BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0071012381:

MITCHELL REINHARDT,	)	Case No. 748-2008
	)	
Charging Party,	)	
	)	**ON REMAND:**
vs.	)	**HEARING OFFICER DECISION**
	)	**AND NOTICE OF ISSUANCE OF**
BNSF RAILWAY COMPANY,	)	**ADMINISTRATIVE DECISION**
	)	
Respondent.	)	

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I. PROCEDURE AND PRELIMINARY MATTERS ON REMAND

After the initial decision and affirmation of that decision by the Human Rights Commission, a judicial review proceeding initiated in state district court by Reinhardt was removed to federal court by BNSF. The federal court ruled that Reinhardt's evidence at hearing was direct evidence of illegal discrimination, to which BNSF might prove either that Reinhardt's direct evidence was not worthy of belief, or that no unlawful motive played a part in the action taken. *Reinhardt v. BNSF Ry. Co.*, CV 10-H-CCL, "Opinion and Order" (D.Mt., Hel. Div., Feb. 6, 2012), p. 14.

The Human Rights Commission received the federal court's remand order, and in turn directed the Hearings Bureau to conduct the analysis mandated by the Federal Court. *Reinhardt v. BNSF* , Case No. 748-2008, HRB Case No. 0071012381 (Feb. 27, 2012).

II. ISSUES ON REMAND

The dispositive issue is whether BNSF discharged Reinhardt because of age and disability. Although the findings of fact in the first decision were approved, it is clear that the remand order directs revisiting the facts in light of the direct evidence analysis that needs to be applied to them.

Except as follows, the original decision is unchanged. All of the original findings are included herein in Section III, to provide continuity to the reader, with additional findings on remand identified and underlined. Underlining and explaining changes in the discussion in Section IV would probably be more confusing than helpful to the reader, so the discussion has been entirely rewritten as it now appears in Section IV. Sections V and VI are unchanged from the original decision and appear herein in their original form.

III. FINDINGS OF FACT ON REMAND

1. Charging Party Mitchell Reinhardt (date of birth 9/7/1958) first applied for an appointment as a conductor with BNSF Railway Company (BNSF) in 2005, having concluded that the railroad was hiring "older" people. Reinhardt was initially selected for a conductor trainee position in Glendive, but did not pass the Industrial Physical Capability Screening (IPCS) test due to a left shoulder deficiency.

2. In 2005, BNSF indicated that graduates of the National Association of Railway Schools (NARS) program would be given preferences for positions with the railroad. After he initially failed the IPCS test, Reinhardt attended and completed a six-week NARS training course, obtaining his NARS certificate. Reinhardt also reconditioned himself, worked with BNSF to retake the IPCS test, and passed it on August 19, 2005. He again applied but was not selected for conductor training.

3. In July 2006, Reinhardt again applied for Glendive and Forsyth conductor trainee positions, and was invited to the hiring session in Glendive. He completed an application for employment, including his resume, completed BNSF's medical history questionnaire and again took the IPCS test. On or about August 5, 2006, BNSF's Medical Department notified Reinhardt that he met the medical standards for the position of conductor trainee. Accepted for a conductor trainee position, Reinhardt began working for BNSF on August 28, 2006. His training coordinator was Daniel Dassinger and his immediate supervisor was Trainmaster Don Kautzmann.

4. BNSF is a railroad operating in 28 states, including Montana, and two Canadian provinces. It employs approximately 36,000 people. BNSF maintains a division headquarters at Billings, Montana.

5. The job of a BNSF conductor requires many key skills and abilities, including coupling air hoses, which provide pneumatics for the braking system on trains. Coupling involves bending down and reaching in between cars for the air hoses, then grasping, pulling and twisting to connect them.

6. BNSF trains can be up to two miles long. The conductor job requires performing train and equipment inspections. The inspections require proficiently walking the train to identify any unsafe conditions or mechanical defects, down one side of the train and then back up the other on uneven terrain and ballast, which stretches for more than a mile at a time. Inspections and other train work also require climbing on and off equipment by lifting one foot approximately three feet onto a ladder while reaching up to grasp the grab irons with both hands and pulling one's weight up onto the ladder.

7. Conductors must also ride on moving cars while holding onto a ladder, sometimes for an extended period of time. Thus, the job also requires the ability to maintain balance while working on and around moving equipment, including getting on and off cars on uneven terrain and ballast. Conductors must operate switches,

which involves bending down over the switch and reaching and being able to exert muscular strength sufficient to push and pull the lever. Conductors must be able to make quick hand and leg movements.

8. Due to the nature of the position (working around moving and heavy equipment), it is imperative that crew members, including conductors, are aware of their environment and are able to react and respond quickly to any condition needing attention. In addition, if there is a broken "knuckle" (coupler connecting two cars) when the train is outside of a terminal, the conductor must replace it, lifting and carrying a replacement "knuckle," which weighs up to 83 pounds.

9. Pursuant to the collective bargaining agreement (CBA) between BNSF and the United Transportation Union, conductor training consists of a one week orientation, followed by three weeks of on-the-job training, three weeks of classroom instruction and then another eight weeks of on-the-job training. At the conclusion of this training, successful trainees are given a promotion examination. Employees who pass the exam become conductors. Employees who failed the examination are scheduled for up to an additional four weeks of either classroom or on the job training, then given a second test. Upon passage of that second test, they become conductors. Upon failure, they forfeit all seniority and employment rights. BNSF has the right to "disapprove an application for employment" (in other words, discharge the probationary employee) within 60 calendar days beyond the initial three weeks of classroom training, not just at the conclusion of the training process.

ADDITION TO FINDING NO. 9: Not every person medically qualified to work as a conductor trainee for BNSF necessarily has the ability to do so safely. Without any physical impairment that substantially limits one or more of a person's major life activities, a medically qualified individual may still lack the physical capacity safely to perform one or more of the essential functions of the position detailed in Findings 5-8. Such a lack is a basis for BNSF to disapprove an application for employment (discharge the probationary employee) at any time within the 60 days beyond the initial three weeks of classroom training. Indeed, confirming that an otherwise qualified applicant can actually safely perform all of the essential functions of the position after completing training is one of the primary purposes of the probationary period.

10. Under Section 5 of the CBA Memo of Understanding, for an employee who is unable to complete training due to a bona fide illness or injury, BNSF is obligated to extend the training period for the period of unavailability, for up to eight months.

11. As part of the training program, the training coordinator serves as a "mother hen," helping trainees with problems, answering questions and shepherding them through the training process. The training coordinator must anticipate problems during training and fashion solutions.

12. The training coordinator fills out a check list during the first week of training to assure that each new employee can properly perform the tasks of conductor. Evaluation of the employee's on-the-job training is performed by "craft instructors." In practice, an employee is evaluated on each trip by a conductor. These evaluations are normally provided on a form filled out by the supervising conductor and given to the training coordinator at the end of each trip. Other employees who may observe the trainee at work (such as other crew members) can also submit evaluations or comments. Classroom work is evaluated by testing done by the classroom administrators.

13. Over the history of railroading in America, an unusual aspect of training for new hires has evolved – the use of union employees (craft instructors) rather than management for much of the training. To some extent, this distances management from some of the actual training and evaluation of new hires, requiring management to rely to a greater extent upon the feedback of the seasoned union employees who train and observe the trainees.

14. Don Dassinger was the BNSF training coordinator during Reinhardt's tenure with the railroad. He evaluated Reinhardt's orientation week, which Reinhardt successfully completed. Dassinger filled out an evaluation form for Reinhardt, which was not produced in this case. ***See***, ***infra***, Finding 36, p. 8, footnote 2.

15. In early September 2006, Reinhardt began his initial three-week on-the-job training, which he successfully completed. During that on-the-job training, Dassinger observed Reinhardt in the field, learning to work on and around the railroad cars, on a few occasions. On one of those occasions, the trainees individually climbed a ladder on a grain car and practiced performing their hand signals while on the ladder. Dassinger commented that Reinhardt, while signaling from the ladder, was not adequately signaling. He asked Reinhardt if he was "scared," to which Reinhardt replied that he was "nervous" and had been up on the car "a long time."

16. For new trainees to be nervous working around railroad cars and equipment is not at all unusual. Familiarizing new hires with the working environment, so they can learn to react promptly and properly, is a goal of training.

17. After completion of the initial on-the-job training weeks, classroom training followed in weeks five, six and seven (September 25 through October 13, 2006). Reinhardt successfully completed this classroom training.

18. On October 16, 2006, Reinhardt began the additional eight weeks of field work. He was now at the point in his training where he began working on moving trains, observed by the other crew members (particularly but not exclusively the conductors) that he accompanied on particular assignments, whether "trips" on a train out on the road or more local work, such as switching cars in the yard or helper service (on a unit or units assisting in pushing other trains).

19. Keith Clingingsmith is a conductor who, as of the time of hearing, served as Training Coordinator, as Dassinger's successor. Clingingsmith has worked for BNSF as a brakeman and conductor since 1976. On October 21, 2006, Reinhardt accompanied Clingingsmith, the conductor, on a helper service assignment. Afterwards, Clingingsmith filled out an evaluation form for Reinhardt in which all but three of the 22 categories assessed were marked good or fair. However, Clingingsmith, along with engineer, Al Koncilya, reported both to Dassinger and to Glendive trainmaster Don Kautzmann that Reinhardt was not "walking stable." In attempting to describe the problem that he observed, Clingingsmith opined that Reinhardt might have a health issue, which he described as "a stroke."

20. Clingingsmith requested that he work with Reinhardt on more than one trip because of his concern about Reinhardt's ability to perform the physical requirements of the job. In addition to his observations about Reinhardt's uncertain balance while working in or around moving equipment, uneven terrain and ballast, Clingingsmith had doubts about Reinhardt's ability to throw switches and to couple the engine and air hoses, also essential requirements of the job. His concerns involved performance, but also the safety of Reinhardt or others. He observed Reinhardt walking with difficulty toward switches and exhibiting confusion about switching activities. ADDITION TO FINDING NO. 20: Clingingsmith did make a statement that he thought Reinhardt might have a physical impairment that limited his capacity to perform his job duties safely [see Finding No. 19]. He did not make any statement that he thought Reinhardt might be too old to perform his job duties safely. His comments clearly reported concerns about whether Reinhardt was capable of performing his job duties safely, no matter what the cause.

21. Clingingsmith also recommended that Reinhardt be placed with another veteran conductor. Knowing that Reinhardt had obtained a NARS certificate, Clingingsmith discussed with Dassinger calling to verify Reinhardt's NARS training performance. Despite his predominantly "good" or "fair" scoring on his written evaluation, Clingingsmith reported that Reinhardt was "poor" on his understanding of track warrants and documents, his identification of switches, and his overall understanding concerning his responsibility and key requirements. Clingingsmith noted that Reinhardt needed help with overall field work.

22. Al Koncilya is a locomotive engineer for BNSF, who has worked for 33 years as an engineer and brakeman. He worked with Reinhardt and Clingingsmith on the same helper service assignment in Glendive. When separating the helper engine from the train, he, like Clingingsmith, observed Reinhardt was not "walking stable." Immediately after finishing the shift, he also made an oral report to Kautzmann, out of concern about Reinhardt's mobility. Koncilya's concern was that he, as an engineer, could be working in the future with just Reinhardt, as a conductor, and did not want him falling under the engine. He also questioned whether Reinhardt could get out of harm's way quickly, when and if that was necessary. ADDITION TO

FINDING NO. 22: Koncilya did not make any statement that he thought Reinhardt might have a physical impairment that limited his capacity to perform his job duties safely. Koncilya did not make any statement that he thought Reinhardt might be too old to perform his job duties safely. Koncilya reported concerns about whether Reinhardt was capable of performing his job duties safely, without manifesting any discriminatory attitude towards Reinhardt because of age or disability.

23. Reinhardt's next assignment, on October 25, 2006, was with conductor John Wilson. Wilson evaluated Reinhardt's performance as "good" in every category. Wilson, with a seniority date of January 16, 2006, had far less experience than many other union employees who worked with and evaluated Reinhardt.

24. Pete Score is an engineer for BNSF, who has worked as a brakeman, conductor and engineer since 1989. He worked with Reinhardt between four and seven times on runs between Glendive and Forsyth. Score observed Reinhardt having inordinate difficulty walking and keeping his balance while on ballast and getting on and off the locomotive. He was concerned that Reinhardt was going to get hurt. During the time that Score worked with Reinhardt, he reported his concerns to Dassinger. ADDITION TO FINDING NO. 24: Score did not make any statement that he thought Reinhardt might have a physical impairment that limited his capacity to perform his job duties safely. Score did not make any statement that he thought Reinhardt might be too old to perform his job duties safely. Score reported concerns about whether Reinhardt was capable of performing his job duties safely, without manifesting any discriminatory attitude towards Reinhardt because of age or disability.

25. On October 30, 2006, Dassinger assigned Reinhardt to work in the switch yard. While this was not unusual, it consisted of duties not assigned to others in Reinhardt's class. Switch yard duty involved 12-hour days in which the employees spent most of the time on their feet climbing in and out of trains and rail cars.

26. Reinhardt worked his switch yard shifts with two conductors – Jim Knoll and Steve Ballentine. Knoll worked with Reinhardt on yard switcher duty from approximately October 30 to November 2, 2006. Knoll has worked for BNSF as a conductor and brakeman since 1974. He has trained 75 to 80 new hires during his entire railroad career.

27. Kautzmann and Dassinger felt that they should assign Reinhardt work with more older, experienced workers, preferably with some of their better craft instructors. Knoll was one such worker. He had been in the yard for years and had trained many new hires. He had filled out evaluation forms for 10 years – if a trainee did not provide an evaluation form, Knoll would report his observations orally.

28. Knoll turned in an evaluation of Reinhardt, dated November 3, 2006, to Dassinger and Kautzmann, and also discussed his evaluation with Kautzmann. Out of 35 categories in which he evaluated Reinhardt, Knoll gave him four "good" ratings,

21 "fair" ratings and 10 ratings worse than "fair." He rated Reinhardt "poor" in safe, alert and efficient job performance around equipment; proper radio procedure; working with end of train devices (ETD); understanding switch lists, track lists and work orders; understanding and identifying hazards at industries; understanding basic switching moves; aligning drawbars; setting out/picking up efficiently and properly; inspecting cars and brake tests; remaining safe and alert while working on or around equipment; and in Reinhardt's overall understanding concerning a conductor's responsibility and skill requirements. He and Ballentine also noted Reinhardt's difficulty coupling hoses.

29. Knoll appended a "note" to his evaluation, expressing his feeling that Reinhardt "does not have the physical capability to do the job [and] seems very unstable walking along the tracks and . . . on moving equipment." Reinhardt's performance of his duties "scared" Knoll. Knoll had never before reported feeling that a trainee could not physically perform the job nor written a similar "note." ADDITION TO FINDING NO. 29: Knoll did not make any statement that he thought Reinhardt might have a physical impairment that limited his capacity to perform his job duties safely. Knoll did not make any statement that he thought Reinhardt might be too old to perform his job duties safely. Knoll reported concerns about whether Reinhardt was capable of performing his job duties safely, without manifesting any discriminatory attitude towards Reinhardt because of age or disability.

30. Ballentine, who worked on the yard switcher crew with Knoll and Reinhardt, had been employed by BNSF as a conductor or brakeman since 1976, and had trained approximately 20 conductor trainees since 1992. Like Knoll, Ballentine would either fill out reports on progress or provide an oral report to the training coordinator and/or the trainmaster. Ballentine also observed Reinhardt having difficulty coupling air hoses, showing insecurity on equipment, and having difficulty walking on ballast. Ballentine had conversations with Dassinger (before Reinhardt's eventual dismissal) in which he expressed his safety concerns regarding Reinhardt. Reinhardt was the first trainee that Ballentine had felt this strongly about reporting as a safety risk. Dassinger told him to put it in writing when he got time. Ballentine filled out an evaluation, dated November 14, 2006, and submitted it, not knowing that BNSF had already dismissed Reinhardt. ADDITION TO FINDING NO. 30: Ballantine did not make any statement that he thought Reinhardt might have a physical impairment that limited his capacity to perform his job duties safely. Ballantine did not make any statement that he thought Reinhardt might be too old to perform his job duties safely. Ballantine reported concerns about whether Reinhardt was capable of performing his job duties safely, without manifesting any discriminatory attitude towards Reinhardt about age or disability.

31. A huge training concern is making sure that trainees are capable of doing every aspect of the job – that they are not going to get hurt or get someone else hurt.

Dassinger routinely tracked the progress of new hires through evaluations completed by union employees (craft instructors). The initial evaluations indicating that Reinhardt had a slow pace and seemed nervous were not determinative of Reinhardt's future employment. However, the continued reports of performance problems and safety concerns did become crucial for Reinhardt's future with BNSF.

32. Knoll's evaluation and note, as well as Knoll and Ballentine's oral reports, raised a question for Kautzmann about whether Reinhardt could safely work as a conductor. Kautzmann talked with Tom Lowe, his supervisor, and also with Mike Woodard, BNSF's Human Resource Officer at the time, about his concerns and about the reports that he was getting from other employees. Kautzmann told Woodard that he might have to let Reinhardt go. Kautzmann mentioned "stroke" and "too old" comments made in some of the oral and written reports, as descriptions of what craft instructors had observed. Woodard responded that Reinhardt had successfully completed the NARS program and was deemed medically qualified. Woodward also pointedly stated that Kautzmann was not a medical expert and that the BNSF did not choose employees based on their ages. He told Kautzmann that the proper procedure would be to let Reinhardt proceed through the training program and see how he did. He also told Kautzmann that any decision to terminate Reinhardt had to be on the basis of documented test results or performance issues.

ADDITION TO FINDING NO. 32: Woodard's duties as a Human Resource Officer required him to caution Woodard about relying upon statements expressly mentioning either possible disability issues or age as a basis for safety questions. However, Woodard either knew or reasonably should have known that BNSF also had statements, based upon first hand observation of Reinhardt at work, that raised concerns about his ability safely to perform his job duties, without manifesting any discriminatory attitude towards Reinhardt about age or disability.

33. Reinhardt knew that he had difficulty connecting air hoses while working the yard switching job at the end of October and first few days of November. He was having problems with his legs (weakness and difficulty with coordination), particularly on long or busy shifts. He had experienced difficulty keeping up with Knoll and Ballentine. He knew that they made complaints about his performance. He knew he had not been able to keep up the pace of getting up and down engines and coupling trains. He did not report any of the problems he was having with his legs to BNSF. ADDITION TO FINDING NO. 33: He did not report that he had any physical impairment that limited his ability safely to perform his job duties.

34. On or about November 6, 2006, Dassinger told Reinhardt that he was "unhappy" with him, that the switch crew had not been happy with him, and that there were complaints about his work. Dassinger told Reinhardt that he would be getting one more chance, on the local freight to Hettinger. During this conversation, Dassinger told Reinhardt that "maybe he was too old for the job." Dassinger also told Reinhardt that he would be watched closely so he should do the best he could.

Reinhardt responded with a denial that he was having any problems. ADDITION TO FINDING NO. 34: Over the course of Reinhardt's training, Dassinger had made several previous inquiries to Reinhardt about how Reinhardt was doing. Reinhardt had these multiple opportunities to advise Dassinger of any physical impairment he was experiencing that was in any way limiting his ability safely to perform his job duties. He did not advise BNSF of any such impairment. After this conversation, Reinhardt knew or should reasonably have known that BNSF was considering "disapproving his application for employment" (in other words, discharging him while he was still a probationary employee). SECOND ADDITION TO FINDING NO. 34: After this conversation, with every reason to come forward and disclose any physical impairment that was in any way limiting his ability safely to perform his job duties, Reinhardt did not make any such disclosure. The substantial and credible evidence of record is that he did not suffer from any such limitation, and that BNSF had no reason to make inquiry into whether he required an accommodation for any such undisclosed limitation.

35. Dassinger wanted to send Reinhardt out on another run where there was air hose switching. He had even made two calls to NARS to find out more about Reinhardt's performance and to see if they had information that he could use to help Reinhardt get through the BNSF training program. He assigned Reinhardt, with Jason Ackerman as the conductor, to the Hettinger trip on November 7, 2006 (an "over and back" run, returning on November 8, 2006). Reinhardt completed that assignment, and felt that he had performed satisfactorily, with no problems.[1]

36. By this time, Dassinger and Kautzmann had talked five or six times about Reinhardt's performance. Kautzmann may also have seen some of the evaluations. Dassinger made him generally aware of the written and oral reports and complaints about Reinhardt, and Kautzmann had heard some of the oral reports and complaints himself. Dassinger also reported (to Woodard as well as to Kautzmann) that there were many ("30-40") good evaluations of Reinhardt.[2] Kautzmann as well as Dassinger had enough experience to know that some "bad" evaluations would be normal at the commencement of field work. The gravity of the reported concerns about Reinhardt's performance were extraordinary.

37. Without talking to Woodard again or waiting to find out from Dassinger or Ackerman how the Hettinger trip had gone, Kautzmann had another conversation with his supervisor, Tom Lowe. They decided to end Reinhardt's employment. On

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[1] Ackerman would submit a "bad" written report of Reinhardt's performance on the Hettinger run, which BNSF sought and obtained after discharging Reinhardt. ***See***, ***infra***, Finding No. 40, p. 9.

[2] At hearing, Dassinger testified that he had overstated the number of good evaluations, which could not have been more than 23, based upon the number of assignments Reinhardt worked. The question of numbers of good versus bad evaluations arose because BNSF produced virtually none of the good evaluations. BNSF witnesses testified that they could not find most of the evaluations.

November 9, 2006, Kautzmann prepared a termination letter for Lowe's signature. Reinhardt had worked almost half of the 60 calendar days beyond initial classroom training during which BNSF, under the CBA, could fire a probationary employee.

38. On November 10, 2006, Kautzmann called Reinhardt into his office and, in Dassinger's presence, told him that BNSF had concerns about his physical capacity to perform his job duties and that for safety's sake they were terminating his employment. BNSF terminated Reinhardt's employment because of concerns from operating employees in the field that Reinhardt was not capable of safely performing his job in the field and could place himself and others in harm's way. It did not terminate his employment because of age or perceived disability.

39. Dassinger was surprised that the decision had already been made and was being implemented on November 10, 2006. Based upon the evaluations, complaints and reports he had received, and his conversations with Kautzmann about Reinhardt, he expected Reinhardt to be discharged, just not quite so soon.

40. On November 12, 2006, Dassinger sent an email to BNSF personnel, including Woodard, advising them that Reinhardt had been terminated. When Woodard received the email, he called and asked Dassinger why Reinhardt had been fired and requested documentation related to performance deficiencies from Dassinger. On November 13-14, 2006, Dassinger collected bad evaluations of Reinhardt, consisting of three evaluations done in September, Knoll's evaluation and note and the evaluations from Ackerman and Ballentine, both of which had been dated and submitted after Reinhardt's discharge. As already noted, Ballentine had voiced his concerns to BNSF before the discharge decision was made.

41. Woodard questioned the decision to terminate Reinhardt's employment. He was worried about the adequacy of the documentation. He felt that descriptions of the problems Reinhardt seemed to have at work in terms such as "old" and "too old," as well as by reference to a possible medical condition[3], were inappropriate. Woodard's main concern was whether the existing documentation would justify the firing in any subsequent litigation.

42. The CBA's provision for additional time and a second test, for a probationary employee who completes training but fails the promotion exam, does not apply to probationary employees discharged before completing their training.

43. The CBA's provision for additional time to complete training, for a probationary employee who has a bona fide medical illness or injury during training,

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[3] For example, Tr. p. 295, lines 19-23: "'[H]ave you ever seen somebody that had a stroke or had recovered from a stroke?' And I think we said, 'Yeah,' we both, you know, knew. And I said, 'And to me that seems like where we're at here.'" Clingingsmith, reading his deposition testimony at hearing about the conversation he had with Koncilya, the engineer, describing their observations and concerns about Reinhardt [interior quotation marks added.]

does not apply to probationary employees who neither report nor otherwise assert the occurrence of a bona fide medical illness or injury during training. ADDITION TO FINDING 43: The CBA's provision for additional time to complete training, for a probationary employee who has a bona fide medical illness or injury during training, may apply to probationary employees who report or assert any physical or mental impairment limiting their ability safely to perform essential functions of their work, but Reinhardt neither reported nor asserted any such impairment or resulting limitation.

44. After BNSF dismissed him, Reinhardt sought treatment from Ty Dufner, P.T., regarding his problems with his legs. He had subsequent medical evaluation and treatment for those and other problems with his upper as well as his lower extremities. His reports to the medical professionals about the onset and severity of those problems are too vague to make any findings about whether any of these problems manifested while he worked for BNSF and caused or contributed to his performance difficulties as a conductor trainee. The evidence adduced regarding post termination medical evaluations and treatment of Reinhardt does not support any findings that Reinhardt suffered from any defined medical problem that caused his difficulties safely performing the required physical activities necessitated by essential conductor job duties. ADDITION TO FINDING 44: The evidence adduced regarding post termination medical evaluations and treatment of Reinhardt does not support a finding that Reinhardt, while he was a probationary employee of BNSF, experienced any identifiable physical impairment limiting his ability safely to perform essential functions of his work.

IV. DISCUSSION ON REMAND[4]

Reinhardt presented two different charges of discrimination in employment – age discrimination and disability discrimination. Mont. Code Ann. § 49-2-303(a) provides, in pertinent parts, that it is an unlawful discriminatory practice for an employer "to discriminate against a person . . . in a term, condition, or privilege of employment because of . . . age [or] physical or mental disability."

The department follows the Montana Rules of Evidence in making contested case fact determinations. "Notice of Hearing," November 2, 2007, p. 2; ***also see*** Admin. R. Mont. 24.8.704 and 24.8.746. Applying those Rules, the evidentiary framework for department discrimination cases is the same as that applicable in district court civil trials. The burden of producing evidence is initially upon the party who would lose if neither side produced any evidence; thereafter, the burden of producing evidence shifts to the party against whom a finding would issue if no further evidence was produced. Mont. Code Ann. §26-1-401. In discrimination

[4] Fact statements incorporated by reference as findings. *Hoffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

cases, as in most civil cases, the ultimate burden of persuasion always rests upon the party advancing the particular claim or defense. ***E.g.***, Mont. Code Ann. §26-1-401; *Heiat v. Eastern Montana College* (1996), 275 Mont. 322, 912 P.2d 787, 791, ***citing*** *Texas Dept. of Comm. Affairs v. Burdine,* (1981), 450 U.S. 248, 253; *Taliaferro v. State* (1988), 235 Mont. 23, 764 P.2d 860, 862; *Crockett v. Billings* (1988), 234 Mont. 87, 761 P.2d 813, 818.

In civil cases, a preponderance of the evidence – enough to persuade the fact finder about what is more likely than not true – is sufficient to establish the truth of any fact at issue. Mont. Code Ann. §26-1-403(1). When the record contains conflicting evidence of what is true, the fact finder decides the credibility and weight of the evidence. *Stewart v. Fisher* (1989), 235 Mont. 432, 767 P.2d 1321, 1323; *Wheeler v. City of Bozeman* (1989), 232 Mont. 433, 757 P2d 345, 347; *Anderson v. Jacqueth* (1983), 205 Mont. 493, 668 P.2d 1063, 1064. In this regard, the standard for deciding facts is still the preponderance of evidence standard. ***Cf.***, *Pannoni v. Bd. of Trustees*, ¶73, 2004 MT 130, 321 Mont. 311, 90 P.3d 438, (Cotter, dissenting) (defining the preponderance standard as "more likely than not").

Montana adopted[5] the pretext or single-motive evidentiary analysis for discrimination cases articulated in *McDonnell Douglas Corp. v. Green*, (1973), 411 US 792. *McDonnell Douglas* involves shifting evidentiary burdens, with the initial burden resting upon the charging party to establish a prima facie case of discrimination. If that is done, the burden shifts to the defendant, who must offer a legitimate nondiscriminatory reason for the employment decision. If the defendant proffers evidence showing such a reason, the burden shifts back to the charging party to prove that the defendant's professed reason was pretextual.

The evolution of *McDonnell Douglas* is aptly described in Maya R. Warrier's Note, "Dare to Step Out of the Fogg: Single-Motive Versus Mixed-Motive Analysis in Title VII Employment Discrimination Cases," 47 U. Louisville L. Rev. 409 (Winter, 2008), pp. 412-13 [notes omitted]:

> Initially, the *McDonnell Douglas* framework was instituted in order to facilitate employees in presenting their case. The prima facie stage of the framework enabled an employee to bring a claim of discrimination that was not onerous. This stage allowed an employee who had only a suspicion of discrimination to have access to the judicial system by showing that the adverse employment action was not the result of either of the two most common legitimate reasons: (1) lack of qualifications or (2) no available position. However, as the ambiguities present in this

[5] ***E.g.***, *Crockett*., 761 P.2d ***at*** 817.

> framework were clarified in subsequent cases, the refinement of the three-part framework became less favorable to plaintiffs.
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> Although *McDonnell Douglas* was a triumph for plaintiffs, it left a lot to be desired. For example, what if the employer's action was motivated by more than just one reason? What if there was both a discriminatory and nondiscriminatory reason for the adverse employment action? Therefore, in 1989, the United States Supreme Court again addressed the issue of intentional discrimination and devised a new approach to bringing employment discrimination claims.

Reinhardt presented evidence that BNSF expressly considered illegal criteria (his age or a possible perceived disability) in its decision to discharge him. In the plurality holding from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the United States Supreme Court discarded use of the *McDonnell Douglas* analysis in cases where direct evidence was presented that an unlawful consideration played a motivating role in an employment decision, ruling that such direct evidence is sufficient to support a finding of unlawful discrimination. Montana has adopted that same principle. *Laudert v. Richland County Sheriff's Office*, ¶¶27-28, 218 MT 2000, 301 Mont. 114, 7 P.3d 386.

Direct evidence is "proof which speaks directly to the issue, requiring no support by other evidence" and which proves a fact or facts without the need for an inference or a presumption. *Black's Law Dictionary* 413 (5th Ed. 1979).

On the face of the testimony, Reinhardt presented direct evidence sufficient to support a finding of illegal discrimination. The evidentiary record includes evidence that some of the craft instructors and other union employees who reported problems with Reinhardt's performance expressly stated that it seemed he was "too old" and that he moved as if he might have "had a stroke." There is also testimony (in addition to Woodard's memo) that BNSF decision makers made the same kinds of comments about age and disability in explaining the decision to end his employment. This was direct evidence, far more solid than examples of "not direct evidence" discussed in *Price Waterhouse*.[6] Direct evidence can relate to the adverse action taken against the charging party or to the respondent's discriminatory intent in taking that action. *Foxman v. MIADS* (6/29/1992), HRC Case #8901003997; *Edwards v. Western Energy* (9/8/1990), HRC Case #AHpE86-2885; *Elliot v. Helena* (6/14/1989), HRC Case #8701003108.

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[6] Quoting Justice O'Conner's concurring opinion in *Price Waterhouse*, 490 U.S. ***at*** 277, the *Laudert* decision offered examples of what would not be "direct evidence" – "stray remarks in the workplace," "statements by nondecisionmakers," or "statements by decisionmakers unrelated to the decisional process." *Laudert* ***at*** ¶26

When direct evidence proves illegal discrimination, the burden of persuasion (not just the burden of production) shifts to the respondent, to prove either that the direct evidence is not credible or that any illegal motive played no role in the action taken. *Carney v. Martin Luther King Homes, Inc.* (8th Cir. 1987), 824 F.2d 643, 648; *Fields v. Clark University* (1st Cir. 1987), 817 F.2d 931, 935; *Blalock v. M.T.I.* (6th Cir. 1985), 775 F.2d 703, 712. Unless the respondent meets this burden with sufficient proof to discredit the direct evidence or to show a non-discriminatory legal justification for the adverse action, the charging party's direct evidence proves the illegal discrimination. *Blalock* ***at*** 707.

In this case there also was ample evidence of legitimate safety concerns that were not tainted by discriminatory motives regarding age or perceived disability. Not every person medically qualified to work as a conductor trainee for BNSF necessarily has the ability to do so safely. Without any physical or mental impairment that substantially limits one or more of a person's major life activities, a medically qualified individual may lack the physical or mental capacity safely to perform one or more of the job duties of the position, and one of the primary purposes of the probationary period it to confirm that an otherwise qualified applicant can actually safely perform all of the essential functions of the position after completing training. BNSF management personnel witnessed Reinhardt's difficulties safely performing his job duties. BNSF management also received multiple statements questioning whether Reinhardt was capable of performing his job duties safely, from fellow workers who did not manifest any discriminatory attitude towards Reinhardt because of age or disability.

As noted, evidence that the illegal motive played no role in the action taken defeats a direct evidence case. But this must be evidence that the illegal motive played no role in the action. *Laudert* ***at*** ¶¶33-34. The critical question for Reinhardt's claims of both age and disability discrimination is whether the evidence adduced was sufficient to establish that the illegal motive played no role at all in BNSF's discharge of Reinhardt. Although the reviewing Court found that there was an illegal motive, and that finding is the law of the case on this remand, there is such strong evidence that it was a safety decision rather than an age or disability based decision.

Montana law follows federal precedent that a respondent can show that it would have made the same decision even without the unlawful discrimination, which requires a lesser showing than proof from which it is more likely than not that the unlawful discrimination played no part in the decision. *Crockett*, 761 P.2d ***at*** 819; *Muntin v. State of Cal. P.&R.D.* (9th Cir. 1984), 738 F.2d 1054, 1056. This affirmative defense bears the rubric of a "mixed motive" case. In essence, if Reinhardt proved illegal discrimination, but BNSF showed it would have discharged him anyway, even without its illegal age and perceived disability discrimination, because of the "pure" safety concerns it legitimately had, then there was no resulting

harm to Reinhardt from the illegal discrimination – the same result would have occurred without it. *Laudert*. Thus, the mission of the department to "require any reasonable measure . . . to rectify any harm, pecuniary or otherwise, to the person discriminated against"[7] was not triggered by his discharge, since the discharge would have occurred anyway, and the mixed motive analysis applies.

How to redress a case of mixed motive discrimination is not a matter left to the discretion of the Hearing Officer – the department has already exercised its discretion by adopting a regulation that dictates the outcome when the evidence establishes a mixed motive case:

> When the charging party proves that the respondent engaged in unlawful discrimination or illegal retaliation, but the respondent proves the same action would have been taken in the absence of the unlawful discrimination or illegal retaliation, the case is a mixed motive case. When the charging party proves that the respondent engaged in unlawful discrimination or illegal retaliation but the respondent proves the same action would have been taken in the absence of the unlawful discrimination or illegal retaliation, the case is a mixed motive case. In a mixed motive case, the commission will order respondent to refrain from the discriminatory conduct and may impose other conditions to minimize future violations, but the commission will not issue an order awarding compensation for harm to the charging party caused by an adverse action that would have been taken by the respondent regardless of an unlawful discriminatory or retaliatory motive.

Admin. R. Mont. 24.9.611.

The idea of "mixed motive" cases serves the public interest, although the charging party receives no recovery. The rule's mandate for injunctive relief and authorization of discretionary additional affirmative relief under the Act manifests a department determination that such judgments will be sufficient to deter similar discrimination in the future by the offending employer, satisfying the public policy requirements of the Act under Mont. Code Ann. 49-2-506(1) and (1)(a).

Clearly, the line between a successful defense that the discrimination played no role in the decision and a mixed motive defense that the same decision would have been made without the discrimination is an exceedingly fine one, particularly when the reason for the discharge (here, safety) pertains both to the evidence of discriminatory discharge (management and fellow workers reporting that because of age or perceived disability he was unsafe at work) and to the evidence of a legitimate

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[7] Mont. Code Ann. §49-2-506(1)(b).

business reason (management and fellow workers reported that he was unsafe at work without manifesting discriminatory animus because of his age or perceived disability). Which side of the line BNSF's proof falls on is a question of fact.

Beyond cavil, the facts proved did establish a mixed motive defense. Disregarding comments that Reinhardt was unsafe because of age or perceived disability, the rest of the comments about his observed inability to perform his job duties safely justified Reinhardt's discharge during his probationary period. BNSF proved that even without the illegal discrimination, it would still have discharged Reinhardt during his probationary period. The "clean" evidence that Reinhardt could not safely do his job established that BNSF needed to remove him from the work place at once, for his own safety and that of other employees.

But did BNSF go further and successfully prove the illegal discrimination played no role in its decision to discharge Reinhardt? This Hearing Officer finds that it is more likely than not that BNSF did discharge Reinhardt with the illegal discrimination playing no part in the decision.

A number of workers voiced safety concerns (based on their first-hand observations of Reinhardt at work) without tying those concerns to his age and/or any perceived disability. This evidence made it more likely than not that BNSF made the decision to discharge Reinhardt with the illegal discrimination playing no role.

With regard to the evidence of discrimination because of age or perceived disability, Reinhardt repeatedly and steadfastly denied that he suffered from any physical impairment, age-related, disability-related or otherwise, that prevented him from safely performing his job duties. Those denials were made to BNSF while he worked there. Even though BNSF had multiple persons saying that Reinhardt seemed to have age-related and disability-related problems, BNSF also had Reinhardt's medical clearance to work and Reinhardt's own word that there were no such problems. This evidence also made it more likely than not that BNSF made the decision with the illegal discrimination playing no role.

One of Reinhardt's primary arguments was that BNSF had a duty to engage in an interactive process to ascertain whether he could, with or without a reasonable accommodation, perform the essential duties of his job. After all, despite any good intentions on the part of an employer, making unilateral decisions about what is best for an employee regarded as disabled is prohibited. *Reeves v. Dairy Queen*, ¶35, 1998 MT 287 Mont. 196, 953 P.2d 703. If the employer defends adverse action against a person with a disability on the grounds that an accommodation would endanger somebody's health or safety, failure independently to assess whether the accommodation would create a reasonable probability of substantial harm creates a disputable presumption that the employer's justification is a pretext for disability discrimination. *Reeves*, ¶42; Admin. R.. Mont. 24.9.606(7).

Reinhardt could only have a disability if he had a impairment, a record of an impairment, or if BNSF regarded him as having an impairment, that resulted in a disability. Mont. Code Ann. §49-2-102(19(a). Reinhardt emphatically rejected suggestions that he might have such an impairment, such a limiting condition. Based upon the evidence of record, he never had such an impairment, he never had any record of such an impairment, and, with his medical clearance and his adamant denials of any impairment, BNSF did not regard him as having such an impairment. It is more likely than not that BNSF regarded Reinhardt as being unable safely to perform the duties of his job, but had no more idea that Reinhardt did of why he couldn't do the job safely. With no impairment visible anywhere in the evidence, with no record of any impairment visible anywhere in the record, and with no credible evidence that BNSF made its decision based upon regard of Reinhardt (in light of his own assertions to the contrary) as having any impairment, it is more likely than not that BNSF never regarded him as disabled, and therefore never had any obligation to perform an independent assessment of whether any accommodation would create a reasonable probability of substantial harm. With no impairment identified, what was there for BNSF to accommodate? All it had was a probationary employee with medical qualification and with no physical impairment, who manifestly posed a safety risk due to his observed difficulties doing his job safely.

Finally, it is true that Reinhardt and the next oldest trainee in his group were both let go during their probationary periods. This could suggest age discrimination. BNSF hired Reinhardt when he was 47. He had turned 48 by the time he was dismissed. However, BNSF had a large number of engineers and conductors older than Reinhardt. Witnesses Clingingsmith, Koncilya and Score were all older than Reinhardt. The next oldest trainee lost his job because he stopped showing up ("job abandonment"), not because of his age. On the facts in this record, the terminations of the employments of Reinhardt and the next oldest trainee in his group were not sufficient to make it more likely than not that BNSF let Reinhardt go because of his age.

At the end of the day, it is impossible to say why Reinhardt sometimes appeared unable to perform his job safely and adequately. Even his medical treatments and evaluations after his discharge did not identify any condition causing his performance problems. All that is clear from the evidence is that Reinhardt's unsafe job performance, not his age or any suspected physical impairment, was the reason that BNSF dismissed him.

Human Resources Officer Mike Woodard wrote a memo to his supervisor on May 22, 2007, in which he reported that Kautzmann fired Reinhardt because he was medically unsuited for the job, was not catching on and was too old for the job. He also reported that Dassinger had acknowledged that Kautzmann told Reinhardt he was too old and was medically unsuited for the job.

Woodard's memo was evidence that discrimination played a role in the discharge. However, the substantial and credible evidence of record showed that instead of changing its reasons for firing him, BNSF, in response to Woodard's concerns and in response to Reinhardt's charges of discrimination, has been clarifying its reasoning, explaining that it was the reports of Reinhardt's difficulties in the field, not the discriminatory terms in some of those reports and in Kautzman's poorly phrased explanations of the reasons for firing Reinhardt, that motivated and justified the discharge.

BNSF had notice of the observations and concerns of multiple experienced employees who had actually worked with Reinhardt. It had the right and duty to rely upon those observations and concerns, and to conclude that at least some of the time Reinhardt was not able safely to perform his duties as a conductor trainee. Had Reinhardt needed an accommodation due to any impairment he suffered, he had the right and the responsibility to ask. He did not, which is very persuasive evidence that he had no such impairment.

Being unable safely to perform one's duties at any time, whether in a train yard or on a freight train en route to a destination, is a serious matter. This probationary employee had passed his medical tests and had not reported any medical problems (actively denying any such problems). He was, as far as BNSF knew, giving his best efforts to his work. Yet, he repeatedly left experienced workers with grave concerns about whether he could be trusted to do the job safely.

Under these facts and this testimony, the witnesses' resort to stereotypical language to describe how Reinhardt walked and worked may be evidence of age or disability bias rather than simply the efforts of working men to describe what they observed in lay language. However, the substantial and credible evidence of record established that it was more likely than not that BNSF discharged Reinhardt during his probationary period because he was not able safely to perform his job duties, and that illegal discriminatory motives of age and perceived disability played no role in that decision.

The efforts by BNSF to point out that the conclusory statements were not evidence of illegal motives, but descriptions of actual performance problems were just that – explanations, not changing justifications.

BNSF satisfactorily explained the lost evaluations as a mistake rather than an attempt at concealment. Indeed, throughout the case, BNSF acknowledged the number and the quality of those evaluations. Since BNSF admitted the existence and the contents of the missing evaluations, it had no motive for withholding the evidence and remedied the effect of the absence of that evidence.

VI. CONCLUSIONS OF LAW [UNCHANGED]

1. The Montana Department of Labor and Industry has jurisdiction over these charges of illegal discrimination. Mont. Code Ann. § 49-2-512(1).

2. BNSF Railway Company did not illegally discriminate in employment because of age or disability against Mitchell Reinhardt as alleged in his complaint. Mont. Code Ann. § 49-2-303.

VII. ORDER [UNCHANGED]

1. Judgment issues in favor of respondent BNSF Railway Company and against charging party Mitchell Reinhardt on his charges of illegal discrimination in employment because of age or disability.

2. The Human Rights Act complaint of charging party Mitchell Reinhardt against respondent BNSF Railway Company is dismissed.

Dated: March 11, 2013.

TERRY SPEAR

Terry Spear, Hearing Officer
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Peter Michael Meloy, Meloy Law Firm, attorney for charging party Mitchell Reinhardt, and Michelle T. Friend, Hedger Friend, PLLC, attorney for respondent BNSF Railway Company:

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. **Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court.** Mont. Code Ann. § 49-2-505(3)(c).

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission, c/o Katherine Kountz
Human Rights Bureau, Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Hearings Bureau, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The original transcript is in the contested case file.