



Issue Date: 29 September 2020

CASE NO.: 2016-FRS-00029

In the Matter of:

ROBERT JOHNSON,
Complainant,

v.

BNSF RAILWAY COMPANY,
Respondent.

Appearances: R. Scott Oswald, Esq.
John T. Harrington, Esq.
for Complainant

Michael E. Chait, Esq.
Kelsey Endres, Esq.
Paul S. Balanon, Esq.
for Respondent

Before: Steven B. Berlin
Administrative Law Judge

DECISION AND ORDER

This matter arises under the whistleblower-protection provision of the Federal Rail Safety Act.¹ Complainant Robert Johnson alleges that BNSF Railway Company violated the Act when it retaliated against him for reporting an injury. He alleges that the retaliation occurred when BNSF (1) initiated an investigation of his compliance with safety rules; (2) assigned a different work vehicle to him and gave him new job duties that were unsafe. Although BNSF suspended Complainant without pay for 5 days pending investigation of the safety violations, Complainant does not seek an award of lost wages. He seeks compensatory damages for pain and suffering resulting from BNSF’s allegedly retaliatory actions, and he seeks punitive damages.

Complainant filed a timely complaint with the Occupational Health & Safety Administration. After OSHA issued “Secretary’s Findings” on February 26, 2016, Complainant timely objected and requested a hearing. I will find that Complainant engaged in protected activity when he reported the injury, that Respondent’s investigation was an adverse action against Complainant,

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

and that Complainant's protected activity was a contributing factor in the adverse action. But I will find as well that, even if there was never an injury or an injury report, BNSF has shown by clear and convincing evidence that it would have taken the same action. For that reason, I will deny Complainant's claim.

Introduction and Procedural History

I conducted a regularly noticed hearing in this matter on May 29 and 30, 2018 in Spokane, Washington. The parties were represented by their respective counsel of record. Complainant testified on his own behalf and called his wife, Linda Johnson, as a witness. The parties jointly called three witnesses: Kristopher C. Harris (Structures Supervisor in Spokane); Michael Schram (Structures Manager); and Corey Aten (initially a system electrician and later the supervisor of Complainant's work group). BNSF separately called three witnesses: Russ D. (Dave) Barajas (Complainant's foreman for several years, including the time of Complainant's reported injury); Todd Richards (electrical foreman in Whitefish, Montana); and Kathleen Maglisceau (Director of Employee Performance in the Labor Relations Department at BNSF). I accepted several stipulated facts, and I admitted numerous exhibits.² The parties both filed post-hearing briefs.

Facts

BNSF is a covered employer under the FRSA. Tr. 5. At all relevant times, Complainant was an employee of BNSF and was a covered employee within the meaning of the Act. Tr. 5. BNSF hired Complainant in November 2005 as a system electrician in Pasco, Washington. JX-2; Tr. 36. Complainant's job duties included maintenance of the electrical system, some of which was in the Pasco yard, and some of which was off-site. Tr. 36. Complainant's foreman assigned him tasks in varying locations, based on the particular maintenance needed at the time. Tr. 240.

Complainant's decision to saw through a locked chain. On October 29, 2012, Complainant was sent to inspect several bungalows at an off-site location near Lind, Washington, which is about an hour's drive from Pasco. Tr. 25; Tr. 109. After completing his inspections, Complainant continued down a narrow access road commonly used to access remote inspection sites. He planned to use this road to return to the main road and continue back to BNSF's Pasco yard. Tr. 40.

On the narrow access road, Complainant came to a gate with a series of locks linked together. JX-4; Tr. 40. Complainant was familiar with the locks from previous trips; he would open one lock and could then remove the whole chain of locks. But this time, he found that the locks had been closed in a manner that he could not open the chain as he usually did by unlocking just one

² I admitted Complainant's Exhibits ("CX") 8, 20, 23, 34, 37, 38, 40, 41, 44, 45, 47, 48, 49, 50, 51, 52, and 53. Complainant's Exhibit 6, the Notice of Investigation, was withdrawn and replaced by Joint Exhibit 6, which is a signed copy of the same document. I admitted Joint Exhibits ("JX") 2-17 and 19-22. I also admitted Respondent's Exhibits ("RX") A-Q. I later admitted Complainant's Exhibit 54, a small portion of Corey Aten's August 2016 deposition. I re-admitted Complainant's Exhibit 34, the Maintenance of Way Safety Rules, after it was confirmed that these were the rules in place at the time of Complainant's injury.

of the locks. Tr. 40. He tried to unlock the remaining locks with his other keys, but he didn't have the right keys. Tr. 41.

Complainant's options were either to turn his truck around on the narrow access road or find another way to open the chain of locks. *Id.* Complainant testified that it was after 2:00 p.m., his shift was scheduled to end at 3:30 p.m., he wasn't authorized for overtime, and if he turned around and retracked the whole way on the narrow road, he might be late. Tr. 45. He said he also was concerned about the relative safety of making the k-turns on the narrow road to turn around versus opening the chain other than with the keys. *Id.*

As to the late return to Pasco, Complainant said he estimated retracking on the narrow road would add 30 to 45 minutes to the 1-hour return trip to Pasco. *Id.* As he had somewhat less than 1 and 1/2 hours until the end of the shift, he estimated the total time for the return trip likely would keep him working beyond the end of the shift and would incur unauthorized overtime. *Id.* He said he also thought it might be unsafe to turn around on the access road, and he might damage the Railroad's truck. Tr. 43.

I reject Complainant's testimony about his safety concerns. Other BNSF employees had made the same turn in the past, both safely and without hesitation. Tr. 234. The area was open, large, and grassy, which would accommodate the turn. JX-4. I find that Complainant likely saw this and was not especially concerned about the safety of turning the vehicle around. It appears that his focus was on saving time. In any event, he decided against turning the vehicle around and going back the way he'd arrived. Tr. 46.

Instead, Complainant decided to cut through the chain and open the gate that way. *Id.* According to Complainant, bolt-cutters would have been the preferred tool for cutting the chain.³ Tr. 138. Whether or not Complainant had bolt-cutters on his truck is in question, but I find, more likely than not, that he had no bolt-cutters. Tr. 46; Tr. 230.⁴

Complainant uses a tool not designed for his purpose. Lacking the preferred tool to cut through the chain, Complainant opted for a Sawzall. A Sawzall is a hand-held, oscillating saw. Tr. 138; JX-4. Complainant had taken numerous Hand and Power Tool Safety courses and Maintenance of Way Safety Rules courses at BNSF.⁵ JX-2. He admitted being aware of the proper protocols and tools to use in different instances. He admitted knowing that a Sawzall was not the right tool to cut the chain. Tr. 39, 104, 175. His explanation for using the Sawzall anyway was that he'd

³ Complainant also testified that a battery-operated side grinder would have been another good choice of tools.

⁴ BNSF did not usually provide bolt-cutters for every truck. Tr. 51. Before leaving for their daily worksites, the electricians could ask their foremen for tools they needed. Tr. 51. Complainant did not ask anyone for bolt-cutters that day; he didn't expect to need them. Tr. 46. Complainant's foreman, Dave Barajas, testified that he'd purchased bolt-cutters and put it on Complainant's truck for permanent use. Tr. 230. But Barajas admitted that he had to buy another pair of bolt-cutters because, when he checked after the incident, the bolt-cutters on Complainant's truck were missing. *Id.* I infer from this that the bolt-cutters weren't on the truck at the time of the incident.

⁵ Complainant had taken a course offered by BNSF called Hand and Power Tool Safety, in April 2008 and February 2010. He had also taken Maintenance of Way Safety Rules, another class specifically about BNSF's safety policies, in May 2009, February 2010, and January 2011. JX-2.

used a Sawzall so often in the past that he wasn't much concerned about the safety risk. Tr. 139. But he also had to concede that he'd never before used a Sawzall to cut through a metal chain; he'd primarily used it to cut through conduit or wood. *Id.*

Complainant also did not pursue a third option: contacting someone at BNSF for guidance, advice, and assistance. Tr. 47. For example, a supervisor might have told Complainant not to use a Sawzall and instead have authorized a half-hour of overtime to allow Complainant to return safely by retracking his drive on the access road.

Making a call would likely have been difficult, as the cell phone reception in the area was limited. *Id.* But there was a radio in the truck that Complainant could have used. Tr. 127. Complainant conceded that he made no attempt to use the radio; he explained that he didn't know how to use it. *Id.*

This, however, neglects union foreman Todd Richards' testimony that using the radios is discussed at every yearly safety meeting and that Complainant was required to attend all of those meetings. Tr. 335. With all that training, Complainant at least could have tried to communicate via the radio. He didn't. He proceeded with his plan to cut through the chain with the Sawzall.

To make the cut, Complainant pinned one end of the chain against a wooden post and pulled it tight, continuing to hold the chain with his left hand while operating the Sawzall with his right hand. Tr. 48. As Complainant had learned in BNSF training, safe operation of a Sawzall must be two-handed. JX-2.

Complainant neglects his duty to wear personal protective equipment. In addition, Complainant had learned about BNSF's safety rules on the required personal protective equipment to wear while using various tools. *Id.* For jobs involving risk of lacerations or "abrasive cutting," employees must wear safety gloves to protect their hands. Tr. 108; CX-34 at 71, 74. That includes times when making a cut with a Sawzall. Tr. 48. Aware of this requirement, Complainant put on the gloves. *Id.*

As Complainant attempted to cut through the hardened metal chain, the Sawzall blade wore out quickly. *Id.* Complainant stopped cutting to replace the blade. *Id.* To handle the blade more ably, Complainant took the safety glove off his left hand. *Id.* But, when he returned to resume the cut, he failed to put the glove back on. *Id.*

The injury. Complainant continued cutting the chain without the left safety glove and with the Sawzall. Tr. 49. As he cut, the saw "kicked" up and punctured his left hand, which he was still using to hold the chain. *Id.*

In all, Complainant knew he was not using a preferred tool for the job and was not operating the tool in the approved manner in two different ways: he wasn't using both hands to operate the Sawzall, and he wasn't wearing a safety glove on the hand that was injured. Each of these was a violation of a safety rule on which Complainant had been trained and about which he knew at the time of the injury.

Complainant later testified that even if he had been wearing the glove, it would not have protected him from this injury. Tr. 67. In fact, in his opinion, wearing the glove likely would have made his injury worse by imbedding fibers in his hand. *Id.*

I give this opinion little weight because Complainant is not a medical doctor, nor does his area of expertise serve as a basis for this opinion. More to the point, however, is that BNSF is entitled to rely on medical advice at its disposal and on its experience over decades with hundreds (or thousands) of employees when it adopts safety rules and requires employees to comply with them. That is what the Company did. CX-34. And Complainant, who was in a hurry to get back, disregarded and violated those safety rules.

Completing the project. Feeling the laceration, Complainant immediately stopped to apply a bandage. Tr. 49. The chain was still intact, so Complainant went back to the gate and twisted the chain link back and forth until it eventually broke. *Id.* He drove through the gate and re-secured it behind him. Tr. 50. The entire incident lasted about 15 minutes from the time Complainant stopped at the gate until the time he re-locked the gate from the other side. *Id.*

Complainant fails to report the injury at his earliest opportunity. The applicable collective bargaining agreement requires an employee who is injured at work to make a “written report of the circumstances of the accident just as soon as they are able to do so after receiving medical attention.” JX-19 at Rule 35. BNSF’s rules also require a “report by the first means of communication” for injuries that may affect the safe and efficient operation of the railroad. CX-34 at 1.1.3.

During his drive back to the Pasco yard, which lasted about an hour, Complainant pulled over and stopped at 2:21 p.m., and called John Ball, a BNSF supervisor, to report his injury. Tr. 53; JX 5 at 3. Complainant called Ball instead of his regular supervisor, John Weiner, because Weiner was on vacation and Complainant believed that Ball was covering for him. *Id.* The call to Ball occurred about 15 minutes after the injury occurred. Tr. 54. When Ball’s answering machine picked up the call, Complainant did not leave a message. *Id.* Complainant’s only explanation was that he’d never reported an injury at BNSF, that he knew he was supposed to report as soon as possible, but that he thought he had to report directly to a supervisor, not by voicemail. *Id.* This does little to explain why Complainant didn’t leave a voicemail for Ball and also try to contact another supervisor or manager directly.

Continuing his drive, Complainant arrived at the BNSF Pasco yard around 3:15 p.m., about 15 minutes before his shift was to end. Tr. 55. Again, he didn’t report his injury. Tr. 56. He testified that there was “no one there to tell” because all of the electricians were out of the office and Weiner was on vacation. Tr. 55. Instead, he dropped off his work truck – called a “bucket truck” – and left the yard for the night. Tr. 55. What this neglects is that he could have reported to BNSF supervisors other than those who supervised electricians, he could have called supervisors in other BNSF locations, there are higher level managers who work at 3:15 in the afternoon, and he could have asked his foreman what he should do to report the injury.

After leaving at the end of his shift and before going home, Complainant went to a previously scheduled 4:00 p.m. chiropractor appointment.⁶ Tr. 56. He did not try to call anyone at BNSF to report the injury either before the appointment or before driving home at the end of the appointment. Tr. 148.

When Complainant got home around 5:00 p.m., his wife noticed that his hand was bandaged. Tr. 56. She asked to see the injury. *Id.* Complainant unwrapped the bandage and saw that his hand was swelling. Tr. 57. He and his wife decided to see a doctor because neither could remember the last time he'd had a tetanus shot. Tr. 57.

Complainant's report to his union foreman. Before leaving to see a doctor just after 5:00 p.m., Complainant called his foreman, Dave Barajas. *Id.* Since Weiner was on vacation and Ball hadn't answered his phone, Complainant figured Barajas was the best person to call. Tr. 56-57, 323. It was now about three hours after the injury. Tr. 186. The delay cannot be excused because Complainant was receiving medical care; he had only decided to see a doctor at 5:00 p.m. and could have called Barajas as soon as he was unable to reach Ball. That was well-before he'd decided to see a doctor to get a tetanus shot.

Barajas asked what had happened, and Complainant explained. Tr. 58. Barajas commented that he thought there were bolt-cutters on the truck, which could have helped Complainant avoid the incident altogether. *Id.* Much of the rest of the conversation is disputed. *See* Tr. 59; Tr. 228.

Complainant testified that Barajas suggested that it would be better to report the injury as having taken place in Complainant's garage, rather than on the BNSF worksite and that Complainant might not want to report the injury at all, which, to Complainant, suggested that BNSF disfavors injury reports. *Id.* Tr. 58. Barajas denied all of this and emphasized that BNSF strictly enforces its injury reporting policy as it is important for the safety of all employees. Tr. 228-229.

I give more weight to Barajas' testimony about the phone call than to Complainant's for three reasons. First, during the OSHA investigator's interview, Complainant stated that he had considered reporting that the incident took place in his garage *before* he called Barajas. RX-O at 6. Given that Complainant already had the idea before he spoke to Barajas, it is not credible that Barajas just happened coincidentally to propose a plan to make a false report with the exact same story: say the injury occurred in Complainant's own garage.

Second, Barajas testified that, on Complainant's first day on the job, he introduced himself to Barajas by stating that his name was Robert Johnson, that he was deadly at 50 feet, and that he was prejudiced—in just those words. Tr. 223, 245. Barajas understood by “deadly at 50 feet” that Johnson “maybe was a sharpshooter.” Tr. 223. Being Hispanic, Barajas thought Complainant's statement that he was prejudiced “very odd” and awkward, but, rather than question Complainant; he let it go. Tr. 223, 245. Sometime later, Barajas asked Complainant about this, and Complainant explained that he was prejudiced toward “certain people” who, for example, got welfare. Tr. 246. Barajas thought the reference was to people in ethnic groups

⁶ Complainant testified that getting to this appointment on time did not factor into his decision to cut through the chain.

other than Complainant's. (Complainant is white.) Barajas knew that he could contact Human Resources because BNSF does not permit discrimination, but he believed reports were optional, and he never made a complaint. Tr. 246-47. Nonetheless, I infer a level of animus from Complainant toward Barajas that would lead him to make hostile and potentially untruthful allegations about him.⁷

Third, I gave Complainant every opportunity to present a rebuttal case. If he disputed Barajas' testimony about Complainant's self-description as "deadly at 50 feet" and "prejudiced," Complainant could have testified and denied it. He didn't. From this, I conclude that Barajas' testimony in this regard was truthful.

In any event, as a union worker and not a manager or supervisor, Barajas was not speaking for BNSF when he discussed with Complainant what he should report about the injury or to whom. He was giving Complainant advice as an experienced co-worker.

After the phone call with Barajas, Complainant and his wife went to a nearby emergency clinic. Tr. 60. About half an hour later, BNSF Structures Supervisor Kristopher Harris called Complainant and told him he needed to file an injury report immediately. Tr. 60-61.⁸ Complainant told Harris that he was going to the emergency clinic, and Harris met Complainant there. Tr. 61. He gave Complainant an injury report form to fill out. *Id.* Complainant asked if he could complete the report after he saw a doctor, and Harris asked him to start filling it out. *Id.* Complainant wrote his name on the form, and the doctor called him in. Tr. 62. Complainant invited Harris to accompany him into the examination. Harris declined. JX 5.

BNSF policy requires the "complete and accurate reporting of all accidents, incidents, injuries, and occupational illnesses arising from the operation of the railroad." CX-34 at Rule 26.8. It also prohibits the "harassment or intimidation of any person that is calculated or discouraged or prevents such person from receiving proper medical treatment from reporting the accident, incident, injury or illness." *Id.*

Harris testified that he acted within these rules on the night of the injury. Tr. 343. He wanted Complainant to complete the injury report as soon as possible, but he stayed at the clinic so Complainant could get medical attention, and he did nothing to discourage Complainant from seeing the doctor as soon as the doctor was ready. Harris waited at the clinic for Complainant to complete his medical visit. Tr. 63.

⁷ There was additional evidence going to animus. Barajas testified that, as a foreman, he found Complainant a "difficult employee." Tr. 224. For example, BNSF allowed the foreman, but not line electricians, to drive a company truck home. Tr. 225. Complainant was upset about this and asked Barajas if he could compensate Complainant for gas and driving expenses by giving him overtime. Tr. 225-26. Barajas told Complainant he'd have to take that up with John Wiener, the supervisor. Tr. 226. Complainant emailed Wiener, who sent an email reply to all electricians, rejecting the request. *Id.* Complainant was "very upset" and felt Wiener should have sent a private reply, not one directed to all of the electricians. *Id.* Under the collective bargaining agreement, only employees using their personal automobiles "in connection with their work" are allowed mileage, and employees may not be required to use their private automobiles to perform service for BNSF. JX 19, Rule 28.

⁸ Apparently, Barajas had informed management about the injury.

The doctor's visit took about 45 minutes, including an examination, x-rays, and a tetanus shot.⁹ Tr. 62-63. Afterward, Complainant found Harris in the waiting room, and Harris directed Complainant to complete the injury report. Tr. 63. Complainant agreed to resume working on it. *Id.* His daughter picked up his wife so she didn't have to wait. Tr. 64. After about an hour but before Complainant finished the report, the clinic asked Complainant and Harris to leave because it was approaching 8:00 p.m., and the clinic was closing. *Id.* As they left, Complainant told Harris that he would provide more detail for his report the next day, and both men went to their respective homes for the night. Tr. 65.

That evening, Harris spoke with Mike Schram, the BNSF Structures Manager. Tr. 347-349. He told about Complainant's injury, the trip to the doctor's office, and the status of the injury report forms. Tr. 446. Schram prepared and distributed an "Initial Report of Employee Injury." CX-40. He briefly described the incident and injury and stated that Complainant had no previous injuries at BNSF, that he had reported the injury, and that he'd gone to see a doctor. *Id.*

Potentially applicable rules. The applicable collective bargaining agreement requires that employees injured at work "make a written report of the circumstances of the accident just as soon as they are able to do so after receiving medical attention Proper medical attention shall be given at the earliest possible moment" JX 19, Rule 35.

The collective bargaining agreement provides that, except for employees in service 60 days or fewer, no discipline may be imposed without "a fair and impartial investigation," which must be conducted within 20 days. JX 19, Rule 30(a). If, as in the present case, the employee is held out of service pending investigation, the investigation must be held within 10 days after the employee is withheld from service. *Id.*, Rule 30(b). The employee is entitled to written notice of the investigation, specifying the charges. *Id.*, Rule 30(c). BNSF must make available "all necessary employee witnesses who have direct personal knowledge of the matter under investigation." *Id.* A decision must be rendered within 20 days following the investigation with written notice of the discipline and a transcript of the investigative hearing given to the employee and the union. *Id.*, Rule 30(d), (e).

The employee may waive the hearing in the presence of the union representative. *Id.*, Rule 30(f). If BNSF agrees to the waiver, it must advise the employee of the discipline that will be imposed if the investigation is waived. *Id.* The waiver "procedure is entirely voluntary on the part of the employee under charge." *Id.* If the waiver is agreed to, the discipline may not be appealed. *Id.* If the investigation or the decision are not timely, the charges against the employee must be dismissed. *Id.*, Rule 30(i).

BNSF's "Policy for Employee Performance Accountability" gives a "non-exhaustive list of Serious Violations" (those falling into Level S). JX 11, Appendix A. The items include in pertinent part: (1) Violation of any work procedure that is designed to protect employees, the public and/or others from potentially serious injury(ies) and fatality(ies) . . . ; (5) Tampering with

⁹ About a week after making his injury report, Complainant went to another doctor, who removed a small piece of metal from the cut in his hand. Tr. 68. That concluded Complainant's medical care for the injury.

safety devices . . . ; (8) Late reporting of accident or injury.” *Id.*¹⁰ It is sufficient grounds for dismissal, standing alone, if the employee fails outright to report an accident or injury; manifests “conscious or reckless indifference to the safety of themselves, others or the public; or engages in multiple serious (Level S) violations during the same tour of duty. *Id.*, Appendix B(6), (10), (11).

BNSF’s “Code of Conduct” provides with regard to “Safety, Health and Environment”: “You have an obligation to follow safe working procedures, help prevent injury to yourself or others, prevent damage to property and equipment and to protect the environment. It is crucial that you report any condition that you believe to be unsafe, unhealthy, or hazardous to the environment.” JX 10 at 15. “All employees are required to report actual and apparent violations of the law, this Code of Conduct, and any BNSF policy” as well as “suspected or known instances of retaliation . . .” *Id.* at 3. “BNSF will take appropriate steps to investigate all reports and will take appropriate action.” *Id.* at 5.

Complainant’s completion of the injury report and the Company safety call. On October 30, 2012 (the day after the injury), Complainant arrived at work at 7:00 a.m. to finish his report at the office. Tr. 65. He completed the standard forms and started writing what would be a six-page addendum describing injury incident. Tr. 65; JX-3; JX-5. Harris interrupted to direct Complainant to attend a division-wide safety call. Tr. 68. It was customary to have a safety call after an injury so that supervisors could bring attention to proper safety steps that could have prevented the injury. Tr. 68, 471. To keep as many employees as practical informed about these safety considerations, BNSF includes employees from other locations, not just the local employees. Tr. 471. There were about 120 people on this call. *Id.* Schram led the call and described the injury. Tr. 471. No one referred to Complainant by name.¹¹ Tr. 69.

On the injury report form, Complainant admitted that he could have prevented the injury had someone else been present who could hold vise grips on the chain so that Complainant could use two hands on the Sawzall. JX-3. He added that he could have used bolt cutters or a grinder if he’d had either of them on the truck, but he didn’t. *Id.* He admitted that no one else caused the accident, and he described how the injury happened in some limited detail. *Id.*

After the call, Complainant completed his detailed six-page addendum and gave it to Harris. Tr. 71; JX-5. In the addendum, Complainant recited the facts of the injury event consistent with the findings above, including, for example, that he knew bolt cutters or a side grinder would have been better tools for the job; that he removed his protective glove to change the saw blade and

¹⁰ The provision on late reporting of injuries includes the following note: “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, the employee notifies the supervisor before seeking medical attention, and the medical attention verifies that the injury was most likely linked to the event specified.” *Id.*

¹¹ Complainant testified that Schram said on the call that “some idiot used a Sawzall to cut a chain.” Tr. 70. Complainant said that word travels quickly and people probably knew he was the one who got injured. *Id.* Schram denied making the comment, and no other witness testified about it. Tr. 471. As Schram never identified who was injured, I take his comment, even if he made it, to be relevant only in that it revealed what he thought of Complainant’s using the Sawzall. It does not affect the outcome of the issues pending before me, as the Company has consistently viewed Complainant’s use of the Sawzall as unsafe.

didn't put it back on; and that he decided not to leave a message when he got John Ball's answering machine. Consistent with the findings above, Complainant described his return to the BNSF property in Pasco without mentioning any attempt to report his injury. In the addendum, Complainant describes the injury as a "puncture" with "a little irritation around [it]," not (as he later described it) as swelling, but I view the difference as of little consequence. He describes his call to Dave Barajas as being to tell him what happened and that he was going to get a tetanus shot (not remembering when he'd last had one). He does not suggest any need for medical care beyond the tetanus shot. He describes Harris as arriving at the clinic while Complainant was waiting for the shot and states that Harris wanted only to get the paperwork filled out.¹²

The Notice of Investigation. Harris asked Complainant to stay in the office building. Tr. 71. Within a half hour, Harris returned and gave Complainant a one-page Notice of Investigation, raising three allegations: (1) failure to be alert and attentive, (2) negligent conduct regarding his own safety, and (3) failure to make an injury report immediately to the proper supervisor. JX-6. The Notice, signed by Alice Ard, Director of Administration, stated that Complainant would be "withheld from service pending results of the investigation"; that is, BNSF suspended Complainant without pay pending investigation.

Schram was responsible for the decision to issue the Letter of Investigation. Tr. 447. He testified that he based his decision on Complainant's injury report (Form 51662), Complainant's six-page addendum to the report, and a review of the applicable rules. Tr. 450, 498. Complainant did not dispute this, and the admissions in the injury report (including the addendum) supply Schram with sufficient information to raise the allegations listed in the Notice of Investigation. I therefore accept that Schram reached his decision on the basis to which he testified.

The Notice of Investigation was the first Complainant had received; he wasn't familiar with the process. Tr. 72. He called his union representative, Mark Klecka, but Klecka didn't answer. Tr. 73. Harris escorted Complainant out of the building to his personal vehicle and told him to leave and not return until the investigation was complete. Tr. 74, 78. As Complainant was being withheld from service and not paid, BNSF had 10 days to complete the investigation and an additional 20 days to issue a written decision.

Waiver of investigation. On the third day after the suspension, at union representative Klecka's request and as provided in the collective bargaining agreement, BNSF provided Complainant with a written waiver of investigation form. Tr. 74; JX-7. Klecka apparently made the request without Complainant's knowledge: Complainant testified that, at the time, he had not spoken with Klecka or discussed his work situation with anyone. Tr. 76.

¹² Toward the end of the addendum, Complainant wrote: "I then went home [from the medical clinic] and started feeling as if I should not have said anything about my injury, and just said I did it at home. But then the railroad wants us to be honest people, which I am. So I feel I properly reported it." JX-5 at 5-6.

I find this inconsistent with Complainant's allegation that Barajas suggested that he might want to say the injury happened in his own garage. In the addendum, Complainant is describing the thought that he'd say he was injured at home as his own thought, not one Barajas suggested. He wrote this on the day after it happened. Why attribute the thought to himself, if it was Barajas' suggestion?

The proposed waiver letter provides that Complainant is voluntarily waiving the right to an investigation and that “it has been determined that you were in violation of” the rules concerning being alert and attentive, immediately reporting injuries, and exercising care regarding safety (listing the Rule provisions). JX 7. It states that a Level S 30-Day Record Suspension is being assessed with a one-year review period, beginning that day (November 2, 2012). *Id.* It states that, in assessing discipline, consideration was given to Complainant’s (clean) personnel record. *Id.*

As discussed above, under the collective bargaining agreement, “Level S” indicates a “serious” violation of the rules but falls short of a basis for immediate dismissal. A “record suspension” (as opposed to a regular suspension) results in the violation’s being entered on the employee’s personnel record but still allows him to work and be paid during the “suspension”; it’s essentially a suspension for the record only. The one-year review period means that, for purposes of progressive discipline, if there are additional violations within one year, the Level S record suspension would be considered when assessing the discipline to be imposed. For example, a second Level S violation within the one-year review period might result in a termination of the employment, rather than a suspension. Tr. 467.

Complainant did not understand the meaning of the proposed discipline. Tr. 78. Klecka explained the “Level S 30-day record suspension” and the impact it would have, but Complainant testified that he never fully understood. *Id.* Klecka encouraged Complainant to sign the waiver and return to work. *Id.*

Feeling that he needed to get back to work to support his family, Complainant signed the waiver. Tr. 79. He testified that he didn’t think he’d actually violated BNSF’s rules and didn’t think that signing the waiver was an admission that he had. Tr. 189. But his manager, Schram, testified that he understood Complainant to be admitting fault. Tr. 495.

Complainant returned to work on November 5, 2012, having missed five days. Tr. 80. BNSF never demoted Complainant or changed his job title, pay grade, or hours allowed. Tr. 174.

Around two weeks later, Barajas reassigned Complainant from using a bucket truck and doing off-site work to driving a small utility vehicle (a Kubota) and working primarily in BNSF’s Pasco yard. Tr. 81–84, 86, 176. Workers on Complainant’s team hadn’t previously been assigned the Kubota on a consistent basis, though workers on other teams had been. Tr. 176, 240.

At about the same time as Barajas changed Complainant’s assignment, BNSF hired a new electrician, Brandon Curry. Curry was assigned the bucket truck job. Tr. 82, 198. These assignments remained in place until Complainant left BNSF in 2014. Tr. 86.

Though Complainant testified that he believed the collective bargaining agreement required assignments to particular vehicles and other job duties were based on seniority, he was mistaken; there is no provision that mandates this. Tr. 95; JX-19.¹³ Barajas testified that, in making these

¹³ Under the collective bargaining agreement, employees may exercise seniority to “bump” more junior employees when a job is eliminated or a more senior worker loses her job through no fault of her own. JX 19, Rule 12. They

assignments, he didn't consider seniority; he considered each employee's skills and assigned the employee whose skills better fit the job duties. Tr. 240.

Barajas denied that Complainant's injury report had anything to do with the work assignments. *Id.* He explained that, when Curry became available, Barajas assigned the work in the Pasco yard to Complainant because Complainant had experience doing it, and Curry didn't. *Id.* Having assigned Complainant to the Pasco yard, it made sense to give him the Kubota because it is an appropriate vehicle for getting around the yard. *Id.*

I accept Barajas' explanation as it makes business sense, and there is no evidence to the contrary, given that Curry was newly hired at the time (thus explaining the timing) and was less experienced for the kind of work done in the Pasco yard (thus explaining which employee should be assigned what work). I also accept that the Kubota is an appropriate vehicle for getting around the yard; again, there is nothing to dispute it.

Beginning several months later (in 2013), Barajas started to assign tasks to Complainant that either were new to Complainant or that he'd previously done together with Barajas but now was expected to do alone. Tr. 88. As to the tasks that he'd previously done together with Barajas, Complainant thought some of them required two people for safety. *Id.*

For example, Barajas told Complainant to install light fixtures in the yard, using a ladder. *Id.* The railroad has a rule to have three "points of [physical] contact" at all times on a ladder. Tr. 89. Complainant testified that, if he had to carry his equipment up the ladder, he often found it impossible to maintain three points of contact. *Id.*

In another assignment, Barajas told Complainant to inspect transformers. Tr. 88. The transformers are high voltage and thus present a hazard. *Id.* Complainant had always inspected and maintained these transformers with another person, who would be a second set of eyes for safety. *Id.*

Finally, Barajas assigned Complainant to tasks that required him to cross a two-lane road in the Kubota. Tr. 88, 395. Complainant thought this was dangerous because the Kubota was not made for road use. Tr. 88.

The Railroad sufficiently answered some of these allegations. Electrical foreman (and union member) Richards testified that, although two people often had inspected transformers together in the past, it wasn't necessary to have two people all the time. Tr. 312-313. As he explained, the transformers were always disabled for inspection, meaning that they were not dangerous unless the employee physically touched the equipment inside the transformer. Complainant was never asked to manipulate the equipment inside the transformer; his work was limited to opening the door and doing a visual inspection. *Id.* Thus, it could be done alone safely. *Id.*

also have rights when bidding for jobs, but, here, both employees were electricians on the same job; they just had different duties that their union foreman assigned.

As to crossing a road with the Kubota, BNSF agreed that the vehicle wasn't designed for "road use," but they understood this to refer to driving along a roadway, not driving the short distance across a two-lane road. Tr. 395. There is no dispute that BNSF in good faith consistently treated the road-crossing as a safe use for a Kubota.

BNSF did not address the ladder and the need for three points of contact. But, what is crucial concerning all three of Complainant's concerns, is that BNSF has a policy that allows employees to refuse tasks that they believe are dangerous. CX-34 at 1.1; Tr. 114. Complainant was aware of this policy at the relevant times. *Id.* He never complained that any of these tasks was unsafe, nor did he refuse to perform any of them. *Id.* The Company viewed the work as safe, and if Complainant never said anything to the contrary or refused to do the work for safety reasons, Complainant's unexpressed concerns (kept to himself) are not protected activity, and BNSF's asking Complainant to do work that the Company understood to be safe and within Complainant's training and ability is not an adverse employment action.

In 2014, Complainant concluded that he was not going to get back to his previous duties, and he resigned from BNSF. Tr. 90. Before leaving, he accepted comparable employment with no loss of wages. Tr. 93.

BNSF's history of disciplinary actions imposed on others for unsafe activity. BNSF has imposed similar discipline on employees for violation of the safety rules even when they weren't injured. JX-15. In February 2014, for example, BNSF gave a Level S 30-day record suspension to an employee who failed to wear required personal protective equipment. *Id.* The employee reported no injury and was not injured. *Id.* As in Complainant's case, this discipline was imposed in connection with the employee's waiver of an investigation. There was another case in 2012 in which BNSF imposed the same discipline (with a waiver of investigation) also for not wearing personal protective equipment.

BNSF also provided another set of examples to show that reporting injuries and being disciplined are not linked. It cited 17 employees who reported injuries where there was no violation of a safety rule. BNSF disciplined none of them.

Represented by counsel, Complainant offered no counterexamples: no cases where an employee violated safety rules, was not injured, and yet was not disciplined. Complainant similarly offered no examples where an employee reported an injury and was disciplined without violating any safety rules. When asked about this at the hearing, Complainant could not cite any counterexamples. Tr. 181-82.¹⁴

Complainant testified that BNSF's treatment of him after he reported his injury – including the investigation, the assignment of the Kubota, and the assignment of tasks which required two people to complete safely – affected him emotionally. Tr. 94. Complainant told the OSHA investigator that, after the disciplinary incident, he had trouble sleeping for about a week and experienced stress in his relationship with his wife for two or three weeks. RX-O; Tr. 183-84. Complainant never sought medical care or saw a mental health professional in connection with

¹⁴ Complainant himself had no previous discipline and no previous injuries. JX-2.

anything raised in this case. Tr. 182. Complainant did, however, see a psychologist on BNSF's request during discovery; the psychologist did not diagnose depression. Tr. 182-83.

Discussion

The Federal Railroad Safety Act

prohibits a railroad carrier engaged in interstate or foreign commerce from . . . suspending . . . or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith protected activity. 49 U.S.C. §§ 20109(a).

Thorstenson v. BNSF Ry. Co., ARB Nos. 2018-0059, 2018-0060, ALJ No. 2015-FRS-00052 (ARB Nov. 25, 2019) (slip op. at 6). Among the activities that are protected is notifying the railroad of a work-related personal injury of an employee. 49 U.S.C. § 20109(a)(4).

“The FRSA expressly invokes the AIR-21 framework set forth in 49 U.S.C. § 42121(b) for claims of unlawful discrimination. *Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1194–95 (9th Cir. 2019) (footnote omitted), citing *Rookaird v. BNSF Railway Co.*, 908 F.3d 451, 459 (9th Cir. 2018).

To establish a claim of unlawful discrimination under the FRSA, the plaintiff must prove by a preponderance of the evidence that his or her protected conduct “was a contributing factor in the unfavorable personnel action alleged in the complaint.” A contributing factor is “any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision.” If the plaintiff succeeds, the employer can attempt to rebut the allegations and defeat the claim by demonstrating “by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity].”

Importantly, the only burden the statute places on FRSA plaintiffs is to ultimately prove, by a preponderance of the evidence, that their protected conduct was a contributing factor to the adverse employment action—i.e., that it “tend[ed] to affect” the decision in some way.

Frost at 1195 (citations and footnote omitted); see *Thorstenson* at 6 (citing 49 U.S.C. § 20109(d)(2)(A)(i); 49 U.S.C. § 42121(b)(2)(B)(i)(2000); 29 C.F.R. § 1982.109(a), (b)).¹⁵

¹⁵ BNSF asserts that the action should be precluded by the Railway Labor Act (“RLA”) because it deals with “controversies over the meaning of an existing collective bargaining agreement,” and that it is subject to mandatory arbitration as a result. See 45 U.S.C. § 151. I reject the argument.

First, Complainant did not seek a remedy or assert a claim under the Railway Labor Act, nor has he alleged in this action that BNSF breached its obligations under the collective bargaining agreement. To the contrary, Complainant voluntarily accepted the discipline BNSF proposed in view of the alleged violations of the railroad's safety rules, including rules concerning the reporting of personal injuries on the job. No dispute arose concerning the rights of the parties under the collective bargaining agreement. (*Footnote continues . . .*)

As a complainant must prove no more, a complainant's satisfaction of that burden also satisfies any requirement to show discriminatory or retaliatory intent. *Frost* at 1195-96; distinguishing

Second, even if Complainant had pursued an action under the Railway Labor Act, under 49 U.S.C.A. § 20109(g), (h), he may do both. See *Mercier v. Union Pacific*, ARB No. 09-101, 09-121, ALJ No. 2008-FRS-00001, 00004 (Sept. 29, 2011).

Third, BNSF misplaces its reliance on *Miglio v. United Airlines*, No. C13-573RAJ, 2014 WL 1089285 at *4 (W.D. Wash. Mar. 17, 2014) (quoting *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1059-60 (9th Cir. 2007)). Those cases hold that the Railway Labor Act preempts state law claims when the state claim involves a right conferred by the collective bargaining agreement or is substantially dependent on the collective bargaining agreement. The doctrine grows out of Supreme Court authority interpretation the Labor Management Relations Act, section 301, as preempting state law so entirely that a court must recharacterize any state law claim for violations of contracts between employers and unions as an action under section 301. *Burnside* at 1058, citing *Livadas v. Bradshaw*, 512 U.S. 107, 121-24, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 403-06, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208-13, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985); *Cramer*, 255 F.3d at 689-93; *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1106-09 (9th Cir.2000).

But the Federal Rail Safety Act is an act of Congress, not a state law. Moreover, Complainant's claim turns on whether Complainant's protected activity was a contributing factor to the adverse actions he alleges and, secondarily, whether BNSF would have taken the same adverse actions had Complainant not engaged in the protected activity. Neither of those issues is substantially dependent on the collective bargaining agreement. The result would differ if Complainant's protected activity concerned a unionizing effort; it didn't.

Finally, even if an interpretation of the collective bargaining agreement was required, the Act provides: "The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment." 49 U.S.C. § 20109(h). That includes the collective bargaining agreement, which is a contractual agreement. Given that this provision was added to the statute in 2007, if it is inconsistent with the Railway Labor Act, it has amended that Act by implication.

BNSF also argues that Complainant did not exhaust his administrative remedies at OSHA because he requested that OSHA conclude its investigation and refer the matter for litigation at OALJ and because Complainant raised new issues at OALJ that were not included in his OSHA complaint or considered during the OSHA investigation. These new claims are that the assignment of the Kubota was retaliatory and that the assignment to perform alone jobs that required two individuals for safety was also retaliatory.

I denied BNSF's motion to exclude these claims because I am of the view that the administrative process is still ongoing in this case. Complainant has not left the Department of Labor and may continue to exhaust his administrative remedies at OALJ. His opportunity to exhaust will not end until there is a final decision of the Secretary.

Indeed, if OSHA declined to investigate the claim, Complainant could come to OALJ to litigate his case and could here amend his complaint. If he did, I could not remand to OSHA for that agency to investigate or investigate further. See 29 C.F.R. § 182.109(c) (ALJ may not remand to OSHA for further investigation where OSHA has closed the case without completing an investigation); 29 C.F.R. § 18.36 ("The judge may allow parties to amend and supplement their filings.").

Especially because pleading at OSHA is very informal, ALJs often must determine the precise dimensions of the claims, defenses, and disputed issues with little guidance from the "pleadings" (such as they are) filed at OSHA. See 29 C.F.R. § 182.103(b) (no particular form of complaint is required; complaint may be oral or written and may be in any language); *id.* § 182.104(b) (no answer required; respondent may file a written position statement or ask for a meeting with OSHA). In some cases, the ALJ will amend the pleadings as late as the end of the hearing to conform the pleadings to the proof and to the parties' understanding of the case as manifested or clarified during the hearing.

Kuduk v. BNSF Ry. Co., 768 F.3d 786 (8th Cir. 2014); *see also Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013) (a complainant need not prove a retaliatory motive beyond showing that her protected activity was a contributing factor in the adverse action). Even if an employer imposed an adverse action based on an honest belief that the worker engaged in the alleged misconduct, the complainant satisfies his burden by showing that his protected activity was a contributing factor in the adverse action. *Frost* at 1196-97, distinguishing *Armstrong v. BNSF Railway Co.*, 880 F.3d 377 (7th Cir. 2018).

I. Complainant Engaged in Protected Activity.

It is undisputed that BNSF is a railroad carrier engaged in interstate commerce and thus falls within the Act and that Complainant was an “employee” within the meaning of the Act. JX-22. The parties stipulate that Complainant engaged in protected activity when he reported his work-related injury to BNSF on October 29, 2012. *Id.*; *see* 29 C.F.R. § 1982.102(b)(iv) (protecting act “to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee”).

II. Respondent Took Adverse Personnel Action.

A complainant must show by a preponderance of the evidence that respondent took some adverse action against him. *Palmer v. Canadian Nat’l Ry./Ill. Ctrl. R.R. Co.*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016). As both the statute and the regulations include suspensions among actions that are adverse, 49 U.S.C. §§ 20109(a); 29 C.F.R. 1982.102(b)(1), and BNSF suspended Complainant without pay for five days pending investigation, there is no question that BNSF took an adverse action within the meaning of the statute.

The regulation also states that “discipline” is an adverse action, 29 C.F.R. 1982.102(b)(1), and includes, not only suspension, but also placing the employee on probation or noting a reprimand on the employee’s record. 49 U.S.C. § 20109(c)(2). Here, the record suspension was adverse as a disciplinary action although it resulted in no loss of work or pay. It exposed Complainant to greater consequences that would result from any rule violations in the coming year under BNSF’s progressive discipline policy. Because of the record suspension, another Level S violation might lead to a termination rather than a 30-day record suspension. It is adverse in the sense that it would deter others from engaging in activity that the Act protects. *See Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), cited with approval in *Thorstenson*, at 7.

I am aware that, to be allowed to return to his duties and earning a living, Complainant agreed to the discipline. It is possible that, had the parties proceeded to a disciplinary (investigation) hearing, BNSF would have decided not to impose discipline. But BNSF’s charging Complainant with the violations and thus threatening discipline is sufficiently adverse. The regulations expressly include “threatening” as an adverse action. 29 C.F.R. § 1982.102(b)(1); *see Vernace v. Port Authority Trans-Hudson Corp.*, ARB No. 12-003, ALJ No. 2010-FRS-00018 (ARB Dec. 21, 2012) (threatening discipline is an adverse action) at 2-3, citing *Williams*. The threat is adverse in that it is an unfavorable employment action that is more than trivial. *See Williams v.*

American Airlines, ARB No. 09-018, ALJ No. 2007-AIR-00004, slip op. at 15 (ARB Dec. 29, 2010) (defining “adverse action in AIR-21 case).

On the other hand, I reject Complainant’s contention that his reassignment to work in the Pasco yard (using the Kubota) was an adverse action within the meaning of the Act. A change in job assignments that negatively affects a complainant’s pay, hours, and weekend free time can be an adverse action. *See D’Hooge v. BNSF Railways*, ARB Nos. 15-042, -066, ALJ No. 2014-FRS-2 (ARB Apr. 25, 2017); *see also, McClendon v. Hewlett Packard, Inc.*, ARB No. 2006-SOX-00029, at 78 (ARB Oct. 5, 2006) (a change in job assignment is an adverse action when there is a reduction in pay or the work is substantially different such that a reasonable employee would be dissuaded from whistleblowing on the basis of the change in job tasks). Trivial events are not harmful enough to amount to adverse actions. *Williams* at 8 (AIR-21); *see Fricka v. National Railroad Passenger Corp. (Amtrak)*, ARB No. 14-047, ALJ No. 2013-FRS-35 (ARB Nov. 24, 2015) (following *Williams* in a rail safety case).

Complainant’s work was not substantially different. He was not transferred hundreds of miles away or at all. He was not asked to work at night. His pay and status were not reduced. He remained on the same team, under the same supervision, still doing the work of a journeyman electrician, some of which work he’d also done on his previous assignment. Complainant’s contentions notwithstanding, he was not entitled under the collective bargaining agreement by reason of his seniority to choose which assignment he got. His preference for working alone in locations remote from the Pasco yard and for driving a truck rather than a less capable but entirely sufficient vehicle, while undoubtedly real, was also trivial.

Complainant’s best argument that the job assignment was substantially different is that he had to climb ladders while carrying equipment and thus could not maintain three points of contact and that he had to work on electrical transformers alone. As to the transformers, however, I find that the work was not substantially different because I accept the testimony that the transformers were disabled when being inspected, that the risk occurred only if the electrician was touching equipment inside the transformer, and the Complainant only had to do visual inspections. Complainant could have disputed this in rebuttal testimony at the hearing, but he didn’t. There is no evidence to dispute it. I therefore find that this work was not hazardous as Complainant described it.

As to the ladder, Complainant had been trained that he had a duty to report unsafe conditions and that he could refuse to do work that was unsafe. He was familiar with the three points of contact rule. He never said anything about a problem safely climbing the ladder. (He also never reported that working alone with the transformer was unsafe.) If he had reported his concern, BNSF would have had an opportunity to provide training on how Complainant could climb with his equipment and also maintain three points of contact. BNSF could also have modified the job duties. If Complainant had reported this particular use of a ladder as a safety hazard, that report would have been protected activity under the Act. He didn’t report it.

In all, I conclude that the reassignment was not an adverse action. Nonetheless, Complainant has established adverse employment actions in the suspension without pay pending investigation,

BNSF's charging him with violations that threaten discipline, and the Level S 30-day record suspension.

III. Complainant's Protected Activity Was A Contributing Factor in Respondent's Adverse Action.

"A contributing factor is *any* factor, which alone or in combination with other factors, tends to affect in *any* way the outcome of the decision." *Palmer v. Canadian Nat'l Ry./Ill. Ctrl. R.R. Co.*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016), slip op. at 53. This is a "low," "broad and forgiving" standard. *Id.* at 15, 53. The employee's protected activity need not be "significant, motivating, substantial or [the] predominant" factor. *Id.* at 53-55. "If the ALJ believes that the protected activity *and* the employer's nonretaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question." *Id.*

Though the context of other facts might also be relevant, "[t]emporal proximity is an important part of a case based on circumstantial evidence, often the 'most persuasive factor.'"¹⁶ BNSF notified Complainant of the charges against him less than one-half hour after Complainant completed and submitted his injury report on the morning of October 30, 2012. True, BNSF received a portion of the report at about 8:00 p.m. on the preceding evening (October 29, 2012), but BNSF did not notify Complainant of any charges until it received the complete report. The manager who decided to open the investigation, Schram, relied on the report and on what supervisor Harris told him the evening before after Harris spoke with Complainant at urgent care and took a partial injury report from Complainant at that time. According to Schram, he relied almost entirely on the injury report when he decided to initiate the investigation.

It is difficult to imagine a situation in which it could more appropriately be said that the disciplinary process began on the heels of the protected activity (*i.e.*, Complainant's submitting the injury report).¹⁷ But this case presents a complicating context: namely, Complainant's injury report included the information that strongly suggested, and perhaps directly admitted, that he had violated multiple BNSF safety rules. Thus, it is equally true that BNSF's decision to initiate a disciplinary process came on the heels of its learning from Complainant facts that indicated he'd violated multiple safety rules.

As the ARB recently explained in *Thorstenson*, "The ARB has [in the past] held that where protected activity directly leads to an investigation, and the investigation leads to discovery of

¹⁶ *Hukman v. U.S. Airways, Inc.*, ARB No. 2018-0048, ALJ No. 2015-AIR-00003 (ARB Jan. 16, 2020), 2020 WL 624344 at *10, citing *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 10-11 (ARB Sept. 26, 2012) (quoting *Beliveau v. U.S. Dep't of Labor*, 170 F.3d 83, 87 (1st Cir. 1999)); *see also Sylvester v. Parexel Int'l*, ARB No. 07-123, ALJ No. 2007-SOX-00039, 00042 (ARB May 25, 2011), slip op. at 22; *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-00003 (ARB Aug. 29, 2014), slip op. at 10; *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 507 (9th Cir. 2000) (Title VII – causation can be inferred from timing alone); *Miller v. Fairchild Indus.*, 885 F.2d 498, 505 (9th Cir. 1989) (causation was established when discharges occurred forty-two and fifty-nine days after reporting); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (sufficient where adverse actions occurred less than three months after complaint filed).

¹⁷ BNSF's opening the investigation occurred almost immediately after Schram learned of Complainant's injury report, regardless of whether that was sometime after 8:00 p.m. on October 29, 2012, or less than one-half hour after Complainant submitted the complete written report on the morning of October 30, 2012.

wrongdoing which results in unfavorable employment action, the report and the discipline are inextricably intertwined and causation is established presumptively as a matter of law.” *Thorstenson* at 8, citing and overruling *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-00009 (ARB Feb. 29, 2012). Essentially, the protected injury report was seen to have led to a chain of events, culminating in the discipline, and thus establishing contributing factor causation.

In its recent *Thorstenson* decision, however, the ARB overruled and rejected any holding reached *as a matter of law* that finds contributing factor causation based on events that are “inextricably intertwined” or part of a “chain of events.” *Thorstenson* at 10-11. Rather, the ARB required that a complainant establish contributing factor causation in these cases by showing *factually* how the protected activity was “a proximate cause of the adverse action, not merely an initiating event.” *Id.* at 10.¹⁸

As I review the facts of this case in the light of *Thorstenson*, it appears that the ARB conflated two different analyses of causation when it broadly discussed (1) events that were “inextricably intertwined” and (2) circumstances linked in a “chain of causation” or “chain of event.” The Board cites cases that involve a “chain of events” or “chain of causation” analysis. These cases find a series of events over time, with one event causing the next in an unbroken chain and thus causally linking the employee’s protected activity to the employer’s adverse action.

Thus, in the examples the ARB cites, if the employee didn’t report an injury, the railroad wouldn’t have investigated the circumstances of the injury, wouldn’t have discovered that the employee violated safety rules, and wouldn’t have imposed disciplinary sanctions. *Thorstenson* requires that this chain of events amounts to contributing factor causation only if there is a factual showing of protected activity was a proximate cause of the adverse action, not “merely an initiating event” that might be *a cause* but not a *proximate cause*.¹⁹

¹⁸ The ARB stressed the requirement that complainant show proximate causation. Quoting the Seventh Circuit, the ARB stated: “[Simple causation] embraces causes that have no legal significance. Had the plaintiff never been born or never worked for BNSF he would neither have been hurt by the plank flung at him by the energetic front-end loader nor have stolen railroad ties from the railroad. But that doesn’t mean that his being born or his being employed by the railroad were legally cognizable [proximate] causes of his being fired.” *Thorstenson* at 10-11, citing *Koziara v. BNSFS Ry. Co.*, 840 F.3d 873, 877 (7th Cir. 2016).

¹⁹ The Ninth Circuit, controlling here, said of proximate cause:

There is no hard and fast rule for establishing proximate cause. Far from being a one-size-fits-all ‘blackletter rule that will dictate the result in every case,’ the proximate-cause requirement varies by statute. As a result, the proximate-cause requirement is “controlled by the nature of the statutory cause of action.” Although proximate cause “is not easy to define,” the basic inquiry is “whether the harm alleged has a *sufficiently close connection* to the conduct the statute prohibits. Put differently, the proximate-cause requirement generally bars suits for alleged harm that is ‘too remote’ from the defendant’s unlawful conduct.” *Id.*

City of Oakland v. Wells Fargo & Co., No. 19-15169, ___F.3d___, 2020 WL 5035815, at *6 (9th Cir. Aug. 26, 2020).

See examples of Ninth Circuit causation analyses involving a “direct and unbroken chain of events” in *Serv. Employees Int’l, Inc. v. Dir., Office of Workers’ Comp. Programs*, 793 F. App’x 655, 656 (9th Cir. 2020) (unpub.) (Defense Base Act); *Kealoha v. Dir., Office of Workers Comp. Programs*, 713 F.3d 521, 523-25 (9th Cir. 2013) (Longshore & Harbor Workers Compensation Act).

Causation in the present case does not involve a chain of events that occurred separately over time. Complainant's submission of his injury report notified BNSF communicated information in two relevant categories *simultaneously*. Complainant reported (1) that he had sustained a workplace injury, and (2) that he engaged in certain conduct from which BNSF could reasonably infer that he violated multiple BNSF safety rules. It was this single written submission that Schram says led to his decision to open the disciplinary investigation and suspend Complainant without pay pending investigation. That alone makes it a proximate cause of BNSF's decision to open the investigation. Proximate causation is also apparent in the proximity in time of the submission of the report and the disciplinary response and the absence of any intervening events during the one-half hour interval between the protected activity and the adverse action. Tr. 450, 498. These facts not only "have a sufficiently close connection to the conduct the statute prohibits"; it is difficult to imagine how facts could be less remote from the BNSF's alleged unlawful conduct. *See City of Oakland v. Wells Fargo & Co., supra.*²⁰

This leaves me with the task of trying to determine whether, while Schram read and considered the single injury report form and six-page addendum and decided to open a disciplinary investigation, Schram entirely disregarded Complainant's report of an injury and focused solely and exclusively on Complainant's disclosure of unsafe conduct. I must do this while bearing in mind that Complainant need not show that his report of an injury was the primary, motivating, or sole factor that contributed to Schram's decision, nor need Complainant show that Schram intended to retaliate because Complainant was reporting an injury. I must appreciate that, if I find that both Complainant's protected activity and his unsafe conduct contributed to Schram's decision to open the investigation, I must find that Complainant has met the "low," "broad and forgiving" burden imposed on him. I cannot neglect that, even if an employer imposed an adverse action based on an honest belief that the worker engaged in alleged misconduct, the complainant at this stage of the analysis need prove only that his protected activity was a contributing factor in the adverse action. *See Frost* at 1196-97.

I conclude that, given the particular facts presented and that BNSF's deciding manager learned of Complainant's protected activity and his apparent violations of Company safety rules at the same time in the same report, and given the applicable legal framework, I can only conclude, more likely than not, that Complainant's inclusion in the report of the fact that he was injured and the disclosures of his apparent unsafe conduct led to both of these contributing to Schram's decision to open the investigation that posed a threat of discipline. This satisfies the low, broad, and forgiving burden placed on Complainant to show by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action.

²⁰ I reject Complainant's argument that foreman Barajas urged Complainant not to report the incident as a workplace injury, and that this is evidence that the report was a contributing factor in the discipline. I found in the text above that Barajas' denial of this is more credible than Complainant's testimony on it. But even if Barajas urged Complainant to treat the injury as having happened in his garage, Barajas was a union foreman, not a BNSF manager or supervisor. He did not speak for the Company. In addition, his only involvement in the BNSF's decision to initiate an investigation was that he told Harris that Complainant had called him about an injury; after that, Harris followed up. If this was any role, it did not amount to proximate causation: Barajas served as nothing more than a conduit of Complainant's information to Harris. Even if Barajas' conduct somehow was a proximate cause of the Company's opening an investigation, Complainant's submission of the injury report (including a description of his safety violations) was also a proximate cause.

IV. Employer Established Its Affirmative Defense.

Legal framework. 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 protected behavior. 49 U.S.C. §§ 20109(d)(2)(A)(ii); 42121(b)(2)(B)(iii)(iv); 29 C.F.R. § 1982.109(b); *see Palmer*, ARB No. 16-035, slip op. at 56 (quoting the same statute and regulation).

To be “clear and convincing,” an employer must provide an “unambiguous explanation for the adverse action” and demonstrate that the explanation is “highly probable or reasonably certain.”²¹ This 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.”²² As such, the “clear and convincing” standard is undoubtedly intended to be 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 II* at 8.

In applying this framework, the ARB explained:

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.”

DeFrancesco II at 7.

Thus, “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. The ALJ must have “the flexibility to weigh the significance of comparators case-by-case, depending on the level of similarity or lack of similarity among the comparators.” *See Speegle v. Stone and Webster Constr. Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 n.66 (ARB Apr. 25, 2014). But “it is not enough for the employer to show that it *could* have taken the same action; it must show that it *would* have.” *Palmer* at 57

²¹ *DeFrancesco v. Union R.R. Co. [DeFrancesco II]*, ARB Case No. 13-057, ALJ Case No. 2009-FRS-009, 2015 WL 5781070, at 5 (ARB Sept. 30, 2015); *Williams v. Domino’s Pizza*, ARB No. 09-092 at 6 (Jan 31, 2011).

²² *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 II* at 10-11.

(emphasis in original).²³ The employer must show that the discipline to which the complainant was subjected “was applied consistently, within clearly-established company policy, and in a non-disparate manner consistent with discipline taken against employees who committed the *same or similar violations.*” *DeFrancesco II* at 10, 13-14.

Here, BNSF must show by clear and convincing evidence that it would have initiated the disciplinary investigation, suspended Complainant without pay pending investigation, and accepted a waiver imposing a Level S 30-day record suspension with a one-year review period, absent Complainant’s protected activity.

Discussion of the affirmative defense. Here, BNSF asserts that it opened an investigation because Complainant’s report disclosed that he had violated Company safety rules in a manner that was a disciplinary offense and failed to report immediately the injury he sustained. BNSF charged him with (1) failure to be alert and attentive, (2) negligent conduct regarding his own safety, and (3) failure to make a report immediately to the proper supervisor. BNSF never reached a conclusion that Complainant actually violated any rules. It concluded only that the information Complainant provided was enough to open an investigation and that, if Complainant wanted to waive the disciplinary process under the collective bargaining agreement, BNSF would agree to that request if Complainant would accept a Level S 30-day record suspension. Complainant chose to accept the agreement.

At the outset, Complainant’s description in the injury report and addendum essentially conceded that the Sawzall that he used wasn’t neither the preferred tool nor the second most preferred tool. Complainant conceded that he knew he wasn’t operating the Sawzall safely because he had only one free hand to use when operating it, and safety requires using both hands. He conceded that he put on safety gloves as required, took one of the gloves off to change saw blades, and neglected to put the glove back on before he returned to operating the saw. He conceded that he sustained the injury around 2:15 p.m., and BNSF was aware that Complainant first reported the injury shortly after 5:00 p.m., when he called Barajas. BNSF’s deciding official, Schram, credibly testified why he believed that Complainant’s conduct was unsafe. Harris, the supervisor, testified to the same.

²³ This evidence might include factors such as:

1. Whether the railroad monitors for compliance with the work rules the complainant is charged with violating in the absence of an injury? Does the railroad routinely monitor the manner in which employees perform the action the complainant was performing?
2. Whether the railroad consistently imposes equivalent discipline against employees who violate the work rules the complainant was cited for violating but who are not injured as a result of the violation?
3. Are the work rules the complainant was charged with violating routinely applied?
4. Are the work rules the complainant was charged with violating vague and thus subject to manipulation and used as pretext for unlawful discrimination? If they are general safety rules, how has the railroad applied the rules in situations that do not involve an employee injury?
5. Does other evidence suggest that in conducting its investigation the railroad was genuinely concerned about rooting out safety problems? Or does the evidence suggest that its conduct of the investigation was pretext designed to unearth some plausible basis on which to punish the complainant for the injury report?

See DeFrancesco.

The collective bargaining agreement expressly lists as serious (Level S) violations: “Violation of any work procedure that is designed to protect employees, the public and/or others from potentially serious injury(ies) and fatality(ies) . . . ; [and] Late reporting of accident or injury. BNSF’s Code of Conduct requires employees “to follow safe working procedures [and to] help prevent injury to yourself or others.” It states that, “BNSF will take appropriate steps to investigate all reports and will take appropriate action.”

Here, Complainant disclosed more than enough in his report (including the three hours it took him to tell the Company about the injury) to give BNSF reason to open an investigation. That (and the suspension pending investigation) is all the Company did until Complainant’s union asked for terms under which the disciplinary process could be waived. This, on its face, appears to be a credible, fair and reasonable, honestly held, non-pretextual reason for the Company’s action. But there is considerably more.

BNSF submitted evidence from other railroad employees located in the region where Complainant worked (Washington State) at the relevant time. This included the personnel files of 27 employees who reported injuries in 2012 and 2013 and were not disciplined when there was no safety violation. RX-E. The work duties, location, and timing of these cases make them sufficiently comparable to Complainant. These 27 cases in the local area at the same time are strongly persuasive evidence that BNSF does not discipline employees for the act reporting a workplace injury, standing alone. Represented by counsel and given broad access to discovery, Complainant offered no counterexamples, where BNSF had even arguably disciplined an employee for reporting an injury when there was no safety violation.

BNSF also offered four examples of employees in 2012 to 2014 about whose conduct BNSF opened investigations for violating multiple safety rules during one incident, just as BNSF did with Complainant in this case. JX-15. But there was a distinguishing factor in these four cases: None of these employees reported injuries at or around the time of their discipline. *Id.*

In three of the four of the cases, the union requested a waiver, to which BNSF agreed in return for the employee’s acceptance of a Level S 30-day record suspension. JX-15. In the fourth case, the employee also waived investigation and agreed to a formal reprimand for being inattentive and failing to wear personal protective equipment. Of the three cases that resulted in a Level S 30-day record suspension, one employee was being investigated for apparently violating multiple safety rules, including a failure to wear personal protective equipment. *Id.* The other two employees were being investigated for carelessness concerning safety and failure to wear personal protective equipment. *Id.*

These four examples also present comparable employees; the only substantial difference is that there was no injury or report of injury involved. These cases strongly support a conclusion, as the affirmative defense requires, that in cases involving apparent safety violations but absent an injury, BNSF will initiate an investigation and agree to the employee’s waiver of the investigation if the employee will accept the same discipline as that to which Complainant agreed in the present case.

Again, Complainant offered no counterexamples, where employees engaged in conduct that appeared to violate safety rules, BNSF did not open an investigation, or BNSF did not agree to discipline the same as or similar to the discipline BNSF agreed to accept in Complainant's case.

Based on the evidence as a whole, I conclude that, by clear and convincing evidence, BNSF has shown that, even absent Complainant's report that he'd been injured, BNSF would have initiated an investigation and agreed, via the waiver process, to the same discipline it imposed here. BNSF acted consistent with the collective bargaining agreement and the Code of Conduct. It acted consistent with past practice in cases not involving an injury. It has a history of not imposing discipline after receiving injury reports that are not connected to safety violations. The process of the waiver and the level of discipline imposed again were consistent with past practice and the discipline provision in the collective bargaining agreement.²⁴ I therefore conclude that BNSF has established the affirmative defense and that Complainant is not entitled to a remedy.

Order

For the foregoing reasons, Complainant's claim is DENIED and the case DISMISSED. *See* 29 C.F.R. § 1982.109(d)(2). Complainant shall take nothing by reason of his complaint.

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.

²⁴ I have rejected Complainant's assertion that his foreman retaliated against him in the work he assigned after the injury.

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

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

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

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

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

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

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

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