

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 10 January 2014

In the Matter of:

DAVID PETERSON,
Complainant,

Case No. 2010-FRS-00029

v.

BNSF RAILWAY COMPANY,
Respondent.

Appearances:

For Complainant: Fredric A. Bremseth, Esq.
Bremseth Law Firm

Michael F. Tello, Esq.
Michael P. McReynolds, Esq.
Tello Law Firm

For Respondent: Jacqueline M. Holmes, Esq.
Joanne R. Bush, Esq.
Jones Day

Before: Paul C. Johnson, Jr.
Associate Chief Administrative Law Judge

DECISION AND ORDER

This matter arises under the employee-protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109, as amended by the Rail Safety Improvement Act of 2008, Pub. L. 110-432 (2008), and its implementing regulations at 29 C.F.R. Part 1982 ("FRSA" or "the Act"). To prevail on a claim of discrimination under the FRSA, Complainant David Peterson must demonstrate by a preponderance of the evidence that (1) he engaged in protected activity; (2) he suffered an unfavorable personnel action¹; and (3) the protected activity was a contributing factor

¹ The terms "unfavorable personnel action," "adverse employment action," and "adverse action" appear in the FRSA, in the incorporated provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121, and the regulations implementing both statutes. They terms are used interchangeably in this Decision and Order.

in the unfavorable personnel action.² If Complainant satisfies his burden, BNSF may escape liability only if it can show by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected behavior. 49 U.S.C. § 20109(b)(2)(B)(ii); 29 C.F.R. § 1982.109(b).

After full consideration of all testimony and other evidence admitted in this matter, as well as the arguments of the parties, I find that BNSF violated the FRSA when it terminated Complainant Peterson's employment. I will grant Mr. Peterson's complaint and order his immediate reinstatement as well as an award of damages.

Findings of Fact

Respondent BNSF is a nationwide rail carrier. At the time of the hearing, it was divided into several divisions, including the Twin Cities Division. Within the Twin Cities Division are several rail yards, including the Willmar yard, at which both Mr. Peterson and Mr. Gunderson worked.

A. Background

Mr. Peterson was employed by BNSF as a brakeman/switchman/conductor beginning in 1997. (Tr.³ 260, 266.) In 2006, he qualified to serve as a yardmaster. The duties of a yardmaster are to ensure the prompt and regular movement of trains in the yard, supervising other involved employees. (RX 5.) He held a full-time yardmaster position from 2006 until 2008, when he was bumped from the position by a more senior BNSF yardmaster, as permitted under the collective bargaining agreement. [RX 20.] He exercised his own seniority to work as a full-time conductor/brakeman/switchman; at the same time, he remained on the yardmaster "extra" list. The yardmaster "extra" list consists of qualified yardmasters without the seniority to work as a yardmaster full time, but are on call to work when a need arises for a specific shift. The yardmaster "extras" are called in order of seniority. [RX 20.] Mr. Peterson was the most senior of the three people on the yardmaster "extra" list; the other two people on the list were Mitchel Duke and Robert Cluka. [Tr. 131-132.] In addition to his operational duties, Mr. Peterson served first as a member, and later as the union co-chairman, of the Willmar site safety committee.

Paul Gunderson began working for BNSF as a brakeman/conductor/switchman in October of 1989. [Tr. 775.] He also worked as an RCO operator during the time he worked for BNSF. [Tr. 778-79.] During his tenure with BNSF, he was involved with the United Transportation Union, serving as Vice Local Chairman, Local Chairman, and Vice General Chairman at various times. [Tr. 776-77.] As a union officer, his duties included representation of union members who were undergoing investigation by BNSF, and also included appealing time claims. [Tr. 813-814.] However, no employees underwent formal investigation by BNSF while

² 49 U.S.C. § 20109(d)(2) (incorporating the burdens of proof set forth in 49 U.S.C. § 42121(b)); 29 C.F.R. §§ 1982.104(e)(2), 1982.109. See *Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-025, slip op. at p. 3 (Apr. 30, 2013).

³ "Tr." refers to the transcript of the formal hearing in this matter; "CX" refers to the Complainant's exhibits, and "RX" refers to the Respondent's exhibits.

Mr. Gunderson was the local chairman, because he was able to “work everything out” with local management. [Tr. 822-823.]

B. Injury Reporting

1. Company Policies

A rail carrier must report certain injuries to the Federal Railroad Administration. *See* 49 C.F.R. § 225.19(d). Reportable injuries are generally the more serious injuries that occur to railroad employees, such as fatal injuries or injuries that cause the employee to obtain medical treatment, lose consciousness, miss a day or more of work, receive medical restrictions, and the like. *Id.* Less serious injuries are not required to be reported. BNSF has instituted a policy, the Employment Review Process (ERP) which assesses points to its employees who report injuries. If an employee is injured, and the injury must be reported to the FRA, then the employee is assessed 40 points regardless of fault. Employees who suffer non-reportable injuries are assessed five points. After an employee accumulates a certain number of points, he or she must undergo testing for operational efficiency; continuing to accumulate points may result in termination. The number of points an employee has on record diminishes over time if there are no additional injuries. [CX 3, CX 4.] Mr. Peterson was not enrolled in and was not a participant in ERP. [Tr. 1625.]

2. Peterson Report of Injury

Mr. Peterson injured his left knee on May 2, 2008 while performing his duties as a conductor. [Tr. 398.] As he debarked from a locomotive, he stepped onto an embankment composed of mainline ballast, which shifted under his feet, causing the injury. [Tr. 398.] Early the following morning, at the end of his shift, he informed the yardmaster on duty at the Willmar yard that he had hurt his knee. [Tr. 473.] Later on May 3, he went to an urgent care clinic, where he was diagnosed with a knee strain. [RX 582, Ex. 1.] At that time, he was not placed on any work restrictions for his knee injury, and worked the midnight shift as a yardmaster on May 3, 2008. [*Id.*, Tr. 399.] On May 4, 2008, Mr. Peterson told the Willmar trainmaster, Bill Shulund, that he had sprained his knee, and on that day he submitted an injury report. [CX 118.] He was then called off the Yardmaster extra list and worked the midnight shift as a yardmaster on May 5, 2008. [Tr. 399.]

On May 6, 2008, Mr. Peterson’s mandatory rest day, he visited his primary care doctor, who determined that his knee may have been more seriously injured than previously believed. The doctor ordered an MRI and instructed Mr. Peterson not to walk on uneven surfaces. [RX 488.] On the same day, Mr. Peterson provided Respondent with the medical restriction that he not walk on uneven surfaces. [RX 582, Ex. 1.] Shortly thereafter, he was instructed not to report for a yardmaster shift that he previously was scheduled to work. [Tr. 284-287.]⁴

⁴ The parties dispute the reasons that Mr. Peterson was directed not to report for this shift. Mr. Peterson believed that Mr. Babik, the yard superintendent, did so for because of animus against Mr. Peterson. Mr. Babik did not recall “busting the call,” but testified that he may well have done so upon being informed of Mr. Peterson’s medical restriction.

Because of his knee injury, Mr. Peterson was not fit for duty as a brakeman/switchman/conductor. For the next several months, he believed that he was able to perform duties as a yardmaster, and sought yardmaster shifts from the extra list. [Tr. 400-401, 406-410; CX 18, 175, 177, 178, 180, 183, 185.] His physician maintained the work restrictions under which Mr. Peterson was prohibited from walking on uneven surfaces through October 10, 2008, when he changed the restriction to allow Mr. Peterson to walk on uneven surfaces “occasionally.” [Tr. 1566, 405; CX 180; RX 584.] At that time, the doctor estimated that Mr. Peterson would be able to return to work without restrictions in March of 2009. The doctor reiterated that Mr. Peterson could walk on uneven surfaces occasionally on January 29, 2009, and that the restriction would remain effective until Mr. Peterson’s next visit in March of 2009. [CX 169.]

In February of 2009, Mike Tello, Mr. Peterson’s attorney, attended a mediation in an unrelated matter with Rosie Weisenberg, a BNSF claim agent familiar with Mr. Peterson’s case. Mr. Tello informed Ms. Weisenberg that Respondent was risking a lawsuit by Mr. Peterson under the Americans with Disabilities Act because they were not accommodating his medical condition. Shortly thereafter, Respondent’s medical department released Mr. Peterson to work as a yardmaster, effective February 23, 2009. [RX 483.] Because Mr. Peterson lacked seniority for a full-time yardmaster position, he worked only when he was called off the extra list. He worked as a relief yardmaster until he was terminated in July of 2009.

Under the collective bargaining agreement between Respondent and the UTU, Mr. Peterson was entitled to request payment for shifts that he was entitled to work, but which were given to workers with less seniority than he had. Claims for payment for those shifts are referred to as “runaround claims” or “time claims.” To make claims, Mr. Peterson was required to document the occasions on which junior relief yardmasters were awarded shifts that he believed he was entitled to work. One method of documenting those occasions was by running “time slips” from Respondent’s computerized records system.

On or about March 22, 2009, Mr. Peterson printed out information regarding two junior yardmasters, Mitchel Duke and Robert Cluka. He did so by logging into the BNSF system using a “CC Info” command. [RX 23, BNSF 1388.] By using this method, he printed out more information than was necessary to submit runaround claims. [RX 23, BNSF 1367-1368, 1371-1372.] However, using the “CC Info” command and submitting the records printed by using it was a common method of submitting runaround claims. [Tr. 147; CX 215; CX 216.] After printing them out, Mr. Peterson left the documents on a desk in the yardmaster’s office while he performed his duties. For unknown reasons, Mr. Peterson did not retrieve the documents at the end of his shift. On March 22, 2009, yardmaster Kevin Quale gave Mr. Cluka the documents relating to him that had been left on the desk in the office. Upon review, Mr. Cluka believed that Mr. Peterson had accessed and used Respondent’s computer system to print out personal information that Mr. Peterson had no authorization and no reason to have. On March 24, 2009, Mr. Cluka complained to Mr. Shulund, the trainmaster, that Mr. Peterson had accessed and printed the information without authorization or need, that he had left the information in a public area for anyone to see, and by doing so he may have placed Mr. Cluka, his family, and his military reserve unit “in harm’s way.” [CX 11.] Likewise, Mr. Duke made a complaint about Mr. Peterson’s having accessed his information and leaving it in a public area. [CX 7.] Mr. Duke

further alleged that he had asked Mr. Peterson why he had accessed the information, and that Mr. Peterson had told him that “Mike Tello, his lawyer, told him to obtain this information” for reasons unknown to Mr. Duke. [*Id.*]

After receiving the complaints from Mr. Duke and Mr. Cluka, Mr. Shulund forwarded them, along with the documents printed by Mr. Peterson, to his supervisors, Herb Beam and Michael Babik. Mr. Beam was the terminal manager, and Mr. Babik was the yard superintendent. Mr. Babik, in turn, forwarded the information to Richard Ebel, who was the general manager of the Twin Cities division. [Tr. 1512-13; RX 5.] Mr. Ebel contacted Respondent’s Labor Relations office for guidance. [Tr. 1294-95, 1298, 1594-1595.] Labor Relations recommended that Mr. Ebel issue a Notice of Investigation to Mr. Peterson, and Mr. Ebel directed that one be issued. [Tr. 1110-1111, 1295-1296.] According to Mr. Ebel, he did so because (1) Mr. Peterson had said that he intended to provide the records to his attorney, (2) Mr. Peterson had printed out the documents while on duty, which was a violation of Respondent’s policies, and (3) Mr. Peterson had printed off time sheets for shifts that occurred more than 60 days before he printed them off, and were therefore time-barred under the collective bargaining agreement. [Tr. 1294-1295, 1298, 1594-1595.] The Notice of Investigation informed Mr. Peterson that the investigation would take place on April 7, 2009, and identified Mr. Duke and Mr. Cluka as witnesses. [RX 50.]

C. Reports of Safety Concerns

1. Company Process

BNSF has established a program for addressing safety-related matters within the system. In 2002, BNSF and the UTU signed a Safety Summit Agreement, which in part provided for the establishment of employee-run local safety committees. Mr. Peterson was a co-chair of the Willmar committee, along with the superintendent. Mr. Fry was the superintendent from 2007 to 2009, when he was replaced by Mr. Babik.

In addition to the site safety committees, BNSF has established a Safety Issue Resolution Process, or SIRP, to track safety concerns and monitor progress in resolving those issues. Each report, also referred to as a SIRP, is entered into a SIRP log along with an assigned completion date and the name of a manager who is responsible for monitoring the issue. [Tr. 1606-1607.] Although BNSF has a goal of closing a SIRP within 90 days (Tr. 589), some issues cannot be completed in that period of time and remain open for much longer, sometimes for years. [Tr. 1608.]

As an alternative to reporting through the site safety committee or the SIRP process, employees at Willmar could raise safety issues anonymously through two toll-free hotlines. [Tr. 1283-1284.] Likewise, safety concerns could be raised directly with an employee’s supervisor. [*Id.*]

2. Peterson Involvement in Reporting Safety Concerns

Mr. Peterson served as a member and, for the last year of his employment, co-chair of the Willmar Yard's site safety committee. In that capacity, he was active in reporting safety concerns to management, and in following up on those concerns. William Fry, a yard superintendent from 2006 to 2008, testified that Mr. Peterson was a strong advocate of safety and a leader in that field. [Tr. 579-580.] Mr. Fry testified that Mr. Peterson and Mr. Gunderson were the two strongest safety advocates during his tenure as superintendent. [Tr. 582.] Mike Loos, a trainman who worked with Mr. Peterson, testified that Mr. Peterson and Mr. Gunderson were the "lead guys" and "bulldog[s]" when it came to safety issues. [Tr. 215-217.] Other witnesses described them in similar terms. [Tr. 644; Tr. 977.] During Mr. Fry's tenure as superintendent, Mr. Peterson advocated for correcting such safety problems as unsafe walking conditions at the "Dassel siding," weed control along the tracks to eliminate tripping hazards, mitigation of flooding hazards, installation and maintenance of electric switches, snow removal, and poor lighting in the Willmar yard. [Tr. 586-589.] Those issues were raised every year for several years (Tr. 321, 382, 392, 501, 590, 667, 781, 902-904.) After Mr. Ebel and Mr. Babik arrived, funding was obtained to correct the lighting in the Willmar yard, and the project was completed in 2009. [Tr. 668-669, 900-902.] Likewise, Mr. Ebel obtained funding to correct the walking conditions at Dassel. [Tr. 1287-1288.]

In early 2007, Mr. Peterson was asked to prepare "storybooks" describing the conditions at various customer locations, including a description of areas that would require extra care in operation. [Tr. 307-309.] In November of the same year, Mr. Peterson was trained by Jeff Duke, the northern line safety coordinator, to perform safety audits. [Tr. 313-314.] The training consisted of walking around the Willmar yard with Mr. Duke, who pointed out safety issues for Mr. Peterson to photograph. [Tr. 316-317, 347; CX 219.] Mr. Peterson gave the pictures to Mr. Beam and submitted SIRPs for the issues that were identified. [Tr. 351; CX 1.] Mr. Beam asked that in the future the persons performing the audit "correct any issues that can easily be fixed," rather than waiting until after the audit. [CX 1-R; Tr. 988-989.]

According to Mr. Peterson, he was routinely "chewed out" for submitting photographs of unsafe conditions; however, he did not identify any specific occasions that it happened, and in context his testimony is clear that his managers' objections were to his printing out a large number color photographs, rather than to his submission of the photographs as documentation of unsafe conditions. [Tr. 351.] He did describe an occasion in February of 2008 when, during a safety committee meeting, he informed Mr. Babik that his co-workers did not agree with Mr. Babik's self-description as a "laid back easy-going" manager. After the meeting, Mr. Babik angrily confronted Mr. Peterson, wagging his finger in Mr. Peterson's facing and telling him not to "call [Mr. Babik] out" like that in public. After Mr. Peterson brought the matter to the attention of Mr. Babik's supervisor, Mr. Babik called and apologized for his behavior. However, Mr. Peterson saw that episode as a turning point in his relationship with Mr. Babik, who, he said, would sit forward and "glare" at Mr. Peterson when he raised issues in safety meetings that Mr. Babik didn't like. [Tr. 356-358.]

D. Discipline

1. Company Process

Respondent has entered into several collective bargaining agreements with its employees. The CBAs set forth the process to be used when imposing discipline on the employees. The Yardmaster CBA (RX 20, Rule 22) governs the process with respect to Mr. Peterson. The Uniform Investigation Rule (CX 107, Article II) governs the process with respect to Mr. Gunderson. The Yardmaster CBA and the Uniform Investigation Rule contain similar requirements.

The first stage of the discipline process requires BNSF to issue a notice of investigation to the employee, setting forth the charge against him and directing him to appear at a certain place and time for the formal investigation. The notice informs the employee of his rights under the CBA, including his right to representation and his right to call witnesses. The employee must be notified that BNSF will produce witnesses against him. The formal investigation must be a “fair and impartial hearing,” and the process provides for a limited exchange of information prior to the hearing. A BNSF officer serves as the investigator, or “conducting officer,” and is responsible for presenting BNSF’s case by calling and questioning witnesses. The conducting officer also rules on objections. The employee has the right to make opening and closing statements, to cross-examine witnesses, and to call witnesses on his own behalf. The recording of the investigation is sent to a third-party vendor for transcription, which is then reviewed by the conducting officer for accuracy. BNSF officers thereafter review the transcript, decide the appropriate level of discipline, and inform the employee in writing of the decision.

The decision made after formal investigation can be appealed through a two-step “on-property” process. First, the employee may appeal to the highest-ranking BNSF officer in the area, in this case the general manager, Mr. Ebel. If that officer declines to modify the decision, a further appeal can be made to the highest-ranking officer in BNSF Labor Relations. If that officer declines to modify the decision, the employee may continue to challenge the decision by appealing to a Public Law Board.

If the discipline is maintained, the employee may challenge the decision by submitting it to a Public Law Board. The PLB is a three-person panel comprising representatives of the carrier and the union, and a neutral member. The PLB reviews the “on-property record,” which consists of all documents from the notice of investigation through the final appeal denial. The parties may present oral argument before the PLB, but may not present witnesses. The neutral arbitrator issues the written decision of the PLB, after which a party may move in U.S. District Court to vacate all or part of the decision.

In addition to the above steps, BNSF has established a Policy for Employee Performance Accountability, or PEPA. PEPA is intended to ensure consistent administration of discipline across all its divisions. To do so, the policy establishes guidance as to the appropriate discipline for various types of misconduct, requires the Director of Employee Performance to review all dismissals to ensure that they are consistent with BNSF’s rules and consistent with previous

similar cases, and provides for monthly meetings of a PEPA Board to review a docket of disciplinary cases.

2. Discipline of Mr. Peterson

Before the on-property investigation into the charge against Mr. Peterson was conducted, Kenneth Doll, vice-general chairman of the UTU Yardmaster union, assumed the duty of representing Mr. Peterson. While preparing for the hearing, Mr. Doll sent an email to Ned Percival, director administration for the Twin Cities division, asking about the possibility of a “waiver.” Under a waiver, an employee undergoing an investigation can waive the investigative process and accept lesser discipline. The email was forwarded to several management personnel, including Mr. Babik. Mr. Babik forwarded the message to Mr. Ebel with the comments: “I thought we talked about this? Dismissal is what needs to take place. This individual is not an asset to us and has shown his disdain for this company through these actions. We need to go to investigation and then determine...” [CX 24.]

After several postponements, the investigation into the violations that were alleged against Mr. Peterson took place on July 16, 2009. [RX 23.] The conducting officer was Matthew Burkart and Mr. Doll represented Mr. Peterson. [RX 23, BNSF 1284.] The major disputed issue for investigation was whether Mr. Peterson printed out Mr. Duke’s and Mr. Cluka’s time slips for an improper purpose – that is, to give them to his attorney to assist in his claim under the Federal Employees’ Liability Act (FELA)⁵. Mr. Duke testified at the hearing that Mr. Peterson had told him that he had printed the time records because “he needed all that information to hand over to his lawyer, Mike Tello.” [*Id.* at BNSF 1365.] Mr. Tello was representing Mr. Peterson on his FELA claim. [*Id.* at BNSF 1344-1345.] Mr. Peterson, to the contrary, testified that he printed the time records to submit runaround claims, and denied that he told Mr. Duke that he did so with the intent to give them to Mr. Tello. [*Id.* at BNSF 1388-1389, 1393.] Although it was undisputed that Mr. Peterson was permitted to run the time information in some form in order to make a runaround claim, Mr. Duke, Mr. Cluka, and Mr. Gunderson all testified that there was a way to obtain the information without using the “CC Info” command, which would result in less personal information being printed out. [*Id.* at BNSF 1357-1358, 1367-1368, 1371-1372, 1385-1386.]

A second issue at the investigation hearing was whether the Yardmaster office was secure. Mr. Peterson testified that in his experience, the door to the office was always locked, and that in order to enter the office, an employee needed to be buzzed in. [RX 23 at BNSF 1395.] Mr. Gunderson testified likewise. [*Id.* at 1378.] On the other hand, Mr. Cluka and Mr. Shulund testified that the Yardmaster office was not secure. [*Id.* at 1356, 1327.]

After completion of the hearing transcript, Mr. Ebel, the officer deciding whether to impose discipline, consulted with Mr. Percival, Mr. Babik, Mr. Hurlburt, Mr. Ringstad, and Mr. Siegele. [Tr. 1303.] Although Mr. Percival initially believed that no discipline would survive arbitration, the others consulted believed that termination was the appropriate disciplinary action.

⁵ FELA is a substitute for traditional workers’ compensation law. Railroad employees who are injured in the scope of their employment must pursue their claims in U.S. District Court, and must show that the injuries were caused, in any part, by the railroad’s negligence. 45 U.S.C. § 51 *et seq.*

Mr. Hurlburt and Mr. Ringstad determined by separate investigation that Mr. Peterson did not submit time claims for most of the shifts for which he ran off records. [Tr. 1106-07; RX 84.] They also determined by separate investigation that Mr. Peterson had submitted timely runaround claims between May and September of 2008, while he was held off duty due to his injury. Further, although he did submit time claims in April of 2009 (about a month after running of Mr. Duke's and Mr. Cluka's records), all were denied as untimely. [RX 85.] Mr. Hurlburt advised that "the only reasonable inference to draw from the transcript – and we are entitled to draw this inference – is that Mr. Peterson was not obtaining this information for a time claim." [Id.] Mr. Hurlburt believed that in order to find Mr. Peterson's testimony credible, the company would have to believe that he intended to submit second time claims, having submitted claims between May and September of 2008. [Id.] Because he was a seasoned and well-represented employee, concluded Mr. Hurlburt, Mr. Peterson was not credible. [Id.] Mr. Hurlburt believed that Mr. Peterson ran off the time sheets with "mens rea," that is, with the intent to use them for an improper purpose, and considered that to be a "form of theft" warranting dismissal. [Tr. 1111-1113.]

On July 23, 2009, after the transcript of the investigation was prepared, Mr. Babik rode in a company-provided van while on travel unrelated to this matter. The van driver, Robin Ahrens, reported that Mr. Babik made several telephone calls during which he spoke in tones too low for her to hear. At some point in the ride, however, Mr. Babik received a call during which he raised his voice, and Ms. Ahrens overheard him say, "They are both fucking liars!"; "They both contradict each other and we can use them against each other"; "Gunderson said 'a person has to go through locked doors and buzzers to get to the trainmaster's office' and the other one says 'it's open all the time.' We can fire them both for lying"; "I don't give a shit what I have to do I'm not going to rest until I have that fucker's head on a platter and he's fired! He's been a thorn in my side long enough."⁶ [CX 61.] At the hearing, Mr. Babik denied making the statements quoted by Ms. Ahrens. [Tr.

Mr. Ebel ultimately made the decision to terminate Mr. Peterson, after confirming that Mr. Peterson did not submit runaround claims for most of the shifts for which he ran off information from the BNSF system. [Tr. 1310, RX 85.] The basis for his decision was that Mr. Peterson had violated the General Code of Operating Rules (GCOR) 1.6 and 1.15 by engaging in misconduct that could adversely affect BNSF's interests, by using BNSF's computer system for unofficial purposes, and by misuse of company time (running off the time information while on duty). [Tr. 1310; CX 67.] Mr. Ebel informed his supervisor, Mr. Sexhus, as well as the Assistant Vice President of Human Resources. Both officials agreed with Mr. Ebel's decision. [RX 89; Tr. 1307-1310.] He was dismissed effective July 28, 2009. [CX 67.]

The PEPA Board, upon review, upheld Mr. Ebel's decision to dismiss Mr. Peterson. [Tr. 1136.]

Mr. Peterson, through the UTU, challenged his dismissal through the on-property process. Mr. Peterson argued that BNSF denied him his right to a fair and impartial hearing, that BNSF prejudged the case by interviewing two witnesses before the investigation hearing, that the charges were ambiguous, that BNSF did not disclose some of the exhibits timely, and that the

⁶ Spelling errors in the original statement have been corrected.

investigation transcript was not accurate. [CX 97 at BNSF 1544, 1547, 1555, 1556, 1566.] He also argued that Mr. Duke's version of the conversation he had with Mr. Peterson could not be verified, and that Mr. Duke and Mr. Cluka were not credible because they would benefit from Mr. Peterson's dismissal because they would each move up one step in seniority. Finally, he argued that the method he used to pull information for time claims was accepted in BNSF. [*Id.* At 1567-1568.] BNSF responded to and disagreed with each of Mr. Peterson's allegations, and both Mr. Ebel and Mr. Siegele declined Mr. Peterson's appeal. [*Id.* at BNSF 1562, 1569.] BNSF requested information regarding the allegedly inaccurate transcript, but Mr. Peterson and his representative did not respond to that request.

Mr. Peterson then appealed his dismissal to a Public Law Board. The PLB determined that substantial evidence existed to show that Mr. Peterson had run off the time sheets for the purpose of giving them to his attorney. [RX 342 at BNSF 1239.] The PLB characterized that conduct as "a serious act of misconduct" and determined that dismissal was appropriate. [*Id.* at 1239.] Notably, the PLB addressed the differing accounts of the conversation between Mr. Duke and Mr. Peterson: the Board determined that Mr. Duke was more credible than Mr. Peterson because although his testimony at the formal hearing was slightly different from his written statement, he consistently said that Mr. Peterson retrieved the information for his attorney. The PLB found on the other hand that Mr. Peterson was inconsistent in his testimony at the formal hearing. [*Id.* at 1238-1239.]

One of the contested issues that I must resolve is whether Mr. Peterson ran off the time slips in order to give them to Mr. Tello to support Mr. Peterson's FELA claim. During the investigation hearing, Mr. Peterson was asked whether he told Mr. Duke that he had been advised by his lawyer and several other union officers to submit runaround claims. According to the initial transcript of the investigation hearing, Mr. Peterson said "Mr. Tello, I did mention by name, but I know, I said my lawyer told me to check with ... my representatives, and if they okayed it to put in the claims." [*Id.* at BNSF 1392-1393; RX 342.] Later in the hearing, Mr. Peterson testified that "I did not use Mr. Tello's name..." [RX 23 at BNSF 1400; RX 342.] The investigating officer relied in part on the discrepancy in Mr. Peterson's testimony to find him incredible, and recommended termination. [CITE] After viewing the transcript, Mr. Peterson realized that his response was incorrectly transcribed, and requested the tape of the hearing. The tape revealed that Mr. Peterson stated that he had *not* used Mr. Tello's name. Before the transcript was corrected, however, the decision to terminate Mr. Peterson was upheld by the Public Law Board that reviewed the investigation. As a result, Mr. Peterson's termination was upheld.

Based on all the relevant evidence, I find:

1. Mr. Peterson considered, but was uncertain, whether he could submit runaround claims for the entire period of his absence for medical reasons.
2. Mr. Peterson asked Mr. Tello, who was the attorney for the union, whether he could submit such runaround claims.
3. Mr. Tello advised Mr. Peterson to check with the union and if the union said he could do so, then he could do so.

4. Mr. Peterson checked with union officials, as advised by Mr. Tello, and thereafter decided to submit runaround claims for the entire period of his medical absence.

My findings are based on Mr. Peterson's and Mr. Tello's credible testimony at the hearing, as well as the inconsistent and vague statements by Mr. Duke upon which Respondent seized to show that Mr. Peterson's actions were somehow improper. Mr. Duke's statement varied over time – he stated at one time that Mr. Peterson had run off the time slips because “Mr. Tello” had told him to, and at a different time that “his lawyer” had told him to. Additionally, I credit Mr. Tello's testimony at the hearing that he had no reason to ask Mr. Peterson for the time slips, because they were irrelevant to the FELA claim on which Mr. Tello was representing Mr. Peterson. I have little doubt that a “lawyer” was mentioned during the conversation between Mr. Peterson and Mr. Duke. I conclude, however, that Mr. Peterson merely mentioned that he had spoken to an attorney – which he had – and did not say that he intended to give the time slips to the attorney.

An additional matter to be resolved is whether Mr. Babik made the statements attributed to him by Ms. Ahrens during the van ride on July 23, 2009. I conclude that he did. My conclusion is based on several factors: first, I did not find Mr. Babik's testimony on this point to be credible; he appeared evasive and belligerent when questioned about the statements, as opposed to his demeanor during the other portions of his testimony. Second, the timing of the remarks – coming one week after the investigation hearing, and on the very day that the draft transcript was due (see CX 23 at BNSF 1284), supports the conclusion that Mr. Peterson's investigation was on Mr. Babik's mind at the time.⁷ Third, Ms. Ahrens, who had no connection with the events, specifically named Mr. Gunderson (who had testified at Mr. Peterson's investigation), and specifically mentioned the dispute over whether or not the trainmaster's office at Willmar was locked. There is no evidence that she was aware of Mr. Gunderson or of the dispute over the security of the trainmaster's office prior to hearing Mr. Babik mention them. Fourth, Ms. Ahrens' deposition testimony on this matter was credible and consistent with her written statement. I find that Mr. Babik did make the remarks attributed to him. I further find, however, that although Mr. Babik clearly held some animus against Mr. Gunderson, the statements he made during the van ride do not support a finding that he held retaliatory animus toward Mr. Peterson. Although he referred to Mr. Gunderson by name, he did not refer to Mr. Peterson during the van ride. His statement that they could fire them “both” for lying because they “contradict[ed]” each other does not implicate Mr. Peterson; his statements concerning security in the yardmaster office were consistent with, not contradictory of, Mr. Gunderson's statements.

Conclusions of Law

It is clear from the foregoing, and BNSF does not dispute, that Mr. Peterson engaged in protected activity both in reporting the injury incurred on May 2, 2008, and in frequently expressing safety concerns. I find that Mr. Peterson has satisfied this element of his complaint.

⁷ Indeed, Mr. Babik testified that he had received the transcript and “may well have” reviewed it during the van ride. [Tr. 1525.]

Likewise, there is no dispute that Mr. Peterson suffered an unfavorable personnel action when BNSF terminated his employment on July 28, 2009. Mr. Peterson has satisfied this element of his complaint.

The issues remaining to be resolved are (1) whether Mr. Peterson's protected activity was a contributing factor in BNSF's decision to terminate him, and (2) if so, whether BNSF has shown by clear and convincing evidence that it would have taken the same action in the absence of such protected activity. For the reasons set forth below, I find that Mr. Peterson's report of injury was a contributing factor to his termination, although his reports of safety concerns were not. I further find that BNSF has not met its burden to show by clear and convincing evidence that it would have taken the same action in the absence of Mr. Peterson's injury report.

A. Mr. Peterson's Report of Injury was a Contributing Factor in BNSF's Decision to Terminate His Employment

A complainant must demonstrate by a preponderance of the evidence that his protected activity was a contributing factor in Respondent's adverse action. 29 U.S.C. § 5851(b)(3)(C). Contributing factor includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at p. 6 (ARB), quoting *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, at 6 (ARB Jan 31, 2011). "[A]ny weight given to the protected disclosure, either alone or in combination with other factors, can satisfy the 'contributing factor' test." *Smith v. Duke Energy Carolinas, LLC, et al.*, ARB No. 11-003 (ARB June 20, 2012) (quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). "Contributing factor" in a whistleblower case is "not a demanding standard." *Menendez v. Halliburton, Inc.*, ARB No. 12-026, ALJ No. 2007-SOX-045, slip op. at p. 13 (ARB Mar. 15, 2013). "A complainant need only prove, by a preponderance of the evidence, that his protected activity, 'alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision.'" *Id.*, slip op. at p. 14, quoting *Evans v. Miami Valley Hosp.*, ARB No. 07-118, ALJ No. 2006-AIR-022, slip op. at 17 (ARB June 30, 2009). In showing that protected activity was a contributing factor to the adverse action, a complainant need not show retaliatory animus on the part of the employer. *DeFrancesco, supra*, slip op. at p. 6.

1. Safety Concerns

Mr. Peterson identified a number of safety concerns he raised with BNSF during his tenure as a member and as co-chair of the Willmar site safety committee. Those concerns included unsafe walking conditions at the Dassel siding, weed control along the tracks to eliminate tripping hazards, mitigation of flooding hazards, installation and maintenance of electric switches, snow removal, and poor lighting in the Willmar yard. As BNSF points out, however, those concerns were raised year after year, and as Mr. Peterson admitted, many of the concerns required several years and increased budgets to address. Mr. Peterson was a member of the committee from late 2002 or early 2003, and became co-chair in February of 2008. [Tr. 296.] He continued to serve on the committee after his May 2008 injury until his termination in July 2009. [Tr. 499.] The identified issues were raised repeatedly during his time on the committee, and no disciplinary action against Mr. Peterson, or any other member of the committee, ensued.

Furthermore, the concerns raised by Mr. Peterson were ultimately addressed by BNSF – the Dassel siding was improved, lighting was installed, and annual treatment of weeds and snow conditions were implemented.

In addition, BNSF demonstrated its commitment to safety issues by negotiating the Safety Summit Agreement, establishing the SIRP process, establishing hotlines for employees to report safety concerns, and actually addressing the concerns raised by Mr. Peterson. I am persuaded that BNSF actively encouraged the reporting of safety concerns, and that commitment is inconsistent with a finding that Mr. Peterson's participation in those processes contributed to his termination.

For the foregoing reasons, it is clear to me that Mr. Peterson's raising safety concerns played no part in BNSF's decision to terminate him, and I find that Complainant has failed to show by a preponderance of the evidence that it did.

2. Report of Injury

Mr. Peterson was injured on May 2, 2008, and reported his injury the following morning at the end of his shift. He underwent an MRI on May 6, after which his physician placed a work restriction against walking on uneven surfaces. From that point on, Mr. Peterson was not permitted to work as a trainmaster, and was not called off the yardmaster extra list, until February 23, 2009. Between May 2008 and his return to work, Mr. Peterson made repeated attempts to work yardmaster shifts on the theory that yardmaster work is sedentary work, and does not require walking on uneven surfaces. BNSF, in compliance with its own "transitional work" policy, declined to allow Mr. Peterson to work yardmaster shifts while he was on medical restrictions without a return to work date. After Mr. Tello raised the issue of an ADA lawsuit with BNSF, BNSF allowed Mr. Peterson to work yardmaster shifts off the extra list beginning on February 23, 2009 and continuing until his termination five months later.

Mr. Peterson believed that his medical condition was no different on February 23, 2009 from what it was before that date, and that he had been wrongfully refused yardmaster shifts before he was allowed to return to work. He therefore determined to submit runaround claims for the shifts that had been worked by Mr. Duke and Mr. Cluka, who were junior to him in the yardmaster craft. To support his claims, he printed out information from the BNSF personnel system on March 22, 2009, and inadvertently left the printouts on a desk in the Yardmaster office.

The act of printing out information regarding Mr. Duke's and Mr. Cluka's work information triggered the disciplinary investigation and Mr. Peterson's ultimate termination. As discussed above, I have found that his motive for printing out that information was not to provide it to Mr. Tello for the FELA claim, but to submit his own runaround claims to BNSF. Had Mr. Peterson not been injured, and subsequently reported his injury, he would not have been held out of service from May of 2008 through February of 2009. He therefore would not have had the need to submit runaround claims, and would not have printed out the information regarding Mr. Duke and Mr. Cluka. Had he not printed out that information, he would not have been subjected to disciplinary investigation and ultimate termination. As a factual matter, then, it is clear that

Mr. Peterson's injury report contributed, more than "slightly," to BNSF's decision to terminate his employment; it was a predicate for the act of printing out the work information, and an integral part of the chain of events leading to his termination.

BNSF argues that an intervening event – the act of printing out Mr. Duke's and Mr. Cluka's work information – severed any connection between the report of injury and the ultimate termination. Its position apparently is that because it had a reasonable belief that Mr. Peterson pulled the information for an improper purpose, the act of doing so is an intervening event that caused the company to terminate him. This argument is without merit. The act of pulling information from the BNSF computer system is not an "intervening event"; to the contrary, it is part and parcel of the chain of events from injury to termination. A classic "intervening event" would involve an event that was unrelated to the injury report but which would itself be grounds for termination – for example, had Mr. Peterson disobeyed a direct order or committed misconduct while on duty. Mr. Peterson's act of printing out information for his runaround claims was at least incidental to his injury report, and was not an intervening event. *See, e.g., Speegle v. Stone & Webster Construction, Inc.*, ARB No. 11-029-A, ALJ No. 2005-ERA-006, slip op. at p. 17 (ARB Jan. 31, 2013) (insubordinate comment made during safety meeting was not an intervening event when it was incidental to protected activity).⁸

Because I have found as a factual matter that Mr. Peterson's protected activity of reporting an injury contributed to his termination, I need not address whether any of the supervisors involved in the decision to terminate him – particularly Mr. Babik – were motivated by retaliatory animus against him. I will therefore refrain from addressing that issue.

B. BNSF Has Not Shown By Clear and Convincing Evidence That It Would Have Taken the Same Action in the Absence of Protected Activity

BNSF argues that it has shown by clear and convincing evidence that it would have terminated Mr. Peterson even if he had not engaged in protected activity. Its argument is based essentially on the theory that Mr. Hurlburt, its Director of Employee Performance, agreed with every decision made by Mr. Ebel; and that, (1) because Mr. Hurlburt did not know Mr. Peterson, and (2) Mr. Hurlburt has the responsibility to ensure equal treatment of equal violations across all of BNSF, the termination decision would have happened regardless of the injury report.

BNSF's argument is flawed. With regard to Mr. Hurlburt's lack of familiarity with Mr. Peterson, the argument is premised on Mr. Hurlburt's lack of knowledge of Mr. Peterson's safety advocacy. [BNSF Post-Hearing Brief at p. 139.] BNSF does not argue, and cannot argue, that Mr. Hurlburt was unaware of Mr. Peterson's report of injury – it was the foundation of the charge against him. With regard to Mr. Hurlburt's responsibility to ensure equal treatment across BNSF, the company argues that because he regarded Mr. Peterson's action as a form of theft, an offense that regularly results in dismissal, Mr. Peterson was treated the same as every other thief at BNSF. This argument overlooks the fact that Mr. Peterson was entitled to run off the

⁸ In any event, an intervening event does not necessarily sever the connection between protected activity and adverse action - protected activity can be a contributing factor even if the employer also had a legitimate reason for the unfavorable employment action against the employee. *Francini v. Argonne Nat'l Lab*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 9, 11 (ARB Sept. 26, 2012).

information he did in order to submit runaround claims; it overlooks the fact that Mr. Peterson did not provide the information to his attorney, either in March of 2009 or later; it overlooks the fact that what Mr. Peterson did was common within BNSF to support runaround claims. Finally, BNSF presented no evidence of any other person being terminated for printing information from the personnel system to support runaround claims. Indeed, all the evidence was to the contrary. [Tr. 114,117-118 (Tello testimony), 147 (Kenny Doll testimony), 613 (William Fry testimony), 737 (Wier testimony), 983 (Shulund testimony) 1218 (James Hurlburt testimony); CX 215 (Sellman affidavit); CX 216 (Gary Virgin affidavit).] Two witnesses testified that they had done precisely what Mr. Peterson did, and were not disciplined for doing so. [Loos, Tr. 225-226; Hanson, Tr. 661-662.]

Furthermore, BNSF's disciplinary process was flawed and unfair as applied to Mr. Peterson. I note that Mr. Ebel had access to information that was not presented during Mr. Peterson's investigation – specifically, that Mr. Peterson did not submit runaround claims for most of the shifts for which he ran off information from the BNSF system. [Tr. 1310, RX 85.] Mr. Peterson was not given the opportunity to address this information at the hearing, because Mr. Ebel obtained it afterwards. Similarly, BNSF refused to consider evidence that Mr. Peterson's hearing testimony was transcribed incorrectly – that he said he “didn't” use Mr. Tello's name when he spoke to Mr. Duke, rather than he “did” use his name. Granted, that information was not available to BNSF until after Mr. Peterson's termination was upheld by the Public Law Board, but there appears to be no reason that BNSF could not have reconsidered its decision when it learned that a key basis of its termination decision was factually incorrect. It appears to me, then, that BNSF was more interested in terminating Mr. Peterson than in making a fair and impartial decision. Consequently, BNSF has not shown that it would have terminated Mr. Peterson regardless of his engaging in protected activity.

C. Conclusion

Based on the foregoing, I conclude (1) that Mr. Peterson engaged in protected activity; (2) that he suffered an adverse employment action; and (3) that his engaging in protected activity was a contributing factor in the adverse employment action. I further conclude that BNSF has not shown by clear and convincing evidence that it would have taken the same action in the absence of protected activity. Accordingly, Mr. Peterson's complaint will be granted.⁹

Remedies

The Federal Rail Safety Act provides as follows:

Remedies.—

(1) In general.— An employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole.

⁹ I reject BNSF's argument that I am bound by the findings of the Public Law Board. Although styled an arbitration, the proceedings before the Board did not involve the present claims of retaliation. Instead, they involved the issue whether Mr. Peterson's termination was in accordance with the collective bargaining agreement and was warranted by the evidence presented at the investigation.

(2) Damages.— Relief in an action under subsection (d) (including an action described in subsection (d)(3)) shall include—

- (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
- (B) any backpay, with interest; and
- (C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(3) Possible relief.— Relief in any action under subsection (d) may include punitive damages in an amount not to exceed \$250,000.

49 U.S.C. § 20109(e).

Equitable remedies: To make Mr. Peterson whole, BNSF must expunge any negative information from his personnel file, including any record of termination, and amend the file to show that he has been continually employed since his original hire date. BNSF must reinstate Mr. Peterson immediately and without loss of seniority to a full-time brakeman/switchman/conductor or yardmaster position at the Willmar yard. His rate of pay must be equivalent to current rates of pay under the applicable collective bargaining agreement.

Back pay: Mr. Peterson is entitled to back pay at the annual rate of \$89,900 (his last full year of employment) from July 28, 2009 until he is reinstated. [CX 109.] He is additionally entitled to an annual amount of \$36,711.91 representing loss of fringe benefits. [CX 122.] Furthermore, he is entitled to interest on the award of back pay, including pre-judgment interest up to the date of this Order and post-judgment interest from the date of this Order until payment is actually made. Interest is calculated at the rate charged for underpayment of taxes under 26 U.S.C. § 6621(a)(2) (the short-term Federal rate plus three percent).

BNSF is entitled to reduce the back pay award for any income received by Mr. Peterson after his termination. Mr. Peterson testified that he had earned \$4,000-\$5,000 in 2011. [Tr. 514-517.] He also earned \$3,800 in 2010. [CX 109.] Although Mr. Peterson testified that he had worked in 2009, he could not recall the amount of his earnings (Tr. 514); in the absence of evidence of earnings, no reduction will be made for the 2009 work. *See Smith v. Lake City Enterprises, Inc.*, ARB Nos. 09-033, 08-091, ALJ No. 2006-STA-032, slip op. at p. 10 (ARB Sep. 28, 2010).

BNSF is not entitled to reduce the back pay award for monies received by Mr. Peterson job-loss insurance benefits.¹⁰ Under the “collateral source” or “collateral benefit” rule, a defendant (or respondent in this case) may not benefit from payments made by third parties to the wronged employee. *See Bashears v. Asbill*, 930 F.2d 1348, 1355 n. 11 (8th Cir. 1991); *Moyer v. Yellow Freight System, Inc.*, Sec’y No. 89-STA-7, slip op. at p. 5 (Aug. 21, 1995). Although most applications of the rule involve the receipt of government benefits rather than private

¹⁰ The evidence shows that Mr. Peterson received \$14,400 in 2009 and \$22,100 in job-loss insurance benefits from UTU Insurance after his termination. [CX 109.]

insurance benefits, as this case does, BNSF has made no argument as to why private insurance benefits should be treated differently. BNSF should not be permitted to avoid its liability by passing some of it off to a private insurer, and so I will apply the general collateral source rule in this case.

Compensatory Damages: Mr. Peterson is also entitled to non-economic compensatory damages. Compensatory damages are designed to compensate complainants not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress. *Ferguson v. New Prime, Inc.*, ARB No. 10-10-075, ALJ No. 2009-STA-047, slip op. at 7 (ARB Aug. 31, 2011), citing *Smith v. Lake City Enters., Inc.*, ARB Nos. 09-033, 08-091, ALJ No. 2006-STA-032 (ARB Sept. 24, 2010). To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Id.* I credit Mr. Peterson's testimony that the loss of employment was devastating to him and to his family emotionally, as he had to deal with providing for a spouse and two children without income or health benefits. Mr. Peterson was clearly moved by the effect that his disciplinary proceeding had on other people at the Willmar yard, some of whom lost their jobs as well. He was emotionally affected by the questions raised to his children about why their father was not working. I note also, however, that his testimony was not supported by the testimony of other persons, or by any physicians or mental health practitioners. Thus, although I have no reason to doubt his credibility on this issue, I am constrained to make a smaller award than I might otherwise have made. I find that compensatory damages in the amount of \$10,000 are appropriate.

Punitive Damages: The FRSA allows for an award of punitive damages in an amount not to exceed \$250,000. 49 U.S.C. § 20109(e)(3). The United States Supreme Court has held that punitive damages may be awarded where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law" *Smith v. Wade*, 461 U.S. 30, 51 (1983). The purpose of punitive damages is "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979). In this case, there is ample evidence to find that BNSF had a reckless and callous disregard for Mr. Peterson's rights under the Act. Once the company learned that he had printed out information, its energy was focused on ensuring his termination. Less than three weeks after Mr. Peterson printed out the time slips, his representative inquired about the possibility of a "waiver"; the response of Mr. Babik, his yard superintendent, was "I thought we talked about this? Dismissal is what needs to take place." [CX 24.] Likewise, the director of employee performance (Mr. Hurlburt) stated on the same day that Mr. Peterson's offense was "clearly dismissible." [Rx 51.] Shortly before the investigation was convened, Mr. Hurlburt sent instructions to company supervisors – including the conducting officer, Matthew Burkhardt – that if Mr. Duke and Mr. Cluka were asked whether the time slips could be used for a runaround claim, they would "need to be prepared to answer either 'I can't say,' or 'according to my understanding, the documents could also support a lost wages FELA claim.'" [CX 55.] Mr. Babik in fact did prepare the witnesses to so testify at a meeting at Mr. Babik's house the night

before the investigation. [CX 233, pp. 28-29, 32-34.]¹¹ This type of witness coaching is directly contrary to the bargained-for fair and impartial investigative process, and is evidence that BNSF was determined to fire Mr. Peterson. Mr. Ebel obtained evidence that Mr. Peterson had not in fact submitted runaround claims for the period for which he printed out Mr. Duke's and Mr. Cluka's information, and did so without giving Mr. Peterson the opportunity to respond to that evidence – to make matters worse, Mr. Peterson did in fact submit runaround claims for that period in April of 2009. [RX 85 at BNSF 2725, ¶ 7.] Taken as a whole, the evidence is abundantly clear that BNSF had a callous and reckless disregard for Mr. Peterson's rights not to be discriminated against for reporting an injury, and that punitive damages are appropriate. Throughout the handling of the disciplinary proceedings, every matter that could be interpreted in different lights was interpreted in the light least favorable to Mr. Peterson. I can only conclude that BNSF institutionally had a single goal: to terminate Mr. Peterson regardless of the evidence.

BNSF argues that it cannot be subject to punitive damages, because it made a good-faith attempt to comply with the FRSA's anti-retaliation provisions by training all of its managers on its requirements. I reject that argument. Clearly, although the managers who testified at the hearing all testified that they had received training on, and understood, the prohibition on retaliation for engaging in protected activity, that training was not good enough to make them act in conformance with the FRSA. The managers in this case were out to get Mr. Peterson, and they succeeded.

I find that punitive damages in the amount of \$100,000 are appropriate in this case, to provide an incentive to BNSF to honor more scrupulously the rights of its employees not to be subject to retaliation for engaging in legally protected activities.

ORDER

For the reasons set forth above, IT IS ORDERED:

1. The complaint of discrimination filed by Complainant David Peterson is GRANTED;
2. Respondent BNSF shall expunge all negative information from Mr. Peterson's personnel file, including any record of termination, and shall amend the file to show that he has been continually employed since his original hire date;
3. Respondent BNSF shall reinstate Mr. Peterson immediately and without loss of seniority to a full-time brakeman/switchman/conductor or yardmaster position;
4. Respondent BNSF shall pay Mr. Peterson an amount equal to an annual salary of \$89,900 plus benefits in the annual amount of \$36,711.91, from the date of his termination until the date of his reinstatement, less \$7800 representing the proven amount of post-discharge earnings, and less appropriate tax withholding;
5. Respondent BNSF shall pay interest on the amount paid in accordance with Paragraph 4 at the rate charged for underpayment of taxes under 26 U.S.C. § 6621(a)(2) (the short-term Federal rate plus three percent);

¹¹ I credit Mr. Burkart's testimony regarding this point over Mr. Babik's testimony denying that such a conversation took place. Again, I found Mr. Babik to be less than credible on this matter, based on his demeanor during this portion of his testimony.

6. Respondent BNSF shall pay Mr. Peterson the amount of \$10,000.00 in compensatory damages;
7. Respondent BNSF shall pay Mr. Peterson the amount of \$100,000.00 in punitive damages; and
8. Counsel for Mr. Peterson shall be allowed 30 days from the date of this Order to submit a fully-supported application for attorney's fees and costs, after which Respondent BNSF shall have 21 days to file its objections thereto.

The parties are advised that any further filings in this matter should be addressed to the undersigned at the following address:

U.S. Department of Labor
Office of Administrative Law Judges
11870 Merchants Walk, Ste. 204
Newport News, VA 23606

SO ORDERED.

PAUL C. JOHNSON, JR.
Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business 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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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, Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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 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).