

**U.S. Department of Labor**

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**Issue Date: 30 July 2014**

Case No.: 2013-FRS-82

In the Matter of:

Clyde O. Carter Jr.,  
Complainant

v.

Burlington Northern Santa Fe  
Railway Company,  
Respondent

**DECISION AND ORDER**

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 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”), and the matter was assigned to the undersigned Administrative Law Judge (“ALJ”). A formal hearing took place on January 7 through 9, 2014, in Kansas City, Missouri. At that time, I admitted 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.<sup>1</sup> On February 3, 2014, I issued an Order closing the record and providing the parties time to submit written briefs. The Complainant submitted a brief on ; the Respondent submitted a brief on June 5, 2014.

### ***Background***

The Respondent, Burlington Northern Santa Fe Railway Company (BNSF), is a railroad carrier within the meaning of the Act, in that it transports goods using the general railroad system. The Complainant worked for BNSF as a carman at the Argentine Yard in Kansas City, Kansas, from November 2005 until his termination on April 5 and April 16, 2012.

### ***HEARING TESTIMONY***

#### **WITNESSES**

#### **Clyde O. Carter Jr.**

Mr. Carter was 47 years old on the date of the hearing. He is married, and three of his children live at home with him and his wife (Tr. 48).

In 2005, Mr. Carter learned of an opening for a position at BSNF from an attorney named Ellie Sullivan, who told him that BSNF was hiring, that she knew whom to contact, and that she would submit his resume for him.<sup>2</sup> Mr. Carter took paperwork to her office so that she could complete his resume (Tr. 51). Ms. Sullivan contacted him a few times to obtain more information, and paperwork such as his DD 214. She told Mr. Carter that BNSF was interested in hiring him, that she had submitted everything for him, and that he would be going through the hiring process. Even though she had already submitted the application, Ms. Sullivan instructed Mr. Carter to go online to find out the next step in the process (Tr. 53).<sup>3</sup>

When Mr. Carter went online, he found an application, and began filling it out. He called Ms. Sullivan because he did not have all of his military information. When she asked him what he was doing, and he told her, she told him that she had already filled out his application, and that he should just put down "see resume" on the rest of the online application. He did so, and then received notifications to take a drug test and an aptitude test, which were done at a hotel off the Shawnee Mission Parkway (Tr. 53, 192-193).

Mr. Carter applied for a railroad carman position, which entails working in the shop, doing welding and torch work and air tests, and replacing big parts. It also involves inspecting lines of cars for defects and putting information in the computer so the cars can be routed for repair. It was the same type of work he did previously at Kansas City Southern (Tr. 54).

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<sup>1</sup> Respondent's Exhibit 30 was marked and identified for use as impeachment or to refresh recollection; it was not admitted.

<sup>2</sup> Ms. Sullivan represented Mr. Carter in connection with a previous lawsuit.

<sup>3</sup> The Respondents' Exhibits include a blank "external" application, which appears to be an employment application that is submitted in hard copy, as opposed to online (RX 6B).

BNSF contacted him on the computer for the next phase of the hiring process, which was a physical examination (Tr. 55). 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).

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 “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.<sup>4</sup> 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 an 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

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<sup>4</sup> The online questionnaire indicates that the HR Rep was Shinita Hishaw (RX 6B).

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).

Mr. Carter went to work for BNSF as a carman on November 20, 2005 (Tr. 67). He stated that his job was excellent; the guys were nice, he was glad to be there, and he loved going to work every day. He loved his job, and would love to still be working there. Mr. Carter said that he had employment evaluations, where he was called in every 90 days and told how he was supposed to be working. His supervisors had a little book, and if they caught him violating a rule, they wrote him up, and he signed it. If he had a good evaluation, he signed that and got a copy, and a copy went to his personnel file. Mr. Carter stated that all of his reviews were excellent, except for one that was bad, when one of his supervisors said he was just testing something and would not be turning it. He did turn it in, and right after that, Mr. Carter was fired (Tr. 68-69).<sup>5</sup>

Mr. Carter recounted the events of August 30, 2007, when he was injured on the job. He stated that a guide rod had gotten bent when the employees were working on it the day before. This is a rod that goes under the car and hooks all of the brake linkage together. It had a hump in it, and Mr. Carter was instructed to go back to the heavy and straighten the rod out. Mr. Carter told them that he could fabricate the part faster than trying to straighten it out. The other men were waiting for the person who worked in the press and fabricated parts (Tr. 71).

At that time, an employee named Larry Winter came out, and said he knew how to run the guide rod in. He told them to turn it on its side and push it in. When they got to the big bend, Mr. Carter was holding it, and Mr. Winter told him to push it all the way in. Mr. Carter asked if he was sure, and Mr. Winter told him that would straighten it out. Mr. Carter said the punch went up and came down, but did not touch the guide rod; it went back up, and slammed down. Mr. Carter was holding the guide rod, and it slid to the side at an angle. Mr. Winter and the other men ran over and asked him what was wrong. Mr. Carter responded that he did not know, but his shoulder and neck hurt, and felt funny. He was in a lot of pain, and asked for an ambulance. But they did not want to bring one. Bryan Thompson told him that he needed to do a urinalysis; Mr. Carter told him that was not a problem, but they would not get anything but kidney medication (Tr. 71-72).

Mr. Carter kept asking for an ambulance. Supervisor Chuck Spencer put him in his personal car, but instead of going to the hospital as Mr. Carter asked, took him to the BNSF clinic. The doctor there said he just had a sprain, and gave him Tylenol. Mr. Carter went back to him once more, and the doctor told him the same thing, and instructed him to ice it. The doctor told Mr. Carter that it was basically arthritis, because of his age and because that was what happened to black males. Mr. Carter knew something was wrong, and he went to his own doctor, who did an x-ray, and told him there was definitely something wrong with his shoulder and neck. Mr. Carter subsequently saw specialists, and had medical procedures and therapy. There was litigation, and after a jury trial, he was awarded damages (Tr. 73-76).

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<sup>5</sup> This appears to be a reference to the time card violation written up by Mr. Murray, which was the basis for Mr. Carter's second termination.

Mr. Carter reported his injury, but claimed that BNSF disputed it, and said that he was not hurt that day (Tr. 73). According to Mr. Carter, when he reported his injury, and started litigation, there was an almost immediate change in the attitude of his supervisors. Before that, his supervisors were cheerful with him. But that changed, and they did not really talk with him; he was not having full conversations anymore. He started noticing that whatever he did, he was being watched. It got so bad that the men he worked with started not wanting to work with him, because big guys with radios and little code books were coming down on him (Tr. 77).

Mr. Carter's supervisor at the time was Don Jordan. Mr. Jordan normally worked in the tarmac, but one day after Mr. Carter was back to work Mr. Jordan was riding around doing write-ups, and he came up to Mr. Carter. Mr. Jordan asked him how he was doing. At that time, Mr. Carter had undergone surgery on his shoulder, and was getting injections in his neck. Mr. Carter had already noticed how some supervisors who used to be really nice to him were starting to act. Mr. Jordan told him that he had gotten hurt and he knew what they were going to do to him. They would write him up and get him out the door. Mr. Carter asked what he had done, and Mr. Jordan said that he had gotten hurt (Tr. 79-80).

Mr. Carter asked Mr. Jordan how he knew that they were going to get him out the door. Mr. Jordan told him to wait, and parked the truck, took Mr. Carter to a shanty, and got on a computer. When the screen came up, he told Mr. Carter to read it. Mr. Carter saw a document with Bill Snell's name was at the top, and it went to Bryan Thompson, who sent the information to all of the other supervisors. The document said to watch everyone who was injured, and write them up at all costs so they could get them out. Mr. Carter asked for a copy, but Mr. Jordan said no; he was a little ticked off, and Mr. Carter told him he would not get him in trouble (Tr. 80-81).

Shortly after, another supervisor named Claude told Mr. Carter to watch himself, that he was a good guy, and they were going to look to get rid of him. Mr. Carter asked him why he was saying that. Claude took Mr. Carter into another office, typed in a computer, and the same letter popped up, from Phil McNaul to Bryan Thompson, with the names of all of the other supervisors. Claude told Mr. Carter that he liked him, and he was a good guy, but he should watch himself, because they were going to get him out. Mr. Carter told Claude that was terrible, and Claude told him he knew; he was getting tired of the way they were doing people (Tr. 81-82). According to Mr. Carter, Claude was gone from his supervisor position shortly after that (Tr. 82).

Mr. Carter recalled that he saw this memo after his shoulder surgery in 2008, but before his neck surgery in May or June 2011. Mr. McNaul is the head boss of the rail yard; Mr. Thompson was the general foreman (Tr. 83).

After his litigation was over, Mr. Carter received a notice of an investigation, for dishonest conduct due to failure to disclose pertinent medical information about previous injuries to his back and knee on the pre-employment medical questionnaire, and his military service in the Navy, including his less than honorable discharge (Tr. 87-89).<sup>6</sup> Mr. Carter clarified that the

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<sup>6</sup> The trial in Mr. Carter's lawsuit began on October 23, 2013.

retaliation was before his FELA case was wrapped up (Tr. 131). By the time the verdict was back in that case, he had already been dismissed (Tr. 136).

According to Mr. Carter, at the investigation hearing, there was a discussion between his union representative and Mr. Sherrill about documents Mr. Carter had not been provided. Mr. Carter had told the union representative what happened at his employment interview, and the union representative had asked for a hard copy of Mr. Carter's personnel file and application, but Mr. Thompson refused to produce it (Tr. 91-92).

Mr. Carter stated that at the hearing, they had a copy of his application. Mr. Thompson said that he was the designated corporate representative in the lawsuit, and saw the documents the Complainant produced, and began to look through them (Tr. 94). They discussed his discharge from the Navy. He told them that the question on the application was about a dishonorable discharge. He thought that he had put a little more about his military service than was shown on the application; he answered no to the question about dishonorable discharge, which was an honest answer (Tr. 96).

Mr. Carter stated that his knee was scoped, but this did not require him to miss work for more than two days (Tr. 100).

Mr. Carter was also investigated for failure to clock in and dishonesty at a hearing that was held on March 18, 2012 (Tr. 102). According to Mr. Carter, there were two occasions where he got to work a little late. The first time, he was driving his wife's car, and it was foggy. When Mr. Carter first saw the videotape at the investigation hearing, it refreshed his recollection about the events surrounding his being late that day. He noted that it was not foggy, and he was in his car, not his wife's (Tr. 103-104). He noted that the Respondent initially said that he was 15 minutes late, and then 10; the videotape shows that he was three minutes late. According to Mr. Carter, he is supposed to be at work by 7:00 a.m.; he can clock in at 6:55 a.m. If he arrives after 7:00, there is another procedure (Tr. 104).

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).

Mr. Carter wanted to stay out of trouble, because there had just been an incident where a shuttle driver claimed that he sped past one of them in his wife's truck. He stayed behind the shuttle so he would not get written up for passing the shuttle and violating company policy (Tr.

107). According to Mr. Carter, the procedure in this instance was to tell the immediate supervisor. When he got out of his vehicle, he came in the back door, unlocked his locker, and went into the front area where the morning meeting was taking place, and sat down. He told Mike Ford, his acting supervisor, that he was stuck behind the shuttle truck, and that was why he was late (Tr. 108). Mr. Ford told him not to worry about it, that he had him. Mr. Carter told Mr. Ford that he knew they were going after him, and asked him to make sure. Mr. Ford told Mr. Carter that he had him, and he was not the only one. Mr. Carter went on with his daily duties (Tr. 109).

Mr. Carter stated that he did not tell Mr. Ford he was at work on time. He told Mr. Ford that he was behind the shuttle, and did not get the chance to clock in because it was after the morning meeting. Mr. Carter asked Mr. Ford to make sure he got him, because Mr. Ford knew how they were trying to do him. Mr. Ford agreed, and told Mr. Carter he had him, and Mr. Carter went to work. Mr. Carter stated that he was at work on time, but he did not clock in on time (Tr. 165).

About four days later, on February 9, Tom Murray, a supervisor, approached Mr. Carter and told him that he needed to talk to him. He walked outside, and Mr. Carter went with him. Mr. Murray told him that they needed to discuss the day he was late, and Mr. Carter asked what day he was talking about (Tr. 110). Mr. Murray then started trying to break it back, and when he started explaining, Mr. Carter asked him if it was the day it was foggy, or was it another day. Mr. Murray told Mr. Carter that it was the day he told Mr. Ford that he was late. Mr. Carter told Mr. Murray that he had explained it to Mr. Ford. Mr. Murray instructed him to go in and write a statement (Tr. 111, 166-167). But Mr. Carter was not sure which day he was supposed to write a statement about. Mr. Murray was asking him a lot of questions, and changing things. Mr. Carter wrote a statement, which Mr. Murray read, and handed back to him, instructing him to put in that he was there on time. But Mr. Carter stated that he was not on time, and told him why; he was in the yard, blocked by the van; he did not know exactly what time he arrived at the building. He would have arrived 20 to 30 minutes earlier but for the shuttle van (Tr. 111, 169-171).

Mr. Murray again told Mr. Carter to put down that he was there on time. Mr. Carter started laughing, and wrote it down, and handed the statement to Mr. Murray. He said, okay, I see what is going on, when is the investigation. Mr. Murray told him there would not be an investigation. But shortly thereafter, he received notice of the investigation (Tr. 112).

Mr. Carter stated that Jeremiah Thomas was there when Mr. Murray told him to go write what he said down (Tr. 166).

When Mr. Carter saw the video for the first time at the hearing, he realized the incident for which he was being investigated was the day he was late because he was blocked by the shuttle car. Mr. Ford did not appear at the investigation. Mr. Carter asked that he be called as a witness, but was told that Mr. Ford was busy. His union representative also asked for Mr. Ford to appear.

Mr. Carter acknowledged that in 1987, when he was 18 years old, working on a construction site for Eliason & Knuth, he was carrying Dryvit across a pit when the boards

broke; he pulled a muscle and strained his back. He was sent to the doctor once. The next day, he left to join the military, where he passed his physical with flying colors. At his deposition (in connection with his lawsuit), the attorney had a copy of a check for \$100 or \$130 for time off. Mr. Carter never saw it; he did not receive or cash the check, and did not know where it was sent. He did not put this injury on his application. When the attorney brought it up, it was the first time he had heard of it for a long time; he had forgotten about it (Tr. 116-118, 142).

Mr. Carter also acknowledged that when he was in the military, he was moving a file cabinet upstairs, when the two men on the other end dropped it and pinned him. It was normal protocol in the military to go to sick call, even though he said there was nothing wrong with him. He was given Tylenol, which he did not take; he returned to work the same day. Mr. Carter did not put this down on his application; he did not feel that a bruise was a back injury (Tr. 115-116).

Mr. Carter stated that in 1990 he was working for Sysco, and he was in the cooler at Associated Wholesale Grocers. When he got off his trailer, he slipped onto his kneecap. He was not sure if this injury kept him from working for more than two days; he recalled that he was assigned to do paperwork after that. His treating doctor restricted him from lifting, and he wrapped and iced his knee, and used crutches. He was able to work within the doctor's restrictions, and kept on working at Sysco; he did not miss more than two days. He was put on light duty, where he put orders in, and did paperwork and clerical work (Tr. 98-101, 143).

In the 1997 incident, Mr. Carter reported to work each day, but missed some when he left to see the doctor or have x-rays. In that incident, his knee was scoped at a Surgicenter (Tr. 144-145).

Mr. Carter did not think the incidents in 1987 or 1990 constituted "injuries;" in his mind, it was not an injury unless it involved a broken bone, rib, or shift in the spine (Tr. 147-148). He did not feel that a bruise was a back injury (Tr. 151).

Mr. Carter acknowledged that his first term of service in the Army, and his service in the Navy, were not on his application in the section for military service (Tr. 155). According to Mr. Carter, he received an other than honorable discharge from the Navy because he reported a theft of classified equipment to NIS, and he was viewed as a rat. He explained that an NCO came in, drunk, and asked Mr. Carter why he had told on someone, and smacked him. Mr. Carter got up to leave, and the NCO smacked him again; they started to fight. Mr. Carter had the chance to tell his side of the story, which was believed. But he was told that he should not have hit the NCO, he should have left and summoned the shore patrol. But the shore patrol had just left, and there was no way to contact them. Mr. Carter did not think he deserved an other than honorable discharge; the NCO got a deduction (Tr. 156-157).

Mr. Carter stated that he told the attorney that his wife first tried to fix his discharge status; then they both went, but the mayor would go out the back door. They never got a chance to see him, and his discharge was never amended (Tr. 162-163).

Mr. Carter testified that at the hearing, he was asked why he did not put down in detail what he did in the military on his application. His union representative asked him if he would be



in violation of military law to divulge what he did while he was in the Navy and Army with a top secret classification, and he answered that was correct; they were discussing his job duties (Tr. 195).

Mr. Carter feels that a “chopped” version of his employment application was used at the investigation hearing, and also in this proceeding. He stated that his attorney filled out an application and resume, and submitted it; he followed the online directions for submission. What was missing was his time at NTTC Florida, the cryptographic school. Mr. Carter knew that he put his naval service on his application, and so did his attorney. He noted that the application submitted at this hearing states that he was a cryptographic technician, which is what he did in the Navy (Tr. 198-203). He thought the application submitted at this hearing was different from the one used in the investigation, and the one he submitted at the start of the application process (Tr. 197-199).<sup>7</sup>

Mr. Carter claimed that at the investigation hearing Mr. Sherrill had an application with additional information on it, and some information relating to the Navy (Tr. 204, 220-221). The original has never been provided to him, and Mr. Thompson claimed that they did not have to produce it.

Mr. Carter stated that he had neck surgery in May or June 2011, and shoulder surgery in 2008 (Tr. 182).

Mr. Carter stated that when he was at BNSF, he worked 40 hours a week and overtime, a minimum of three days almost every week. He was paid \$21 or \$22 an hour when he started, and \$25 or \$26 when he left (Tr. 119-120). He estimated that conservatively, he made about \$1,536 a week, or about \$84,500 a year (Tr. 122).

Mr. Carter stated that he lost his home because he could not pay the taxes (Tr. 191).

Mr. Carter went to work for Mile Rail after he left BNSF; he earned \$18.00 an hour. He also did some work for a temp service in 2012; he made \$17,295 in 2012 (Tr. 123, 186, 188). Mr. Carter stated that he was dismissed from Mile Rail because someone had a personal vendetta against him (Tr. 190). Mr. Carter now works for General Mills, where he started on January 7, 2013. In 2013 he earned \$43,573. His total earnings in 2012 and 2013 were \$60,868.02; he would have earned \$169,040 at BNSF (Tr. 123). He is asking for the shortfall of \$108,000. Mr. Carter also wants to be reinstated. He loved his job, and knows he could work there. Mr. Carter also wants punitive damages, in the amount of \$250,000, and attorneys fees (Tr. 125-128).

#### Mr. Larry Mills

Mr. Mills started working as a carman at BNS in September 1993; BNS then merged with the Santa Fe. Mr. Mills worked as a lead man on every job there was; he was an assistant taking

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<sup>7</sup> Although the medical questionnaire submitted by the Respondent was printed out on November 8, 2005, indicating that it was a contemporaneous printout of the questionnaire submitted by Mr. Carter, the employment application was printed out on July 23, 2009. There is no contemporaneous printout of Mr. Carter’s original employment application, or any copy of the external application submitted by his attorney.

care of the yards. He supervised Mr. Carter, who started working after the merger (Tr. 225-226). Mr. Mills no longer works for BNSF. He was accused of falsifying a request for FMLA. He was dismissed, and his claim went to arbitration, which is still pending. He did not think the investigation was fair, because he was not allowed to enter information about his claim during the investigation (Tr. 226-227).

According to Mr. Mills, as a manager, he saw a difference in the treatment of Mr. Carter after he reported his injury. The word was out that they had a target on Mr. Carter's back for filling out a personal injury report. Mr. Carter was a good employee; he did his job, and kept his mouth shut. Mr. Mills recounted that on one occasion, he was driving a truck and lightly inspecting the trains; it was about 3:20 p.m., and cold. He saw Mr. Carter standing by the time clock, looking for Casey Graves, another carman. Mr. Sherrill walked up to Mr. Carter and asked him what he was doing; Mr. Carter said that he was looking for Mr. Graves to make sure the blocks were down (Tr. 228).

Mr. Mills explained that the blocks control the blue lights. You have to get in touch with the person you work with to get them checked and locked; it is a safety issue. Mr. Carter was doing the right thing by trying to find Mr. Graves. Mr. Mills stated that you do not leave the property until you make sure the blocks are clear. You must communicate with the men you work with during your shift; if you do not, you are in serious trouble the next day (Tr. 229-230).

Mr. Mills thought that Mr. Sherrill had a "taste of bitter" towards Mr. Carter. Mr. Sherrill followed Mr. Carter, who was looking in the locker room, and told him that no, he had to time out now, and hit the clock. Mr. Mills thought that Mr. Carter was acting professionally, but Mr. Sherrill was being aggressive. Mr. Carter timed out and went home (Tr. 229-230).

A few days later, Mr. Mills was called into Mr. Thompson's office, which was connected by an open door with another office, where Mr. Sherrill was sitting and talking on the phone. Mr. Sherrill did not realize Mr. Mills was there; Mr. Mills was sitting in a chair hidden from the door. Mr. Mills could hear Mr. Sherrill say, man, I've got to nail this Carter. Mr. Sherrill looked up, and saw Mr. Mills, and cussed (Tr. 230-231, 252-253).

Mr. Mills had no doubt that Mr. Carter had a target on his back, because he filled out a personal injury claim, and got a lawyer. He stated that this was common if you filled out a personal injury claim. Mr. Mills claimed that supervisors got a bonus at the end of the year, and if there were no injuries, they got a "big fat check." It was a serious issue if there were injuries. He claimed that he had been threatened for filling out a personal injury report (Tr. 231-232).

Mr. Mills stated that it was a "catch 22." If you got hurt on the job and tried to say that it happened at home, and the company found out, they would charge you with falsifying an injury at home. If you say you got hurt at work, they try to talk you out of it any way they can (Tr. 233).

Mr. Mills acknowledged that he had been convicted of a felony at age 21 or 22; he told BNSF about it when he applied (Tr. 234).

Mr. Mills stated that he called his supervisor on January 25 to request a floating vacation day so that he could have his floors repaired. He had been approved for a vacation day, and was trying to make sure that he was covered. Tommy told him he could not give him a vacation day. At the same time, Mr. Mills' medical condition worsened; he was in the middle of a divorce, and fighting with his spouse. He then called his acting foreman and told him he needed an FMLA day, and was told he was approved (Tr. 236-237). He went to work two or three days later, and the next thing he knew he was thrown off the property for falsifying an FMLA day. He was charged with falsifying an FMLA day by first calling in for a vacation day, and when he could not get it, calling in and asking for an FMLA day. He was fired (Tr. 237-238).

Mr. Mills was the subject of two investigations in 2011 for quarrelsome behavior. The first incident involved Tom Cloyd, who Mr. Mills claimed had mental issues after serving in Iraq. Mr. Cloyd was fired, and returned a year later, and tried to bribe Mr. Mills. Mr. Mills went to a special agent, and Mr. Cloyd was run off the property. Mr. Mills testified against him. He claimed that Mr. Cloyd's four friends came after him, scratched his Harley, and moved his locker. Mr. Mills contacted his Union representative, who told him to file charges against the four men with HR. Mr. Mills did so, and all of a sudden, the four men filed charges against him (Tr. 240-242).

At the first investigation, they claimed he used the "f" word when he did not. The second investigation involved an incident where he found scratches on his motorcycle, and a man by his bike. Mr. Mills told the man to stay away from his bike, and the man ran and told the foreman that Mr. Mills threatened him. The foreman had told the man not to be around Mr. Mills' things two days earlier. Mr. Mills walked in and said that the man had been warned, meaning that the foreman had told him to leave his things alone. But this was interpreted as a threat (Tr. 243-244).

Mr. Mills was investigated in 2002 for an altercation with Steve Burns, who was fired for falsifying an injury (Tr. 245). He was charged in 1996 with throwing Ed Parkerson against a file cabinet (Tr. 246). He failed a drug screen in 1998, and went to a drug program.

Mr. Mills stated that Mr. Sherrill now works in New Mexico. Mr. Thompson was fired for dishonesty and stealing; he took his personal trucks to the repair shop. Mr. Murray is on a leave of absence (Tr. 254-257).

### Phillip McNaul

Mr. McNaul works for BNSF as the field superintendent of operations. He was hired in 1973 as a laborer, and worked as a carman for 22 years. In 1996, he was promoted to a front line supervisor. In 2001, he was the general foreman over the Newton Car Shop; in 2003, he became a general foreman II, in Tulsa. He was a general foreman III from 2005 to 2007 in Kansas City, when he was promoted to his current position. Mr. McNaul manages the mechanical operations from Kansas City to Clovis, New Mexico. He supervises 35 managers, and about 350 scheduled employees, craft, and union employees. Mr. McNaul is acquainted with Mr. Carter (Tr. 280-281).

As the general foreman of the Kansas City car shop, Mr. McNaul had about 20 front line supervisors working for him, who were Mr. Carter's supervisors, and who reported to him. The front line supervisor is responsible from the start of the shift for monitoring performance, safety, and quality of work throughout the day, and logging the employee out of the task for the day. Mr. McNaul stated that for the most part, all employees are watched, by way of operations testing to make sure they have safe practices, are doing the correct repairs, and getting the work done. There are cameras around the facility; he does not have the ability to watch people, but other supervisors do (Tr. 282, 300).

Mr. McNaul stated that the front line supervisor would not be doing his job if he did not check on employees in the field. He stated that he never had Mr. Carter watched, and he never wrote a document instructing management to watch everyone who had an injury and write them up. Employees who report injuries are not singled out (Tr. 283).

Mr. McNaul identified RX 11, the BNSF web page which has the hotline number for an employee to report or advise senior managers and HR about any wrongdoing, unsafe act, or anything that might violate company policies. The report can be anonymous. All calls are investigated by HR (Tr. 284).

Mr. McNaul also identified the BNSF Mechanical Safety Rules at RX 23. Rule 26.8 requires reporting of accidents and injuries, and occupational illnesses arising from the operation of the railroad. It states that employees are not subject to harassment or intimidation. This policy was in place in April 2012 (Tr. 288-289).

Mr. McNaul stated that since 2009, he has had 39 reportable injuries. Five of these employees were dismissed, including Mr. Carter. Two were dismissed for reasons having nothing to do with the incident that resulted in injury. He stated that supervisors do not receive bonuses related to the number of injury reports. The bonus is the same every year, depending on the performance of the company (Tr. 289-290).

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).

According to Mr. McNaul, under the union agreement, no discipline can be assessed without a proper investigation. The employee has the right to call other employees to testify, and to have a representative. The employer is obligated to get the fellow employee to come to the hearing if asked. Their responsibility is to advise the employee that he is wanted at the hearing or investigation, but it is not mandatory for the employee to attend (Tr. 292-294).

Bryan Thompson worked for Mr. McNaul, as a carman supervisor. Mr. Thompson was demoted from management; Mr. McNaul removed him from his exempt status after findings from a corporate audit that he was dishonest; he was not privy to the investigation findings. Tom Murray resigned, but he does not know why. Charles Sherrill is still working in management (Tr. 295-297).

Tamala Cleaver

Ms. Cleaver is the Human Resources Director for the Kansas Division. She oversees all hiring, employee relations issues, and training. Ms. Cleaver started in December 2007 as an HR generalist in Kansas City, Kansas. Seven months later, she was promoted to her current job. She is familiar with the policies and procedures for the employment application process for 2005, because she was trained on all policies and procedures. To her knowledge, the general policies, practices, and procedures for the application process in November 2005 were the same as when she was hired in 2007 (Tr. 303-306).<sup>8</sup>

Ms. Cleaver stated that today, a job applicant can go on the website, find openings, and apply electronically. The application has room to include as many military stints as an applicant has had. The application is not made in writing and submitted in hard copy; it is all done online (Tr. 309).<sup>9</sup> The applicant is never requested to provide additional documentation with the initial application. If an applicant did so, it would not be kept, or taken into consideration; it would either be returned or destroyed. Scheduled employees, such as Mr. Carter, are not asked to submit a resume with their application (Tr. 310).

After the application is submitted, the applicant is screened for basic qualifications. Those who meet the qualifications are invited to a hiring session, where they experience a company overview, a preview of a day in the life of a particular craft, such as carman. They are subject to drug screening, and a hair sample is taken. There is then a 20 minute interview, with a panel consisting of an HR representative and a department representative, usually a department manager. They have no document to refer to other than the online employment application, which is printed off to take to the interview. Applicants are never asked to submit more than one employment application (Tr. 311).

According to Ms. Cleaver, military service is discussed during the interview, including the details of what the applicant did in the military, to see if it was job related, and the rank at which the applicant left. In her experience, it is relatively rare for an applicant to have multiple military stints; this is something that would pique her interest (Tr. 312). She would want to know what jobs the applicant held, and why he served in multiple branches. It was possible that if she learned the applicant received an other than honorable discharge, it could affect the hiring decision, but everything is taken on a case by case basis. She would need to get the facts behind it (Tr. 313).

Successful candidates are given a conditional offer within two weeks of the interview. The applicant then goes through a pre-employment physical, after filling out an online pre-employment medical questionnaire, and a background check (Tr. 313-314). The background check and medical screening are done by third party vendors. BNSF employees do not initiate discussions about medical issues during the interview. If the applicant brings this up, they stop him and tell him they cannot go into any medical details; it is not their area of expertise. They

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<sup>8</sup> Ms. Cleaver did not provide the basis for her understanding.

<sup>9</sup> While this may be the case today, the "External Application for Employment" suggests that at one time, as described by Mr. Carter, employment applications could be submitted by hand, instead of online (RX 6B).

do not give out opinions about the nature of medical procedures. Ms. Cleaver stated that BNSF employees do not help applicants fill out the online medical questionnaire. To her knowledge, these are the same general practices that were in place in November 2005 (Tr. 315-316).<sup>10</sup>

According to Ms. Cleaver, hourly scheduled employees do not receive performance evaluations pursuant to the collective bargaining agreement (Tr. 316).

Ms. Cleaver did not recall a “Tamika” from Human Resources; she was not the first woman to work in Human Resources. She thought that Larry Cloyd was a local union representative for the carmen. She stated that union representatives are allowed at the interview process (Tr. 318-319). They print the application off to take to the hiring session (Tr. 320).

Ms. Cleaver stated that BNSF maintains Mr. Carter’s personnel file, although she has never seen it. No one called or contacted her to bring this file or to make it available (Tr. 320-321).

Ms. Cleaver acknowledged that in 2005, it was possible that someone could have put comments on the printout of an application or on a legal pad. But it is not their practice now. Corrections would be made right on the application, not on a note or yellow pad. The applicant is notified directly by the medical vendor about the physical, and to complete the medical questionnaire, which is sent electronically (Tr. 323-324).

Ms. Cleaver stated that the applicant is tested for strength. To her knowledge, a doctor or nurse is not present; there is a technician. She did not know if the technician had the questionnaire, or if they went through it with the applicant. She would not know if Mr. Carter discussed his knee procedure or his organ transplant. She stated that it was not uncommon in 2005 to discuss an applicant’s military career at the interview (Tr. 326-327).

Chris Kowalkowski

Mr. Kowalkowski is the Director of Medical Support Services, responsible for the pre-employment medical review program, drug and alcohol program, and compliance medical examinations for employees of BNSF. He has worked for BNSF for 25 years, including 20 years in the claims department; he is familiar with the pre-employment medical questionnaire (Tr. 329-330).

Mr. Kowalkowski was trained by his predecessor, a medical officer, two nurses, and a senior medical specialist, on everything from start to finish on all aspects of the three divisions he is responsible for. On the pre-employment side, his training involved understanding how a candidate applies for a job and receives a conditional offer, and how the medical screening occurs (Tr. 331). Mr. Kowalkowski met with internal and external vendors, and attended sessions to understand how reviews were historically done, how they transitioned to what was done when he was hired in 2009, and how they are done today. He stated that the practice in

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<sup>10</sup> Again, Ms. Cleaver did not explain the basis for her assumption. I note that several aspects of the process are different from the hiring process as described by Mr. Carter. For example, Mr. Carter stated that the interview was the last step in the hiring process, and that he was offered his job at the conclusion of the interview.

2005 was the same as the time he transitioned to the medical department. When a job candidate receives a conditional offer from HR, they are sent a request to complete a medical questionnaire online with the medical vendor. The applicant provides information requested in the questionnaire, acknowledges that it is accurate, and submits it for review (Tr. 332).

According to Mr. Kowalkowski, they are being asked to issue a medical determination on a job candidate for a safety sensitive job. They need to take a complete and extensive medical history from the candidate; the questionnaire is the first opportunity to get this information from the candidate. The carman position is safety sensitive – the carman inspects, maintains, repairs, or operates trains, locomotives, rail cars, rolling stock, single systems, and track structures. He works daily in a position with attention and focus on safety as a key to his own well-being, and to avoid injuries and death, to himself and co-workers, and communities where the trains go through. The questionnaire is first reviewed by a medical clerical individual, who makes the decision whether to forward it to a nurse for review and followup (Tr. 333).

Neither the clerk nor the nurse is a BNSF employee. They are trained by BNSF on how to review the questionnaire. Mr. Kowalkowski is responsible for making sure the nurses are doing appropriate review, and doing appropriate followup if necessary based on the interviews. The nurses are told that the purpose of the questionnaire is to obtain as much information as possible (Tr. 334).

Mr. Kowalkowski stated that if all the answers on the questionnaire are “no,” the questionnaire is reviewed by administrative medical personnel and cleared; it does not require any followup, and the applicant would move to the next medical component of the medical review process. If the medical department does not issue a clearance, the applicant is interviewed by a nurse on the areas at issue. The nurse clears the questionnaire after reviewing the candidate. Mr. Kowalski stated that a complete and accurate medical history is important, because it is the first opportunity to understand the applicant’s medical history, and their current status for a safety sensitive position. It is very important that the information is accurate and the candidate fully forthcoming so that they can do a proper review to determine if the applicant can safely perform the essential job functions of a safety sensitive position (Tr. 335).

According to Mr. Kowalkowski, any affirmative response triggers a followup. A nurse calls the applicant, and goes through the affirmative responses in more detail. He stated that affirmative responses to any questions about missing work for more than two days would require the nurse to call the candidate and interview him in detail. This issue would have to be explored by the nurse before they could advance the person through the medical review process. An affirmative response to the question about surgery would also require the nurses to call the candidate and ask for details, as would an affirmative response to the question about a back injury (Tr. 337-338).

Mr. Kowalkowski stated that any indications of problems with pain, or musculoskeletal problems, would require the nurse to call. With respect to back pain, the nurse would need to find out about the degree of the pain, and how it might play a role in whether they might have to offer an accommodation, or whether the applicant could safely perform the work of a carman.

This is a very physically demanding job that requires a lot of strength; the back is a key component (Tr. 339).

Mr. Kowalkowski was not at Mr. Carter's physical examination, and he has no specific personal knowledge of it. Nor was he at the hiring event, and cannot say whether Mr. Carter met with a nurse and doctor at his physical examination. At the time, he was a general claims agent. He stated that the doctor does not go through the questionnaire with the applicant; the nurse does (Tr. 342).

Mr. Kowalkowski agreed that the questionnaire did not specify any definition of the degree of back pain, or how long it lasted. He agreed that it might be fair to say that everybody in the room has probably had back pain at some time; if everyone answered "yes," the nurse would have to call them. The question about back pain is to elicit followup; it is a general question that would lead to followup to obtain more detail. Mr. Kowalkowski agreed that to be truthful, an applicant would have to answer that his back hurt once when he picked up his child (Tr. 347-348).

Mr. Kowalkowski stated that the purpose of the question about surgery is to give the applicant the opportunity to inform them of any and all surgical procedures they have had; it is a very broad question. He thought that it was fair to say that "surgical procedures" was somewhat ambiguous, and it was unclear if it included everything from a needle biopsy to open heart surgery (Tr. 350).

Mr. Kowalkowski agreed that the question about missing two days from work did not define if it was two continuous days. If someone did not know what "two days" meant, it was possible that they could give an answer based on an incorrect interpretation, but it would not mean that they were being dishonest (Tr. 351-352).

According to Mr. Kowalkowski, the nurses are trained that when they are in doubt, something should be put on the questionnaire. He would expect an applicant who sprained his back at work to put this on the questionnaire, as well as arthroscopic knee surgery. Applicants have instructions about where to call for assistance with filling out the questionnaire, and the vendors get calls daily; the applicant would talk with a nurse. There is no followup by the nurse if all the answers on the questionnaire are "no (Tr. 353-354)."<sup>11</sup>

### Charles Barnard Sherrill

Mr. Sherrill is currently a general foreman in Barstow, California. He began with BNSF on March 3, 1997 as a laborer, and after six months he was promoted to carman apprentice, his job for two years. He transferred to Pasco, Washington, finished his apprenticeship, and worked seven more years. He was promoted to front line supervisor in Kansas City, Kansas in

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<sup>11</sup> Although the Respondent blacked out all of the questionnaire responses other than those it claimed were dishonest, it is apparent that Mr. Carter disclosed his kidney surgery on this questionnaire, as well as the fact that he took medication in connection with this transplant. Although Mr. Carter testified that he spoke with the doctor at his physical about his kidney surgery, he did not testify about receiving any follow-up call regarding his medical questionnaire.



December 2006, and worked another year before being promoted to Mechanic Foreman II. He worked a couple more years, and was promoted to Assistant General. In January 2013 Mr. Sherrill was promoted to the Barstow General Front Line (Tr. 358-359).

Mr. Sherrill has conducted several investigations for BNSF as a principal. He stated that the conducting officer oversees the investigation, questions witnesses, and presides over the hearing. He attended a one-day training class at Johnson County Community College on the rules of investigation, and a few years later, a class at the National Railroaders Conference in Phoenix. Mr. Sherrill has done about three dozen investigations (Tr. 360).

According to Mr. Sherrill, the purpose of a hearing is to question witnesses, and ask about the facts surrounding an alleged incident, to determine if a particular rule was violated. The hearing is required by the collective bargaining agreement (Tr. 361). At the hearing, the notice is read, and the witnesses and employee are questioned. The employee is represented, typically by a union representative. There is no right of discovery on either side. BNSF is not required to give the documentary evidence to the employee before the investigation, nor is the employee required to turn his over. The investigation is transcribed (Tr. 363-365).

Mr. Sherrill stated that the union representatives are experienced advocates, and receive training; they do a good job. The employee also has the right to request the presence of other employees at the hearing. BNSF informs potential witnesses, but Mr. Sherrill was not sure if BNSF could do anything to make sure the witness showed up (Tr. 366-367). If the framework set out in the collective bargaining agreement is not followed, the case can be thrown out. After the investigation is concluded, he reviews the transcript and exhibits. Once he determines if a rule was violated, he submits a recommendation for discipline to the leadership for approval (Tr. 370-371).

Mr. Sherrill stated that he follows the guidelines for discipline set out in the Policy for Employee Performance Accountability (PEPA, RX 8). These guidelines differentiate between serious and other violations (Tr. 372-373).

According to Mr. Sherrill, the March 20, 2012 investigation had nothing to do with Mr. Carter's August 2007 report of injury. Mr. Carter was represented by Stan Berlowitz and Jeff Gronniger, both experienced representatives, who did a good job. Mr. Carter was allowed to ask questions and make objections (Tr. 373-374). At the hearing, they had a copy of Mr. Carter's original employment application with his responses to questions. As far as he knows, there were no attachments when they got it, and it was the full application (Tr. 375).<sup>12</sup> Mr. Sherrill stated that the medical questionnaire is important with respect to the questions about injuries, hospitalizations, illnesses, and surgeries. On Mr. Carter's medical questionnaire, a few of the entries were blacked out because they were not pertinent to the investigation (Tr. 376-377).

Mr. Sherrill stated that Dr. Jarrard is the Medical Director for BNSF, who reviews the employee's medical information. At the hearing, Dr. Jarrard stated that if the questions in Mr.

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<sup>12</sup> In fact, Mr. Sherrill had a copy of Mr. Carter's employment application printed out on July 23, 2009, and a copy of his medical questionnaire printed out on November 8, 2005.

Carter's case had been answered correctly, there could have been further medical review (Tr. 378-379).

Mr. Sherrill stated that Mr. Carter's Navy paperwork shows that he had an other than honorable discharge. There were also documents regarding injuries and surgeries, and workers' compensation documents. They supported the fact that Mr. Carter missed more than two days of work because of injuries (Tr. 379-380). There were also documents that showed Mr. Carter received other workplace injuries, as well as medical treatment, and that he underwent a scope on his knee (Tr. 381). Documents produced at the hearing showed that Mr. Carter had a job related injury on March 8, 1987, and received workers compensation; Mr. Sherrill saw the surgeon's report (Tr. 382). He also had a work injury on August 17, 1990 at Associated Wholesale Grocers, where he slipped on some dressing, and was treated for low back pain (Tr. 383-384).

Mr. Sherrill stated that the documents showed that Mr. Carter visited Dr. Mark Hatley on May 13, 1997 after he injured his right knee in a fall at work, and Dr. Hatley gave him an off work excuse from June 9 to June 20, 1997. Mr. Sherrill interpreted this to mean that Mr. Carter was off work for this time period (Tr. 385-387).

According to Mr. Sherrill, Mr. Carter admitted that he did not list his Navy service on the application. Mr. Carter claimed that he had a top secret clearance in the Navy, and was not allowed to disclose his service; he said that his Navy records were supposed to be sealed for 65 years after his death. Mr. Sherrill did not find that to be credible. Mr. Carter also listed his Army service as involving a top secret clearance. At the hearing, Mr. Carter said that he brought up his service during the initial interview, but Mr. Sherrill found that to be contradictory. Mr. Carter never provided any documentation (Tr. 388-390).

Mr. Sherrill stated that at the hearing, Mr. Carter claimed that his Navy discharge had been amended by Emmanuel Cleaver to honorable, but he provided no documentation (Tr. 391). He also said that he had a scope on his knee, which Mr. Sherrill interpreted as a surgical procedure. Mr. Carter admitted that he left his previous injuries off the medical questionnaire, but claimed that he felt they were not injuries. Mr. Carter stated that he did not think something was an injury unless he was paralyzed (Tr. 391-393). Mr. Sherrill did not find that credible, and stated that the paperwork supported the fact that Mr. Carter had had multiple injuries and surgery (Tr. 393).

At the hearing, Mr. Carter stated that he did not think his knee procedure was a surgery, because he discussed it with someone at his interview (Tr. 394). Mr. Sherrill testified that Dr. Jarrard described the procedure as a surgery, and he relied on that to determine that Mr. Carter violated the honesty portion of Section A28.6 (Tr. 395). This is a rule violation that provides for stand-alone dismissal under Appendix B. according to Mr. Sherrill, a stand-alone offense is for a single rule violation; dishonesty is one of the violations (Tr. 396-397). Later in his testimony, Mr. Sherrill stated that Dr. Jarrard did not testify about whether a scope was surgery, and agreed that it would be incorrect to say that he relied on this testimony to determine that Mr. Carter's answer was dishonest (Tr. 475, 481-482).

At the second investigation, Mr. Carter was represented by Mr. Berlowitz and Mr. Gronniger. Mr. Sherrill stated that it was not true that Mr. Carter asked to call Mike Ford as a witness, but Mr. Sherrill would not let him. If Mr. Carter had asked, they would have notified Mr. Ford to attend the investigation. He did not recall any discussion about calling Mr. Ford as a witness (Tr. 400-401).

At this hearing, the supervisors testified that Mr. Carter stated he arrived to work on time on February 5; the testimony from Mr. Carter and his notes state that he was there on time. But later testimony and a review of the video show that he arrived at work about five minutes late. The supervisors testified that Mr. Carter's statement about being on time came about when they asked him about a clock-in exception (Tr. 402).

There were two written statements by Mr. Carter, and both say that he was at work on time. The video shows that he arrived about five minutes late, and he ultimately admitted that he was late (Tr. 403). Mr. Carter said that he was stuck behind the Renzenberger van, and that he reported it to his supervisor, Mike Ford. According to Mr. Sherrill, Mr. Carter originally stated that he told Mike Ford he was late; ultimately, he said that he thought he was talking about a different date when he wrote the statements (Tr. 404). Mr. Carter stated that he thought he was not late because he thought it was a different day; he did not understand what day they were talking about (Tr. 478).

According to Mr. Sherrill, if Mr. Carter were held up by a Renzenberger van, he would be late, and would not be excused (Tr. 461).<sup>13</sup> He did not recall any issues about going around the vans, upsetting them, or causing a danger (Tr. 462). Mr. Sherrill stated that an employee is supposed to clock in no matter what time he shows up. He recalled that Mr. Carter stated at the hearing that he told Mike Ford why he was late and asked him to take care of it, and Mr. Ford told him he had him, it was okay. Mr. Sherrill thought that Mr. Ford was questioned, but that he did not recall that comment. He acknowledged that it would have changed his mind if Mr. Ford came to the hearing and said that Mr. Carter was a few minutes late because he was behind a van, and Mr. Ford told him it was okay (Tr. 463-464).

Mr. Sherrill thought that Mr. Murray talked with Mr. Ford on February 9, and asked him if he had talked to Mr. Carter, and if he said anything about being late on February 5. He did not think Mr. Murray got a written statement from Mr. Ford (Tr. 488-489). Mr. Sherrill thought that Mr. Thompson instructed Mr. Murray to get a written statement from Mr. Carter about being late, because there were "multiple issues" with Mr. Carter telling the truth (Tr. 489).<sup>14</sup> Mr. Sherrill determined that Mr. Carter was dishonest when he wrote that he was on time to work on February 5, 2012 (Tr. 406).

Mr. Sherrill described an incident on a morning when Mr. Carter was working the third shift. It was a few minutes after 7:00 a.m., and it was time for Mr. Carter to clock out and go home. Mr. Carter and Mr. Graves had just finished their train inspection, and Mr. Graves was in

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<sup>13</sup> In fact, at the investigation hearing Mr. Thompson testified that if an employee were stopped behind a van or train, he would expect him to notify his supervisor, who would validate it, and note an exception.

<sup>14</sup> Mr. Sherrill did not elaborate on these "multiple issues."

the supervisor's office finishing paperwork and billing information. Mr. Sherrill asked Mr. Carter why he was hanging around in the lunchroom, and Mr. Carter told him that he was waiting to see if Mr. Graves needed any help finishing his paperwork. Mr. Sherrill asked Mr. Graves if he needed any help, and Mr. Graves said that he had everything handled. Mr. Sherrill told Mr. Carter to clock out and go home, and not to get paid past his shift. Mr. Carter got an extra hour of pay for clocking out after 7:00 (Tr. 408-409, 470).

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).

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).

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.

Mr. Sherrill acknowledged that serious violations, such as a violation of a critical safety rule, can result in seriously debilitating or life-threatening injury; these violations incur a thirty day record suspension (Tr. 447).

### Jeremiah Thomas

Mr. Thomas is currently the Kansas Division Manager of Safety. In February 2012 he was a Mechanical Foreman I; he oversaw the train yard operations from a mechanical perspective, handed out rules for the inspection of trains, made sure the proper air tests were

done, handled the repair of railroad equipment, and did timekeeping (Tr. 495). Mr. Thomas was involved in the review of the February 5, 2012 time clock exception, and he was present when Mr. Carter was interviewed on February 9.

Mr. Thomas started with BNSF as a carman in Tulsa in 2005. He got his journeyman's license, and went into management on September 10, 2010 as a Mechanical Foreman I. He was promoted to Mechanical Foreman II about six months earlier, and got his current job on August 1, 2013. As part of his job duties, he reviewed time entries for exceptions, which are anything outside of an employee's normal shift. For example, clocking in more than twenty minutes early or more than eleven minutes late will show up as an exception; it shows up as highlighted on the computer screen. He stated that it was not uncommon to speak with an employee who did not clock in to get their side of the story (Tr. 496-497).

On February 5, 2012, Mr. Carter failed to clock in. Mr. Thomas went with another supervisor, Mr. Murray, to talk to Mr. Carter. They were going to have Mr. Carter write a statement, which was typical, for documentation (Tr. 498, 504). Mr. Carter stated that he was at work on time, in the break room, ready for the job. He did not say anything about being stuck behind a Renzenberger van. He asked Mr. Carter's supervisor, Mr. Ford, if Mr. Carter came and talked with him about being late or forgetting to clock in; Mr. Ford said that he did not (Tr. 498-499).

Mr. Thomas reviewed the video, which showed Mr. Carter pulling in at three or four or five minutes after 7:00 a.m. The second video showed the inside of the break room, with Mr. Carter walking in, passing right by the time clock, and sitting down (Tr. 500).

Mr. Thomas stated that he was not with Mr. Murray the entire time he was talking with Mr. Carter (Tr. 502). Mr. Carter and Mr. Murray were talking outside, and Mr. Thomas did not know where they went. He went outside and joined the conversation as Mr. Murray was asking Mr. Carter if there was an exception, and trying to get his story. Mr. Murray asked Mr. Carter if he was at work on time, and Mr. Carter said yes. Mr. Thomas was present when Mr. Carter wrote his statement; it was written either on the front table in the break room or in one of the offices in the back (Tr. 505, 515). He did not recall Mr. Murray telling Mr. Carter to add that he was there on time; he was not sure if he was present when Mr. Carter wrote that (Tr. 506). Mr. Thomas stated that he watched Mr. Carter write the statement, and he was in the building when he was writing it (Tr. 506). Mr. Murray was standing with Mr. Carter while he wrote the statement; he was walking around and talking to the guys (Tr. 516). He did not recall Mr. Carter stating that he brought it to management's attention that he could not remember if he clocked in or not, but wanted his manager to know (Tr. 506). Mr. Thomas thought Mr. Carter wrote one statement, but he may have written two; Mr. Murray took them, and he does not know what happened with them after that (Tr. 516-517).

According to Mr. Thomas, there is no exception for being blocked by a Renzenberger van; he has never seen this happen. He stated that the van does not stop in the middle of the road and block other vehicles; it pulls to the side so other vehicles can go around (Tr. 509). He acknowledged that he had heard that Renzenberger was complaining about people flying around them, and passing them at high speed (Tr. 514).

Joseph Ryan Heenan

Mr. Heenan is a Director in Labor Relations. He had this same position in March 2012. Mr. Heenan is responsible for discipline policy, and is the director of employee performance. He reviews all major discipline cases before discipline is issued, and gives a recommendation on the appropriate level of discipline. Mr. Heenan works out of Fort Worth (Tr. 524-525).

Mr. Heenan stated that he first receives an email from the local field officer, asking him to review a potential dismissal or actual suspension, and make a recommendation on discipline. He reviews the investigation transcript and exhibits, the personnel record, and the policy. He reviews the employee transcript, which is an overview of the employee's history of employment with the railroad (Tr. 526, 528).

According to Mr. Heenan, his role is to administer discipline consistently. He does not do a de novo review; he is limited to the facts and defenses raised in the record. The standard of proof at the investigation hearing is substantial evidence. Mr. Heenan likes to review cases the way an arbitrator would. When he is finished, he sends an email back with his recommendation (Tr. 527-529).

Mr. Heenan has never met or spoken with Mr. Carter (Tr. 526). He reviewed both of his investigations. Mr. Carter has been through the appeals process, and his cases are listed to the public law board, but there has been no hearing yet (Tr. 526, 531).

Mr. Heenan stated that he has reviewed 700 to 800 cases as the director of employee performance (Tr. 531). A hearing is required under the collective bargaining agreement. It is a way to flesh out the facts of a particular situation, and for the employee to raise defenses. It is the decision of local management as to whether to bring an investigation (Tr. 532, 550).

The PEPA policy gives employees advance notice of the discipline policy for particular rule violations (Tr. 532). Mr. Heenan discussed examples of serious and dismissable rule violations. Stand-alone dismissable offenses may result in dismissal without regard to an employee's previous discipline history. There is no progressive discipline for these offenses. He stated that the discretionary language in the policy means that if there is any question, the supervisor is encouraged to err on the side of leniency (Tr. 533-534).

Mr. Heenan stated that dishonesty is a stand-alone dismissable 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).

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).

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).

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).

Mr. Heenan's review of the transcript showed an incident where Mr. Carter had back pain, and received treatment for at least a week. This was one of several instances in question. Mr. Heenan's overall picture was that Mr. Carter was a dishonest individual. This was not a series of collective mistakes; Mr. Carter had multiple opportunities to clear the record, and he did not do so. There were multiple questions in the questionnaire that Mr. Carter could have answered differently, but he answered "no." Coupled with Mr. Carter's omission of his previous military history, there was enough relevant evidence to conclude he was dishonest (Tr. 575).

Mr. Heenan stated that there were a few places on the application that talked about previous employers. Mr. Carter put down his army service, and left multiple blank spots behind it; he did not make any reference to his Navy service. Mr. Heenan stated that it was really not relevant if his discharge was honorable, dishonorable, or other, the bottom line is that none of that service was disclosed, and HR never got the chance to ask questions about it. Mr. Heenan did not believe Mr. Carter's claim that he talked about his Navy history at the interview, or that it was attached to or written on his application (Tr. 576-577).

Mr. Heenan disagreed that because the applicant did not yet have a job, the information on the application was not related to the job. He stated that this information is absolutely job related, and is what they take into account in the hiring process.

Mr. Heenan identified a dismissal letter for another employee, Darren Butler, for dishonest conduct. Mr. Heenan reviewed that case, and the employee transcript. Mr. Butler did not make a report of injury (Tr. 538-540). Mr. Heenan also reviewed a dismissal letter for William Echols for falsification of information on his employment application. Mr. Heenan reviewed that case; there was no report of a work injury (Tr. 540).

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).

According to Mr. Heenan, the vast majority of employees who are dishonest about being on the clock are dismissed; it does not matter if they reported an injury. He identified RX 20, the dismissal for an employee named Rohan Kerr, who was dismissed after he was approached about having a TV on his locomotive, with the windows blocked. When he was asked what he was doing with the TV, Mr. Kerr said that it was only up there for his breaks. But the security footage showed that he went in there for breaks plus 40 minutes. Mr. Kerr was dismissed (Tr. 544-545).

Employee Jeremiah Tordoff was dismissed for dishonesty with company officers, by making conflicting statements (Tr. 545-546).

Mr. Heenan stated that Mr. Carter's August 2007 report of injury did not play any role in his recommendation for dismissal in either investigation (Tr. 548).

According to Mr. Heenan, generally, if there are mitigating circumstances, the charge can be dropped down to the level of a serious rule violation, which would probably result in a 30 day record suspension, and possible actual suspension. They usually dismiss for dishonesty (Tr. 561-562).

## ***EXHIBITS***

The following exhibits were admitted at the hearing in this claim.

### *Claimant's Exhibits*

#### *CX 1*

This is the April 5, 2012 Dismissal letter, advising Mr. Carter that he was dismissed immediately for dishonest conduct due to his failure to disclose pertinent medical information regarding previous injuries to his back and knees on his pre-employment medical questionnaire,



and his failure to disclose his military service in the Navy, including his less than honorable discharge.

CX 2

This is the April 16, 2012 Dismissal letter, advising Mr. Carter that he was dismissed immediately for dishonesty when questioned by BSNF officers on February 9, 2012 regarding a failure to clock in to work on February 5, 2012.

CX 3

This is the transcript of the March 20, 2012 investigation hearing.

CX 5

This exhibit includes the last page of the Mr. Carter's employment application, a notice of Mr. Carter's other than honorable discharge from the Navy, and two pages from Mr. Carter's medical questionnaire.

CX 7

This exhibit is the Claimant's Motion for Production of Documents, dated November 21, 2013.

CX 8

This exhibit is Mr. Carter's federal income tax return for 2011.

CX 9

This exhibit is a weekly payroll record for Mr. Carter's earnings at General Mills for the period from December 16, 2013 to December 22, 2013.

CX 10

This exhibit is the February 14, 2012 letter from the Respondent to Mr. Carter advising him that they intended to conduct an investigation into allegations of dishonest conduct in connection with Mr. Carter's medical questionnaire and employment application.

Respondent's Exhibits

RX 1 - Online Questionnaire

This is the medical questionnaire completed by Mr. Carter in connection with his application for employment. It is 8 pages long, and consists of a series of 66 questions. The answers to all but 6 of the questions have been blacked out. In response to question 2, "Have you had any of the following that required you to miss work for more than 2 days, illness or injury, hospitalization, or surgery, the answer was "no."

In response to question 4, which asked, “Have you ever had any of the following pulmonary or lung problems?” and its subset “Any other surgeries?” the answer was “no.”

In response to question 16, “Have you ever had a back injury?” the response was “no.”

In response to question 19, which asked “Do you currently or have you ever had any of the following musculoskeletal problems,” and its subset “back pain,” the answer was “no.”

### *RX 2 – Application for Employment*

This is a printout of Mr. Carter’s three page Application for Employment submitted on September 29, 2005. The script at the bottom of the page indicates that it was printed out on July 23, 2009.

### *RX 3*

This is the BNSF Personal Injury report dated August 31, 2007, in regards to Mr. Carter’s August 30, 2007 injury.

### *RX 6*

### *Hearing Transcript*

The hearing in connection with this charge took place on March 20, 2012. Mr. Sherrill was the conducting officer, and Mr. Carter was represented by Mr. Berlowitz and Mr. Gronniger. Dr. Michael Jarrard, BNSF Medical Officer, testified by teleconference; Mr. Carter’s representative strenuously objected to this procedure. Mr. Berlowitz also objected to Mr. Sherrill’s denial of his request for a postponement of the hearing to March 27 or March 29 because additional time was needed to prepare.

Mr. Berlowitz also noted that a document dated February 17, 2012, purporting to postpone the investigation until March 20, 2012 by mutual agreement, and the notice of investigation, also indicating that the hearing was postponed until March 20, 2012 by mutual agreement, was incorrect, as the date was not mutually agreed on, and BNSF unilaterally selected the date despite Mr. Carter’s request to postpone the hearing until March 27 or March 29.

Mr. Sherrill noted Mr. Berlowitz’s objections, and opined that it had been over one month since the original notice of investigation dated February 14, 2012, and the hearing date of March 20, 2012, which he found was sufficient time to proceed with the investigation. Mr. Berlowitz disagreed, noting the seriousness of the charges. He also argued that they had requested information from BNSF, which BNSF flatly ignored. He submitted a letter from Mr. Gronniger to Mr. Thompson dated March 15, 2012, requesting a copy of Mr. Carter’s application, which BNSF had ignored. He advised that Mr. Carter was not prepared to proceed

with the investigation, because the union had requested information and documentation, and BNSF had refused to provide it.

Mr. Sherrill advised that Mr. Berlowitz would be given time to review any exhibits or information during the investigation. He felt that all of the information Mr. Berlowitz needed was set out in the investigation notice.

Mr. Thompson testified at the hearing. He described his employment history with BNSF; his current position was General Foreman III in Kansas City, Kansas. Mr. Thompson identified his response to Mr. Gronniger's request for a copy of Mr. Carter's employment application, which stated that the schedule agreement did not provide for the exchange of evidence before the investigation, and his request was denied.

Mr. Thompson testified that on January 30, 2012, he had a meeting with BNSF attorneys regarding pending litigation.<sup>15</sup> Mr. Thompson was chosen to be BNSF's corporate designee, responsible to review all pertinent information regarding the case.<sup>16</sup> During this meeting, Mr. Thompson was provided a significant amount of information about Mr. Carter, including his July 20, 2009 deposition, and medical and military documentation he had not disclosed.

When Mr. Thompson reviewed the deposition, he noted several items that Mr. Carter disclosed about previous military service in the Navy, and several previous injuries at other companies where he worked. BNSF was not aware of any of these situations, and so they began a review of his pre-employment medical questionnaire and employment application. He introduced Mr. Carter's three page employment application filed on September 29, 2005.<sup>17</sup>

Mr. Thompson introduced seventeen pages of information provided to BNSF by its attorneys, which included paperwork from Mr. Carter's 1987 enlistment in the Navy. Mr. Thompson also introduced a January 1990 letter outlining Mr. Carter's less than honorable discharge from the Navy for misconduct.

Mr. Thompson introduced an 8-page pre-employment medical questionnaire completed by Mr. Carter in November 2005. He indicated that the answers to some of the questions were blacked out because they were not relevant to the situation under investigation.

Mr. Thompson provided documentation of a knee injury that Mr. Carter sustained in May 1997 while working for Sysco. He also provided a document outlining a workers compensation claim dated March 1987, in connection with an injury Mr. Carter sustained while working for Millard Drywall. The documentation stated that Mr. Carter was carrying buckets of Dryvit material, and stepped on boards over a hole, which broke. He sustained a strain to his lower back.

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<sup>15</sup> This would be Mr. Carter's FELA lawsuit.

<sup>16</sup> The Judgment returned on November 2, 2012 reflects that the Respondent's corporate representative was Mark Grubbs. RX 29.

<sup>17</sup> Although Mr. Thompson stated that the application was "filed" on September 29, 2005, it appears to have been printed out from the computer on July 23, 2009; there is nothing on the application to indicate when it was "filed."

Mr. Thompson introduced a photo of a document dated August 22, 1990, which was an employer's report of an accident from Associated Wholesale Grocers. It reported that Mr. Carter slipped on some dressing and hit his lower back on a rack; he suffered a sore lower back.

Mr. Berlowitz objected to all of the documents, arguing that BNSF had refused to provide Mr. Carter with the documents before the hearing, and that the documents themselves appeared to have been obtained in violation of privacy laws. He asked for a recess of one week to review the 14 documents submitted. Mr. Sherrill granted Mr. Berlowitz a 30 minute recess to do so.

When the hearing reconvened, Mr. Berlowitz again objected to going forward, noting that BNSF had had since January 30 to gather and prepare documentation to substantiate the allegations against Mr. Carter, and he had had only an hour or so to review dozens of pages, which was not sufficient. BNSF had denied their request for advance copies of this documentation. Mr. Berlowitz argued that, given the severity of the charges, they could not reasonably be expected to prepare an adequate defense of Mr. Carter. He again requested a one week recess for review of the documentation.

Mr. Sherrill agreed to a recess of one more hour for review of the exhibits. Mr. Berlowitz argued that one hour was not sufficient. Mr. Sherrill denied the request.

Ms. Tamala Cleaver testified. She stated that if a job candidate listed on his application that he received an other than honorable discharge from the military, it would make him less qualified than other candidates, and she would pass him over and move to a more qualified candidate. She stated that during the hiring session, the applicant is given his application to review, and reminded to make sure they disclose any criminal or military information; they are allowed to make changes right on the application itself.

Ms. Cleaver stated that the three page application was a "whole" application form. Mr. Carter did not list any Navy job history or experience with the Navy, or an other than honorable discharge from the Navy. She acknowledged that the application did not ask if the applicant received a less than honorable discharge.

Ms. Cleaver stated that the original copy of Mr. Carter's application was in his personnel file. She claimed that she never got a message from Mr. Carter asking to view his personnel file. She stated that she did not see his original application.

Dr. Michael Jarrard testified (by telephone). He is the Medical Officer for BNSF; he reviews cases for fitness for duty, primarily new hires. He also works with the employee assistance program, and other programs in the safety and medical departments.

Dr. Jarrard stated that if an applicant answered "yes" to any of the questions at question 2, it would have required further medical review before the applicant was considered for hire. A nurse would call the applicant and interview him to obtain all of the details. Most likely, that would lead to additional examinations or requests for records.

With respect to the question about surgeries, Dr. Jarrard stated that a positive answer to this question would have been followed up by a nurse, who might have requested more information. Similarly, if the question about a previous back injury had been answered affirmatively, it would have been followed up, and additional information almost certainly requested. A positive response to the question about back pain would also require more screening and follow up by a nurse.

Dr. Jarrard was asked to review a document regarding a knee injury in May 1976. He noted that the time period for the records was from May to June 1997, and included treatment and documented lost time. It did not support Mr. Carter's response of "no" to the question of whether he ever had an injury, illness, hospitalization or surgery that required him to miss work for more than two days. Dr. Jarrard noted that the document specifically stated that Mr. Carter was given an off work excuse from June 9 to June 20, 1997.

Mr. Carter stated that he guessed that he missed work, having seen the document. But he stated that he went back to work on light duty, and did not understand if that would be considered as being "off work." He thought that he missed work the day he had his knee scoped, but then he went back to work on light duty. He did not miss more than two days work for this incident.

Dr. Jarrard reviewed Exhibit 13, which was a report of injury, a strain to the lower back. He stated that it differed from Mr. Carter's answer on the questionnaire, which was "no." It reflected that Mr. Carter had a history of low back pain.

Dr. Jarrard reviewed the 1990 report of Mr. Carter slipping and hitting his back on a rack, which did not support his answers to the questionnaire.

Mr. Berlowitz objected that Dr. Jarrard, BNSF's witness, had been provided copies of these documents before the hearing, even though BNSF refused to provide them to Mr. Carter.

Mr. Carter testified at the hearing. He stated that on his application, there was a spot for the U.S. Army, but part of his Navy service, his attendance at the cryptographic technician school, was also on the application. He stated that his Navy information was not on the application because he had a top secret clearance. Mr. Carter stated that during his second round in the Army, he also had top secret clearance. He stated that someone with a top secret clearance cannot disclose what they did.

Mr. Carter stated that on his initial discharge from the Navy, he received an other than honorable discharge for misconduct. He acknowledged that he injured his knee in the spring or summer of 1997 at work. He stated that he would not call the incident in 1987 at the Millard Drywall Company a "back injury." He had never seen the report of injury before the date of the hearing. After reviewing the report, he continued to state that he had never sustained a back injury. He noted that the report reflected a sprain to lower back. He recalled that he was walking on boards across a little valley. The board broke while he was carrying two big pails of Dryvit. He did not sustain any broken bones, fractures, lacerations, cuts, or bruises. It was customary that if anything happened, they were treated. All that was done was to put some heat

on his back and that was the end of it. The pain lasted about a week, and he has had no symptoms since then. Mr. Carter did not consider that to be an “injury,” and that was why he did not report it as an “injury” on his questionnaire.

Mr. Carter acknowledged that he had a knee injury while working for Sysco, but he reported that during his application and interview process. He stated that during the employment process, he called a nurse over to ask her if the question involved having his knee “scoped.” She told him that the question was asking about major surgery, such as open heart surgery or things of that nature. He pulled his pants leg up and showed her where the scope was done, and said, you mean to tell me you don’t consider this a surgery? She told him that no, they were looking for major surgeries, and asked him to walk back and forth for her. She told him that it did not appear there was anything wrong with his knee. He was not limping. The nurse indicated that as part of his employment process he would go through a stress test, and if he did not pass, he would not be considered.

In Mr. Carter’s view, he answered all three of the questions correctly, and in accordance with what the nurse told him. Mr. Carter stated that at the time he filled out the questionnaire, he did not have any back pain or musculoskeletal problems.

Mr. Carter stated that he went to talk to the Mayor of Kansas City, Emanuel Cleaver, to see if he could correct his other than honorable discharge. He stated that his discharge was amended to honorable; he now has three honorable discharges on his military record.

Mr. Carter stated that it would be a violation of military law to divulge what he did while in the Army and Navy under a top secret classification, and that is why he did not put his Navy service on his application. He stated that he could not talk about what he did because he would go to prison; he also stated that his records would be sealed until 65 years after his death.

Mr. Carter claimed that the three page application was not a complete copy of his employment application. He stated that there was paperwork that was filled out and signed by him and Larry Cloyd, as well as the other person at the interview, that was stapled to the back of his application, along with his DD214s, union cards, and other cards from the other railroad where he worked, which were paper clipped. The statements were his explanation of why he could not disclose what he did in the Navy, and what the nurse told him about his knee, and that it was not necessary to report the scope, which was not a surgery.

Mr. Carter identified the HR rep at the employment interview as Shanida Highsaw; the other person was Larry Cloyd, the Local Chairman of the union.

Mr. Carter acknowledged that the event reflected in the employer’s report of accident for Associated Wholesale Grocers, in which he slipped on some dressing and hit his lower back against a rack, happened. He did not consider that bump to his back to be an “injury.” He stated that he experienced soreness; the doctor wrote low back pain and bruising.

Mr. Carter had never seen (EX 13 and 14) before. He recalled the two incidents. He stated that to him, a back injury is something that would paralyze you; a strain, sprain, or

bruising is just something that happens, and heals, and you go on about your life. He did not have any pain from these incidents; he did not think he could have done a lot of things he did, such as going into the military, if he had problems. He received medical attention for both incidents, and heat treatment for one of them, but he never had any more problems with his back.

Mr. Carter argued that he was not going to get a fair chance, because he got hurt, and the company wanted to get him out.

This exhibit includes a dismissal letter dated April 5, 2012, signed by Mr. Sherrill, advising Mr. Carter that as a result of the March 20, 2012 investigation, he was immediately dismissed for dishonest conduct due to his failure to disclose pertinent medical information concerning previous injuries to his back and/or knee on his pre-employment medical questionnaire, as well as his failure to disclose his military service in the Navy, including his less than honorable discharge. He was charged with violating MSR 28.6 Conduct.

Mr. Sherrill stated that in assessing discipline, consideration was given to Mr. Carter's personnel record and the discipline assessed was in accordance with the BNSF Policy for Employee Performance and Accountability.

#### RX 7

These exhibits concern the March 28, 2012 investigation of Mr. Carter's alleged dishonesty when questioned by his supervisors on February 9, 2012 about his failure to clock into work on February 5, 2012. Mr. Sherrill was the conducting officer, and Mr. Carter was represented by Mr. Berlowitz and Mr. Gronniger.

Thomas Murray testified that on February 9, 2012, he was going through his time keeping payroll and his No Clock in Exception Report, when he saw that Mr. Carter's name came up as not clocking in on February 5. According to Mr. Murray, Mr. Carter was on probation for absenteeism, and he noticed that his name did not have a clock in.<sup>18</sup> He wanted to ask him if he was at work on time that morning.

When he asked Mr. Carter if he clocked in on February 5, Mr. Carter stated that he did not know if he did, and that he had asked the Relief Supervisor, Mike Ford, to check on it that day for him. Mr. Murray questioned Mr. Ford, who said that he had no knowledge of Mr. Carter asking him to check on his time that morning.

Mr. Murray stated that he received a statement by Mr. Carter on February 9, 2012, stating that on February 5, 2012, he came in and told Mr. Ford that he could not remember if he clocked in ASAP, and Mr. Ford said he would check, because Mr. Carter did not want to double clock in. Mr. Carter thought that this was the day that it was foggy outside. He talked with Mr. Ford after the morning briefing. He was dressed and there on time.

Mr. Murray acknowledged that on February 9, 2012, he had Mr. Carter write two statements. On the first statement, Mr. Murray instructed Mr. Carter to put in that he was there

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<sup>18</sup> There is nothing in the record to suggest that Mr. Carter was on probation for any reason.

on time; if Mr. Carter was there on time, they needed to have that in the statement. Mr. Murray stated that he made a copy of the “final draft,” and gave the two statements back to Mr. Carter.

According to Mr. Murray, Mr. Carter did not say that he had been blocked by a train or van on his way to work that morning; it was not typical for employees to be blocked by a train going to that building.

Mr. Murray stated that he instructed Mr. Carter to write a statement saying whether or not he was there on time ready to go to work. He agreed with Mr. Carter that after Mr. Carter wrote his statement, he read it and asked Mr. Carter to write another statement saying whether or not he was there on time for work. He did not tell Mr. Carter to write that he was there on time.

Mr. Murray took this information to his foreman, Bryan Thompson and asked his advice on how to proceed.

Mr. Jeremiah Thomas testified that he also questioned Mr. Carter on February 9, 2012. During his turnover with Mr. Murray that morning, Mr. Murray was doing his regular timekeeping for his shift, looking for clocking exceptions. He noticed that there was no section on February 5 for Mr. Carter, and he asked Mr. Thomas to go with him to take a statement from Mr. Carter.

Mr. Carter stated that he was there on time, dressed and ready to go, but he could not remember if he clocked in. He did not want to have double clocking, so he did not clock in until he talked to his Relief Supervisor and asked him to check on it.

Mr. Thomas stated that he was outside the first time Mr. Murray spoke with Mr. Carter. Mr. Thomas did not ask Mr. Carter questions, but witnessed the questions Mr. Murray asked.

Mr. Bryan Thompson testified that sometime in the first part of February, Mr. Murray brought to his attention that he had an issue with Mr. Carter involving invalid clocking. Mr. Murray indicated that there were some discrepancies on the 5<sup>th</sup> of February, and he asked for Mr. Thompson’s help in investigating the situation.

Mr. Thompson requested footage from the security cameras for that date. The video was played, and showed that on February 5, 2012, a white SUV came into the parking lot at 7:03:58 and parked at 7:04:06. Mr. Carter got out of the vehicle, and entered the building at 7:04:30. A second video showed Mr. Carter arriving in the lunch room at 7:05:13, walking past the time clock, and off camera at 7:05:35.

Mr. Carter asked Mr. Thompson what was the policy if an employee were late because he was stopped behind a van or a train. Mr. Thompson stated that he would expect the employee to notify his supervisor, and the supervisor would validate that the delay was valid, and note the exception.

Mr. Carter testified that, after watching the video, he was late to work on February 5, 2012. He acknowledged that he provided two statements to Mr. Murray, who instructed him to



put in that he was there on time. At that time, Mr. Carter could not remember looking at the time clock, and he did not know if he was there on time. When Mr. Murray told him to write down that he was there on time, he smiled at him and asked when was the investigation; Mr. Murray told him there would be no investigation.

Mr. Carter stated that the white SUV in the video was his wife's vehicle; he does not typically drive it to work. When Mr. Murray came to him on February 9, 2012, he thought he was talking about the day that was foggy outside, and he was confused until he saw the video. He saw that he was in his wife's vehicle, and not in his truck. He knew that was not the day he was thinking about, and that he referred to in his statement.

Mr. Carter stated that on February 5, 2012, he was driving his wife's vehicle; he had been up until late the previous night because of his wife's health. Mr. Carter was delayed by traffic trying to get to work. He was behind a Renzenberger truck, which was the transportation used by BNSF to transport conductors and switchmen. In his statement, he was incorrectly referring to a date other than February 5, 2012. When he saw the video at the hearing, and realized he was driving his wife's SUV on February 5, he realized his mistake.

Mr. Carter stated that he told Mike Ford when he got to work, during the morning briefing, that he was delayed by the Renzenberger van. There was a discussion about the vans and speeding in the yard. He was not dishonest when he wrote his statement; he was mistaken about the day Mr. Murray was referring to. After seeing the video, he agreed that he was late on February 5, and it was because of a delay caused by the Renzenberger van.

Mr. Carter produced a copy of the original statement he wrote for Mr. Murray, in which he stated that on the day they talked about he came in and told Mike Ford that he could not remember if he clocked in ASAP, and Mr. Ford stated that he would check because Mr. Carter did not want to double clock in. Mr. Carter thought that this was the day it was foggy outside. He was dressed and ready to go to work. Mr. Murray instructed him to add that he was there on time.

Mr. Sherrill sent a dismissal letter dated April 16, 2012, advising Mr. Carter that he was dismissed for dishonesty when questioned by BNSF officers on February 9, 2012 about his failure to clock in to work on February 5, 2012. He was charged with violation of MSR 28.6 Conduct.

RX 8

This exhibit is the BNSF Policy for Employee Performance Accountability (PEPA).

RX 9

This exhibit includes Rule 40 and Rule 41 from the collective bargaining agreement between the Respondent and the unions, effective September 1, 1974.

RX 10

This exhibit includes unsigned lists of work restrictions for Mr. Carter dated September 29, 2009 and September 14, 2011. They reflect that Mr. Carter was not working at the time.

*RX 11*

This exhibit is a one page undated discussion of the BNSF Hotline, including a message from Mr. Rose, Chairman, President, and CEO, and instructions on making a report.

*RX 12*

This exhibit is a copy of the BNSF 2012 Code of Conduct.

*RX 13*

This exhibit is a December 5, 2013 “Callout Report” for Mr. Carter, which appears to reflect his monthly earnings with BSNF.

*RX 14*

This exhibit is a two page graph.

*RX 15*

This exhibit is Mr. Carter’s November 5, 2013 answers to the Respondent’s interrogatories.

*RX 16*

This exhibit is the August 2, 2012 letter from the OSHA investigator to the Respondent requesting a written position statement.

*RX 17*

This exhibit is the August 7, 2013 letter transmitting the Secretary’s findings to Mr. Carter.

*RX 18*

This is a one-page report, dated January 8, 2006, reflecting Mr. Carter’s absenteeism on four occasions in December 2005.

*RX 19*

This exhibit is an undated one page document titled “Mechanical P&M Team Attendance Policy.”

RX 20

This exhibit includes a dismissal letter dated November 22, 2011 for Darren Bowler, a dismissal letter dated January 8, 2010 for William B. Echols, a dismissal letter dated March 25, 2011 for Rohan R. Kerr, and a dismissal letter dated April 29, 2011 for Jeremiah S. Tordoff, along with their employee transcripts.

RX 21

This exhibit is Mr. Carter's employee transcript.

RX 22

This exhibit is a two page discussion of BNSF's injury reporting policy, effective November 16, 1998.

RX 23

This exhibit is Sections 26.8 and 26.9 of the BNSF Mechanical Safety Rules, effective June 24, 2009.

RX 25

This exhibit is a two page "OSHA Fact Sheet" on whistleblower protection for railroad workers.

RX 27

This exhibit is Mr. Carter's January 3, 2014 response to discovery pursuant to my Order.

RX 28

This is Mr. Carter's Petition for Damages in connection with the civil case against the Respondent.

RX 29

This exhibit is the Judgment returned on October 23, 2012 in the civil case filed by Mr. Carter against the Respondent.

RX 31

This exhibit includes medical records in connection with Mr. Carter's August 2007 injury.

This exhibit is a one page Personal Injury/Occupational Illness Report for Larry Mills, dated March 12, 17, 1995.

## DISCUSSION

### APPLICABLE LAW

The FRSA prohibits a covered railroad carrier from taking adverse action against a railroad employee who engages in protected activity. 49 U.S.C. § 20109. Prohibited activity covers, *inter alia*, an employee's "lawful, good faith act done . . . to notify, or attempt to notify, the railroad carrier or Secretary of Transportation of a work-related personal injury or work-related illness of an employee . . ." 49 U.S.C. § 20109(a)(4). Congress inserted this provision in its amendments to the FRSA in Section 1521 of the 9/11 Commission Act of 2007 because it was concerned that employees would not report work-related injuries for fear of retaliation. *Santiago v. Metro-N. Commuter R.R.*, ALJ No. 2009-FRS-00011, at 16 (ALJ Sept. 14, 2010) (citing *Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads; Hearing Before the H. Comm. On Transportation and Infrastructure*, 110th Cong. 84 (2007)). The failure to report injuries, Congress concluded, undermined the FRA's ability to correctly identify and address threats to the safety of the nation's rail network. *Ibid.* Thus, the purpose of the provision was to encourage employees to report work-related injuries by providing them with whistleblower protection. *Ibid.*

The FRSA makes it unlawful for a railroad carrier to discipline an employee for reporting a hazardous safety condition, for reporting a work-related illness or injury, "for requesting medical or first aid treatment, for refusing to work when confronted by a hazardous safety or security condition, or for following orders or a treatment plan of a treating physician." The Act incorporates by reference the procedures and burdens of proof for analogous claims under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century (AIR 21).<sup>10</sup> AIR 21 requires a complainant prove by a preponderance of the evidence that: (1) he or she engaged in protected activity or conduct; (2) the employer knew of the protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. A complainant who meets this burden is entitled to relief unless the employer can establish, by clear and convincing evidence, that it would have taken the same adverse action absent the protected activity. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. Section 1979.109(a); *Hafer v. United Airlines, Inc.*, ARB No. 06-017 (Jan. 31, 2008), slip op. at 4; *Clemmons v. Ameristar Airways, Inc., et al*, ARB No. 05-048, ALJ No. 2004-AIR-11, slip opinion at 3 (ARB June 29, 2007); *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058 (Dec. 31, 2007), slip op. at 5.

In establishing that a protected activity was a contributing factor to a subsequent adverse action, it is not necessary to show that the employer was motivated by the activity or even gave any significance to the activity. To place the clear and convincing burden on a respondent, all a complainant need do is show that the employer knew about the protected activity and the protected activity was a necessary link in a chain of events leading to the adverse activity. In short, in order to vindicate what has been interpreted as congressional intent to make it very

difficult for employers to defend themselves against whistleblower complaints, the contributing factor analysis has become simply a question of “but for” factual causation.

Once a complainant has shown that his protected activity was a contributing factor to the adverse employment action, an employer is liable unless it can prove by clear and convincing evidence that it would have taken the same action absent the protected activity. 49 U.S.C. § 2121(b)(2)(B)(iv); *Patino v. Birken Manufacturing Co.*, ARB No. 06-125, 2005-AIR-23 (ARB July 7, 2008); *see also* § 20109(d)(2)(a)(i). However, simply because the protected activity was a link in the chain of event leading to the adverse action does not mean another independent chain of causation did not exist. Even if a complainant is able to establish a factual link of causation between the protected activity and adverse action, an employer may still avoid liability by presenting clear and convincing evidence that it would have taken the same adverse action even in the absence of the protected activity. That evidentiary standard is more rigorous than the preponderance-of-the-evidence and denotes a conclusive demonstration that the thing to be proved is highly probable or reasonably certain. *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-9 (ARB February 29, 2012), ARB No. 10-114, PDF at 8 (*citing Clarke v. Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-018, slip op. at 4 (ARB June 29, 2011); *Williams v. Domino’s Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB January 31, 2011)).

### ISSUES

The Respondent has agreed that it is a “railroad carrier” within the meaning of 49 U.S.C. §§ 20102 and 20109. Thus, the Respondent is responsible for compliance with the employee protection provisions of the FRSA. The Respondent also agrees that Mr. Carter was an “employee” within the meaning of 49 U.S.C. § 20109, and thus Mr. Carter enjoys the protections of the FRSA.

The issues to be decided are whether Mr. Carter engaged in protected activity when he reported his August 30, 2007 workplace injury, and whether his protected activity was a contributing factor in the Respondent’s decision to terminate his employment.

### DISCUSSION

There can be no dispute that Mr. Carter engaged in protected activity when he reported his August 30, 2007 workplace injury.<sup>19</sup> Nor is there any dispute that the Respondent was aware of this injury, which subsequently became the subject of a successful lawsuit.

Nor is there any dispute that Mr. Carter suffered an unfavorable personnel action. Indeed, Mr. Carter was fired, not once, but twice. He was dismissed by letter dated April 5, 2012, and again by letter dated April 16, 2012.

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<sup>19</sup> As discussed further below, the Respondent’s argument that filing a FELA claim is not a protected activity is a red herring - Mr. Carter is claiming that he suffered adverse action not because he filed a FELA claim, but because he reported his August 2007 workplace injury to the Respondent, which falls squarely within the definition of protected activity under the Act.

In order to prevail, Mr. Carter must show that his protected activity, that is, his report of his workplace injury, was a contributing factor in at least one of the two determinations to fire him.

### Contributing Factor

It is the complainant's burden to prove by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action. 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." *Clark v. Pace Airlines, Inc.*, ARB No. 04-150 (Nov. 30, 2006), slip op. at 11. In establishing the contributing factor, a complainant need not "prove that his protected activity was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action" but only that his protected activity "tends to affect in any way the outcome of the [employer's] decision." *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, PDF at 13 (ARB Sept. 30, 2011) (internal quotations and citations omitted).

A complainant can connect his protected activity to the adverse action directly or indirectly through circumstantial evidence. *Williams v. Domino's Pizza, supra*, ARB 09-092, PDF at 6; *DeFrancesco v. Union Railroad Co., supra*, ARB No. 10-114, PDF at 6-7. Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward a complainant after he or she engages in protected activity. *Id.*, PDF at 7; *see also Bechtel v. Competitive Techs., Inc., supra*, ARB No. 09-052, PDF at 13, n.69; *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, PDF at 13 (ARB June 24, 2011).

A fair adjudication of whistleblower complaints requires the "full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Timmons v. Mattingly Testing Services*, 1995-ERA-40 (ARB June 21, 1996). In order to establish motivation, a complainant must prove a state of mind, something which is rarely, if ever, established with direct evidence. Circumstantial evidence must be weighed "as a whole to properly gauge the context of the adverse action in question." *Bobreski, supra*, ARB No. 09-057, PDF at 13-14. This is because "a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction." *Bechtel v. Competitive Techs., Inc., supra*, ARB No. 09-057, PDF at 13 (quoting *Sylvester v. SOS Children's Vills. Ill., Inc.*, 453 F.3d 900, 903 (7th Cir. 2006)).

Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041 (Nov. 30, 2005), slip op. at 9. Where an employer has established one or more legitimate reasons for the adverse actions, the temporal inference alone may be insufficient to meet the employee's burden to show that his protected activity was a contributing factor. *Barber v. Planet Airways, Inc.*, ARB No 04-056 (Apr. 28, 2006).

Furthermore, an employee "need not demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action." *Marano v. Department of Justice*, 2 F.3d at 1141 (emphasis in original); see also *Coppinger–Martin v. Solis*, 627 F.3d 745, 750 (9th Cir.2010) ("A prima facie case does not require that the employee conclusively demonstrate the employer's retaliatory motive."). *Araujo v. New Jersey Transit Rail Operations, Inc.*, No. 12-2148, \_\_ F.3d \_\_, 2013 WL 600208 (3rd Cir. Feb. 19, 2013), slip op. at 14-15 (emphasis as in original).

The Board has held that it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action. *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037 (Jan. 31, 2006), slip op. at 14, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation, because once the employer's justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action. See *Florek v. Eastern Air Central, Inc.*, ARB No. 07-113 (May 21, 2009), slip op. at 7-8, citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000).

#### First termination

Despite the fact that it occurred in 2007, I find that Mr. Carter's report of his workplace injury clearly was a factor which, alone or in combination with other factors, tended to affect the Respondent's first decision to terminate his employment. Mr. Carter's workplace injury, and its report to his supervisors, set off a chain of events that led to his successful FELA suit against the Respondent, which encompassed Mr. Carter's deposition as part of discovery. Absent this chain of events, the Respondent would not have had the opportunity to obtain the information it then used as the justification for firing Mr. Carter.

The Respondent devotes much of its brief to its argument that Mr. Carter should not be allowed to argue that he was retaliated against for filing a lawsuit under the FELA. In fact, in this case, Mr. Carter is arguing, not that he was retaliated against for filing his FELA lawsuit, but for reporting his injury in 2007.<sup>20</sup> But it was during the discovery phase in the FELA lawsuit that the medical and other records used as a justification for firing Mr. Carter were discovered.

The Respondent also argues that, because more than four and a half years elapsed between Mr. Carter's report of his injury and his dismissal, this negates an inference that his report of injury was a contributing factor to his dismissal. Respondent's Brief at 20. But just as temporal proximity between the protected activity and the adverse action does not automatically establish that the protected activity was a contributing factor in the adverse action, temporal distance between the protected activity and the adverse action does not automatically "negate" the contribution of the protected activity to the adverse action. While the courts in the cases cited by the Respondent concluded that the passage of time was too great to permit an inference

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<sup>20</sup> Thus, it is not necessary for me to determine whether Mr. Carter exhausted his administrative remedies under FELA, or whether filing an FELA petition is a protected activity under the Act.

of retaliation, those were findings made on the specific facts of those cases. There is no automatic cutoff beyond which an inference of retaliation is not allowed.

Nor would the fact that there was “clearly sufficient and abundant evidence to demonstrate” that Mr. Carter was dishonest, even if established, automatically equate to the conclusion that his dismissal was not pretextual. Respondent’s Brief at 20.

The Respondent claims that Mr. Carter cannot argue that “but for” his August 2007 report of injury, he would not have brought his FELA claim, because a report of injury is not a prerequisite to bringing a FELA claim. Respondent’s Brief at 23. The Respondent’s reasoning seems to be as follows: the Act defines protected activity as the “report” of an injury, as opposed to the occurrence of the injury itself. The FELA does not require that a claimant *report* an injury in order to bring suit, and the predicate for Mr. Carter’s FELA claim was his actual injury, as opposed to his “report” of that injury. Thus, the discovery of Mr. Carter’s previous injuries, as well as his military history during the course of discovery in the FELA lawsuit, was the consequence of Mr. Carter’s injury, as opposed to his “report” of that injury, and Mr. Carter’s “report” of his injury had no connection with the discovery of this information.

I am not swayed by these mental gymnastics. In *Vernace v. Port Authority Trans-Hudson Corp.*, ARB No. 12-003 (ARB Dec. 21, 2012), the ARB noted that the Respondent unpersuasively challenged the ALJ’s factual finding of causation, arguing that it initiated a disciplinary investigation only because of the allegedly unsafe use of a chair (by sitting on it) and not because the claimant reported an injury. The ARB noted that the ALJ found that this clever distinction ignored the broad and plain language of the statute and regulations, as well as the FRSA’s extensive legislative history citing the rampant practices of abuse and intimidation inflicted on railroad workers who reported or even attempted to report work injuries. ARB *slip. Op.* at 2-3.

In this case, it is not possible to isolate Mr. Carter’s “report” of his 2007 workplace injury from the injury itself. Mr. Carter’s “report” of his injury occurred almost simultaneously with the injury – it was his supervisor who took him, ignoring his request for an ambulance, to the on-site medical clinic immediately after the injury.<sup>21</sup> Indeed, the basis for discussing Mr. Carter’s termination cannot be explained without also discussing his “report” of his injury. There is nothing even close to a complete break in the chain of events, such that Mr. Carter’s “report” of his injury dropped out of the line of causation leading to his termination. See, *Hutton v. Union Pacific Railroad Company*, ARB No. 11-091 (ARB May 31, 2013) (ARB has repeatedly ruled that under certain circumstances a “chain of events” may substantiate a finding of contributory factor).

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<sup>21</sup> The Respondent acknowledges that the documentation relating to the injury report indicates that Mr. Thompson was aware of the injury on the date it occurred or very soon thereafter. Respondent’s Brief at 23. In fact, the First Report of injury was initiated on August 30, 2007, 25 minutes after the injury occurred at 8:20 a.m., and reflects that Mr. Thompson called the HD to ask where he could take Mr. Carter; he was advised to take him to the Wyandotte Occupational Health Clinic. RX 31.



As the ARB has noted, the “contributing factor” in a FRSA whistleblower case is not a demanding standard. In *Hutton v. Union Pacific Railroad Company*, *supra*, the Board stated:

The FRSA's legislative history ... reveals Congress's intent to comprehensively address the problem of railway retaliation for occupational injury reporting. Congress's adoption in 2007 of the comparatively lower contributory factor standard reflects congressional intent to promote effective enforcement of the Act by making it easier for employees to prove causation. A "contributing factor" includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." The contributing factor standard was "intended to overrule existing case law, which required that a complainant prove that his protected activity was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor" in a personnel action. Therefore, a complainant need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's "reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected" activity. Indeed, the Third Circuit recently held that the 2007 FRSA amendments adopting the contributing factor standard for FRSA whistleblower complaints reflects Congress's intent to be "protective of plaintiff-employees."

USDOL Reporter at 6-8 (footnotes omitted). *See, e.g., DeFrancesco, supra*, ARB No. 10-114 (Employer, as per its routine, reviewed complainant’s disciplinary records after he reported an injury; Court found that if the complainant did not report his fall, there would be no reason for the employer to review his records, determine that he had a pattern of unsafe conduct, and impose discipline. As a matter of law, the complainant’s report of his injury was a contributing factor to his suspension.)

Clearly Mr. Carter’s August 2007 injury, including his “report” of that injury, was part of a chain of events that triggered the process which resulted in his FELA lawsuit, which in turn resulted in the Respondent’s discovery of the documentation it then used to fire him.<sup>22</sup>

I find that the 2007 report of Mr. Carter’s injury was a contributing factor in the Respondent’s notification to Mr. Carter that he was terminated for dishonesty on his initial job application and physical questionnaire. Since Mr. Carter was able to show that his protected activity contributed to the adverse action, in *order to avoid liability, Respondent must show by clear and convincing evidence it would have taken* the same adverse action in the absence of the protected activity. That means Respondent has to establish not that it might have, but that it would have still fired Mr. Carter, even if he had never reported his injury.

A respondent's burden to prove the affirmative defense under FRSA is purposely a high one. . . . FRSA whistleblower cases are governed by the legal burdens set out in AIR 21, 49 U.S.C.A. § 42121(b). The AIR-21 burdens of proof were modeled after the burdens of

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<sup>22</sup> Under the FRSA whistleblower statute, the causation question is not whether a respondent had good reasons for its adverse action, but whether the prohibited discrimination was a contributing factor "which, alone or in connection with other factors, tends to affect in any way" the decision to take an adverse action.

proof provisions of the 1992 amendments to the Energy Reorganization Act, 42 U.S.C.A. § 5851.40 Congress intentionally drafted the burdens of proof contained in the 1992 ERA amendments – the same as those now contained in FRSA – to provide complainants a lower hurdle to clear than the bar set by other employment statutes: "Congress desired to make it easier for whistleblowers to prevail in their discrimination suits . . . ." In addition to *lowering* a complainant's burden, Congress also *raised* the respondent's burden of proof – once an employee demonstrates that protected activity was a contributing factor, the burden is on the employer to prove by clear and convincing evidence that it would have taken the same action absent the employee's protected activity.

*Hutton v. Union Pacific Railroad Company, supra*, USDOL Reporter at 13 (footnotes omitted).

It is virtually impossible for the Respondent to establish that it would have fired Mr. Carter for dishonesty on his employment application absent his workplace injury and its report, for the simple reason that, had Mr. Carter not suffered this injury, which ultimately led to a lawsuit under the FELA, the Respondent would not have learned about the injuries and military history that were the basis for its dismissal of Mr. Carter. The Respondent has offered nothing to even suggest that, but for this injury, including its “report” to management, and its *sequelae*, it would have become aware of Mr. Carter’s previous injuries and military service, and the fact that they were not included on his employment application.

I find that the Respondent has not met its burden to show by clear and convincing evidence that it would have fired Mr. Carter for dishonesty on his employment application, even if he had not reported his injury.

#### Second termination

It is difficult to understand why the Respondent, having already fired Mr. Carter, would then turn around and fire him again just a few weeks later for allegedly lying to his supervisors about a time card violation, other than as “insurance” in case the earlier termination did not stick. This provided the Respondent with a second, backup justification for firing Mr. Carter – his alleged dishonesty in providing his statement about his reasons for being late to work on February 5, 2012. It is conceivable that, considered in isolation, this incident could establish that the Respondent would have fired Mr. Carter even absent his injury. Unfortunately, that incident is not so cleanly excised from the surrounding circumstances.

Mr. Murray testified at the investigation hearing that he paid particular attention to Mr. Carter’s clock violation because he was on probation for absenteeism. In fact, there is no evidence in the record to suggest that Mr. Carter was not on probation of any kind. In other words, there is nothing to suggest that Mr. Carter was anything but a fully satisfactory employee. There is certainly nothing to substantiate Mr. Murray’s claim during the second investigation hearing that Mr. Carter was dishonest.

Apparently to bolster Mr. Murray’s claim that Mr. Carter was on probation for absenteeism, the Respondent pointed to December 2005, when Mr. Carter had four instances of absenteeism. Respondent’s Brief at 44. The Respondent noted that under its progressive policy

for dealing with absences, an employee receives coaching and counseling for the first seven absences in a calendar year; subsequent absences can trigger the disciplinary process, and lead to dismissal, thus explaining an employee's eagerness to avoid a charge of tardiness, and apparently providing a motive for Mr. Carter to lie when he was confronted by Mr. Murray. Of course, there is no evidence that Mr. Carter had *any* instances of tardiness in the subsequent six calendar years, or that on February 5, 2012, he was at risk for triggering the Respondent's disciplinary process. Indeed, it would be quite a feat of recollection for Mr. Murray to recall these four instances that occurred more than six years earlier as he was reviewing the time records, and to pay particular attention to Mr. Carter's time clock violation because of these instances, unless Mr. Murray was looking for a reason to discipline Mr. Carter.

To be sure, 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. But it is not possible to separate Mr. Heenan's review of the charges in connection with the application and questionnaire from his review of the charges in connection with the clock violation. Mr. Heenan stated repeatedly that the "overall picture" showed that Mr. Carter was not an honest person. His review and consideration of the clock violation charge did not occur in a vacuum, and it is clear that his perception of Mr. Carter and his credibility was colored by his consideration of the charges in connection with the application and questionnaire.

The Board has held that it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action. *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037 (Jan. 31, 2006), slip op. at 14, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). As a general proposition, proof that an employer's explanation is unworthy of credence is persuasive evidence of discrimination, because "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation" for an adverse action. See *Florek v. Eastern Air Central, Inc.*, ARB No. 07-113 (May 21, 2009), slip op. at 7-8, citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000).

In this case, I find that the Respondent's first justification – that Mr. Carter lied on his initial employment application and physical questionnaire – is completely unworthy of credence.

The copy of Mr. Carter's employment application, which was also used at the investigation hearing, appears to have been printed on July 23, 2009, just a few days after Mr. Carter's July 20, 2009 deposition in connection with his FELA lawsuit. According to Mr. Sherrill, the documentation of Mr. Carter's previous injuries and his military history was "brought forward" during Mr. Carter's deposition in connection with the litigation of his FELA claim. No one explained why it was important to provide these documents to Mr. Thompson two and a half years later, on January 30, 2012, or how they related to his role as the "company representative" in the pending FELA lawsuit.<sup>23</sup>

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<sup>23</sup> In fact, the judgment returned on November 2, 2012 in the FELA lawsuit reflects that the Respondent's corporate representative was Mark Grubbs. RX 29.

But less than two weeks after Mr. Thompson was provided with these documents, and a copy of Mr. Carter's deposition testimony, the first notice of violation was issued, charging Mr. Carter with dishonesty on his employment application.<sup>24</sup>

According to Mr. Thompson's testimony at the investigation hearing, the Respondent was not aware of the previous injuries reflected in the documentation. In its Brief, the Respondent claims that, in reviewing Mr. Carter's deposition and "related materials" in preparation for a corporate representative deposition in the FELA case, Mr. Thompson "incidentally" discovered that Mr. Carter was dishonest on his application and questionnaire. Respondent's Brief at 22. But this is blatantly disingenuous - the Respondent was aware of these injuries and Mr. Carter's military record since at least July 2009, when the Respondent obtained this documentation in connection with Mr. Carter's deposition in his FELA claim. The evidence also supports the inference that Respondent knew, well before January 2012, that the "related materials" were not consistent with what was on Mr. Carter's application, which appears to have been printed on July 23, 2009, just days after Mr. Carter's deposition. Yet it took two and a half years before Mr. Thompson was provided this documentation and a copy of Mr. Carter's deposition transcript to "review." Within two weeks, the notice of investigation was issued.

In support of its claim that Mr. Carter received all procedural rights at the investigation hearings, the Respondent points to the Collective Bargaining Agreement (CBA), which makes no provision for prehearing discovery. But while the Respondent was not required to provide Mr. Carter and his union representatives with documentary evidence before the hearing, neither was it prohibited from doing so.<sup>25</sup> Mr. Carter's job was at stake. The Respondent granted him just a one week continuance for the first investigation hearing, when his representatives asked for a month, and denied a request for a modest one week continuance so that he could review the 14 pages of documentation the Respondent produced at the hearing, instead allowing him only a total of one and a half hours during the hearing to do so. Again, the Respondent had had all of this information and documentation for at least two and a half years. Its refusal to allow even a modest continuance, or to provide the documentation to Mr. Carter before the hearing or adjourn for a week so that he could review it, supports an inference of a retaliatory motive on the Respondent's part.<sup>26</sup>

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<sup>24</sup> It is not necessary for me to enter the fray over whether Mr. Carter's alleged omissions on his application and medical questionnaire constituted "dishonesty." It appears that Mr. Carter reported his most recent period of military service, but not all; he truthfully answered the question of whether he had received a dishonorable discharge. The triviality of the injuries dug up by the Respondent, and the extraordinary effort that must have been required to obtain this documentation (as well as questions raised about privacy violations), certainly suggests that the Respondent was trying to make a case against Mr. Carter. Clearly Mr. Carter did not disclose these incidents on his medical questionnaire. But that does not compel a conclusion that he was dishonest or deceitful. Indeed, Mr. Carter has been consistent in expressing his confusion about just what constituted an "injury" or "surgery" that was required to be reported on the application.

<sup>25</sup> The Respondent's "technical compliance" with the CBA is, as the Respondent points out, not at issue here. Respondent's Brief at 52. But the Respondent's "technical compliance" with the CBA does not insulate it from liability in this claim.

<sup>26</sup> Nor are the scales balanced by the fact that Mr. Carter "availed himself of this procedural mechanism" during the second hearing when he introduced his second handwritten statement. Respondent's Brief at 52.

The Respondent's claim that Mr. Carter's requests for continuances were granted is misleading (Respondent's Brief at 8, 11). As Mr. Carter's union representatives pointed out at the March 20, 2012 investigation hearing, the statement on the notice that the hearing was rescheduled by one week by mutual consent was not correct – Mr. Carter did not agree to that date. In fact, Mr. Carter's union representatives strenuously objected to Mr. Sherrill's refusal to grant an additional continuance of one week, so that Mr. Carter could have adequate time to review the documentation, and given the seriousness of the charges. The union representatives also strenuously objected to Mr. Sherrill's refusal to provide the documentation used at the hearing to Mr. Carter in advance (although this documentation was provided in advance to the Respondent's witness, Dr. Jarrard), and his further refusal to allow Mr. Carter more than an hour and a half to review the documentation during the hearing.

The Respondent had been in possession of a copy of Mr. Carter's employment application, as well as the documents it obtained in connection with his deposition, for at least two and a half years. But it was not until January 30, 2012, that he was notified of an investigation hearing to take place just two weeks later. The Respondent refused to provide any documentation to Mr. Carter in advance, and refused his request to reschedule the hearing for just one more week for him to review the documentation and prepare.

Meanwhile, ten days later, Mr. Murray claimed that during a routine review of timesheets, he noticed that Mr. Carter had a clocking discrepancy. Mr. Murray claimed that because Mr. Carter was on probation for absenteeism, he went to talk with him and get a statement. But again, there is no evidence that Mr. Carter was on probation for *any* reason.

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.<sup>27</sup> 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.

While Ms. Cleaver claimed that the mechanics of the hiring process were the same when Mr. Carter was hired as when she began working in her position, she offered no explanation of how she knew this. Mr. Carter's description of the hiring process, which has been consistent, both at his investigation hearing and during this hearing, differs in several respects from Ms. Cleaver's.

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<sup>27</sup> I also note that at the investigation hearing, Mr. Thompson testified that if an employee were stopped behind a van or train, he would expect him to notify his supervisor, who could validate it, and note an exception. This is precisely what Mr. Carter did.

For example, the testimony by Ms. Cleaver and Mr. Kowalkowski leaves much confusion about the sequence of events in the hiring process. Both testified that, if any question on the medical questionnaire was answered “yes,” there would be a followup call by one of the nurse vendors to obtain further information, before the applicant could proceed to the “next step” in the medical evaluation process. Neither Ms. Cleaver nor Mr. Kowalkowski adequately described how the physical examination fit into this process, or how any information obtained during this “followup” would be incorporated into that process.

There was no testimony to establish who redacted portions of Mr. Carter’s medical questionnaire or when, or if the redactions were done before the questionnaire was given to Mr. Thompson, or after. The only responses that are not redacted are those that correlate with the information obtained by the Respondent’s attorneys in connection with Mr. Carter’s FELA lawsuit. But it is reasonable to infer that Mr. Carter did in fact answer “yes” to some of these questions. Specifically, Mr. Carter had a kidney transplant, and was taking medication regularly in connection with that surgery. Mr. Carter did not testify about any nurse or medical personnel contacting him for further information, nor did the Respondent produce any witness to testify about “following up” on Mr. Carter’s “yes” answers.

I note that the medical questionnaire reflects that Mr. Carter’s “Preferred Date” was November 8, 2005, and his “Preferred Clinic City” was Kansas City. It also reflects that Mr. Carter’s “Start Date” was November 14, 2005; Mr. Carter testified that he began work on November 20, 2005. The last question on the eight page questionnaire asks if the applicant would like to talk to the health care professional who would review the questionnaire. This suggests that at the time he completed the medical questionnaire, Mr. Carter had a conditional offer of employment, and his physical examination took place on November 8, 2005, with his interview with Mr. Cloyd and Ms. Hinshaw occurring shortly thereafter.

Mr. Carter has consistently and repeatedly testified that he discussed his knee “scope” with the medical personnel at his physical examination. Mr. Kowalkowski confirmed that a nurse reviews the medical questionnaire with the applicant at the examination.

Ms. Cleaver testified that the employment application is online, and the Respondent does not accept applications any other way. In fact, the Respondent’s Exhibits include an “external” application form, which appears to be a hard copy of the application intended for use in person rather than online. Mr. Carter testified that his attorney submitted a hard copy of his application for him, while he submitted an application online.<sup>28</sup>

Neither Ms. Cleaver nor Mr. Kowalkowski can say definitively that the events described by Mr. Carter did not occur. Mr. Carter has stated consistently that he discussed his military history, including his other than honorable discharge, and his knee surgery with the two interviewers at the final step in the hiring process. He has described how he wrote the information down, and Mr. Cloyd stapled it to his application. Perhaps much of these questions

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<sup>28</sup> Respondent’s claim to the contrary, the fact that prospective employees are not *requested* to submit a resume, or multiple employment applications, does not mean that it does not happen, or cast doubt on Mr. Carter’s version of events. Respondent’s Brief at 29, fn. 34.

could be answered if the record included the “original” copy of Mr. Carter’s employment application. According to Respondent’s counsel, Mr. Carter was provided with all 469 pages of his personnel file. But the only copy of his employment application is the one that was printed out on July 23, 2009, which the Respondent used at the investigation hearing, and introduced in this claim. Clearly Mr. Cloyd and Ms. Hinshaw had a paper copy of Mr. Carter’s application and questionnaire when they conducted his interview; equally clearly, the copy of the application was not the one that was offered by the Respondent at the investigation hearing and at the hearing in this claim.

The Respondent points to discrepancies in Mr. Carter’s explanation of how he completed his employment application, stating that Mr. Carter’s testimony suggests that there are four different employment applications – one submitted by him, one submitted by his attorney, one that was introduced at the investigation hearing, and one that was submitted at the hearing. The Respondent’s statement that Mr. Carter has never provided any support for his “multiple application” allegation is not well taken, especially since the Respondent has not produced the “original” application that, along with his medical questionnaire, was reviewed at his interview shortly before he began work for the Respondent. Respondent’s Brief at 30.

Nor do I find the Respondent’s second justification for firing Mr. Carter – that he lied to his supervisors about a time card incident – worthy of credence. The Respondent produced little, if any, evidence that other employees suffered similar consequences for similar behavior. The examples proffered by the Respondent in an attempt to establish that Mr. Carter was not singled out are not persuasive. Thus, Mr. Darren Bowler was fired on November 22, 2011, after the Respondent learned on September 16, 2011 that he did not disclose pertinent medical information on his medical questionnaire and in his interview with the nurse. His employee transcript reflects that he was on medical leave from September 24, 2011 to October 20, 2011. Clearly, the Respondent took prompt action on learning of medical information that was inconsistent with Mr. Bowler’s application. The Respondent did not wait for two and a half years to act.

Mr. Echols was dismissed on January 8, 2010 for falsification of a BNSF Railway employment application. There is no indication of the nature of the “falsification.”

Mr. Kerr was dismissed on March 25, 2011 for misrepresenting facts when questioned by a supervisor about a television he set up on a locomotive. Although Mr. Kerr did not report any workplace injuries, his record reflects that he received a record suspension in February 2009, and a conditional suspension in April 2009 for testing positive for alcohol on the job.

Mr. Tordoff was dismissed on April 29, 2011 for leaving the property without authorization, and providing conflicting statements to supervisors. Again, while Mr. Tordoff’s employee transcript does not reflect any reports of workplace injuries, it does reflect five previous instances of discipline, from 2006 through 2010.

These examples hardly constitute “evidence that two similarly situated employees were given the same discipline for committing the same violation,” which reflected a “consistent and

neutral application of BNSF's disciplinary policies and procedures." Respondent's Brief at 62, fn. 46.

Moreover, it is not Mr. Carter's burden to "come forward" with "evidence to support an allegation that injured employees are subjected to greater discipline than non-injured employees." Respondent's Brief at 62. Mr. Carter having met his burden to establish that his protected activity was a contributing factor in his terminations, it is the *Respondent's* burden to establish by clear and convincing evidence that it would have fired him regardless of his protected activity. Evidence that similarly situated employees were given the same discipline for committing the same violation could support such a conclusion. Unfortunately for the Respondent, the examples it tendered do not meet that standard.<sup>29</sup>

Moreover, I find that the evidence as a whole supports the reasonable inference that Mr. Murray seized the opportunity presented by the time clock discrepancy, as well as Mr. Carter's confusion over the date in question, to lock him into a written statement that he knew could be proved wrong, and used as the basis for Mr. Carter's termination.

Indeed, once the Respondent's alleged basis for the discipline of Mr. Carter has been eliminated as a pretext, I find that it is eminently reasonable to conclude that Mr. Carter was fired, not once, but twice, because he engaged in protected activity, and for no other reason.

## **CONCLUSION**

Based on the foregoing, I find that Mr. Carter, the Complainant, has established that BNSF, the Respondent, retaliated against him for his reporting of a workplace injury, in violation of the FRSA.

## **DAMAGES**

Neither side has briefed the issues of damages and attorneys' fees. As I have now made the determination that Mr. Carter has established a violation of the FRSA, Mr. Carter will have thirty days from the date of this Decision and Order to submit argument on the amount of damages he believes he is entitled to, as well as appropriate attorney fees. The Respondent will have thirty days from receipt to submit a response, and Mr. Carter will have seven days from receipt to submit any reply.

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<sup>29</sup> Nor does Mr. Mills' dismissal for allegedly fabricating a request for FMLA leave support any such conclusion.



SO ORDERED.

LINDA S. CHAPMAN  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *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).