



**In the Matter of:**

**RANDAL F. JOHNSON,**

**ARB CASE NO. 14-083**

**COMPLAINANT,**

**ALJ CASE NO. 2013-FRS-059**

**v.**

**DATE: June 1, 2016**

**BNSF RAILWAY CO.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Randal F. Johnson, *pro se*, Lincoln, Nebraska**

***For the Respondent:***

**Jennifer L. Willingham, *Esq.*; Paul S. Balanon, *Esq.*; BNSF Railway Co., Fort Worth, Texas**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*. Judge Royce, dissenting.**

### **FINAL DECISION AND ORDER**

This case arises under the employee protection provisions of the Federal Railroad Safety Act (FRSA), 49 U.S.C.A. § 20109 (Thomson Reuters 2015), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-153, and as implemented by federal regulations at 80 Fed. Reg. 69,115; 69,132, 29 C.F.R. Part 1982 (Nov. 9, 2015) and 29 C.F.R. Part 18, Subpart A (2015). On or about December 11, 2012, Randal Johnson filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, BNSF Railway Co. (BNSF), violated the

FRSA by terminating his employment. OSHA dismissed the complaint. Johnson requested a hearing before an Administrative Law Judge (ALJ). Following an evidentiary hearing, the ALJ issued a Decision and Order on July 11, 2014, determining that BNSF did not violate the act. Johnson petitioned the Administrative Review Board (ARB) for review, and we affirm the ALJ.

## BACKGROUND

Johnson worked for BNSF as a locomotive Engineer. Decision and Order (D. & O.) at 4 (Stipulation #3). On June 14, 2012, BNSF asked Johnson to report for duty. *Id.* (Stipulation #8). Because of a 2011 arrest and conviction for driving under the influence, BNSF had prepared a letter requiring Johnson to enter into an Extended Assistance Program (EAP), a substance-abuse program, and the letter and EAP forms were waiting for Johnson's signature when he arrived at work at approximately 5:00 p.m., on June 14, 2012. D. & O. at 4. After Johnson arrived at work, Mark Athey (terminal superintendent) noticed that Johnson was trembling, pale and grey skinned, and his eyes were bloodshot. *Id.* at 9. Johnson told the superintendent that he could still work. Athey asked Johnson if he needed medical attention, but Johnson declined. Johnson ate something and waited thirty minutes before starting work. But that did not help. Athey again asked Johnson if he needed medical attention, and Johnson again declined. *Id.* at 9, 13. Athey pulled him from service pending medical review and ordered a drug and alcohol test. When the drug-test administrator expressed concern about Johnson's condition, Athey and others were more assertive that he seek medical attention. Johnson agreed, and they took him to the hospital. Johnson was cleared to return to service in mid-July 2012 on the condition that he fully complete with all the requirements of the EAP.

One of the EAP requirements was to attend group sessions. *Id.* at 9. Christina Thomas was Johnson's substance-abuse counselor at First Step and Program Director Jerrid Ray was Thomas's supervisor at First Step. If Johnson could not attend a session, he knew that he had to notify his substance abuse counselor and schedule alternate sessions. *Id.* If Johnson missed sessions without being excused, he could be discharged from First Step. "Two or more no shows no calls results in immediate discharge." RX-9, at 1. The aftercare sessions met less frequently than the intensive outpatient treatment sessions. RX-10.

On August 20, 2012, and September 3, 2012, Johnson missed a counseling session. D. & O. at 9 (stipulations #10, 11). He did not call First Step beforehand to notify or schedule a makeup. D. & O. at 9. On or about September 5, 2012, Thomas informed Tom Reimers, EAP manager, that Johnson did not attend two meetings and did not call or schedule a makeup in advance.

Johnson's noncompliance with EAP was forwarded to Janssen Thompson, who was the general manager of the Nebraska Division of BNSF. Thompson recommended that Johnson be dismissed because of the EAP violation in conjunction with Johnson's three "S violations" or serious violations. D. & O. at 8. Johnson had fourteen disciplinary incidents between 1990 and

2012. *Id.* at 4. Johnson was first put on a thirty-six-month probation for an “S violation” or serious violations in 2007. He received a second S violation in 2009 and a third in July of 2010. The director of labor relations affirmed Thompson’s recommendation for dismissal. BNSF dismissed Johnson on October 18, 2012, for violating BNSF’s General Code of Operating Rules 1.13.<sup>1</sup>

Johnson filed a complaint with OSHA on or about December 11, 2012. On April 22, 2013, OSHA dismissed Johnson’s complaint. Johnson filed objections, and the case was assigned to an ALJ for hearing. A DOL ALJ held a hearing on March 12, 2014. On July 11, 2014, the ALJ issued a decision and order dismissing Johnson’s complaint. Johnson filed a petition for review with the ARB. D. & O. at 2.

## DISCUSSION

The Secretary has delegated authority to the ARB to issue final agency decisions under the FRSA. Secretary’s Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379 (Nov. 16, 2012); 80 Fed. Reg. 69,115; 69,137, 29 C.F.R. § 1982.110 (Nov. 9, 2015). We review the ALJ’s factual findings for substantial evidence, and conclusions of law de novo. 29 C.F.R. § 1982.110(b); *Rudolph v. Nat’l R.R. Passenger Corp. (AMTRAK)*, ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 10 (ARB Mar. 29, 2013). To prevail, an FRSA complainant must establish, by a preponderance of the evidence, three specific elements: (1) that he engaged in a protected activity, as statutorily defined; (2) that he suffered an unfavorable personnel action; and (3) that the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action. 49 U.S.C.A. § 42121(b)(2)(B); 29 C.F.R. § 1982.109(a). Failure to prove any one of these elements requires dismissal of the complainant’s whistleblower claim. In this case, we agree that Johnson failed to prove the causation element and focus only on that element, assuming for the sake of analysis that he engaged in protected activity on June 14, 2012.

While Johnson’s loss of his job was truly unfortunate, substantial evidence in the record supports the ALJ’s clear findings that events occurring before June 14, 2012, set in motion and solely fueled the chain of events that led to Johnson’s removal from service and ultimate loss of employment, not any alleged protected activity. Johnson was an Engineer for a locomotive, obviously a job with serious public safety implications. He was arrested and convicted for a DUI incident in 2011. This required his enrollment in an EAP and a notification letter was “already” prepared before he arrived at work on June 14, 2012. D. & O. at 14. Johnson admitted that he had to participate in the EAP “because of [his] certification and because of [his] driving record.” *Id.* at 6. Failure to comply with the EAP would lead to additional serious violations. Johnson

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<sup>1</sup> Section 1.13 states in its entirety: “Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions by managers of various departments when the instructions apply to their duties.” RX-3.

admits, and the record demonstrates, that he missed two meetings, which violated his obligations under the EAP. D. & O. at 4; JX-1. This violation was a third Level S (serious) violation. He was dismissed for these violations, and Johnson even stipulated that he was “dismissed from employment for failing to comply with the terms of his EAP treatment plan.” D. & O. at 4 (no. 12); JX-1 (no. 6).

The ALJ was not persuaded that any protected activity contributed to the removal from service or termination of employment. The ALJ correctly recognized that “contributing factor” is not a “demanding standard” and that it means “any factor” that tends “to affect in any way the outcome of a decision.” D. & O. at 14 (citations omitted). He found that the evidence “demonstrably shows that BNSF fired Complainant for missing two required group sessions mandated as part of his EAP contract and not contacting his substance abuse counselor . . . .” D. & O. at 15. He also found that “Complainant’s reporting of a work related illness or requesting medical treatment on June 14, 2012, did not set in motion the chain of events eventually resulting in the allegation of rules violation and is not inextricably intertwined with the eventual adverse employment action.” *Id.* at 14. The ALJ found as a matter of fact that BNSF “honestly and reasonably believed at the time of the decision to terminate Complainant that he had missed two group sessions without permission” and that this was his “third level S violation” and, therefore, a “dischargeable offense.” *Id.* at 15. In his petition for review and supporting brief, Johnson attempts to challenge the ALJ’s critical findings of fact on the issue of causation. But these findings of fact are supported by substantial evidence and, therefore, we cannot choose to ignore them and reach our own conclusions. Accordingly, for the reasons articulated in the ALJ’s Decision and Order as to the issue of causation, based upon the ALJ’s findings of fact and conclusions of law, we affirm the ALJ’s dismissal of Johnson’s complaint.<sup>2</sup>

**SO ORDERED.**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

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<sup>2</sup> While we affirm the ALJ’s dismissal of Johnson’s claim, we do not endorse every collateral legal issue in the ALJ’s legal analysis.

**Judge Royce, dissenting.**

I disagree with the majority's dismissal of this case for a number of reasons. The majority declined to rule on the ALJ's findings of no protected activity but instead affirmed the ALJ's finding of no contributing factor. In my view, had the ALJ properly analyzed complainant's alleged protected activity, controlling precedent would mandate, at a minimum, that contributing factor causation be presumed. In addition, the ALJ's finding of no contributing factor was based upon key findings of fact unsupported by substantial evidence.

1. Protected Activity

Johnson's allegations of protected activity under FRSA include the following:

- a) He requested medical or first aid treatment on June 14, 2012, under 49 U.S.C. § 20109(c)(2).
- b) He requested transportation to a hospital on June 14, 2012, under 49 U.S.C. § 20109(c)(1).
- c) He refused in good faith to work on June 14, 2012, in light of his dehydration and inability to work safely under 49 U.S.C. § 20109(b)(2).
- d) BNSF endangered his life by denying, delaying or interfering with his medical or first aid treatment on June 14, 2012, under 49 U.S.C. § 20109(c)(1).

The ALJ also considered whether Johnson might be covered under 49 U.S.C. § 20109(a)(4), which covers complainants who notify the railroad of a work-related personal injury.

The ALJ rejected all of these claims except Johnson's work refusal allegation, which the ALJ did not address. With respect to Johnson's protected activity allegation under § 20109(a)(4) (reporting a work-related injury or illness) and § 20109(c)(1) (delaying medical treatment or requesting transportation to hospital), the ALJ summarily stated, without explanation, that neither statutory provision applied because Johnson's illness, although manifesting itself while on duty, "was not work-related as required under the statute. § 20109(a)(4), § 20109(c)(1)."<sup>3</sup> This was error.

In a recent case with comparable facts, the Eastern District of Louisiana explained in detail why the manifestation of a pre-existing condition while on duty constitutes an injury "during the course of employment" within the meaning of § 20109(c)(1).<sup>4</sup> In *Jones v. Illinois*

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<sup>3</sup> D. & O. at 13.

<sup>4</sup> *Jones v. Illinois Cent. R. Co.*, No. 15-635, 2015 WL 5883030, at \*3-5 (E.D. La. Oct. 8, 2015) (noting that *Port Authority Trans-Hudson Corp. v. Dep't of Labor*, 776 F.3d 157 (3d Cir. 2015) is not *contra* as it does not directly address "whether an injury occurring at work must also be caused by work.").

*Cent. R. Co.*, the complainant alleged that sometime after he arrived at work he became ill and, because his supervisors failed to call an ambulance or timely take him to the hospital, he suffered a brain hemorrhage and significant brain damage due to delay in his medical treatment.<sup>5</sup> The complainant admitted that his brain hemorrhage was triggered by high blood pressure that was not work-related. The court first looked to the language of the statute which explicitly covers an employee “who is injured during the course of employment.” Construing the word “during” as ordinarily indicating a temporal limitation, the court held that “this language unambiguously covers employees who suffer injury while on duty at their place of employment, irrespective of the injury’s cause.” The court additionally explained why this interpretation was necessary to achieve the statutory goals. First, the court noted that § 20109(c)(1) was remedial in nature and must thereby be liberally construed. Finally, the court reasoned:

Congress must have recognized that the incentive for an employer to discourage treatment is present any time an employee is injured while at work. After all, the cause of an on-duty injury is often unclear. An employee can have a heart attack, for example, and it may not become evident until much later whether the attack was brought on by work-related stress or a pre-existing condition. Because the employer often will not immediately know whether a given injury will ultimately be reportable, prohibiting interference with medical care for *all* injuries would promote the deterrent effect.<sup>[6]</sup>

It is undisputed that Johnson requested transportation to a hospital on June 14, 2012, despite conflicting evidence surrounding that request. Johnson testified that he repeatedly asked to go to the hospital but was told he had to wait for both a breathalyzer and urine test before he could leave.<sup>7</sup> BNSF witness, Mark Athey, Terminal Supervisor, the only other person testifying, who was actually present at the time, denied telling Johnson he had to wait for a breathalyzer and urine test before he would let him go to the hospital.<sup>8</sup> Athey conceded, however, that Johnson “volunteered” to go to the hospital after the person sent to administer the urine test expressed concern with Johnson’s condition.<sup>9</sup>

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<sup>5</sup> *Jones*, 2015 WL 5883030, at \*1.

<sup>6</sup> *Jones*, 2015 WL 5883030, at \*7.

<sup>7</sup> Hearing Transcript (Tr.) at 31, 63, 76.

<sup>8</sup> Tr. at 194.

<sup>9</sup> Tr. at 174-175.

Further corroboration that Johnson requested transportation to a hospital may be found in the June 15, 2012 letter addressed to Johnson from BNSF Director of Administration (Greg Wright). This letter—written the day after Johnson’s hospitalization—instructed Johnson that he was being placed on medical leave and directed him to contact Field Manager Medical Environmental Health, Eileen Warner. The letter stated in part:

You were observed to be trembling, anxious, and have blood shot eyes. In your conversation you noted that you were not eating, had lost fifty (50) pounds, and perhaps had low blood sugar to account for your symptoms. *You requested treatment at a local hospital.* Additionally, you noted that you were not safe to be on a train that evening.<sup>[10]</sup>

The ALJ erred by failing to explicitly find that Johnson requested transportation to the hospital on June 14, 2012, and that that request constituted protected activity under § 20109(c)(1).

The ALJ similarly erred in his treatment of Johnson’s claim under the “prompt medical attention” provision of FRSA (§ 20912(c)(1)) which states that a railroad “may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment.” Contrary to the ALJ’s decision, this provision requires only that an injury occur “during the course of employment”—not that it is otherwise “work-related.” The ALJ’s findings of fact in connection with this claim consisted of a single conclusory sentence: “Respondent did not refuse Complainant’s requests to seek medical attention or deny or prevent him from getting medical treatment.”<sup>11</sup>

As mentioned above, two witnesses (Athey and Johnson) testified regarding the events of June 14, 2012, during which Johnson became ill and was ultimately hospitalized—and in key respects their testimony was contradictory. Johnson testified that he repeatedly requested medical treatment after being pulled from service on June 14, 2012, but that he was not allowed to leave until he had been screened for drug and alcohol use.<sup>12</sup> Athey denied this testimony, instead stating that Johnson repeatedly rejected offers of medical treatment until right before he was transported to the hospital, when he “volunteered” to go.<sup>13</sup> The ALJ’s scant findings of fact regarding the events of June 14, 2012, impliedly rejected Johnson’s testimony and adopted Athey’s version of events: “It was not until Respondent asked about his well-being a third time

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<sup>10</sup> BNSF Exh. 7 (emphasis added).

<sup>11</sup> D. & O. at 13.

<sup>12</sup> Tr. at 63, 65-66 (Johnson).

<sup>13</sup> Tr. at 174, 177 (Athey).

and requested a drug test, did Complainant seek medical treatment.”<sup>14</sup> The ALJ offered no explanation of why he credited Athey’s testimony over Johnson’s. He made no credibility findings and did not resolve the conflicts between Johnson’s and Athey’s testimony. In any case, the ALJ’s findings of fact, when viewed in concert with several undisputed record facts, strongly suggest that BNSF “delayed” his medical treatment in violation of § 20109(c)(1).

The ALJ held that “while Mr. Johnson believed he was capable of performing his duties when he reported for work on June 14, 2012, the fact is he was in a state of extremis shortly after arriving at the train yard, the result of overexertion in the heat at his home earlier in the day and nothing related to or occurring on his job.”<sup>15</sup> Athey and Johnson both testified that when Johnson arrived at work at 17:00, Johnson was directed to sign a letter pertaining to a DUI he received over a year earlier.<sup>16</sup> Not long thereafter, Athey observed that Johnson was trembling, pale, grey-skinned and his eyes were bloodshot.<sup>17</sup> Given these symptoms, Athey decided to initiate a “signs and symptoms observation” to determine whether Johnson was under the influence of drugs or alcohol.<sup>18</sup> At this point, Athey pulled Johnson out of service, pending medical review and sent for a drug and alcohol tester to administer a breathalyzer and take a urine sample.<sup>19</sup>

Johnson’s undisputed testimony reflects he was pulled out of service at 17:43.<sup>20</sup> According to Johnson, the breathalyzer tester showed up at 18:20.<sup>21</sup> This testimony accords with Athey’s testimony that Johnson passed the breathalyzer test at 18:45.<sup>22</sup> Athey further testified that the urinalysis tester arrived at 19:15, but Johnson was unable to produce a sample and was complaining of cramping. Then, according to Athey, the tester expressed concern about Johnson’s condition, and Johnson “voluntarily sought medical attention” at 19:20.<sup>23</sup> The parties’

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<sup>14</sup> D. & O. at 13.

<sup>15</sup> *Id.*

<sup>16</sup> Tr. at 30, 58-59 (Johnson), BNSF Exh. 16, at p. 10 (Athey).

<sup>17</sup> Tr. at 171 (Athey).

<sup>18</sup> Tr. at 168 (Athey).

<sup>19</sup> Tr. at 174 (Athey).

<sup>20</sup> Tr at. 75.

<sup>21</sup> Tr. at 74, 75.

<sup>22</sup> BNSF Exh. 16, at p.11.

<sup>23</sup> *Id.*



accounts conflict regarding (1) when Johnson requested medical treatment and (2) whether Johnson was prevented from treatment pending tests for drugs and alcohol. However, regardless of whether Johnson was affirmatively *denied* medical treatment after requesting it, record evidence demonstrates there was a *delay* in treatment.

Johnson testified that he was delayed from going to the hospital for about 90 minutes.<sup>24</sup> Undisputed record facts corroborate this timing. Johnson testified (and BNSF did not dispute) that Athey pulled him from service at 17:43 because, as found by the ALJ, Johnson “was in a state of extremis.”<sup>25</sup> Athey testified that Johnson “volunteered” to seek medical attention at 19:20. The record demonstrates conclusively that Johnson suffered serious medical symptoms from the time he was pulled out of service at 17:43 until he was taken to the hospital sometime after 19:20. Thus, 97 minutes passed from the time Athey pulled Johnson out of service until he was transported to the hospital.

On this record, it is evident that BNSF *delayed* Johnson’s medical treatment.<sup>26</sup> The ALJ found that BNSF neither denied nor interfered with Johnson’s medical treatment but erred by failing to consider whether the evidence was sufficient to support a finding that BNSF *delayed* Johnson’s medical treatment under § 20109(c)(1). Had the ALJ so found, causation would have been presumed. We have held that the protected activity of requesting medical treatment is presumed to be a factor in the adverse action of delaying medical treatment. As we explained in *Santiago v. Metro-North Commuter R.R. Co.*,

However, the instant that the railroad carrier directly or indirectly inserts itself into that process and causes a denial, delay, or interference with the medical treatment, the protected activity necessarily becomes a presumptive reason. In other words, a request for medical treatment is necessarily connected to the

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<sup>24</sup> Tr. at 86.

<sup>25</sup> D. & O. at 13.

<sup>26</sup> The ALJ acknowledged that Johnson sought medical treatment at some point: “It was not until Respondent asked about his well-being a third time and requested a drug test, did Complainant seek medical treatment.” D. & O. at 13. Exactly when and how many times Johnson requested medical treatment or hospitalization were disputed facts not sufficiently addressed by the ALJ. In any case, the provision prohibiting delay in treatment (§ 20109(c)(1)) contains no explicit precondition requiring an injured employee to actually request medical attention; the prohibition states only that a railroad “may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment.” It stands to reason that a literal request for medical treatment would not be required to warrant protection since an injured employee might be too ill or traumatized to articulate such a request.

railroad carrier's act of denying, delaying, or interfering with such request rather than staying out of the medical treatment. This is consistent with the fact that, in trying to follow the parallel structure in sections 20109(a) and (b), Congress did not need to include the language prohibiting discrimination "due, in whole or in part," to the protected activity in section 20109(c). Causation is assumed by virtue of the fact that the railroad carrier inserted itself into the medical treatment.<sup>[27]</sup>

## 2. Substantial evidence does not support key findings of fact

As explained above, the ALJ erred by failing to properly construe "protected activity" under the statute and apply it to the facts of this case. The ALJ ruled in the alternative that even if there *were* protected activity, Johnson failed to establish that any protected activity was a contributing factor to his termination. But key findings of fact on which the ALJ based his causation analysis are not supported by substantial evidence.

In essence, the ALJ found that the events leading to Johnson's termination were entirely the result of a previous DUI, rather than caused by any protected activity that may have occurred on June 14. The ALJ held:

Complainant was already required to participate in the EAP because of his prior DUI, which occurred well before the events of June 14, 2012. The requirement that Complainant participate in EAP, and the letter acknowledging such, including the requirement to attend group sessions and notify his substance abuse counselor of any absences, existed before the events of June 14, 2012 and Complainant would have been required to attend EAP group sessions whether or not he requested medical treatment or reported a work related illness on June 14, 2012.<sup>[28]</sup>

The majority repeats and affirms this finding, but it is unsupported by substantial evidence of record. First of all, the June 14, 2012 letter to which the ALJ refers, allegedly outlining Johnson's alcohol treatment program, is not in the record. This omission is suspect, given that it is undisputed that the letter was generated by BNSF. Second, the ALJ mistakenly paraphrased Johnson's testimony as follows: "Beginning in June 2012, I knew I had to participate 'because of my certification and because of my driving record' and the EAP had

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<sup>27</sup> *Santiago v. Metro-North Commuter R.R. Co.*, ARB No. 10-147, ALJ No. 2009-FRS-011, slip op. at 16-17 (ARB July 25, 2012).

<sup>28</sup> D. & O. at 14.

nothing to do with the events of June 14, 2012.”<sup>29</sup> When read in context, Johnson’s testimony reflects just the opposite—that his participation in EAP was *not* the result of his DUI arrest (over a year earlier on May 31, 2011) but was instead the result of his illness on June 14, 2012, when BNSF Terminal Supervisor Athey took him out of service, pending medical evaluation.<sup>30</sup> The ALJ presumably based his mistaken determination on testimony by Athey in response to questioning by the ALJ:

Judge Henley: It’s your testimony that Mr. Johnson would have been referred to EAP regardless, because of the pending DUI issue?

Athey: That is correct.<sup>[31]</sup>

Implicit in Athey’s testimony, however, is an acknowledgment that Johnson was referred to EAP for reasons other than his DUI—namely, that Athey withheld Johnson from service, pending medical review, to screen Johnson for substance abuse.<sup>32</sup>

Another BNSF witness, Eileen Walker (nurse practitioner and BNSF Field Manager, Medical Environmental Health) definitively testified that she “mandatorily” referred Johnson to EAP on June 15—the day after he was removed from service and hospitalized—because she determined he was anxious, very nervous, and remained unfit for duty.<sup>33</sup> Further, she testified that she was unaware of the DUI until later.<sup>34</sup> Finally, it is undisputed that Johnson did not sign the First Step (substance abuse program) contract until June 25, 2012.<sup>35</sup> It was this contract—not the June 14 letter as found by the ALJ<sup>36</sup>—that contained the details of Johnson’s treatment,

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<sup>29</sup> *Id.* at 6.

<sup>30</sup> Tr. at 59-60; 97-99.

<sup>31</sup> Tr. at 197.

<sup>32</sup> Tr. at 173 (Athey).

<sup>33</sup> Tr. at 206-207 (Walker).

<sup>34</sup> Tr. at 207.

<sup>35</sup> BNSF Exh. 9.

<sup>36</sup> 49 C.F.R. § 240.115 (Criteria for consideration of prior safety conduct as a motor vehicle operator) provides a clue as to what the June 14, 2012 letter may have contained. The regulation states in relevant part that when a railroad identifies an incident in which an employee is convicted of DUI:

The railroad shall provide the data to the railroad’s EAP Counselor, together with any information concerning the person’s railroad

including the requirement to attend group sessions and notify his substance abuse counselor of any absences. Warner also testified that Johnson's participation in the substance abuse program (First Step) was because Johnson voluntarily informed the EAP Manager (Weidner), sometime following his referral to EAP on June 15th, that he had a chronic alcohol problem.<sup>37</sup>

As a consequence of his DUI (and the June 14, 2012 letter instructing him to contact a counselor) Johnson may well have ended up signing the same contract with First Step as he signed following his hospitalization. Nevertheless, the record demonstrates that the chain of events leading to his contract with First Step was not, as the ALJ found (and the majority affirms), solely because of his DUI, much less in place prior to his hospitalization. This factual distinction is critical because the ALJ's ultimate finding of no contributing factor was itself based upon the faulty finding that "[t]he evidence demonstrates that BNSF's decision to terminate Mr. Johnson on October 18, 2012 was not based in any part on the events of June 14, 2012." The ALJ continued: "[s]imply put, Complainant's reporting of a work related illness or requesting medical treatment on June 14, 2012, did not set in motion the chain of events eventually resulting in the allegation of rules violation and is not inextricably intertwined with the eventual adverse employment action."<sup>38</sup> On the contrary, as explained above, the evidence definitively demonstrates that the events of June 14, 2012, including Johnson's illness, the

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service record, and shall refer the person for evaluation to determine if the person has an active substance abuse disorder.

The June 14, 2012 letter, though not in the record, likely instructed Johnson to report to an Employee Assistance counselor for evaluation. Nevertheless, undisputed evidence shows he was mandatorily referred to EAP on June 15th by a BNSF official unaware of his DUI and as a direct consequence of being suspected of substance abuse and held out of service on June 14th.

<sup>37</sup> Tr. at 210 (Warner). Although not alleged in the record, the fact that Johnson was returned to work on July 18, 2012 (BNSF Exh. 11) and retained his certification (at least provisionally) suggests that he may have taken advantage of BNSF policies reflecting provisions in 49 C.F.R. § 219.403 (Voluntary referral policy), which provides:

(1) A covered employee who is affected by an alcohol or drug use problem may maintain an employment relationship with the railroad if, before the employee is charged with conduct deemed by the railroad sufficient to warrant dismissal, the employee seeks assistance through the railroad for the employee's alcohol or drug use problem or is referred for such assistance by another employee or by a representative of the employee's collective bargaining unit. The railroad must specify whether, and under what circumstances, its policy provides for the acceptance of referrals from other sources, including (at the option of the railroad) supervisory employees.

<sup>38</sup> D. & O. at 14.

misdiagnosis of that illness and his hospitalization, precipitated Johnson's participation in the EAP (and First Step)—not his DUI arrest a year earlier. I would reverse the ALJ's findings with respect to protected activity and contributing factor and remand for findings of law and fact consistent with this opinion.

**JOANNE ROYCE**  
**Administrative Appeals Judge**