David Ramirez

March 17, 1994

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: David Ramirez

Date of Filing: September 22, 1993

Case Number: LWA-0002

This Decision involves a complaint filed by David Ramirez ("Ramirez" or "the complainant") under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. Ramirez contends that a reprisal was taken against him after he raised safety concerns with Brookhaven National Laboratory/Associated Universities, Inc. ("BNL" or "the Laboratory"), a DOE contractor. Specifically, the complainant alleges that he was terminated from employment at BNL on March 20, 1992, in retaliation for his having raised safety issues with his BNL supervisor. The DOE's Office of Contractor Employee Protection (OCEP) investigated the complaint and found that Ramirez' termination did not constitute a reprisal. Ramirez requested a hearing before an Office of Hearings and Appeals (OHA) Hearing Officer under 10 C.F.R. § 708.9(a), again maintaining that his termination was a reprisal for his safety disclosures. Neither BNL, nor Ramirez's employer, J. P. Daly & Sons, Inc. (Daly), a BNL contractor and thus DOE subcontractor, requested a hearing to challenge any of OCEP's findings. The hearing in this case was held on December 14 and 15, 1993, at the BNL facility in Upton, Long Island, New York.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE Contractor Employee Protection Program became effective on April 2, 1992. 57 Fed. Reg. 7533 (March 3, 1992). Its purpose is to encourage contractor employees at DOE's government-owned, contractor-operated (GOCO) facilities to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from reprisals by their employers. 10 C.F.R. § 708.1.

Before Part 708 was promulgated in 1992, contractor employee protection at DOE's GOCO facilities was governed by DOE Order 5483.1A (6-22-83) ("Occupational Safety and Health Program for DOE Contractor Employees at Government-Owned Contractor-Operated Facilities"). As with Part 708, the Order prohibited contractors from taking reprisals against whistleblowers. However, no formal procedures existed under Order 5483.1A. The Part 708 regulations were adopted to improve the process of resolving whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee.

B. Factual Background

The following summary is based on the testimony of witnesses at the December 14-15 hearing and the OCEP investigation.1/ From December 1985 until March 20, 1992, Ramirez was continuously employed at BNL as an electrician by a series of DOE subcontractors, each of which had a contract with BNL to provide electrician labor support. These subcontractors supplied electricians to BNL on an "as-needed" basis through a referral process utilizing Local 25 of the International Brotherhood of Electrical Workers Union (IBEW). While working at BNL, the electricians were supervised by BNL personnel. At the time of the alleged reprisal, the firm that supplied electricians to BNL was Daly, which had become a BNL contractor, and therefore Ramirez' employer, on March 14, 1992.

Under the terms of the contract between BNL and Daly, BNL had authority to lay off subcontractor electricians working at BNL when their services were no longer required. When a work slowdown was anticipated, subcontractor electricians sometimes were laid off and sometimes were permitted to agree voluntarily to an informal system of furloughs to obviate the necessity of layoffs. When an electrician was laid off, the individual's name was placed on the bottom of the IBEW referral list for future work.

In January 1992, Ramirez' BNL supervisor, Donald Jesaitis, was promoted and replaced by a new Electrical Construction Support Supervisor, Bill Softye (Softye). Ramirez alleges that he informed Softye about two safety issues and that in retaliation for making these disclosures he was laid off from his position as a subcontractor electrician.

The first alleged disclosure occurred in mid-February 1992 when Ramirez and another electrician were working in Building 902. While tracing out electrical feeders in a high voltage "experimental cubicle" area, the power came on and red indicator lights flashed. Ramirez states that he became concerned and related his concerns to Softye. Ramirez alleges that Softye's response was "Another problem Dave?" Ramirez states that he returned to work, despite still feeling concerned about his safety, because he felt threatened by Softye's response. Softye disputes Ramirez' account of this incident and asserts that he was not made aware of the activation of the power source until subsequently.

The second disclosure by Ramirez involves asbestos in the ceiling of a hospital corridor in Building 490. While removing electrical fixtures on February 21, 1992, Ramirez was approached by a hospital custodian who informed him of the possibility that there was asbestos in the ceiling. Ramirez then apprised Softye about the potential asbestos problem. Softye contacted Peter Stelmaschuk,2/ Supervisor of Carpenters, who informed him that there was no asbestos in the ceiling tiles. Softye thereupon informed Ramirez that the "area was clean," and Ramirez returned to work. BNL has stipulated that Ramirez raised his concern regarding asbestos in good faith. Transcript of Proceedings (December 14-15, 1993 Hearing) at 21 (hereinafter "Tr.").

Ramirez' concern about asbestos did not end with the February 21 disclosure, however. During the week of February 24, 1992, carpenters started to remove the ceiling tiles in the hospital corridor where Ramirez had raised his asbestos concern. After completing their work on the morning of Friday, February 28, the carpenters were taken off the job because BNL's Health Physics Department had determined that there was a potential for release of asbestos-containing material from the area above the ceiling. Tr. at 330 (Ramirez); see also April 15, 1992 Safety & Environmental Protection Division (S&EP) Investigation Report at 2, OCEP Complaint File Tab P (S&EP Report). Ramirez was reluctant to install temporary pre-fabricated "carnival" lighting, as Softye had directed, and instead wanted to use temporary "pigtail" lighting.3/ However, after another electrician was assigned to assist him, he worked on the carnival lighting installation. Later that day, Ramirez and Softye had an argument regarding Ramirez' initial refusal to do this job.

Ramirez raised his asbestos concern the following work day, March 2, when he called the business manager of IBEW Local 25, William Lindsay (Lindsay). As a result of that call, Lindsay met with Ramirez and some of the other contract electricians the following day. At that meeting, Ramirez again mentioned his safety concerns with regard to the asbestos in Building 490 and also the incident in Building 902. Tr. at 336; see also Report at 17 (Lindsay Interview). Lindsay in turn informed William Slavinsky (Slavinsky), General Supervisor for Construction Support and supervisor of both Softye and Peter Stelmaschuk, of the concerns raised at his meeting with the contractor employees. Tr. at 449 (Slavinsky). Soon afterwards, Slavinsky and Softye went out speak with Ramirez. A heated argument between Ramirez and Softye occurred.

Ramirez again raised his safety concerns regarding the high voltage area in Building 902 and asbestos in Building 490 the following day, March 4, at a meeting of all the contract electricians. Softye in turn mentioned certain specific jobs that, he alleged, Ramirez had not performed as directed. Ramirez again lost his temper and, in a loud voice, accused Softye of lying.

At the March 4 meeting, Slavinsky had denied that there was any asbestos problem in the ceiling in the hallway in Building 490 where Ramirez had strung the carnival lighting. However, on the weekend of March 7 and 8, carpenters wearing protective clothing and respirators removed the ceiling tiles. Tr. at 87-89 (Ronald Kister).4/

On March 19, 1992, BNL notified Daly that there was an anticipated work slowdown, and directed Daly to lay off Ramirez and two other subcontractor electricians (Dennis Rhodes and Richard Chesney). On the following day, the three men were laid off. Ramirez alleges that his layoff was in retaliation for having previously raised legitimate concerns regarding safety.

BNL denies that Ramirez' layoff was in reprisal for his having disclosed safety concerns. BNL asserts that the decision to lay off several subcontractor electricians was based on a slowdown in work. Slavinsky and Softye assert that they independently decided that the same three electricians should be laid off, the former basing his decision on leadership potential, and the latter utilizing four criteria: seniority, attendance, performance, and work attitude. Both men state that they included Ramirez in the group to be laid off because of his frequent tardiness, failure to perform assigned jobs as directed, and bad attitude.

C. Procedural History of the Case

On May 19, 1992, Ramirez filed a complaint with the DOE Chicago Field Office under Part 708. After an unsuccessful attempt to reach an informal resolution, the complaint was forwarded on July 28, 1992 to OCEP to institute a formal investigation. OCEP conducted an investigation of Ramirez' allegations of reprisal and issued a Report of Investigation (OCEP Report) and a Proposed Disposition on July 29, 1993. The Proposed Disposition, which relied upon the findings in the OCEP Report, determined that Ramirez had established by a preponderance of the evidence that his safety disclosures may have been a contributing factor in BNL's decision to lay him off. However, the Proposed Disposition concluded that BNL had shown by clear and convincing evidence that the termination of Ramirez as a subcontractor electrician would have occurred absent his disclosure of safety concerns. Moreover, OCEP concluded that Ramirez was selected to be laid off because of factors that included his attendance, performance, and work attitude. Finally, OCEP did not find any evidence during its investigation to support Ramirez' allegation that his layoff was retaliatory.

On August 16, 1993, Ramirez submitted to OCEP his request for a hearing pursuant to section 708.9. On September 22, 1993, OCEP transmitted that request, together with the complaint file, to the OHA. On the following day, the Director of OHA appointed the undersigned as Hearing Officer. A hearing date and prehearing briefing schedule were established in letters sent to the parties on September 28, 1993. Subsequently scheduling changes were made on the basis of good cause shown by the attorneys for Ramirez and BNL. Prehearing statements were filed on behalf of Ramirez and BNL on November 5 and November 26, 1993, respectively. Counsel for Ramirez also separately submitted the names of witnesses she wanted subpoenaed by the Hearing

Officer, and BNL submitted the affidavit of Daniel Ahearn, a proposed witness for both parties, who was to be out of the country on the scheduled hearing dates. A prehearing telephone conference was held on December 3, 1993.

In a letter filed on December 8, 1993, Daly, in its first submission in the proceeding, requested that the scheduled December 14 and 15, 1993 hearing be postponed.5/ Daly asserted that a determination should be made on its potential liability prior to the hearing. According to Daly, Ramirez had no legitimate complaint against Daly and the DOE had no jurisdiction over Daly. In a December 9, 1993 letter to Daly, the Hearing Officer denied the firm's request for a suspension of the hearing.

At the start of the December 14, 1993 hearing, Daly and BNL each made an oral motion to dismiss the proceeding against it on jurisdictional grounds. For the reasons stated on the record, see Tr. at 15-16, and more fully set forth below, both motions were denied. However, on the basis of the OCEP Report and the proposed testimony of the parties at the hearing, the Hearing Officer dismissed Daly from the proceeding on the grounds that there was nothing in the record upon which he could find a prima facie case against the firm.

Since there was not sufficient time at the conclusion of the hearing for closing statements, permission was given for the submission of written closing statements. Written statements were filed by counsel for Ramirez and BNL on February 3 and 17, 1994, respectively.

The Part 708 regulations do not specify what is to be included in the record of the proceedings provided for in that Part. Consistent with a determination in the first case in which a hearing was requested pursuant to Part 708, the Hearing Officer defined the "record" in this proceeding to consist of the OCEP Complaint File, which includes the OCEP Report, all papers filed by the parties with the OHA, all letters and memoranda of telephone conversations in which procedural or other interlocutory determinations were made, the transcript of the testimony at the hearing, and any exhibits submitted by the parties at the hearing. Tr. at 6-7.

II. Discussion

A. The Motions to Dismiss

At the hearing, Daly argued that the proceeding should be dismissed against the firm since: (1) Daly's contract with BNL had no provisions for whistleblower procedures; (2) the whistleblower provisions under which this proceeding is being conducted did not go into effect until April 2, 1992, and Ramirez was laid off prior to that date; and (3) Ramirez was employed by Daly for only five days, and his raising of safety issues occurred while he was an employee of another BNL subcontractor, A & H Electrical Contractors (A&H).

At the hearing, and also in its pre-hearing written submission, BNL argued that Ramirez has no legal basis for bringing this case against the Laboratory. Like Daly, BNL contends that this case should be dismissed since the alleged reprisal occurred prior to the effective date of the Part 708 regulations. In addition, BNL contends that Ramirez does not have "standing" to bring a complaint against BNL since BNL was not his employer. BNL also argues that the case against it should be dismissed since its contract with Daly was entered into before the effective date of the Part 708 regulations and never incorporated those regulations.

As indicated above, at the hearing I rejected these arguments and denied the motions. Part 708, by its own words, applies to any complaint filed after the effective date if (i) the alleged reprisal stems from a disclosure, participation or refusal involving health and safety matters, and (ii) the underlying procurement contract requires compliance with all applicable health and safety regulations and requirements of DOE. 10 C.F.R. § 708.2(a); see also 57 Fed. Reg 7533 (March 3, 1992) ("This final rule is effective April 2, 1992"). There is nothing in the Part 708 regulations that limits these proceedings to alleged reprisals involving health and safety matters that occur after the effective date.6/ It is undisputed that the complaint in this case was filed after the effective date of Part 708 on April 2, 1992. Therefore, Ramirez' complaint is properly within the purview of Part 708. This conclusion is consistent with the first DOE whistleblower case issued under these regulations, Ronald A. Sorri, 23 DOE ¶ 87,503 (1993) (review requested December 22, 1993) (Sorri). In that case, while the contractor and subcontractor challenged the timeliness of the filing of the complaint under the "60 day rule" in section 708.6(d), they conceded the applicability of the Part 708 procedures to alleged acts of reprisal that occurred prior to April 2, 1992.

It is important to note in this regard that the Part 708 prohibition against reprisals for health and safety disclosures does not impose any new standards of conduct on contractors. Section 970.5204-2 of the Department of Energy Acquisition Regulations, 48 C.F.R. § 970.5204-4, in effect in BNL's contract with DOE in March 1992, provided that "[t]he contractor shall take all reasonable precautions in the performance of the work under this contract to protect the safety and health of employees and of members of the public and shall comply with all applicable safety and health requirements ...of DOE." Similarly, the contract which Daly entered into with BNL on March 14, 1992, required that Daly "comply with all applicable environmental, safety and health regulations and requirements [of BNL] and DOE." Contract No. 482511, Attachment A, Article 30, OCEP Complaint File Tab L. DOE Order 5483.1A (6-22-83), which was in effect in March 1992, prohibited reprisals by contractors against employees who made workplace health and safety disclosures.7/ The Part 708 regulations thus changed only the procedures with regard to complaints by employees that they had been discriminated against for making health and safety disclosures and was effective with respect to any such complaints made after April 2, 1992.

BNL's argument that Ramirez does not have standing to bring this action against it because he was not employed by the Laboratory is also unpersuasive. Proceedings under Part 708 are not brought to vindicate an employee's contractual rights vis a vis his employer. Rather, they are intended to extend in a meaningful way to employees of DOE contractors (including subcontractors) the important national policy of protecting whistleblowers from reprisals for, inter alia, their disclosure of conditions dangerous to health and safety. Cf. 57 Fed. Reg. 7533-34 (March 3, 1992) (Preamble to Part 708 Regulations); see also URA, 23 DOE at

89,022. As the agency stated in explaining why it was extending the Contractor Employee Protection Program to cover the employees of subcontractors:

The DOE believes that the health and safety of all contractor employees is of the utmost importance and overrides enforcement and administrative difficulties that could be incurred in extending the ruling to second- and lower-tier subcontractors.

57 Fed. Reg at 7535.

In cases such as the present one, in which the day-to-day activities of a subcontractor employee are supervised by the prime contractor, it is evident that adverse personnel actions are frequently going to be taken by the subcontractor based solely on the directions of the prime contractor. Were we to accept BNL's attempt to avoid jurisdiction based upon the formalities of the employer-employee relationship, any contractor could be insulated from the prohibitions against whistleblower reprisals simply by virtue of having utilized a subcontractor. This would deprive Ramirez and many other whistleblowers of the procedures that were promulgated specifically to provide them with an equitable method of resolving complaints of illegal reprisals. Since this would be contrary to the overall framework and stated purpose of Part 708, BNL's argument must be rejected. Cf. Sorri, 23 DOE at 89,018 (prime contractor jointly liable for paying compensation under section 708.10(c) to complainant who was an employee of a subcontractor).

B. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under section 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). Thus, in order to meet his burden under this section, Ramirez must prove by a preponderance of the evidence, i.e., that it is more probable than not, see 2 McCormick on Evidence § 339 at 439 (4th ed. 1992), that he engaged in a protected activity that was a "contributing factor" in his termination.

The standard of proof adopted in section 708.9(d) is similar to the standard adopted in the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. § 1221(e)(1), and the 1992 amendment to § 210 (now § 211) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. In explaining the "contributing factor" test in the WPA, the Senate floor managers, with the approval/concurrence of the legislation's chief House sponsors, stated:

The words "a contributing factor", ... mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant", "motivating", "substantial", or "predominant" factor in a personnel action in order to overturn that action.

135 Cong. Rec. H747 (daily ed. March 21, 1989)(Explanatory Statement on Senate Amendment-S.20). See Marano v. Dep't of Justice, 2 F.3d 1137 (Fed. Cir. 1993)(applying "contributing factor" test).

In addition, "temporal proximity" between a protected disclosure and an alleged reprisal has been held to be "sufficient as a matter of law to establish the final required element in a prima facie case of retaliatory discharge." County v. Dole, 886 F.2d 147, 148 (8th Cir. 1989).

Applying these standards to the present case, I find that Ramirez has met his burden under Part 708 of proving by a preponderance of the evidence that his safety disclosures were contributing factors in his being laid off by BNL. As indicated above, BNL has stipulated to the fact that Ramirez made a good faith safety disclosure concerning asbestos. In addition Ramirez' disclosure of the activation of the high energy power source was a protected safety disclosure.8/ Although there are inconsistencies in the testimony of Nelson Briggs, the foreman of the subcontractor electricians, Ramirez, and Softye regarding this incident, I am persuaded from Ramirez' testimony that he had a good faith belief that the activation of the power source created a substantial danger to his safety. I am also persuaded that Ramirez disclosed his safety concern to BNL prior to the alleged reprisal.9/

It is also evident that BNL's decision to direct Daly to terminate Ramirez' employment at the Laboratory was a "personnel action ... against the complainant" as that phrase is used in section 708.9(d).10/ Finally, Ramirez' employment at the Laboratory was terminated shortly after he raised his safety concerns. In fact, the last occasion when he raised those concerns was at the March 4, 1992 meeting, which occurred only 15 days before the BNL supervisors to whom he raised those concerns decided to lay him off. For these reasons I find that the record supports Ramirez' position that his safety disclosures were a contributing factor to his termination and is sufficient to shift the burden under section 708.9(d) to BNL.

No such finding can be made with respect to Daly, however.11/ It is undisputed that Ramirez' disclosures were made prior to his being employed by Daly. In addition, there is no evidence in the record that Daly, or its predecessor, A&H, had any knowledge of these disclosures. It is also undisputed that the decision to terminate Ramirez' employment at BNL was made solely by BNL employees.12/ This case is therefore readily distinguishable from the Sorri case, in which the Hearing Officer denied the subcontractor's motion to dismiss on the grounds that its actions were "inextricably intertwined" with those of the prime contractor. Sorri, 23 DOE at 89,012. For these reasons, Daly was dismissed from the proceeding at the start of the hearing.

C. The Contractor's Burden

Subsection 708.9(d) provides that, once the complainant has met his burden under that subsection, "the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's

disclosure...." 10 C.F.R. § 708.9(d). The standard of proof by "clear and convincing evidence" is more stringent than the "preponderance of the evidence" standard applied to complainants, but not as high as the "beyond a reasonable doubt" standard used in criminal cases. See 2 McCormick on Evidence § 340 at 442. It has been described as that evidence sufficient to persuade a trier of fact that the truth of a contested fact is "highly probable." Id. For the reasons set forth below, I have concluded that BNL has not met this stringent standard.13/

As an initial matter, I am not persuaded that it was necessary for BNL to lay off, as opposed to furlough, Ramirez. BNL advanced two reasons for resorting to layoffs in March 1992. Slavinsky testified that, at the time the decision to lay off was made on March 19, furloughs were not an option because there was not much work for the subcontractor electricians and he did not anticipate that work would pick up soon, possibly not even for three months. Tr. at 455-56.14/ Slavinsky also stated that his decision was done to "accommodate[]" IBEW Local 25 Business Manager Lindsay, after a conversation in which Lindsay had stated that furloughs were in violation of the union contract. Id. at 456.

Neither explanation is persuasive, and both appear to be mere pretexts. First, the work slowdown was very temporary, and during temporary slowdowns in the past experienced electricians such as Ramirez had not been laid off. On May 5 and 11, 1992, only a month and a half after Ramirez was laid off, two new subcontractor electricians began working at BNL. OCEP Complaint File Tab O (J.P. Daly [Brookhaven Lab] Listing of Employees). Prior to 1992, when there was a temporary slowdown such as this one, it had been the practice of Softye's predecessor, Donald Jesaitis, to maintain a "skeletal crew" of experienced subcontractor electricians by permitting them to take their union-mandated annual vacations. Tr. at 280-81 (Jesaitis). This skeletal crew included Ramirez. Indeed, even after Softye took over, one member of the skeletal crew, Dennis Rhodes, took his vacation in February 1992; two others, Dennis Thomas and Daniel Ahearn, took their vacations during the week of April 24, 1992, only a month after Ramirez was laid off; and another subcontractor electrician, Nelson Briggs, took a vacation during the week of May 8. Id. at 40 (Briggs). Ramirez and the other subcontractor electricians were also willing to take their vacations during the slow period in the spring of 1992. See, e.g., id. at 260-61, 267-70 (Michael Porwick).

Slavinsky's statement that he decided to lay off Ramirez in deference to the wishes of IBEW Local 25 is equally lacking in credibility. First, it is undisputed that the Laboratory was not a party to the contract with IBEW 25, and there is no evidence that it made any other attempts to comply with the union's wishes. On the contrary, counsel for BNL went to great lengths to emphasize that BNL was under no obligation to comply with the union's preferences with respect to type of temporary lighting fixtures to be installed by subcontractor union electricians. See, e.g., id. at 129-31 (cross examination of Dennis Thomas). Moreover, there is no reason to believe that the union's policy against furloughs was a new policy in early 1992 or that Slavinsky first learned about it in 1992. Even if there were a greater number of electricians unemployed in March 1992 than in prior years, neither the testimony of Slavinsky nor that of any other witness persuades me that accommodating IBEW 25 was an important BNL priority or that BNL would have laid off an experienced electrician like Ramirez unless it had its own reasons to do so. 15/

Thus the reasons presented by BNL for resorting to layoffs rather than permitting vacation furloughs are unconvincing. However, this in and of itself does not mean that BNL has failed to meet its burden of proof. To make a determination on that issue, we must also evaluate the reasons that BNL has advanced to support its contention that Ramirez was laid off for reasons other than the safety concerns that he raised.

In their testimony, both Slavinsky and Softye strongly denied that their decision to lay off Ramirez was based in any way upon his safety complaints. Softye stated that he rated each of the subcontractor electricians on a scale of one to ten in four categories -- performance, attendance, attitude and seniority -- and recommended that the three electricians with the lowest scores be laid off. While this sounds like an objective formula, the record suggests that it is nothing more than an after-the-fact rationalization for a much more informal and subjective decisionmaking process. First, no document containing these calculations was ever entered into the record; in fact, Softye never even stated that he wrote these calculations down anywhere. Moreover, his testimony raises serious questions concerning what, if any, calculations he actually performed:

Q. So was it the ones who received the lowest total score from you were laid off, you recommended to be laid off?

A. I don't recall. Yes, I believe it was.

Tr. at 533 (Direct Examination)

Q. How many points did Mr. Ramirez get for seniority?

A. I don't recall. I would say it was my understanding at the time that he had seven years seniority here.

Q. So would you score one point for every year?

A. I believe that's what I did, yes.

Q. And how many points did Mr. Ahearn get for seniority?

A. I think at that point maybe two years.

Q. And do you recall what kind of points were scored by Chesney for performance?

A. No, I do not.

Q. Do you recall what kind of points Mr. Rhodes scored for performance?

A. No, I do not.

Q. Do you recall what kind of points were scored for attendance, meaning the number of days on the job or missed?

A. No, I do not.

Q. Yet it's your testimony that you used this ten-point system and that's how you arrived at your decision?

A. That's correct.

Q. And you don't recall how these points were assigned? A. Not at this time, I don't.

Id. at 555-556 (Cross Examination)16/

Despite BNL's failure to advance a credible explanation of the process by which Ramirez was selected to be laid off, the Laboratory has shown that there were job-related factors involved in the layoff decision that were not related to Ramirez' protected activities. Softye and Slavinsky testified to nine incidents during the first two and a half months in 1992 in which Ramirez allegedly did not do a job as directed by Softye or otherwise caused trouble on the job. BNL's and Ramirez' versions of these incidents are briefly summarized in the Appendix to this Decision. In addition, there was testimony about Ramirez' tardiness, which allegedly was also a factor in the decision to lay him off.17/

Although BNL has shown that there were non-safety related factors involved its decision to lay off Ramirez, this is not sufficient to sustain the Laboratory's burden under section 708.9(d). First, with the exception of the carnival lighting incident (Appendix item H), these factors are all relatively trivial. Secondly, upon reviewing the entire record, I am persuaded that the crucial carnival lighting incident was an integral part of the asbestos safety issue raised by Ramirez. Finally, I am convinced that Ramirez would not have been terminated were it not for his behavior at the meetings that took place on March 3 and 4, shortly before BNL's layoff decision. In those meetings, which were a direct outgrowth of the carnival lighting incident, Ramirez' behavior was far more disruptive than that alleged with respect to any of the non-safety related factors cited by BNL. However, at the same time, Ramirez also raised his safety concerns.

Although it previously appeared to me that the carnival lighting incident was separate from the asbestos issue, see, e.g., Tr. at 128 (Hearing Officer), my evaluation of the entire record convinces me otherwise. This incident occurred in the same location where Ramirez made his asbestos disclosure on February 21. On February 28, the day that Softye first directed Ramirez to install the carnival lighting at that location, nothing had been done to remove the asbestos since BNL did not think that there was an asbestos problem. However, Ramirez had good reason to believe that, contrary to what Softye had indicated the previous week, there was in fact asbestos present in the ceiling where Softye wanted him to snake the carnival lighting. When Softye had told Ramirez that the "area was clean," see supra p.3, he was relating what Peter Stelmaschuk had told him about the absence of asbestos in the ceiling tiles; he apparently had not asked Stelmaschuk about the presence of asbestos in the area above the ceiling. According to Ramirez, when he was directed to install the carnival lighting he was very worried about the asbestos both because the carpenters had been pulled off the job site earlier that day as a precaution and because Slavinsky appeared concerned about the asbestos. Tr. at 330-332.

Since Ramirez was aware of the presence of asbestos in the area above the ceiling, I find credible his assertion that he initially refused to install the carnival lighting because of his safety concern about the asbestos. I reach this finding despite the fact that Ramirez apparently did not expressly raise his safety concern when Softye directed him to install the carnival lighting. BNL contends that the reason Ramirez refused to do the job was because of the union's opposition to this type of prefabricated temporary lighting. However, as can be seen from the testimony of Softye excepted below, Ramirez, contrary to his reputation as a person who is outspoken and argumentative, did not assertively justify his initial refusal to do the job on the union's position:

Q. Did Mr. Ramirez say anything to you when you told him you had bought this lighting fixture and you wanted him to install it?

A. He seemed hesitant. I didn't know what the problem was at that point. He just seemed hesitant to get involved with it.

Q. Did he express [why] he was hesitant about it?

A. Not at that point.

...

Q. Did you subsequently have an opportunity to inspect the hospital or Building 490 job?

A. Yes.

Q. And what did you find?

A. That no progress had been made on the job.

Q. Was there any explanation given as to why no progress had been made?

A. No. Dave was just hesitant to even talk. ...

...

A. ... I think he said he needed help or assistance.

Tr. at 524-525.

Softye then testified that he asked Dennis Thomas, whom he had assigned to help Ramirez on the job, why Ramirez had initially refused to install the carnival lighting. In response, Thomas stated that "maybe" it was because Ramirez felt it was contrary to the union contract. Id. at 525. Softye in turn asked Ramirez whether that was the reason for his refusal to perform the job. According to Softye, Ramirez "just expressed the opinion that the union didn't like this type of light." Id. at 526.

That Ramirez' initial refusal to install the carnival lighting was based in large part on his concern about the asbestos in the ceiling is also confirmed by his raising a safety concern about asbestos on the following work days (Monday - Wednesday, March 2-4). On March 2, after he had been taken off the carnival lighting job by Softye, Ramirez called Bill Lindsay, the IBEW 25 business manager, "to express my concerns because I was not getting any kind of positive input from management at the contract labor office in regards to the concerns I brought up." Id. at 336. That those "concerns" included the asbestos issue is made clear from accounts of Lindsay's meetings the next day both with Ramirez and some of his co-workers and with Slavinsky. According to the OCEP investigator, Lindsay indicated that at his meeting with some of the subcontractor electricians, Ramirez "outlined a number of what appeared to be serious safety concerns, involving asbestos and a high power generator." OCEP Report at 17 ¶ c. Lindsay then mentioned these matters to Slavinsky. Id.; see also Tr. at 449 (Slavinsky).18/

Lindsay's meeting with Slavinsky on March 3 led directly to the first of the two meetings in which Ramirez' confrontations with his supervisors finally impelled BNL to get rid of him. Ramirez stated that at his meeting with Messrs. Softye and Slavinsky on March 3 he brought up the same issues that he had raised with Lindsay. Id. at 337. As indicated in the previous paragraph, those issues included Ramirez' concern about the asbestos in the ceiling of Building 490. Ramirez testified that in response Softye called him a liar and he in turn lost his temper and called Softye a "fucking liar." Id. at 337-38.19/

We now come to the climactic March 4 meeting in which another confrontation occurred between Ramirez and his BNL supervisors. During the course of the proceeding, BNL has argued at great length that the March 4 meeting was not a "safety meeting." E.g., Respondent's Statement of Fact and Law at 6. It is not really important how the meeting is denominated. What is important is the ample evidence that Slavinsky convened this meeting in large part because of the safety concerns raised by Ramirez, and that Ramirez raised those concerns at this meeting.

Ramirez' contention that this meeting was a direct result of the safety concerns that he had previously raised with Lindsay and his BNL supervisors is confirmed by Slavinsky's explanation of how he came to convene the meeting. Slavinsky testified that during the course of the encounter on March 3 between Ramirez and Softye:

Nelson Briggs walked in. I said to Nelson Briggs, ... "Tomorrow morning, everybody reports to Building 452. We're going to have an open meeting, ... tell everybody that they are going to be able to express their viewpoints, either personal, safety related, anything that they want to bring up. They are going to have a chance to voice this right in front of Bill Softye, right to me, and we will resolve all the issues that Bill Lindsay had a concern over."

Tr. at 450. Slavinsky attempts to downplay the safety issue by his reference to "all the issues." However, as the record shows, Lindsay had gotten involved in this matter because of the telephone call in which Ramirez, shortly after the carnival lighting incident, had expressed his safety concerns.

It is undisputed that at the March 4 meeting Ramirez again raised his concerns about asbestos in Building 490. He did not limit his remarks to the February 21 incident; he also referred to the carnival lighting incident. See, e.g., Tr. at 153 (Thomas). In response, Slavinsky strongly denied that there was any asbestos problem. Id. at 453-54 (Slavinsky). Despite Slavinsky's statement, however, a few days later, carpenters who worked in his department under the supervision of Peter Stelmaschuk removed ceiling tiles in Building 490 wearing full asbestos containment clothing and equipment. See supra p.4.

Softye disputed the safety concerns raised by Ramirez and mentioned various incidents which BNL now relies upon to justify its decision to lay off Ramirez. Tr. at 347-48 (Ramirez).20/ Ramirez, as he has throughout this proceeding, strongly disputed Softye's account of these incidents. He also lost his temper and started yelling loudly at Softye.

BNL has referred to Ramirez' behavior on March 3 and 4 to support its contentions that Ramirez had a bad attitude and that there was a personality conflict between Ramirez and Softye. However, neither assertion, even if true, is sufficient to enable BNL to meet its burden in this case. Courts have considered the issue of profanities and other obstreperous behavior by purported whistleblowers on a number of occasions. While such behavior is not a protected activity, it is not sufficient to refute a claim of reprisal if it is closely related to the events in which the protected activity occurred. For example, in Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159 (9th Cir. 1984), the Secretary of Labor had dismissed a whistleblowers's claim of unlawful reprisal because there was substantial evidence that he was a difficult employee who created friction in his relations with his co-workers and superiors. However, the court of appeals remanded the case because the Secretary had failed to determine the extent to which the whistleblower's "troublesomeness arose from his persistence ... in identifying quality and safety problems." Id. at

1165. Accord, Passaic Valley Sewerage Commissioners v. Department of Labor, 992 F.2d 474, 481 (3rd Cir. 1993); see also Lewis Grocer Co. v. Holloway, 874 F.2d 1008 (5th Cir. 1989).

In the present case, Ramirez' behavior on March 3 and 4 was a continuation of a persistent attempt to raise the asbestos and high voltage issues. The asbestos issue was originally raised on February 21 and was also present in the context of the carnival lighting dispute. Although Ramirez' co- worker on the carnival lighting job on February 28, Dennis Thomas, testified that he had "no knowledge that [Ramirez] was laid off because of safety reasons," Tr. at 144-45, he also stated that there was a potential danger when installing carnival lighting when asbestos was in the ceiling or around the pipes there. Id. at 123-26. Similarly, Dennis Rhodes, who worked with Ramirez on that job on March 2, testified as to the potential safety problems when snaking carnival lighting through a ceiling area in which asbestos is present. Id. at 226-28.

Finally, I am not persuaded that Ramirez' lay off can be explained solely in terms of a "personality conflict," as suggested by a number of Ramirez' co- workers. When Dennis Thomas, for example, attributes Ramirez' lay off to a "personality difference," he is referring to Ramirez' failure to use more "diplomacy" in dealing with Softye. Id. at 145, 155. The record makes it clear that on no occasion was Ramirez more undiplomatic than at the meetings on March 3 and 4.21/ However, Ramirez' behavior in those meetings was inseparable from the safety concerns that he raised on those occasions. Thus, BNL has not presented clear and convincing evidence that Ramirez would have been laid off in the absence of the disclosures of his safety concerns. Accordingly, I find that BNL's decision to lay off Ramirez violated section 708.5.

III. Remedy

Having concluded that BNL has failed to meet its burden of showing by clear and convincing evidence that it would have taken the same personnel action against Ramirez absent his disclosure of safety problems, and that a violation of the prohibitions set forth in Part 708 has occurred, I now turn to the remedy.

In an addendum to his pre-hearing statement, Ramirez requested the following relief:

[F]ull restitution of all damages sustained since his wrongful discharge, such as back pay and the aggregate amount of all reasonable costs and expenses, including but not limited to attorney fees and expert-witness fees, reasonably incurred by him in bringing the complaint as well as transportation and other costs associated with alternative job-seeking.

Addendum (filed November 9, 1993).

There was no testimony or other evidence submitted at the hearing as to the amount of Ramirez' damages. However, in the Addendum Ramirez preserved his claim for relief. For this reason and in order to effectuate the important policies underlying the Part 708 regulations, Ramirez will be permitted to supplement the record by submitting written evidence of his damages.

For those cases in which discrimination against an employee in reprisal for a protected disclosure is found to have occurred, the goal of the DOE regulations is to restore the employee to the position in which he or she would otherwise have been, absent the act (s) of reprisal, in a manner similar to that provided by other whistleblower protection schemes. See Sorri, 23 DOE at 89,016. Section 708.10(c) provides that the initial agency decision may include an award of reinstatement, transfer preference, back pay, and all reasonable costs and expenses (including attorney and expert witness fees) reasonably incurred by the complainant in bringing the complaint upon which the decision is issued.

Ramirez does not seek reinstatement, and transfer preference is not applicable to the circumstances of this case. An award of back pay is appropriate, however. Back pay is intended to restore the complainant to his proper position by providing compensation for the tangible economic loss suffered and by acting as a deterrent against unlawful reprisals. See United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973). Ramirez suffered an economic loss as a result of being laid off by BNL on March 20, 1992.

Ramirez must, however, document the extent of that loss during the period from March 20, 1992, until he was rehired to work at BNL.22/ In order to do this, his counsel must submit the information described in Ordering Paragraph (3), infra. As part of his back pay and any other salary-related elements of his award, Ramirez should receive interest to compensate him for the time value of money lost while bringing this complaint. In the Sorri case, the Hearing Officer followed the practice of the Merit Systems Protection Board (MSPB) under the WPA in determining the rate of interest that should be applied to the back pay award to a contractor employee whistleblower under section 708.10(c). The MSPB awards interest on back pay under the Office of Personnel Management regulation found at 5 C.F.R. § 550.806(d). That regulation in turn refers to the "overpayment rate" established by the Secretary of the Treasury under 26 U.S.C. § 6621(a)(1). The overpayment rate is the Federal short-term rate plus two percentage points. The Federal short-term rate for a particular calendar quarter is the short-term rate for the first month of the preceding calendar quarter, rounded to the nearest whole percent.

With respect to attorney's fees, I will follow the precedent of the Sorri case by applying the "lodestar approach" to determine the amount of attorney's fees to award in this case. See 23 DOE at 89,018 (citing Blanchard v. Bergeron, 489 U.S. 87, 95 (1989); Hensley v. Eckerhart, 461 U.S. 424 (1983); Blum v. Stenson, 465 U.S. 886, 888 (1984)). Under this approach, a reasonable attorney's fee is the product of reasonable hours times a reasonable rate. Interpreting the phrase "reasonably incurred" in section 708.10(c) in this manner recognizes the public interest nature of representing a whistleblower under Part 708 and encourages attorneys to take these cases. The Order below will direct counsel for Ramirez to submit a full, documented accounting of her hourly charges for attorney's fees together with any costs and expenses incurred in representing Ramirez. The fee applicant has the burden of producing satisfactory evidence that the requested rates are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, or reputation. See Blum v. Stenson, supra. Therefore, counsel for

Ramirez should also submit appropriate evidence to show what is a reasonable hourly rate for her to receive in this case.23/

In addition to the categories discussed above, Ramirez should receive restitution for any other costs "reasonably incurred" in bringing his complaint under Part 708. These additional costs include the value of time lost from any employment he may have had in bringing the complaint (including the time lost for preparing and attending the hearing), and mileage, long distance telephone charges, postage, copying, the court reporter (for the transcript of the hearing), and all other related expenses.24/

IV. Conclusion

For the reasons set forth above, I conclude that Ramirez has established by a preponderance of the evidence that his disclosures of safety concerns regarding asbestos in building 490 and a high voltage incident in building 902 were contributing factors in the determination of BNL to lay him off as a subcontractor electrician on March 20, 1992. However, no such evidence was submitted with respect to Daly, and that firm has therefore been dismissed from this proceeding. BNL has failed to prove by clear and convincing evidence that it would have laid off Ramirez absent his protected activities. I therefore find that a violation of Part 708 has occurred and Ramirez should be awarded back pay lost (plus interest) as a result of the reprisal taken against him, as well as all costs and expenses reasonably incurred by him in bringing the present complaint. After counsel for Ramirez has provided the information described in Ordering Paragraph (3), infra, and BNL has had a chance to comment on that information, I will issue a Supplemental Order specifying the exact amount to be awarded Ramirez.

It is Therefore Ordered That:

(1) David Ramirez' request for relief under 10 C.F.R. Part 708 is hereby granted as set forth in paragraph (2) below and is denied in all other respects.

(2) Brookhaven National Laboratory/Associated Universities, Inc. (BNL) shall pay to David Ramirez an amount to be determined based on the information provided under paragraph (3) below in compensation for lost salary and benefits, and interest thereon, and for all costs and expenses, including attorney's fees reasonably incurred by David Ramirez in bringing his complaint under Part 708.

(3) Claire C. Tierney, attorney for David Ramirez, shall, no later than 30 days after the issuance of this Decision by the Office of Contractor Employee Protection, submit to the undersigned Hearing Officer and to Andrea S. Christensen, attorney for BNL:

(a) a detailed schedule showing the amount of wages and other benefits that David Ramirez would have earned from his employment at BNL from March 20, 1992, until he was rehired to work at BNL. This schedule must specify the assumptions upon which it is based, including hourly wage and hours per week;

(b) a monthly schedule showing the amount of any wages, benefits and other income that David Ramirez earned from employment or self employment during this same period of time.

(c) copies of Ramirez' Federal Income Tax Return Form 1040 and Schedule C, if any, for 1992 and 1993, together with copies of all W2 forms;25/

(d) a full accounting of her hourly charges for attorney fees together with any costs and expenses incurred in representing David Ramirez, including appropriate documentation of both hours worked and that the rates requested are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, or reputation;

(e) a full accounting of any and all other costs and expenses reasonably incurred by David Ramirez in bringing his complaint under Part 708.

Ms. Tierney shall send this information to Ms. Christensen by United States Postal Service Express Mail, or an equivalent private overnight delivery service, or by facsimile transmission.

(4) Andrea S. Christensen, attorney for BNL, shall, no later than 15 days after receipt of a copy of the submission referred to in paragraph (4), submit to the Hearing Officer and to Ms. Tierney a response to that submission. This response shall be limited to the reasonableness and accuracy of the calculations set forth in that submission. Ms. Christensen shall send this information to the Hearing Officer and Ms. Tierney by United States Postal Service Express Mail, or an equivalent private overnight delivery service, or by facsimile transmission.

(5) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless, within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or her designee is filed with the Director of the Office of Contractor Employee Protection.

Ted Hochstadt

Hearing Officer

Office of Hearings and Appeals

Date: March 17, 1994

APPENDIX

The Nine Incidents

A. Building 911 (January 1992). BNL alleges that Ramirez did not use all new bolts to reassemble cable trays, as instructed by Softye. Ramirez claims that his use of galvanized spray on the rusty bolts was a more efficient way of doing this job and was approved by Softye, but he acknowledges that Softye was unhappy that he did not replace all of the bolts. Tr. at 308, 369.

B. Building 923.* BNL alleges that Ramirez installed wires on the outside of the walls, and not on the inside as instructed by Softye. Ramirez claims that Softye initially did not specify how the wires were to be installed, and that, when Softye expressed displeasure with the outside wiring, he re- routed the wires inside the walls even though this required the use of an additional 40-50 feet of wiring.

C. Building 923 (same day as item B). BNL alleges that Ramirez failed to label plates, as Softye had instructed. Ramirez asserts that he had intended to do so, but had not gotten around to this task which was to be done at the very end of the job.

D. Building 1008.* In connection with a rush job, BNL alleges that Ramirez did not replace light bulbs in the manner in which Softye had instructed. It is undisputed that the job was completed prior to the deadline. Ramirez asserts that his testing of the emergency circuits and ballasts was necessary to ensure that the lights would work.

E. Building 820.* In his interview with the OCEP investigator, Softye alleged that Ramirez failed follow instructions and label a circuit after replacing a disconnect switch. In her prehearing statement, counsel for Ramirez indicated that he did not remember this incident. At the hearing, Ramirez testified about the job, but did not address the allegation, which Softye subsequently testified to.

F. Building 902.* Softye testified at the hearing that several times when he went to check up on work that Ramirez was doing at this site, he found that Ramirez was not in his work area, but was conversing with other electricians. In response to a similar allegation in Softye's statement to the OCEP investigator, counsel for Ramirez asserted that those conversations were work related. However, at the hearing Ramirez did not testify about this matter.

G. Tank Farm Job. Softye alleges that Ramirez spent his time arguing with the team leader, Daniel Ahearn, rather than doing the assigned job. Ramirez claims that the job could not be done because of the absence of necessary tools and other equipment and that this was the responsibility of the lead person, Ahearn.

H. Building 490 (February 28 and March 2, 1992). BNL alleges that Ramirez refused to install temporary carnival lighting, as instructed by Softye. Ramirez asserts that his initial refusal to do this job was because of his concern about asbestos in the ceiling, but that he eventually did the job with the assistance of a co-worker.

I. The raincoat incident.* BNL alleges that Ramirez caused trouble by telling a carpenter to leave the work site and ask his BNL supervisor for a raincoat. Ramirez asserts that he simply brought up the subject, but that the carpenter left the work site at his own initiative.

* No testimony as to date of incident

1/ The OCEP investigation included the acquisition and analysis of relevant documents and the conducting of on-site interviews. Summaries of the interviews are contained in the OCEP Report of Investigation, OCEP Complaint File Tab E. Unless otherwise noted, any statement quoted from the OCEP Report is from the investigator's account of an oral statement made by one of the persons interviewed and is not a direct quote from the interviewee.

2/ Mr. Stelmaschuk's name is spelled "Stomajick" in the hearing transcript.

3/ Carnival and pigtail lighting are two types of temporary lighting fixtures. The former is a pre-assembled fixture that comes in one-hundred foot sections with wiring, lamp sockets every few feet, and cages with hooks so that it can be supported in the ceiling. A pigtail is a device that holds one lamp and is installed in the existing wiring.

4/ On the basis of air samples collected from the carpenters and bulk samples collected from utilities above the ceiling on March 6, S&EP concluded that the amount of asbestos was below OSHA regulatory limits. S&ECP Report at 4. This conclusion was accepted by the DOE in response to an Occupational Safety & Health Complaint filed by Ramirez on March 31, 1992. See Letter from Frank J. Crescenzo, Deputy Area Manager, DOE, to David Ramirez (May 4, 1992), OCEP Complaint File Tab P. This conclusion is disputed by Edward Olmsted of the New York Committee for Occupational Safety and Health in a December 22, 1992 letter to Ramirez. See Respondent's Statement of Issues Presented for Review, Attachment A.

5/ In a telephone conversation with the Hearing Officer on December 9, 1993, Daly's vice president, John P. Daly, III, stated that he had previously sent to the DOE Chicago Area Office a letter commenting on Ramirez' complaint. That letter is not a part of the record of this proceeding.

6/ In contrast, section 708.2(a) provides that, with respect to a disclosure, participation or refusal regarding matters other than health or safety, Part 708 is applicable only to alleged reprisals that occur after the April 2, 1992 effective date. This provision also requires that the underlying procurement contract with DOE contain a clause requiring compliance with the Part 708 regulations.

However, once such a clause is incorporated into a procurement contract, any alleged reprisal after the April 2, 1992 effective date is subject to Part 708, even if it occurred prior to the modification of the procurement contract. See Universities Research Association, Inc., 23 DOE ¶ 87,504 (1993) (URA).

7/ Under the DOE Order, an employee could file a complaint with the head of the appropriate DOE office, who was authorized to investigate and resolve the complaint.

8/ At one point during the hearing I incorrectly stated that this disclosure was subject to BNL's stipulation. Tr. at 297.

9/ Softye denies that Ramirez notified him of this incident on the date in February that it occurred and suggests that he may not have heard about it until after Ramirez was laid off. Tr. at 528. However, Slavinsky testified that he heard about the incident several days after it occurred and was pretty sure that he had heard about it from Softye. Tr. 446-47. In addition, Ramirez' testimony that he raised this issue during the March 4 meeting at which Softye was present, id. at 346, is confirmed by Slavinsky's statement to the OCEP investigator. OCEP Report at 27.

10/ During the course of the hearing, counsel for BNL disputed the use of the word "termination" with regard to BNL's action on the grounds that, since BNL was not Ramirez' employer, it could not have terminated his employment. See, e.g., Tr. at 26-27. She did acknowledge that the decision to lay off Ramirez was made by BNL. Id. Regardless of what term is used, it is clear that BNL's action, if it occurred for the reasons alleged by Ramirez, would constitute a prohibited "discriminatory act" as that term is defined in section 708.4. The record in this case also makes it quite clear that Ramirez was an employee of Daly solely by virtue of Daly's contract with BNL, i.e., he had no independent employment contract with Daly outside of his employment at BNL, and that his being laid off by BNL terminated his employment and placed him at the bottom of the union's referral list.

11/ In fact, Ramirez does not even claim that Daly wrongfully discriminated against him in reprisal for his disclosures, and made his complaint solely against BNL. See, e.g., Proposed Disposition at 2 n.*, OCEP Complaint File Tab F.

12/ Although Nelson Briggs, the foreman of the subcontractor electricians and a Daly employee by virtue of Daly's contract with BNL, informed Ramirez that he was laid off, see 1 Tr. at 83-84, BNL does not suggest that he had any role in making the decision to lay off Ramirez.

13/ The standard of proof under section 708.9(d) is much more stringent than the standard applied by the National Labor Relations Board (NLRB) in denying Ramirez' unfair labor practice complaint against Daly and Brookhaven. See Letter Determination of Alvin Blyer, NLRB Regional Director (November 20, 1992) (Blyer Letter), Exhibit B to BNL's Statement of Fact and Law in Opposition to Complainant's Whistleblower Claim. Under the NLRB standard, after a complainant establishes a prima facie case, the respondent only has the burden of going forward; the ultimate burden of persuasion remains with the complainant. See NLRB v. Wright Line, 662 F.2d 899, 904-05 (1st Cir. 1981), cited with approval in Blyer Letter. Thus, in Ramirez' NLRB case, the respondents were not required to establish their position by clear and convincing evidence. For this reason, and because the record in Ramirez' NLRB case is not before me, I have given no weight to the NLRB determination.

14/ Slavinsky first said that he did not think that there would be work for "several weeks," but quickly increased that to "seven, eight weeks ...maybe even three months." Id. at 456. According to the OCEP investigator, Slavinsky stated that "BNL did not anticipate work picking up any time soon." OCEP Report at 27 ¶ i. In his testimony, Slavinsky indicated that, in view of the expected length of the slowdown, layoffs were a necessary cost-cutting measure. Tr. at 456-57. However, BNL did not submit any evidence to show that the work slowdown was projected to be any longer than other slowdowns or that the Laboratory was more concerned about the budgetary implications of work slowdowns in 1992 than in prior years.

15/ Although Slavinsky asserted that there were 600 "or so" unemployed electricians in March 1992, 2 Tr. at 456, I am more inclined to accept the figure of approximately 500, as testified to by two men who were placed at the bottom of the IBEW 25 referral list in that month. See Tr. at 294 (Ramirez); Id. at 237 (Rhodes). Although Rhodes indicated that there may have been a couple of hundred more electricians out of work in 1992 than 1991, he did not appear certain of either number, Id. at 245; see also id. at 235 (in which Rhodes agreed with counsel for BNL that there were "400-odd" electricians out work). Moreover, BNL has not introduced any objective, credible evidence that the number of electricians on the IBEW Local 25 referral list was significantly greater in March 1992 than in 1991 or prior years.

16/ While this testimony was given more than a year and a half after the events in question, Softye did not provide any more details of his rating process when he was interviewed by the OCEP investigator on August 25, 1992, five months after Ramirez was laid off. See OCEP Report at 23-24 ¶ r.

17/ In his direct examination, Softye asserted that Ramirez was "habitually late." Tr. at 533. Under cross examination, he quantified that by stating that Ramirez was late five or six times by ten or fifteen minutes. Id. at 521. Similar testimony was given by Nelson Briggs. Id. at 78 ("maybe once a week for like a month's time ... about five or ten minutes late").

18/ Slavinsky also stated that Lindsay had mentioned that some "personality problems" had been raised by the electricians. Id. However, he did not specify the nature of those problems or indicate that they were unrelated to the safety concerns.

19/ On cross examination, Ramirez stated that this incident occurred on Monday, March 2, prior to his call to Lindsay. Tr. at 412. However, his testimony on direct examination, that the incident occurred the day prior to the March 4 meeting and thus after his call to Lindsay, is confirmed by both Softye and Slavinsky. See id. at 449-51 (Slavinsky); id. at 528-29 (Softye).

20/ Although Ramirez stated that Softye brought up four or five different incidents, the only two non-safety related incidents that he expressly mentions are the tunnel job (Appendix item D) and the tank farm job (Appendix item G). It is likely that Softye mentioned other incidents which BNL has relied on in this proceeding to justify its termination of Ramirez, including the then-recent carnival lighting incident.

21/ BNL might well have responded to Ramirez' safety concerns differently if he had raised them in a more tactful manner, see, e.g., 1 Tr. at 145 (positive response to safety concern raised by Dennis Thomas). However, there is nothing in Part 708 that permits the Laboratory to avoid the prohibition against reprisals on the grounds that a whistleblower raises safety concerns in an obnoxious manner.

22/ In her Closing Statement, counsel for Ramirez requested a back pay amount through November 1993. Closing Statement at 29. However, there is evidence in the record that Ramirez was rehired by a BNL subcontractor prior to that time and then laid off again. See, e.g, Record of September 23, 1993 Telephone Conversation between Ramirez and Len Tao, OHA attorney (Case No. LWA-0002). Although Ramirez apparently claims that the subsequent layoff was in reprisal for his earlier whistleblower complaint, id., there is no evidence in the record of the present proceeding to substantiate that claim. Accordingly, we will not consider that claim here, and in this proceeding Ramirez will not be awarded back pay for any time after he was rehired to work at BNL.

23/ Reasonable attorney's fees also include the services of a law clerk, paralegal or law student. Cf. 5 C.F.R. § 550.807(f).

24/ I will not, however, grant Ramirez' request for restitution for transportation and other costs associated with alternative job-seeking. Section 708.10(c) does not provide for this relief and Ramirez has not cited any other authority for it. Nor has Ramirez claimed that the transportation costs that he incurred in job seeking were any greater than those he would have incurred commuting to the Laboratory. In addition, Ramirez is not entitled to his requested expert-witness fees since no expert witness testified on his behalf.

25/ Counsel may delete Ramirez' social security number and other personal non-financial information, e.g., information about dependents. However, if Ramirez wishes any of financial information to be treated as confidential, counsel shall submit to the Hearing Officer one complete copy of the income tax returns and two copies with confidential information deleted, and shall prepare a protective order for signature by the parties and their attorneys and issuance by the Hearing Officer.