UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 14 December 2016

CASE NO.: 2014-FRS-00043

In the Matter of:

JOHNNY S. PEREZ,
Complainant,

v.

BNSF RAILWAY COMPANY,
Respondent.

Before: Jonathan C. Calianos, Administrative Law Judge

Appearances:

Daniel J. Cohen, Esq., Law Offices of Daniel J. Cohen, St. Louis, Missouri, for the Complainant

Paul S. Balanon, Esq. and Jacob Godard, Esq., BNSF Railway Company, Fort Worth, Texas, for the Respondent

DECISION AND ORDER

I. STATEMENT OF THE CASE

This case arises from a complaint filed by Johnny S. Perez (the "Complainant" or "Perez") with the Department of Labor's Occupational Safety and Health Administration ("OSHA") against BNSF Railway Company ("Respondent" or "BNSF") under the employee protection provisions of the Federal Rail Safety Act (the "FRSA" or the "Act"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 121 Stat 266 (Aug. 3, 2007).

The FRSA complaint filed with OSHA alleged that BNSF unlawfully retaliated against Perez for reporting a workplace injury and for requesting time off to undergo surgery. On December 31, 2013, the Secretary of Labor ("Secretary"), acting through his agent, the Regional Administrator for OSHA, found that there was no reasonable cause to find BNSF violated the FRSA. Perez objected to the Secretary's finding and requested a *de novo* hearing before the Office of Administrative Law Judges ("OALJ").

A hearing was held before me in Kansas City, Missouri over two trial days: March 1, 2016 and March 2, 2016. At the hearing, the parties were afforded the opportunity to present evidence and arguments. Formal papers were admitted into evidence as Administrative Law Judge Exhibits ("ALJX") 1-26, and the parties' documentary evidence was admitted as Complainant's Exhibits ("CX") 1-12 and 17, Respondent's Exhibits ("RX") 1-9, and Joint Exhibits ("JX") 1-8 and 10-12.[1] Testimony was heard from Perez, BNSF Director of Employee Performance Derek Cargill, BNSF General Foreman John Stockman, local chairman for the machinist's union Kenneth Krause, and BNSF General Foreman John Reppond. The record is now closed, and the parties have submitted post-hearing briefs ("Compl. Br.," "Compl. Prop. Find. of Fact and Concl. of Law," and "Resp. Br.") and reply briefs ("Compl. Rep. Br." and "Resp. Rep. Br.").

II. STIPULATIONS AND ISSUES PRESENTED

The parties have stipulated to the following facts in this matter:

1. Complainant was an employee protected under the provision of the FRSA;

2. Respondent was an employer subject to the provisions of the FRSA;

[1] In its post-hearing brief, BNSF includes a "Motion to Strike/Exclude Evidence," requesting that evidence of Perez's purported conversations with BNSF nurse manager Natalie Jones "be stricken or not relied upon in this case, or such other relief the Court deems just and proper under these circumstances." Resp. Br. at 8-9. According to BNSF, Perez testified that he made notes of his conversations with Jones which were not prepared under instructions of counsel, but Perez has not provided BNSF with these notes, thus prejudicing BNSF in its preparation of this case "and certainly with respect to hearsay testimony offered by Perez concerning Putative conversations with Jones." *Id.* at 8. In his reply brief, Perez states that this evidence was not produced based on an invocation of privilege that BNSF elected not to challenge prior to trial; that BNSF now believe the trial records demonstrate the invocation of privilege was ill-founded does not excuse its failure to seek to compel discovery at the appropriate time. Compl. Rep. Br. at 4. Although BNSF counsel raised the issue of Perez's notes at the hearing on Perez's cross-examination, the issue appeared to be dropped. BNSF had the opportunity to make a request to compel the production of Perez's notes, but failed to do so. BNSF also could have presented Jones as a witness, but chose not to do so. Therefore, BNSF's request for the exclusion of evidence related to Perez's conversations with Jones is denied.

3. Complainant began working for Respondent on March 10, 1993, and remains employed by Respondent to this date;

4. Complainant was employed as a machinist at BNSF's Murray Yard in North Kansas City, Missouri;

5. On October 9, 2012, BNSF issued a Notice of Investigation to Complainant, charging him with violations of Respondent's Rule 28.2.5 and Respondent's Rule 28.6;

6. On April 7, 2013, Complainant filed a complaint with OSHA;

7. On December 31, 2013, OSHA dismissed Complainant's complaint.

ALJX 26.

The issues before me are: (1) whether Complainant engaged in protected activity; (2) whether Complainant suffered adverse action; (3) whether Complainant's protected activity was a contributing factor in the adverse action; and (4) whether Respondent would have taken the same adverse action against Complainant absent any protected activity.

Based on the record as a whole, I find that Perez's protected activity of reporting a work-related injury was a contributing factor in BNSF's decision to issue him a charge letter and to hold an investigative hearing. I further find that BNSF failed to prove that it would have taken the same adverse action in the absence of the protected activity, and thus Perez is entitled to relief under the FRSA.

III. BACKGROUND

Perez testified that on August 12, 2010, while trying to prevent a door from falling off a train and onto another BNSF employee, he felt a "snap in his hamstring and sharp, sharp pain in my hamstring area, and like a burning sensation" in his right leg. TR 41-42. He tried to "walk it off" but the symptoms did not go away, so about 45 minutes to 1 hour after the incident, Perez reported the injury to his supervisor Dan Parrish. TR 42.

Perez testified that he told Parrish that he wanted to go to the emergency room and then to his personal physician for treatment, to which Parrish initially responded "that was fine." TR 42. However, Parrish later told him "I can't let you do that" and handed him a phone with

Natalie Jones, a Nurse Case Manager and a managing employee of BNSF,[2] on the other end. TR 43. Jones told Perez that: (1) his group health insurance through his employment with BNSF would not cover his treatment; (2) he "needed to go to" the North Kansas City Occupational Clinic ("the clinic") instead, where she had already arranged for him to be treated; and (3) he would not be able to see his personal physician "until you've been released from the company doctor." TR 43-47, 114. Perez stated that he and other employees refer to the clinic as the "company clinic" and to Dr. Ryan as the "company doctor" because "[t]hat's who the company has always used in previous incidences with other employees. That's where they send them. I don't know what the business dealing is, but I would assume, or probably assume they're contracted by the Railroad." TR 47, 50-51. Parrish took Perez to the clinic for treatment. TR 47.

Perez testified that when he returned to the shop after leaving the clinic, he completed a personal injury report form[3] and told Parrish he wanted to clock out and go home because he "was hurting pretty good." TR 48. However, Parrish would not let him leave and instead required him to participate in a physical reenactment of the incident that led to the injury. TR 48. Feeling "coerced and pressured into staying," Perez was made to "physically pick up the door, handle the door, show them my body position while holding . . . the door," which weighed 75 pounds. TR 49, 129. Then, other employees conducted the reenactment while Perez observed and described the position of his body and the door and how the incident happened. TR 50. Parrish took photos of the reenactment but later deleted them. TR 49-50.

Perez testified that on his way back to the shop after leaving the clinic, he noticed a "significant amount of stiffness" in his back. TR 47-48. The next day, on August 13, 2010, he told Dr. Ryan about his back pain and that he remembered "a hard pull to my lower back" when "the door pulled me over and tore my hamstring." TR 52. During the course of his treatment with Dr. Ryan, Perez attempted to discuss his back condition about three more times; however, Dr. Ryan repeatedly told him to "give it a little time" and that it was not necessary to see a specialist for his back or to undergo an MRI. TR 54-56.

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[2] At the hearing, BNSF counsel disputed that Jones was a BNSF employee but presented no evidence contradicting Perez's statement. *See* TR 44.

[3] In the injury report form, Perez described his injury as a "strained ham-string right side." JX 1.

Perez stated that, given Jones's statements that his insurance would not cover the injury and he could not see a doctor of his own choosing until the company doctor released him, he believed that when telling Dr. Ryan about his symptoms, he was communicating to BNSF. TR 51-52. Perez understood that BNSF was getting information about his injury and treatment from Ryan through Jones; he assumed the information he provided to Ryan "was being relayed to the company nurse, Nurse Natalie Jones" and that Ryan "was working in letting Nurse Natalie know how my progression was going." TR 56-57. 133. Consequently, by bringing his potentially work-related back injury to the attention of Ryan, Perez believed he had reported it to BNSF. TR 56, 123, 133. Perez did not inform a regular BNSF employee of his work-related back injury until September 17, 2012. TR 133-135.

Perez testified that he last visited the clinic on September 10, 2010 and was released by a nurse practitioner for full duty work. TR 58. After Perez left the examination room, a receptionist handed him a phone with Nurse Jones on the other end, which was consistent with Perez's assumption that Jones was receiving information about him from the clinic. TR 56-59. Perez told Jones that he had been returned to full duty, but indicated he would prefer another couple weeks of physical therapy for his hamstring injury. TR 59. Jones told Perez that she would confer with Reppond, but she did not think it would be a problem. TR 59. Jones never followed up with Perez to schedule any further physical therapy. TR 59.

On August 24, 2010, Perez provided a recorded statement to BNSF Claims Manager Randy Nystul regarding the August 12, 2010 incident and the injury to his hamstring. JX 8. Perez testified that he contacted Nystul again on September 24, 2010 because other employees told him he needed to let Nystul know he had returned to work full duty. TR 73. According to Perez, when he called Nystul on this second occasion, Nystul thought Perez "was calling about instigating a claim or settling a claim." TR 74. Nystul told Perez, "Well, it takes about a year or a year and a half to file a claim" and "let's let some time go by and see if anything else transpires, and I'll be giving you a call." TR 74.

After he was released to full duty, Perez sought treatment for his leg and back injuries from his primary care physician and from an orthopedic specialist, Dr. Reardon. TR 60-62. Perez did not apprise BNSF of further treatment from his personal physicians for his work-related injuries until September 17, 2012. TR 68. Perez testified that if Jones had instructed him

to keep BNSF apprised, he would have done so, and since he had not heard from Jones or Nystul since his last conversations with them, he assumed he was on his "own trying to get…[his] back fixed." TR 68, 136.

Perez testified that after he reported his hamstring injury on August 12, 2010, "the whole demeanor [at BNSF] had changed. They weren't as friendly." TR 80. General Foreman Earl Bunce, for example, "threatened to write [Perez] up for stuff" and, at one point, went through Perez's tool box "looking for contraband." TR 81. Four days after Perez reported the injury, Bunce "made an attempt to make me look bad" in front of coworkers by announcing that, because of Perez's injury, "we were back to 'square zero,'" meaning "we would lose our safety dinner," which is a dinner for employees as a reward for avoiding injuries. TR 81. Bunce also "shot me a glance of disgust -- like anger and disgust like I had, you know, committed a serious murder or something, and I -- just looking at me like I was scum of the earth, before he proceeded to open the whole conversation up to the rest of the people." TR 81-82. Prior to the injury, Perez did not have any issues with Bunce. TR 82.

On September 17, 2012, Perez sought a medical release from BNSF for back surgery, which was scheduled the next day. TR 68-69. Perez testified that he waited to fill out medical leave paperwork because "I wanted to make sure that I was able to pass the pre-screening for surgery, and had went that previous day and got the clear for surgery." TR 69. Accompanied by local union chair, Kenneth Krause, Perez asked a BNSF office administrator for an on-duty injury medical leave form, and stated that the surgery was related to the August 12, 2010 incident. TR 69-70.

Perez and Krause then met with Foreman Reppond, who had to approve of the leave. TR 70. Perez's and Reppond's accounts of their conversation are in conflict. According to Perez, he told Reppond that he needed approval of medical leave for his back surgery and that his back injury related to the August 2010 incident. TR 66, 71. Reppond said "So this is associated with your injury back in 2010. That's been quite a long time ago" and asked Perez "have you talked to anybody about your back problem or issues?" TR 71. Perez told Reppond that he "tried to tell them, the company, the company doctor [about his work-related back injury] but they weren't listing. He didn't take me serious or he didn't care, but I made an attempt to let them know something was going on." TR 71. Reppond told Perez "that's not a company doctor.

That's just who we use," and asked Perez if he "called the claims agent about this." TR 71-72. Perez answered "No" and explained that he last talked to Nystul on September 24, 2010 shortly after returning to work full duty and that Nystul said at the end of that conversation "don't call me, I'll call you." TR 71-75. During this interaction, Perez states he never told Reppond that Nystul refused to take his statement. TR 77.

Reppond's version of the September 17, 2012 conversation differs from Perez in one distinct manner. Reppond heard Perez say that Nystul refused to take any statement regarding Perez's back injury. Reppond elaborated that he first learned of Perez's back problem at the September 17, 2012 meeting with Perez. TR 409. He said that Perez "talked about telling the company doctors about [his back injury]." TR 404. Reppond replied that BNSF does not have company doctors, and asked if "he reported [the back injury] to any company official." TR 404. That is when Perez indicated that "he tried to talk to Randy Nystul but Randy Nystul told him he didn't need to talk to him." TR 404. Nystul's take away from the brief conversation with Perez was that sometime between September 2010 and September 2012, Perez attempted to have a conversation with Nystul about his back injury, and Nystul refused to speak with Perez or take his statement. TR 403, 440-441.

Reppond testified that he was surprised by Perez's comment that Nystul refused to take his statement, and after his meeting with Perez, he contacted Nystul, who informed him that "he had not had any conversation with Perez" and "he had no recollection of ever talking to" Perez. TR 405, 407, 441. Armed with what he perceived to be a conflict between Nystul and Perez, Reppond believes he brought the matter to the attention of shop superintendent Dennis Bossolono.[4] TR 405. "[W]ithin two or three days," Bossolono advised Reppond that an investigation against Perez should go forward because "there was a distinct – two different opinions or two different comments" in that "Perez stated that he had spoke with Mr. Nystul, and Mr. Nystul was adamant that he had not spoke to him." TR 410. At that point, Reppond made a

[4] Reppond testified that it was normal practice to speak with Bossolono when there was an issue with an employee because "he was a superintendent of the shops and he has to be involved in everything that we do, so it's my responsibility to keep him up to speed on everything." TR 408. While he does not know "exactly what he did," he also "normally . . . would've called the medical department and see if they knew anything, checked with Randy again" but he does not recall getting anything specific from the medical department or Nystul. TR 405, 409.

recommendation to the Employer to initiate an investigation against Perez for potential rules violations. *See* TR 402.

Reppond assigned Stockman as the conducting officer of the investigation, as Reppond was the only other conducting officer and he could not hold the investigation in Perez's case. TR 410-411. Asked to clarify who told Stockman to conduct the investigation, Reppond stated, "I would have taken the information to Bossolono. He would have made his ruling, and then I would have naturally give[n] the directive to Mr. Stockman to hold the investigation but the decision to hold the investigation would have been done by Mr. Bossolono . . . ."[5] TR 442.

Reppond explained that his role in the investigation was "to bring forward what I knew about the event" to support the charge. TR 442. Reppond prepared a folder containing documents relevant for the investigation, including notes of his meeting with Perez, which he sent to himself by email after his meeting with Perez, and provided the folder to Stockman for his review. TR 402, 410-411. In his notes, Reppond wrote, in part, that Perez "mentioned that he tried to contact Claims Manager Randy Nystul but was told by Randy that he did not need to talk to him anymore." JX 2.

While Perez was at home recovering from the back surgery, he received a letter from BNSF dated October 9, 2012 ("the Notice of Investigation"), written by Stockman, stating:

> An investigation has been scheduled . . . in connection with your alleged late reporting of an alleged back injury that you stated occurred on August 12, 2010, and your alleged dishonesty when you alleged that a BNSF Claims Manager refused to take your statement. The date BNSF received first knowledge of this alleged violation is September 17, 2012.

TR 84, 87; JX 2. Stockman testified that he made the determination to issue the Notice of Investigation when he read the information in the folder provided by Reppond, and he made the determination to charge Perez with late reporting and dishonesty based on the information contained in the folder. TR 308-309. He charged Perez with late reporting because Perez

[5] OSHA's summary of the statement Reppond gave to OSHA makes no mention of Bossolono and states: "Once Complainant came to Reppond, Reppond did some legwork, and when Reppond couldn't match things up, the decision was made by Reppond and Stockman to hold the investigation." TR 432. At his deposition, Reppond testified, "I would have said [to Stockman] this is what we've got, these are the potential rule violations, and I want you to hold the investigation." TR 433. By using the words "hold the investigation," Reppond clarified that "We're going to issue a Notice of Investigation. I want you [Stockman] to hold the hearing." TR 433.

"associated it with his previous injury for his back, now it's his leg, but he associates it with the same injury for the same event." TR 371. According to Stockman, at the time Perez understood that his back injury was associated with the August 12, 2010 incident, Perez was required to update his medical status. TR 366-367. Perez would not have had to file a new injury report form because "this information's already been gathered," but he "could contact medical care management, he could contact any member of management with BNSF and let them know that his situation has changed." TR at 367. Clarifying why he wrote in the Notice of Investigation that a BNSF Claims Manager refused to take his statement, Stockman explained he interpreted the statement "he did not need to talk to him anymore" in Reppond's notes as synonymous with "I'm not going to take your statement." TR 392.

Under BNSF's Policy for Employee Performance Accountability (the "discipline policy" or "PEPA"), a dishonesty violation can result in dismissal, even for an employee with no discipline history. TR 249. A late reporting violation is considered a "Level S" (serious) violation, for which the standard discipline is a 30-day suspension with a 36-month review period. TR 250. BNSF is required by the collective bargaining agreement to hold an investigation prior to imposing discipline. TR 191.

After several postponements made at Perez's request, the investigative hearing took place on January 9, 2013. TR 88. Stockman, the hearing officer, described his role as "allow[ing] for the orderly introduction of testimony in regards to an alleged event, alleged rule violation or potential rule violation. I turn the tape recorder on and off; I make sure everything's held within the scope of the Notice of Investigation." TR 307. He compared his role to that of a stenographer and explained that, in his view, the hearing officer is "neither the judge or the jury or the executioner. I just simply put the facts on the recording, make a transcription of it, and then read it and make a recommendation." TR 394-395. Perez, Reppond, Bunce, and Nystul testified at the investigative hearing. *See* JX 4. During this testimony, Reppond claimed that Perez did not comply with BNSF's dishonesty rule because Perez "stated that … he had been in contact with Claims Manager Nystul, and he had not been in touch with him." *Id.* at 61. Perez testified that he complied with the dishonesty rule because he "never made the statement … that Mr. Reppond said I had made. … I never did state that Randy Nystul wouldn't take the

statement from me. Uh, he's already done that on August the 24th of 2010." *Id.* at 68. With regard to Reppond's email note that Perez said he was "told by [Nystul] that he did not need to talk to him anymore," Nystul testified that he "may have called Mr. Perez after, after his injury to talk to him about … if he wanted to settle his claim or if he wanted to wait but … I don't recall that specific statement to him." *Id.* at 32-33. Nystul also testified that he recalls taking the statement of Perez's injury on August 24, 2010 and he "may have talked to [Perez] one subsequent time to that to see if he was . . . [r]ecovered or ready to settle his claim or whatever, but I have no records other than that statement." *Id.* at 35-36.

Stockman found the charges of dishonesty and late reporting proven and recommended Perez's dismissal. CX 1; TR 315-317. Stockman explained he found the late reporting charge proven because "It was the simple fact that there was a two-year time period or span in between [the] injuries [to his hamstring and to his back]." TR 316. The dishonesty charge was proven because Perez did not dispute that he told Reppond Nystul refused to take his statement, and Stockman found Nystul's "testimony to be more credible than Mr. Perez's" on the issue of whether Nystul had refused to take Perez's statement because "when [Perez] said that Nystul never would take that statement from him, that's Nystul's job, that's his responsibility; what would be Nystul's motive, was my thinking." TR 316, 346-359.

After the investigative hearing, Cargill reviewed the transcript and exhibits. CX 1; TR 180. Cargill's responsibility was to oversee the discipline policy for all scheduled employees at BNSF; before dismissing or suspending an employee for more than 30 days, a manager was required to communicate with Cargill or someone on his team to make sure they are in compliance with the PEPA. TR 181. Cargill concluded that there was insufficient evidence to prove the dishonesty charge,[6] and although Perez violated the rule on late reporting under a "strict interpretation" of the rule, there were mitigating factors: he reported the injury to his hamstring on the day of the August 10, 2010 incident and he had close to twenty years of service

[6] Cargill explained that there was insufficient evidence to prove the dishonesty charge because Perez "was charged with dishonesty in connection with his statement that Mr. Nystul told him that he did not need to take his statement, and that, to me, was inconsistent with Mr. Reppond's written statement" and "there were some areas in Mr. Nystul's testimony where he was less than clear. Specifically, he was asked about how many times he had a conversation with Mr. Perez, and he – he seemed a little unclear of that." TR 195-196.

with no discipline on his record. TR 195-197. Cargill also took into consideration that "there was, according to Mr. Perez, some communication to either Nurse Jones or to the doctor," which "should be considered a mitigating factor." TR 258. Believing Perez "deserved the benefit of the doubt," Cargill, after consulting with BNSF's Law Department, recommended no discipline be issued. TR 197. Bossolono, the ultimate decisionmaker, agreed with Cargill's determination. TR 197, 318. Reppond testified that he agreed with the determination not to issue discipline because "Nystul's testimony was pretty weak and there was nothing substantial that would prompt us to issue discipline." TR 413.

Stockman issued a letter to Perez dated January 24, 2013, stating, "As a result of investigation . . . no discipline will be assessed." EX 5. Perez returned to work on April 4, 2013. TR 96. Perez lost no pay or seniority or benefits. TR 319.

Before reporting the injury, Perez never had a disciplinary charge letter issued to him in the first seventeen and a half years of his career. TR 96. Since returning to work, Stockman has issued Perez two disciplinary charges, one for being absent without leave, even though Perez had received permission from a supervisor to take the day off. TR 96-97. Perez testified that when his supervisor tried to notify Stockman of his responsibility for the mistake, Stockman said he would proceed with the charge anyway. TR 173. Stockman denied making that statement and testified that he "certainly wouldn't have gone to an investigation" under these circumstances although a "notice may've been issued;" he would have dropped the investigation right away upon learning of the mistake. TR 38-381. Both matters were dropped before they got to investigative hearings. TR 97. At no time during or after Perez's September 17, 2012 meeting with Reppond did anyone at BNSF request that he supplement his original injury report and add information related to his work-related back injury. TR 164-165.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 20109 of the FRSA prohibits railroad carriers engaged in interstate or foreign commerce or its officers or employees from discharging, demoting, suspending, reprimanding or in any other way discriminating against an employee, in whole or part, for engagement in activity protected by the FRSA. The FRSA whistleblower provision incorporates the

administrative procedures found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121. *See* § 20109(d)(2)(A)(i). Therefore, complaints under the FRSA are analyzed under the legal burdens of proof outlined in the AIR 21. *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013).

The burden-shifting framework set forth in AIR 21 requires a complainant to prove by a preponderance of the evidence[7] 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.*, ARB No. 10-114, ALJ No. 2009-FRS-00009, PDF at 5 (ARB Feb. 29, 2012) (*citing* 49 U.S.C.A. § 42121(b)(2)(B)(iii); *Luder v. Cont'l Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-00009, slip op. at 6-7 (ARB Jan. 31, 2012)); *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-00012, PDF at 5-6 (ARB Oct. 26, 2012).

If a complainant proves that his protected activity contributed to the adverse action, the employer may avoid liability if it "demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity]." 49 U.S.C. §§ 42121(b)(2)(B)(iv), 20109(d)(2)(A)(i); *see also* 29 C.F.R. § 1982.104. If the employer does so, no relief may be awarded to the complainant. 42 U.S.C. § 42121(b)(2)(B)(iv). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-00052, PDF at 5 (ARB Jan. 31, 2011) (*quoting Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, slip op. at 14 (ARB Jan. 31, 2006)).

A. Subject-matter Jurisdiction

Before addressing the burden-shifting framework, I must address BNSF's argument that the Court lacks subject matter jurisdiction to resolve this matter. Specifically, BNSF argues that

[7] The "[p]reponderance of the evidence is the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, PDF at 13 (ARB Jan. 31, 2006) (internal quotation marks omitted) (*quoting Black's Law Dictionary* 1201 (7th ed. 1999)).

"because the propriety of whether to issue the notice of investigation and to hold the investigation are subject to and inextricably intertwined with interpreting the terms of a [collective bargaining agreement, or "CBA"], that is a matter preluded under the Railway Labor Act. Such issues must be decided by resort to arbitration." Resp. Br. at 11.

The Railway Labor Act ("RLA") establishes a mandatory arbitral mechanism for "the prompt and orderly settlement" of two classes of disputes: major disputes and minor disputes. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-253, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994). Major disputes relate to the formation of CBAs or efforts to secure them. *Id.* at 252. Minor disputes involve controversies over the meaning of an existing CBA and must be resolved only through the RLA mechanisms, including the carrier's internal dispute resolution processes and an adjustment board established by the employer and the unions. *Id.* at 253. The RLA does not deprive courts of jurisdiction over disputes that do not fall within either category. *Sturge v. Nw. Airlines, Inc.*, 658 F.3d 832, 837 (8th Cir. 2011).

BNSF appears to argue that Perez's claim involving the Notice of Investigation and the investigative hearing is based on a minor dispute, and that this court therefore lacks subject-matter jurisdiction. *See* Resp. Br. at 14-15. With respect to the minor disputes, the U.S. Court of Appeals for the Eighth Circuit explains:

> A dispute between an air carrier and an employee is a minor dispute if its resolution "depends on an interpretation of [a] CBA." *Hawaiian Airlines*, 512 U.S. at 261, 114 S.Ct. 2239. As such, "[c]ourts can resolve questions of federal or state law involving labor claims only if the issues do not require the court to construe the collective bargaining agreement." *Deneen*, 132 F.3d at 439. Courts may, however, resolve issues that require mere reference to a collective bargaining agreement. *Hawaiian Airlines*, 512 U.S. at 261 n. 8, 114 S.Ct. 2239; *Thomas v. Union Pac. R.R. Co.*, 308 F.3d 891, 893 (8th Cir.2002). Likewise, the RLA does not deprive courts of jurisdiction to decide " 'purely factual questions' about an employee's conduct or an employer's conduct and motives" that "do not 'requir[e] a court to interpret any term of a collective-bargaining agreement.' " *Hawaiian Airlines*, 512 U.S. at 261, 114 S.Ct. 2239 (quoting *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988)) (alteration in original).

Sturge, 658 F.3d at 837.

To resolve Perez's retaliation claim, I will primarily address "purely factual questions" about Perez's conduct and BNSF's motivations. I will have to determine what Perez did and why BNSF pursued a disciplinary investigation against Perez for alleged rule violations. The process related to potential discipline of a BNSF employee, which was used in Perez's case, may be spelled out in the CBA. While I may have to make reference to the CBA, I will not have to interpret any term of the CBA. I will not determine whether the disciplinary process as used against Perez constituted a "fair and impartial investigation" under the CBA, as BNSF suggests. *See* Resp. Br. at 13. Rather, I will determine whether BNSF used the disciplinary process to retaliate against Perez in violation of the FRSA. My determinations, set forth below, that the company's disciplinary process was not used perfectly and that Stockman should have conducted pre-investigation fact-checking and should have taken a more active role as the hearing officer, do not go to interpretation of the CBA, as BNSF claims. *See* Resp. Br. at 13. Indeed, to make these determinations I do not need to focus on the CBA at all; I need only cite the testimony of the managers themselves. Moreover, the CBA is not the source of Perez's right not to be accused of rule violations in retaliation for engaging in conduct protected by the FRSA. Therefore, I find I have appropriate subject matter jurisdiction.

B. Protected Activity

Perez contends his "actions of seeking medical leave in anticipation of surgery for his on-duty injury, and in answering Respondent's questions regarding the causal connection between said injury and surgery [on September 17, 2012] constitute 'protected activity' within the meaning of the FRSA." Compl. Br. at 4; *see* Compl. Pr. Find. of Fact and Concl. of Law. at 15, 17.

It is undisputed that Perez reported a work-related back injury to Reppond on September 17, 2012. Protected activity under the FRSA includes reporting a work-related injury or illness. 49 U.S.C. § 20109(a)(4). BNSF argues that Perez's report of a work-related back injury on September 17, 2012 is not protected activity because it was not made in good faith. Resp. Br. at 9-10. A report of a work-related injury is made in good faith, and therefore protected under the FRSA, if the plaintiff actually believed, at the time he reported the injury, that it was work related. *Davis v. Union Pac. R.R. Co.*, No. 12-cv-273, 2014 WL 3499228, at *7 (W.D.La. July

14, 2014). The belief must also be objectively reasonable. *Koziara v. BNSF Ry. Co.*, No. 13-CV-834-JDP, 2015 WL 137272, at *6- (W.D. Wis. Jan. 9, 2015). Pointing out that Perez testified he suffered a back injury as a result of a car accident on July 23, 2009 and took medical leave as a result, BNSF argues that "[t]here is evidence sufficient to demonstrate Perez chose to report an off-duty back injury as work-related. He did so as a means to have BNSF cover the off-duty injury to allow him to seek damages in his FELA lawsuit." Resp. Br. at 9; *see* TR 105-108.

I find Perez genuinely believed his back injury was work-related at the time he reported it to BNSF on September 17, 2012. Perez testified that he "absolutely" reported his work-related back injury to Reppond in good faith. TR 91. While he did not report his work-related back injury to a BNSF employee until more than two years after the August 12, 2010 incident he alleges caused the injury, Perez credibly testified that on August 13, 2010, he brought his back condition to the attention of Dr. Ryan and linked it to the incident. *See* TR 52. It is true that, as BNSF points out, Dr. Ryan's August 13, 2010 treatment notes do not mention Perez's back symptoms. *See* Resp. Br. at 3. However, this is consistent with Perez's testimony that Dr. Ryan did not show great concern about Perez's back symptoms despite Perez's complaints throughout the course of his treatment.[8] *See* TR 54-56. Moreover, although Perez told Nystul, in his August 24, 2010 recorded statement, that "Nothing else had been injured but my hamstring area," he clarified at the hearing that Nystul's questions and his answers were focused on where he was injured on his leg. TR 158. A review of the recorded statement confirms that Nystul and Perez were discussing Perez's leg specifically when Perez made that statement. *See* JX 8 at 8-9.

I also find Perez's belief was reasonable. Perez credibly testified that he felt back pain on his way to the shop after leaving the clinic on August 12, 2010. *See* TR 47-48. In addition, Perez testified that Dr. Ryan connected Perez's back pain to the August 12, 2010 incident, telling him "the reason that I was experiencing discomfort in my lower back, primarily on my left side, was because the [August 12, 2010] injury had adjusted my gait and I was putting extra weight on

[8] BNSF states that Dr. Ryan's other records do not mention Perez's back condition. Resp. Br. at 10. However, BNSF relies on evidence not in the record as these records were withdrawn and BNSF did not submit them as evidence.

that left side, and that was causing the discomfort and pain." TR 52. Perez also testified that his treating physician, Dr. Reardon, compared an MRI undertaken after the car accident in 2009 and an MRI post-dating the August 12, 2010 injury and told Perez the more recent MRI showed a new injury, which verified for him that there was something wrong with his back and gave him reason to believe he injured his back at the same time he injured his hamstring. TR 64-66. BNSF has not submitted any evidence to support its contention that Perez's back injury was cause by the 2009 automobile accident or any other evidence to contradict Perez's testimony that the back injury was work-related. Therefore, Perez has demonstrated that he engaged in protected activity by reporting his work-related back injury on September 17, 2012.

Turning to Perez's request for medical leave in anticipation of surgery for his work-related back injury, Perez argues that his "attempt to obtain medical leave was part and parcel of his effort to obtain treatment for an on-duty injury, which is expressly identified as 'protected activity' in the FRSA."[9] Compl. Rep. Br. at 4. BNSF argues that attempts to obtain medical leave "would appear not [to] be a protected activity under the FRSA." Resp. Br. at 9. Perez's request for medical leave in anticipation of surgery for his work-related back injury is protected activity under the FRSA because, in requesting leave for back surgery, Perez was following medical orders and/or the treatment plan of his treating physician. The FRSA prohibits railroad carriers from disciplining, or threatening discipline to, an employee for requesting medical or first aid treatment or for following orders or a treatment plan of a treating physician. 49 U.S.C. § 20109(c)(2). Contrary to BNSF's contention, Section 20109(c) applies beyond immediate medical care, even if the heading of the section reads "Prompt Medical Attention." *See Santiago v. Metro-North Commuter R.R. Co., Inc.,* ARB No. 10-147, ALJ No. 2009-FRS-11, slip op. at 12 (ARB July 25, 2012). Thus, I find Perez has established that he engaged in protected activity

[9] Although Perez cites Section 20109(c)(1) in support of his argument that his activities on September 17, 2012 constitute protected activity, Perez does not appear to argue, nor has he presented evidence showing, that BNSF denied, delayed, or interfered with his request for medical leave. *See* 49 U.S.C. § 20109(c)(1). Indeed, Reppond approved Perez's request for leave, and Perez underwent back surgery the day after submitting his request. TR 83. Perez has already established that his injury report and request for medical leave are protected activity under Sections 20109(a)(4) and (c)(2) respectively. I need not address his additional argument that his actions are protected activity because he provided information to BNSF so it could properly report lost time attributable to an on-duty injury to the Federal Railroad Administration. *See* Compl. Br. at 4 (citing to Section 20109(a)(1) and (6) for support); Compl. Pr. Find. of Fact and Concl. of Law. at 15.

when he reported his work-related back injury on September 17, 2012 and requested medical leave for back surgery.

C. Adverse Action

Perez contends that "From the initiation of the disciplinary process by Reppond through to the determination that no discipline would be imposed, BNSF's actions toward Perez – including the disciplinary charge letter, the investigative hearing, and the no-discipline letter itself—were adverse actions." Compl. Prop. Find. of Fact and Concl. Of Law. at 15-16.

BNSF argues that the adverse action alleged in Perez's brief "appears to be a whole new unfavorable personnel action not exhausted with OSHA and certainly outside the FRSA's 180-day statute of limitations." Resp. Rep. Br. at 4. BNSF's argument is a nonstarter. Although perhaps worded differently, the adverse action alleged in Perez's complaint—"charg[ing] Complainant with misconduct and threaten[ing] to impose discipline," holding an investigation regarding its allegations of misconduct, and "notifying Complainant that 'no discipline w[ould] be assessed'"—is the same adverse action alleged in his post-hearing brief. *See* JX 6 at 1-2. The alleged adverse action was certainly within the scope of the OSHA investigation as well. *See* JX 10 at 2 ("Complainant suffered an adverse action when he was charged with rule violations on October 9, 2012 and when an investigation was held regarding the alleged rule violations on January 9, 2013"). In his brief, Perez discusses procedural irregularities, including events pre-dating the Notice of Investigation, but not for the purpose of raising a new adverse action; he does so to provide evidence of pretext, which goes to the contributing factor element. *See* Compl. Br. at 6. Thus, Perez's allegations of adverse action are not untimely and are virtually identical to what was presented to OSHA.

BNSF also argues that issuing the Notice of Investigation and holding of the investigative hearing do not constitute adverse action because, ultimately, no discipline was issued; Perez lost no pay, retained his seniority, and lost no benefits as a result of the issuance of the Notice of Investigation and the investigation. Resp. Br. at 15, 18. BNSF's argument, that actual discipline is required for adverse action to be found, is inconsistent with Administrative Review Board ("ARB") precedent. In *Vernace v. Port Authority Trans-Hudson Corp.*, ARB No. 12-003, ALJ

No. 2010-FRS-18 (ARB Dec. 21, 2012), the ARB held that adverse action under the FRSA includes threatened discipline. There, the Administrative Law Judge ("ALJ") found adverse action where the respondent sent a charging letter to the complainant stating that she failed to exercise constant care and utilize safe work practices to prevent injury to herself when she failed to inspect a chair before sitting on it. *Id.* On appeal, the respondent argued that it had taken no disciplinary action against the complainant. The ARB affirmed the ALJ's finding, explaining:

> The ALJ noted that the relevant regulations include "intimidating" and "threatening" actions as prohibited discrimination. We agree with the ALJ's reliance on our analysis of a similar regulation in *Williams v. American Airlines*, ARB No. 09-018, 2007-AIR-004 (ARB Dec. 29, 2010). Moreover, Congress re-emphasized the broad reach of FRSA when it expressly added "threatening discipline" as prohibited discrimination in section 20109(c) of the FRSA whistleblower statute. The disciplinary investigation stretching one year in this case qualifies as discrimination under the regulations and as "any other discrimination" prohibited by the statute.

Id.

In this case, the investigation pursued against Perez contained, at least implicitly, a threat that Perez would be disciplined if the charges against him were proven. The Notice of Investigation stated the investigation would determine whether Perez violated BNSF's rules on late reporting of an injury and dishonesty, and Perez had to defend himself against these charges at an investigative hearing. JX 2. If these charges were proven, Perez faced varying levels of discipline, including the "death penalty," i.e., termination. *See* TR 249-250. Perez understood that these disciplinary charges, if proven, were terminal offenses. TR 91.

BNSF states that there is no time lag in this case like the one-year lapse between the issuance of the Notice of Investigation and the investigative hearing, which the ARB relied on in *Vernace*. Resp. Br. at 16 n.9. BNSF's attempt to distinguish this case from *Vernace*, however, is unpersuasive. In all relevant respects, the cases are analogous. Like the respondent in *Vernace*, BNSF issued the Complainant a charge letter and pursued an investigation against him that carried the potential for future discipline.

BNSF also appears to argue that *Vernace* was wrongly decided. *See* Resp. Br. at 16 n.9 (stating, for example, that the ARB in *Vernace* "disregards the fact investigations can be held for

any number of reasons completely unrelated to anything concerning an injury"). In support of the proposition that an investigation that does not result in discipline is not adverse action, BNSF cites to two cases arising under the FRSA that conflict with the ARB's holding in *Vernace*: *Brisbois v. Soo Line RR Co.*, 124 F. Supp. 3d 891(D. Minn 2015) and *Stallard v. Norfolk So. Ry. Co.*, ALJ No. 2014-FRS-00149 (ALJ Dec. 9, 2015). In *Brisbois*, the Court declined to find adverse action where a railroad worker was accused of violating workplace rules and had to address those accusations at a disciplinary hearing but was not disciplined in connection with the alleged violations. *Brisbois*, 123 F.Supp. 3d at 903. Similarly, in *Stallard*, the ALJ found that the mere scheduling and canceling of a formal hearing is not adverse action. *See Stallard*, slip op. at 8. I do not find *Stallard* and *Brisbois* persuasive. These decisions do not address the ARB's decision in *Vernace*, which is binding precedent. Given the ARB's analysis of the statute and the implementing regulations in *Vernace*, I find that the disciplinary investigation pursued against Perez qualifies as discrimination under the regulations and as "any other discrimination" under the statute.

The investigation pursued against Perez also qualifies as "discipline" under § 20109(c)(2), which prohibits an employer from disciplining an employee for following orders or a treatment plan of a treating physician. Section 20109(c)(2) explicitly includes, in its definition of discipline, "bring[ing] charges against a person in a disciplinary proceeding." By accusing Perez of violating its rules on late reporting and dishonesty and by requiring Perez to address these accusations at an investigative hearing, BNSF brought charges against Perez in a disciplinary proceeding.

Adverse actions can also include an employment action that "would dissuade a reasonable employee from engaging in protected activity." *Vernace*, ARB No. 12-003 (*citing Menendez v. Halliburton*, ARB Nos. 09-002, -003; ALJ No. 2007-SOX-2005 (ARB Sept. 13, 2011). Under the facts of this case, the disciplinary investigation pursued against Perez resulting in the no discipline letter satisfies this standard as well. As I discuss in detail in the section addressing damages for emotional distress, Perez credibly testified that the investigation caused him stress and anxiety for fear that he might lose his job if the charges were proven.

Cargill testified that, given Perez's job was on the line, the situation would cause anyone in Perez's shoes anxiety. TR 255.

In addition, the disciplinary investigation was not without negative consequences for Perez's record and his professional reputation. Perez was not cleared of the charges levied against him. As Stockman testified, a "no discipline letter simply means that no discipline is being assessed;" it does not mean that an employee is innocent of the charges. TR 253. Perez credibly testified to the black mark left on his record as well as to the damage to his reputation in the workplace despite being issued no discipline. Perez does not feel that his record is clean. TR 100. Of the 212 pages in his personnel file more than a hundred pages relate to the disciplinary matter. TR 100. Asked by his counsel if he felt exonerated, vindicated or proven innocent upon receiving the no discipline letter, Perez responded,

> When I read it, I didn't see any of that. Though I [am] appreciative that somebody down at Fort Worth decided that this was a bad idea to terminate me, I do appreciate that, but it doesn't change the fact of all of the negative stuff that happened, the impact, you know, my credibility with my co-workers, my supervisors. It doesn't clear me of anything. It just says they didn't punish me. There's people that thought I got away with something, that I'm a fraud and a liar . . . .

TR 94. When Perez returned to BNSF after receiving the no discipline letter, a supervisor told him "he thought I had friends in some high places . . . ." TR 94. Thus, just because BNSF issued no discipline does not mean the process "worked." *See* Resp. Br. at 18.

Moreover, even though "[i]t's supposed to be private throughout the Company," co-workers learned of the disciplinary investigation; now, some employees Perez had worked with for twenty years "don't even talk to me hardly anymore, you know, or conversate with me like they used to. My business was all over that shop by the time I had gotten back to work, and that's unacceptable." TR 169-170. Cargill agreed that the disciplinary process involving a hearing, as in Perez's case, "should be private" and Perez's testimony about his return to work ridicule surprised him. TR 261-262. Notwithstanding Cargill's surprise, Perez's credible testimony is unchallenged. It is not a far stretch to say that requiring an employee to participate in an anxiety-inducing and reputation-tarnishing investigation resulting in a letter stating only

that no discipline will be issued would likely dissuade a reasonable employee from engaging in protected activity.

At the hearing, BNSF claimed that the "question really in this case is whether" the process followed by BNSF (and dictated by the CBA) when a rules violation is suspected is "a valid legitimate process or whether that process is on its face a violation of the FRSA . . . ." TR 32. To the contrary, this case is not about the CBA disciplinary process itself. Rather, BNSF did not use the disciplinary process properly against Perez, as discussed below, and the question becomes, why? BNSF cannot use the CBA as a shield to protect itself against a claim for retaliation under the FRSA. As Cargill testified, "the discipline process should not be used for retaliatory purposes." TR 248. BNSF's warning, that finding a Notice of Investigation and an investigative hearing to be adverse action "would have major implications for labor relations in the rail industry," is a groundless slippery slope. *See* Resp. Br. at 18 (citing *Brisbois,* 123 F.Supp. 3d at 903). For a successful claim under the FRSA much more is needed than simply a showing of adverse action. All the pieces of the puzzle must fit, and only then does an adverse action become punishable.

Accordingly, for the reasons set forth above, I find that Perez has established, by a preponderance of the evidence, that the disciplinary investigation pursued against him—from the October 9, 2012 Notice of Investigation through the January 9, 2013 investigative hearing to the January 24, 2013 no discipline letter—constitute adverse action under the FRSA.

D. Employer Knowledge

Perez must establish that BNSF knew he engaged in the protected activity. *See Araujo*, 708 F.3d at 158. Reppond and Stockman made the decision to take the adverse action against Perez. Even if Bossolono made the decision to go forward with the investigation, Reppond initiated the investigation by bringing the information of Perez's alleged late reporting of his injury and alleged dishonesty to Bossolono, by recommending Perez's investigation, and by instructing Stockman to hold the investigative hearing. *See* TR 402, 405, 442. Stockman made the decision to issue the Notice of Investigation charging Perez with late reporting and dishonesty and to hold the investigative hearing without conducting any pre-investigation fact-

checking; he also recommended Perez's termination at the conclusion of the investigative hearing and issued Perez the no discipline letter. *See* JX 2; EX 5; TR 315-317.

BNSF argues that Perez has failed to establish employer knowledge of the protected activity because Perez failed to prove the relevant decision-makers knew he reported a back injury in August 2010. Resp. Br. at 10-11. Respondent's argument is misplaced. The protected activity alleged in this case is Perez's September 17, 2012 report of a work-related back injury and request for medical leave. The parties do not dispute that Perez told Reppond of his work-related back injury and sought Reppond's approval for medical leave during their September 17, 2012 meeting. There is also no dispute that Stockman knew of Perez's report of his work-related back injury to Reppond. Indeed, as discussed in the next section, Perez's report of his work-related back injury prompted the charge of late reporting, and Perez's conversation with Reppond regarding Perez's discussion with Nystul was the foundation of the dishonesty charge. Thus, the evidence establishes that the relevant decision-makers had knowledge of the protected activity.

E. Contributing Factor

A "contributing factor" includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-9 (ARB Feb. 29, 2012). A complainant need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's "reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected" activity. *Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, ALJ No. 2010-FRS-20 (ARB May 31, 2013) (quoting *Walker v. Am. Airlines, Inc.*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 18 (ARB Mar. 30, 2007)). In *Kuduk v. BNSF Ry. Co., 768* F.3d 786 (8th Cir. Oct. 7, 2014), the U.S. Court of Appeals for the Eighth Circuit[10] held that, while a "contributing factor" causation does not require that the employee conclusively demonstrate the employer's retaliatory motive in making his prima facie case, he must prove intentional

[10] Appellate jurisdiction in this case lies with the Eighth Circuit. *See* ALJX 26; 49 § U.S.C. 20109(d)(4); Resp. Br. at 7; Compl. Rep. Br. at 8-9..

retaliation prompted by the employee engaging in protected activity. Citing to *Staub v. Proctor Hosp.*, 131 S.Ct. 1186, 1190 n. 1 (2011), the court stated that the essence of a FRSA claim is "discriminatory animus." *Kuduk, 768* F.3d at.

A complainant can connect his protected activity to the adverse action directly or indirectly through circumstantial evidence. *Williams*, ARB No. 09-092, PDF at 6; *DeFrancesco*, ARB No. 10-114, PDF at 6-7. Direct evidence "conclusively links the protected activity and the adverse action and does not rely upon inference." *Williams*, ARB No. 09-092, PDF at 6 (*citing Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-00028, PDF at 4-5 (ARB Jan. 30, 2008)); *DeFrancesco*, ARB No. 10-114, PDF at 6 (holding employer's suspension of employee who reported job-related injury "violated the direct language of the FRSA"). A complainant may also rely upon circumstantial evidence, which:

> 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 a complainant after he or she engages in protected activity.

DeFrancesco, ARB No. 10-114, PDF at 7; *see also Bechtel v. Competitive Technologies, Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, PDF at 13 (ARB Sept. 30, 2011); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-00003, PDF at 13 (ARB June 24, 2011). Circumstantial evidence must be weighed "as a whole to properly gauge the context of the adverse action in question." *Bobreski*, ARB No. 09-057, PDF at 13-14. This is because "a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction." *Bechtel*, ARB No. 09-057 at 13 (*quoting Sylvester v. SOS Children's Vills. Ill., Inc*., 453 F.3d 900, 903 (7th Cir. 2006)).

The ARB has held that if the protected activity and the adverse action are "inextricably intertwined," there exists a presumptive inference of causation. *See Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012) (finding a presumptive inference of causation where complainant's investigation and discipline directly stemmed from his report of injury); *DeFrancesco*, ARB No. 10-114 at 7 (finding because

complainant's report of injury triggered the employer's review of his personnel records and led to his suspension, his report of injury was a contributing factor to his suspension as a matter of law); *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, PDF at 8 (ARB June 20, 2012) (holding because complainant's protected disclosures prompted the employer's investigation that led to complainant's discharge, the complainant's disclosures "were inextricably intertwined" with the investigations that resulted in his discharge and complainant established the "contributing factor" element of his claim). Protected activity and employment actions are inextricably intertwined where the protected activity directly leads to the unfavorable employment action in question or the employment action cannot be explained without discussing the protected activity. *Benjamin v. Citationshares Management, LLC*, ARB No. 12-029, ALJ No. 2010-AIR-1 (ARB Nov. 5, 2013).

In the instant matter, Perez's report of his work-related back injury to Reppond on September 17, 2012 led directly to the charge of late reporting and the investigative hearing. The Notice of Investigation states that an investigation has been scheduled in connection with Perez's alleged late reporting of the back injury and that BNSF first learned of the alleged violation on September 17, 2012, the date Perez reported the back injury to Reppond. JX 2. At the hearing, when asked to explain his basis for charging Perez with late reporting, Stockman referenced Perez's report of a work-related back injury, stating he charged Perez with late reporting "Because the employee associated it with his previous injury for his back, now it's his leg, but he associates it with the same injury for the same event." TR 371. BNSF admits that "the very reason BNSF issued the notice of investigation and held the investigation was, in part, because of what the BNSF managers believed as late reporting in 2012 of a supposed back injury initially manifesting (as claimed by Perez) in 2010." Resp. Br. at 11.

The charge of dishonesty also would not have occurred but for Perez' report of his work-related back injury to Reppond. Perez was accused of dishonesty in his answer to Reppond's question of whether he previously reported his work-related back injury to Nystul. Reppond alleged that Perez told him he attempted to tell Nystul about his back injury and Nystul refused to take Perez's statement. *See* TR 440-441. Because Nystul denied that conversation occurred, Reppond initiated the investigation and Stockman charged Perez with dishonesty. *See* TR 392,

405-410. Thus, Perez's protected activity—his report of his work-related back injury—and the adverse action—the disciplinary investigation—were inextricably intertwined.

Given that the Eighth Circuit requires the complainant to demonstrate intentional retaliation prompted by the employee engaging in protected activity, I do not find the inextricable intertwinement to create a presumptive inference of causation between the protected activity and the adverse action in this case. Nevertheless, I find that the inextricable intertwinement is evidence that those who decided to pursue the disciplinary investigation against Perez had discriminatory animus toward Perez's protected activity.

There is also close temporal proximity between the protected activity and the adverse action in this case, contrary to BNSF's contention.[11] The protected activity—Perez's September 17, 2012 injury report and request for medical leave—occurred less than one month before he received the Notice of Investigation, dated October 9, 2012. This close temporal proximity provides circumstantial evidence that Perez's injury report and request for medical leave were a contributing factor in the disciplinary investigation pursued against Perez.

I recognize that employees cannot hide their own wrongdoing by cloaking their actions in a report of protected activity. *See BNSF Ry. Co. v. U.S. Dept. of Labor*, 816 F.3d 628 (10th Cir. 2016). BNSF alleges that Perez attempted to do just that. According to BNSF, "BNSF managers reasonably believed Perez attempted to report, in 2012, a previously unreported 2010 injury," in violation of company rules on late reporting. *See* Resp. Rep. Br. at 7-8. However, there is strong evidence that the stated reasons for conducting the investigation—violating company rules on late reporting and dishonesty—were pretextual. Although Perez did not tell a regular BNSF employee about his back injury and its connection to the August 2010 incident until his meeting with Reppond in September 2012, Perez testified that he discussed the back injury with Dr. Ryan, the "company doctor," during the course of his treatment in August and September 2010 and that, by doing so, he believed he was providing the information to BNSF and complying with the timely reporting rule. *See* TR 51-56, 123, 133. He further assumed the

[11] BNSF argues that "there is no temporal proximity between Perez supposed report of a back injury to Dr. Ryan/Jones in August 2010 and the issuance of the notice of investigation in October 2012." *See* Resp. Br. at 20. However, BNSF misidentifies the protected activity in this case.

information was being passed on to Nurse Jones, who he believed to be an employee of BNSF and who was in direct communication with the clinic. *See* TR 51-56, 123, 133. There is no evidence contradicting Perez's testimony, and I find it to be credible.

During his deposition, while discussing the September 2012 meeting, Reppond indicated that Perez never mentioned any conversation he had with the "company doctor" about his back injury. TR 415-417. Subsequently at trial, Reppond admitted that Perez did tell him during their meeting that he reported his back injury to Dr. Ryan, and it "appeared [Perez] was under the impression that telling the doctor was telling a company official," and he believes Perez "truly believed that we had company doctors."[12] TR 404, 421. Reppond also testified that if Perez told Dr. Ryan about his back injury, under the assumption that Dr. Ryan would relay that information to Nurse Jones, Perez would have sufficiently complied with BNSF's timely reporting rule. TR 422-423. Thus, at the time he initiated the investigation, Reppond was aware of Perez's (seemingly reasonable) mindset that he reported the back injury timely. *See* TR 438. Yet Reppond made no attempt to contact Dr. Ryan or Nurse Jones to confirm Perez's story and he initiated the investigation anyway.[13] TR 421-425. Reppond's decision to initiate the investigation under these circumstances indicates that a potential violation of the late reporting rule was not the real purpose of the disciplinary investigation. At the hearing, Reppond maintained, inconsistently, that Perez nevertheless violated the rule on late reporting because the original injury report form instructs employees to update supervisors about changes in condition, which Perez failed to do. *See* TR 439. However, at no time during or after Perez's meeting with Reppond did BNSF ask Perez to supplement his injury report to include his back injury, which suggests that filing a supplemental report was not really a necessity. *See* TR 164-165.

[12] Reppond's deposition testimony is also contradicted by the notes he made of his meeting with Perez, which he emailed to himself and sent to Stockman in preparation for the investigation. In the notes, he wrote that Perez "made several comments about the 'company' doctor not listening to him when he asked to see a specialist as well stating he asked Natalie Jones to see another doctor and she told him no, he had to see the 'company doctor.'" JX 2. Krause also testified that he remembers Perez telling Reppond at the meeting that he "went to the company doctor and explained to the company doctor that he felt it was his back, not his leg or hamstring." TR 269-270.

[13] Reppond testified that he "was never able to contact" Jones to see whether she had knowledge of Perez's back problems. TR 421-424.

Examining BNSF's other stated reason for taking adverse action-- Perez's alleged dishonesty in his conversation with Reppond-- is equally unworthy of credence. As stated previously, Reppond's testimony at his deposition and his testimony at the hearing are in direct conflict. These inconsistencies are unexplained. The only conclusion I can reach is that Reppond lied during his deposition when discussing whether Perez related conversations about his back injury to the company doctor. Although Reppond eventually told the truth at trial, these inconsistencies impair his credibility as a witness. Thus, in all instances where the testimony of Perez and Reppond are in conflict, I will accept the testimony of Perez as being the more credible version of what transpired.

For instance, Perez and Reppond provided conflicting accounts of their conversation on September 17, 2012. Reppond claims Perez told him he attempted to tell Nystul about his back injury but Nystul said "we don't need to talk," which Reppond extrapolated to "I won't take your statement." TR 440-441. In contrast, Perez states that he never told Reppond that Nystul refused to speak with him. Rather Perez stated that he called Nystul after returning to work in September 2010 and Nystul basically said when they are ready to discuss the claim, "don't call me, I'll call you." TR 71-75. I find Perez's account of his conversation with Reppond to be more credible than Reppond's.

The whole dishonesty investigation was premised on a statement that Perez never made. Indeed when Reppond contacted Nystul, Nystul too "was adamant that that conversation never took place." TR 405, 410, 440-441. Yet Reppond pressed on instructing Stockman to issue the Notice of Investigation. *See* JX 2; TR 392. What transpired is BNSF's attempt to mask the true facts behind a poor rendition of Abbott and Costello's routine, "Who's on First."

Stockman's failure to adequately fact-check prior to issuing the Notice of Investigation and holding the investigative hearing provides additional evidence that the charges against Perez were pretextual. Stockman did not interview any of the relevant parties before sending the Notice of Investigation, including Nystul, and although Stockman contacted the parties after issuing the Notice of Investigation and before the investigative hearing, he only did so for scheduling purposes. *See* TR 345. Respondent states that "There is nothing to suggest BNSF

issued the notice of investigation out of spite or as a means to single out Perez for reporting an injury. Indeed, issuance of the notice and holding the investigation are prerequisites of the CBA prior to issuing any discipline for any reason." Resp. Br. at 16. Stockman's failure to conduct any pre-investigation fact-checking, however, is contrary to BNSF's procedures.

Reppond, who also conducted investigations for BNSF, testified that the investigator's role is to evaluate whether a Notice of Investigation is justified rather than to automatically proceed with the investigation. TR 427. To that end, it is "normally the practice" for the investigator to conduct pre-hearing interviews with any and all people who have knowledge prior to issuing the Notice of Investigation and if there are inconsistencies or ambiguities it is common practice to return to the person who commissioned the investigation and to the employee for questioning; "you always want to interview your witnesses." TR 430-431, 434. Cargill testified that, although "supervisors have a certain amount of time [under the CBA] in which to issue a Notice of Investigation," he would "generally agree" that managers can undertake informal investigation before proceeding with a Notice of Investigation. TR 208-209.

Given the inconsistencies between Perez's and Reppond's accounts of their conversation on September 17, 2012 and the ambiguity of the statement "he didn't need to talk to him anymore" in Reppond's email notes,[14] the need for fact-checking was evident. Even more, the investigation was requested by a manager who, on the same day the Notice of Investigation issued, was found by an ALJ to have "exhibited animus" to influence a different employee from filing an injury report. *See Cain v. BNSF Ry. Co.*, 2012 FRS 00019, slip op. at 16 (Oct. 9, 2012), *aff'd as mod.,* ARB No. 13-006 (Sept. 18, 2014), *aff'd in part and rev'd and remanded in part*, *BNSF Ry. Co.*, 816 F.3d 628. Thus, Stockman could have and should have conducted pre-investigation fact-checking to determine whether the charges should be brought against Perez. Instead of doing his due diligence in accordance with BNSF procedures, Stockman immediately issued the Notice of Investigation, without any diligence.

[14] Reppond had written that Perez told him Nystul said he didn't need to talk to him anymore, which, on its face, has a very different meaning from the statement Stockman accused Perez of making. *See* JX 2.

Stockman also should have taken a more active role at the investigative hearing. For example, he failed to call Krause as a witness. Krause was the only other person who attended the September 17, 2012 meeting and had knowledge of the conversation between Perez and Reppond. Krause could have weighed in on what Perez told Reppond.[15] Stockman also did not call or obtain a statement from Nurse Jones, who could have confirmed whether Perez timely reported his work-related back injury to the clinic. Although Stockman believes his duties are more aligned with a transcriptionist or stenographer, his description does not match Reppond's account of what a hearing officer is called to do. Reppond testified that a hearing officer "absolutely" actively asks questions of witnesses and "you have to ask the questions to get the facts on the table." TR 443. The only reasonable explanation for Reppond's decision to initiate the investigation and for Stockman's deviation from standard practice in conducting the investigation is that they were motivated by retaliatory intent and had discriminatory animus toward Perez's protected activity.

In his post-hearing brief, Perez argues that Stockman's conclusion that the dishonesty charge was proven is inconceivable in light of the lack of evidence to support the charge. *See* Compl. Prop. Find. of Fact and Concl. of Law at 12, 14. While I do not attribute it significant weight, I find Complainant's argument persuasive. Stockman testified that he found the dishonesty charge sustained in part because Perez did not deny he told Reppond that Nystul refused to take his statement. TR 316, 346-359. At the investigative hearing, however, Perez unequivocally and irrefutably made such a denial. *See* JX 4 at 32-36, 68. Stockman apparently ignored it.

I note, as Employer points out, that "federal courts do not sit as a super-personnel department that re-examines an employer's disciplinary decisions." *See* Er. Br. at 19 n.11 (quoting *Kuduk*, 768 F.3d at 792). To be clear, by pointing out that Stockman blatantly mischaracterized what the transcript of the investigative hearing plainly shows, I am not acting as a super-personnel department re-examining BNSF's disciplinary decision. Rather, I find that

[15] At trial Krause testified that he does not recall ever hearing of a claims agent refusing to take the statement of an injured employee and he thinks he would remember if he ever heard that happening. TR 270. Regarding Perez's and Reppond's September 17, 2012 meeting, Krause testified that he does not "recall Randy Nystul being part of the conversation." TR 270-271.

Stockman's irrational explanation casts suspicion on his motives for concluding that the dishonesty charge was proven and thereby provides additional evidence that the dishonesty charge against Perez was pretextual.

BNSF states "There is also no evidence of antagonism towards the protected activity. Perez is his own comparator. If BNSF had sought to intentionally retaliate against Perez for reporting an injury, he never explains why BNSF never disciplined him when he reported the 2010 on-duty injury." Resp. Br. at 20. To the contrary, there is evidence BNSF managers manifested antagonism against Perez for reporting his hamstring injury in August 2010. Perez testified that after he reported his hamstring injury to his supervisor Parrish, Parrish refused to let him go home to recuperate and instead required him to participate in a physical reenactment of the incident, which involved lifting the same 75 pound door that caused the injury in the first place. TR 48-50. Parrish's decision to put Perez, an injured employee, in a situation likely to cause him additional physical harm defies common sense and can only be explained by intent to retaliate against Perez for reporting the injury. Parrish must have sensed he was engaging in questionable conduct because he deleted the reenactment photographs. Perez was also deceived by Jones, who told him he could not see his personal physician and that he had to receive treatment for his work-related injury from the "company doctor."[16] TR 43-47, 114. BNSF had the opportunity to present Parrish and Jones as witnesses, but they chose not to do so. As a result, Perez's testimony is uncontradicted and I find it credible.

Considering the indicators of pretext discussed above, combined with the close temporal proximity between the adverse action and the protected activity and the inextricable intertwinement of the protected activity and the adverse action, I find that Perez has proven by a preponderance of evidence that the adverse action taken against Perez was motivated by retaliatory intent and animus. Accordingly, I find that Perez has established that his protected activity of reporting an injury and requesting medical leave contributed to the adverse action, and the burden shifts to BNSF to establish that it would have taken the same action absent the protected activity.

[16] Stockman testified that "An employee can absolutely go to any doctor that they want to go to." TR 363-364.

F. Respondent's Affirmative Defense

Once a complainant has shown that his protected activity was a contributing factor to the adverse employment action, the respondent is liable unless it can prove by clear and convincing evidence that it would have taken the same action absent the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); *Patino v. Birken Mfg. Co.*, ARB No. 06-125, ALJ No. 2005-AIR-00023 (ARB July 7, 2008); *see also* 49 U.S.C. § 20109(d)(2)(a)(i). The clear and convincing standard is a higher burden than a preponderance of the evidence and the respondent must conclusively demonstrate "that the thing to be proved is highly probable or reasonably certain." *DeFrancesco*, ARB No. 10-114 at 8; *Williams*, ARB 09-092 at 5; *Araujo*, 708 F.3d at 159. A respondent's burden to prove the affirmative defense under the FRSA is purposely a high one. *Hutton*, ARB No. 11-091 at 13; *see also Araujo*, 708 F.3d at 159-60 (noting the burden shifting analysis is intended to be protective of plaintiff-employees and is a "tough standard" for employers to meet). Respondent is required to prove not what it "could have" done, but rather what it "would have" done. *Cain v. BNSF Ry. Co.,* ARB No. 13-006, ALJ No. 2012-FRSA-019, slip op. at 7 (ARB Sep. 18, 2014).

As discussed above, the adverse action in this case—the disciplinary investigation pursued against Perez—is inextricably intertwined with Perez's report of his work-related back injury. Apparently acknowledging that the charge of late reporting would not have occurred but for the injury report, BNSF argues that it would have taken the same adverse action regardless of any protected activity because "Even if the alleged late reporting violation was never a part of the notice and investigation, BNSF still noticed Perez for a potential dishonesty violation (completely unrelated to anything concerning late reporting)," which subjects an employee to potential dismissal under the PEPA policy. *See* Resp. Br. at 21.

Contrary to BNSF's contention, the dishonesty charge was not "completely unrelated" to Perez's injury report. To properly decide what would have happened in the "absence of" protected activity, one must also consider the facts that would have changed in the absence of the protected activity. *Speegle v. Stone & Webster Construction, Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-6 (ARB Apr. 25, 2014). Had Perez not reported his work-related back injury to Reppond on September 17, 2012, Reppond would not have asked Perez if he previously reported

it to Nystul, and Perez would not have recounted his last conversation with Nystul. Perez's account (as conveyed by Reppond) of what Nystul told him became the basis for the allegation that Perez was dishonest. BNSF cannot establish by "clear and convincing" evidence that it was "highly probable" that the dishonesty allegation would have occurred even absent Perez's protected activity of reporting the injury.

In any event, as discussed previously, I do not find BNSF's stated reasons for taking the adverse action--both the dishonesty and the late reporting charges--to be worthy of credence. *See Raye v. Pan Am Railways, Inc.*, ARB No. 14-074, ALJ No. 14-074, slip op. at 4 n.12 (ARB Sep. 9, 2016) (noting that "The lack of credible explanations [for taking adverse action] from the employer . . . effectively eliminates the employer's ability in this case to establish an affirmative defense"). To reiterate, the dishonesty charge was premised on a falsehood propagated by Reppond: that Perez told Reppond he attempted to inform Nystul about his back injury and Nystul refused to take his statement. Stockman failed to conduct pre-investigation fact-checking in accordance with BNSF procedures, and despite the lack of evidence presented at the investigative hearing to support the dishonesty charge Stockman inexplicably found it proven and recommended Perez's termination. Having considered all the evidence of record, I am convinced that Reppond's initiation of the investigation and Stockman's actions as the conducting officer did not arise out of an impartial weighing of the facts, but, rather unhappiness with Perez for filing the report of injury and for requesting medical leave for back surgery. The injury report and request for medical leave were the actual reasons for the adverse action, not the alleged late reporting and dishonesty, which were pretext.

In addition, BNSF's failure to pursue an investigation against Nystul for dishonesty reveals selective enforcement of its dishonesty rule. Reppond claimed that Nystul told him, after the September 17, 2012 meeting, that he had never talked to Perez. TR 424. At the investigative hearing, however, Nystul testified that he had had multiple conversations with Perez. JX 4 at 32-36. Reppond admitted that Nystul's testimony at the investigative hearing differed from what he told Reppond when he interviewed him. TR 424. If Reppond is to be believed, Nystul lied to him and put Perez's job in jeopardy. Yet Reppond did not suggest an investigation of Nystul for giving false information and he is not aware of anyone else doing so. TR 425. Asked if Nystul

was held to the same standard as Perez, Reppond testified "I really can't answer that because I didn't -- I didn't elevate that to anybody. It really wasn't my place to do that." TR 426.

For the foregoing reasons, BNSF has failed to establish by clear and convincing evidence that it would have taken the same adverse action against Perez absent his protected activity of reporting an injury and requesting medical leave. Therefore, Perez is entitled to relief under the FRSA.

V. REMEDIES

A successful complainant is entitled to be made whole under the FRSA. 49 U.S.C. § 20109(e)(1). Perez requests, and he is entitled to, expungement from all BNSF files of any and all references to its disciplinary processes against him initiated by the October 9, 2012 disciplinary charge letter; dissemination of a communication throughout BNSF's Kansas City metropolitan area mechanical department, designed and likely to reach all mechanical department employees, that Perez was innocent of all charges in connection with the October 9, 2012 disciplinary charge letter; and publication in a conspicuous location within BNSF's Kansas City metropolitan area mechanical department, regularly accessible to all BNSF mechanical department employees, of a copy of this decision. *See* Comp. Prop. F. of Fact and Concl. of Law at 17.

A. Damages for Emotional Distress

Perez also seeks compensatory damages. The FRSA provides for "compensatory damages, including compensation for any special damages sustained as a result of the discrimination" under 49 U.S.C. § 20109(e)(2)(C). Compensatory damages include damages for emotional distress. *Barati v. Metro-North R.R. Commuter R.R. Co.*, 939 F. Supp. 2d 143, 152 (D. Conn. 2013). A complainant must prove compensatory damages by a preponderance of the evidence. *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-00047, PDF at 7 (ARB Aug. 21, 2011). A complainant's credible testimony alone is sufficient to establish emotional distress. *Id.* at 7-8; *see also Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, -088, ALJ No. 2005-STA-00040 (ARB Nov. 30, 2007).

Perez testified that throughout the disciplinary investigation, from the Notice of Investigation to the no discipline letter, he "went through significant negative things, you know, while this was going on. I had a lot of anxiety, some depression going on. I couldn't eat, I couldn't sleep." TR 92. When he was able to sleep he had bad dreams. TR 92. He had panic attacks. TR 93. "Physically," he was a "mess. Diarrhea, you know." TR 92. He felt this way "every day, all of the time. I couldn't think of nothing else. I couldn't do anything else. I just – it – it was something I never want to have to go through again, I know that. TR 93. The stress "made my ability to heal after my back surgery – it just aggravated everything." TR 92. He got "so bad" emotionally he had to see his primary care physician, Dr. Keenan. TR 92. Dr. Keenan prescribed him Paxil for depression and Alprazolam for the anxiety and panic attacks. TR 92, 164.

Although Perez testified that during this time the death of his wife's father also caused him stress, Perez clarified that his emotional distress was primarily caused the disciplinary investigation and, in particular, to the threat that he would be terminated if the alleged rule violations were proven. He testified, " I was just a mess emotionally, physically, overall of this, worrying about whether or not, you know, am I going to lose my house, our health insurance, am I going to be able to take care of my wife?" and he was worried about losing his retirement. TR 92, 168. "[I felt] like I was on my back and I was being kicked while I was down on my back, and there wasn't a whole lot I could do about it because of my surgery, and I felt like I was hanging out there in the wind." *See* TR 93. He stated that he was prescribed medication during the BNSF disciplinary period because he could no longer manage emotionally. TR 164. Even after he received the no discipline letter

> it took a while for most of - the serious, more anxiety, panic attacks, to dissipate and go away. It wasn't as soon as I heard, whoosh, it was gone. I still suffer from, you know, issued about how I feel about, you know, the company that I once enjoyed working for and I've always enjoyed working for and I've always tried to do a good job for.

TR 152. Before BNSF brought charges against Perez he "felt very lucky and proud . . . to be a part of the BNSF team and, you know, I enjoyed what I did," but "It's just a job now. I still go

in and do what I'm told. It's taken all of the enjoyment out of being a railroader . . . . I just go and clock in and do what I'm told and I go home . . . . it's just not the same." TR 102-104.

Perez testified he had previously experienced stress, anxiety, and depression; he experienced stressful situations when he was in the Marine Corps, and in 1995 and 1998 he had bouts of anxiety and depression brought on by stress, for which he was prescribed medication. TR 151, 163. Those bouts, however, cleared up and, he stated the stress he experienced as a result of the "railroad business" was worse than these other periods in his life. TR 151, 163.

I find Perez testified credibly and there is nothing in the record to contradict his description of the emotional distress he suffered as a result of the disciplinary investigation pursued against him by BNSF. While his testimony is compelling, Perez presented no medical evidence to help me better understand the stress he endured and the actual treatment he received. Moreover, even though Perez suffered through a stressful investigation and faced the possibility of termination, Perez was not actually terminated at the conclusion of the investigation and suffered no actual discipline, which are all factors when determining the amount of emotional distress damages to award. After a review of other whistleblower decisions awarding damages for emotional distress,[17] I find Perez is entitled to $10,000 in emotional distress damages.

[17] *See, e.g., Griebel v. Union Pac. R.R. Co.*, 2011-FRS-00011(ALJ Mar. 18, 2014), *aff'd* ARB No. 12-038 (ARB Mar. 18, 2014) (awarding $5,000 in compensatory damages where no evidence of medical or psychological treatment and no evidence of sleeplessness, anxiety, extreme stress, depression, marital strain, loss of self-esteem, excessive fatigue, or a nervous breakdown); *Bailey v. Consolidated Rail Corp.*, 2012-FRS-00012 (ALJ Dec. 31, 2012), *aff'd* ARB Nos. 13-030, -033 (ARB Apr. 22, 2013), *aff'd* Civ. No. 13-3740 (6th Cir. 2014) (unpublished) (awarding $4,000 where there was credible testimony of emotional distress without any evidence of psychological treatment and the emotional distress was not entirely due to the unlawful retaliation); *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-35 (ARB Jan. 31, 2008) (affirming the ALJ's award of $5,000 in compensatory damages for stress and anxiety which was based solely on the Complainant's testimony and was not supported by medical evidence); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-35 (ARB Aug. 6, 2004) (affirming the ALJ's award of $10,000 in compensatory damages based on a finding that Complainant's testimony regarding his humiliation and emotional distress was unrefuted, credible and persuasive); *see also Fink v. R&L Transfer, Inc.*, ARB No. 13-018, ALJ No. 2012-STA-6 (ARB Mar. 19, 2014) ($100,000 in compensatory damages where ALJ found that the respondent's termination of the complainant's employment had a significant emotional impact on the complainant in the effect it had on his dignity and self-esteem, his ability to support his family, and his vulnerable economic position); *Anderson v. Amtrak*, 2009-FRS-00003 (ALJ Aug. 26, 2010) (awarding $60,000 in compensatory damages where complainant was terminated); *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009) ($100,000 in compensatory damages where complainant testified that his termination took his confidence away, he was upset that he could no longer provide for his family, he and his family sought counseling, he was treated by a doctor for depression and anxiety, and his testimony was found credible, unrefuted and corroborated by his wife's testimony).

D. Punitive Damages

Perez seeks punitive damages in the amount of $150,000. Compl. Br. at 10. Punitive damages up to $250,000 are authorized under the FRSA to punish unlawful conduct and to deter its repetition. 49 U.S.C. § 20109(e)(3); *BMW v. Gore*, 517 U.S. 559, 568 (1996). Relevant factors when determining whether to assess punitive damages and in what amount include: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the respondent's actions; and (3) the sanctions imposed in other cases for comparable misconduct. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35 (2001).

1. Whether Punitive Damages are Warranted

Punitive damages are appropriate for cases involving "reckless or callous disregard for the [complainant's] rights, as well as intentional violations of federal law." *Cain*, ARB No. 13-006, slip op. at 10 (*quoting Youngermann*, ARB No. 11-0566). I find that BNSF's conduct showed reckless or callous disregard of Perez's rights under the FRSA, and BNSF intentionally violated those rights. When Perez reported his back injury, attributing it to an incident in which he injured himself at work while trying to prevent a door from falling off a train and onto another BNSF employee, and requested medical leave for back surgery, two BNSF managing employees conspired to have Perez disciplined in retaliation. Reppond commenced an investigation against Perez for rules violations he did not genuinely or reasonably believe occurred and gave Stockman the instruction to pursue the investigation. Disregarding BNSF protocol of conducting pre-investigation fact-checking, Stockman charged Perez with dishonesty (on the basis of a falsity conjured up by Reppond) as well as late reporting of his back injury (even though Perez protested to Reppond that he had timely reported his back injury to the company doctor)—charges which carried the threat of discipline, including termination. Perez was then made to defend himself against these baseless charges at an investigative hearing, and despite having insufficient evidentiary support, Stockman concluded that the charges were proven and recommended Perez's termination. I can only conclude that Reppond and Stockman wanted to punish Perez for engaging in protected activity, and, at each stage of the disciplinary proceeding, misrepresented, twisted, and ignored the facts to accomplish their desired result.

Even though Perez was not ultimately disciplined, he was charged with serious violations and never cleared of the false charges. Such actions by BNSF are sufficient to cause a serious chilling effect of dissuading employees from asserting their rights under the FRSA. Thus, BNSF effectively utilized the disciplinary process to discourage protected activity by Perez and other employees. BNSF's actions of bringing baseless and serious charges against Perez for filing an injury report and requesting medical leave for surgery related to the injury are reprehensible and constitute a willful act of retaliation.

2. The Amount of the Punitive Damages Award

In analyzing the amount of damages awarded, the focus is on the employer's conduct and "whether it is of the sort that calls for deterrence and punishment." *Cain*, ARB No. 13-006, slip op. at 10 (*quoting Youngermann*, ARB No. 11-0566). The ARB further requires that an ALJ weigh whether punitive damages are required to deter further violations of the statute and consider whether the illegal behavior reflected corporate policy. *Ferguson*, ARB No. 10-075, slip op. at 8. I find that an award of $60,000.00 in punitive damages is necessary in this case in furtherance of the goal of punitive damages to punish and deter future misconduct.

This is not the first case of its kind at BNSF. It is also not the first involving Reppond. In *Cain,* the ALJ found that "several of [BNSF's] management employees conspired to defeat Complainant's right to submit a medical claim and deprive him of his job," and the ALJ found Complainant credible that Reppond himself "exhibited animus to influence Complainant not to make a second [injury report] filing." *Cain*, ALJ No. 2012-FRSA-019, slip op. at 16, 18-19. These findings were not disturbed on appeal. *See BNSF Ry. Co.*, 816 F.3d 628, slip op. at 19, 22; *Cain*, ARB No. 13-006, slip op. at 8, 10-11. Notwithstanding the presence of a company policy prohibiting retaliation and training provided for managers, it appears to be selectively applied. *See* TR 183-184, 205-207 (describing BNSF's anti-retaliation rule and training for managers on the FRSA). As Perez points out, there is no evidence Reppond has been disciplined by BNSF, *see* Compl. Rep. Br. at 25, and Nystul escaped discipline even though he made inconsistent statements regarding what conversations he had with Perez.

In addition to showing a pattern of reprehensible conduct, BNSF reacted to Perez's initial report of a hamstring injury with retaliatory intent and disregard of his rights when Parrish forced Perez to participate in a physical reenactment of the incident that led to the injury. Additionally, Nurse Jones lied to Perez, telling him he could not receive treatment from his personal physician and had to see the company doctor instead. I make reference to these prior incidents not to rely on them as evidence, but only to provide context to the adverse action taken against Perez in this case.

As stated above, BNSF's conduct in targeting Perez because he reported his work-related back injury and requested medical leave was intentional and reprehensible. Reppond fabricated grounds for the dishonesty charge against Perez and initiated the investigation for late reporting of an injury despite not genuinely or reasonably believing there was a late reporting violation. Stockman put no effort into fact-checking Reppond's story prior to issuing Perez the Notice of Investigation, contrary to BNSF's procedures, and he recommended Perez's termination on the basis of flimsy evidence obtained at the investigation hearing. Reppond lied under oath during this proceeding, and Stockman made no apologies for how he conducted the investigation, despite almost costing Perez his job. BNSF's conduct in this case is egregious and mandates punishment and deterrence.

In finding punitive damages as awarded herein, I am keenly aware that Perez was not actually disciplined at the conclusion of the investigation. BNSF did not terminate or even suspend Perez nor did he lose any pay or benefits. Accordingly, the amount of punitive damages awarded herein is less than in a case where the adverse action is more severe. *See Vernace v. Port Authority Trans-Hudson Corp.*, ALJ No. 2010-FRS 0018 (ALJ Sept. 23, 2011), *aff'd* ARB No. 12-003 (ARB Dec. 21, 2012) ($1,000 in punitive damages because the complainant was not terminated or demoted, and lost only two days' pay or vacation time). Nevertheless, BNSF's threats of discipline have a chilling effect on future reports of injury by Perez, and that coupled with BNSF's failure to clear Perez of the charges, caused him to suffer significant emotional distress and damaged his otherwise unblemished professional reputation of 17+ years.

In *Raye v. Pan Am Rys., Inc.*, 2013-FRS-0008 (ALJ June 25, 2014), I awarded $250,000 in punitive damages where the employer responded to the complainant's FRSA complaint by charging the complainant with serious and terminal offenses and responded to all injury reports with an adversarial process, blaming employees for their injuries. The ARB affirmed the award, reasoning that "The ALJ finding of intentional misconduct supports a significant punitive damages award even though Pan Am did not formally discipline *Raye* as a result of the investigative hearing and charges." *Raye*, ARB No. 14-074, slip op. at 8. BNSF, like the respondent in *Raye*, charged the complainant with serious and terminal offenses in a willful act of retaliation but did not formally discipline the complainant. This case is distinguishable from *Ray*, however, as there is no evidence that BNSF, as an institution, uses similar processes to systematically discourage protected activity.

While I do not find the circumstances in this case as egregious as those in *Raye*, a substantial punitive damages award is necessary to deter such company conduct in the future. The circumstances in this matter are comparable to facts in other FRSA cases where sizeable punitive damages were awarded but in amounts less than half the statutory maximum. *See, e.g., Smith v. Union Pac. R. R. Co.,* ALJ No. 2012-FRS-0039 (ALJ April 22, 2013) ($25,000 punitive damages against railroad and $1,000 against supervisor when conduct was "egregiously reprehensible"); *Griebel v. Union Pac. R.R. Co.*, 2011-FRS-00011 (ALJ Jan. 31, 2013), *aff'd* ARB No. 13-038 (ARB Mar. 18, 2014) ($100,000 in punitive damages where the employer had "a mentality that discourages the filing of an injury report, and meets those that are filed with suspicion and mistrust" and did not give appropriate consideration to employees' rights under the FRSA); *Peterson v. BNSF Railway Co.,* ALJ No. 2010-FRS-00029 (ALJ January 10, 2014) ($100,000 in punitive damages where the ALJ noted, in part, that "Throughout the handling of the disciplinary proceedings, every matter that could be interpreted in different lights was interpreted in the light least favorable to [the complainant]. I can only conclude that BNSF institutionally had a single goal: to terminate [the complainant] regardless of the evidence.").

Considering the degree of reprehensibility and egregious conduct by BNSF and the need to deter similar conduct in the future, and the harm to Perez's emotional state and professional

reputation even though he was not ultimately disciplined, I find that Perez is entitled to $60,000 in punitive damages.[18]

E. Attorney Fees

Perez is entitled to reasonable attorney fees under the FRSA. 49 U.S.C. § 20109(e)(2)(C). The Complainant's counsel may submit a petition for attorney fees and costs for his work before the Office of Administrative Law Judges within 20 days of receipt of this Decision and Order. Respondent's counsel has 20 days from receipt of the fee petition to file a response.

ORDER

For the foregoing reasons, I find that Perez has established that BNSF retaliated against him in violation of the Federal Rail Safety Act for reporting a work-related injury and for requesting medical leave in anticipation of surgery for the injury. Accordingly, it is hereby ORDERED:

1. BNSF shall expunge from all BNSF files any and all references to the disciplinary processes against Perez initiated by the October 9, 2012 disciplinary charge letter;

2. BNSF shall disseminate a communication throughout BNSF's Kansas City metropolitan area mechanical department that Perez is innocent of all charges in connection with the October 9, 2012 disciplinary charge letter. The Complainant shall draft an initial version of this communication and provide it to the Respondent for edit and comment. If the parties cannot agree on the content, they shall present the dispute to the undersigned for resolution;

3. BNSF shall publish in a conspicuous location within BNSF's Kansas City metropolitan area mechanical department, regularly accessible to all BNSF mechanical department employees, a copy of this Decision & Order;

[18] I note that I awarded Perez $10,000 in compensatory damages. A punitive damages award of $60,000 yields a 1:6 ratio of compensatory to punitive damages. Based on the Supreme Court's guidance that ratios not exceed single digits, I find that the ratio here is reasonable. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

4. BNSF shall pay Perez compensatory damages in the amount of $10,000 for his emotional distress as the result of the disciplinary investigation pursued against him;

5. BNSF shall pay Perez punitive damages in the amount of $60,000; and

6. BNSF shall pay the Complainant's reasonable attorney fees and litigation costs. The Complainant shall file an application for reimbursement of attorney fees and litigation costs within 20 days of the date on which this order is issued. Should the Respondent object to any fees or costs requested in the application, the parties shall discuss and attempt to informally resolve the objection. Any agreement reached between the parties as a result of these discussions shall be filed in the form of a stipulation. In the event that the parties are unable to resolve all issues relating to the requested fees and costs, the Respondent's objection shall be filed not later than 20 days following service of the Complainant's application. Any objection must be accompanied by a certification that the objecting party made a good faith effort to resolve the issues with the Complainant prior to the filing of the objection.

SO ORDERED.

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts

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).