U.S. Department of Labor

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

In the Matter of:

JOHNNY S. PEREZ **ARB CASE NOS. 2017-0014**
2017-0040

COMPLAINANT, **ALJ CASE NO. 2014-FRS-00043**

v. **DATE: September 24, 2020**

BNSF RAILWAY COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Daniel J. Cohen, Esq.; *Law Offices of Daniel J. Cohen*; St. Louis, Missouri

For the Respondent:
Jacqueline M. Holmes, Esq.; Nikki L. McArthur, Esq.; *Jones Day*; Washington, District of Columbia

For the Solicitor of Labor, Amicus Curiae:
Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; Sarah K Marcus, Esq.; Megan E. Guenther, Esq.; Susannah M. Maltz, Esq.; *U.S. Department of Labor*; Washington, District of Columbia

BEFORE: James A. Haynes, Thomas H. Burrell, and Heather C. Leslie, *Administrative Appeals Judges*; Judge Burrell, concurring

DECISION AND ORDER OF REMAND

PER CURIAM. Complainant Johnny S. Perez filed a complaint under the employee protection provision of the Federal Rail Safety Act of 1982 (FRSA), as amended,[1] with the Department of Labor's Occupational Safety and Health Administration (OSHA). Perez alleged that BNSF (Respondent), his employer, retaliated against him for reporting a workplace injury and for requesting medical treatment for a work-related injury. OSHA found that there was no reasonable cause to find that BNSF violated the FRSA. Perez timely objected and requested a hearing before the Office of Administrative Law Judges (OALJ). The ALJ found that Perez established that he engaged in protected activity, that there was an adverse employment action, and that the protected activity was causally related to the adverse employment action. In addition, the ALJ found that BNSF did not establish by clear and convincing evidence that it would have disciplined Perez even if he had not engaged in protected activity. Thus, the ALJ awarded compensatory and punitive damages. Subsequently, the ALJ issued a Supplemental Order Awarding Fees and Costs and Staying Effect of Order Pending Appeal. BNSF appealed the ALJ's decision (ARB No. 2017-0014) and the order of an attorney's fee (ARB No. 2017-0040). For the following reasons, we consolidate and vacate the ALJ's decisions and remand for further findings consistent with this opinion.

BACKGROUND

Complainant Perez was employed as a machinist at BNSF's Murray Yard in North Kansas City, Missouri, and had worked for Respondent since March 10, 1993. Perez testified that he was injured on August 12, 2010, while trying to prevent a door from falling off a train and onto another BNSF employee. After he unsuccessfully tried to walk off his injury, he reported the injury to his supervisor about an hour later. Complainant was seen by Dr. Ryan at the North Kansas City Occupational Clinic as instructed by Natalie Jones, a BNSF Nurse Case Manager.

Perez testified that when he returned to work from the clinic, he completed a personal injury report form which identified his injury as a "strained ham-string." Complainant asked to go home because he was in pain, but his supervisor required him to participate in a physical reenactment of the incident that led to the injury. The next day, August 13, Complainant testified that he told Dr. Ryan that he had

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[1] 49 U.S.C. § 20109 (2008), as implemented at 29 C.F.R. Part 1982 (2019) and 29 C.F.R. Part 18, Subpart A (2019).

back pain and that he remembered a hard pull to his lower back when the door pulled him over. He attempted to tell Dr. Ryan about back pain three more times during the course of treatment but Dr. Ryan repeatedly told him to give it a little time and that he did not need a specialist or an MRI. Perez testified that he believed that he was reporting his back condition to a company doctor and thus that he had reported it to BNSF. He did not inform a regular BNSF employee of his back injury until September 17, 2012.

Perez was released for full duty on September 20, 2010, and spoke to Nurse Jones by phone at the clinic. He requested further physical therapy, but the physical therapy was not scheduled. Perez testified that he spoke with Claims Manager Randy Nystul regarding the August 2010 incident and his injury, and that it was his understanding that Nystul encouraged him to put off filing a claim and informed Perez he would give him a call later.

After he was released for full duty, Perez sought treatment for his leg and back injuries from his primary care physician and orthopedic specialist. He did not apprise BNSF of this treatment until September 17, 2012. On that day he sought a medical release from BNSF for back surgery which was scheduled for the next day. Perez and his union representative, Kenneth Krause, met with Foreman John Reppond who asked whether Perez had talked to anybody about the back problem. Perez stated that he had tried to tell the company doctor but that the doctor did not listen or take him seriously. Reppond informed Perez that Dr. Ryan was not a company doctor and asked whether he had called a claims agent. He informed Reppond that he had talked to Nystul, who said that he would be in touch later. Reppond contacted Nystul who reported a conflicting version of events. There was a dispute as to how Perez characterized his conversation with Nystul so Reppond consulted the shop superintendent Dennis Bossolono about the discrepancy. Bossolono advised Reppond to conduct an investigation regarding the two opinions about what was said regarding filing an injury report for the back injury.

Perez received a Notice of Investigation on October 9, 2012, stating that an investigation was scheduled in connection with an allegation of late reporting a back injury and an allegation of dishonesty based on his allegation that a claims manager refused to take his statement. A dishonesty violation can result in dismissal and a late reporting violation is considered a Level S violation, for which the standard discipline is a thirty-day suspension. After the hearing, the Conducting Officer, Mark Stockman, found the charges proven and recommended Perez's dismissal. The manager in charge of the discipline policy for all scheduled employees at BNSF, Derek Cargill, reviewed the transcript and exhibits from the

investigation and concluded that there was insufficient evidence to prove the dishonesty charge and that there were mitigating factors regarding the late reporting. Thus, he recommended no discipline be issued. Bossolono, the ultimate decision maker, agreed. Perez returned to work on April 4, 2013, and lost no pay or seniority or benefits.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB or Board) to issue agency decisions under the FRSA.[2] The Board reviews the ALJ's factual determinations under the substantial evidence standard.[3] The Board reviews an ALJ's conclusions of law de novo.[4]

DISCUSSION

1. Respondent's Challenge to the ALJ's Appointment

Respondent argues that it is entitled to a new hearing before a different ALJ under the United States Supreme Court's decision in *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), because the ALJ was not properly appointed under the Appointments Clause of the U.S. Constitution.[5] Respondent asserts that it did not waive the challenge and that its challenge was timely under *Lucia* as promptly filed once the Supreme Court's decision issued.[6]

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[2] 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); *see* 29 C.F.R. § 1982.110(a).

[3] 29 C.F.R. § 1982.110(b).

[4] *Hamilton v. CSX Transp., Inc.*, ARB No. 2012-0022, ALJ No. 2010-FRS-00025, slip op. at 2 (ARB Apr. 30, 2013) (citations omitted).

[5] U.S. Const. Art. II, § 2, cl. 2. Which provides that Congress may vest the appointment of inferior officers in the President, "Courts of Law," or "Heads of Departments."

[6] The Board accepted Respondent's supplemental brief addressing the *Lucia* issue on April 16, 2020, and requested the Solicitor of Labor to file an amicus brief on the issue. The Board also allowed Complainant to file a response brief and Respondent to reply. The Solicitor submitted a brief in May 2020 and Complainant submitted a brief in June 2020. Respondent submitted a reply brief on June 15, 2020.

Perez and the Solicitor of Labor, as *amicus*, argue that Respondent waived its right to make an Appointments challenge. Ordinary principles of forfeiture and waiver apply to Appointments challenges.[7] We agree with Solicitor's contention that all of the information needed to challenge the Department of Labor's ALJ appointments was available prior to the issuance of the ALJ's decision in this case. First, we note that the Appointments Clause issue was raised by the Supreme Court in *Freytag v. Comm'r of Internal Rev.* in 1991, seventeen years prior to the issue being raised again in *Lucia*.[8] Second, it is clear that Respondent had inquiry notice as early as December 2017 when the Secretary of Labor "ratified" the appointment of its administrative law judges. Yet, BNSF did not file a motion for supplemental briefing until almost a year later. Thus, we hold that the challenge was not raised in a timely manner as it was not raised before the ALJ, in the petition for review, or in the initial brief before the ARB. Accordingly, we hold that the issue is forfeited and proceed to address the appeal on the merits.[9]

2. Essential Elements of Perez's Claims

FRSA complaints are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[10] To prevail on an FRSA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity that was a contributing factor in an unfavorable personnel action taken against him.[11] 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.

A. Protected Activity

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[7] *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018); *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009).

[8] 501 U.S. 868 (1991).

[9] *See Riddell v. CSX Transp., Inc.*, ARB No. 2019-0016, ALJ No. 2014-FRS-00054 (ARB May 19, 2020).

[10] 49 U.S.C. § 20109; *see* 49 U.S.C. § 42121(b) (2000).

[11] 49 U.S.C. § 42121(b)(2)(B)(iii).

Section 20109(a)(4) provides that a railroad carrier may not discipline an employee who notifies the railroad of a work-related personal injury or work-related illness.[12] The ALJ found that Perez genuinely believed that his back injury was work-related at the time he reported it and that BNSF did not submit any evidence to contradict Perez's testimony that the back injury was work-related. The ALJ also found that Perez was following medical orders and/or the treatment plan of his treating physician when he requested medical leave in anticipation of surgery for his work-related back injury. The ALJ considered BNSF's objections in his decision and concluded that Perez's testimony was credible and consistent with the evidence. Moreover, the ALJ noted that there was no contradictory evidence submitted by Respondent. Thus, the ALJ concluded that Perez reported his back injury in good faith. We affirm the ALJ's finding that Perez established protected activity as it is reasonable exercise of his discretion and Respondent has raised no reversible error on appeal.

B. Adverse Employment Action

Under the FRSA, an employer "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee" because that employee engaged in activity protected by the Act.[13] The regulations further explain that under the FRSA at 29 C.F.R. §§ 1982.102(b)(1) and (2)(i), an employer may/shall "not discharge, demote, suspend, reprimand, or in any other way retaliate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining" an employee because they engage in FRSA protected activity.

BNSF contends that the ALJ erred in finding that the Complainant was subjected to an adverse employment action. In considering whether an action is adverse, the Board has referenced the United States Supreme Court's decision in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), a case decided under Title VII of the Civil Rights Act of 1964. In describing the injury or harm alleged as retaliation, the Court held that: "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[14] Moreover, the Court held that the

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12 49 U.S.C. § 20109(a)(4).

13 49 U.S.C. § 20109(a).

14 *Burlington Northern*, 548 U.S. at 68.

significance of any given act of retaliation will often depend upon the particular circumstances and context.[15] Any alleged adverse action must be considered in context, including internal investigations and hearings which may result in the imposition of discipline.[16]

It is undisputed that Complainant's employment was not terminated, and he did not suffer a loss of position, wages or seniority. However, Complainant contended before the ALJ that the actions including the disciplinary charge letter, the investigative hearing and the no-discipline letter were adverse actions. The ALJ rejected Respondent's contention that an investigation that does not result in discipline is not adverse action and found that the Board's decision in *Vernace* was binding precedent.[17]

In *Vernace*, the Board held that an investigation extending over a year was an intimidating and threatening action constituting prohibited retaliation under the FRSA, relying in part on the decision in *Williams v. Am. Airlines*, ARB No. 2009-0018, 2007-AIR-00004 (ARB Dec. 29, 2010), which arose under AIR 21.[18] To the extent that *Vernace* stands for the position that all investigations are adverse actions, we overturn it. As discussed previously, the analysis of whether an action is adverse must be contextual and include a discussion of the circumstances in each case. "[B]ringing a disciplinary charge alone, in and of itself, does not automatically constitute an adverse action, although it can constitute one if such action 'would dissuade a reasonable employee' from engaging in the protected conduct."[19]

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[15] *Id.* at 69.

[16] *See Thorstenson v. BNSF Ry. Co.*, ARB Nos. 2018-0059, -0060, ALJ No. 2015-FRS-00052, slip op. at 10 (ARB Nov. 25, 2019) (any alleged adverse action must be considered in context, including internal investigations and hearings which may result in the imposition of discipline).

[17] *Vernace v. Port Auth. Trans-Hudson Corp.*, ARB No. 2012-003, ALJ No. 2010-FRS-00018, slip op. at 2 (ARB Dec. 21, 2012).

[18] In *Williams*, the Board held that "we believe that a written warning or counseling session is presumptively adverse where: (a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline." *Williams v. Am. Airlines, Inc.* ARB No. 2009-0018, ALJ No. 2007-AIR-00004, slip op. at 6 (ARB Dec. 29, 2010).

[19] *Petronio v. Nat'l R.R. Pas. Corp.*, 2019 WL 4857579 (SDNY 2019); *Thorstenson*, ARB Nos. 2018-0059, -0060.

As BSNF correctly contends, a notice of investigation and/or an investigation hearing are not specifically identified as discrimination with the meaning of Section 20109(a) or its implementing regulations. Following *Vernace* and the reasoning identified in *Williams*, ARB 2009-0018, the ALJ found that BNSF's Notice of Investigation was an adverse action because it was a threat of discipline.[20] We conclude that "threat" in the FRSA's implementing regulations must be read together with the regulatory terms it accompanies, which include "intimidate," "coerce," and "blacklist."[21] In context, "threaten" is not construed synonymously with a simple "investigation" even though both actions might precede a greater action, a discipline. We distinguish a simple fact-finding investigation from the regulatory prohibitions including threatening, coercive acts.

The question whether an investigation is an adverse action is all the more problematic in cases where the employer is following the negotiated procedures mandated by a CBA.[22] In *Brisbois*, the Court reasoned:

> True, any investigation of a suspected rule violation carries an implicit threat that, if the employee is found to have violated the rule, she might be disciplined. But that is a far cry from the rail carrier explicitly warning an employee that, if she engages in protected activity, the rail carrier will, in fact, take action against her.
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> To hold that a rail worker suffers an adverse employment action any time a rail carrier attempts to determine whether she has violated a rule—typically by following an investigatory process mandated under a CBA—would have major implications for labor relations in the rail industry. In the absence of persuasive authority

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[20] D. & O. at 18-19.

[21] FRSA's implementing regulations provide that an employer may "not discharge, demote, suspend, reprimand, or in any other way retaliate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining, an employee [for engaging in protected activity]." 29 C.F.R. § 1982.102(b)(1). Terms in a statute or regulation should be interpreted in context and with associated words to avoid giving unnecessary breadth to a word in a series. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995).

[22] D. & O. at 8; Tr. 190-92 (testimony as to CBA's requirements), 208-10 (employer must hold investigation before discipline, once employer has "first knowledge" of a potential rule violation).

> suggesting that an employee who has not been disciplined can nevertheless recover for retaliation under the FRSA because she was accused of violating a workplace rule, the Court is unwilling to stretch the FRSA so far.[23]

Conversely, we do not say that an investigation cannot itself be an adverse action. An investigation could be found to be an adverse action if, for example, it is retaliatory, a pretext, performed in bad faith, or otherwise constitutes harassment. An investigation might accompany other material consequences that affect the employee's terms, conditions, and privileges of employment or otherwise dissuade a reasonable employee from engaging in protected activity.[24]

In his adverse action findings, the ALJ also identified the *White* test of "dissuade a reasonable person" and found that Perez suffered "stress and anxiety" as a result of the investigation and the possibility that he may lose his job.[25] However, it is not clear from the ALJ findings what BNSF did to generate those consequences and how those consequences are adverse actions under the FRSA as we have outlined above. Furthermore, that an employee fears that he or she may lose their job is not necessarily an adverse action for the same reasons that an employer is permitted to investigate possible rule violations. Perez and the ALJ also identified a distinction between "no discipline" and "innocence," and note that Perez's record still retains documents discussing the event. In finding this evidence supporting an adverse action, the ALJ failed to explain what the significance of the distinction between "innocence" and "no discipline" means for purposes of Perez's personnel record.[26] Furthermore, an employer may be required to retain some records concerning the events that underpin an allegation, investigation, and finding.[27]

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[23] *Brisbois v. Soo Line R.R. Co.*, 124 F. Supp. 3d 891, 903 (D. Minn. 2015).

[24] *Renzi v. Union Pacific R.R. Co.*, 2018 WL 3970149, at *4-5 (N.D. Ill. Aug. 20, 2018) (citing *Vernace* for the point that investigations can constitute adverse actions but that "context matters" when making this assessment).

[25] D. & O. at 19-20.

[26] D. & O. at 20; Tr. 253.

[27] *Brough v. BNSF Ry. Co.*, ARB 2016-0089, ALJ No. 2014-FRS-00103 (ARB June 12, 2019) (identifying tension between ALJ's order to expunge a personnel record and employer's need to retain records).

On remand, we direct the ALJ to apply these principles to evaluate whether the investigation in this case was a bad faith investigation that constituted a form of harassment or whether it was a routine investigation, in good faith, to determine if a violation of BNSF's policies occurred.

C. Contributing Factor

On appeal, Respondent also contends that the ALJ erred in finding that Perez established that the injury report was a contributing factor to the employer's decision to investigate. We note that the ALJ incorrectly relied upon the rule of "inextricably intertwined" to establish a causal relationship between protected activity and the adverse action. This proposition has been overturned by the Board's decision in *Thorstensen*, which held that "[b]y placing the focus on how the employer came to learn of the employee's wrongdoing rather than the employer's actions based on that wrongdoing or protected activity, 'chain of events' causation departs from the statute's 'contributing factor' text."[28] Specifically, the Board held that an ALJ must explain how the protected activity is a proximate cause of the adverse action, not merely an initiating event.[29] Thus, we vacate the ALJ's finding that Perez established that the protected activity was a contributing factor to any alleged adverse action and remand for further findings and conclusions of law consistent with *Thorstenson* and without the "inextricably intertwined" analysis.

D. Damages and Attorney's Fees

Given our disposition of remand to the ALJ for further findings, we also vacate the award of damages and award of attorney's fees and instruct the ALJ on remand to reconsider these awards given the findings on remand.[30]

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[28] *Thorstenson*, ARB Nos. 2018-0059, -0060, slip op. at 7.

[29] *Id*.

[30] Moreover, we note that the ALJ's findings regarding the imposition of punitive damages should be related to the facts of this case. *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419-21 (2003).

CONCLUSION

We **AFFIRM** the ALJ's protected activity findings. The ALJ's finding that Perez has established that he suffered an adverse employment action and that his protected activity was a contributing factor to that action is **VACATED** and the case is **REMANDED** to the ALJ for further findings consistent with this opinion. The ALJ's award of damages and the order awarding an attorney's fee is **VACATED** and the ALJ is instructed to reconsider these awards if reached.

SO ORDERED.

Thomas H. Burrell, Administrative Appeals Judge, concurring

I agree with the majority's holding that the ALJ's protected activity findings are supported by substantial evidence. In line with the ARB's position in *Thorstenson v. BNSF Ry. Co.*,[31] I agree with the majority's remand of the ALJ's adverse action findings and legal conclusions. Not every act that upsets an employee constitutes an adverse action prohibited by the FRSA.[32]

I further agree with the majority that the ALJ's reliance on inextricably intertwined as a basis for finding discriminatory animus on the part of BNSF was error.[33] Under that rule, an employer's imposition of an adverse action for reasons discovered in a chain of events stemming from a protected act is inextricably intertwined with the protected event. But for the protected event of filing the injury report, BNSF would not have investigated the employee and discovered the alleged wrongdoing of late reporting and dishonesty.

In *Thorstenson*, we overturned these precedents in favor of the rule of proximate causation. The fact that a protected report initiated a suspicion of late reporting and subsequently yielded a perception of dishonesty does not preclude the employer from disciplining an employee for late reporting and or dishonesty connected with filing the report. The initiating event of filing a protected report of an injury does not insulate an employee from discipline. If the employer decides to

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[31] ARB Nos. 2018-0059, -0060, ALJ No. 2015-FRS-00052, slip op. at 10 (ARB Nov. 25, 2019).

[32] *Burlington Northern*, 548 U.S. at 68 ("petty slights [and] minor annoyances" would not deter reasonable employee from making charge of discrimination).

[33] D. & O. at 23-25, 30.

discipline the employee, the fact-finder may find that the proximate cause for that discipline is the late reporting and not the filing of the protected report.[34]

I write separately to identify additional problems with the ALJ's contributing factor and pretext analyses.

A. Perez's Alleged Late Reporting and Dishonesty

Before tackling the crux of the ALJ's causation findings, I observe that the ALJ merged both the report of injury and the request for medical leave as causes for the Notice of Investigation (NOI).[35] However, the record demonstrates that the NOI was specifically connected to late reporting and dishonesty, not Perez's request for medical leave. It was issued "for the purpose of ascertaining the facts and determining [Perez's] responsibility, if any, in connection with [his] alleged late reporting of an alleged back injury that [he] stated occurred on August 12, 2010, and [his] alleged dishonesty when [he] alleged that a BNSF Claims Manager refused to take [his] statement."[36] BNSF's assertion that it granted Perez several months off for the surgery is not disputed.[37] The ALJ's analysis focuses on the late reporting and allegation of dishonesty but sweeps up the request for medical leave as a tag-along contributing factor in its final conclusion without any analysis specific to the request for medical leave.[38]

B. The ALJ's Findings on Pretext for Whistleblower Retaliation

The ALJ did not limit his causal connection to the rule of inextricable intertwinement. In his contributing factor findings and conclusions, the ALJ found that BNSF's NOI was pretext.[39]

For several reasons, I would find that the ALJ's pretext findings are not supported by substantial evidence. The critical inquiry in pretext analysis "is not whether the employee actually engaged in the conduct for which he was terminated

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34 *Thorstenson*, ARB Nos. 2018-0059, -0060.

35 D. & O. at 19, 30.

36 JX-3.

37 BNSF Br. at 3, 19.

38 D. & O. at 30.

39 *Id.* at 25-30.

but whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge."[40] Pretext involves more than just faulty reasoning or mistaken judgment on the part of the employer; it is a "lie, specifically a phony reason for some action."[41] Thus, in assessing a plaintiff's claim that an employer's explanation is pretextual, we do not second guess an employer's facially legitimate business decisions.[42] Rather, we ask only whether the employer's explanation was "honestly believed." "An employer's explanation can be 'foolish or trivial or even baseless' so long as it 'honestly believed' the proffered reasons for the adverse employment action."[43] The question for the ALJ is whether the NOI was so out of place that it constitutes a phony reason serving as circumstantial evidence of pretext for whistleblower retaliation.

The crux of the ALJ's pretext analysis is his finding that a pre-hearing investigation was BNSF's policy and would have been more appropriate for Perez. The ALJ leaps from observing that Perez's account of his failure to report the injury was "seemingly reasonable" to the conclusion that BNSF's decision not to conduct a pre-hearing investigation constitutes pretext:

> [A]t the time he initiated the investigation, Reppond was aware of Perez's (seemingly reasonable) mindset that he reported the back injury timely. Yet Reppond made no attempt to contact Dr. Ryan or Nurse Jones to confirm Perez's story and he initiated the investigation anyway. Reppond's decision to initiate the investigation under these circumstances indicates that a potential violation of the late reporting rule was not the real purpose of the disciplinary investigation.[44]

The ALJ's finding that it is was BNSF's policy to conduct a pre-hearing investigation is undermined by the testimony of others, which the ALJ failed to account for. Despite several findings on Reppond's animus and lack of credibility, the ALJ credited Reppond's testimony that *Reppond* normally conducts witness interviews before issuing a NOI. The ALJ did not discuss evidence that challenge's

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40 *McCullough v. Univ. of Ark. for Med. Scis.*, 559 F.3d 855, 861–62 (8th Cir. 2009).

41 *Sublett v. John Wiley & Sons, Inc.*, 463 F.3d 731, 737 (7th Cir. 2006) (citation omitted).

42 *Culver v. Gorman & Co.*, 416 F.3d 540, 547 (7th Cir. 2005).

43 *Id.* at 547

44 D. & O. at 26.

Reppond's account or its relevance.[45] Reppond was not the investigator in this case. The ALJ fails to account for the fact that Stockman was the conducting officer and Shop Superintendent Dennis Bossolono was the supervisor who decided that BNSF should issue the NOI on Reppond's recommendation.[46] As BNSF argues in its brief, Stockman testified that he only speaks with witnesses or the supervisor before scheduling an NOI if he feels that he needs more information:

> Q. Under the protocol and policy in place, the standard operating practice in place at the time of these events in . . . September, October of 2012, it was within your prerogative as the conducting officer to reach out to Mr. Krause and say the union has indicated they're reserving the right to call you as a witness, what do you know about any of this. You could've done that, couldn't you?
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> A. No. Why would I have done that? . . . He was going to be present. Everything I had up to that point said he was going to be present at the investigation. I would do it on the record.
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> Q. …[I]f I represent to you that Mr. Reppond indicated it's standard operating practice for the conducting officer to conduct a prehearing interview with anyone who's expected to testify at the disciplinary hearing, that's not a practice, a standard operating practice you're aware of and you did not follow that in regard to Mr. Perez's hearing?
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> A. If more information is needed or required, if I reviewed the folder and I said, wait a minute, there's a piece missing here, I would've gone back as the hearing officer to the supervisor who led the investigation, who was Mr. Reppond. . . . So I would've gone to him and said, hey, look, there's more data that needs to be gathered here. What about this? What about that? But at that point, I didn't see the need to based on the review of the folder. I reviewed the information that was in there and then said, okay, here's all the parties involved, let's start working on scheduling, let's get the notice out, and then we'll get all parties together. At that point, I had no determination what was fact or fiction, who was right or wrong, anything of that nature. It was

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

[46] D. & O. at 8; Tr. 405-06, 408, 410. Bossolono received Reppond's recommendation and account of Perez's statement and recollection and Nystul's statement and recollection.

> bringing both sides together, putting the information together, determining what the facts are at that point.[47]

Director of Employee Performance Derek Cargill testified that while nothing prevents a supervisor from pre-hearing questioning, a supervisor was to schedule a hearing once he or she had "first knowledge" of a potential rule violation.[48]

Further, it may be overreaching by the ALJ to say that no pre-hearing investigation took place. Upon hearing Perez's statement and the dialogue between Perez and Nystul, Reppond asked Nystul for his side of the story. The ALJ wrote: "Reppond testified that he was surprised by Perez's comment that Nystul refused to take his statement, and after his meeting with Perez, he contacted Nystul, who informed him that he had not had any conversation with Perez and he had no recollection of ever talking to Perez."[49] General Foreman Stockman, too, contacted Nystul before the hearing but after issuing the NOI.[50]

Even if the pre-hearing investigation were BNSF policy and BNSF did not follow that policy, it is a leap to transform BNSF's failure into a pretext for whistleblower retaliation. The ARB has stated on many occasions that the ALJ should not sit as a super-personnel advocate when viewing the employer's decisions for an adverse action. "[I]t is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible . . . [rather] he must show that the explanation is a 'phony reason.'"[51] The FRSA is not a wrongful termination statute. An employer's actions can be harsh, faulty, and unjustified, but this does not establish that the employer retaliated for FRSA whistleblowing activity. The FRSA "does not forbid sloppy, mistaken, or unfair terminations; it forbids discriminatory or retaliatory terminations."[52]

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47 Tr. 342-43; *see also* BNSF Br. at 15.

48 Tr. 208-10.

49 D. & O. at 7; Tr. 405.

50 Tr. 345.

51 *Clem v. Comp. Sci. Corp.*, ARB 2016-0096, ALJ Nos. 2015-ERA-00003, -00004 (ARB Sept. 17, 2019); *Gale v. Ocean Imaging*, ARB No. 1998-0143, ALJ No. 1997-ERA-00038, slip op. at 13 (ARB July 31, 2002).

52 *Collins v. Am. Red Cross*, 715 F.3d 994, 999 (7th Cir. 2013).

The ALJ's analysis appears to be subject to this criticism. The ALJ wrote: "[m]y determinations, set forth below, that the company's disciplinary process was not used perfectly and that Stockman should have conducted pre-investigation fact-checking and should have taken a more active role as the hearing officer…."[53] As the testimony supports, Stockman could have conducted a pre-hearing inquiry but was not required to. BNSF's failure to follow up with Dr. Ryan and Nurse Jones before the hearing, if they were available, could have been short-sighted on BNSF's part, but that shortcoming is not evidence of pretext for retaliation.[54]

In evaluating BNSF's decision to issue the NOI, the ALJ's analysis failed to grapple with BNSF's honest belief that an investigation was warranted.[55] "[P]retext is not established merely because the company was mistaken in its belief, if honestly held. Whether [employer's] conclusion was correct is irrelevant; if [employer's] belief that [Complainant] violated company policy motivated its discharge decision, then it was not a pretext, and [Complainant] cannot meet his evidentiary burden."[56] Reppond, Bossolono, and Stockman received what appeared to be a suspicious, two-year-old report of an injury as well as an account of potential dishonesty based on Reppond's account of what Perez and Nystul said happened in August 2010.[57] According to BNSF, Perez violated BNSF's policy even if he did inform Ryan of his back injury for failing to timely inform his supervisor of the injury.[58] Further, the fact that the CBA mandates the investigation in cases where discipline is a possibility greatly reduces the availability of a fact-finder to find that the NOI was a tool of retaliation for whistleblowing. As noted above, Cargill

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53 D. & O. at 14.

54 Reppond testified that he was not able to contact Nurse Jones because she was no longer employed by BNSF. Tr. 421. Reppond did not contact Dr. Ryan's office. Tr. 423-24.

55 *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 598–99 (6th Cir. 2007) (an employer with an honest belief in its disciplinary decisions, even when ultimately mistaken, is entitled to summary judgment when its belief is based on particularized facts). A significant component of the tension is that the investigation itself is being analyzed as the adverse action and not the discipline arising out of that investigation.

56 *Swenson v. Schwan's Consumer Brands N. Am., Inc.*, 500 Fed. Appx. 343, 346 (5th Cir. 2012).

57 D. & O. at 8, 24; Tr. 430, 432.

58 BNSF Br. at 13 & n. 4; Tr. 128 (Perez's testimony that he did not mention the back injury); *see also* D. & O. at 26.

testified that a supervisor was under time constraints to schedule a hearing once he or she had knowledge of a potential rule violation.[59]

The ALJ's finding that the NOI was pretext for retaliation for filing the injury report identifies credibility problems with Reppond's account of Perez-Nystul communications and recollections.[60] The inconsistency between the two accounts of "don't call me, I'll call you" and "refused to take his statement" is not a wide cavern. As the ALJ recognized, this lack of strong inconsistency is problematic to sustain a charge of discipline. Nonetheless, the Respondent's weakness does not demonstrate pretext for retaliation. Establishing that an employer's reasons for an adverse action were based on an erroneous interpretation of an employee's actions or on facts that are reasonably disputed does not prove that the employer's asserted reasons are pretextual.[61] BNSF ultimately agreed with Perez's account when it concluded that discipline was not warranted based in part on Nystul's weak testimony.[62]

C. The ALJ's Temporal Proximity Findings

The ALJ also found close temporal proximity between the September 2012 injury report and request for medical leave and BNSF's issuance of the NOI on October 9, 2012.[63] The mere circumstance that protected activity precedes an adverse personnel action is not proof of a causal connection between the two.[64] "Timing may be an important clue to causation, but does not eliminate the need to

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59 Tr. 208-09 (employer must hold hearing before discipline, once employer has "first knowledge" of a potential rule violation). The hearing must take place within thirty days of receiving "factual knowledge" if the employee has not been suspended. JX or RX 7, appx at I (CBA Rule 40); Tr. 190-91 (testimony as to CBA's requirements).

60 D. & O. at 27.

61 *Jackson v. Lakewinds Nat. Foods*, No. 08-398, 2009 WL 2255286, at *4 (D. Minn. July 28, 2008).

62 The ALJ erred in crediting the findings and conclusions of another case involving Reppond for a showing of Reppond's animus in this case. D. & O. at 28.

63 D. & O. at 25, 30.

64 *Acosta v. Union Pacific R.R. Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082 (ARB Jan. 22, 2020).

show causation."[65] The insufficiency of temporal proximity as a basis for proving causation is even more apparent when the facts reveal an intervening event occurring between the protected activity and the adverse personnel action.[66] The ALJ's temporal proximity discussion is undermined by the intervening events of alleged late reporting and dishonesty.

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[65] *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1179 (7th Cir. 1998)); *Huss v. Gayden*, 571 F.3d 442, 459 (5th Cir. 2009) (noting "the post hoc ergo propter hoc fallacy assumes causality from temporal sequence"); *Huskey v. City of San Jose*, 204 F.3d 893, 899 (9th Cir. 2000) (same).

[66] *Acosta*, ARB No. 2018-0020, slip op. at 8-9.