U.S. Department of Labor

Administrative Review Board
200 Constitution Ave., N.W.
Washington, DC 20210

In the Matter of:

CLYDE O. CARTER, JR.,	**ARB CASE NOS. 14-089, 15-016, 15-022**
COMPLAINANT,	
v.	**ALJ CASE NO. 2013-FRSA-082**
BNSF RAILWAY, CO.,	**DATE: June 21, 2016**
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
David Bony, Esq.; *Sole Practitioner*; Kansas City, Missouri

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

Before: E. Cooper Brown, *Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*. Judge Corchado, concurring.

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Federal Rail Safety Act

of 1982 (FRSA).[1] On June 26, 2012, Clyde Carter filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his employer, Burlington Northern Santa Fe Railway Co., (BNSF), violated the FRSA by retaliating against him because he filed a report of a work-related injury on August 30, 2007. OSHA found no violation, and Carter requested a hearing before a Department of Labor (DOL) Administrative Law Judge (ALJ). After a formal hearing, the ALJ issued a decision finding that BNSF violated the FRSA and unlawfully discriminated against Carter.[2] In a separate decision, the ALJ ordered BNSF to reinstate Carter and to pay him back pay with interest, punitive damages, and attorney's fees.[3] BNSF appealed both the merits and damages orders, and Carter appealed the ALJ's damages decision. We consolidate the three petitions for purposes of issuing one final decision. We affirm both ALJ decisions, with two modifications regarding the period of back wages and the award of damages, and we summarily explain the basis for our decision.[4]

DISCUSSION

To promote safety in railroad operations and reduce railroad-related accidents, Congress enacted the FRSA whistleblower protection provisions prohibiting a railroad carrier from discharging, demoting, suspending, reprimanding or in any other way discriminating against an employee who engages in any one of seven lawful, good faith acts including notifying or attempting to notify a railroad carrier of a work-related personal injury.[5] A complainant seeking whistleblower protection under the FRSA must establish by a preponderance of the evidence that: (1) the complainant engaged in protected activity; (2) the complainant suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the

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[1] 49 U.S.C.A. § 20109 (Thomson Reuters 2007 & Supp. 2015), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53, and as implemented by federal regulations at 29 C.F.R. Part 1982 (2015) and 29 C.F.R. Part 18 Subpart A (2015).

[2] *Carter v. BNSF Ry. Co.*, ALJ No. 2013-FRS-082 (ALJ July 30, 2014) (D. & O.).

[3] ALJ's Supplemental Decision and Order Awarding Damages, ALJ No. 2013-FRS-082 (ALJ Nov. 25, 2014) (Supplemental D. & O.).

[4] For the ARB's authority, see Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a).

[5] 49 U.S.C.A. § 20109(a)(4) expressly protects 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. . . .".

personnel action.[6] If the complainant meets this burden of proof, the employer may avoid liability by proving through clear and convincing evidence that it would nevertheless have taken the same personnel action in the absence of the complainant's protected activity.[7]

In affirming the ALJ's Decision and Order, we limit our comments to the most critical points.[8] We briefly summarize the background, beginning with the fact that Carter suffered a work place injury on August 30, 2007, which he immediately reported to his supervisor.[9] On June 5, 2008, Carter filed a claim in state court under the Federal Employer's Liability Act of 1908, 45 U.S.C.A. § 51 *et seq*. (FELA), alleging that BNSF acted negligently with respect to his August 30, 2007 workplace injury and requesting damages.[10] In July of 2009, Carter was deposed in connection with his FELA action.[11] On January 30, 2012, Bryan Thompson, a BNSF manager, met with BNSF lawyers to discuss the pending FELA litigation. The lawyers gave him a copy of Carter's 2009 deposition and his employment application.[12] Two weeks later, BNSF notified Carter that in two weeks it would conduct an investigatory hearing about inconsistencies between his deposition testimony and his employment application.[13] Meanwhile, on February 5, 2012, Carter was approximately five minutes late to work and failed to clock in.[14] BNSF informed Carter that he would be investigated about dishonesty regarding his failure to clock

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6 49 U.S.C.A. § 20109(a), (b), (c); *DeFrancesco v. Union R.R. Co.,* ARB No 13-057, 2009-FRS-009, slip op. at 5 (ARB Sept. 30, 2015).

7 *DeFrancesco,* ARB No 13-057, slip op. at 5.

8 While we affirm the ALJ's decision on the merits, we do not adopt every collateral ruling in her legal analysis.

9 D. & O. at 40, n.21 (Carter's First Report of injury initiated twenty-five minutes after the injury).

10 *Id.* at 35; RX 28.

11 *Id.* at 43.

12 *Id.* at 27. Carter's employment application was originally completed in 2005, but the copy that BNSF's lawyers gave to Thompson had been printed on July 23, 2009, three days after Carter's deposition in the FELA matter. *Id.* at 43.

13 *Id.* at 26.

14 *Id.* at 19.

in.[15] The internal hearings in the two matters took place about a week apart in March, and BNSF fired Carter twice by separate letters on April 5, 2012, and April 16, 2012.[16]

We initially affirm the ALJ's findings that: (1) Carter engaged in FRSA-protected activity when he reported his work injury on August 30, 2007; (2) Respondent was aware of Carter's work place injury and of his injury report and (3) Carter suffered unfavorable personnel actions in the form of the two dismissals.[17] And we agree with the ALJ that it is pure semantics to separate the "report of injury" from the injury itself. While apparently not alleged as protected activity in its own right, the FELA litigation undisputedly involved the 2007 injury and kept Carter's protected report of injury fresh as the events in the case unfolded. As we stated in *LeDure*, we can see no logical reason why earlier "protected activity would lose its protected status when it is also discussed in a FELA case. Retaliation for later notifications of the same injury is just as unlawful as retaliation for the initial notice."[18]

As to contributing factor causation, while the ALJ's findings on this issue were difficult to follow at times, she implicitly recognized that the FELA litigation, even if not protected itself, should not be isolated from the original injury or Carter's report of injury: "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."[19] The ALJ seemingly relied on a strict "chain of events" type of analysis that we do not necessarily endorse.[20]

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[15] *Id.* at 6, 24, 25; CX 2.

[16] *Id.* at 24, 37, 42, 45.

[17] BNSF does not dispute that it engaged in adverse action when it fired Carter on April 5, and April 16, 2012. Respondent's Brief at 9, 11.

[18] *LeDure v. BNSF Ry. Co.*, ARB No. 13-044, ALJ No. 2012-FRS-020, slip op. at 5 (ARB June 2, 2015). Notably, the ALJ did not determine whether Carter's FELA claim was also FRSA-protected activity, and Carter neither asserted that his FELA claim was protected activity nor that he suffered adverse action because he filed the FELA claim. *See* D. & O. at 37 n.19, 39 n.20. Prior to the ALJ's D. & O. in this case, the ARB had not addressed this question. However, in the interim since the ALJ's decision, the ARB has addressed the question. In *LeDure*, ARB No. 13-044, slip op. at 5, the ARB affirmed the ALJ's ruling that because the filing and pursuit of a FELA claim effectively provides notification of a work-related injury, often in greater detail than an initial oral or written notice to an employee's supervisor at the time of injury, a FELA claim constitutes protected activity under the FRSA's whistleblower protection provisions.

[19] D. & O. at 41 (footnote omitted).

Nevertheless, she provided sufficient reasons for her causation finding independent of this justification to support a finding of contributory causation.

As the ALJ correctly noted, contributing factor causation may be proven indirectly by circumstantial evidence, including, *inter alia*, "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 the complainant after he or she engages in protected activity."[21] In addition to evidence of a change in Carter's supervisors' attitude toward him after he filed his initial injury report,[22] the ALJ made several findings of fact based on circumstantial evidence of record warranting a finding of contributory causation, including: that Respondent's justification for its initial termination of Carter's employment (i.e., that Carter lied on his initial job application) was "completely unworthy of credence,"[23] that circumstantial evidence support[ed] an inference of a retaliatory motive on the Respondent's part,"[24] and that Respondent's justification for its second termination letter (i.e., that Carter lied to his supervisors about a time card incident) was also unworthy of credence.[25] Ultimately, the ALJ found that Respondent's alleged basis for

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[20] In *Hutton v. Union Pac. R.R. Co*., the ARB held that under certain circumstances a "chain of events" may substantiate a finding of contributory causation. ARB No. 11-091, ALJ No. 2010-FRS-021, slip op. at 6-7 (ARB May 31, 2013) (citing *Smith v. Duke Energy Carolinas, LLC,* ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012), and *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB Feb. 29, 2012)). However, we have never held that protected conduct may be deemed a contributing factor whenever it is part of a chain of causally-related events leading to the adverse action. *See DeFrancesco*, ARB No. 13-057, slip op. at 6-7. In any case, the ALJ's analysis regarding a "chain of events" analysis is harmless in this case because the ALJ relied on a wealth of circumstantial evidence supporting contributing factor causation separate from any mere "chain of events" rationale.

[21] D. & O. at 38 (citing *DeFrancesco,* ARB No. 13-057, slip op. at 7).

[22] The ALJ found Carter to be a credible and reliable witness. D. & O. at 45. He testified that his supervisors' attitude toward him changed after he filed his injury report, D. & O. at 5, testimony that was corroborated by the testimony of Mr. Mills, a former supervisor no longer employed by BNSF, who testified that he noticed a difference in certain supervisors' treatment of Carter after Carter filed his report, and that he overheard a supervisor stating, "got to nail Carter." D. & O. at 10.

[23] *Id*. at 43.

[24] *Id*. at 44.

[25] *Id*. at 47.

terminating Carter's employment "not once, but twice," was pretext for unlawful retaliation.[26] Accordingly, we affirm the ALJ's finding that Carter's protected activity was a contributing factor in his adverse action.

Finally, regarding BNSF's affirmative defense, the ALJ flatly disbelieved BNSF's justifications for the termination of Carter's employment and found that BNSF failed to show clearly and convincingly that it would have fired Carter absent his protected activity. Substantial evidence supports the ALJ's finding that BNSF did not meet its burden, which we accordingly affirm.

Regarding back pay,[27] the Board finds that the ALJ appropriately ordered reinstatement and sufficiently provided reasons for the damages she awarded. Of course, as a FRSA complainant is entitled to be made whole, Carter is due back pay from the date his employment was terminated until he is reinstated.[28] As the ALJ ordered BNSF to pay Carter back wages only until the date of her decision in the expectation that BNSF would reinstate Carter, we make clear that Carter is entitled to continuing back wages until he receives a bona fide offer of reinstatement.[29]

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[26] *Id*. at 48.

[27] We requested the parties to provide the Board with copies of their briefs on damages filed with the ALJ because these documents were not included in the record the OALJ provided to the Board.

[28] 29 C.F.R. §§ 1982.109(d)(1), 1982.110(d) (orders issued finding FRSA violations "will direct the respondent to take appropriate affirmative action to make the employee whole"); *Ferguson v. New Prime, Inc.*, ARB No. 12-053, ALJ No. 2009-STA-047, slip op. at 3 (ARB Nov. 30, 2012) ("Back pay runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement.").

[29] If BNSF fails to reinstate Carter, he may apply to the Assistant Secretary for Occupational Safety and Health to enforce our order of reinstatement. See 29 C.F.R. § 1982.113 ("Whenever a person has failed to comply with . . . a final order . . . the Secretary may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred. In such civil actions . . . the district court will have jurisdiction to grant all appropriate relief" including reinstatement, back pay with interest, and special damages.). In an action for enforcement in district court, Carter may be able to intervene in the proceedings to enforce his administrative order in this case. *See Martin v. Yellow Freight Sys., Inc.*, 793 F.Supp. 461 (S.D.N.Y. 1992), *aff'd*, 983 F.2d 1201 (2d Cir. 1993) (in which a district court "relied on *Int'l Union, United Auto., Aerospace and Agr. Implement Workers of Am. v. Scofield*, 382 U.S. 205 (1965), for the proposition that a successful party in administrative proceedings has the right to intervene in proceedings which review or enforce administrative orders even if the person has no private right of enforcement.").

With regard to punitive damages, both parties appealed the ALJ's decision. The parties' arguments center around the facts of the case as found by the ALJ. Relief under FRSA "may include punitive damages in an amount not to exceed $250,000."[30] Reviewing the ALJ's punitive damages award requires the ARB to consider (1) whether any punitive damages award was warranted, and (2) whether the amount awarded is sustainable.[31]

The inquiry into whether punitive damages are warranted focuses on the employer's state of mind and does not necessarily require that the misconduct be egregious.[32] The determinative factual question an ALJ must answer is whether the respondent acted with "reckless or callous disregard for the plaintiff's rights" or intentionally violated federal law.[33] Like any other fact finding under FRSA, we review an ALJ's factual determination that the employer acted with reckless or callous disregard or intentionally violated federal law for whether it is supported by substantial evidence in the record.[34] If the ALJ finds that the employer had the requisite state of mind and that finding is supported by substantial evidence, on appeal, the ARB will uphold the ALJ's determination that punitive damages are warranted.

BNSF has put forth several arguments as to why punitive damages are not warranted in this case.[35] First, BNSF argues that its conduct does not warrant punitive damages nor call for

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30 49 U.S.C.A. § 20109(e)(3).

31 *Youngermann v. United Parcel Serv. Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 5 (ARB Feb. 27, 2013) (citation omitted)).

32 *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 546 (1999) ("[A]n employer's conduct need not be independently 'egregious' to satisfy 42 U.S.C.A. § 1981a's requirements for a punitive damages award, although evidence of egregious misconduct may be used to meet the plaintiff's burden of proof.").

33 *Youngermann*, ARB No. 11-056, slip op. at 5-6.

34 *Id.* at 7; 29 C.F.R. § 1982.110(b) ("The ARB will review the factual determinations of the ALJ under the substantial evidence standard.").

35 We note that BNSF did not object on appeal to the amount of the punitive damages award (as unconstitutional or otherwise), only as to whether punitive damages were warranted. As no due process challenge has been asserted on appeal to the amount of the award, the punitive damage concerns addressed in *BNSF Ry Co. v. Cain*, 816 F.3d 628 (10th Cir. 2016) are not at issue. In that case, after the respondent challenged the size of the punitive damages award as unconstitutional, the Tenth Circuit held that "the Board must use the *State Farm* guideposts to evaluate the constitutionality of punitive damages awarded under" the FRSA. *Id.* at 643; see *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003).

deterrence because it did not act with reckless disregard of Carter's rights under FRSA. In support of her determination that punitive damages were warranted, the ALJ cited the fact that BNSF fired Carter two times because he engaged in protected activity (reporting his workplace injury) and for no other reason, from which the ALJ concluded that BNSF used the second firing as "insurance" to ensure that Carter would be fired one way or another because of his protected activity. Further, the ALJ cited the fact that BNSF did not provide Carter with his job application, medical questionnaire, and other documentation before his first investigative hearing and refused to grant Carter's request for a one-week continuance to review the documentation it produced, instead providing Carter only an hour and a half break to review documentation that BNSF had had for at least two and a half years. The ALJ viewed this conduct as indicative of intentional retaliation. Further, the evidence of record suggests that BNSF knew that firing Carter *twice* because he reported a workplace injury, even if it had other reasons to give as justifications, exhibited a reckless disregard for Carter's FRSA rights. While there is some contrary evidence in the record—for example, that Carter put notations that he had not had back injuries in the past although he apparently had, and that he was three to five minutes late on February 5, 2012, and apparently stated that he had not been late after he failed to clock in that day—the ALJ's findings that BNSF had the requisite state of mind and acted in reckless disregard of Carter's rights under the FRSA are supported by substantial evidence of record. Further, substantial evidence supports the ALJ's finding that BNSF "had the intent and resolve" to take actions that resulted in harm to Carter,[36] and that BNSF consciously disregarded how its actions obstructed Congress' mandate for FRSA.[37]

Next, BNSF argues that it had anti-retaliation policies showing "good faith" compliance with the FRSA and that the acting supervisors acted outside the scope of their employment when they engaged in misconduct. These arguments fail first because the ALJ was free to discredit the evidence on which BNSF relies to support its "good faith" compliance (anti-discrimination policies) and did discredit it.[38] Written anti-retaliation policies, without more (as in efforts to implement and enforce these policies), do not insulate an employer from punitive damages liability.[39] Further, with regard to the supervisors, the ALJ found that BNSF's agents had the intent and resolve to act to create harm to Carter despite BNSF's policies purporting to prohibit retaliation and that BNSF ratified the agents' actions.[40] Additionally, the ALJ found that BNSF endorsed the supervisors' actions through conducting investigatory hearings with the supervisors

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36 Supplemental D. & O. at 5.

37 *Id*. at 6.

38 *Id*. at 5-6;

39 *E.E.O.C. v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1248 (10th Cir. 1999).

40 *Id.*

as BNSF agents, relying on their reasons for firing Carter in litigation, and offering their testimony in support of this case and cannot now argue that these supervisors acted without its authority or outside of their scope of employment.[41] These findings are supported by substantial evidence.

BNSF also argues that the ALJ made improper inferences and evidentiary determinations. We find these arguments unpersuasive. It is the trier-of-fact's duty to make factual determinations based on the evidence and inferences flowing from it, and the ALJ did not err in doing so in this case. We review an ALJ's evidentiary determinations for an abuse of discretion, and we conclude that the ALJ did not abuse her discretion with regard to the evidence. Specifically, the ALJ did not abuse her discretion when she did not receive Respondent's Exhibits 4 and 5 into evidence because 1) BNSF's counsel withdrew these exhibits at the hearing (D. & O. at 37), and 2) BNSF did not argue then that they were relevant.[42]

Finally, BNSF argues that punitive damages are inappropriate because the ALJ's decision rests on a novel and incorrect understanding of protected activity under the FRSA. We disagree. As noted above, we explained in *LeDure* that protected activity does not lose its protected status when it is later discussed in a FELA claim.[43] The ALJ's decision regarding protected activity is neither novel nor incorrect.

The ALJ's determination that punitive damages were warranted is supported by substantial evidence in the record, and is otherwise in accordance with law. We therefore affirm the ALJ's finding that punitive damages are warranted.

One more issue regarding punitive damages remains. On appeal, Carter not only argues that a punitive damages award was justified given the egregious nature of BNSF's conduct, he argues that a larger award is necessary to punish BNSF for its wrongful acts and to deter such conduct in the future. The ALJ determined that a punitive damages award in the amount of $50,000.00 was necessary to deter further FRSA violations. Punitive damages are not awarded as of right upon a finding of the requisite state of mind; rather, the question of whether to award

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41 *Id.* at 6.

42 D. & O. at 33-37. BNSF argues before us that the exhibits are relevant to show that Carter had absenteeism in his past; however, BNSF failed to make this argument to the ALJ at the hearing, and instead withdrew these exhibits after Carter objected to them as irrelevant.

43 *LeDure*, ARB No. 13-044, slip op. at 5.

punitive damages is in the ALJ's discretion.[44] An ALJ's task, after determining that the evidence is sufficient for a punitive damages award, is to consider the amount necessary for punishment and deterrence and then to either make an award or not, based on those considerations.[45] We review the amount an ALJ awards in punitive damages award for an abuse of discretion.[46] The size of the award an ALJ makes is based on fact findings, and we are bound by the ALJ's findings if they are supported by substantial evidence.[47] We find that the ALJ did not abuse her discretion in determining that $50,000.00 in punitive damages was necessary and sufficient in furtherance of the goal of punitive damages awards to punish and deter future misconduct.

Finally, the Board modifies the ALJ's attorney's fee order such that Carter's counsel shall receive payment for work performed in this case at $285 per hour rather than $225 per hour. Mr. Bony has been practicing law since 1977 as a sole practitioner. The ALJ looked to the 2012 Altman Weil Survey of Law Firm Economics for guidance, which listed the standard median hourly rate for equity partners in the Kansas City area as $285, for a non-equity partner as $241, and for an associate, as $190.[48] Based on Mr. Bony's almost forty years of practice and the difficulty of this litigation, we hold that the ALJ abused her discretion when she ordered that he be compensated at less than the median hourly rate for an equity partner in the Kansas City area

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[44] *Smith v. Wade*, 461 U.S. 30, 52, 54 (1983) (quoting Restatement (Second) of Torts § 908(1) (1977) (Punitive damages "are never awarded as of right, no matter how egregious the defendant's conduct," but "are awarded in the jury's discretion 'to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.'").

[45] *Id.* at 54 ("The focus is on the character of the tortfeasor's conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards.").

[46] Supreme Court and circuit court law points to an abuse of discretion standard for the amount awarded in punitive damages, absent a challenge that the amount is unconstitutionally excessive. *See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433 (2001) ("If no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's 'determination under an abuse-of-discretion standard'" regarding the amount of a punitive damages award (in a common-law claim of unfair competition)) (quoting *Browning-Ferris Indus. of Vt., Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989)); *Deters v. Equifax Credit Info. Servs. Inc.*, 202 F.3d 1262, 1273 (10th Cir. 2000) (in which the Tenth Circuit held that "the district court did not abuse its discretion in reducing the award to conform within the" statutory maximum for punitive damages).

[47] *Youngermann*, ARB No. 11-056, slip op. at 10.

[48] Supplemental D. & O. at 8.

as set forth by the ALJ.[49] Thus, the attorney's fee award is modified, and BNSF shall pay the sum of $42,436.50, representing 148.9 hours of time at the rate of $285 per hour. We affirm the ALJ's determinations regarding Carter's counsel's time entries as within her discretion.

CONCLUSION

For the foregoing reasons, the ALJ's Decision and Order of July 30, 2014, and Supplemental Decision and Order Awarding Damages of November 25, 2014, are **AFFIRMED**, with two modifications to the ALJ's award; (1)the attorney's fees for legal services provided Complainant before the ALJ, is modified such that BNSF shall pay $42,436.50 in attorney's fees and (2) Respondent is ordered to pay back pay until reinstatement, rather than to the date the ALJ issued her decision.

As the prevailing employee, Carter is also entitled to "compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney's fees."[50] Accordingly, Carter shall have thirty (30) days from receipt of this Final Decision and Order in which to file a fully supported statement of costs with the ARB, with simultaneous service on opposing counsel. Thereafter, BNSF shall have thirty (30) days from its receipt of the costs statement to file a response.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge

Judge Corchado, concurring:

I agree that substantial evidence supports the ALJ's finding of a whistleblower violation and agree with the damages awarded and the majority's ruling on the attorney's fees. I do not fully understand the majority's discussion of the ALJ's reliance on a per se "chain of events"

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[49] We review an ALJ's award of attorney's fees under an abuse of discretion standard. *Coates v. Grand Trunk W. R.R. Co.*, ARB No. 14-067, ALJ No. 2013-FRS-003, slip op. at 2 (ARB Aug. 12, 2015).

[50] 29 C.F.R. § 1982.110(d).

theory of causation. Supra, p. 4, footnote 20. If I understand the discussion correctly, I agree that protected activity is not a per se causal link to an unfavorable employment action, even under the "contributing factor" causation standard, simply because it falls in the chain of events leading to the employment action or because it occurs very close to the decision to impose an unfavorable employment action. To violate the FRSA whistleblower statute, the protected activity must affirmatively influence the mental processes of the decision-maker's mind. The fact that protected activity falls in the chain of events leading to unfavorable employment actions can be powerful evidence that it affirmatively influenced the employer's decision-making.[51]

On another point, I must add that the Board determined in *LeDure*[52] that the FELA claim in that case was protected activity based on the evidence presented in that case. It left open for another day the question of whether FELA claims constitute protected activity as a matter of law.

LUIS A. CORCHADO
Administrative Appeals Judge

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[51] Consider the Board's discussion in reversing a summary judgment order in *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 10-11 (ARB Oct. 26, 2012) (the Board explained how the employer's reference to the protected activity in its termination letter constituted evidence of causation).

[52] ARB No. 13-044, slip op. at 5.