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Issue Date: 28 April 2014

IN THE MATTER OF:

MARK GEYER,
Complainant,

v. Case No.: 2013-FRS-00054

BNSF RAILWAY CO.,
Respondent.

Appearances:
Todd F. Bovo, Esq.
For the Complainant

Jennifer L. Willingham, Esq.
Keith Goman, Esq.
For the Respondent

Before:
William S. Colwell
Associate Chief Administrative Law Judge

INITIAL DECISION AND ORDER

This matter arises under the Federal Rail Safety Act at 49 U.S.C. § 20109, as amended by Section 1521 of the *Implementing Recommendations of the 9/11 Commission Act of 2007* (FRSA), and the regulations at 29 C.F.R. Part 1982. A hearing was held in Denver, Colorado on November 18, 2013, during which the following exhibits were admitted for consideration in this matter: (1) *Complainant's Exhibits* (*Cx.*) 1-4, 8 and 9[1]; (2) *Respondent's Exhibits* (*Rx.*) 1-46, with the exception of *Rx.* 12, which

[1] *Complainant's Exhibits* 2.5 was withdrawn, 5 was excluded, and 6 and 7 were excluded on grounds that they were duplicates of *Respondent's Exhibits* 18-19.

was withdrawn; (3) *Administrative Law Judge's Exhibits* (*ALJx.*) 1-6; and (4) *Joint Exhibit* (*Jx.*) 1.

I
Procedural background

Pursuant to Mr. Geyer's complaint filed with OSHA on July 17, 2012, he states, "I strongly believe that I was disciplined with extreme prejudice and retaliation for refusing to take out a train, which was out of compliance, from Restricted Limits Cheyenne Yard to Highland Siding as out dispatcher (CWR) had instructed our crew to do." *Respondent's Exhibit (Rx.)* 29. Mr. Geyer further maintains, "I feel that in issuing my discipline that my reportable injury was taken into consideration even though it was no fault of mine, and it is still being held against me!" He observes:

> It is with my past experiences and those of my fellow coworkers, that my supervisors are extremely vindictive with retaliation towards employees who have reportable injuries, report or are the cause of reports being made of unsafe work conditions, or challenge their decision making of rule violations.

Rx. 29.

OSHA concluded prohibited discrimination did not occur; rather, "Complainant was assessed discipline for a serious rule violation that occurred in 2011, and again for another serious rule violation that took place in 2012." *Rx.* 31. Notably, the OSHA investigator determined Complainant was terminated for having two Level S suspensions within a 36-month timeframe such that the Complainant's injury was not a contributing factor to the termination.

At the hearing before this tribunal, Mr. Bovo states the following with regard to the issues:

> [T]here's no dispute that Mr. Geyer was terminated. …[W]hat's in dispute is why? And the facts and the evidence will show that what contributed to his ultimate termination was protected activity. To what degree? I think that's the question of fact and the whole purpose of us being here.

Hearing Transcript (*Tr.*) at 10. Mr. Bovo noted that, "On August 20th, 2009, (Mr. Geyer) fell, injured his arm, because of vegetation," and "[t]wo months after his attorney filed suit, Mr. Geyer was terminated." *Tr.* at 13-14. On the other hand, Ms. Willingham stated:

> [T]he case before you is about an employee, who committed serious safety rules violations that resulted in his dismissal, a dismissal that was made in accordance with BNSF's disciplinary policy.

Tr. at 18.

II
Summary of the evidence

Mr. Geyer was hired to work for Respondent on April 4, 2006. At the November 18, 2013, hearing before this tribunal, Complainant described the duties of his position as a conductor as follows:

> Usually, a conductor is always in charge of the crew. If I'm working in the yard, you're usually the foreman and you're kind of in charge of like switching or anything like that. You, basically, give the directions to the engineer. And if you happen to have a helper, you're basically the one that's in charge of giving the orders of how the work is to be performed and everything.
>
> [O]nce you're working a road switch, you're usually with an engineer, just you and your engineer. And as part of that crew, both communicate (about the) track conditions, what our destination is, and how far we're supposed to go. I'm the person that does the radio communication, a lot of times, I operate the switches. I'm the one that actually goes out, physical, and does the cars—if we need to set-out or pick up a car—I'm the person that will tie a brake or go over and physically go over and pick up and make sure the car made the joint.

Tr. at 33-34. Complainant further explained that an engineer "has complete control of the train, the stopping, the acceleration, basically, he's in charge

of . . . driving the train." *Tr.* at 34. Both crew members, the conductor and the engineer, are in charge of tracking the mile markers. *Tr.* at 34.

This is consistent with Mr. Geyer's previous testimony. Notably, Mr. Geyer was deposed on August 27, 2013. Citations to this deposition transcript are *ALJx. 5*. Mr. Geyer testified that he was hired as a conductor for BNSF on April 4, 2006. *ALJx. 5* at 17. When describing his duties, Complainant stated:

> [A] conductor's usually in charge of the crew when we're called out. We switch cars, pick up, talk on the radio, fill out paperwork, work with your fellow crew members.

ALJx. 5 at 17. A "crew" means individuals operating the locomotive. *ALJx. 5* at 18.

August 20, 2009; injury to left arm

On August 20, 2009, Complainant was "working as a brakeman, in the yard in Cheyenne." *Tr.* at 34-35. He recalled that he "fractured (his) radial head on (his) left arm." *ALJx. 5* at 25. During his deposition, Complainant stated:

> [I]t was getting dark at night, and we were switching out cars in the yard. And when I was walking down to check a clearance point and protect the shore, I tripped and fell. And I just got right back up and continued on working, finished the night.

ALJx. 5 at 27. At the hearing, he offered a similar recollection:

> I tripped and fell that night and I, basically, jammed my arm. At that time, I got up immediately and continued to work, and I finished out the rest of the night.
>
> . . .
>
> The following day, I believe it was a Saturday morning, I went to the doctor, in Cheyenne, and she, basically, said she thought I

> had fractured my radial head on my left arm. And that's the time I got injured.

Tr. at 34-35.

During his deposition, Complainant recalled that he contacted his trainmaster, Wes Adkins, the next day, and Mr. Adkins stated that Complainant should call him if Complainant needed to go to the doctor. *ALJx. 5* at 29. Complainant testified that Respondent did not interfere with, or prevent him from, seeking medical care for his injury. *ALJx. 5* at 30. However, Complainant recalls that Mr. Adkins advised that, if Complainant had a "reportable injury," then he would be reduced from an "A" employee to a "C" employee. *ALJx. 5* at 33. Complainant recalls that Mr. Adkins stated:

> Right now, you don't have any injuries or anything . . . but if you have what they call a reportable injury, you're assessed so many points or something and it will bring you down.

ALJx. 5 at 33. At the hearing, Complainant presented "pictures of the conditions of the Cheyenne yard at the time (he) was working," and noted the pictures revealed the presence of "high weeds." *Tr.* at 37; *Cx.* 1.

Complainant did complete an injury report and, regarding the cause of the 2009 injury, he "put excessive weeds and poor lighting." *ALJx. 5* at 37. When asked whether he had any concerns regarding how BNSF responded to the injury report, Complainant responded:

> Just other than the fact that, you know, like I said before, they assigned points against my personal—my PPI index. They also make me join the ERP program. I don't think I should have had to, and I didn't think that was fair, just because I had a personal injury I had to join this program, which basically was a probationary program.
>
> And I had to meet with either a trainmaster or another official at least once a month and talk to them, and then also got ops

> tested more often and when I came back to work I was a C employee and I had to join this ERP program.
>
> . . .
>
> I think the whole thing was because BNSF neglected to take care of the yard where I got . . . hurt, and that was no fault of my own, I don't believe, and I don't think I would have got injured had they maintained the yard in a safe, professional manner.

ALJx. 5 at 62 and 102. Complainant testified, with regard to a requirement that he participate in the ERP program, "I disagreed, but I accepted it because that's the only way I could come back to work." *ALJx. 5* at 102.

Complainant stated that he returned to work in February 2010. *ALJx. 5* at 131.

Complainant's Employee Review Process (ERP) package was submitted as *Respondent's Exhibit* 9. The document reveals an "Entry Date" of September 1, 2009, and an "Initial Plan Date" of March 9, 2010. In the close-out comments dated September 1, 2010, William P. Herrin states, "I had a discussion with Mr. Geyer about his ERP program. He said he is paying closer attention to his working conditions and has slowed down."

At the hearing, Complainant observed, in February 2012, he filed his personal injury lawsuit related to the August 2009 accident, and he was terminated on June 1, 2012. *Tr.* at 41; *Cx.* 2.

<u>May 7, 2011; the "set-and-center" violation</u>

On May 7, 2011, Complainant was the conductor on "the beer run," which required that he deliver grain and syrup for making beer to the Coors location at Golden, Colorado, and then haul train cars of Coors beer out of Golden. *ALJx. 5* at 75 and 79. By this time, he had been employed by BNSF for about five years. *Tr.* at 41. He recalled he "was working with a new-hire and explaining to him what to do" in preparation for taking "beer cars from Golden, Colorado, into Denver, Colorado, and back." *Tr.* at 42. He testified:

> Well, incidentally, some of the supervisors were watching me, and . . . they said that they'd seen me, I had my foot inside the rail . . ..

Tr. at 42-43. Complainant stated:

> I admitted to it. I'm human. And I did accept my punishment for that.

Tr. at 43.

In a notice dated May 10, 2011, from BNSF's Director of Administration, Complainant was advised that an investigation would be held regarding Complainant's "failure to get Set and Center Protection before going between cars coupled to a locomotive." *Rx.* 4.[2] The notice further provided that Complainant was "ineligible for Alternative Handling because the charge involve[d] alleged violation of rules associated with BNSF's eight deadly decisions." In describing a "set-and-center" violation, Complainant stated:

> Basically, before you go in between cars to hook up hoses or, I guess, untie brakes or anything, you're supposed to get set and center, make sure the train is set and center, and basically it's like permission from the engineer.

ALJx. 5 at 77. Complainant stated that he was working as the conductor and, as a result, he was on the ground going in between cars and he was supposed to get "set-and-center protection" from Brian Brito, the engineer, either "over the radio," or by using "hand signals." *ALJx. 5* at 78. When asked why "set-and-center" is important, Complainant responded:

> Because you have to make sure that the cars are through moving and that he has basically the brakes set.

ALJx. 5 at 78. He further stated "set-and-center" is designed:

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[2] A list of the eight "Deadly Decisions" at *Respondent's Exhibit* 5 includes "Going Between," which is described as, "Going between coupled cars or locomotives without proper protection." *Rx.* 5.

> . . . to make sure the engineer has the brakes set and his reverser is centered, because if the reverser is centered, you can't move. It won't go backwards or forwards.

ALJx. 5 at 79.

Complainant testified that failure to obtain a set-and-center was "one of the 8 deadly decisions." *ALJx. 5* at 79; *Rx.* 18. He noted that he agreed to waiver of the investigation, and he accepted a 30-day suspension as well as placement on "a one-year review period." *ALJx. 5* at 81-82; *Tr.* at 48. On May 18, 2011, BNSF's Director of Administration issued an "Investigation Waiver" and noted:

> This letter will confirm that as a result of our conference on May 18, 2011 concerning your responsibility for your failure to get Set and Center Protection before going between cars coupled to a locomotive . . ., you are hereby assessed Level S 30 Day Record Suspension. In addition, you will be placed on a One (1) Year Review Period. Any rules violation during this review period could result in further disciplinary action.
>
> In assessing discipline, consideration was given to your personnel record. A copy of this letter will be placed in your personnel record.

Rx. 6.

Complainant testified that he did not believe that the "set-and-center" sanction was issued because of his prior physical injury report. *ALJx. 5* at 83. Complainant noted he was given a "record" suspension as opposed to an "actual" suspension, which meant that the suspension was placed on his record, but he did not lose pay or time from work. *ALJx. 5* at 84-85.

During the deposition, Complainant asserted that his one-year probationary period started on May 7, 2011 because "that's when the incident occurred," whereas BNSF asserted the probationary period started on May 18, 2011, which is the date BNSF notified Complainant of the

discipline assessed based on Complainant's acceptance of alternative handling. *ALJx. 5* at 85-86. At the hearing, Complainant testified:

> I was on probation, on May 7th, when I agreed to this waiver, and that's the date of the incident. And I had served my term, I believe. I had served my full year probationary period.

Tr. at 48-49.

Complainant's Employee Review Process (ERP) program documents were submitted at *Respondent's Exhibit* 10. The documents reveal an "Entry Date" of May 18, 2011, and an "Initial Plan Date" of May 30, 2011. The close-out comments dated June 6, 2012 provide the following:

> ERP CLOSED. Per HR Table Employee is no longer employed with BNSF.

Rx. 10. However, a previous entry in the ERP documents, dated May 8, 2012, from Wes Adkins, contains the following notation:

> Met with Mr. Geyer at the MP 80.8 on the Front Range Sub, where he was outside his train authority limits. The H LAUDEN1 06A, was issued a track warrant to MP 81, and they passed that MP. There were 2 other trains working with joint authority between MP 81 and MP 74 at the same time. We briefed on REACT, and how each component would apply to their situation.

Rx. 10.

Complainant was asked whether the PEPA policy governs employee discipline at BNSF, and he replied, "I would say that it does, but I feel it's written very loosely." *ALJx. 5* at 87. It was noted that the PEPA policy provides that "[t]he review period for a serious violation beings the date the discipline is assessed." *ALJx. 5* at 93. Complainant countered to state his "waiver does not say that." *ALJx. 5* at 93. Rather, Complainant maintains

that the March 1, 2011, PEPA policy did not apply to his investigation waiver dated May 18, 2011. *ALJx. 5* at 93-94.[3]

May 8, 2012; train non-compliance and exceeding track authority

On May 8, 2012, Complainant was the conductor, and the dispatcher was Charles Reynolds. *ALJx. 5* at 140; *Tr.* at 64. Brian Brito was the engineer, and Complainant had a student conductor on the crew. *Tr.* at 65. Complainant testified, as the conductor, he had responsibility for ensuring that the train operated in compliance with the scope of the track warrant. *ALJx. 5* at 145. Complainant recalled the following:

> On May 8th, when my crew, myself, Mr. Brito and our student, reported for work, our dispatcher, they called and told us that our train was out of compliance and that it was okay to take the train, even though they knew it was out of FRA compliance, the corridor (superintendent) said it was okay for us to take our train as far as down to the Highland Siding and do our set-out. Once we did our set-out, our train would be in compliance. Then me and my engineer discussed it, after we had talked with the dispatcher, who had given us those orders, and we didn't feel comfortable taking the train out of compliance. We didn't feel like that was the right thing to do.

Tr. at 61-62. When asked how the train was out of compliance, Complainant responded:

> (The dispatcher) told us that we had hazmats throughout our train and it was over 5,700 tons. And so we needed to have at least 10 buffer cars, basically, which are non-hazmat cars, on the head in, between our motors and like the first hazmat car . . ..

Tr. at 62. He stated he knew the train was out of compliance because he had been told by the dispatcher, and he believed, "on (the) original call

[3] Complainant also testified that he was cited for exceeding the authorized speed on September 9, 2011, while he was assigned as a crew member, but BNSF "cancelled (the formal investigation) for everybody" because "there was major confusion on the (speed) limits that they had just recently changed in Longmont." *ALJx. 5* at 131.

sheet it stated, at the bottom of that, that our train was out of compliance." *Tr.* at 67.

Prior to May 8, 2012, Complainant stated that he had never been asked to take a train that was out of compliance. *ALJx. 5* at 187. When he was informed that the train was out of compliance, he called his union representative, Mr. Mason, who then called the supervisor, Mr. Sickler. *ALJx. 5* at 187; *Tr.* at 62-63. Mr. Mason told the "crew that we do not leave the yard until our train is in compliance." *Tr*. at 63. When asked whether he thought the supervisor was "happy" about the report that the train was out of compliance, Complainant responded, "I would say, yes, the dispatcher was not happy." *ALJx. 5* at 187. Complainant stated he could tell the dispatcher was upset from "the tone of his voice," and he recalled the dispatcher said, "Since everybody is raising a big stink about this train, how long is it going to take you guys to put it back in compliance?" *Tr.* at 63-64. Complainant recalled that they were two to three hours late on the run because they had to bring the train into compliance. *Tr.* at 75.

Complainant testified that he thought the dispatcher, Mr. Reynolds, and the corridor superintendent, Mr. Sickler, were not "real pleased" that the train was reported being out of compliance, and they "held a grudge." *ALJx. 5* at 138. When asked what made him believe that Mr. Sickler was not pleased about the crew reporting the train was out of compliance, Complainant stated:

> I don't know if he was or not. I can't truly say, because I never talked with that gentleman.

ALJx. 5 at 138. Complainant stated that he only talked to the dispatcher, Mr. Reynolds, and the local chairman, Mr. Mason, that day. *ALJx. 5* at 139-40.

Once the train was in compliance, Complainant recalled they "were issued a track warrant." *Tr.* at 65. Under this track warrant, Complainant stated, "[W]e were supposed to go from restricted limits Cheyenne to Milepost 81." *Tr.* at 66.

Later the same day, Complainant recalled the following incident that occurred:

> [A]s we went down the track, we were approaching Milepost 81, and I was explaining to my student what a joint track warrant was and why we needed it, how it was so important. Because when you get a joint track warrant, you're working with other trains in the area and possibly other people that are working the same territory that you are.
>
> And then I was explaining to him, and then I leaned over and looked out our window and asked Brian, 'Where are we?' And he says, 'Oh, we're at 82,' and then he says, 'Oh no, we're at 81.' And I believe that's when Brian put the train in emergency instead of full service . . . to get it stopped.
>
> And when we stopped we went past Milepost 81. I stated, in my statement, I believe . . . approximately 10 to 12 cars past the milepost. And then, Brian immediately called our dispatcher and let him know that we were past our limits.

Tr. at 76-77. After the dispatcher was notified, the train master and road foreman "came out to our train and they asked us for a statement," and each member of the crew "wrote a brief statement of what had happened." *Tr.* at 83.

Complainant maintains it was a clear day, nothing was on the track ahead of them, no one was injured, and there was no property damage, "Without turning ourselves in, there may not have been an investigation, at all." *Tr.* at 78-79. He stated the crew reported the incident, but they "could have been dishonest and not said anything" and "[n]obody would ever have found out." *ALJx. 5* at 142. When they went past Milepost 81, Complainant stated they should have "broadcast emergency," but they did not; rather, they called and reported the incident to the dispatcher, and then the dispatcher "broadcast emergency." *ALJx. 5* at 146.

Complainant testified that, normally in such situations, the crew of the train would have been relieved "on the spot," for drug and alcohol testing,

but Complainant recalled, in this case, Mr. Brito was permitted to take the train another five or six miles to the North Yard. *Tr.* at 84-85.

Complainant and the crew received a formal notice, and the matter proceeded to a formal investigation. *ALJx. 5* at 148; *Rx.* 24. In the May 10, 2012, notice issued by Mr. Davila, Complainant was notified that an investigation was scheduled regarding "alleged negligence and carelessness of the safety of yourself and others when you allegedly exceeded the limits of Track Warrant Authority 763-48 at Milepost 81 on the Front Range Subdivision on May 8, 2012." *Rx.* 15.

Complainant alleged that, if he had not reported the train being out of compliance, he would not have been issued a notice investigation for exceeding the track warrant authority. *ALJx. 5* at 150; *Rx.* 25. He asserted that, if he had not complained about the train being out of compliance earlier in the day, the discipline would have probably been different. *ALJx. 5* at 151. He noted that Brian Brito received a three-year level S suspension as a result of the incident. *ALJx. 5* at 152; *Rx.* 27. The following exchange occurred with regard to review of Complainant's dismissal letter at *Respondent's Exhibit* 27:

Counsel: And are you claiming that your dismissal was in part because you had previously reported that this train was out of compliance?

Complainant: I'm saying, yes, that could be part of that. And it could also—I think it was part of the outcome, the decision of my discipline.

Counsel: And to you contend that your injury was also a reason why you were dismissed?

Complainant: Yes, I do.

ALJx. 5 at 152; *Rx.* 27. Complainant further maintained that another reason for the dismissal was "the fact that (he) had the lawsuit, which (he) just filed two months prior to this incident." *ALJx. 5* at 155.

The transcript of the May 21, 2012 investigative hearing before P.L. Kreger, Superintendent of Operating Practices and Conducting Officer of the Investigation, is in the record. *Rx.* 16A. Complainant testified that Mr. Kreger "was kind of like the boss of the investigation." *Tr.* at 86.

Wes Adkins testified that the train was about 15 cars and three locomotives past milepost 81, and "they were stopped short of a road crossing." *Rx.* 16A at 13. Mr. Adkins stated the cars average 50 feet in length each, and the train had a track warrant authority only to milepost 81 because two other trains were working in the area. *Rx.* 16A at 16. When Mr. Adkins arrived at the site, he recalled:

> [W]hen we had a briefing about their track warrant limits to milepost 81 they indicated that they knew they had a track warrant to milepost 81, but they were having a job safety briefing about a track warrant that they did not have between milepost 81 and 74.

Rx. 16A at 34. Mr. Adkins testified that, pursuant to Rule 5.1.1, they should have had a briefing about "existing or potential hazards" up to the point they reached milepost 81. *Rx.* 16A at 35.

James H. Castleberry III, Road Foreman of Engineers in Denver, testified that his "responsibilities are to ensure compliance with BNSF and FRA regulations." *Rx.* 16A at 66. He has been trained and tested as a designated Supervisor of Locomotive Engineers. *Rx.* 16A at 68. When he arrived at the site, he noted the train was about 1,064 feet past milepost 81, and was at milepost 80.8. *Rx.* 16A at 68. Mr. Castleberry testified that exceeding a track warrant authority constitutes a serious rules violation pursuant to 49 C.F.R. § 240.117(e)(4). *Rx.* 16A at 72. He stated that the crew was permitted to remain on the train to get it safely out of the main line:

> I rode in the engine as a pilot to ensure that everything was done correctly to . . . move that train . . . out of the main line so that we could move traffic until the time we could get someone else to crew the train.

Rx. 16A at 74.

This is consistent with Mr. Kreger's recollection of the testimony received his investigative hearing. Mr. Kreger testified before this tribunal that his training "has been very extensive on holding formal investigations," and he has conducted a "couple hundred" investigation hearings as well as trained others to conduct these hearings. *Tr.* at 270. He stated that not every investigative hearing results in the assessment of discipline, and he recalled two cases where he did not find a rules violation and assess discipline. *Tr.* at 274. He noted:

> . . . my role as the investigating officer is to ensure we've got a clear and concise picture . . . of what transpired, so a decision could be made on whether the rules were violated or not.

Tr. at 289. The purpose of Mr. Geyer's investigative hearing was, according to Mr. Kreger, to:

> Develop facts and place responsibility, if any, concerning the alleged . . . violations there which, bottom line, was a track authority violation that occurred on the Front Range Subdivision.

Tr. at 278. Mr. Kreger noted "there are six cardinal sins identified by the Federal Government under 49 CFR 240, including exceeding main track authority at 49 CFR § 240.117(e)(4)." *Tr.* at 281. He noted the following regarding exceeding a track warrant authority:

> It is a very serious rule violation, it could lead to, potentially, a collision among trains. It could lead to someone from the track department and their maintenance away team being out there on the track and having his truck . . . be run down by a train. A number of different things can happen, when you go into an area you're not authorized to operate in.

Tr. at 283.

During the investigative hearing in this matter, the employees admitted they violated their track warrant authority. *Tr.* at 290. Mr. Kreger

determined Mr. Geyer violated GCOR 6.3 and 14.1, "Because he didn't have authority, beyond Milepost 81, and he operated beyond that point, by his own admission." *Tr.* at 292.

Mr. Kreger stated an on-site drug and alcohol review of the crew was conducted, and Mr. Adkins and Mr. Castleberry did not suspect drug or alcohol involvement in the incident:

> They evaluated whether or not the crew was fit to move the train. They were at a location where they could not perform a meet/pass. They were actually north of Fort Collins, Colorado, and Milepost 81, and they moved the train about four miles south, with Mr. Brito operating the controls, under the direction of road foreman of engines, Castleberry.

Tr. at 360. When asked why Mr. Castleberry did not take the controls of the train, Mr. Kreger responded:

> We don't have supervisors operate trains. We have our employees operate the trains.

Tr. at 367-68. So, although Mr. Castleberry was a certified engineer, he would not have operated the train, according to Mr. Kreger. *Tr.* at 368.

Brian Brito testified at the investigative hearing. *Rx.* 16A at 90. When asked by Mr. Kreger why he exceeded the limits of his track warrant authority, Mr. Brito responded, "I could not get the train stopped in time." *Rx.* 16A at 90. He stated that he notified the dispatcher immediately and, although he did not make an "emergency broadcast," Mr. Brito noted "the Dispatcher immediately notified all of the crews in the area." *Rx.* 16A at 90. Mr. Brito further recalled that they were instructed not to "move the train," and the dispatcher would inform "everybody who needed to know." *Rx.* 16A at 90.

Mr. Brito stated, in the time period leading up to the incident, they were getting a student prepared to write down the joint track warrant information from the dispatcher. *Rx.* 16A at 92. Mr. Brito agreed that he

did not properly control the train, and Mr. Castleberry suspended Mr. Brito's certificate to operate a locomotive. *Rx.* 16A at 95.

Mr. Geyer testified at the investigative hearing. *Rx.* 16A at 96. He stated he was working as a conductor on May 8, 2012. *Rx.* 16A at 96. The following inquiry occurred during the hearing:

> **Mr. Kreger:** So you were spending more time talking with . . . Trainee Conductor Reynolds about a warrant you didn't have in your possession and you might get rather than talking about what the end of your limits were?
>
> **Mr. Geyer:** At the time I was discussing, yes. I was explaining to Jack what a joint track warrant was.

Rx. 16A at 99. Mr. Geyer agreed, once they realized they were going past the track warrant authority, they did not place the train "in emergency," and according to their training, they should have placed the train in emergency. *Rx.* 16A at 105. Mr. Geyer explained that they did not feel they were in jeopardy at the time because they could not see anyone on the track. *Rx.* 16A at 105.

Mr. Geyer, Mr. Brito, and Mr. Reynolds (the conductor trainee) submitted written statements at the time of the incident. *Rx.* 16B. In the statements, they agree that they were explaining to Mr. Reynolds about the next warrant they would get when they reached milepost 81, and how a joint track warrant differed from their existing warrant. They thought they were at milepost 82, and had another mile. However, they put on the brakes when they realized they already passed milepost 82. By the time the train stopped, it was past milepost 81.

With regard to the fact that there was a student conductor on board the train at the time it exceeded the track warrant authority, Mr. Kreger explained:

> We ask (conductors to take student conductors with them) and, actually, compensate them for that. But there are times we've

had conductors who didn't feel comfortable with training new people, and they haven't.

Tr. at 268. When asked whether a conductor is "forced" to take a student conductor along, Mr. Kreger replied, "No." *Tr.* at 268. The following exchange then occurred:

> **Mr. Goman:** Do you fully expect a conductor to remain aware of things like track warrant authority and what milepost and mile-marker they're at, even if they have a student conductor on-board.
>
> **Mr. Kreger:** Yes. We have a number of rules in . . . the General Code of Operating Rules . . .. [W]e have some specific duties that they have to do. And, particularly in this, what we call 'track warrant,' or 'TWC' territory, they have to have a very close line of communication, in the cab, on what their end limits are.

Tr. at 269.

The record contains General Order No. 120, dated April 27, 2012, which reads, in part, as follows:

> During times in train operations when tasks required an increased focus to minimize distractions, train crews will enact a process called R.E.A.C.T. Reduce Exposure and Control Train.
>
> When operating on a main track or siding, the requirement for the crew to R.E.A.C.T. must be complied with anytime the train's locomotive is:
>
> * Approaching within 1 mile of the end of the train's authority limit, or
> * Operating on an approach signal.
>
> The following requirements/restrictions and exceptions apply during a 'R.E.AC.T. condition':

. . .

> * Controlling cab communication is restricted to immediate responsibilities for safe train operation and communicating between crew members about conditions affecting movement and complying with the rules.

Rx. 16B (exhibit 8).

Complainant stated that he admitted to violating rules 6.3 and 14.1 during the investigation, "but after we had studied the rules . . . we found out that those weren't the rules that we actually violated." *Tr.* at 87.

As a result of the investigative hearing, Mr. Geyer was dismissed. The record contains the June 1, 2012, Dismissal of Mr. Geyer, which was signed by Roberto L. Davila, Director of Administration for BNSF. *Rx.* 17. In the letter, Mr. Geyer was dismissed based on the May 21, 2013, investigation regarding exceeding the limits of a Track Warrant Authority in violation of GCOR 14.1 and GCOR 6.3. The dismissal letter further provides, "In assessing discipline, consideration was given to your personnel record and the discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA)." *Rx.* 17.

On the day of his termination, Complainant's first-line supervisor was Wes Adkins, Mr. Adkins reported to Torrance LeSure, and the "big boss" in Denver was Jansen Thompson. *ALJx. 5* at 20-21. At the time, Complainant worked in Respondent's transportation department, and he was a member of the Trainmen and Transportation Union. *ALJx. 5* at 22. The general chairman of the union at the time of Complainant's dismissal was Ken Mason. *ALJx. 5* at 23.

Complainant testified, "I believe Brian (Brito) got a three-year Level S, and was put on probation for three years." *Tr.* at 89. He stated that his discipline was different than that assessed against Mr. Brito for the same violation. *Tr.* at 92.

Pursuant to the *Summit Agreement,* Mr. Kreger noted Complainant's May 7, 2011, set-and-center violation was a "Deadly Decision," and a Class I offense, which occurred within the previous 24 months of the violation for exceeding the track warrant authority such that Mr. Geyer's case was not eligible for alternative handling. *Tr.* at 297-98. And, under PEPA, Mr. Geyer's 12-month probationary period started on the date discipline was assessed, which was May 18, 2011. *Tr.* at 300. The following exchange then occurred:

> **Mr. Goman:** So, you look at the PEPA Policy, as it relates to Mr. Geyer, and what does it tell you, what conclusions do you draw from it?
>
> **Mr. Kreger:** He had a serious rule violation in the previous 12 months and another serious rule violation that occurred, from the incident that was under investigation, and that stood for dismissal.

Tr. at 301.

Mr. Kreger further stated that he was familiar with Mr. Brito, but he did not look at Mr. Brito's PPI before the investigation either. *Tr.* at 326. Rather, Mr. Kreger testified he was only concerned with Mr. Geyer's recorded discipline for the previous "set-and-center" violation; he was not concerned with the ERP program, the prior injury, or any failure on operations testing. *Tr.* at 330.

At the hearing, it was noted that Mr. Brito was disciplined, but not dismissed, whereas Mr. Geyer was dismissed. *Tr.* at 337. Mr. Kreger noted that Mr. Brito should have applied the brakes on the train, but he did not do so until directed by Mr. Geyer. *Tr.* at 337. With regard to Mr. Brito's discipline, the following exchange occurred:

> **Mr. Goman:** What was your recommendation for Mr. Brito's discipline?
>
> **Mr. Kreger:** I believe it was a Level S, 30-day record suspension and a 30-day revocation of his engineer certificate.

> **Mr. Goman:** Do you recall . . . whether that recommendation was approved?
>
> **Mr. Kreger:** I believe it was.

Tr. at 362. Moreover, the following testimony was offered:

> **Mr. Goman:** So you recommend suspension for Mr. Brito and dismissal for Mr. Geyer, right—why the difference?
>
> **Mr. Kreger:** Right. The suspension . . ., there was two components to that. One, the Level S, 30-day record suspension per the BNSF discipline policy, outlined in PEPA. And, number two, the hearing that (Mr. Brito's) allowed under 240.307, was combined. So, he got a revocation of his certificate for 30 days.
>
> **Mr. Goman:** Why did you, also, not recommend Mr. Brito be dismissed?
>
> **Mr. Kreger:** The only thing he had on his record was this event, as I recall.

Tr. at 365. Mr. Kreger testified that Mr. Geyer, on the other hand, had a second Level S violation within his 12-month review period. *Tr.* at 366.

Mr. Kreger testified that, once he determined the discipline he would impose on Mr. Geyer, he communicated with his supervisor as well as with Labor Relations, also known as the "PEPA team." *Tr.* at 303. Here, the PEPA team and his supervisor, Janson Thompson, agreed with dismissal of Mr. Geyer. *Tr.* at 303. Mr. Kreger stated that he did not consult with anyone else besides Mr. Thompson and the PEPA team in assessing discipline. *Tr.* at 305.

When asked what is meant by "consideration was given to your personnel record," Mr. Kreger responded, "The transcript that we showed earlier, that showed where he stood, as far as the discipline process went." *Tr.* at 306. When asked whether the "personnel record" refers to anything,

or has anything to do with, Mr. Geyer's ERP or PPI records, Mr. Kreger responded, "No, it does not." *Tr.* at 308.

Melissa Ann Beasley has been the Senior Director in Labor Relations for two years, and was a member of the "PEPA team" consulted by Mr. Kreger in this matter. *Tr.* at 370. With regard to her role in Mr. Geyer's dismissal, Ms. Beasley testified:

> In my role, in Labor Relations, I was responsible, partially, for the initial review, as well as the handling of the general chairman's, of the union, appeal of Mr. Geyer's dismissal, up to and including arbitration.

Tr. at 369. Ms. Beasley testified that the PEPA team ensures that discipline is being applied consistently under the PEPA policy. When asked what the PEPA team's recommendation was with regard to Mr. Geyer, Ms. Beasley stated, "The recommendation was for dismissal from service." *Tr.* at 371.

In arriving at the recommended discipline, Ms. Beasley explained the process:

> We review the transcript from the formal investigation, as well as any exhibits that were entered into the investigation transcripts. We then consult the employee transcript, which contains the employee's disciplinary history. We then lay all that up against the new PEPA policy, to determine what discipline should be assessed.

Tr. at 372. With regard to disciplinary history, Ms. Beasley stated:

> We consider the disciplinary history, in order to see what progression of discipline an employee might stand for. Again, the PEPA Policy lays out the steps and the progression of discipline, based on the discipline history.

Tr. at 373.

Ms. Beasley stated that exceeding the track warrant authority was "not a no-harm, no-foul violation"; rather, "[i]t is a violation that can and does, quite often, lead to disastrous results" such that "anytime a track warrant authority is exceeded or a red signal is exceeded, we view that as a very serious rules violation." *Tr.* at 377. Mr. Beasley noted the PEPA policy provides, "if two serious rules violations occur within the review period of the first (violation) . . . the employee is subject to dismissal." *Tr.* at 381. In this case, Ms. Beasley noted that Mr. Geyer's second Level S violation occurred within the 12-month review period of his prior Level S violation such that dismissal was proper. *Tr.* at 383-84. Ms. Beasley noted:

> The associated review period begins on the date discipline is assessed, meaning the day that the employee signs the waiver or the date of the discipline notification to the employee.

Tr. at 388. Under these circumstances, the first Level S violation was assessed on May 18, 2011. *Tr.* at 388.

Ms. Beasley further testified, because Mr. Brito had no prior Level S discipline at the time he exceeded the track warrant authority, "he was just given the first step or the 30-day record suspension" along with a three-year review period in accordance with the PEPA policy. *Tr.* at 390.

Ms. Beasley testified she has reviewed "[w]ell into the hundreds, of not into the thousands" of cases of employee discipline, and Mr. Geyer's discipline is consistent with the discipline of other employees. *Tr.* at 391. With regard to certain other employees mentioned at the hearing, Ms. Beasley stated Mr. Smith was not similarly-situated to Mr. Geyer because the review period for Mr. Smith's first Level S violation had expired before the second Level S violation occurred.

<u>Reduction of dismissal</u>

Complainant stated that the union appealed BNSF's decision to terminate him, and *Respondent's Exhibit* 28 is a copy of the union's submission to the Public Law Board. *ALJx. 5* at 157; *Rx.* 28. Ultimately, Complainant stated the dismissal was reduced, but he was given a three-

year level S suspension with no back pay or benefits for time lost, and no reimbursement of lost seniority time. *ALJx. 5* at 162; *Rx.* 30.

At the time of the deposition, Complainant was serving the probationary period, and the suspension for the Level S violation commenced on June 1, 2012, continuing to the day before he returned to work on June 22, 2013. *ALJx. 5* at 161. The 36-month review period would commence on the first day he returned to work (June 22, 2013). *ALJx. 5* at 161. Since his return to work, Complainant stated "[e]veryone's been very cooperative, and I have no complaints." *ALJx. 5* at 162-63.

The May 15, 2013, determination of the Public Law Board (Board) provides the following:

> It is undisputed as concerns the incident that gives rise to the dispute that. . . on May 8, 2012 Claimant and crew operated their train beyond the limits of a Track Warrant. Further, Claimant and crew failed to make an emergency broadcast to notify crews of the other trains that had joint authority in the track ahead of them that they had exceeded the limits of their Track Warrant. Claimant and crew did, however, notify the Dispatcher of the infraction once they realized their Track Warrant limits had been exceeded, the Dispatcher then contacted all other trains and carriers that were in the area that could have been affected.

Rx. 18.

The Board noted that Mr. Geyer received an "assessment of a dismissal from service penalty . . . in view of the Claimant having a Level S-30-day Record Suspension and 12 month probationary review period on his record for a previous offense." *Rx.* 18. The Board noted Mr. Geyer argued to the Board that he was provided conflicting information regarding the onset date of the 12 month probationary review period, but the Board concluded:

> Although one might sympathize with Claimant and his representative having been misinformed about the review period

provisions contained in the PEPA Policy and thus given false hope that the current disciplinary incident fell outside the parameters of the 12-month review period, the fact remains that the PEPA policy, as distributed, and as the Carrier submitted during appeal of the claim . . ., clearly states:

> 'The review period for a Standard violation begins on the date discipline is assessed and expires 12 months later.' (Emphasis contained in the PEPA policy).

Claimant's discipline for the first offense was assessed May 18, 2011, namely, a waiver of hearing in acceptance of a Level S 30-day Record Suspension and 12-month probationary review period for a May 7, 2011 rules violation. Under PEPA, the bell began to toll for the 12-month review period on that same date (May 18, 2011), Claimant having been extended and accepting alternative handling discipline in waiver of his right to a formal investigative hearing. Therefore, the disciplinary incident at issue here, having occurred on May 8, 2012, must be recognized as having fallen within the 12-month review period by 10 days.

Rx. 18.

The Board nevertheless reduced the discipline assessed against Mr. Geyer, and explained its decision as follows:

> In the circumstances of record, especially as concerns Carrier supervisory officials not having viewed the incident sufficiently serious to have removed Claimant from service at the location of the incident, but instead instructing Claimant and crew to operate their train to the North Yard before a removal from service, and PEPA providing some discretion involving imposition of the dismissal from services penalty for a second serious offense, the Board finds the discipline as assessed to be harsh and excessive. We will, therefore, direct that discipline be modified to a suspension from service, with seniority and other benefits unimpaired, and without pay for all time lost.

> Claimant's return to service will be subject to his successfully passing both a rules examination and return to service physical examination.

Rx. 18.

By letter dated May 28, 2013, Mr. Davila of BNSF notified Mr. Geyer of his reinstatement pursuant to the Board's decision. *Cx.* 6; *Rx.* 19. In the letter, Mr. Davila notes the Board's decision:

> . . . includes no pay for time lost, seniority and benefits restored, and dismissal reduced to a suspension for time served and the modification of your dismissal to a Level S time served suspension that commenced on June 1, 2012 and continued the day before you are returned to service. You will have a 36-month review period commencing on your first day returned to service.

Rx. 19.[4]

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[4] At the November 2013 hearing before this tribunal, Complainant asserted that the "36-month return to work review period" was the result of his protected activity. *Tr.* at 104-105. However, this tribunal ruled that the only issue raised by the parties was whether Complainant's dismissal was prompted by his protected activity. *Tr*. at 105. Based on *Joint Exhibit* 1, the parties agreed to the issues to be adjudicated in this proceeding, and it would violate due process to allow the additional issue of the 36-month probation period to be litigated after discovery has ended. It is noted that Ms. Beasley was a member of the Public Law Board that reduced Mr. Geyer's dismissal to a suspension with time served. She testified the union requested an executive session with the arbitrator to discuss the issue of discipline. According to Ms. Beasley, executive sessions are confidential. *Tr.* at 403-404. However, the following exchange occurred regarding imposition of a 36-month review period:

> **Ms. Willingham:** So, generally, what did the arbitrator determine and indicate to the union as well as yourself?
>
> **Ms. Beasley:** When asked the question about . . . application of the probationary period, he replied that he did intend for the probationary period to apply.

Tr. at 403-404. On cross-examination, Ms. Beasley reiterated, "What was found, in the Public Law Board, is that the discipline remained on (Mr. Geyer's) record, (and) the (36-

Relevant agreements

A June 1, 2003, *Memorandum of Agreement* between BNSF and the Union, known as the "Safety Summit Agreement," provides that Class I offenses are subject to alternative handling, unless the employee has "a Class I violation in the previous 12 months." *Rx.* 22. The agreement further provides an "alternative handling plan must be in place and started not later than 30 days from the offense" absent "unavoidable delay," such as medical issues. *Rx.* 22.

The March 1, 2011, *Policy for Employee Performance Accountability* (PEPA) provides, "The review periods described in this Policy begin on the date discipline is assessed." *Rx.* 28. Under PEPA, "The first Standard violation will result in a formal reprimand with a 12 month review period." With regard to a "serious" violation, the PEPA states:

> The first serious violation will result in a 30-day record suspension and a review period of 36 months. Exceptions: Employees qualify for a reduced review period of 12 months if they demonstrate a good work record, defined as having at least five years of service and having been both reportable injury-free and discipline free during the five years preceding the date of the violation in question.
>
> A second Serious violation committed within the applicable review period may result in dismissal.

Rx. 28. Appendix A to the PEPA sets forth a list of "Serious Violations," which includes TY&E's Deadly Decisions, Telecom's Essentials, Engineering's Critical Decisions, and Mechanical's Safety Absolutes. *Rx.* 28.

Damages

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month) probationary period was attendant to that discipline." *Tr.* at 417. She stated, although not included in the Board's decision, it was determined during the executive session that the probation period would apply. *Tr.* at 417.

Complainant seeks lost wages for the time during which he was dismissed from work. *ALJx. 5* at 163; *Rx.* 31. He testified that he did not apply for other jobs in the interim because he did not "know how (his) appeal would go." *ALJx. 5* at 164. He stated:

> I collected unemployment from the railroad retirement, and I also had job insurance, but I only had it for six months.

ALJx. 5 at 165. At the hearing, Complainant's counsel stated:

> The evidence will show that Mr. Geyer is entitled to back-pay, interest, reinstatement of benefits, taxes and lost vacation time.

Tr. at 13-14. *Complainant's Exhibit* 9 is Complainant's computation of his lost wages:

> I totaled up what I made the previous 12 months, and divided by 24 (pay) periods that I was out of work.

Tr. at 112. Complainant testified:

> I do now have . . . all my benefits back, like it says in here. I've got my benefits, my seniority was restored. I received no back pay and I didn't get any back pay for the benefits I would have received, at the time.

Tr. at 122.

III
Discussion and conclusions

In his February 27, 2014, post-hearing brief, Complainant asserts the two issues presented for adjudication in this case are as follows:

> Whether BNSF's decision-maker, Mr. Kreger, knew that Mr. Geyer had a reportable injury, and

Whether Mr. Geyer's reporting of that injury contributed to his termination.

Complainant's brief at 2. Specifically, Complainant maintains that his PPI record, which reveals he was assessed ten points for the reportable 2009 injury, was considered by Mr. Kreger in rendering his discipline in the wake of the May 2012 incident exceeding the track warrant authority. As a result, Complainant argues he was terminated by Mr. Kreger in response to his engaging in protected activity, *i.e.* reporting an injury in 2009 and filing a personal injury lawsuit two months prior to the May 2012 incident exceeding the track warrant authority.

Respondent counters that Complainant's PPI was maintained in a database separate from his personnel record, and Mr. Kreger based his decision to terminate Complainant on Complainant's personnel record along with "investigative facts" underlying the May 2012 incident; Mr. Kreger did not consider Complainant's PPI, or his participation in the ERP program.

To prevail, Complainant must demonstrate each of the following by a preponderance of the evidence: (1) he engaged in protected activity, as statutorily-defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action. If Complainant meets this burden of proof, Respondent may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected activity. 49 U.S.C. § 42121(b)(2)(B)(iii)-(iv); *Santiago v. Metro-North Commuter R.R. Co.*, ARB No. 10-147, ALJ Case No. 2009-FLS-11 (ARB July 25, 2012); *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ Case No. 2008-AIR-9 (ARB Jan. 31, 2012).

Here, the parties stipulated that Complainant engaged in protected activity when he reported suffering a work-related injury in August 2009. *Jx.* 1. And, the parties stipulated that Complainant suffered an unfavorable personnel action when he was dismissed from his employment with Respondent on June 1, 2012, a few months after he filed a personal injury lawsuit related to the 2009 work-related injury. *Jx.* 1.

The sole issue in dispute is whether Complainant's protected activity, *i.e.* reporting the 2009 injury and filing a related lawsuit along with reporting noncompliance of the train consist, contributed to his dismissal. At this juncture, it is critical to determine what Mr. Kreger and his advisors, including Ms. Beasley of the PEPA team, and Dr. Jansen knew about Mr. Geyer's 2009 injury, the filing of his personal injury lawsuit, and the reporting that the train consist was in non-compliance on May 8, 2012. If this tribunal is able to discern any direct or circumstantial evidence that Mr. Kreger and Ms. Beasley and the PEPA team, or Mr. Jansen had any knowledge of the protected activity, then this tribunal must determine whether the injury played a role in Mr. Geyer's dismissal.

As noted by the Administrative Review Board (ARB or Board) in *DeFrancesco v. Union Railroad Co.*, ARB Case No. 10-114, ALJ Case No. 2009-FLS-9 (ARB Feb. 29, 2012):

> The ARB has said often enough that a 'contributing factor' includes 'any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.' The contributing factor element may be established by direct evidence or indirectly by circumstantial evidence. Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engaged in protected activity.

Slip op. at 7 (footnote citations omitted). *See also Santiago*, *supra* (circumstantial evidence may include temporal proximity, the threat of government fines, inconsistent treatment of employees, and shifting explanations). Importantly, the Board makes clear that, under FRSA:

> . . . the causation question is not whether a respondent had good reasons for its adverse action, but whether the prohibited discrimination was a contributing factor 'which, alone or in

> connection with other factors, tends to affect in any way' the decision to take an adverse action.

Henderson v. Wheeling & Lake Erie Railway, ARB Case No. 11-013, ALJ Case No. 2010-FRS-012 (ARB Oct. 26, 2012).

Complainant states, "Although the PPI may not be technically found in an employee's personnel file," supervisors had unlimited access to this information. *Complainant's brief* at 8. To that end, Complainant cites to Mr. Kreger's testimony at the hearing as follows:

> **Mr. Bovo:** And you were privy to (PPI) information at anytime?
>
> **Mr. Kreger:** If I used it, yes.
>
> **Mr. Bovo:** And you were privy to the PPI, at the time, prior to the final investigation hearing?
>
> **Mr. Kreger:** Yes, I would have had access to the PPI program.

Complainant's brief at 9; *Tr.* at 320.

Knowledge of "protected activity"

At the hearing, Mr. Kreger testified as follows regarding his position as a supervisor:

> **Mr. Goman:** . . . [Y]ou are, technically speaking, Mr. Geyer's supervisor, is that right?
>
> **Mr. Kreger:** Yes. I have oversight for all of the transportation employees, in fact all employees, in one way or another, on the Powder River Division, or the former Colorado, as we were discussing.
>
> **Mr. Goman:** Give us an idea, though, in practical terms, what kind of day-to-day interaction you'd have with a conductor like Mr. Geyer?

Mr. Kreger: I might or might not see an employee for months upon end. I travel extensively across the territory that I identified there. I don't have a day-to-day line of communication with any of the TY&E employees.

Mr. Goman: TY&E meaning what?

Mr. Kreger: Train Engine and Yard.

Tr. at 259. Mr. Kreger testified that he knew Mr. Geyer "by name," but he did not "really have any type of relationship with Mr. Geyer." *Tr.* at 260.

Mr. Goman asked whether, in preparing for the May 21, 2012, hearing, Mr. Kreger knew Complainant had reported the training being out of compliance earlier in the day. Mr. Kreger responded, "No, I did not." *Tr.* at 264.

Mr. Kreger explained that Mr. Sickler is the General Director of Transportation and both of them report to the General Manager. *Tr.* at 265. However, in the absence of the General Manager, Mr. Kreger testified that he takes direction from Mr. Sickler. *Tr.* at 265. The following testimony then occurred:

Mr. Goman: Did you ever speak with Mr. Sickler about Mr. Geyer's concern about the train consist compliance on May 8th, 2012?

Mr. Kreger: No.

Tr. at 265.

Kevin Wilde, General Director of Systems Safety at BNSF for three years, testified he was not involved in Complainant's separation from employment, or in any decisions regarding his termination; rather, Mr. Wilde stated he is:

> . . . primarily responsible for (BNSF's) safety management systems, all the different elements, regulatory compliance, safety programs for employees, really all things that are safety related, based on regulation or internal policy.

Tr. at 210. He stated the Personal Performance Index (PPI) system is no longer in place at BNSF, but the Employee Review Process (ERP) remains in place. *Tr.* at 211.

Mr. Wilde testified the PPI was created to "give supervisors a tool to be able to identify employees that had an accident/incident history that was different than the normal population." *Tr.* at 212. If so, they could "take a look and see if there's anything (they) could do, in regard to coaching, training, or other items, as each individual is looked at." *Tr.* at 212. The following exchange occurred at the hearing:

> **Ms. Willingham:** Would an employee's PPI points ever have been recorded on their discipline record?
>
> **Mr. Wilde:** No. They were housed separately.
>
> **Ms. Willingham:** And would any employee's PPI points be in their personnel record?
>
> **Mr. Wilde:** No.

Tr. at 214. With regard to ERP records, the following exchange occurred:

> **Ms. Willingham:** And are ERP records part of a personnel file for an employee?
>
> **Mr. Wilde:** No, they're in a stand-alone database, simply there for review by supervisors, as the tool that it was intended to be.

Tr. at 222. Mr. Wilde confirmed that Mr. Geyer's PPI and ERP program information was not contained in his personnel record.[5] *Tr.* at 223.

[5] Mr. Kreger clarified that an employee's personnel record is also known as the "Employee Transcript," and these designations are used interchangeably. *Tr.* at 253.

On cross-examination, Mr. Wilde was asked about access to the employee's records:

> **Mr. Bovo:** Who, amongst BNSF employees, had access to PPI?
>
> **Mr. Wilde:** . . . [A]s part of our – one of our safety management system elements, supervisors have access to the calculation and to the detail of how that calculation was created and through the Personal Performance Index system, that we created.
>
> **Mr. Bovo:** So, if the supervisor had access to PPI, but you said that PPI was not in the personnel file, where was the PPI contained?
>
> **Mr. Wilde:** It's contained in a database and . . . you can get a printout . . .. And it changes daily, based on the five-year snapshot.
>
> **Mr. Bovo:** So, a supervisor, with decision making ability, could access the PPI, in his regular course, and his job duties, he could access an employee's PPI?
>
> **Mr. Wilde:** That is correct.

Tr. at 240-241.

Paul Lawrence Kreger, Superintendent of Operating Practices for the BNSF Railway on the Powder River Division, testified that he has been with BNSF for 39.5 years, and he made the decision to terminate Mr. Geyer. *Tr.* at 247. Mr. Kreger testified that he had no involvement in Complainant's enrollment in the ERP program in 2010 or 2011, and he had no interaction with Complainant in conjunction with his placement in the ERP program. *Tr.* at 252.

Mr. Kreger stated he would have access to an employee's personnel record also known as the "employee transcript." When viewing Mr. Geyer's

personnel record, Mr. Kreger noted Mr. Geyer had one disciplinary action. The "discipline date" denotes "the date the discipline as actually issued for the event," and the "violation date" is "the date that the event actually occurred on." *Tr.* at 253. The notation of a "Level S violation," means "Serious rule violation" as defined in the PEPA policy. *Tr.* at 254. Mr. Kreger testified:

> This was the first incident of discipline in Mr. Geyer's career that shows on his transcript. And it occurred, as you said, on 5/7/2011. The discipline date was 5/18/2011. And there was a 12-month review period.

Tr. at 254. The following exchange occurred with regard to the personnel record:

> **Mr. Goman:** So, an employee's personnel record is something that you can access, as a supervisor at BNSF, is that right?
>
> **Mr. Kreger:** Yes. I have access to this document.
>
> **Mr. Goman:** . . . [I]n order to apply the PEPA policy . . . do you need to know if an employee has previous discipline?
>
> **Mr. Kreger:** Yes. We need to understand where they stood, within the PEPA policy.

Tr. at 255.

When asked whether he had knowledge of Mr. Geyer's 2009 injury, Mr. Kreger responded:

> Nothing specific. I knew that—just by looking at this transcript here, which I did have a copy of in the file—that he did have an injury. But that didn't weigh anything on what I was doing with the investigation.

Tr. at 261. He further testified as follows:

> **Mr. Goman:** When you are preparing to serve as the conducting office, in the investigation that was held May 21st, of 2012, what, if anything, did you know about Mr. Geyer's FELA lawsuit.
>
> **Mr. Kreger:** Nothing.

Tr. at 263. On cross-examination, Mr. Kreger stated that he was not aware of Mr. Geyer's personal injury when it happened:

> **Mr. Bovo:** And along with that, you were privy to his PPI, that listed 10 points assessed against (Mr. Geyer), for a reportable injury?
>
> **Mr. Kreger:** I didn't review that document.

Tr. at 323-24. Rather, Mr. Kreger testified that he became familiar with Mr. Geyer's PPI only in "preparation for this trial." *Tr.* at 335. Then, the following exchange occurred:

> **Mr. Bovo:** So, is it your testimony that you didn't look at this document prior to the investigation?
>
> **Mr. Kreger:** I did not.
>
> **Mr. Bovo:** Okay. But you were privy to it?
>
> **Mr. Kreger:** I could have accessed it, if I would have wanted to look at it, yes.
>
> **Mr. Bovo:** Well, did you access PPI?
>
> **Mr. Kreger:** No, I did not.

Tr. at 325-26.

With regard to Mr. Geyer reporting the train out of compliance earlier the same day the track warrant authority was exceeded, the following exchange occurred:

> **Mr. Goman:** . . . [W]hen you were assessing what discipline was appropriate and when you were deciding whether the rule was, in fact, violated, were you aware that he's claiming his (train) was out of compliance that morning?
>
> **Mr. Kreger:** No, I was not.
>
> **Mr. Goman:** Okay. The fact that his train was delayed by one to two hours, coming out of the yard, were you aware of that during the investigation?
>
> **Mr. Kreger:** I don't think that was brought up.

Tr. at 357.

Turning to Ms. Beasley, who was a member of the PEPA team that reviewed Mr. Geyer's case for purposes of assessing discipline, she testified that she did not know Mr. Geyer was injured in 2009; she did not know about Mr. Geyer's concerns about taking the train out of compliance the morning the track warrant authority was exceeded; she did not know about the train being delayed; and she did not know Mr. Geyer filed a personal injury lawsuit. *Tr.* at 405. The following exchange occurred:

> **Ms. Willingham:** And when I say FELA lawsuit, I mean a lawsuit regarding his 2009 injury.
>
> **Ms. Beasley:** We don't have any information on that.

Tr. at 406. Rather, Ms. Beasley testified, "The only piece of information from the personnel record that we referred to is the employee transcript, which is Exhibit 1, which has the employee's disciplinary history on it." *Tr.* at 407-408. Ms. Beasley stated she never relied on, or reviewed, Mr. Geyer's PPI index:

> The assessment of PPI points is a total—a different department's measurement. It's nothing we consider.

Tr. at 408. She further stated she did not review, or rely on, Mr. Geyer's ERP record, and she was not aware he had participated in the ERP program. *Tr.* at 408. In the end, Ms. Beasley stated "our determination was based, solely, on the type of rule violation that occurred, as well as the employee's disciplinary history and the application of the PEPA policy." *Tr.* at 411.

Complainant testified, "The actual person that dismissed me was Torrance LeSure." *ALJx. 5* at 36. At the hearing, Mr. Kreger testified that Torrance LeSure was Superintendent of Operations, and he would have been responsible for communicating the personnel decision to Mr. Geyer. *Tr.* at 305-306; *Rx.* 17. When asked whether Mr. LeSure knew about his 2009 injury report, Complainant responded, "I do not know." *ALJx. 5* at 36.

Discussion and conclusions regarding knowledge of protected activity

With a focus on Mr. Kreger, Ms. Beasley, and Mr. Jansen (collectively referred to as the "decision-makers"), this tribunal finds no direct evidence that the decision-makers knew about Complainant's protected activity at the time of his dismissal. There is no testimony or documentation that Mr. Jansen was aware of the protected activity at the time of Mr. Geyer's dismissal, and Mr. Kreger and Ms. Beasley credibly testified at the hearing before this tribunal that they did not know about Mr. Geyer's protected activity at the time they decided to dismiss him from employment with Respondent. They further credibly testified that they did not access Complainant's PPI or ERP program records at the time they determined Mr. Geyer's discipline for the May 2012 incident. There is no documentation, such as email exchanges or other such written notations, or inconsistencies in the testimony of these witnesses, which would bring their credibility into question. And, while Mr. LeSure communicated the personnel decision to Mr. Geyer, there has been no allegation, or written or testimony evidence, of his involvement in the decision to dismiss Mr. Geyer. So, this tribunal will focus on whether circumstantial evidence is sufficient to support a finding that the decision-makers had knowledge of the protected activity when they assessed discipline against Mr. Geyer.

First, Complainant's injury was reported to Mr. Adkins in August 2009, and the dismissal was issued in June 2012. The passage of time between the August 2009 injury, and the June 2012 spans nearly three years, and this tribunal does not find temporal proximity between these events sufficient to give rise to circumstantial evidence that the decision-makers knew about the reported injury.

The personal injury lawsuit related to the injury was filed four months prior to the dismissal. This could provide circumstantial evidence of knowledge, but this tribunal finds otherwise because the record is devoid of any indication that the filing of this lawsuit was noted in *any* of Mr. Geyer's employment records that could have been accessed by the decision-makers, and there was no testimony from Mr. Geyer, Mr. Kreger, or Ms. Beasley that this information was known to the decision-makers at the time discipline was assessed. In fact, Mr. Kreger and Ms. Beasley credibly testified that they were unaware of the filing of the lawsuit at the time discipline was assessed against Mr. Geyer. Moreover, Complainant has neither alleged, nor testified, that Mr. Jansen knew about the lawsuit. In sum, this tribunal does not find the timing of the particular events in this case circumstantially support a finding that the decision-makers knew about, let alone considered, Mr. Geyer's filing of a personal injury lawsuit at the time of his dismissal.

And, although Mr. Geyer and his crew reported the train consist as being out of compliance on the morning of May 8, 2012, this was reported to the dispatcher at the time, Mr. Reynolds, as well as to Mr. Mason and Mr. Sickler. There is no evidence of record to suggest, or testimony by the decision-makers to infer, that they were aware of the fact that Complainant and his crew reported the train consist as being in noncompliance. As will be discussed, even though this protected activity occurred in temporal proximity with the dismissal, there was a significant, intervening factor that led to Complainant's dismissal; that is, committing a second Level S rules violation within the probationary period of a prior Level S rules violation.

Second, this tribunal does not find Respondent engaged in "shifting explanations" for its conduct, or that Respondent offered "false reasons" for dismissing Mr. Geyer. Complainant testified during the investigative hearing before Mr. Kreger as well as during the hearing before this tribunal that there were inconsistent interpretations of the PEPA policy with regard to

whether a probationary period for a Level S violation occurs on the date of the violation, or on the date discipline is assessed.

This was an issue because Mr. Geyer committed a Level S violation on May 7, 2011, and was assessed a 12-month probationary period on May 18, 2011. In accordance with how the decision-makers applied the PEPA policy, Mr. Geyer's second Level S violation, occurring on May 8, 2012, was within the 12-month probationary period of the first violation such that dismissal was proper. Mr. Geyer neither alleged nor testified that any of the decision-makers provided him with inconsistent interpretations of the PEPA policy. To the contrary, Mr. Kreger and Ms. Beasley were consistent in their testimony that the probation period began to run on May 18, 2011. Indeed, the Public Law Board acknowledged Mr. Geyer's assertion regarding inconsistent PEPA policy interpretations, but concluded, consistent with views of Mr. Kreger and Ms. Beasley, the written PEPA policy is clear, and it provides that Mr. Geyer's probationary period commenced as of the date his discipline was assessed, *i.e.* May 18, 2011. As a result, this tribunal finds no indicia of "shifting explanations" or "false reasons" offered by the decision-makers for Mr. Geyer's dismissal.

Third, this tribunal does not find indications that Employer's policies were inconsistently applied to Mr. Geyer as compared to other employees. Review of the written PEPA policy at issue here reveals that dismissal of an employee "may" be imposed where the employee commits a second Level S violation within the probationary period of a prior Level S violation. Here, the facts are undisputed that Mr. Geyer committed a Level S violation on May 7, 2011, his 12-month probationary period for the violation commenced on May 18, 2011, and his second Level S violation occurred within the 12-month period on May 8, 2012. Thus, a determination by the decision-makers to dismiss Mr. Geyer was consistent with the written PEPA policy.

The Public Law Board agreed that the sequence of Mr. Geyer's violations could support dismissal under the PEPA policy. But, because the PEPA policy provides an employee "may" be dismissed, the Public Review Board reduced Mr. Geyer's discipline to a "suspension from service . . . without pay for all time lost." The Public Law Board reasoned that the dismissal was "harsh and excessive" in light of the fact that, at the time the track warrant authority was exceeded, supervisors did not view:

> . . . the incident sufficiently serious to have removed Claimant from service at the location of the incident, but instead instructing Claimant and crew to operate their train to the North Yard before removal from service, and PEPA providing some discretion involving imposition of the dismissal . . ..

This tribunal finds the decision-makers and the Public Law Board applied the written PEPA policy to Mr. Geyer. And, there was no dispute that "dismissal" could be assessed against Mr. Geyer in accordance with the PEPA policy under the circumstances presented. However, because the policy afforded some discretion, this tribunal finds that reasonable minds could differ regarding the discipline to impose, as in this case.

Complainant alleged similarly-situated employees were not assessed the same level of discipline (dismissal) as was assessed against Mr. Geyer for the same serious rules violation, *i.e.* exceeding a track warrant authority. However, none of the employees cited were similarly-situated to Mr. Geyer.

Starting with Mr. Brito, who was a member of the crew at the time of the May 2012 incident, he was assessed a 30-day suspension and a 36-month probationary period as compared to the dismissal assessed against Mr. Geyer. However, the evidence of record demonstrates, at the time the May 2012 incident occurred, Mr. Brito was not serving any probationary period stemming from a prior Level S violation. Indeed, he had no prior discipline of record at the time of the incident. This is distinguished from Mr. Geyer, who was still in his probationary period for a prior Level S violation. Mr. Brito is not similarly-situated.

Next, this tribunal turns to Conductor C.J. Gehring. At the hearing, the employee transcript of Mr. Gehring was admitted for purposes of impeachment of Ms. Beasley; that is, to demonstrate that inconsistent discipline was assessed against Mr. Geyer as compared to Mr. Gehring for the same serious rules violation. *Tr.* at 421; *Cx.* 8. The following exchange occurred at the hearing:

> **Mr. Bovo:** In this situation, it was a conductor (C.J. Gehring) who you had recommended that he be dismissed.

Ms. Beasley: Yes.

Mr. Bovo: And in that situation, he had failed to stop at his track warrant and went about 32 feet past, correct?

Ms. Beasley: Yes sir.

Mr. Bovo: And in that situation, he didn't notify dispatch that he was going to put the train in reverse?

Ms. Beasley: Correct.

Mr. Bovo: And he did put it in reverse, without notifying dispatch?

Ms. Beasley: Yes.

Mr. Bovo: And he didn't even report it for 12 days?

Ms. Beasley: That's correct.

Mr. Bovo: You recommended that he be dismissed?

Ms. Beasley: Yes, the difference being that this employee (C.J. Gehring) was dismissed on a standalone basis.

Tr. at 422. Ms. Beasley testified, similar to the incident involving Mr. Geyer, there were no injuries and no damages as a result of the incident involving Mr. Gehring. *Tr.* at 422. Ms. Beasley testified that she recommended that Mr. Gehring be dismissed, but the Public Law Board reduced the dismissal to reinstatement, suspension with time served, and a 36-month probationary period. *Tr.* at 423. The following exchange then occurred:

Mr. Bovo: And this violation (involving Mr. Gehring), you would agree with me, is much worse than Mr. Geyer's?

Ms. Beasley: Again, there are more elements to this case (involving Mr. Gehring), but this was a standalone dismissal, whereas Mr. Geyer's was not.

Mr. Bovo: But these violations are more excessive than what Mr. Geyer did?

Ms. Beasley: Which is why it was a standalone dismissal.

Tr. at 424. Ms. Beasley explained the differences between the incident involving Mr. Geyer, and the incident involving Mr. Gehring:

> The bases for (Mr. Gehring's) dismissal was multiple serious rules violations, in the same tour of duty. So, essentially, we view the main track authority violation as a serious rules violation, the unauthorized reverse movement as another serious rules violation, and the failure to report or dishonesty as, yet, another serious rules violation. In fact, the dishonesty, in and of itself, could have been a dismissable violation. However, because there were three separate and distinct serious rules violations, this qualified for a standalone dismissal, under PEPA policy—meaning this particular employee did not have any prior level S discipline on his record, he was dismissed for this incident alone.

Tr. at 426. As previously noted, Ms. Beasley acknowledged that the Public Law Board reduced the discipline in Mr. Gehring's case to a serious rules violation with suspension for time served and a 36-month probationary period. *Tr.* at 426.

Respondent submitted transcripts of other employees (*Rx.* 32-36) who were dismissed for track warrant authority violations. Ms. Beasley testified:

> . . . the violation resulted in the dismissal of these employees for, again, it was a serious rules violation, but there were some variables in the progression of discipline, it appears. But again, they were all . . . dismissed, they were all treated as serious rules violations.

Tr. at 392. And, the following exchange occurred with regard to discipline assessed against employee John P. Smith:

> **Ms. Willingham:** Now, Ms. Beasley, I kind of want to change tracks for a moment here. There's been some discussions, some claims by Mr. Geyer that an employee by the name of John P. Smith, was an employee that he believes, Mr. Geyer believes was similarly situated to himself, in that he had the same rules violations and they did not result in dismissal.
>
> In preparation for this case, have you had a chance to review Mr. Smith's employee transcript and discipline history?
>
> **Ms. Beasley:** Yes, I have.

Tr. at 393; *Rx*. 45-46. On review of the employee transcript, Ms. Beasley stated that Mr. Smith was not similarly-situated to Mr. Geyer, and she explained the following:

> . . . I base this on a few things. The first of which is the level S discipline, that he was assessed, occurred on October 31st, 2008. So, even given a 36-month probationary period, he would have been off of probation on October 31st, 2011. The violation date of the second incident was September 13th, 2012, so it was outside of that timeframe. Therefore, at the time the second incident occurred, Mr. Smith was not in the review period of his Level S serious rules violation. The second difference between Mr. Geyer's case and Mr. Smith's case, is the second incident that occurred was not viewed as a serious rules violation, it was a speeding violation . . . for which decertification was not assessed, which means it was less than 10 miles an hour over maximum authorized speed. As such, because it was not an incident for which decertification occurred, it was viewed as a standard rule violation as opposed to a serious rules violation.

Tr. at 395-96. Indeed, based on the testimony at the hearing along with documentation related to the discipline of other BNSF employees, this

tribunal does not find evidence of inconsistent application of BNSF disciplinary policies and procedures with regard to Mr. Geyer as compared to other BNSF employees.

Finally, this tribunal finds no evidence that Respondent changed its attitude toward Mr. Geyer after reporting the 2009 injury, filing the personal injury lawsuit, or reporting the train consist in noncompliance. Mr. Geyer testified at various points that he has been treated respectfully, and has not been threated or harassed by Respondent's supervisory or non-supervisory employees.

Taken as a whole, this tribunal does not find any direct evidence of causation, nor does this tribunal find circumstantial evidence sufficient to support that Mr. Geyer's protected activity (*i.e.* filing an injury report in 2009 along with a subsequent personal injury lawsuit, and reporting noncompliance of his train consist on the morning of May 8, 2012) contributed to his dismissal by a preponderance of the evidence. 29 C.F.R. § 1982.109(a). Accordingly,

ORDER

IT IS ORDERED that the complaint of Mark Geyer is DENIED.

Digitally signed by WILLIAM COLWELL
DN: CN=WILLIAM COLWELL, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

William S. Colwell
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).

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).