U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 02 January 2019

CASE NO.: 2017-FRS-00003

In the Matter of:

HERBERT ROTHSCHILD,
Complainant,

v.

BNSF RAILWAY COMPANY,
Respondent.

Appearances: Paula Rasmussen, Esq.
Thomas Lelevich, Esq.
For the Complainant

Paul Balanon, Esq.
Jacob Godard, Esq.
Derek A. Cargill, Esq.
For the Respondent

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER GRANTING CLAIM

This matter arises out of the employee-protection provisions of the Federal Rail Safety Act ("FRSA" or "Act"), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053, 121 Stat. 266, 444 (2007) and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848, 4892 (2008). 49 U.S.C. § 20109. Herbert Rothschild ("Complainant") alleges that his employer, BNSF Railway Company ("Respondent" or "BNSF"), violated the whistleblower protection provisions of the FRSA by disciplining him after he reported a work-related injury. This claim was initiated with the Office of Administrative Law Judges ("OALJ") on October 11, 2016, when OALJ received Respondent's timely objections to the findings of the Regional Administrator of the Occupational Safety and Health Administration's ("OSHA"). This case is before me *de novo*.

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

I. Procedural History

Complainant filed a complaint with OSHA on May 12, 2015, alleging that Respondent had retaliated against him for reporting a work-related injury.[1] (JX 8, pp. 1-2; *see* RX Q, p. 1.) On October 5, 2016, the Regional Administrator of OSHA, acting on behalf of the Secretary of Labor, issued Secretary's Findings determining there was reasonable cause to find that Respondent had violated the FRSA. (RX Q, pp. 1-4) On October 11, 2016, Respondent timely appealed OSHA's findings and requested a hearing before an administrative law judge ("ALJ"). (*See* JX 16, p. 1.)

On November 2, 2016, the case was assigned to me. I issued a Notice of Hearing on December 20, 2016, setting this case for hearing on July 11, 2017, in Seattle, Washington. Complainant filed a motion on June 26, 2017, asking me to take judicial notice of OSHA's October 5, 2016 decision. Respondent filed an objection the following day. On June 28, 2017, Respondent filed a motion to exclude Complainant's testimony on emotional distress, anxiety, depression, betrayal, and pain and suffering. Complainant filed a combined motion on June 30, 2017, opposing Respondent's motion to exclude and objecting to some of Respondent's proposed exhibits. On July 5, 2017, Respondent filed a notice stating that two of its witnesses could not appear at the hearing as planned on July 11 due to a previously-scheduled external conflict, and that a third witness could not appear on July 12. Respondent asked that the witnesses be allowed to switch days.

I addressed these issues during a telephone pre-hearing conference on July 5, 2017, summarized in an order issued July 7, 2017.[2] I denied Complainant's request for judicial notice of the OSHA determination because my hearing of the case is *de novo* and OSHA's findings are not binding on me. I deferred ruling on Respondent's motion to exclude Complainant's emotional distress testimony, because there was a disagreement about whether some notes made by Complainant had been produced. With respect to Respondent's witnesses' conflicts with their scheduled appearances at the hearing, I ordered the parties to see whether the conflict could be removed. I accepted 13 stipulations the parties agreed to before or during the conference. Finally, I reviewed Complainant's objections to Respondent's exhibits and recorded the resolution of those objections. I deferred Respondent's objections to Complainant's exhibits to the beginning of the hearing.

On July 7, I held a telephonic status conference to address the scheduling conflict regarding Respondent's witnesses. Respondent's counsel informed me that their conflict was an external client meeting that had been scheduled for a year and could not be changed. Because it was an external meeting and both witnesses had been deposed, I determined that they would testify on July 12 instead.

The hearing was held on July 11-12, 2017, in Seattle, Washington. In accordance with the decisions reached at the prehearing conference, I admitted Complainant's Exhibits ("CX") 1,

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[1] The complaint form also alleges that Complainant "[t]estified or provided statement in investigation or other proceedings," but this protected activity allegation evidently referred to his participation in the investigation of his alleged violation of the injury reporting rules. It was not pursued. (JX 8, p. 2.)

[2] The order mistakenly states that the pre-hearing conference was conducted on July 11, which was actually the scheduled hearing date. My subsequent Order Summarizing July 7, 2017 Status Conference reflects the correct date.

2, 8, 9, 10, and 12. (Hearing Transcript ("HT"), pp. 4-5.) CX 5 was withdrawn, and CX 4 was excluded.[3] Respondent's Exhibits ("RX") B[4], E-I, K-N, P, Q, S, and T were admitted.[5] RX D and J were withdrawn, RX O[6] was excluded, and RX A, R, and U[7] did not exist. Joint Exhibits ("JX") 1-19 were marked and admitted.[8] (HT, p. 9.) Harold Lederer, Derek Cargill, Richard Bronson, and Complainant testified on July 11, 2017. Tracy Rothschild, Ronald Holm, David Bertholf, and Richard Lovin testified on July 12, 2017, and Complainant was also briefly recalled.

Respondent's Post-Hearing Brief ("RB") was filed on September 18, 2017. Complainant's Post-Hearing Brief ("CB") was filed on September 19, 2017. On October 4, 2017, Respondent filed a Notice of Supplemental Authority noting two recent cases in which certiorari had just been denied. Over Complainant's objections, I issued an order on October 20, 2017, concluding that submission of the cases was proper and agreeing to consider them. On November 21, 2018, Respondent filed a Notice of Supplemental Authority noting another case recently decided by the Ninth Circuit. On November 29, 2018, Complainant filed a Response to Respondent's Notice.

II. Issues

1. Did the Complainant engage in an activity protected under the Federal Railroad Safety Act?
2. Was BNSF aware of the Complainant's protected activity?
3. Did the Complainant suffer an adverse action as a result of his protected activity?
4. Was the Complainant's protected activity a contributing factor to an adverse action taken against the Complainant
5. Would BNSF have taken the same action if the Complainant had not engaged in the protected activity?
6. If BNSF retaliated against the Complainant, what damages is he entitled to?

III. Stipulations

Prior to the hearing the parties stipulated to the following, as reflected in the Order Summarizing Pre-hearing Conference:

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[3] CX 3, 7, and 11 did not exist. Although CX 6 was also listed as "does not exist" in the transcript, a CX 6 consisting of the OSHA Secretary's Findings below was submitted with Claimant's exhibits but was never admitted. In any case, the same document was admitted in its entirety as RX Q, so the precise status of CX 6 does not matter.

[4] The transcript says RX B did not exist, and it does not appear to mention RX C. However, an RX B was submitted while no RX C was submitted, and my notes state that RX B was admitted. I conclude that the transcript misheard the letter B as C and that RX B was submitted and admitted at the hearing.

[5] The transcript says that RX G was both admitted and withdrawn, but the statement that it was withdrawn was in error. My Pre-Hearing Conference order of July 7, 2017 indicates that it was to be admitted, and Respondent relied on it at the hearing. (HT, pp. 109-10.) Because RX D was withdrawn at the pre-hearing conference but not mentioned at the hearing, the reference to RX G being withdrawn was likely another mistranscription.

[6] The transcript mistakenly states that RX O was admitted, but my Pre-Hearing Conference order of July 7, 2017 indicates that it was excluded, and no such exhibit was submitted to me.

[7] The transcript mistakenly states that RX U was admitted, but the Pre-Hearing Conference order indicates that it did not exist, and no such exhibit was submitted to me.

[8] For all three sets of exhibits, the page numbering begins anew with each exhibit.

1. Respondent BNSF is a Common Carrier by railroad within the meaning of 49 U.S.C. § 20109 and 49 U.S.C. § 20102.
2. BNSF is engaged in interstate commerce within the meaning of 49 U.S.C. § 20109.
3. The Complainant is a covered "employee" within the meaning of 49 U.S.C. § 20109(a).
4. At all times relevant, BNSF employed the Complainant as a Carman at the Interbay car shop in the Seattle area.
5. On January 2, 2015, the Complainant began work approximately 7:00 a.m. About two hours into the shift, the Complainant stood up from a squatting position and felt a "pop" in his left knee. The Complainant completed his shift at about 2:55 p.m. without notifying BNSF of the alleged injury.
6. The Complainant did not immediately report his knee injury to his supervisors at BNSF.
7. On January 3, 2015, at approximately 6:00 a.m. the Complainant called the overnight Carman (Michael Royal) to say he was not feeling well and needed to take the day off. The Complainant never told Mr. Royal about his knee hurting or that he felt a "pop" in his knee the prior day. Approximately eight hours later, at about 2:00 p.m. the Complainant went to the Harrison Medical Center Bremerton Emergency Services.
8. The Complainant completed a Personal Injury/Occupational Illness Report, dated January 7, 2015, related to "injury to meniscus left knee," and he further noted he first noticed the symptoms on January 2, 2015.
9. On May 13, 2015, BNSF conducted the on-property investigation.
10. The Complainant timely filed an OSHA complaint in June 2015.
11. OSHA issued its findings on October 5, 2016, which BNSF timely appealed.
12. The Complainant does not seek an award of lost wages.
13. BNSF complied with the collective bargaining agreement provisions related to the investigation process.

IV. Factual Background

A. Complainant's Background and Employment with Respondent

Complainant lives in Port Orchard, Washington with his wife, Tracy Ann Rothschild. (JX 1, p. 1; HT, p. 293.) They met while they were both serving in the United States Navy. (HT, pp. 157-58, 293.) Complainant was hired as a laborer by BNSF on October 20, 2008. (JX 1, p. 1.) He became a maintenance equipment apprentice in May 2010 and began work as a carman in October 2010. (*Id.*; HT, p. 157.) A carman inspects and repairs freight cars. (HT, p. 196.) Complainant worked at Interbay and at another location for several years but has been at Interbay since November 2014. (JX 1, p. 1; HT, p. 157.) As of December 29, 2016, he had no discipline or injuries on record other than the events that are the subject of this case. (JX 1, p. 1.)

Interbay Car Shop is a BNSF facility with approximately 45 employees, including about 20 carmen. (HT, pp. 178, 374.) Interbay is managed by General Foreman David Bertholf. (HT, p. 26.) Rick Lovin is one of several field supervisors or foremen who work at Interbay and

report to Mr. Bertholf. (HT, pp. 26-27.) Mr. Bertholf reports to zone superintendent Harold Lederer. (JX 17[9], pp. 4-5. (HT, p. 27.)

Complainant has some history of anxiety prior to the events of this case. He was first officially diagnosed with anxiety on March 1, 2013, though his medical records first reflect anxiety symptoms in August 2012.[10] (RX T[11], pp. 521-22, 524-25.) He was originally prescribed citalopram hydrobromide (Celexa), but at the March 1, 2013, appointment, his primary care physician, Dr. Frandsen, switched the prescription to escitalopram oxalate (Lexapro) due to adverse reactions, as well as adding alprazolam (Xanax) on an as-needed basis for insomnia. (RX T, pp. 521-22; *see* HT, p. 136.) Records of a March 28, 2013, office visit state that Complainant suffered from generalized anxiety and panic attacks several times per week and that "apparent triggers include work and family." (RX T, p. 519.) Both the escitalopram oxalate and alprazolam were listed as current medications, and Dr. Frandsen recorded that Complainant's anxiety was well controlled on his prescriptions. (*Id.* at 519-20.) At a July 12, 2013, office visit, Dr. Frandsen again recorded generalized anxiety and panic attacks, this time occurring several times per day, again triggered by work and family. The doctor also refilled Complainant's prescriptions of both medications. (*Id.* at 517-18.) Notes of an August 13, 2013, visit to follow up on an emergency room visit for an unrelated digestive condition do not address anxiety at all. Notes of an October 23, 2013, office visit also do not address anxiety and are contradictory as to insomnia.[12] At a June 13, 2014, visit the doctor noted situational anxiety and feelings of stress based on working in Seattle and going to school full time. (RX T, pp. 509-12; HT, p. 258.) Complainant reported that he was taking the escitalopram oxalate as needed rather than daily, but that it had side effects, so Dr. Frandsen discontinued it and instead prescribed clonazepam for his anxiety. (RX T, pp. 509-10.) Notes from the last office visit prior to Complainant's injury, on November 18, 2014, do not mention psychological symptoms. Alprazolam and clonazepam continued appear on Complainant's list of current medications, but no prescription or refill was issued for either medication. (RX T, pp. 507-08.) At the time of his injury, he evidently still had ongoing prescriptions for both drugs but no longer had a prescription for escitalopram oxalate (Lexapro).

B. Respondent's Rules and Policies

BNSF has extensive safety rules, and even Complainant agreed that the company cares a lot about employee safety. (HT, p. 199.) The Mechanical Safety Rules, which govern mechanical workers like Complainant, fill about 100 pages in a binder. (HT, p. 345.) Long-time

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[9] JX 17 is duplicated at CX 12.

[10] On cross-examination, Complainant agreed that he did not have any reason to dispute that his medical records showed he was first diagnosed on August 19, 2014. (HT, pp. 227, 258.) However, Respondent's counsel's question was based on a hospital record showing August 19, 2014, as the diagnosis date for most of Complainant's diagnoses; that date was a week before another surgical procedure Complainant underwent and almost certainly reflects when the hospital first recorded the diagnoses, not when his own doctor first made them. (See RX K, p. 136.) The records from Complainant's primary care doctor show anxiety diagnosed as early as March 1, 2013. (RX T, pp. 521-22.) There is no question that Respondent had the records demonstrating this fact: not only were they submitted as RX T, but Respondent questioned Complainant based on the same March 1, 2013, office visit record. (*See* HT, p. 260.)

[11] RX T's page numbering skips several blocks of page numbers. It is numbered 1-26, 500-12, 515-25, 549-54.

[12] The review of symptoms section says he was positive for insomnia, but the narrative notes of the visit say Complainant reported he was "sleeping well." (RX T, p. 511.)

employee and local union chairman Ronald "Ed" Holm thought the safety program was good and believed it had decreased the number of injuries, particularly severe injuries, during his time with the railroad. (HT, pp. 345-46.) BNSF provides a variety of incentives to encourage employees to work safely and avoid injury. At Interbay, safety lunches or "safety feeds" are typically provided for every set time period that the site goes without an injury.[13] (HT, p. 55.) Each employee receives a plaque or certificate for every year worked without an injury, and after 5 years injury-free they are able to pick something out of a catalogue, like a baseball cap or sweatshirt. (HT, pp. 153, 252; RX K, p. 55.)

1. Injury Reporting Rules and BNSF Discipline Policy

Mechanical Safety Rule ("MSR") S-28.2.5 states, "All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed." (JX 13, p. 1.) Employees are trained on these rules annually. (HT, p. 418.) Complainant's employee transcript indicates that he completed the 2014 Mechanical Safety Cert/Approach in April 2014 and completed a Mechanical Safety Rules Qualification on January 1, 2015. (JX 1, p. 2.)

An employee may verbally report an injury, but a written form is also required. (*See* JX 13, p. 1; JX 9, p. 13.) The employee's supervisor also completes a report. (HT, p. 421.) Once the employee's injury report and supervisor's injury report are completed, they are sent to a BNSF accident reporting center in Fort Worth, Texas. (HT, pp. 421, 478.) If the nature of the injury requires it, it will also be reported to the Federal Railroad Administration ("FRA"). (HT, p. 421.) BNSF sends out anonymized reports of injuries to its facilities so employees can be briefed on injuries that occur across the system and discuss how they could prevent the same thing from happening at their location. (HT, pp. 480-81.)

BNSF's Policy for Employee Performance Accountability ("PEPA") provides BNSF's "process to enforce BNSF and federal safety requirements" when rules are violated.[14] (JX 15, p. 2.) PEPA establishes three categories of discipline: Standard Violations, Serious Violations, and Stand Alone Dismissible Violations. (*Id.* at 3-4.) Serious violations are also commonly referred-to as "Level S" violations. (HT, p. 98.) Standard violations do not "subject an employee or others to potentially serious injury or fatality" and do not meet other criteria for Serious or Stand Alone Dismissible violations. (*Id.* at 3.) The PEPA document does not provide a description of Serious Violations or their characteristics, but a non-exhaustive list of such violations is attached as Appendix A. (*Id.* at 4-5.) Level S violations include such infractions as violation of a work procedure that is designed to protect people from potentially serious injury and fatality; unauthorized absence; tampering with safety devices; and EEO policy infractions. (*Id.*) Stand Alone Dismissible Violations are also not described, and a non-exhaustive list is attached as Appendix B. (*Id.* at 4, 6.) Late reporting of an accident or injury is a Level S violation. (JX 15,

[13] Testimony about the length of time between lunches varied; Mr. Lederer said it was typically every 100 days, Mr. Bronson believed it was quarterly, and Mr. Bertholf, Mr. Holm, and Complainant said it was every 60 days. (HT, pp. 55, 146, 335, 375; RX K, p. 55.)

[14] Mr. Lovin testified at the BNSF investigation that employees were compelled to follow PEPA under Mechanical Safety Rule S-1.2.5, which requires compliance with "all applicable safety rules, mandates, instructions, training practices, and policies." (JX 9, pp. 23-24; JX 10, p. 19.)

p. 5.) Failure to report an accident or injury at all is a Stand Alone Dismissible Violation. (JX 15, p. 6.)

Unlike any other Level S violation, the "late reporting" line item in Appendix A includes a note. It says in full,

> 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.

(JX 15, p. 5.) This language had been part of the PEPA policy since at least 2000. (HT, p. 109; *see* RX G, p. 6; RX H, p. 5.) The exact application of this provision and the meaning of its terms were a matter of some disagreement at trial, so I will discuss it in detail later. However, BNSF managers uniformly agreed that the provision would only apply if an employee was in compliance with all three components of the paragraph. (HT, pp. 79-80, 122, 250.)

Each level of violation comes with a standard discipline progression for successive violations, and violations are subject to a review period during which further violations lead to heightened discipline. The first Level S violation results in a 30-day record suspension[15] followed by a 36-month review period. If the employee commits a second Level S violation within the review period, it may result in dismissal. Employees who have at least 5 years of service with BNSF and have been discipline-free for the 5 years preceding the date of a violation are considered to have a "good work record" and qualify for a reduced review period of 12 months. (JX 15, p. 4.) Supervisors must consult with the Director of Employee Performance before they issue a dismissal, an actual suspension, or a deviation from the Policy. (*Id.* at 4.)

2. Training on Reporting Rules

a. Employee Training

Employees receive some training on the injury reporting rules and on the PEPA policy, but the extent of employees' actual knowledge of the rules was disputed. Complainant's employee transcript showed a Mechanical Safety certification annually from 2010[16]-2014 and Mechanical Safety Rules qualification or review in 2010, 2011, and 2013. At the BNSF investigation, Mr. Lovin showed that Complainant had signed off on having received a copy of the PEPA policy in May 2014. (JX 9, p. 24; JX 10, p. 18.) Mr. Lovin did not recall ever discussing either the PEPA policy in general or the 72-hour provision in particular with Complainant, nor could he specifically recall when he gave Complainant a copy of the policy. (HT, p. 446.) However, he said that when the PEPA policy was updated recently he had gone over it "line-by-line" with everyone there, and that he had done so in the past as well. (HT, p. 446.) Mr. Lovin later said he would not find it surprising if employees had different beliefs about the required injury-reporting timeline because "not all of them read the rules" even though

[15] A record suspension is recorded on the employee's personal record but is not actually served. (JX 15, p. 2.)
[16] Although Complainant began working for BNSF in 2008, he was a laborer until 2010. (JX 1, p. 1.)

he gives them to everyone, so the extent to which employees are specifically informed about the full set of injury-reporting rules and provisions is not clear. (HT, p. 487.)

Employee knowledge of the reporting rules varied, and training on their details was limited. Complainant testified at the hearing that he had not known about the immediate reporting rule prior to his injury. (HT, p. 207.) Complainant believed that he had heard that they had 72 hours to report from Rick Lovin at a briefing and that it was the general understanding at Interbay, though he thought some people didn't know how long they had to report. (HT, pp. 160, 272.) At one point after Complainant returned to work, Mr. Lovin read the immediate reporting rule to everyone in the lunchroom, and Complainant gathered that a lot of his coworkers also hadn't known the rule. HT, p. 282.) Similarly, Mr. Holm did not know about the immediate reporting rule before Complainant's injury and the subsequent investigation, although he said that as a practical matter, employees would have to report acute injuries because they would be bleeding or otherwise showing immediate effects. (HT, p. 323.)

With respect to the PEPA provision, both Complainant and Mr. Holm said at the investigation that they had known about the 72-hour provision but had not known about the requirement to contact a supervisor before seeking medical treatment. (JX 9, pp. 31-33, 36.) Complainant said that "all we ever heard" was the 72-hour window, and "I never heard about calling before you go see a doctor or anything like that." (HT, p. 272.) Mr. Lovin had told them about the 72-hour rule but had never spelled out the details of the provision for them. (HT, p. 264.) The PEPA policy had been handed out to them, but there was no real explanation, they were just told to ask if they had any questions. (HT, pp. 160, 237-39.) Complainant didn't believe he had actually seen the written PEPA provision allowing 72 hours to report. (HT, p. 164.) Nobody had ever discussed what a muscular-skeletal injury was or told him that he had to tell a supervisor about an injury before seeing a doctor. (HT, pp. 160-61.) Mr. Holm, too, did not know that the rule required employees to call a supervisor before they went to a doctor. (HT, p. 324.) Mr. Holm also did not know that the rule required a doctor to confirm a diagnosis, but he assumed that would happen anyway because a diagnosis would be required before an employee who reported an injury could come back to work. (HT, p. 325.)

Mr. Holm, a long-time employee and the local union chairman, said he was sure that everyone had had some kind of conference and probably had to sign off about the PEPA policy, but for himself at least, no manager had ever come out and spelled the policy out in detail or gone over it with him. (HT, p. 326.) Although the PEPA policy was available to employees and he had looked at it before, it had mostly been for absenteeism issues and he hadn't read it through completely. (HT, p. 324.) He also said national union representatives had brought the rule forward, and the 72 hours was the part they focused on. (HT, p. 325.) He believed that there was a general consensus at Interbay that there was a 72-hour window to report just muscular-skeletal injuries, not all injuries. (HT, p. 318.) After Complainant's investigation, Mr. Holm had talked to everyone at Interbay and told them "that we should basically bring forward everything immediately, even if [they] don't think it's an issue," in an apparent effort to prevent other employees from facing the same situation Complainant did. (HT, p. 328.)

By contrast, Mr. Bronson, another carman, knew only that injuries needed to be reported right away and, in 2015, had not known about a provision allowing for a longer reporting period. (HT, pp. 142-44.) Nobody from BNSF had ever defined a muscular-skeletal injury for Bronson,

nor had he seen it defined in the rule book; his understanding was that it meant "something that affects both your muscles and your skeleton." (*Id.* at 145.) BNSF staff had talked to him about the PEPA policy, but he did not recall anyone going through it and pointing out an exception to the immediate reporting rule. (*Id.* at 145-46.) When asked about his understanding in 2015 had been of what the PEPA policy was about, he was unable to answer, saying only that it was the sort of thing that likely went right into the top of his locker and then right into the garbage can. (*Id.* at 145.)

The BSNF managers nevertheless generally believed that employees knew both rules. Mr. Lederer believed they knew the immediate reporting rule at MSR S-28.2.5 because "[t]hey go through it annually. They've got a safety certification course that we give every year to all of our employees, including managers. The new rule book's distributed at that time and any additions or changes are discussed." (HT, p. 63.) However, he did not discuss whether the course reviews rules that have *not* changed (presumably including the immediate reporting rule). Mr. Bertholf's testimony was that employees were trained annually on the rules and that the immediate reporting rule is discussed annually "with their safety action plan." (HT, p. 418.) He thought it "would be alarming" if some employees didn't know that they had to immediately report an injury or if they had different beliefs about how soon they were required to report. (HT, pp. 418, 430-31.) Mr. Lovin, however, said he would not find it surprising because "not all of them read the rules" even though he gave them to everyone. (HT, p. 487.)

Despite testimony that training only mentioned the 72-hour portion of the PEPA injury-reporting provision, BNSF managers also believed that employees knew or should know all three parts of the provision. As Mr. Lederer said, "[I]t's all the same paragraph, all three are listed together. So if you know one, you should pretty much know all three of them. It's all the same paragraph." (HT, p. 66.) Similarly, Mr. Cargill didn't give much weight to Complainant's statement at the investigation that he had not known about the other two parts of the provision because he did know about the 72-hour part. (HT, pp. 110-11.)

b. Manager Training

BNSF also has guidelines and training for managers on how to handle injury reporting. Management Instruction No. 70 states that when an injury occurs, a manager's "first concern MUST be looking after the employee's welfare and obtaining prompt medical treatment as needed." (RX E, p. 1.) It instructs managers on how to appropriately obtain medical treatment for an employee and what they may and may not do or discuss with the employee and the doctor. It also instructs supervisors on how to fill out an injury report. The document also states, "It is not only BNSF policy but also Federal Law that harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical attention or from reporting an accident, incident, injury or illness will not be permitted or tolerated." (RX E, p. 2.)

Management Instruction No. 70 also seems to address the PEPA late reporting exception, though in slightly different terms. It explains,

> If an employee experiences muscular aches and pains from 'routine' work that do not appear to be serious when they first occur, he or she has 72 hours to notify the

> appropriate supervisor that an injury has occurred. Employees will not be disciplined for 'late reporting' of this type of injury, as long as:
>
> - They report the injury within 72 hours of the probable triggering event,
> - They notify the supervisor before seeking medical attention, and
> - The medical attention verifies that the injury was most likely linked to the event specified.

(RX E, pp. 2-3.) However, the document does not refer to the PEPA policy by name or give any source for these instructions.

As further evidence of its managers' training, BNSF submitted a set of PowerPoint slides addressing Management Instruction No. 70 and retaliation against injured employees. (RX S, pp. 1-14.) The slides are undated and the record does not reveal whether or how often managers are trained on this material. The first five slides repeat Management Instruction No. 70's focus on the employee's welfare and guidelines for reporting and medical treatment. A "No Harassment" slide repeats the statement that "harassment or intimidation of any person that is calculated to discourage or prevent such person . . . from reporting an accident, incident, injury or illness will not be permitted or tolerated." (*Id.* at 7.) The accompanying text says that "BNSF does not discipline employees for reporting on-the-job injuries" and that, under the PEPA policy, "an employee's injury, by itself is not a basis for discipline." (*Id.*) The next slide provides information about who to contact to report retaliation, including a BNSF Hotline that accepts anonymous calls. (*Id.* at 8.) The presentation next confirms that employees can still be held accountable for violating a safety rule when the violation results in an injury. (*Id.* at 10.) It indicates that as of March 2013, BNSF added an additional review step to the discipline-review process for cases where an employee who reports an injury "is also subject to potential discipline related to the incident giving rise to the injury report." The text asks supervisors to focus on the rule violated rather than on the fact of an injury in deciding whether to schedule an investigation. They should ask themselves, "Would this investigation be held if there was not an injury?" (*Id.* at 11.)

Managers are trained annually on BNSF's Equal Employment Opportunity Anti-Discrimination and Harassment Policy annually, but the policy does not specifically refer to injury reporting or any other FRSA-protected activity, or to employees' protections against retaliation for such activities. (HT, pp. 75, 116; RX F, pp. 1-2.) They are required to certify on the BNSF Code of Conduct annually. Discrimination and retaliation are part of the code, but it primarily discusses discrimination based on protected characteristics like race, religion, and age. Although it does prohibit retaliation for good faith reporting of a violation of the law or BNSF policy, it does not mention the FRSA or cover the full scope of protected activities, nothing in the code of conduct leads me to believe that a manager could learn anything about injury reporting from it. (HT, pp. 74-75, 91, 116, 406-07; JX 14, pp. 19, 21.) They had not received any information or training from OSHA, either. (HT pp. 27-28, 119, 463.) Mr. Bertholf described an online training module on harassment and retaliation of injured employees, which taught that a supervisor who retaliated against or harassed an employee who reported an injury could be dismissed. (HT, pp. 406-07.) The record does not establish how often managers are trained specifically on whistleblower protections.

3. *Disciplinary Procedures*

Disciplinary procedures begin with a notice of investigation.[17] The specific procedural steps and time limits for an investigation are established by the applicable collective bargaining agreement, here the agreement with Complainant's union, the Brotherhood of Railway Carmen ("BRC"). (HT, pp. 102-03.) According to Mr. Lederer, an investigation is intended to "ascertain facts." (HT, p. 64.) An investigation is essentially an internal hearing. Witnesses are called, documentary evidence can be presented, and the employee under investigation is assisted by a union representative. (*See* JX 9; JX 10.) A manager is brought in to run the hearing, and that employee makes a recommendation about whether and what discipline to impose. (HT, pp. 45, 50-51, 69; JX 17, pp. 14-15, 20; *see* CX 10, p. 5.) Several levels of manager are involved in the ultimate decision, including Mr. Lederer and his supervisor. (HT, pp. 27, 38.) It is also reviewed by staff in the Labor Relations Department. (HT, p. 38.)

The issuing of a notice of investigation does not automatically mean that the employee involved will be disciplined, but the general practice seems to be that managers cancel investigations when facts come to light demonstrating the employee's innocence or that they believe will not result in a finding that the employee had committed the violation. (HT, pp. 64-65, 443.) Mr. Lovin testified that sometimes BNSF decides to cancel investigations out of lenience. (HT, pp. 443-44.) Which manager or managers have the authority to cancel investigations is not entirely clear. (HT, p. 468.) Although Mr. Lovin testified that he can and has canceled some investigations himself, including attendance-related investigations that later arose for Complainant, he also said that he is able to give an opinion but is not the ultimate decision-maker. (HT, pp. 442-43, 461-62.) He later said that, even with attendance cases, he can't cancel them himself but is one of the decision-makers along with Mr. Bertholf and Mr. Lederer. (HT, p. 471.)

There are two other ways that the disciplinary process can be handled. The first is waiver: an employee can usually waive a hearing, which is essentially like pleading guilty. (HT, pp. 48-49.) The employee must admit responsibility, accept the discipline to be assessed, and sign off that they have waived their right to a hearing. (JX 17, p. 12.) In "very egregious" situations, such as a physical altercation between two employees, waiver may not be permitted. (*Id.*) The second way is "alternative handling," which is only available for some rule violations. Under that approach, the employee is given a plan to complete based on the rule violation, and if the employee completes it in a timely manner per the agreement, the discipline itself is waived. (JX 17, p. 12.) Alternative handling is not provided for more serious violations, including violations of "rules associated with BNSF's Critical Work Practices." (*Id.*; JX 7, p. 1.) The decision whether to offer alternative handling would come from Mr. Bertholf in this case. (JX 17, p. 12.) However, according to Mr. Bertholf, corporate policy provides that Level S offenses are not eligible for alternative handling. (HT, pp. 380-81.)

BNSF also has a PEPA team to oversee the company's application of the policy and ensure that "discipline is being assessed consistently and in compliance with the policy across the system." (HT, pp. 97, 99.) The PEPA team is based in Fort Worth, Texas and is led by

[17] The notice of investigation is also referred to by employees as a charge letter. This is the term used in the collective bargaining agreement. (HT, pp. 316-17.)

Derek Cargill. (HT, p. 97.) They provide support to supervisors in the field who have questions about how to handle an investigation or what level of discipline to assess. (HT, p. 99.) Under the PEPA policy, they also review the transcript of every investigation where the potential outcome is an actual suspension or a dismissal, "to make sure that there is substantial evidence to prove a rule violation and make sure that dismissal or an actual suspension would be in compliance with the policy." (*Id.* at 99-100.) The team can also look at a database of discipline assessed to make sure it is being applied consistently and to identify outliers and any need for training. (*Id.*) In the past, Mr. Cargill has occasionally recommended that discipline not be issued after he reviews the records of an investigation. (HT, p. 101.) As an example, he described a late injury report case where the employee had an injury he thought would go away and reported it late, claiming that a supervisor had told him he didn't need to report it immediately. (*Id.* at 102.) Because the supervisor wasn't brought in to testify at the investigation about whether he had in fact said that, Mr. Cargill thought there was a question as to whether discipline would be supported by substantial evidence and therefore recommended against issuing discipline. (*Id.*) Mr. Cargill also testified that, when he reviews a potential rule violation associated with a contemporaneous injury, he consults with the law department because it could potentially implicate the FRSA anti-retaliation provisions.

Employees have a right of appeal through their union, as described in their collective bargaining agreement ("CBA"). (HT, p. 107.) The union can send the case to a Public Law Board for review. A Public Law Board is composed of three members: a union member, a company member, and a neutral arbitrator. The board reviews the investigation records and hears argument from both sides. The arbitrator ultimately makes the decision, but the union and company members can write a dissenting opinion if they disagree with the decision. (HT, p. 107.)

In addition to the union-based right of appeal, two provisions of the applicable CBA were raised at the hearing. The first is Rule 41, "Personal Injuries," which begins, "Employees injured while at work will be required 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 18, p. 47.) The other is Rule 18, "Long and Faithful Service," which provides that employees who "have given long and faithful service" to BNSF and are no longer able to handle heavy work will be given preference for light work. (*Id.* at 30.)

C. Environment Around Injury Reporting at BNSF and Interbay

BNSF managers thought that employees should have no concerns about reporting an injury and said they had not heard employees raise such concerns. Mr. Bertholf, for example, said he had never heard any rumors that Interbay employees are afraid to report injuries. (HT, pp. 417-18.) Mr. Lovin said they had been trained not to retaliate against or discipline employees for reporting injuries, and he had "never" heard anyone say things like "don't ruin this for us" about safety lunches or other safety rewards. (HT, pp. 458-59, 463-64.) However, when faced with his deposition testimony, where he said he had heard such things, Mr. Lovin explained that the statements he'd heard had been joking, not serious, or else they were in other shops back when he was a car man and it was "a different time" – presumably with a different attitude to safety as well. (HT, pp. 458-59.) And even according to Mr. Lovin, "Nobody wants to report injuries anywhere on the railroad," including carmen. (HT, p. 457.)

Yet according to Mr. Holm, Interbay employees "can be reluctant to report an injury. Mr. Holm thought "they should take care of themselves first," and he himself had never been afraid to report an injury and take care of himself first. (HT, pp. 334, 344.) Mr. Holm knew of one situation where an Interbay employee hit his finger with a hammer and it hurt enough that he thought he might have broken the finger. But "instead of having the scrutiny and going into the office, he figured, well, I'll just go ahead and tape the thing up real tight and I'm not saying a thing." (HT, pp. 337, 343.) Mr. Holm's sense was that the employee didn't want the scrutiny or any negativity sent his way.[18] (*Id.*) Employees also have the sense that the whole injury reporting process is a negative one, with foremen saying things like, "I've got so much to do now. You don't know how hard this is." (HT, p. 336.) In addition to employees not wanting the scrutiny for themselves, Mr. Holm thought that sometimes they also respected the foreman and didn't want him to have to deal with the paperwork and the scrutiny, either. (HT, p. 334.) He believed that other employees would also say that there was a negative climate toward reporting injury at Interbay, based on past discussions, which included statements like "I don't even know if I want to [report an injury]." (HT, pp. 339-340.) He said he had told them that it was their responsibility to report injuries, but they were still afraid, and "you can lead a horse to water but you can't make them drink." (HT, p. 344.)

Complainant was personally afraid of what might happen if he reported an injury. He had heard rumors[19] about people who had reported injuries being in trouble, such as one employee who reported an injury after the 72-hour period and whom Complainant believed had been punished. (HT, pp. 248-50.) When questioned about the rumors of people being disciplined for reporting an injury, he replied, "Well, one's factual now," evidently in reference to himself, though he acknowledged that his situation was not exactly like the other employee's because he had reported his injury within the 72-hour period. By contrast, Mr. Bronson didn't specifically recall hearing rumors about retaliation, though he acknowledged that he may have heard some. (HT, pp. 148-49.)

Mr. Holm said he and other employees felt "that the safety rules were not just safety rules. They were punitive action rules, as far as we were concerned at that time." (HT, p. 322.) He also thought that management was more concerned with the event and the reporting rules than with taking care of the injured employee. (*Id.*) Asked whether he thought that attitude still went on today, he said, "You know, I hate to say that, but, yeah, there's an awful lot of people who are involved in a lot of these injuries and then there's a lot of scrutiny that, you know comes down, and, yes, we see that our managers, you know, kind of 'Oh, my gosh. Here we go,' you know, type of thing. So yeah, it does happen still." In the time since his own last injury about 15 years previously, he said, "I think they made an effort to make the culture change. I don't think it truly has." (HT, pp. 322-23.)

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[18] Mr. Holm discussed this story at his deposition and was asked to name the employee in question. He said at the hearing that he had been worried to give a name because he thought BNSF might go after the employee for late reporting or something like that. In the end, Mr. Holm felt like he had to name him and told him that he had done so. (HT, pp. 337-38.)

[19] Claimant acknowledged that he had researched FRSA complaints while on medical leave, but said that the rumors he was talking about were not based on that research. (HT, p. 251.)

D. Complainant's Injury, Injury Report, and Subsequent Medical Treatment

On January 2, 2015, Complainant began work at 7:00 AM and at the morning briefing was assigned to work with Jeremy Close. (JX 2, p. 1; HT, pp. 159, 197-98.) Shortly before the 9:00 AM break, he was in a squat position while checking the side bearings on a covered hopper car.[20] (HT, pp. 195, 200-01.) When he stood up, possibly twisting as he stood, (HT, pp. 200, 264; JX 9, p. 27.) he felt a pop in his left knee, without much pain. (HT, p. 158.) He had previously felt strain in his knee while working as a carman, but this was the first time he had felt a pop. (HT, p. 161; RX L, p. 8.) He did not know what the pop was and continued to work without mentioning anything about it to a manager. (HT, pp. 159, 199-201.) At some point during the day he mentioned to Mr. Close that he had felt a pop in his knee when he got up earlier. (HT, pp. 210-11.) Complainant did not believe he needed to immediately report what he had felt to his supervisor because he did not know what it was, and thought that "if it was anything, I had 72 hours to report it." (HT, pp. 159-60.) He also did not know that the Mechanical Safety Rules require immediate reporting of an injury, though he acknowledged that he was supposed to know all of those rules. (HT, pp. 207-08.)

During the day, the pain worsened. (HT, p. 208.) He thought it felt like a strain. (HT, p. 202.) Complainant's job required him to kneel, squat, and bend – more depending on the extent of the repairs to be done on a given car. (HT, p. 205.) He tried not to bend that knee as much, but he continued to bend, kneel, and squat throughout the day. (HT, p. 207.) At the hearing, Complainant acknowledged that he hadn't given BNSF a chance to tell him to go home and get his knee cared for because he hadn't told them it was a problem. (HT, p. 207.) However, no doctor ever told him that continuing to work that day had made his knee worse, and he didn't expect that that would be BNSF's reaction if he had reported an injury – he thought it would more like, "Oh great, there's an injury." (HT, pp. 266-67.) Mr. Holm also agreed that if Complainant had reported an injury the day he felt the pop, BNSF might have sent him home and told him to go to the doctor. But Mr. Holm didn't know if BNSF would actually have responded like that, and he said a lot of employees were afraid to speak up because if they were sent home, they would lose their pay for the rest of the day. (HT, p. 371.)

Complainant left work for the day and drove home, a trip of at least an hour. (HT, pp. 212-214). The pain was increasing when Complainant got home, and he generally sat around that evening. (HT, p. 165.) He had gone home sore from work before, but this time was more severe. (HT, p. 209.) When his wife arrived at home, he was limping and obviously in pain. (HT, p. 216.) He had not come home limping "to that extent" before. (HT, p. 216.) According to her, he was complaining about his knee hurting, so she suggested he elevate his knee and ice it. (HT, p. 293.) He said that he had told her that he felt a pop while standing up but he acknowledged that, because he was hoping it would go away, he may also have told her he was fine. (HT, p. 216.) That night, he didn't sleep well, tossing and turning, while he felt like he knee was going to dislocate or separate.[21] (HT, pp. 218, 265.)

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[20] A covered hopper car is a type of freight rail car that generally has a trough-like opening at the top and usually carries grain of some kind. The car body rides on side bearings. (HT, p. 195.)

[21] At his deposition, Complainant originally raised the feeling that his knee would separate or dislocate when he was asked how it felt between 9:15 AM and noon on the day of the injury. (RX K, p. 33.) But he corrected his testimony shortly thereafter and repeated the correction at the hearing. (RX K, p. 36; HT, pp. 265, 277-78.)

When Complainant woke up to go to work at 4:30 the following morning, his left knee buckled when putting pressure on it and he caught himself on the night stand, so he lay back down. (HT, pp. 161-62, 217-18.) He felt more pain than he had on the previous day and took one oxycodone pill he had left over from a prescription for another medical condition the prior year. (HT, pp. 162, 218-19.) Around 6:00 AM, he called in to work and spoke with Michael Royal, the relief supervisor. (JX 5, p. 1; HT, p. 222.) Complainant told Mr. Royal that he would be out that day and may have said that he wasn't feeling well, but he did not mention the knee pain because he was still "hoping it would go away." (HT, pp. 162, 222.) After that, he went back to sleep. When he got up again around 9:00 AM, his knee was still hurting and he limped into the living room, though he could "barely" walk. (HT, p. 163, 223-24.) The pain was worse than it had been that morning, because he was standing up and trying to walk around some. (*Id.* at 223-24.) Despite his initial reluctance, his wife convinced him to go to the emergency room and drove him there. (*Id.* at 163, 223-24, 308-09.) By that time, the pain was worse than it had been that morning or the day before. (*Id.*) Complainant said he was thinking about what was wrong with his knee, not about calling his supervisor. (*Id.* at 164.)

Complainant arrived at the Harrison Medical Center emergency room around 2:30 PM that afternoon and was treated by Dr. Scott Ekin. (RX K, pp. 134-53.) The doctor told him it was probably a meniscus tear and referred him to an orthopedic surgeon. (HT, p. 164.) Complainant was given crutches but no medication. (HT, p. 225.) After Complainant got home from the hospital, he called in to work again to say he would not be coming in the following day, Sunday, January 4, 2015. (HT, p. 165.) On this occasion, he spoke with Thomas St. Onge, a mechanical foreman reporting to Mr. Lovin, and informed him that he was not feeling well and that he had also called in earlier that day. (JX 3, p. 1; HT, pp. 230, 466.) He again did not mention his knee, testifying that he was afraid to report the injury and had to figure out how to tell his supervisors. (HT, pp. 165, 230-31.) Once he figured out that his injury needed to be reported, he went back and forth in his mind about whether to actually report it because he "knew it was going to turn into something" and would "upset" his supervisors. (*Id.* at 175.) He hoped that he wasn't putting himself at risk of losing his job, but it was in the back of his mind. (*Id.*) He had heard stories over the years about "guys not wanting to report injuries," though they were mostly "just rumors" and he didn't know what had happened to the people who had reported injuries. (*Id.* at 165-66.) He did know of one instance where a carman reported an injury and was disciplined because he had reported it after the 72-hour period. (*Id.* at 166.) Complainant was afraid he would also be disciplined even though he was still within the 72-hour period.

The following day, Sunday, January 4, 2015, Complainant called Mr. Lovin, his supervisor, around 1:15 PM. (HT, pp. 166, 231; JX 9, p. 9.) His wife believed he was "apprehensive to call" because she had gotten the impression from Complainant that there was a stigma at BNSF and that employees don't want to report injuries. (HT, pp. 301-02.) Complainant told Mr. Lovin how he had felt a pop when standing up from squatting. According to Complainant, Mr. Lovin "sounded like he wasn't sure what to do" and said that he didn't know what to do because he had never been through an injury report before.[22] (HT, p. 166.)

[22] Mr. Lovin later testified that he had never previously dealt with an investigation involving violation of injury reporting rules or the PEPA provision. (HT, pp. 282, 484.)

Complainant told Mr. Lovin that he had seen a doctor and learned he had a torn meniscus. (HT, p. 435.) Mr. Lovin notified Mr. Bertholf of Complainant's injury report. (HT, p. 376.)

Complainant said at the hearing that he later spoke to Mr. Bertholf and told him about the injury. (HT, pp. 376-77.) According to Complainant, Mr. Bertholf first asked what had happened, and when Complainant explained, Mr. Bertholf's first reaction was to say, "Why did you wait so long?" (HT, pp. 166-67; *see* RX M, pp. 14-15.) However, Mr. Bertholf denied saying, "Why did you report it so late?" (HT, pp. 418-19.) Complainant was taken aback by that, because he believed he had 72 hours to report the injury and had reported it within that time frame. (HT, p. 167.) Complainant testified that Mr. Bertholf raised his voice and seemed agitated and upset, which he interpreted to mean that Mr. Bertholf was agitated about him reporting the injury, though he acknowledged that Mr. Bertholf's statements were explicitly about the time issue. (*Id.* at 167, 232-34.) Mr. Bertholf's reaction made Complainant feel a "little upset and angry" and almost like he shouldn't have reported the injury. (*Id.* at 167-68.) Complainant was also surprised that Mr. Bertholf seemed so upset because he figured he was within the 72 hours to report it and figured that if he had an injury, "they would want to hear about it." (*Id.* at 168.)

On January 7, 2015, Complainant filled out an Employee Personal Injury/Occupational Illness Report. (JX 6, p. 1.) At Mr. Bertholf's request, he also attached a written statement describing what had happened. The statement said, "On January 2, 2015 while working sometime in the morning I was in a squatted position and when I got up I felt a pop in my knee. As the day when on I noticed myself in a little pain and limping. I figured whatever it was it will go away." (HT, p. 169; JX 6, p. 2.) He wrote that the pain had been steady throughout the day, but at night once he fell asleep, every time he turned over the pain increased. When he woke up for work and got out of bed, his knee "gave out" and he nearly fell over. He "took an oxycodone for the pain" and called in to work to let them know he would not be in. Later in the day, with the pain persisting, he went to the emergency room, where the doctor diagnosed a torn meniscus in his left knee. He was given crutches but no medication and was referred to an orthopedic surgeon for follow-up. (JX 6, p. 2.)

Complainant then went on medical leave, backdated to January 2, 2015, and returned to work on May 8, 2015. (HT, p. 171; JX 1, p. 1.) He had arthroscopic surgery to the meniscus of his left knee on February 2, 2015, and then participated in physical therapy. (RX T, pp. 10, 12.)

E. Investigatory Hearing and Discipline of Complainant

Mr. Lovin completed a Supervisor's report of BNSF Employee Injury/Illness indicating that he had been notified of the injury at 1:30 PM on January 4, 2015. (JX 2, p. 1; CX 9, pp. 8-9; HT, p. 477-78) The report indicated that there was no rail equipment involved in the injury. (JX 2, p. 1.) Another report went to the Mechanical Department. (HT, p. 479.)

The same day, Mr. Lovin, Mr. Bertholf, and Mr. Lederer began working to gather information on what had happened with respect to the injury and injury report. (HT, pp. 376, 435-36.) Mr. Lovin gathered statements from the supervisors to whom Complainant had spoken over the weekend. (HT, p. 62.) According to Mr. Lovin, this was standard practice whenever there was an incident or investigation. The goal was to get at the root of what had happened and

why, because sometimes the employee involved was not able to adequately assess what had happened. (HT, pp. 437, 467-68.) Both Mr. Royal's and Mr. St. Onge's statements matched Complainant's description of his phone calls with them. (JX 5, p. 1; JX 3, p. 1.) Mr. Lovin also took a written statement from Mr. Close, with whom Complainant had worked on the day of the injury. He had "noticed a little bit of limping but did not think anything of it." (JX 4, p. 1.)

Mr. Bertholf said that initially, on January 4th, the managers regarded their actions simply as fact-finding, but by the following day, they were drafting the notice of investigation. (HT, pp. 376, 378.) According to Mr. Bertholf, Mr. Lederer made the decision on January 5th that they should move forward with an investigation. (HT, p. 380.) As general foreman, Mr. Bertholf had the authority to make a recommendation on whether or not to hold an investigation, but here he didn't feel that a recommendation not to hold one was warranted. (HT, pp. 382-83.) "With the information that was presented to me, I thought the investigation was in line." (HT, p. 383.) By 2:00 PM on January 5th, Mr. Bertholf had sent an email to schedule an investigation. (CX 9, p. 3.) In addition to listing logistical information and the planned witnesses, Mr. Bertholf wrote, "This is a serious rules violation. No alternative handling offered or available." (*Id.*) On the same day, January 5, 2015, the initial draft of a charge letter was created and forwarded to the PEPA Commission and the Law Department for review. (HT, pp. 39-40, 42-43; *see* CX 9, pp. 1-2.) Mr. Cargill reviewed the draft letter and worked with the company's Law Department to revise it. (HT, p. 104.)

On January 7, 2015, BNSF issued the final letter to Complainant notifying him that an investigation had been scheduled for January 21, 2015, to ascertain the facts and determine his responsibility "in connection with your alleged failure to immediately report a personal injury that occurred on the morning of 01/02/2015 at the Interbay Car Shop. It is alleged that you did not report the personal injury to your supervisor until 01/04/2015, after you had already sought medical attention."[23] (JX 7, p. 1.) The letter further stated that he was ineligible for "Alternative Handling" because the charge involved "rules associated with BNSF's Critical Work Practices." (*Id.*)

Complainant's understanding was that he was charged with late reporting. (HT, p. 170.) When he got the notice of investigation, he was "pretty upset" because he felt like all his fears about reporting an injury "came to life right there." (*Id.*) He felt like it was a done deal and that, regardless of what the letter said, Employer already knew what they were going to charge him with. (HT, p. 184.) As the union representative, Mr. Holm received a copy of Complainant's notice of investigation. (HT, p. 317.) He knew that BNSF had a rule providing a 72-hour reporting window for non-acute, possible soft tissue injuries, and he assumed that was the rule at issue. His concern was to make sure that Complainant had contacted management within the required 72 hours. (HT, p. 318.)

The investigation was postponed four times because Complainant was still recovering from his injury and had not yet returned to work. (JX 10, pp. 3-6; HT, pp. 49, 442; CX 9, pp. 34, 42, 49, 51.) Complainant returned to work on May 8, 2015, and the investigation was finally held on May 13, 2015. (JX 9, p. 1; JX 1, p. 1.) It was conducted by Dale Larsen, General

[23] Mr. Lovin said he could have voiced his opinion if he felt the investigation should be canceled, but in this case he did not have an opinion either way. (HT, p. 444.)

Foreman of the Vancouver territory in Washington, Oregon, and Northern California.[24] (JX 17, p. 2; JX 9, p. 1.) Mr. Larsen had conducted a number of investigations as the hearing officer in the previous ten years. (JX 17, pp. 5-6.) Complainant was represented by Mr. Holm as the local union chairman. (JX 9, pp. 1-2, 7.) Mr. Lovin, Mr. St. Onge, and Mr. Royal all testified, and 12 exhibits were entered into evidence. (JX 9, p. 1; *see* JX 10 (exhibits)). Mr. Lovin determined what witnesses there were, gathered their statements, and compiled other evidence. (HT, p. 436.)

Mr. Lovin testified first, explaining that Complainant had called him on January 4 and notified him of his injury. (JX 9, p. 9.) He also read into the record a statement he had written at the time. Both his testimony and the transcribed written statement indicate that Complainant told him that he had injured his knee while standing up from a kneeling position and thought it would go away, but later sought medical attention and was diagnosed with a torn meniscus. (JX 9, pp. 9-10.) Mr. Lovin testified that Complainant had "worked all day" on January 2nd but "[d]idn't say anything to me about [it], didn't leave early." (*Id.* at 10.) Mr. Lovin said he believed that Complainant's injury qualified as a muscular-skeletal injury under the PEPA policy. (JX 9, p. 18.)

Mr. Royal testified that Complainant had called out of work on January 3rd but that he "did not actually state why, I just took it that he was not feeling well." (JX 9, p. 20.) Mr. St. Onge testified that Complainant had called him on the evening of January 3rd and let him know that "he wasn't feeling well and would not be in." (JX 9, p. 22.) Mr. Lovin was recalled and testified further about the PEPA policy, as well as MSR S-1.2.5, which required employees to "Comply with all applicable safety rules, mandates, instructions, training practices, and policies," including PEPA. (*Id.* at 23-25.)

Complainant testified about the injury and said he didn't think about contacting a supervisor to let him know that he was going to seek medical attention before going to the emergency room because "I thought I was doing everything right by the PEPA Policy at that point, um. I had in mind I had 72 hours to report it. At that point, I was still in pain so I really wasn't thinking about calling my supervisor, uh, so he could be informed about the ER." (JX 9, pp. 27-28.) He believed he had followed all of the policies as he understood them, but because he didn't know the policy "verbatim" he hadn't known about the requirement to notify a supervisor first. (*Id.* at 29, 32.) He hadn't mentioned his knee to his supervisors when he called out of work because he didn't know how severe it was or what kind of injury it was at the time. (*Id.* at 30.) He said it was standard practice for employees to hope minor injuries would go away. He also felt pressure not to report because he had "always heard horror stories about reporting an injury as far as they take you to investigation, um. And I just didn't want to cause any rifts with anybody, with managers, supervisors." (JX 9, p. 31.)

Mr. Larsen's questioning focused on the PEPA Policy, with Complainant testifying that he had reported his injury within 72 hours and that his doctor had said that the "standing up from a squatting position and possibly twisting" was the "likely cause" of his knee injury. (JX 9, pp. 32-33.) Complainant was surprised to hear about the PEPA requirement to notify a supervisor before seeking medical attention because he had not heard it before. However, when he saw that the written rule did require that, he agreed that he was not in compliance with that portion of the

[24] This territory did not include Interbay and Mr. Larsen never worked at Interbay. (JX 17, p. 2.)

policy. (*Id.* at 34; HT, pp. 172-73.) He concluded by saying that he "absolutely had no intention of violating any rules," and if he had known that he should have contacted his supervisor before seeking treatment, he "absolutely would have." But he also "didn't even know what was wrong with me at that time" and didn't want to report something that turned out to be a sprain that would go away with an ice pack in a day or two. (JX 9, pp. 35-36.) Ultimately, despite his concerns about retaliation for reporting an injury, he had intended to comply with the reporting rules and believed at the time that he had done so. (JX 9, pp. 31, 35.)

Mr. Holm's concluding statement pointed out that, although at the investigation they were reading rules and regulations verbatim, employees don't often know every rule exactly. With respect to the PEPA Policy, he said that "the main idea that you will hear if you go anywhere on the property is that we have a 72 hour window." (JX 9, p. 36.) Mr. Holm himself "was educated as we went through this process" to learn that they needed to notify a supervisor first.

After the investigation was complete, Mr. Larsen concluded that Complainant's testimony established that he had violated Mechanical Safety Rule S-28.2.5 "when he did not advise the appropriate supervisor prior to seeking medical attention." (CX 10, p. 3.) Based on this finding, he recommended a Level S record suspension with a 12-month review period. (*Id.*) Mark Grubbs, an assistant vice president who supervised Mr. Lederer, requested review by the PEPA team. (CX 10, p. 5; JX 17, p. 4.) Mr. Cargill reviewed the record and Complainant's discipline history on behalf of the PEPA team, concluding that "the charges were proven with substantial evidence, as [Complainant] admitted he did not follow the rule which requires an employee to report an injury to his supervisor before seeking medical treatment." (CX 10, p. 1.) He supported the discipline recommended by Mr. Larsen in accordance with PEPA. (HT, p. 105; CX 10, pp. 1-2.) Mr. Grubbs agreed with the recommendation, and Mr. Lederer directed Mr. Larsen to issue the discipline.

In Mr. Cargill's email to Mr. Lederer describing his recommendation, he noted, "The chances of discipline being reduced at arbitration are increased for the reasons we discussed on the phone." (HT, p. 105; CX 10, pp. 1-2.) Mr. Cargill testified that they had discussed two possible reasons for the Public Law Board arbitrator to reduce the discipline: first, Complainant's six and a half years of service with no prior discipline, and second, the possibility that an arbitrator would choose to be lenient despite the violation because he might think Complainant simply missed the step because he was distracted by severe pain when he woke up on January 3rd. (HT, p. 106.) Although Mr. Cargill himself had considered the possibility that Complainant was simply distracted by the pain, he concluded that the pain couldn't have been that bad because Complainant was focused enough to make two calls to supervisors. (HT, p. 120.) Mr. Cargill also did not give much weight to Complainant's statement that he didn't know he had to call a supervisor before seeing a doctor because Complainant did know about the 72-hour part of the rule. (HT, pp. 110-11.)

Mr. Larsen testified at his deposition that he believed Complainant would not have violated the policy if he had called his supervisor before going to the hospital. (JX 17, p. 15.) He highlighted Complainant's admission that he was not in compliance with the part of the rule requiring a report to a supervisor before seeking medical attention, stating that a Level S Record Suspension was the lowest amount of discipline he could have been issued for that violation

under the PEPA policy.[25] (JX 17, p. 16.) Although there are potentially ways for a hearing officer to make the case that an employee deserves a lesser discipline than the policy prescribes, Mr. Larsen believed there was nothing supporting such a decision here because Complainant "had admitted to violating that rule." (*Id.*) In his view, exceptions become a "slippery slope" because people need to know what their boundaries are. (*Id.* at 17.)

BNSF notified Complainant that discipline had been assessed on June 2, 2015. (JX 11, p. 1.) Complainant was assessed a Level S 30-day record suspension with a one-year review period for his "failure to contact the appropriate supervisor prior to seeking medical treatment as a result of an injury that occurred on 1/2/2015 at the Interbay Car Shop." (*Id.*) The letter cited a violation of MSR S-28.2.5 Reporting and said that consideration was given to Complainant's discipline record and the discipline assessed was in accordance with PEPA. The mention of Complainant's discipline record is a reference to the PEPA provision establishing a reduced one-year review period instead of the usual three years for employees with a good work record, meaning five years of total service and five years discipline-free before the date of violation. (JX 15, p. 4.)

Complainant appealed his discipline to the Public Law Board. On December 4, 2016, the Public Law Board issued a decision upholding the discipline. (RX N, pp. 1-2.) Noting that there was no factual dispute that Complainant had sought medical attention before reporting the injury, it found that BNSF had "sustained its burden" of proving Complainant had committed the charged offense and that "the discipline was not harsh or excessive but was in accordance with the Carrier's PEPA." (*Id.* at 2.) Neither the union member nor the company member of the public law board wrote a dissenting opinion. (HT, pp. 107-08; RX N, pp. 1-2.)

F. Events Since Complainant's Discipline

After his injury and the notice of investigation, Complainant said he began taking clonazepam again, at first in the same amount as before. (HT, p. 186.) But his anxiety both increased and felt different because of the new stress and anxiety he felt over possibly losing his job and the uncertainty about what would happen. (HT, pp. 187-88.) At some point he talked to his doctor about an increase. He said the doctor suggested he start taking a tablet twice a day, which did not require a change in the prescription. (HT, pp. 186-87.) He continued to take the same dose of anti-anxiety medication once he returned to work after the investigation and discipline. (HT, p. 187.)

Complainant also testified that he suffered from sleeplessness during the entire period he was out on medical leave. The sleeplessness got better when he went back to work, but the anxiety did not get much better; as of the hearing date, he still took the same dosage and had not tried to drop it again. (HT, p. 188.) Although his medical records indicate a history of insomnia in March and October 2013 and sleep apnea in July 2013 (RX T, pp. 511, 517, 521.) he did not recall having had insomnia at that time. (HT, pp. 259-60.)

Complainant's wife's testimony was similar. She said that he "was doing really well before the injury" and everything that followed it, and had "started kind of weaning himself off"

[25] If Complainant had not made that admission, Mr. Larsen was "pretty sure [he] would have came (sic) to the same conclusion but without a lot of evidence." (JX 17, p. 25.)

of the anxiety medication "because he was feeling really great." (HT, pp. 299-300.) But when he received the notice of investigation, she said he was "distressed and distraught," and he was "very upset" to feel "like he was being retaliated against for reporting an injury on the job." (HT, p. 297.) Over the time he was out on medical leave, "it just started eating away at him, pacing." She also said that "[h]e would actually stay up nights thinking about what was happening at work." (HT, p. 298.) He became "a little bit more withdrawn, kind of just going in the garage and sticking to himself, not really talking, going inward, just being really, you know, upset and distraught." (HT, p. 301.) He became "extremely stressed out" and "his anxiety levels increased tremendously," to the point where she suggested that he needed to resume taking his anxiety medication regularly, which she said he did.[26] (HT, pp. 298-99.)

At Complainant's January 12, 2015, initial visit with his orthopedic surgeon, Dr. Nels Sampatacos, he said he was "feeling fine" and the review of symptoms did not report anxiety, depression, or insomnia. (RX T, pp. 23-26.) Similarly, at his pre-operative clearance with his primary care doctor on January 29, the review of symptoms reported insomnia, but no anxiety, depression, or feelings of stress, while his current medications list did not include clonazepam. (RX T, pp. 505-06.) A February 17, 2015, post-operative visit with a nurse practitioner did not address mental health, but on March 5, 2015, Dr. Frandsen recorded that Complainant was experiencing anxiety and feelings of stress. The doctor said he had discussed anxiety with Complainant and gave him a handout on Generalized Anxiety Disorder. He also refilled Complainant's clonazepam prescription. (RX T, pp. 12; 503-04.) Dr. Sampatacos did not record any mental health information at three post-operative appointments in March and April 2015.[27] (RX T, pp. 4-11.) Dr. Frandsen recorded worsening depression and feelings of stress on Complainant's next appointment on October 19, 2015, and prescribed escitalopram oxalate for the depression. Clonazepam was again listed as a current medication, but Complainant did not report experiencing anxiety. (RX T, pp. 500-02.)

During this period, Complainant wrote a few notes on his computer to try to get some thoughts and feelings out of his head, as well as recording some things he was looking up and thinking about with respect to whistleblower rights. (HT, p. 189; *see* JX 19, pp. 571-73, 581.) They included comments on now feeling surrounded by negative influences when he had never had a disciplinary issue before, statements that he was "not afraid to take a stand," and a definition of anxiety evidently copied and pasted from the internet. (JX 19, p. 571.) Complainant said he eventually deleted them because he felt like he had been in a dark place and they showed that, so he wanted to get rid of them. (HT, p. 189; RX K, pp. 7-8. He also wrote a brief paper on worker protections in the Federal Employers Liability Act (FELA) and the FRSA for an Olympic College class. (HT, p. 190; JX 19, pp. 574-80.) The paper included a brief discussion of his unhappiness with being investigated despite reporting his injury, which he saw as a violation of his rights. It concluded with the statement, "I am not really sure what will

[26] She testified that she had to pick up his prescriptions from the pharmacy more often after the injury, going from perhaps once a month to a couple of times a month. (HT, p. 300.) However, Complainant's March 5, 2015, prescription was for 180 pills, which would last 3 months even if he took the full dose of 1 pill twice a day, so her testimony likely does not address his increased use of anxiety medication during that period.

[27] At the March 18, 2015 visit, Dr. Sampatacos did note that Complainant was "sleeping though the night," but this comment was recorded within a "History of present illness" and was accompanied by notes about Complainant's pain and walking ability. (RX T, pp. 10-11.) In context, I take this as a statement on whether pain or discomfort from the knee was disrupting Complainant's sleep, not whether he had psychological symptoms of insomnia.

happen when the investigation is executed, I will not lose my job but I will lose the six and [a] half years of being injury free. It is not a big deal but I get to come home with all my extremities intact." (JX 19, p. 578.) Notes on the page following the school paper indicate that Complainant believed the investigation was being held "to make sure there [was] no negligence on [BNSF's] part." (*Id.* at 581.) He also wrote that the railroad believed all accidents are preventable, but that "things happen," and that with repetitive motions like bending and lifting it's only a matter of time before someone is injured. He also implied that holding investigations on employees who report injuries – even to make sure the railroad wasn't negligent – runs counter to the company's goal of having employees report injuries. (*Id.*)

During the 12-month probationary period, Complainant felt like he needed to be extra careful that everything he did was in compliance with the rules because of the risk that he could be fired for committing another Level S violation. (HT, pp. 184-85.) When he first returned to work, he saw the company's reaction as "glad you're back, glad you're feeling better, you know, put it behind us and move on, essentially." (HT, p. 263.) He did not think Mr. Lovin's attitude toward him was any different. (HT, pp. 176-77.) His wife also said he seemed happy to go back to work and "was trying to go back with an open mind that . . . everything was going to be okay and he wasn't going to be treated any differently." (HT, p. 302.) And he initially told the OSHA investigator in October 2015 that he didn't think he had been harassed or subject to unfair treatment since June 2, when he received the letter notifying him of the discipline. (CX 1, pp. 20-21; HT, p. 194.) But later, sometime around when OSHA contacted them in connection with his whistleblower complaint, he believed that reaction changed. (HT, p. 263.) Where he had previously had a comfortable relationship with Mr. Lovin that involved occasional casual conversations, it seemed that Mr. Lovin now avoided such contact with him, scrutinized his work more, and assigned him to work with lazier co-workers. (HT, pp. 177, 185, 264.)

At the hearing, Complainant raised an incident in March or April 2017 as a demonstration of his fear that he was being retaliated against over his OSHA suit. On one particular day, Complainant was assigned to work with Richard Bronson. (HT, p. 152.) Mr. Bronson is a carman and had worked for BNSF for nearly 20 years, though he has only been at Interbay for a few years. (HT, pp. 138-39.) He had been assigned off and on to work with Complainant over that period and believed Complainant was a good worker and someone who followed company rules. (*Id.* at 139-40.) On the day in question, Mr. Bronson and Complainant were working together on a car when Complainant's scissor lift bumped into the car, pinching some wiring on the equipment. (*Id.* at 140.) Although it would be easy to fix, the repair was not their job, so the foreman needed to be informed. Mr. Bronson testified that Complainant had seemed nervous or hesitant to let the foreman know that he had pinched the wires, and Mr. Bronson volunteered to go inform him. (*Id.* at 140-42.) At the time, he had the impression that Complainant was worried about his job. (*Id.* at 143.) When Mr. Lovin asked why Complainant hadn't come himself, Mr. Bronson said he didn't know, but that Complainant had seemed afraid to do it and he had volunteered instead. (*Id.* at 140.) Mr. Lovin then replied with something like, "Well, he's suing the company." (*Id.* at 141.) Mr. Bronson testified that he "took that to mean, well, maybe, yeah, he should maybe [be] a little apprehensive to come to the foreman with anything, you know." He thought that Mr. Lovin seemed upset and looked like he had taken it personally, though there was a lot going on that day and Mr. Lovin might have been just generally irritated. (*Id.* at 141-42.) Regardless of the cause, Mr. Bronson thought Mr. Lovin's reaction seemed "over the top." (HT, pp. 155-56.)

Complainant also received a total of three notices of investigation for attendance[28] around April or May 2017, which were related to an FMLA filing for which some paperwork had not been properly filled out by a doctor. (HT, pp. 179, 181-82, 238-41, 462-63, 470.) He received each notice via certified mail but said, "Rick Lovin, I guess, thought I needed an extra copy" because he also gave them to Complainant in person in front of the whole lunch room. Complainant felt that Mr. Lovin seemed "kind of gleeful in doing it" and thought it was "absolutely" a retaliatory action. (HT, pp. 180-81.) The investigations were cancelled and no discipline was issued. (HT, pp. 240-41, 470; JX 1, p. 1.) Mr. Lederer was not aware of any of these notices of investigation for Complainant, though he would normally be aware of every notice, even if the investigation was waived. (HT, pp. 84-85.)

V. Credibility Determinations

In arriving at a decision, the finder of fact is entitled to determine the credibility of witnesses, to weigh evidence, to draw her own inferences from evidence, and is not bound to accept the opinion or theory of any particular witness. *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968), *reh'g denied*, 391 U.S. 929 (1968); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981); *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98, 101 (1997), *aff'd*, 169 F.3d 615 (9th Cir. 1999). An ALJ is not bound to believe or disbelieve the entirety of a witness' testimony, but may choose to believe only certain portions of it. *Altemose Constr. Co. v. Nat'l Labor Relations Bd.*, 514 F.2d 8, 16 n.5 (3d Cir. 1975).

The ARB has stated its preference that ALJs "delineate the specific credibility determinations for each witness," though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006).

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

[28] Employees are required to work a certain number of days within a given time period, and if they fail to do so, a computerized attendance system notifies a supervisor. (HT, p. 469.) Mr. Lovin, as the notified supervisor, typically attempts to learn from the employee what happened and to find out if there are extenuating circumstances. (HT, pp. 469-70.)

A. Credibility of BNSF Managers and Employees

1. Richard Lovin

Richard Lovin has been a mechanical foreman at Interbay since approximately 2010. (HT, pp. 433-34, 465-66.) As mechanical foreman, he supervises the carmen at Interbay, including assigning them to tasks and work crews. He supervises approximately 35-40 employees, including another mechanical foreman, Thomas St. Onge. (HT, p. 466.) He reports to Mr. Bertholf. (HT, p. 434.) At the time of hearing, he had known Complainant for about six years. (HT, pp. 433-34.) Before starting at BNSF, he had worked as a carman on a different railroad for several years. (HT, pp. 464-65.)

I found Mr. Lovin generally credible regarding his interactions with Complainant and the facts of the discipline process. However, he was less credible with respect to statements on the application of the PEPA provision.[29] His expressed view of that provision's application changed significantly from his testimony at the BNSF investigation to his testimony at the hearing in this case, and his present testimony closely matched that of his supervisor, Mr. Bertholf. At the investigation he said that he thought Complainant's injury was a muscular-skeletal injury and would qualify for the PEPA provision. He did not evince any doubts that Complainant's injury was the type that would fall under the provision, assuming Complainant had reported his injury prior to seeking medical treatment. (JX 9, p. 18.) But at the hearing, he adopted Mr. Bertholf's position that Complainant's injury did not qualify for the PEPA provision because it was caused by a "specific event," which requires immediate reporting and which is somehow different from a "triggering event" as referred to in the PEPA provision. (HT, pp. 451-54; *see* HT, pp. 388-94.) This change and the similarity of their language may indicate that Mr. Lovin conferred with Mr. Bertholf on his testimony beforehand, though it may also simply be a sign that Mr. Lovin had received training or instruction on the PEPA provision from Mr. Bertholf in the intervening period. Whatever the explanation, this limits the value of Mr. Lovin's testimony on the subject.

2. Harold Lederer

Harold Lederer has been Zone 1 Field Superintendent with BNSF for 3 years. (HT, pp. 25-26.) He first worked for BNSF as a car man, was promoted to front line supervisor, and spent 13 years as a General Foreman in California before beginning his present position. (HT, p. 59.) As superintendent, he supervises approximately 500 employees, and Interbay is part of the zone he manages. (HT, pp. 25-26, 60.) He is part of the chain of review in the disciplinary process and his involvement begins early in the process. (HT, p. 37.) He is sometimes involved in deciding which rules to charge and is involved in drafting the charge letter or notice of investigation. He has discretion to cancel investigations and has done so in the past when the facts show that the investigation will not be fruitful. (HT, pp. 37-38.) He is also involved in deciding whether to issue discipline. (HT, p. 38.)

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[29] Another factor that bears on his overall credibility is that he may also have changed his testimony on attitudes to injury reporting: At the hearing he said he had never heard anybody say things like "don't ruin this for us." But when questioned about his deposition, where he evidently did say he had heard such comments, he testified that the comments were just joking, or had occurred in other shops or when he himself was a car man (in "a different time," i.e. the old days). (HT, pp. 458-59.) His deposition is not in evidence, so it is not possible to verify whether he did offer conflicting testimony, but he didn't deny previously making that statement when questioned about it.

I found his testimony to be generally credible, including his statement that he did not subjectively intend to retaliate or discriminate against Complainant based on his injury report, though of course that is not dispositive. (HT, pp. 75-76.) I give his testimony reasonable weight.

3. Derek Cargill

Mr. Cargill is the Director of Labor Relations, and he leads the PEPA Team in overseeing the application of the PEPA disciplinary policy. (HT, pp. 97-98.) He practiced law for several years before joining BNSF, but his work with BNSF does not include any legal responsibilities or use of his law degree. (*Id.*) He was generally a responsive witness and entitled to reasonable weight.

However, I found some of Mr. Cargill's testimony somewhat cagey or evasive on two topics. The first was the training he receives on retaliation against employees. After an extended discussion of employee records and whether they show discipline contemporaneously with injury reporting, he was asked whether he receives training on discrimination and retaliation. He said that he did, listing an annual certification on the BNSF Code of Conduct and the Human Resources Equal Employment Opportunity policy, both of which cover discrimination and retaliation. (HT, p. 116; *see* RX F, JX 14.) He then added that he had received training from the law department on Section 20109 of the FRSA. But the record shows that the BNSF Code of Conduct and EEO policy primarily address discrimination over protected characteristics like race and retaliation against those reporting such retaliation or discrimination and do not specifically mention retaliation based on the FRSA or on injury reporting,[30] as Mr. Cargill later acknowledged. (HT, p. 137; JX 14, pp. 19, 21; RX F, pp. 1-2.)

Similarly, when asked about his view of the significance of Complainant's investigation testimony that he had not known he was required to contact a supervisor before seeing a doctor, Mr. Cargill expressed doubt that he would have known about one part of the policy but not the other. (HT, p. 133.) Asked whether he did not believe Complainant, Mr. Cargill replied, "I don't know that I would say I didn't believe him," but that it came down to an issue of credibility, "and ultimately on that, I did not find his testimony to be credible." (*Id.*) Regarding Mr. Holm's similar testimony that, despite being the local union chairman, he also had not known about that portion of the rule, Mr. Cargill again "wouldn't say [he] didn't believe him" but said it again "came down to a determination of credibility." (*Id.* at 133-34.) In both situations he seemed to be evading the question, whether by providing information that turned out not to be relevant or responsive, or by quibbling over word choice.

4. Richard Bronson

Richard Bronson has been a carman with BNSF for nearly 20 years and has worked at Interbay since about 2015. (HT, pp. 138-39.) Mr. Bronson had met Complainant at morning briefings at the Everett location, but they did not work together until Mr. Bronson transferred to Interbay. He is sometimes assigned to work with Complainant. (*Id.* at 139.) His testimony is of limited relevance to the central issues in this case, but I found it generally credible.

[30] The Code of Conduct does prohibit retaliation for good faith reporting of a violation of the law or BNSF policy. (JX 14, p. 21.)

5. David Bertholf

David Bertholf is a general foreman, mechanical, who supervises about 120 carmen and locomotive employees at various BNSF locations in the Seattle area. (HT, p. 373.) He is a third-generation railroader and has worked on the railroad since 1988, including time working as a journeyman carman. (HT, pp. 412-13.) Most days he works at Interbay Terminal. (*Id.*) About 45 employees work at Interbay. (HT, p. 374.) Mr. Bertholf reports to Harold Lederer, the zone superintendent. (*Id.*) He was not a decision-maker with respect to what discipline was issued to Complainant. (HT, p. 414.) Nothing in his testimony made me question his general credibility.

6. Ronald Edward Holm

Ronald "Ed" Holm has been a journeyman car man since 1979 and has worked at Interbay for most of that time. (HT, p. 313.) He was the local union chairman in the BRC for over 20 years until 2016, and the only union representative at Interbay. (HT, pp. 314, 350.) He was therefore involved in all investigations of employee rule violations at that location, approximately 30-35 investigations in total. (HT, pp. 314-15.) His other responsibilities included making sure that the collective bargaining agreement was being followed and acting as a go-between between employees and management. (HT, pp. 314-15.) In this case, he represented Complainant at the BNSF investigation and witnessed some of how Complainant was treated after he returned to work. I found him straightforward and credible.

B. Credibility of Tracy Ann Rothschild

Tracy Ann Rothschild met Complainant when they were both serving in the U.S. Navy. They married in 2008. (HT, pp. 292-93.) She now works for the Department of Social and Health Services. (HT, p. 292.) Although I saw no reason to doubt her truthfulness, Ms. Rothschild's knowledge of relevant information is limited, so the weight I can give her testimony is also limited. Where she had a stronger base for knowledge, such as in her own observations of Complainant's actions on January 2-3, 2015, and of the effects on him of the disciplinary process, I give her statements reasonable weight.

b. Complainant's Credibility

I generally found Complainant's testimony straightforward and credible. In particular, I noted that Complainant consistently acknowledged, both at the BNSF investigation and at the hearing, that he had not complied with the reporting rules as written. He repeatedly stated that he had not known the rules, but he did not equivocate. Mr. Larsen, who conducted the BNSF investigation hearing, shared this view. He came away from the hearing "thinking that [Complainant] was a good employee" because he was "very cooperative" during the hearing and not at all defensive. (JX 17, p. 13.) However, he was slightly evasive at the hearing with respect to the oxycodone he took the morning after his injury. In his injury report and at the BNSF investigation, he had freely admitted that he had taken a leftover oxycodone pill from a previous prescription. (JX 6, p. 2; JX 9, p. 28.) Yet when first asked about it at the hearing, he said only that he "may have taken" a pill. (HT, p. 162.) He freely admitted it again later at the hearing, however. (HT, p. 218.) His testimony about his anxiety after the injury is also somewhat less

solid; although it is not necessarily contradicted by his medical records, it is at least not fully supported by them. Overall, however, I found Complainant's testimony credible.

VI. Legal Analysis and Findings

A. Did BNSF Retaliate Against Complainant?

The FRSA provides that railroad carriers "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part" to any protected activities. 49 U.S.C. § 20109(a). Actions brought under the FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). *See* 49 U.S.C. § 20109(d)(2)(A)(i). In order to prevail, a complainant must demonstrate that: (1) he engaged in protected activity (protected activity); (2) the employer knew that he engaged in protected activity (knowledge); (3) he suffered an unfavorable personnel action (adverse action); and (4) the protected activity was a contributing factor in the unfavorable personnel action (contribution). 49 U.S.C. § 42121(b)(2)(B)(iii-iv); *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *see also Kuduk v. BNSF Ry. Co.*, 768 F. 3d 786, 789 (8th Cir. 2014). The complaining employee bears the initial burden, and must show "by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint." 29 C.F.R. § 1982.109(a); *see Rookaird v. BNSF Railway Co.*, 908 F.3d 451, 460 (9th Cir Nov. 8, 2018).

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)(iv); 29 C.F.R. § 1982.109(b); *Rookaird*, 908 F.3d at 460; *Araujo*, 708 F.3d at 157; *Beatty v. Inman Trucking Mgmt., Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-020, 2008-STA-020, slip op. at 7-11 (ARB May 13, 2014); *see also Addis v. Dep't of Labor*, 575 F.3d 688, 691 (7th Cir. 2009) (holding that AIR-21 language overrules traditional case law and allows an employee to shift the burden to the employer with a "lesser showing"); *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) ("For employers, this is a tough standard, and not by accident."). Clear and convincing evidence is evidence that shows "that the thing to be proved is highly probable or reasonably certain." *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015) ("*DeFrancesco II*") (citing *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011)); *see also Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 6 (ARB Apr. 25, 2014); *Brune v. Horizon Air Indus., Inc.*, ARB Case No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006).

1. Complainant's Case For Retaliation

The parties do not dispute every element of Complainant's retaliation case, so my review of the undisputed issues will be brief. The central dispute at this stage of analysis is the fourth element: whether Complainant has shown that the protected activity was a contributing factor in the adverse action.

a. Did Complainant Engage in Protected Activity?

To establish a case for retaliation, a complainant must first show that he or she engaged in some protected activity. *Araujo*, 708 F.3d at 157. The FRSA contains three sets of employee protections. Among the protected activities in Section 20109(a) of the FRSA is notifying the railroad carrier of a work-related personal injury. 49 U.S.C. § 20109(a)(4). Remarkably, Respondent now argues that Complainant has not engaged in protected activity because he has not shown that his injury was work-related. (RB, p. 10.) Respondent claims that Complainant's medical records show he had a pre-existing knee problem unrelated to his work, meaning that he failed to prove protected activity because he "offered no objective evidence to refute the contention that he never suffered a work-related injury." (RB, p. 10.) The referenced medical records state that, when Complainant went to the emergency room on January 3, he reported having experienced pain in his knee over the month or two prior to the date of injury. (RX K, pp. 137-38.) Complainant disputes the accuracy of these records, testifying that he did not make any such statements to the providers and did not experience prior knee issues. (HT, pp. 489-93.) The records are not otherwise free from error: another chart note states that he was complaining of right knee pain, even though the injury was to his left knee. (*Id.*) Complainant's wife also said she was not aware of any prior injuries to his knees and he had not previously complained about them.[31] (HT, p. 296.) I am persuaded that Complainant did not experience knee pain prior to the injury – at least, not beyond the aches that are normal for someone performing a physically-demanding job.

Regardless of whether Complainant had some degree of prior knee pain, however, he clearly suffered an injury at work on Friday, January 2, 2015. There is no dispute that Complainant felt a pop when standing up from a squatting position and subsequently felt increasing pain.[32] Complainant then felt increasing pain, which became so severe by the next day that he took an oxycodone and went to the emergency room to find out what was wrong. Shortly thereafter he underwent knee surgery and physical therapy, which successfully addressed the pain. Previous aches or not, the condition of Complainant's knee became significantly worse after it popped during his work activities – essentially the definition of an injury. Furthermore, Respondent has consistently acted on the belief that Complainant suffered from a work-related injury. All of the documentation of the investigation and discipline, and all of the testimony from Respondent's managers, indicates that Complainant was disciplined for failure to comply with the rules for reporting a work-related injury.[33] Respondent cannot now claim immunity from FRSA employee protection rules because Complainant's injury was purportedly not work-related when Respondent's every action has been based on the premise that it was.

[31] I also note that Complainant's simply having had earlier knee pain would not prove that it was unrelated to his work.

[32] Respondent has stipulated that Complainant felt a "pop" in his knee when he stood up from a squatting position while at work. Separately, Respondent appears to claim that the act of standing up from squatting to examine a piece of rail car equipment is not a work-related activity. (RB, p. 10.) This argument is not worthy of a serious response.

[33] There is a separate rule requiring reporting of non-work-related injuries, but it requires only that off-duty injuries that will affect an employee's performance be reported "as soon as possible"; the PEPA 72-hour provision does not apply to it. (HT, pp. 33, 473; *see* JX 13, p. 1.)

Finally, contrary to Respondent's assumption, I am not convinced that the FRSA requires an employee to prove, as a medical matter, that an injury is actually work-related in order to establish that reporting the injury is protected activity.[34] Respondent points to an OSHA regulation that defines work-related injuries for the purpose of employer injury-reporting requirements, but that regulation does not apply to employee retaliation protections and does not replace the good-faith report standard established by Congress.[35] (RB, p. 10.) Under the statute's good-faith report requirement, any report made in good faith is protected activity; whether the medical cause of the injury is ultimately work-related is evidently immaterial. 49 U.S.C. § 20109 (a)(4); *see, e.g.*, *Koziara v. BNSF Railway Co.*, No. 13-cv-834-jdp, 2015 WL 137272, at *6-7 (W.D. Wis. Jan. 9, 2015); *Davis v. Union Pacific Railroad Co.*, No. 5:12-CV-2738, 2014 WL 3499228, at *6-7 (W.D. La. July 14, 2014). Respondent does not argue that Complainant's report was not made in good faith, and in any event the evidence does not support such an argument. Furthermore, the Ninth Circuit has approvingly cited lower court opinions refusing to construe Section (a)(4) to require that the injury actually be work-related *Rookaird*, 908 F.3d at 458 (citing *Thomas v. Union Pac. R.R. Co.*, 203 F.Supp.3d 1111, 1117-18 (D. Or. 2016); *Cash v. Norfolk S. Ry. Co.*, No. 6:13-CV-00056, 2015 WL 178065, at *11 (W.D. Va. Jan 14, 2015); *Koziara*, 2015 WL137272, at *6; *Davis*, 2014 WL 3499228, at *6-7; *Ray v. Union Pac. R.R. Co.*, 971 F.Supp.2d 869, 882-84 (S.D. Iowa 2013)). The Ninth Circuit highlighted these courts' focus on the statutory good faith requirement instead. *Id.* (citing *Koziara*, 2015 WL 137272, at *6).

Complainant has demonstrated this element of his case.

b. Did Respondent Know About Complainant's Protected Activity?

A complainant must also show that the respondent knew about his protected activity. *See Araujo*, 708 F.3d at 157. It is not enough for a complainant to show that his employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the decision-makers who subjected him to the alleged adverse actions were aware of his protected activity. *See Conrad v. CSX Transp.*, 824 F.3d 103 (4th Cir. 2016); *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); *Peck v. Safe Air Int'l, Inc*., ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). Case law differs on whether this factor is a required independent showing or if it is subsumed in the causal showing that a complainant must make. *Compare Conrad*, 824 F.3d at 107, *with Coates v. Grand Trunk Western R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 2 n.5 (ARB July 17, 2015). But whether analyzed independently or not, some knowledge of the protected activity must be shown; a

[34] A hypothetical situation shows why it would be odd if it did: Suppose that an employee suffered sudden and severe pain in his arm while at lifting something at work; immediately and in good faith reported a work injury according to his employer's injury reporting policy; was fired by his employer expressly because he had reported a work injury; and subsequently learned that the pain had actually been caused by a previously-undiscovered congenital condition which was not affected by his work activities. The employer's intentional retaliation would not be permissible under the FRSA simply because both parties were initially mistaken about the medical cause of the employee's injury.

[35] That regulation, 29 C.F.R. § 1904.5(b)(2)(ii), provides that an injury is not work-related if it "involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment." Even if this regulation did apply, it would not defeat Complainant's claim. Given the facts of the case, it is impossible to conclude that Complainant's symptoms resulted *solely* from non-work-related events or exposures.

protected activity can hardly contribute to an adverse action if the employer and its agents lack any knowledge of the protected activity.

There is no dispute on this issue. The protected activity was reporting an injury, and the discipline that Complainant objects to was based on the time and manner in which Complainant performed the protected activity. There can be no question that Respondent and its employees were aware of the protected activity when the alleged adverse actions were taken.

c. Did Respondent Take Adverse Action Against Complainant?

Third, a complainant must show by a preponderance of the evidence that the respondent took some adverse action against him or her. *Araujo*, 708 F.3d at 157. The FRSA specifies that a railroad carrier may not "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee" on the basis of protected activity. 49 U.S.C. § 20109(a). The ARB has indicated that whistleblower standards are meant to be interpreted expansively, as they have "consistently been recognized as remedial statutes warranting broad interpretation and application." *Menendez v. Halliburton*, ARB Nos. 09-002 and 09-003, ALJ No. 2007-SOX-2005, slip op. at 15 (ARB Sept. 13, 2011). Employer actions must be considered in the aggregate to determine if together they rise to the level of an actionable adverse action. *Id.* at 20-21. Based on the similar language in the statutes, the ARB has applied the same broad definition of an adverse action under the FRSA as it previously articulated under AIR-21 and Sarbanes-Oxley: a railroad engages in adverse action if it engages in "'unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.'" *Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 14-047, ALJ No. 2013-FRS-035, slip op. at 7 (ARB Nov. 24, 2015) (quoting *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-4, slip op. at 7 (ARB Dec. 29, 2010)); *see also Stallard v. Norfolk Southern Railway Co.*, ARB No. 16-028, ALJ No. 2014-FRS-149, at 8 (ARB Sept. 29, 2017).

Complainant argues that Respondent took two adverse actions against him, first when it issued a Notice of Investigation and again when it assessed discipline against him. (CB, pp. 8-9.) It is clear that assessed discipline is an adverse action. Respondent conducted an investigation and disciplined Complainant with a Level S 30-day record suspension with a 12-month probationary review period. Records of past discipline remain on an employee's transcript permanently and, even when the review period is over, in a future incident a charging officer can look at the employee's history of discipline and it can influence the type of discipline the officer recommends. (HT, p. 45.) The discipline assessed falls into the category of an adverse action, and Respondent does not dispute the issue. Complainant has demonstrated this element of his case.

Complainant argues that the Notice of Investigation was also an adverse action because BNSF's practices are such that investigations always (or nearly always) result in discipline. (CB, p. 8.) This line of argument misses the mark; however much the record might support a claim that an *investigation* always results in discipline, it does not support the claim that a *notice of investigation* always results in discipline. The BNSF managers who testified that investigations nearly always lead to discipline also testified that they had canceled investigations for various reasons, and Complainant himself acknowledged that he had received three notices of

investigation for attendance violations which were later withdrawn. (HT, p. 181.) Complainant is nevertheless correct that a notice of investigation can, on its own, be an adverse action. In fact, the ARB has affirmed that a charge letter initiating a disciplinary investigation process is a threat of discipline that qualifies as prohibited discrimination under 49 U.S.C. § 20109 and 29 C.F.R. § 1982.102(b)(1), and as such is an adverse action.[36] *Vernace v. Port Authority Trans-Hudson Corp.*, ARB No. 12-003, ALJ No. 2010-FRS-18, at 2-3 (ARB Dec. 21, 2012).

The list of prohibited activities is "quite broad" and includes reprimands or counseling sessions "which are coupled with a reference to potential discipline." *Williams v. American Airlines*, ARB No. 09-00018, ALJ No. 2007-AIR-00004, slip op. at 10-11 (ARB Dec. 29, 2010). Although it is not a separate reprimand, the notice of investigation does more than refer to "potential" discipline: it notifies the employee that disciplinary processes have been initiated against him. Even if the investigation were ultimately to be canceled, the employee would be aware that his employer was in the process of mustering evidence and witnesses against him, and that he faced a very real risk of discipline. Like the charge letter in *Vernace*, which the ARB upheld as an adverse action, the notice of investigation is the first step in a disciplinary process that can lead to discipline and loss of income, and is part of a progressive discipline policy where successive violations lead to more serious consequences, potentially including termination. *Vernace v. Port Authority Trans-Hudson Corp.*, ALJ No. 2010-FRS-18, slip op. at 26 (ALJ Sept. 23, 2011). A written warning is presumptively adverse, including where it implicitly or explicitly references potential discipline. *Williams v. American Airlines*, ARB No. 09-00018, at 11. The Notice of Investigation sent to Complainant implicitly referenced potential discipline by explaining that the investigation was scheduled "for the purpose of . . . determining [Complainant's] responsibility, if any, in connection with" an alleged rule violation. It also did so by directing Complainant to arrange for representation and witnesses as provided in his CBA. (JX 7, p. 1.) Given this evidence and the ARB's precedent in *Vernace*, I find that Complainant's Notice of Investigation was an adverse action.

d. <u>Was Complainant's Protected Activity a Contributing Factor in Respondent's Adverse Actions?</u>

i. Legal Framework

The final question in Complainant's case for retaliation is whether he has shown by a preponderance of the evidence that the protected activity contributed to the decision to take the adverse action. This is not meant to be a difficult or arduous showing. *E.g. Ledure v. BNSF Ry. Co.*, ARB No. 13-044, ALJ No. 2012-FRS-020, slip op. at 8 (ARB June 2, 2015); *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ Case No. 2010-FRS-020, slip op. at 7 (ARB May 31, 2013). A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Araujo*, 708 F.3d at 158 (quoting *Ameristar Airways Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 563, 567 (5th Cir. 2011)); *see also Addis v. Dep't of Labor*, 575 F.3d 688, 691 (7th Cir. 2009); *Marano v. Dep't of Justice*, 2 F.3d 1137, 1150 (Fed. Cir. 1993); *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-

[36] Because threatened discipline is involved, there is no need to consider whether a Notice of Investigation would dissuade other employees from engaging in the protected activity. *Vernace*, ARB No. 12-003, at 2 n.4 (ARB Dec. 21, 2012).

STA-052, slip op. at 5 (ARB Jan. 31, 2011).[37] The ARB recently reemphasized "how low the standard is for the employee to meet, how 'broad and forgiving' it is. 'Any' factor really means *any* factor. . . . The protected activity need only play some role, and even an '[in]significant' or '[in]substantial' role suffices." *Palmer v. Canadian Nat'l Railway/Illinois Central Railway Co.*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 53 (ARB Jan. 4, 2017). In determining whether Complainant has met this burden, I must consider all of the evidence, including evidence of Employer's nonretaliatory reasons, but I do not weigh those reasons against the evidence of retaliation; Complainant only needs to "show that the retaliation played some role" – that the nonretaliatory reasons, even if true, were not the only reasons for the adverse action – to prevail at this stage of the analysis. *Id.*

The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. *See, e.g., Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13 (ARB Sept. 30, 2011) (citing *Sylvester v. Paraxel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, slip op. at 27 (ARB May 25, 2011)). Circumstantial evidence may include a wide variety of evidence, such as temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation of the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. *Id.* at 13, 18; *Bobreski v. J. Givoo Consultants, Inc,* ARB No. 09-057, ALJ No. 2008-ERA-003, slip op at 13 (ARB June 24, 2011). It is not necessary for a complainant to establish any retaliatory motive in order to show the contributory factor element. *See Marano*, 2 F.3d at 1141; *see also Coppinger-Martin v. Solis*, 627 F. 3d 745, 750 (9th Cir. 2010). Nor is it necessary to show any animus. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Feb. 29, 2012) ("*DeFrancesco I*"). Contribution might be shown simply by the presence of a protected activity in a chain of causation leading to the adverse action, even when there is no evidence of retaliatory animus or motive. *E.g. Hutton*, ARB No. 11-091 at 6-7.

One method of showing that a protected activity is a contributing factor to an adverse action is to show that the adverse action is "inextricably intertwined" with the protected activity. This does not mean simply that the protected activity and adverse action are connected in some way. Rather, "[f]or an adverse action to be '*inextricably* intertwined' with protected activity requires that it not be possible, even based 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 protected activity and unfavorable employment actions are inextricably intertwined, causation is established without the need for circumstantial evidence; however, such

[37] The Ninth Circuit recently highlighted the difference between the prima facie or investigatory stage established in 49 U.S.C. § 42121(b)(2)(B)(i)-(ii), where the complainant is only required to show that the circumstances were sufficient to raise an inference that the protected activity was a contributing factor, and the substantive or adjudication stage established in 49 U.S.C. § 42121(b)(2)(B)(iii)-(iv), where the complainant must show that the protected activity was a contributing factor by a preponderance of the evidence. *Rookaird*, 908 F.3d 451, 459-61 (9th Cir. 2018). Although *Araujo*'s discussion of the "contributing factor" definition occurs in the context of a prima facie case under subsections (i)-(ii), the definition itself is also applied in the context of substantive contributing factor analyses. *See, e.g., Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 476 & n.3 (5th Cir. 2008) (quoting *Klopfenstein v. PCC Flow Technologies*, ALJ No. 04-SOX-11, ARB No. 04-06149, at *13 (ARB May 13, 2006)). The difference highlighted by the Ninth Circuit is the standard of proof, not the definition of a contributing factor.

evidence may certainly bolster the causal relationship." *Benjamin v. Citationshares Management, L.L.C.*, ARB No. 12-029, ALJ No. 2010-AIR-001, slip op. at 12 (ARB Nov. 5, 2013).

Respondent has asked me to consider two recent cases from the 8th Circuit, *Heim* and *Blackorby*. *Heim v. BNSF Railway Co.*, 849 F.3d 723 (8th Cir. 2017); *Blackorby v. BNSF Railway Co.*, 849 F.3d 716 (8th Cir. 2017). Both cases hold that an employee must establish "intentional retaliation" in order to show that protected activity was a contributing factor. *Heim* expressly holds that the "intentional retaliation" requirement means that it is not sufficient to show that the protected activity and the adverse action were inextricably intertwined. *Heim*, 849 F.3d at 727. Both cases are in the 8th Circuit and are not binding authority in this case, while ARB precedent establishing the "inextricably intertwined" standard and declining to require a retaliatory motive is binding. Therefore, although I have considered the positions expressed in *Heim* and *Blackorby*, I will not apply them directly to this case.

In another notice of supplemental authority, Respondent has pointed to the Ninth Circuit's recent decision in *Rookaird v. BNSF Railway Company*. 908 F.3d 451 (9th Cir. 2018). In that case, the court quoted another Eighth Circuit case, *Kuduk*, which similarly states that "the contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity." *Kuduk v. BNSF Ry. Co.*, 768 F. 3d 786, 791 (8th Cir. 2014) (quoted in *Rookaird*, 908 F.3d at 461-62). Respondent argues that the Ninth Circuit thereby "affirmed that an FRSA plaintiff must prove intentional retaliation" and that "there is no presumption of causation." Complainant argues that the Ninth Circuit's holding in *Rookaird* means that Complainant's evidence is sufficient as a matter of law at the *prima facie* stage, and that at the substantive stage the court simply held that there was a genuine dispute of material fact on contribution because Respondent alleged that he was fired for unrelated reasons. Complainant also argues that *Rookaird* did not address presumptive causation and could not have overturned *DeFrancesco* because *Rookaird* was decided on the complainant's summary judgment burden rather than on the merits.

Respondent is partially correct in that there is no presumption of causation that permits Complainant to sidestep the requirement to prove contribution by a preponderance of the evidence. *Rookaird* clearly affirmed that existing requirement. However, the ARB has also discussed "inextricable intertwinement" cases in terms of a presumption of causation. *Riley v. Dakota, Minnesota & Eastern Railroad Corp. d/b/a Canadian Pacific*, ALJ No. 2014-FRS-044, ARB Nos. 16-010, 16-052, slip op. at 5-6 (ARB July 6, 2018). In the absence of Ninth Circuit precedent overruling the ARB on that subject, the ARB's case law applies. If Respondent means to argue that *Rookaird* does overrule the ARB or that it requires Complainant to show that BNSF acted with retaliatory animus, it is reading too much into the case. The *Kuduk* quote was simply part of a paragraph summarizing the law, and the Ninth Circuit did not elaborate on its meaning. Furthermore, Complainant is correct that *Rookaird*'s substantive case under subsections (iii)-(iv) of the statute – parallel to what is at issue here – was decided on the summary judgment standard, not on the definition of a contributing factor. In fact, the case did not explicitly involve either retaliatory animus or the doctrine of inextricable intertwinement.[38] *Rookaird*, 908 F.3d at

[38] The district court judge simply said that BNSF's stated reason for termination "cannot be unwound" from the protected activity at issue, without discussion or analysis. *Rookaird v. BNSF Railway Co.*, No. C14-176RSL, 2015

462-63. The decision simply did not reach the issue.[39] For these reasons I do not read *Rookaird* as disapproving the application of the ARB's inextricable intertwinement doctrine or as requiring retaliatory animus in this circuit.

ii. Contribution as to the Notice of Investigation and June 2, 2015, Discipline[40]

Complainant argues that his injury report was necessarily a contributing factor to the discipline he received because it was the only factor that triggered the discipline. (CB, p. 9.) He argues that his case is like *DeFrancesco I* and *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012), where the ARB found that injury reports were a contributing factor to adverse action because they were what triggered the employers' investigations. (CB, pp. 9-12.)

Respondent argues that the injury report played no role in Complainant's discipline and that the discipline was purely about Complainant's failure to comply with the rules governing when to report an injury. In particular, it argues that there was no temporal proximity between the protected activity and the adverse action; that both its internal review and the Public Law Board upheld the disciplinary decision; that it did not provide false or shifting explanations for the discipline or issue it based on pretext; and that BNSF showed no hostility toward the injury report or change in attitude. (RB, pp. 12-18.)

Complainant's burden of demonstrating contribution has been met because the discipline and his protected activity are inextricably intertwined, even under BNSF's theory of the case. BNSF's position is straightforward: it disciplined Complainant solely because his injury report was late, and the decision had nothing to do with his injury or the fact of the report as such. (RB, pp. 1, 9-18, 26.) There is no way to explain this disciplinary decision without referring to an injury report. Complainant was disciplined for the time and manner in which he performed a protected activity, so it is impossible to explain the reasons for the discipline without discussing the protected activity.

The circumstantial evidence also generally supports a finding of contribution. BNSF claims that the temporal proximity factor weighs against contribution because the protected activity and the adverse action were separated by five months. (RB, p. 13.) In fact, BNSF goes so far as to claim that the five-month gap "is sufficient, in and of itself, to counter any suggestion of contribution." To the contrary, although there were indeed five months of chronological separation, the delay occurred only because Complainant was on medical leave due to the injury. In terms of Complainant's working days, the hearing was held about a week after the injury report. Furthermore, even if five months of separation were long enough that events on either

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WL 6626069, at *10 (W.D. Wa. Oct. 29, 2015) (order granting in part and denying in part plaintiff's second motion for partial summary judgment and denying defendant's motion for summary judgment). The district court did not explain whether this involved inextricable intertwinement, a chain of events, or something else entirely.

[39] I also note that the ARB has questioned the grounds for the Eighth Circuit's *Kuduk* holding on intentional retaliation. *Riley*, ARB Nos. 16-010, 16-052, slip op at 6 n.13.

[40] The Notice of Investigation was not an independent event but an integral part of the disciplinary process leading to the investigation and ultimate assessment of discipline; there is no suggestion that it involved different decision-makers, facts, or motives; and the parties do not discuss it separately from the assessment of discipline. Therefore, I see no reason to discuss it separately except where specific facts make it relevant.

end could never be considered proximate,[41] this factor would not deserve much weight under the circumstances. Temporal proximity is most useful in situations where protected activity may have contributed to otherwise-unrelated discipline. But here, there can be no dispute that the injury report is related to the discipline, even if Respondent is correct that the report did not improperly contribute to it. If BNSF had fired Complainant with the stated purpose of punishing him for reporting a work-related injury, no amount of time between the two events could diminish the connection between the two. The question is whether the *fact of* the injury report improperly contributed to discipline that should only have been contributed by its *time and manner*.

BNSF's claim that the successful internal and external review by its employees and the Public Law Board help show that there was no retaliation is also of limited use. (RB, pp. 18-19.) Those reviews examined whether the disciplinary decision was supported by substantial evidence and was in accordance with BNSF's disciplinary policies, not whether there was retaliation. The PLB's decision in particular makes clear that it reviewed the case to determine whether Respondent had "sustained its burden of proving [Complainant's] guilt of the charged offense" and whether the discipline was in accordance with PEPA. (RX N, p. 2.) BNSF is correct that these reviews help show there was no pretext involved with the discipline, but Complainant does not allege that he was intentionally charged with violating the reporting rules as a pretext to discipline him for having reported at all.[42] Nor is pretext is required for a protected activity to be a contributing factor.

BNSF also argues that the company and its managers did not provide false or shifting explanations for Complainant's discipline and that its explanation was not a pretext hiding retaliatory motive. (RB, pp. 15-18.) I generally credit the BNSF managers' statements that they did not believe they were retaliating against Complainant, were not motivated by a desire to retaliate against him for being injured, and did not see evidence of retaliation by others. (HT, pp. 117, 464.) Nor do I see significant evidence that they secretly had such a motivation or that the stated reason for the discipline was a pretext. But, as I explained above, the applicable test is not a "motivating factor" test but a "contributing factor" test, so motivation or subjective intent is merely one way to show that a protected activity contributed to adverse action. Furthermore, though managers' statements may not show a motivation to punish Complainant for reporting an injury, they do show a lack of awareness that retaliation could even be implicated in this situation.

An employer's hostility to protected activity can also constitute circumstantial evidence that the protected activity contributed to adverse action. There is some evidence here of hostility to injury reporting and of a climate of employee fear around reporting. Although managers testified that retaliation was absolutely wrong, long-time employee and union representative Mr.

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[41] Contrary to Respondent's argument, five months is not long enough to "negate any inference of causal connection." (RB, p. 13.) The ARB has held that "a temporal proximity of seven to eight months between protected activity and adverse action may be sufficient circumstantial evidence to prove that the protected activity contributed to the adverse action." *Zinn v. American Commercial Lines Inc.*, ALJ No. 2009-SOX-00025, ARB No. 10-029, slip op. at 12 (ARB March 12, 2012).

[42] He does briefly claim that the reporting rules themselves are a pretext for discipline, in combining MSR S-28.2.5 and the PEPA provision and without providing definitions of key terms or training on how to apply them – but no amount of fair process in enforcing a rule can provide evidence that the rule itself lacks a retaliatory design.

Holm believed managers created a negative environment around injury reporting by complaining about the additional work it created. (HT, p. 336.) He had heard other employees say that they might not want to report injuries and knew of at least one employee who decided not to report when he hit his finger with a hammer but didn't want the scrutiny or negativity that might ensue. (HT, pp. 337, 343, 339-40.) Complainant had heard rumors about people who had reported injuries getting in trouble and was afraid of what might happen if he reported an injury. (HT, pp. 248-50.) By contrast, Mr. Bronson didn't recall hearing rumors about retaliation, though he acknowledged it was possible he had heard them at some point. (HT, pp. 148-49.) Ultimately, Mr. Holm felt, BNSF had tried to change the culture around injury reporting and the focus on scrutinizing the injured employee, but they had not truly succeeded. (HT, pp. 322-23.)

Despite this testimony, managers did not believe that employees had concerns about injury reporting or retaliation. In particular, Mr. Bertholf said he had never heard rumors that Interbay employees were afraid to report injuries. (HT, pp. 417-18.) However, I do not find this particularly persuasive. Employees who are afraid of retaliation from their supervisors are unlikely to openly inform those same supervisors about their fears. And second, Mr. Lovin's statements in particular show a concerning attitude toward discipline: At his deposition, he said that he canceled hearings when he could not "win" them. (HT, p. 443.) At the hearing, he said that he had misspoken and really meant that he would not go forward if he could not prove the charge, because it would "waste everyone's time." (HT, p. 443.) Yet when discussing Complainant's potential attendance violations, which were ultimately dropped because Complainant had FMLA coverage for that time, Mr. Lovin's attitude was more that the disciplinary proceedings should be dropped because the charges couldn't be proven and the company would "look bad" rather than that Complainant was excused by his family problem and therefore didn't warrant discipline.[43] (HT, pp. 462-63.) Any employee who didn't realize right away that something was more serious than an everyday ache or twinge would reasonably be afraid to report it to a supervisor who is more focused on winning than on fairness.

Although BNSF managers professed to have no prejudice or animus against employees reporting injuries, more than one employee felt differently. Mr. Holm said that employees could be reluctant to report injuries. He attributed this partly to not wanting to cause trouble and paperwork for the foremen, and partly to a belief that they will get unfavorable recognition for reporting an injury because of the emphasis on how many days the worksite goes injury-free. (HT, pp. 334-35.) Managers help create this environment when they respond to injury reports by implying that the process is annoying, such as by saying, "I've got so much to do now. You don't know how hard this is." (HT, p. 336.)

There was conflicting testimony about two specific incidents that were raised as examples where some employees felt there was retaliation for protected activity. Mr. Holm believed that Mr. Bertholf had abolished a job in a way that affected an employee who had just been injured a week or so earlier. Both Mr. Holm and Mr. Bertholf seemed to agree that two positions were moved from one shift to another. Mr. Bertholf said that the switch was all about staffing needs, while Mr. Holm acknowledged that he was speculating about the abolishment but

[43] When asked about cancellation of attendance cases overall, Mr. Lovin said he tried to be considerate about hardships and to look for reasons that an employee's having missed work was beyond their control. (HT, pp. 468-69.)

said that it seemed like a reaction to the injury. (HT, pp. 331-33.) However, he did not call the anonymous hotline to report his concerns, even though he had done so on another occasion. (HT, pp. 349, 356.) Mr. Bertholf's testimony was that the employee's job had not been abolished. Rather, two carman vacancies had arisen after two employees transferred out, leaving the relevant shifts shorthanded. Because of a hiring freeze, Mr. Bertholf needed to abolish two other jobs so that the carman positions could be filled. (HT, pp. 422-23.) Mr. Holm also thought that another employee's position was abolished after he had reported something to the FRA. (HT, pp. 366-67.) Mr. Bertholf did not recall abolishing that employee's job,[44] nor was he aware of any FRA reports made by the employee. (HT, p. 424.)

Mr. Lovin agreed that reporting was a good thing and said that they wanted to encourage employees to report. However, he also said that he didn't know whether people would be discouraged from injury reporting by seeing someone disciplined for doing it the wrong way. (HT, pp. 487-88.) That is implausibly naïve. Of course employees would feel discouraged from reporting an injury if they saw someone disciplined for doing so in the wrong manner, especially if the person being disciplined was attempting to comply with the rules or believed he had done so, or if the employees didn't feel like they had a strong understanding of the rules themselves. This is true even if neither the managers nor BNSF as a whole did anything to actively discourage reporting.

Based on Mr. Holm's and Complainant's testimony, employees heard some rumors about retaliation for injury reporting. With respect to specific incidents that Mr. Holm had heard about, Mr. Bertholf provided reasonable nonretaliatory explanations for those events, but even if his explanations are complete and accurate it is telling that at least some employees perceived retaliation under those circumstances. It is also telling that supervisors like Mr. Bertholf and Mr. Lovin did not seem overly disturbed that employees might wrongly perceive retaliation where there was none and were not concerned about risks that employees might feel discouraged from reporting injuries. Supervisors' reactions to injury reports as negative events that create extra work also contributed to this negative environment. Although this is far from the worst examples of hostility to injury reporting, it is nonetheless sufficient to raise fears around injury reporting.

I also note that some of BNSF's questions at trial could be seen as personally angry or even implicitly threatening. In particular, asking whether Complainant had ever told BNSF that he was taking anxiety medication can easily be seen as an implicit threat that Complainant could get in trouble again for not having informed them. (HT, p. 191) Complainant openly admitted that he had not told anyone at BNSF about his knee injury prior to his conversation with Mr. Lovin on January 4. (HT, pp. 162, 165-67.) Yet Respondent's counsel repeatedly grilled him on whether he had told anyone about the pain at specific times on January 2 and 3. Again and again, Complainant was asked, "You didn't tell anyone?" "You didn't mention that it popped? You didn't mention that it hurt?" "You didn't bother to call?" Complainant's counsel counted 22 times that Respondent's counsel asked whether Complainant had called BNSF at specific times, and Respondent's counsel said or asked 10 times that Complainant "didn't bother" to call or to mention his knee. (HT, pp. 215, 217, 221, 223-25, 230.) Respondent certainly showed that

[44] Mr. Bertholf said he definitely had not done so at Interbay, but it was possible he had abolished a position occupied by that employee at another location 5 or 10v years before. (HT, pp. 423-24.)

Complainant had a number of opportunities to report his injury that he didn't take, and the questioning *was* interspersed with questions about how his pain was at each point, but Complainant agreed that the repeated questioning made him feel like BNSF was pretty mad at him. (*Id.*) (He repeatedly responded that he had not said anything to BNSF, that he had been hoping the pain would go away, and that his understanding throughout was that he had 72 hours to report if he turned out to have an injury.) (HT, pp. 268-69.) Complainant also had the impression that his coworkers at Interbay were worried about being involved in his case, saying, "I guess some of them feel that they'll be retaliated against." (HT, p. 275.)

Complainant also alleges that he was treated differently after he returned to work.[45] He said he felt that Mr. Lovin was "teaming [him] up with lazier co-workers who didn't want to pull their own weight." (HT, p. 177.) He thought Mr. Lovin was "trying to play mind games" with him by doing that, and that it was related to his injury report and investigation because there was no other apparent reason. (*Id.*) Complainant believed that other co-workers, including Jeremy Close, shared his perception that these individuals were lazier, and some co-workers ribbed him for having to work with them when they were assigned together. (*Id.* at 178.) Mr. Holm agreed that Complainant may have been assigned to work more frequently with "some of the guys that a lot of people didn't want to work with" because they would argue about how to do a job or would disappear for part of the day. (HT, pp. 338-39.) Complainant testified that he mentioned the issue to Mr. Lovin at his annual review early in 2017, but that he had never made any kind of formal, written complaint because "from a managerial standpoint, I should be able to work with anybody." (HT, pp. 239-240, 244.)

Mr. Lovin did not recall whether he assigned Complainant to work with different people he hadn't worked with before after he returned to work. He said that he tried to consistently move people around rather than leaving people partnered for long periods, and the small number of employees and everyone having different days off also made it more likely that work assignments would vary. (HT, pp. 459-60.) He never intentionally assigned a worker to the laziest coworkers, including Complainant. (HT, p. 474.) He tried to check in with his employees to see how they're working together and said that generally, everyone complains about everyone else. (HT, pp. 474-75.) Mr. Lovin said he saw everybody as having their own personality quirks that make them a little difficult to work with.[46] (HT, p. 460.) Mr. Bronson thought Mr. Lovin was a good foreman who didn't have it out for Complainant in how he assigned work partners, but he was unable to compare Complainant's treatment before and after the discipline because he hadn't worked with Complainant before his injury.[47] (HT, pp. 154-55.)

Mr. Holm had also perceived a change in his own treatment by management after one injury, a shoulder injury. (HT, p. 320-22.) They periodically observed employees to see if they

[45] Complainant's wife also said that, when he had had surgery for an unrelated medical condition in August 2014, he got balloons and a card and well wishes from people at work, but with his work-injury knee surgery, nobody contacted him at all and he felt no support from the company. (HT, p. 303; RX K, p. 136.)

[46] Mr. Bertholf gave some vague testimony that Complainant is difficult to work with and that other employees have complained about him. (HT, pp. 426-27.) However, he provided no detail that would explain the relevance of such statements; they certainly weren't part of the justification for Complainant's discipline. It may have been intended to undermine Complainant's testimony that he had been paired up with lazy coworkers by suggesting that he himself was similarly disliked by some others but that all were treated equally.

[47] Mr. Bronson is one of the workers identified by Complainant as lazier; he said Complainant didn't see him work during his first 15 years with the railroad. (HT, p. 154.)

were doing their job correctly. A few weeks after that injury, a foreman warned him that he would be observed that afternoon, saying he should make sure he was doing everything right because he was about to be observed and if he did anything wrong, he would be cited with a violation. (HT, p. 321.)

Complainant also alleged that he was under more scrutiny after he filed his complaint with OSHA.[48] He felt that Mr. Lovin was right behind him much more frequently than before. (HT, p. 185.) Mr. Holm believed that Mr. Lovin did keep a bit closer eye on Complainant after he returned to work. For example, when a part was needed for a repair and Complainant went to find the part or make it in the blacksmith shop, Mr. Lovin would remark on Complainant's not being at his job site, repeatedly asking "Has anybody seen Herb?" (HT, p. 329.) Mr. Holm did not see him do the same thing with other employees. (HT, p. 330.) His educated guess was that this treatment was less to do with Complainant's return to work after the investigation and "more about the fact that there was a lawsuit in progress." (HT, p. 330.) Mr. Lovin denied doing so and said he didn't have time to pay extra attention or give extra scrutiny to what Complainant was doing just because he'd reported an injury. (HT, p. 476.)

In sum, Mr. Holm and Complainant both perceived somewhat more scrutiny of Complainant from Mr. Lovin. They also both perceived that Complainant was being paired with less-desirable coworkers more frequently than before. However, there are no allegations of more serious differing treatment, and these are situations where perception is key. Mr. Lovin denies treating Complainant differently, and neither party has documentary evidence to present. BNSF argues that it is not relevant whether Mr. Lovin treated Complainant differently because he was not one of the managers responsible for the ultimate disciplinary decision, so his actions could not have affected the outcome of the disciplinary decision. (RB, p. 14.) This misses the point; the alleged different treatment is intended to show hostility toward someone who made an injury report, not to show that said different treatment affected the decision to issue discipline. Indeed, it could not have affected that decision because Complainant was disciplined very soon after he returned to work, essentially before there was much time for him to be treated differently on the job. I also note that Mr. Lovin gathered evidence for the BNSF investigation and testified at it, so some of his actions did affect the disciplinary decision even though he was not a decision-maker. Overall, I find that the allegations of a change in treatment weigh in favor of finding contribution, but only slightly.

Finally, Complainant argues that the safety incentive program discourages injury reporting because employees feel pressure not to take away collective rewards from their coworkers. (CB, pp. 16-17.) This is at best partially supported by the record. The only collective reward described is the safety lunches, or "safety feeds," which are given every 60

[48] He told the OSHA investigator in an October 2015 interview that he hadn't been subjected to unfair treatment or harassment since receiving the discipline and said that he didn't feel like he had a target on his back. (HT, p. 294.) Respondent argues that those statements undermine his hearing testimony about different treatment. However, it is not clear when BNSF learned about the OSHA investigation, and the allegations of different treatment are either not time-specific or apparently took place after the initial OSHA interview. At the next OSHA interview, in August 2016, he mentioned his sense of having been paired with lesser skilled workers during the year-long discipline review period that ended in June 2016. (RX M, p. 5.)

days.[49] Complainant said that everyone enjoys the safety lunches and nobody wants to be the one who "blows it for everyone else." (HT, pp. 175-76.) Mr. Holm said that the lunches were kind of a fun and a reprieve for employees. He hadn't observed any serious conversations where an employee told another not to report an injury because of the reward, but he also said that there is nonetheless "a lot of banter," and even when it's lighthearted it can sometimes "really get to" the injured person. (HT, pp. 335-36.) Mr. Bronson said the prospect of losing a safety feed would not deter him from reporting an injury. (HT, p. 153.) Based on the record, then, Interbay employees participate in some degree of joking about losing out on collective rewards. But the testimony provided does not establish that, on the whole, employees took the rewards seriously enough for this to have a meaningful effect on injury reporting.

2. *Has Respondent Shown by Clear and Convincing Evidence That It Would Have Taken the Same Adverse Action Absent the Protected Activity?*

a. Legal Framework

Relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1982.109(b); *see also Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002, slip op. at 6-7 (ARB Mar. 30, 2016). 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 (quoting *Brune*, ARB No. 04-037 at 14). 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(e). To prevail under this standard, the respondent must show that its factual contentions are highly probable—it is a burden of proof more demanding than the preponderance of the evidence standard, residing in between "preponderance of the evidence" and "proof beyond a reasonable doubt." *See Araujo*, 708 F.3d at 159 (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *Addington v. Texas*, 441 U.S. 418, 425 (1979)); *DeFrancesco I*, ARB No. 10-114, at 8. Evidence is clear when the employer has presented an unambiguous explanation for the adverse action. It is convincing when based on the evidence the proffered conclusion is highly probable. *DeFrancesco II*, ARB No. 13-057 at 7-8 (citing *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 6 (ARB Apr. 25, 2014)). 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 Eng'g Corp. v. Herman*, 115 F.3d at 1568, 1572 (11th Cir. 1997); *see also DeFrancesco II*, ARB No. 13-057, at 8.

This inquiry can be difficult because it is counterfactual. An ALJ must somehow factor the protected activity out of the situation and ask whether the respondent has shown that it is highly probable or reasonably certain that the same adverse action would still have been taken.

[49] Complainant does not allege that individual rewards deter employees from reporting injuries, and the record would not support such a claim. Mr. Bronson said that he personally wouldn't feel discouraged from reporting an injury by the prospect of losing plaque or getting a gift from a catalog. (HT, p. 153.) Complainant also acknowledged that he had never known anyone who didn't want to report an injury because they wouldn't get those rewards, and that these are individual rewards so they would not be affected by another employee's reporting an injury. (HT, pp. 252-53.)

When there are multiple, independent contributing factors, this is fairly straightforward. For example, if an employee reported an injury and soon thereafter violated an unrelated safety rule, the question would be whether an employee who had violated the same safety rule but had not reported an injury would have been subject to the same adverse action. *See, e.g., Kuduk v. BNSF Ry. Co.*, 768 F. 3d 786, 792-93 (8th Cir. 2014) (deciding whether an employee who had violated a particular safety rule but had not made unrelated safety complaints would have faced the same discipline for the rule violation). When the protected activity and adverse action are intertwined, however, things are not so easy. In this case, the non-retaliatory reason for the adverse action is the time and manner in which Complainant performed the protected activity of reporting an injury. Yet there is no way to coherently inquire whether an employee who did not report a work-related injury would have received the same discipline for reporting a work-related injury late.

Neither party's briefing addresses how this inquiry should be approached under these circumstances. Complainant simply asserts that Respondent has not presented clear and convincing evidence and that Respondent intentionally applies a confusing rule, which is interpreted differently by various managers, in a way that punishes and discourages reporting. (CB, pp. 26-27.) Respondent argues that the affirmative defense can be established by showing five elements related to the clarity of the rule, the significance of each violation, the propriety of the investigation, the approval of discipline by a neutral third party, and the employer's consistency in disciplining employees for the same violation. (RB, p. 19.) Although BNSF does not identify any source for these specific elements as an established list of factors, let alone a source that is controlling in this case,[50] the elements nevertheless do include relevant considerations.

As I have done previously, I find that the best way to approach the affirmative defense inquiry in a case involving inherently intertwined protected activity and adverse action is to construct the closest coherent comparator involving the same sort of actions by an employee but absent the protected activity and any facts resulting from the protected activity. *Speegle*, ARB No. 13-074, at 28-29; *see Brough v. BNSF Railway Co.*, ALJ No. 2014-FRS-00103 (ALJ Aug. 10, 2016). For instance, reporting non-work-related injuries is not protected by the FRSA, but it is required by BNSF's injury reporting rules. (*See* CX 23, p. 7.) One can ask whether BNSF would have disciplined Complainant if he made a late report of a non-work-related injury.[51] Similarly, one can ask whether BNSF would have disciplined Complainant if he had made a late report of an incident that did not involve an injury. This approach preserves the proper burdens and demanding standard placed on railroads while still making it possible to raise the affirmative defense. Thinking in terms of the closest unprotected comparator case also properly focuses the question on the underlying rationale of the actual adverse action, probing whether the railroad was punishing just the time and manner of the activity or the activity itself.

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[50] The cases cited in support are primarily Eighth Circuit district court decisions, with one Eighth Circuit Court of Appeals decision: *Kuduk v. BNSF Railway Co.*, 768 F. 3d 786, 792 (8th Cir. 2014); *Dafoe v. BNSF Railway Co.*, 164 F. Supp. 3d 1101, 1116 (D. Minn. 2016); *Brisboi v. Soo Line Railroad Co.*, 2016 U.S. Dist. LEXIS 177785, at *16-17 (D. Minn. Dec. 22, 2016); *Gunderson v. BNSF Railway Co.*, 2015 U.S. Dist. LEXIS 99046, at *40 (D. Minn. July 28, 2015). (RB, pp. 19-20.)

[51] The question isn't exactly on point, because BNSF has more of an interest in work-related than non-work-related injuries. Still, no inquiry can be exactly on point when the adverse action and protected activity are inextricably intertwined; by definition, there is no clean way to disentangle them.

This inquiry also requires weighing the employer's reasons to ascertain whether there is a rational, non-discriminatory basis for that action that powerfully compels a conclusion that the action would have taken place apart from the protected activity. In *DeFrancesco II* the ARB offered a series of questions to consider. Does the employer routinely monitor or investigate compliance with the rules absent protected activity? Does the employer consistently impose equivalent discipline to employees who violate the rule but engage in no protected activity? Are the rules charged routinely applied? Are those rules vague and subject to manipulation? Does the evidence show that the investigation was designed to further the purpose of the rule rather than as a way to punish the employee? *DeFrancesco II*, ARB No. 13-057, at 11-12. To prevail, an employer must show more than that a rule was violated, that it had a legitimate motive for the adverse action, and that it imposes discipline generally whenever it determines a rule has been broken. Instead, it is necessary to establish the more particular point that the rule is applied consistently such that employees who engage in substantially similar conduct absent the protected activity are also investigated and punished in the same manner. *Id.* at 13-14. It is also important to consider evidence of discipline in other cases, insofar as those cases are suitably similar to the case at hand. *See Cain*, ARB No. 13-006 at 8 (evidence of uniform discipline in all similar cases sufficient to meet standard).

b. Application

To evaluate whether BNSF would have disciplined a similarly situated employee who did not engage in protected activity, I must critically examine the non-retaliatory reasons given by BNSF, including looking at the structure of the rules, the attitudes of the decision-makers towards protected activity, evidence of discipline meted out to other employees, and the strength of BNSF's case against Complainant. Only one reason was given for disciplining Complainant: his failure to comply with the injury reporting rules. I first discuss the process of discipline and then consider of the proffered reason for discipline.

1. The Process of the Disciplinary Decision and Strength of BNSF's Case Against Complainant

I described above the process BNSF followed in deciding to discipline Complainant. Complainant has not alleged procedural irregularities in the disciplinary process,[52] and the evidence does not indicate that the process was driven by individual animus against injury reports. As I discussed above, the managers who participated in the process seem to have genuinely, if mistakenly, believed both that the fact of Complainant's injury report had nothing to do with his discipline and that what they perceived as his clear and admitted violation of a well-known reporting rule was the sole reason he was disciplined. In their eyes, the investigation was held to further the purpose of the rule by requiring prompt injury reporting, not to punish Complainant for reporting his injury – though, as I will discuss, the actual purpose of the rule is not so clear. Furthermore, as Respondent points out, BNSF's case against Complainant was strong, in large part because Complainant admitted to having violated the PEPA provision as written. The Public Law Board unanimously upheld the discipline and agreed that BNSF had

[52] Complainant's brief does call it a "kangaroo court of an internal 'investigation,' " but the statement is made as part of his contention that the outcome was predetermined because all investigations that are actually held result in discipline – not in conjunction with a claim that BNSF failed to follow proper procedure. (CB, p. 4; *see id.* at 8-9.)

followed procedure. Complainant primarily disputes the fairness of the rule and its application to him, rather than the fact of his compliance with it.

I do note two minor concerns. First, Mr. Lovin played something of a dual role in the investigation, acting as something like a prosecutor as well as a witness. It was his job to determine what witnesses there were and to gather evidence. (HT, p. 436.) He was the one who gathered the statements from Mr. St. Onge, Mr. Royal, and Mr. Close. It was also his job to "pull whatever rules were cited on the investigation notice to bring to the investigation"; here he pulled the late reporting rule. (HT, p. 440.) In addition to this role of gathering evidence against Complainant, he gave evidence at the investigation as a witness, at Mr. Bertholf's direction. (HT, pp. 439-40.) This is not improper according BNSF's procedures for disciplinary investigations, but it is at least irregular when compared with usual adjudicatory practices. It is a bit more concerning in light of Mr. Lovin's deposition statement that he cancels investigations if he cannot "win" them, even if he did later say he had misspoken. (HT, p. 443.)

Second, Mr. Close's statement about the day of the accident was not submitted to the investigation as evidence. Mr. Close's statement said he had noticed Complainant limping but hadn't thought anything of it at the time. (JX 4, p. 1.) Mr. Lovin took Mr. Close's statement to mean that nothing out of the ordinary had been apparent on that day, because people just limp sometimes and it was "pretty common" for employees to come to work "a little lame" from weekend activities. (HT, p. 438.) When Mr. Lovin was being asked about Mr. Close's statement and whether he had kept the statements he collected to bring to the investigation, he initially said that the statements "would have no bearing on the investigation," despite the fact that he had introduced the statements from Mr. St. Onge and Mr. Royal – but not Mr. Close – as exhibits at the investigation. (HT, p. 439.) Mr. Lederer also did not see why a statement from Complainant's co-worker on the date of the injury would be relevant to the investigation because, in his view, "the investigation, again, had nothing to do with the injury." (HT, p. 93.) But given the BNSF managers' disagreements about whether Complainant should have known he was injured immediately or whether it was the sort of injury that would qualify for the PEPA provision, it seems quite relevant whether another employee noticed anything untoward.

These events, while somewhat concerning, do not rise raise serious concerns in the face of the overall evidence that the process proceeded regularly.

2. The Content and Purpose of BNSF's Injury Reporting Rules

Following the ARB in *DeFrancesco*, I first inquire into the purpose of the rules applied to Complainant and ask whether they are vague or subject to manipulation. Here, the interplay of MSR S-28.2.5 and the PEPA provision is obscured both by the location of the PEPA provision in an appendix and the fact that some of its key terms are undefined. BNSF managers do not agree on the meaning and application of the PEPA 72-hour provision. They have different understandings on the meaning of the term "muscular skeletal injury"; on what type of event might cause a muscular skeletal injury as opposed to an injury that requires immediate reporting; and on what qualifies as an injury that requires reporting at all. Managers' disagreements on meaning demonstrate that the rules are vague and subject to manipulation simply because of that lack of clarity. Furthermore, managers either fail to understand the purpose of the PEPA

provision – or, if their understanding of its purpose is correct, they are unaware or unconcerned that it works counter to that purpose.

i. The meaning of key terms

Managers do not know or do not agree on what a "muscular skeletal injury" is, though it is the key to the provision's application. The term is not defined within the PEPA policy or in MSR S-28.2.5's immediate reporting rule. (JX 15, pp. 1-6; JX 13, p. 1; HT, p. 30.) None of the managers said they had been trained on the term's meaning, and Mr. Lederer did not recall BNSF's training on the policy addressing the term. (HT, p. 31.) Mr. Lederer's testimony on the meaning of "muscular skeletal injury" was as follows:

> Q: And your understanding of what a muscular skeletal injury is anything but a broken bone?
> A: I have no idea what a muscular skeleton injury amounts to, but I would agree, anything but a broken bone, yeah.
> Q: Okay. So something that could be a tear or a strain?
> A: Probably. I'm not a doctor, but, yeah.

(HT, pp. 29-30.) He agreed that "the employee has to make an assessment as to whether or not what he's feeling is a muscular skeletal injury." (*Id.* at 30.) (Mr. Lederer did not explain how an employee was supposed to know how to make such an assessment when he himself "had no idea" what it meant other than excluding broken bones.) Mr. Cargill thought it covered "certain types of soft tissue injuries" like arthritis or muscle and ligament strains, but not broken bones. (*Id.* at 120, 132.) Mr. Bertholf thought that the PEPA provision applied to cumulative trauma or repetitive motion injuries, the sort of thing where you wake up and are sore but don't know what caused it, or have back pain but don't recall when it started to cause a problem. (HT, p. 389-90.) Mr. Lovin believed that the PEPA provision applied to "soft tissue, kind of muscular skeletal injuries." (HT, p. 453.) His understanding was that these are the sort of injuries where someone woke up with an ache or pain in a specific area but didn't know why.

Mr. Bertholf testified that he had never been given any sort of training on how to apply the provision or how to define "muscular skeletal." (HT, p. 400.) Asked whether anyone had ever told him "muscular skeletal" meant only cumulative trauma, he said, "We've referred to that over the years, yes" and said that "we" had discussed it with the BNSF medical department, apparently during a review process that occurs for every injury. (HT, pp. 399-400.) However, he had never told people at Interbay that "muscular skeletal" referred only to cumulative trauma, and he did not recall whether he had ever told Mr. Lovin that. (HT, p. 400.) Nobody at BNSF had ever explained to Mr. Lovin what a muscular skeletal injury was, either, but he said that he'd "been kind of trained informally" that it meant situations where someone wakes up with an unexpected ache.[53] (HT, pp. 453-54.) Mr. Holm's understanding of a muscular-skeletal injury was that it was "like a sprain or some kind." He had never received any training or had any

[53] Mr. Lovin had no experience with applying the PEPA 72-hour provision prior to this incident, because this was the first investigation he had been involved with that had to do with injury reporting methods. (HT, p. 482.) Although he was not one of the managers involved in the ultimate decision to issue discipline, his lack of experience with these rules in 13 years of employment at BNSF suggests that they do not frequently arise for other managers, either.

discussions with BNSF management about how to determine what a muscular-skeletal injury was. (HT, pp. 324-25.) According to the managers' testimony, BNSF simply did not define "muscular skeletal injury" or train its managers on how to apply it in practice.[54] The managers shared some similar understandings – such as their agreement that it did not include broken bones – but defined it in different terms, sometimes by different medical terms and sometimes by how the injury was discovered.

Mr. Cargill believed that the PEPA provision existed "to account for certain types of soft tissue injuries, where an employee may feel a tweak or some type of a strain, but not necessarily know or understand that there is an injury at that time." (HT, pp. 120-21.) The additional time would allow the employee to "give it some time, maybe to get some rest, to sleep on it, and see how it feels the next day." (HT, p. 121.) Mr. Holm also believed that the PEPA provision as a whole was implemented because sometimes employees tweak an elbow or a knee and the rule gives them time to see whether it resolves on its own or to find out what it is. (HT, p. 318.)

This disagreement about the meaning of a "muscular skeletal" injury is not just about the type of injury – that is, whether it is a strain or a broken bone. Part of the disagreement is about how suddenly or noticeably the injury occurs. The PEPA provision requires a muscular-skeletal injury to be reported within 72 hours of the "probable triggering event." (JX 15, p. 5.) Mr. Bertholf believed that a "triggering event" was only something like feeling pain without knowing why, as opposed to a "specific event," which must be reported immediately. (HT, pp. 392-94.) Mr. Lovin also testified that injuries must be reported immediately "if you have a specific event" and that a muscular skeletal injury is an injury "where there was no specific event." (HT, p. 447.) According to him, a specific event is when "something happens and you immediately have some kind of an effect." (HT, p. 447.) However, he then said that a "triggering event," as referred to in the policy, is a specific event. (HT, p. 447.) (By this understanding, the 72-hour provision would never apply to an injury because any "triggering event" that might cause a qualifying muscular-skeletal injury would also be a "specific event" that required immediate reporting.)

Mr. Lovin's opinion on whether Complainant's injury involved a triggering event or a specific event changed over time. At the investigation, Mr. Lovin testified that he believed Complainant's injury was a muscular-skeletal injury and that it would fall under the 72-hour provision. (JX 9, p. 18.) However, at the hearing he testified that his opinion had changed because he now believed there was a triggering or specific event and the injury was not a soft tissue or muscular skeletal injury, such that the provision would not apply: A pop in the knee is a "specific event." (HT, pp. 451-53, 472.) Mr. Lovin's changed opinion matched Mr. Bertholf's view that Complainant's injury did not qualify for the PEPA provision because it was caused by a "specific event" requiring immediate reporting, not by a "triggering event" as discussed in PEPA. Regardless of why Mr. Lovin's opinion changed, it is at least apparent that BNSF did not have a clear or agreed-upon meaning for the provision.

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[54] The source of some of these interpretations may be Management Instruction No. 70, which refers to a 72-hour period to notify a supervisor of "muscular aches and pains from 'routine' work that do not appear to be serious when they first occur." (RX E, p. 2.) That document repeats the three requirements contained in the PEPA provision and says that employees will not be disciplined for late reporting under those circumstances, but it does not explicitly refer to PEPA, nor does the PEPA provision indicate that its meaning is further discussed in Management Instruction No. 70 or anywhere else.

Mr. Bertholf saw Complainant's experience of feeling a pop or pain in his knee while standing up as a specific event that required immediate reporting, and he did not believe the PEPA provision applied to his case. (HT, pp. 388-90.) Given his opinion that Complainant did not qualify for the PEPA provision because there was a "specific event," Mr. Bertholf evidently believes that Complainant should have known he was injured when he felt the pop in his knee. But if I credit Complainant's statements that he had a good-faith belief that he was not injured at the time it occurred (and therefore did not believe there was anything to report), then Mr. Bertholf's position must be that the rules require Complainant to face discipline for late reporting even though he did not yet know he was injured at the time he was supposedly required to report the injury.

This is especially concerning because there is also a lack of clarity about what types of harm count as injuries that require reporting. Respondent argues that Complainant should have known immediately that he was injured, and they act as though the meaning of "injury" is self-evident. (RB, p. 16.) But there must be some line between things that are and are not injuries. BNSF cannot expect employees to report every minor bump or paper cut, so the reporting rules rely on someone's judgment of what counts as an injury that must be reported under those rules. Mr. Bertholf's understanding of the immediate reporting rule is "If you get hurt, you report," and the kind of injury that needs to be reported is any time "an employee feels that they were injured." (HT, p. 415.) This does not help clarify the rule or guide employees in understanding how to comply with it because reasonable people can differ on whether certain experiences count as an injury. Mr. Lovin said that BNSF employees were not expected to report every "normal sprain" or bump or bruise they felt at work, though he himself would report being sore. (HT, p. 456.) Mr. Lovin agreed that any time it's serious enough to see a doctor, it's probably something that needs to be reported, and that this is "just an affirmation of BNSF's rule to report all injuries immediately." (HT, pp. 482-83) However, he acknowledged that, earlier in his career, as a car man working on a different railroad, there were times that he did things like bashing his thumb and chose not to report it. (HT, pp. 458, 485-86.) In this case, Complainant did not "feel he was injured" when his knee popped on Friday morning, yet Mr. Bertholf believes that he still should have known he needed to report the experience immediately.

Mr. Bertholf said that if he needed help figuring out the application of the PEPA provision, he would seek help from his supervisor or the BNSF medical department. (HT, p. 416.) He said similar resources are also available to employees like Complainant, who could seek guidance from any of the supervisors, from himself, or from their local union chairman. (HT, p. 417.) He evidently believed that the way for an employee to determine whether a specific event had occurred (and therefore whether the 72-hour rule applied) was for the employee to contact their supervisor and discuss it. (HT, pp. 389-90.) Of course, this approach essentially requires the employee to report the injury in order to find out how to comply with the injury reporting rule in his situation – something not preventable by expecting employees to ask in advance because the particular facts of a situation that might give rise to questions will often not be known until an injury has occurred, and if the employee has already missed a step because the rule is not well publicized or understood, he will have no opportunity to comply despite an honest effort to do so. This also ignores the possibility that an employee who is afraid of retaliation for reporting an injury is probably also afraid to ask the same supervisor whether or how to report an injury. Furthermore, given the supervisors' lack of knowledge or obvious confusion on what injuries and events qualify for the PEPA provision, this approach has its

limits, and the record does not meaningfully address whether employees who followed a supervisor's incorrect advice would nevertheless be disciplined for it.[55]

Complainant argues that BNSF provided contradictory and confusing shifting explanations for his discipline, with the Notice of Investigation, disciplinary letter, and different managers variously stating that his discipline was warranted under MSR S-28.2.5, the PEPA provision, or both. He points out that managers disagreed on whether the PEPA provision applied to Complainant at all. Respondent argues that it did not provide shifting explanations and that its explanation in the Notice of Investigation was perfectly consistent. (RB, pp. 15-16.) Complainant's characterization of the situation is more accurate. BNSF did not provide shifting explanations in the traditional sense, where the explanation changes over time. Instead, the record shows that none of the managers had a particularly clear understanding of the meaning and application of the PEPA provision, let alone a single, consistent understanding shared by all of them. Their explanations of the discipline were different or contradictory because of this confusion about what the rules meant, not because they were changing their story.

To begin with, the discipline letter does not make it clear how the provisions interact. The first sentence states that Complainant was assessed discipline "for [his] failure to contact the appropriate supervisor prior to seeking medical treatment" as a result of his injury. (JX 11, p. 1.) After two short sentences describing the applicable review period, it says, "It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of MSR S-28.2.5 Reporting." (*Id.*) Mr. Cargill believed that the letter could have omitted the first statement and simply said Complainant was disciplined for late reporting because he had violated MSR S-28.2.5's immediate reporting rule; he thought that including the additional information about failing to contact his supervisor before treatment was "more clear" because it was trying to communicate to Complainant why he was found to have reported late. (HT, pp. 131-32.)

Mr. Larsen's post-investigation email recommending a conclusion and proposing discipline noted that the evidence showed Complainant had received copies of both the PEPA policy and a rulebook, then concluded, "Based on testimony in the transcript, [Complainant] is in violation of Rule S-28.2.5 Reporting, when he did not advise the appropriate supervisor prior to seeking medical attention." (CX 10, p. 3.) This statement conflates MRS S-28.2.5 and the PEPA provision; it could mean that Mr. Larsen's view was that Complainant had violated the immediate reporting rule because he did not qualify for the PEPA provision's extension of time, or it could reflect Mr. Bertholf saw the PEPA policy as primarily a guideline for discipline. (HT, p. 387.) He did not see the 72-hour provision referred to in PEPA as an exception to the MSR immediate reporting rule. (HT, pp. 388, 401-02.) He also testified that the 72-hour provision is not itself a rule, but part of a set of discipline guidelines. (HT, p. 388, 401.) Mr. Bertholf said he

[55] Mr. Cargill mentioned a case where he had recommended no discipline, in which an employee charged with late reporting said his supervisor had told him he didn't have to report his injury immediately. But even there, the 'no discipline' recommendation was because the supervisor wasn't brought in to testify at the investigation, not because the employee had simply been following instructions. Furthermore, the ultimate decision not to issue discipline was based on that procedural unfairness and did not come until the PEPA team was reviewing the proposed discipline. (HT, pp. 101-02.) If the bosses don't have a uniform understanding of the rules, and employees can still be subject to discipline even if they are following a supervisor's instructions, it is especially problematic that the supervisors do not understand the rules.

was not involved with the investigation, so he could not explain why the letter assessing discipline listed violation of that provision as a basis for discipline, despite the fact that he himself did not consider it a rule. (HT, pp. 395-98.)

Mr. Lederer said Complainant was disciplined for late reporting because, once he failed to comply with all three portions of the PEPA 72-hour exception, the exception didn't apply – making Complainant liable for having failed to report his injury immediately (even though he did not believe he was injured at the time). (HT, p. 80.) Yet he later said that Complainant "missed part of [the PEPA provision] and that's what the discipline was for." (HT, p. 94.) Mr. Cargill believed the PEPA provision did not apply here because Complainant had not met all of its requirements, so he said that Complainant had committed a straightforward violation MSR S-28.2.5 by failing to immediately report his injury. (HT, pp. 127-30.) Yet when he emailed Mr. Lederer and Mr. Bertholf explaining the results of the PEPA team's review, he wrote, "The charges were proven with substantial evidence, as [Complainant] admitted he did not follow the rule which requires an employee to report an injury to his supervisor before seeking medical treatment." (CX 10, p. 1.) Mr. Holm also saw the PEPA provision as "a rule for" non-acute, possible soft-tissue injuries. (HT, p. 317.)

These statements collectively show that managers simply did not agree on how to explain the basis for Complainant's discipline, beyond a general agreement that his injury report had violated a rule about when and how to report. They also show that, even if the 72-hr PEPA provision is not a rule in form, and some managers consider it an exception to the immediate reporting rule or just a disciplinary guideline, other managers treat it as a rule that can be violated, despite the fact that few people would expect to find an additional injury-reporting rule in an appendix to a general disciplinary policy.

ii. Purpose of the PEPA provision

The purpose of the full PEPA provision is also not clear, and BNSF managers' explanations do not illuminate it. Their explanations generally focused on the importance of fixing any safety violation that may have caused an injury and on making sure injured employees receive medical care. Mr. Lederer said that the goals of the injury reporting rules were to ensure that the employee is getting medical attention and to allow BNSF to correct whatever caused the injury. (HT, pp. 80-81.) Mr. Bertholf said part of the purpose for the reporting rule and PEPA policy is to ensure that the injured employee gets medical treatment. (HT, p. 403.) However, no one was able to explain why the PEPA provision requires employees to contact a supervisor before seeing a doctor.

Mr. Bertholf also believed that the purpose of the PEPA provision requiring employees to call their supervisor before seeking medical attention was so that BNSF could be involved in the employee's medical care. (HT, p. 402.) He was questioned on why an employee would be disciplined for calling a supervisor after getting medical treatment, if policy's goal is to ensure that the employee gets medical treatment, and he only replied that even though the goal was accomplished, the employee had not followed the entire reporting process. (HT, pp. 403-40.) Mr. Bertholf said the reporting process was "absolutely not" more important than the employee getting medical treatment, but could not explain why the rules were written such that it was a violation if an employee gets medical treatment first. (HT, p. 404.)

Mr. Lovin said he believed the reason behind the requirement to notify a supervisor before seeing a doctor is "[b]ecause the supervisor should know if you're going to the doctor, so that if you have a condition at work, he can get in front of it and so that no one else gets hurt." (HT, p. 448.) If there was a hazardous condition, they needed to be able to correct it immediately, and even if there wasn't a hazardous condition, it was still important "because the employees are under our care as long as they're working and we want to be responsible for them." (HT, p. 454.) When asked again, he repeated that he would want to know if the condition that caused the injury still existed, but he also said that he didn't write the policy and "[t]hat's the way it is." (HT, pp. 448-49.) Yet Mr. Lovin agreed that he did not know what could be done to prevent someone from tearing their meniscus while standing up and that in Complainant's case no corrective action could have been taken. (HT, p. 455.) He also agreed that Complainant was getting medical care, so the concern about making sure the employee was being treated was taken care of. (HT, p. 456.)

Similar to Mr. Lovin, Mr. Lederer said that it was wrong for employees to receive medical care before calling their supervisor because "the whole scenario and scene has changed" with respect to safety issues; "three days later, it's all changed." (HT, p. 81.) When pressed on why, if the goal of ensuring the employee gets medical care is already met, it was still a violation not to have told a supervisor first, Mr. Lederer could only say, "Because it's written." (HT, p. 82.) He was later asked why Complainant's deviation from policy in seeing a doctor before calling his supervisor was so important that it deserved discipline, and his response was simply, "Because there's three components of it." (HT, p. 93.)

Mr. Holm did not know the reason for requiring employees to notify management before seeing a doctor. He personally disagreed with it, because he felt like the obligation restricted an employee's privilege and freedom to go to a doctor and take care of himself, possibly delaying treatment.[56] (HT, p. 328.) Mr. Cargill thought that in a real emergency situation, where reporting the injury before going to the hospital might be burdensome, the company would see things differently and would not "hold an employee accountable for something like that." In his view, the policy was not intended to be unfair when there are "unusual circumstances," but in this case he did not see the circumstances as deserving such lenience. (HT, p. 136.)

When asked why employees with off-the-job injuries would not be disciplined for seeing a doctor before telling their supervisor, Mr. Lederer explained that was because "[t]here would be nothing that we would be able to follow up on. What happened work [sic] is there a danger to anybody else? Is there some sort of a safety issue we need to address? It would be something that obviously happened on the property." (HT, p. 33.)

This is an excellent justification for requiring injuries to be reported immediately. For example, on one occasion a piece of metal broke off from the equipment an Interbay employee was working with and wounded his shoulder. He immediately went to the manager's office and reported the injury, and BNSF examined the equipment to figure out what had gone wrong and whether something needed to be changed to prevent future incidents. The employee was not

[56] Of course, here Respondent's questioning made it clear that Complainant had multiple opportunities to call before he went to the doctor, none of which would have delayed his actual receipt of care. (HT, pp. 200-01, 204, 206, 211-12, 214-17, 221-25.)

investigated or disciplined. (HT, pp. 350-51, 363-64.) Mr. Holm contrasted that situation with Complainant's, saying that short of elevating the rails such that workers didn't need to bend over, there was nothing BNSF could do to evaluate or address the cause of Complainant's injury. (HT, p. 364.) In the context of muscular-skeletal injuries which are not immediately identified, and which managers believe are the sort of injury that an employee first notices when they wake up sore the next day, managers' safety explanation provides no justification for punishing employees who see a doctor before calling their supervisor within the required time period.

Although there is some disagreement about how the rules applied and whether Complainant was disciplined for violating MSR S-28.2.5 or the PEPA exception, managers seem to agree that Complainant only received discipline because he saw a doctor before informing his supervisor; had Complainant taken the exact same actions but called Mr. Lovin immediately prior to going to the emergency room – or waited to go to the emergency room until after he had called Mr. Lovin on Sunday – he would have been in compliance with the PEPA exception and would not have been subject to discipline. So Respondent's discussion of the reasons it needs to know about injuries right away, and its purportedly consistent decisions to discipline employees for failing to immediately report non-accident injuries, miss the point in this case: the facts and rule provision on which Complainant's discipline rest are the order of his actions and PEPA's requirement that he do things in a particular order.

Ultimately, the provision itself doesn't further the medical-care purpose BNSF's managers assign to it and may work counter to that purpose. And in the factual circumstances several managers believe the provision is intended to account for – situations where employees wake up sore and don't know exactly why – or circumstances like Complainant's, there is no safety concern to fix, so the rule also does not further that purpose. So, even though the investigation was aimed at what BNSF's managers saw as a real violation of a time-and-manner rule and it was not a pretext for personal animus over the injury report itself, I cannot say that enforcement of the "report before treatment" PEPA provision does anything other than punish an employee for seeking medical care prior to reporting an injury that BNSF otherwise thinks the employee should have 72 hours to report, or for reporting an injury that the employee wasn't initially sure was an injury at all and for which he sought medical care to determine his condition.

iii. Contradictions and risk of retaliation

BNSF discusses the PEPA provision as though it only applies when an employee does not immediately know that he is injured – as though an employee who feels pain and knows or should know that it is an injury is always required to report it immediately and cannot qualify for the provision. (RB, p. 16, n. 79.) But nothing in the provision says that. Mr. Cargill clearly thinks that Complainant was wrong not to report an injury on Saturday morning, when he should have known he was injured because he had to take pain medication and call out of work. (HT, p. 120.) But it does not appear from the terms of the relevant policies that this matters. The PEPA 72-hour provision does not state that an employee must report as soon as he knows he is injured, or that an employee who knew he had a muscular-skeletal injury right away would be disqualified from the PEPA exception even if he followed it to the letter. Despite some managers' interpretation of "muscular-skeletal injury" to refer only to situations where an employee wakes up a day or two after work and feels pain, there is no definition of the term that

would exclude sprains or strains that hurt immediately. Nor does the provision require employees to report *as soon as they know they are injured but no later than* 72 hours after a triggering event. To someone simply reading the PEPA provision, as long as a muscular-skeletal injury is reported within the 72 hours and before seeking medical care, the provision should apply. Mr. Cargill's interpretation adds additional provisions to the written rules.

Furthermore, Mr. Cargill evidently subscribes to an interpretation of the rules which it could be impossible for an employee to comply with. He believes that the PEPA exception exists to account for soft-tissue injury situations where an employee feel some type of tweak or strain but does not immediately know it's an injury. (HT, p. 121.) But part of his reason for believing that Complainant's rule violation warranted discipline was that on Saturday morning Complainant was in such severe pain that he had to take pain medicine, almost fell over, and had to call in sick to work, and "at that point, that's not the type of situation that the 72-hour rule, I think, would encompass. At that point, I would think with all of that going on, he should know that he was injured." (HT, p. 122.) He believed that Complainant's feeling such severe pain on the second day meant that the PEPA provision did not apply to the injury, and that Complainant could therefore be in trouble for not having reported it immediately. (*Id.*) The implication seems to be that if Complainant's knee had hurt less on Saturday, the PEPA provision would have applied and he would not be in trouble for violating the immediate reporting rule.

Under Cargill's view, then, an employee could feel a tweak or strain; decide not to report it because he felt very little pain and believed it would go away (and that, if it didn't, he would be covered by the PEPA exception); feel increasing pain over time and decide to go to the doctor 48 hours later, even calling his supervisor first; yet, if the pain was severe enough that he absolutely should have known he was injured after 24 hours, he would be subject to discipline for not having reported it when he first felt the tweak – even though at *that* point he was not in pain and did not believe he was injured. Mr. Cargill thus interpreted the reporting rules such that an employee could be disciplined for failing to immediately report an injury even though he did not know he was injured at the time Mr. Cargill expected him to report it. This makes no sense. Why should an employee's decision not to report something he feels at Time A be rendered a violation or not a violation of the reporting rules by events at Time B? Employees are only required to report injuries, but if later events can turn a minor bump into an injury that was *only* permissible to report immediately, employees should report every bump or paper cut in case it worsens over time, to prevent unwitting violation of the rules.

BNSF managers' attitudes toward protected activity are also relevant here. As discussed earlier, the overall atmosphere toward protected activity among managers was mixed. In general, they seem to understand that employees must not be disciplined for reporting injuries. For example, Mr. Lederer said that retaliation or discrimination against an employee who reports an injury was "unacceptable" for him or anyone who works under him, and doing so could "absolutely" cost him his job. (HT, p. 74.) Yet testimony from Mr. Holm and Complainant indicates that managers could be upset by injury reports and saw them as a nuisance that took up time and created extra work. (HT, pp. 175, 336.) And, importantly, managers seemed to understand the retaliation protections only in the context of an employee being disciplined for an injury or for a safety violation that was related to an injury. They were almost uniformly unaware that rules punishing the time or manner of injury reporting might implicate the same concerns. Mr. Lederer said that he had not looked at the whistleblower rules as he was

evaluating Complainant's discipline because "it wasn't necessary . . . [because] it was pretty cut and dry from his testimony that he violated the rule and didn't – admitted to not knowing what it was." (HT, pp. 50-51.) Even though Mr. Lederer mistakenly believed that Mr. Cargill had expressed FRSA-related concerns,[57] Mr. Lederer still was not concerned about retaliation because of Complainant's admission that he had violated the rule. (HT, pp. 52, 70, 77-78, 95.) Mr. Bertholf was similarly unconcerned that Complainant's situation might trigger whistleblower concerns. He explained that the investigation was based on how he reported the injury, not on the fact that he had the injury, so in his view "an investigation was not being scheduled as a result of the injury." (HT, pp. 407-08.) These responses showed no awareness that retaliation might be related to an injury report, not just the injury itself, or that enforcement of time and manner rules might be an area of concern under the FRSA.

Mr. Cargill was the sole exception, because he realized that the connection of an injury to the violation deserved "additional scrutiny." (HT, pp. 126-27.) Even so, in reviewing Complainant's case Mr. Cargill did not recall personally looking at the FRSA or Section 20109 provisions to consider whether BNSF's time and manner rules might implicate them. Instead, he said "[t]hat would have been why I consulted with the law department. That's their area of expertise." (HT, pp. 118-19.) (The law department was involved in the wording of the charge letter, and Mr. Cargill said that he also consulted with them in reviewing the proposed discipline.) (HT, pp. 40, 104, 117.)

The managers' lack of awareness makes sense because it reflects the company's apparent focus in preventing retaliation. Manager training on injury reporting made it clear that retaliation was unacceptable, but it did not go into any detail about what might count as retaliation. Less than two years before Complainant's injury, BNSF – laudably – added an additional level of review for situations where an employee is subject to discipline for a rule violation that led to an injury, but it evidently did not do so where the time or manner of reporting is at issue. (RX S, p. 11.) Similarly, the manager training materials submitted by BNSF only flag those situations where an employee is subject to potential discipline related to *the incident giving rise to* the injury report, and tell managers to ask themselves whether an investigation would still be held "if there was not *an injury*." (RX S, p. 11 (emphasis added).) Mr. Bertholf testified that he had not considered the question in this case. (HT, p. 429.) Of course, it may well not have occurred to Mr. Bertholf to ask the question because the training materials and the question itself essentially assume that any potentially-retaliatory discipline is based on the events that caused the injury, and not based on the injury report. Similarly, Mr. Lederer testified that he had "not exactly" asked himself the question because the facts surrounding the injury were already part of the investigation and if there hadn't been an injury, there couldn't have been an investigation. (HT, pp. 57-58.) And he said that the fact that the only reason an investigation took place was because of an injury report did not give him any concern. (*Id.* at 58.) Based on the record before me, BNSF's training for managers does nothing to make them aware that discipline based on an injury report itself can also pose a risk of unlawful retaliation.

[57] Mr. Lederer believed that Mr. Cargill's statement about the risk of Complainant's discipline being reduced at arbitration was about FRSA concerns. (HT, pp. 70, 77.) But Mr. Cargill said he had been referring to the employee's union-based right of appeal to the Public Law Board and said that he did not discuss whistleblower concerns with Mr. Lederer. (HT, pp. 105-08.) Public Law Board appeals concern whether the employer's and union's processes have been followed and whether the disciplinary decision is supported by substantial evidence.

I also note that Mr. Cargill – one of the key employees charged with ensuring that the PEPA policy was implemented in a manner that is fair, consistent, and in compliance with the law – had an unrealistic view of what would discourage employees from reporting injuries. Mr. Cargill did not find either Complainant or Mr. Holm credible when they said that they had not known they were required to call a supervisor before seeing a doctor for a muscular-skeletal injury. (HT, p. 133.) Having dismissed this evidence of employee confusion or ignorance about details of the injury reporting rules, Mr. Cargill claimed that employees would not be discouraged from reporting injuries if they knew that they could be disciplined for not getting the reporting rules exactly right. He thought that all employees were provided with the rules and it was made clear that injured employees must comply with them, so their seeing discipline issued for failure to do so wouldn't "discourage somebody from reporting an injury at all."[58] (HT, p. 135.) Mr. Cargill had worked on the PEPA team at corporate headquarters in Texas since BNSF hired him and had been a lawyer before that; as far as the record shows, he had never worked at a BNSF railyard, so the foundation for his beliefs about employee behavior is not clear. (HT, p. 99.)

3. BNSF's Enforcement of Injury Reporting Rules and Their Application to Complainant

The ARB's precedent also asks me to consider whether BNSF routinely monitors compliance with the rules and applies them to employees, and whether it consistently assigns equivalent discipline to employees who violate the rule (or a comparable rule) without engaging in protected activity. *DeFrancesco II*, ARB No. 13-057, at 11-12. Respondent argues that Complainant's discipline was solely based on his failure to report his injury in the time and manner required by BNSF's injury reporting rules. It claims that at trial it introduced evidence showing that any employee who failed to make a required report on time would have faced the same discipline. (RB, pp. 20-21.) However, I saw very little discussion of that subject at the hearing, and BSNF's brief cites just three portions of the record, none of which have anything to do with how consistently BNSF monitors and enforces its accident-reporting rule in the absence of injuries or injury reports. The evidence cited does show that the reporting rule, MSR S-28.2.5, requires immediate reporting of on- and off-track accidents without reference to whether an injury was caused, but the existence of the rule demonstrates nothing about its enforcement. BNSF also asserts that the injury-reporting rules are applied mechanically to all employees in an effort to prevent retaliation, arguing that "the only way to ensure that rules are applied consistently, and that managers are punishing legitimate rule violations and not retaliating, is for managers to mechanically apply rules to all applicable situations." (RB, p. 22.) But, as I have just reviewed, BNSF's rules, managers, and employees lack clarity on what injuries qualify for the PEPA provision's exception to the immediate reporting rule and even on when injuries are severe enough to require reporting, so "mechanical" application of a vague and poorly-understood rule cannot completely prevent retaliation based on animus, nor does it address whether the rule itself therefore leads to retaliation.

[58] Mr. Cargill's full statement was, "I kind of think all employees are provided with what the rules are. It's made readily available that if you are injured, you have to comply with what the rule says. So I don't think that that discourages somebody from reporting an injury at all. And I think most of the employees understand that and they want to do the right thing." (HT, p. 135.)

Mr. Lederer confirmed that BNSF requires immediate reporting of non-injury accidents as well as of injuries and holds employees accountable for failing to immediately report non-injury accidents and incidents. (HT, pp. 63-64.) Mr. Cargill testified that he had searched the database of prior discipline and found "five or six times" where BSNF had issued discipline for late reporting of an accident that did not involve an injury report of any kind. (HT, pp. 111-12.) However, no detail was given, so it is impossible to make any sort of comparison.

Respondent also provided 29 employee transcripts, which it characterized as comparators. (RX I.) Of these transcripts, 23 showed employees who had at least one injury between 2009 and 2016, but with no connected discipline.[59] (RX I, pp. 27-134.) Only 7 of these employees worked at Interbay, but none of them were in the same craft at Complainant and they had different managers. (HT, p. 89; RX I, pp. 103, 106, 109, 115, 121, 122, 131.) At trial, BNSF pointed to several of these as examples of employees who reported injuries but were not disciplined afterwards. (HT, pp. 72-73.)

The other 6 transcripts showed employees who had been disciplined for failure to promptly report "an on track incident resulting in a collision." (RX I, pp. 1-26.) The disciplinary record for each employee shows the same date and time of incident and lists the same train or location, indicating that all 6 were involved in the same accident and were disciplined for failing to report it – perhaps having collectively attempted to hide it from their superiors. (*Id.* at 3, 6, 10, 15, 18, 22.) The accident evidently took place in California, as all of the disciplined employees were stationed in either Stockton or Richmond, California at the time. (RX I, pp. 1-26.) If these are an attempt to show that BNSF routinely disciplines employees for failure to report non-injury accidents, it fails partly because multiple disciplines connected to one 2013 incident demonstrate very little about routine. It also fails because the incident did involve injuries and injury reports: Two of the disciplined employees incurred on-duty injuries on the same day as the accident, one of which was an FRA-reportable injury.[60] (*Id.* at 3, 22.)

There are also a number of problems with the 23 purported comparators who had injuries but no discipline. First, BNSF did not adequately explain the criteria by which the proposed comparators were chosen. They are not a complete list of injuries in Complainant's region. Mr. Lederer testified that the exhibit did not reflect every injury that had occurred in his purview and during his tenure. According to him, BNSF's counsel determined the selection of records. (HT, p. 88.) Mr. Cargill testified differently, saying that the transcripts had been compiled by an employee who reports to him for use in a prior FRSA case, *Meyer v. BNSF*. (HT, pp. 114-15.) He believed that the collection was intended to be a representative sample of all the individuals in the Northwest Division who had been injured during a certain time period and that his staff member had pulled every fifth employee record from that group, though he did not know of the search criteria used. (HT, pp. 115, 122-23.)

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[59] Of these employees, 21 had discipline only prior to their first injury or had no discipline whatsoever. One received discipline more than 7 years after an injury (RX I, p. 88.) The last two were disciplined between 6 months and two years after an injury, but in each case the injury was not reportable to the FRA, the violation was facially unrelated to the injury, and the employee waived the investigation. (RX I, pp. 115.)

[60] One of the two injured employees was dismissed, but his injury was not considered reportable to the FRA. (RX I, p. 22.) Both dismissed employees were still within the review period of a prior Level S violation at the time of the incident, so they may have been dismissed not because their conduct was in itself more egregious but by operation of the progressive discipline PEPA provision.

Mr. Lederer's belief that BNSF's counsel selected the records might be accurate, but it tells me nothing I can use to evaluate the comparators. Mr. Cargill's explanation would be more useful, but I find it highly unlikely that it is a fully accurate description of the exhibit's origin. First, four of the employee transcripts showed no injuries whatsoever during the individual's employment with BNSF, so they cannot have been pulled as a sample of all individuals injured during a particular time period. (RX I, pp. 6-19.) These four individuals were among the six disciplined for late reporting of the same collision, so those six employee transcripts were likely included as examples of late reporting, rather than as part of a sample of injured employees. Second, the dates of the printouts do not make sense in the context of the *Meyer* case referenced by Mr. Cargill. The *Meyer* hearing took place on December 21, 2015, and no exhibits were admitted after that date; the decision was issued on February 27, 2017.[61] *Meyer v. BNSF Railway Co.*, ALJ No. 2015-FRS-00024 (ALJ Feb. 27, 2017). But the transcripts in RX I have varying printout dates of 4/15/2014; 12/11/2015; 4/11/2016; 4/18/2016; and 4/10/2017. Some of these transcripts were printed in April 2016 and April 2017, so they could not have been compiled with the others for use in the *Meyer* hearing. In particular, the eight Interbay or Seattle employees' transcripts were all printed in April 2016, while five of the six same-collision transcripts were printed in April 2017. (RX I, pp. 1-19, 104-34.) I therefore have no basis to consider the transcripts as a representative sample of anything, nor any real idea of how they were selected. Their value in showing BNSF's usual practice is therefore low.[62]

Furthermore, the employee transcripts provide very limited information. Each transcript includes a discipline record and a personal injury record. The personal injury record lists the date of injury; injury, including body part and type (e.g. laceration or sprain); whether it occurred on duty; whether it was reportable to the FRA; and number of work days lost. It does not indicate how or when the injury was reported to BNSF. (HT, pp. 90, 125; RX I.) The discipline record lists the discipline date, level, discipline type, review period, violation date, and when applicable, the investigation date. It also contains a short description of each violation, e.g. "inappropriate conduct and failure to promptly report to appropriate supervisor an on track incident resulting in collision at [time] while working the [train or location]." If the investigation was waived, this is indicated as well. If an investigation was scheduled but then cancelled before it was held without the employee accepting a waiver, it would not be reflected on the employee's transcript. (HT, pp. 90, 125.) Similarly, if an employee is offered alternative handling and completes the action plan, the discipline itself is waived, and it evidently does not appear on the transcript at all.[63] (JX 17, p. 12.) It is not clear whether an investigation that resulted in a finding that the employee had not committed a violation would appear on the transcript, either; after all, no discipline would have been imposed.

Mr. Cargill testified that the records in RX I show that most employees who reported injuries did not have contemporaneous discipline, and that this matched his findings from an analysis of employee records performed several years earlier examining all employees who had reported an injury in 2012. (HT, pp. 113, 116.) He said that his earlier analysis showed that less

[61] I was the ALJ assigned to *Meyer*.

[62] This is not a finding that the transcripts are affirmatively *unrepresentative* of BNSF's practices, simply a statement that I have not been provided with the necessary information to evaluate and then rely on them.

[63] Each transcript either lists the discipline that was issued or says that there was "no data for discipline available," so if discipline was not issued there seems to be no record of the alternative handling on the transcript, probably one of the benefits of completing that process instead of undergoing the disciplinary process.

than 5% of the employees who reported personal injuries in 2012 also received discipline "around the same time." (Mr. Cargill testified that the discipline was not issued *because* the employees had reported discipline, only that the discipline was "contemporaneous.") (*Id.* at 113-14.) Again, there are two main problems with this testimony as evidence that Respondent did not retaliate against Complainant and would have disciplined him regardless of his injury. First, retaliatory discipline is not necessarily issued contemporaneously with the injury report, as other cases show. *E.g. Brucker v. BNSF Railway Co.*, ARB No. 14-071, ALJ No. 2013-FRS-00070, slip op. at 12-13 (ARB July 29, 2016) (remanding case for ALJ to consider whether "continuing fallout" of protected activity contributed to adverse action more than two years later). Second, while these records provide some support for BNSF's argument that it does not routinely, or even frequently, discipline employees who report injuries, they say nothing about whether Respondent affirmatively *would* have disciplined Complainant absent protected activity. In particular, they say nothing about Respondent's enforcement of other late-reporting rules where injury reports or other protected activity are not involved. And, because the transcripts provide no information about when the employees reported their injuries, they don't even illuminate whether Respondent routinely enforces its rules about late injury reporting.

At the hearing, Respondent also raised the idea that it routinely disciplines employees for failing to timely report accidents or incidents, even when they do not result in injuries, but it did not provide more useful evidence. Mr. Cargill testified that he had personally looked up 10 past disciplinary cases he had seen that involved late reporting of an injury, but he could not answer why those cases were not included in the comparators. (HT, p. 124.) In 2, he said no discipline was issued; the other 8 were handled as Level S discipline or led to dismissal because it was the employee's second Level S within the review period. (HT, p. 124.) There is therefore no documentary evidence that BNSF routinely enforces the late-injury-reporting rule.

There is also little testimony on BSNF's enforcement of late reporting, whether of injuries or of non-injury accidents. Mr. Lederer said that in the 3 years he'd been at his position, there had been 10 or more reportable injuries, and Complainant was the only employee disciplined for not following proper procedures. (HT, p. 71.) Mr. Cargill said that he had searched for instances of employees disciplined for late reporting of a non-injury-related accident and found "five or six" examples. (HT, pp. 111-12.) However, he did not provide any further details, and again, those employee records were not included in the record. They cannot be the 6 employees whose transcripts are in the record and who were disciplined for the same collision, because that incident did have related injuries. No evidence in the record addresses whether BNSF enforces the rule requiring timely reporting of non-work-related injuries.

Finally, I note that Respondent has also implied that Complainant deserved the discipline anyway. BNSF has attempted to convey an image of Complainant as a stubborn man who willfully refused to acknowledge his injury when it should have been clear that he was injured and required to report it. (RB, pp. 1-4.) (At the hearing, Respondent elicited testimony from Complainant's wife about his tendency to try to work through the pain.) (HT, pp. 304-07.) As a factual matter, there is some support for this image, though it does not show Complainant in as damaging a light as Respondent seems to think. Complainant acknowledged that he initially hoped or believed the knee issue would go away and, although this seems to have been a reasonable reaction at first, it was surely no longer so when he reached the point of taking a prescription opioid medication. But I credit Complainant's statements that he had not known the

relevant provision of the PEPA policy and that he had attempted to comply with the company's rules as he understood them. For that reason, I do not accept Respondent's implication that Complainant was willfully ignoring the rules and avoiding calling a supervisor out of some misplaced pride. However, even if I fully accepted Respondent's view of the Complainant's actions, that would not be dispositive. The critical question is not whether Respondent had good reason to discipline Complainant for actions he undoubtedly took, but whether his discipline was influenced by improper factors. Even had Complainant fully known the rules and willfully ignored them for two days, his discipline would be improper under the FRSA if Respondent cannot show it would have disciplined him regardless.

4. Conclusion

Respondent did not provide usable comparators or show that it would have similarly enforced either the non-work-injury reporting rule or non-injury accident reporting rule. Although the disciplinary process was regular, Respondent did not show that the rule in question is clear and unambiguous or that it routinely enforces the rule. To the contrary, the evidence and testimony show that the details of this rule are not consistently understood even by BNSF's managers, let alone its employees, such that it is hard to evaluate whether a different set of BNSF decision-makers would have reached the same conclusions even on the same facts. Or, more to the point, a different set of decision-makers would likely have reached the same conclusion – that Complainant had violated the late-reporting rule and ought to be disciplined – but it is hard to evaluate what reasoning they would have used to explain that conclusion. Respondent has not met its burden to show that it would have taken the same adverse action absent Complainant's protected activity.

I find Respondent has failed to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action against the Complainant if he had not filed his injury report.

B. Remedies

Under the FRSA a successful complainant is entitled to be made whole. 49 U.S.C. § 20109(e)(1). Four types of damages are specifically included. First, a complainant is entitled to reinstatement with the same seniority he or she would have enjoyed absent the discrimination. 49 U.S.C. § 20109(e)(2)(A). A successful complainant is also entitled to back pay with interest. 49 U.S.C. § 20109(e)(2)(B). The FRSA further provides for "compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." 49 U.S.C. § 20109(e)(2)(C). Finally, punitive damages up to $250,000.00 are authorized. 49 U.S.C. § 20109(e)(3).

Complainant seeks equitable relief in the form of expungement of the discipline from his employee record. (HT, p. 276; CB, p. 29.) He requests compensatory damages for pain and suffering as well as punitive damages. (CB, pp. 28-29.)

1. Equitable Relief

Complainant asks that the discipline be removed from his record and employee file. In order to be made whole, he is entitled to expungement from his records of the discipline and any other negative references relating to this matter.

2. Compensatory Damages

The FRSA provides that relief shall include "compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." 49 U.S.C. § 20109(e)(2)(C). Compensatory damages include damages for emotional distress. In order to recover, a complainant must show 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, ALJ No. 2007-STA-027, slip op. at 11 (ARB Mar. 19, 2010). An award is "warranted only when a sufficient causal connection exists between the statutory violation and the alleged injury." *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938 (5th Cir. 1996). A complainant's credible testimony alone is sufficient to establish emotional distress, and medical or other expert evidence is not required. *Hobson v. Combined Transport Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-035, slip op. at 8 (ARB Jan. 31, 2008); *Blackorby v. BNSF Railway Co.*, 849 F.3d 716, 723 (8th Cir. 2017).

Complainant seeks emotional distress damages for anxiety and sleeplessness he suffered after he received the first notice of investigation. He acknowledges that he had a recent history of anxiety and had previously taken anti-anxiety medication, but argues that his condition had improved in the months before his injury and worsened again when he learned he would face a disciplinary investigation. (CB, pp. 27-28.) Respondent argues that all of Complainant's symptoms were caused by his preexisting condition and that he failed to demonstrate any additional problems caused by his discipline. (RB, pp. 22-24.) The key question is therefore what a review of the record shows about Complainant's mental and emotional condition prior to and after he received the notice of investigation and was disciplined.

Complainant's medical records first indicate symptoms of anxiety in August 2012, and he was officially diagnosed on March 1, 2013. (RX T, pp. 521-22, 524-25.) He had previously been prescribed citalopram hydrobromide but his doctor switched him to escitalopram oxalate on that date and added alprazolam for insomnia, for Complainant to take as needed. (RX T, pp. 521-22.) Later in March 2013, the doctor recorded that Complainant suffered from generalized anxiety and panic attacks several times per week and that "apparent triggers include work and family." (RX T, p. 519.) The doctor again recorded generalized anxiety and panic attacks in July 2013 and refilled both of Complainant's prescriptions. (*Id.* at 517-18.) Records from visits in August and October 2013 do not mention anxiety, while the October records indicate insomnia in the review of symptoms but also say Complainant reported "sleeping well." (*Id.* at 511-12, 515-16.) The doctor did not prescribe refills or new anxiety or insomnia medications at either visit. At the next recorded visit, in June 2014, the doctor noted situational anxiety and feelings of stress based on Complainant's busy work and school schedule. (RX T, p. 509.) Complainant reported taking his anxiety medication only as needed and reported side effects, so the doctor replaced it with clonazepam. (*Id.* at 509-10.) The prescription was for 60 tablets with 5 refills. (RX T, p. 510.) The doctor did not record anything about psychological symptoms or

change Complainant's anxiety medication at a November 2014 visit, the last one prior to the injury.

The medical records overall show that Complainant was experiencing severe enough anxiety symptoms to be prescribed medication in 2012, prior to his diagnosis. By early 2013, he experienced generalized anxiety and relatively frequent panic attacks and was officially diagnosed with anxiety. He also experienced sufficient insomnia to warrant a prescription. Late 2013 records do not mention Complainant's mental health to any significant degree, and in June 2014, Complainant reported taking the anxiety medication only on an as-needed basis, rather than daily as prescribed. His mental health was again not mentioned in late 2014. The last information in the medical records, then, is that six months before the injury Complainant was taking his anxiety medication only as needed. He had not been prescribed alprazolam for insomnia since July 2013, when his prescription was refilled, and his records did not indicate insomnia at all after late 2013.[64]

Complainant's testimony about anxiety over this period is consistent with these records, though he said he did not recall having suffered from insomnia in 2013. (HT, pp. 259-60.) He conceded that he had a pre-existing anxiety disorder for which he had been taking clonazepam for a year or two before the injury. (HT, p. 185.) But he testified that over that period he had reduced the dosage he was taking and may even have stopped taking the medication entirely shortly prior to his injury. (*Id.* at 186.) At most, he said, he was taking it on an as needed basis rather than every day as prescribed. (HT, p. 275.) His wife also said he was doing well before the injury and had started weaning himself off the anxiety medication because he was feeling so good. (HT, pp. 299-300.) This matches the medical records described above. Hospital records from his emergency room visit do indicate that he had taken clonazepam earlier that day, but this is not proof of a contradiction or an indication of dishonesty on Complainant's part. (RX K, p. 136.) He was taking the medication sporadically, on an as-needed basis, and it is entirely consistent for him to have both have stopped taking it for days or weeks prior to the injury and also to have taken it that morning due to his fears about having to report an injury. (*See* HT, pp. 165, 230-31.)

After Complainant was injured and received the notice of investigation, he said he began taking clonazepam again. (HT, p. 186.) His anxiety both increased and felt different because he now felt new stress and anxiety over the risk of losing his job and general uncertainty about what would happen. (*Id.* at 187-88.) He also suffered from sleeplessness while he was out on medical leave. (HT, p. 188.) Again, his wife's testimony agrees. She said he was "distressed and distraught" after receiving the notice of investigation, and that it ate away at him over the time he was out on medical leave. Nevertheless, Complainant acknowledged that he had never sought

[64] Respondent also sought testimony at the hearing attempting to show that Complainant had insomnia before his injury and discipline. When pressed about a March 1, 2013, note by Dr. Frandsen saying he'd had insomnia for the past four years and "falls asleep at work on a daily basis," Complainant testified that he did not recall ever saying that. (HT, p. 260.) He said he didn't "have any of that" and that if he fell asleep at work, he'd be written up. (HT, p. 260.) I credit Complainant's denial and believe that there must have been some miscommunication between Complainant and Dr. Frandsen. Complainant had an entirely clean discipline record before the incident at issue here, and it is impossible to believe that BNSF – with what I do credit is a real concern for employee safety – would have failed to notice an employee falling asleep on the job every day or would have had nothing to say about such dangerous misconduct.

treatment from a psychologist, psychiatrist, or mental health counselor for any issues related to the investigation or discipline. (HT, p. 253.)

Medical records from his orthopedic surgeon's practice from January through April 2015 do not mention anxiety or mental health, which is hardly surprising. (RX T, pp. 4-12, 22-26.) Complainant's pre-operative clearance with his primary care doctor at the end of January also does not mentions anxiety, though it does list insomnia in the review of symptoms. (*Id.* at 505-06.) But on March 5, 2015, Complainant returned to his primary care doctor reporting anxiety and feelings of stress. (RX T, p. 503.) The doctor discussed anxiety with him, gave him a handout on generalized anxiety disorder, and refilled his clonazepam prescription. (*Id.* at 503-04.) Dr. Frandsen recorded worsening depression and feelings of stress on Complainant's next appointment on October 19, 2015, and prescribed escitalopram oxalate for the depression.[65] Clonazepam was again listed as a current medication, but Complainant did not report experiencing anxiety. (RX T, pp. 500-02.)

At the hearing, Complainant acknowledged that records from a January 12, 2015, visit with his orthopedic surgeon and a January 29, 2015, visit with his primary care physician indicated that he was negative for depression, anxiety, stress, and insomnia. (HT, pp. 254-56.) However, he said that his stress and anxiety had increased steadily after the notice of investigation, so it wasn't surprising to him that a doctor's report just a few days after the injury said he was negative for stress and anxiety. (HT, p. 274.) At some point during the spring, he wrote his journal notes on the computer, but the lack of dates means these are of little help in determining when his mental state worsened or improved.

Complainant told the OSHA investigator in October 2015 that he was still suffering from some anxiety and had had many sleepless nights worrying about whether he was being watched or would get in trouble again, and wondering what his supervisors were really thinking when they interacted with him. (RX L, pp. 23-24.) The medical records are perhaps less supportive of this, as Dr. Frandzen's records in October 2015 reflect stress and depression rather than anxiety. Nevertheless, Complainant told the OSHA investigator in August 2016 that he was still suffering from stress, anxiety, and depression connected to the adverse actions.[66] (RX M, pp. 7-8.) He also said that he was still taking clonazepam, now at a higher dosage, but was no longer suffering from sleeplessness. (*Id.* at 8, 11.) Complainant testified at the hearing that his anxiety continued to affect him and that he was still taking the medication, but more recent medical records addressing mental health are not available to corroborate this, and he has not presented evidence to indicate that this is still the effect of the adverse actions rather than his longer-term background anxiety.[67] Regardless of the degree of support for Complainant's claim of more recent emotional distress, however, this does not contradict what the record shows through late 2015.

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[65] I note that escitalopram oxalate, prescribed here for depression, had previously been prescribed for Complainant's anxiety in March 2013. (RX T, p.

[66] Complainant acknowledged that, as Respondent points out, he did not comply with the OSHA investigator's request to get a statement of his mental health from his doctor. (*Id.* at 253-54; *see* RB, p. 23.)

[67] The only record after October 2015 is a November 2016 nerve conduction and EMG report for carpal tunnel. (RX T, pp. 2-3.)

The medical records and the main arc of Complainant's and his wife's testimony are generally consistent: he suffered from anxiety and insomnia beginning a couple of years before the injury; he was treated with medications; the anxiety and insomnia had improved by the time of the injury; and, after his injury occurred and the disciplinary process began, his insomnia returned, his anxiety worsened, and he began taking anxiety medication again. His symptoms were evidently not debilitating, but they did exist and affected his well-being to the point of requiring medication. Once he returned to work, his anger faded, though his anxiety continued, at least to some extent. (HT, pp. 257-58.)

Overall, medical records and credible testimony from Complainant and his wife show that Complainant's pre-existing anxiety and previous insomnia had significantly improved before the injury and notice of investigation. Medical records and credible testimony from Complainant and his wife also show that he suffered increased anxiety, insomnia, and stress in 2015 after receiving the notice of investigation and being disciplined. Complainant is not required to have sought treatment from a specialist or to have presented expert evidence in order to prove emotional distress. I conclude that Complainant suffered emotional distress as a result of the adverse actions and is entitled to compensatory damages. The next question is therefore of the appropriate amount for such damages.

Many emotional distress damage awards fall in the range of about $5,000 to $10,000, though awards can be significantly higher. One ALJ awarded $5,000 as "nominal" damages when there was some degree of emotional distress but "inadequate evidence of a specific discernible injury" to justify a greater award. *Griebel v. Union Pacific Railroad Co.*, 2011-FRS-00011 (ALJ Mar. 18, 2014), *aff'd* ARB No. 12-038 (ARB Mar. 18, 2014) (finding no evidence of medical or psychological treatment, sleeplessness, anxiety, extreme stress, depression, marital strain, loss of self-esteem, excessive fatigue, or a nervous breakdown). The ARB upheld another award of $5,000 for a fired whistleblower based on the complainant's credible and unrefuted testimony that his nerves were "messed up" and his stress and anxiety had been made worse by his termination. *Hobson v. Combined Transport, Inc.*, ALJ No. 2005-STA-00035, ARB Nos. 06-016, -053, slip op. at 8 (ARB Jan. 31, 2008). By contrast, the ARB overturned an award of $5,000 for emotional distress for an STAA whistleblower, saying it was not supported by substantial evidence because neither the documentary evidence nor the plaintiff's testimony reflected any emotional distress, humiliation, loss of reputation, or mental anguish. *Simon v. Sancken Trucking Co.*, ALJ No. 2005-STA-00040, ARB Nos. 06-039, -088, slip op. at 9 (ARB Nov. 30, 2007).

Higher awards have also been granted. In a Seaman's Protection Act case, the ALJ awarded $10,000 based on the complainant's credible testimony of anxiety, sleeplessness, and humiliation after being demoted, constructively discharged, and publicly humiliated. *Loftus v. Horizon Lines, Inc.*, ALJ No. 2014-SPA-00004, slip op. at 36, 40-41 (ALJ July 12, 2016), *aff'd* ARB No. 16-082 (May 24, 2018). Another $10,000 award was based on the complainant's credible testimony of distress, including panic at the thought of losing his job, worry about being able to support his wife and two young children, and anxiety, sleeplessness, and loss of appetite as he waiting for the company investigation and decision. He faced serious charges and was at risk of termination if found to have violated the rules, but was ultimately not disciplined and there was no evidence of medical or psychological treatment. *Raye v. Pan Am Railways, Inc.*, ALJ No. 2013-FRS-00084, slip op. at 16-17, (ALJ June 25, 2014).

Here, the degree of harm and distress was lower than some cases and higher than others. Complainant did not experience a period without pay and had no immediate worries about providing for his family, but he was concerned for a time about the potential risk to his employment. Although he was not fired and, based on the PEPA severity provisions, was not at risk of being fired, he did wait several months for the company investigation and was issued discipline. He had some pre-existing anxiety unrelated to the adverse actions, but his credible testimony about increased anxiety, stress, and sleeplessness was corroborated by his wife and supported, if not fully confirmed, by medical records showing renewed prescription anxiety medication for a period after the Notice of Investigation and around the discipline. Because Complainant did receive medical treatment for his increased anxiety in addition to his other emotional distress, but was not fired or humiliated and did not experience time without wages or worry about providing for his family, I find that a compensatory damage award of $5,000 is appropriate in this case.

3. Attorney's Fees and Costs

The FRSA provides that a successful complainant shall be awarded reasonable attorney's fees and costs. 49 U.S.C. § 20109(e)(2)(C). Complainant has been successful here, and thus is entitled to attorney's fees and costs. The parties will be directed to pursue briefing of the amount of fees and costs to be awarded per a schedule below.

4. Punitive Damages

The FRSA authorizes punitive damages "in an amount not to exceed $250,000." 49 U.S.C. § 20109(e)(3). Punitive damages are to punish unlawful conduct and deter its repetition. *BMW v. Gore*, 517 U.S. 559, 568 (1996); *Smith v. Wade*, 461 U.S. 30, 51 (1983). 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.*, 532 U.S. 424, 434-35 (2001). The ARB further requires that an ALJ weigh whether punitive damages are required to deter further violations of the statute and consider whether the illegal behavior reflected corporate policy. *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 8 (ARB Aug. 31, 2011). An illegal motive is not necessary to justify punitive damages under the FRSA; "[a]n award of punitive damages may be merited where there has been 'reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law.' " *Leiva v. Union Pac. R.R. Co., Inc.*, ARB Nos. 14-016, -017; ALJ No. 2013-FRS-019, slip op. at 8 (ARB May 29, 2015) (quoting *Petersen v. Union Pac. R.R. Co.*, ARB No. 13-090, ALJ No. 2011-FRS-017, slip op. at 5 (ARB Nov. 20, 2014)).

Respondent's policies and its employees' conduct show some degree of disregard for Complainant's rights. As I discussed earlier, BSNF training materials and management policies demonstrate a lack of awareness that discipline issued based on the time or manner of an injury report might implicate FRSA retaliation provisions, despite having a late-reporting PEPA provision that requires quite a lot from employees but is not well-communicated to them. BNSF managers are reasonably well-trained on BSNF's anti-retaliation policies, which focus on injuries associated with safety violations or other incidents, but not on the meaning of its late-

reporting PEPA provision. However, this gap in BNSF's policies and training is closer to an inadvertent blind spot than a callous or reckless disregard for employees' reporting rights. Complainant has not shown that BNSF's actions go beyond carelessness or, at worse, obliviousness, let alone that they rise to the level of a corporate policy to punish employees for reporting injuries by intentionally trapping unsuspecting individuals into disqualifying themselves from an exception to the injury reporting rules. I found no illegal motive on the part of Respondent or its managers, and the record cannot support an attempt to claim that an intentional violation of federal law occurred here. Respondent's degree of reprehensibility or culpability is fairly low.

The harm caused to Complainant in this case is similarly low. The discipline assessed here was not termination or even a suspension from work without pay; instead, he was issued a record suspension and lost no wages at all. Aside from the impact on his service record and potential future discipline should something else have occurred within the 12-month review period, the primary impact on Complainant was the emotional distress he suffered. These impacts are certainly not trivial, but they are also not the sort of serious harm that cries out for a punitive damage award to punish Respondent's actions and deter future violations.

The facts of this case are far from the more shocking or egregious situations where the ARB and other ALJs have found punitive damages warranted. For example, in *Greibel v. Union Pacific*, an employee's protected injury report also contributed to his discipline in violation of the FRSA, and the ARB upheld a punitive damage award of $100,000. *Griebel v. Union Pacific Railroad Co.*, 2011-FRS-00011 (ALJ Jan. 31, 2013), aff'd ARB No. 12-038 (ARB Mar. 18, 2014). However, the employee in question was terminated on a charge of dishonesty related to his injury report, and the ALJ found that the employer discouraged injury reports, attempted to prevent employees from consulting with an attorney before filing an injury report, and suspected employees who do meet with an attorney of colluding in fraudulent behavior. The employee in the case was forced to submit a second report saying that the injury did not occur on duty and then, days later, was charged with dishonest reporting based only on suspicions. Similarly, in *Anderson v. Amtrak*, an employee was terminated after an accident, but the railroad had no procedures in place to ensure compliance with legal requirements, no guidance on the level of discipline to impose, and no review to protect against improper termination. The ALJ concluded that the respondent had consciously disregarded how its practices obstructed the requirements of the FRSA and assessed $100,000 in punitive damages. *Anderson v. Amtrak*, 2009-FRS-00003, slip op. at 26-27 (ALJ Aug. 26, 2010) (later settled while on appeal). More comparable is *Jackson v. Union Pacific Railroad Co.*, where the ARB overturned a $1,000 punitive damage award. An employee reported safety concerns about smoky conditions and was sent home, despite the employee's insistence that he was not complaining about an injury or his personal health. He missed three days of work but was later paid for the lost shifts. *Jackson v. Union Pacific*, ARB No. 13-042; ALJ No. 2012-FRS-017, slip op. at 4-5 (ARB Mar. 20, 2015). The ARB overturned the award because the record did not show any "reckless" or "callous" indifference to the employee's rights; the supervisor who sent him home had consistently testified that he had believed the employee was reporting a personal health issue because nobody else seemed to be concerned. *Id.* at 7.

Managers here genuinely believed that Complainant had violated the late reporting rule, and they assessed discipline in accordance with BNSF policy, giving appropriate credit for

Complainant's good work history. The primary issue is BNSF's failure to define terms in its PEPA provision and its training blind spot with respect to the risk of retaliation in time and manner reporting violations. This does not rise to the level of a "reckless or callous disregard" for Complainant's rights, and there is no evidence that it is an intentional violation of federal law. *Ferguson*, ARB No. 10-075, slip op. at 8 (citing *Smith*, 461 U.S. at 51). Taking all these factors into consideration, I find that punitive damages are not warranted here.

VII. ORDER

For the reasons stated above, it is hereby ORDERED that Complainant's May 12, 2015, complaint is GRANTED. It is hereby ORDERED that:

1. Respondent, BNSF Railway Company, shall expunge any employment records referencing Complainant's discipline issued on June 2, 2015.
2. Respondent, BNSF Railway Company, shall pay to Complainant, Herbert Rothschild, compensatory damages for emotional distress of $5,000.00.
3. Complainant, Herbert Rothschild, is entitled to reasonable attorney's fees and costs paid by Respondent, BNSF Railway Company. If this decision is not appealed, Counsel for Complainant shall file and serve by **January 31, 2019**, a fully supported application for costs and fees to Respondent's Counsel and to the undersigned Administrative Law Judge. Within 20 days thereafter, Respondent's Counsel shall initiate a verbal discussion with Complainant's Counsel in an effort to amicably resolve any dispute concerning the amounts requested. If the two parties agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes, the Complainant's Counsel shall file and serve by **March 1, 2019**, changes agreed to during discussions with Respondent's Counsel and shall set forth in the Final Application the final amounts he requests as fees and costs. Respondent's Counsel shall file and serve by **March 15, 2019**, a Statement of Final Objections. The Complainant's Counsel may file a reply by **March 29, 2019**. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.
4. The parties are ordered to notify this Office immediately upon the filing of an appeal.

JENNIFER GEE
Administrative Law Judge

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

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

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

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).