

But BNSF’s rule here is not confusing. To the contrary, Complainant complied with it on all seven of his previous injury reports. It is true that there is an exception to the requirement of an immediate report for injuries involving muscular-skeletal injuries, but that exception could only have helped Complainant because his was a muscular-skeletal injury, thus giving him 72 hours to report. Moreover, I find nothing confusing about the exception. In addition, as discussed in the text above, Complainant could have sought guidance from his union, his supervisor, his trainmaster, or BNSF’s human resources department if he was confused. He did none of this within the 72 hours he had to get it done.

explained, the arbitrators would rely on the transcript of the disciplinary hearing; the managers at that hearing did not build a sufficient record of Complainant's communication failures to show why his discipline should be more severe than Wasnoska's; and a standalone dismissal for Wasnoska – who was less culpable – would be found unjustified. Higher level management, including decisionmaker Jones, accepted Smith's analysis, and Lucero eventually joined the others in endorsing Level S discipline for the train operation safety violations.

I find that entirely convincing. There is no dispute as to any of Complainant's safety violations, except that he says the train was going 60 mph when he pulled the emergency brake, a contention that I have rejected based on the expert witness's opinion and the recorder's documentation. Complainant's activity posed a real risk to the public when the train went through the crossing without a horn or whistle. It posed a real risk to Wasnoska from slack action. Given that Wasnoska had already acted to slow the train and that it had slowed below 60 mph, pulling the emergency brake was unnecessary. BNSF imposed Level S discipline against Wasnoska, who was no more culpable – and perhaps less culpable – than was Complainant.

I therefore find powerful and convincing Smith's testimony that the otherwise supportable standalone dismissal was inappropriate only because BNSF management had not created a complete record at the disciplinary hearing. Tr. 654. Looking at a complete record, as I do here, I find that a standalone dismissal would have been consistent with BNSF policy. As the Level S that BNSF imposed is a lesser level of discipline than a standalone dismissal, I find the evidence clear and convincing that BNSF would have imposed this discipline even had Complainant not reported an injury several months earlier.³²

That, however, does not complete the analysis. That is because BNSF relied on the earlier Level S for the late-reported injury when it terminated the employment. Wasnoska was disciplined with a 30-day record suspension for his Level S, while BNSF discharged Complainant after the same incident. The difference was Complainant's earlier Level S violation based on conduct in November 2010 and imposed in January 2011. That is what implicated BNSF's progressive discipline policy. The policy allows for a termination for a second Level S violation within the review period. BNSF decided to take that option to discharge Complainant on August 30, 2011.

I have found that BNSF did not violate the FRSA when imposed Level S discipline for Complainant's late report of his injury except in one regard: BNSF imposed a 36-month review period. The difficulty here, however, is that if BNSF had not considered Complainant's injury history when it imposed that review period, it would instead have imposed a 12-month review period in place of 36 months. Counting the time most favorably to Complainant, his discharge from employment on August 30, 2011, was less than 12 months after his failure to report in November 2010. Thus, the one aspect of the first of the two Level S violations that was unlawful had no impact on the decision to terminate in August 2011. Based on the same analysis that I applied to all other aspects of the initial Level S, I again conclude that BNSF would have

³² I have previously held that Complainant's claim based on the protected activity of filing his initial OSHA complaint fails because Complainant did not prove that anyone involved in the termination decision knew that he had filed this administrative complaint. I conclude in the alternative that, even if any of those involved in the termination decision had known that Complainant had filed an OSHA complaint, they would have imposed the Level S discipline for the same reasons as stated in the text above.

terminated the employment even absent Complainant's protected injury report. Accordingly, no remedy can be ordered based on the termination.

VI. Complainant Is Entitled to a Limited Remedy.

BNSF violated the Act when it imposed a 36-month review period on Complainant's November 2010 injury report. In all other respects, no remedy may be imposed in connection with that report, as BNSF has shown by clear and convincing evidence that it would have noticed an investigation and imposed the same Level S 30-day record suspension absent Complainant's protected activity.

As to the termination, Complainant has established a *prima facie* case that violated the Act. But no remedy may be imposed because BNSF has shown by clear and convincing evidence that, absent all of his protected activity (including the filing of an initial OSHA complaint), BNSF would have terminated the employment.

Complainant's allegations concerning retaliation for filing the initial OSHA complaint also fail for the same reasons as his allegation concerning the termination. In addition, there is a lack of evidence to show that any decisionmaker on the adverse action had knowledge of the OSHA complaint.

The Act provides for make whole relief; reinstatement with the same seniority status that the employee would have had, but for the discrimination; backpay with interest; compensatory damages;³³ and possible punitive damages in an amount not to exceed \$250,000. 49 U.S.C. § 20109(e). Complainant has established no economic loss from BNSF's imposition of a 36-month (rather than 12-month) review period on his initial Level S discipline. Reinstatement is unavailable because the imposition of the 36-month review period (rather than a 12-month review period) had no effect on the termination. But, to make Complainant whole, I must order BNSF to cease and desist from any policy that treats more harshly employees who report injuries absent any other distinguishing factor.

Compensatory damages include compensation when a complainant shows by a preponderance of the evidence that the unfavorable personnel action caused mental suffering or emotional anguish. *Testa v. Consol. Edison Co., Inc.*, ARB No. 08-029 at 11 (Mar. 19, 2010). "Awards generally require that a complainant demonstrate both (1) objective manifestation of distress, e.g., sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) a causal connection between the violation and the distress." *Martin v. Dep't of the Army*, ARB No. 96-131 (July 30, 1999), slip op. at 17.

Here, Complainant offered no evidence of mental or emotional anguish because the first Level S included a 36-month review period. I could imagine evidence that the length of this probationary

³³ Compensatory damages includes compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees

period could cause anguish, but Complainant offered none.³⁴ Accordingly, Complainant is not entitled to compensatory damages.

Punitive damages are to punish unlawful conduct and to deter its repetition. *BMW v. Gore*, 517 U.S. 559, 568 (1996). Relevant factors when determining whether to assess punitive damages and in what amount include: 1) the degree of the defendant's reprehensibility or culpability; 2) the relationship between the penalty and the harm to the victim caused by the respondent's actions; and 3) the sanctions imposed in other cases for comparable misconduct. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35 (2001).

Punitive damages are appropriate in whistleblower cases to punish wanton or reckless conduct and to deter such conduct in the future. *Johnson v. Old Dominion Security*, 86-CAA-345, (Sec'y May 29, 1991).

The threshold inquiry centers on the wrongdoer's state of mind: did the wrongdoer demonstrate reckless or callous indifference to the legally protected rights of others, and did the wrongdoer engage in conscious action in deliberate disregard of those rights? The 'state of mind' thus is comprised both of intent and the resolve actually to take action to effect the harm. If this state of mind is present, the inquiry proceeds to whether an award is necessary for deterrence.

Johnson at 29, citing the Restatement (Second) of Torts, §908 (1979); *Youngermann v. United Parcel Services, Inc.*, ARB No. 11-056 (Feb. 27, 2013) (An award of punitive damages may be warranted where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law").

A personnel policy that explicitly on its face discriminates against injured workers invites a possible imposition of punitive damages. Given BNSF's disciplinary policies, a failure to report and injury or a late-report of an injury leads to discipline. Thus, there is a direct correlation between having an injury and the protected activity of reporting one. Giving lesser discipline to workers who have no history of injuries in the previous five years than the discipline given to others for the same violations is discriminatory. The discrimination is inextricably intertwined with the protected activity of reporting injuries. That is what BNSF did here. BNSF's actions disregarded its statutory obligations under the Act.

What saves BNSF from punitive damages is that it eliminated this personnel policy provision before this case went to trial. Smith testified that the policy was voluntarily changed as part of a settlement in late 2011. Tr. 613, 637-38. This eliminates the need for deterrence.

In addition, Complainant here suffered no harm as a result of the policy. As discussed above, it caused no economic loss, there is no evidence of emotional harm, and the termination would have occurred even if BNSF had imposed the shortened 12-month review period.

³⁴ Complainant stated that he felt emotional stress in December 2010 because a union representative told him he would be fired. R.Ex. 23 at 48. But this occurred before BNSF imposed the 36-month review period and cannot be said to have resulted from the imposition of the review period.

Given these factors, I decline to impose punitive damages.³⁵

Order

For the foregoing reasons,

1. Complainant's claim against Respondent DeLargy is denied and dismissed.
2. As discussed above, BNSF must cease, desist, and not resume the imposition of greater discipline (or increased risk of progressive discipline) based solely on account of an employee's history of workplace injuries.
3. As Complainant failed to establish economic loss as a result of BNSF's violation of the Act, no remedy is allowed for such loss.
4. Compensatory damages are denied because Complainant did not establish the extent of such loss as a result of the violation.
5. Punitive damages are denied.
6. The remainder of Complainant's complaint is denied and dismissed.
7. If Complainant's counsel contends that Complainant is entitled to an award of attorney's fees and costs, he must file a petition within 28 days after this Decision and Order issues. The petition must include a rationale for the award, a detailed statement of the work performed (giving the time spent on each activity), market data and other evidence to establish an hourly billing rate for Complainant's counsel in the relevant community, and an explanation for any request for an adjustment to fees (such as any multiplier). In the petition, Complainant's counsel must affirm that he met and conferred with defense counsel in an effort to agree on the fees and costs owed. If Complainant's counsel files a fee petition, Respondent's counsel must file any objections or opposition within 28 days following service of the petition. If Respondent's opposition contains any new evidence or unexpected argument, Complainant's counsel may file a reply within 14 days following service of the opposition. Any reply is

³⁵ Although it had no effect in the present case, the record here reveals another personnel policy that could lead to the imposition of punitive damages in a different case. The Act was amended to provide that a "railroad carrier . . . may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment." 49 U.S.C.A. § 20109 (effective October 16, 2008). Under BNSF's July 1, 2000 disciplinary policy, employees may be disciplined for "late reporting" of muscular-skeletal injuries if they fail to notify their supervisor before seeking medical attention. R.Ex. 5 at 18. Placing a burden on an injured worker's obtaining medical care appears to be "interference" in violation of the Act. I urge BSNF to review this personnel policy provision to be certain that it is giving proper regard to the will of Congress.

limited to the new evidence or unexpected argument in the opposition brief; any other argument will be disregarded.

SO ORDERED.

STEVEN B. BERLIN
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. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(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 for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(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. §§ 1978.109(e) and 1978.110(b). 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. § 1978.110(b).