



In the Matter of:

CLYDE O. CARTER, JR.,

ARB CASE NO. 2021-0035

COMPLAINANT,

ALJ CASE NO. 2013-FRSA-00082

v.

DATE: September 26, 2022

BNSF RAILWAY COMPANY,

RESPONDENT.

Appearances:

For the Complainant:

David Bony, Esq.; Kansas City, Missouri

For the Respondent:

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

**Before HARTHILL, Chief Administrative Appeals Judge, and BURRELL
and PUST, Administrative Appeals Judges**

DECISION AND ORDER

HARTHILL, Chief Administrative Appeals Judge:

This case arises under the employee protection provisions of the Federal Railroad Safety Act of 1982 (FRSA).¹ Complainant Clyde Carter (Complainant or Carter) filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Respondent BNSF Railway Company (BNSF) violated the FRSA by terminating his

¹ 49 U.S.C. § 20109, as implemented by regulations at 29 C.F.R. Part 1982 (2021).

employment.² OSHA determined that Carter’s discharge did not violate the FRSA and Carter requested a hearing before an Administrative Law Judge (ALJ). In 2014, ALJ Linda Chapman (ALJ Chapman) presided over a formal hearing and issued a Decision and Order (D. & O.) in which she concluded that Carter’s discharge violated the FRSA.³ The ARB affirmed ALJ Chapman’s ruling, and BNSF appealed the ARB’s decision to the Eighth Circuit Court of Appeals.

In 2017, the Eighth Circuit held that the ALJ erred in analyzing Carter’s case and vacated and remanded the case to the Board. We remanded the case for further proceedings before an ALJ, consistent with the Eighth Circuit’s opinion and instructions. On April 29, 2021, ALJ Heather C. Leslie (ALJ Leslie) issued a Decision and Order on Remand (D. O. R.) in which she concluded that Respondent did not violate the FRSA when it terminated Carter’s employment.⁴ Carter timely appealed to the Board. We affirm.

BACKGROUND⁵

Carter applied for employment with BNSF in 2005. The application included a medical questionnaire that asked if he had missed more than two days of work in his previous jobs due to illness, injury, hospitalization, or surgery. The questionnaire also asked if he had any previous surgeries, back injuries, or back pain.⁶ Carter answered “no” to these questions.⁷ The application also asked questions about military service, in response to which Carter identified his past service with the Army but did not disclose his service with the Navy.⁸ The application stated that providing false information would be grounds for dismissal at any time.⁹ BNSF hired Carter as a carman on November 20, 2005.

On August 30, 2007, Carter was working at BNSF’s Argentine Yard in Kansas City, Kansas, when he injured his shoulder and neck. Supervisor Chuck Spencer drove Carter to a company clinic where he was diagnosed with a sprain and

² *Carter v. BNSF Ry. Co.*, ALJ No. 2013-FRS-00082, slip op. at 1 (ALJ Apr. 29, 2021) (D.O.R.).

³ *Carter v. BNSF Ry. Co.*, ALJ No. 2013-FRS-00082 (ALJ July 30, 2014).

⁴ D. O. R. at 20.

⁵ The D. O. R. developed and issued by ALJ Leslie contained thorough and detailed findings of fact (see *id.* at 6-12), which we summarize herein. ALJ Chapman’s D. & O. provided a full description of the hearing testimony and exhibits (see D. & O. at 2-36).

⁶ D. O. R. at 18.

⁷ *Id.* at 5-7.

⁸ *Id.* at 7.

⁹ *Id.*; see also Respondent’s Exhibit (RX) 1 (Carter’s Application).

prescribed over-the-counter pain medication.¹⁰ Carter was later examined by his own physicians and referred for surgery, injections, and therapy for his shoulder and neck.¹¹

In 2008, Carter filed a claim under the Federal Employer's Liability Act (FELA),¹² alleging that BNSF's negligence caused his injury. As part of his FELA litigation, Carter provided deposition testimony to BNSF on July 20, 2009.¹³

In January 2012, BNSF Manager Bryan Thompson (Thompson), who was acting as the Designated Corporate Representative in Complainant's FELA matter, reviewed discovery materials submitted by Carter in the FELA litigation and discovered discrepancies between Carter's 2009 deposition testimony and his 2005 employment application.¹⁴ BNSF then initiated a disciplinary investigation into potentially dishonest statements made by Carter in his application.¹⁵ In February 2012, the company initiated a second disciplinary investigation to determine whether Carter had signed a false statement regarding the timing of his arrival to work on February 5, 2012.¹⁶

On March 20, 2012, BNSF conducted an internal hearing regarding the validity of information provided on Carter's 2005 employment application, specifically Carter's failure to reveal his prior knee and back injuries and his omission of any reference to his prior service with the Navy. BNSF conducted a second internal hearing on March 28, 2012, regarding Carter's alleged failure to timely clock in on February 5, 2012. BNSF General Foreman Charles Sherrill (Sherrill) officiated at both hearings. After the hearings, Sherrill concluded in both matters that Carter had violated company policies prohibiting dishonesty, and that any discipline imposed should comport with BNSF's Policy for Employee Performance Accountability (PEPA).¹⁷ The PEPA policy defines various severity levels of discipline and specifically notes that dishonesty about any job-related subject is a sufficient dismissible violation.¹⁸

¹⁰ D. O. R at 8.

¹¹ *Id.*

¹² 45 U.S.C. §§ 51-60.

¹³ D. O. R. at 8.

¹⁴ *Id.* at 10, 14.

¹⁵ *Id.*

¹⁶ *Id.* at 9-10, 12.

¹⁷ D. O. R. at 10; *see also* Transcript (Tr.) at 437; RX 8 (PEPA).

¹⁸ D. O. R. at 8-9.

Sherrill's recommendation that Carter be disciplined in accordance with the PEPA policy was submitted to Phillip McNaul (McNaul), BNSF's Field Superintendent of Operations, who then submitted the hearing records and Sherrill's findings to Joseph Heenan (Heenan), a Director of Labor Relations.¹⁹ Heenan was responsible for discipline policy and employee performance and accountability.²⁰ He concluded that the evidence supported Sherrill's findings and recommended that Carter be discharged for dishonesty, as provided for under the PEPA. BNSF terminated Carter's employment in two letters dated April 5 and April 16, 2012.²¹

On June 26, 2012, Carter filed a timely complaint with OSHA alleging that BNSF violated the FRSA by terminating his employment in retaliation for his reporting a work-related injury in 2007. OSHA found no violation, and Carter requested a hearing before an ALJ.

After a formal hearing, ALJ Chapman issued a D. & O. finding that BNSF violated the FRSA and unlawfully discriminated against Carter.²² In a separate decision, she ordered BNSF to reinstate Carter and pay him back pay with interest, punitive damages, and attorney's fees.²³ BNSF appealed both the merits and damages orders, and Carter appealed the ALJ's damages decision. The Board affirmed both decisions.²⁴ BNSF appealed the rulings to the United States Court of Appeals for the Eighth Circuit.

In its decision issued on August 14, 2017, the Eighth Circuit determined that ALJ Chapman had ascribed to a "flawed chain-of-events causation theory,"²⁵ "erred

¹⁹ *Id.* at 10-11.

²⁰ *Id.* at 11.

²¹ *Id.* at 6. Sherrill signed the letters. *See* Complainant's Exhibits (CX) 1 and 2.

²² D. & O. at 48.

²³ ALJ's Supplemental Decision and Order Awarding Damages, ALJ No. 2013-FRS-00082 (ALJ Nov. 25, 2014).

²⁴ *Carter v. BNSF Ry. Co.*, ARB Nos. 2014-0089, 2015-0016, -022, ALJ No. 2013-FRS-00082 (ARB June 21, 2016).

²⁵ *BNSF Ry. Co. v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 867 F.3d 942, 945-46 (8th Cir. 2017) ("The ALJ nonetheless found that the injury report was a contributing factor by applying a "chain of events" theory of causation. The ALJ reasoned: 'In establishing that a protected activity was a contributing factor ... it is not necessary to show that the employer was motivated by the activity or even give any significance to the activity . . . [A]ll a complainant need do is show that the employer knew about the protected activity and the protected activity was a necessary link in a chain of events leading to the adverse activity.'").

in interpreting and applying the FRSA and failed to make findings of fact that are critical to a decision applying the proper legal standard.”²⁶

Specifically, the Eighth Circuit determined that the ALJ failed to make findings of fact regarding whether: (1) Carter’s supervisors targeted him; (2) there was discriminatory animus against Carter; (3) BNSF in good faith believed that Carter was guilty of the conduct justifying discharge; (4) Carter’s FELA lawsuit provided BNSF with “more specific notification” about Carter’s injury report; and (5) credibility issues had been appropriately determined.²⁷ Further, the court concluded that the Board exceeded its scope of review to the extent it filled in missing findings and “misstat[ed] the scope of [our] decision in *Ledure*.”²⁸ According to the Eighth Circuit, [t]o base its decision on *Ledure*, the ARB needed a finding that Carter’s FELA lawsuit provided BNSF with “more specific notification” of his injury report, a fact question relevant to the temporal proximity between the protected activity and Carter’s termination.²⁹ The court vacated and remanded the case to the Board and, on June 18, 2018, the Board remanded the case to the Office of Administrative Law Judges for further proceedings.³⁰

The case was first assigned on remand to ALJ Jennifer Whang (ALJ Whang), before whom Carter submitted a motion which included a request to amend his complaint to add additional allegations. On September 13, 2019, ALJ Whang denied the request to amend the complaint.³¹

This case was then transferred to ALJ Leslie. On remand, the parties agreed that the case could be disposed of on briefs. On April 29, 2021, ALJ Leslie issued a D. O. R. in which she concluded that Carter failed to prove that BNSF retaliated against him for engaging in activities protected by the FRSA in 2007.³² She also concluded that BNSF had proven by clear and convincing evidence that it would

²⁶ *Id.*

²⁷ *BNSF Ry. Co. v. U.S. Dep’t of Labor, Admin. Rev. Bd.*, 867 F.3d at 947-48.

²⁸ *Id.* at 948 (citing *Ledure v. BNSF Ry. Co.*, ARB No. 2013-044, ALJ No. 2012-FRS-00020 (ARB June 2, 2015)).

²⁹ *Id.* For discussion of this aspect of the case, see discussion at Section 3.A below.

³⁰ *Carter v. BNSF Ry. Co.*, ARB Nos. 2014-0089, 2015-0016, -0022, ALJ No. 2013-FRSA-00082 (ARB June 21, 2018).

³¹ Order Denying in Part Complainant’s Motion to Amend Complaint.

³² D. O. R. at 20.

have fired Carter for dishonesty in the absence of any FRSA-protected activity.³³ Carter timely appealed the D. O. R. to the Board.³⁴

Carter's Petition for Review identified numerous points of error which can be summarized as follows: (1) ALJ Whang abused her discretion by denying his motion to amend his complaint; (2) ALJ Leslie made unsupported findings of fact and failed to credit ALJ Chapman's credibility findings, which undermined the resulting analysis;³⁵ (3) ALJ Leslie failed to draw an adverse inference against BNSF for failing to call Thompson as a witness; (4) ALJ Leslie failed to take notice of facts in other cases involving BNSF; (5) ALJ Leslie mischaracterized the roles played by certain managers in his discharge; and (6) ALJ Leslie imposed incorrect legal burdens and failed to find retaliatory motive.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue agency decisions under the FRSA.³⁶ The Board will affirm the ALJ's factual findings if supported by substantial evidence but reviews all conclusions of law de novo.³⁷ Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."³⁸ The Board has held that an ALJ's factual

³³ *Id.*

³⁴ *See* Complainant Clyde Carter's Petition for Review on Remand (Petition for Review).

³⁵ Carter's appeal briefs contain several arguments regarding alleged errors in ALJ Leslie's factual findings. After careful review of the petition and briefs, we have identified the following factual findings that Carter takes issue with: (1) Heenan terminated Carter's employment, not Sherrill (Complainant's Brief at 9-10); (2) BNSF incentivized retaliation by linking managers' performance reviews and compensation to the number of on-the-job injuries reported (*id.* at 3-4, 13-16); (3) Thompson decided to discharge Carter in retaliation for the 2007 injury report (*id.* at 10); and (4) Carter arrived to work on time on February 5, 2012 (*id.* at 23). Although Carter does not clearly articulate how each of these factual findings undermines the ALJ's legal analysis, they are all findings that supported the ALJ's analysis that Carter's 2007 injury report was not a contributing factor in BNSF's decision to terminate his employment in 2012 and that BNSF would have made the same decision to dismiss Carter absent any protected activity.

³⁶ 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. 13,186 (Mar. 6, 2020).

³⁷ 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) (citation omitted).

³⁸ *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));

findings will be upheld where supported by substantial evidence even if we “would justifiably have made a different choice had the matter been before us *de novo*.”³⁹ The ARB reviews an ALJ’s procedural and evidentiary rulings for abuse of discretion.⁴⁰

DISCUSSION

1. Carter’s FRSA-Protected Conduct Did Not Contribute to His Employment Termination

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.⁴¹ To prevail on an FRSA retaliation complaint, a complainant must prove by preponderance of the evidence that: (1) he engaged in protected activity; (2) his employer took an adverse employment action against him; and (3) the protected activity was a contributing factor in the unfavorable personnel action.⁴² If the complainant successfully proves that the protected conduct was a contributing factor, the employer may avoid liability by proving, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the protected activity.⁴³

Carter established the first two elements of his claim: he engaged in protected activity when he reported his workplace injury in 2007⁴⁴ and he suffered

Mercier v. U.S. Dep’t of Labor, Admin. Rev. Bd., 850 F.3d 382, 388 (8th Cir. 2017) (quoting *Gonzales v. Barnhart*, 465 F.3d 26 890, 894 (8th Cir. 2006)).

³⁹ *Henrich v. Ecolab, Inc.*, ARB No. 2005-0030, ALJ No. 2004-SOX-00051, slip op. at 8 (ARB June 29, 2006) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

⁴⁰ *See Chambers v. BNSF*, ARB No. 2019-0074, ALJ No. 2018-FRS-00086, slip op. at 6 n.24 (ARB Mar. 5, 2021) (per curiam); *Bechtel v. Competitive Techs., Inc.*, ARB No. 2009-0052, ALJ No. 2005-SOX-00033, slip op. at 19 (ARB Sept. 30, 2011).

⁴¹ 49 U.S.C. § 20109(a).

⁴² 49 U.S.C. § 20109(d)(2), incorporating the burdens of proof set forth in 49 U.S.C. § 42121(b); *Fricka v. Nat’l R.R. Passenger Corp.*, ARB No. 2014-0047, ALJ No. 2013-FRS-00035, slip op. at 5 (ARB Nov. 24, 2015) (citing 49 U.S.C. § 42121(b)(2)(B)(iii)).

⁴³ *Fricka*, ARB No. 2014-0047, slip op. at 5 (citing 49 U.S.C. § 42121(b)(2)(B)(iv)). Per the Eighth Circuit and ARB’s remand instructions, ALJ Leslie did not apply the “chain-of-events causation” analysis when she ruled on this case.

⁴⁴ Regarding Complainant’s assertion that his 2008 FELA claim constituted additional protected activity, see discussion at Section 3.A below.

adverse employment action when his employment was terminated in 2012.⁴⁵ This case turns on the third required element of the claim: whether Carter’s protected activity was a contributing factor with respect to his termination.

A “contributing factor” includes “any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the [adverse] decision.”⁴⁶ While this element can be established by either direct or circumstantial evidence,⁴⁷ it must be established. Carter failed to establish this element of his claim. BNSF fired Carter over four years after he reported his injury. We agree with ALJ Leslie’s conclusion that the lack of temporal proximity between the injury and the discharge supports a conclusion that Carter was fired for his dishonesty which BNSF discovered in 2012.⁴⁸ As we have noted in prior cases, “the probative-value of temporal proximity decreases as the time gap between protected activity and adverse action lengthens, particularly when other precipitating events have occurred closer to the time of the unfavorable action.”⁴⁹

In an attempt to avoid this conclusion, Carter insists that he was not dishonest on his application or with regard to his reporting to work on February 5, 2012. He also argues that his supervisors targeted him for years following his 2007 report of injury. In effect, Carter seeks to rely on his 2007 report of injury as a shield from consequences of his workplace misconduct, a position that neither the law nor the factual record supports.

While there are several factual assertions by both parties that are contradicted by the record,⁵⁰ the Eighth Circuit noted that the “critical inquiry” in

⁴⁵ The Eighth Circuit noted that BNSF conceded that Carter’s “prompt injury report was protected activity” and that he “suffered adverse action when BNSF fired him.” See *BNSF Ry. Co. v. U.S. Dep’t of Labor, Admin. Rev. Bd.*, 867 F.3d at 945.

⁴⁶ *Id.* (quoting *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017)).

⁴⁷ *DeFrancesco v. Union R.R. Co.*, ARB No. 2010-0114, ALJ No. 2009-FRS-00009, slip op. at 6-7 (ARB Feb. 29, 2012).

⁴⁸ D. O. R. at 14 (“The fact that Respondents fired Mr. Carter over four years after the injury, and two years after the FELA deposition, weighs against a finding of retaliatory motive. The lack of temporal proximity supports a conclusion that Mr. Carter was fired for dishonesty as his termination occurred after this discovery, and . . . not the work injury of four years prior.”).

⁴⁹ *Brucker v. BNSF Ry. Co.*, ARB Nos. 2018-0067, -0068, ALJ No. 2013-FRS-00070, slip op. at 9 (ARB Nov. 5, 2020); see also *Tyler v. Univ. of Arkansas Bd. of Trustees*, 628 F.3d 980, 986 (8th Cir. 2011) (“As more time passes between the protected conduct and the retaliatory act, the inference of retaliation becomes weaker and requires stronger alternate evidence of causation.” (citations omitted)).

⁵⁰ For example, there is conflicting evidence regarding Murray’s assertion that Carter was on probation for absenteeism. See D. & O. at 31 n.18. And former Mayor Emanuel

this case is whether BNSF “in good faith believed that the employee was guilty of the conduct justifying discharge.”⁵¹ The record supports ALJ Leslie’s conclusion that BNSF believed Carter was guilty of several acts of dishonesty which, when discovered, resulted in the termination of his employment in accordance with workplace policies. The ALJ thoroughly discussed the evidence in the record in support of her determination that Carter failed to meet his burden of proving by a preponderance of the evidence that his FRSA-protected activity contributed to his discharge. We affirm that determination.

A. Carter Was Dishonest on His Application for Employment

The record supports ALJ Leslie’s finding that Carter engaged in dishonesty when he applied for a position at BNSF. The employment application informed applicants that omissions or misrepresentations would be grounds for dismissal at any time.⁵² Carter checked “no” on the application where it asked if he had missed more than two days of work due to illness, injury, hospitalization or surgery as well as where it asked if he had experienced any other surgeries, back injuries, or back pain.⁵³ The record established that Carter had failed to disclose three injuries, one of which required surgery.⁵⁴ Although Carter testified as to his explanations for why he checked “no” to these questions and ALJ Leslie found that his testimony regarding the completion of his application was credible, she also found that it did not “negate the fact that he did check off ‘no.’”⁵⁵

Carter was also required to disclose his complete military history on the application but failed to do so. BNSF introduced evidence at the investigative hearing that Carter omitted his naval history from his employment application. Carter attempted to defend this omission by arguing that he had “top secret clearance.”⁵⁶ The fact that he had disclosed his Army career, which he also asserted was top secret, weighed against his argument that he had not been dishonest by failing to disclose his complete record of military service.⁵⁷

Cleaver did not change Carter’s “other than honorable” discharge to an “honorable discharge. See D. O. R. at 5. However, such inconsistencies do not change the fact that Carter committed at least one offense that was grounds for discharge.

⁵¹ *BNSF Ry. Co. v. U.S. Dep’t of Labor, Admin. Rev. Bd.*, 867 F.3d at 947-48 (quoting *Gunderson*, 850 F.3d at 969).

⁵² D. O. R. at 7-8.

⁵³ *Id.* at 18.

⁵⁴ *Id.*

⁵⁵ D. O. R. at 18.

⁵⁶ *Id.* at 7, 19 n.30.

⁵⁷ *Id.* at 19.

Reviewing the complete record, ALJ Leslie found that Carter was dishonest on his application for employment in 2005. We agree that this finding is supported by substantial evidence.

B. Carter Was Dishonest About Clocking in on February 9, 2021

According to evidence in the record, Tom Murray (Murray), a BNSF supervisor, conducted a timekeeping review on February 9, 2012, and noticed that Carter had failed to clock in on February 5, 2012. Murray asked Carter to provide a written statement about his failure to clock in.⁵⁸ Carter submitted two written statements indicating that he arrived at work on time, but a security video contained a time stamp indicating that Carter arrived after his shift was scheduled to begin.⁵⁹

The record supports ALJ Leslie's finding that Carter clocked in late to work on the date in question.⁶⁰ The record further supports the ALJ's determination that Carter provided conflicting statements at the investigative hearing about his attendance, and these statements led to BNSF's conclusion that Carter was being dishonest.⁶¹ Carter indicated that he was unsure whether he had clocked in on time, was confused about the date in question, was late because he had been dealing with his wife's health issues, and got stuck behind a transportation van.⁶² Based on the complete record, we agree with ALJ Leslie's conclusion that BNSF "had a sincere belief that Mr. Carter was in fact late and was dishonest in reporting his time on February 5, 2012."⁶³

ALJ Leslie's finding about Carter's attendance is supported by substantial evidence. BNSF fired Carter for his dishonesty, and Carter failed to prove that his FRSA-protected conduct was a contributing factor in his discharge.

⁵⁸ *Id.* at 9; *see also* Tr. 111, 166-67.

⁵⁹ D. O. R. at 12.

⁶⁰ *Id.* at 18.

⁶¹ *Id.* at 12 ("I find that based on his review, Mr. Heenan believed Mr. Carter was a dishonest individual and found it noteworthy that Mr. Carter had multiple opportunities to clear the record and did not.").

⁶² D. & O. at 33; *see also* RX 7.

⁶³ D. O. R. at 19.

C. *BNSF Did Not Target Carter for Discharge*

Carter argues that he was targeted for discharge because of his 2007 protected activity.⁶⁴ The only evidence Carter provided to support this claim was his own testimony and that of Larry Lee Mills (Mills), another former BNSF employee. ALJ Leslie did not find either of their testimony persuasive. She found that Carter’s assertion that managers colluded to fire him was contradicted by the evidence showing that BNSF managers were performing their jobs pursuant to the PEPA.⁶⁵ The ALJ did not give any weight to the testimony of Mills and questioned his credibility because he had been fired by BNSF and his testimony, given after his firing, was inconsistent with that of McNaul, Thomas, and Sherrill.⁶⁶ Further, the ALJ found credible Sherrill’s testimony that he did not target Carter, never had any phone conversations wherein he said he was going to “get Carter,” but instead based his decision as hearing officer solely on his finding of Carter’s dishonesty and not on Carter’s prior protected activity.⁶⁷

To counter the ALJ’s determination, Carter argues that ALJ Leslie abused her discretion by declining to take judicial notice of the facts in *Wooten v. BNSF Ry. Co.*, and *Blackorby v. BNSF Ry. Co.* to establish that BNSF utilized a “bonus program” that incentivized retaliation against employees who filed injury reports.⁶⁸ In *Wooten*, the court noted that “BNSF may have incentivized retaliation by managers and supervisors by linking their individual performance reviews to the number of on-the-job injuries reported.”⁶⁹ In *Blackorby* the court noted that “BNSF stipulated, moreover, that managers may earn bonuses based on the rates of employee injuries—one of the very concerns examined by Congress before incorporating the contributing-factor standard into the FRSA.”⁷⁰ Carter asks the Board to take notice of the facts of both cases regarding the bonus program.⁷¹

⁶⁴ Complainant’s Brief at 4, 7-8.

⁶⁵ D. O. R. at 16.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Complainant’s Brief at 13-16 (citing *Blackorby v. BNSF Ry. Co.*, 849 F.3d 716 (8th Cir. 2017), and *Wooten v. BNSF Ry. Co.*, 2018 WL 2417858 (D. Mont. 2018) (not reported)).

⁶⁹ *Wooten v. BNSF Ry. Co.*, 2018 WL 2417858 at *5.

⁷⁰ *Blackorby*, 849 F. 3d at 722.

⁷¹ We review the ALJ’s decision not to take judicial notice for abuse of discretion. *See Cravens v. Smith*, 610 F.3d 1019, 1029 (8th Cir. 2010). We note that Carter did not ask ALJ Leslie to take judicial notice of the facts in *Blackorby*, and so has waived that argument on appeal. *See, e.g., Sandra Lee Bart*, ARB No. 2018-0004, ALJ No. 2017-TAE-00014, slip op. at 4-5 (ARB Sept. 22, 2020) (“Under our well-established precedent, we decline to consider arguments that a party raises for the first time on appeal.”).

Under 29 C.F.R. § 18.201, an ALJ may take official notice of adjudicative facts generally known within a local area or capable of accurate determination by sources whose accuracy cannot be reasonably questioned. The rule defines adjudicative facts subject to judicial notice as follows:

(b) Kinds of facts. An officially noticed fact must be one not subject to reasonable dispute in that it is either: (1) Generally known within the local area, (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, or (3) Derived from a not reasonably questioned scientific, medical or other technical process, technique, principle, or explanatory theory within the administrative agency's specialized field of knowledge.⁷²

We have previously held that documents may be judicially noticed to show, for example, that a proceeding occurred or that a document was filed in another court case, but an ALJ cannot take judicial notice of findings of fact from another case to support a contention before it.⁷³ Likewise, the Eighth Circuit has held that courts “should not use the doctrine of judicial notice to go outside the record unless the facts are matters of common knowledge or are capable of certain verification.”⁷⁴ Thus, ALJ Leslie correctly determined that she could not take judicial notice of the facts in *Wooten*, and we refuse to do so with respect to *Blackorby*.

Even if ALJ Leslie had chosen to take judicial notice of the existence of bonus policies in *Blackorby* or *Wooten*, those facts would have been irrelevant to the determination in Carter's case. Carter would have needed to present evidence that, between 2007 and 2012, BNSF had a bonus policy in place that encouraged *his* supervisors to retaliate against him for his 2007 injury report. The testimony in the record on this point from BNSF's witnesses specifically disputed this assertion and Carter did not present any evidence to establish that any bonus policy served as an incentive for the decision-makers in his case to terminate his employment.

Based on these findings, ALJ Leslie concluded that the weight of the evidence did not support Carter's assertion that BNSF targeted him for termination in 2012

⁷² 29 C.F.R. § 18.201(b).

⁷³ See, e.g., *Adm'r, Wage & Hour Div. v. Global Horizons Manpower, Inc.*, ARB No. 2009-0016, ALJ No. 2008-TAE-00003, slip op. at 14 (ARB Dec. 21, 2010).

⁷⁴ *Am. Prairie Constr. Co. v. Hoich*, 560 F.3d 780, 798 (8th Cir. 2009) (citing *Alvary v. United States*, 302 F.2d 790, 794 (2d Cir. 1962)).

based on his injury report made four years earlier. We hold that ALJ Leslie's conclusion is supported by substantial evidence.

2. BNSF Would Have Fired Carter Even If He Had Not Engaged in FRSA-Protected Activity

If a complainant meets his burden of proof to establish that his protected activity contributed to adverse employment action, an employer may avoid liability by proving by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.⁷⁵ As noted by the Eighth Circuit, "The critical inquiry in a pretext analysis is . . . whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge."⁷⁶

In Carter's case, the record supports ALJ Leslie's conclusion that BNSF proved by clear and convincing evidence that it would have fired Carter in the absence of his protected activity. We affirm this conclusion as well.

BNSF's employment application indicated that omissions or misrepresentations would be sufficient cause for dismissal.⁷⁷ As noted above, ALJ Leslie found that, while Carter's testimony regarding the reasons he completed his application as he did was credible, it did not "negate the fact that he did check off 'no' when asked if he had missed more than two days of work due to illness, injury, hospitalization or surgery, and when asked if he had any other surgeries, back injuries, or back pain."⁷⁸ The ALJ also found that Carter's omission of any reference to his naval career from his employment application was dishonest.⁷⁹

With respect to the time clock incident, ALJ Leslie found that BNSF had a "sincere belief" that Carter was dishonest in reporting his time on February 5, 2012. This determination is supported by substantial evidence in that there was video footage showing that Carter was late and his explanations of his actions on that day were inconsistent.⁸⁰

McNaul submitted the investigative hearing records and Sherrill's findings to Heenan, whose responsibilities included ensuring disciplinary consistency. After

⁷⁵ 29 C.F.R. § 1982.109(b).

⁷⁶ *BNSF Ry. Co. v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 867 F.3d at 947.

⁷⁷ D. O. R. at 8, 18; *see also* RX 1, 2, and 6A at RX000236.

⁷⁸ D. O. R. at 18.

⁷⁹ *Id.* at 19.

⁸⁰ *Id.*

reviewing the records, Heenan concluded substantial evidence supported Sherrill’s findings and recommended terminating Carter’s employment for dishonesty, a “stand-alone dismissible offense.”⁸¹ BNSF sent Carter dismissal letters dated April 5 and April 16, 2012, terminating his employment for dishonesty.⁸²

Substantial evidence supports ALJ Leslie’s conclusion that BNSF would have fired Carter even if he had not complained about his injury on August 30, 2007. ALJ Leslie concluded that both Heenan and Sherrill believed in good faith that Carter was guilty of dishonesty on his application and surrounding his untimely clocking-in on February 5, 2012, and that the notification of his injury or the FELA lawsuit played no part in their recommendations or the ultimate decision to terminate his employment.⁸³ These conclusions are supported by substantial evidence in the record.

3. The ALJs Did Not Abuse Their Discretion or Commit Errors of Law in Making Procedural and Evidentiary Rulings

The Board reviews an ALJ’s determinations on procedural issues and evidentiary rulings under an abuse of discretion standard.⁸⁴ We conclude that ALJ Leslie did not abuse her discretion, or commit errors of law, in the matters raised by Carter in this appeal and addressed below.

A. Denial of Carter’s Motion to Amend His Complaint Was Not an Abuse of Discretion

Carter filed his FRSA complaint with OSHA in 2012, identifying his protected conduct as his 2007 report of a workplace injury. On appeal, Carter argues that he should have been allowed to amend his complaint in 2019 to add his 2008 FELA claim as an additional protected activity and therefore additional grounds for retaliatory conduct, and to add a claim that BNSF interfered with his medical treatment in 2007. ALJ Whang denied Complainant’s motion to amend and, on remand, ALJ Leslie addressed whether the FELA claim provided sufficient notice of protected activity to relevant decision-makers.⁸⁵ We disagree with Complainant’s assertion of error and conclude that the motion to amend was properly denied.

⁸¹ *Id.* at 11-12.

⁸² *Id.* at 6.

⁸³ *Id.* at 16-19.

⁸⁴ *Jay v. Alcon Lab’ys, Inc.*, ARB No. 2008-0089, ALJ No. 2007-WPC-00002, slip op. at 4 (ARB Apr. 10, 2009) (denial of motion to amend complaint reviewed under abuse of discretion standard).

⁸⁵ D. O. R. at 17.

Carter filed his FELA claim nine months after his 2007 injury report.⁸⁶ The Eighth Circuit has already noted in this case that the FRSA may protect a notice of injury made in the course of FELA litigation, but it does not protect the FELA litigation itself.⁸⁷ To qualify as protected activity, Carter needed to prove that his FELA claim provided BNSF with “more specific notification” of his original injury report.⁸⁸ The record supports ALJ Leslie’s finding that Thompson knew about Carter’s 2007 injury on the day it occurred and learned nothing new about the injury from the FELA litigation that would qualify the litigation itself as an additional FRSA-protected activity.⁸⁹ We therefore agree with the conclusion that Carter’s FELA claim does not constitute a separate FRSA-protected activity.

Carter’s claim that BNSF interfered with his medical treatment in 2007 is barred by FRSA’s statute of limitations because he did not file his OSHA complaint until 2012.⁹⁰ As an amendment to add either the time barred claim or a claim based on his FELA litigation would be futile, it was not an abuse of discretion to deny Carter’s motion to amend.

B. ALJ Leslie Made Sufficient Credibility Determinations

Carter argues on appeal that ALJ Leslie erred by not considering the credibility determinations made by ALJ Chapman.⁹¹ The record does not support Carter’s position. We remanded this matter to allow the ALJ to make specific findings of fact as directed by the Eighth Circuit. ALJ Leslie adopted ALJ Chapman’s credibility determinations where appropriate while also making her own credibility determinations as instructed by the Board and the Eighth Circuit.

ALJ Leslie acknowledged that ALJ Chapman characterized some of BNSF’s arguments as “disingenuous,”⁹² and adopted the determination that Carter was a credible witness even though Carter’s testimony was inconsistent on crucial points. She also made her own specific credibility determinations. She described Heenan’s

⁸⁶ *Id.*; see also RX 28.

⁸⁷ *BNSF Ry. Co. v. U.S. Dep’t of Labor, Admin. Rev. Bd.*, 867 F.3d at 948 (citing *LeDure v. BNSF Ry. Co.*, ARB No. 2013-0044, ALJ No. 2012-FRS-00020 (ARB June 2, 2015)).

⁸⁸ *Id.*

⁸⁹ D. O. R. at 37, 40 n.21.

⁹⁰ *Id.* at 1.

⁹¹ Complainant’s Brief at 4, 16-18.

⁹² D. O. R. at 5.

testimony as informative, uncontested, and credible.⁹³ In contrast, she found that Mills, the only person Carter called to provide testimony that Carter was targeted for discharge, was not a credible witness.⁹⁴ Therefore, ALJ Leslie made sufficient and supported credibility determinations as required and did not abuse her discretion in so doing.

C. ALJ Leslie Did Not Err in Refusing to Draw an Adverse Inference Against BNSF for Not Calling Thompson as a Witness

Carter argues that ALJ Leslie erred as a matter of law by refusing to “find an adverse inference against BNSF for not calling” Thompson to testify.⁹⁵ He asserts that “ALJ Leslie should have recognized that not calling Thompson, (who next to Carter is the most probative witness in the trial of Carter’s Complaint), is circumstantial proof of an inference that the notification(s) of injury were contributing factors in Carter’s two dismissals.”⁹⁶ While the argument is creative, it is not supported by the law. The Eighth Circuit has held that “the inference rule ‘permits an adverse inference to be drawn; it does not create a conclusive presumption against the party failing to call the witness.’”⁹⁷ ALJ Leslie correctly held that there was nothing preventing Carter himself from calling Thompson.⁹⁸ More directly important, ALJ Leslie properly determined that establishing that protected activity was a contributing factor was Complainant’s burden to prove by a preponderance of the evidence, which he failed to do.⁹⁹

⁹³ *Id.*

⁹⁴ *Id.* at 16.

⁹⁵ *Id.* at 4.

⁹⁶ *Id.* at 12.

⁹⁷ *New World Commc’ns v. NLRB*, 232 F.3d 943, 946 (8th Cir. 2000) (citing *Rockingham Machine-Lunex v. NLRB*, 665 F.2d 303, 305 (8th Cir. 1981)).

⁹⁸ D. O. R. at 16 n.24.

⁹⁹ *Id.*

D. ALJ Leslie Did Not Harmfully Mischaracterize Heenan's Role in Carter's Discharge

In concluding that BNSF would have fired Carter in the absence of his protected activity, ALJ Leslie emphasized the role Heenan played in Carter's discharge:

I find persuasive Mr. Heenan's testimony on this point as it establishes, with reasonable certainty, that he fired Mr. Carter for reasons other than FRSA protected activity, his injury. He did not know of the injury or FELA lawsuit nor was his motive in firing Mr. Carter in any way related to his FRSA protected activity. He fired Mr. Carter after looking at all the evidence presented to him, including dishonesty on his application and in clocking in. Mr. Heenan also noted other employees who were fired because of being dishonest on their application, similar to Mr. Carter. As I stated above, I find his testimony to be credible as it is consistent with the other testimony and evidence submitted, including Respondent's PEPA policy.¹⁰⁰

Carter argues that ALJ Leslie erred by ruling that Heenan, and not Sherrill, discharged him.¹⁰¹ But even if it is erroneous to state that Heenan "fired" Carter, such mistake does not change the essential facts that led to Carter's discharge. Although he did not sign the discharge letters, Heenan was the person ultimately responsible for reviewing Sherrill's recommended action in light of the investigation files and making a recommendation of dismissal in accordance with the dictates of the PEPA policy. Therefore, while references to Heenan's "firing" Carter may more accurately have been stated as "making the final recommendation for firing Carter," any statement in ALJ Leslie's decision that describes Heenan as the person who "fired" Carter does not constitute reversible error.

¹⁰⁰ *Id.* at 19.

¹⁰¹ Complainant's Brief at 9-10.

CONCLUSION

For the reasons stated above, we **AFFIRM** ALJ Leslie's conclusion that BNSF did not violate the FRSA by terminating Carter's employment. Accordingly, Carter's complaint is **DENIED**.

SO ORDERED.¹⁰²



SUSAN HARTHILL
Chief Administrative Appeals Judge



THOMAS H. BURRELL
Administrative Appeals Judge



TAMMY L. PUST
Administrative Appeals Judge

¹⁰² In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor, and not the Administrative Review Board.