



Issue Date: 10 January 2014

In the Matter of:

PAUL GUNDERSON,
Complainant,

Case No. 2011-FRS-00001

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. To prevail on a claim of discrimination under the FRSA, Complainant Paul Gunderson must demonstrate by a preponderance of the evidence that (1) he engaged in protected activity; (2) he suffered an unfavorable personnel action¹; and (3) that the protected activity was a contributing factor in the unfavorable personnel action.² If Mr. Gunderson satisfies his burden, BNSF may escape liability

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.

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.

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 did not violate the FRSA when it suspended and subsequently terminated Mr. Gunderson, and will deny his complaint.

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. Gunderson worked.

A. Background³

Mr. 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 Mr. Gunderson was the local chairman, because he was able to “work everything out” with local management. [Tr. 822-823.] Mr. Gunderson also served on the site safety committee at the Willmar yard for some period of time.

David Peterson was employed by BNSF as a brakeman/switchman/conductor beginning in 1997. (Tr.⁴ 260, 266.) In 2006, he qualified to serve as a yardmaster. By 2008, he was working as a full-time conductor/brakeman/switchman, and at the same time, he was 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 as the union co-chairman of the Willmar site safety committee.

Mr. Peterson injured his left knee on May 2, 2008 while performing his duties as a conductor. [Tr. 398.] From May 4, 2008, when he reported to his supervisor that he had sprained his knee, until February 23, 2009, he was not permitted to work as a brakeman/switchman/conductor or as a yardmaster due to his knee injury and medical restrictions placed on

³ Many of the events concerning Mr. Gunderson were related to an investigation involving his co-worker, David Peterson, who filed his own complaint under the FRSA. A Decision and Order on Mr. Peterson’s complaint is issued simultaneously with this Decision and Order.

⁴ “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.

him as a result of them. On February 23, 2009, he was permitted to return to work as a yardmaster, working shifts as needed off the extra list. As Mr. Peterson did not believe that his medical condition was any different on February 23, 2009 from what it was before that date, he believed he should have been allowed to return to work earlier, and to work yardmaster shifts before February 23. 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. When Mr. Cluka and Mr. Duke found out that he had printed out the time sheets and left them in the yardmaster’s office, they complained to Mr. Shulund, the trainmaster, about Mr. Peterson’s conduct. They subsequently put their complaints in writing. Mr. Shulund forwarded them to his supervisors and, ultimately, it was determined that Mr. Peterson should undergo a disciplinary hearing. He was served with a Notice of Investigation dated March 30, 2009, informing him that an investigation would be conducted on April 7, 2009. The Notice identified Mr. Duke and Mr. Cluka as witnesses. One of Mr. Duke’s allegations was 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. [CX 7.]

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. Gunderson was not enrolled in and was not a participant in ERP. [Tr. 1625.]

2. Gunderson Report of Injury

Mr. Gunderson injured his right shoulder on September 12, 2008, when he attempted to throw a railroad switch. Although he completed and turned in an injury report, he delayed in doing so because, he said, he was afraid he would accumulate points under Respondent's ERP. He was not disciplined for his delay in submitting his report of injury.

C. Events After Peterson Notice of Investigation

On April 11, 2009, Mr. Gunderson approached Mr. Duke and told him that if Mr. Peterson's investigation went forward, Mr. Duke could get in trouble, and that Mr. Peterson could sue him if Mr. Peterson lost his job. Mr. Duke reported that encounter to the local union president, Doug Campen, who advised him to document what was happening. After Mr. Duke injured his ankle on May 21, 2009, Mr. Gunderson told him that if he "played [his] cards right," his injury could be worth \$500,000. Mr. Duke was called daily by Bob Pearson, a retired BNSF employee, who on May 26, 2009 left him a voice mail saying that he had a plan; when Mr. Duke did not return the call, Mr. Pearson called him again on May 27, 2009 and read a letter to Mr. Duke recanting Mr. Duke's complaint against Mr. Peterson. Mr. Duke responded by saying "I don't know about this" and "it just doesn't sound right, that's not my feelings in this." Mr. Duke then asked Mr. Pearson if Mr. Tello would refuse to represent him in his injury claim if he did not recant his statement about Mr. Peterson, and Mr. Pearson replied, "I don't know, Mitch, that's a good question, you will have to talk to [Mr. Tello]."

Mr. Tello called Mr. Duke and told him that Mr. Peterson was "getting messed around with" and that similar things could happen to him. Mr. Tello then asked Mr. Duke about the recantation letter, and Mr. Duke replied that it seemed "really risky" to him and that the letter did not reflect his feelings. Mr. Duke asked Mr. Tello if he would represent him if he did not sign the recantation letter, and Mr. Tello said "I can't answer that question...you've got to make a choice." At that point, Mr. Duke came to believe that Mr. Gunderson's comment about the \$500,000 settlement was a ploy to get him into the effort to help Mr. Peterson, and that Mr. Tello would not represent him if he did not sign the recantation letter. Mr. Tello told Mr. Duke that he would give the letter to Mr. Gunderson.

Mr. Duke informed Mr. Campen about the recantation letter, and Mr. Campen advised him not to sign it, because he could get in trouble for doing so, but to get a copy of it so he could see whether what Mr. Duke was saying was true. Mr. Duke called Mr. Gunderson, and went to Mr. Gunderson's house on May 29 to get the recantation letter. Mr. Gunderson had not received it from Mr. Tello, so he called Mr. Tello's office, and the letter was emailed to him. Mr. Gunderson printed the letter and asked Mr. Duke to sign it so Mr. Gunderson's wife could notarize it, but Mr. Duke told him that he wanted his own wife to look it over first.

Mr. Duke felt pressure from union members to sign the recantation letter, feeling that he was treated differently since Mr. Gunderson first approached him in April. He was suffering

from panic attacks and dreaded coming to work. Although Mr. Gunderson wanted him to withdraw his complaint, he never intended to do so. [RX 24.] Mr. Gunderson testified to a different version of the events involving Mr. Duke at the formal hearing before me in this case. In essence, he said that Mr. Duke initiated the conversations they had and that he was merely trying to respond to Mr. Duke's concerns and requests. Mr. Gunderson is not credible in this testimony, based on his demeanor and the inconsistency of his testimony with other evidence in the case. Mr. Duke's testimony regarding Mr. Gunderson's conduct, as presented at the company investigation into Mr. Gunderson, was consistent with Mr. Campen's testimony; and Mr. Duke's version of events simply rings true as a narrative, unlike Mr. Gunderson's version. In particular, Mr. Duke's testimony that he alerted Mr. Campen to Mr. Gunderson's actions before the issue of a letter was ever raised persuades me that Mr. Duke's version of events is credible. I therefore credit Mr. Duke's version of these events over Mr. Gunderson's.

Doug Campen (president of UTU Local 1177) reported that Mr. Gunderson had approached Mr. Duke in May about recanting his statement. [RX 55.] According to Mr. Campen, Mr. Gunderson would provide Mr. Duke with a letter from Mr. Tello that would recant Mr. Duke's statement regarding Mr. Peterson's printing off Mr. Duke's personal information. [*Id.*] On May 30, 2009, Mr. Duke submitted a written statement regarding perceived harassment, alleging a number of harassing acts. Some of those acts did not involve Mr. Gunderson. With regard to Mr. Gunderson, Mr. Duke alleged: (1) that Mr. Gunderson had approached him on April 11, 2009 and harassed him, telling him that if he did not withdraw his statement about Mr. Peterson that "things could get really bad" for Mr. Duke; (2) that on May 21, 2009, after Mr. Duke injured his ankle, Mr. Gunderson told him that the injury could be "worth a \$500,000 lawsuit" if Mr. Duke "played his cards right"; (3) that on May 27, 2009, Bob Pearson called Mr. Duke and asked him if he would sign a letter to be drafted by Mr. Tello recanting his statement against Mr. Peterson and, on the same day, Mr. Tello called Mr. Duke and told him that he would send the letter to Mr. Gunderson for further review; (4) that on May 28, 2009, Mr. Campen advised Mr. Duke to get the letter from Mr. Gunderson; and (5) that on May 29, 2009, Mr. Gunderson told Mr. Duke to come to his house and that when he did so, Mr. Gunderson told him that he and Ken Doll had contributed to the letter and that if Mr. Duke signed it, he would be "100% out of the picture." Mr. Duke stated that he did not intend to sign the letter because he did not agree with what was written. [RX 59.]

At around the same time, Mr. Cluka reported that another union official, Steve Mace, had approached Mr. Cluka and asked him to recant his statement concerning Mr. Peterson. Mr. Cluka further reported that Mr. Gunderson had been giving him the "cold shoulder" or the "silent treatment," to the extent that Mr. Cluka was concerned for the safety of his family, pets, and property. He also alleged that he had heard that Mr. Peterson was making inquiries about him. [RX 59.]

Mr. Ebel forwarded Mr. Duke's and Mr. Cluka's statements to Respondent's Law Department, Labor Relations, and Human Resources. [RX 59.] After receiving advice from the Law Department and Labor Relations, Mr. Ebel decided to issue a Notice of Investigation to Mr. Gunderson based on allegations that would, if true, violate Respondent's policies against harassment and violence in the workplace. [Tr. 1322-1325.] Preparation of the Notice took a few days, and it was ultimately decided to serve it on Mr. Gunderson on June 3, 2009. Mr. Ebel also

decided to remove Mr. Gunderson from service as of the time he was served with the Notice of Investigation, due to the “egregious” level of “intimidation and harassment” involved. [Tr. 1120, RX 40.] Because Mr. Babik was scheduled to be on vacation on that day, he asked Mr. Beam to serve the Notice of Investigation on Mr. Gunderson. [Tr. 994-995.] He also suggested that Respondent’s Resource Protection (the company’s security officers) be present when the Notice was served, and Mr. Ebel agreed. [Tr. 996, 1330-1331.] Mr. Beam met with two Resource Protection officers, Mr. Collins and Mr. Novak, on June 1, 2009 to discuss the availability of officers on June 3. On June 3, 2009, Officer Collins and Officer Poundstone went to Willmar in order to be present when Mr. Beam met with Mr. Gunderson. [CX 197.]

On June 3, 2009, Mr. Beam met with Mr. Gunderson shortly before the 3:00 p.m. scheduled start of his shift. [Tr. 997-998, RX 68.] Before doing so, he met with Officers Collins and Poundstone and asked them to sit in his office when he served the Notice of Investigation, but Officer Collins believed it more appropriate that they go to an office across the hall so that their presence would not escalate the situation. [Tr. 996-997, 1056-1057.] They went to an office across the hall and left the door ajar so that they could hear the conversation in Mr. Beam’s office. [Tr. 1057-1058.] Also present in Mr. Beam’s office was Kevin Keck, a trainmaster, who was asked to witness the service of the Notice of Investigation. [Tr. 997.] When Mr. Gunderson arrived, Mr. Beam handed him the Notice, and asked him to read and sign it. [Tr. 999-1000.] Mr. Gunderson refused to sign it because it had also been sent to him by certified mail. [Tr. 1000.] Mr. Beam told Mr. Gunderson that he would need to leave the property, and the two moved toward the door. At that point, Mr. Gunderson said, “Herb, you know I’m not just a local chairman.” Mr. Beam replied, “Yes, I understand that, Paul.” Mr. Gunderson went on to say, “You know things come back around and it can hurt (or hurt you).” Officers Collins and Poundstone overheard Mr. Gunderson’s statement. [Tr. 1000; RX 71; RX 25.] Mr. Beam and Officers Collins and Poundstone all interpreted the statement that “things can come back to hurt you” as a threat of future harm to Mr. Beam. [Tr. 1001, 1006, 1059-1060.] All three men wrote reports of the events. [RX 71; CX 47.]

Pursuant to a BNSF policy that requires that all threats be reported, Mr. Beam sent his statement to Mr. Babik, Mr. Ebel, Labor Relations, Officers Collins and Poundstone, Mr. Keck, Jason Ringstad, and Everett Percival. [RX 71.] Mr. Ebel forwarded the report to Mr. Percival, the Law Department, and Human Resources, and inquired as to whether a second Notice of Investigation was warranted. [RX 72.] Representatives of the Human Resources and Labor Relations departments advised him to do so, characterizing Mr. Gunderson’s conduct as reported by Mr. Beam to be “an intentional attempt to intimidate and threaten” and as a violation of BNSF policies regarding violence in the workplace. [RX 72; Tr. 1332-1333.] Mr. Ebel decided to do so, and issued a second Notice of Investigation on June 9, 2009. [Tr. 1332-1333; CX 222.]

D. 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. Gunderson Involvement in Reporting Safety Concerns

Mr. Gunderson 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. Gunderson was a strong advocate of safety and a leader in that field. [Tr. 579-580.] Mr. Fry testified that Mr. Gunderson and Mr. Peterson 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. Gunderson and Mr. Peterson 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.]

Mr. Gunderson also made a complaint to the Federal Railroad Administration about a BNSF's failure to conduct air tests on brakes after a train had been out of service for more than four hours as required by FRA regulations. An FRA inspector examined the practice at Willmar, and informed Mr. Beam that the air testing needed to be done. Conducting that air testing caused delays in returning trains to service, and Mr. Beam was angry about what Mr. Gunderson had done. [Tr. 593-94, 780-781, 1008.] In December of 2007, Mr. Gunderson shut down the Willmar yard because of the safety hazards of snow and ice, and again Mr. Beam was angry with Mr. Gunderson's action. Mr. Gunderson reported unsafe badger holes on the Watertown line,

unacceptable dust levels in the Willmar yard, employees being required to work with unsafe equipment (composite brake shoes and frozen switches). [Tr. 647-649, 779-783.]⁵

E. 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 Uniform Investigation Rule (CX 107, Article II) governs the process with respect to Mr. Gunderson.

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

⁵ Mr. Gunderson made additional safety-related complaints to BNSF; however, because BNSF does not dispute that he engaged in protected activity, this summary will suffice for purposes of this Decision and Order.

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. Gunderson

a. First Investigation

The first disciplinary investigation regarding Mr. Gunderson took place on August 12, 2009. [RX 24.] This investigation concerned the allegations that Mr. Gunderson attempted to interfere with the investigation into Mr. Peterson by asking Mr. Duke to retract his statement. The conducting investigator was William Stuhldreher, a BNSF terminal superintendent from Belen, New Mexico. [Id.] At the hearing, Mr. Duke testified consistently with the statements he had made concerning Mr. Gunderson's attempts to persuade him to withdraw his complaint against Mr. Peterson. [Id.]

After reviewing the transcript of the investigation, Mr. Ebel came to the conclusion that Mr. Gunderson had engaged in a "serious event of intimidation and harassment." [Tr. 1335.] After consulting with Mr. Percival, Mr. Hurlburt, and Mr. Sexhus, all of whom recommended that he terminate Mr. Gunderson, he decided to do so. [Tr. 1130, 1132-1133, 1335-1337.] Mr. Gunderson was informed on August 25, 2009 that he was terminated "effective immediately" for violating BNSF's Workplace Harassment Policy and GCOR 1.6. [CX 79.]

b. Second Investigation

The second disciplinary investigation regarding Mr. Gunderson took place on August 13, 2009. [RX 25.] This investigation concerned the alleged threat made by Mr. Gunderson to Mr. Beam when Mr. Beam served Mr. Gunderson with the notice of his first investigation. Mr. Beam and Officers Poundstone and Collins all testified consistently with the summary above, that Mr. Gunderson had made the statement to Mr. Beam that "things can come around to hurt you" or words to that effect. Mr. Gunderson did not deny making that statement, but testified that his memory was foggy because he was taken aback by what he considered to be false allegations of interfering with Mr. Peterson's investigation.

After receiving the report of the investigation, Mr. Ebel again consulted with Mr. Hurlburt and Mr. Sexhus, both of whom recommended dismissal of Mr. Gunderson for violating GCOR 1.6 and BNSF's Workplace Violence Policy. Mr. Ebel determined that Mr. Gunderson had threatened Mr. Beam in violation of those policies, and decided to terminate Mr. Gunderson. [Tr. 1139-1141.] Mr. Gunderson was dismissed effective August 25, 2009. [CX 80.]

c. On-Property Appeals

With respect to Mr. Gunderson's appeal of his first dismissal – that related to his intimidation of Mr. Duke during the investigation into Mr. Peterson – the Union argued to BNSF and to the Public Law Board that Mr. Gunderson's actions were taken in the role of union

official, and that he was therefore immune from discipline. [RX 159 at BNSF 2293-2298, 2313; RX 156 at BNSF 1447-1448, 1480-1481, 1486, 1544-1545.] The Union also argued that Mr. Gunderson's actions took place while he was off duty and not on BNSF property, and therefore he could not be disciplined for those actions. [RZX 159 at BNSF 2296-2298; RX 156 at BNSF 1478-1485.] The Union also argued that BNSF made a number of procedural errors in processing Mr. Gunderson's disciplinary action, and that he should therefore be reinstated. [RX 156.] Notably, the Union's position necessarily constituted an admission that Mr. Gunderson did indeed attempt to persuade Mr. Duke recant his accusation against Mr. Peterson. Ultimately, Mr. Gunderson's first- and second-level appeals were declined.

Likewise, Mr. Gunderson's first- and second-level appeals of his second dismissal – that related to his alleged threat to Mr. Beam – were declined. The Union made arguments during his appeals that were similar to those made during the appeal of his first dismissal: that Mr. Gunderson was acting as a union official and was therefore immune from discipline, and that his actions took place while he was off duty. [RX 158; RX 155.] The Union also argued that BNSF made a number of procedural errors in the disciplinary process. [RX 158.] Again, the Union did not deny that Mr. Gunderson in fact made the statements to Mr. Beam that were attributed to him.

d. Public Law Board

The Public Law Board upheld Mr. Gunderson's first dismissal on December 14, 2010. [RX 343.] The PLB found that his conduct went beyond the acts of a union official to "that of interfering with the proper conduct of a company investigation by harassing and intimidating a complainant and company witness to have such person commit a fraudulent act by the placement of their signature on a letter to recant given statements in a company investigation and cast events that had given rise to the investigation with falsehoods." [RX 343 at BNSF 1433.] The PLB determined that Mr. Gunderson actively participated in the events that led to the drafting of the "recant letter." [*Id.*]

Also on December 14, 2010, the PLB upheld Mr. Gunderson's second dismissal. [RX 344.] The Board rejected the Union's arguments that Mr. Gunderson's statements were made in the course of his duty as a union officer, and that the statement he made did not amount to a threat. Likewise, the Board rejected the Union's complaints of procedural irregularities. [*Id.*]

e. PEPA Board

BNSF's PEPA Board upheld both of Mr. Ebel's decisions to terminate Mr. Gunderson. [Tr. 1136.]

3. Hostility to Mr. Gunderson

Mr. Peterson's investigation occurred on July 16, 2009, and Mr. Gunderson testified at that investigation. [RX 23.] 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. 1528-1532.] 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, stated that Mr. Babik 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, Mr. Gunderson has not met his burden to show that the animus was based on Mr. Gunderson’s having engaged in protected activity. The record shows that Mr. Gunderson and Mr. Babik encountered each other at least weekly, dealing with union matters. Mr. Gunderson admits that in representing union interests, he frequently used intemperate language that may be found offensive in other contexts. I find that Mr. Babik’s animus against Mr. Gunderson was related to his union activities, and not to his report of injury or safety concerns.

There was additional evidence that Mr. Babik was disrespectful in his interactions with Mr. Gunderson, rolling his eyes and “glaring” at him. I find that, like Mr. Babik’s comments during the July 23 van ride, these actions do not demonstrate an animus based on Mr. Gunderson’s having engaged in protected activity. Instead, I find that Mr. Babik’s dislike of Mr. Gunderson is based on their many and frequent dealings over union matters and workplace disputes.

Finally, the record shows that Mr. Percival said, in an email relating to Mr. Gunderson’s disciplinary process, “We above all want Gunderson.” Mr. Gunderson argues that this statement shows a retaliatory animus against him. It does not. Instead, it demonstrates that in Mr. Percival’s opinion, the conduct of Mr. Gunderson was the most egregious of the individuals who were involved in trying to get Mr. Peterson’s accusers to change their stories. The evidence shows that Mr. Gunderson and Mr. Mace, another union official, approached Mr. Duke and Mr. Cluka respectively, and tried to get them to withdraw their complaints. Mr. Mace’s conduct did not include a veiled threat against Mr. Cluka, comparable to Mr. Gunderson’s statement to Mr.

⁶ Spelling errors in the original statement have been corrected.

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

Duke that “things could get really bad for” him if he did not withdraw his statement. Mr. Mace’s conduct did not include any statement implying that Mr. Cluka could be rewarded for “playing his cards right,” like Mr. Gunderson did in telling Mr. Duke that he could receive a large settlement if he played his cards right. Mr. Mace did not threaten Mr. Cluka with a loss of attorney representation, as Mr. Gunderson did in implying that Mr. Tello would not represent Mr. Duke if he did not withdraw his statement. It is clear, then, that Mr. Percival’s statement reflected his belief that Mr. Gunderson’s conduct was the most severe and, if proven, warranted the most severe sanction. Because it related to Mr. Gunderson’s alleged witness intimidation, and not any protected activity, I find that it was not motivated by Mr. Gunderson’s having reported a work injury or expressing safety concerns.

Conclusions of Law

It is clear from the foregoing, and BNSF does not dispute, that Mr. Gunderson engaged in protected activity both in reporting the injury incurred on September 12, 2008, and in frequently expressing safety concerns. I find that Mr. Gunderson has satisfied this element of his complaint.

Likewise, there is no dispute that Mr. Gunderson suffered an unfavorable personnel action when BNSF terminated his employment on August 25, 2009. Mr. Gunderson has satisfied this element of his complaint.

The issues remaining to be resolved are (1) whether Mr. Gunderson’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 neither Mr. Gunderson’s report of injury nor his reports of safety concerns were contributing factors to his termination. Although denial of his complaint would be appropriate on that basis alone, I further find that BNSF has met its burden to show by clear and convincing evidence that it would have terminated him for his harassment and intimidation of Mr. Duke even in the absence of Mr. Gunderson’s protected activity.

A. Mr. Gunderson’s Report of Injury Was Not a Contributing Factor in BNSF’s Decision to Terminate His Employment

Mr. Gunderson was injured on September 12, 2008. He reported his injury, although he did not do so timely. He was not disciplined for his untimely reporting of his injury. He was first issued a Notice of Investigation on June 3, 2009, almost six months after reporting his injury. This lapse of time between his injury report and the Notice of Investigation, while not determinative, is strong evidence that there was no connection between the two. Additionally, the Notice of Investigation was issued within just a few days of BNSF’s being informed of Mr. Gunderson’s attempts to get Mr. Duke to withdraw his accusation against Mr. Peterson, including (1) his approach to Mr. Duke on April 11, (2) his intimation that Mr. Duke could obtain a large settlement of his own injury claim if he “played his cards right,” (3) his deep personal involvement in the preparation and delivery of the proposed recantation letter, and (4) his intimation that Mr. Tello would not represent Mr. Duke in his injury claim if he did not withdraw his complaint against Mr. Peterson. This temporal proximity is strong evidence that the

Notice of Investigation was based on Mr. Gunderson's interactions with Mr. Duke, and not on his having reported an injury.

For the foregoing reasons, I find that Mr. Gunderson's report of injury did not contribute to BNSF's decision to terminate him.

B. Mr. Gunderson's Reports of Safety Concerns Were Not Contributing Factors in BNSF's Decision to Terminate His Employment

Mr. Gunderson identified a number of safety concerns he raised with BNSF during his tenure at the Willmar yard. 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 many of the concerns required several years and increased budgets to address. The identified issues were raised repeatedly during Mr. Gunderson's time as an employee, as a union official, and as a member of the site safety committee, and no disciplinary action against Mr. Gunderson, or against Mr. Peterson or any other member of the site safety committee, ensued. Furthermore, the concerns raised by Mr. Gunderson 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. Gunderson. I am persuaded that BNSF actively encouraged the reporting of safety concerns, and that commitment is inconsistent with a finding that Mr. Gunderson's participation in those processes contributed to his termination.

For the foregoing reasons, it is clear to me that Mr. Gunderson's raising safety concerns played no part in BNSF's decision to terminate him.

C. BNSF Has Shown by Clear and Convincing Evidence That It Would Have Terminated Mr. Gunderson's Employment Even in the Absence of Protected Activity

Based on the facts I have found as discussed above, I find that Mr. Gunderson did approach Mr. Duke and attempt, through intimidation, intimation of financial gain, and threats, to have Mr. Duke withdraw his allegations against Mr. Gunderson. His behavior is grounds for the disciplinary action taken by BNSF.

The BNSF Workplace Harassment Policy prohibits any "verbal or physical conduct which harasses, disrupts, or interferes with another's work performance or which creates an intimidating, offensive, or hostile environment." [RX 24 at BNSF 3265.] Sanctions for violating this prohibition, even for the first offense, may result in termination. [*Id.* at BNSF 3266-3267.] Mr. Gunderson's conduct was clearly intimidating and threatening, and BNSF has shown that it

has a policy to terminate employees for such conduct. Additionally, it is clear that BNSF in fact terminated Mr. Gunderson for his conduct with respect to Mr. Duke, and that his protected activity played no part in BNSF's decision to do so.

Accordingly, I find that BNSF has shown by clear and convincing evidence that, based on its Workplace Harassment Policy, it would have terminated Mr. Gunderson for his conduct toward Mr. Duke even if he had not engaged in protected activity.⁸

Conclusion

Based on the foregoing, I conclude that BNSF did not violate the Act when it terminated Mr. Gunderson's employment.

ORDER

The complaint of discrimination filed by Complainant Paul Gunderson is DENIED.

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

⁸ BNSF has met its burden to show that it would have taken the same action without regard to protected activities, based on Mr. Gunderson's conduct toward Mr. Duke. Thus, I need not address whether BNSF has met its burden with respect to its second termination decision, that based on Mr. Gunderson's alleged threat to Mr. Beam.

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).

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.

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 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).