No. 20-70211

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN THORSTENSON,

Plaintiff-Appellant,

v.

DEPARTMENT OF LABOR

Defendant-Appellee.

On Petition for Review of the Final Decision and Order of the United States Department of Labor's Administrative Review Board

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RESPONSE BRIEF FOR THE SECRETARY OF LABOR

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JURISDICTIONAL STATEMENT

This case arises under the anti-retaliation provisions of the Federal Railroad Safety Act ("FRSA" or "the Act"), 49 U.S.C. 20109, and its implementing regulations, 29 C.F.R. Part 1982. The Secretary of Labor ("Secretary") had subject matter jurisdiction over this case based on a whistleblower complaint filed by Stephen Thorstenson ("Thorstenson") on February 27, 2011 with the Occupational Safety and Health Administration ("OSHA") against his former employer, Intervenor BNSF Railway Company ("BNSF"), pursuant to 49 U.S.C. 20109(d)(1).

On November 25, 2019, the Administrative Review Board ("ARB" or "Board") issued a Final Decision and Order ("FDO"), holding that the ALJ erred in his contributing factor analysis, affirming the Decision and Order of the Administrative Law Judge ("ALJ") that BNSF proved its affirmative defense (rendering remand on the first point unnecessary), vacating the ALJ's "cease and desist" order regarding a BNSF policy, and dismissing the complaint.[1] On January 22, 2020, Thorstenson filed a Petition for Review of the Board's FDO with this Court. Because the alleged violation occurred in Washington, this Court has

[1] At all times relevant to this case, the Secretary had delegated to the ARB the authority to issue final agency decisions under the employee protection provisions of FRSA. *See* Sec'y of Labor's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378 (Nov. 16, 2012); *see also* 29 C.F.R. 1982.110(a).

jurisdiction to review the ARB's FDO. *See* 49 U.S.C. 20109(d)(4) (review of the Secretary's final order may be obtained in the United States Court of Appeals for the circuit in which the violation allegedly occurred); 29 C.F.R. 1982.112(a).

ISSUES PRESENTED

1. Whether the ALJ, as affirmed by the ARB, erred as a matter of law in analyzing BNSF's affirmative defense, and whether substantial evidence supports the ALJ's conclusion that BNSF proved by clear and convincing evidence that it would have issued a level S record suspension and terminated Thorstenson in the absence of his protected injury report.

2. Whether the ARB erred as a matter of law in holding that the ALJ's conclusion that Thorstenson met his burden under the contributing factor standard was legal error.

3. Whether the ARB was correct to vacate the ALJ's cease and desist order regarding BNSF's disciplinary review period policy.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The anti-retaliation provisions of the Federal Railroad Safety Act ("FRSA" or "the Act"), 49 U.S.C. 20109, prohibit railroad carriers from suspending, terminating, or otherwise discriminating against an employee for engaging in protected activity under the Act, including notifying the railroad of "a work-related

personal injury." 49 U.S.C. 20109(a)(4). FRSA incorporates the procedures and burdens of proof from the whistleblower protection provision of the Wendell H. Ford Aviation and Investment and Reform Act for the 21st Century, commonly known as "AIR21." *See* 49 U.S.C. 20109(d)(2)(A). An employee who believes that he or she has been retaliated against in violation of FRSA may file a complaint with the Secretary of Labor. *See* 49 U.S.C. 20109(d); 29 C.F.R. 1982.103. Following an investigation, the Occupational Safety and Health Administration ("OSHA") will issue a determination either dismissing the complaint or finding reasonable cause to believe that retaliation occurred and ordering appropriate relief. *See* 49 U.S.C. 20109(d)(2)(A); 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1982.105. The ALJ's decision is subject to discretionary review by the Board, which issues the final order of the Secretary. *See* 29 C.F.R. 1982.110.

B. Statement of Facts[2]

Thorstenson was hired by BNSF as a yardman in May 1989. ER 16. He later worked as a switchman and brakeman, and was promoted to a conductor position in 1996. *Id.* During the events relevant to this case, Thorstenson was a train conductor in and around Vancouver, Washington. *Id.*

[2] Citations to the Supplemental Excerpt of Record are abbreviated as "SER." Citations to the Thorstenson's Excerpt of Record is abbreviated as "ER."

As a conductor, Thorstenson was required to adhere to the BNSF safety rules applicable to conductors, engineers, and switchmen, as well as its "General Code of Operating Rules" ("GCOR"). *Id.* GCOR 1.2.5 required BNSF employees to immediately report personal injuries to the proper manager and to complete a written report. ER 21. BNSF's progressive disciplinary policy, known as the "Policy for Employee Performance Accountability" ("PEPA"), divides rule violations into four categories: "Non-Serious Rule Violations," "Serious Rule Violations," "Dismissible Violations," and "Attendance Violations." ER 22. The PEPA designated late reporting of injuries as a "Serious Rule Violation," but contained an exception in which an employee would not be disciplined for late reporting of a "muscular-skeletal injury" if:

> the employee reports the injury within 72 hours of the probable triggering event, the employee notifies the supervisor before seeking medical attention, and the medical attention verifies that the injury was most likely linked to the event specified.

ER 575, 17.

BNSF refers to serious violations as "Level S" violations. ER 22. The usual discipline for a first Level S violation is a 30-day record suspension, in which the suspension is noted in the employee's personnel file but the employee is still permitted to work and earn wages. *Id*. BNSF generally imposed a 36-month probationary "review period" on an employee following a Level S violation, but at

the time of the events in this case, it imposed a shorter 12-month review period for employees who had been both "discipline-free" and "injury-free" for the last five years. *Id.*

On February 2, 2009, Thorstenson slipped on the steps while boarding a train and injured his left knee. ER 17. On February 4, 2009, Thorstenson made a timely report of his injury to BNSF (i.e., within the 72-hour time limit for muscular-skeletal injuries). *Id*. Afterward, Thorstenson was on leave for approximately six months due to the injury, until August 2009. *Id*. When he returned to work, he still experienced periodic stiffness, swelling, and some pain in his left knee after working, and he occasionally visited a physician due to these symptoms. *Id*. Thorstenson periodically provided verbal updates about his medical appointments and the condition of his knee to BNSF manager Steve Matzdorff, claims manager Kris Osmus, and "medical manager" Joan Costa. *Id*. The managers that received these updates did not instruct Thorstenson to report any of the information he provided as a new injury. *Id*.

On October 20, 2010, Thorstenson visited Dr. Kevin Kahn at Rebound Orthopedics in order to close out his medical file on the injury. *Id*. In the medical record of this appointment, Dr. Khan noted that Thorstenson reported occasional discomfort in his left knee, which he described as "just an annoyance" that did not prevent him from working. *Id*. Dr. Khan further noted that Thorstenson still had

full range of motion without pain or instability. *Id*. Dr. Khan released Thorstenson to full-duty work without restrictions. *Id*. The record does not indicate whether Dr. Khan or Thorstenson informed BNSF of the work release. *Id*.

On November 17, 2010, Thorstenson was working as a conductor when he accidentally banged his left kneecap against something metal as he was sitting down. *Id*. He felt pain after bumping his knee, and thought it might be due to his prior injury to the same knee in February 2009. *Id*. He finished his shift that day without reporting the incident to BNSF management. *Id*.

The next day, November 18, 2010, Thorstenson worked his scheduled shift and experienced more swelling, stiffness, and pain in his knee than usual. *Id.* On November, 19, 2010, a scheduled rest day for Thorstenson, he went to Rebound Orthopedics and saw a physician's assistant about his knee. ER 18. He reported that he had pain in his left knee after bumping it against a desk at work and thought he may have "aggravated" his February 2, 2009 injury. *Id*. The physician's assistant prescribed Thorstenson pain relief medication. *Id*.

Thorstenson worked the next two days, November 20, 2010 and November 21, 2010. *Id.* On both days he experienced pain, swelling, and stiffness in his knee, and his pain became increasingly severe on November 21. *Id*. On November 22, 2010, Thorstenson was not scheduled to work and he returned to the doctor regarding his knee. *Id*. The doctor drained fluid from his knee and injected

cortisone, took X-rays, and recommended that he remain off work.[3] *Id.* After the medical appointment, Thorstenson called BNSF Claims Manager Kris Osmus, who told him to inform the trainmaster on duty, John Canavan.[4] ER 19-20. Thorstenson called Canavan, who instructed him that day to fill out an injury report form. *Id.*

On November 24, 2010, BNSF notified Thorstenson that the company was initiating an investigation into whether he had violated the company's timely reporting rule for injuries. ER 21. Following a hearing on January 21, 2011, General Manager Doug Jones concluded that Thorstenson had violated the rules because he did not report the November 17, 2010 workplace injury within 72 hours and he did not report the injury before going to a doctor. ER 21-22. BNSF issued a Level S record suspension, which triggered a probationary period of 36 months. ER 22. Under BNSF's policy at the time allowing a reduced 12-month review period if the disciplined employee had been injury-free for the last five years,

[3] Thorstenson returned to the doctor about his knee on December 6, 2010. The doctor diagnosed him with a torn meniscus and recommended surgery. After recovering from surgery, Thorstenson returned to work on January 17, 2011. ER 18.

[4] As part of his testimony during the ALJ hearing, Thorstenson claimed that he first informed Osmus and a BNSF nurse about the injury on November 19, and called them again on November 22. However, this conflicts with the statement he made to OSHA, in which he said he couldn't remember the date that he first informed management, and his deposition, in which he stated that November 22 was the first date he informed anyone at BNSF about having hurt his knee on November 17. Response Brief Appendix pg. 33. The ALJ ultimately made the credibility determination that his prior statements were likely accurate because they occurred sooner after the events in question than the ALJ hearing.

Thorstenson was not eligible for the reduced 12-month probationary period because he had reported the first knee injury in February 2009.[5] *Id.* On January 28, 2011, BNSF formally imposed the Level S record suspension. *Id.*

Thorstenson filed a grievance challenging the record suspension, and his union represented him before the General Manager and ultimately before a Public Law Board, which arbitrates appeals of disciplinary actions pursuant to the collective bargaining agreement. *Id.* On February 27, 2013, the Public Law Board upheld the record suspension. ER 23.

On February 7, 2011, Thorstenson filed a FRSA complaint with OSHA alleging that he was suspended in retaliation for seeking medical treatment, following the orders of a treating physician, and filing an injury report. *Id.*

On June 26, 2011, Thorstenson was working as a conductor aboard a train with engineer Walt Wasnoska. *Id.* Under BNSF rules, both the engineer and the conductor are responsible for the safe operation of the train, including adherence to applicable speed limits. *Id.* The engineer operates a throttle and brakes to control the speed of the train, and the conductor has access to an emergency brake to stop the train if "the train's maximum authorized speed is exceeded by five miles an

[5] BNSF has revised this company rule as part of a settlement agreement with OSHA. The rule currently only requires that an employee be discipline-free for the prior five years to be eligible for the reduced 12-month probationary period.

hour or more, and there is doubt that the throttle or the non-emergency brakes can control train speed." *Id.*

Wasnoska was eating lunch when the train exceeded the speed limit of 55 miles per hour for 44 seconds, 12 seconds of which the train was traveling at 60 miles per hour. ER 24. The train is equipped with an "alerter" that sounds when the train is speeding and the throttle and brakes have not been moved to slow the speed. *Id.* The alerter was activated for the last six seconds that the train was speeding, at which point Wasnoska moved the throttle from level 8 to level 1 to reduce the speed. *Id.* About five seconds later, Wasnoska lowered the throttle again to idle. *Id.* At this point, Thorstenson noticed that the train was speeding and pulled the emergency brake without warning or communicating with Wasnoska. *Id.* Thorstenson braced himself for "severe slack action," but he did not warn Wasnoska to brace himself. *Id.* Neither Thorstenson nor Wasnoska sounded the whistle before the train crossed a public crossing. *Id.*

On June 29, 2011, the Superintendent of Operations in Vancouver, Chris Lucero, issued a notice of investigation to Thorstenson and Wasnoska regarding the alleged speeding and failure to sound the whistle at a crossing. *Id.* The hearing for both employees took place on August 18, 2011. *Id.* During the hearing, Thorstenson admitted to speeding and not sounding the whistle. ER 25. After the hearing was conducted, Lucero concluded that both employees were responsible

for speeding, failing to sound the whistle before a crossing, and engaging in negligent behavior. *Id.* Lucero recommended Thorstenson and Wasnoska both be terminated as a "stand-alone dismissal," meaning termination regardless of whether they had any prior discipline on their record. *Id.* Pursuant to BNSF's process for making termination decisions, Lucero consulted with HR manager Andrea Smith for her opinion on the recommended action and whether it was likely to be upheld by the Public Law Board. ER 26. Smith advised him that there was a risk of the Public Law Board overturning a stand-alone dismissal in Wasnoska's case because speeding was usually considered a non-serious violation and his failure to sound the whistle occurred in part because of his confusion following Thorstenson pulling the emergency brake without communicating with him first. ER 26. She also advised that the Public Law Board could overturn a stand-alone dismissal of Thorstenson because the transcript of BNSF's investigation hearing did not include much information about the seriousness of Thorstenson's failure to communicate with Wasnoska before activating the emergency brake. *Id.* Based on this analysis, Lucero recommended to General Manager Robert Johnson to issue a Level S discipline against both Wasnoska and Thorstenson, and Johnson adopted his recommendation. *Id.* Pursuant to its disciplinary policy, BNSF imposed a 30 day-record suspension on Wasnoska as he did not have any active disciplinary measures on his record, and terminated

Thorstenson for receiving a second Level S while under the review period for the previous Level S violation imposed nine months before for the late injury report. ER 26-27. On August 30, 2011, BNSF notified Thorstenson of his termination. ER 27.

On August 31, 2011, Thorstenson amended his OSHA complaint to include his termination as an adverse action, and asserted that he would not have been terminated had he not received a Level S discipline for his untimely injury report. ER 28.

Thorstenson exercised his right to appeal BNSF's decision pursuant to the union grievance process. *Id.* The General Manager denied the appeal, and the union represented Thorstenson in arbitration before a Public Law Board. *Id.* On May 30, 2013, the Public Law Board upheld the termination. *Id.*

On June 16, 2015, OSHA issued "Secretary's Findings," to which BNSF filed a timely objection and request for a hearing before an ALJ. *Id.*

C. The ALJ's Decision and Order

After conducting an evidentiary hearing and considering the complete record in the case, the ALJ issued a Decision and Order on July 31, 2018 dismissing Thorstenson's complaint. ER 15-45. In his decision, the ALJ discussed the witness testimony and documentary evidence presented in the case. *Id.*

The ALJ began by explaining that, to prevail under FRSA, a complainant must demonstrate by a preponderance of the evidence that: (1) he engaged in protected activity; (2) the employer knew that he engaged in protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. ER 29. If the complainant meets this initial burden, the burden shifts to the respondent employer to show by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. *Id.*

The ALJ found that Thorstenson engaged in three protected activities: (1) reporting his February 2, 2009 injury to BNSF, (2) reporting his November 17, 2010 injury to BNSF, and (3) filing a complaint with OSHA on February 7, 2011.[6] *Id.* He further found that the BNSF decision-makers who issued the adverse actions against him were aware of the 2009 and 2010 injury reports, but that Thorstenson did not meet his burden to prove the decision-makers knew about the OSHA complaint. ER 31. With regard to the adverse actions at issue, the ALJ noted that the parties stipulated that the January 28, 2011 record suspension and the August 30, 2011 termination were both adverse actions, and found that BNSF's

[6] The ALJ noted that it was undisputed that the two injury reports were protected activities under FRSA, and rejected BNSF's argument that the OSHA complaint was not properly before the court as a protected activity. ER 31-32.

notification of investigation of the late injury report was an adverse action. ER 31-32.

Next, the ALJ found that Thorstenson's protected activity was a contributing factor in the decision to issue a notice of investigation and a Level S discipline for a late injury report. ER 32-33. The ALJ explained that the complainant's burden to meet this causation element requires a showing by a preponderance of the evidence only that the protected activity played "some role," not that it was a "substantial, significant, motivating, or predominant factor." ER 32 (citing *Palmer v. Canadian Nat'l Ry*., ARB No. 16-035, 2016 WL 5868560, *31 (ARB Sept. 30, 2016) (reissued Jan. 4, 2017)). He then determined that Thorstenson's report of the November 17, 2010 injury triggered both the notice of investigation and issuance of the first Level S discipline, and that therefore his protected activity was "inextricably intertwined" with those adverse actions. ER 32-33. The ALJ explained that, "[t]o be inextricably intertwined means that it is not possible... to explain the basis for the adverse action without reference to the protected activity." *Id.* (citing *Palmer*, 2016 WL 5868560, at *15) (internal quotation marks omitted). The ALJ noted that he was "unable to separate [Thorstenson's] reporting the injury and the resultant discipline" because BNSF learned of the Thorstenson's late injury report through the report itself and not from an unrelated source, such as another employee informing management of the untimely-reported injury. ER 33. The

ALJ rejected BNSF's argument that the discipline was imposed because Thorstenson reported late and not because of the report itself, finding that the argument "neglects that there cannot be a late report unless there is a report, and the report is protected." *Id.* He concluded that based on the "inextricably intertwined" theory, Thorstenson had satisfied contributing factor causation with regard to the first two adverse actions. *Id.*

Since he found that the injury report was a contributing factor in the decisions to investigate and issue a Level S discipline against Thorstenson for late reporting of an injury, the ALJ also found that the protected activity was a contributing factor in his termination. *Id.* He relied on Smith's testimony that, without the discipline imposed for the late injury report, she would still have recommended Level S discipline for the second disciplinary action. *Id.* He also noted that BNSF does not dispute that the termination occurred only because, "under BNSF's progressive discipline policy, the prior Level S discipline for late-reporting an injury combined with the second Level S discipline to allow a dismissal." *Id.*

After finding that Thorstenson had met his causation burden, the ALJ determined that BNSF had successfully established the affirmative defense that the company would have issued the Level S record suspension and the termination even in the absence of Thorstenson's protected activities. ER 33-38.

Acknowledging that the "intertwined nature of the injury report and the late reporting makes this a difficult case in which to determine what BNSF would have done absent the protected activity," he found relevant guidance in the ARB's decision in *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, 2015 WL 5781070 (ARB Sept. 30, 2015). ER 36. He explained that in *DeFrancesco*, an employee reported an injury and the employer imposed discipline because it determined that the employee's violation of railroad safety rules caused the injury. *Id.* The ALJ in the case found that the employer did not establish its affirmative defense because "the adverse action logically and literally would never have come about but for the protected activity." *Id.* (citing *DeFrancesco*, 2015 WL 5781070, at *4) (internal quotation marks omitted). The ARB reversed, holding that the ALJ must consider extrinsic factors that the employer can prove would "independently lead to the employer's decision to take the personnel action at issue." *Id.* This could be shown through evidence that there was a "rational basis for the employer's decision, such as the existence of employment rules or polices supporting the decision," along with evidence that the basis was "so powerful and clear" that the adverse action "would have occurred apart from the protected activity." *Id.* (citing *DeFrancesco*, 2015 WL 5781070, at *10) (internal quotation marks omitted). Weighing against this could be evidence of disparate treatment or selective enforcement of company rules against the complainant. *Id.*

Applying this precedent to Thorstenson's case, the ALJ found that, "The overwhelming evidence on the record establishes that in cases involving employees who report workplace injuries, BNSF imposes no discipline when the report is timely and imposes discipline when the report is late." ER 37. Specifically, the ALJ noted that BSNF had submitted evidence that 17 employees other than Thorstenson had timely reported injuries in 2011 and were not disciplined. ER 33, 352-425. The ALJ also found it significant that Thorstenson himself had timely reported injuries on seven prior occasions throughout his career at BNSF and was not disciplined following those reports. ER 38. BNSF also submitted seven Public Law Board decisions upholding its decisions to issue Level S discipline to employees for late reporting an injury, including two employees who, like Thorstenson, "were disciplined for late reporting when the injury occurred less than a week before the report" and one employee who was disciplined although he believed his pain was caused by an aggravation of a prior injury. ER 34, 426-49. He also found it significant that despite the availability of discovery, Thorstenson offered no examples of BNSF either failing to discipline an employee who untimely reported an injury or disciplining an employee for reporting a timely injury. *Id.* This substantial evidence of BNSF's consistent application of its policy for injury reporting showed that timeliness of reporting, not the act of reporting itself, "is the distinguishing factor." ER 37.

Additionally, the ALJ found that the evidence did not indicate that enforcement of the late reporting rule was used as a pretext to retaliate against Thorstenson, or that BNSF harbored animus against Thorstenson. *Id.* The decision-makers provided consistent testimony about their honestly-held beliefs that Thorstenson's injury was a work-related injury that was required to be reported within 72 hours. *Id*.; SER 4-5, 15-17. Further, Thorstenson testified that Canavan did not seem upset with him when he came in to complete his injury report. *Id*.; SER 9. The ALJ also rejected Thorstenson's argument that BNSF's 72-hour reporting rule was arbitrary and confusing, noting that Thorstenson was trained on BNSF's injury reporting rules and had previously reported seven timely injuries before the November 2010 untimely injury report. ER 38-39. He also frequently informed BNSF about doctor appointments and condition updates following his 2009 knee injury even though he was not required to under the rules, and could have asked BNSF managers within the 72-hour period if he wasn't sure whether he should report a new injury. ER 38. He found BNSF's evidence persuasive that under these circumstances, the standard discipline of a Level S 30-day record suspension was appropriate and that it disciplined Thorstenson because his report was late, not because he reported an injury. *Id.*

Having found that BNSF would have issued a record suspension for the late injury report absent the protected activity, the ALJ further determined that BNSF

also met its affirmative defense burden as to the termination. ER 39. BNSF adhered to its progressive disciplinary policy when terminating Thorstenson for a second Level S violation within the probationary period, and issued a Level S record suspension to Wasnoska as well. ER 39-40.

Lastly, the ALJ addressed BNSF's policy of imposing a longer disciplinary review period on employees who had reported injuries within the previous five years. ER 39. He found that BNSF failed to establish its affirmative defense regarding the imposition of a 36-month review period for Thorstenson's first Level S discipline, and that the policy violated the Act, "both on its face and as applied to [Thorstenson] in this instance," because, absent his timely injury report in 2009, Thorstenson would have received a 12-month review period for the first Level S discipline instead of 36 months. *Id.* However, he found that Thorstenson was terminated roughly nine months after the first Level S disciplinary action, so he would have still been terminated even if a 12-month review period had been imposed. ER 26-27, 42. While noting that BNSF no longer requires employees to be injury-free to be eligible for the 12-month review period pursuant to a settlement with OSHA, he ordered BNSF to "cease and desist from any policy that treats more harshly employees who report injuries absent any other distinguishing factor." ER 41, 42.

D. The ARB's Final Decision and Order

On March 25, 2019, the ARB found that the ALJ erred in his contributing factor analysis, but found that remand was unnecessary because it affirmed the ALJ's finding that BSNF established by clear and convincing evidence that it would have imposed the Level S violations and terminated Thorstenson in the absence of his protected activity. ER 1-14. The ARB also found that the ALJ exceeded his authority by issuing a cease and desist order regarding BNSF's policy of imposing a longer review period for employees based on their history of injuries, and vacated the order. *Id.*

First, the ARB affirmed the ALJ's finding that Thorstenson engaged in protected activity by filing injury reports in February 2009 and November 2010 and filing a FRSA complaint with OSHA on February 7, 2011, as well as his finding that the Level S record suspension, the 36-month review period, and the termination were adverse actions.[7] ER 6-7. However, the Board held that the ALJ erred in his contributing factor analysis. ER 7. The ARB held that the "'inextricably intertwined' or 'chain of events' analysis is a construction that is not reflected in the plain language of the statute..." and that the analysis improperly "substitutes for and in some cases circumvents the ALJ's contributing factor or

[7] The ARB noted that, given the disposition of the case, it need not address BNSF's arguments about whether the notice of investigation was an adverse action. ER 7.

affirmative defense analyses." ER 10. The ARB clarified that it will no longer require ALJs to use this analysis, although the ALJ could still "find that an adverse action and protected activity are intertwined such that contributing factor causation is factually established. *Id.* For these cases, the ALJ must explain how the protected activity is a proximate cause of the adverse action, not merely an initiating event." *Id.* (citing *Koziara v. BNSF Ry. Co.*, 840 F.3d 873, 877 (7th Cir. 2016)).

The ARB found that the ALJ's error in the contributing factor analysis did not necessitate remand because the ARB affirmed the ALJ's finding that BNSF established its affirmative defense. ER 11. First, the ARB found that substantial evidence supported the ALJ's finding that BNSF showed by "clear and convincing evidence" that it would have issued the Level S record suspension for the late injury report if Thorstenson had not engaged in protected activity. ER 11-12. The ARB found that the ALJ properly weighed the evidence to conclude that BNSF consistently enforced the late reporting rule, and that there was no evidence of personal animus, disparate treatment, or pretext. *Id.* The ARB also affirmed the ALJ's rejection of Thorstenson's argument that BNSF's affirmative defense must fail because its timely injury reporting rule is "unreasonable and unduly burdensome," because "an employer is entitled to its disciplinary rules even if the rules are unwise, counterproductive, or arbitrary." ER 12. Having found that

BNSF met its burden in defense of the first Level S discipline, the ARB also affirmed the ALJ's finding that BNSF would have imposed a second Level S discipline for the multiple rule violations that occurred on June 26, 2011, and that it would have terminated him in accordance with its progressive discipline policy even in the absence of the protected injury. ER 12-13.

Lastly, the ARB vacated the ALJ's cease and desist order for the company to eliminate its policy of imposing a longer 36-month review period if the employee had reported any injuries within the five years prior to receiving discipline. ER 13. The ARB agreed that BNSF failed to establish its affirmative defense as to the imposition of the 36-month review period for the late-reported injury, but agreed with BNSF's argument on appeal that the cease and desist order was beyond the ALJ's powers and was *ultra vires*, citing *Hoffman v. NetJets Aviation, Inc*. ARB No. 09-021 (ARB Mar. 24, 2011) (the Board only has power to abate a proven violation). *Id.*

SUMMARY OF ARGUMENT

Following an evidentiary hearing and after considering all record evidence, the ALJ concluded that BNSF had proved by clear and convincing evidence that it would have issued a 30-day record suspension and later terminated Thorstenson in the absence of his protected injury report. The ARB correctly affirmed that holding. Contrary to Thorstenson's argument, the ALJ and ARB properly applied

FRSA's affirmative defense standard by holding that in cases where an employee's protected injury report results in the employer discovering that the employee violated a workplace rule, an employer can still establish an affirmative defense without needing to show that the adverse action "logically and literally would not have come about but for the protected activity." Substantial record evidence supports the ALJ's decision that BNSF met its affirmative defense burden as to the 30-day record suspension based on overwhelming evidence that it consistently enforced its workplace rule requiring timely reporting of injuries without regard to the protected activity itself, and that the evidence did not indicate this enforcement was mere pretext for discrimination or that the decision-makers harbored any animus toward Thorstenson for reporting injuries. Substantial evidence also supports the ALJ's finding that BNSF would have terminated Thorstenson absent the protected activity due to his receiving a second Level S discipline less than a year after the record suspension.

Contrary to Thorstenson's arguments, it was not error for the ALJ and ARB to find that the affirmative defense burden was satisfied without requiring evidence of the treatment of similarly situated employees who violated a different type of late reporting rule. It was also proper for the ALJ and Board to consider evidence that BNSF lacked personal animus toward Thorstenson. Lastly, the ALJ and

ARB's analysis of the affirmative defense did not disregard agency guidance on injury reporting rules or policy considerations related to injury reporting.

Next, it was not legal error for the ARB to reverse the ALJ's determination that Thorstenson had met the contributing factor causation standard. The ARB properly relied on relevant courts of appeal decisions to overturn the ALJ's determination that Thorstenson satisfied the contributing factor standard merely by showing that, if he had not filed an injury report, there would have been no discipline for untimely filing it.

Lastly, the ARB did not err by vacating the ALJ's cease and desist order prohibiting BNSF from issuing a shorter review period to employees who had been injury-free for five years prior to receiving a disciplinary action. Remedies under FRSA are limited to make-whole remedies tailored to the prevailing employee, and the order would not serve as make-whole relief for Thorstenson since he no longer works for BNSF, the policy was never applied to him, and the policy has been changed in any event.

STANDARD OF REVIEW

Judicial review of the ARB's decision is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2). *See* 49 U.S.C. 20109(d)(2)(A), incorporating 49 U.S.C. 42121(b)(4)(A). Under this standard, this Court must affirm the agency's decision if it is supported by substantial evidence and is not

"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

The Court reviews the ARB's findings of law de novo and accords due deference to the ARB's "reasonable interpretation" of the statute, reversing the ARB'S decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Calmat Co. v. U.S. Dep't of Labor*, 364 F.3d 1117, 1121 (9th Cir. 2004) (citing 5 U.S.C. 706(2); *see also Coppinger-Martin v. Solis*, 627 F.3d 745, 748 (9th Cir. 2010); *Lockert v. U.S. Dep't of Labor*, 867 F.2d 513, 520 (9th Cir. 1989).

The ALJ's factual determinations, as affirmed by the ARB, may be set aside only if they are "unsupported by substantial evidence." 5. U.S.C. 706(2)(E). "Substantial evidence is more than a mere scintilla. It means such relevant evidence, as a reasonable mind might accept as adequate to support a conclusion." *Sievers v. U.S. Dep't of Labor*, 349 F. App'x 201, 203 (9th Cir. 2009) (quoting *Maka v. I.N.S.*, 904 F.2d 1351, 1355 (9th Cir. 1990) (internal quotation marks omitted)). Where the evidence is susceptible to different interpretations, the Court "may not displace the agency's choice between two fairly conflicting views," *id.* (quoting *Lockert*, 867 F.2d at 520), or "substitute its judgement for that of the [Secretary]." *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1212 (9th Cir. 2008).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S CONCLUSION THAT BNSF SHOWED BY CLEAR AND CONVINCING EVIDENCE THAT IT WOULD HAVE IMPOSED THE ADVERSE ACTIONS IN THE ABSENCE OF THORSTENSON'S PROTECTED ACTIVITY.

A. FRSA and its Applicable Burdens

To prevail on a FRSA claim, a complainant must prove by a preponderance of the evidence that (1) he engaged in protected activity; (2) the employer knew or suspected that the employee engaged in protected activity; (3) he suffered an adverse action; and (4) his protected activity was a contributing factor in the adverse employment action. *See* 49 U.S.C. 42121(b)(2)(B)(iii) incorporated into FRSA by 49 U.S.C. 20109(d)(2)(A)(i); 29 C.F.R. 1982.109(a). If the complainant makes this showing, the burden of proof shifts to the employer to prove "by clear and convincing evidence that the employer would have taken the same adverse action in the absence of [the protected conduct]." 49 U.S.C. 42121(b)(2)(B)(iv); *see* 29 C.F.R. 1982.109(b).

In this case, Thorstenson has appealed the ARB's holdings that 1) BNSF proved its affirmative defense by clear and convincing evidence; 2) the ALJ erred as a matter of law in its analysis of the contributing factor standard; and 3) the ALJ exceeded his authority by issuing a "cease and decease" order with regard to BNSF's policy on probationary periods following discipline. As explained below,

substantial evidence and controlling precedent of this Court support the ARB's decision on all three points.

B. The ALJ, as affirmed by the ARB, Correctly Applied the Affirmative Defense Standard to Conclude that BNSF Would have Issued the 30-day Record Suspension and Terminated Thorstenson Absent his Protected Report.

Under FRSA, if the complainant proves that his protected activity contributed to the employer's adverse action, the burden of proof shifts to the employer to prove "by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity]." 49 U.S.C. 42121(b)(2)(B)(iv); 29 C.F.R. 1982.109(b). The "clear and convincing evidence" standard requires an employer to show that "the truth of its factual contentions are highly probable." *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (internal quotation marks omitted).

The ALJ's decision, as affirmed by the ARB, properly explained that, in cases where an employee's protected injury report results in the employer discovering that the employee engaged in some type of misconduct or wrong-doing, employers may satisfy their affirmative defense burden with evidence of extrinsic factors, such as employment rules or policies, that would independently lead to the decision to take adverse action along with evidence that the basis for discipline was "so powerful and clear" that the adverse action "would have

occurred apart from the protected activity." *DeFrancesco*, 2015 WL 5781070, at *6 (citing *Henderson v. Wheeling & Lake Erie RR*, ARB No. 11-013, 2012 WL 5391422, *9 (ARB Oct. 26, 2012)). The employer need not show that the adverse action "logically and literally would not have come about but for the protected activity." *DeFrancesco*, 2015 WL 5781070, at *4. The "same action" affirmative defense "does not require that the adverse personnel action be based on facts completely separate and distinct from protected whistleblowing disclosures." *Duggan v. U.S. Dep't of Defense*, 883 F.3d 842, 846 (9th Cir. 2018) quoting *Watson v. U.S. Dep't of Justice*, 64 F.3d 1524, 1528 (Fed. Cir. 1995) (internal quotation marks omitted). Rather, the "same action" affirmative defense may be satisfied where the employer shows by clear and convincing evidence that discipline was taken for misconduct in connection with a protected disclosure. *Id*. (adopting Federal Circuit case law holding that "same action" affirmative defense could be met where an employee is disciplined for disruptive conduct in connection with a protected report); *accord Smith v. U.S. Dep't of Labor*, 674 Fed.Appx. 309, 315 (4th Cir. 2017) (affirming ARB's holding that "same action" defense was met where the whistleblower's protected disclosure revealed the whistleblower's own misconduct).

On appeal, Thorstenson argues that the ARB applied the wrong legal standard to the affirmative defense analysis by concluding that BNSF proved its

affirmative defense in part because "the overwhelming evidence establishes that BNSF imposes no discipline when a report is timely and imposes discipline when the report is late." According to Thorstenson, the ALJ and the ARB committed legal error by relying of a comparison of two groups of employees who both engaged in the protected activity of filing an injury report. Op. Br. 22. Thorstenson argues that since FRSA states that an employer can avoid liability if it proves by clear and convincing evidence that it "would have taken the same adverse action *in the absence of any protected behavior*," an employer can only meet its "same-action" affirmative defense burden by comparing its treatment of employees who filed untimely injury reports and uninjured employees who filed an untimely report of an issue not covered by FRSA, such as conviction of a DWI. Op. Br. 23 (emphasis in original), 26; 49 U.S.C. 20109(d)(2)(A)(i). This narrow view of what the same-action affirmative defense requires is not supported by the ARB or circuit court precedent explained above.

As Thorstenson recognizes, in circumstances such as this one, where the protected activity (in this case, filing an injury report) and the basis for discipline (late reporting of the injury) are factually related, courts often evaluate the "same action" affirmative defense by looking at a non-exclusive list of three factors: (1) "the strength of the . . . evidence in support of" the action taken; (2) "the existence and strength of any motive to retaliate on the part of" the decision-makers; and (3)

"any evidence that the [employer] takes similar actions against" similarly situated employees who are not whistleblowers." *See Duggan*, 883 F.3d at 846 (adopting factors in *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). Evidence of BNSF's consistent application of its injury reporting rule is relevant to the first factor—the strength of the employer's basis for discipline. Evidence that BNSF disciplines only those employees who report injuries late supports the conclusion that BNSF's overwhelming concern in disciplining Thorstenson was the timing of his report and not the report itself. The ALJ and ARB thus did not err in considering BNSF's history of disciplining employees who reported injuries late but taking no action against employees who reported injuries within 72 hours.

Thorstenson cites *Carr*, 185 F.3d 1318 and *Smith*, 674 Fed.Appx. 309, in support of his argument that an employer can only prove its affirmative defense by establishing that "it would have imposed the same type of discipline for the same infraction by a 'non-whistleblowing employee.'" Op. Br. 24. However, as explained above, comparison of similarly situated employees is only one of three factors that *may* be considered to determine whether an employer has carried its burden of proving by clear and convincing evidence that it would have taken the same action absent the protected activity. Employers are not required to put forth evidence of every one of the three factors, and a lack of evidence of similarly

situated comparators "can effectively remove [the third] factor from the analysis." *Whitmore v. U.S. Dep't of Labor*, 680 F.3d 1353, 1374 (Fed. Cir. 2012); *see also McCarthy v. Int'l Boundary and Water Comm.: U.S. & Mexico*, 116 M.S.P.R. 594, 626 (2011), *aff'd* 497 Fed.Appx. 4 (Fed. Cir. 2012); *Sutton v. U.S. Dep't of Justice*, 94 M.S.P.R. 4, 13-14 (2003), *aff'd*, 97 Fed.Appx. 322 (Fed. Cir. 2004). *See also Speegle v. Stone & Webster Constr. Inc*., ARB No. 13-074, 2014 WL 1758321 (ARB Apr. 25, 2014) (applying a similar three-factor test). By its nature, BNSF's timely injury reporting rule is not enforced against "non-whistleblower" employees (i.e., employees who did not report an injury). In these circumstances, it is not a critical component of the affirmative defense analysis.

Thorstenson suggests that BNSF could nevertheless have mounted a successful defense by submitting evidence of its treatment of employees who violated its rule requiring employees to timely report that they were convicted of a DWI. Op. Br. 26. However, for an employee to be similarly situated to an individual who is disciplined, "it must be shown that the conduct and the circumstances surrounding the conduct of the comparison employee are similar to those of the disciplined individual." *Carr*, 185 F.3d at 1226. *See Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003) (finding that plaintiff was not similarly situated to other employees because they did not engage in conduct of comparable seriousness). In this case, no evidence was presented

regarding whether employees who late reported an injury would be similarly situated to employees who late reported being convicted of a DWI. Violation of the rule against late injury reporting could arguably pose a more serious and immediate danger to employees on the premises than violation of the rule against late reporting of DWI convictions. And, in any event, BNSF was not required to rely on any particular type of evidence to prove its affirmative defense.

C. Substantial Record Evidence Supports the ALJ's Decision, Affirmed by the ARB, that BNSF Would Have Issued the Adverse Actions in the Absence of Thorstenson's Protected Activity.

Substantial evidence supports the ALJ's decision, affirmed by the ARB, that the ALJ would have issued the Level S 30-day record suspension absent the protected activity because Thorstenson had not reported his injury within the required 72-hour time limit.

In this case, the ALJ found that the evidence overwhelmingly showed "that in cases involving employees who report workplace injuries, BNSF imposes no discipline when the report is timely and imposes discipline when the report is late." ER 37. The ALJ considered seven Public Law Board decisions upholding BNSF's decisions to issue Level S discipline to employees for untimely reporting of injuries, including two employees who, like Thorstenson, "were disciplined for late reporting when the injury occurred less than a week before the report" and one employee who was disciplined although he believed his pain was caused by an

aggravation of a prior injury. ER 34, 426-49. The ALJ afforded great weight to the Public Law Board's observation that it was BNSF's practice to issue Level S discipline for late injury reports. *Id.* Additionally, the ALJ noted that BSNF had submitted evidence that 17 employees other than Thorstenson had timely reported injuries in 2011 and were not disciplined, and evidence that Thorstenson was not disciplined following seven other occasions in which he had reported injuries in accordance with the timely reporting rule. ER 33, 352-425. The ALJ also found it significant that despite the discovery tools at his disposal, Thorstenson offered no examples of BNSF either failing to discipline an employee who untimely reported an injury or disciplining an employee for reporting a timely injury. ER 34. This substantial evidence of BNSF's consistent application of its policy for injury reporting showed that "[t]imeliness is the distinguishing factor." ER 37. Additionally, there was no evidence of animus or potential pretext in the case, and the decision-makers' testimony consistently supported their honestly held belief that Thorstenson's injury was a work-related injury subject to the 72-hour reporting rule. *Id.*; SER 4-5, 9, 15-17.

Substantial evidence also supports the ALJ's conclusion, affirmed by the ARB, that BNSF proved by clear and convincing evidence that it also would have terminated Thorstenson absent his 2010 protected activity report. It is undisputed that Thorstenson was terminated in accordance with BNSF's progressive

disciplinary policy following his involvement in a serious incident on June 26, 2011 in which he and Wasnoska, the conductor he was working with that day, were found to have violated the rules against speeding and failing to blow the whistle before entering a public crossing. ER 39-40. Thorstenson admits that he committed several serious rule violations that day, and that his failure to warn Wasnoska before pulling the emergency brake could have resulted in injuries to Wasnoska, the passengers, or pedestrians. *Id.* While BNSF management considered issuing a stand-alone dismissal based on Thorstenson's lack of communication in the incident, the ALJ credited the HR manager's testimony that the company ultimately decided to issue Level S discipline to both Thorstenson and Wasnoska because of deficiencies in the investigation transcript. *Id.* Since the ALJ determined that the both the first and second Level S disciplinary actions would have been issued regardless of Thorstenson's protected activity, he also correctly found that Thorstenson would still have been terminated in the absence of his protected injury reports pursuant to the progressive disciplinary policy because he received a second Level S discipline within 12 months of the first Level S discipline.

D. The ALJ and ARB Did Not Err by Considering Evidence Showing that BNSF Managers Lacked Personal Animus Toward Thorstenson.

Thorstenson also argues that the ALJ and ARB erred by finding that evidence that BNSF lacked "personal animus" toward Thorstenson supported BNSF's affirmative defense analysis. Op. Br. 41-42. At the same time, he argues that the policy of imposing a shorter review period for employees who were injury-free and discipline-free for five years prior to the discipline at issue was evidence of animus that undermines BNSF's affirmative defense. *Id.*

First, as described above, the ARB and the courts of appeals have recognized that while evidence regarding personal animus is not required for either the employee or employer to meet their respective burdens, it is a relevant factor to consider as part of the overall analysis in cases where the employee's protected activity revealed his own misconduct. *See Smith,* 674 Fed.Appx. at 316 (one of the factors that should be considered when analyzing affirmative defense is "whether any other evidence suggests a retaliatory motive for the adverse employment action"); *Carr*, 185 F.3d at 1323 (relevant factor to consider is "the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision"). The ALJ and ARB decisions did not indicate that evidence showing a lack of animus was the key to a determination that BNSF met

its affirmative defense, but merely considered this evidence along with all the other relevant evidence as part of its affirmative defense analysis.

Second, Thorstenson's argument that the ALJ's finding that the 36-month review period policy violated FRSA on its face should have defeated the affirmative defense is without merit. The ALJ and ARB found that policy to be discriminatory on its face because it treated non-injured employees more favorably than injured employees. However, the policy did not have an effect on the adverse actions suffered by Thorstenson, and the ALJ did not err by failing to impute retaliatory motive to individual decision-makers because of an unrelated generally applied policy.

For these reasons, the ALJ and ARB did not err as a matter of law in weighing evidence regarding the existence of animus or retaliatory motive.

E. The ALJ's Decision, as Affirmed by the ARB, is Consistent with Policy Considerations and the Department's Guidance on Injury Reporting.

Thorstenson spends much of his brief challenging BNSF's injury reporting rule as inconsistent with the policy considerations underlying FRSA and with OSHA guidance to whistleblower investigators regarding investigations of retaliation cases involving injury reporting under FRSA and section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. 660(c). *See* Op. Br. 27-40. The gist of Thorstenson's arguments is that because BNSF's reporting rule itself

violated FRSA, BNSF cannot meet its "same action" affirmative defense. The ALJ and the ARB considered the policy issues that Thorstenson raises and reasonably concluded, based on the evidence in the record, that application of the rule in this case was not retaliatory. *See* ER 37-38, 12. The ALJ's factual findings on this point are based on substantial evidence and it was appropriate for the ALJ and the ARB to rely on those findings in concluding that BNSF had met its "same action" affirmative defense.

First, both the ALJ and the OSHA guidance on which Thorstenson relies recognize that employers have an interest in requiring employees to promptly report injuries. *See* ER 37 and 38 n.31 (noting without notice of an injury the employer cannot take action to resolve any unsafe condition that caused the injury and "[g]enerally, so long as rule is lawful, an employer is entitled to its disciplinary rules even if the rules are unwise, counterproductive, or arbitrary"); Memorandum from Richard E. Fairfax, Deputy Assistant Secretary for OSHA, to Regional Administrators, Whistleblower Program Managers, Re: Employer Safety Incentive and Disincentive Policies and Practices (Mar. 12, 2012) ("OSHA guidance"), available at https://www.osha.gov/as/opa/whistleblowermemo.html ("OSHA recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries. To be consistent with the statute, however, such procedures must be reasonable and may not unduly burden the

employee's right and ability to report."). They also recognize that, in a retaliation case, examination of an injury reporting rule is appropriate to determine whether the complainant suffered retaliation for reporting an injury. ER 38-39 n.31 ("Rules are subject to examination as to whether they adversely affect workers for protected activity"); OSHA guidance (stating that enforcement of injury reporting rules may not be used as a pretext for discrimination and outlining factors to examine to determine whether an injury reporting rule is applied pretextually).

In this case, the ALJ specifically considered the same arguments that Thorstenson raises now and examined whether BNSF's rule was so confusing or conflicting that its true purpose or effect was to retaliate against employees who report injuries. *Id.* The ALJ concluded that, at least as it was applied to Thorstenson, the rule was not a pretext for discrimination. To the contrary, the ALJ found based on the evidence submitted at the hearing that BNSF consistently enforced the injury reporting rule, and Thorstenson complied with it with regard to his seven prior injury reports. *Id.* Moreover, the ALJ specifically found Thorstenson admitted that if he had found the rule confusing he could have sought guidance from his union, his supervisor, his trainmaster, or BNSF's human resources department and that Thorstenson had previously kept BNSF management apprised of his recovery from his prior 2009 injury and could have done the same in this instance. ER 38-39 n.30 and n.31. Additionally, the ALJ noted that

Thorstenson violated the rule in two different ways: (1) by waiting five days to report his injury even though he sought medical treatment and had reason to suspect he had been injured at work within 72 hours and (2) by waiting until after he sought medical treatment before reporting the injury even though he could have reported it prior to seeking treatment. ER 38 n.30. Finally, he found that the managers involved in the decision to discipline Thorstenson gave consistent explanations for why they believed Thorstenson's injury was a work-related injury that needed to be reported and that their belief that the report was required was honestly held. ER 37; SER 4-5, 15-17.

These findings are supported by substantial evidence and the ALJ and the ARB's reliance on them in concluding that BNSF met its "same action" affirmative defense was appropriate. Indeed, as previously explained, these facts are highly relevant to determining the strength of the evidence supporting the employer's basis for discipline for purposes of meeting the "same action" affirmative defense.

II. THE ARB DID NOT ERR IN VACATING THE ALJ'S FINDING OF "CONTRIBUTING FACTOR" CAUSATION.

Because the ALJ held and the ARB affirmed that BNSF had met its affirmative defense of proving by clear and convincing evidence that it would have suspended and later terminated Thorstenson absent his protected injury reports, the

Court need not reach the question of whether the ARB was correct in reversing the ALJ's holding that Thorstenson had shown his injury report was a contributing factor in the discipline taken against him. *See Epple v. BNSF Ry. Co.*, 785 Fed.App'x 219, 223 (5th Cir. 2019) (declining to consider the correct interpretation of the "contributing factor" causation standard under FRSA "because the record developed at trial establishes by clear and convincing evidence that BNSF would have dismissed Epple regardless of the injury report that he filed."). Nonetheless, should the Court reach the issue, it should hold that the ARB did not err in reversing the ALJ's determination that Thorstenson had shown that his injury report was a contributing factor in his suspension and termination.

A. The ARB Properly Interpreted the Contributing Factor Standard.

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." *Frost v. BNSF Ry. Co.,* 914 F.3d 1189, 1195 (9th Cir. 2019), *citing Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 461 (9th Cir. 2018) (quoting *Gunderson v. BNSF Ry. Co*., 850 F.3d 962, 969 (8th Cir. 2017). The statutory contributing factor standard does not require that the employee conclusively demonstrate the employer's retaliatory motive to establish a prima facie case. *See Frost*, 914 F.3d at 1195 (citing *Tamosaitis v. URS Inc.*, 781 F.3d 468, 482 (9th Cir. 2015)) and *Coppinger-Martin v. Solis*, 627 F.3d at 750; *see also Araujo v. N.J. Transit Rail Operations, Inc*., 708

F.3d 152, 158 (3rd Cir. 2013). However, as the Tenth Circuit has explained, the contributing factor standard under FRSA is not so permissive as to permit employees to "immunize themselves against wrongdoing by disclosing it in a protected-activity report." *BNSF Ry. Co. v. U.S. Dep't of Labor ("Cain")*, 816 F.3d 628, 639 (10th Cir. 2016) citing *Marano v. U.S. Dep't of Justice*, 2 F.3d 1137, 1142 n.5 (Fed. Cir. 1993) (distinguishing the facts in *Marano* from "a situation in which an employee in essence blew the whistle on his own misconduct in an effort to acquire the [Whistleblower Protection Act's] protection" and "doubt [ing] that the [Whistleblower Protection Act] would protect such an individual from an agency's remedial actions"); *accord Gunderson*, 850 F.3d at 969-70. Thus, in a circumstance, such as this one, where an employee's report also reveals the employee's own misconduct, the employee must show more than a report loosely leading to his firing. *See Cain*, 816 F.3d at 639; *accord Heim v. BNSF Ry. Co*., 849 F.3d 723, 727 (8th Cir. 2017) (holding that an employee must "demonstrate more than a mere factual connection between his injury report and his discipline in order to establish a prima facie case under the contributing-factor standard."). As the ARB correctly explained, by relying simply on the factual connection between Thorstenson's injury report and BNSF's discipline of Thorstenson for late reporting of the injury, the ALJ failed to require Thorstenson to show that the injury report, as opposed to report's timing, was a contributing

factor in the adverse actions against him. ER 10 (noting that for cases where protected activity and the basis for an adverse action are factually intertwined, "the ALJ must explain how the protected activity is a proximate cause of the adverse action, not merely an initiating event"). In reaching this decision, the ARB correctly noted that an interpretation to the contrary risks improperly focusing on how the employer came to learn of the employee's wrong-doing rather than the employer's actions based on that wrong-doing. *Id.* In this case, the ALJ had reasoned with regard to Thorstenson's suspension simply that "there cannot be a late report unless there is a report, and the report is protected. The fact of reporting the injury and the timing of the injury report are inextricably intertwined. . . . . That satisfies contributing factor causation." ER 33. The ARB's conclusion that this reasoning was insufficient to meet the contributing factor standard was proper.

B. The ARB Did Not Depart from Governing Law in its Application of the Contributing Factor Standard or Impose an Impermissibly High Burden on Thorstenson.

In challenging the ARB's decision to vacate the ALJ's ruling on causation, Thorstenson attempts to draw a semantic distinction between an "inextricably intertwined" analysis, which he believe is proper and consistent with the contributing factor standard, and a "chain of facts" theory, which he asserts is the theory disfavored by some courts. Op. Br. 46. The shortcoming in Thorstenson's argument is that neither the ARB nor the courts have drawn the same distinction

and instead have used the terms "inextricably intertwined" and "chain of facts" or "chain of events" to describe and reject exactly the type of reasoning that the ALJ used in this case. *See*, *e.g., Riley v. Dakota, Minnesota & Eastern R.R. Corp*., ARB Case No. 16-010, 16-052, 2018 WL 6978216, at *3 (ARB Jul. 6, 2018) ("Simply put, [Riley's] reporting of his injury set in motion the chain of events eventually resulting in the investigation and is inextricably intertwined with the eventual adverse employment action."), *rev'd Dakota, Minnesota, & Eastern R.R. Corp. v. U.S. Dep't of Labor*, 948 F.3d 940 (8th Cir. 2020) (relying on decisions from the Sixth, Seventh, Eighth and Tenth Circuits to hold that showing that employee's protected safety report and suspension were inextricably intertwined was insufficient to satisfy contributing factor causation standard); *see also Lemon v. Norfolk S. Ry. Co*., 958 F.3d 417 (6th Cir. 2020) ("chain of events" theory was insufficient to meet contributing factor standard in case where the employee was terminated after making false statements in his protected injury report). And, in any event, Thorstenson never identifies what evidence, apart from the fact that the injury report initiated BNSF's inquiry into whether the report was timely, the ALJ relied on to find that Thorstenson's injury report, rather than its timing, was a factor in BNSF's decisions to suspend and later terminate Thorstenson.

Thorstenson also takes issue with the ARB's reference to the requirement that a complainant show that protected activity was a proximate cause of the

adverse action and not merely an initiating event. ER 10 (adopting the reasoning from *Koziara*, 840 F.3d at 877). Citing to the Restatement on Torts and several tort law cases, he asserts that "proximate cause" requires a showing that an event was a "substantial factor" in bringing about the harm at issue, rendering it inconsistent with the more lenient contributing factor standard under FRSA that requires a complainant to prove that the protected activity merely contributed in some way to the adverse action. Op Br. 52. However, the ARB's decision, and the Seventh Circuit's *Koziara* opinion which the ARB cites, does not improperly heighten employees' burden of causation under the contributing factor standard.

In *Koziara*, the Seventh Circuit found that the complainant employee did not meet his burden under the contributing factor standard because, although his injury report led the employer to investigate and to discover his theft, it was not a proximate cause of the adverse action. *Koziara*, 840 F.3d at 877. The court explained that "there are different definitions of 'proximate cause'" depending on the statute at issue, and but noted that generally and for purposes of the FRSA whistleblower provision, "'proximate' denot[es] in law a relation that has legal significance." *Id.* The court distinguished between "causation and proximate causation," finding that "the former term embraces causes that have no legal significance." *Id.* The court pointed out that if the plaintiff had not been born or never worked for BNSF, he would not have experienced the workplace injury or

stolen materials from the railway, but "that doesn't mean that his being born or his being employed by the railroad were legally cognizable causes of his being fired." *Id.* *See also Heim*, 849 F.3d at 727 (mere factual connection between "inextricably intertwined" injury report and discipline was not enough, without more, to establish the contributing factor element). The term proximate cause as used in the ARB's decision (and in *Koziara*) does not suggest that protected activity must have been a substantial factor in the railroad's decision making, only that protected activity must actually have played a role, however small, in the decision to take adverse action. This is a reasonable interpretation of FRSA's contributing factor standard, which requires an employee to prove intentional retaliation by a preponderance of the evidence by showing that the protected activity played a role in the decision to take adverse action, i.e., that it "tended to affect the decision in some way." *Frost*, 914 F.3d at 1196 (citing *Rookaird*, 908 F.3d at 461) (brackets and internal quotation marks omitted).

Finally, Thorstenson argues that the ARB's analysis of the contributing factor causation standard incorrectly required Thorstenson to meet a higher standard than but-for causation under Title VII – a standard that is typically considered more difficult for employees to meet than the contributing factor causation standard. Op. Br. 51. Citing to the Supreme Court's recent Title VII decision in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), he notes

that the "traditional but-for causation standard is established whenever a particular outcome would not have happened 'but for' the purported cause" and that but-for causation is established if an employer "'relies in part' on the protected activity when deciding to discipline or terminate the employee..." *Id*.

Thorstenson's reliance on *Bostock* misses the mark. In the ARB's view, the shortcoming in the ALJ's causation finding was that the ALJ cited no evidence that BNSF relied in any part, no matter how small, on Thorstenson's injury report. Instead, the ALJ viewed the mere fact that the injury report triggered an inquiry into whether it was timely as sufficient to show causation. Additionally, not only did *Bostock* involve an entirely different statutory causation standard, but also, in *Bostock*, the Supreme Court was not faced with a circumstance such as this one, in which the employee's protected report also revealed the employee's potential misconduct. Nothing in *Bostock* suggests that the Supreme Court intended to dispense with the requirement that, in such a circumstance, the protected report must actually have played a role in the employer's decision to take adverse action.

In this case, while as a factual matter Thorstenson's injury report may have made BNSF aware of a potential serious rule violation for late reporting of an injury, the ALJ did not rely on evidence sufficient to show that the injury report itself (rather than its timing) was a factor in BNSF's decision-making process regarding whether to issue Level S discipline for late reporting. Accordingly, the

ARB's legal conclusion that Thorstenson failed to show contributing factor causation was correct.

III. THE ARB WAS CORRECT IN VACATING THE ALJ'S "CEASE AND DESIST" ORDER AND, IN ANY EVENT, THE ISSUE IS MOOT BECAUSE BNSF HAD ALREADY DISCONTINUED THE POLICY COVERED BY THE ORDER.

Thorstenson challenges the ARB's decision to vacate the ALJ's "cease and desist" order prohibiting BNSF from applying a longer probationary period to employees who commit serious rule violations and have suffered a workplace injury as compared to uninjured employees who commit the same violations. Op. Br. 55-57. First, this issue is moot because BNSF has changed its disciplinary policy to apply the same probationary period regardless of whether an employee suffered a workplace injury. *S. Pac. Transp. Co. v. Pub. Util. Comm'n of Oregon*, 9 F.3d 807, 810 (9th Cir. 1993) (case becomes "moot" when issues presented are no longer alive or parties lack legally cognizable interest in the outcome) (citing *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969)); ER 13 n.14 (noting that BNSF discontinued the practice); *see also* Press Release, U.S. Dep't of Labor, BNSF Railway Co. Signs Accord with U.S. Labor Dep't's OSHA regarding Employee Practices under Federal Railroad Safety Act (Jan. 15, 2013), available at

https://www.osha.gov/news/newsreleases/national/01152013. In any event, the ARB's decision was correct.

The ARB affirmed the ALJ's finding that BNSF failed to establish its affirmative defense regarding BNSF's imposition of a 36-month review period on Thorstenson based on its former policy of permitting a more lenient 12-month review period for employees who had no reportable injuries on their record within the last five years. ER 13. However, the ARB also noted that the ALJ found that Thorstenson did not establish any damages due to the imposition of the 36-month review period because he received the second Level S discipline less than 12 months after the first Level S discipline and would have been subject to termination even absent the retaliatory policy. *Id.* Accordingly, the Board vacated the ALJ's cease and desist order as beyond the ALJ's powers and *ultra vires* because the policy resulted in no proven violation against Thorstenson. *Id.*

FRSA states that an employee who prevails in a FRSA action "shall be entitled to all relief necessary to make an employee whole." 49 U.S.C. 20109(e)(1). The statute also includes a non-exhaustive list of make-whole relief available to a prevailing employee, including reinstatement with the same seniority status that the employee would have had absent the retaliation, back pay with interest, and compensatory damages. 49 U.S.C. 20109(e)(2); 29 C.F.R. 1982.109(d)(1). The regulations implementing FRSA further state that if an ALJ

concludes that the respondent has violated FRSA, the ALJ will issue an order that will include, where appropriate:

> affirmative action to abate the violation; reinstatement with the same seniority status that the employee would have had, but for the retaliation; any back pay with interest; and payment of compensatory damages, including compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees.

29 C.F.R. 1982.109(d)(1). Thus, the regulations explicitly permit ALJs to order nonmonetary relief targeted at making the employee whole if there is a proven violation, and Thorstenson is correct that FRSA's make-whole remedies are not limited to economic damages. Op. Br. 57. *See Giuliano v. CSX Transportation, Inc.*, No. 2016-FRS-00061 (ALJ Jun. 9, 2017) (ALJ order finding that orders of abatement are permitted under FRSA to the extent that they make the prevailing employee whole in some way, such as restoring the employee's reputation or remedying the resulting fear of future retaliation).

However, in this case, the extended probationary policy was never applied against Thorstenson. He was fired within 12 months of receiving his first Level S suspension. In addition, Thorstenson is no longer employed by BNSF, and the prospective remedy provided by the cease and desist order would not have the effect of making him whole in any way, such as by reducing fear of future retaliation. Under these circumstances, the cease and desist order did not remedy a

proven violation or make Thorstenson whole, and the ARB's order to vacate the ALJ's cease and desist order was proper.

CONCLUSION

For the foregoing reasons, the judgment of the ARB should be upheld.

Respectfully Submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Counsel for the Secretary of Labor states that there are no known related cases pending in this Court.

Date: July 27, 2020

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s): 20-70211

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