**U.S. Department of Labor**

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (Fax)

**Issue Date: 09 December 2013**

**CASE NO.: 2013-FRS-41**

**IN THE MATTER OF:**

**DAVID E. STANLEY**

**Complainant**

**v.**

**BNSF RAILWAY COMPANY**

**Respondent**

APPEARANCES:

DAVID E. STANLEY, PRO SE
For the Complainant

KIM GAROON, ESQ.
JENNIFER L. WILLINGHAM, ESQ.
For the Respondent

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

**DECISION AND ORDER**

This proceeding arises pursuant to a complaint alleging violations under the employee protective provisions of the Federal Rail Safety Act (herein the FRSA or Act), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53. The employee protection provisions of the FRSA are designed to safeguard railroad employees who engage in certain protected activities related to railroad safety from retaliatory discipline or discrimination by their employer.

## I. PROCEDURAL BACKGROUND

David E. Stanley (Complainant) filed a complaint with the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor on February 17, 2012, alleging that on or about November 18, 2011, BNSF Railway Company (herein Respondent) violated Section 20109 of the FRSA by terminating his employment in retaliation for reporting three work-related injuries. (RX-23).

The Secretary of Labor, acting through the Regional Administrator for OSHA, investigated the complaint. The "Secretary's Findings" were issued on February 11, 2013. OSHA determined that the evidence developed during the investigation was not sufficient to support the finding of a violation. (RX-24).

On March 13, 2013, Complainant filed his objections to the Secretary's findings and requested a formal hearing before the Office of Administrative Law Judges (OALJ). (ALJX-1).

A de novo hearing was held in Seattle, Washington on July 16 and 17, 2013. Complainant offered seven exhibits and Respondent proffered 24 exhibits, which were admitted into evidence along with three administrative law judge exhibits. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from Complainant and Respondent on October 17, 2013. Based upon the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

[1] References to the transcript and exhibits are as follows: Transcript: Tr.___; Complainant's Exhibits: CX-___; Respondent's Exhibits: RX-___; and Administrative Law Judge Exhibits: ALJX-___. RX-2 and RX-25 were withdrawn. CX-5 was rejected.

## II. UNDISPUTED FACTS

At the commencement of the hearing, the parties stipulated, and I find:

1. Complainant was terminated by Respondent on November 18, 2011, and he timely filed a complaint with OSHA on February 17, 2012. (Tr. 26).

2. At all times material, Respondent was a railroad carrier within the meaning of 49 U.S.C. §§ 20109 and 20102. (Tr. 27).

## III. SUMMARY OF THE EVIDENCE

### Testimonial Evidence

### Complainant

Complainant testified he achieved a GED. (Tr. 29). He completed the 11th grade of formal education before attending a trade school in Phoenix, Arizona, for two months. He joined the Arizona National Guard and transferred to the Washington State National Guard after basic training. (Tr. 30).

Complainant served in the Washington State National Guard for 12 years. (Tr. 29). His Military Occupational Specialty (MOS) was a 63B light-wheel mechanic and later a 63A heavy-wheel mechanic. (Tr. 30). He worked on tracked vehicles as a civilian in Yakima, Washington, for ten years. (Tr. 31).

On April 3, 2006, he was hired by Respondent as a carman. A carman inspects, maintains, and repairs rail cars. (Tr. 31). He would perform welding and run tests on the cars. (Tr. 32). He worked in the Pasco, Washington yard and rip track. (Tr. 32-33). Inspections took place in the yard and heavy repairs occurred in the rip track. (Tr. 33). Complainant underwent an apprenticeship through the union and was upgraded to work on his own after several months. (Tr. 34-36). He became a journeyman in October 2008. (Tr. 36).

Complainant received wage increases pursuant to the collective bargaining agreement between Respondent and the union. (Tr. 34). In November 2011, he was earning $25.00 an hour, working 40 hours per week with no overtime. (Tr. 36-37). Complainant took his name off of the overtime list, and he would only perform overtime work if it was mandatory. (Tr. 37).

In November 2010, he first experienced symptoms of carpal tunnel syndrome (CTS) of his right hand which was treated with anti-inflammatory medication in January 2011. (Tr. 37-38). In January 2011, he also experienced CTS of the left hand. Complainant informed his general car foreman, Risdon, of his CTS hand injury and diagnosis. (Tr. 38). He was required to fill out paperwork on a form provided by Respondent which reported the injury. (Tr. 39). From February 18, 2011 to April 1, 2011, Complainant was on medical leave for CTS surgery on his right and left hands. He received partial wages while on medical leave. (Tr. 40). Upon his release from the doctor, Complainant gave the medical care administrator Ann Lynch, a nurse for Respondent, his release papers. (Tr. 40-41).

On August 3, 2011, Complainant alleged a third injury when he hit his head on a ladder, causing a lump on his head. (Tr. 42, 48). He reported the injury to Jesse Vater, his supervisor at the time, and filled out forms. He gave a statement about his accident. (Tr. 42). He also reenacted the incident for Risdon, Vater and Long, the assistant car foreman. He did not seek any medical care. (Tr. 43). He testified there is a system used to track injuries and assign "PPI" ratings. He stated he received five PPI points per hand and five points for the lump on his head. (Tr. 44).

During the investigation of his complaints, PPI did not come up as an issue. (Tr. 45). None of Complainant's three injuries were reportable injuries because no medical care was sought for the lump on his head and the CTS injuries were not reportable under the FRA. (Tr. 47-48).

On September 26, 2011, Complainant complained of cumulative trauma to his elbow from using a sledge hammer and reported the injury to foreman Long. He sought medical attention, received a cortisone shot and was placed on medical leave for 30 days until November 9, 2011. (Tr. 50-52).

Complainant received an investigative hearing notice on October 3, 2011. The hearing was scheduled for the "purpose of ascertaining facts and determining responsibility in connection with [his] alleged misconduct and dishonesty while attempting to thieve material." (Tr. 49-50; RX-8). The investigative hearing was scheduled for October 12, 2011, and rescheduled for November 9, 2011. (Tr. 54; RX-8; RX-9). Complainant was represented by Ed Holm, a union steward. (Tr. 54). The investigative hearing was transcribed. (Tr. 55; RX-21). The union representative requested a waiver of the investigation, but his request was denied. (Tr. 55). Complainant was paid administrative leave from November 10, 2011, until the final decision was made. (Tr. 56).

Complainant's dismissal letter was dated November 18, 2011. (Tr. 57; RX-22; CX-2). The dismissal letter dismissed Complainant "effective immediately from employment with BNSF Railway Company for misconduct and dishonesty while attempting to thieve material belonging to a BNSF customer while said material was on BNSF property contained in freight car GONX 330143...In assessing discipline, consideration was given to [Complainant's] personnel record and the discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA)." (RX-22; CX-2).

At the investigative hearing, Foreman Vater testified that Complainant was caught stealing scrap metal, but Complainant testified he pulled scrap metal from a car and then put it back. (Tr. 57). The dismissal letter indicates Respondent used Complainant's personnel records to conclude he should be dismissed. The personnel record contained his injury reports. (Tr. 58). Complainant testified OSHA concluded that Respondent's PEPA policy was wrong and required Respondent to change the policy. (Tr. 59). After receiving the dismissal letter, Complainant filed a grievance with the union, which is presently pending. (Tr. 61).

On cross-examination, Complainant testified he is familiar with the mechanical safety rules (MSR). Respondent trained him on the MSRs, and he was annually re-certified as to his knowledge of the MSRs. (Tr. 65; RX 13-17). MSR S-28.3.1 dated June 24, 2009, requires employees to have a copy of and be familiar with the MSRs, attend classes and pass a required exam. (Tr. 67-68; RX-15). Employees were also required to ask supervisors for clarification of the rules when questions arose. (Tr. 69). MSR S-1.2.5 requires employees to comply with all

company safety rules, training practices and policies. (Tr. 69; RX-16). MSR S-28.6 states, "any act of misconduct affecting the interest of the Company or its employees is cause for dismissal and must be reported." Complainant acknowledged that employees must not be dishonest and any act of misconduct could be cause for dismissal. (Tr. 70; RX-17).

Complainant further acknowledged that he received no discipline for reporting his injuries. (Tr. 70-71). He stated on August 3, 2011, he was not allowed to leave work following his injury. He was required to stay at work until after midnight, and his job ended at 11:00 p.m. (Tr. 71). MSR S-26.8 requires that employees report all injuries arising from operation of the railroad. (Tr. 72; RX-13). A supervisor asking that he report the injury was not considered discipline because the report was required. (Tr. 73). He was approved for medical leave for his CTS surgeries. (Tr. 74).

The October 3, 2011 notice of investigation letter Complainant received from Respondent does not mention his injuries. (Tr. 74; RX-8). The notice of postponement Complainant received on October 28, 2011, does not mention his injuries either. (Tr. 74; RX-9). None of Complainant's injuries were mentioned in the investigative hearing conducted by Respondent. (Tr. 74-75). The dismissal letter mentioned the use of his administrative personnel file which contained information relating to his injuries. (Tr. 75).

Complainant was represented by a union representative at the investigative hearing. He was given the opportunity to present witnesses, question Respondent's witnesses and present evidence. (Tr. 76). The transcript of the investigative hearing reflects Complainant was not assigned to work the car which contained the scrap metal. (Tr. 77-78; RX-21, p. 80). He admitted removing material from the car. (Tr. 78; RX-21, p. 80). Complainant affirmed that he was required to comply with the MSRs. (Tr. 78; RX-21, p. 82). MSR S-28.6 which proscribes dishonesty was not complied with and his actions could be construed as stealing. (Tr. 79; RX-21, p. 83). Complainant confirmed that his actions were unprofessional. (Tr. 80).

Complainant began a second medical leave of absence for 30 days beginning September 27, 2011, because he had received an injection in his right arm and there was no light duty work available. (Tr. 80). Complainant submitted his injury claims to a claims adjuster. (Tr. 82-83). He did not file a claim under the Federal Employers' Liability Act. (Tr. 83).

Complainant acknowledged that his OSHA complaint made no reference to PPI ratings. (Tr. 84; RX-23). He does not understand how PPI ratings work. (Tr. 84-86). He believes his personnel records were used in assessing discipline. (Tr. 87).

Complainant is currently employed at a New Holland shop in Union Gap, Washington, where he maintains and repairs farm equipment. (Tr. 88-89). He began with New Holland on March 26, 2012. (Tr. 89). He obtained no other employment since his dismissal from Respondent. He currently earns $16.00 an hour, but started at $12.00 an hour. (Tr. 90). He has medical insurance and a 401(k) pension plan with New Holland. He works a minimum of 42.5 hours and up to 60 hours per week. Overtime is paid at time and one-half for work over 40 hours per week and is based on work load. (Tr. 91, 101). He has no other means of income. (Tr. 92).

Complainant removed himself from Respondent's overtime list because sometimes his name would be skipped over. (Tr. 91).

Complainant received railroad unemployment from November 2011 to March 2012, but there was nothing preventing him from working during the period. (Tr. 92-93). He applied for three to four jobs per week. He has not received any discipline at his current employer. (Tr. 93).

On September 23, 2011, Vater approached Complainant about the scrap metal. After speaking with Vater, Complainant returned the scrap metal to the gondola. (Tr. 93). Later that day, Complainant went to Vater's office to write a statement about the scrap metal incident. (Tr. 94). Complainant asked if the incident could be a "learning experience" and asked for leniency. David Schiefelbein stated he had "gone too far." Complainant asked to speak to his union representative. He was not initially told there would be an investigation. (Tr. 95).

Complainant heard rumors that an employee named Fredrick Wright had received a waiver, but he did not have any personal knowledge of what happened to Fredrick Wright. (Tr. 96-99).

**Ryan Risdon**

Risdon became general foreman of Respondent's Pasco Territory in May 2010. (Tr. 118-119). He supervises all 115 employees at the rail yard. His duties include participation in training, administrative functions from a mechanical

perspective, investigations and creating a safe work environment. (Tr. 119-120). The chain of command begins with the front line supervisor, to the mechanical foreman, to the assistant general foreman (Long), to the general foreman (Risdon), to the field superintendent (Terrance Gay) and to the chief mechanical officer. (Tr. 120). All mechanical employees are required to follow the rules set forth in the Mechanical Safety Rule book. (Tr. 121).

MSR S-26.8 requires the reporting of all accidents. (Tr. 121-122; RX-13). Risdon testified that intimidation or discouraging employees from reporting accidents would not be tolerated. (Tr. 122). MSR S-26.9 is the EEO Policy and Program that states no employment decisions will be based on protected activities, including injury reporting. (Tr. 122-123; RX-14). MSR S-28.3.1 requires all employees to know and follow all rules, and requires employees to seek clarification of the rules from their supervisors. (Tr. 123-125; RX-15). MRS S-1.2.5 requires that all mechanical employees comply with all safety rules, training practices and company policies. (Tr. 125-126; RX-16). MRS S-28.6 relates to conduct of employees; sub-section four prohibits dishonest acts which are a cause for dismissal. (Tr. 126; RX-17). Risdon is very familiar with the MSRs. He has been employed by Respondent for 16 years, and enforced the MSRs in his role as a supervisor for 11 years. Employees are given annual training on the MSRs. They also receive annual safety certification. (Tr. 127).

Risdon testified that on January 6, 2011, Complainant reported an injury. (Tr. 127-128). A day or two earlier Complainant told Risdon he was being treated for carpal tunnel syndrome and may need to take medical leave. There was no claim filed indicating that it was an on-duty injury. Complainant reported a second injury on February 3, 2011. He indicated that he was diagnosed with left CTS. Risdon assisted Complainant with the paperwork. (Tr. 128). On August 3, 2011, Complainant reported a third injury. He bumped his head while coming out from underneath a freight car. Risdon assisted Complainant with the paperwork. There was no other reporting of other injuries. (Tr. 129).

Risdon testified that Vater called him to report that Complainant was caught attempting to steal scrap metal from a customer's freight car. The freight car was a gondola car that did not belong to Respondent. (Tr. 130). The gondola car was identified as "GONX," and was not owned or operated by Respondent. Complainant was on duty when the incident occurred,

and he was in a location where he should not have been. (Tr. 131). Risdon testified that employees should know that scrap metal is of value. He opined that stealing is a violation of the MSRs. There is not a MSR that addresses theft directly, but theft is considered dishonest. (Tr. 132).

Risdon called Gay and told him he needed approval for urinalysis, which is standard protocol in instances of serious rules violations. (Tr. 132-133). Gay also indicated that Risdon should assign a more senior foreman to help Vater conduct the incident investigation. Risdon was not in the area on the night of the incident. Photographs of the incident and employee statements were also part of Respondent's investigation protocol. (Tr. 133). Jeremy Foster was called in to assist Vater with the investigation. (Tr. 133-134). Schiefelbein took photos of "GONX 330143," the gondola car. (Tr. 134; RX-7). The photos show two views of the gondola car, scrap metal from the inside of the gondola car and the bucket used by Complainant to load the scrap metal. (Tr. 134-135; RX-7). The gondola car was approximately 8 to 10 feet wide by 60 feet long. (Tr. 135). The bucket was two to two and one-half gallons in size. (Tr. 137).

Statements were obtained following the incident. (Tr. 136). Complainant provided a statement the night of the incident. His statement reads as follows, "I removed a very small amount of scrap out of GONX52385 and put back the same amount of scrap back into GONX52385." His statement reflects the wrong number of the car involved. (Tr. 137; RX-3). Risdon did not know the value of the scrap metal. (Tr. 138). Complainant admitted that he wrote the wrong car number in his statement. (Tr. 139; RX-21, p. 79).

Vater also provided a statement on the night of the incident. (Tr. 139; RX-4). Risdon relied on Vater's statement in determining how to proceed following the incident. (Tr. 140). Vater stated he witnessed Complainant exiting the gondola with a bucket of scrap metal, which Complainant planned to use for blacksmith work. (Tr. 140; RX-4). Vater believed Complainant was stealing, and Complainant acknowledged his actions were wrong. Complainant asked Vater for the incident to be considered a "learning experience." Schiefelbein and Vater were present while Complainant made his statement. (Tr. 141; RX-4).

Foster and Schiefelbein also made statements, which Risdon relied upon. (Tr. 141-142; RX-5; RX-6). According to Schiefelbein's statement Complainant admitted to taking the material and asked for "a one-time warning as opposed to more formal." (Tr. 142; RX-6).

After the statements were made, Foster called Risdon with an update, and Risdon reported to Gay. (Tr. 144). Risdon recommended that a formal investigation be conducted to determine whether Complainant violated any MSRs, and Gay made the decision to proceed with the formal investigation. (Tr. 144-145). A formal investigation is a right given to employees by the collective bargaining agreement (CBA) before any discipline is assigned. A union representative and hearing officer participate in the formal investigations. Employees are provided written notification of formal investigations. (Tr. 145). Risdon wrote the notification that was provided to Complainant. (Tr. 145; RX-8). Complainant was ineligible for alternative handling of the incident, which is an alternative method of discipline, because misconduct is excluded from the CBA provision related to alternative handling. (Tr. 145-146; RX-8). Risdon testified the fact that Complainant reported injuries in January 2011, February 2011 and August 2011 had no bearing on the investigation. The investigation would have occurred absent any reported injuries. (Tr. 148).

Complainant's investigative hearing was postponed because his union representative was based in Seattle and because Complainant was on medical leave. (Tr. 148-149). The union representative requested a "waiver" for Complainant, but Risdon stated a waiver would not be fair to Complainant because it would mean he was admitting guilt and it would essentially be a "self-dismissal" or resignation. Complainant's charges were of such a severity that it would be a "stand-alone violation" requiring dismissal and a waiver requires an admission of wrongdoing. The grant of a waiver is at the discretion of the Respondent. (Tr. 149-150).

Risdon wrote the investigation postponement notice. The only change in the postponement notice from the original notice was the date. (Tr. 151; RX-9).

Risdon was not involved in the dismissal of Complainant. (Tr. 151, 159). He was not present at the investigative hearing and was not consulted about the dismissal. (Tr. 151-152). Risdon did not write Complainant's dismissal letter and was not

involved in the dismissal. (Tr. 152; RX-22). Risdon testified that Complainant's injuries played no role in the formal investigation. (Tr. 152). He bore no ill will toward Complainant. (Tr. 153).

Respondent's Equal Employment Opportunity policy (EEO) prohibits retaliation against employees for exercising rights protected by the policy. (Tr. 153-154; RX-10). Respondent's Code of Conduct requires the reporting of theft. (Tr. 154-155). Vater was subject to the Code of Conduct and had to report the theft. (Tr. 155-156). RX-12 is Respondent's "no retaliation" policy. (Tr. 156; RX-12). All supervisors are bound to the Code of Conduct. (Tr. 156-157). Risdon complied with the EEO policy and Code of Conduct in dealing with Complainant. (Tr. 158).

Risdon has no involvement in assigning PPI or how it is determined or assessed. (Tr. 158). He did not consider PPI points and did not know the number of PPI points assigned to Complainant. Risdon testified that PPI points were never a part of the decision to investigate Complainant's actions and Complainant's injuries played no part in his decision to initiate a formal investigative hearing. (Tr. 158-159).

On cross-examination, Risdon testified it took one to two days to decide to investigate the theft incident. He stated that theft is a serious rule violation. (Tr. 160). Rule 35 of the CBA requires an informal investigation, and gives Respondent 20 days to decide to bring charges or to conduct an investigation. (Tr. 162).

The conducting officer, Schwartz, gathered all documents for the formal investigation. (Tr. 164). The pre-investigation photos and statements were compiled at Risdon's direction. (Tr. 165).

Respondent changed its PEPA policy, but Risdon did not know the reason for the change. (Tr. 167).

The bucket Complainant used to remove the scrap metal was in Risdon's office following the incident, but he could not recall what happened to the bucket. (Tr. 167).

Risdon testified there is a general association between PPI numbers and injuries. (Tr. 168). The personnel record does not specify the PPI rating, but a foreman would know that an employee has a PPI rating if an injury is listed on his personnel record. (Tr. 168-169).

Risdon was familiar with Respondent's employee transcripts. He was not familiar with Fredrick Wright or his employee transcript. (Tr. 172). Risdon was a mechanical foreman in Spokane, Washington, when Fredrick Wright was dismissed on July 2, 2009. (Tr. 172-173). He could not explain Fredrick Wright's waiver or the meaning of "negligent removal of BNSF property." (Tr. 173-174). Risdon testified "removal of BNSF property without authority" may be a stand-alone dismissible violation dependent on the case. (Tr. 179).

Risdon did not know the market value of the scrap metal involved in Complainant's incident. (Tr. 179).

The CBA refers to "conduct related violations" as an excluder to alternative handling. (Tr. 182).

**Terrance Gay**

Gay is the Field Superintendent of Operations for Respondent in Zone One over Pasco and has held his position since May 2011. (Tr. 183-184). He was one of the officers involved in the decision to terminate Complainant. (Tr. 183).

Gay's duties include supervision of 550 employees, including 62 company officers, in five states. He oversees maintenance of cars and locomotives, safety and discipline. Complainant reported to him indirectly. (Tr. 184). The chain of command begins with the front line supervisor, to a lead supervisor, to an assistant general foreman, to the general foreman (Risdon), and then to the field superintendent. (Tr. 185).

Prior to the incident, Gay had never met Complainant. On September 23, 2011, Risdon contacted Gay about Complainant's rules violation. It was standard procedure for Risdon to contact him regarding possible rules violations. (Tr. 185). Risdon related that Vater found Complainant with a bucket of scrap metal which had been taken out of a gondola car. Gay ordered that a urinalysis be conducted. Because Vater was young in experience, Gay decided to bring in a more senior supervisor

to assist him in taking statements and photos. (Tr. 186). Later that night, Gay received a call back from Risdon that "all of the steps had been executed." Gay told Risdon they would talk on Monday. (Tr. 187). Gay was on the road from Monday through Friday. He asked Risdon to send the statements to him for review, which he believed that he reviewed the Friday following the incident. (Tr. 188). Gay and Risdon determined that there was sufficient evidence available for Complainant to present a case. (Tr. 188-189).

The CBA does not have rules regarding whether or not to initiate a formal investigation. Rule 35 of the CBA requires 20 days to call for a formal investigation through a notice of investigation issued to the employee and his representative. (Tr. 189). Risdon drafted a notice of investigation for Gay's review. (Tr. 190). The process of drafting the notice typically takes several days. Ten days could have elapsed before the formal notice was provided to Complainant. There is no connection between the seriousness of a potential rule violation and the length of time taken to create the notice. (Tr. 191).

Gay stated he knew of Complainant's August 2011 injury because of safety protocol, but the injury had no influence on the investigative hearing. (Tr. 192). He would have scheduled the investigative hearing even if Complainant had no reported injuries. (Tr. 192-193). Gay did not attend the investigative hearing. (Tr. 193).

The conducting officer taped recorded the investigative hearing and submitted the tape for transcription. The conducting officer is required to review the transcription for accuracy. (Tr. 193). The conducting officer then makes a recommendation to Gay on whether the charges were proven, and provides the transcription and exhibits to Gay for review. (Tr. 194).

Brandon Schwartz was the conducting officer for Complainant's investigative hearing. Gay received the investigative hearing transcript from Schwartz. (Tr. 194; RX-21). Gay looked at the testimony of Vater, Foster and Complainant. Complainant stated he removed the materials from the car. Gay reviewed the PEPA policy to determine if the violation was a "stand-alone" dismissible violation. He did not review Complainant's employee transcript. (Tr. 195). Gay concluded Complainant had committed theft and was dishonest. Theft is not an independent category of misconduct under the

MSRs, but he concluded theft was dishonest in violation of the MSRs. (Tr. 196).

Complainant was walking away from the car when he was stopped. (Tr. 197). Complainant admitted removing the scrap metal, and he was not assigned to complete any work on the car which contained the scrap metal. (Tr. 197-198; RX-21, p. 80). During the investigative hearing, Complainant admitted he violated MSR S-28.6. (Tr. 199; RX-21, pp. 84-85). Complainant did not admit to stealing or take accountability for his actions. (Tr. 199-200).

Gay received a copy of Complainant's statement from the day of the incident. In his statement Complainant does not admit to stealing or take accountability for his actions. (Tr. 200; RX-3). During the investigative hearing, Complainant stated he understood that he did wrong by removing materials, which was in violation of the theft rule or dishonesty. (Tr. 201-202; RX-21, p. 87). Taking the material from the gondola car was theft even if Complainant did not plan to bring it home with him. (Tr. 203). Theft is not based on the value of property stolen. Gay testified the return of scrap metal to the gondola car had no effect on the theft because Complainant was still guilty of theft when he removed the materials. (Tr. 204). Gay added that Complainant's injuries had no effect on the termination decision. (Tr. 205).

Gay concluded that Complainant's actions rose to the level of a "stand-alone violation" under the PEPA policy. (Tr. 205; RX-19; RX-20). Appendix B to the PEPA policy, lists the stand alone violations. (Tr. 205; RX-20). Gay testified that PEPA is a progressive discipline policy requiring that employees have multiple violations over a given period of time before they can be fired. A stand-alone violation is one where an employee can be terminated after one event. (Tr. 206). Gay opined that Complainant's actions were subject to two of the stand-alone violations listed in Appendix B: (1) "theft, or any other fraudulent act, which may be evidenced by the intent to defraud BNSF or by taking of BNSF monies, or property not due" and (2) "dishonesty about any job-related subject." (Tr. 207; RX-20, p. 36). MSR S-28.6 does not prevent Gay from finding that theft constitutes a "stand-alone violation." (Tr. 207-208).

Gay made his recommendation to terminate Complainant to three departments: the Mechanical Chain of Command; Human Resources; and Labor Relations. (Tr. 208). He received feedback from all three departments which supported the

dismissal. (Tr. 209). Complainant's dismissal letter was prepared by Schwartz. (Tr. 209; RX-22). The dismissal letter was based on a template. Complainant received the letter. (Tr. 210).

Although the scrap metal was not of considerable worth, its value did not influence the termination decision. (Tr. 211). Complainant's contention that he did not know taking the scrap metal was theft did not influence the termination decision. Gay did not believe Complainant's assertion that he did not know taking the scrap metal was wrong because employees are told not to remove things from the cars. (Tr. 212). Complainant pleaded for the incident to be a "learning opportunity" to preclude the pursuit of discipline. (Tr. 213). Complainant's request for leniency did not influence the termination decision nor did his promise not to thieve again. Complainant did not refer to any injuries during the investigative hearing, and the injuries had no effect on the termination decision. (Tr. 214).

Gay was not familiar with the discipline given to Fredrick Wright. Fredrick Wright was not employed under Gay and was discharged in 2009. Fredrick Wright received a "waiver" for "negligent removal of Respondent's property without authority." Gay stated he was not involved in the grant of a waiver to Fredrick Wright. Gay testified that Fredrick Wright's violation was not the same as Complainant's violation. (Tr. 215).

Mark Wright was a machinist who was disciplined for theft, removing scrap metal from a dumpster. Gay was the conducting hearing officer in the case. Mark Wright was dismissed for theft and dishonesty. (Tr. 216). No waiver was offered to Mark Wright because it would not be fair to dismiss an employee without an investigative hearing since a waiver is not appealable, nor was alternative handling fair since it was a conduct issue investigation. (Tr. 218).

Gay is subject to the Respondent's EEO and Code of Conduct no retaliation provisions. He complied with the EEO and Code of Conduct in his dealings with Complainant. (Tr. 220; RX-10; RX-12).

Gay testified that Complainant's injury reports played no role in the decision to investigate the incident or the decision of dismissal. If there had been no injuries, the decision would have been the same. (Tr. 221).

On cross-examination, Gay acknowledged Mark Wright's investigation occurred in 2011 or 2012. (Tr. 222).

There may be exceptions to the rule against removing material from a customer's car without approval. For example, Respondent may hold onto material removed from a car as evidence in a potential disciplinary hearing. (Tr. 223). Gay did not authorize Vater and Foster to remove a piece of metal for a photo. (Tr. 225). Gay believed that Vater and Foster are still employed by Respondent. (Tr. 226).

Gay stated the PPI ratings have not been used for a couple of years. (Tr. 227-229).

On re-direct examination, Gay testified he was not involved in assessing PPI points to Complainant. (Tr. 234). He did not look at or consider Complainant's PPI ratings in his decision to initiate a formal investigation or his decision to terminate Complainant. (Tr. 234-235).

**Joseph Heenan**

Heenan is Respondent's Director of Employee Performance and Labor Relations. He has held the position since September 2009. (Tr. 248). He evaluates all cases involving significant discipline or potential dismissal, reviewing the investigative hearing transcripts and exhibits and giving a recommendation for the appropriate level of discipline. (Tr. 248-249). He testified that Respondent believes it is important that potential dismissals be reviewed to promote fair and consistent application of the discipline policy for over 30,000 craft employees in multiple states. He has system-wide oversight of all of the discipline amongst all crafts. (Tr. 249). Heenan typically reviews the employee's transcript, the investigative transcript, exhibits and the PEPA policy. (Tr. 249-250; RX-21). He testified that in Complainant's case he pulled the employee transcript, the investigation exhibits and the investigation transcript. Due to the nature of the charges against Complainant, the primarily relevant documents were the investigation transcript and the PEPA policy. (Tr. 250).

Heenan testified that there are three levels of violations under the PEPA policy: standard, such as late for work; "Level S" serious violations; and "stand-alone, dismissible violations." (Tr. 251). In "stand-alone violations," the employee transcript is not relevant, and he did not consider the employee transcript in Complainant's case. (Tr. 252).

The evidentiary standard in investigative hearings is substantial evidence. (Tr. 252). Complainant was charged with theft and dishonesty. Heenan determined that there was substantial evidence that Complainant was dishonest by engaging in theft. (Tr. 253). On September 23, 2011, a supervisor saw Complainant on a gondola car taking scrap metals, and Complainant admitted taking such materials. (Tr. 253-254). The supervisor told Complainant he was "stealing," and Complainant dumped the materials out. Complainant admitted his guilt in his written statement and in the investigative hearing transcript. (Tr. 254). He argued for leniency and pled ignorance of the violation and returned the materials stolen. (Tr. 254-255). Heenan did not find these arguments persuasive. (Tr. 255).

After Heenan determines that the burden of proof is met, he looks at the PEPA policy to ensure that the discipline he is recommending is consistent with the system-wide policy. (Tr. 255).

The PEPA policy was revised on March 1, 2011. Heenan reviewed the policy for guidance in determining the appropriate level of discipline. (Tr. 257; RX-26). The PEPA policy contains a non-exhaustive list of stand-alone rule violations that if committed and proven at an investigative hearing can subject an employee to dismissal for a one-time only violation. (Tr. 259; RX-20; RX-26). Heenan looked to this policy in determining the level of discipline appropriate for Complainant. (Tr. 259). RX-18, RX-19 and RX-20 are all part of the PEPA policy contained in RX-26. (Tr. 260).

Heenan made a recommendation to Gay regarding the level of discipline. (Tr. 260). PEPA requires discipline review for potential dismissal. (Tr. 260; RX-19). Heenan recommended dismissal, consistent with items one, theft or fraudulent acts, and two, dishonesty, of the stand-alone dismissible offense category. (Tr. 261; RX-20). Heenan has reviewed 800-900 cases in the last four years. (Tr. 261). Complainant's discipline is consistent with other similar cases. In 2011, Heenan reviewed 11 cases of theft and dishonesty. He recommended dismissal in all of those cases. These numbers do not reflect any cases that the other Director of Employee Performance may have reviewed. (Tr. 262).

The PEPA policy changed in 2012. (Tr. 262). The PEPA policy never allowed for consideration of injuries in assessing discipline. (Tr. 263). The probation period associated with Level S cases changed in 2012. (Tr. 264). The change involved redefining the definition of a "good work record" from "five years of service, and having been both reportable injury free and discipline free" to "five years of service, and being five years discipline free." (Tr. 264-265). There were no other substantive changes to the PEPA policy in 2012. (Tr. 266). The provision that changed had no relevance to Hennan's recommendation because Complainant was charged with a stand-alone offense not a Level S offense. (Tr. 265-266). His recommendation would have been the same under the 2012 PEPA policy. (Tr. 266). There were multiple rule violations in Complainant's case, but only the most offensive rule violations were considered. (Tr. 266-267). Under the CBA, Complainant appealed the dismissal decision to arbitration. The parties are awaiting arbitration by a neutral third party. (Tr. 268).

Heenan testified that PPI points did not play any part in the decision to terminate Complainant. Heenan did not rely upon PPI and had no knowledge of Complainant's PPI points, which were not relevant in this matter. (Tr. 269).

Respondent has policies that prohibit retaliation against employees, which applies to Heenan. Annual training on the policy is provided by Respondent. (Tr. 270; RX-12). Heenan complied with the no retaliation policy in his evaluation of Complainant's potential discipline case. (Tr. 271).

Complainant's dismissal letter references his "personnel record," which includes records of his past injuries. Heenan testified that the dismissal letter contains computer-generated language, and Complainant's injuries were not considered in the decision to terminate him. (Tr. 271; RX-21). Heenan did not consider Complainant's injuries in making his recommendations. He would have recommended dismissal even if Complainant had no injuries. (Tr. 272).

On cross-examination, Heenan testified the discipline record, investigation notice, investigation postponement and dismissal letter all state Complainant was charged with "misconduct and dishonesty while attempting to thieve material." (Tr. 273-275; RX-1; RX-8; RX-9; RX-22).

Heenan testified that a theft case may not result in dismissal if the burden of proof is not met or there is a procedural violation. (Tr. 276). Heenan was not in his present position in January 2007 when Fredrick Wright was charged with "negligent removal of property." (Tr. 277; CX-4). Heenan did not consider any of Complainant's prior violations in making his recommendation. (Tr. 285).

Heenan was not familiar with the term "negligent removal of BNSF property without authority." (Tr. 286-287). He recommended dismissal in the 11 theft and dishonesty cases he reviewed in 2011. (Tr. 287).

Heenan was familiar with the news release by OSHA dated January 15, 2013, announcing that Respondent signed an accord regarding employee practices under the Federal Railway Safety Act. (Tr. 287-288; CX-3). The news release indicates that the discipline policy no longer considers injuries in determining a probation period following a record suspension for serious rule violation. (Tr. 290; CX-3).

Complainant's dismissal letter mentions his personnel record. An employee from the field office generated the first paragraph of the dismissal letter, and the remainder of the letter was computer generated. (Tr. 291; RX-22; CX-2).

Heenan testified that Complainant was assigned to work Track 2 with possible additional responsibilities in Track 3. The gondola car was in Track 1. There may have been 50 feet between the work areas. (Tr. 293).

Heenan was recalled as a witness to clarify review periods set forth in Complainant's employee transcript. A copy of Complainant's employee transcript printed on November 7, 2011, reflects a review period of "zero." (Tr. 334; CX-1). A copy of Complainant's employee transcript printed on January 24, 2013, reflects a review period of 36 months. (Tr. 334; RX-1). Prior to 2010, information from discipline letters did not contain any reference to review periods. Review periods were used, but not always contained in the letters. (Tr. 334-335). Sometime between 2010 and 2012, Respondent decided to list the review period in the discipline letters in the interest of transparency. (Tr. 335). Clerks would go into the system and update the information to make it more current. (Tr. 336).

Complainant had a Level S violation in 2009. Under the PEPA policy, Complainant did not qualify for a twelve month probation period because he had not been employed by Respondent for five years. (Tr. 336-337). If an employee does not have five years of service, a 36-month probation period is required. Prior discipline was not considered following Complainant's 2011 violation because it was a stand-alone, dismissible violation. (Tr. 337).

On re-cross examination, Heenan testified the August 17, 2009 Level S waiver shows a review period of "zero." The document is dated April 3, 2012. (Tr. 343; CX-6). A document signed by Complainant, Schultz and Long on August 14, 2009 reflects a probation period of "zero." Heenan did not believe the document was the actual waiver because it was not on company letterhead and not in the form he has previously seen. (Tr. 345-346; CX-7).

On re-direct examination, Heenan testified he had no knowledge regarding Complainant's 2009 waiver. (Tr. 347). The 2009 waiver having a review period would not have changed Heenan's assessment of Complainant's 2011 case. (Tr. 348).

**Michael Schultz**

Schultz retired from Respondent after 38 years of employment. He was a local chairman of the carmen's union. (Tr. 297). He served as local counsel representing Fredrick Wright. (Tr. 298, 319). On January 24, 2007, Fredrick Wright was charged with theft of valves and brass. (Tr. 301). Fredrick Wright's wife was pregnant and pleaded for his job. Hust, presumably Wright's supervisor, had pity on Fredrick Wright and granted a waiver. (Tr. 302).

On cross-examination, Schultz testified he began with Respondent as a carman. (Tr. 310-311). Shultz retired from Respondent on June 15, 2011, as a repair truck carman. (Tr. 304, 311). Carmen and repair truck carmen are represented by the same union. (Tr. 311). He worked for Respondent for 23 years in Pasco, Washington. (Tr. 312). He was the local chairman for the union from 2007 to 2010. (Tr. 313). Hust was the General Car Foreman in Pasco before Risdon. (Tr. 314). Hust was not employed by Respondent on September 23, 2011, and he was not involved in Complainant's investigation. (Tr. 315).

Schultz was on a trip on September 23, 2011, and he was not involved in Complainant's investigation or investigative hearing. (Tr. 316-317).

Gay was the general car foreman in Spokane, Washington, in 2007, at the time of Fredrick Wright's waiver. (Tr. 319). Risdon was a foreman at that time. Neither Gay nor Risdon was involved in Fredrick Wright's waiver. Schultz had never met Heenan, and he did not believe Heenan was involved in Fredrick Wright's waiver. (Tr. 320). The only decision maker involved in Fredrick Wright's waiver was Hust, who retired in 2010. (Tr. 320-321). Schultz testified he had no knowledge of the incident set forth in CX-5, an e-mail referencing an injury to Complainant on August 3, 2011. (Tr. 321-322).

On re-direct examination, Schultz testified he did not know whether injuries played a role in Fredrick Wright's waiver. (Tr. 323). Fredrick Wright stole property and was given a waiver by Hust. (T. 325-326).

Schultz was recalled as a witness to clarify CX-7. He testified that the document dated August 14, 2009 is a waiver. (Tr. 349; CX-7). Schultz completed the waiver and submitted it to Long for approval. The waiver indicates that, in lieu of formal investigation, Complainant would have a 30-day record suspension for an infraction, which occurred in July 2009, with no days off and no probation. (Tr. 350; CX-7).

## IV. ISSUES

1. Did Complainant engage in protected activity under subsections (a)(1) and (a)(4) of 49 U.S.C. § 20109?

2. Did Respondent have knowledge of Complainant's alleged protected activity?

3. Did Complainant suffer any adverse unfavorable action?

4. Was Complainant's alleged protected activity a contributing factor in the alleged adverse unfavorable personnel action?

5. If Complainant meets his burden of entitlement to relief, did Respondent establish, by clear and convincing evidence, that it would have taken the same adverse action absent the alleged protected activity?

## V. CONTENTIONS OF THE PARTIES

Complainant contends he engaged in protected activity, and Respondent knew about the protected activity. He asserts that he suffered an unfavorable personnel action when Respondent terminated his employment. He argues that Respondent's prior PEPA policy allowed for consideration of injury history in determining whether to grant a leniency exception to an otherwise terminable offense. He argues that the prior PEPA policy was asserted in his case, and his previous injuries prevented him from receiving a leniency exception. He further argues that he has established a **prima facie** case and Respondent failed to produce clear and convincing evidence that the termination would have occurred regardless of the protected activity. He contends Respondent failed to present evidence supporting its assertion that every employee who stole property was dismissed.

Respondent contends Complainant reported three injuries with the assistance of his supervisors, and was not subject to any disciplinary proceedings or adverse action as a result. It does not dispute that Complainant engaged in protected activity by reporting the injuries or that his dismissal rises to the level of an adverse employment action. Instead, Respondent contends Gay and Heenan, the ultimate decision makers in the decision to terminate Complainant, had no knowledge of the three injuries Complainant reported. Further, Respondent asserts that Complainant's protected activities in no way contributed to his termination. Alternatively, Respondent argues it proved by clear and convincing evidence that it would have discharged Complainant even in the absence of his protected activity.

## VI. APPLICABLE PROVISIONS OF THE FRSA

Complainant alleges that Respondent violated the FRSA § 20109(a)(4), which provides:

> (a) In General-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 employee's 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) (2008) (emphasis added).

**VII. ELEMENTS OF FRSA VIOLATIONS AND BURDENS OF PROOF**

Actions brought under FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). See 49 U.S.C. § 20109(d)(2)(A)(i). Accordingly, to prevail, a FRSA complainant must demonstrate that: (1) his employer is subject to the Act, and he is a covered employee under the Act; (2) he engaged in a protected activity, as statutorily defined; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action.[2] See 49 U.S.C. § 42121(b)(2)(B)(iii); Rudolph v. National Railroad Passenger Corporation (AMTRAK), ARB No. 11-037, ALJ No. 2009-FRS-015, slip opinion @ 11 (ARB March 29, 2013); Clemmons v. Ameristar Airways Inc., et al., ARB No. 05-048, ALJ No. 2004-AIR-11, slip op. @ 3 (ARB June 29, 2007); Luder v. Continental Airlines, Inc., ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. @ 6-7 (ARB Jan. 31, 2012).

[2] In Hamilton v. CSX Transportation, Inc., ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013), the ARB found that the ALJ's legal analysis and conclusions of law on the three essential elements of a FRSA whistleblower case (protected activity, adverse action, and causation) were in accordance with applicable law. The ARB noted, however, that the ALJ and the parties had cited a fourth element, the employer's knowledge of the protected activity. Id. slip op. at 3. The ARB cited caselaw that provides that the final decision maker's "knowledge" and "animus" are only factors to consider in the causation analysis; they are not always determinative factors. Id. citing Staub v. Proctor, 131 S. Ct. 1186 (2011) (under a different anti-retaliation statute, the final decision-maker may have unlawfully discriminated where a subordinate supervisor proximately caused retaliation); Bobreski v. J. Givoo Consultants, Inc., ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 29, 2011) (remanded to the ALJ to reconsider under the totality of circumstances the respondent's potential influence on the final decision-maker's hiring choices).

The term "demonstrate" as used in AIR 21, and thus FRSA, means to "prove by a preponderance of the evidence." See Peck v. Safe Air International, Inc., ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. @ 9 (ARB Jan. 30, 2004); Brune v. Horizon Air Industries, Inc., ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. @ 13 (ARB Jan. 31, 2006)(defining preponderance of the evidence as superior evidentiary weight). Thus, Complainant bears the burden of proving his case by a preponderance of the evidence.

If Complainant establishes that Respondent violated the FRSA, Respondent may avoid liability only if it can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected behavior. See 49 U.S.C. §§ 20109(d)(2)(A)(i) and 42121 (b)(2)(B)(iii)(iv); Menefee v. Tandem Transportation Corp., ARB No. 09-046, ALJ No. 2008-STA-055, slip op. @ 6 (ARB Apr. 30, 2010) citing Brune, ARB No. 04-037, slip op. @ 13.

In view of the undisputed facts noted above, it is found that Respondent is a person within the meaning of the FRSA and is responsible for compliance with the employee protection provisions of FRSA. It is also established that Complainant was a covered employee of Respondent under the FRSA. No evidence to the contrary was introduced at the hearing.

As outlined in the post-hearing briefs of the parties, the issue to be decided is whether Complainant's reporting of three work-related injuries in 2011 were a contributing factor in Respondent's decision to terminate Complainant.

**A. Credibility**

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 1992-ERA-19 @ 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his/her evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe . . . Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

Generally, I found Complainant's testimony to be consistent and credible. I also found Risdon, Gay, Heenan and Schultz to be sincere, unbiased and credible witnesses. The consistency and believability of their testimony is more fully analyzed below.

**B. Protected Activity**

By its terms, FRSA defines protected activities as including acts done "to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee." 49 U.S.C. § 20109(a)(4).

The OSHA regulations regarding recording and reporting occupational injuries and illnesses provides that employers "must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness." 29 C.F.R. § 1904.5(b)(5). An injury or illness is considered to be a pre-existing condition if "the injury or illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment." 29 C.F.R. §§ 1904.5(b)(2)(ii) and 1904.5(b)(5). A pre-existing injury or illness is considered to be "significantly aggravated" when the exposure at work causes:

> (iii) one or more days away from work, or days of restricted work, or days of job transfers that otherwise would not have occurred but for the occupational event or exposure
>
> (iv) medical treatment in a case where no medical treatment was needed for the injury or illness before the workplace event or exposure, or a change in medical treatment was necessitated by the workplace event or exposure

29 C.F.R. § 1904.5(b)(4).

In brief, Respondent does not dispute that Complainant engaged in protected activity by reporting the following incidents: his diagnosis of carpal tunnel syndrome in his right upper extremity on January 6, 2011; his diagnosis of carpal tunnel syndrome in his left upper extremity on February 3, 2011; and a head bump suffered while backing out from underneath a freight car on August 3, 2011.

Based on the foregoing, I find and conclude that Complainant engaged in protected activity by reporting his right carpal tunnel syndrome on January 6, 2011, his left carpal tunnel syndrome on February 3, 2011 and his head bump on August 3, 2011.

**C. Alleged Unfavorable Personnel Action**

By its terms, FRSA explicitly prohibits employers from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee, if such discrimination

is due, in whole or part, to the employee's lawful, good faith act done, or perceived by the employer to have been done to provide information of reasonably believed unsafe conduct, notifying Respondent of a work-related illness, or denying, delaying or interfering with Complainant's request for medical treatment or care.

In determining whether the alleged conduct is an unfavorable personnel action, the Supreme Court's Burlington Northern & Sante Fe Railway Co. v. White, 548 U.S. 53 (2006) decision as to what constitutes an adverse employment action is applicable to the employee protection statutes enforced by the U.S. Department of Labor, including the AIR 21, incorporated into the FRSA. Melton v. Yellow Transportation, Inc., ARB No. 06-052, ALJ No. 2005-STA-00002 (ARB Sept. 30, 2008). The Court stated that to be an unfavorable personnel action the action must be "materially adverse" meaning that it "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Burlington Northern, 548 U.S. at 57.

Respondent does not dispute that Complainant's dismissal from employment rises to the level of an adverse employment action under the FRSA. Therefore, I find Complainant has demonstrated by a preponderance of the record evidence that he was subjected to adverse action by being fired by Respondent on November 18, 2011.

**D. Contributing Factor**

The FRSA requires that the protected activity be a contributing factor to the alleged unfavorable personnel actions against Complainant. A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." Ameristar Airways, Inc. v. Admin, Rev. Bd., 650 F.3d 563, 567 (5th Cir. 2011) (quoting Allen v. Admin. Rev. Bd., 514 F.3d 468 (5th Cir. 2008).

The Board recently observed in Rudolph v. National Railroad Passenger Corporation (AMTRAK), supra @ 16, that "proof of causation or 'contributing factor' is not a demanding standard. To establish that his protected activity was a "contributing factor" to the adverse action at issue, the complainant need not prove that his or her protected activity was the only or the most significant reason for the unfavorable personnel action. The complainant need only establish by a preponderance of the

evidence that the protected activity, "alone or in combination with other factors," tends to affect in any way the employer's decision or the adverse actions taken. Klopfenstein v. PCC Flow Techs., ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. @ 18 (ARB May 31, 2006).

**1. Temporal Proximity**

Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. Robinson v. Northwest Airlines, Inc., ARB No. 04-041, ALJ No. 2003-AIR-22, slip op. @ 9 (ARB Nov. 30, 2005). However, where an employer has established one or more legitimate reasons for the adverse actions, the temporal inference alone may be insufficient to meet the employee's burden to show that his protected activity was a contributing factor. Barber v. Planet Airways, Inc., ARB No. 04-056, ALJ No. 2002-AIR-19 (ARB Apr. 28, 2006).

Complainant engaged in protected activity by reporting his right carpal tunnel syndrome on January 6, 2011, his left carpal tunnel syndrome on February 3, 2011 and his head bump on August 3, 2011. He was caught stealing scrap metal on September 23, 2011, and was terminated by Respondent on November 18, 2011, after a full investigation and hearing. I find that the temporal proximity between Complainant's protected activity and his termination may be sufficient circumstantial evidence to prove that the protected activities contributed to the adverse actions. However, I find, for the reasons discussed below, this circumstantial evidence fails to establish the requisite element of causation because it is overwhelmed by the direct evidence of legitimate intervening bases for the dismissal. I further note that the record is devoid of any animus directed toward Complainant because of his alleged protected activity.

**2. Respondent's Knowledge of the Protected Activity**

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

Where a complainant's supervisor had knowledge of his protected activity and had substantial input into the decision to fire the complainant, even though the vice president who actually fired the complainant did not know about the protected activity, such knowledge could be imputed to Respondent. Kester v. Carolina Power & Light Co., ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003).

Respondent contends Gay and Heenan, the ultimate decision makers in the decision to terminate Complainant, had no knowledge of the three injuries Complainant reported. Respondent asserts Gay only had knowledge of Complainant's August 2011 reported injury to the extent that he was charged with oversight of the federal protocols regarding reporting of injuries.

Gay and Heenan were two of the officers involved in the decision to terminate Complainant. It is not disputed that Gay was aware of Complainant's August 2011 reported injury. Gay testified he did not review Complainant's employee transcript. Heenan testified he did not review Complainant's employee transcript, which lists his three work injuries. I find that this evidence is insufficient to establish that Heenan had knowledge of the injuries. Gay admitted that he had personal knowledge of Complainant's August 2011 injury. In accordance with Kester, I find that because Gay had knowledge of Complainant's August 2011 protected activity and had substantial input into the decision to fire Complainant, such knowledge can be imputed to Respondent even if Heenan did not know about Complainant's protected activity.

**3. Respondent's PEPA Policy**

Complainant argues that Respondent's prior PEPA policy allowed for consideration of injury history in determining whether to grant a leniency exception to an otherwise terminable offense. He alleges that the prior PEPA policy was asserted in his case, and his previous injuries prevented him from receiving a leniency exception.

Hennan testified that the probation period of the PEPA policy associated with Level S cases changed in 2012. The change involved redefining the definition of a "good work record" from "five years of service, and having been both reportable injury free and discipline free" to "five years of service, and being five years discipline free." He testified

that there were no other substantive changes to the PEPA policy in 2012. The provision that changed had no relevance to Hennan's recommendation because Complainant was charged with a stand-alone offense not a Level S offense. His recommendation in Complainant's case would have been the same under the 2012 PEPA policy. Complainant offered no other evidence to contradict Hennan's testimony. Accordingly, I find Complainant has not established that under Respondent's prior PEPA policy he would have been granted leniency but for his reported injuries.

**4. Complainant's PPI Rating**

During the formal hearing, Complainant asserted that his PPI rating was considered in his dismissal. However, he did not present any evidence to support this assertion. Risdon testified there is a general association between PPI numbers and injuries. The personnel record does not specify the PPI rating. Risdon testified that PPI points were never a part of the decision to investigate Complainant's actions and played no part in the Respondent's decision. He did not consider PPI points and did not know the number of PPI points assigned to Complainant. Gay testified he was not involved in assessing PPI points to Complainant. He did not look at or consider Complainant's PPI ratings in his decision to initiate a formal investigation or his decision to terminate Complainant. Heenan testified that PPI points did not play any part in the decision to terminate Complainant. Heenan did not rely upon PPI points and had no knowledge of Complainant's PPI points, which were not relevant in this matter. Accordingly, I find Complainant has not established that his PPI rating was considered in his dismissal.

**5. Disparate Treatment**

Complainant also asserted that he was treated differently than other employees who were caught stealing from Respondent. He contends Fredrick Wright was given a waiver after stealing property. Schultz testified that Fredrick Wright was charged with theft of valves and brass on January 24, 2007. Fredrick Wright's wife was pregnant and pleaded for his job. Hust, the General Car Foreman in Pasco before Risdon, had pity on Fredrick Wright and granted a waiver. Hust was not employed by Respondent on September 23, 2011, and he was not involved in Complainant's investigation. The only decision maker involved in Fredrick Wright's waiver was Hust, who retired in 2010.

The only evidence presented regarding differential treatment of employees who stole from Respondent was the testimony regarding Fredrick Wright. Heenan testified that he recommended dismissal in the 11 theft and dishonesty cases he reviewed in 2011. Gay testified he was the conducting hearing officer in the case of Mark Wright, a machinist who was dismissed for theft and dishonesty after removing scrap metal from Respondent's facility in 2011 or 2012. The decision makers in Complainant's dismissal were not involved in Fredrick Wright's waiver. There was no evidence that the decision makers in Complainant's case treated other employees who committed theft differently from Complainant. Accordingly, I find Complainant has not established by a preponderance of the evidence that he was disparately treated.

**6. The Dismissal Letter**

The only direct evidence Complainant submitted supporting his contention that his protected activity was a contributing factor in Respondent's decision to terminate his employment is the November 18, 2011 dismissal letter.

The dismissal letter terminated Complainant "effective immediately from employment with BNSF Railway Company for misconduct and dishonesty while attempting to thieve material belonging to a BNSF customer while said material was on BNSF property contained in freight car GONX 330143...In assessing discipline, consideration was given to [Complainant's] personnel record and the discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA)." The personnel record referenced in the dismissal letter includes records of his past injuries. However, both Gay and Heenan credibly testified that the dismissal letter was based on a computer-generated template, and they did not consider Complainant's personnel record or his injuries. The dismissal letter does not directly reference Complainant's injuries, and Complainant provided no evidence contradicting Gay and Heenan's assertion that the letter was based on a template.

**7. The Legitimacy Reasons for Employer's Actions**

The Board has held that it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action in the course of concluding whether a complainant has demonstrated by a preponderance of the evidence that protected activity contributed to the alleged adverse action. Brune v. Horizon Air Industries, Inc., ARB No. 04-037, ALJ No. 2002-AIR-

8, slip op. @ 14 (ARB Jan. 31, 2006) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). Proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation because once the employer's justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action. See Florek v. Eastern Air Central, Inc., ARB No. 07-113, ALJ No. 2006-AIR-9, slip op. @ 7-8 (ARB May 21, 2009) (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147-48 (2000)). A complainant is not required to prove discriminatory intent through direct evidence, but may satisfy this burden through circumstantial evidence. Douglas v. Skywest Airlines, Inc., ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-00014, slip op. @ 11 (ARB Sept. 30, 2009). Furthermore, an employee "need not demonstrate the existence of a retaliatory motive on the part of the employe[r] taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel actions." Marano v. Department of Justice, 2 F.3d 1137 (Fed. Cir. 1993).

Respondent has presented overwhelming evidence regarding the legitimacy of the decision to terminate Complainant. Complainant admitted that he removed the scrap metal, and he was not assigned to complete any work on the car which contained the scrap metal. During the investigative hearing, Complainant admitted he violated MSR S-28.6. Complainant stated he understood that he did wrong by removing materials, which was in violation of the theft rule or dishonesty. Both Gay and Heenan testified that Complainant's actions rose to the level of a "stand-alone violation" under the PEPA policy. They noted that Complainant's actions were subject to two of the stand-alone violations listed in Appendix B: (1) "theft, or any other fraudulent act, which may be evidenced by the intent to defraud BNSF or by taking of BNSF monies, or property not due" and (2) "dishonesty about any job-related subject."

Complainant has established that the dismissal letter mentions his personnel record, one decision maker had limited knowledge of his protected activity and there is a degree of temporal proximity between the protected activities and the adverse action. However, there were also significant legitimate intervening bases for his dismissal, namely the Complainant's theft. Because Complainant's theft constitutes a legitimate intervening basis for which the preponderance of the evidence is overwhelming, I conclude the temporal proximity between the Complainant's protected activities and adverse action does not establish causation supportive of discrimination. I also find

that the decision makers' knowledge of his protected activity and the dismissal letter are not sufficient evidence to show Complainant's protected activities were contributing factors in his termination.

**E. Clear and Convincing Evidence**

The "clear and convincing evidence" standard is the intermediate burden of proof, in between "a preponderance of the evidence" and "proof beyond a reasonable doubt." Araujo v. New Jersey Transit Rail Operations, Inc., 708 F.3d 152, slip op. at p. 16 (3rd Cir. Dec. 14, 2012). To meet the burden, Respondent must show that "the truth of its factual contentions are highly probable." Colorado v. New Mexico, 467 U.S. 310, 316 (1984).

Assuming, **arguendo**, Complainant had shown any protected activity to be a contributing factor for his dismissal, Respondent has satisfied its burden of rebuttal by showing through clear and convincing evidence it would have taken the same adverse employment action regardless of Complainant's engagement in protected activity. As discussed above, the evidence clearly establishes that Complainant's employment was terminated because he stole scrap metal. Accordingly, I find that Respondent has demonstrated by clear and convincing evidence that it would have taken the same adverse actions absent Complainant's protected activities.

## VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find and conclude Respondent did not unlawfully discriminate against David Stanley because of his activity and, accordingly, David Stanley's complaint is hereby **DISMISSED.**

**ORDERED** this 9th day of December, 2013, at Covington, Louisiana.

Digitally signed by LEE J. ROMERO JR
DN: CN=LEE J. ROMERO JR, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

LEE J. ROMERO, JR.
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party’s legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1982.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).