

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 29 September 2020

CASE NO.: 2018-FRS-00018

In the Matter of:

THE BANKRUPTCY ESTATE OF
DONALD M. GRAFF,
Complainant,

v.

BNSF RAILWAY COMPANY,
Respondent.

Before: Timothy J. McGrath
Administrative Law Judge

Appearances:

Richard L. Boucher, Esq., and Bradley Supernaw, Esq., Boucher Law Firm, Lincoln, Nebraska,
for Complainant

Paul S. Balanon, Esq., BNSF Railway Company, Fort Worth, Texas, for Respondent

DECISION AND ORDER DENYING COMPLAINT

On August 24, 2017, Donald M. Graff (“Complainant”) filed a complaint with the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”) alleging that BNSF Railway Company (“BNSF” or “Respondent”) violated the employee protection provisions of the Federal Railroad Safety Act (“FRSA” or “Act”) when it terminated his employment on June 15, 2017, in retaliation for reporting various work-place safety concerns. *See* 49 U.S.C. § 20109(a)(4); 29 C.F.R. Part 1982.

After investigating, OSHA dismissed the complaint on November 24, 2017, finding no violation of the Act. Complainant timely filed objections to the findings and requested a hearing before the Office of Administrative Law Judges (“OALJ”). The matter was then assigned to me

and I presided over a two-day hearing on June 13-14, 2018, in Omaha, Nebraska. The trial transcript is referred to herein as “TR.”

At the hearing, I admitted Administrative Law Judge Exhibits (“ALJX”) 1 through 5, TR 6, Joint Exhibits (“JX”) 1 through 13, TR 7, 281-83, Complainant’s Exhibits (“CX”) 1 through 3, 10 and 14 through 15, TR 9, and Respondent’s Exhibits (“RX”) 1 through 38, 40, and 42, TR 11-13. Seven witnesses, including Complainant, testified. Complainant and Respondent filed post-hearing briefs, Cl. Br. and Resp’t Br., respectively, on August 31, 2018. I base my decision on all of the evidence admitted, relevant controlling statutory and regulatory authorities, and the arguments of the parties.¹ As explained in greater detail below, I find Complainant did not prove that any activity protected under the FRSA was a factor in Respondent’s decision to terminate his employment, and therefore, deny his complaint.

I. STIPULATIONS

The parties entered into a number of stipulations. Those stipulations are supported by the record, and I make the following findings of fact based upon them:

- (1) BNSF is a railroad carrier within the meaning of 49 U.S.C. § 20109;
- (2) On December 3, 2007, Complainant began his employment with BNSF;
- (3) Complainant was a member of the International Brotherhood of Electrical Workers (“IBEW”) during the entirety of his employment with BNSF;
- (4) In 2017, Complainant resided in Gretna, Nebraska;
- (5) On June 15, 2017, BNSF dismissed Complainant twice; for insubordination and also for intentional and malicious attempt to destroy a telecom battery plant at David City, Nebraska;
- (6) Complainant’s dismissals on June 15, 2017, are unfavorable personnel actions;

¹ In *Austin v. BNSF Ry. Co.*, ARB No. 17-024, ALJ No. 2016-FRS-13, slip op. at 2 n.3 (ARB Mar. 11, 2019) (per curiam), the Administrative Review Board (“ARB”) noted that an administrative law judge (“ALJ”) need not include a summary of the record in the Decision and Order, as it is assumed that the ALJ reviewed and considered the entire record in making his or her decision. The ARB stated that what is more helpful for its review of whether the ALJ’s findings of fact are supported by substantial evidence of record is a tightly-focused set of findings of fact. Accordingly, in this Decision and Order I focus specifically on findings of fact pertinent to the issues in dispute. I have, however, reviewed and considered the entire record.

- (7) One August 24, 2017, Complainant timely filed a complaint with OSHA pursuant to 49 U.S.C. § 20109. Complainant's OSHA complaint alleges a violation of 49 U.S.C. § 20109(b)(1)(A), which protects employees who "report, in good faith, a hazardous safety or security condition";
- (8) On November 24, 2017, OSHA issued findings dismissing Complainant's complaint; and
- (9) On December 29, 2017, Complainant timely appealed the OSHA findings to the OALJ.

ALJX 4.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

Complainant was employed by BNSF from 2007, until his termination in 2017.² TR 26. He worked as "Electronics Technician 2," first on the night shift and then as a foreman a few years later. *Id.* Complainant had about eight to nine other electronic technicians reporting to him. TR 111-12. As foreman, Complainant managed "the safety process for all telecom employees" and "performed repairs and maintenance of all telecommunications equipment." JX 9. Complainant stated he ran the shop in a "militaristic" manner. TR 34. Complainant admitted that he "ran the shop like a well-oiled machine." *Id.* He explained "[w]e has all the documentation, everybody had the right tools for the job, everything had a procedure, we followed the rules. And I was real big on following the procedures and rules." *Id.*

In the year leading up to his termination, Complainant's immediate supervisor was Robert Mize.³ TR 27. Complainant and Mr. Mize had monthly meetings during which they discussed various personnel issues and safety concerns. TR 156. During these meetings, Complainant made numerous safety complaints to Mr. Mize relating to another BNSF employee, Daniel Wolken.⁴ TR 28. These complaints had to do with personal protective equipment, dereliction of duty and failure to complete assigned tasks. *Id.*

Complainant stated Mr. Wolken did not embrace BNSF's Personal Protective Equipment ("PPE") rules. *Id.* For example, Complainant testified:

² Prior to joining BNSF, Complainant served two enlistments in the U.S. Navy. TR 87; *see* CX 14.

³ Mr. Mize supervised 17 to 19 employees including, a foreman who worked with Complainant, Mike Warrington. TR 155, 193.

⁴ Complainant and Mr. Wolken had other unpleasant run-ins. At one point, Mr. Wolken threw a job safety book at Complainant. TR 67-68.

When I approached him or when I did job checks on the site and the employees, I asked [Mr. Wolken] where his PPE was and he says: “Gosh darn . . . I forgot it again. I’ll go out to my truck and get it.” And I [said]: “Okay, well, let’s get your PPE on.” That was . . . the first time I had an incident with [Mr. Wolken] about wearing his PPE.

TR 29; *see* TR 294 (“[Mr. Wolken] would have to be reminded to wear his PPE.”). Complainant also made contemporaneous notes of Mr. Wolken’s various safety violations. *See* CX 1.

Complainant also testified that Mr. Wolken regularly failed to report to the location where he was working. TR 32. This is important “[b]ecause if something happens while you’re out on the road, we need to know where you’re at.” *Id.*; *see* TR 33. Complainant stated he would not hear from Mr. Wolken until he got back to the shop. TR 33.

According to Complainant, much of the ongoing issues between him and Mr. Wolken stemmed from a change in Mr. Wolken’s work location. *Id.* Previously, Mr. Wolken reported to a different foreman at BNSF’s downtown Lincoln, Nebraska depot. *Id.* At some point, the team underwent a consolidation and Complainant, along with previous managers, decided to make “one team to build morale.” *Id.* The members of this new consolidated team were to report for duty to the Lincoln radio shop. *Id.* With Mr. Wolken now at the same shop, Complainant would assign him tasks to complete. TR 259. Mr. Wolken did not react well to this change and he continued to report to the downtown depot without informing Complainant. TR 30. Mr. Wolken also testified that he felt the work Complainant asked him to do was “demeaning” because “people with less seniority” could have done it. TR 258.

The most serious safety concern raised by Complainant pertaining to Mr. Wolken was when Mr. Wolken wired an alarm relay inside an electrical breaker panel at the David City radio site on May 9, 2017. TR 35; *see* CX 3, TR 165-66. Mr. Wolken, who is not an electrician, “double-tapped a breaker, which caused the difference in wiring.” TR 35. Complainant testified this faulty wiring by Mr. Wolken could cause electrocution or a fire. TR. 41. When Complainant inquired about the wiring done at David City, Mr. Wolken said that was the way it had always been done. TR 42. Complainant brought this incident to the attention of Mr. Mize via email followed by a phone conversation. TR 38, CX 3. The email contained photos of the breaker panel Mr. Wolken wired. TR 39; *see* CX 3. In response to Complainant’s report, Mr. Mize said he would “take care of it.” TR 39. Complainant also forwarded the email to David

Mensch, Operations Manager North Region who in turn forwarded the email to Kevin Kautzman, Director of Technology Services-Telecommunications. TR 40, CX 3. No disciplinary action was taken against Mr. Wolken for this incident. *Id.*; *see* TR 43. Mr. Mize testified that he did not view this as a serious violation.⁵ TR 158. He spoke with Mr. Wolken about it and Mr. Wolken understood that an electrician should do that work. *Id.*; *see* TR 166-68.

B. David City Incident

The David City site⁶ consists of “a little telecom[munications] hut at the base of a [radio] tower.” TR 37; *see* JX 13; TR 118-19 (stating the building is about 4 by 6 feet or 4 by 8 feet in size). This site is a battery plant that serves as “secondary support in case AC power fails. It keeps the site up and running until power is restored.” TR 196. It is used to power “dispatcher radios” and equipment “use[d] across the railroad . . . [to] communicate [with trains] on the tracks.” *Id.*

During the morning briefing on April 12, 2017, the work group discussed the battery cell with bad readings at the David City site. TR 50. Two plans were offered to fix this problem. Complainant recommended using a brand new charger intended for another site. TR 51; *see* TR 119. Mr. Wolken suggested using four spare batteries that were located at the Lincoln shop. TR 51; *see* TR 119. Mr. Wolken’s plan was chosen. After this meeting, Complainant asked Mr. Mize why he chose Mr. Wolken’s plan. Mr. Mize stated he wanted to boost crew morale.⁷ TR 52. Complainant testified he was not upset that his plan was not chosen, but instead “was surprised more than anything.” *Id.*; TR 119-20.

After the meeting, Mr. Wolken and Bob Davis went to the David City site to install the four spare batteries. TR 256. According to the Net Guardian⁸ alarm system, Mr. Wolken and Mr. Davis entered the building at “10:25:11 AM CDT.” RX 26 at 5. The Eltek system,⁹ which

⁵ Mr. Kautzman also testified that “based on [his] 29 years and [his] formal education . . . [he] did not see any potential for serious injury, at all, in that situation.” TR 520.

⁶ The David City site is located approximately 50 miles from the Lincoln shop. *Cf.* TR 196.

⁷ Mr. Mize testified that he chose the spare battery plan because he wanted to fix the problem before the upcoming Easter holiday. Complainant’s plan to replace the charger system would take four hours while using the spare batteries could be completed in one hour. TR 53.

⁸ Net Guardian is sometimes referred to as “Net Boss” or “Netboss.”

⁹ The Eltek system is “like a mini-computer, a little module installed in the unit. . . . [I]t tells the charger what voltage to charge the batteries” depending on how many batteries are attached to it. TR 55. The batteries are approximately two feet by six inches and weigh around 98 pounds. TR 72.

records changes to the battery charger, indicates the batteries were changed at “09:07.” *Id.* at 3-4.

The next day, April 13, 2017, Complainant had three major tasks to complete: (1) visit the Jamaica site because a new propane tank was delivered; (2) verify the FCC license at David City; and (3) attend a 1:00 P.M. meeting at the Havelock site regarding the camera system being installed. TR 43-44. A second antenna was being installed at David City in order to make up for signal coverage that was lacking. TR 286. Complainant testified he was at the David City site to “check[] the FCC license to make sure it was correct.” TR 43. He also checked the height of the antenna “to verify it was in the correct place for the FCC license.” TR 44. Complainant testified he took pictures of the tower to document the current placement of the antennas for the crew.¹⁰
Id.

He testified:

I opened the door when I got to the site, it’s alarmed, so I called in. I tried to call into the [Technology Services Operations Center] right away, but the phone wasn’t working, so I had to use my cell phone. So, I stepped outside the site, used my cell phone to call the [Interactive Voice Response] system, which is a system that monitors alarms, it indicates who’s at the site. So, it takes your B-number, your employee ID and your password, and authenticates I’m at the site. And when you login you put an estimated time you’re going to be there. You usually put an hour, if you’re going to be there. If you put too short, you can run out of time and it throws the alarm. So I put down I was there for a little while.

I [then] went back inside. Inside the building, the first rack is a radio rack . . . so I took pictures . . . because I wanted to make sure we had room for the . . . new radio.

I looked around on the floor for the A[ntenna] S[tructure] R[egistration] sign, I didn’t see it. Stepped outside [sic]. I took pictures from the south and from the north, so Mike Warrington and his crew had both sides of the antenna. Then I just did a quick walkabout of the fence [to] make sure there’s no damage to the fence line.

Then I went back in the site, I pulled the rug out, shook the mud off. Threw the track in my truck. Locked the door. Called IVR and headed to Havelock.

¹⁰ These photos were never recovered from Complainant’s work phone or computer despite several attempts to locate them. TR 46-47, 122-23.

TR 48-49.

According to the Net Guardian records, Complainant entered the building at “10:34:59 AM CDT” and stayed for approximately 45 minutes. RX 26 at 10; *see* TR 47, 123. The Eltek system recorded several “configuration changes”¹¹ spanning from “09:17” to “09:20.” RX 26 at 9.

Five days later on April 18, 2017, Mr. Wolken went to the David City site to retrieve a wrench. Mr. Wolken’s entrance into the building was not present on the Net Guardian alarm system. It was later determined that whoever made the configuration change on April 13, 2017, also disconnected the wires to the alarm system. TR 206. When Mr. Wolken went to pick up the wrench he noticed the batteries “felt hot.” RX 1 at 105. He also saw that the charger was changed to 59.0 volts from 54.0 volts. *Id.*

Mr. Wolken testified that he took it upon himself to investigate the cause of the configuration change because it “was so egregious.” TR 254. He did this by logging into the “charger rack to see what the alarm log said, to see when something happened.” *Id.* When asked why he did this he stated:

I’m responsible for those sites and it’s up to me to kind of figure out if things are working correctly or if something failed on its own or . . . if somebody sabotaged something. So, me being responsible for the site, I did as much as I could to figure out . . . what our liability was there.

TR 255.

The next day on April 19, 2017, Mr. Wolken sent an email to Paul Miller,¹² detailing what he found at David City. RX 1 at 105. In addition to information about the voltage change, Mr. Wolken wrote: “Not sure how the setting got changed from 54.0 but I think [Complainant] was there on 4-13-17 as Netboss shows an entry at 10:33. My entry there yesterday 4-18 did not show on Netboss. I think the door relay is not working.” *Id.*

On April 21, 2017, Mr. Wolken sent an email to Mr. Kautzman, the Director of Technology Services-Telecommunications. RX 18. This email reiterated much of what he

¹¹ A “configuration change” can be caused by “anything to do with the battery plant that would be a . . . modification to its set-up.” TR 172. The alarm log does not specify what changes were made, only that a configuration change occurred. *Id.*

¹² There is no information in the record indicating who Paul Miller is.

wrote in the April 19, 2017, email, however, he did not mention Complainant by name as the person who entered the site at 10:33 A.M. *Id.*

Mr. Mize was first informed of the incident at David City via the email from Mr. Wolken addressed to Mr. Kautzman. TR 17, RX 18. Mr. Mize forwarded this email to Complainant in order to determine if someone had been at David City when the configuration change occurred. TR 198, RX 19; *see* TR 109. Complainant did not respond to Mr. Mize's email. TR 199.

On April 23, 2017, Complainant sent an email to a BNSF human resources employee complaining of a hostile work environment. CX 2; *see* TR 64, RX 20 at 3-4. In that email, Complainant made allegations of bullying and threatening tactics by Mr. Wolken and another electronics technician, Jeff Woodard. TR 63. Human resources followed-up by phone with Complainant and assured him the issue would be taken care of. TR 65. Later that same day, Mr. Mize came into Complainant's office and allegedly stated, "Don't you ever call HR. I'm taking care of the issue." TR 66. Complainant testified that Mr. Mize told him to stop bringing these issues to the attention of human resources several other times. *Id.* Mr. Mize denies this.

During a shop meeting on May 10, 2017, Mr. Mize told the team that the results of the investigation of the David City incident were inconclusive and they were going to put it behind them. TR 60. Mr. Mize told the group he wanted to "put this David City issue to bed." TR 60, 61; *see* RX 20 at 1. Mr. Mize testified he "couldn't conclusively say that . . . anything had happened there. . . . I felt like I didn't have enough information or details . . . to move forward." TR 199.

It was at this time that Mr. Wolken, disappointed by this result, indicated he had more information. TR 181, 257. The next day Mr. Mize met with Mr. Wolken to see the new information. Mr. Mize went on to say: "I . . . talked to [Mr. Wolken], who had showed me a picture of his laptop that had a time change, . . . where it showed the actual date and time on his laptop, that stamp versus that alarm logs from the battery plant." TR 175, 182. The picture of Mr. Wolken's computer screen shows the date and time, April 21, 2017, 1:07 P.M., in the bottom right-hand corner. In the middle of the screen is the Eltek application,¹³ which displays the same

¹³ According to Complainant, Mr. Wolken was the only person at the time that had the software and cable necessary to access the Eltek system. TR 56-57, 58.

date, April 21, 2017, and the time as 11:48 A.M. Based on this picture, Mr. Wolken and Mr. Mize determined the Eltek time keeping system was off by one hour and 19 minutes. TR 189-90. Mr. Mize and Mr. Wolken also went to David City that day to check out the site. TR 273.

Based on this new information, Mr. Mize determined that “it appeared that [Complainant] was at the site whenever a configuration change had happened at the [Davis City] plant. So there was some involvement there that [he] felt like [Complainant] had been in there.” TR 204; *see* TR 182.

Based on the allegations made in Complainant’s workplace harassment report, Mr. Kautzman and Mr. Mensch, Operations Manager North Region, visited the Lincoln shop to meet with employees on May 17, 2017. TR 519. Mr. Kautzman testified the intention of the trip was to “find out exactly what was transpiring, why we were having these type[s] of reports coming to us, because we typically don’t see that. . . . And when we have multiple [reports] like that, from a given location, that’s something that we want to look into.” TR 507.

Mr. Kautzman first met with Complainant in his office. *Id.* During this 15-minute meeting, Complainant appeared nervous, “jumping around stories” and not “focused on one thing or another.” TR 508. After Complainant and Mr. Mize were dismissed, Mr. Kautzman and Mr. Mensch spoke with the other technicians. TR 507-08. Of the discussion with the technicians, Mr. Kautzman said:

I was real surprised to hear what I did.

What was compelling about the . . . discussion with the technicians is that . . . they all had a lot of problems with [Complainant], as their foreman. The way [Complainant] led his team, there was a lot of feelings that he was always looking over their shoulder, that he would tell them exactly what to do, when to do and how to do [sic].

And I think the feeling that I got in the room was that they were very upset. And it wasn’t just one or two, it was everyone in the shop [that] was having issues with [Complainant].

TR 509-10.

C. Investigation and Termination

On May 18, 2017, Mr. Mize sent an email to Mr. Kautzman and Mr. Mensch containing all the information he compiled regarding the David City incident.¹⁴ *See generally* RX 26. Based on the information contained in this email, Mr. Kautzman determined he “needed to get more information and hear from [Complainant].” TR 512. He set up a conference call with BNSF’s Labor Relations Representative, Rachel Yurek on May 18, 2017. *Id.* Mr. Mize and Mr. Mensch participated in the call along with Ms. Yurek and Mr. Kautzman. *Id.* During the call, they discussed “if [they] felt that there was enough information within the documents to go to the next step, which was the investigation. TR 513. He went on “It was felt that there was, that we had to take it to that next step to get more information through an investigation process.”¹⁵ *Id.*; *see* RX 35.

Ms. Yurek helped “craft the letters of investigation”, which were to be given to Complainant later that afternoon.¹⁶ TR 513.

At 3:05 P.M. on May 18, 2017, Mr. Mize sent a text message to Complainant telling him to remain at the shop after the work day was complete at 3:30 P.M. TR 75, 168. The text message failed to indicate why it was necessary for Complainant to stay and Mr. Mize did not respond when Complainant asked if it could wait until the next day. TR 75, 169. Mr. Mize later testified that he wanted Complainant to stay after work hours “to help save a little dignity and not walk him out in front of the rest of the employees. At that time we were going to hand out the investigation letter to him and escort him off the property.” TR 209.

Complainant testified he remained at the shop until about 4:00 P.M, but Mr. Mize had not returned yet. TR 75. At that time, he checked to see if there were any issues that needed to

¹⁴ Mr. Kautzman testified he received this email on May 17, 2017; however, the email is dated “Thursday, May 18, 2017 10:44 AM.” *Compare* TR 511 *with* RX 26 at 1.

¹⁵ Mr. Kautzman also stated that the insubordination was discussed during this conference call. However, this is impossible since the alleged insubordination had not yet occurred. Mr. Mize did not send Complainant the text message asking him to remain at the shop until 3:05PM, over two hours after the meeting was scheduled to be held. *Compare* TR 513 *with* RX 35 *and* RX 2 at 31. Further, the insubordination charge is only first mentioned in a May 19, 2017, email from Ms. Yurek. *See* RX 27.

¹⁶ Once again, the timeline of events is unclear. Mr. Kautzman testified that Ms. Yurek drafted both letters of investigation, for intentional and malicious attempt to destroy a telecom battery plant and insubordination, on May 18, 2017. However, as noted *supra* note 8, the alleged insubordination had not occurred yet. Further, the email Ms. Yurek sent regarding the investigation of the insubordination was sent at 1:09 P.M. on May 19, 2017. RX 27. Somehow Complainant was given both notices of investigation as soon as he arrived around 7:30 A.M. on May 19, 2017, despite Ms. Yurek not learning of the insubordination until later that afternoon. TR 82.

be taken care of via phone, email, and the work ticket generating system. TR 75-76. This search yielded no work issues. TR 76. Complainant left around 4:00 P.M. because he had an appointment at 4:30 P.M. to get allergy shots approximately 35 minutes away, which he did not end up making. *Id.*; see TR 128, 306. Complainant testified he was also suffering from a migraine.¹⁷ TR 77. Records from the doctor's office do not indicate whether Complainant was scheduled to come in for an allergy shot on May 18, 2017. TR 132, RX 15.

Around 6:00 P.M., after arriving home, Complainant called Mr. Mize to inform him that he had an appointment and was dealing with a migraine. TR 78-79. Complainant spoke with Mr. Mize who told him "he was very disappointed . . . and couldn't believe [Complainant] would . . . leave without . . . seeing him." TR 81.

The next day, Complainant was issued the two notices of investigation and was suspended for insubordination, JX 3, and "intentional and malicious attempt to destroy a telecom battery plant at David City," JX 4, and was escorted off the property. TR 82. This was the first and only time Complainant was ever disciplined during his 10 years at BNSF. TR 112.

On June 1, 2017, the investigative hearing was held with General Foreman Joseph Ow¹⁸ serving as the conducting officer. *See generally* RX 1. Mr. Ow has conducted over 150 investigations throughout his career with the railroad. TR 451. Complainant was represented by Dale Doyle, General Chairman of the IBEW and Travis Suckstorf, Local Chairman of the IBEW observed. TR 452, RX 1 at 1. Both sides were permitted to call witnesses, present evidence and make closing statements. Mr. Ow "allowed everybody who had a witness that wanted to present. I also allowed exhibits that they wanted to submit. . . . Anything that was related to the investigation, I allowed. So, I believe [the investigation] was very fair." TR 462.

At the investigative hearing, four people testified: Complainant, Mr. Wolken, Mr. Mize, and an electronics technician, Jason Koch. RX 1. All of the evidence presented has been discussed above. At the advice of his union representative, Complainant did not discuss the litany of issues he had with Mr. Wolken. TR 118.

¹⁷ Mr. Warrington, who worked with Complainant that day, confirmed Complainant complained of a migraine while driving back to the radio shop. TR 306.

¹⁸ Mr. Ow worked out of the BNSF facility in Galesburg, Illinois and did not know any of the parties involved here.

Mr. Ow, as the investigating officer, did not have any decision-making functions. His “sole purpose was to ensure [Complainant] got a fair investigation.” TR 462. After compiling the evidence and testimony presented during the investigation, Mr. Ow sent everything to BNSF’s Policy for Employee Performance Accountability (“PEPA”) team to review. TR 463. Derek Cargill, Director of Employee Performance, heads the PEPA team, which consists of two other employees located in Fort Worth, Texas. TR 348.

Mr. Cargill testified that in potential dismissal cases, the PEPA team review is directed to “make sure . . . the policy is being applied correctly and that no one is stepping outside the bounds of the policy” and “to make sure that discipline was being applied consistently and fairly for employees across the system.” TR 349. He continued, the PEPA team was “there to . . . have an objective review of the transcript removed from supervisors and the employee in the field, just to make sure that we were issuing discipline fairly and consistently.” *Id.*

Mr. Cargill reviewed the transcript and exhibits associated with the investigation of Complainant. TR 355. He concluded “there was substantial evidence to prove the charges” and that “based on the nature of the violation, . . . [Complainant] stood for dismissal under the PEPA policy.” *Id.* Mr. Cargill explained that his review of the transcript revealed that Complainant admitted to being on the David City site on the date the configuration change occurred and no one else had been to the site on the day. TR 456-57.

Essentially, it was my finding that there was no one else there on that date. I found there were logs from the batteries, which showed that the configuration had been changed. He admitted that he was, in fact, there. And . . . there was evidence the wires had been removed from that chrome block, which to me indicated an attempt to cover his tracks.

TR 357.

Mr. Cargill also “found no supporting evidence in the record to indicate that Mr. Wolken was [at the David City site] on the 13th or that he had anything to do with changing the configuration on the batteries.” *Id.*

With regard to the insubordination charge, Mr. Cargill “concluded that there was substantial evidence in the investigation that proved . . . [Complainant] . . . was insubordinate

when he was given clear and direct instructions from his supervisor [to remain at the shop].” TR 359.

Mr. Cargill recommended dismissal on both charges. RX 30 at 2, 3. These recommendations were sent to Mr. Ow who then informed Mr. Kautzman, Mr. Mensch and Mr. Mize on June 12, 2017. *Id.* Based on Mr. Cargill’s recommendations, Gary Grissum, Assistant Vice President of Telecom & IT Infrastructure supported Complainant’s dismissal later that afternoon. RX 31 at 1. Mr. Kautzman testified that he agreed with dismissing Complainant.¹⁹ TR 514. On June 13, 2017, Mr. Kautzman asked Mr. Mensch and Mr. Mize to work with Ms. Yurek in drafting Complainant’s termination letters. RX 32 at 1.

On June 15, 2017, Complainant was issued two dismissal letters: one for “intentional and malicious attempt to destroy a telecom battery plant at David City”, JX 6, and one for “insubordination on May 18, 2017”, JX 7. His dismissal was effective that day.

D. Legal Framework

The FRSA prohibits railroad carriers from retaliating against an employee for engaging in certain protected activities, including “reporting, in good faith, a hazardous safety or security condition.” 49 U.S.C. § 20109(b)(1)(A). The FRSA incorporates the rules, procedures and burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century whistleblower cases. *Id.* § 20109(d)(2)(A)(i), (ii); *see Araujo v. N.J. Transit Rail Ops., Inc.*, 708 F.3d. 152, 157 (3d Cir. 2013).

To prevail, a complainant must prove: (i) that he engaged in a protected activity; (ii) he suffered an adverse action against him; and (iii) that the protected activity was a contributing factor in the adverse action. If a complainant satisfies this initial burden by a preponderance of the evidence, a respondent may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action even if the complainant had not engaged in the protected activity.

In the present case, BNSF concedes the second element, that Complainant’s termination on June 15, 2017, constitutes an adverse action.

1. Protected Activity

¹⁹ Mr. Mize testified he did not have any role in the decision to terminate Complainant for the David City incident or insubordination. TR 197.

Complainant must first establish that he engaged in protected activity. Complainant engaged in numerous instances of protected activity both before and after the David City incident. He credibly testified of his monthly meetings with Mr. Mize where he reported Mr. Wolken's repeated defiance of BNSF's PPE policy. TR 27-28. Some of the safety violations reported by Complainant to Mr. Mize are reflected in his contemporaneous notes. *See generally* CX 1 (detailing safety concerns relating to Mr. Wolken's conduct over the period of September 2016, through February 2017). Mr. Mize confirmed that these safety concerns relating to Mr. Wolken were brought to him by Complainant during the monthly meetings. TR 156-57. I find these safety concerns were raised in good faith, and thus, constitute protected activity.

Complainant also engaged in protected activity when he reported Mr. Wolken's faulty wiring done on May 9, 2017, to Mr. Mize. Though the testimony reflects disagreement as to the severity of the wiring done by Mr. Wolken, I find Complainant viewed this as a serious safety concern when he informed Mr. Mize about it. Therefore, I find Complainant's May 9, 2017, report of Mr. Wolken's faulty wiring also constituted protected activity.

2. Adverse Action

The parties stipulated, and I find the record supports a finding, that Complainant suffered an adverse action when he was terminated on June 15, 2017. I also find Complainant suffered an adverse action when he was suspended on May 19, 2017.

3. Contributing Factor

Complainant must next show by a preponderance of the evidence that his protected activity was a contributing factor in the adverse employment actions. *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014). 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." *Id.* at 791 (quotation omitted). A complainant need not "conclusively demonstrate [the employer's] retaliatory motive." *Id.* at 791 (quoting *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010)). Instead, under the "more lenient 'contributing factor' causation standard," *id.* at 792, a complainant must show "by a preponderance of the evidence" that the employer retaliated against him for "engaging in protected activity." *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 968 (8th Cir. 2017) (quoting *Kuduk*, 768 F.3d at 791). "In other words, although it need not be the

determinative factor,” a complainant must establish that “an unlawful retaliatory motive – or ‘discriminatory animus’ – . . . contributed in some way to [the employer’s] decision.” *Gunderson v. BNSF Ry. Co.*, No. 14-CV-0223 (PJS/HB), 2015 U.S. Dist. LEXIS 99046, at *24 (D. Minn. July 28, 2015) (quoting *Kuduk*, 768 F.3d at 791 n.4).

Evidence which may indicate a link between the protected activity and the adverse actions includes:

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.

Ray v. Union Pac. R.R. Co., 971 F. Supp. 2d 869, 885 (D. Iowa 2013) (quotation omitted).

Complainant’s case rests on his ability to show by a preponderance of the evidence that the intentional and malicious attempt to destroy a telecom battery plant and insubordination charges were a guise for BNSF’s true motivation: retaliating against him for engaging in protected activity.

a. Temporal Proximity

Evidence of proximity in time between the protected activity and the adverse employment action, along with other circumstantial evidence, can raise an inference of causation. The ARB has cautioned that temporal proximity is of limited value in proving causation by a preponderance of the evidence. *See Acosta v. Union Pacific*, ARB No. 2018-0020, ALJ No. 2016-FRS-82, PDF at 8 (ARB Jan. 22, 2020) (stating that “[g]enerally, temporal proximity is associated with an inference to avoid summary judgment and is not sufficient to prove contributing factor causation by a preponderance of the evidence.”). Temporal proximity is not a dispositive factor, but just one piece of evidence for the trier of fact to weigh. *See Spelson v. United Express Systems*, ARB No. 09-063, ALJ No. 2008-STA-39, PDF at 3, n.3 (ARB Feb. 23, 2011).

Temporal proximity is evaluated based “on the record as a whole, including the nature of the protected activity and the evolution of the unfavorable personnel action.” *Franchini v. Argonne Nat’l Laboratory*, ARB No. 11-006, ALJ No. 2009-ERA-14, PDF at 11 (ARB Sept.

26, 2012). The ARB has emphasized that determining the strength of a temporal relationship is fact-specific and has declined to set outer time limits. *See Franchini*, ARB No. 11-006, PDF at 10 (ARB Sept. 26, 2012) (“[d]etermining what, if any, logical inference may 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” that “involves more than determining the length of the temporal gap and comparing it to other cases”).

Complainant was suspended by BNSF for attempted destruction of a telecom battery plant and insubordination 10 days after sending the May 9, 2017, email reporting Mr. Wolken’s safety violations. I find this short time period between Complainant’s protected activity and the adverse action supports a finding of temporal proximity. However, temporal proximity, standing alone, is not enough to satisfy Complainant’s burden by a preponderance of the evidence.

b. Disparate Treatment

The Eighth Circuit has held that “[a] plaintiff may show pretext, among other ways, by showing that an employer . . . treated similarly-situated employees in a disparate manner.” *Lake v. Yellow Transp., Inc.*, 596 F.3d 871, 874 (8th Cir. 2010). But, “the test for determining whether employees are similarly situated to a plaintiff is a rigorous one.” *Bone v. G4S Youth Servs., LLC*, 686 F.3d 948, 956 (8th Cir. 2012) (quoting *Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 853 (8th Cir. 2005)). The complainant must show that the other employee is “similarly situated in all relevant respects,” including that he or she “dealt with the same supervisor, [had] been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances.” *Id.* (quoting *Rodgers*, 417 F.3d at 853; *Clark v. Runyon*, 218 F.3d 915, 918 (8th Cir. 2000)). “Furthermore, [t]o be probative evidence of pretext, the misconduct of more leniently disciplined employees must be of comparable seriousness.” *Id.* (quoting *Rodgers*, 417 F.3d at 853).

Here, Complainant argues he was treated in a disparate manner relative to Mr. Wolken. That is, since Complainant was punished for allegedly tampering with the battery charger then Mr. Wolken also should have been punished for incorrectly wiring the alarm relay. According to Complainant, this disparate treatment is evidence of pretext: Complainant took safety protocols very seriously, and Mr. Wolken did not; therefore, Complainant was fired, and Mr. Wolken was not disciplined.

I find Mr. Wolken is similarly-situated to Complainant as they are members of the same radio shop headed by Mr. Mize. Although Mr. Wolken is an adequate comparator and he was treated differently than Complainant, I find distinguishing circumstances that render the treatment not disparate.

Mr. Wolken “double-tapped a breaker [while wiring an alarm relay contact inside a break panel], which caused the difference in wiring”, and, according to Complainant, “could be a fire hazard, could burn the building down, and . . . [is] an electrical hazard [that] could shock anybody in the building.” TR 35. While Complainant viewed this as “the most serious [safety] complaint” against Mr. Wolken, Mr. Mize and Mr. Kautzman did not agree. Mr. Mize, an electrical engineer, stated that he did believe this to be a serious violation. TR 158. He stated that Mr. Wolken did not install the wires incorrectly, but performed work that electricians should have done. TR 160. Consequently, Mr. Mize had a conversation with Mr. Wolken to make sure he understood that the wiring should be done by the electricians and determined no disciplinary action was necessary. *Id.* Mr. Kautzman, also an electrical engineer, testified that “based on [his] 29 years and [his] formal education . . . [he] did not see any potential for serious injury, at all, in that situation.” TR 520. I afford Mr. Mize and Mr. Kautzman’s assessment of this incident more weight than Complainant’s based on their education, experience and explanation. Mr. Kautzman, for instance, was able to articulate precisely why Mr. Wolken’s wiring did not pose an electrical shock hazard. He stated:

When I heard about the double-tap aspect of it, the reason that . . . a relay was installed . . . was to obtain a relay point for our Net Guardian, which is our alarm system, if the power would go out. So, by tapping onto this breaker, which a breaker is a safety device that is there if any short-circuit, any problem downstream from that break, that breaker trips.

So, there was no electrical shock hazard or anything, that I can say existed in this situation. It was double-tapped. It isn’t a carrying capacity type device, it’s strictly sensing the presence of voltage.

Complainant did not articulate why this was a safety hazard other than to say that it was one. Therefore, I find Mr. Wolken’s wiring of the alarm relay posed a relatively minor risk that was adequately addressed by a conversation with his manager.

In contrast, Complainant was accused of deliberately tampering with the battery charger to overcharge the batteries at David City, which could result in a “hydrogen concentration [that] would be high enough where it would be above its lower explosive limit and it could possibly turn into an explosion or a fire.” TR 460. In turn, if the David City site were to go out of service, BNSF would lose the ability to communicate with trains. TR 197. Mr. Woodard expressed concern for his personal safety and everyone at the Lincoln shop based on this incident. RX 21. Moreover, Mr. Mize testified that “the shop seemed pretty stressed [about] the situation.” TR 207. If the batteries were not discovered, the risk of harm to the property or other employees was very high. Thus, I find the violations Complainant and Mr. Wolken were accused of are not of comparable seriousness and cannot be used to show disparate treatment.

Accordingly, I find Complainant has not proven disparate treatment by a preponderance of the evidence.

c. Pretext

Complainant next argues that BNSF’s stated reason for discharging him is “based on false or misleading information.” Cl. Br. at ¶ 57. That is, according to Complainant, by demonstrating BNSF’s determination that he attempted to destroy the David City battery plant was factually incorrect, he has established pretext. However, pretext is not established merely because the company was mistaken in its belief, if honestly held. Whether BNSF’s conclusion was correct is irrelevant;²⁰ if BNSF’s belief that Complainant attempted to destroy the David City battery plant motivated its discharge decision then it was not a pretext, and Complainant cannot meet his evidentiary burden. *See Waggoner v. City of Garland, Tex.*, 987 F.2d 1160, 1166 (5th Cir. 1993) (stating the complainant “must, instead, produce evidence demonstrating that [the respondent] did not in good faith believe the allegations, but relied on them in a bad faith pretext to discriminate against him”). Although Complainant presented evidence that demonstrates that he did not commit the act of which he was accused, he presented no evidence that BNSF’s belief, even if improper, was not held in good faith.

²⁰ I want to make clear that based on the evidence before me it was unlikely for Complainant to have tampered with the batteries. However, the relevant question is not whether Complainant committed the offense he was fired for, but whether BNSF had a good faith belief that he did. This does not mean that BNSF’s decision was correct or advisable; it almost certainly was not. But BNSF’s misguided termination decision does not necessarily amount to a violation of the FRSA.

The information relied upon in the decision to terminate Complainant consists of the investigative record compiled by Mr. Ow. *See generally* RX 1. Of note, the record includes the Eltek system alarm log, *id.* at 106, the Net Guardian alarm log, *id.* at 107-25, and the photos of Mr. Wolken's computer screen, *id.* at 127. As previously noted, the Eltek alarm log indicates three configuration changes were made on the day Complainant was at David City: 9:17, 9:19 and 9:20.²¹ *Id.* at 106. The Net Guardian alarm log indicates Complainant entered at 10:33:30 AM CDT.²² RX 1 at 112. Thus, based on these two alarm logs, it is highly unlikely for Complainant to have made the configuration changes because he entered the building one hour and 13 minutes after the last change was made.

The only piece of evidence placing Complainant at David City when the configuration changes occurred is the photo of Mr. Wolken's computer which purports to show a one hour and 19 minutes difference between the time shown on the Eltek system and the time on the computer. BNSF did not attempt to authenticate this photo nor did it produce any corroborating evidence supporting the assertion that the Eltek system was one hour and 19 minutes slow. This photo, curious to begin with,²³ was also only produced by Mr. Wolken after he learned the original investigation by Mr. Mize was inconclusive. To summarize, Mr. Wolken, who had a history of issues with Complainant, discovered the batteries,²⁴ steered the investigation to Complainant, and produced all the information implicating Complainant. Based on all of this information, it is

²¹ This document, which was procured by Mr. Wolken, does not list the alarms in chronological order. For example, the first alarm entry reads "11:09 2017/05/11 TIME SET". Four entries down, the alarm reads "13:58 2018/06/11 TIME SET". These seemingly random date changes occur through the document. This is likely due to how this alarm log was compiled by Mr. Wolken who testified that in order to print the Eltek alarm log, the information must be transferred to a text file. TR 171. In transferring the information, somehow the dates were not copied correctly. Similarly, random date changes can be found in the records from the Net Guardian system. This information was copied from an Microsoft Excel document to a Microsoft Word document by Mr. Mize who "may have . . . transposed[] the data." RX 1 at 45. Records that were admittedly not transferred accurately provide very unreliable evidence on which to base Complainant's dismissal.

²² There are numerous inconsistencies between the time the door alarm goes off and the Eltek time throughout the records. Neither party has presented a credible explanation as to why that is the case.

²³ For example, how do I know that the time on the computer was not changed to reflect the discrepancy that would place Complainant inside the building at the time the configuration change occurred?

²⁴ I note that it is unclear from the record how Mr. Wolken determined the batteries were set to 59.0 volts. Mr. Mize testified that there is no record of what the batteries were set at before the configuration change or after April 13, 2017, because there is no online monitoring of the voltage. TR 170, 237-38. Additionally, it seems BNSF did not consider that the change in voltage could have been caused by the age of the batteries and not by some attempt to destroy the battery plant. The batteries installed at David City were spare batteries that were 10 years old and "80 percent past their life." TR 119-20.

clear that the only evidence implicating Complainant was not evidence at all, but merely an unreliable photo taken by a partial witness.

Why no one at BNSF recognized the complete lack of information from an objective source implicating Complainant is a question that should be asked; however, it is not the question I am tasked with answering. “[I]t is not unlawful for a company to make employment decisions based upon erroneous information and evaluations.” *Allen v. City of Pocahontas*, 340 F.3d 551, 558 n.6 (8th Cir. 2003)). Thus, the relevant question is did the BNSF decision-makers rely on this information in good faith. I find they did.

There were four people involved in deciding to issue Complainant the notices of investigations: Mr. Mize, Mr. Kautzman, Mr. Mensch and Ms. Yurek. All four were aware of the issues Complainant had with Mr. Wolken, and thus of Complainant’s protected activity. However, the testimony of Mr. Mize and Mr. Kautzman reveal they honestly believed the information provided to them by Mr. Wolken. While this reliance on Mr. Wolken’s portrayal of the incident was misplaced, I find it was in good faith.

Mr. Cargill, Mr. Kautzman and Mr. Grissum made the final decision to terminate Complainant. Mr. Cargill, who had no previous knowledge of anyone involved in the investigation, reviewed the investigative file compiled by Mr. Ow. As previously outlined, the documents, without additional context, support the finding that Complainant engaged in attempted destruction of a battery plant. Given that the file contained no information relating to Complainant’s conflict with Mr. Wolken, Mr. Cargill came to the conclusion that the evidence showed Complainant tampered with the batteries leading him to recommend dismissal. Mr. Cargill credibly testified, “I never met [Complainant] before I reviewed the investigation transcript, and I was unaware of any protected activity, because there was no mention of that in the investigation.” TR 366. Mr. Grissum authorized the decision based on the recommendation of Mr. Cargill and Mr. Kautzman merely agreed. I find Mr. Cargill’s belief that Complainant committed attempted destruction of a battery plant to be honestly held. Because his “review was limited to what was in the investigative transcript”, Mr. Cargill had no knowledge of Complainant’s protected activity so it could not have played any role in the termination recommendation. TR 360.

“[I]f the discipline was wholly unrelated to protected activity,” as it is here, “whether it was fairly imposed is not relevant to the FRSA causal analysis.” *Kuduk*, 768 F.3d at 792. Further, whether I would have made the same decision is not important because I “do not sit as a super-personnel department that re-examines” employment decisions. *Id.* at 792. As Complainant did not establish by a preponderance of the evidence that protected activity contributed to BNSF’s decision to terminate his employment,²⁵ Complainant has not established a necessary element of his FRSA retaliation claim.

ORDER

Accordingly, **IT IS ORDERED** that the FRSA complaint filed by Donald M. Graff against BNSF is **DENIED**.

SO ORDERED.

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts

²⁵ As I found Complainant has failed on the contributing factor prong, I will not address whether BNSF proved by clear and convincing evidence that it would have made the same decision absent the protected activity. Accordingly, I do not address the second reason for termination: the alleged insubordination.

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).