**U.S. Department of Labor**

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

**IN THE MATTER OF:**

**DALE GOURNEAU,**

**COMPLAINANT,**

**v.**

**BNSF RAILWAY COMPANY,**

**RESPONDENT.**

**ARB CASE NO. 2023-0034**

**ALJ CASE NO. 2021-FRS-00018**
**ALJ EVAN H. NORDBY**

**DATE: May 21, 2025**

**Appearances:**

***For the Complainant:***
**Frederic A. Bremseth, Esq.; *Bremseth Law Firm, PC;* Minnetonka, Minnesota**

***For the Respondent:***
**Bryan P. Neal, Esq.; *Holland & Knight, LLP*; Dallas, Texas**

**Before JOHNSON, Chief Administrative Appeals Judge, and THOMPSON and KAPLAN, Administrative Appeals Judges**

## DECISION AND ORDER

This case arises under the whistleblower protection provisions of the Federal Railroad Safety Act of 1982 (FRSA).[1] Dale Gourneau (Complainant or Gourneau) filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that BNSF Railway Company (Respondent or BNSF) violated the FRSA by terminating his employment.[2] OSHA determined that Gourneau's discharge did not violate the FRSA. Gourneau requested a hearing before an Administrative Law Judge (ALJ).

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[1] 49 U.S.C. § 20109, as implemented by 29 C.F.R. Part 1982 (2024).

[2] Decision & Order (D. & O.) at 2.

On May 4, 2023, ALJ Evan H. Nordby issued a Decision and Order (D. & O.) concluding that Gourneau's discharge violated the FRSA. BNSF timely appealed to the Administrative Review Board (ARB or Board). We affirm the ALJ's D. & O.

## BACKGROUND

Gourneau worked as a carman for BNSF from 2002 until his employment was terminated on January 22, 2020.[3] For eighteen years, his only prior incident of discipline was for one unexcused absence due to the passing of his mother.[4] Aside from that one absence, Gourneau had a completely clean record until the four months preceding his dismissal.[5] At all times relevant to this case, he worked at BNSF's Madan, North Dakota train yard.[6] The lead foreman for Madan is Mark Bieber.[7]

As a carman, Complainant was responsible for inspecting train cars as they arrived at the train yard.[8] Not every train was scheduled for inspection upon arrival, although carmen would note issues on "non-inspection" trains.[9] When a carman discovered a defect, it was called a "bad order" report and those reports were logged.[10] Some bad order reports involved minor repairs that a carman could complete in the train yard.[11] Other times a train car was pulled from service and sent for repair.[12] In general, when a car needed repair, it slowed down operations.[13]

Complainant was regarded as a good carman and was knowledgeable about the Federal Railroad Authority (FRA) rules that govern train safety standards.[14] He was active in safety initiatives at BNSF, including as a member of the Safety

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3 *Id.* at 2-3.

4 *Id.* at 3.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.* at 4.

12 *Id.*

13 *Id.*

14 *Id.* at 3.

Committee, the Leadership Advisory Committee, and a program called Approaching Others, which encourages non-adversarial ways of raising safety issues.[15]

Carmen travel around the train yard on ATVs. The train yard, which contains multiple train tracks, does not have stop signs.[16] There are areas in the train yard that pose increased safety risks due to their proximity to busy terminals, the railroad crossing area, or a convergence of multiple tracks. These spaces are designated as "foul areas," in which employees are not permitted to stop because of risk of death or harm from a moving train.[17] There are two videos in the record, which show that many of the tracks run close to or cross each other.[18] Thus, there are substantial areas of the yard that are foul areas because of the numerous tracks in close vicinity to each other.[19]

In approximately August of 2019, Complainant raised an issue with Mark Bieber, Complainant's supervisor and a general foreman, regarding the administration of BNSF's "Broken Wheel Club" program.[20] The Broken Wheel Club is an incentive program that encourages employees to report defects with wheels to prevent derailments.[21] If an employee reported a defect and the person who administered the program in Fort Worth found it eligible, the employee could receive $500. Complainant testified that he discovered that management in his district was not submitting the carmen's reported wheel defects for compensation.[22] Complainant raised the issue with Bieber and made copies of the rules for himself, Bieber, and human resources.[23]

On September 3, 2019, Complainant raised several more safety concerns. That morning, Complainant raised concerns pertaining to road conditions including

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15 *Id.* at 4, 14.

16 *Id.* at 5.

17 Hearing Transcript (Tr.) at 55 (Gourneau testimony).

18 Respondent's Exhibit (RX) -24, -25.

19 *See* Tr. at 53, 55, 56 (Gourneau testimony) (testifying about the numerous tracks in proximity to each other and how parts of the yard are designated foul areas, specifically stating about some of the tracks "[t]hey're too close together. There's not enough space in there to drive through there safely.").

20 D. & O. at 4.

21 *Id.*

22 *Id.*

23 *Id.* As a result of Complainant's efforts, carmen received compensation. *Id.*

washboarding,[24] potholes, and missing blue flags.[25] Later that shift, Complainant made three bad order reports on a train involving stencil violations.[26] He noticed that some of the cars on a nearby non-inspection train were missing the required federal consolidated stencil to identify the cars.[27] Complainant radioed the relevant supervisor, J.T. Smith, to ask if he should "bad order" the cars or repaint the stencils himself. Complainant testified that Myles Braun, one of Respondent's supervisors, then came on the radio and "sternly" told Complainant to go get the stencil.[28] While Complainant and his colleague, Matthew Williams, were waiting for a train to pass they heard a sound that indicated the running boards were broken on a non-inspection train.[29] Three total broken running boards were identified.[30]

**1. Level S Violations**

When BNSF employees engage in misconduct, the misconduct is rated based on its severity. At issue in this case are two level S or "Serious" violations, and one conduct violation.[31] BNSF's policy is that two level S violations within a 12-month period will generally result in dismissal.[32]

When an employee is charged with misconduct, BNSF holds an investigation, during which a manager outside the employee's chain of command holds a hearing.[33] The manager who conducts the investigation is chosen by the general foreman of the facility.[34] The investigator recommends appropriate discipline. In cases where dismissal is recommended, BNSF's Policy for Employees' Performance Accountability (PEPA) committee reviews the investigation record created by the investigator and the employee's personnel file to determine whether

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24 RX 28 at 3. "Washboard" or "washboarding" and ballast conditions relate to uneven and bumpy roads and present safety concerns.

25 D. & O. at 4. Blue flags were used as a safety measure to indicate that there were men at work on a train such that certain safety precautions including blocking switches would be taken. Tr. at 39-40.

26 D. & O. at 6.

27 *Id.* "The stencil includes information such as the build date of the train car." *Id.* at 6 n.5.

28 *Id.* at 6.

29 *Id.*

30 *Id.*

31 *Id.* at 10.

32 *Id.* at 34.

33 *Id.* at 7, n.7.

34 Tr. at 275 (Chad Vogele testimony).

dismissal is appropriate.[35] PEPA does not conduct a separate investigation as part of its review. If PEPA determines that termination is appropriate, PEPA forwards the proposed termination and investigation record to other management for approval.[36] The PEPA committee is based out of Fort Worth, Texas.[37]

In this case, the violations that led to Complainant's dismissal happened in short succession. The first occurred on September 3, 2019, which resulted in a 20-day actual suspension, a 10-day record suspension, and a 12-month probationary period.[38] The second occurred on January 3, 2020, which resulted in dismissal.[39]

Both of the Level S violations at issue in this case involved violations of BNSF's Mechanical Safety Rule 12.1.2, "crossing tracks," which states as follows:

> When crossing tracks with a motor vehicle or off-track equipment at non-public crossing locations:
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> - Approach as close to a right angle to the track as practical to allow for optimal viewing of potential approaching [train] movements.
> - Stop before crossing the track(s), unless the vehicle or off-track equipment is foul of a previously crossed track.
> - Look for trains, engines, rail cars and on-track equipment movements approaching from either direction.
> - Yield to trains, engines, rail cars and on-track equipment before proceeding across the track(s).[40]

The rule does not specify a distance from the crossing at which an employee must stop. At the hearing, every witness who was asked to specify an appropriate

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35 D. & O. at 8. PEPA is the name of BNSF's progressive discipline policy and also the name of the committee.

36 *Id.* at 13-14.

37 *Id.* at 8.

38 *Id.* at 11.

39 *Id.* at 12-13.

40 *Id.* at 5.

stopping distance gave a different one.[41] During his testimony, Bieber agreed that it was up to the employee's discretion to determine safe operations.[42]

*A. September 3, 2019 Incident*

On September 3, 2019,[43] Complainant was operating an ATV in the yard. He stopped to do work and saw his supervisor for that day, Braun, speaking with his coworker, Matthew Williams, east of where Gourneau was working. When Gourneau completed his task, he got on his ATV and drove across a set of tracks.[44] The record contains video of this crossing but does not show where Gourneau stopped.[45]

Within a few feet of crossing the tracks, Braun told Gourneau to stop and admonished him for not stopping before crossing the track.[46] Gourneau responded that he knew Braun had seen him stop while performing work.[47] Gourneau testified that he stopped in that location to avoid stopping in a designated foul area, which is prohibited. He further testified that he had stopped in that same location before, as had his colleagues.[48] The video is consistent with Gourneau's testimony.

Three of Gourneau's colleagues testified at the hearing that they had previously stopped where Gourneau had stopped without incident.[49] Gourneau similarly testified that Respondent had never had a problem with him stopping at that location before.[50] In October 2019, a safety meeting was held at which carmen were told to stop before crossing a track in the same manner as Complainant had stopped. After this meeting, several workers told Gourneau that Bieber's instruction

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41 *See* Tr. at 279 ("At or near the crossing," with near meaning ". . . like one or two feet . . . like right before the crossing, a couple of feet," per Chad Vogele); *Id.* at 374 ("About 25 feet from the track," per PEPA Committee member Detlefsen); *Id.* at 386 ("probably 30 to 40 feet," per Bieber).

42 *Id.* at 411. He goes on to say that "150 feet is a bit excessive." *Id.*

43 After Complainant reported washboarding, potholes, and missing blue flags, but before he reported illegible stencils and broken running boards. D. & O. at 4-6.

44 *Id.* at 5.

45 *Id.* at 6; RX-25.

46 D. & O. at 5.

47 *Id.*

48 *Id.*

49 *Id.* at 15-16.

50 Tr. at 43.

for properly crossing the tracks was the same as the conduct for which Gourneau had been suspended.[51]

Later that day, Braun summoned Gourneau to his office. Complainant testified that he "knew they were mad" because he made nine total bad order reports that day.[52] Gourneau asked Williams to accompany him as a witness.[53] At this meeting, Gourneau received paperwork about the alleged failure to stop.[54] Two days later, Gourneau was notified there would be a formal investigation into the incident, and shortly after that, he was notified that a second charge of discourteousness was added.[55]

According to Braun, Gourneau was discourteous to him at the time of the September 3 incident. He testified that Gourneau had cut him off in an "elevated tone, very disrespectfully, and disrespectfully told me that I should go hang out with the round house which is the slang term for our machinists . . . and electricians [a]nd turned around and started his Honda – his four-wheeler and drove away from me."[56] Braun's text message to Bieber on September 3, 2019, did not mention Gourneau's tone or discourtesy, only that he did not stop at the crossing.[57]

On September 5, 2019, Bieber sent Braun a text message asking whether Gourneau had been "discourteous towards [him] at any time" to which Braun replied, "yes."[58] Braun testified that he felt Gourneau was upset at the time he initially spoke to Gourneau, and wanted to give him time to cool-off, which was why he did not bring the discourteousness up earlier.[59] Gourneau denies being discourteous.[60] The ALJ found that Braun had an opportunity to raise the alleged discourteousness when he served Gourneau with the initial paperwork, but did not.[61] Based on this and other facts surrounding this issue, the ALJ ultimately

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51 D. & O. at 10, 29.

52 *Id.* at 6.

53 *Id.*

54 *Id.*

55 *Id.* Discourteousness is a violation of BNSF's code of conduct.

56 Tr. at 308.

57 D. & O. at 7.

58 *Id.*; Tr. at 316.

59 D. & O. at 7; Tr. at 319-21.

60 D. & O. at 6.

61 *Id.* at 19.

found that Gourneau had not been discourteous, and that this allegation was added by Respondent after the fact.[62]

Bieber selected Chad Vogele, a car supervisor, to conduct the investigation.[63] Vogele sustained both charges. He viewed the video and determined Complainant should have stopped closer to the tracks than he did. He agreed with Braun's version of the events about Gourneau's demeanor and behavior. Vogele also stated that he credited Braun over Gourneau.[64] At the hearing, Vogele learned for the first time that the "discourteous" allegation was added after the fact.[65] Vogele confirmed at the hearing that the "discourteous" charge should have been made immediately.[66]

After sustaining both charges, Vogele initially recommended a 30-day suspension, with a 12-month probationary period.[67] After conferring with Bieber, who wanted a more severe penalty for Complainant, Vogele recommended a 36-month probationary period, with a 30-day suspension.[68]

Kathleen Maglisceau, one of the PEPA officials who testified, explained that PEPA reviewed dismissals as a matter of course, and otherwise was available for questions about discipline generally.[69] In this instance, because Vogele recommended discipline outside the standard policy of a suspension with a 12-month probationary period, PEPA was involved.[70] An e-mail exchange followed between Vogele, Bieber, and the PEPA staff, which the ALJ details extensively in the D. & O. The PEPA staff explicitly noted Gourneau's clean record and stated that "I am not seeing something so egregious" as to deviate from the standard 12-month probation.[71] At the hearing, Bieber minimized his role in disciplining Complainant

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62 *Id.*

63 *Id.* at 8.

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.* at 9.

68 *Id.*

69 *Id.*; Tr. at 264, 332.

70 The probationary period means that if an employee commits other level S violations during the period, there is the potential for dismissal. At the hearing, Vogele testified that he reached out to PEPA because when he attempted to submit the selected discipline to the system, it was rejected. Tr. at 265. He testified that he and Bieber structured the discipline that way because of the two offenses in the same incident—failure to stop and discourteousness. *Id.* at 264.

71 D. & O. at 9.

and was vague about his disciplinary recommendation.[72] However, the record shows that Bieber advocated for a 36-month probationary period and spoke with Maglisceau about it.[73] BNSF imposed an actual 20-day suspension in addition to a "record" suspension, a Level S discipline entry in his personnel record for a severe safety violation, and a 12-month probationary period.[74]

*B. January 3, 2020 Incident*

On January 3, 2020, Complainant was working with three other men in the yard. Williams, his colleague on September 3, 2019, operated as lead man, while two others worked on the east end, and Gourneau worked on the west end.[75] A train approached from the west end of the yard, and Complainant's two colleagues were blocked by another train. Complainant began his portion of the train inspection, starting on the north side and working eastward. When he finished that portion, he called in an "OK train," crossed the track at the east end, and began working from the other end, moving west. Complainant's colleagues were able to take over once they could clear the tracks. Williams told Complainant that once he had finished his share of the train and he could cross safely, he could stop work for the night.[76]

While Complainant was working that night, Bieber was in the office, operating the surveillance cameras. According to Bieber, the cameras are used for evaluating carmen and for discipline.[77] BNSF is required to test the cameras regularly.[78] The video in the record shows an ATV crossing tracks on the west end of the yard. The video zooms in on the driver approximately halfway through. The video starts at 10:11 pm, shows the ATV stopping at 10:13:35, and zooms in on the driver at 10:13:50.[79] The driver stops to complete a task, and proceeds to cross several tracks that are close together without stopping.[80]

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72 *Id.* at 11.

73 *Id.* at 9; Tr. at 394.

74 D. & O. at 10.

75 *Id.* at 12.

76 *Id.*

77 *Id.*

78 *Id.* at 12-13.

79 *Id.* at 12.

80 *Id.* at 13.

The ALJ found that it was impossible to tell who drove the ATV.[81] Bieber believed it was Gourneau based on radio transmissions.[82] Gourneau said he "does not think it was him."[83] While the ALJ generally found Gourneau credible, the ALJ found this one aspect of his testimony evasive.[84] However, the ALJ found that whether Gourneau was driving the ATV was not critical to his conclusions.[85]

Two days later, Complainant's union representative informed him that he was being pulled out of service for another level S violation of Rule 12.1.2.[86] Bieber initiated the investigation into this incident.[87] As this was a second level S within the probationary period, Complainant's employment could be terminated. A second investigation was held, with Vogele serving as the investigator, once again at Bieber's request.[88] Bieber was the primary witness for BNSF at the investigation hearing, described the alleged conduct, advocated for finding it a violation, and recommended termination of Gourneau's employment.[89] Vogele sustained the charge and the PEPA committee reviewed the recommended termination.[90]

PEPA Committee member Stephanie Detlefsen reviewed the proposal to terminate Complainant's employment. She relied entirely on the hearing record and engaged in no independent review or fact-finding.[91] Detlefsen testified that her review showed that Complainant had engaged in the same misconduct before and had expressed no remorse.[92] After Detlefsen completed her review, other managers reviewed the proposed termination in accordance with BNSF policy.[93] No one who reviewed the proposed termination relied on information outside of the record Vogele and Bieber created.[94]

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81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.* at 18.

85 *Id.*

86 *Id.* at 12.

87 *Id.* at 12-13.

88 *Id.* at 13.

89 *Id.*

90 *Id.* at 13-14.

91 *Id.* at 13.

92 *Id.*

93 *Id.* at 13-14.

94 *Id.*

BNSF offered the disciplinary records of several other BNSF employees as comparator evidence. Those records show that many employees with two level S violations within a 12-month period are terminated, but offered no details on whether the failure to stop violations involved foul areas or an employee stopping too far away from the tracks.[95] Complainant offered the testimony of several colleagues, each of whom testified that they had made the same choices of where to stop as Gourneau and not been disciplined for failing to stop.[96] Bieber denied seeing that conduct. Steve Simons, a former yard lead man, stated at the hearing that he watched the video of the September 3, 2019 incident and that the "very next day, we're told exactly—we're supposed to do exactly what Dale did."[97] Some of those colleagues admitted to driving right through the tracks, making no attempt to stop whatsoever, and not being disciplined for it.[98]

**2. Procedural History**

On February 25, 2020, Complainant filed a whistleblower complaint with OSHA.[99] On January 25, 2021, OSHA dismissed Complainant's complaint.[100] Complainant requested a hearing with an ALJ, and a hearing was held on November 16-17, 2021.[101]

On May 4, 2023, the ALJ issued a D. & O. in favor of Complainant. The ALJ made extensive credibility findings in the D. & O., which are important to many of his factual conclusions. Specifically, the ALJ found that Gourneau was credible, except with his evasiveness as to who was driving the ATV in the January 3, 2020 video;[102] Braun was less than credible, especially when it came to the testimony about the discourteous charge;[103] Bieber was not credible for broad parts of his testimony, including his explanation for why he followed up with Braun to ask whether Gourneau was discourteous and his testimony that he had never seen

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95 RX-14.

96 D. & O. at 15-16.

97 *Id.* at 15.

98 *Id.* at 16.

99 *Id.* at 2; RX-31.

100 D. & O. at 2.

101 *Id.*

102 *Id.* at 19.

103 *Id.*

someone stop where Gourneau did on September 3, 2019;[104] and Vogele and members of the PEPA committee were credible.[105]

The ALJ found that Complainant engaged in the several instances of protected activity. The ALJ stated, "[i]n general, Gourneau was known as a safety advocate [ . . . ] As far as specific protected activities, he was a member of the safety committee into the fall of 2019; at the committee's monthly meetings and from day to day as well, Gourneau would raise safety concerns to Bieber and other managers, such as washboarding and potholes in the yard and missing blue flags at certain sections of track."[106] The washboarding, potholes, and missing blue flags were reported on September 3, 2019.[107] The ALJ also found that Gourneau engaged in three more instances of protected activity: (1) Complainant's report to Bieber regarding management's failure to submit eligible reports as part of the administration of BNSF's Broken Wheel Club; (2) Complainant's three bad order reports of stencil violations to his supervisor; and (3) Complainant's report of three broken running boards.[108]

The ALJ found that Respondent engaged in adverse employment actions against Complainant when: (1) it imposed charges, a suspension, and a 12-month probationary period on Complainant in October 2019, and (2) it terminated Complainant's employment on January 22, 2020.[109]

The ALJ found that Complainant's protected activity was a contributing factor to the adverse employment actions that he suffered based on the "cat's paw" theory of liability, temporal proximity, pretext, BNSF's inconsistent application of its policies, BNSF's antagonism or hostility toward Complainant, Respondent's change in attitude toward Complainant, and the falsity of BNSF's explanation for the adverse actions taken.[110] The ALJ further found that BNSF did not prove that it would have taken the same adverse action against Complainant absent his protected activity because Respondent did not prove that it applied Rule S-12.1.2 "consistently for the same conduct."[111] Supporting this finding was evidence that multiple carmen testified that they drove ATVs in the same manner as Complainant without punishment and continued to do so after Complainant's

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104 *Id.* at 19-20.

105 *Id.* at 20.

106 *Id.* at 24.

107 *Id.* at 4.

108 *Id.* at 4-6, 24.

109 *Id.* at 25.

110 *Id.* at 26-33.

111 *Id.* at 34.

punishment "even with video surveillance available to management to find and charge Level S violations."[112]

The ALJ ordered the following remedies: (1) reinstatement;[113] (2) $318,979.98 in back pay wages and $39,679.74 in prejudgment interest,[114] with backpay and post-judgment interest to continue to accrue through the date of payment;[115] (3) $70,000 in compensatory damages;[116] (4) $150,000 in punitive damages;[117] (5) reasonable attorney's fees and costs;[118] and (6) ordered BNSF to seal all documents relating to the incidents, charges, and adverse actions addressed in the D. & O. and redact any such references, and to post the D. & O. for a minimum of 60 days in a place and manner that is usual and customary for employees to gather and review employment related information.[119]

Respondent filed a timely appeal with the Board.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to review ALJ decisions under the FRSA.[120] The ARB will affirm the ALJ's factual findings if they are supported by substantial evidence, but reviews conclusions of law de novo.[121] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[122] The Board has held that an ALJ's factual findings will be upheld where supported by substantial evidence even if we "would

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112 *Id.*

113 *Id.* at 34-35.

114 The ALJ selected the interest rate of 7 percent compounded daily. *Id.* at 35. Respondent did not appeal the ALJ's decision with respect to the interest rate.

115 *Id.* at 35-36. The ALJ stated that "[b]ackpay and interest shall continue to accrue, in amounts consistent with these calculations, through the date of payment." *Id.* at 36.

116 *Id.* at 36-39.

117 *Id.* at 39-45.

118 *Id.* at 45.

119 *Id.* at 45-46.

120 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (Mar. 6, 2020); *see* 29 C.F.R. § 1982.110(a).

121 *Klinger v. BNSF Ry. Co. (Klinger II)*, ARB No. 2023-0003, ALJ No. 2016-FRS-00062, slip op. at 5 (ARB July 23, 2024) (citation omitted).

122 *Carter v. BNSF Railway Co.*, ARB No. 2021-0003, ALJ No. 2013-FRS-00082, slip op. at 6 (ARB Sept. 26, 2022) (citation omitted).

justifiably have made a different choice had the matter been before us de novo."[123] The ARB reviews an ALJ's procedural and evidentiary rulings for abuse of discretion.[124] In addition, because an ALJ observes all witnesses throughout a hearing the Board generally defers to an ALJ's credibility findings "unless they are 'inherently incredible or patently unreasonable.'"[125]

## DISCUSSION

On appeal, BNSF challenges the ALJ's findings on protected activity, contributing factor causation, its affirmative defense, and damages.[126] For the reasons that follow, we affirm the ALJ's D. & O.

### 1. FRSA Whistleblower Elements

The FRSA provides that railroad carriers "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part" to any FRSA-protected activities.[127]

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123 *Carter*, ARB No. 2021-0003, slip op. at 6-7 (citation omitted).

124 *Id.* at 7 (citation omitted).

125 *Klinger II*, ARB No. 2023-0003, slip op. at 5 (citing *Mizusawa v. United Parcel Serv.*, ARB No. 2011-0009, ALJ No. 2010-AIR-00011, slip op. at 3 (ARB June 15, 2012), *aff'd* No. 12-9563 (10th Cir. 2013)).

126 Respondent also raises two procedural issues. First, Respondent contends that the ALJ impermissibly relied on hearsay evidence regarding the ALJ's finding that Bieber targeted Complainant. At issue is Steve Simons' testimony that Bieber told Will Leach—who was not called to testify—that "We got Dale. And we're going to get him fired." The applicable regulations specifically state that the formal rules of evidence will not apply and allow the ALJ to admit relevant evidence. 29 C.F.R. § 1982.107(d). In any case, Bieber, the original speaker, here testified and disclaimed the testimony, which offsets the concern that the statement would be taken as true without testimony—albeit testimony that the ALJ did not find credible here—arguing against the veracity of the statement. Additionally, the ALJ relied on other evidence for finding that there was antagonism and hostility toward Gourneau's protected activity. Thus, we do not disturb the ALJ's finding.

Second, Respondent contends that Complainant failed to exhaust his administrative remedies with regards to the Broken Wheel Club because he did not explicitly refer to the Broken Wheel Club in his OSHA complaint. However, the ALJ explained that the hearing was a de novo proceeding. D. & O. at 22. Exhaustion requires a complainant to give notice of all claims of discrimination. *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 630 (8th Cir. 2000) (citation omitted) (discussing Title VII cases). We conclude that Complainant properly raised his report about Respondent's failure to properly administer the Broken Wheel Club program as protected activity before the ALJ. Thus, we are not persuaded by Respondent's argument.

127 49 U.S.C. § 20109(a).

FRSA cases are governed by the burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21).[128] Thus, to prevail, a complainant must show by a preponderance of the evidence that he engaged in protected activity, was subjected to an unfavorable personnel action, and that protected activity was a contributing factor in the unfavorable personnel action.[129] The employer may avoid liability by demonstrating, by clear and convincing evidence, that it would have taken the same action against the complainant in the absence of the protected activity.[130]

*A. Complainant Engaged in Protected Activity*

The FRSA prohibits an employer from discriminating against an employee because the employee reported a "hazardous safety or security condition."[131] A complainant's report of a hazardous condition must be made in good faith. A good-faith report is one that the complainant subjectively believes constitutes a hazardous safety or security condition.[132] The Eighth Circuit[133] has rejected the notion that a good-faith report of a hazardous safety or security condition must be objectively reasonable.[134]

The ALJ found that Complainant engaged in several instances of protected activity under 49 U.S.C. § 20109 (b)(1)(A) by making good faith reports of "hazardous safety or security conditions" when he: (1) challenged Respondent's failure to properly administer the Broken Wheel Club; (2) reported three bad orders for illegible stencils on September 3, 2019; (3) reported three broken running boards

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128 *See id.* § 20109(d) (citing *id.* § 42121(b)).

129 29 C.F.R. § 1982.109(a).

130 *Id.* § 1982.109(b).

131 49 U.S.C. § 20109(b)(1)(a).

132 *Monohon v. BNSF Ry. Co.*, 17 F.4th 773, 780 (8th Cir. 2021) ("As an initial matter, the statute requires only that the employee report 'in good faith,' meaning 'honestly and frankly, without any intent to defraud.' The statute's plain language thus does not require that the report be objectively reasonable, and we decline to read a reasonableness requirement into the 'reporting, in good faith provision.") (citation omitted).

133 Because the events giving rise to this complaint occurred in North Dakota, the Eighth Circuit may have jurisdiction over any appeal of this decision. *See* 29 C.F.R. § 1982.112(a).

134 *Monohon*, 17 F.4th at 780; *see also Ziparo v. CSX Transp., Inc.,* 15 F.4th 153, 159 (2d Cir. 2021) ("The ordinary meaning of the plain text of § 20109(b)(1)(A), then, would entail that there is no requirement that, in order to be protected, a report must be *reasonably* believed to concern a safety condition, so long as it is made in the good-faith belief that it does.") (emphasis in original).

on September 3, 2019; and (4) reported washboard conditions, potholes in the yard, and missing blue flags at certain sections of the track throughout the fall of 2019.[135]

Respondent objects to the ALJ's finding that Complainant's challenge about the Broken Wheel Club, reports of illegible stencils, and report of broken running boards are protected as reports of "hazardous safety or security conditions."[136] Specifically, Respondent contends that the ALJ erred by extending protection to reports of conditions that are only "potentially" hazardous.[137] Respondent argues that the word "hazardous" in the phrase "hazardous safety or security condition," means a significant and immediate safety hazard, as opposed to something that is potentially hazardous or might become hazardous in the future.

The Eighth Circuit has explicitly recognized that a disclosed safety condition need not be immediately hazardous or actually cause harm to be protected.[138] In *Monohon v. BNSF*, a railway worker complained that having to wear a seatbelt in a truck that operates on pavement and railroad tracks was dangerous because it could prevent him from being able to quickly exit the truck if a train approached.[139] A jury found that Monohon's complaint demonstrated a hazardous safety condition even though no harm actually came to Monohon.[140] The Eighth Circuit affirmed the jury's finding, emphasizing that whether something is a hazardous safety condition is a factual issue, and noted that the "statute does not require that an accident or injury have occurred."[141] Thus, in accordance with the Eighth Circuit and the statutory language, we conclude that to establish a good faith report of a "hazardous

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135 D. & O. at 24.

136 Resp. Br. at 13, 15-19. Respondent also challenges the ALJ's statement that "Gourneau was known as a safety advocate," and argues that being a safety advocate is not protected activity. *Id.* at 19. We do not construe the ALJ's statement as finding specific protected activity, but instead as context supporting his findings of protected activity. Furthermore, the ALJ found numerous other instances of protected activity, and in at least two instances—Gourneau's reporting of washboard conditions and potholes—Respondent does not even challenge the ALJ's findings of protected activity under the FRSA. Thus, we find that substantial evidence supports the ALJ's finding of protected activity in this case, and we affirm the ALJ's determination.

137 Respondent's Brief in Support of its Petition for Review (Resp. Br.) at 16.

138 *Monohon*, 17 F.4th at 783 ("The statute does not require that an accident or injury have occurred.").

139 *Id.* at 776-78.

140 *Id.* at 783.

141 *Id.*; *see also Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 790 (8th Cir. 2014) ("the [ ] records would permit a reasonable jury to find that BNSF understood Kuduk's complaint regarding the handle to be, at bottom, a safety report.").

safety or security condition," Complainant need not prove that the reported safety conditions be immediately hazardous or have actually caused harm.

*a. Complainant's Broken Wheel Club Complaints were Protected Activity*

The ALJ found that Complainant's Broken Wheel Club complaint was protected activity because "[f]inding and reporting broken wheels prevents derailments, as Gourneau testified, and defective wheels are expressly a target of the minimum Federal safety standards at 49 C.F.R. Part 215."[142] To support his conclusions, the ALJ relied in part on *Ziparo*, wherein the Second Circuit found that an employee who was feeling stressed because of pressure by his supervisors to falsify records (unrelated to safety themselves), reported a hazardous safety condition because it affected his ability to perform his safety-related job.[143]

Here, Complainant reported that managers were not administering a program designed to prevent derailment. In his testimony, he explained that carmen were reporting defects and that managers were essentially killing those reports in the yard, even though the wheel itself may have been fixed.[144] A wheel defect, which could cause a derailment, is clearly hazardous. BNSF argues, in part, that Gourneau's complaint was about payments or administration of the program, not the broken wheels. But Gourneau reported a failure to adhere to an internal program designed to prevent hazardous safety conditions. The fact that some carmen ended up receiving rewards under the program shows that there were in fact hazardous conditions corrected under the program. The program's existence also demonstrates the urgency of discovering and correcting wheel defects to Respondent in preventing derailments and other hazardous conditions that could result from unreported wheel defects.

The testimony in the record provides evidence that there were safety problems associated with broken wheels and that these problems were significant enough for BNSF to create incentives for employees to report them. Based on the foregoing, we conclude that substantial evidence supports the ALJ's finding that Complainant's Broken Wheel Club complaints were protected activity.

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142 D. & O. at 24.

143 *Id.* at 23-24; *see also Ziparo*, 15 F.4th at 156-57, 163-64, 165 (Ziparo's supervisors' "demands were creating an unsafe environment by causing Ziparo . . . to be stressed and distracted and therefore unable to focus properly on [his] work.").

144 D. & O. at 4.

*b. Complainant's Report of Missing Stencils was Protected Activity*

The ALJ found that Complainant engaged in protected activity when he reported illegible stencils.[145] The ALJ observed that FRA rules, which state explicitly that they are intended to provide "minimum Federal safety standards for railroad freight cars," require railcars to have "clearly legible letters and numbers" stenciled "on each side of the car body."[146] Gourneau explained at the hearing that stencils are required on each railcar to ensure that when a railcar is inspected, it can be easily identified if an issue or defect is found.[147] Indeed, Gourneau's very first task when inspecting a train was to write down the car numbers for each car that needed further scrutiny.[148] He also explained that the FRA even requires reporting defects, like stencil violations, on non-inspection trains, like the trains reported by Gourneau on September 3, 2019.[149] Consequently, a reasonable factfinder could determine that Gourneau believed, in good faith, that the illegible stencils presented a hazardous safety condition because a car might not be properly inspected or a hazard on a car might not be properly identified because the

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145 *Id.* at 24.

146 4 C.F.R. § 215.301 ("The railroad or private car owner reporting mark, the car number, and built date shall be stenciled, or otherwise displayed, in clearly legible letters and numbers not less than seven inches high, except those of the built date which shall not be less than one inch high (a) On each side of each railroad freight car body; and (b) In the case of a tank car, in any location that is visible to a person walking at track level beside the car . . ."); *see also id.* § 215.303 ("restricted railroad freight car[s] . . . shall be stenciled, or marked—(1) in clearly legible letters . . ."), § 215.305 ("Maintenance-of-way equipment . . . shall be stenciled, or marked—(1) In clearly legible letters . . .").

147 Tr. at 28 (Gourneau explaining that during train inspections, he had to identify the number on the railcar so that the carman could return to those cars later for a more thorough inspection). BNSF contends that a violation of an FRA rule, like the stenciling rule, does not necessarily or automatically create a hazardous safety or security condition. Resp. Br. at 17. Indeed, the ALJ recognized as much. D. & O. at 24 (stating that "one could imagine reports of [FRA] rule violations that do not implicate safety" and therefore are not protected by Section 2019(b)(1)(A)). Even so, for the reasons above, the FRA rule violation in this instance also poses a hazardous safety condition. Additionally, the fact that Gourneau understood that the stencils on the identified rail cars violated the FRA rules, which on their face state that they provide "minimum Federal safety standards," supports the ALJ's conclusion that Gourneau believed, in good faith, that the stencils constituted a hazardous safety condition. *Monohon*, 17 F.4th at 780 (requiring a plaintiff to show only that he believed "in good faith" that a hazardous safety condition existed); *see also* D. & O. at 23-24 ("Gourneau clearly understood that the FRA rules ensure safety by identifying and outlawing conditions that are or may become hazardous, and in turn that reporting conditions that were in violation of the FRA rules was *in fact* reporting hazardous conditions, or potentially hazardous conditions, so that they could be repaired.").

148 Tr. at 28.

149 *Id.* at 66-67, 131-33.

inspector could not determine which car had the defect. Thus, we affirm the ALJ's finding that Complainant's report of illegible stencils was protected activity.

*c. Complainant's Report of Broken Running Boards was Protected Activity*

The ALJ found that Complainant's report of broken running boards[150] was protected activity. The ALJ's finding is supported by substantial evidence. Broken running boards present a clear safety risk—running boards are designed for people to stand on, and there is a risk of physical harm from a fall if one is broken. Gourneau also stated at the hearing that a broken running board is an "FRA Federal Safety Compliance Defect."[151] Consequently, a reasonable factfinder could determine that Gourneau believed, in good faith, that the broken running boards presented a hazardous safety condition because of the risk of injury to railway workers and others. Thus, we affirm the ALJ's finding that Complainant's report of broken running boards was protected activity.

Therefore, we find that each of the ALJ's findings of protected activity are supported by substantial evidence and affirm the ALJ's conclusion that Complainant engaged in protected activity.

*B. Complainant was Subjected to an Adverse Action*

A complainant must establish that they suffered an adverse action.[152] Pursuant to the FRSA, an employer "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee" because that employee engaged in FRSA-protected activity.[153] The regulations elaborate that an employer cannot "discharge, demote, suspend, reprimand, or in any other way retaliate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining" an employee because they engage in FRSA-protected activity.[154]

The ALJ found that Complainant's dismissal was an adverse action, as were the "charges, suspension, and 12-month probationary period imposed in October 2019, prompted by the September 3, 2019 track crossing incident."[155]

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150 D. & O. at 24.

151 Tr. at 67.

152 29 C.F.R. § 1982.109(a).

153 49 U.S.C. § 20109(a).

154 29 C.F.R. § 1982.102(b)(1), (b)(2)(i).

155 D. & O. at 25.

BNSF does not challenge the ALJ's findings that Complainant's dismissal, suspension, and 12-month probationary period were adverse actions.[156] The record substantially supports the ALJ's factual findings that Respondent suspended Complainant for 20 days, subjected Complainant to a 12-month probationary period, and terminated Complainant from his employment on January 22, 2020. The ALJ's findings on adverse action are affirmed.

### *C. Complainant's Protected Activity was a Contributing Factor in his Adverse Action*

Complainant must establish by a preponderance of the evidence that his protected activities were a contributing factor to the adverse actions taken against him.[157] A "contributing factor" includes "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the [adverse] decision."[158] This element can be established by either direct or circumstantial evidence.[159] Temporal proximity between the protected activity and the adverse action is probative for contributing factor, but is not determinative.[160]

Since the D. & O. was issued in 2023, there have been important developments in the law relating to contributing factor. The ALJ applied the relevant Eighth Circuit case law requiring that the complainant establish that the employer intended to retaliate because of the protected activity, which was outlined in *Kuduk v. BNSF Railway*.[161] Whether an intent to retaliate is required as part of contributing factor causation under FRSA and other whistleblower statutes is an issue that has been extensively litigated before the ARB and in the federal courts.[162] The Supreme Court, in *Murray v. UBS*, recently provided clarity on the intent

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156 BNSF contends that the charging letter for the September 3, 2019 incident was not a separate adverse action. Resp. Br. at 20. However, because we affirm the ALJ's adverse action findings on other grounds, we need not reach this issue.

157 29 C.F.R. § 1982.109(a).

158 *Carter v. BNSF Ry. Co.*, ARB No. 2021-0035, ALJ No. 2013-FRS-00082, slip op. at 8 (ARB Sept. 26, 2022) (quoting *Gunderson v. BNSF Ry.*, 850 F.3d 962, 969 (8th Cir. 2017)).

159 *Id.* (citation omitted).

160 *Id.* (citation omitted); *see also Tyler v. Univ. of Ark. Bd. of Trustees*, 628 F.3d 980, 986 (8th Cir. 2011) ("As more time passes between the protected conduct and the retaliatory act, the inference of retaliation becomes weaker and requires stronger alternate evidence of causation.") (citation omitted).

161 *Kuduk*, 768 F.3d at 792.

162 *See e.g., id.* at 791; *Murray v. UBS Secs., LLC*, 601 U.S. 23, 33 (2024) (stating that while a SOX whistleblower "must prove that his protected activity was a contributing factor in the unfavorable personnel action, he need not also prove that his employer acted with 'retaliatory intent.'").

question. In clear terms, the Court held that while a complainant must prove that the protected activity was a contributing factor, he does not need to additionally prove that there was retaliatory intent or animus.[163] *Murray* is a SOX case, but SOX, like FRSA, incorporates the burden-shifting standard laid out in AIR21.[164] Thus, the standard we apply is the one articulated in *Murray* and we do not require a complainant to show retaliatory intent in proving a contributing factor.[165]

*i. Cat's Paw*

The ALJ, applying *Kuduk*, found BNSF liable on a cat's paw theory of liability. The cat's paw theory was laid out in *Staub v. Proctor Hospital*, wherein the Supreme Court found that employers can be held liable for employment discrimination based on discriminatory animus of an employee who influenced, but did not make, the final employment decision.[166] Cat's paw liability as described in *Staub* requires that the supervisor intends to cause an adverse employment action.[167] If the supervisor's action is a proximate cause of the employer's adverse action, then the employer is liable.[168]

Respondent challenges the ALJ's cat's paw analysis, arguing a lack of intent and that the ALJ applied a diminished standard that undermines existing case law. Respondent also emphasizes the role of Vogele, his disciplinary investigations, and PEPA's review, highlighting their independence and essentially arguing, as the ALJ described it, that they serve as "firewalls between those with knowledge of and animus toward Gourneau's protected activity, and the company's termination of his employment."[169] A thorough review of the record, however, supports the ALJ's factual findings. The ALJ applied a straightforward cat's paw analysis, and there is no reason to disturb his reasoning.

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163 *Murray*, 601 U.S. at 33.

164 *Id.* at 27-28; *see also* 18 U.S.C. § 1514A; 49 U.S.C. §§ 20109(d), 42121(b).

165 *Dick v. USAA*, ARB No. 2022-0063, ALJ No. 2018-STA-00054, slip op. at 14 n.98 (ARB Apr. 16, 2024) (citing *Murray*, 601 U.S. 23) (a whistleblower complainant "is not required to make some further showing that his employer acted with 'retaliatory intent'").

166 562 U.S. 411, 413, 422 (2011).

167 *Id.* at 422. We note that *Staub* is a USERRA case, which requires different burdens of proof. FRSA cases have a lower contributing factor causation standard as compared to the more stringent motivating factor required in a USERRA or Title VII case.

168 *Id.* (if the supervisor performs an act "that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable . . .").

169 Resp. Br. at 24-27; D. & O. at 31.

The ALJ's cat's paw analysis focuses on Bieber: "Bieber's animus contributed to his actions to influence Braun, then Vogele, and then the reviewers in the PEPA office in the process to discipline."[170] Underlying this analysis, the ALJ noted "evidence that managers in Mandan became frustrated with Gourneau, a long-time, knowledgeable, and effective carman, because of his safety advocacy overall and specific actions he took."[171] Further, the ALJ found that Respondent, Bieber most specifically, had "animus and impermissible motive," to take adverse action against Complainant with protected activity as a contributing factor.[172] Bieber, influenced the charges brought and the final discipline from both formal investigations against Gourneau.[173]

Respondent contends that, by applying *Staub*, the ALJ watered down the showing required to establish that the final decisionmaker served as a mere cat's paw. *Staub* is a USERRA case, and that statute requires a *motivating factor* to find liability.[174] The ALJ noted that the standard in FRSA cases is the lower contributing factor standard and aptly adapted *Staub* to account for the lower standard, and his analysis is sound.[175] The ALJ clearly catalogued how Bieber's actions led to Gourneau's termination—Bieber's choice of investigator, Bieber's prompting to add a discourteous charge, Bieber's push for a more severe penalty for the September 3, 2019 incident, and, ultimately, Bieber's decision to charge Gourneau with another violation for the January 3, 2020 incident despite dubious camera and audio evidence.

Respondent argues that its independent PEPA committee establishes that the termination was proper, but the ALJ made factual findings that undermine their arguments. Specifically, the ALJ found that while PEPA committee members were unaware of Gourneau's protected activity, Bieber's actions nonetheless led to

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170 D. & O. at 31.

171 *Id.* at 29.

172 *Id.* at 30-31.

173 *Id.* at 31.

174 *Id.* at 24.

175 *See Rudolph v. Nat'l R.R. Passenger Corp. (Amtrak)*, ARB No. 2011-0037, ALJ No. 2009-FRS-00015, slip op. at 17-18 (ARB Mar. 29, 2013) (finding that, under the cat's paw theory "if a supervisor performs an act motivated by discriminatory animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action taken, then the employer will be held liable." Where a complainant must establish that his protected activity was a contributing factor to the adverse action, proof of motivation is not required and a "complainant need not prove that the decision-maker responsible for the adverse action knew of the protected activity if it can be established that those advising the decision-maker knew, regardless of their motives.").

Gourneau's job loss because Bieber intended to retaliate and influenced the ultimate decision to terminate. Contrary to Respondent's assertions, PEPA was not isolated. Bieber spoke directly with PEPA about the appropriate discipline for the September 3, 2019 incident and argued for more discipline. PEPA's purported independence was simply not enough to change the outcome—PEPA still relied on Bieber's initial charges of misconduct and investigations run by Bieber's chosen investigator. The ALJ's reliance on and application of the cat's paw theory was sound, and we affirm.

*ii. Temporal Proximity and Pretext*

The ALJ found that temporal proximity and pretext also supported the conclusion that Complainant's protected activity was a contributing factor to his suspension and termination, particularly in light of Complainant's clean track record, reputation, and history as a "tenacious safety advocate."[176] Specifically, the ALJ found that there was close temporal proximity between both Gourneau's report about the Broken Wheel Club in August 2019 and bad order reports on September 3, 2019, with Braun's issuance of the charge against Gourneau for his track crossing at the end of the shift on September 3rd.[177] The ALJ also found that this temporal proximity carried over to the January 3, 2020 incident and January 22, 2020 termination because only a few weeks separated the end of Gourneau's suspension following the September 3, 2019 incident and the investigation of the January incident that led to his termination.[178] The ALJ further found that Respondent's actions and explanations were pretextual.[179]

Respondent contends that the ALJ's findings on temporal proximity and pretext are flawed because the ALJ erred in conflating two disciplinary events.[180] Specifically, Respondent contends that the ALJ's finding that the September 3, 2019 incident is temporally proximate to the January 3, 2020 incident and January 22 termination is broken by Gourneau's intervening misconduct when Gourneau drove through a crossing without stopping for a second time.[181]

First, substantial evidence supports the ALJ's finding of temporal proximity between Complainant's protected activity and Respondent's decision to discipline and then terminate his employment. Gourneau was initially disciplined within a

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176 D. & O. at 28.

177 *Id.*

178 *Id.*

179 *Id.* at 28-29.

180 Resp. Br. at 28.

181 *Id.*

few weeks of reporting protected hazardous safety concerns. And, Complainant's ultimate termination occurred within weeks of serving the first suspension, and only a few months after the initial disciplinary action was taken.

Second, the record supports the ALJ's finding that Respondent's reasons for taking adverse action against Complainant were pretextual. The evidence demonstrated that it was accepted practice among carmen to stop some distance ahead of the yard track crossing as Gourneau did in this case, there was no evidence of a consensus among BNSF management as to what the correct stopping distance was, and the rule itself did not provide a stopping distance.[182] We agree with the ALJ that the facts support an inference that the reasons to discipline and later terminate Gourneau were pretextual.

For all the reasons discussed above, we find the ALJ's factual findings supported by substantial evidence and his analysis consistent with the law. Accordingly, we affirm the ALJ's finding that Gourneau established that his protected activity was a contributing factor to his termination.[183]

*D. Respondent Failed to Prove its Affirmative Defense*

If a complainant meets his burden of proof to establish that his protected activity contributed to adverse employment action, an employer may avoid liability by proving by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.[184] The clear and convincing standard is "a very high burden of proof."[185] An employer satisfies this standard by

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182 D. & O. at 32.

183 Respondent also argues that the ALJ erred in criticizing its policies for two reasons. First, Respondent contends that the ALJ's finding that Respondent inconsistently applied its policies is speculative and flawed. Resp. Br. at 29. However, after the September 3 incident, Bieber held a safety meeting to discuss properly stopping before the tracks, and several carmen present believed that Bieber was authorizing them to do what Gourneau had been disciplined for. We find the record substantially supports the ALJ's finding. Second, Respondent contends that the ALJ acted as a "super-personnel" department in criticizing BNSF's policies. However, while the ALJ is critical of BNSF's policies, the ALJ's contributing factor analysis did not hinge on BNSF's policy decisions. Thus, we are not persuaded by Respondent's argument in this regard.

184 29 C.F.R. § 1982.109(b).

185 *Raye v. Pan Am Rys., Inc.*, ARB No. 2014-0074, ALJ No. 2013-FRS-00084, slip op. at 5 (ARB Sept. 8, 2016), *aff'd Pan Am Rys., Inc., v. U.S. Dep't of Lab.*, 855 F.3d 29 (1st Cir. 2017) (quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 2004-0037, ALJ No. 2002-AIR-00008, slip op. at 14 (ARB Jan. 31, 2006) (stating that clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.") (citation omitted).

demonstrating that it is "highly probable" that it would have taken the same action in the absence of protected activity.[186] A "fact-finder must holistically consider any and all relevant, admissible evidence when determining whether an employer would have taken the same adverse action against an employee in the absence of any protected activity."[187] In *Murray*, the Supreme Court stated that, "[t]he right way to think about that kind of same-action causation analysis is to 'change one thing at a time and see if the outcome changes.'"[188]

The ALJ found that Respondent failed to meet its burden because the record evidence provided by Respondent did not show that it would have terminated Gourneau in the absence of his protected activity, and because Gourneau provided testimony from other carmen who testified they engaged in the same conduct and were not penalized.[189] The ALJ noted that the comparator evidence provided by Respondent was, in fact, not actually comparable because although it showed several employees were disciplined for violations of Rule 12.1.2, none were terminated for the same misconduct as Gourneau and in the same time period.[190] He further found that carmen continued to stop where Gourneau did without any discipline, even after Gourneau was penalized, despite the presence of cameras in the yard for supervisors to use to identify the same misconduct.[191] Thus, he found that Respondent failed to prove its affirmative defense.[192]

Respondent argues that it met its burden of proof to establish that it would have terminated Complainant in the absence of protected activity because the two Level S violations in short succession would have been grounds for dismissal regardless. Respondent further argues that the comparators who testified in support of Complainant about their discipline for violating Rule 12.1.2, are not proper comparators due to the difference in the timing between offenses and because some of them accepted a waiver.[193] Respondent further argues that the ALJ

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186 *Acosta v. Union Pac. R.R. Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082, slip op. at 13 (ARB Jan. 22, 2020) (citing *Palmer v. Canadian Nat'l Ry./Ill. C. R.R. Co.*, ARB 2016-0035, ALJ No. 2014-FRS-00154, slip op. at 52-53 (ARB Jan. 4, 2017) (reissued with dissent Jan. 4, 2017)).

187 *Id.* at 13 (citation omitted).

188 *Murray*, 601 U.S. at 38 (quoting *Bostock v. Clayton Cnty.*, 590 U. S. 644, 656 (2020)).

189 D. & O. at 34.

190 *Id.*

191 *Id.*

192 *Id.*

193 A waiver is when the employee accepts responsibility for the offense, and generally is granted a lesser discipline. *Id.* at 17.

erred by faulting Respondent for failing to enforce "hypothetical rule violations of which there is no evidence that Bieber and Braun" were aware.[194]

We find that the ALJ's factual findings are supported by substantial evidence in the record. Respondent's comparator evidence does not even address carmen receiving discipline for stopping before crossing a track as Gourneau did, which is at the crux of the alleged misconduct. The record, in fact, leaves that question unanswered. The testimony of the carmen at the hearing was that they routinely stopped in the manner that Gourneau did without receiving discipline. Furthermore, Bieber himself endorsed their choice of how and where to stop before crossing a track in a safety meeting following Gourneau's termination where he advised carmen to proceed in a manner that they viewed as the same or similar to the conduct for which Gourneau was disciplined.[195]

To bolster its position, Respondent cites case law that looks to "whether the railroad consistently enforces the policies and rules at issue" as a factor in determining whether an affirmative defense has been proven.[196] Respondent asserts that consistent enforcement is demonstrated by highlighting comparator evidence that shows two Level S violations in twelve months regularly results in dismissal. Respondent's argument ignores the inconsistent enforcement of Rule 12.1.2—the rule that Complainant is alleged to have violated resulting in each Level S discipline. The inconsistent application of Rule 12.1.2 is at issue here.[197]

Applying the *Murray* standard, removing Complainant's protected activity likely does change something—whether he was penalized for violating Rule 12.1.2. The employer's burden in a FRSA case is to prove by clear and convincing evidence that it would have taken the same action absent the protected activity. Here, Respondent has failed to meet that heavy burden—the evidence provided is insufficient to show that BNSF consistently enforced Rule 12.1.2 or that it ever enforced it in the way it was used to terminate Complainant's employment. Therefore, we affirm the ALJ's finding that BNSF did not meet its burden to prove

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194 Respondent's Reply Brief in Support of its Petition for Review at 11.

195 Whether management actually witnessed other carmen stopping where Gourneau did, forming the basis for potential discipline, is less relevant given the ALJ's finding that Bieber explicitly told other carmen to make similar choices about where to stop.

196 *Dafoe v. BNSF Ry. Co.,* 164 F. Supp. 3d 1101, 1115-16 (D. Minn. 2016).

197 We note this inconsistency not to criticize BNSF's personnel policies, nor to sit as a "super-personnel" department, but instead to highlight that BNSF cannot meet its burden of proof in this case because the enforcement inconsistency itself is a sign of retaliation. *See Riddell v. CSX Transp., Inc.*, ARB No. 2019-0016, ALJ No. 2014-FRS-00054, slip op. at 21 (ARB May 19, 2020).

by clear and convincing evidence that it would have terminated Gourneau absent his protected activity.

**2. Damages**

The regulations specify that when a complainant prevails under FRSA:

> [T]he ARB will issue an order providing relief to the complainant. The order will include, where appropriate, affirmative action to abate the violation; reinstatement with the same seniority status that the employee would have had but for the retaliation; any back pay with interest; and payment of compensatory damages, including compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The order will also require the respondent to submit documentation to the Social Security Administration or the Railroad Retirement Board, as appropriate, allocating any back pay award to the appropriate months or calendar quarters. The order may also require the respondent to pay punitive damages up to $250,000.[198]

The ALJ ordered the following remedies: (1) reinstatement;[199] (2) $318,979.98 in back pay wages and $39,679.74 in prejudgment interest, with backpay and interest to continue to accrue until payment;[200] (3) $70,000 in compensatory damages;[201] (4) $150,000 in punitive damages;[202] (5) reasonable attorney's fees and costs;[203] and (6) Respondent must seal all documents relating to the incidents, charges, and adverse actions addressed in the D. & O. and redact any such references, and Respondent must also post the D. & O. for a minimum of 60 days in a place and manner that is usual and customary for employees to gather

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198 29 C.F.R. § 1982.110(d).

199 *Id.* at 34-35.

200 *Id.* at 35-36.

201 *Id.* at 36-39.

202 *Id.* at 39-45.

203 *Id.* at 45.

and review employment related information.[204] Respondent specifically challenges reinstatement, back wages, and punitive damages.[205] We affirm the ALJ.

*A. Reinstatement*

Respondent challenges the ALJ's order of reinstatement, stating that the parties have too much animus for reinstatement. While Gourneau stated at the hearing that he would go back to BNSF, his statement was reluctant and his briefing at the hearing included a request for front pay. The ALJ stated in his decision that "I credit Gourneau's own testimony over arguments in briefing about front pay."[206] Nevertheless, the statute requires reinstatement.[207] The ARB has recognized very few exceptions. In *Dale v. Step 1 Stairworks, Inc.*, the ARB stated that, "reinstatement should not be denied merely because friction may continue to exist between the complainant and the company or its employees. Nor should it be denied because the employer may find it inconvenient to reinstate the former employee."[208] Here, the ALJ ordered reinstatement, Gourneau does not argue for a different outcome on appeal, and BNSF's own manager, who worked to terminate Gourneau, admitted that he was a "good carman." There's nothing in the record that supports granting an exception to the reinstatement requirement. Accordingly, we affirm the ALJ's order that BNSF reinstate Gourneau.

*B. Back Wages*

Respondent contends that the ALJ erred because he failed to account for Gourneau's duty to mitigate damages. A wrongfully-discharged employee seeking back pay has a duty to exercise reasonable diligence to mitigate his damages by

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204 *Id.* at 45-46.

205 Although Respondent contends that the ALJ should vacate all damages, Respondent does not explicitly challenge the ALJ's award of compensatory damages. Compensatory damages are authorized by the FRSA and are available for emotional pain and suffering, mental anguish, embarrassment, and humiliation. 29 C.F.R. § 1982.109(d)(1); *Petitt v. Delta Airlines, Inc.*, ARB No. 2021-0014, ALJ No. 2018-AIR-00041, slip op. at 23 (ARB Mar. 29, 2022). The ALJ awarded $70,000 in compensatory damages for Gourneau's emotional distress, including the impact on his relationships with family; for his financial distress, including selling personal belongings; and because Gourneau began taking medication to help manage depression and anxiety from losing his job. The record substantially supports the ALJ's findings. Thus, we affirm the ALJ's award of compensatory damages.

206 D. & O. at 35.

207 49 U.S.C. § 20109(e)(2) ("Relief . . . shall include . . . reinstatement."); *see also* 29 C.F.R. § 1982.110(d) ("The order will include . . . reinstatement.").

208 *Dale v. Step 1 Stairworks, Inc.*, ARB No. 2004-0003, ALJ No. 2002-STA-00003, slip op. at 5 (ARB Mar. 31, 2005).

searching for substantially equivalent work.[209] It is the employer's burden to prove that the employee failed to mitigate by submitting evidence that would establish that substantially equivalent positions were available and that the employee failed to attempt to diligently secure such positions.[210] The Supreme Court has stated, an "unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position [and will only] forfeit[ ] his right to backpay if he refuses a job substantially equivalent to the one he was denied."[211]

Here, Respondent failed to meet its burden to show a failure to mitigate because it failed to provide evidence about substantially equivalent work. Respondent submitted job postings for mechanics and "field service technicians" in the area as evidence of available work.[212] The jobs in general have lower pay than Gourneau's, and a review of the descriptions does not show that they are substantially equivalent to the position he held with Respondent. The ALJ noted in his decision that "there is no clear evidence presented by BNSF in the record as to the available hours, pay or working conditions of the only comparable work Gourneau mentioned seeking, with two short-line railroads."[213] Accordingly, Respondent failed to meet its burden to show that damages were not mitigated.

In any case, Gourneau testified that his search for work was limited due to the COVID-19 pandemic, which was in full force at the time his employment was terminated and increased the danger of obtaining work with his pre-existing asthma condition. The ALJ found this to be reasonable,[214] stating that "under the unprecedented circumstances of the pandemic, it was a reasonable decision not to seek new employment in general, given Gourneau's age and preexisting pulmonary conditions and the associated elevated risk of death from COVID-19."[215]

We find substantial evidence in the record to support the ALJ's decision, and we affirm the ALJ's backpay award.

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209 *Dale,* ARB No. 2004-0003, slip op. at 5-7.

210 *Id.* at 7.

211 *Ford Motor Co. v. EEOC,* 458 U.S. 219, 231 (1982); *see also Parrish v. Immanuel Med. Ctr.*, 92 F.3d 727, 735 (8th Cir. 1996).

212 RX-15.

213 D. & O. at 36.

214 *Id.* The ALJ also noted that Complainant's asthma diagnosis was not a disabling condition generally, preventing Gourneau from working for Respondent, because it was a condition that existed before and during Gourneau's employment with BNSF.

215 *Id.*

*C. Punitive Damages*

Respondent also challenges the ALJ's award of punitive damages. Respondent argues that it took steps to comply with the law, and that its anti-retaliation policies are evidence of that.[216] Respondent also argues that its policies insulate it from liability for any punitive damages because of its good-faith efforts to comply with the FRSA.

Relief under FRSA "may include punitive damages in an amount not to exceed $250,000."[217] An award of punitive damages may be awarded when there has been a reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law."[218] The inquiry into whether punitive damages are warranted focuses on the employer's state of mind, and thus does not require that the employer's misconduct be egregious.[219] Instead, a plaintiff must present proof that the employer acted "in the face of a perceived risk that its actions will violate federal law."[220] The focus must be on whether the employer's actions call for "deterrence and punishment over and above that provided by compensatory awards."[221] An employer may avoid punitive damages when it has made a good-faith effort to comply with the law.[222] The employer relying on the affirmative defense of good faith has the burden of proof.[223]

The Board's standard of review for whether punitive damages are warranted is substantial evidence—that is, the Board reviews the factual question of whether the employer acted with the requisite state of mind for substantial evidence in the record.[224] "An ALJ's task after determining that an award of punitive damages is

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216 Resp. Br. at 56.

217 49 U.S.C. § 20109(e)(3).

218 *Smith v. Wade*, 461 U.S. 30, 51 (1983); *Raye*, ARB No. 2014-0074, slip op. at 8.

219 *Raye*, ARB No. 2014-0074, slip op. at 7.

220 *Kolstad v. Am. Dental*, 527 U.S. 526, 536 (1999).

221 Smith, 461 U.S. at 54.

222 *Youngermann v. United Parcel Serv.*, ARB No. 2011-0056, ALJ No. 2010-STA-00047, slip op. at 7 (ARB Feb. 27, 2013) (citations omitted).

223 *Kolstad*, 527 U.S. at 545.

224 *Raye*, ARB No. 2014-0074, slip op. at 8 (ARB Sept. 8, 2016) ("The substantial evidence of record supports the ALJ's findings of egregious and intentional conduct warranting the award of punitive damages."); *D'Hooge v. BNSF Rys.*, ARB No. 2015-0042, -0066, ALJ No. 2014-FRS-00002, slip op. at 11 (ARB Apr. 25, 2017) ("We review the ALJ's finding of the requisite state of mind for substantial evidence."); *Riddell*, ARB No. 2019-0016, slip op. at 22 (ARB May 19, 2020) ("The Board reviews whether a punitive damages

appropriate is to determine the amount necessary for punishment and deterrence—'a discretionary moral judgment.'" [225] The ARB reviews an ALJ's determination of the amount of a punitive damages award for an abuse of discretion.[226]

The ALJ found that "Bieber had knowledge that the FRSA bars retaliation against employees who make safety complaints" and "acted with malice or reckless indifference to Gourneau's rights."[227] Earlier in the ALJ's decision, the ALJ found "that BNSF's adverse actions reflected intentional conduct by the company's managers in reckless disregard of Gourneau's protected FRSA rights."[228] We agree. Substantial evidence in the record supports the ALJ's finding Respondent's conduct in taking adverse action against Complainant in this matter was done in reckless indifference to the law.

With respect to the first discipline Respondent leveled against Complainant, the ALJ found that Vogele and Bieber, "the manager in the field with the most knowledge of Gourneau's history of safety advocacy," pushed for harsher penalties for Gourneau, while the managers in Fort Worth, Maglisceau and Detlefsen pushed back. All of this for an action that Respondent had no clear rule about—Bieber himself had "emphasized that carmen should use their judgment to make the safest

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award is warranted for whether substantial evidence supports the ALJ finding that the employer acted with the requisite intent."); *see Schaub v. VonWald*, 638 F.3d 905, 939 (8th Cir. 2011) ("Whether a defendant's conduct meets the callousness threshold [to support a punitive damages award] is a question of fact."); *Fletcher v. Tomlinson*, 895 F.3d 1010, 1024 (8th Cir. 2018) (""[W]hether a defendant's conduct was motivated by an evil motive or involves reckless indifference to the federally protected rights of others" "is a question of fact."). C*ontra Brough*, ARB No. 2016-0089, slip op. at 17 (ARB June 12, 2019) (despite ARB caselaw to the contrary, the Board concluded that under the APA the question of whether Respondent acted with reckless or callous disregard for the plaintiff's rights or intentional violations of federal law warranting punitive damages was a question of law subject to de novo review.).

[225] *Raye*, ARB No. 2014-0074, slip op. at 10 (quoting *Smith v. Wade*, 461 U.S. at 52).

[226] *Id.* at 2 (citing *Cooper Indus. Inc., v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433 (2001) ("If no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's 'determination under an abuse-of-discretion standard'" regarding the amount of a punitive damages award) (quoting *Browning-Ferris Indus. of Vt., Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989)). Respondent did not appeal the amount of the punitive damages award, only that punitive damages were awarded at all, so the issue of whether the ALJ abused his discretion in awarding $150,000.00 in punitive damages is not at issue on appeal.

[227] D. & O. at 44.

[228] *Id.* at 28.

decisions when operating vehicles in foul areas," and it was commonly thought that the actions Gourneau took were considered the correct course.[229]

After returning from his suspension, Gourneau believed that "Bieber's attitude had changed toward him. Gourneau felt that Bieber 'was holding a grudge" and "was out to get me . . . and was going to get me sooner or later.'"[230] Further, Gourneau heard from coworkers that Bieber was trying to fire him.[231] The ALJ found Complainant to be overall credible and specifically found credible and supported by other facts in the record, that Gourneau "was being targeted, and that Bieber's attitude toward him had in fact perceptibly changed."[232]

With regard to Respondent's second discipline against Gourneau and ultimate termination, Bieber initiated the action himself by operating the camera and taking video to identify what he asserted was a violation, identified Gourneau as the person in the video committing the violation, and initiated a second violation against Gourneau.[233] Bieber then requested that Vogele serve as the investigator into Gourneau a second time.[234] During the investigation, Bieber was the primary witness for BNSF.

Viewed together, this evidence supports, as the ALJ found, that Bieber had animus against Gourneau because he engaged in protected activity and engaged in intentional conduct in reckless disregard of Gourneau's protected FRSA rights. Therefore, the ALJ's finding on this issue supportive of a punitive damages award is affirmed as supported by substantial evidence.

As stated above, an employer may avoid punitive damages if it can prove that it has made a good-faith effort to comply with the law. However, the ALJ found that BNSF's anti-retaliation policies were insufficient to establish a good faith effort to comply with the FRSA in this matter. While BNSF's policies exist, the ALJ found that Bieber was able to work around those policies, resulting in the prohibited termination of Gourneau's employment. He noted that some Eighth Circuit and other cases have found that sufficient corporate policies preclude punitive damages.[235] Respondent relies heavily on one of those decisions, *Carter,* an appeal

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229 *Id.*

230 *Id.*

231 *Id.*

232 *Id.*

233 *Id.* at 12.

234 *Id.*

235 *Id.* at 41-42; *see BNSF Ry. Co. v. U.S. DOL Admin. Review Bd. (Carter*), 867 F.3d 942 (8th Cir. 2017); *Kolstad*, 527 U.S. at 544.

from the ARB in which a punitive damages award was vacated. In that decision, the Eighth Circuit stated, in part,

> BNSF may avoid vicarious punitive damages liability by showing that it made good faith efforts to comply with the FRSA. Here, the ALJ acknowledged that BNSF has a Code of Conduct that specifically prohibits retaliation, an Injury Reporting Policy prohibiting retaliation against employees who report injuries, a Mechanical Safety Rule expressly prohibiting retaliation, a hotline or website, and review of dismissals by its Labor Relations Department, and that Heenan, the person ultimately responsible for reviewing the file and making a recommendation, had never met Mr. Carter, and knew nothing about his injury or subsequent lawsuit. This is strong evidence of BNSF's good-faith efforts to prevent retaliation.[236]

Respondent also relies on *Kolstad v. American Dental Association*, a case arising under Title VII, in which the Supreme Court held that an employer is not liable for punitive damages if a supervisor's action was "contrary to the employer's good-faith efforts to comply" with federal law.[237]

The ALJ found *Carter* and *Kolstad* inapplicable. The ALJ reasoned that the discussion in *Carter* was dicta (1) regarding the final decisionmaker's lack of knowledge without analyzing whether his decision was influenced by those with knowledge, and (2) because it failed to examine in-circuit precedent on punitive damages and insufficient good faith efforts. The ALJ's analysis on *Carter* is persuasive and is bolstered by the subsequent history involved in *Carter*—once *Carter* went back to the ALJ and the inextricably intertwined causation was removed from the analysis, the ALJ found no liability whatsoever for BNSF. This Board affirmed.[238]

The ALJ found that *Kolstad* was inapplicable because the Tenth Circuit and the District of Minnesota both explicitly rejected the notion that BNSF's policies are a total bar to punitive damages.[239] Instead, the ALJ relied on *Fresquez v. BNSF,* a

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236 *See Carter*, 867 F.3d at 949 (quotation omitted).

237 Resp. Br. at 47 (citing *Kolstad*, 527 U.S. at 545).

238 *Carter*, ARB No. 2021-0035, slip op. at 18.

239 D. & O. at 41-42 (citing *Fresquez v. BNSF Ry. Co.,* 52 F.4th 1280, 1320 (10th Cir. 2022); *Sanders v. BNSF Railway Co.*, No. 17-cv-5106, 2019 WL 5448309, at *16 (D. Minn. Oct. 24, 2019)).

case that also contained a cat's paw fact pattern.[240] Specifically, despite a PEPA review, the Court found that a reasonable jury would find that the anti-retaliation policies were insufficient and the managers who retaliated "promoted a workplace culture that encouraged the flouting of federal safety regulations, and openly discouraged employees, by way of intimidation and fear of reprisal, from objecting to these practices, all for the purpose of allowing trains to continue to run on tracks that contained defects."[241] Other courts have followed similar reasoning and found that the existence of the policy is insufficient—the employer must actually insulate the decision-maker from managers with ill-intent.[242]

Here, the ALJ noted that the PEPA committee was small and relied very heavily on the work of the managers on the ground to process discipline. The ALJ pointed out that in this case, despite BNSF's policies, Bieber successfully used the PEPA process to effectively retaliate against Gourneau. The ALJ described Bieber's conduct as "a months-long series of actions to discipline and then fire Gourneau."[243] We note that the evidence shows Bieber was directly in contact with PEPA and argued for harsher discipline. There is sufficient evidence in the record for a reasonable mind to conclude that BNSF did not make a good faith effort to comply with FRSA.

A thorough review of the record demonstrates that (1) Respondent acted with the requisite intent to support an award of punitive damages, (2) Respondent failed to meet its burden to prove the affirmative defense of good faith, and (3) the ALJ's

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240 *Fresquez v. BNSF Ry. Co.,* 52 F.4th 1280 (10th Cir. 2022).

241 *Id*. at 1320-21.

242 *Sanders*, 2019 WL 5448309, at *16 ("[O]ne of the key aspects of this determination is whether BNSF did not merely have but followed an internal review process in which the person ultimately responsible for the decision was disconnected from the assertedly bad actor."); *see also Fresquez v. BNSF Ry. Co.*, No. 17-cv-00844-WYD-SKC, 2018 WL 6249686, at *9 (D. Colo. Oct. 2, 2018) (denying summary judgment on punitive damages because PEPA committee was aware that there were complaints of retaliation, but did nothing to investigate); *Smith v. BNSF Ry. Co*., No. 17-CV-00977-KMT, 2019 WL 3230975, at *8 (D. Colo. July 18, 2019) (fact question as to whether BNSF acted in good faith despite having anti-retaliation policies).

243 D. & O. at 43.

factual findings on these issues are supported by substantial evidence. Accordingly, the ALJ's punitive damages award of $150,000 is affirmed.

## CONCLUSION

For the reasons set forth above, we **AFFIRM** the D. & O.[244]

**SO ORDERED.**

**ANGELA W. THOMPSON**
**Administrative Appeals Judge**

**RANDEL K. JOHNSON**
**Chief Administrative Appeals Judge**

**ELLIOT M. KAPLAN**
**Administrative Appeals Judge**

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[244] In any appeal of this Decision and Order, the appropriately named party is the Secretary, U.S. Department of Labor, not the Administrative Review Board.