U.S. Department of Labor

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

In the Matter of:

STEPHEN THORSTENSON,

COMPLAINANT,

v.

BNSF RAILWAY COMPANY,

RESPONDENT.

ARB CASE NOS. 2018-0059
2018-0060

ALJ CASE NO. 2015-FRS-00052

DATE: December 21, 2021

Appearances:

For the Complainant:
Paul Bovarnick, Esq; *Rose Senders & Bovarnick LLC*; Portland, Oregon; Shenoa L. Payne, Esq.; *Shenoa Payne Attorney at Law PC*; Portland, Oregon

For the Respondent:
Jacqueline M. Holmes, Esq.; *Jones Day*; Washington, District of Columbia; Autumn Hamit Patterson, Esq.; *Jones Day*; Dallas, Texas

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER ON REMAND

PER CURIAM. This case arises under the employee protection provision of the Federal Railroad Safety Act of 1982 (FRSA), as amended.[1] Stephen Thorstenson

[1] 49 U.S.C. § 20109 (2008), as implemented at 29 C.F.R. Part 1982 (2018) and 29 C.F.R. Part 18, Subpart A (2018).

filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) in which he alleged that his former employer, BNSF Railway Company, retaliated against him for engaging in activity protected by the FRSA. On July 31, 2018, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) in which he concluded that BNSF established by clear and convincing evidence that it would have discharged Thorstenson even if he had not engaged in protected activity. On November 25, 2019, we issued a Final Decision and Order (F. D. & O.) affirming the D. & O.[2]

Thorstenson appealed our ruling to the U.S. Court of Appeals for the Ninth Circuit. On December 21, 2020, the Court issued an unpublished Memorandum in which it stated that "[t]he ARB's decision erred in two respects."[3] The Court remanded the case to the Board "for further proceedings consistent with [its] disposition."[4] Accordingly, we address those two errors and affirm the F. D. & O.

BACKGROUND

We restate the relevant facts from the F. D. & O. At the relevant times at issue in this case, Thorstenson worked as a conductor for BNSF in and around Vancouver, Washington. BNSF's General Code of Operating Rules (GCOR) required employees to report workplace injuries immediately to the proper manager and submit a written report.[5] In addition, BNSF had a Policy for Employee Performance Accountability which provided that employees would not be disciplined for late reporting of muscular-skeletal injuries, as long as the injury was reported within 72 hours of the probable triggering event.[6]

On February 2, 2009, Thorstenson injured his left knee when he slipped on steps while boarding a train. Thorstenson made a timely report of this injury and was off work due to the injury for almost six months.[7] When he returned to work, he

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[2] *Thorstenson v. BNSF Ry. Co.*, ARB Nos. 2018-0059, -0060, ALJ No. 2015-FRS-00052 (ARB Nov. 25, 2019).

[3] *Thorstenson v. U.S. Dep't of Labor*, 831 F. App'x 842, 843 (9th Cir. 2020) (unpublished).

[4] *Id.* at 844.

[5] Respondent's Exhibit (RX) 5 at 15 (GCOR 1.2.5).

[6] RX 5 at 18.

[7] D. & O. at 3.

still had swelling, stiffness, and some pain in his knee after he completed work trips, and occasionally saw a doctor for these symptoms. Thorstenson provided verbal updates to BNSF managers regarding the condition of his knee.

On November 17, 2010, Thorstenson banged his left kneecap against a desk onboard a train and felt pain, but thought that it was from the injury he sustained in February 2009. The next day he had more than the usual swelling, stiffness, and pain in his knee. He was not scheduled to work on November 19 and returned to the orthopedic office where he saw a physician's assistant. Thorstenson informed the physician's assistant that he had bumped a desk and was afraid that he had aggravated his earlier injury.[8] The physician's assistant prescribed pain medication.

After returning to work on November 20 and 21, Thorstenson continued having swelling, stiffness, and pain and returned to the doctor on November 22, 2010. The doctor drained fluid from the knee, took x-rays, injected cortisone, and recommended that Thorstenson remain off work. On November 22, Thorstenson contacted the trainmaster and filled out an injury report.[9] Thorstenson reported the injury to BNSF on November 22, 2010, which was five days after the injury on November 17, 2010.[10]

On November 24, 2010, BNSF notified Thorstenson that it was investigating his apparent late report of the workplace injury and would conduct a hearing on January 21, 2011. On December 6, 2010, Thorstenson returned to the doctor, who diagnosed several injuries to the knee. Complainant was off work until he recovered from surgery and returned to full duty on January 17, 2011.

Following the January 21, 2011 hearing, General Manager Doug Jones concluded that Thorstenson had violated company rules because he did not report an injury within 72 hours, and he did not report the injury before going to the doctor.[11] Jones recommended a Level S or serious violation which resulted in a 30-day "record suspension." For a "record suspension," the suspension is noted on the employee's work history in his personnel file, but he may continue working and earning regular wages.

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8 *Id*. at 4.

9 *Id*.

10 *Id*.

11 *Id*. at 7-8.

Although Thorstenson did not have a history of discipline within the previous five years, he had reported an injury during that time. Therefore, Jones imposed a 36-month review period to attach to the Level S violation and record suspension.[12] At the time in question, the review period that attached to a Level S violation for an employee that was "discipline free" and "injury free" was 12 months, for others, including those who had reported an injury, it was 36 months.[13]

On June 26, 2011, five months after receiving the Level S for late reporting, Thorstenson was working as a conductor aboard a moving train while another employee worked as the engineer.[14] Under BNSF rules, the engineer and conductor are jointly responsible for the operation of the train. During its operation the train exceeded its speed limit and passed through a crossing without sounding the whistle.[15] On June 29, 2011, BNSF's Superintendent of Operations in Vancouver, Chris Lucero, issued a Notice of Investigation into the incident on June 26, and the charges against the two employees were heard together.

Based on the investigation, Lucero concluded that BNSF should dismiss both Thorstenson and the engineer based solely on this incident.[16] The human resources manager disagreed and advised that it would be difficult to support a standalone dismissal for the engineer's case. She recommended that the June event be treated as a Level S violation for both employees.[17] The General Manager, (Johnson), agreed and imposed Level S violations for Thorstenson and the engineer. However, due to its progressive discipline policy, and Thorstenson's 36-month review period imposed in January 2011 for the previous Level S violation, BNSF terminated his employment. Thorstenson was notified of his discharge on August 30, 2011.

Thorstenson filed a complaint with OSHA on February 7, 2011, alleging that the record suspension was in retaliation for requesting medical treatment, following the orders of a treating physician, and for notifying BNSF of a work-related injury. On August 31, 2011, he amended his complaint, asserting that he would not have

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12 *Id*. at 8.

13 *Id.*

14 *Id*. at 9.

15 *Id*. at 10.

16 *Id*. at 11.

17 *Id*. at 12.

been discharged had he not been previously disciplined for late-filing of an injury report.

OSHA investigated the complaint and concluded that there was reasonable cause to believe that BNSF violated the FRSA and awarded back pay, compensatory damages and punitive damages, expungement of Thorstenson's employment records, and ordered BNSF to post a Notice to Employees.

BNSF timely objected and requested a hearing before the Office of Administrative Law Judges (OALJ). On July 31, 2018, the ALJ issued his D. & O., in which he concluded that Thorstenson engaged in FRSA-protected activity, and BNSF's decision to discipline Thorstenson was "inextricably intertwined" with that protected activity.[18] The ALJ further found that BNSF established by clear and convincing evidence that it would have disciplined Thorstenson for the late report and safety violation even if he had not engaged in protected activity. Both Thorstenson and BNSF appealed the ALJ's decision to the Board.

On November 25, 2019, we issued our F. D. & O. affirming the D. & O. We held that the ALJ erred by concluding that BNSF's decision to discipline Thorstenson was "inextricably intertwined" with his protected activity. We explained that an "inextricably intertwined" analysis, which had been previously applied by the Board and ALJs, departed from the plain text of the FRSA and, in some cases, circumvented the appropriate statutory analyses.[19] But the ALJ's legal error did not require remand because we affirmed his finding that BNSF would have imposed the same adverse actions in the absence of Thorstenson's protected activity.

Thorstenson appealed our ruling to the U.S. Court of Appeals for the Ninth Circuit. On December 21, 2020, the Court issued an unpublished Memorandum in

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[18] D. & O. at 28.

[19] Since our prior ruling in this case, the Board has held that, even in situations in which both the protected activity and the employer's non-protected reason for adverse action arise from the same set of events or situations, the ALJ, as the fact-finder, must still decide whether the protected activity "contributed to" the adverse decision. *See, e.g., Riddell v. CSX Transp., Inc.*, ARB No. 2019-0016, ALJ No. 2014-FRS-00054, slip op. at 21 n.13 (ARB May 19, 2020).

which it stated that "[t]he ARB's decision erred in two respects."[20] The Court noted that the circumstances of this case "made it virtually impossible for Thorstenson to know he had experienced a new injury in time to comply with BNSF's 72-hour reporting rule."[21] The Court also concluded that we erred by imposing "a new burden of proof for causation under which FRSA claimants must demonstrate that the protected activity was a proximate cause of the adverse action."[22] The Court remanded the case to the Board "for further proceedings consistent with [its] disposition."[23]

BNSF filed a Motion for Additional Briefing on Remand on July 7, 2021. On July 28, 2021, we directed the parties to submit briefs addressing whether the Memorandum's reversal of the conclusions it deemed erroneous alters our ruling on BNSF's liability under the FRSA. Both parties submitted briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to review appeals of ALJ's decisions pursuant to the FRSA.[24] The Board will affirm the ALJ's factual findings if supported by substantial evidence but reviews all conclusions of law de novo.[25] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[26]

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[20] *Thorstenson*, 831 F. App'x at 843.

[21] *Id*.

[22] *Id*. at 3. We have recently noted that, although the Ninth Circuit stated in its Memorandum that a proximate cause standard was inconsistent with circuit law, it appears to have relied upon a more rigorous definition of "proximate cause" than the ARB's citation, which distinguished legal causation from mere factual causation. *See Klinger v. BNSF Ry. Co.*, ARB No. 2019-0013, ALJ No. 2016-FRS-00062, slip op. at 9 n.58 (ARB Mar. 18, 2021).

[23] *Thorstenson*, 831 F. App'x at 844.

[24] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

[25] 29 C.F.R. § 1982.110(b); *Austin v. BNSF Ry. Co.*, ARB No. 2017-0024, ALJ No. 2016-FRS-00013, slip op. at 7 (ARB Mar. 11, 2019) (citations omitted).

[26] *McCarty v. Union Pac. R.R. Co.*, ARB No. 2018-0016, ALJ No. 2016-FRS-00066, slip op. at 3 (ARB Sept. 23, 2020) (quoting *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (citing and quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938))).

DISCUSSION

1. The Statutory and Regulatory Background

The FRSA prohibits a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith protected activity.[27] To prevail, an FRSA complainant must establish by a preponderance of the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action. If a complainant meets this burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action absent the complainant's protected activity.[28]

2. The ARB's Final Decision and Order

BNSF discharged Thorstenson because he received a second Level S discipline while in probation status for a prior Level S discipline. While we rejected the ALJ's use of inextricably intertwined as a rule of causation for the first Level S violation that Thorstenson received for untimely reporting, we affirmed the ALJ's finding that BNSF met its affirmative defense for that discipline.[29]

As for the second Level S violation, the ARB noted that the ALJ found that there was "no dispute" that BNSF would have imposed the second Level S violation for Thorstenson's role in the June 2011 safety incident in the absence of protected activity. The ALJ reasoned that the other employee involved in the incident was also given a Level S violation, and that it was possible that Thorstenson could have received a standalone dismissal given the seriousness of the charges against him in connection with the event. However, in Thorstenson's case, he was discharged because the second Level S violation occurred while Thorstenson was under a 36-

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[27] 49 U.S.C. §§ 20109(a), (b).

[28] 49 U.S.C. § 20109(d)(2)(A)(i); 49 U.S.C. § 42121(b)(2)(B)(i)(2000); *Riley v. Canadian Pac. R.R. Corp.,* ARB Nos. 2016-0010, -0052, ALJ No. 2014-FRS-00044, slip op. at 4 (ARB Jul. 6, 2018) (citing 49 U.S.C. § 42121(b)(2)(B)(iv)).

[29] F. D. & O. at 12-13.

month review period for the prior Level S violation.[30] The ALJ found that it was part of BNSF's progressive discipline policy to terminate an employee for receiving a second Level S violation within the review period.

The ARB found that the ALJ's findings were supported by substantial evidence. Thus, with two affirmative defense holdings supported by substantial evidence, the ARB affirmed the ALJ's dismissal of Thorstenson's complaint.

3. Thorstenson's Brief to Ninth Circuit

Thorstenson appealed the ARB's decision to the Ninth Circuit. Thorstenson's brief to the Ninth Circuit asserted several errors of law, and in the first major heading in his argument, he argued that the ARB erred in affirming the ALJ's affirmative defense finding. Under a subheading, Thorstenson asserted that the "ARB applied the wrong legal standard in determining whether BNSF would have taken the same adverse action *in the absence of any protected behavior."*[31]

In a separate subheading, Thorstenson argued that "BNSF's policy is unreasonable and unduly burdens an employee's right and ability to report workplace injuries." Thorstenson makes two ancillary points that "BNSF's strict enforcement of its rule without exception is unreasonable because it chills reporting of work-place injuries" and "Thorstenson's deviation from the policy was minor and inadvertent."[32]

This latter argument, though nestled within a major heading that the ARB erred in affirming the ALJ's affirmative defense finding, makes no mention of BNSF's affirmative defense or any of the FRSA's statutory or regulatory language. Instead, Thorstenson's brief makes several policy-oriented arguments, citing 2012 guidance for OSHA investigators that was clarified or revised in subsequent guidance.[33]

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[30] Even if BNSF applied the more favorable 12-month policy, Thorstenson's second Level S violation occurred within the 12-month period.

[31] Brief of Petitioner at 23, *Thorstenson v. U.S. Dep't of Labor*, No. 20-70211 (9th Cir. June 26, 2020).

[32] *Id*. at 27-40.

[33] *Id*. at 28-29.

4. On Remand We Again Find that BNSF Has Proven its Affirmative Defense

A. The Ninth Circuit's Statements Regarding the Late-Reported Injury

Despite several arguments against the ARB's and the ALJ's affirmative defense holdings in Thorstenson's brief, the Ninth Circuit only addressed one argument: that the ARB erred in rejecting Thorstenson's argument that BNSF's policy was "unreasonable" and "unduly burdensome." Following Thorstenson's argument, the Ninth Circuit expanded upon several policy grounds. The Ninth Circuit reasoned that compliance with the policy could not reasonably be met and was "virtually impossible" under certain circumstances. The Ninth Circuit wrote in pertinent part:

> First, the ARB rejected Thorstenson's contention that BNSF's enforcement of its timely injury reporting policy was so unreasonable and unduly burdensome that it constituted retaliation when enforced on these facts. Notifying the railroad carrier of a work-related personal injury is an enumerated protected activity under the FRSA. See 49 U.S.C. § 20109(a)(4). A violation to the FRSA occurs where, as here, an employee is disciplined for failure to comply with a railroad carrier's time or manner reporting rule even though its requirements could not reasonably be met. The following circumstances made it virtually impossible for Thorstenson to know he had experienced a new injury in time to comply with BNSF's 72-hour reporting rule: the injury presented as an aggravation to an existing injury which Thorstenson had already reported, his injury did not require him to miss work until after the 72-hour period had expired, and a medical expert examining him within the 72-hour period did not identify his symptoms as a new injury or take him off work. The fact that BNSF staff, including Thorstenson's supervisor, initially did not know that Thorstenson's symptoms required him to file a new injury report further underscores the unreasonableness of expecting Thorstenson to have known he was required to file such a report and disciplining him because he did not. Accordingly, because it was virtually impossible for Thorstenson to comply with the injury reporting rule, he

> was effectively disciplined for the protected activity of reporting a workplace injury.[34]

The Ninth Circuit reversed and remanded to the ARB "for further proceedings consistent with this disposition."

B. The Law of the Case Doctrine

The ARB is bound by the law of the case and the Ninth Circuit's mandate. The law of the case doctrine is "based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter."[35] "[F]or the [law of the case] doctrine to apply, the issue in question must have been decided either expressly or by necessary implication in [the] previous disposition."[36] In other words, even when issues have not been expressly addressed in a prior decision, if those matters were "fully briefed to the appellate court and . . . necessary predicates to the [court's] ability to address the issue or issues specifically discussed, [those issues] are deemed to have been decided tacitly or implicitly, and their disposition is law of the case."[37] The consistency provided by the rule "protects parties 'from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action . . . .'"[38] The Tenth Circuit has stated that "the doctrine is merely a 'presumption, one whose strength varies with the circumstances.'"[39]

C. The Memorandum Does Not Address BNSF's Affirmative Defense

With this survey of "law of the case" in the federal courts, we observe that the doctrine covers subsequent litigation most fully when the prior court or appellate court addressed the parties' arguments, the applicable law at issue, and the facts of

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[34] *Thorstenson*, 831 F. App'x at 843.

[35] *United States v. U.S. Smelting Ref. & Mining Co.*, 339 U.S. 186, 198 (1950).

[36] *Snapp v. United Transp. Union*, 889 F.3d 1088, 1096 (9th Cir. 2018).

[37] *Alpha/Omega Ins. Servs., Inc. v. Prudential Ins. Co. of Am.*, 272 F.3d 276, 279 (5th Cir. 2001) (alterations and omission in original).

[38] *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991) (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)).

[39] *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1225 (10th Cir. 2007) (quoting *Avitia v. Metro. Club of Chi., Inc.*, 49 F.3d 1219, 1227 (7th Cir. 1995)).

a particular case. As the appellate court leaves more substance untouched, the lower court is less constrained.

There are several reasons why the Ninth Circuit's memorandum does not constitute the law of the case for purposes of BNSF's affirmative defense. First, the Ninth Circuit failed to analyze the FRSA framework and apply its reasoning to the framework. Neither the FRSA's language nor its concepts on affirmative defense are mentioned in the Ninth Circuit's 3-page, unpublished opinion. The FRSA's mandatory framework asks the fact-finder to determine whether protected activity contributed to the adverse action. If it did, it further asks whether the employer has proven by clear and convincing evidence that it would have taken the same action in the absence of protected activity.

Second, the Ninth Circuit focused its attention on Thorstenson's fairness arguments aimed at BNSF's late-reporting policy, not the specific affirmative defense arguments. "Unduly burdensome" and "punitive" are not promulgated regulatory factors for adjudicating an employer's affirmative defense under the FRSA. Further, these considerations are not necessary predicates to an affirmative defense finding. Typically, courts do not review the merits of an employer's policy when deciding if the employer violated the FRSA.[40]

Third, the Ninth Circuit followed Thorstenson's mischaracterizations of BNSF's policy to challenge hypothetical situations that do not match the record or BNSF's policy. The Ninth Circuit offered the following circumstances in support of its finding that BNSF's policy was unduly burdensome and unreasonable as applied to Thorstenson: (1) Thorstenson had no knowledge of a new injury; (2) Thorstenson was not required to miss work until after 72 hours had passed; (3) medical experts did not identify Thorstenson's symptoms as a new injury or take him off work when they initially saw him on the 19th; (4) the fact that Thorstenson's supervisor did not know whether the symptoms required a new injury report underscores the unreasonableness of the policy.

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[40] *Acosta v. Union Pac. R.R. Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082, slip op. at 12 n.7 (ARB Jan. 22, 2020) (quoting *Collins v. Am. Red Cross*, 715 F.3d 994, 999 (7th Cir. 2013) (the FRSA "does not forbid sloppy, mistaken, or unfair terminations; it forbids discriminatory or retaliatory terminations")); *see also Clem v. Computer Sciences Corp.*, ARB No. 2016-0096, ALJ Nos 2015-ERA-00003, -00004, slip op. at 19 (ARB Sept. 17, 2019) ("neither the ALJ nor the ARB is a super-personnel department, evaluating the merits of the employer's decisions beyond the necessary parameters of the whistleblower retaliation complaint before it.").

These circumstances belie the record and BNSF's policy. BNSF's Policy for Employee Performance Accountability ("PEPA") provides:

> Employees will not be disciplined for 'late-reporting' of muscular-skeletal injuries, as long as the injury is reported within 72 hours of the probable triggering event, the employee notifies the supervisor before seeking medical attention, and the medical attention verifies that the injury was most likely linked to the event specified.[41]

BNSF's policy is not built upon reporting: (1) only serious injuries, (2) only new injuries, (3) injuries that require taking one off work status, (4) injuries that require immediate medical attention, (4) injuries that require reporting to the FRA, or (5) only if the omission of such would constitute a major violation. Rather, the policy requires reporting, within 72 hours, *any injury* without any of those qualifications. Further, the policy requires reporting before seeing a doctor.

The Ninth Circuit's factual circumstances are inapplicable to this case. The Ninth Circuit did not comment on the ALJ's finding that BNSF requires reporting even if the pain is thought to be an aggravation of a prior injury. This finding is supported by the record.[42] As the ALJ reasoned, Thorstenson was familiar with these requirements as he had reported his prior injuries multiple times before.

An employee's missing work is completely independent of the requirement to timely report of an injury. An employer can require an employee to report an injury, and discipline the employee for not timely reporting while continuing in on-duty status. The Ninth Circuit may have been suggesting that Thorstenson's injury was not serious enough to be detected until after the 72 hours had passed. But this is flatly contradicted by the record. Thorstenson went to a doctor due to pain within the 72 hours. By seeking medical attention before notifying BNSF, Thorstenson violated BNSF's policy. Finally, testimony supports that BNSF's reporting policy

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41 RX 5 at 18.

42 *See* D. & O. at 20 ("Also as with Complainant, one employee believed his pain had been an aggravation of a prior injury … The Public Law Board affirmed Level S discipline with a 30-day record suspension, stating: 'Even assuming, arguendo, as [complainant] would subsequently offer, that the pain he suffered on December 19, 2010 was [an] aggravation of a prior off-duty injury; such a contention did not excuse him from timely reporting such circumstances to the Carrier.'")

applies to injuries and pains to whatever degree, not to only those pains serious enough to prevent one from working. An injury that was truly unable to be detected within 72 hours may present a problem for BNSF's disciplinary framework in some other case, but it is factually inapplicable in this case.

Given these difficulties with the Ninth Circuit's memorandum, the ARB asked parties for supplemental briefing. Among other points, BNSF argues that the Ninth Circuit's order should be construed as limited to the contributing factor element of Thorstenson's FRSA claim:

> To be sure, the Ninth Circuit also noted that "because it was virtually impossible for Thorstenson to comply with the injury reporting rule, he was effectively disciplined for the protected activity of reporting a workplace injury." Thorstenson, 831 F. App'x at 843. But this sentence appears at the end of a discussion of the existence of a "violation" of FRSA—something the regulations specify is merely a showing that the employee proved his affirmative case. Moreover, this sentence appears without any discussion of the existence of an affirmative defense, without any discussion of the legal standard for proving that defense, and without any discussion of the evidence supporting BNSF's affirmative defense. Therefore, one should not improperly overread this lone sentence as somehow implicitly addressing issues that the Ninth Circuit chose not to address explicitly.[43]

Thorstenson counters that the Ninth Circuit's opinion should necessarily include the affirmative defense:

> The Ninth Circuit's reasoning precludes as a matter of law BNSF's affirmative defense that it would have disciplined Thorstenson for "late" reporting absent his protected activity. As the Court explained, under the facts of this case, BNSF's discipline for late reporting *was effectively discipline for the protected report* and a violation of the FRSA. Thorstenson, 831 Fed.Appx. at 843. The Court's opinion leaves no room for BNSF to avoid liability under the FRSA by claiming that it would have disciplined Thorstenson *absent his protected activity*

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[43] BNSF Railway Company's Supplemental Brief on Remand at 17 n.2.

> because Thorstenson filed his injury report "late." The Court already conclusively ruled that BNSF's discipline for untimely reporting was *discipline for filing his workplace injury report*.[44]

In the analysis that it did do, the Ninth Circuit's memorandum characterized the policy as burdensome, unreasonable, and retaliatory under these circumstances. The Ninth Circuit wrote: "[Thorstenson] was effectively disciplined for the protected activity of reporting a workplace injury."[45] As law of the case, we adopt the Ninth Circuit's position that BNSF violated the statute, but we construe this to apply to Thorstenson's contributing factor phase.

A contrary opinion might look at the Ninth Circuit's language "unduly burdensome," "unreasonable," and "retaliatory" as conclusions that encapsulate or indirectly address BNSF's affirmative defense in so far as they are negatives concerning BNSF's policy. But as stated above, the Ninth Circuit's opinion does not mention the affirmative defense or the FRSA's burden framework and factors such as "unreasonable" and "burdensome" do not necessarily implicate the affirmative defense. By its very nature, the affirmative defense assumes that a violation has taken place, but continues the analysis by comparing the respective weights of the retaliatory reasons with the non-retaliatory reasons and asks the fact-finder to make a finding in a counterfactual or hypothetical situation as if the protected conduct had not occurred. Because the Ninth Circuit's opinion did not discuss the affirmative defense and considered facts that are inapplicable to Thorstenson's situation and BNSF's policy, we conclude that a holding on BNSF's affirmative defense is not the law of the case.

D. The ALJ's Findings on BNSF's Affirmative Defense are Supported by Substantial Evidence

Because we construe the Ninth Circuit's first point of error as a holding on Thorstenson's contributing factor burden, on remand from the Ninth Circuit we again find that the ALJ's findings on BNSF's affirmative defense are supported by substantial evidence. The affirmative defense asks the fact-finder to determine if

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[44] Complainant's Supplemental Brief on Remand from the Ninth Circuit Court of Appeals at 6 (emphasis in original).

[45] *Thorstenson*, 831 F. App'x at 843.

the employer has proven by clear and convincing evidence that it would have taken the same adverse action in the absence of protected activity.[46]

As the ALJ recognized, in cases such as this one where the protected activity of filing an injury report initiated events that led to the adverse action for untimely reporting, the traditional application of "in the absence of protected activity" leads to a more complex analysis.[47] As a result, the fact-finder may evaluate the employer's affirmative defense by examining several extrinsic factors including the employer's justification for the action and the consistency with which the employer applies the policy.[48]

Here, Thorstenson committed two Level S violations within a short duration and was terminated. The ARB found that the ALJ's affirmative defense findings on both the first and second Level S disciplines were supported by substantial evidence. We briefly recap.

On November 17, 2010, Thorstenson banged his left kneecap and felt pain. The next day he suffered swelling, stiffness, and pain in his knee. He sought medical attention on November 19, and he continued experiencing swelling, stiffness, and pain until November 22, when a doctor drained fluid from his knee, took x-rays, injected cortisone, and recommended that he remain off work. Thorstenson did not report his injury to BNSF until November 22, 2010, which was five days after it happened.[49]

In finding that BNSF had proven its affirmative defense that Thorstenson was disciplined for late reporting and not for simply reporting an injury, the ALJ noted that Thorstenson and many others had filed timely injury reports with no repercussions. BNSF submitted personnel files of seventeen workers who reported

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[46] *See* 49 U.S.C. § 20109 (incorporating the burdens of proof found in 49 U.S.C. § 42121(b)(2)(B)(iv)); *Riley,* ARB Nos. 2016-0010, -0052, slip op. at 4.

[47] D. & O. at 22-23.

[48] *DeFrancesco v. Union R.R. Co.*, ARB No. 2013-0057, ALJ No. 2009-FRS-00009, slip op. at 10-11 (ARB Sept. 30, 2015).

[49] D. & O. at 4.

injuries but were not disciplined.[50] Several employees were, however, disciplined for late reporting.[51] As the ALJ reasoned:

> The overwhelming evidence on the record establishes that in cases involving employees who report workplace injuries, BNSF imposes no discipline when the report is timely and imposes discipline when the report is late. Timeliness is the distinguishing factor. Complainant offered no counterexamples, and he is personally an example of this practice in action: BNSF imposed no discipline on the seven occasions that he reported an injury timely, and it imposed discipline on the one occasion when he reported late. There is no evidence of pretext. There is no evidence of personal animus, and in fact, Complainant testified that Trainmaster Canavan did not seem upset with him when he went into the office to complete an injury report. Tr. 343. Both Conducting Officer Surina and decision-maker Jones described why they believed Complainant's injury was a work-related injury that needed to be reported, those reasons were consistent with one another, and I find that they honestly held those beliefs.[52]

The ALJ further concluded that BNSF does not discipline individuals for the timely reporting of their injuries, noting that Thorstenson himself had several prior injury reports with no discipline.[53] The ALJ continued:

> Complainant knew about the policy, had complied with it before, and eventually took the steps needed to comply – but did so late. He conceded that, if he was confused about whether he had to file a new injury report, he could have contacted either management or his union within the 72-hour required reporting period. Tr. 325. He told his doctor on November 19, 2010, that he thought he aggravated his knee condition when he hit the knee against his desk. R.Ex. 5 at 30. That statement to his doctor was on the second day after the incident; Complainant could have

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50 *Id.* at 19.

51 *Id.* at 19-20.

52 *Id.* at 23.

53 *Id.* at 21, 23.

> made the same report to BNSF within the remaining time to meet the 72-hour deadline. At the least, he could have contacted management and asked whether he needed to report the new incident. He did neither.[54]

While a hypothetical policy that required the employee to ascertain whether an injury is a "new injury" and to report "new injuries" within 72 hours may be difficult comply with, that was not a requirement of BNSF's policy:

> Even if he thought his new injury was simply an aggravation of the pre-existing injury, it was his practice to report new symptoms. Yet, he did not. Moreover, the policy requires reports of injuries, not reports of changing symptoms. If Complainant had any question whether hitting his knee against a hard surface and the onset of serious symptoms requiring medical attention was a new injury, he could have asked his supervisor, his trainmaster, or his union. He did none of these.[55]

The ALJ found that BNSF enforced its late-reporting policy consistently. BNSF has discharged employees, like Thorstenson, who had multiple Level S disciplines including one late injury report and including individuals who believed that their pain symptoms were related to prior injuries, even prior off-duty injuries.[56]

Thorstenson knew he had suffered an injury or aggravated an injury. Thorstenson testified to experiencing pain after striking his knee against a metal cabinet. Thorstenson sought medical attention for that pain. Thorstenson was required to inform BNSF before seeing a doctor. This policy allows BNSF to minimize any additional harm, address safety problems, and provide the resources of its occupational health program. As the ALJ reasoned:

> But BNSF's rule here is not confusing. To the contrary, Complainant complied with it on all seven of his previous injury reports. It is true that there is an exception to the requirement of an immediate report for injuries involving muscular-skeletal injuries, but that exception could only have helped Complainant because his was a muscular-

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54 *Id*. at 24 n.30.

55 *Id*. at 24.

56 *Id*. at 20 (footnotes omitted).

> skeletal injury, thus giving him 72 hours to report. Moreover, I find nothing confusing about the exception. In addition, as discussed in the text above, Complainant could have sought guidance from his union, his supervisor, his trainmaster, or BNSF's human resources department if he was confused. He did none of this within the 72 hours he had to get it done. [57]

Having considered these positions, we again affirm the ALJ's order that BNSF met its affirmative defense in the Level S discipline for late reporting.

Thorstenson had been charged with one Level S violation when, only five months later, he and another BNSF employee were operating a train that exceeded its speed limit and passed through a crossing without sounding the whistle. As the ALJ noted, the discipline Thorstenson received in the summer of 2011 may have been a Level S except for Thorstenson's prior Level S for late reporting. The ALJ observed that Thorstenson's actions in the summer of 2011 warranted standalone dismissal.[58] BNSF relied on its progressive discipline policy to terminate his employment for the two Level S disciplines.

Thorstenson complains that BNSF's late-reporting policy is unfair and unreasonable. Our task at the ARB is to ask not whether BNSF's policy is the most-well thought out policy or rings well in a policy setting. Instead, our task is to determine whether BNSF retaliated against Thorstenson for activity protected under the FRSA. "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."[59] We therefore again conclude that BNSF did not violate the FRSA by terminating Thorstenson's employment.

5. The Board Has Not Created a New Standard of Causation for Cases Arising Under the FRSA

The ALJ, following ARB precedent, found that BNSF violated the FRSA because Thorstenson's discipline was "inextricably intertwined" with his protected

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[57] *Id.* at 24-25 n.31.

[58] *Id.* at 25. BNSF considered both Level S disciplines cumulatively in deciding to discharge Thorstenson under its progressive discipline policy.

[59] *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 578 (1978).

reporting of his injury.[60] In our review of the ALJ's decision we held that the "inextricably intertwined" analysis of prior cases was erroneous. We noted that the plain language of the FRSA does not include the term "inextricably intertwined," and the analysis is "a construction that substitutes for, and in some cases circumvents, the ALJ's contributing factor or affirmative defense analyses."[61]

As noted above, the Ninth Circuit's opinion held that the ARB erred in two respects. The Ninth Circuit's language on the second point is as follows:

> Second, the ARB imposed a new burden of proof for causation under which FRSA claimants must demonstrate that the protected activity was a proximate cause of the adverse action. A proximate cause standard is inconsistent with this circuit's law regarding the requirements of the FRSA, which requires plaintiffs to prove only that their protected conduct was a "'factor, which alone or in connection with other factors, tended[ed] to affect in any way the outcome of the decision.'" *Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1195 (9th Cir. 2019) (quoting *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 461 (9th Cir. 2018); *cf. CSX Transp., Inc. v. McBride*, 564 U.S. 685, 694 (2011) ("[The Federal Employers' Liability Act] . . . did not incorporate any traditional common-law formulation of proximate causation . . . . Whether the railroad's negligent act was the immediate reason for the [injury] . . . was an irrelevant consideration." (internal quotation marks and alterations omitted)).[62]

In this assigned error, the Ninth Circuit did not discuss the Board's holding or its rationale on inextricably intertwined. In *Klinger v. BNSF Ry. Co*, the ARB discussed the Ninth Circuit's opinion:

> Although the Ninth Circuit stated that a proximate cause standard was inconsistent with circuit law, it appears to have relied upon a more rigorous definition of "proximate cause" than the ARB's citation, which distinguished legal

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60 F. D. & O. at 10.

61 *Id.*

62 *Thorstenson*, 831 F. App'x at 843-844.

> causation from mere factual causation. The Ninth Circuit did not discuss the Board's principal holding in *Thorstenson* that the inextricably intertwined and chain of events analyses were improper substitutes for the statutory causation and same-action defense analyses. Absent elaboration or further guidance from the Ninth Circuit, and in light of the unpublished nature of the Ninth Circuit's reversal, we continue to adhere to our opinion that applying an inextricably intertwined or chain of events analysis for the issues of causation and the same-action defense is reversible error. *See Hart v. Massanari*, 266 F.3d 1155, 1177-78 (9th Cir. 2001) (stating that in an unpublished decision "the rule of law is not announced in a way that makes it suitable for governing future cases" and that "[a]n unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision").[63]

The Ninth Circuit did discuss and reject the ARB's use of "proximate causation." The ARB acknowledges that "proximate causation" is a legal phrase of art that has attracted many different definitions in many different applications. The ARB quoted one sense as used by the Seventh Circuit to distinguish legal causation from factual causation. The ARB wrote:

> In *Koziara*, the Seventh Circuit held that the "[the district court] failed to distinguish between causation and proximate causation. The former term embraces causes that have no legal significance. Had the plaintiff never been born or never worked for BNSF he would neither have been hurt by the plank flung at him by the energetic front-end loader nor have stolen railroad ties from the railroad. But that doesn't mean that his being born or his being employed by the railroad were legally cognizable [proximate] causes of his being fired." *Id.* at 877.[64]

The Ninth Circuit construed the phrase "proximate cause" in a different manner than that intended by the ARB. The ARB did not intend to create an additional

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63 *Klinger,* ARB No. 2019-0013, slip op at 9 n.58.

64 F. D. & O. at 10.

standard above and beyond the statutory text that requires the complainant to prove only that protected activity was "a contributing factor in the unfavorable personnel action." As we have stated before, a "'contributing factor' includes 'any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision.'"[65]

CONCLUSION

Having considered the Ninth Circuit's Memorandum, and based on its findings and conclusions, we again hold that, to establish a violation under the FRSA, Thorstenson was required to show that his protected activity was a "contributing factor" in the adverse employment actions taken by BNSF. And we again **AFFIRM** that the ALJ's finding that BNSF established by clear and convincing evidence that it would have imposed the Level S violations and terminated Thorstenson in the absence of the Complainant's protected activity was based on substantial evidence. As noted earlier, our role is not to determine whether or not we might have reached a different result based on the record, but rather to determine if the ALJ's findings, which we have closely examined and reflected in our opinion, are supported by substantial evidence, consistent with the FRSA and our role as an appellate body. The ALJ's analysis in this case clearly meets this threshold requirement.

SO ORDERED.

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[65] *See, e.g., Rothschild v. BNSF Ry. Co*., ARB No. 2019-0022, ALJ No. 2017-FRS-00003, slip op. at 2-3 (ARB Nov. 30, 2020) ("The Board made clear that applying either or both of the 'inextricably intertwined' or 'chain of events' theories to create a presumption of causation would be legal error. Accordingly, the ALJ erred as a matter of law in finding that Complainant established that his protected activity was a contributing factor in his discipline. Therefore, the Board remands this case to the Office of Administrative Law Judges for further proceedings consistent with the ARB's decision in *Thorstenson*. We also direct the ALJ and parties to follow the Ninth Circuit's analysis as set forth in *Frost v. BNSF Ry. Co.*"); *see also Acosta,* ARB No. 2018-0020, slip op. at 6 (quoting *Rookaird v. BNSF Ry. Co*., 908 F.3d 451, 461-62 (9th Cir. 2018)).