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**Issue Date: 01 February 2012**

*In the Matter of*
**STEVE A. WILHELM,**
Complainant,

v. Case Number **2011-FRS-00027**

**BNSF RAILWAY COMPANY,**
Respondent.

Jeff R, Dingwall, Esquire and Charles A Collins, Esquire
For Complainant

Andrea Hyatt, Esquire
For Respondent

Before: Daniel F. Solomon

# DECISION AND ORDER

***DISMISSAL OF CLAIM***

This proceeding arises from a claim of whistleblower protection under the Federal Rail Safety Act ("FRSA"), as amended. 49 U.S.C. § 20109.

Respondent filed a Motion for Summary Decision. After a review of the record as submitted at that time, taken in the best light for Complainant, I found that under the Whistleblower standard, a complainant did not need "step" out of his status as safety officer to prove that he was engaged in a protected activity. Therefore, I denied the Motion for Summary Decision.

Although the case had been set for hearing in Chicago, after the Complainant agreed to waive an oral hearing, I accepted "on the record" submissions. I held telephone conferences December 22, December 30, 2011, and January 23, 2012 to discuss the evidence. The record consists of Complainant's Exhibits A-X and AA-DD and Respondent's Exhibits A-Q, which I hereby enter into evidence. I excluded Complainant's proposed exhibit AAA, and although I advised the parties that I would hold in abeyance any discussion of objections to certain emails, I admit them into evidence. Although there was discussion about whether one of the witnesses, Mr. Komater, was made available to Respondent, given my decision, that matter is now moot.

Although the parties are involved in a companion union grievance procedure under a collective bargaining agreement, and although I am advised that collateral sources from that case would be credited to any damages from this case, the parties did not submit any evidence relating to the collateral action.

## THE LAW-49 U.S.C. §20109

In general, in part pertinent, a railroad carrier engaged in interstate or foreign commerce, …or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done--

> (1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by--
>
> > (C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct.

Actions brought under FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, ("AIR 21"). See 49 U.S.C. § 20109(d)(2)(A)(i). Accordingly, to prevail, a FRSA complainant must demonstrate that:

> (1) his employer is subject to the Act, and he is a covered employee under the Act;
> (2) he engaged in a protected activity, as statutorily defined;
> (3) his employer knew that he engaged in the protected activity;
> (4) he suffered an unfavorable personnel action; and
> (5) the protected activity was a contributing factor in the unfavorable personnel action.

See 49 U.S.C. § 42121(b)(2)(B)(iii); ***Clemmons v. Ameristar Airways Inc., et al***., ARB No. 05-048, ALJ No. 2004-AIR- 11, slip opinion at 3 (ARB June 29, 2007). The term "demonstrate" as used in AIR 21, and thus FRSA, means to "prove by a preponderance of the evidence." See ***Peck v. Safe Air Int'I, Inc***., ARB No. 02-028, ALJ No. 01-AIR-3, slip op. at 9 (ARB Jan. 30, 2004). Thus, Complainant bears the burden of proving his case by a preponderance of the evidence. If Complainant establishes that Respondent violated the FRSA, Respondent may avoid liability only if it can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected behavior. See 49 U.S.C. §§ 20109(d)(2)(A)(i); 42121 (b)(2)(B)(iii)(iv).

## FINDINGS OF FACT

The salient facts are not in dispute. BNSF Railway Co. is a railroad carrier engaged in interstate commerce, operating more than 33,500 route miles in 28 states and Canada. Complainant Exhibit "CX" A at 2. It employs approximately 40,000 people. (Id.).

Complainant has been employed by Respondent since April 29, 1974, and he is a member of the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters ("BMWED"). Since 1996 Complainant has served as the Maintenance of Way Safety Assistant, Chicago Region East. In that capacity, Complainant is the liaison between hourly track workers and management. Complainant facilitates safety classes, and participates in coaching and counseling of employees. (Id.).

As a Safety Assistant, Complainant is required to complete 40 hours of safety training per

year, and is specifically trained to respond to unsafe situations through intervention and education of those involved in safety matters. Pursuant to the agreement between Respondent and BMWED that created the Safety Assistant position, Complainant is to report jointly to General Director of Line Maintenance Dan Rankin ("Rankin") and BMWED General Chairman Dennis Craft ("Craft"). Complainant's duties as a Safety Assistant require him to travel extensively in a company vehicle throughout his assigned territory to attend safety meetings, conduct site inspections and to meet with workers and management in the field. When not traveling throughout the territory, Complainant primarily works from home where he prepares reports and completes other administrative tasks related to his position. He was given a company vehicle, a 2002 Ford Escape, used to visit job sites. (EX A at 30.). His territory was between Minneapolis, Minnesota, and Chicago, Illinois. (Id. at 31).

On July 28, 2010, Complainant was contacted by track workers Jay Komater ("Komater") and Michael Bruski ("Bruski"). (Komater Dec. ¶¶ 1-8). Komater and Bruski reported to Complainant that their work crew had been directed by their supervisor, BNSF Roadmaster James Robinson III ("Robinson"), to operate a crane in dangerous proximity to live power lines in Mendota, Illinois. (Id.). Based on this report, Complainant believed that the work as ordered by Robinson created a very dangerous work situation and violated safety rules and regulations. (Id. at 43:7-15, 19-24; 44:1-23). Complainant advised the workers that this was unsafe and that they should not work under such circumstances. Complainant then sought to contact Robinson's immediate supervisors, Division Engineer Gary Wischover and Rankin, but was unable to reach either.

The alleged violation committed by Robinson, constituted a "critical decision failure." (Rankin Dep. at 31:22-24; 32:1-24; 33:3-11, 18-24). Violations of critical decision failures, particularly on multiple occasions, should lead to termination of the offending employee. (Id. at 34:1-9).

Following the incident, Komater requested that Complainant attend a safety meeting which was scheduled for the following day, July 29, 2010, and was to be led by Robinson in Eola, Illinois. (Complainant Dep. at 45:18-24; 46:1-3; Komater Dec. ¶ 8). During the July 29 meeting, Komater sought to address and resolve the work ordered by Robinson the previous day. (Komater Dec.¶¶ 8-9; Complainant Dep. at 46:13-24; 47:1-10). Robinson became defensive and argumentative and told Komater to "shut up." (Komater Dec. ¶¶ 8-9; Complainant Dep. at 49:10-24; 50:1-3; Robinson Dep. at 175:22-24; 176:1-24, 1-21; 178:1-24; 179:1-7; Wischover Dep. at 38:9-24; 39:1-13; 80:23-24; 81:1). Complainant attempted to calm the situation, offering to bring up on Robinson's computer the appropriate rule regarding crane operations in proximity to power lines so that an understanding could be reached and future problems avoided. (Complainant Dep. at 50:4-11; Robinson Dep. at 179: 11-16). Robinson angrily dismissed Complainant, asserting that he was the Roadmaster and no one was going to tell him what to do. (Complainant Dep. at 50:4-11; Komater Dec. ¶ 9).

The next day, July 30, 2010, having made no progress with Robinson, and not having been able to reach Rankin or Wischover to have their concerns about Robinson addressed, Complainant, Komater and Bruski sought assistance from their union representative. Complainant, Komater and Bruski wrote statements of the events of July 28 and 29 and submitted them to Dennis Craft of the BMWED. After informing Complainant of his intention, Komater utilized an Internal Complaint Hotline to report the incidents with Robinson on July 28 and 29. (Komater Dec. ¶ 10; Complainant Dep. at 55: 4-24; 56:5-14).

Craft sent a letter to Rankin, including with it the written statements of Complainant,

Komater and Bruski, bringing his attention to the dangerous situation with the crane on July 28 and Robinson's unacceptable behavior on July 29. (CX T). Craft also sent copies of the letter to Respondent's Vice President, David Freeman, General Manager of Transportation Matthew Igoe, and Supervisor of Safety Assistants Craig Seery.

On August 3, 2010, Complainant received a call on his personal cell phone from Rankin. Rankin took exception to the complaint made by Komater to the hotline and the fact that he now had to answer to his boss (Freeman) about the matter. (Complainant Dep. 57:14-24; 58:1-7; Rankin Dep. at 9:10-24; 10:1-24; 11:1-19). Rankin told Complainant that such matters should not be reported to the hotline or to BMWED, but rather should be directed to Rankin for "internal handling." (Id.).

On August 4, 2010, Complainant received another call on his personal cell phone, this time from Wischover, but which was nearly identical to the message delivered by Rankin. (Complainant Dep. at 63:19-24; 64:1-9; Wischover Dep. at 83:6-24; 87:21-24; 88:1-23). Wischover was angry at how the situation had been reported and that his superiors had been notified. (Id.).

However, meanwhile, Complainant submitted an expense for mileage to Respondent. Because Complainant had been assigned a company car, the mileage charge was questioned. "I just wanted to know why he was submitting mileage when he had a company vehicle," the Division Engineer explained, so he asked about the expense. In response, he received an email stating that he had used his personal vehicle. Because side effects from medication prevented him from driving, his wife drove him to the job sites as she was not permitted to drive the company vehicle. (EX A at 189-199).[1]

Complainant took his medications, Ibuprofen and Tramadol, on August 5 for back pain. (EX A at 121-122). He testified that the Tramadol, taken at bed time, is a muscle relaxer to relieve the lower back muscles. (Id. at 124-127). As a result, the Complainant's wife drove him in the family car to LaCrosse, Wisconsin. (Id. at 129). He did so because he was not sure that he could be alert with the Tramadol. (Id.).

Respondent has a written policy and procedures that apply when employees inform a "supervisor or co-worker of their inability to safely perform their job due to a personal, medical, or EAP [mental-health] condition" and the "medical or behavioral health condition could realistically be the cause of or a significant contributing factor to the unsafe work practice." Specifically, the Procedures for Requiring Medical Department Intervention of In-Service Employees are a "very important element of the BNSF management injury/illness prevention effort." According to the Procedures, when a supervisor is confronted with "statements from the employee demonstrating a threat of serious injury to themselves or co-workers, where an underlying medical and/or EAP [mental health] condition may be at issue" the supervisor is to "contact [his] field Manager, Medical and Environmental Health." An example of a statement "indicating a questionable ability to safely perform the duties of their job," is an employee's statement: "My medication makes me: sleepy, groggy, or foggy."

The Division Engineer contacted the local Medical and Environmental Health Field Manager, Chris McGinnis.

On August 6, 2010, Rankin emailed Craft in response to the letter sent by Craft with a copy of the email going to Wischover. (CX U). In the email Rankin reported that, in speaking

[1] Although the Complainant claimed that he could not remember advising Respondent in an email on or about August 5 that he had requested travel expensed due to his medical situation, I find that he placed Respondent on notice of his medical situation on that date.

with him, Robinson "confirmed the allegations" made in Craft's letter. (Id.). Rankin's email singled out Complainant's involvement in the matter and reiterated his displeasure with how Complainant had handled the situation. (Id.).

On August 10, 2010, Robinson ordered workers under his supervision to perform work on live track under the authority of Respondent contract employees. (CX V, ¶12; Complainant Dep. at 65:11-21; Komater Dec. ¶¶ 12-13). The employees believed this to be an unsafe order and a violation of federal and/or company operating rules and contacted Complainant for assistance. (CX V, ¶ 12; Complainant Dep. at 67:24; 68:1-4; Robinson Dep. at 203:2-17; 204:4-24; 205:1-20; 208:15-18; 210:2-14; 214:1-6; Wischover Dep. at 31:8-24; 32:1-11). Upon learning this information, Complainant placed phone calls to Rankin, Wischover, Signal Supervisor Brian Clanin, and to Robinson himself, but was unable to reach any of them. He did not receive a return call from any of them. (Complainant Dep. at 68:3-22; Robinson Dep. at 203:2-17; 208:15-18; 214:1-6). Complainant also reached out to Craft and another union representative, Jim McGill. (Id.). Complainant traveled to the work site and advised the workers there to stop working until the foreman could obtain proper track authority from dispatch. (Id.).

Coincidentally, at the time Complainant received the call from the workers on August 10, he was attending a safety meeting in which Field Manager for Rules Training Troy Hunter participated via phone. (Complainant Dep. at 71:16-24). Hunter specifically agreed that Respondent employees should not be working under the track authority of a non-Respondent entity. (Complainant Dep. at 72:1-10; Wischover Dep. at 31:8-24; 32:1-11).

On August 11, 2010, the same issue arose when Robinson again ordered those under his supervision to perform on-track work under the authority of a Respondent contractor. (Complainant Dep. at 72:11-18; Robinson Dep. at 215:6-16). Complainant was on site along with Clanin and the foreman of the contract employee crew, though Robinson was not. Complainant, Clanin and the contractor foreman were all in agreement that the Respondent employees should not be working under the contractor authority and told the workers to find other work to do that day. (Complainant Dep. 72:23-24; 73:1-24; 74:1-13).

On August 12, 2010, Robinson personally walked down live track in a manner that, upon learning of it, Complainant believed was in violation of federal on-track safety regulations. (Complainant Dep. at 74:14-20; 75: 4-17; Robinson Dep. at 216:11-24; 217:1-20). Complainant called Rankin regarding this incident and expressed concern over Robinson's mental health, noting also that such a violation should be a dismissible offense. (Complainant Dep. at 75:18-24; 76:1-18). Rankin advised Complainant that he would get in touch with Robinson but Complainant never learned what, if anything, came of this reported issue with Robinson. (Id. at 77:6-12). In fact that was true for all of the issues raised with regard to Robinson. Other than the email from Rankin to Craft, management made no effort to inform Complainant or the other affected employees that anything was being done to address these very serious complaints about Robinson. (Complainant Dep. at 78:4-10; Wischover Dep. at 89:2-24; 90:1-8; 100:9-19).

That day, August 12, 2010, Wischover sent Complainant a letter advising him that he was being placed on a three-day medical leave of absence and that he would not be able to return to work until cleared by the company Medical Department. (CX D). The letter directed Complainant to contact Chris McGinnis, Senior Regional Field Manager, Medical and Environmental Health, and advised him to contact Wischover with any questions. (Id.). By letter dated August 20, 2010, Respondent automatically imposed an extension of Complainant's leave of absence through September 16, 2010. (CX F).

The letter of August 12, 2010, advised that Complainant was being removed from service

because:

> Per your correspondence, you informed me that your medication makes you very lethargic, that you did not believe you could stay awake long enough to make a recent business trip so you had your wife drive you to the meeting in your personal vehicle.

(CX D).

Complainant argues that the letter is absent of any indication of what "correspondence" Wischover was referring to, and when, how, and why such correspondence purportedly occurred. (Id.). He argues that prior to receiving this letter, he had never been notified by anyone at Respondent that there were any concerns about his ability to perform his job safely. (Wischover Dep. at 126:19-24; 127:1-5; McGinnis Dep. at 145:7-20; 147:21-25; 148: 1-4; 148:5-7, 22-25; 149:1-25; 150:1-25; 151:1-25; 152:1-9).

Respondent has a policy in place which is to be invoked for evaluating employees and determining whether a medical leave of absence is possible or necessary. (CX C; CX A). Complainant argues that neither Wischover nor McGinnis, arguably involved in removing Complainant from service, made any effort to comply with the policy in placing Complainant on a medical leave of absence. (McGinnis Dep. at 145:7-20; 147:21-25; 148: 1-4; Wischover Dep. at 108:21-24; 109:1-10). I am advised that each pointed to the other as the person responsible for carrying out the policy, despite the clear requirements of the policy of what steps are to be taken, by whom, and when. (McGinnis Dep. at 145:7-20; 147:21-25; 148: 1-4; 148:5-7, 22-25; 149:1-25; 150:1-25; 151:1-25; 152:1-9; Wischover Dep. at 108:21-24; 109:1-10; 110:3-1-17; 115:19-24; 116:1-18). "It comes then as no surprise that Complainant had never heard of, or seen, the Respondent policy for placing an employee on a leave of absence." (Complainant Dep. at 158:8-16).

Upon receiving the letter following a personal trip out of town, Complainant phoned McGinnis on August 16, 2010. (Complainant Dep. at 156:18-23). McGinnis instructed Complainant that he would need to provide documentation from his personal physician clearing him to work. (Complainant Dep. at 156:18-24; 157:1-5). Complainant's physician stated that since he had never made a determination that Complainant was not fit to work, he could not tell Respondent that Complainant was now able to return to work. (Complainant Dep. at 156:18-24; 157: 1-14). Complainant's doctor sent McGinnis a letter notifying him of the same. (CX I).

McGinnis informed Complainant that the letter from Dr. Sturm was not satisfactory and again directed Complainant to obtain documentation that he was fit to work. (McGinnis Dep. at 201:19-25; 202:1-25; 203:1-6). McGinnis also contacted Complainant's doctor directly. (CX J). After numerous back-and-forths among Complainant, McGinnis and Dr. Sturm, Complainant was finally permitted to return to work on September 20, 2010. (Complainant Dep. at 192:5-12).

Complainant argues that he was placed on medical leave of absence by Respondent without the company having any knowledge of what, if any, medication Complainant might have been on that made him unsafe, and he was permitted to return to work without having any knowledge that Complainant was not taking medication that might make him unsafe. (McGinnis Dep. at 124:6-11; 131:6-17; 205:15-25; 206:1-16; 207: 19-25; 208:1-3). Upon Complainant's return to service, he resumed the duties he had prior to the suspension, including driving a company vehicle.

McGinnis instructed Complainant that, before he could return to work, he needed to provide information from his treating physician indicating that he was fit to return to work. After some initial delay, Complainant's treating physician did provide some information, but the parties disagree about whether that information indicated that Complainant was fit to return to

work.

On September 16, 2010, Complainant reported that he was no longer taking prescription drugs. He was cleared to return to work. His first day back at work was September 20, 2010. He had been away from work for five weeks.

## DISCUSSION

Respondent initially argued that by pursuing a grievance under the Railway Labor Act challenging his dismissal, Complainant elected his remedy and cannot pursue a FRSA claim. However, this allegation has been withdrawn. See ***Mercier v. Union Pacific R.R. Co***., ARB No. 09-121, ALJ No. 2008-FRS-004 (Sept. 29, 2011); the FRSA's election of remedies provision at 49 U.S.C.A. § 20109(f)2.

After a review of all of the evidence, I accept that the Respondent has proved by clear and convincing proof that the suspension was inevitable as it was precipitated by Complainant's request for reimbursement of expenses that were engendered due to a medical infirmity. The following discussion is a discussion of the findings and conclusions of law.

### SUBJECT TO THE ACT

There is no dispute as to this issue.

### PROTECTED ACTIVITY

By its terms, FRSA defines protected activities as including acts done "to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee." 49 U.S.C. § 20109(a)(4). The evidence establishes that Complainant engaged in protected activity under § 20109(a)(4), through his status as Maintenance of Way Safety Assistant, and when, on August 10, 2010, after Robinson ordered workers under his supervision to perform work on live track, Complainant placed phone calls to Rankin, Wischover, Signal Supervisor Brian Clanin, and to Robinson himself, but was unable to reach any of them. Although he did not receive a return call from any of them, he traveled to the work site and advised the workers there to stop working until the foreman could obtain proper track authority from dispatch. At the time Complainant received the call from the workers on August 10, he was attending a safety meeting in which Field Manager for Rules Training Troy Hunter participated via phone. (Complainant Dep. at 71:16-24).[2]

Considering all of the evidence, I find that throughout this fact pattern, the Complainant engaged in safety matters, a protected activity.

### KNOWLEDGE OF PROTECTED ACTIVITY

Generally, it is not enough for a complainant to show that his employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the decision makers who subjected him to the alleged adverse actions were aware of his protected activity. See ***Gary v. Chautauqua Airlines***, ARB Case No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); ***Peck v. Safe Air Int'l, Inc***., ARB Case No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004).

There is no question that Wischover was aware of Complainant's protected activity, as he was Maintenance of Way Safety Assistant, and he put the company on notice of the August 10 incident.

[2] A complainant did not need "step" out of his status as safety officer to prove that he was engaged in a protected activity.

Employer maintains that McGinnis had no knowledge of Complainant's safety complaints lodged against Robinson. It alleges that McGinnis made the decision to temporarily remove Complainant from service based on Complainant's job duties and the information Complainant himself provided, that he was taking medication that made him "very lethargic" and that were times that he had to take his medication religiously even if he did not want to, and that it had "a tendency to make [him] fall asleep."

However, I find that as to notice, by August 12, when the suspension was communicated, McGinnis had to have known that Complainant was Maintenance of Way Safety Assistant and I find that McGinnis did not act unilaterally in applying company policy.[3] According to CX C, Respondent's "Procedures for Requiring Medical Department Intervention of In-Service Employees," the standard procedure is for the supervisor, here Wischover, to initiate and document the issue and then determine whether it could be resolved through "managerial actions" and only then submit the matter to the Field Manager, Medical & Environmental Health, here McGinnis.[4]

Although Respondent argues that the Procedures were "just" guidelines, I find that they are an expression of company policy and that an investigation was necessary. McGinnis testified that he was aware that Complainant was a safety official. He also admittedly discussed the matter with Wischover prior to initiation of the suspension.

Although McGinnis described the information about the protected activity was merely "in passing," I find that Respondent was aware of the protected activity.

I find further that as the FRSA identifies an operative responsible Respondent employee "who has the authority to investigate," McGinnis is such a person.

## UNFAVORABLE PERSONNEL ACTION

By its terms, FRSA explicitly prohibits employers from suspending employees who engage in protected activity. The parties do not dispute and the evidence establishes that Complainant was subjected to adverse employment action when he was suspended by letter dated August 12, 2010.

## CONTRIBUTING FACTOR

Complainant's burden is to prove by a preponderance of the evidence that his protected activity was a contributing factor in Respondent's decision to suspend his employment. A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." See ***Clark v. Pace Airlines, Inc.***, ARB No. 04-150, ALJ No. 2003-AIR-28, slip op. at 11 (ARB Nov 30, 2006).

Therefore, in this fact pattern, as the Respondent was placed on notice regarding the issue of Complainant's medical status, arguably the predicate question is whether suspension was mandatory or was discretionary? Again, a review of company policy, expressed by "Procedures for Requiring Medical Department Intervention of In-Service Employees," shows that it was

[3] McGinnis stated that he became aware of the safety issue on August 5, but did not speak to Wischover until August 12. It was at that time that the Complainant was suspended. See EX C, at 123-124.

[4] I find that Respondent is not credible that it did not "know" and that McGinnis was a unitary decision maker, but even if it were, company policy was that it internally investigate the nature and extent of the alleged side effects from medication. However, McGinnis testified, contrary to policy, that "at the end of the day," only he made the decision. See EX "C" at 6. Although he alleged that to contact Complainant to investigate would have been a violation of a collective bargaining agreement, at 154, this is not proven. If he were the sole decision maker, under stated policy, he exceeded his authority.

discretionary.

I note that although this policy requires the supervisor, namely Wischover, to perform the investigation, the letter sent to Complainant, CX D, states that McGinnis was to do the investigation. I find that this does not follow the established company policy.

Although McGinnis testified that he was provided information about Complainant from Wischover "in passing,"[5] he knew that Complainant was a safety coordinator. (EX C at 99). I find that Wischover would have had a duty as set forth by company policy, to provide information about Complainant's position as a safety officer. [6]

Complainant argues that there are three versions of internal emails, and this makes them suspicious, and in fact argues that as Complainant alleges he could not remember sending it, I should find that its existence is unproved. However, this argument is convoluted and is contrary to the full weight of the evidence, as this matter was discussed by both party. There is a common-law presumption that a letter correctly addressed and mailed is presumed to have been received by the addressee ("the mailbox rule"). See, e.g., ***Hagner v. U.S***., 285 U.S. 427, 430 (1932). Normally, to invoke this presumption, there must be evidence to permit the inference that the letter was properly addressed and actually mailed. See, e.g., ***Davis v. U.S. Postal Service***, 142 F.3d 1334, 1340 (10th Cir. 1998). However, this is not an issue about when it was sent or received. I accept that receipt of the email is substantiated by Complainant's deposition testimony that he was affected by his medication to the extent that he could not drive and asked to be reimbursed for the use of the family car in lieu of the use of the company car, within the course and scope of his employment. Complainant does not deny that he sought reimbursement for expenses related to his medical condition.

It also is reasonable to expect that the controversy arose in part whether to reimburse Complainant and Complainant's request gave rise to the medical issue. Further the reason that this is not purely a medical issue is because Complaint's job was to deal with safety.

Meanwhile, Complainant reminds me that Robinson continued to work in the same capacity as before, with the same responsibilities and the same pay. (Robinson Dep. at 200:9-24; 201:1-12). At no time was Robinson ever removed from service. (Id.). This despite the fact that Robinson was already on a Personal Improvement Plan ("PIP") imposed by Respondent for a prior violation of on track safety. (Wischover Dep. at 91:7-20; 92:2-24; 93:1-3; Robinson Dep. at 189: 23-24; 190: 1-9; 191:14-24; 192: 1-6; 200:9-20). According to Complainant, Respondent, rather than removing Robinson from his position for repeated violations of critical safety matters, simply disregarded the first PIP and "instead punished Complainant." (Wischover Dep. at 93:1-24; 94:1-24; 95:21-24; 96:7-22; Robinson Dep. at 192:7-21).

Although I do not accept that Complainant has proved that he was "punished," I find that the timeliness of the suspension is more than coincidence. Complainant argues that McGinnis based his August 5th report on that Complainant was "at a continual risk of falling asleep." Despite this concern, he was not removed from service until seven days later when Complainant happened to engage in protected activity.

However, I note that although Respondent tried to explain that McGinnis made the

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[5] EX C at 98.

[6] Respondent argues that McGinnis sent Wischover the text of the operative email at CX D, and played no part in the removal decision, but Wischover does not deny that he sent the letter, and I find that it speaks for itself. I also directed both of the parties to ***Staub v. Proctor Hospital***, 131 S. Ct. 1186 (2011), but I do not find that the knowledge of Wischover is imputed to McGinnis, rather that McGinnis was aware of Complainant's status and was placed on inquiry notice if he was indeed, the investigator.

determination entirely on medical, safety concerns for the health of complainant, it used Wischover to send the message, and this factor, is also persuasive.

I find that the medical issue was an opportunity for Respondent to take advantage of the situation. Complainant expressed a concern that the procedure was done unilaterally and testified that the parties should have conferred. (EX A at 142). Wischover testified that although they discussed other matters, there was no conversation about the reimbursement or medical issue. (EX B at 103-109). His allegation is that medical matters were the province of McGinnis. There is nothing in this record to show that it was not feasible for Respondent to have contacted the Complainant and, in fact, the Respondent's "Procedures for Requiring Medical Department Intervention of In-Service Employees," establishes that the Complainant should have been the subject of an investigation after notice and it is quite reasonable that the matter could have been resolved.[7]

Therefore, I find that Complainant has proven that there was contribution.

SHIFTING BURDEN OF PROOF

The employer can overcome the above determinations only if it demonstrates "by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected conduct." 75 Fed. Reg. 53545, 53550; 49 U.S.C.A. § 42121(b)(2)(B)(ii).

Again, McGinnis testified that he was the sole decision maker and that he made a medical determination. I do not accept that he was the sole decision maker. Moreover, he was not told what medication Complainant was taking. (EX C at 124). He did know that the job duties required driving a company vehicle and that Complainant admitted that he did not drive the company vehicle for fear that he would have been too impaired to do so. (Id.).

Obviously, at a minimum, there is some coincidence that the suspension occurred soon after the Complainant made his medical condition known and also soon after he complained to Rankin, et. al about safety issues. Complainant argues that Respondent removed him from service "without ever knowing what medications he may have been on, and returned him to service a month later without any confirmation that he was not on medication that would affect his ability to safely perform his job." I accept this argument.

However, I also accept that Complainant admitted that he would at least have been lethargic and that is why Complainant's wife drove him to job sites. (EX D at 125). Subsequent evidence shows he was prescribed 600 mg Ibuprofen and tramadol.[8] It took McGinnis a week, from August 5 to August 12, to speak to Wischover about this matter. (EX C at 126). He stated that he waited to speak to Wischover before he removed Complainant. (Id.). McGinnis said that he had the capacity to have removed him as of August 5. (Id. at 127).

As he initiated the inquiry by requesting reimbursement for expenses that would not have been made but for his alleged medical impairment, I find it was reasonable to place the Complainant on medical leave.

Once on medical leave, Respondent sent Complainant a letter dated August 16, "Medical

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[7] Complainant argues further that the Collective Bargaining Agreement ("CBA") went into effect in 1982, was updated in 2002, and was in effect throughout the events complained of by Complainant in this action. (See Craft Dec. at ¶ ¶ 4-7). "The CBA between BNSF and BMWED does not contain and has never contained any provision that would preclude McGinnis, or indeed any BNSF management official, from contacting an employee before that employee is removed from service. (See Craft Dec. at ¶ 7). In fact, such a provision has never even been discussed or contemplated by the parties in the time the CBA has been in place. (Id.)."

[8] CX K, report of Dr. James Strum, September 2, 2010. The history states that Complainant had bilateral joint injections, and the Ibuprofen was replaced by Naproxen, 500 mg, #9.

Leave of Absence," CX F. Attached was a Medical Status Form. On the same date, Respondent sent Complainant's treating physician a request for medical information. (CX H). Eventually, Complainant was advised that he was on medical leave for the period August 14-September 16, 2010. (CX G).

Respondent argues that McGinnis instructed Complainant that, before he could return to work, he needed to provide information from his treating physician indicating that he was fit to return to work. After some initial delay, after the provider, Dr. Strum, initially declined to comment specifically,[9] Complainant's treating physician did provide some information, but the parties disagree about whether that information indicated that Complainant was fit to return to work.

On September 16, 2010, Complainant reported that he was no longer taking prescription drugs. He was cleared to return to work. His first day back at work was September 20, 2010. He had been away from work for five weeks.

Respondent argues that even if Complainant had proven that his alleged protected activity was a contributing factor in his temporary removal from service, Respondent would have taken the same actions regardless of Complainant's alleged protected activities.

Although Respondent argued that there was testimony it would have removed him to investigate the matter, in any event, it did not produce affirmative evidence. However, Complainant "agreed with the concept" that there was "a concern for his working safely and operating company vehicles." (EX A at 139-141). After a review of the company policy and the documents, especially the Procedures set forth in CX C, I accept that Complainant was placed on medical leave pending an investigation.

I am directed to Complainant's "two irrelevant arguments" by Respondent.

- First, [the allegation that he] did not actually send the August 5 email regarding his fatigue and inability to drive due to his medication…. Mr. Wilhelm does not deny (1) sending the original email, (2) that the information it contains is accurate, or (3) that he communicated the information in the email to Division Engineer Wischover—either by email or telephone - on August 5, 2010.

I previously discussed that I accept that Complainant's email was proven circumstantially. I accept that this is not a valid objection.

- Second, … [Complainant] argues that, to avoid liability, BNSF must prove that Mr. Wilhelm's removal from service was "compulsory," "automatic," and "non-discretionary." Neither the FRSA, the regulations, nor the caselaw contain any such requirement. The law requires only that an employer prove that it would have taken the same personnel action—even a discretionary one—in the absence of the complainant's protected activity. The Court should decline Mr. Wilhelm's invitation to read a new requirement into the FRSA—particularly one that has no support in the Act itself and conflicts with the regulations and caselaw.

As stated above, company policy, expressed by "Procedures for Requiring Medical Department Intervention of In-Service Employees," and the testimony, shows that it was discretionary. The burden of proof on this issue is on Respondent. However, I find that Complainant's medical status was an issue, and even if Respondent has not produced evidence that the alleged impairment would have adversely affected his other job duties, I find that Complainant admitted that he needed to have his wife to chauffeur him to avoid potential attention and/or sleep problems.

[9] CX I. "I certainly have not put this patient off of work."

A fair reading of the record shows that Complainant possibly could have stopped any suspension, by better explaining his position and or by making better use of the Dr. Strum intervention. The record shows that Complainant initiated the process by not using the company car, and by substituting his own vehicle with a request for reimbursement based on medical necessity, for his trip to LaCrosse on August 5. I find that the request for reimbursement placed Respondent on notice that Complainant had a medical issue. The Statute and the collective agreement of the parties sets forth that "safety" is primary importance, and apparently prevention among these parties is paramount.

I find that unlike a mixed motive case, where the employer bears the risk that the legal and illegal motives cannot be separated, here I find that there is no question that the Complainant had a medical condition that required investigation. The Fitness for duty standard expressed in the Procedures, at CX C, discusses an inability to "safely perform their job….: Once at the job site there is nothing in this record to show that Complainant could not perform his job duties. However, one of the duties of the job was to get to job sites in a geographic area covering territory from Minneapolis to Chicago, and as there is an admission that Complainant needed help to do that for medical reasons, therefore, I also find that the need for medical leave has been proven.

I also find that once the medical leave was initiated, given the *res gestae* events and given the Complainant's medical history, the subsequent investigation and the time expended in performing it is reasonable.

## ORDER

Complainant has failed to establish the required elements of his claim. Accordingly, the relief sought by Complainant is **DENIED**.

A

Daniel F. Solomon
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).

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 for Occupational Safety and Health. 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).