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APPENDIX A – EN BANC NINTH CIRCUIT OPINION, FILED MARCH 15, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-35695

PAUL W. PARKER, as Personal Representative of the Estate of Curtis John Rookaird,

Plaintiff-Appellant,

v.

BNSF RAILWAY COMPANY, a Delaware corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Washington
Richard A. Jones, District Judge, Presiding

Argued and Submitted En Banc March 19, 2025
San Fransico, California
Filed May 15, 2025

Before: MURGUIA, GRABER, WARDLAW, OWENS, FORREST, SUNG, THOMAS, MENDOZA Jr., DESAI, JOHNSTONE, and ALBA, Circuit Judges.

OPINION BY JUDGE GRABER

SUMMARY*

Federal Railroad Safety Act

The en banc court affirmed the district court's judgment after a bench trial in favor of BNSF Railway Co., the defendant in a retaliation action under the Federal Railroad Safety Act.

Conductor Curtis Rookaird alleged that BNSF fired him in retaliation for engaging in protected activity by testing the air brakes on railcars. After a bench trial on remand from this court, the district court concluded that Rookaird met his burden of proving, by a preponderance of the evidence, that the air-brake test was a contributing factor to the firing. The district court further found, however, that BNSF met its burden of proving that it would have fired Rookaird anyway.

The en banc court held that the district court applied the correct burden of proof from the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, or "AIR21," and permissibly determined that the air-brake test played a small role in BNSF's firing decision. Because even a small contribution suffices under the applicable lenient standard, Rookaird properly prevailed at this step of the analysis.

The en banc court held that under the AIR21 standard, if the plaintiff meets their initial burden, then the defendant faces a steep burden in proving,

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* This summary constitutes no part of the opinion of the court. It has been prepared by the court staff for the convenience of the reader

by clear and convincing evidence, the affirmative defense that it would have taken the same unfavorable personnel action in the absence of the protected behavior. The en banc court concluded that the district court correctly applied this legal standard. Reviewing for clear error, the en banc court affirmed the district court's finding that BNSF met the AIR21 standard's high bar and established the affirmative defense.

COUNSEL

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OPINION

GRABER, Circuit Judge:

Curtis Rookaird worked as a conductor for Defendant BNSF Railway Company until early 2010, when BNSF fired him for his conduct on a single

workday. BNSF concluded that Rookaird worked inefficiently; failed to sign his timesheet; dishonestly added to his timesheet time that he did not work; and insubordinately refused two separate instructions by a supervisor to leave the premises, instead staying on site and causing a heated argument with a coworker. Rookaird brought this action, alleging that BNSF retaliated against him in violation of the Federal Railroad Safety Act ("FRSA"). Rookaird argued that, during his shift, he engaged in activity protected by the FRSA by testing the air brakes on railcars and that BNSF fired him on account of those tests. The district court determined, after a bench trial, that BNSF had proved by clear and convincing evidence that it would have fired Rookaird anyway, even if he had not tested the air brakes. Because BNSF proved its affirmative defense, the court entered judgment for BNSF. We hold that the district court's decision was free of legal error and that the court did not clearly err in its factual findings. Accordingly, we affirm.

FACTUAL AND PROCEDURAL HISTORY

The district court made detailed factual findings following the bench trial. *Parker v. BNSF Ry. Co.,* No. 2:14-cv-00176-RAJ, 2022 WL 897604 (W.D. Wash. Mar. 28, 2022). As we explain in this opinion, the record fully supports the district court's findings, and the court did not clearly err. We thus recount the facts as determined by the district court. See *Yu v. Idaho State Univ.,* 15 F.4th 1236, 1241 (9th Cir. 2021) (noting that we must accept the district court's factual findings following a bench trial unless they are clearly erroneous).

On February 23, 2010, BNSF assigned Rookaird to work with engineer Peter Belanger and brakeman Matthew Webb. *Parker*, 2022 WL 897604, at *1. The shift began at 2:30 p.m. at the Swift depot in Blaine, Washington. *Id.* The primary task for the crew was to travel to the Cherry Point depot to service BNSF's customers. *Id.* But the crew was instructed first to travel to the Custer depot and to move 42 railcars onto storage tracks at that location. *Id.*

The crew traveled to Custer as instructed and began moving the cars onto storage tracks. *Id.* at *2. During that process, the crew performed an air-brake test, which took 20 to 40 minutes. *Id.* "During the air test, BNSF trainmaster Dan Fortt called the crewmembers on the radio and asked them why they were conducting the test. He said, 'I'm not from around here, and I don't know how you guys do anything. But from where I'm from, we don't have to air test the cars.'" *Id.* (citation omitted). "Despite his remarks, Mr. Fortt did not instruct the crew to stop the air test." *Id.*

At approximately 7:30 p.m., which was five hours into the shift, the crew had not yet moved all the cars onto the storage tracks. *Id.* When contacted by a supervisor, Rookaird stated that it would take one or two more hours to finish moving the cars. *Id.* The supervisor instructed the crew to tie the cars down to the main line and report back to the Swift depot. *Id.*

When the crew arrived at Swift, BNSF assistant superintendent Stuart Gordon instructed the crew to "tie up," or sign out for the day, and to go home. *Id.* Belanger and Webb signed out and left.

Id. at *4. Rookaird failed to sign his tie-up slip, and he inaccurately recorded the time as 8:30 p.m., instead of 8:02 p.m. *Id.* at *2. Additionally, "instead of going home as instructed, Mr. Rookaird went to the lunch room and argued with another employee." *Id.* Gordon intervened and again told Rookaird to go home. *Id.* Rookaird "did not leave and instead continued to argue." *Id.* For a third time, Gordon instructed Rookaird to go home, and Rookaird complied. *Id.* at *3.

Following an investigation, BNSF fired Rookaird on March 19, 2010, "for four reasons: he failed to work efficiently, he was dishonest when reporting his off-duty time, he failed to provide a signed FRSA tie-up slip, and he failed to comply with instructions when he was instructed to leave the property. All four reasons stemmed from Mr. Rookaird's actions on February 23, 2010." Id. (citation omitted).

> BNSF fired Mr. Rookaird in accordance with its Policy for Employee Performance and Accountability ("PEPA policy"). The PEPA policy outlined several types of rule violations and their consequences. The most severe type of violation was a dismissible violation. A single dismissible violation could result in the ultimate sanction of dismissal. A list of single aggravated offenses that were considered dismissible was contained in Appendix C of the PEPA policy. Under Appendix C of the PEPA policy, a single dismissible

violation include gross dishonesty and insubordination.

BNSF terminated Mr. Rookaird for his gross dishonesty. Mr. Rookaird recorded his tie-up time as 8:30 P.M. when he, in fact, completed his tie-up slip 28 minutes earlier at 8:02 P.M. He also did not sign his tie-up slip. BNSF believed that this was improper and dishonest. It believed that this dishonesty was significant because it believed that maintaining proper tie-up slips was essential to complying with federal regulations. BNSF believed that Mr. Rookaird's failure to sign his FRSA tie-up timeslip and his inaccurate reporting of his tie-up time constituted gross dishonesty under Appendix C of the PEPA policy.

BNSF also terminated Mr. Rookaird for his insubordination. Mr. Gordon had the authority to instruct Mr. Rookaird to tie up and go home. Mr. Rookaird disobeyed Mr. Gordon's two commands to tie up and go home and instead began an argument with another employee. BNSF believed that Mr. Rookaird's refusal to comply with Mr. Gordon's instructions to tie up and go home constituted insubordination under Appendix C of the PEPA policy.

Finally, BNSF terminated Mr. Rookaird for his failure to work efficiently. On February 23, 2010, Mr.

> Rookaird and his crew were assigned several tasks, which included retrieving engines from Ferndale, moving 42 cars into storage at Custer, and servicing customers at Cherry Point. About five and a half hours into their shift, Mr. Rookaird and his crew had still not completed the moving of the cars into storage. BNSF believed that they were inefficient in accomplishing their tasks for that day and called them in accordingly. One reason for the delay was Mr. Rookaird's decision to conduct an air test, a test that BNSF believed to be unnecessary. BNSF concedes that Mr. Rookaird's conducting of the air test contributed to the crew's supposed inefficiency and delay.

Id. at *3–4 (citations, section headers, paragraph breaks, and paragraph numbers omitted).

In 2014, Rookaird brought this action against BNSF under the FRSA, alleging that BNSF fired him in retaliation for the protected activity of testing the air brakes. Rookaird had the burden of proving that BNSF fired him, at least in part, for protected activity. 49 U.S.C. §§20109(d)(2)(A)(i); 42121(b)(2)(B)(iii). BNSF nevertheless could defeat liability by showing, by clear and convincing evidence, that it would have fired Rookaird anyway, even if he had not engaged in protected activity. *Id.* § 42121(b)(2)(B)(iv).

The district court granted partial summary judgment to Rookaird on the issue whether the air-brake test contributed to his firing, but the court concluded that genuine issues of material fact remained as to whether air-brake testing was protected activity and whether BNSF met its affirmative defense. In 2016, a jury found in Rookaird's favor and awarded damages.

BNSF timely appealed, and we vacated the jury's verdict and remanded for further proceedings. *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 463 (9th Cir. 2018). We held that the district court erred by granting partial summary judgment to Rookaird on the issue whether the air-brake test contributed to BNSF's decision to fire him. *Id.* We expressed no view on whether a new trial was warranted on the affirmative defense. *Id.* at 463 n.8.

On remand, the parties stipulated to a bench trial, and the district court scheduled a trial on two substantive issues: (1) "whether Plaintiff could prove, by preponderance of the evidence, that Mr. Rookaird's refusal to stop performing the air test was a contributing factor in his termination"; and (2) "whether BNSF could prove, by clear and convincing evidence, that it would have fired Mr. Rookaird absent the air test." *Parker,* 2022 WL 897604, at *1. Before trial, Rookaird died, and the court substituted Paul Parker, personal representative of Rookaird's estate, as Plaintiff. *Id.* at *5.

The district court found in Plaintiff's favor on the first issue, whether Plaintiff met his burden of proving that the air-brake test was a contributing factor to the firing. *Id.* At *5–6. The court accurately

explained that "[a] contributing factor 'may be quite modest,' and such a factor may 'play only a very small role' in the unfavorable personnel action." *Id.* at *5 (quoting *Frost v. BNSF Ry. Co.,* 914 F.3d 1189, 1197 (9th Cir. 2019)) (brackets omitted). Applying that minimal standard, the court concluded that the air-brake test contributed to BNSF's decision:

> Because Mr. Rookaird was fired for his inefficiency and because the inefficiency was partly caused by the protected activity of refusing to stop the air test, the Court concludes that the air test tended to affect in some way the outcome of BNSF's decision to fire Mr. Rookaird. And because the air test affected Mr. Rookaird's termination, it was a contributing factor in an unfavorable personnel action alleged in Mr. Rookaird's complaint.

Id. at *6 (citations, quotation marks, brackets, paragraph breaks, and paragraph numbers omitted).

But the district court found in BNSF's favor on the second issue, whether BNSF met its burden of proving, by clear and convincing evidence, that it would have fired Rookaird anyway, even if he had not tested the air brakes. *Id.* at *6–7. The court accurately explained that "[a]n employer can defeat a claim for unlawful retaliation if it can prove, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of the protected activity." *Id.* at *6 (citations and internal quotation mark

omitted). The court also correctly described the burden of persuasion: "Clear and convincing evidence requires greater proof than preponderance of the evidence. To meet this higher standard, a party must present sufficient evidence to produce 'in the ultimate factfinder an abiding conviction that the asserted factual contentions are highly probable.'" Id. (quoting *OTR Wheel Eng'g, Inc. v. W. Worldwide Servs., Inc.,* 897 F.3d 1008, 1020 (9th Cir. 2018)) (brackets and some internal quotation marks omitted).

Applying that standard, the court "conclude[d], by clear and convincing evidence, that absent the air test BNSF would have still fired Mr. Rookaird." *Id.*

> Mr. Rookaird was fired for many reasons unrelated to his inefficiency. He was fired for gross dishonesty, having failed to sign his FRSA tie-up timeslip and having falsely recorded his tie-up time. BNSF believed that this dishonesty was significant because of its federal reporting obligations and the potential fines it could have incurred for failing to meet those obligations. Separately, Mr. Rookaird was fired for insubordination, having twice disobeyed BNSF assistant superintendent Stuart Gordon's commands to tie-up and go home. Mr. Rookaird not only disobeyed Mr. Gordon's two commands but also started a heated argument with a coworker. Both gross dishonesty and insubordination were single, dismissible

violations under the PEPA policy, which governed Mr. Rookaird's discipline.

What is more, though the air test was a contributing factor in Mr. Rookaird's termination, the Court concludes that the test contributed very little. To start, the test did not even account for all of Mr. Rookaird's supposed inefficiency on February 23, 2010. Mr. Rookaird and his crew were working for about five-and-a-half hours before they were called in. Yet the air test only accounted for about 20 to 40 minutes of those five-and-a-half hours. In addition, no BNSF officer instructed Mr. Rookaird to stop the air test. Though he doubted the air test's necessity, trainmaster Dan Fortt never instructed Mr. Rookaird to stop the air test. Given that there was no attempt to stop the air test, this is yet more evidence that the test played only a small part in BNSF's overall decision to fire Mr. Rookaird.

Further undermining the significance of the air test is its routine nature. At BNSF, air tests were conducted hundreds of times a day or more. And Mr. Rookaird conducted air tests several times in the weeks leading up to February 23, 2010 without incident. This also demonstrates that the test played only a small part in BNSF's overall decision to fire Mr. Rookaird.

> Finally, Mr. Rookaird's two crew members, Mr. Webb and Mr. Belanger, performed the same air test as Mr. Rookaird but were not fired. They were not fired because, unlike Mr. Rookaird, they did not commit the single, dismissible violations that Mr. Rookaird committed. They were not insubordinate, and they did not improperly complete their tie-up timeslip. This further demonstrates that inefficiency and the air test—alone—would not have resulted in Mr. Rookaird's termination. It also demonstrates that, absent the air test, BNSF would have fired Mr. Rookaird anyway because of his gross dishonesty and insubordination.
>
> In all, the Court forms the "abiding conviction" that even if Mr. Rookaird did not engage in the protected activity of refusing to stop the air test, BNSF would have still fired him for his gross dishonesty and insubordination. *OTR Wheel Eng'g,* 897 F.3d at 1020. Thus, the Court concludes that BNSF has successfully proved its defense by clear and convincing evidence.

Id. at *6–7 (paragraph breaks altered) (paragraph numbers and most citations omitted). Because BNSF proved its affirmative defense, the court concluded that "BNSF is not liable for unlawful retaliation under the FRSA." *Id.* at *7.

Plaintiff timely appeals. A majority of a three-judge panel vacated the district court's decision and remanded for further proceedings. *Parker v. BNSF Ry. Co.,* 112 F.4th 687, 704 (9th Cir. 2024). Judge Graber dissented, stating that she would have affirmed the district court's decision. *Id.* at 704–13 (Graber, J., dissenting). A majority of active judges voted to rehear the case en banc. *Parker v. BNSF Ry. Co.,* 122 F.4th 1072 (9th Cir. 2024) (order). The en banc court heard oral argument on March 19, 2025.

DISCUSSION

The FRSA provides that a "railroad carrier… may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to" specified categories of protected activity, such as refusing to violate a regulation related to railroad safety or testifying in certain railroad-related enforcement proceedings. 49 U.S.C. § 20109(a). Congress did not provide FRSA-specific burdens of proof for retaliation claims; instead, Congress chose to incorporate the burdens of proof found in a different statutory scheme, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121(b). *See id.* § 20109(d)(2)(A)(i) (providing that any action brought under the FRSA "shall be governed by the legal burdens of proof set forth in section 42121(b)"). Those burdens of proof are straightforward and well understood, in part

because many statutory schemes use the same burdens.[1]

At trial, the plaintiff bears an initial burden to prove, by a preponderance of the evidence, that the protected activity was "a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(i). If the plaintiff meets that burden, then the employer bears the burden to prove, "by clear and convincing evidence," that it "would have taken the same unfavorable personnel action in the absence of [the protected] behavior." *Id.* § 42121(b)(2)(B)(ii). That burden-shifting framework is, with respect to the overall burden faced by a plaintiff, "more lenient than most." *Murray v. UBS Sec., LLC*, 601 U.S. 23, 35 (2024). "[B]y design," the framework is "not as protective of employers" as the framework adopted in many other employment statutes. *Id.* at 39.

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[1] Congress incorporated the AIR21 standards expressly in several other statutes, including the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(b)(2); the Surface Transportation Assistance Act, 49 U.S.C. § 31105(b); the Criminal Antitrust Anti-Retaliation Act of 2019, 15 U.S.C. § 7a-3(b)(2); the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 6314, 134 Stat. 3388, 4601 (amending 31 U.S.C. § 5323(g)(3)(A)); and the Taxpayer First Act, 26 U.S.C. § 7623(d)(2)(B). And Congress provided similar legal burdens in more statutes still, including the Motor Vehicle and Highway Safety Improvement Act of 2012, 49 U.S.C. § 30171(b)(2)(B); the FDA Food Safety Modernization Act, 21 U.S.C. § 399d(b)(2)(C); the Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2087(b)(2)(B); the Energy Policy Act of 1992, 42 U.S.C. § 5851(b)(3); and the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(c)(1)(B), 123 Stat. 115, 299.

A. *The Plaintiff's Initial Burden*

The small burden that a plaintiff faces initially is one aspect of the lenient standard. The plaintiff need not prove retaliatory intent or motive. *Id.; Coppinger-Martin v. Solis,* 627 F.3d 745, 750 (9th Cir. 2010). Instead, the plaintiff must prove only that the protected activity was a "contributing factor" in the adverse employment decision. 49 U.S.C. § 42121(b)(2)(B)(i). "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.'" *Rookaird,* 908 F.3d at 461 (quoting *Gunderson v. BNSF Ry. Co.,* 850 F.3d 962, 969 (8th Cir. 2017)). The plaintiff may meet this burden by showing that protected activity played some role in the employer's decision-making process. *Frost,* 914 F.3d at 1196–97. Indeed, even if the protected activity "played only a very small role in [the employer's] decision-making process," the plaintiff has met the initial burden.[2] *Id.* at 1197; *see Murray,* 601 U.S. at 37 (holding that the contributing-factor standard reflects the judgment that employers should not punish—"not even a little bit"— protected activity). Finally, the plaintiff must make that showing only by a preponderance of the evidence, Rookaird, 908 F.3d

[2] That minimal burden is fully consistent with the FRSA's legal rule that a plaintiff must prove that an adverse action was "due, in whole *or in part,* to" protected activity. 49 U.S.C. § 20109(a) (emphasis added). AIR21's burdens capture the notion that protected activity may not play any role, even a small one, in an adverse employment action. Nothing in the text of the FRSA alters the AIR21 burdens.

at 460, the default standard of proof in civil litigation, *E.M.D. Sales, Inc. v. Carrera,* 604 U.S. 45, 50 (2025).

But a minimal standard does not mean no standard at all. An employee may not prevail simply by showing engagement in protected activity. A plaintiff must persuade the factfinder that the protected activity played some role in the employer's decision. *Frost,* 914 F.3d at 1196–97. If the factfinder concludes that protected activity played no role whatsoever, then the plaintiff has not met the initial burden, and the plaintiff's FRSA claim must fail. *Id.*

The district court here correctly applied those legal rules in determining that the air-brake test contributed to BNSF's firing decision and that, accordingly, Plaintiff met his initial burden. The court announced the correct legal principles. *Parker*, 2022 WL 897604, at *5–6. And the court permissibly determined that the air-brake test played a role in BNSF's firing decision. *Id.* at *6. More specifically, the court found that (a) in assessing a worthy response for Rookaird's conduct on the day in question, BNSF's managers considered—along with other factors—the crew's inefficiency; and (b) "the crew's inefficiency was partly caused by Mr. Rookaird's decision to conduct an air test—a test that BNSF managers thought was unnecessary to conduct in the first place." *Id.* The court further concluded that the air-brake test had "contributed very little" to the firing decision. *Id.* at *7. But because even a small contribution suffices, Plaintiff prevailed at this step of the analysis. *Id.* at *5–6.

B. *The Defendant's Affirmative Defense*

Another lenient aspect of the AIR21 standard is that the defendant faces a "steep burden" in proving

the affirmative defense. *Araujo v. N.J. Transit Rail Operations, Inc.,* 708 F.3d 152, 162 (3d Cir. 2013). To defeat liability, the employer must prove that it "would have taken the same unfavorable personnel action in the absence of [the protected] behavior." 49 U.S.C. § 42121(b)(2)(B)(ii). And the employer must meet that burden "by clear and convincing evidence." Id. Both aspects—(1) what the employer must prove and (2) the legal standard—contribute to the high bar that an employer must clear in order to avoid liability.

Concerning the first aspect, the employer must prove that it "*would have"* taken the same personnel action had the employee not engaged in protected activity; proving simply that it "*could have*" taken the same personnel action does not suffice. *Speegle v. Stone & Webster Constr., Inc.,* ARB No. 13-074, 2014 WL 1870933, at *7 (U.S. Dep't of Lab. Admin. Rev. Bd. Apr. 25, 2014) (emphases added) (internal quotation marks omitted); *see id.* (explaining that "it is not enough to show that [the employee's] conduct provided a sufficient independent reason to suspend and fire him"; instead, the employer must show "that the employer would have done so"). "The 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.'" *Murray,* 601 U.S. at 38 (quoting *Bostock v. Clayton County,* 590 U.S. 644, 656 (2020)). The relevant question here "is whether the employer would have 'retained an otherwise identical employee' who had not engaged in the protected activity." *Id.* (quoting *Bostock,* 590 U.S. at 660) (brackets omitted).

In considering that inquiry, it is irrelevant that the plaintiff faced a minimal initial burden or that the statute prohibits even a small amount of

discrimination. The FRSA's prohibition of discrimination "in whole or in part" has no effect on the affirmative defense. Congress chose *both* to prohibit even a small amount of discrimination *and* to allow an employer nevertheless to "defeat the claim" if it can show that it would have taken the same personnel action anyway. *Frost,* 914 F.3d at 1195.

Those two concepts coexist. In some cases, such as this one, an employer may consider, and cite, many reasons for an adverse action but would have made the same ultimate decision even if some of those reasons were absent. In other cases, the factfinder might conclude that each of the factors was critical to the employment decision; or that the protected activity was the only reason for the decision; or that the employer otherwise failed to prove that non-protected activity would have led the employer to the same decision. The key point is that the employer's affirmative defense, which arises only after the plaintiff has met the initial burden, is a distinct inquiry from the plaintiff's initial burden. The finding of a contributing factor is the necessary predicate for the affirmative defense, not some smoking gun that disproves or discredits the affirmative defense (especially where, as here, the district court found that the protected conduct contributed very little to the firing decision).

Nor does it matter *how* the plaintiff met the initial burden. Regardless of method—finding by a jury, ruling at summary judgment, concession, stipulation, estoppel, or some other reason—once the plaintiff meets the initial burden, that part of the case passes out of the picture, and"[t]he burden then shifts to the employer" to prove the affirmative defense. *Murray*, 601 U.S. at 26.

Whether the employer would have taken the same action had the employee not engaged in protected activity is an intensely factual question and, depending on the facts, a wide range of evidence and factors may bear on the inquiry. Each case is different, and some factors that are critical in one case may shed little light in another case. No particular type of evidence is required. Rather than attempt to list all factors that may be relevant, we note simply that a factfinder must "holistically consider any and all relevant, admissible evidence." *Brousil v. U.S. Dep't of Lab., Admin. Rev. Bd.,* 43 F.4th 808, 812 (7th Cir. 2022) (quoting *Clem v. Comput. Scis. Corp.,* ARB No. 16-096, 2019 WL 4924119, at *12 n.8 (U.S. Dep't of Lab. Admin. Rev. Bd. Sept. 17, 2019)).

The applicable legal standard also contributes to the employer's high bar to defeating an FRSA claim. Whereas a plaintiff must meet a "preponderance of the evidence" standard, *Rookaird*, 908 F.3d at 454, the employer must prove the affirmative defense "by clear and convincing evidence," 49 U.S.C. § 42121(b)(2)(B)(ii). Proof by clear and convincing evidence is a "heightened" standard, *E.M.D. Sales,* 604 U.S. at 50, that falls "between a preponderance of the evidence and proof beyond a reasonable doubt," *Addington v. Texas,* 441 U.S. 418, 425 (1979). To meet the standard, the employer must "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable.'" *Florida v. Georgia,* 592 U.S. 433, 439 (2021) (quoting *Colorado v. New Mexico,* 467 U.S. 310, 316 (1984)).

We review for clear error whether the employer has met the affirmative defense.[3] Under that standard, we reverse only if the district court's finding is "illogical, implausible, or without support in inferences from the record." Chaudhry v. Aragón, 68 F.4th 1161, 1171 (9th Cir. 2023) (citation and internal quotation mark omitted). We must have a "definite and firm conviction that a mistake has been committed" to justify reversal. *Long v. Sugai,* 91 F.4th 1331, 1339 (9th Cir. 2024) (quoting *Anderson v. Bessemer City, N.C.,* 470 U.S. 564, 573 (1985)) (internal quotation mark omitted). In the specific context here, "we will upset the district court's finding

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[3] *See Clairmont v. Sound Mental Health,* 632 F.3d 1091, 1108 (9th Cir. 2011) (holding that whether an employer "would have reached the same adverse employment decision even in the absence of the employee's protected conduct" is "purely a question of fact" (brackets, citations, and internal quotation marks omitted)); *see also Baloga v. Pittston Area Sch. Dist.*, 927 F.3d 742, 752 n.7 (3d Cir. 2019) (citing an earlier precedent for the rule that "whether the employer would have taken [an] action regardless" is a "question[] for the jury"); *Koszola v. FDIC,* 393 F.3d 1294, 1300 (D.C. Cir. 2005) (holding that the appellate court reviews "for clear error" "the district court's finding by clear and convincing evidence that the [employer] would have fired [the employee] regardless of any alleged protected activity"); *Johnson v. Univ. of Cincinnati,* 215 F.3d 561, 584 (6th Cir. 2000) (holding that whether the employer "would have terminated [the employee] in the absence of his protected conduct. . . is a question of fact for the jury to decide"); *Bellaver v. Quanex Corp.,* 200 F.3d 485, 495 (7th Cir. 2000) (holding that whether the employer "would have fired [the employee] in the absence of discrimination" is a determination "best left in the hands of a jury"); *Hall v. Marion Sch. Dist. No. 2,* 31 F.3d 183, 193 (4th Cir. 1994) (holding that the determination "whether [the employee] would have been fired 'but for' her protected speech . . . is a factual one, and therefore, is not to be reversed absent clear error" (internal citation omitted)).

of 'clear and convincing evidence' . . . only if we are firmly convinced that it was merely probable or unlikely that the [employer] would have fired [the employee] regardless of any protected [activity]."[4] *Koszola,* 393 F.3d at 1300.

Applying those principles, we conclude that the district court correctly applied the legal standard and permissibly concluded that BNSF cleared the AIR21 standard's high bar.

The court committed no legal error. It accurately recognized that BNSF was required to meet the affirmative defense "by clear and convincing evidence." *Parker,* 2022 WL 897604, at *1, *5–7. It also appreciated the proper legal standard, repeatedly framing the inquiry as whether BNSF "would have" fired Rookaird had he not tested the air brakes. *Id.*

The court did not clearly err in finding that BNSF would have fired Rookaird anyway, had he not engaged in the protected activity of testing the air brakes. The court found that BNSF fired Rookaird for several reasons. I*d.* at *3. The air-brake test related to only one of those reasons: inefficient work. *Id.* at *6. But the air-brake test accounted for only twenty to forty minutes of the crew's five-and-a-half hours of inefficient work, no one told the crew to stop the air-brake test, and air-brake tests were routine. *Id.* at *7.

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[4] Depending on who prevails before the factfinder, the deferential standard of review sometimes favors employees, *Fresquez v. BNSF Ry. Co.*, 52 F.4th 1280, 1307–11 (10th Cir. 2022), and sometimes favors employers, *Brousil*, 43 F.4th at 812–13.

The district court also found that BNSF fired Rookaird "for many reasons unrelated to his inefficiency."[5] *Id.* at *6.

The court concluded that BNSF fired Rookaird because he lied on his timesheet and failed to sign it, violations of work rules that independently warranted dismissal. *Id.* at *6–7. The court credited the evidence that "dishonesty was significant [to BNSF] because of its federal reporting obligations and the potential fines it could have incurred for failing to meet those obligations." *Id.* at *6. Another reason why BNSF fired Rookaird, the court concluded, was that he twice disobeyed orders to leave the premises (causing a heated argument with a co-worker while he remained on site), which is also an independently dismissible violation. *Id.* at *6–7. Both the general manager who decided to fire Rookaird and the Human Resources employee who reviewed the record and concurred in the firing decision testified that the dishonesty and insubordination independently justified Rookaird's dismissal.

The court additionally observed that BNSF imposed a much lesser sanction on the other two members of Rookaird's crew. *Id*. at *7. Although those crewmembers, too, had worked inefficiently, they had

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[5] Parker challenges the district court's finding that BNSF fired Rookaird for "gross dishonesty" and "insubordination" even though the description in Rookaird's termination letter did not use those exact words. But the record fully supports the court's finding. The letter specifically describes Rookaird's conduct and identifies the rules that BNSF determined Rookaird had violated, including rules that use the terms "insubordination" and "gross dishonesty." The district court did not clearly err.

not committed gross dishonesty or insubordination. *Id.*

Considering the record as a whole, the district court's analysis is logical, plausible, and supported by the evidence. The court logically determined that the other, strong reasons for the firing—gross dishonesty, insubordination, and inefficiency unrelated to air-brake testing—overwhelmed the relatively tiny role that the air-brake test played.

There was nothing improper about the district court's analysis in that regard. As a matter of common sense, the role that the protected activity played in the firing decision bears directly on the credibility of an employer's explanation that it would have fired the employee in the absence of the protected activity. For example, if the protected activity was the centerpiece of a firing decision, an employer will have a much harder time convincing a finder of fact that it would have fired the employee anyway. Or, as here, if the protected activity played only a small role and the nonprotected conduct was egregious, then the employer's "we would have fired him anyway" explanation has more credibility. Nothing in the law suggests that a factfinder must disregard the logically salient factor of the role that the protected activity played in the firing decision.

On the other hand, an employer does not necessarily escape liability merely because the protected activity played only a small role in the personnel action. The factfinder must consider all relevant evidence in determining whether the employer has met its burden of proving, by clear and convincing evidence, that it would have taken the identical action in the absence of the protected

activity. Here, the district court reasonably weighed the evidence in reaching its conclusion that BNSF's explanation in this case was credible.

The district court also properly considered the discipline that Rookaird's crewmembers received. Comparator evidence can be useful in assessing whether the employer would have fired the plaintiff anyway. *Araujo,* 708 F.3d at 161. The ideal comparator would be identical in all respects to the plaintiff except that the hypothetical coworker did not engage in the protected activity. No real-world comparator will fit that bill, but understanding how the employer disciplined similar conduct will nevertheless provide inferences useful to a factfinder. Here, Rookaird's crewmembers also engaged in the air-brake test and the inefficient work but, unlike Rookaird, they accurately and timely signed out and followed the instruction to go home. The lesser punishment for the other crewmembers supports the inference that—consistent with BNSF's written policies—BNSF viewed Rookaird's dishonesty and insubordination as the most egregious misconduct.

In sum, the air-brake test comprised only about ten percent of the time that Rookaird and his crewmates worked inefficiently (which is not an independently dismissible offense anyway); the test had nothing at all to do with Rookaird's dishonesty and insubordination (either of which is an independently dismissible offense); and Rookaird's crewmembers, who did not engage in dishonest or insubordinate conduct, received lesser punishment. In these circumstances, the district court reasonably found that BNSF would have fired Rookaird anyway, and we are not "firmly convinced that it was merely probable or unlikely that [BNSF] would have fired

[Rookaird] regardless of any protected [activity]." Koszola, 393 F.3d at 1300.

We stress that none of the evidence discussed above or elsewhere in the record necessarily compelled the district court's conclusion regarding BNSF's affirmative defense. Another factfinder could have viewed the evidence differently, credited other testimony, or simply reached the opposite ultimate finding. Our task on appellate review is not to assess how we would rule as a factfinder; our task is to review the district court's finding for clear error. Because the court did not clearly err, we affirm.[6]

AFFIRMED.

[6] Plaintiff also raises two evidentiary challenges. We agree with, and adopt, the three-judge panel's rejection of those challenges. *Parker*, 112 F.4th at 703–04.

APPENDIX B – DISTRICT COURT FINDSINGS OF FACT AND CONCLUSIONS OF LAW, FILED MARCH 28, 2022

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PAUL W. PARKER, as Personal Representative of the Estate of Curtis John Rookaird,

Plaintiff-Appellee

v.

BNSF RAILWAY COMPANY, a Delaware corporation,

Defendant-Appellant.

Case No. 2:14-cv-00176-RAJ
Richard A. Jones, United States District Judge

ORDER

I. INTRODUCTION

On February 4, 2014, then-Plaintiff Curtis Rookaird sued Defendant BNSF Railway Company ("BNSF") under 49 U.S.C. § 20109(d)(3), alleging that the railway violated the anti-retaliation provision of the Federal Railroad Safety Act ("FRSA"). Dkt.# 1. Two years later, in 2016, the Court tried this case to a verdict. Dkt. ## 202, 204-06, 209, 212, 215, 219. After the first trial, the jury found in Mr. Rookaird's favor. Dkt.# 219, 221. Later, however, the Ninth Circuit vacated the jury verdict and remanded to this Court to retry certain issues. Dkt. # 310. On remand, the parties stipulated to a bench trial, and the Court heard this matter on October 25, 2021 through October 28, 2021. Dkt. ## 454-58. The parties later submitted proposed findings of fact and conclusions of law. Dkt. ## 471, 472.

The procedural posture of this case affected both the issues and evidence presented at trial. On remand, the issues to be retried were limited to whether Plaintiff could prove, by preponderance of the evidence, that Mr. Rookaird's refusal to stop performing the air test was a contributing factor in his termination; whether BNSF could prove, by clear and convincing evidence, that it would have fired Mr. Rookaird absent the air test; and damages. Dkt. # 365 at 1-5. As to the evidence presented, the bench trial included the live testimony of several lay and expert witnesses and the admission of various exhibits into evidence. But given that the facts underlying this case occurred long ago and that many witnesses had already testified at the first trial, both parties also submitted deposition and trial designations for the Court's consideration. Dkt. ## 468-69.

Pursuant to Federal Rule of Civil Procedure 52,

the Court enters the following findings of fact and conclusions of law, which are based upon consideration of all the admissible evidence and this Court's own assessment of the credibility of the trial witnesses. To the extent, if any, that Findings of Fact, as stated, may be considered Conclusions of Law, they shall be deemed Conclusions of Law. Similarly, to the extent, if any, that Conclusions of Law, as stated may be considered Findings of Fact, they shall be deemed Findings of Fact.

II. FINDINGS OF FACT

A. February 23, 2010

1. On February 23, 2010, Mr. Rookaird reported for work at BNSF's Swift depot location in Blaine, Washington. Dkt. # 441 at 16.

2. He began his shift at 2:30 P.M. *Id.*

3. Mr. Rookaird, a conductor, was accompanied by engineer Peter Belanger and brakeman Matthew Webb. *Id.* at 18, 149.

4. That day, the three-person crew was given several tasks. Primarily, the crewmembers were supposed to go from Swift to Cherry Point, where they would service customers. Dkt. # 440 at 87-88, 103; Dkt. # 441 at 26-27. Before going to Cherry Point, however, the crew members were instructed first to take a van, from Swift, south to Ferndale, where certain locomotives were waiting. Dkt. # 440 at 103-104; Dkt. # 441 at 26-27. From Ferndale, they were supposed to take the locomotives back north to Custer, which sits between Ferndale and Swift. Dkt. # 440 at 103; Dkt. # 441 at 35. At Custer, they were supposed to move 42 railway cars onto

storage tracks. Dkt. # 440 at 103-04; Dkt. # 441 at 19, 22, 154. Finally, after moving the cars onto storage tracks, they were supposed to take a van to Cherry Point to service BNSF customers. Dkt. # 440 at 134; Dkt. # 441 at 91-92.

5. As instructed, Mr. Rookaird and his crew departed Swift for Ferndale. Dkt.# 440 at 105-06; Dkt. # 441 at 29-30.

6. Once they arrived at Ferndale, they took two locomotives north to Custer so that they could move the 42 cars onto storage tracks. Dkt. # 441 at 35, 153.

7. While they were moving the cars at Custer, the crew members decided to perform an air test. *Id.* at 63, 76-77.

8. The air test took about 20 to 40 minutes to perform. *Id.* at 77, 160.

9. At BNSF, air tests are routine given that they are conducted hundreds of times a day or more. Dkt. # 466 at 33.

10. Indeed, Mr. Rookaird conducted air tests several times weeks before without reprisal. *Id*. at 33-34.

11. During the air test, BNSF trainmaster Dan Fortt called the crew members on the radio and asked them why they were conducting the test. Dkt. # 441 at 78. He said, "I'm not from around here, and I don't know how you guys do anything. But from where I'm from, we don't have to air test the cars." *Id*. at 79.

12. Despite his remarks, Mr. Fortt did not instruct

the crew to stop the air test. *Id.* at 80, 160.

13. The crew later completed the test. *Id*.

14. Later, while the crew was moving the 42 cars, Mr. Fortt contacted the crew again. *Id.* at 85. This time, Mr. Fortt asked how much longer the crew was going to take to complete the moving of the cars into storage, and Mr. Rookaird estimated that it would take another hour or two. *Id.* at 85-86.

15. After discovering how much longer it would take, Mr. Fortt instructed the crew to tie the cars down to the main line because another crew was going to complete the job. *Id*. at 89; Dkt. # 423-2 at 31-32. He then instructed Mr. Rookaird's crew to report back to the Swift depot. Dkt. # 466 at 58-59; Dkt. # 423-2 at 26.

16. By that time, which was about 7:30 P.M., or about five hours since Mr. Rookaird and his crew started their shift, Mr. Fortt and BNSF assistant superintendent Stuart Gordon believed that the crew was inefficient and that the crew should have been farther along in their work assignment. Dkt. # 466 at 49, 58-59, 102-03; Dkt. # 441 at 161; Dkt. # 423-2 at 32.

17. The crewmembers then returned to the Swift depot. Dkt. # 441 at 161.

18. When they arrived, Mr. Gordon told them to tie up and go home. *Id.* at 92-93, 161-62; Dkt. # 466 at 61-62.

19. "Tying up" refers to the process of completing a "tie-up" sheet to comply with Federal Railroad

Administration regulations. Dkt. # 465 at 165-66.

20. Mr. Rookaird completed his tie-up slip at 8:02 P.M., yet he recorded his tie-up time as 8:30 P.M. Dkt. # 441 at 94; Ex. 521 at 2.

21. Though he completed the tie-up slip, Mr. Rookaird did not sign the slip. Dkt. # 441 at 162; Ex. 521 at 2.

22. Then, instead of going home as instructed, Mr. Rookaird went to the lunch room and argued with another employee. Dkt. # 441 at 93, 97-98, 104; Dkt. # 466 at 62-63; Ex. 532 at 108.

23. The argument escalated, prompting Mr. Gordon to intervene. Dkt. # 441 at 105; Dkt. # 466 at 62-63.

24. Mr. Gordon again instructed Mr. Rookaird to leave. Dkt. # 466 at 62-63; Ex. 532 at 106-07.

25. Mr. Rookaird did not leave and instead continued to argue. Dkt. # 466 at 63; Ex. 532 at 106-08.

26. Mr. Gordon instructed Mr. Rookaird to leave for a third time. Dkt. # 466 at 63; Ex. 532 at 106-08.

27. It was only then that Mr. Rookaird, in fact, left. Dkt. # 466 at 63; Ex. 532 at 106-08.

B. Investigation

28. On February 26, 2010, BNSF sent Mr. Rookaird a letter informing him that he was being investigated for his actions days earlier on February 23. Ex. 526. He was to be

investigated for his failure to work efficiently, dishonesty when reporting his off-duty time, failure to provide a signed FRA tie-up timeslip, and failure to comply with instructions when instructed to leave the property. Id.; Ex. 529.

29. Later, BNSF officer Robert Johnson conducted an investigation. Exs. 529, 532. The investigation lasted about 12 hours and was transcribed. Ex. 532.

30. Mr. Johnson summarized the investigation and sent his summary to James Hurlburt and Doug Jones. Ex. 8. At the time, Mr. Hurlburt was the director of employee performance, and Mr. Jones was the general manager of the Northwest Division. Dkt. # 423-3 at 3; Dkt. # 465 at 66.

31. Mr. Hurlburt reviewed the investigation transcript and Mr. Johnson's summary. Dkt. # 423-3 at 6. After conducting his own independent evaluation, Mr. Hurlburt made a recommendation to Mr. Jones to dismiss Mr. Rookaird. *Id.*

32. Ultimately, Mr. Jones, who as the general manager had decision-making authority with respect to terminations, decided to fire Mr. Rookaird. *Id.*; Dkt. # 465 at 66, 70, 73-74. Mr. Jones based his decision on the investigation transcript, Mr. Johnson's summary, and discussions with Mr. Hurlburt. Dkt. # 465 at 66, 146. Based on his review, Mr. Jones concluded that Mr. Rookaird had committed significant rule violations that harmed BNSF. *Id.* at 143.

C. Termination

33. On March 19, 2010, BNSF fired Mr. Rookaird. Ex. 63.

34. BNSF fired Mr. Rookaird for four reasons: he failed to work efficiently, he was dishonest when reporting his off-duty time, he failed to provide a signed FRA tie-up slip, and he failed to comply with instructions when he was instructed to leave the property. *Id.* All four reasons stemmed from Mr. Rookaird's actions on February 23, 2010.

35. BNSF fired Mr. Rookaird in accordance with its Policy for Employee Performance and Accountability ("PEPA policy"). *Id.;* Dkt. # 465 at 71.

36. The PEPA policy outlined several types of rule violations and their consequences. The most severe type of violation was a dismissible violation. A single dismissible violation could result in the ultimate sanction of dismissal. A list of single aggravated offenses that were considered dismissible was contained in Appendix C of the PEPA policy. Dkt. # 465 at 75; Ex. 546.

37. Under Appendix C of the PEPA policy, a single dismissible violation included gross dishonesty and insubordination. Dkt. # 465 at 75; Ex. 324; Ex. 546 at 7.

i. Gross Dishonesty

38. BNSF terminated Mr. Rookaird for his gross dishonesty. Dkt. # 465 at 170-73; Ex. 324; Dkt. # 423-3 at 6-7.

39. Mr. Rookaird recorded his tie-up time as 8:30 P.M. when he, in fact, completed his tie-up slip 28 minutes earlier at 8:02 P.M. Dkt. # 441 at 94, 152; Ex. 521 at 2. He also did not sign his tie-up slip. Dkt. # 441 at 162; Ex. 521 at 2.

40. BNSF believed that this was improper and dishonest. Dkt. # 465 at 166-67; Dkt. # 423-3 at 6-8. It believed that this dishonesty was significant because it believed that maintaining proper tie-up slips was essential to complying with federal regulations. Dkt. # 465 at 141, 165-66; Dkt. # 423-3 at 6-8.

41. BNSF believed that Mr. Rookaird's failure to sign his FRA tie-up timeslip and his inaccurate reporting of his tie-up time constituted gross dishonesty under Appendix C of the PEPA policy. Dkt. # 465 at 170-72; Dkt. # 423-3 at 6-8; Ex. 324.

ii. Insubordination

42. BNSF also terminated Mr. Rookaird for his insubordination. Dkt. # 465 at 76-77, 165, 170; Ex. 324; Dkt. # 423-3 at 8.

43. Mr. Gordon had the authority to instruct Mr. Rookaird to tie up and go home. Dkt. # 465 at 163-64.

44. Mr. Rookaird disobeyed Mr. Gordon's two commands to tie up and go home and instead began an argument with another employee. Dkt. # 441 at 92-93, 97-98, 105, 161-62; Dkt. # 466 at 61-63; Ex. 532 at 106-8.

45. BNSF believed that Mr. Rookaird's refusal to comply with Mr. Gordon's instructions to tie up and go home constituted insubordination

under Appendix C of the PEPA policy. Dkt. # 465 at 76-77, 165, 170; Ex. 324; Dkt. # 423-3 at 8.

iii. Inefficiency and Air Test

46. Finally, BNSF terminated Mr. Rookaird for his failure to work efficiently. Dkt. # 465 at 82, 108-09; Dkt. # 466 at 41; Ex. 324; Dkt. # 423-3 at 9.

47. On February 23, 2010, Mr. Rookaird and his crew were assigned several tasks, which included retrieving engines from Ferndale, moving 42 cars into storage at Custer, and servicing customers at Cherry Point. Dkt. # 440 at 87-88, 103-04, 134; Dkt. # 441 at 19, 22, 26-27, 91-92, 154.

48. About five and a half hours into their shift, Mr. Rookaird and his crew had still not completed the moving of the cars into storage. Dkt. # 441 at 84-86, 89.

49. BNSF believed that they were inefficient in accomplishing their tasks for that day and called them in accordingly. Dkt. # 466 at 49, 58-59, 102-03; Dkt. # 441 at 161; Dkt. # 423-2 at 32.

50. One reason for the delay was Mr. Rookaird's decision to conduct an air test, a test that BNSF believed to be unnecessary. Dkt. # 466 at 60, 121.

51. BNSF concedes that Mr. Rookaird's conducting of the air test contributed to the crew's supposed inefficiency and delay. Dkt. # 466 at 41-42, 70,124-25.

D. Discipline of Matthew Webb and Peter Belanger

52. Mr. Rookaird's crewmembers on February 23, 2010, Matthew Webb and Peter Belanger, had engaged in the same supposed inefficiency as Mr.Rookaird.

53. Like Mr. Rookaird, Mr. Webb and Mr. Belanger were disciplined for their failure to work efficiently. Exs. 3 & 5. But unlike Mr. Rookaird, Mr. Webb and Mr. Belanger were not dismissed. Instead, they each received a Level S 30 Day Record Suspension and probation. Exs. 3 & 5.

54. Unlike Mr. Rookaird, Mr. Webb and Mr. Belanger committed no other rule violations. Mr. Webb and Mr. Belanger were not disciplined for dishonesty in reporting their off-duty time, for a failure to provide a signed FRA tie-up slip, or for a failure to comply with instructions when they were instructed to leave the property. Dkt. # 465 at 171-72; Dkt. # 423-3 at 12-13.

III. CONCLUSIONS OF LAW

A. Procedural History

1. On February 4, 2014, then-Plaintiff Curtis Rookaird brought this action pursuant to 49 U.S.C. § 20109, alleging that Defendant BNSF Railway Company violated the anti-retaliation provision of the Federal Railroad Safety Act ("FRSA").

2. A claim for retaliation under the FRSA has two stages: a prima facie stage and a substantive stage. *Rookaird v. BNSF Ry. Co.,* 908 F.3d 451,

459 (9th Cir. 2018). Each stage has its own burden-shifting framework. *Id.*

3. At the prima facie stage, a plaintiff must make "a prima facie showing that any protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint." *Id.* at 459-60 (alteration omitted) (quoting 49 U.S.C. § 42121(b)(2)(B)(i)). An employer, on the other hand, can defeat the plaintiff's claim "if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of the protected activity." *Id.* at 460 (alteration omitted) (quoting 49 U.S.C. § 42121(b)(2)(B)(ii)).

4. On the other hand, at the substantive stage, a plaintiff must prove by a preponderance of the evidence that the protected activity was, in fact, a contributing factor in the unfavorable personnel action. *Id.* at 460. The employer's burden, however, remains as it was at the prima facie stage: an employer may defeat the retaliation claim if it can demonstrate by clear and convincing evidence that it would have taken the same unfavorable action absent the protected activity. *Id.*

5. Thus, although the employer has the same burden in each stage, the plaintiff does not. *Id.*

6. After the first trial in this case, the jury concluded that Mr. Rookaird engaged in the FRSA-protected activity of refusing to stop the air test. Dkt. # 221. On appeal, the Ninth

Circuit upheld that determination. *Rookaird*, 908 F.3d at 455-59.

7. The Ninth Circuit also determined that Mr. Rookaird successfully passed the prima facie stage because "the circumstances were sufficient to raise the inference that the air[] test was a contributing factor in Rookaird's termination." *Id*. at 462.

8. The Ninth Circuit vacated the verdict and reversed, however, because it found a genuine dispute of material fact as to whether Mr. Rookaird proved his substantive case. *Id*. at 462-63.

9. On remand, the Court decided to retry several issues: whether Mr. Rookaird could prove, by preponderance of the evidence, that his refusal to stop performing the air test was a contributing factor in his termination; whether BNSF could prove, by clear and convincing evidence, that it would have fired Mr. Rookaird absent the air test; and damages. Dkt. # 365 at 1-5.

10. In September 2021, after the Ninth Circuit remanded, but before this Court could retry the case, Mr. Rookaird died. Dkt. # 411.

11. The Court then substituted as a party Paul Parker, who is the personal representative of Mr. Rookaird's estate. *Id.*

B. Substantive Stage – Contributing Factor

12. At the substantive stage, the plaintiff must prove by a preponderance of the evidence that his protected conduct "was a contributing factor in the unfavorable personnel action

alleged in the complaint." *Frost v. BNSF Ry. Co.,* 914 F.3d 1189, 1195 (9th Cir. 2019) (quoting Rookaird, 908 F.3d at 460).

13. 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." *Rookaird,* 908 F.3d at 461 (internal quotation marks omitted) (quoting *Gunderson v. BNSF Ry. Co.,* 850 F.3d 962, 969 (8th Cir. 2017)). A contributing factor "may be quite modest," and such a factor may "play[] only a very small role" in the unfavorable personnel action. *Frost,* 914 F.3d at 1197.

14. To show a contributing factor, an employee must prove "intentional retaliation" that was "prompted by the employee engaging in protected activity." *Rookaird*, 908 F.3d at 461 (quoting Kuduk v. BNSF Ry. Co., 768 F.3d 786, 791 (8th Cir. 2014)). That said, the employee need not "separately prove" an employer's subjective "discriminatory intent." *Frost,* 914 F.3d at 1195. Rather, "[s]howing that an employer acted *in retaliation for* protected activity is the required showing of intentional discrimination." *Id.* (emphasis in original).

15. The Court concludes, by preponderance of the evidence, that Mr. Rookaird's refusal to stop the air test was a contributing factor in his termination.

16. Mr. Rookaird was fired, in part, for his inefficiency on February 23, 2010. Dkt. # 465 at 82, 108-09; Dkt. # 466 at 41; Ex. 324; Dkt. # 423-3 at 9.BNSF believed that Mr. Rookaird and his crew were taking too long to complete

their assigned tasks for the day. Dkt. # 466 at 49, 58-59, 102-03; Dkt. # 441 at 161; Dkt. # 423-2 at 32.

17. BNSF concedes that the crew's inefficiency was partly caused by Mr. Rookaird's decision to conduct an air test—a test that BNSF managers thought was unnecessary to conduct in the first place. Dkt. # 466 at 41-42, 70, 60, 121, 124-25.

18. Because Mr. Rookaird was fired for his inefficiency and because the inefficiency was partly caused by the protected activity of refusing to stop the air test, the Court concludes that the air test "tend[ed] to affect in [some] way the outcome of [BNSF's] decision" to fire Mr. Rookaird. *Rookaird*, 908 F.3d at 461.

19. And because the air test affected Mr. Rookaird's termination, it was a contributing factor in an unfavorable personnel action alleged in Mr. Rookaird's complaint.

20. Because Plaintiff has met his burden, the burden shifts to BNSF.

C. Substantive Stage – BNSF's Defense

21. An employer can defeat a claim for unlawful retaliation if it can prove, by clear and convincing evidence, "that the employer would have taken the same unfavorable personnel action in the absence of the protected activity." *Rookaird*, 908 F.3d at 460 (alteration omitted) (quoting 49 U.S.C.§ 42121(b)(2)(B)(iv)).

22. "Clear and convincing evidence requires greater proof than preponderance of the evidence. To meet this higher standard, a party

must present sufficient evidence to produce 'in the ultimate factfinder an abiding conviction that [the asserted factual contentions are] highly probable.'" *OTR Wheel Eng'g, Inc. v. W. Worldwide Servs., Inc.,* 897 F.3d 1008, 1020 (9th Cir. 2018)(alteration in original) (quoting *Sophanthavong v. Palmateer,* 378 F.3d 859, 866-67 (9th Cir. 2004)).

23. The Court concludes, by clear and convincing evidence, that absent the air test BNSF would have still fired Mr. Rookaird.

24. Mr. Rookaird was fired for many reasons unrelated to his inefficiency.

25. He was fired for gross dishonesty, having failed to sign his FRA tie-up timeslip and having falsely recorded his tie-up time. Dkt. # 465 at 170-73; Ex. 324; Dkt. # 423-3 at 6-7. BNSF believed that this dishonesty was significant because of its federal reporting obligations and the potential fines it could have incurred for failing to meet those obligations. Dkt. # 465 at 141, 165-66; Dkt. # 423-3 at 6-8.

26. Separately, Mr. Rookaird was fired for insubordination, having twice disobeyed BNSF assistant superintendent Stuart Gordon's commands to tie- up and go home. Dkt. # 465 at 76-77, 165, 170; Ex. 324; Dkt. # 423-3 at 8. Mr. Rookaird not only disobeyed Mr. Gordon's two commands but also started a heated argument with a coworker. Dkt. # 441 at 93, 97-98, 104; Dkt. # 466 at 62-63; Ex. 532 at 108.

27. Both gross dishonesty and insubordination were single, dismissible violations under the

PEPA policy, which governed Mr. Rookaird's discipline. Dkt. # 465 at 75; Ex. 324; Ex. 546 at 7.

28. What is more, though the air test was a contributing factor in Mr. Rookaird's termination, the Court concludes that the test contributed very little.

29. To start, the test did not even account for all of Mr. Rookaird's supposed inefficiency on February 23, 2010. Mr. Rookaird and his crew were working for about five-and-a-half hours before they were called in. Yet the air test only accounted for about 20 to 40 minutes of those five-and-a-half hours. Dkt. # 441 at 77, 160.

30. In addition, no BNSF officer instructed Mr. Rookaird to stop the air test. Though he doubted the air test's necessity, trainmaster Dan Fortt never instructed Mr. Rookaird to stop the air test. Dkt. # 441 at 78-80, 160.Given that there was no attempt to stop the air test, this is yet more evidence that the test played only a small part in BNSF's overall decision to fire Mr. Rookaird.

31. Further undermining the significance of the air test is its routine nature. At BNSF, air tests were conducted hundreds of times a day or more. Dkt. # 466 at 33. And Mr. Rookaird conducted air tests several times in the weeks leading up to February 23, 2010 without incident. *Id.* at 33-34. This also demonstrates that the test played only a small part in BNSF's overall decision to fire Mr. Rookaird.

32. Finally, Mr. Rookaird's two crew members, Mr. Webb and Mr. Belanger, performed the same air test as Mr. Rookaird but were not fired. They were not fired because, unlike Mr. Rookaird, they did not commit the single, dismissible violations that Mr. Rookaird committed. They were not insubordinate, and they did not improperly complete their tie-up timeslip. Dkt. # 465 at 171-72; Dkt. # 423-3 at 12-13. This further demonstrates that inefficiency and the air test—alone—would not have resulted in Mr. Rookaird's termination. It also demonstrates that, absent the air test, BNSF would have fired Mr. Rookaird anyway because of his gross dishonesty and insubordination.

33. In all, the Court forms the "abiding conviction" that even if Mr. Rookaird did not engage in the protected activity of refusing to stop the air test, BNSF would have still fired him for his gross dishonesty and insubordination. *OTR Wheel Eng'g,* 897 F.3d at 1020. Thus, the Court concludes that BNSF has successfully proved its defense by clear and convincing evidence.

34. The Court finds that BNSF is not liable for unlawful retaliation under the FRA.

IV. CONCLUSION

For the reasons previously stated, the Court finds in favor of BNSF on Plaintiff's unlawful retaliation claim. The Clerk shall enter judgment for BNSF.

DATED this 28th day of March, 2022

/s/ Richard A. Jones
The Honorable Richard A. Jones
United States District Court

APPENDIX C – RELEVANT STATUTORY PROVISIONS

49 U.S.C § 20109

§ 20109. Federal Railroad Safety Act Whistleblower Employee Protections

(a) In General. A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done-

> **(1)** to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by-
>
> > **(A)** a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under chapter 4 of title 5;

(B) any Member of Congress, any committee of Congress, or the Government Accountability Office; or

(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

(2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security;

(3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or to testify in that proceeding;

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

(5) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;

(6) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or

damage to property occurring in connection with railroad transportation; or

(7) to accurately report hours on duty pursuant to chapter 211.

(b) Hazardous Safety or Security Conditions. (1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for-

(A) reporting, in good faith, a hazardous safety or security condition;

(B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist; or

(C) refusing to authorize the use of any safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in paragraph (2) exist.

(2) A refusal is protected under paragraph (1)(B) and (C) if

(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) a reasonable individual in the circumstances then confronting the employee would conclude that

(i) the hazardous condition presents an imminent danger of death or serious injury; and

(ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

(C) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

(3) In this subsection, only paragraph (1)(A) shall apply to security personnel employed by a railroad carrier to protect individuals and property transported by railroad.

(c) Prompt Medical Attention.

(1) Prohibition. A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest

hospital where the employee can receive safe and appropriate medical care.

(2) Discipline. A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

(d) Enforcement Action.

(1) In general. An employee who alleges discharge, discipline, or other discrimination in violation of subsection (a), (b), or (c) of this section, may seek relief in accordance with the provisions of this section, with any petition or other request for relief under this section to be initiated by filing a complaint with the Secretary of Labor.

(2) Procedure.

(A) In general. Any action under paragraph **(1)** shall be governed under the rules and procedures set forth in section 42121(b), including:

(i) Burdens of proof. Any action brought under (d)(1) 2 shall be governed by the legal burdens of proof set forth in section 42121(b).

(ii) Statute of limitations. An action under paragraph (1) shall be commenced not later than 180 days after the date on which the alleged violation of subsection (a), (b), or (c) of this section occurs.

(iii) Civil actions to enforce. If a person fails to comply with an order issued by the Secretary of Labor pursuant to the procedures in section 42121(b), the Secretary of Labor may bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred, as set forth in 42121.3

(B) Exception. Notification made under section 42121(b)(1) shall be made to the person named in the complaint and the person's employer.

(3) De novo review. With respect to a complaint under paragraph (1), if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to

the bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.

(4) Appeals. Any person adversely affected or aggrieved by an order issued pursuant to the procedures in section 42121(b), may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. The review shall conform to chapter 7 of title 5. The commencement of proceedings under this paragraph shall not, unless ordered by the court, operate as a stay of the order.

(e) Remedies.

(1) In general. An employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole.

(2) Damages. Relief in an action under subsection (d) (including an action described in subsection (d)(3)) shall include-

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) any backpay, with interest; and

(C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(3) Possible relief. Relief in any action under subsection (d) may include punitive damages in an amount not to exceed $250,000.

(f) Election of Remedies. An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.

(g) No Preemption. Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.

(h) Rights Retained by Employee. Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.

(i) Disclosure of Identity.

(1) Except as provided in paragraph (2) of this subsection, or with the written consent of the employee, the Secretary of Transportation or the Secretary of Homeland Security may not disclose the name of an employee of a railroad carrier who has provided information about an alleged violation of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or a regulation prescribed or order issued under any of those provisions.

(2) The Secretary of Transportation or the Secretary of Homeland Security shall disclose to the Attorney General the name of an employee described in paragraph (1) if the matter is referred to the Attorney General for enforcement. The Secretary making such disclosures shall provide reasonable advance notice to the affected employee if disclosure of that person's identity or identifying information is to occur.

(j) Process for Reporting Security Problems to the Department of Homeland Security.

(1) Establishment of process. The Secretary of Homeland Security shall establish through regulations, after an opportunity for notice and comment, a process by which any person may report to the Secretary of Homeland Security regarding railroad security problems, deficiencies, or vulnerabilities.

(2) Acknowledgment of receipt. If a report submitted under paragraph (1) identifies the person making the report, the Secretary of Homeland Security shall respond promptly to such person and acknowledge receipt of the report.

(3) Steps to address problem. The Secretary of Homeland Security shall review and consider the information provided in any report submitted under paragraph (1) and shall take appropriate steps to address any problems or deficiencies identified.

49 USCS § 42121

§ 42121. Protection of employees providing air safety information

(a) Prohibited discrimination. A holder of a certificate under section 44704 or 44705 of this title, or a contractor, subcontractor, or supplier of such holder, may not discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to aviation safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to aviation safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

(b) Department of Labor and Federal Aviation Administration complaint procedure

(1) Filing and notification. A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

(2) Investigation; preliminary order.

(A) In general. Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the

Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

(B) Requirements

(i) Required showing by complainant. The Secretary of Labor shall dismiss a complaint

filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) Showing by employer. Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) Criteria for determination by secretary. The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing

factor in the unfavorable personnel action alleged in the complaint.

(iv) Prohibition. Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(3) Final order.

(A) Deadline for issuance; settlement agreements. Not later than 120 days after the date of conclusion of a hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

(B) Remedy. If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to—

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

(iii) provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary of Labor, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing the complaint upon which the order was issued.

(C) Frivolous complaints. If the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney's fee not exceeding $1,000.

(4) Review.

(A) Appeal to court of appeals. Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code. [5 USCS § § 701 et seq.]. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

(B) Limitation on collateral attack. An order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

(5) Enforcement of order. Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor and the Administrator of the Federal Aviation Administration shall consult with each other to determine the most appropriate action to be taken, in which—

(A) the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order, for which, in actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, injunctive relief and compensatory damages; and

(B) the Administrator of the Federal Aviation Administration may assess a civil penalty pursuant to section 46301 [49 USCS § 46301].

(6) Enforcement of order by parties.

(A) Commencement of action. A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(B) Attorney fees. The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(c) Mandamus. Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28, United States Code.

Nonapplicability to Deliberate Violations. Subsection (a) shall not apply with respect to an employee of a holder of a certificate issued under section 44704 or 44705 [49 USCS § 44704 or 44705], or a contractor or subcontractor thereof, who, acting without direction from such certificate-holder, contractor, or subcontractor (or such person's agent), deliberately causes a violation of any requirement relating to aviation safety under this subtitle or any other law of the United States relating to aviation safety under this subtitle or any other law of the United States.

(d) Contractor Defined. In this section, the term "contractor" means—

(1) a person that performs safety-sensitive functions by contract for an air carrier or commercial operator; or

(2) a person that performs safety-sensitive functions related to the design or production of an aircraft, aircraft engine, propeller, appliance, or component thereof by contract for a holder of a certificate issued under section 44704 [49 USCS § 44704].