U.S. Department of Labor

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

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

Issue Date: 27 April 2015Case No.: 2013-FRS-00071

In the Matter of:

ANTHONY W. SMITH
Complainant,

v.

BNSF RAILWAY,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

Procedural Background

This proceeding arises under the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109 (the "Act"), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, and Section 419 of the Rail Safety Improvement Act of 2008 (the "Improvement Act"), Pub. L. No. 110-432, and the regulations issued at 29 C.F.R. Part 1982.

Anthony Smith ("Complainant") timely filed a complaint against BNSF Railway ("Respondent" or "BNSF") on August 10, 2012, alleging a violation of the Act with regard to his termination by Respondent on or about June 6, 2012. JS[1] 3 and 4. Complainant alleged that he was terminated in retaliation for raising various safety concerns. Specifically, Complainant alleged he was engaging in protected activity when he informed BNSF on May 22, 2012, at an investigative hearing into an incident on June 2, 2011, that his sleep apnea was partially caused by his irregular hours working for BNSF, that BSNF did not comply with the Improvement Act, and that his BNSF work did not allow him adequate rest periods. CX 11. Respondent asserted that Complainant was terminated for overrunning a stop signal while driving a commuter train on June 2, 2011. CX 13.

In response to his complaint, the Secretary conducted an investigation through the Regional Administrator for the Occupational Safety and Health Administration ("OSHA"), Region 5. On June 10, 2013, the Secretary dismissed the complaint and informed the parties of their appeal rights. CX 15. Complainant filed objections to the Secretary's findings and

[1] In this Decision and Order, Joint Stipulations are referred to as "JS," Administrative Law Judge Exhibits as "ALJX," Complainant's Exhibits as "CX," Respondent's Exhibits as "RX," and the Joint Exhibit as "JX."

dismissal of the complaint and requested a hearing before an administrative law judge by letter dated July 1, 2013. CX 12; JS 6. The above-captioned case was duly filed and docketed in the Office of Administrative Law Judges ("OALJ") on July 11, 2013. ALJX 1.

The case was assigned to me. The parties agreed on and filed various stipulations.[2] I held a hearing on April 24, 2014. All parties were present and the following exhibits were received into evidence: ALX 1-5, Tr. at 7;[3] CX[4] 4, 5, 6, 8, 10,[5] 11, 12, 14, 15, 16, 17, 18, 19, Tr. at 8-11; CX 21, Tr. at 238; [6] RX 1-34,[7] Tr. at 30; RX 35, Tr. at 240; RX 36, Tr. at 295; and JX 1, Tr. at 31. I sustained objections to, and did not admit, CX 1, 2, 3, 9, 14, and 20. Tr. at 16, 23-24, 27, and 238. Three witnesses, Complainant, Ms. Andrea Smith (no relation to Complainant), and Mr. Timothy Merriweather, testified at the hearing. The parties made closing arguments at the end of the hearing and waived post-hearing briefs. Tr. at 366. The record is now closed.

The findings and conclusions that follow are based on a complete review of the entire record in light of the arguments of the parties, the evidence submitted, applicable statutory and regulatory provisions, and pertinent precedent. Although not every exhibit in the record is discussed below, each exhibit was carefully considered in arriving at this decision.

As will be explained in greater detail below, I find Complainant has established by a preponderance of the evidence that his report of sleep apnea on November 28, 2011 and his complaints at the May 22, 2012 hearing that BNSF partially caused his sleep apnea, failed to comply with the Improvement Act, and that his BSNF work did not provide him adequate rest periods constitute protected activity under the Act. Moreover, given the temporal nexus between the protected activity and his termination on June 6, 2012, I find that Complainant has established by a preponderance of the evidence that the protected activity was a contributing factor in his dismissal. However, because I find that BNSF has shown by clear and convincing evidence that it would have taken the same adverse action in the absence of Complainant's protected activity, Claimant is not entitled to relief under the Act.

---

[2] The relevant stipulations are incorporated below.

[3] I listed and described ALJX 1-5, and then stated "ALJ 1 through 6 are admitted." Tr. at 7:18. I inadvertently referred to nonexistent ALJX 6; only ALJX 1-5 were admitted.

[4] Following the hearing, counsel for Complainant submitted exhibits as I had requested at the hearing. In her post-hearing submission, however, she numbered the exhibits differently than she had numbered them in her pre-hearing exhibit list and as we referred to them during the hearing. In this Decision and Order, I use the numbers for Claimant's Exhibits listed on Claimant's pre-hearing exhibit list and/or used at the hearing (CX 20 and 21 were marked at the hearing and were not listed on Claimant's pre-hearing exhibit list).

[5] CX-10 was later withdrawn. Tr. at 30.

[6] Counsel for Claimant did not submit CX 21 post-hearing. As this exhibit is a complete copy of the final rule amending 49 C.F.R. Part 228, a document that can be readily found and ascertained as genuine, Tr. at 23-24, I have printed out this document from the U.S. Government Publishing Office's website and have included that copy in the record. *See Final Rule, Hours of Service of Railroad Employees; Substantive Regulations for Train Employees Providing Commuter and Intercity Rail Passenger Transportation; Conforming Amendments to Recordkeeping Requirements*, 76 Fed. Reg. 50,360 (Aug. 12, 2011).

[7] RX 24, 25, 27, and 29 were later withdrawn. Tr. at 343.

Issues Presented

Whether Complainant can prove by a preponderance of the evidence that his protected activity contributed to BNSF's decision to discharge him.

If so, whether BNSF can demonstrate by clear and convincing evidence that it would have discharged him in the absence of any protected activity.

Tr. at 32.

Summary of the Evidence

Joint Stipulations

The parties agree to the following facts:[8]

1. BNSF is a "railroad carrier engaged in interstate commerce," and as such is a covered employer under the Act.

2. Complainant was, for purposes of the events giving rise to his complaint under the Act, a covered "employee" within the meaning of 49 U.S.C. § 20109.

3. Complainant filed the complaint in this matter with OSHA on August 10, 2012.

4. The complaint in this matter was timely filed.

5. Following an investigation, the Regional Administrator for OSHA, Region VIII, dismissed the complaint in this matter on June 10, 2013.

6. Complainant timely filed his objections and request for a hearing before an administrative law judge on July 1, 2013.

7. OALJ has jurisdiction over this matter pursuant to 49 U.S.C. § 20109 and 29 C.F.R. § 1982.106.

8(a). Complainant received BNSF's June 6, 2011 Notice of Investigation indicating that it would be conducting a formal investigation, "for the purpose of ascertaining the facts and determining … [his] responsibility, if any, in connection with [your] alleged failure to stop before a signal displaying stop indication and allegedly passing a signal displaying stop indication approximately 90 feet … on June 2, 2011."

8(b). On November 28, 2011, Complainant reported to BNSF Superintendent Timothy Merriweather that he suffered from a medical condition known as sleep apnea.

[8] While some of the numbered paragraphs that follow are identical to the language used in the Joint Stipulations, others are non-verbatim summaries of that language. *See* JX 1.

8(c). On May 22, 2012, during the disciplinary investigation hearing for his failing to stop his train at a stop indication, Complainant reported that he had not had adequate rest on June 2, 2011, due to sleep apnea – a condition with which he was diagnosed *after* the incident. (Emphasis in original).

8(d). On May 22, 2012, during the disciplinary investigation hearing for failing to stop his train at a stop indication, Complainant reported that BNSF was at fault for his sleep apnea.

8(e). On May 22, 2012, during the disciplinary investigation hearing for failing to stop his train at a stop indication, Complainant reported that BNSF violated the Improvement Act by not instituting a fatigue management plan for his job assignment and by not providing fatigue management training.

8(f). On May 22, 2012, during the disciplinary investigation hearing for failing to stop his train at a stop indication, Complainant reported that his job assignment did not provide adequate rest periods.

8(g). Complainant engaged in protected activity on November 28, 2011, and on May 22, 2012.

9(a). On June 2, 2011, Complainant was the engineer on a passenger service train when he overran a red stop signal.

9(b). On June 2, 2011, Mr. Smith's engineer certificate was revoked for six (6) months in accordance with Federal Railroad Administration ("FRA") regulations.

9(c). An investigation was held regarding the June 2, 2011 incident and after the investigation BNSF dismissed Complainant on June 6, 2012 "for failure to stop before a signal displaying stop indication and passing a signal displaying stop indication approximately 90 feet … on June 2, 2011."

9(d). The dismissal issued to Complainant on June 6, 2012, rises to the level of an adverse employment action.

10(a). BNSF hired Complainant on September 19, 1988.

10(b). Complainant is a member of an employee union, the Brotherhood of Locomotive Engineers and Trainmen ("BLE").

10(c). At the time of his dismissal, Complainant was working as a switchman on BSNF's Chicago Division.

10(d). Complainant's chain of command at the time of his dismissal was as follows: (i) Complainant reported to several supervisors, including Trainmaster Christopher Motley; (ii) Mr. Motley, in turn, reported to Terminal Manager Clayton Johanson; (iii) Mr. Johanson, in turn, reported to Terminal Superintendent Timothy Merriweather.

11. Complainant reported alleged safety concerns to members of BNSF management between 2000 and 2006.

12(a). On October 12, 2010, Complainant was the engineer on a passenger service train when he entered a 40 MPH speed zone traveling 70 MPH.

12(b). On October 13, 2010, Complainant's engineer certificate was revoked for thirty days in accordance with FRA regulations.

12(c). On October 20, 2010, Complainant signed an investigation waiver for the October 12, 2010 incident. Complainant admitted to violating safety rules and accepted a Level S 30 Day Record Suspension and twelve month review period.

Witness Testimony and Documentary Evidence[9]

Complainant was an employee of Respondent for over 25 years. Tr. at 47-48. He had worked for BNSF since September 19, 1988, chiefly as an engineer. Tr. at 48-49; JS 10(a). Complainant had worked on safety issues for BNSF. Tr. at 53-54. Between the years 2000 and 2006, he had reported a number of such concerns to members of BNSF management. JS 11. He also took various kinds of safety training during his career. Tr. at 140-141; RX 15 at 2-4. Claimant's responsibilities and duties as an engineer were "for the safe and efficient handling of trains … to be aware of the safety compliance on trains, such as air brakes, and make sure that all the equipment is working properly." Tr. at 49.

Complainant had no serious or Level S violations until 2010. Tr. at 56; RX 15. On October 12, 2010, Complainant, an engineer on a passenger service train, entered a 40 MPH speed zone at a speed of 70 MPH. JS 12(a); Tr. at 58-59. As a result of that incident and in accordance with FRA regulations, Complainant's engineer certificate could be revoked for a period of up to thirty days. JS 12(b); Tr. at 59-60, 142. As a result of his waiving the investigation, BNSF agreed to reduce the revocation of Complainant's engineer certificate to fifteen days. Tr. at 247-48. On October 20, 2010, Complainant admitted, with regard to the events of October 12, 2010, to violating safety rules and accepted a Level S 30 day record suspension and a 15 day actual suspension. Tr. at 204-5, 247-48; JS 12(c). Complainant waived his right to an investigation and took full responsibility for his actions on October 12, 2010. Tr. at 61. Pursuant to his admission and BNSF's Policy for Employee Performance Accountability ("PEPA") in place at that time, he became subject to a twelve month review period. RX 36.

Prior to the expiration of the twelve month review period and on or around June 1, 2011, Complainant began serving as an engineer on a passenger commuter suburban service train. Tr. at 143. His trip started at Union Station and there were nine stops en route. Tr. at 143. Complainant testified that the train had five or six cars and each car could carry approximately 120 passengers. Tr. at 146.

[9] This summary is not an exhaustive analysis of all the testimony or of each exhibit, but rather merely highlights certain portions of the testimony and exhibits.

On June 2, 2011, Complainant was again assigned to operate the same train run. Complainant overran a stop signal at "West Eola." JS 9(a); Tr. at 149, 244; RX 7A at 66. He stopped the train, but approximately 90 feet after the stop signal. Tr. at 244. Mr. Merriweather testified that when Complainant left the station that morning, "he probably had approximately eight to nine hundred passengers" and that by the time he ran the stop signal, Mr. Merriweather "believed … [Complainant] had made eight stops; there was probably still … approximate[ly] probably three hundred passengers on that train." Tr. at 317. No injuries or problems resulted from the overrun. Tr. at 171. Mr. Merriweather testified that running a stop signal is considered a serious infraction as there could be men working on the track, another stopped train, or other equipment. Tr. at 244-45. After running the stop signal, Complainant told Mr. Motley that he had only slept two or three hours the night before and was not "feeling like [him]self that day." Tr. at 147-48. As a result of running the stop signal, Complainant's engineer certification was suspended for six months pursuant to FRA regulations. Tr. at 151-52, 246-47.

Complainant testified that he had only two to three hours sleep the previous evenings, he had been feeling tired, and after leaving Route 59, "something was going on I didn't understand." Tr. at 150-151. He stated:

> This was a very difficult situation at this time. I mean, this is when I ran a red signal.
>
> ….
>
> And it's important to point out that I was not myself at this time running the signal. I mean, you know, I am a professional and that is not an act of a professional.
>
> ….
>
> I was impaired at the time of this incident and, of course, I didn't know what was going on and why I was impaired.
>
> ….
>
> But the strangest part about it was I'm in a different state, a déjà vu state, and I'm performing this task, but it's like a remote performance. And I'm looking down the track and I'm not sleeping, but I'm not doing what I know that I'm trained to do when I see an approach[] medium. When I see an approach medium, I'm trained to reduce my speed. I'm going to 70 miles an hour; I'm trained to reduce my speed to 40 mph and I did not do that.
>
> Q. And you took responsibility that you did not do that; is that correct?
>
> A. Well, yes. I am responsible – and I always will say that I am responsible for running that red signal.

Tr. at 63-65.

Claimant admitted that he had not mentioned his lack of sleep or odd feeling to any of his coworkers or supervisors before the June 2, 2011 incident and he did not refer to his sleeplessness or odd feeling in his report regarding the incident. Tr. at 147-151, 250. Claimant admitted that he ran the stop signal. Tr. at 171. However, Complainant also stated that he had had only a few hours of sleep in the two days before; he stated that he "knew there was something wrong, but as … [he] was operating the train … [he] felt like … [he] normally did." Tr. at 147.

Under FRA regulations, when an employee runs a stop signal, his license is automatically suspended, and then, if he is found guilty of the offense, revoked for a period of six months. Tr. at 245-6, 319. Complainant was notified of the suspension. Tr. at 246; RX 19. Respondent, under the supervision of Mr. Merriweather, conducted an investigation into the circumstances of the June 2, 2011 incident. JS 10(d); Tr. 254-56, 316. Respondent's procedures after an incident include the reporting of the incident to management and completing a statement about the circumstances around the event. Complainant wrote such a statement. Tr. 149; RX 7A at 66. However, as his report shows and as he confirmed at the hearing, he did not mention anything unusual about his condition in the required report that he filed, even though the report form specifically asks the writer to "[i]nclude any conditions that may have contributed to the incident including, for instance, human factors." RX 7A at 66.

As a result of the June 2, 2011 incident, pursuant to FRA regulations, Complainant was again suspended from service for six months effective June 2, 2011. Tr. at 151-52; RX 19. Complainant received a notice of investigation on that date. Tr. at 160; RX 5; RX 7A at 3. He was reassigned as a conductor. Tr. at 155-156. An investigatory hearing was scheduled for Sunday, June 12, 2011, RX 5 and RX 7A at 3, but was rescheduled by mutual agreement of the Respondent, and Complainant's union, BLE, until November 30, 2011. JS 10(b); RX 7A at 23. The notices informing him of the investigation hearing and postponements indicated that Complainant (as well as other employees also noticed) was ineligible for "alternative handling." RX 7A at 3, 5,17, 20, 29.

In the meantime, on June 16, 2011, Complainant had sought medical treatment and received a diagnosis of obstructive sleep apnea. Tr. at 152-4; RX 7A at 89. On November 28, 2011, he reported the diagnosis to BSNF management, specifically, Mr. Merriweather, the management official responsible for investigating the matter. Tr. at 158; JS 8(b). This was the first time that Mr. Smith had reported a condition of sleep apnea to Mr. Merriweather. Tr. at 250-51. Complainant testified that he did not report this medical condition before that time because he was no longer working as an engineer so he saw no safety issue, "[a]nd besides that, it was not a requirement to report it." Tr. 156-57. Complainant was, however, working as a conductor and BNSF considered that a "safety-sensitive" position because it involved "shoving trains" (lingo for moving a train) and when a train is being moved, the conductor must provide directions to the engineer. Tr. at 252-53.

Sometime before the May 22, 2012 investigation and after receiving his sleep apnea diagnosis on June 16, 2011, Complainant had begun to wonder whether his sleep apnea could be work-related. Tr. at 157-59. He sought a postponement through his union representative who informed Mr. Merriweather that Complainant was under medical treatment. RX 7A at 28. On

November 28, 2011, Complainant informed Mr. Merriweather that he suffered from a medical condition known as sleep apnea. JS 8(b); Tr. at 158. On that date, Complainant did not assert either that sleep apnea had caused him to run the stop signal on June 2, 2011 or that his sleep apnea was work-related because these issues were not clear to him at that time. Tr. 158; Tr. at 250-51. Complainant received a medical leave of absence from December 2, 2011, until January 20, 2012, when he was cleared by the medical and environmental health department for return to work. Tr. at 159; RX 21-22. He returned to his position of "operating trains." Tr. at 159.

Respondent's investigation into the June 2, 2011 incident resulted in a disciplinary hearing on May 22, 2012,[10] which involved a review of his disciplinary record, the rule violation, BNSF's disciplinary policy, the transcript of the investigatory hearing, and exhibits introduced at that hearing, including a video of the incident. Tr. at 189-95; 205-8. Complainant testified at that hearing with regard to the events of June 2, 2011, his sleep apnea condition, and his failure to follow safety rules. Tr. at 266-69. Complainant admitted to overrunning the stop signal and violating BNSF's General Code of Operating Rules. RX 6 at 69-70; Tr. at 265-6. Complainant stated he was aware of the PEPA, which provided that a second serious Level S rule violation "may" result in dismissal. Tr. at 160; RX 23 at 3. He reported at the disciplinary hearing that he believed that he had run the stop signal because he was sleep-deprived and had sleep apnea. RX 5 at 69, 78-79, 91-96. Complainant stated BNSF had violated the Improvement Act by not instituting a fatigue management program and not providing fatigue management training to him. RX 5 at 95. He also stated that BNSF had placed him on a work schedule with a 10 hour and 30 minute rest period rather than the recommended 12 hour rest period. RX 5 at 91. At the hearing of this matter, Complainant testified that he had the federally-mandated regular rest period on June 2, 2011. Tr. at 166-167.

Ms. Andrea Smith, a director in BNSF's labor relations department since July 2011, testified that BNSF did not dismiss Complainant in retaliation for his protected activities. Tr. at 190, 212-13. Ms. Smith testified that Complainant did not submit any evidence at the investigatory hearing that BNSF had caused his sleep apnea. Tr. at 195. Both Ms. Smith and Mr. Merriweather testified that Complainant admitted that he did not seek medical treatment for his fatigue or sleeping issues until after the June 2, 2011 incident and that he had not reported to management on the day of the incident that he was "too tired to work." Tr. at 194-95, 268, 281. These two witnesses also testified that Complainant presented no evidence to support his claim that the Improvement Act required either the institution of a fatigue management plan or the provision of training on sleep apnea at the time of the incident. Tr. at 196, 271.

[10] The investigatory hearing was initially scheduled for November 30, 2011, but was postponed at the request of Complainant's union representative. Tr. at 183, 257. It was rescheduled for March 22, 2012. Tr. at 257. Complainant and his union representative showed up for the hearing but the BNSF hearing officer, Mr. Merriweather, was late in arriving. Tr. at 182-183, 259. Accordingly, the hearing was postponed again until May 22. Tr. 257-8. As a result of the passage of time, Complainant was able to return to his position of engineer from that of conductor in January 2012. Tr. at 185-6. As a result of the length of time which passed and the fact that he had been permitted to return to his position as engineer, Complainant believed that he would not be dismissed, but would be treated more leniently for his offense. Tr. at 186. The issue of the propriety of the postponement of the investigatory hearing is not a subject of this proceeding and is being adjudicated in another forum. Tr. at 228-9.

Mr. Merriweather testified that, absent Complainant's allegations at the May 22, 2012 disciplinary hearing, he would still have recommended Complainant's dismissal. Tr. at 299. Mr. Merriweather also testified that absent those allegations, BNSF would still have dismissed him. Tr. at 300. Ms. Smith referred to Complainant's admission that at the time of the June 2, 2011 incident that he was on a regular on-duty time schedule. Tr. at 195. Mr. Merriweather testified that on June 2, 2011, Mr. Smith's job allowed him at least eight consecutive hours off every 24 hours and that, although he went on duty at 4:40 a.m. on that day and went off duty at 6:01 p.m, he was not required to be on duty for twelve consecutive hours because he had a respite period of six hours and thirty-one minutes between his on duty time and his off duty time. Tr. at 275. Ms. Smith also testified that if Complainant had been unable to get rested prior to working, Complainant had the obligation to inform BNSF. Tr. at 197. Mr. Merriweather also testified that BNSF was not required to provide training on fatigue management to its employees until December 31, 2012, and had in fact begun providing such training in June 2012. Tr. at 276-80; CX-21 (49 C.F.R. § 228.411(c)); CX 13.[11]

The PEPA is BNSF's formal discipline policy. Tr. at 201, 284. The PEPA provides for three levels of discipline ranging from non-safety sensitive violations to serious rule violations that are safety sensitive to stand-alone dismissable violations. Tr. at 201-2. Running a stop signal is a serious rule violation or "Level S" violation. Tr. at 202-03; RX 23 at 5, items 1 and 2. Two different versions of the PEPA were admitted in this case: the PEPA effective July 1, 2000 (the "2000 PEPA"), RX 36, and the PEPA effective March 1, 2011 (the "2011 PEPA"), RX 23. In relevant part, the two versions of the PEPA differ with respect to the timing of the start of a probationary period triggered by a rule violation and with respect to the permissive versus mandatory nature of a dismissal for an infraction falling within the duration of the probationary or review period. Briefly, the 2011 PEPA states a review period begins when discipline is assessed and that a second serious violation within a review period may result in dismissal, while the 2000 PEPA does not explicitly state when a review period begins (although its reference to a "rolling … review period" indicates it contemplates the review period begins on the date of the violation) and states that a second serious violation within a review period will result in dismissal. *Compare* RX 23 with RX 36.

At the time that Complainant received his first disciplinary assessment for speeding, the probationary period began on the date of the event triggering the discipline, October 12, 2010. Tr. at 285; 327. At the time that Complainant received his second discipline for the running the stop signal, the probationary or review period had changed, and began, pursuant to the 2011 PEPA, on the date discipline was assessed. Mr. Merriweather testified that regardless of the change between the two PEPAs, Complainant would have been in the twelve month review period resulting from the October 12, 2010 incident at the time of the June 2, 2011 incident. Tr. at 328-29. Mr. Smith was aware of the PEPA and that his second Level S violation within a twelve month period might result in his dismissal. Tr. at 71-2.

[11] CX 13 at 6 states, "BNSF began providing such training in June 2011 – after Mr. Smith's dismissal." During his testimony, Mr. Merriweather stated the reference to June 2011 as opposed to June 2012 was a typographical error. Tr. at 279.

On June 6, 2012, as a result of the May 22, 2012 hearing, BNSF dismissed Complainant for the June 2, 2011 incident. Tr. at 172; JS 9(c); CX 17; RX 10; Tr. at 207. According to Ms. Smith, a dismissal decision is a mutual one by labor relations and field management, in this case, Mr. Merriweather. Tr. at 206-07. Ms. Smith testified that she had reviewed approximately 700 potential dismissal cases since July 2011, when she began her position, and approximately 100-150 actual dismissal cases between starting her position and considering Complainant's case. Tr. at 208, 222. Although leniency could be an option in a case involving a second Level S violation, management did not think leniency was justified in Complainant's case. Tr. at 207-08; 224-25; 287-89. Ms. Smith testified with regard to several employees whose dismissal was considered on the basis of having committed second serious rules violations. Tr. at 208-09; RX 13; RX 14. Two other engineers were dismissed in 2013 period and one in 2011 after engaging in a second serious violation. RX 13; RX 11. BNSF did not find that Complainant's years of service warranted mitigation of discipline. Tr. at 229, 288-89.

Coming into the May 22, 2012 investigation, Complainant thought that management would recognize his years of service and the character and professionalism he brought to the position and "never thought that he would be dismissed" based on the PEPA policy which provided that dismissal "may" result. Tr. at 72. Ms. Smith testified that, in contrast to the Complainant, employees who were not dismissed after a second serious violation had committed those second violations during a time period when they were no longer under either a probation or review period for a prior serious rules violation. Tr. at 209; RX 14. Ms. Smith also specifically testified with regard to Mr. Davis, whom Complainant had identified as a comparator, *i.e.*, someone who was in similar circumstances to him with regard to his employment and disciplinary record, but who had not been dismissed for his second offense while under review; Ms. Smith testified that Mr. Davis was on probation at the time of his second Level S violation. Tr. at 216-218. Mr. Merriweather, however, testified that Mr. Davis was not on probation at the time he had his second Level S violation because the review period stared on the date of the first Level S violation, September 22, 2009, and would have ended on September 22, 2010, before Mr. Davis's second Level S violation on October 7, 2010. Tr. at 297; RX 35.

Ms. Smith acknowledged that while she could not recall any circumstance where an employee argued at a disciplinary hearing that "BNSF had creat[ed] sleep apnea" and therefore warranted mitigation of the discipline, employees did frequently argue in approximately 20 percent of disciplinary investigations that "mitigating circumstances" included medical conditions and history. Tr. at 226-8.

Mr. Merriweather testified to other employees who ran stop signals. One employee who was dismissed for running a stop signal was on probation for an active Level S violation. Tr. at 289-90; RX 11. Mr. Merriweather also was involved in other cases in which employees were dismissed for running stop signals. Tr. at 289-90. Three other employees received 30 day record suspensions rather than being dismissed, but, according to Mr. Merriweather, none of the three were on active probationary or review periods at the time of their second offense. Tr. at 290.

Both management witnesses testified in rebuttal with regard to the propriety of Mr. Davis as a comparator. CX 8; RX 35;[12] Tr. at 215-218, 294-98. Ms. Smith testified that she was not familiar with Mr. Davis's case. Tr. at 217-218. She could not testify as to what mitigating circumstances, if any, would have justified leniency. Tr. at 218. Mr. Merriweather, however, was familiar with Mr. Davis's case because it occurred within his jurisdiction as terminal superintendent over Chicago suburban services. Tr. at 294. Mr. Merriweather testified that Mr. Davis was subject to the 2000 PEPA, and that under that PEPA, the review period started on the date of the violation. Tr. at 297. Mr. Merriweather testified that under the 2011 PEPA, the starting date for the review or probationary period applicable to the Complainant was the date discipline was assessed. Tr. at 294-298; *compare* RX 23 with RX 35. Mr. Merriweather testified that Mr. Davis received his first Level S violation for an offense committed on September 22, 2009; his review or probationary period started on that date and terminated on September 22, 2010, twelve months later. Tr. at 297. Mr. Davis received his second record Level S suspension on October 7, 2010. Mr. Davis's investigatory hearing on the second offense was held on January 12, 2011, and discipline was assessed on January 27, 2011. Accordingly, according to Mr. Merriweather's testimony, Mr. Davis' incidents and discipline occurred under the 2000 PEPA. Tr. at 297-98.

Shortly after Complainant's dismissal, BNSF began a new training program involving sleep and rest issues. Tr. at 179-181. Complainant learned about the program from former co-workers. Complainant came to believe that the company had changed its practices regarding rest and sleep apnea. Tr. at 181. He further believed that the new BNSF program was triggered by what he had raised during the investigative process into the June 2, 2011 incident. Tr. at 181. Complainant also learned that there were other employees besides himself who had violated the rules or run a red light on more than one occasion, but who, he alleged, unlike him, had not been terminated for the repeat offense. Specifically, he testified that Mr. Davis, another engineer on the suburban service, had been placed on a three-year probation, instead of dismissed, as a result of a second Level S violation. Tr. at 174-178.

Findings of Fact and Conclusions of Law

Whether Respondent Is a Covered Rail Road Company
and Whether Complainant is an Employee under the Act.

The Act applies to any "railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier." 49 U.S.C. § 20109(a). The Complainant and Respondent have stipulated, and, I independently find, that BNSF qualifies as a railroad carrier within the meaning of the FRSA. 29 U.S.C. § 20109 (a) and Complainant was employed as a "employee of such a railroad carrier."

[12] At one point in the record, this exhibit was originally designated at RX 22. Tr. at 215. It was later redesignated as RX 35. Tr. at 240.

Whether Complainant Can Prove by a Preponderance of the Evidence
That His Protected Activity Contributed to BNSF's Decision to Discharge Him

As noted above, the Act prohibits railroads from discriminating against their employees for reporting safety and security issues to the company, a regulatory body, or a law enforcement agency or for following orders or a treatment plan of a treating physician, ex. *See* 49 U.S.C. §§ 20109(a), (b). Section 20109(a) of Title 49 of the United States Code states:

> A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, 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 employees' lawful, good faith act done, or perceived by the employer to have been done or about to be done—*
> **(4)** *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) (emphasis added).[13] The Act's whistleblower provision incorporates the procedures enacted by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21").[14] Thus, the instant complaint is governed by AIR 21's legal burdens of proof. To prevail, a complainant under the Act must establish by a preponderance of the evidence that: "(1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action." *DeFrancesco v. Union R.R. Co.*, No. 10-114, ALJ No. 2009-FRS-00009, slip op. at 5 (ARB Feb. 29, 2012); *Powers v. Union Pacific R.R. Co*., No. 13-034, ALJ No. 2010-FRS-00030, slip op. at 10 (ARB Apr. 21, 2015) (*en banc* reissued decision). If a complainant meets his burden of proof, the employer 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 a complainant's protected activity. *DeFrancesco*, slip op. at 5; *Powers*, slip op. at 10; 49 U.S.C. §§ 20109(d)(2)(A)(i), 42121(b)(2)(B)(iii), (iv).

In order to meet the "contributing factor" test, a complainant must show by a preponderance of the evidence that the protected activity was "any factor, which alone or in connection with other factors, tend[ed] to affect in any way the outcome of the decision [to take the adverse action]." *DeFrancesco*, slip op. at 6 (*quoting Williams v. Domino's Pizza,* No. 09-092, ALJ No. 2006-STA-00052, slip op. at 6 (ARB Jan. 31, 2011)); *Powers*, slip op. at 11 (also quoting *Williams*). Complainant may establish that the protected activity was a contributing

[13] *Nor may a railroad carrier or a covered person discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician*, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. 49 U.S.C. § 20109(c)(2) (emphasis added).
[14] 49 U.S.C. §§ 42121(b), 20109(d)(2)(A).

factor either directly or indirectly through circumstantial evidence. *DeFrancesco*, slip op. at 6-7; *Powers,* slip op. at 11. "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 engages in protected activity." *DeFrancesco,* slip op. at 7.

Inasmuch as the parties have stipulated and the facts presented support that stipulation, I find that Complainant engaged in activity protected under the Act on two separate dates – November 28, 2011 and on May 22, 2012. Specifically, I find that Complainant engaged in protected activity in reporting his sleep apnea to Mr. Merriweather on November 28, 2011, and in alleging on May 22, 2012, that BSNF was at fault for his sleep apnea, that BNSF violated the Improvement Act by not having a fatigue management plan for his job assignment and not providing fatigue management training, and that his job assignment did not provide adequate rest periods.[15]

Having heard Complainant testify and having observed his demeanor while testifying, I find credible Complainant's testimony that it took him some time to come to the conclusion that his failure timely to obey the stop signal on June 2, 2011 and his overrunning that stop signal was related to a medical condition. Complainant consistently admitted at the time of the event, at the disciplinary hearing, and at the hearing of this matter that he had committed the violation at issue and was responsible for it. At the same time, he was consistent and credible in his testimony that he knew that he had acted out of character on the day of the incident and was troubled by that. Tr. at 82. While it took Complainant approximately six months to determine that a lack of sleep and sleep apnea caused or contributed to his behavior on June 2, 2011, that delay does not undercut his good faith reporting of that conclusion to BNSF. Mr. Smith's having previously reported safety concerns to BNSF, JS 11, supports a conclusion that he acted in good faith in engaging in protected activity on November 28, 2011, and May 22, 2012.

I further find that Complainant has established that his protected activity was a contributing factor in his dismissal. Although BNSF presented evidence stating that Complainant was not terminated as a result of his having engaged in protected activity, the Board has recognized that "temporal proximity *alone* may at times be sufficient to satisfy the contributing factor element." *Powers,* slip op. at 22. Here, Mr. Merriweather, who was involved in the decision to dismiss Complainant, knew of Complainant's protected activity. Given the close temporal proximity between the protected activity, particularly the activity that occurred on May 22, 2012, and the dismissal on June 6, 2012, I find Claimant has met his burden to show that his protected activity was a contributing factor in the adverse action.[16]

[15] I recognize that Complainant's OSHA complaint alleged only that he engaged in protected activity on May 22, 2012. CX 11. As the parties have stipulated that Complainant engaged in protected activity also on November 28, 2011, however, it is appropriate for me to find that he engaged in protected activity on November 28, 2011, as well as on May 22, 2012.

[16] In *Powers*, the Administrative Review Board discussed *Zurcher v. Southern Air, Inc.*, No. 11-002, ALJ No. 2009-AIR-00007 (ARB June 27, 2012), a case in which the Board affirmed an administrative law judge's finding that a complainant had failed to show his protected activity was a contributing factor in the adverse action. In *Zurcher*, temporal proximity between the two was the only circumstantial evidence of a contributing factor. Unlike in this

Whether BNSF Can Demonstrate by Clear and Convincing Evidence
That It Would Have Discharged Complainant in the Absence of Any Protected Activity

Once an employee has satisfied the contributing factor test, the burden of proof shifts to the employer to show "by clear and convincing evidence" that "an employer would have disciplined the employee in the absence of the protected activity". *DeFrancesco*, slip op. at 8; *Powers*, slip op. at 10. The clear-and-convincing standard is "more rigorous than the preponderance-of-evidence standard." *DeFrancesco*, slip op. at 8. "Clear and convincing evidence denotes a conclusive determination, *i.e.*, that the thing to be proved is highly probable or reasonably certain." *Id*. If the employer can show that it "would have disciplined the employee in the absence of the protected activity," that showing "overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability." *Id.* As required by the statute, the employer is required to show that it would have taken the same personnel action in the absence of the protected activity. 49 U.S.C. §§ 20109(d)(2)(A)(i), §§ 42121(b)(2)(B)(iii), (iv); *Santiago v. Metro-North Commuter R.R. Co*., No. 10-147, ALJ No. 2009-FLS-00011 (ARB July 25, 2012).

Direct evidence "conclusively links the protected activity and the adverse action and does not rely upon inference." *Williams v. Domino's Pizza*, No. 09-092, ALJ No. 2008-STA-00052, slip op. at 6 (ARB Jan. 31, 2011). "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 towards a complainant's protected activity, the falsity of an employer's adverse action taken, and a change in the employer's attitude toward a complainant after he or she engages in protected activity." *DeFrancesco*, slip op. at 7; *see also Bechtel v. Competitive Techs, Inc*. No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13 (ARB Sept. 30, 2011). Among other things, pretext may be shown by disproportionate harshness of the unfavorable personnel action considering the employee's work record[17] and disparate treatment between a complainant and similarly situated employees who did not engage in protected activity.[18]

Here, Complainant argues that, had it not been for his protected activity in November 2011 and May 2012 with regard to reporting his sleep apnea, concerns about the lack of fatigue training, lack of management fatigue plan, and lack of adequate rest periods during his employment, he would not have been terminated for running the stop signal on June 2, 2011. He argues that his raising of these issues was a factor in management's decision to dismiss him rather than impose some lesser disciplinary action.

Complainant argues that at least one similarly situated employee, Mr. Davis, received a 30 day suspension rather than dismissal for a committing a second serious rules violation, indicating that Complainant received disparate treatment. Complainant also argument that

---

case, in *Zurcher* there was no evidence the persons who decided to take the adverse action were aware of the protected activity. *Powers*, slip op. at 21-22.

[17] *Overall v. TVA*, ARB Nos. 98-111 and 128, ALJ No. 1997-ERA-053, slip op. at 16-17 (ARB April 30, 2001), *aff'd, TVA v. DOL*, 59 Fed. Appx. 732 (6th Cir. 2003) (unpub.).

[18] *Speegle v. Stone & Webster Construction, Inc*., No. 06-041, 2005-ERA-006, slip op. at 13 (Sept. 4, 2009).

management had the flexibility to impose lesser punishment and would, absent Complainant's protected activity, have imposed a penalty short of termination on him. Tr. at 349-50, 354.

In response, BNSF contends that it did not take into consideration Complainant's protected activity in deciding to dismiss him and that instead that decision was "based on the evidence that substantiated the [June 2, 2011] rule violation and the fact that there was no evidence to excuse, to mitigate the violation." Tr. at 363. BNSF also argues that Mr. Davis was not similarly situated to Complainant and that the punishment Complainant received was consistent with other employees who had committed similar misconduct while on probation for a serious violation. Tr. at 363. BNSF also argued that the Improvement Act did not require it to provide a fatigue management plan for Complainant's job assignment or to provide training before he was dismissed. Tr. at 360-61.

I find that considering all the evidence, direct and circumstantial, BNSF has shown by clear and convincing evidence that even absent Complainant's protected activity, BNSF would have dismissed him. As discussed above, BNSF officials making the decision to dismiss Complainant clearly knew about Complainant's protected activity. Moreover, I have found the timing of that protected activity occurred in sufficient temporal proximity to Complainant's dismissal to infer a causal connection between the two under the "contributing factor" analysis. That temporal proximity, however, is insufficient by itself to preclude a finding that BNSF has proven, by clear and convincing evidence, that it would have taken the same adverse action in the absence of Complainant's protected activity.

As outlined above, Complainant testified credibly with regard to his realization and belief that a medical condition that neither he nor the employer knew of at the time may have contributed to the June 2, 2011 incident. Nevertheless, the overwhelming evidence establishes that Complainant's commission of a second Level S violation within the probationary period of a prior Level S violation merited termination under BNSF's practice and the applicable PEPA. Ms. Smith and Mr. Merriweather, who were responsible for deciding to dismiss Complainant, testified credibly with regard to the seriousness of the offenses and the consistency of BNSF's application of the rules. I thus find that BNSF dismissed Complainant because of the severity of his second Level S violation, which occurred while Complainant was on a review period for a prior Level S violation, and that BNSF would have dismissed Complainant if he had not engaged in any protected activity. Moreover, I find that Respondent has not engaged in either shifting explanations or otherwise false reasons for dismissing Complainant.

I also find that Mr. Davis should not be considered a comparator to Complainant. The evidence shows that there were significant distinctions between the records of Mr. Davis and Complainant allowing for them to be treated differently.

First, Complainant had committed a Level S violation on October 12, 2010, and was assessed a 30 day record suspension and a twelve month probationary period on October 20, 2010. The 2000 PEPA in effect at that time does not specify when that review period would begin, but Mr. Merriweather credibly testified that parties' practice at the time was triggered by the date of the incident at issue. Tr. at 285-298. Moreover, I find that while the 2000 PEPA did

not specifically address when a review period would begin, its reference to a "rolling … review period" is consistent with Mr. Merriweather's testimony.

Complainant's second offense, which triggered the dismissal at issue here, occurred on June 2, 2011, and discipline was assessed on June 6, 2012, over a year later. While the change in the timing of the effective date of a second review period effectively postponed the start of any applicable review period for a second offense, and changed the effective date of his discharge to a later date, an earlier resolution of the second discipline would not have impacted the effective dates of the review period and the suspended discipline for the 2010 offense. That twelve month period, whether under the 2000 PEPA or the 2011 PEPA, would have ended respectively on either October 12, 2011 or October 20, 2011; accordingly, the June 2, 2011 incident, under either PEPA, occurred within the review period for the October 12, 2011 violation. In other words, the change in when a review period starts under the 2011 PEPA could not have factored into Complainant's dismissal.

It is true that the delay in holding the investigative hearing for the June 2, 2011 incident would affect the timing of the ultimate discipline for that incident. There is nothing in the record, however, that suggests that such delay in the investigative hearing was motivated by management animus towards Complainant as a result of his protected activity on November 28, 2011. Moreover, to the extent that the delay accrued to the benefit of either party, it would have immediately accrued to Complainant's benefit, as it delayed the ultimate imposition of the penalty for an offense whose facts were undisputed.

In response to Complainant's argument that the comparable record of the asserted comparator George Davis demonstrates different treatment and pretext, I find that Mr. Davis is not an appropriate comparator to Complainant. Complainant's argument thus fails. Mr. Davis's record varies substantially from that of Complainant. Specifically, Mr. Davis worked almost ten years longer than Complainant; he had not served any actual suspensions since 1994, while Complainant served two record suspensions in 2004 and 2005, respectively, and received a formal reprimand in 2002. The facts are undisputed that dismissal of an employee "may" be imposed where the employee commits a second level S violation within the probationary or review period. Accordingly, a determination by BNSF to dismiss Complainant was consistent with the 2011 PEPA.

In contrast, Mr. Davis committed a Level S violation on September 22, 2009 for which he waived a 30 day suspension and was assessed a 12 month probationary period on November 20, 2009. RX 35. His second Level S violation, for which he incurred a 30 day record suspension and 36 month review period, occurred on October 7, 2010. *Id.* He received a second 30 day suspension on January 27, 2011 and was placed on a 36 month review period.

In relevant part, the 2000 PEPA states:

General Guidelines

…

a. An employee involved in a first non-serious incident may choose alternative handling. Examples of alternative handling include coaching, training, pr the Safety Incident Analysis Process (See Appendix A).

…

Serious Rule Violations

…

c. A second serious incident within a 36-month period *will* subject the employee to dismissal. **Exception**: The serious-incident period will be reduced to 12 months for employees who have completed at least five years' service and who have been injury-free and discipline-free during the five years of service preceding their first serious incident,

…

Dismissable Violations

The ultimate sanction of dismissal *may* be imposed in a single aggravated offense, as listed in Appendix C. … There are essentially four events or combinations of events that may result in dismissal:

…

- Two serious rule violations (see Appendix B) within 36 months (or within 12 months, if the employee's record review period was reduced to recognize five years of injury-and discipline-free service)….

RX 36 at pp. 3-4 (emphasis added).

In relevant part, the 2011 PEPA states:

General Information

...

4. The review periods described in this Policy begin on the date discipline is assessed.

...

Categories of Discipline

...

II. Serious Violations

…

A. Progression:

The first Serious violation *will* result in a 30-day record suspension and a review period of 36 months. Exception: Employees qualify for a reduced review period of 12 months if they demonstrate a good work record, defined as having at least 5 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.

B. Review Period:

The review period for a Serious violations begins the date the discipline is assessed and expires after 36 months of service (or 12 months if qualifying as referenced above).

RX 23 (emphasis added).

Essentially, the parties focused on the differences in the two PEPAs involving the triggering of the probationary or review period. The evidence establishes that Complainant's second Level S violation occurred during a review period for a previous Level S violation, while Mr. Davis's second Level S violation did not occur during a review period for a previous Level S violation. *Compare* RX 15 with RX 35 in light of the differences between the two PEPAs. I find this difference significant, and sufficient in itself to render Mr. Davis an inappropriate comparator for Complainant.

Moreover, as outlined above there are significant factual differences in the employment histories of Mr. Davis and the Complainant. These differences also are sufficient in themselves to render Mr. Davis an inappropriate comparator for Complainant. Accordingly, I find that the differences in the discipline BNSF imposed on Mr. Davis and the discipline BNSF imposed on Complainant do not establish that Complainant suffered disparate treatment or that BNSF's stated reason for dismissing him was in any way pretextual.

I also find the evidence involving other comparators convincing. Specifically, BNSF presented evidence of other comparators that establishes Complainant was treated under a consistently applied serious violation policy. RX 10-14. Complainant made no attempt to rebut or impeach these comparators.

Based on the foregoing evidence, I find that BNSF has established by clear and convincing evidence that it would have taken the same adverse action absent Complainant's protected activity.

ORDER

For the foregoing reasons, I find that the Complainant has established that his protected activity was a contributing factor in BNSF's decision to dismiss him. I further find that BNSF has met its burden of establishing an affirmative defense, namely that it would have taken the same adverse action absent Complainant's protected activity. Accordingly, the complaint in this matter is hereby DISMISSED.

SO ORDERED.

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

PAUL R. ALMANZA
Administrative Law Judge

Washington, D.C.

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).