

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 July 2019

CASE NO.: 2018-FRS-00086

In the Matter of:

GREGORY CHAMBERS,
Complainant,

v.

BNSF RAILWAY COMPANY,
Respondent.

BEFORE: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This proceeding arises pursuant to a complaint alleging violations under the employee protection provisions of the Federal Rail Safety Act (herein the FRSA or Act), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53. The employee protection provisions of the FRSA are designed to safeguard railroad employees who engage in certain protected activities related to railroad safety from retaliatory discipline or discrimination by their employer.

PROCEDURAL BACKGROUND

On August 30, 2017, Gregory Chambers (Complainant or Chambers) filed a complaint with the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor alleging that, on or about June 20, 2017, BNSF Railway Company (herein Respondent or BNSF) violated Section 20109 of the FRSA by terminating his employment for reporting an injury to management on September 11, 2016.

The Secretary of Labor, acting through the Regional Administrator for OSHA, investigated the complaint. The Secretary's Findings were issued on May 21, 2018. OSHA determined that the evidence developed during the investigation was not sufficient to support the finding of a violation.

On May 25, 2018, Complainant filed his objections to the Secretary's findings and requested a formal hearing before the Office of Administrative Law Judges (OALJ).

A de novo hearing was held in Fort Smith, Arkansas, on March 12, 2019. The parties offered 6 joint exhibits (JX), all which were admitted into evidence, along with two administrative law judge exhibits. The Complainant's (CX) and Respondent's (RX) exhibits were admitted as indicated on pages 3 and 4 of the transcript. RX 48, submitted post-hearing, was not admitted.

Post-hearing briefs and proposed findings were received from Complainant and Respondent. This decision is based upon a full consideration of the record. My findings are based on a complete review and consideration of the relevant arguments of the parties, evidence submitted, applicable statutory provisions, regulations, and precedent. Although not every exhibit in the record is cited below, I have carefully considered the entire record in arriving at this decision.

STATEMENT OF THE CASE

Complainant had previously been injured while working for Union Pacific Railroad Company (UP). In a lawsuit against UP, Complainant claimed he was climbing on a railcar and the grab iron broke, causing him injury and pain to his neck, back, and knee. Complainant had surgery to his neck wherein a disc was removed, and a plate and screws were implanted. When Complainant applied for work at BNSF, he completed the BNSF pre-employment medical questionnaire. Several questions on the questionnaire asked about prior workplace claims, injuries, surgeries, and physical pain. Complainant failed to disclose the information from his UP injury, surgery, and lawsuit.

On September 11, 2016, Complainant made a report of injury to BNSF. Complainant alleges that BNSF dismissed him in retaliation for reporting this job injury. BNSF asserts that Complainant was dismissed for dishonesty in completing his pre-employment medical questionnaire.

FINDINGS OF FACTS

1. BNSF is a "railroad carrier" within the meaning of 49 U.S.C. § 20109. *Stipulated.*
2. Complainant began his employment with BNSF on May 20, 2013. *Stipulated.*
3. During his employment with BNSF, Complainant worked in train service as a brakeman, switchman, or conductor primarily stationed in Enid, Oklahoma. *Stipulated.*
4. Complainant is an "employee" of a "railroad carrier" within the meaning of the Act. *Stipulated.*
5. On September 11, 2016, Complainant made a report of injury to BNSF. *Stipulated.*

6. On June 20, 2017, BNSF terminated Complainant's employment. *Stipulated.*
7. BNSF operates a railroad network covering the western two-thirds of the United States, with over 32,000 route miles traversing 28 states and three Canadian provinces. *Stipulated.*
8. BNSF employs more than 40,000 people, a majority of whom are members of one of several unions. *Stipulated.*
9. On June 20, 2017, BNSF dismissed Complainant "for dishonesty in completing your pre-employment medical questionnaire submitted on April 2, 2013." *JX 4.*
10. On August 30, 2017, Complainant filed a lawsuit against BNSF pursuant to the Federal Employers' Liability Act ("FELA"). *RX 45.*
11. On October 3, 2017, Complainant filed an FRSA complaint with OSHA. The complaint was timely filed. *RX 29.*
12. On May 21, 2018, OSHA dismissed Complainant's FRSA complaint. *Stipulated.*
13. By letter dated May 25, 2018, Complainant timely objected to the OSHA findings by seeking review before the Office of Administrative Law Judges. *Stipulated.*
14. On May 11, 2017, pursuant to the terms of the collective bargaining agreement between BNSF and Complainant's union, BNSF issued a notice of investigation "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with any alleged dishonesty in completing your pre-employment medical questionnaire submitted on April 2, 2013." *JX 2 at 1, 3.*
15. On June 7, 2017, the investigation hearing took place in Enid, Oklahoma. Darren Hale (Terminal Superintendent in Tulsa, Oklahoma) served as the conducting officer. Complainant participated in the investigation hearing with Nicolas Traficanti serving as his union representative. *JX 1.*
16. The facts ascertained during the investigation hearing were that Complainant had previously been involved in a lawsuit against another rail carrier, Union Pacific Railroad Company ("UP"), before coming to work for BNSF. *JX 1 at 27:21-24; JX 2 at 28-33.*
17. In this lawsuit against UP, Complainant claimed he was climbing on a railcar and the grab iron broke, causing him injury and pain to his neck, back, and knee. *JX 1 at 27:21-30:9; JX 2 at 29, ¶6-30, ¶7.*
18. Following this incident at UP, Complainant had surgery to his neck wherein a disc was removed, and a plate and screws were implanted. *JX 1 at 31:13-32:3.*

19. This UP incident and subsequent neck surgery took Complainant out of work for ten months. *JX 1 at 31:2:22-26.*

20. One of Complainant's doctors told him he could not return to work as a conductor for UP, and two of his doctors told Complainant he would need another neck surgery in the future. *JX 1 at 33:2-34:2.*

21. Complainant's lawsuit against UP sought compensation for these injuries, medical expenses, lost wages, benefits, and other damages. *JX 2 at 30.*

22. All of these UP events took place before Complainant applied for work at BNSF and before he completed the BNSF pre-employment medical questionnaire. Complainant was interviewed for BNSF employment on March 25, 2013. *RX 36 at 7.* He completed BNSF's pre-employment medical questionnaire on April 2, 2013. *JX 3 at 10.*

23. Complainant completed an employment application for BNSF wherein he stated he left UP to "finish college degree." However, Complainant testified that his position with "UP ended because they terminated me in 2006 because they held an investigation and I was unable to go" and "I was terminated because I was injured." *Tr. 139; 140.*

24. Donald Anderson is a director of human resources and conducted the March 25, 2013 pre-employment interview. Although Anderson did not specifically remember the interview, he credibly testified that he would have asked Complainant if he had ever been involved in a workplace accident. Anderson's notes indicate "No WPA," which means that Complainant had answered "No" to the question. The lack of follow-up questions also indicate Complainant had answered "No" when asked if he had ever been involved in a workplace accident. *Tr. 296-7; RX 36 at 11.*

25. Complainant testified that he told Anderson that he had an injury at UP, had a settlement, and resigned. *Tr. 154.*¹

26. There were several questions on BNSF's pre-employment medical questionnaire that asked about prior workplace claims, injuries, surgeries, and physical pain. Complainant failed to disclose the information from his UP injury, surgery, and lawsuit. Specifically, Complainant answered "No" to the following questions on the medical questionnaire:

- Have you had any of the following that caused you to miss work/school for more than 2 days...
 - illness or injury?
 - surgery?

¹ The information that was provided on the employment application and during the interview was not presented during the BNSF investigation or considered by the decision makers. However, I have considered this evidence as it reflects on the credibility of Complainant as discussed below.

- Have you ever been injured in an on-the-job accident and filed a claim against the employer for medical benefits and other compensation?
- Any other surgeries?
- Have your work tasks or daily activities ever been interfered with by pain, swelling or soreness in your...neck/back/knees?
- Have you ever been diagnosed or treated for any of the following...herniated disc disease (neck or back)?
- Do you currently or have you ever had any of the following musculoskeletal problems...back pain?

JX 3.

27. The questionnaire informed Complainant that any incomplete or false answers may be grounds for withdrawal or termination of employment. *JX 3 at 2; Tr. 149:24-150:2.*

28. Complainant certified that his answers were correctly recorded and that his answers were true. *JX 3 at 2; Tr. 150:9-11.*

29. Complainant's answers to the pre-employment questionnaire are contrary to the information reflected in the UP lawsuit and deposition.

30. BNSF conducted the investigation hearing in accordance with the process set forth in the collective bargaining agreement between BNSF and Complainant's union: notice was provided; Complainant was represented by his local union representative; he could call witnesses; his union representative questioned witnesses; he could and did offer exhibits; and he was permitted to make a closing statement and did. *Tr. 164:23-165:13, 166:10-24, 167:23-168:10; JX 1 at 9:8-15, 48:19-49:25, 50:6-15; JX 2 at 1-6.*

31. Complainant admitted he had the opportunity to communicate what he needed to communicate to the hearing officer about the events surrounding his pre-employment questionnaire. *Tr. 187:2-9; JX 1 at 50:16-19.* His union representative admitted that the investigation hearing was conducted fairly in accordance to BNSF's rules and policies. *JX 1 at 50:10-15.*

32. The investigation hearing only concerned the relevant facts surrounding Complainant's completion of the pre-employment medical questionnaire. *Tr. 168:13-22; JX 1.* There was no attempt on the part of BNSF to discuss or explore Complainant's report of a personal injury. The only brief mention of a FELA claim was made by Complainant's union representative. *JX 1 at 31.*

33. Following the BNSF investigation hearing, the testimony and exhibits were reviewed by Hearing Officer Darren Hale, Director of Employee Performance Stephanie

Detlefsen, and General Manager Marc Stephens. *Tr. 200:1-16, 213:21-23, 231:20-22, 271:22-272:8.*

34. BNSF has a Policy for Employee Performance Accountability (PEPA) Team. *Tr. 228:21-24.* The PEPA Team is a group of three employees in Fort Worth, unfamiliar with the employee who has been charged, who manage the discipline policy to ensure it is consistently applied across the BNSF system and in compliance with the applicable collective bargaining agreement. *Tr. 229:21-230:7.*

35. BNSF's PEPA policy states that dishonesty is a Stand-Alone Dismissal, which means if an employee is found to be dishonest, that employee may be dismissed regardless of their years of service or record. *Tr. 229:7-20; RX 10 at 2.*

36. BNSF's PEPA policy also states that, before a scheduled employee can be dismissed, a Director of Employee Performance must be consulted and provided the investigation hearing transcript and exhibits for review and consideration. *Tr. 230:8-12; RX 10 at 1.*

37. Complainant's transcript and exhibits were forwarded to a PEPA Director for review because Complainant's charge of dishonesty could result in his dismissal. *Tr. 272:23-273:14.*

38. General Manager Marc Stephens, Hearing Officer Hale, and Director of Employee Performance Stephanie Detlefsen concluded that the evidence supported Complainant's dismissal for dishonesty because Complainant's answer of "no" to the several questions above was not truthful in light of the UP lawsuit, injuries, and neck surgery. *Tr. 203:4-22, 233:10-13, 277:2-15, RX 18.* Further, they found Complainant not to be credible. *Tr. 203:14-22, 261:3-17, 262:3-10, 277:2-7, 276:3-13, 284:9-15.*

39. BNSF's Vice President of the Southern Region, Rob Reilly, also supported dismissal. *RX 18.*

40. On June 20, 2017, Complainant was sent a letter dismissing him for dishonesty in completing his pre-employment medical questionnaire and for violation of General Code of Operating Rule 1.6, Conduct. *JX 4.*

41. During the evidentiary hearing on March 12, 2019, in this FRSA forum, Complainant admitted that the UP injury caused him to miss work for more than two days. *Tr. 151:21-152:7.* He admitted he had neck surgery that caused him to miss work for months. *Tr. 136:23-137:6.* Additionally, he admitted he filed a lawsuit against UP for an on-the-job injury. *Tr. 153:20-22.*

42. The UP complaint in evidence reflects the suit was for personal injuries, medical expenses, lost wages, benefits, and other damages. *JX 2 at 30.* The UP settlement agreement in evidence reflects compensation for injuries, lost wages, and medical expenses. *RX 47.*

43. I find that Complainant intentionally provided false answers when he completed his pre-employment medical questionnaire.

44. BNSF has policies and rules prohibiting dishonesty and a legitimate interest in enforcing those policies and rules. For example,

- The questionnaire cautioned that any incomplete or false answers may be grounds for withdrawal or termination of employment. *JX 3 at 2; Tr. 149:24-150:2.*
- Complainant knew this and certified that his answers were correctly recorded and that his answers were true. *JX 3 at 2; Tr. 150:9-11.*
- The General Code of Operating Rules (“GCOR”), operating rules followed by conductors such as Complainant, specifically Rule 1.6, states that employees must not be dishonest. *JX 2 at 7; RX 40 at 15.*
- Complainant had prior knowledge of Rule 1.6 and dishonesty from working at UP. *Tr. 126:16-24.*
- Complainant knows that telling the truth is very important, and one should always tell the truth. *Tr. 150:3-8.*
- After Complainant became an employee of BNSF, GCOR 1.6 Conduct applied to him. *RX 40 at 2.*

45. The testimony of the decision-makers (Hale, Stephens, and Detlefsen) reflect that they were focused solely on the pre-employment medical questionnaire and that they honestly believed Complainant gave false answers, which was grounds for dismissal. *Tr. 202:13-20, 203:4-13; 203:14-22; 233:10-13; 261:3-262:10; 277:2-7.*

46. Complainant’s discipline process was consistent with BNSF’s Policy for Employee Performance Accountability for Stand-Alone Dismissals. *RX 10 at 2, 5.* The discipline process was also reviewed by a member of the PEPA Team (Detlefsen) who did not know Complainant and was not in his line of supervision. *Tr. 273:2-19.*

47. Complainant presented insufficient circumstantial evidence to show any discriminatory animus because:

- there was no temporal proximity between the report of injury and discipline;
- there was no evidence presented of antagonism or hostility;
- BNSF’s explanation for dismissal was consistent;
- the UP lawsuit and deposition were persuasive evidence of dishonesty; and

- BNSF consistently dismisses employees found to be dishonest.

48. BNSF followed its written policies regarding dishonesty. *RX 10 at 2; JX 2 at 7. JX 2 at 10; JX 3 at 2.*

49. BNSF followed the investigation procedures outlined in the collective bargaining agreement. *RX 7; RX 38 at 212-219.*

50. Temporal proximity exists between the discovery of the dishonest answers and the adverse action. *Tr. 196:25-197-8; JX 2 at 1-6; JX 4.*

51. BNSF consistently enforces the policies and rules regarding dishonesty. *RX 20; RX 30.*

52. BNSF has a legitimate interest in having prospective employees fully disclose their medical history in pre-employment questionnaires and to be honest in all aspects of their employment. *Tr. 205:8-206:2, 229:13-20, 277:8-15, 298:12-299:6.*

DISCUSSION

A. CREDIBILITY

Prefatory to a full discussion of the issues presented for resolution, I note that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative, and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tenn. Valley Auth., Case No. 1992-ERA-19 at 4 (Sec’y Oct. 23, 1995).

Credibility of witnesses is “that quality in a witness which renders his/her evidence worthy of belief.” Ind. Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe.... Credible testimony is that which meets the test of plausibility.

Id. at 52.

An administrative law judge is not bound to believe or disbelieve the entirety of a witness’s testimony but may choose to believe only certain portions of the testimony. Altemose Constr. Co. v. NLRB, 514 F.2d 8, 16 and n.5 (3rd Cir. 1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner, and appearance of witnesses from which I garnered impressions of the demeanor of

those testifying, which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

Here, I found Complainant not credible. In addition to observing his demeanor while testifying, I found it implausible that the alleged computer malfunctions were limited to questions that may reflect on the UP injuries and lawsuit. In finding that Complainant was not a credible witness, I also evaluated the information provided on the employment application and the testimony of Anderson concerning the pre-employment interview. Complainant stated on the employment application for BNSF that he left UP to “finish college degree.” However, Complainant testified that his position with “UP ended because they terminated me in 2006 because they held an investigation and I was unable to go” and “I was terminated because I was injured.” Anderson credibly testified that he would have asked Complainant if he had ever been involved in a workplace accident. Anderson’s notes indicate “No WPA,” which means that Complainant had answered “No” to the question. The lack of follow-up questions also indicate Complainant had answered “No” when asked if he had ever been involved in a workplace accident.

In contrast, I found Anderson, Hale, Detlefsen, and Stephens to be unbiased, sincere, and credible witnesses. I observed little to no inconsistency in and among their respective testimony.

B. APPLICABLE PROVISIONS OF THE FRSA

Complainant alleges that Respondent violated Sections 20109(a)(4) and 20109(c)(2) of the Act, which provide:

(a) IN GENERAL.—A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee’s lawful, good faith act done, or perceived by the employer to have been done or about to be done—

...

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

...

(c) PROMPT MEDICAL ATTENTION.-

...

(2) DISCIPLINE.-A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier’s refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for

fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

49 U.S.C. §§ 20109(a)(4), (c)(2)(2008).

C. ELEMENTS OF FRSA VIOLATIONS AND BURDENS OF PROOF

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).

Initially, to maintain a 49 U.S.C. § 20109 claim, the complainant must first demonstrate that the respondent is subject to the Act and that the complainant is a covered employee under the Act. See § 20109(d)(2)(A)(i). In view of the undisputed facts noted above, I find that Respondent is a carrier within the meaning of the FRSA and is responsible for compliance with the employee protection provisions of the FRSA. I also find that Complainant was a covered employee of Respondent under the FRSA. No evidence to the contrary was introduced at the hearing.

1. Section 20109(a)(4) and (c)(2) Claims

The ARB set forth a "two-step burden-of-proof framework" that must be applied to actions arising under the FRSA and related whistleblower provisions. Palmer v. Canadian National Railway, ARB No. 16-035, OALJ No. 2014-FRS-154, slip op. at 15-16 (ARB, Sep. 30, 2016) (en banc), reissued with full separate opinions (Jan. 4, 2017), erratum with caption correction (Jan. 4, 2017); 49 U.S.C. § 42121(b)(2)(B)(iii), (iv). The first step requires that an FRSA complainant demonstrate: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action.² See Palmer, *supra*, slip op. at 16, n. 74; see also 49 U.S.C. § 42121(b)(2)(B)(iii); Johnson v. BNSF Ry. Co., ARB No. 14-083, OALJ No. 2013-FRS-59, slip op. at 3 (ARB Jun. 1, 2016) (acknowledging these three essential elements);

² In Hamilton v. CSX Transp., Inc., ARB No. 12-022, OALJ No. 2010-FRS-25 (ARB Apr. 30, 2013), the ARB found that the ALJ's legal analysis and conclusions of law on the three essential elements of a FRSA whistleblower case (protected activity, adverse action, and causation) were in accordance with applicable law. The ARB noted, however, that the ALJ and the parties had cited a fourth element, the employer's knowledge of the protected activity. *Id.* slip op. at 3. The ARB acknowledged that the final decision-maker's "knowledge" and "animus" are only factors to consider in the causation analysis; they are not always determinative factors. *Id.* (citing Staub v. Proctor, 131 S.Ct. 1186 (2011) (under a different anti-retaliation statute, the final decision-maker may have unlawfully discriminated where a subordinate supervisor proximately caused retaliation)); see Bobreski v. J. Givoo Consultants, Inc., ARB No. 09-057, OALJ No. 2008-ERA-3 (ARB June 29, 2011) (remanded to the ALJ to reconsider under the totality of circumstances the respondent's potential influence on the final decision-maker's hiring choices).

Fricka v. Nat'l R.R. Passenger Corp. (AMTRAK), ARB No. 14-047, OALJ No. 2013-FRS-35, slip op. at 5 (ARB Nov. 24, 2015) (recognizing that the complainant has the burden of proving these elements); Rudolph v. Nat'l R.R. Passenger Corp. (AMTRAK), ARB No. 11-037, OALJ No. 2009-FRS-15, slip op. at 11 (ARB Mar. 29, 2013) (to prevail, an FRSA complainant must establish these three elements by a preponderance of the evidence); Luder v. Cont'l Airlines, Inc., ARB No. 10-026, OALJ No. 2008-AIR-9, slip op. at 6-7 (ARB Jan. 31, 2012); Clemmons v. Ameristar Airways Inc., et al., ARB No. 05-048, OALJ No. 2004-AIR-11, slip op. at 3 (ARB Jun. 29, 2007).

The term “demonstrate” means to “prove by a preponderance of the evidence.” Palmer, supra, slip op. at 17; see Peck v. Safe Air Int'l, Inc., ARB No. 02-028, OALJ No. 2001-AIR-3, slip op. at 9 (ARB Jan. 30, 2004); Brune v. Horizon Air Indus., Inc., ARB No. 04-037, OALJ No. 2002-AIR-8, slip op. at 13 (ARB Jan. 31, 2006) (defining preponderance of the evidence as superior evidentiary weight). Thus, Complainant bears the burden of proving his case by a preponderance of the evidence; however, the evidence need not be “overwhelming” to satisfy the requirements set forth in 49 U.S.C. § 42121(b)(2)(B)(iii).³ Indeed, circumstantial evidence is sufficient to meet this burden. Araujo v. New Jersey Transit Rail Operations, Inc., 708 F.3d 152 (3rd Cir. 2013). Moreover, when the fact-finder considers whether the complainant has proven a fact by a preponderance of the evidence, “necessarily means to consider all the relevant, admissible evidence and... determine whether the party with the burden has proven that the fact is more likely than not.” Palmer, supra, slip op. at 17-18.

Step two of the test shifts the burden of proof to the respondent when the complainant establishes a violation of the FRSA. Palmer, supra, slip op. at 22. As a result, the respondent may avoid liability only if it can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected behavior.⁴ See 49 U.S.C. §§ 20109(d)(2)(A)(i) and 42121(b)(2)(B)(iii), (iv); Menefee v. Tandem Transp. Corp., ARB No. 09-046, OALJ No. 2008-STA-55, slip op. at 6 (ARB Apr. 30, 2010) (citing Brune, ARB No. 04-037, slip op. at 13). The ARB noted the “clear and convincing” standard is rigorous and denotes a conclusive demonstration that “the thing to be proved is highly probable or reasonably certain.” Speegle v. Stone & Webster Constr., Inc., ARB No. 13-074, OALJ No. 2005-ERA-6, slip op. at 11 (ARB Apr. 25, 2014) (emphasis added).

³ Notably, the Palmer court instructed ALJs not to use the phrase or concept of “prima facie” when analyzing the complainant’s burden under step one because the Act does not apply this term. Therefore, the term “demonstrate” in clause (iii), which means “proves,” is not equivalent to establishing a “prima facie” case. Palmer, supra, slip op. at 20, n. 87.

⁴ In Palmer, the ARB characterized step two as the “same-action defense” rather than the “clear and convincing” defense, noting that the ARB, courts, and administrative law judges have commonly referred to step one as the “contributing factor” step, and step two as the “clear and convincing” step. In doing so, the ARB explained, “The phrase ‘same action defense’ makes clear that step two asks a different factual question from step one—namely, would the employer have taken the same adverse action?—and is not simply the same question [as step one] with the heavier ‘clear and convincing’ burden imposed upon employer.” Palmer, supra, slip op. at 22.

The burden-shifting framework that is applicable to the FRSA cases is much easier for a complainant to satisfy than the McDonnell Douglas standard and is, thus, more challenging for a respondent to overcome. Palmer, *supra*, slip op. at 26, n. 113; McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Among the reasons for this complainant-friendly standard is that the rail industry has a long history of underreporting incidents and accidents in compliance with Federal regulations. The underreporting of railroad employee injuries has long been a particular problem, and railroad labor organizations have frequently complained that harassment of employees who reported injuries is a common railroad management practice. One of the reasons that pressure is put on railroad employees not to report injuries is the compensation system. Some railroads base supervisor compensation, in part, on the number of employees under their supervision that report injuries to the Federal Railroad Administration. Although many railroad companies have since changed this system, a culture of retaliation for reporting injuries unfortunately still lingers in some instances. Araujo, *supra*.

2. Protected Activity

By its terms, the FRSA defines protected activities as including acts done by an employee in good faith “to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee” and “requesting medical or first aid treatment, or... following orders or a treatment plan of a treating physician.” 49 U.S.C. §§ 20109(a)(4), (c)(2). The OSHA regulations regarding recording and reporting occupational injuries and illnesses provides that employers “must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness.” 29 C.F.R. § 1904.5(b)(5).

The parties have stipulated and I find and conclude that Complainant engaged in protected activity on September 11, 2016, when he made a report of injury to BNSF.

3. Alleged Unfavorable Personnel Action

By its terms, the FRSA explicitly prohibits employers from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee, if such discrimination is due, in whole or part, to the employee’s lawful, good faith act done, or perceived by the employer to have been done to notify Respondent of a work-related illness or injury, or for requesting medical or first aid treatment, or following orders or a treatment plan of a treating physician. 49 U.S.C. §§ 20109(a)(4), (c)(2).

In determining whether the alleged conduct is an unfavorable personnel action, the Supreme Court’s decision in Burlington N. & Sante Fe Ry. Co. v. White, 548 U.S. 53 (2006), as to what constitutes an adverse employment action is applicable to the employee protection provisions incorporated into the FRSA. Melton v. Yellow Transp., Inc., ARB No. 06-052; OALJ No. 2005-STA-2 (ARB Sep. 30, 2008). The Court stated that, to be an unfavorable personnel action, the action must be “materially adverse,” meaning that the action “must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” Burlington Northern, *supra* at 57. Moreover, “adverse actions” refer to

unfavorable employment actions that are “more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” Fricka, supra, slip op. at 7 (citing Williams v. Am. Airlines, Inc., ARB No. 09-018, OALJ No. 2007-AIR-4 (ARB Dec. 29, 2010)).

The parties have stipulated and I find and conclude that Complainant’s dismissal on June 20, 2017, rises to the level of an adverse employment action under the FRSA.

4. Contributing Factor

The FRSA requires that the protected activity be a contributing factor to the alleged unfavorable personnel actions against Complainant. A contributing factor is “any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.” Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254, 262-63 (5th Cir. 2014) (quoting Allen v. Admin. Rev. Bd., 514 F.3d 468 (5th Cir. 2008)); accord Ameristar Airways, Inc. v. Admin. Rev. Bd., 650 F.3d 563, 567 (5th Cir. 2011); Palmer, supra; Coates v. Grand Trunk W. R.R. Co., ARB No. 14-019, OALJ No. 2013-FRS-3, slip op. at 3 (ARB Jul. 17, 2015).

Recently, the Administrative Review Board (“the Board”) reemphasized in Palmer “how low the standard is for the employee to meet, how ‘broad and forgiving’ it is.” Palmer, supra at 53; see also Rudolph, supra at 16. The Board observed, “‘Any’ factor really means any factor,” it need not be “‘significant, motivating, substantial, or predominant’ it just needs to be a factor.” Palmer, supra at 53. The complainant need not prove that his or her protected activity was the only or the most significant reason for the unfavorable personnel action. He need only prove that it played “some” role. Thus, even an “[in]significant” or [in]substantial role suffices.” Araujo, supra at 158; Palmer, supra, at 53, n. 218. The complainant need only establish by a preponderance of the evidence that the protected activity, “alone or in combination with other factors,” tended to affect in any way the employer’s decision or the adverse actions taken. Klopfenstein v. PCC Flow Techs., ARB No. 04-149, OALJ No. 2004-SOX-11, slip op. at 18 (ARB May 31, 2006). Furthermore, the complainant is not required to demonstrate retaliatory motivation or animus to prove that the protected activity contributed to respondent’s adverse personnel action. See Halliburton, supra at 263 (quoting Marano v. Dept. of Justice, 2 F.3d 1137, 1141 (Fed. Cir. 1993)).

If the respondent claims the non-retaliatory reasons were “the only reasons for the adverse action (as is usually the case),” the evidence of employer’s non-retaliatory reasons must be considered alongside the complainant’s evidence in making such a determination. Palmer, supra at 54-55. However, the fact-finder need not compare the respondent’s non-retaliatory reasons with the complainant’s protected activity to determine which is more important in the adverse action. Id. at 55.

Even if the fact-finder determines that the respondent has a true non-retaliatory reason for terminating the complainant, this determination still does not preclude protected activity as a contributing factor in the termination of employment. Palmer, supra, slip op. at 54, n. 224 (citing Bobreski v. J. Givoo Consultants, Inc. [Bobreski II], ARB No. 13-001, OALJ No. 2008-ERA-3 (ARB Aug. 29, 2014)). A “legitimate business reason” to take an adverse action “is by itself insufficient to defeat an employee’s claim under the contributing-factor analysis... since

unlawful retaliatory reasons [can] co-exist with lawful reasons.”⁵ Palmer, supra at 58 (quoting Bobreski II, supra, slip op. at 17 (internal quotations omitted)); contra Henderson v. Wheeling Lake Erie Ry., ARB No. 11-013, OALJ No. 2010-FRS-12, slip op. at 11 (ARB Oct. 26, 2012) (citing Zinn v. Am. Commercial Lines Inc., ARB No. 10-029, OALJ No. 2009-SOX-25, slip op. at 11 (ARB Mar. 28, 2012)). In the event that the adjudicator believes the protected activity and the employer’s non-retaliatory reasons both played a role, the Board declared “the analysis is over and the employee prevails on the contributing-factor question.” Palmer, supra at 54-55.

a. Direct Evidence

The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. Direct evidence is “smoking gun evidence that conclusively links the protected activity and the adverse action and does not rely upon inference.” Williams v. Domino’s Pizza, ARB No. 09-092, OALJ No. 2008-STA-52, slip op. at 6 (ARB Jan. 31, 2011). Protected activity and employment actions are inextricably intertwined when protected activity “directly leads to the adverse employment action in question, or the employment action cannot be explained without discussing the protected activity.” Benjamin v. Citationshares Mgmt., LLC, ARB No. 12-029, OALJ No. 2010-AIR-1, slip op. at 12 (ARB Nov. 5, 2013); DeFrancesco v. Union R.R. Co., ARB No. 10-114, OALJ No. 2009-FRS-9, slip op. at 3 (ARB Feb. 29, 2012) (finding the complainant’s suspension was directly intertwined with his protected activity because had the complainant not reported his injury, the respondent would not have conducted an investigation that resulted in his discipline); Smith v. Duke Energy Carolinas, LLC, ARB No. 11-003, OALJ No. 2009-ERA-7, slip op. at 4 (ARB Jun. 20, 2012) (the Board held the complainant’s protected disclosures were inextricably intertwined with the investigation resulting in the complainant’s termination where the complainant reported a rule violation and was terminated for late reporting of the same. As such, the Board found the complainant established the “contributing factor” element of his claim).

Furthermore, where protected activity and adverse employment actions are inextricably intertwined, presumptive inference of causation is established without need for circumstantial evidence. Benjamin, supra, slip op. at 12; Henderson v. Wheeling & Lake Erie Ry., ARB No. 11-013, OALJ No. 2010-FRS-12, slip op. at 12-13 (ARB Oct. 26, 2012) (finding that where the complainant was discharged, in part, for failing to report a personal injury before leaving company premises, the complainant’s alleged protected activity was inextricably intertwined with his adverse action, and created a presumptive inference of causation). Nevertheless, circumstantial evidence may bolster a causal relationship between protected activity and adverse employment actions. Benjamin, supra, slip op. at 12.

In the present matter, Complainant has produced no evidence linking the protected activity and the adverse employment action. Complainant speculates that BNSF would not have

⁵ The ARB noted in Palmer that the administrative law judge specifically stated “the argument that [Illinois Central] had a ‘legitimate business reason’ to take the adverse action is inapplicable to FRSA whistleblower cases.” The Board explained it would be “clear error” for the fact-finder to conclude that Illinois Central’s “legitimate business reason” is irrelevant to the contributing-factor analysis. Id., slip op. at 58.

known about his injuries and claims against UP but for his report of injury and the subsequent investigation by BNSF's claims department. The evidence indicates that Mr. Cook of the claims department became aware of the UP claim and injuries because someone had heard Complainant bragging to several of his co-workers about getting several million dollars from UP on a prior claim. CX 21 at 9. Even if true that a claims department's investigation initiated by Complainant's report of injury initiated a series of events that led to his termination, courts have held it is not retaliatory to hold a disciplinary hearing when information is uncovered during the course of the investigation that reflects that the employee may have violated company rules. BNSF Ry. Co. v. U.S. Dept. of Labor Admin. Review Bd., 867 F.3d 942 (8th Cir. 2017).

While not necessary to establish Complainant's case, I note that there has been no evidence to show Respondent had a retaliatory motive that, even in part, was prompted by Complainant's report of injury. I find there has been no direct evidence that the report of injury played any role in the decision to dismiss Complainant.

b. Circumstantial Evidence

If the complainant does not produce direct evidence or if he seeks to bolster the direct evidence demonstrating a causal relationship between his protected activity and adverse employment action, he must proceed indirectly or inferentially by proving by a preponderance of the evidence that retaliation was the true reason for terminating his employment. That is, the complainant must present circumstantial evidence. Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, or a change in the employer's attitude toward the complainant after he or she engages in protected activity. Brucker v. BNSF Ry. Co., ARB No. 14-071, OALJ No. 2013-FRS-70, slip op. at 10-11 (ARB Jul. 29, 2016) (noting that intent and credibility are crucial issues in employment discrimination cases); see, e.g., DeFrancesco v. Union R.R. Co., ARB No. 13-057, OALJ No. 2009-FRS-9 (ARB Sep. 30, 2015); Speegle v. Stone & Webster Constr., Inc., ARB No. 13-074, OALJ No. 2005-ERA-6, slip op. at 10 (ARB Apr. 25, 2014); Palmer, *supra*, slip op. at 55, n. 227. Whether considering direct or circumstantial evidence, an administrative law judge must make a factual determination under the preponderance of the evidence standard of proof. The judge must be persuaded and must believe that the complainant's protected activity more likely than not played some role in the adverse action. Palmer, *supra*, slip op. at 55-56.

Temporal Proximity

“Temporal proximity between the employee's engagement in a protected activity and the unfavorable personnel action can be circumstantial evidence that the protected activity was a contributing factor to the adverse employment action. See Kewley v. Dept. of Health and Human Servs., 153 F.3d 1357, 1362 (Fed. Cir. 1998) (noting that, under the Whistleblower Protection Act, “the circumstantial evidence of knowledge of the protected disclosure and a reasonable relationship between the time of the protected disclosure and the time of the personnel action will establish, prima facie, that the disclosure was a contributing factor to the personnel action”)

(internal quotation omitted).” Direct evidence of an employer’s motive is not required. See Araujo, supra, at 161.

Determining, what, if any, logical inference can be drawn from the temporal relationship between the protected activity and the unfavorable employment action is not a simple and exact science but requires a “fact intensive” analysis. Brucker, supra, slip op. at 11 (quoting Franchini v. Argonne Nat’l Lab., ARB No. 11-006, OALJ 2009-ERA-14, slip op. at 8-9 (ARB Sep. 26, 2012)). Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. Robinson v. Nw. Airlines, Inc., ARB No. 04-041, OALJ No. 2003-AIR-22, slip op. at 9 (ARB Nov. 30, 2005); see Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989) (the Eighth Circuit reversed the Secretary for failing to appreciate that a 30-day temporal gap in that case was sufficient to support an inference of retaliation); see also Barker v. UBS AG, 888 F.Supp.2d 291, 2012 WL 2361211, 2012 U.S. Dist. LEXIS 71234 *8 (D. Conn. 2012) (suggesting that a range up to five months could be a sufficiently close temporal gap to support an inference of unlawful discrimination); Goldstein v. Ebasco Constructors, Inc., No. 1986-ERA-36, slip op. at 11-12 (Sec’y Apr. 7, 1992), rev’d on other grounds sub nom., Ebasco Constructors, Inc. v. Martin, 986 F.2d 1419 (5th Cir. 1993) (causation established where seven or eight months elapsed between protected activity and adverse action). However, where an employer has established one or more legitimate reasons for the adverse actions, the temporal inference alone may be insufficient to meet the employee’s burden to show that the protected activity was a contributing factor. Barber v. Planet Airways, Inc., ARB No. 04-056, OALJ No. 2002-AIR-19 (ARB Apr. 28, 2006).

Here, on September 11, 2016, Complainant engaged in protected activity by reporting a work place injury. Complainant was not terminated from his employment with Respondent until June 20, 2017, over nine months after his protected activity. Therefore, I find and conclude that no logical inference of retaliation can be drawn from the temporal relationship between Complainant’s protected activity and the termination of his employment with Respondent.

Respondent’s Knowledge of the Protected Activity

Although the respondent’s knowledge of the protected activity is not conclusive evidence that the complainant’s protected activity was the catalyst for respondent’s adverse personnel action, knowledge is certainly a factor that must be considered. See Hamilton, supra, slip op. at 3. Generally, the complainant cannot simply show that the respondent, as an entity, was aware of his protected activity. Rather, he must establish that the “decision-makers” who subjected him to the alleged adverse actions were aware of his protected activity. See Gary v. Chautauqua Airlines, ARB Case No. 04-112, OALJ No. 2003-AIR-38 (ARB Jan 31, 2006); Peck v. Safe Air Int’l, Inc., ARB Case No. 02-028, OALJ No. 2001-AIR-3 (ARB Jan. 30, 2004); see Johnson v. BNSF Ry. Co., OALJ. No. 2013-FRS-00059, slip op. at 11, n. 8 (ALJ Jul. 11, 2014) (noting that the final decision-maker’s “knowledge” and “animus” are only factors to consider in the causation analyses).

Hale and Detlefsen had no prior knowledge of Complainant’s report of injury beyond the union representative’s mention of a FELA case during the investigation hearing. While Stephens would have been made aware of the report of injury because he was in Complainant’s

supervisory chain, this occurred longer than nine months before the hearing, and Stephens credibly testified that the injury report did not play any part in his decision to terminate Complainant's employment.

Indications of Pretext

Under the FRSA's contributing factor standard, the complainant does not have to prove that the respondent's "proffered non-discriminatory reasons are pretext." Coates, *supra*, slip op. at 4. In other words, the complainant "need not necessarily prove that the railroad's articulated reason was a pretext in order to prevail, because the worker alternatively can prevail by showing that the railroad's reason, while true, is only one of the reasons for its conduct and that another reason was the worker's protected activity." See OSHA's Final Interim Rule Summary of Section 1982.104; 29 C.F.R. § 1982.104.

Nevertheless, the complainant may demonstrate that the respondent's non-discriminatory reasons are pretextual in nature when evidence is presented that indicates the respondent did not in good faith believe the complainant violated its policies but relied on the alleged violations in bad faith pretext to terminate employment. See Redweik v. Shell Exploration & Prod. Co., ARB No. 05-052, OALJ No. 2004-SWD-2, slip op. at 9 (ARB Dec. 21, 2007). However, if the complainant is terminated because the respondent was mistaken in its belief, the belief is not pretext for retaliation if honestly held. See Swenson v. Schwan's Consumer Brands N. Am., Inc., 500 F.App'x. 343, 346 (5th Cir. 2012); see also Dailey v. Shintech, Inc., 629 F.App'x. 638, 642 (5th Cir. 2015); Collins v. Am. Red Cross, 715 F.3d 994, 999, (7th Cir. 2013) (the FRSA "does not forbid sloppy, mistaken, or unfair terminations; it forbids discriminatory or retaliatory terminations." Thus, the relevant question is not the complainant's guilt or innocence; rather, the question is whether the respondent terminated the complainant's employment because it believed in good faith that the complainant violated its policies (i.e., theft, fraud, or violated a safety policy)). Villegas v. Albertsons, LLC, 96 F.Supp.3d. 624, 636 (W.D. Tex. 2015); Jauhola v. Wis. Cent., Ltd., 2015 WL 4992392, 2015 U.S. Dist. LEXIS 109930, at *19 (D. Minn. 2015) ("The relevant question is 'not whether the stated basis for termination actually occurred, but whether the defendant believed it to have occurred[.]'"). On this basis, "federal courts do not sit as a super-personnel department that re-examines an employer's disciplinary decisions." Kuduk, *supra* at 792 (quoting Kipp v. Mo. Highway & Transp. Comm'n, 280 F.3d 893, 898 (8th Cir. 2002).

Consequently, in the present matter, Complainant may demonstrate that his dishonesty in completing the medical questionnaire was not Respondent's true reasons for terminating his employment, thereby invoking an inference that it was a pretext for retaliation. However, I find Stephens, Hale, and Detlefsen had a good faith belief that Complainant had been dishonest in completing the medical questionnaire and, thus, genuinely believed Complainant violated Respondent's rules and standards relating to dishonesty.

Accordingly, I find and conclude Complainant has failed to present any circumstantial evidence that Respondent used Complainant's dishonesty as a pretext to his discharge.

Disparate Treatment

To establish disparate treatment, a plaintiff must demonstrate that a “similarly situated” employee under “nearly identical” circumstances was treated differently. Wheeler v. BL Dev. Corp., 415 F.3d 399, 406 (5th Cir. 2005) (quoting Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1090 (5th Cir. 1995)). The Court further explained that, to be a proper comparator, the employee must have held the same job or responsibilities, shared the same supervisor, had employment status determined by the same person, and have essentially similar violation histories. Lee v. Kansas City S. Ry. Co., 574 F.3d 253, 260 (5th Cir. 2009). The Court noted that of most importance, the employee’s conduct that elicited the adverse personnel action must be “nearly identical to that of the proffered comparator who allegedly drew a dissimilar employment decision.” Id.; see Wyvill v. United Life Cos. Life Ins. Co., 212 F.3d 296, 304-05 (5th Cir. 2000) (a finding of “striking differences” between the plaintiff and comparator more than accounts for the different treatment each person received); see also Little v. Republic Refining Co., 924 F.2d 93, 97 (5th Cir. 1991) (plaintiff had not proffered a nearly identical comparator because the two employees did not share the same supervisor).

Complainant did not submit any comparator evidence. Detlefsen testified that BNSF’s application of the Stand-Alone Dismissal for Complainant’s dishonesty was consistently applied. Therefore, I find and conclude that the lack of preponderant evidence demonstrating disparate treatment does not support a finding that Complainant’s protected activity was a contributing factor to his termination.

Inconsistent Application of Respondent’s Policies

Circumstantial evidence may include 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 for the adverse action taken, and a change in the employer’s attitude toward the complainant after he or she engages in protected activity. Brucker, supra, slip op. at 11.

Detlefsen testified that when dishonesty is proven in the record, she recommends dismissal 100% of the time. Given the foregoing, I find and conclude Respondent has not inconsistently applied its discipline policy.

The Legitimacy Reasons for Employer’s Actions

The Board has held that it is proper to examine the legitimacy of an employer’s reasons for taking adverse personnel action in the course of concluding whether the complainant has demonstrated by a preponderance of the evidence that protected activity contributed to the alleged adverse action. Palmer, supra, slip op. at 29, 55; Brune, supra at 14 (citing McDonnell Douglas Corp. v. Green, supra). Proof that an employer’s explanation is unworthy of credence is persuasive evidence of retaliation. Once the employer’s justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action. See Florek v. E. Air Cent., Inc., ARB No. 07-113, OALJ No. 2006-AIR-9, slip op. at 7-8 (ARB May 21, 2009)

(citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147-48 (2000)). The complainant is not required to prove discriminatory intent through direct evidence but may satisfy this burden through circumstantial evidence. Douglas v. Skywest Airlines, Inc., ARB Nos. 08-070, 08-074, OALJ No. 2006-AIR-14, slip op. at 11 (ARB Sep. 30, 2009). Furthermore, an employee “need not demonstrate the existence of a retaliatory motive on the part of the employe[r] taking the alleged prohibited personnel action in order to establish that his [or her] disclosure was a contributing factor to the personnel actions.” Marano, supra.

Undoubtedly, the answer Complainant provided on the medical questionnaire were not correct. BNSF has a legitimate interest in having prospective employees fully disclose their medical histories in pre-employment questionnaires. Having determined that Complainant had provided false answers on his questionnaire, BNSF terminated Complainant for dishonesty as per BNSF policy.

Complainant’s dismissal was upheld on appeal to BNSF’s Assistant Vice President of Labor Relations, Milton H. Siegele Jr. RX 5.⁶ I fully agree with his conclusions, specifically:

Claimant was disciplined because he was blatantly dishonest. The mere act of dishonesty is grounds for dismissal; this position has been upheld by numerous boards.... The Policy for Employee Performance Accountability clearly states that dishonesty is a stand-alone dismissible violation in Appendix B. Claimant was clearly dishonest. Claimant intentionally withheld information regarding his prior injuries in order to secure a position at BNSF, who would not have hired him with this knowledge. When his gross dishonesty was discovered, he was properly dismissed.

RX 5.

As previous stated, I found Stephens, Hale, and Detlefsen to be very credible witnesses. After hearing their testimony and reviewing the record, I have no doubt that Complainant’s protected activity played absolutely no part in the decision to terminate Complainant. Complainant has not shown by a preponderance of the evidence that the protected activity, alone or in combination with other factors, affected in any way BNSF’s decision or the adverse actions taken.

D. Same Action Defense

Even if Complainant had shown by a preponderance of the evidence that the protected activity, alone or in combination with other factors, tended to affect in any way BNSF’s decision to terminate him, I find BNSF would have taken the same adverse action even in the absence of Complainant’s protected activity.

⁶ The opinion of the Public Law Board (RX 48) was not admitted as it was offered after the record had closed and briefs had been filed.

Where the complainant demonstrates his protected activity contributed to his dismissal, the respondent may show by clear and convincing evidence it would have taken the same action absent the complainant's protected activity. Palmer, supra, slip op. at 22. A respondent's burden to prove this step by clear and convincing evidence is a purposely high burden, as opposed to a complainant's relatively low burden to establish the elements of his claim. Id. Clear and convincing evidence that an employer would have disciplined the employee in the absence of protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability. Id. (stating that step two asks whether the non-retaliatory reasons, by themselves, would have been enough that the respondent would have taken the same adverse action absent the protected activity); see DeFrancesco, supra, slip op. at 8; Fricka, supra, slip op. at 5.

The "clear and convincing evidence" standard is the intermediate burden of proof between "a preponderance of the evidence" and "proof beyond a reasonable doubt." Araujo, supra, at 159. To meet the burden, Respondent must show that "the truth of its factual contentions is highly probable." Colorado v. New Mexico, 467 U.S. 310, 316 (1984)(emphasis added); see Speegle, supra, slip op. at 11. Additionally, Respondent must present evidence of "unambiguous explanations" for the adverse actions in question. Brucker, supra, slip op. at 14.

The following facts demonstrate by clear and convincing evidence that BNSF would have taken the same adverse actions absent Complainant's protected activities:

- BNSF has policies and rules prohibiting dishonesty and a legitimate interest in enforcing those policies and rules. For example, the questionnaire cautioned that any incomplete or false answers may be grounds for withdrawal or termination of employment. Complainant knew this and certified that his answers were correctly recorded and that his answers were true. The General Code of Operating Rules followed by conductors such as Complainant, specifically Rule 1.6, states that employees must not be dishonest.
- The testimony of the decision-makers (Hale, Stephens, and Detlefsen) reflect they were focused solely on the pre-employment medical questionnaire and that they honestly believed Complainant gave false answers, which was grounds for dismissal. The investigation only concerned the relevant facts surrounding the completion of the medical questionnaire.
- Complainant's discipline process was consistent with BNSF's Policy for Employee Performance Accountability for Stand-Alone Dismissals. The process was also reviewed by a member of the PEPA Team (Detlefsen) who did not know Complainant and was not in his line of supervision.
- Temporal proximity exists between the discovery of the dishonest answers and the adverse action. There is no temporal proximity between the protected activity and the adverse action.
- BNSF's explanation for dismissal was consistent.

- BNSF consistently dismisses employees found to be dishonest.
- Detlefsen has recommended dismissal in 100% of the cases when dishonesty has been proven.
- PEPA states that dishonesty is a Stand-Alone Dismissible Violation.
- BNSF followed the procedures outlined in the collective bargaining agreement.
- The termination was approved by others in senior management.
- The decision to terminate Complainant for dishonesty was upheld on appeal to the Assistant Vice President of Labor Relations.
- BNSF has a legitimate interest in having prospective employees fully disclose their medical history in pre-employment questionnaires and to be honest in all aspects of their employment.

Further, the credible testimony of Hale, Detlefsen, and Stephens proves by clear and convincing evidence that Complainant would have been dismissed for his dishonesty in completing the medical questionnaire regardless of his protected activity.

Accordingly, I find and conclude Respondent has demonstrated by clear and convincing evidence that it would have taken the same adverse actions absent Complainant's protected activity.

CONCLUSION AND ORDER

Based upon the foregoing and upon the entire record, Complainant has failed to prove that his protected activity under the Federal Railway Safety Act, alone or in combination with other factors, tended to affect in any way Respondent's decision to terminate his employment. Accordingly, Case No. 2018-FRS-00086 is hereby **DISMISSED**.

So ORDERED.

LARRY W. PRICE
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, 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).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1982.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1982.110(b).