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Issue Date: 29 April 2021Case No.: 2013-FRS-00082

OWCP Case No.: 7-5880-12-069

In the Matter of:

CLYDE O. CARTER, JR.,
Complainant,

v.

BNSF RAILWAY CO.,
Respondent.

Before: HEATHER LESLIE
Administrative Law Judge

DECISION AND ORDER ON REMAND

This matter arises under the employee protection provisions of the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53. This provision prohibits railroad carriers engaged in interstate commerce from discharging or otherwise discriminating against any employee for providing information regarding any conduct that the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or reporting in good faith a hazardous safety or security condition. 49 U.S.C. § 20109(a)(1), (b)(1)(A).

PROCEDURAL BACKGROUND

The Complainant, Mr. Clyde Carter, timely filed a complaint with the Secretary of Labor on June 26, 2012, alleging that Burlington Northern Santa Fe Railway Company, the Respondent, suspended and terminated his employment in violation of the FRSA. Following an investigation, the United States Department of Labor's Occupational Safety and Health Administration ("OSHA") found that Mr. Carter engaged in protected activity on August 30, 2007 when he reported a work-related personal injury; that the Respondent did not dispute that it had direct knowledge of that protected activity; and that Mr. Carter suffered adverse actions when he was terminated. OSHA determined that the Respondent provided clear and convincing evidence that it would have taken the same adverse actions in the absence of Mr. Carter's protected activity. The Complainant timely appealed OSHA's findings to the Office of Administrative Law Judges ("OALJ"). A formal hearing took place on January 7 through 9, 2014, in Kansas City, Missouri. Complainant's Exhibits (CX) 1 through 3, 5, and 7 through 10; Respondent's Exhibits (RX) 1 through 3; 6 through 23, 25, 26 through 29, and 31 through 33; and Administrative Law Judge

Exhibits (ALJX) 1 through 3 were admitted into the record. On July 30, 2014, a Decision and Order ("DO") was issued, concluding that Mr. Carter established that the Respondent, retaliated against him for reporting of a workplace injury, in violation of the FRSA. Damages were subsequently awarded in a separate order.

The Order was appealed to the Administrative Review Board ("ARB") which affirmed the Order. Respondent appealed to the United States Court of Appeals, Eighth Circuit. That court remanded the case back to the ARB on August 14, 2017 finding that the Administrative Law Judge ("ALJ") had erred in analyzing Mr. Carter's case. In the June 21, 2018 ARB Remand order, the ARB summarized the Eight Circuit's concern, stating:

> The court determined that the ALJ ascribed to a "flawed chain-of-events causation theory," "erred in interpreting and applying the FRSA, and failed to make findings of fact that are critical to a decision applying the proper legal standard." Specifically, the ALJ failed to make findings of fact regarding whether Carter's supervisors targeted him, if there was discriminatory animus against Carter, if BNSF in good faith believed that Carter was guilty of the conduct justifying discharge, if Carter's FELA lawsuit provided BNSF with "more specific notification" about Carter's injury report, and about credibility issues. Further, the court found 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.*" Because the ALJ order could not be upheld, the Eighth Circuit vacated the Board's decision and remanded.

The case was remanded to OALJ and assigned to me.[1] The parties agreed the case on remand could be disposed of on brief. The parties filed closing briefs on February 15, 2021 and filed responsive briefs on March 15, 2021. The record is now closed.

PRELIMINARY ISSUES

Preliminarily, I address Mr. Carter's assertions that 1) there is a difference between the terms "notify" and "report", and 2) his burden should be a *prima facie* burden. I also address Mr. Carter's objections to the exhibits attached to Respondent's Proposed Exhibits on Remand.

> First, Mr. Carter points out that 49 U.S.C. § 20109 states, in relevant part:
>
> (a) . . . A railroad carrier . . . may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done.

Mr. Carter also points out that subpart, (a)(4) states "to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee[.]"

[1] The case was initially assigned on remand to Judge Carrie Bland as the hearing judge is no longer with OALJ. Subsequently, the case was re-assigned to me.

Mr. Carter states that case law has replaced "to notify" with "to report" which has had a negative impact on Whistleblower protections. Specifically, that the defense of "temporal proximity" has resulted from this confusion of terms and as such, Respondent should not be allowed to use this as a defense.

> The Eleventh Edition of Black's Law Dictionary defines the terms as such:
>
> Notify: To inform (a person or group) in writing or by any method that is understood <I notified the court of the change in address>. 2. *Archaic*. To give notice of; to make known <to notify the lawsuit to all the defendants>
>
> Report: A formal oral or written presentation of facts or a recommendation for action <according to the treasurer's report, there is $300 in the bank>.

Black's Law Dictionary (11th ed. 2019).

The definitions are similar. To notify in writing is in effect a report, a written presentation of facts. A notification can also be in any other method that is understood, including oral notification. A report can also be oral. A review of the rest of the statute shows the words "to provide information…to file a complaint…to notify…" and further in subsection (b) the words "reporting…" appear.

I do not agree that the definitions of the word to notify and to report are so different as to have illegally created the defense of temporal proximity, as Mr. Carter seems to argue. I also do not agree there was any obvious or intentional mistakes made repeatedly by various jurists, creating a "Clausewitz" as Mr. Carter argues. Complainant's brief at 3. Further, I do not agree that temporal proximity is an illegal defense created by this intermingling of terms. Temporal proximity has been acknowledged by the ARB and the Eight Circuit in this case, as one factor an ALJ can consider when weighing evidence.

Whether notification ("to notify") is in writing via a report or orally ("to report") which a report can also be, seems to be simply an argument in semantics. Regardless, the undersigned will endeavor to use the words as outlined in the statute and regulations applicable to the case at bar as well as taking into consideration the Eight Circuits decision and remand instructions.[2]

Second, Mr. Carter argues that to require him to prove his case by a "preponderance of the evidence is an incorrect application of the law and subjects Carter to proof of a higher burden than the law instructs..." Complainant's brief at 7. Respondent, in reply, not only points the undersigned to language used in the Eight Circuit's remand, but also notes that the ARB has had a chance to address this very question in *Acosta v. Union Pacific Railroad Company*, ARB No. 2018-0020 (January 20, 2020)("*Acosta*"). In *Acosta*, the ARB stated:

> Despite its commonplace occurrence in the post-hearing opinions of ALJs, a "prima facie case" is usually associated with an inference and the investigatory

[2] I will, however, use "reporting" or "report" when that is the terminology a witness uses.

> phase of a whistleblower complaint, not proof after hearing. *See, e.g., Zinn v. Am. Commercial Lines*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 10 (ARB Mar. 28, 2012) (explaining the different phases of investigation and proof by a preponderance after an evidentiary hearing); *Hoffman v. Nextera Energy*, ARB No. 12-062, ALJ No. 2010-ERA-011, slip op. at 12 (ARB Dec. 17, 2013) (*prima facie* showing irrelevant once case goes to hearing before ALJ). As the Eleventh Circuit has noted, incorporation of the term "*prima facie* case" into whistleblower adjudication has "bred some confusion, chiefly because the phrase evokes the sprawling body of general employment discrimination law." *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (citations omitted). At the evidentiary stage after hearing, the complainant is required to prove the elements by a preponderance of the evidence, including proof that protected activity was a contributing factor in the adverse action, 29 C.F.R. § 1982.109(a), and not merely allege circumstances sufficient to establish the four elements, including circumstances sufficient to raise the inference that the protected activity was a contributing factor, 29 C.F.R. § 1982.104(e)(2)(iv). *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 1997-ERA-038, slip op. at 9 (ARB July 31, 2002) ("However, because this case has been fully tried on the merits, we move beyond the question of whether Complainant has presented a *prima facie* case to analysis of the evidence on the ultimate question of liability."); *Palmer v. Canadian Nat'l Ry, IL Cent. R.R. Co.*, ARB 16-035, ALJ No. 2014-FRS-154, slip op. at 20 n.87 (ARB Jan. 4, 2017) (reissued with dissent) (comparing and contrasting the investigation stage with the burden of proof after hearing); *Rookaird*, 908 F.3d 461-62 (same).

After confirming that a complainant's burden is preponderance of the evidence, the ARB went on to say that:

> To prove a fact by a preponderance of the evidence "means to show that that fact is more likely than not; and to determine whether a party has proven a fact by a preponderance necessarily means to consider all the relevant, admissible evidence and, on that basis, determine whether the party with the burden has proven that the fact is more likely than not." *Palmer*, ARB 16-035, slip op at 18. As we have stated before, the employer's reasons for its actions are relevant at both the contributing factor stage, when applying the ""preponderance of the evidence" standard, and at the affirmative defense stage, when analyzing the employer's burden by the "clear and convincing evidence" standard.

Mr. Carter's argument is thus rejected. His burden is that of a preponderance of the evidence.

Finally, I address Mr. Carter's objections to Respondent's proposed exhibits attached to its Closing Brief on Remand. Mr. Carter argues the exhibits are untimely and should be rejected on that basis. Mr. Carter also objects to Exhibit 34 and 35, the depositions of Mr. Carter and Exhibits 36, 37 and 40, the personnel files of Mr. Carter from other employers. Formal rules of evidence

do not apply to administrative hearings before OALJ. See 29 C.F.R. 501.34.[3] I will allow all exhibits in as they all have some relevance to the proceeding at hand.

CREDIBILTIY DETERMINATIONS

As I am not the hearing judge in this matter, I am unable to assess the demeanor of the witnesses nor observe the question and answer aspect of their testimony to determine whether they were seemingly truthful, forthright, rehearsed, or argumentative and the like. In his brief, Mr. Carter asserts that as the parties agree that the credibility determinations remain "in tact [sic] and undisturbed[,]" a rehearing was unnecessary, and the parties would submit arguments via brief. In reply to Mr. Carter's brief, the Respondents did not address this assertion. As Mr. Carter's argument remains uncontested, I will accept this statement as true.

A review of the prior DO reveals the ALJ made the following credibility determination:

> I found that, while there were aspects of Mr. Carter's testimony that were contradictory or inconsistent, on crucial points he was a credible and reliable witness. To be sure, as the Respondent has pointed out, Mr. Carter was not correct when he claimed at the investigation hearing that former Mayor Emanuel Cleaver amended his other than honorable discharge to an honorable discharge.
>
> But Mr. Carter has been consistent in his description of the events surrounding his application to work for the Respondent, and his failure to clock in on February 5, 2012. His description of the application process is credible; indeed, Mr. Carter is the only witness with firsthand knowledge of the process he went through in order to get his job.

DO at 45. (Footnote omitted.)

I will continue to follow the credibility determination as outlined above.

While the ALJ referred to some of Respondent's arguments and actions as disingenuous, no other explicit credibility finding was made similar to the credibility determination of Mr. Carter. Thus, any credibility determination I make will be based solely on that individual's testimony at the hearing and whether it is consistent, or inconsistent, with the testimony and evidence as a whole.

[3] 29 C.F.R. 501.34 states, in relevant part:

> The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) will not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The ALJ may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

FINDING OF FACTS[4]

Respondent is a railroad carrier within the meaning of the Act, in that it transports goods using the general railroad system. The Complainant worked for Respondent as a carman at the Argentine Yard in Kansas City, Kansas, from November 2005 until his termination on April 5 and April 16, 2012. DO at 2.

1. Work History and Injury Report

Events surrounding Mr. Carter's Application for Employment[5]

I find the following:

In 2005, Mr. Carter began the application process to apply for a position as a carman with Employer. Mr. Carter was assisted by attorney Ellie Sullivan in this application process. Hearing transcript at 51 ("Tr."). Mr. Carter brought all information Ms. Sullivan requested, including his military information, to aid in her submission of his application. If any information was lacking, when asked about his past military career, Ms. Sullivan instructed Mr. Carter to state "see resume" as he did not have all his military information before him (Tr. 53). Mr. Carter made it to the next phase of the interview.

Respondent contacted him on the computer for the next phase of the hiring process, which was a physical examination. Hearing transcript at 55 ("Tr."). All of these tests took place in Topeka. There was a weight test, which required him to lift weights, and do squats and leg raises (Tr. 56). The physical was similar to what he underwent in the military. Mr. Carter thought that there was a doctor at the physical part of the testing, and a nurse at the weight testing (Tr. 57-58).

The following findings are from the DO:

> Mr. Carter has had a kidney transplant, and the doctor saw his scar and asked him about it. When Mr. Carter told him that it was from a kidney transplant, the doctor told him that the surgery was not done that way anymore, and he should have had a much smaller incision (Tr. 59). Mr. Carter stated that there were several discussions about his issues with his right knee, and he told the doctor that he had had his knee "scoped." Mr. Carter told the doctor that he was told this was not a "surgery." According to Mr. Carter, the doctor asked to see his knee, and Mr. Carter pulled his pants leg up to show him. The scar was about the size of a pencil eraser. The doctor told him that it did not matter, and they talked about what was "surgery" and what was a "scope." The doctor told him that his kidney transplant was

[4] The summary of testimony and exhibits are incorporated by reference into the findings of fact. For ease, the undersigned will copy the relevant summary, necessary to satisfy the remand instructions, into the finding of facts as outlined above with reference to the DO.

[5] As stated above, Mr. Carter's testimony is deemed to be credible when describing the events surrounding his application. Because of this, the testimony of Ms. Cleaver and Mr. Kowalkowski is not persuasive.

"surgery," but a "scope" was when they just went in and looked around. When Mr. Carter told the doctor he thought a "surgery" was anytime the skin was pierced, the doctor told him that was not the case; he pointed out that needles pierce the skin, but it is not "surgery" when you get a shot. It looked to him like they just went in and looked around (Tr. 59-60).

After the physical, Mr. Carter went to an interview at the Johnson County Community College. He received the notice on the computer; this was the final stage, and he would find out at the end of the interview if he got the job. Mr. Carter stated that the room had about six tables, with two BNSF people at each table (Tr. 61). He waited in line, and when it was his turn and he sat down, the two people opened up a file in a manila binder, and asked him to go over all of the information on his application. Mr. Carter thought one of the persons was named Tamika or Tamala, from Topeka; he learned later that she was from human resources.[6] The other person was the union president, Larry Cloyd. They asked him a few questions about his job experience (Tr. 62-63).

Toward the end of the interview, they asked Mr. Carter if there was anything he thought they should know about; they told him that they would do an extensive background check, and if they found anything, they would walk him off the property even if he had already been hired (Tr. 63). Mr. Carter stated that he told them about his military experience and history, and that he received an honorable discharge from the Army, and an other than honorable discharge from the Navy. He then went back into the service, and received another honorable discharge from the Army National Guard. Mr. Carter told them that there was no place on the application to put any other than honorable discharge (Tr. 64-65).

Mr. Carter told the interviewers that he had been misled on something: he had had his knee scoped, which some people called surgery, and others did not. He had talked with several doctors, and was told it was just a scope. He was concerned about it. He told them what their doctor had told him, and he thought that they got a kick out of it. Mr. Carter claimed that the human resources representative told him to write down the information about his military history on a page she tore from a yellow notebook. She signed it, and Mr. Cloyd signed it. Mr. Carter wrote about his knee on a second page, and they both signed. Mr. Cloyd picked up the folder, put the paper in the back, and stapled it. He put it on a pile with other interview folders, and said congratulations on being hired at BNSF (Tr. 66, 190).

DO at 3-4.

I find the evidence shows that in the medical questionnaire completed by Mr. Carter, when asked if he had missed more than 2 days of work due to illness, injury, hospitalization or surgery, Mr. Carter answered no. Respondent's exhibit 1 ("RX –"). In the same exhibit, I find Mr. Carter also answered no when asked if he had any other surgeries, back injuries, or back pain.

[6] The online questionnaire indicates that the HR Rep was Shinita Hishaw (RX 6B).

I find that Mr. Carter signed his application, certifying that he answered all questions to the best of his ability and acknowledging that any false information will be grounds for dismissal at any time.

Mr. Carter was subsequently hired as a carman[7] by Respondent on November 20, 2005. Mr. Carter testified that he enjoyed his job, had mostly positive reviews, with one exception, that being written up and subsequently fired for a time card violation (discussed more fully below).

Events surrounding the injury of August 30, 2007

I find the following:

I find that Mr. Carter, while attempting to straighten out a rod that had been bent the day before, injured his shoulder and neck (Tr. 70-72). Because of the pain, Mr. Carter sought medical care. After requesting an ambulance, Mr. Carter was taken to a BNSF clinic by supervisor Chuck Spencer. Mr. Carter was initially diagnosed with a sprain and prescribed Tylenol. Because of continued pain, Mr. Carter subsequently saw his own physicians, who referred him for further medical treatment, including surgery, injections and therapy. Mr. Bryan Thompson was present the day of his injury (Tr. 72).

Mr. Carter filed a Federal Employer's Liability Act ("FELA") lawsuit and litigation ensued (Tr. 76). As part of this litigation, Mr. Carter's deposition was taken on July 20, 2009. Mr. Carter was awarded damages. DO at 4.

Thereafter, I find Mr. Carter believed that he was being targeted by his supervisors because of the injury and litigation. Mr. Carter came to this belief based on a conversation he had with Mr. Don Jordan, a supervisor with the name of Claude, and a memo he stated he viewed where it was stated that any who was injured should be written up at all costs so they could be terminated (Tr. 80). DO at 5. Mr. Carter testified that Mr. Bill Snell, Mr. Thompson, and Mr. Phillip McNaul were on this memo.

Mr. Larry Mills, a former manager of Respondents, testified that he saw a difference in the treatment of Mr. Carter after he provided notice of his injury and specifically testified to Mr. Sherrill's "bitter" attitude towards Mr. Carter (Tr. 229-233). Mr. Mills believed that employees who notified Respondent of a personal injury were targeted, in part because supervisors received bigger bonuses if there were no injuries. Mr. Mills no longer works for BNSF as he was fired for falsifying an FMLA day.

2. **Complainant's Disciplinary Issues and Termination**

Under Respondent's Policy for Employee Performance Accountability (PEPA) policy there are three severity levels of discipline. The first is a standard violation, the second is a serious

[7] Mr. Carter testified that as a carman, he "goes out and he works either the shop, or either he inspects" (Tr. 54).

violation, and the third is a stand-alone dismissible violation. RX – 8. Dishonesty about any job related subject is a stand-alone dismissible violation.

I find that Mr. Carter was investigated for failure to clock in and dishonesty on February 5, 2012 at a hearing that was held on March 18, 2012. As outlined in the DO, I find the following:

> Mr. Carter stated that he is often late because he is blocked by a train (Tr. 104). On this date, the problem was caused by the Renzenberger shuttle, which is used to shuttle conductors and engineers around the site. It is a railroad cab. When Mr. Carter came off the bridge, he turned onto a ramp into BNSF, from where it took him about 20 minutes to get to his building (Tr. 105). If he was blocked by a train, he was supposed to get a number from the side of one of the cars so it could be verified. If the problem was with the shuttle, he was to tell his supervisors. According to Mr. Carter, at the time they were having problems with the shuttle, because the shuttle drivers were complaining that they were being passed, and employees were riding up on their bumpers. As soon as Mr. Carter came down from the bridge to the stop sign, he saw the shuttle driver pulled off into the gravel. As Mr. Carter approached, the driver pulled out in front of him. They stopped at the tracks and went across, and the shuttle started to slow down (Tr. 106-107).

DO at 6.

I find Mr. Carter testified that he informed Mr. Ford that he was stuck behind the shuttle and that Mr. Ford told him not to worry about it. Mr. Carter testified that while he was at work on time, he did not clock in on time[8] (Tr. at 165).

Several days later, Mr. Carter testified that Mr. Tom Murray, a supervisor, asked him to make a statement about the events surrounding this day. An investigation ensued. Mr. Carter testified even though he requested Mr. Ford to be at the investigation, this request was denied.

I find, Mr. McNaul at the time of the hearing was the general foreman of the Kansas City Car shop with 20 front line supervisors working for him (Tr. 282). Front line supervisors check on employees in the field. However, Mr. McNaul testified he never had Mr. Carter singled out and watched because he had an injury, nor are employees singled out for reporting injuries (Tr. 283). Mr. McNaul also testified that a supervisor's yearly bonus is dependent on the performance of the company and not the number of injury reports (Tr. 290). Mr. Thompson was a supervisor under Mr. McNaul. Mr. McNaul, when testifying about his relationship with Mr. Carter, as outlined in the prior DO, stated:

> Mr. McNaul stated that he did not really have any interaction with Mr. Carter. He spoke with him when he was first hired, but did not recall any other conversations. He stated that Mr. Carter was terminated for being dishonest on his application, and for his statements about why he was late for work one day (Tr. 291).

DO at 12.

[8] As stated above, I find his testimony to be credible regarding these events.

I find Mr. Charles Sherrill, at the time of the hearing, was a general foreman in Barstow, California. In that capacity, Mr. Sherrill has conducted investigations, question witnesses, and presides over hearings for Respondents (Tr. 359-360). If discipline is warranted, he follows PEPA guidelines. Mr. Sherrill was involved with Mr. Carter's disciplinary hearings. See DO at 18-20. Pertinent to the remand instructions, I find Mr. Sherrill testified at the hearing, and as outlined in the DO, the following:

> Mr. Sherrill stated that he never had any phone conversations where he said that he was going to get Mr. Carter (Tr. 409). The fact that Mr. Carter reported an injury had nothing to do with the decision to fire him (Tr. 413). Mr. Sherrill claimed that Mr. Carter was supposed to disclose his less than honorable discharge on his employment application. He acknowledged that the form asked whether the applicant received a dishonorable discharge, but stated that Mr. Carter was still supposed to put his other than honorable discharge on the application. He did not disclose his Navy service (Tr. 414-419).
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> Mr. Sherrill stated that the information used in the investigation was brought forward during Mr. Carter's deposition in the course of the litigation of his job injury. Someone got a copy of the deposition, and on review of the deposition, it was discovered there were multiple previous injuries Mr. Carter had with previous employers (Tr. 425). Mr. Sherrill thought the transcript was given to Mr. Thompson by the claims department, "just to go over it;" he did not know why (Tr. 483). He recalled Mr. Thompson reading the deposition in his office, and bringing it to his attention, saying that Mr. Carter had multiple injuries before he worked for BNSF, and he did not know if Mr. Sherrill knew about any of that information. Mr. Sherrill reviewed parts of the deposition before the investigation (Tr. 484).
>
> They started to research whether Mr. Carter disclosed this information (Tr. 425). The majority of the document gathering was done by Mr. Thompson. Mr. Sherrill thought that he was working through the claims department, and that was how he got the documents (Tr. 426, 485).
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> Mr. Sherrill sent his recommendations to his supervisors, Mr. Thompson and Mr. McNaul. He did not recommend a particular disposition, but only that discipline be assessed in accordance with PEPA policy (Tr. 437-438). He understood that the decision went all the way up to Jeff Wright. Mr. Sherrill's understanding was that there was no option other than dismissal, under the PEPA guidelines. Mr. Sherrill was not sure how he learned about the determination to fire Mr. Carter.

DO at 20.

I find that Mr. Jeremiah Thomas, at the time of the hearing, was the Kansas Division Manager of Safety. On February 5, 2012, Mr. Thomas was Mr. Carter's supervisor, along with Mr. Murray, and spoke to him about his failure to clock in (Tr. 495). As part of his duties, Mr. Thomas reviewed video which showed Mr. Carter arriving late. (Tr. 500). Mr. Thomas testified he was not with Mr.

Murray the whole time he spoke to Mr. Carter, however, he testified he was present when Mr. Murray asked Mr. Carter if he was on time and Mr. Carter answered yes and when Mr. Carter wrote a statement. I find Mr. Thomas testified that he had never seen an individual be blocked by a Renzenberger van.

I find at the time of the hearing that Mr. Joseph Ryan Heenan was a Director in Labor Relations and was responsible for discipline policy and employee performance and accountability (Tr. 524). He reviews potential dismissals or suspension actions and makes a recommendation. I find that Mr. Heenan has never met Mr. Carter. I find, as outlined in the DO, the following:

> Mr. Heenan stated that dishonesty is a stand-alone dismissible offense. In the March 20, 2012 investigation, Mr. Carter was charged with dishonesty and misrepresenting or omitting information from his pre-employment medical questionnaire and his employment application. Mr. Heenan reviewed the transcript, exhibits, and Mr. Carter's employee transcript. He concluded that there was substantial evidence of a violation. "Kind of an overall picture" of the transcript (535) was that Mr. Carter was certainly asked questions in the questionnaire, such as, had he missed a certain amount of days as a result of previous injuries, or had he ever experienced back injury or pain. There may have been more. The facts as he saw them in the record established that Mr. Carter answered very clearly "no." However, the record showed that Mr. Carter had a couple of instances of back pain or injury, and he received workers compensation for at least one. He also had a knee injury, and medical documentation showed that he missed more than two days of work. This was inconsistent with Mr. Carter's answers on the medical questionnaire (Tr. 535).
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> Mr. Heenan believed that a reasonable person would remember and disclose an injury that occurred at age 18. He did not think the question about surgeries was the primary point in the investigation; it was not a big deal in his review (Tr. 582). He noted that Mr. Carter was asked three different questions about whether he had an injury or accident where he was required to miss more than two days of work, and he said no (Tr. 583). The transcript showed that was not truthful. The question about experiencing back pain or injury was asked in a couple of different questions in a different form, and Mr. Carter answered no to at least two without further explanation. This was untruthful, as Mr. Carter has had back pain and injury, and on at least one occasion had treatment for over a week. Mr. Heenan felt that a reasonable person would have disclosed this. Coupled with the omission of his navy service, it painted a picture of a dishonest individual (Tr. 584).
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> Mr. Heenan stated that the application asks for military history. Mr. Carter provided some, but he did not disclose his other military service in the Navy (Tr. 536).
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> Mr. Heenan acknowledged Mr. Carter's representative's objections to the telephone testimony from Dr. Jarrard, the vagueness of the notices, and the inadequate time to prepare. He stated that this was not uncommon, and he did not consider these objections to be fatal (Tr. 537). Mr. Sherrill was responsible for

> judging credibility, and he defers to those findings unless there was a clear abuse of discretion. He recommended that Mr. Carter be dismissed, under the PEPA standalone policy. He did not find compelling mitigating circumstances (Tr. 537).

DO at 22-23.

> At the second investigation, Mr. Heenan testified to the following:
>
> > Mr. Heenan stated that in the second investigation, Mr. Carter was charged with dishonesty in communicating with company officers about his whereabouts on February 5, 2012. Mr. Heenan reviewed the record, and determined that there was substantial evidence of a violation. A couple of supervisors reviewing the time sheets and clock exceptions noticed that Mr. Carter did not clock in on February 5. They approached Mr. Carter and asked him why he did not clock in. Mr. Carter told them that he arrived on time, ready for work, and he put it down in writing. The security footage showed that was not true, and Mr. Carter was late. He recommended that Mr. Carter be dismissed for dishonesty, a stand-alone event under the PEPA policy. He found no compelling mitigating circumstances (Tr. 541-542).

DO at 24.

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. Mr. Heenan testified that the vast majority of employees who are dishonest about being on the clock are dismissed and that it does not matter if they reported an injury.

DISCUSSION

The FRSA prohibits a rail carrier engaged in interstate commerce from discharging, demoting, suspending, reprimanding, or in any other way retaliating against an employee who engages in certain protected activity, such as reporting a work-related injury or illness.[9] 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 the unfavorable personnel action.[10] If a complainant meets his 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 in the absence of a complainant's protected behavior.[11]

As was found by the prior ALJ, affirmed by the ARB, and not contested by the Respondent before me, Mr. Carter engaged in protected activity when he reported his August 30, 2007

[9] 49 U.S.C. § 20109(a)(4).

[10] *Seay v. Norfolk S. Ry. Co.*, ARB Nos. 2014-0022, -0034; ALJ No. 2013-FRS-00034, slip op. at 6 (ARB Oct. 27, 2015).

[11] *Id.*

workplace injury. Further, Mr. Carter suffered an unfavorable personnel action when he was fired on April 5 & 16, 2012. Thus, taking into consideration the Eight Circuit's concerns in the Remand Order, I turn first to whether the protected activity in 2007 contributed to his firing in 2012.

1. <u>Was the protected activity a contributing factor in the unfavorable personnel action?</u>

To establish a violation under the FRSA, a complainant must show that the protected activity was a "contributing factor" in the adverse employment action.[40] "A contributing factor is 'any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.'"[12] "[T]he contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity."[13] In satisfying this statutory standard, a complainant need not prove a retaliatory motive beyond showing that the employee's protected activity was a contributing factor in the adverse action.[14]

The ARB has held that while close temporal proximity alone does not compel a finding of contributing factor causation, an ALJ's finding of causation may be affirmed when the ALJ relies on a large variety of both direct and indirect evidence in making his causation determination and does not rely on temporal proximity alone.[15] When determining whether protected activity was a contributing factor in an adverse personnel action, the ALJ should be aware that, "in general, employees are likely to be at a severe disadvantage in access to relevant evidence."[16] "Thus, an employee 'may' meet his burden with circumstantial evidence."[17] As such, a contributing factor in a whistleblower case is "not a demanding standard."[18]

As the Eight Circuit noted in this case,

> An unusual aspect of this case is that Carter's protected injury report was made and known by his BNSF supervisors in August 2007, more than *four years* prior to the adverse action of BNSF investigating and terminating Carter for acts of dishonest in 2005 and 2012 that were seemingly *unrelated* to his 2007 injury and injury report. In a retaliation case, "[a] gap in time between the protected activity and the adverse employment action weakens and inference of retaliatory motive."

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[12] *Coates v. Grand Trunk W. R.R. Co.*, ARB No. 2014-0019, ALJ No. 2013-FRS-00003, slip op. at 3 (ARB July 17, 2015) (quotation marks and citations omitted).

[13] *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014).

[14] *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013); *see Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1195 (9th Cir. 2019) ("Showing that an employer acted *in retaliation for* protected activity *is* the required showing of intentional discrimination; there is no requirement that FRSA plaintiffs separately prove discriminatory intent." (emphasis original)).

[15] *Riddell v. CSX Transp., Inc.*, ARB No. 2019-0016, ALJ No. 2016-FRS-00082 (ARB Jan. 22, 2020).

[16] *Powers v. Union Pacific R.R. Co.*, ARB No. 2013-0034, ALJ No. 2010-FRS-00030, slip op at. 9 (ARB Jan. 6, 2017) (citing *Palmer v. Canadian Nat'l Ry.*, ARB No. 2016-0025, ALJ No. 2014-FRS-00154, slip op. at 59 (ARB Sept. 30, 2016) (reissued Jan. 4, 2017)).

[17] *Id*.

[18] *Menendez v. Halliburton, Inc.*, ARB No. 2012-0026, ALJ No. 2007-SOX-00045, slip op. at 13 (ARB Mar. 15, 2013).

> *Wells v. SCI Mgmt., L.P.*, 469 F.3d 697, 702 (8th Cir. 2006) (quotation omitted); see *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 274 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001) (per curiam) ("Action taken (as here) 20 months later suggest, by itself, no causality at all."); *Gunderson*, 850 F.3d at 969.

(Emphasis in original.)

I agree with the Eight Circuit. Mr. Carter took a deposition in his FELA lawsuit in July 2009. Mr. Thompson, in reviewing this deposition discovered discrepancies on his employment application and medical questionnaire in January of 2012 which led to his first hearing on dishonesty. As the Eight Circuit noted, this is more than four years after the injury. The Board has held that 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.[19] As the Respondent's point out, in the recent case of *Brucker v. BNSF Railway Company*[20], the ARB affirmed the ALJ's denial of complainant's case in part because the protected activity in that case occurred over two years before termination. 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 nothing not the work injury of four years prior.

There are other ways to prove retaliatory motive however. Pretext for instance, which Mr. Carter asserts occurred in this case. In argument, Mr. Carter argues that the two investigations, the first into his answers in his application and the second into his reporting of time, were "motivated and started – at least in part – by the BNSF's discovery in Carter's FELA action, including depositions, that Thompson – acting as the Designated Corporate Representative in the FELA matter – reviewed and discussed with the BNSF attorneys in the FELA matter." Complainant's Brief on Remand at 10. Mr. Carter further argues that there was "collusion" between Thompson and Sherrill when discussing the FELA discovery which "unequivocally proves a bias and disparate treatment of Carter" at his dismissal hearings. *Id*. Mr. Carter also points to Mr. Jeremiah Thomas's testimony and Mr. Mill's testimony and urges the undersigned to take judicial notice of *Wooten v. BNSF Railway Company*, CV 16-139-M-DLC-JCL, United States District Court for the District of Montana, Missoula Division, (May 29, 2018) ("*Wooten*") for the proposition that Respondent had "incentivized retaliation by managers and supervisors by linking their individual performance reviews, and so, compensation to the number of on-the-job injuries reported." Complainant's Brief on Remand at 13.

[19] *Henrich v. Ecolab, Inc.*, ARB No. 2005-0030, ALJ No. 2004-SOX-00051, slip op. at 18 (ARB June 29, 2006).

[20] ARB Nos. 2018-0067, 2018-0068, ALJ No. 2013-FRS-00070 (November 5, 2020)("*Brucker*").

I disagree. First, I decline to take judicial notice of the decision in *Wooten*. The regulations governing official notice are 29 C.F.R. § 18.45[21] and § 18.201[22]. As the ARB has stated, official notice "is a rule of evidence applicable to adjudicatory proceedings before Department of Labor ALJs. It permits an ALJ to take official notice of facts not subject to reasonable dispute because generally known within the local area, or capable of accurate and ready determination by consulting reliable sources, or derived from reliable scientific, medical, or technical process, technique, or principle.[23]" I am basing my decision on the evidence and testimony submitted in the case before me. I decline to impute any findings or conclusions in *Wooten* to the case at bar as it is inappropriate in the circumstances before me and do not fall within the standards set out in the regulations.

I conclude that the weight of the evidence supports a conclusion that Respondent did not target Mr. Carter for termination after notifying Respondent of his injury four years earlier. While Mr. Mills testified in support of Mr. Carter, the others, Mr. McNaul, Mr. Sherrill and Mr. Thomas all

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[21] 29 C.F.R. § 18.45 states, Official Notice:

> Official notice may be taken of any material fact, not appearing in evidence in the record, which is among the traditional matters of judicial notice: Provided, however, that the parties shall be given adequate notice, at the hearing or by reference in the administrative law judge's decision, of the matters so noticed, and shall be given adequate opportunity to show the contrary.

[22] 29 C.F.R. § 18.201, Official notice of adjudicative facts, states:

> (a) *Scope of rule.* This rule governs only official notice of adjudicative facts.
>
> (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.
>
> (c) *When discretionary.* A judge may take official notice, whether requested or not.
>
> (d) *When mandatory.* A judge shall take official notice if requested by a party and supplied with the necessary information.
>
> (e) *Opportunity to be heard.* A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after official notice has been taken.
>
> (f) *Time of taking notice.* Official notice may be taken at any stage of the proceeding.
>
> (g) *Effect of official notice.* An officially noticed fact is accepted as conclusive.

[23] *Montgomery v. Jack In The Box*, ARB No. 05-129, OALJ No. 2005-STA-006 (October 31, 2007).

testified that the work injury did not have any bearing on whether he was fired and that it was his dishonesty on his application and his dishonesty about being late on February 5, 2012 which precipitated his termination. Because of the consistency of the testimony of McNaul, Sherrill and Thomas, I do not give any weight to the testimony of Mr. Mills and question his credibility. Mr. Mills was fired from Respondent and gave his testimony after this firing. His testimony is also inconsistent with that of the other witnesses, including Mr. Sherrill who specifically testified he did not target Mr. Carter.

I do acknowledge Mr. Carter's attack on Mr. Thompson's credibility. Mr. Carter points out Mr. Thompson's testimony regarding his demotion resulting from an audit where Mr. Thompson was found to be dishonest. However, in testimony regarding this case, Mr. Thompson's testimony regarding the reasons for firing Mr. Carter are consistent with the other testimony, as stated above. I do not agree that Mr. Thompson's demotion for dishonesty is proof that Mr. Carter was treated differently. I cannot make that determination as the facts of Mr. Thompson's demotion are different then the facts before me.[24] Stated another way, I cannot agree that Mr. Thompson's circumstances are that of a similarly situated employee.

Without more, I also cannot agree that there was any "collusion" between Mr. Sherrill and Mr. Thompson, or any discriminatory animus. Mr. Carter in argument, seems to equate Mr. Thompson and Mr. Sherrill working together (Mr. Thompson was Mr. Sherrill's supervisor at the time) as evidence of bias. Specifically, Mr. Carter argues that at the hearing as Mr. Sherrill would make the recommendation to terminate at a hearing where Mr. Thompson was a witness, this is evidence of bias against Mr. Carter. I do not agree. Mr. Sherrill and Mr. Thompson were performing their jobs, pursuant to Respondent's PEPA policy and the CBA. Also, I find it noteworthy that the person who ultimately made the decision to fire Mr. Carter was Mr. Heenan, and not Mr. Sherrill or Mr. Thompson.

I find the testimony of Mr. Heenan to be informative, and as his testimony is uncontested, I conclude his testimony to be credible.[25] As the prior DO noted, "Mr. Heenan, the person ultimately responsible for reviewing the file and making a recommendation, had never met Mr. Carter, and knew nothing about his injury or subsequent lawsuit." DO at 43. The evidence supports this assessment and I agree. Mr. Heenan did not know of the injury, lawsuit nor did he know Mr. Carter. I also find Respondent's PEPA policy clearly outlined the disciplinary process, including that dishonesty was a serious rule violation and that Mr. Heenan, after reviewing the evidence and hearing notes, terminated Mr. Carter's employment pursuant to Respondents written policies and practices. As Mr. Heenan testified, taking into consideration his dishonesty on his application and in his time reporting on February 5, 2012, he concluded Mr. Carter was a dishonest person. Mr.

[24] Mr. Carter makes an interesting argument that as Respondent did not call Mr. Thompson to testify at the hearing, "a presumption in favor of Carter is created that his testimony would be unfavorable to BNSF and favorable to Carter." Complainant's Reply unnumbered, at 14. Mr. Carter makes this statement without support and I decline to follow this reasoning. At this stage it is Mr. Carter's burden, to prove by preponderance of the evidence, that the protected activity was a contributing factor in the unfavorable personnel action. Mr. Carter could have called Mr. Thompson to testify at the hearing also and did not.

[25] In his Brief on Remand and in Opposition, Mr. Carter largely ignores the testimony of Mr. Heenan and focuses on the testimony of Mr. Sherrill and Mr. Thompson.

Heenan also presented testimony, and identified exhibits of other employees who were fired for dishonesty for time violations to show other similarly situated employees also received discipline for dishonesty. Tr. 544-546; RX 20; DO at 47. Importantly, the injury or FELA lawsuit did not have any bearing on Mr. Heenan's decision to terminate Mr. Carter.

Stated another way, I conclude, based on his testimony, that Mr. Heenan believed in good faith that Mr. Carter was guilty of the conduct charged, that is dishonesty on his application and dishonesty surrounding the events of February 5, 2012, and that the notification of his injury or the FELA lawsuit played no part in his decision.[26]

Finally, I do not believe that the FELA lawsuit was in itself protected activity based on the facts before me. Mr. Carter's injury was on August 30, 2007. The FELA lawsuit was filed approximately nine months after his injury, in June of 2008. Mr. Carter's deposition was taken in July 2009. Mr. Carter was terminated in 2012. As the Eight Circuit noted, the ARB stated in *LeDure v. BNSF* that "the FRSA protects a notice of injury made in the course of FELA litigation, not that FELA litigation is per se protected activity.[27]" The Eight Circuit also noted the prior DO had concluded that Mr. Thompson knew of Mr. Carter's injury on the date it happened, four years before he read the deposition. DO at 4. I agree with the prior DO and conclude Mr. Thompson did know on the date it happened. Had Mr. Thompson tried to fire Mr. Carter for notifying Respondent of his injury, one would expect such a termination to occur closer in time to the actual injury, the filing of the lawsuit in 2008, or after the deposition in 2009. Respondents did not take any action until 2012, based on information regarding Mr. Carter's employment application filled out in 2005. Thus, I do not conclude that the FELA lawsuit provided Respondent, through Mr. Thompson, with any further notice of the injury itself. The FELA lawsuit, and Mr. Carter's deposition, provided Respondent with information of prior injuries and military service that was not disclosed on his application.

In sum, I conclude that neither the investigations Respondent pursued against Mr. Carter, which lead to his termination, was the product of any intentional retaliation because Mr. Carter submitted a notice of injury four years earlier.

2. <u>Assuming *arguendo* that Mr. Carter did prove his protected activity was a contributing factor in his termination, Employer has proven, by clear and convincing evidence, that it would have taken the same unfavorable personnel action.</u>

If a complainant proves that his protected activity contributed to an adverse action, the employer may nevertheless avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the complainant's protected activity.[28] Assuming *arguendo* that the protected activity contributed to his 2012 firing, I conclude

[26] "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." *Gunderson v. BNSF Ry*., 850 F.3d 962 (8th Cir. 2017).
[27] Arb No. 13-044, 2015 WL 4071574 (June 2, 2015).

[28] 49 U.S.C. § 20109(d)(2)(A)(i) (incorporating 49 U.S.C. § 42121(b)(2)(B)(iv) ("Relief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.")). See *Raye v. Pan Am Railways, Inc*., ARB No. 2014-0074, ALJ No. 2013-FRS-00084, slip op. at 5 (ARB Sept. 8, 2016) (citing *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ

that Respondent has proven, by clear and convincing evidence, that it would have fired Mr. Carter in the absence of the 2007 report of injury.

While I find that Mr. Carter's testimony is credible surrounding the events of his application, his credible testimony still does not negate the fact that he did check off "no" when asked if he had missed more than 2 days of work due to illness, injury, hospitalization or surgery, and when asked if he had any other surgeries, back injuries, or back pain. While his understanding of what constitutes knee surgery and a back injury may be less than others, it still stands that at the very least, Mr. Carter had prior documented back injuries that he failed to disclose and he still had knee surgery. In signing his application, Mr. Carter was aware that any false statements discovered on his application could be grounds for dismissal. It is also true that Mr. Carter clocked in late to work on February 5, 2012.

As the ARB stated in *Acosta v. Union Pacific Railroad Co*.:[29]

> 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. *Clem v. Computer Sciences Corp*., ARB No. 16-096, ALJ Nos 2015-ERA-003, -004 (ARB Sept. 17, 2019); *Gale v. Ocean Imaging,* ARB No. 98-143, ALJ No. 1997-ERA-038, slip op. at 13 (ARB July 31, 2002) ("Moreover, the thrust of Complainant's argument is that it was wrong, unfair or unjust for Respondent not to weigh the grounds that they cited against Complainant's past performance and find in favor of retaining her, and that therefore Respondents' rationale was pretext. However, "[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.'" citing *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 278 (7th Cir. 1995)). 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.

Mr. Carter, in argument, attacks the questions on the application as "vague" and that he was only five minutes late. Complainant's brief on Remand at 10. Mr. Carter also points to answers on the application where he did answer yes to surgery, when explaining his "kidney transfer." Complainant's brief at 13. In sum, Mr. Carter argues it is not his "fault BNSF's Application was not specific enough so as to require detailed answers" and that the application was "unfair, unrealistic and disingenuous." Claimant's reply brief unnumbered at 2.

Mr. Carter failed to answer affirmatively when asked about back pain or surgery when addressing his knee in the application before his interviews. While I find credible his testimony after the application was filled out, where he explained his knee procedure and how it was "scoped", Mr. Carter still answered no to questions regarding surgery and whether he missed more than two days due to illness, injury, hospitalization or surgery. According to his own testimony,

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No. 2008-STA-052, slip op. at 6, 9 n.6 (ARB Jan. 31, 2011) (quoting *Brune v. Horizon Air Indus., Inc*., ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (citation omitted) (Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.")).

[29] ARB No. 2018-0020, ALJ No. 2016-FRS-00082, 11 (January 22, 2020).

he answered these application questions before his interview and answered in the negative, which was not true. Mr. Carter suffered prior back injuries which were documented and a knee injury requiring surgery which would require an affirmative answer on the application.

Mr. Carter also argues that he answered honestly when he checked off "no" to whether he was dishonorably discharged from the military. As he testified, his discharge was "other than honorable." While an "other than honorable discharge" is different from a "dishonorable discharge", and while I accept as true that he informed those at his subsequent interviews of this discrepancy, Mr. Heenan still terminated Mr. Carter for dishonesty. At the investigation hearing, Mr. Carter admitted he did not list his naval career at all on the application. RX – 6. So while I agree that answering in the negative to his discharge status is not, by itself, necessarily dishonest, he answered untruthfully to his employment history in omitting his Navy career completely.[30]

While I accept as true Mr. Carter arrived on time but clocked in late, it is clear that Respondent sincerely believed he was late and acted accordingly. Mr. Sherrill testified that he reviewed a video showing Mr. Carter arriving late. Thus, Respondent had a sincere belief that Mr. Carter was in fact late and was dishonest in reporting his time on February 5, 2012.

I acknowledge Mr. Carter's argument where he points out that Mr. Thomas testified he had not seen anyone else terminated for being late similar to Mr. Carter and that there may have been some confusion at the hearing regarding the date of the late arrival. I also acknowledge that his testimony concerning the events around his clocking in on February 5, 2012 was deemed credible and that his firing may be unwarranted. However, while to Mr. Carter this may be unfair or unreasonable, I do not sit as a super-personnel advocate.[31] And while, again, it may seem unfair or unreasonable, the FRSA is not a wrongful termination statute.[32] Respondent believed he was late.

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.

[30] Mr. Carter did testify that the reason he left off his Navy career is that it was top secret and he could not divulge to others his naval career. However, he did divulge his top secret Army career. He was also able to disclose his naval career at his disciplinary hearing, even though it was top secret. RX-6.

[31] See *Wright v. R.R. Comm'n of Texas*, ARB No. 2019-0011, ALJ No. 2015-SDW-00001, slip op. at 4, n.9 (ARB May 22, 2019) ("We note that it is the role of neither the ALJ nor the Board to act as a super-personnel 'department that reexamines an entity's business decisions.'') (quoting *Jones v. U.S. Enrichment Corp.*, ARB Nos. 02-093, 03-010, ALJ No. 2001-ERA-021, slip op. at 17 (ARB Apr. 30, 2004) (citations omitted)).

[32] [I]f the discipline was wholly unrelated to protected activity… whether it was fairly imposed is not relevant to the FRSA causal analysis." *Gunderson* 850 F.3d at 969.

Thus, I conclude Respondent believed that Mr. Carter was dishonest on his application and in reporting when he clocked in on February 5, 2012. Respondent has shown, by clear and convincing evidence, that it would have fired Mr. Carter in the absence of any protected activity.

CONCLUSION

Based on the foregoing, I conclude that Mr. Carter failed to prove, by a preponderance of the evidence that BNSF, the Respondent, retaliated against him for his notification to Respondent of a workplace injury, in violation of the FRSA. I also conclude that even if Mr. Carter had proven that BNSF retaliated against him for notification of a workplace injury, BNSF proved, by clear and convincing evidence, that they would have fired him for dishonesty on his application and in false reporting time on February 5, 2012.

ORDER

Mr. Carter's claim is **DENIED**.

SO ORDERED.

HEATHER C. LESLIE
Administrative Law Judge
Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of the administrative law judge's decision.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for online filing will become mandatory for parties represented by counsel on April 12, 2021. Parties represented by counsel after this date must file an appeal by accessing the eFile/eServe system (EFS) at https://efile.dol.gov/ EFILE.DOL.GOV. Before April 12, 2021, all parties may elect to file by mail rather than by efiling.

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Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at https://efile.dol.gov/support/.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf and/or the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact.

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Self-represented litigants (and all litigants prior to April 12, 2021) may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

Access to EFS for Other Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:
https://efile.dol.gov/support/boards/request-access-an-appeal

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.