No. 22-3218

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CLYDE CARTER, JR.,

Petitioner,

v.

JULIE A. SU, ACTING SECRETARY,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition for Review of an Order of the
Department of Labor's Administrative Review Board,
Case No. 21-035

RESPONSE BRIEF FOR THE SECRETARY OF LABOR

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SUMMARY OF THE CASE

Clyde Carter ("Carter") reported a workplace injury to his employer, BNSF Railway, Co. ("BNSF"), and then filed a claim under the Federal Employer's Liability Act ("FELA"). During discovery for this claim, BNSF learned that Carter failed to disclose prior injuries and military service on his job application. Shortly thereafter, a timekeeping review revealed that Carter had failed to clock in for a shift. Following investigations into these instances, BNSF determined that Carter was dishonest on both occasions and discharged him from employment. Carter filed a complaint alleging retaliation in violation of the whistleblower protection provision of the Federal Railroad Safety Act ("FRSA").

In initial proceedings, the Department of Labor's Administrative Review Board ("ARB" or "Board") upheld the Administrative Law Judge's ("ALJ") finding that BNSF unlawfully retaliated against Carter. The Eight Circuit Court of Appeals vacated and remanded this decision. The ARB then remanded the case to an ALJ for further proceedings. Substantial evidence supports the ALJ's further findings, affirmed by the ARB, that Carter failed to prove that his protected activity was a contributing factor in his discharge and that BNSF would have discharged him for dishonesty even if he had not engaged in protected activity.

Although the Secretary will gladly participate in oral argument, she does not believe that it is necessary because the issues may be resolved based on the briefs.

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RESPONSE BRIEF FOR THE SECRETARY OF LABOR

The Secretary submits this brief in response to Carter's opening brief.

JURISDICTIONAL STATEMENT

The Secretary generally agrees with Carter's jurisdictional statement. In short, the Board had authority to issue final decisions adjudicating Carter's administrative complaint alleging BNSF violated the anti-retaliation provision of FRSA. *See* 49 U.S.C. 20109(d)(1) (establishing the Secretary's administrative authority under FRSA); U.S. Dep't of Labor, Secretary's Order No. 01-2020 (Feb. 21, 2020), 85 Fed. Reg. 13,186–13,189 (Mar. 6, 2020) (delegating that authority to the Board); *see also* 29 C.F.R. Part 1982. On July 31, 2014, an Administrative Law Judge ("ALJ") entered the first decision and order. After BNSF timely appealed, the Administrative Review Board ("ARB") upheld the ALJ's ruling in its June 21, 2016 decision. BNSF then timely appealed to the U.S. Court of Appeals for the Eight Circuit and on April 7, 2017, the Court reversed and remanded the ARB's decision. The ARB in turn remanded the case to the Department's Office of Administrative Law Judges for further proceedings. An ALJ issued a decision on remand on April 29, 2021. Carter timely appealed to the ARB, which issued its second decision on September 26, 2022. On October 25, 2022, Carter timely appealed the ARB decision to the Eight Circuit. Because Carter resided in the state

of Missouri at the time of the alleged violation, this Court has jurisdiction to review the Board's decision. *See* 49 U.S.C. 20109(d)(4).

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports ALJ Leslie's finding on remand, affirmed by the ARB, that Carter's FRSA-protected activity did not contribute to his discharge.
   - 49 U.S.C. 20109(d)(2)(A)
   - 49 U.S.C. 42121(b)(2)(B)
   - *BNSF Ry. Co. v. DOL,* 867 F.3d 942 (8th Cir.2017)
   - *Gunderson v. BNSF Ry.*, 850 F.3d 962 (8th Cir. 2017)
2. Whether substantial evidence supports ALJ Leslie's finding on remand, affirmed by the ARB, that BNSF would have discharged Carter even if he had not engaged in FRSA-protected activity.
   - 49 U.S.C. 20109(d)(2)(A)
   - 49 U.S.C. 42121(b)(2)(B)
   - *BNSF Ry. Co. v. DOL,* 867 F.3d 942 (8th Cir.2017)
   - *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014)

3. Whether ALJs Leslie and Whang, as affirmed by the Board, properly exercised their discretion in their procedural and evidentiary rulings on remand.

- *Cravens v. Smith,* 610 F.3d 1019 (8th Cir. 2010)
- *JHP & Assocs., LLC v. NLRB.*, 360 F.3d 904 (8th Cir. 2004)
- 29 C.F.R. 18.201

STATEMENT OF THE CASE

A. FRSA

FRSA's employee protection (whistleblower) provisions prohibit, among other things, a railroad from "discharg[ing], demot[ing], suspend[ing], reprimand[ing], or in any other way discriminat[ing]" against an employee "due, in whole or in part, to the employee's lawful, good faith" notification to the railroad "of a work-related personal injury." 49 U.S.C. 20109(a)(4). To prove a violation, the employee has the burden of showing by a preponderance of the evidence that the injury report was "a contributing factor" in the unfavorable personnel action that the employee suffered. 49 U.S.C. 20109(d)(2)(A)(i) (incorporating 49 U.S.C. 42121(b)(2)(B)(iii)).[1] If the employee makes this showing, then the railroad may

[1] FRSA incorporates the rules, procedures, and burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121 ("AIR 21"). 49 U.S.C. 20109(d)(2)(A).

prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the injury report. 49 U.S.C. 20109(d)(2)(A)(i) (incorporating 49 U.S.C. 42121(b)(2)(B)(iv)). If the railroad makes its showing, then it is not liable for a FRSA violation, and no relief may be ordered. *Id*.

The Secretary has jurisdiction over employee complaints under FRSA. 49 U.S.C. 20109(d)(1). An employee complaint must be filed with the Occupational Safety and Health Administration ("OSHA"), which investigates and issues findings. 29 C.F.R. 1982.103–.105. The employee or railroad may object to OSHA's findings and request a *de novo* hearing before an administrative law judge ("ALJ"). 29 C.F.R. 1982.106-.107. The ALJ's decision may be appealed to the Board. 29 C.F.R. 1982.110.

B. Factual Background[2]

Carter applied for employment with BNSF in 2005. To be considered for employment, Carter needed to fill out an application that stated that providing false information was grounds for dismissal at any time. (App. 26, A.R. 110); (Supp.

[2] Unless otherwise indicated, this statement of facts is based on the facts as determined by ALJ Leslie on remand.

App. 004, A.R. 16).[3] Carter answered "no" on a medical questionnaire that asked whether he had missed more than two days of work in previous employment due to illness, injury, hospitalization, or surgery. (App. 25, A.R. 110); (App. 001034, A.R. 16). Carter also answered "no" on the questionnaire when asked whether he had any previous surgeries, back injuries, or back pain. (App. 25, A.R. 110); (App. 001035-37, A.R. 16). In response to a question about military service, Carter provided information about his service with the Army, noting that his "duties performed" with the Army were "top secret." (Supp. App. 004, A.R. 16). He did not provide information about his service with the Navy. *Id.* After submitting this application, Carter was hired by BNSF. (App. 26, A.R. 110).

On August 30, 2007, Carter was injured when working at a BNSF facility in Kansas City, Kansas; he reported the injury and was taken to a BNSF clinic by a supervisor. *Id.* Carter filed a claim under the Federal Employer's Liability Act (FELA) the following year. *Id.*; (Supp. App. 015-024, A.R. 16). In July 2009, during discovery for the FELA proceeding, Carter provided deposition testimony. In connection with this deposition, BNSF obtained medical documents showing that Carter sustained multiple work-related injuries prior to working for BNSF, including back injuries and a knee injury, as well as military documents indicating

[3] Citations to Carter's Appendix are abbreviated as "App."; citations to the Secretary's Supplemental Appendix are abbreviated as "Supp. App."; and citations to the Certified List are abbreviated as "A.R."

that he served in the Navy and received an other-than-honorable discharge. (App. 32, A.R. 110); (App. 001032-001033, A.R. 16); (Supp. App. 006-013, A.R. 16).

In January 2012, BNSF supervisor Bryan Thompson ("Thompson") reviewed Carter's July 2009 deposition transcript and other documents obtained in connection with this deposition in preparation for Carter's FELA trial and learned of Carter's prior injuries and his service with the Navy. (App. 32, A.R. 110).[4] Thompson then conducted a review of Carter's 2005 employment application and discovered that he had not included information about his prior injuries or Navy service on his application forms. (App. 000834-36, A.R. 16). Based on this review, Thompson concluded that Carter had been dishonest on his application. *Id.* at 000885-86. Pursuant to the applicable collective bargaining agreement, BNSF initiated a disciplinary investigation. A hearing was scheduled for March 20, 2012. (App. 29, A.R. 110); (App. 000811, A.R. 16).

In early February 2012, BNSF supervisor Tom Murray ("Murray") was conducting a timekeeping review of BNSF employees when he found that Carter had failed to clock in for his shift on February 5, 2012. (App. 27, A.R. 110). Murray asked Carter to provide a written statement about his failure to clock in. *Id.* In response, Carter provided two written statements indicating that he arrived

[4] Carter provided additional deposition testimony on January 28, 2012. (App. 000120-000199, A.R. 107). There are no findings that Thompson ever reviewed this testimony.

on time but could not recall if he clocked in. (App. 001028, 001030, A.R. 16). Jeremiah Thomas ("Thomas"), one of Carter's supervisors, then conducted a review of time-stamped security footage from the morning of February 5, 2012, determining that it showed that Carter arrived at the BNSF facility after his shift was scheduled to begin. (App. 28, A.R. 110). BNSF initiated a second disciplinary investigation into whether Carter was dishonest regarding his whereabouts on February 5, 2012, scheduling a hearing for March 18, 2012. (App. 27, A.R. 110); (App. 000962, A.R. 16).

BNSF General Foreman Charles Sherrill ("Sherrill") officiated both the March 20 and March 28 disciplinary hearings. (App. 3, A.R. 125) (citing (App. 28, A.R. 110)). Carter was represented by his union on both occasions. (App. 000811, 000963, A.R. 16).

During the March 20, 2012 hearing, BNSF presented evidence that Carter sustained prior work injuries to his back, including one for which Carter submitted a workers' compensation claim, as well as a prior work injury to his knee, which, Carter acknowledged, necessitated a "scope" procedure, and for which he was excused from work for two weeks. (App. 29, A.R. 110); (App. 000850, 000876, 000898, A.R. 16); (Supp. App. 006-013, A.R. 16). Carter testified that he did not think the scope on his knee constituted a surgery and that a medical provider informed him as much later in the application process. (App. 000897-99, A.R. 16).

He also testified that he "sprain[ed]" rather than injured his back and that he was not experiencing any back pain at the time he submitted his application. *Id.* at 000895-96. Carter acknowledged that he did not specifically reference his service with the Navy in his application, explaining that he did not include his Navy service because he thought his top-secret clearance prevented him from divulging it. *Id.* at 000890. When asked why he was nonetheless able to disclose his service with the Army, which he specifically identified as top secret, Carter reiterated that he was unable to disclose any of his military duties for which he had a top-secret clearance. *Id.* at 000891-92. Thereafter, his union representative clarified that Carter performed top-secret service for both the Army and the Navy. *Id.* at 000892.

During the March 28, 2012 hearing, Carter was shown the time-stamped footage of him arriving at work the morning of February 5, 2012. (App. 000996-97, A.R. 16).[5] Carter testified that he was delayed getting to work because he was stuck behind a transportation van and that he had informed BNSF relief supervisor Mike Ford ("Ford") of these circumstances when he arrived at work that day. *Id.*

[5] Carter acknowledged at the March 28 disciplinary hearing that the footage showed that he did not arrive on time, though he was not sure if the time stamp was accurate. (App. 000998, A.R. 16). Carter also testified that when Murray asked him to complete a written statement regarding whether he clocked in on time on February 5, 2012, he thought Murray was asking him about a different day. (App. 001005, A.R. 16).

at 001004, 001010. Shortly thereafter, Carter testified that he "never told [Ford] that [he] was late to work"; rather, he "notified [Ford] to the fact that [he] could not remember whether or not [he] had clocked in." *Id.* at 001010.

After both hearings, Sherill concluded that Carter violated BNSF policies prohibiting dishonesty in failing to disclose his prior work-related injuries and Navy service on his employment application and in his communications with his supervisors concerning his whereabouts on February 5, 2012. (App. 28, A.R. 110). Sherill determined that "the paperwork" obtained by BNSF in the course of discovery showed that Carter "had multiple injuries and a surgery." (App. 000593, A.R. 18). And he found that Carter failed to explain why he could disclose his top-secret service with the Army on his application but not his top-secret service with the Navy. *Id*. at 000589-90. Based on the security footage, Sherrill determined that Carter was late on February 5, 2012. (App. 37, A.R. 110). And he found Carter's explanation for his failure to clock in that day not credible, noting that Carter testified "that he told [Ford] he was late" but "in the same line of questioning, he … contradicted himself and said I never told [Ford] I was late." (App. 000604, A.R. 18). Sherrill recommended that Carter be disciplined in accordance with BNSF's Policy for Employee Performance Accountability (PEPA), *see* (App. 28, A.R. 110); (App. 000637, A.R. 18), which states that job-related dishonesty is grounds for immediate discharge, (Supp. App. 036, A.R. 16).

Sherill's findings and recommendations were submitted to Phillip McNaul ("McNaul"), BNSF's Field Superintendent of Operations, who then forwarded them to Joseph Heenan ("Heenan"), a BNSF Director of Labor Relations. (App. 28-29, A.R. 110). Heenan was responsible for reviewing all cases that could result in termination or a suspension of more than 30 days "before discipline [was] issued." (App. 000725, A.R. 19). He had never met Carter and was unaware of his 2007 injury or his FELA claim at the time of his review. (App. 34, A.R. 110) (citing (App. 99, A.R. 29)). Heenan reviewed Sherill's findings and recommendation and the transcripts and exhibits from both disciplinary hearings. (App. 29, A.R. 110); (App. 000738, 000743, A.R. 19).

Heenan determined that Carter's answers on his employment application regarding his injury history were inconsistent with the record developed through BNSF's disciplinary investigation, which showed that Carter "had … a knee injury" for which "medical documentation … show[ed] [that] he missed more than two days … of work," as well as "a couple [] different instances of back pain or injury[.]" (App. 000736, A.R. 19). Heenan believed that a reasonable person would have disclosed these injuries. *Id.* at 000785. Together with the fact that Carter "could have …[but] failed to" "disclose[] his prior military history in the Navy," Heenan concluded that Carter's conduct "paint[ed] a picture of a dishonest individual." *Id.* Heenan also concluded that Carter was "dishonest[] when

communicating with company officers about his whereabouts on February 5th[,]" as Carter stated in writing "that he was there and he was on time" that day, but "security camera footage … [showed] that was not true." *Id.* at 000742-43.

Heenan thus recommended that Carter be discharged for both instances of dishonesty, as dishonesty is a "stand-alone dismissible" violation under BNSF's PEPA. (App. 29, A.R. 110); (App. 000738, 000743, A.R. 19). BNSF had discharged other employees for failing to disclose information on their preemployment medical questionnaire and for failing to disclose a work injury. *See* (App. 000739-40, A.R. 19); (Supp. App. 038, 040, A.R. 16). According to Heenan, he recommends termination in the "vast majority" of cases where employees are dishonest about being on the clock. (App. 30, A.R. 110); (App. 000745, A.R. 19).

Consistent with Heenan's recommendation, BNSF discharged Carter from employment in April 2012. *See* (App. 30-31, 35, A.R. 110). BNSF issued two termination letters. In a letter dated April 5, 2012, letter, BNSF discharged Carter for dishonesty on his job application. (App. 000810, A.R. 16). In a letter dated April 16, 2022, BNSF discharged him for being dishonest about his conduct on February 5, 2012. (App. 000961, A.R. 16).

In June 2012, Carter timely filed a complaint with OSHA alleging that BNSF violated FRSA by discharging him from employment in retaliation for

reporting the workplace injury he experienced in 2007. (App. 19, A.R. 110); (Supp. App. 061, A.R. 1). After OSHA found no merit to his complaint, Carter requested a hearing before an ALJ. (App. 19, A.R. 110).

C. Procedural History

1. First ALJ Decision

Following a formal hearing, ALJ Linda S. Chapman issued a decision and order on July 30, 2014, finding that Carter's discharge was in violation of FRSA. (App. 104, 106, A.R. 29). There was no dispute that Carter engaged in protected activity when he reported his August 30, 2007 workplace injury, that BNSF knew of his injury report, or that Carter suffered adverse action when he was discharged from employment. *Id.* at 93. The ALJ concluded that Carter's injury report was a contributing factor in his discharge, reasoning that it was part of a "chain of events" that led to Carter's FELA claim, BNSF obtaining documents and deposition testimony from Carter, and, ultimately, Carter's discharge. *Id.* at 95-97.

ALJ Chapman heard testimony from Carter, Larry Mills ("Mills"), a former BNSF employee who testified on Carter's behalf, and BNSF representatives Heenan, Sherrill, McFaul, and Thomas. *Id.* at 59-80. The ALJ found that "while there were aspects of [Carter's] testimony that were contradictory or inconsistent,"[6]

[6] For instance, during the investigatory hearing, Carter stated that the former mayor of Kansas City, Missouri, Emmanuel Cleaver III, changed his Navy discharge from

he "was a credible and reliable witness" on "crucial points," and specifically found credible Carter's "description of the application process[.]" *Id.* at 101.

The ALJ determined that both of BNSF's rationales for discharging Carter—dishonesty on his job application and dishonesty regarding his whereabouts on February 5, 2012—were "unworthy of credence," citing "the triviality" of Carter's injuries, as well as the fact that BNSF obtained documentation of Carter's medical history and military service in 2009 but did not discharge him until 2012. *Id.* at 99, 100 n.24. With respect to Carter's statements regarding his attendance on February 5, 2012, the ALJ found that it was "conceivable that, considered in isolation, this incident could establish that [BNSF] would have fired Mr. Carter even absent his injury," adding that "Heenan, the person ultimately responsible for reviewing the file and making a recommendation, had never met Mr. Carter, and knew nothing about his injury or subsequent lawsuit." *Id.* at 98-99. However, the ALJ concluded that it was "not possible to separate [Heenan's] review of the charges in connection with the application … from his review of the charge[d] … clock violation." *Id.* at 99.

Having concluded that BNSF's bases for discharging Carter were not "[]worthy of credence," the ALJ found that BNSF failed to meet its burden of

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an other than honorable discharge to an honorable discharge—a claim the ALJ characterized as "not correct." (App. 101, A.R. 29).

showing that it would have dismissed Carter absent his protected activity. *Id.* at 98, 104. BNSF timely appealed to the Administrative Review Board. *Id.* at 46.

2. First ARB Decision

The ARB affirmed the ALJ's decision and order as being supported by substantial evidence. (App. 46, A.R. 70). The ARB noted that the ALJ appeared to have relied on a "chain of events" analysis, which the ARB did "not necessarily endorse[.]" *Id.* at 48. However, it concluded that the ALJ "provided sufficient reasons for her causation finding independent of this justification." *Id.* Although Carter's employment was terminated over four years after Carter's injury report, the ARB reasoned that "the FELA litigation undisputedly involved the 2007 injury and kept Carter's protected report of injury fresh as the events in the case unfolded." *Id.* Pointing to the ALJ's finding that BNSF's justifications for terminating Carter were "unworthy of credence," the ARB affirmed the ALJ's conclusion that BNSF's "alleged basis for terminating Carter … was pretext for unlawful retaliation." *Id.* at 48-49. The ARB similarly concluded that substantial evidence supported the ALJ's finding that BNSF had not met its burden to show that it would have fired Carter absent his protected activity. *Id.* at 49.

3. This Court's Decision in *Carter I*

BNSF appealed the ARB's decision to this court, which held in *BNSF v. United States Department of Labor,* 867 F.3d 942, 946 (8th Cir. 2017) ("*Carter I*")

that the ARB's decision was not supported by substantial evidence because ALJ Chapman erred when she applied a "chain of events" theory of causation. App. 000112-13. Although the ARB "properly declined to endorse the ALJ's chain-of-events causation theory," this court found that the ALJ's findings were insufficient to support contributing factor causation. *Id*. at 000114-15.

This court highlighted the lack of any findings by the ALJ that BNSF targeted Carter for retaliation or that his discharge was motivated by discriminatory animus, as well as the lengthy period between Carter's 2007 injury and his 2012 discharge. *Id.* at 000112, 000115-16. It noted that the ALJ failed to make any credibility findings beyond concluding that Carter was credible on "'crucial points.'" *Id*. at 000115 (quoting (App. 101, A.R. 29)). This court also reasoned that the ARB's contributing factor determination was premised on a conclusion that "Carter's FELA litigation was itself FRSA-protected." *Id.* at 000117. However, it rejected this conclusion, since, under the ARB's own precedent, Carter's FELA proceeding could only constitute protected activity if it "provided BNSF with 'more specific notification' of his injury report," and the ALJ failed to make such a finding. *Id*. (quoting *LeDure v. BNSF Ry. Co.*, ARB Case No. 13-044, 2015 WL 4071574, at *4 (ARB June 2, 2015)).

This court also held that the ALJ erred in rejecting BNSF's rationales for terminating Carter, as the ALJ failed to undertake the "'critical inquiry in a pretext

analysis'"— "'whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge.'" *Id.* at 000116 (quoting *Gunderson v. BNSF Ry.*, 850 F.3d 962, 969 (8th Cir. 2017)). Absent this "critical" finding, this court concluded that the ALJ's rejection of BNSF's affirmative defense was the product of the same "flawed chain-of-events causation theory" as the ALJ's contributing factor analysis. *Id.* at 000118. It vacated the ARB's order and remanded the case for further proceedings.

4. ALJ Decision on Remand

Following this court's decision in *Carter I*, the ARB remanded this matter to the Department's Office of Administrative Law Judges ("OALJ"). (App. 41-43, A.R. 74).

On August 21, 2019, Carter filed a motion to amend his FRSA complaint to add allegations that BNSF retaliated against him for filing a FELA claim and that BNSF unlawfully interfered with his medical treatment, which BNSF opposed. (Supp. App. 063, A.R. 84). On September 13, 2019, ALJ Jennifer Whang issued an order denying in part Carter's motion to amend his complaint. (Supp. App. 063, A.R. 84); (Supp. App. 64, A.R. 89). ALJ Whang reasoned that a FELA claim is not, in itself, protected activity under FRSA. (Supp. App. 064, A.R. 89) (citing 49 U.S.C. 20109(a)(4) and *Carter I*, App. 000117). And she noted that although

Carter appeared to allege medical interference at ALJ Chapman's hearing,[7] Carter did not identify medical interference as a basis of his FRSA claim, which he initiated over four years after the alleged interference. *Id.*[8]

This matter was subsequently reassigned to ALJ Heather Leslie, who issued a decision and order on remand on April 29, 2021, finding that Carter's FRSA-protected injury report was not a contributing factor in his discharge and thus that BNSF did not violate the Act. (App. 38, A.R. 110). The ALJ based her decision on the parties' briefs and the existing record, as the parties agreed that the matter could be resolved without a second evidentiary hearing. *Id.* at 20.

ALJ Leslie acknowledged that Carter and BNSF agreed not to disturb ALJ Chapman's credibility determinations. *Id.* at 23. She thus adopted ALJ Chapman's credibility determination—specifically, that "'while there were aspects of Mr. Carter's testimony that were contradictory or inconsistent,'" "'he was a credible and reliable witness[]'" on "'crucial points,'" including in "'[h]is description of the application process[.]'" (App. 23, A.R. 110) (quoting (App. 101,

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[7] ALJ Whang pointed to a portion of ALJ Chapman's decision in which she recounts Carter testifying that BNSF sent him to a company physician when he suffered his injury rather than calling an ambulance as he requested. (Supp. App. 064, 064 n.10, A.R. 89) (citing (App. 61-62, A.R. 29)).

[8] ALJ Whang stated that Carter's FELA claim and his assertion that BNSF interfered with his medical care could be addressed in the context of his claim that BNSF discharged him in retaliation for reporting a work injury. (Supp. App. 064, A.R. 89).

A.R. 29)). Consistent with *Carter I*, ALJ Leslie also made her own credibility determinations. *Id*. at 33-37. In particular, the ALJ found the testimony of Heenan, the official who recommended that Carter be discharged, to be "informative" and "credible," because it was not contradicted by other BNSF witnesses and, as ALJ Chapman found, Heenan "'had never met [Carter], and knew nothing about his injury or subsequent lawsuit.'" *Id.* at 34 (quoting (App. 99, A.R. 29)). The ALJ also found that all the BNSF witnesses provided consistent testimony, emphasizing that Sherrill "specifically testified he did not target [Carter]." *Id.*[9] In contrast, the ALJ determined that Mills, the witness called by Carter to support his retaliation claim, was not credible because he provided his testimony after he was discharged by BNSF and his testimony was inconsistent with that of other witnesses. *Id.* at 33-34.

ALJ Leslie concluded that the "lack of temporal proximity" between Carter's 2007 injury report and subsequent FELA claim and deposition, on the one hand, and his 2012 discharge, on the other hand, "support[ed] a conclusion" that he was "fired for dishonesty," not his injury report. *Id.* at 31, 32. The ALJ also found

[9] The ALJ did not accept Carter's attack on the credibility of Thompson, the BNSF official who initiated the first investigation into Carter's potential dishonesty and who testified at BNSF's first investigative hearing. The ALJ found that there were not adequate facts to determine that Thompson was not credible, and that Thompson's testimony was consistent with other testimony. (App. 33-34, A.R. 110).

that Carter's FELA suit was not protected activity because it did not provide BNSF "with any further notice of [his] injury[.]" *Id.* at 35, 35 n.27 (citing *LeDure,* 2015 WL 4071574 at *4).

ALJ Leslie rejected Carter's argument on remand that BNSF's two investigations were pretext for retaliation. *See id.* at 33. The ALJ determined that Heenan "terminated [Carter's] employment pursuant to [BNSF's] written policies," which provide that "[d]ishonesty about any job related subject is a stand-alone dismissible violation." *Id.* at 27, 34. And the ALJ concluded that "Heenan believed in good faith that [Carter] was guilty of the conduct charged…and that the notification of his injury or the FELA Lawsuit played no part in his decision." *Id.* at 35. The ALJ also did not find that "there was any" "discriminatory animus" on the part of BNSF officials. *Id.* at 34.

ALJ Leslie found, in the alternative, that BNSF proved by clear and convincing evidence that it would have discharged Carter even if he had not reported his injury. In particular, the ALJ found "persuasive [Heenan's] testimony on this point, as it establishe[d], with reasonable certainty, that he fired [Carter] for reasons other than FRSA protected activity[.]" *Id.* at 37. The ALJ noted that although she found Carter credible regarding the application process, he still "check[ed] off 'no' when asked if he had missed more than two days of work due to … injury'" and he still omitted his Navy record from his application, which the

ALJ found "untruthful[.]" *Id.* at 36. And although ALJ Leslie accepted as true Carter's claim that he arrived at work on time on February 5, 2012 but clocked in late, she noted that BNSF representatives such as Sherrill testified that they thought he was late. *Id.*

The ALJ rejected Carter's request that she take judicial notice of *Wooten v. BNSF Ry. Co.*, 2018 WL 2417858, (D. Mont. May 29, 2018), *report and recommendation adopted*, 2018 WL 4462506 (D. Mont. Sept. 18, 2018), another FRSA case. The ALJ reasoned that taking judicial notice of *Wooten*— which, in denying the parties' cross-motions for summary judgment, found that BNSF may have "'incentivized retaliation'" through its bonus policy—would not "fall within the standards set out in the" Department's OALJ regulations. (App. 32-33, A.R. 110) (quoting *Wooten,* 2018 WL 2417858 at *5 and citing 29 C.F.R. §§ 18.45, 18.201). The ALJ also rejected Carter's argument that BNSF's decision not to call Thompson as a witness created a presumption in his favor. The ALJ noted that Carter did not provide any support for this argument, notwithstanding the fact that it was Carter's burden to prove contributing factor causation. *Id.* at 34 n.24. And she noted that Carter could have also called Thompson as a witness. *Id.* ALJ Leslie accordingly denied Carter's FRSA claim.

5. ARB Decision on Remand

Carter timely appealed ALJ Leslie's decision to the ARB. In a final decision and order dated September 26, 2022, the ARB affirmed the ALJ's denial of Carter's FRSA claim. (App. 01, A.R. 125).

The ARB held that substantial evidence supported ALJ Leslie's conclusion that Carter failed to show that his FRSA-protected injury report contributed to his discharge. *Id.* at 09. It agreed with the ALJ that the lack of temporal proximity between his 2007 injury report and his 2012 discharge supported a conclusion that Carter was not fired for protected activity. *Id.* And it determined that the evidence of record supported the ALJ's conclusion that BNSF did not target Carter for discharge—pointing to, among other evidence: the ALJ's finding that Heenan had a good faith belief that Carter committed "'several acts of dishonesty'" that justified his discharge from employment; the consistent testimony of other BNSF witnesses, which corroborated Heenan's testimony; the ALJ's finding that Mills, who testified on Carter's behalf, was not credible; the ALJ's finding that even though Carter provided credible testimony about the application, he still omitted multiple injuries and his Navy service from his application; and the ALJ's finding that BNSF officials had a good faith belief that Carter was "'late and was dishonest in reporting his time on February 5, 2012.'" *Id.* at 09-11. The ARB also rejected Carter's argument that ALJ Leslie committed reversible error in finding that

Heenan discharged him, determining that "even if it is erroneous to state that Heenan 'fired' Carter" rather than recommending his discharge, "such mistake does not change the essential facts … that Heenan was the person ultimately responsible for reviewing Sherrill's recommended action … and making a recommendation of dismissal in accordance with … the PEPA[.]" *Id.* at 17.

The ARB further concluded that the same evidence of record supported the ALJ's finding that BNSF established by clear and convincing evidence that it would have discharged Carter for his acts of dishonesty even if he had not made his injury report. *Id.* at 10, 13-14.

The ARB rejected Carter's contention that ALJs Whang and Leslie erred in any of their procedural or evidentiary rulings, which it reviewed under an abuse of discretion standard. *Id.* at 14 (citing *Jay v. Alcon Lab'ys, Inc.,* ARB No. 2008-0089, 2009 WL 1176487, at *4 (ARB Apr. 10, 2009)); *see also id.* at 11 n.71(citing *Cravens v. Smith,* 610 F.3d 1019, 1029 (8th Cir. 2010)). The ARB found that ALJ Whang properly exercised her discretion in denying Carter's motion to amend his complaint since it would have been "futile" to permit Carter to add either an allegation that his FELA suit constituted protected activity or an allegation that and that BNSF unlawfully interfered with his medical treatment. The FELA litigation did not provide BNSF with "'more specific notification' of [Carter's] original injury report" as required for it to be FRSA-protected activity.

And the interference claim was barred by FRSA's limitations period. *Id.* at 15 (citing (App. 35, A.R. 110) and quoting *LeDure*, 2015 WL 4071574 at *4).

ALJ Leslie properly declined to take judicial notice of the court's findings in *Wooten*, the ARB concluded, since the findings in that case were not "'matters of common knowledge or are capable of certain verification'" and the ALJ could not "take judicial notice of findings of fact from another case to support a contention before it." (App. 12, 12 n.73, n.74, A.R. 125) (quoting *Am. Prairie Constr. Co. v. Hoich,* 560 F.3d 780, 798 (8th Cir. 2009) and (citing *Adm'r, Wage & Hour Div. v. Global Horizons Manpower, Inc.,* ARB No. 2009-0016, 2010 WL 5535813, at *12 (ARB Dec. 21, 2010)).[10] The ARB affirmed ALJ Leslie's denial of Carter's request that an adverse inference be drawn against BNSF for not calling BNSF supervisor Thompson as a witness, reasoning that the ALJ was not obligated to do so, *id.* at 16, (citing *New World Commc'ns v. NLRB,* 232 F.3d 943, 946 (8th Cir. 2000)), and that the ALJ "properly determined that establishing that protected activity was a contributing factor was [Carter's] burden to prove." *Id*. It further determined that even if the ALJ had taken judicial notice of the findings in *Wooten*,

[10] The ARB also rejected Carter's request to take judicial notice of another case, *Blackorby v. BNSF Ry. Co.,* 849 F.3d 716 (8th Cir. 2017), concluding that he forfeited this argument by failing to raise it before the ALJ. (Add 11, 11 n.71; A.R. 125).

such findings would have been irrelevant, since Carter failed to show that BNSF had a bonus policy that incentivized his discharge. *Id.*

SUMMARY OF ARGUMENT

In *Carter I*, this court held that the ARB erred in affirming the initial ALJ decision in this matter, concluding that since the ALJ relied on a flawed chain of events theory of causation, she failed to make sufficient findings to support her conclusion that Carter's FRSA-protected injury report contributed to his discharge or her rejection of BNSF's affirmative defense. Consistent with *Carter I*, ALJ Leslie made additional findings of fact on remand, determining that BNSF did not target Carter in retaliation for notifying BNSF of a work-related injury but instead discharged him based on a good faith belief that he was dishonest on his employment application and in his statements regarding his whereabouts on February 5, 2012. ALJ Leslie thus concluded that Carter's injury report did not contribute to his discharge and, in the alternative, that BNSF showed by clear and convincing evidence that it would have discharged him absent his protected activity.

Substantial evidence supports ALJ Leslie's conclusion on remand, as affirmed by the ARB, that Carter's injury report was not a contributing factor in his discharge. This evidence includes the large gap in time between Carter' injury report and his discharge; the consistent testimony of BNSF officials at the initial

ALJ hearing and BNSF's investigative hearings that Carter was disciplined for multiple instances of dishonesty and that his injury report played no role in his discharge; the ALJ's credibility determinations—including, crucially, that the BNSF official who recommended that Carter be discharged, Heenan, was a credible witness; discrepancies between Carter's job application and his medical and employment records; and BNSF's PEPA policy, which provides that dishonesty is grounds for immediate discharge. The same evidence which shows that Carter's protected activity did not contribute to his discharge also shows clearly and convincingly that BNSF would have discharged Carter for multiple instances of dishonesty even if he had not made his FRSA-protected injury report.

Carter has failed to establish that ALJ Leslie's decision is not supported by substantial evidence. Carter claims that in affirming ALJ Leslie's decision, the ARB erred in failing to consider additional deposition testimony he provided in 2012. But he forfeited this argument by failing to raise it with the ARB, and, in any event, he has failed to establish that this deposition was a factor in his discharge. Contrary to Carter's contention, the ARB did not make any credibility determinations of its own; it affirmed ALJ Leslie's decision as supported by substantial evidence. Carter also urges this court to reject ALJ Leslie's reasonable findings and credibility determinations, which he misattributes to the ARB;

however, this is not the role of a reviewing court under the substantial evidence standard.

Carter's challenges to the procedural and evidentiary rulings made by ALJs Leslie and Whang and affirmed by the ARB on remand are also without merit. As the ARB concluded, it would have been futile to permit Carter to amend his complaint to add an allegation that BNSF unlawfully interfered with his medical treatment, as this claim was time-barred. ALJ Leslie reasonably exercised her discretion, as affirmed by the ARB, in declining to draw an adverse inference against BNSF for not calling BNSF manager Thompson as a witness, as it is Carter's burden to prove retaliation and he could have called Thompson himself. Finally, the ARB properly affirmed ALJ Leslie's refusal to take judicial notice of findings from another FRSA case to support Carter's retaliation claim, as it would have been inappropriate to take judicial notice of such findings to support a contention before the ALJ.

ARGUMENT

I. STANDARD OF REVIEW

Judicial review of an ARB decision under FRSA is governed by the Administrative Procedure Act, 5 U.S.C. 706(2). *See* 49 U.S.C. 20109(d)(4) ("The review shall conform to chapter 7 of title 5."); *Maverick Transp., LLC v. DOL*, 739

F.3d 1149, 1153 (8th Cir. 2014). Under the APA, this Court must affirm the agency's determination unless it is "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." *Maverick Transp.,* 739 F.3d at 1153 (citing 5 U.S.C. 706(2)(A)). 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 "relevant evidence that a reasonable mind would accept as adequate to support the [agency's] conclusion." *Maverick Transp.*, 739 F.3d at 1153 (citation omitted). It is "more than a scintilla but less than a preponderance." *Midgett v. Wash. Grp. Int'l Long Term Disability Plan*, 561 F.3d 887, 897 (8th Cir. 2009) (internal quotation marks omitted).

The substantial-evidence test is a narrow one, under which the reviewing court does not substitute its judgment for that of the agency. *See Dawson Farms v. Risk Mgmt. Agency*, 698 F.3d 1079, 1083 (8th Cir. 2012). "Evidence may be substantial even when two inconsistent conclusions might have been drawn from it." *Syverson v. USDA*, 601 F.3d 793, 800 (8th Cir. 2010). Thus, the question is "whether substantial evidence supports the Secretary's conclusion, not whether substantial evidence exists to support [an] alternative view." *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 358 (8th Cir. 1996) (citing *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992)). In considering whether the agency's decision is supported by substantial evidence, the court considers the whole record before it. *See Carroll*,

78 F.3d at 358 (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–88 (1951)). Where the Secretary's opinion "is in agreement with and based in part on the ALJ's credibility determinations, it is entitled to 'great deference' by this Court." *Id.* (quoting *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1507 (8th Cir. 1993)).

Legal determinations by the Board are reviewed *de novo*, with appropriate deference to any interpretation of ambiguities in the statute. *See Pattison Sand Co. v. Fed. Mine Safety & Health Review Comm'n*, 688 F.3d 507, 512 (8th Cir. 2012); *see also Maverick Transp.*, 739 F.3d at 1153 (deferring to the Board's application of the statute of limitations under the Surface Transportation Assistance Act (STAA)).[11] Additionally, an ALJ's evidentiary rulings are reviewed under an abuse-of-discretion standard. *Mercier v. DOL.*, 850 F.3d 382, 388 (8th Cir. 2017) (citing *Wright Elec., Inc. v. NLRB*, 200 F.3d 1162, 1166, 1168 (8th Cir. 2000)). Thus, "[a]s long as the ARB correctly applied the law and the ALJ's 'factual findings are supported by substantial evidence,'" this Court "will affirm the ARB's decision 'even though [the Court] might have reached a different decision[.]'" *Maverick Transp.*, 739 F.3d at 1153 (quoting *Wilson Trophy*, 989 F.2d at 1507).

[11] The Secretary's expertise in employee protection supports deference to his interpretation of whistleblower statutes. *See Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 933 (11th Cir. 1995) (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 83 (1990)).

II. SUBSTANTIAL EVIDENCE SUPPORTS ALJ LESLIE'S DETERMINATION ON REMAND, AS AFFIRMED BY THE BOARD, THAT CARTER'S PROTECTED ACTIVITY WAS NOT A CONTRIBUTING FACTOR IN HIS DISCHARGE

To prevail on a FRSA claim, a complainant must prove by a preponderance of the evidence that (1) the complainant engaged in protected activity; (2) the employer knew of such activity;[12] (3) the complainant suffered an adverse employment action; and (4) the complainant's protected activity was a contributing factor in the adverse employment action. *See Carter I*, App. 000111-112 (citing *Gunderson*, 850 F.3d at 968). If the complainant shows by a preponderance of the evidence that their protected activity was a contributing factor in the adverse employment action, the burden shifts to the employer to show, by clear and convincing evidence, that it would have taken the same action absent the protected

[12] ALJ Leslie did not include employer knowledge as a separate element, in accordance with the governing regulation. (App. 30, A.R. 110); *see* 29 C.F.R. 1982.109(a) (stating with respect to ALJ decisions that "[a] determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint"). The ALJ's use of a three-element formulation rather than a four-element formulation of the elements of a FRSA claim does not have a material effect on the outcome of this case, as the ALJ considered employer knowledge in concluding that Carter's protected activity did not contribute to his discharge. ALJ Leslie found that BNSF conceded that it was aware of Carter's 2007 injury report when he initiated the first disciplinary investigation into Carter's conduct in 2012. (App. 08, A.R. 125); (App. 35, A.R. 110). However, ALJ Leslie adopted ALJ Chapman's finding that Heenan did not know Carter or about his injury and lawsuit when he made his recommendation that Carter be discharged. (App. 34, A.R. 110).

activity. *See* 49 U.S.C. 42121(b)(2)(B)(iv); 29 C.F.R. 1982.109(b); *see also Carter I*, App. 000112. There is no dispute that Carter engaged in protected activity when he reported his workplace injury in 2007, that at least certain BNSF officials were aware of Carter's injury report, or that his 2012 discharge was an adverse action. (App. 07-08, A.R. 125); (App. 30-31, A.R. 110); *see also Carter I*, App. 000112.

"A 'contributing factor' includes 'any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.'" *Id.* (quoting *Gunderson*, 850 F.3d at 969). This element may be established by circumstantial evidence; however, it must still be established. *See Brucker v. BNSF Ry. Co.,* ARB Nos. 2018-0067, -0068, 2020 WL 7319286, at *4 (ARB Nov. 5, 2020); *see also Carter I*, App. 000113-114 ("[P]rotected activity is [not] a 'contributing factor' to an adverse action simply because it ultimately [leads] to the employer's discovery of misconduct.") (citing *Koziara v. BNSF Ry.*, 840 F.3d 873, 878 (7th Cir. 2016)). This Carter failed to do.

A. Substantial Evidence Supports ALJ Leslie's Conclusion that that BNSF's Stated Justifications for Discharging Carter Were Not Pretextual.

This court held in *Carter I* that the "critical" flaw of the initial ALJ decision in this matter was the ALJ's failure to determine whether BNSF in fact targeted Carter for retaliation or instead discharged him based solely on a "good faith" belief that he "was guilty of the conduct justifying discharge." App. 000116; *see*

also Gunderson, 850 F.3d at 969 ("In considering this element [contributing factor causation], we must take into account 'the evidence of the employer's nonretaliatory reasons.'") (quoting *Palmer v. Canadian Nat'l Ry.,* ARB Case No. 16-035, 2016 WL 5868560, *33 (ARB Sept. 30, 2016)). On remand, ALJ Leslie thus engaged in a thorough analysis of BNSF's nonretaliatory reasons for discharging Carter. *See* (App. 33-35, A.R. 110). As the ARB affirmed, the ALJ reasonably found that BNSF discharged Carter based on a good faith belief that he was dishonest in multiple instances, not in retaliation for protected activity.

1. ALJ Leslie reasonably concluded that Carter's protected activity was too temporally distant from his discharge to support an inference of retaliation.

In determining that Carter's FRSA-protected injury report did not contribute to in his discharge, ALJ Leslie first concluded that Carter's injury report was too temporally distant to support an inference that it was a contributing factor—a conclusion which is clearly supported by substantial evidence. (App. 32, A.R. 110). "[T]he probative value of temporal proximity decreases as the time gap between protected activity and adverse action lengthens[.]" *Brucker*, 2020 WL 7319286, at *5 (two-year gap between protected activity and adverse action did not support inference of retaliation); *see also Tyler v. Univ. of Arkansas Bd. of Trustees,* 628 F.3d 980, 986 (8th Cir. 2011). Here, as this court emphasized in *Carter I*, "Carter's protected injury report was made and known by his BNSF

supervisors in August 2007, more than *four years* prior to the adverse action of BNSF investigating and terminating Carter for acts of dishonesty in 2005 and 2012 that were seemingly *unrelated* to his 2007 injury and injury report." App. 000112 (emphases in original).

Carter's 2008 FELA suit and subsequent July 2009 deposition did not constitute protected activity in themselves, since, as the ALJ found and the ARB affirmed, they did not provide BNSF with "any further notice of" Carter's August 2007 injury. (App. 35, A.R. 110); *see* (App. 15, A.R. 125); *Carter I,* App. 000117.[13] Regardless, Carter's FELA suit was 46 months prior to his discharge, and his 2009 deposition was over 33 months prior to his discharge. Had BNSF "tried to fire [Carter] for notifying [it] of his injury," as the ALJ noted, "one would expect such a termination to occur closer in time to the actual injury, the filing of the lawsuit in 2008, or after the deposition in 2009." (App. 35, A.R. 110). This "lack of temporal proximity" supports a conclusion that Carter was not discharged for protected activity. *Id.* at 32.

[13] To have contributed to Carter's discharge, Carter's FELA lawsuit needed to have "provided BNSF with 'more specific notification' of his injury report." *Carter I*, App. 000117 (quoting *LeDure,* 2015 WL 4071574 at *4). ALJ Leslie reasonably concluded that it did not, since BNSF supervisor Thompson was already aware of Carter's injury the day it occurred. (App. 35, A.R. 110).

2. ALJ Leslie's conclusion that BNSF discharged Carter for dishonesty is supported by her credibility determinations and other substantial evidence.

ALJ Leslie's conclusion that Carter was discharged for dishonesty, not for protected activity, was also grounded in her assessment of the witnesses' credibility—including, most significantly, her finding that Heenan was a "credible" and "informative" witness. (App. 34, A.R. 110). Heenan, a BNSF Director of Labor Relations, reviewed Carter's employment application and pre-employment records and the transcripts from BNSF's investigative hearings, which were presided over by Sherrill. Heenan agreed with Sherrill that Carter was dishonest on his job application and in his statement that he arrived to work on time on February 5, 2012, and he recommended that Carter be discharged for both instances of dishonesty—a recommendation that was accepted by BNSF. *See* (App. 14, A.R. 125); (App. 34-35, A.R. 110). Based on his testimony, ALJ Leslie concluded that Heenan "believed in good faith that [Carter] was guilty of the conduct charged, that is dishonesty on his application and dishonesty surrounding the events of February 5, 2012," and that "the notification of his injury or the FELA lawsuit played no part in [Heenan's] decision." (App. 34-35, A.R. 110).

As noted above, an agency decision that is "in agreement with and based [on]… the ALJ's credibility determinations [] is entitled to great deference." *Carroll*, 78 F.3d at 358 (internal quotations and citations omitted). Heenan's

credibility is supported by the fact that he had never met Carter and was unaware of either his 2007 injury or his FELA claim when he made his recommendation that Carter be discharged for dishonesty. (App. 34, A.R. 110); (App. 99, A.R. 29); *see also Carter I*, App. 000118 (noting that these facts, among others, were "strong evidence" of "BNSF's good-faith efforts to prevent retaliation"). Although, as the ARB noted, Heenan did not sign the discharge notices that BNSF sent to Carter—such notices were signed by Sherrill—the ARB appropriately concluded that this did "not change the essential facts … that Heenan was the person ultimately responsible for reviewing Sherrill's recommended action … and making a recommendation of dismissal in accordance with … the PEPA[.]" (App. 17, A.R. 125). Moreover, the PEPA policy is clear that "dishonesty about any job-related subject" is a "stand alone" violation that "may result in immediate dismissal." (Supp. App. 036, A.R. 16).

ALJ Leslie's finding that BNSF discharged Carter for dishonesty, not for his protected activity, is further corroborated by the consistent testimony of the other BNSF representatives at ALJ Chapman's evidentiary hearing: Sherrill, McNaul, and Thomas. All three testified that Carter's protected activity had no bearing on BNSF's decision to discharge him; rather, Carter was discharged because he dishonestly omitted prior injuries and his Navy service from his application and dishonestly stated that he arrived on time on February 5, 2012. (App. 32-33, A.R.

110).[14] Based on this testimony, the ALJ concluded that there was no discriminatory animus on the part of BNSF officials, nor was there any improper "collusion" between Thompson and Sherrill." *Id.* at 34. Mills testified to the contrary; however, ALJ Leslie reasonably gave Mills' testimony no weight since he testified after being discharged by BNSF and his testimony was contradicted by the testimony of the other witnesses. *Id*. at 34.

A comparison of Carter's employment application and his pre-employment records also supports ALJ Leslie's conclusion that Carter was discharged for dishonesty. Although ALJ Leslie accepted ALJ Chapman's finding that Carter's testimony regarding "the events of his application" was credible, (App. 37, A.R. 110), Carter's pre-employment records and the record testimony show that he sustained prior work injuries to his back, plus a prior work injury to his knee that necessitated a "scope" procedure and for which he was excused from work for two weeks, (Supp. App. 006-013, A.R. 16); (App. 000850, 000876, 000898, A.R. 16). As the ALJ found, Carter did not include these injuries on his application, and he "omitt[ed] his Navy career completely." (App. 37, A.R. 110). Moreover, the

[14] That BNSF officials believed in good faith that Carter answered untruthfully in omitting his Navy service from his application is reinforced by the explanation he provided for this omission. Carter claimed that he omitted his Navy service because it was top secret, but he included his top-secret service with the Army on his application—a discrepancy which Sherrill found to be indicative of dishonesty. *See* (Supp. App. 004, A.R. 16); (App. 37 n.30, A.R. 110); (App. 000589-90, A.R. 18).

application itself stated that any omission or misrepresentation was grounds for immediate discharge. (App. 27, A.R. 110).

ALJ Leslie accepted as true Carter's testimony that he arrived on time but clocked in late on February 5, 2012 day; nonetheless, BNSF officials consistently testified that they believed he behaved dishonestly when he stated in writing that he arrived on time that day. (App. 30, 37, A.R. 110). Sherrill, for instance, testified that surveillance footage showed Carter arriving late, as well as that Carter provided contradictory statements regarding what he told his supervisor that day. (App. 37, A.R. 110); (App. 000604, A.R. 18). Heenan also testified that Carter informed his supervisors orally and in writing that he arrived on time on February 5, 2012; however, "security camera footage later captured the fact that that was not true." (App. 000743, A.R. 19); *see* (App. 30, A.R. 110).

Based on the evidence in the administrative record, a factfinder could reasonably conclude, as the ALJ did, that the consistent, non-retaliatory explanation for Carter's discharge provided by BNSF officials was genuine, and that Carter was discharged solely for violating BNSF's prohibition against dishonesty. Even if a different factfinder could have drawn other inferences from the record, that is not sufficient grounds to overturn the ALJ's well-reasoned decision, as affirmed by the Board. *See Syverson v. USDA*, 601 F.3d at 800.

B. Carter has Failed to Show that ALJ Leslie's Decision, Affirmed by the ARB, is Unsupported by Substantial Evidence.

Carter attempts to challenge ALJ Leslie's reasonable conclusion, as affirmed by the ARB, that his protected activity did not contribute to his discharge by (1) pointing to additional deposition testimony he provided in 2012, which he argues was protected activity that contributed to his discharge. He also (2) asserts that the ARB engaged in improper credibility determinations and (3) invites this court to reweigh the evidence. These arguments are unavailing.

1. Carter has failed to show that his 2012 FELA deposition establishes contributing factor causation.

Carter contends on appeal that in January 2012, he provided deposition testimony in connection with his FELA claim, in which he "notified BNSF of more specific facts concerning his notification of injury." Thus, he contends, contributing factor causation is supported by the temporal proximity between this deposition and his discharge. Carter Br. 17-18, 21-23. This argument is erroneous for two reasons.

First, Carter failed to raise this argument before the ARB on remand. Although Carter's 2012 deposition is part of the record,[15] Carter did not allege in either his petition for review to the ARB or his brief in support of his petition for

[15] Carter included a copy of his January 2012 deposition with the brief he filed with the ALJ on February 15, 2021. *See* (App. 000120-199, A.R. 107).

review that this 2012 deposition provided BNSF with additional information regarding his 2007 work injury or that the ALJ erred in failing to consider it. *See* A.R. 111, A.R. 121. To the contrary, Carter's brief in support of his petition for review references only his 2009 deposition, asserting that BNSF "began … dismissal proceedings against Carter" "within days of … review[ing]" "Carter's 2009 deposition and discovery documents." (Supp. App. 068, 068 n. 3, A.R. 121). Issue exhaustion is required where, as here, "claimants bear the responsibility to develop issues for adjudicators' consideration." *Carr v. Saul*, 141 S. Ct. 1352, 1358 (2021).[16] Because Carter did not allege before the ARB that his 2012 deposition supports his retaliation claim, this claim is forfeited here.

[16] FRSA whistleblower proceedings are "formal adversarial adjudications" in which parties must first raise their arguments to the agency to preserve them for appeal. 29 C.F.R. 18.101; *see also* 29 C.F.R. 1982.107(a) (providing that FRSA whistleblower proceedings are governed by the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at 29 C.F.R. Part 18, subpart A); 29 C.F.R. 1982.110(a) ("Any party desiring to seek review, including judicial review, of a decision of the ALJ . . . must file a written petition for review with the ARB. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived."). Courts routinely find that issues not exhausted before the ARB are forfeited on appeal in whistleblower cases under statutes analogous to FRSA. *See, e.g., Bechtel v. ARB*, 710 F.3d 443, 450 (2d Cir. 2013) (issue not raised before ARB was waived on appeal); *Formella v. DOL*, 628 F.3d 381, 390 (7th Cir. 2010) (same); accord *Sims v. Apfel*, 530 U.S. 103, 108 (2000) (explaining that where an agency requires issue exhaustion in administrative appeals, "courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues.").

In any event, Carter fails to show that this 2012 deposition contributed to his discharge within the meaning of FRSA. A FELA claim is not, in itself, FRSA-protected activity. See *Carter I*, App. 000117 (citing *LeDure*, 2015 WL 4071574, at *4). Thus, he must establish that this deposition provided BNSF "with 'more specific notification' of his [2007] injury report" to support contributing factor causation. *Id.* This he has not done. Carter conclusorily alleges that his 2012 deposition "further notified BNSF of his workplace injury, of BNSF's negligence that caused his injury, [and] the nature and extent of his injury." Carter Br. 5. However, BNSF officials knew about his injury when it happened, (App. 35, A.R. 110), and Carter fails to articulate what he said about his injury that BNSF did not already know. Carter has also failed to establish that any of the BNSF officials involved in his discharge were aware of his 2012 deposition.

2. Contrary to Carter's contention, the ARB did not reject any of ALJ Leslie or ALJ Chapman's credibility determinations.

Carter's contention that the ARB on remand "made credibility findings in conflict with those of ALJ Chapman[]" and "the OALJ [On Remand]" (ALJ Leslie) is erroneous. Carter Br. 16, 24. The ARB affirmed ALJ Leslie's decision as supported by substantial evidence; it did not make any credibility findings of its

own.[17] And, as explained above, ALJ Leslie explicitly acknowledged the parties' apparent agreement not to disturb ALJ Chapman's credibility determinations and adopted them as her own. (App. 23, A.R. 110). As this court noted in *Carter I*, ALJ Chapman's credibility determinations were quite limited: she found that Carter "'was a credible and reliable witness'" on "'crucial points,'" "namely [] describing his employment application process and his failure to clock in on February 5, 2012." App. 000115 (quoting (App. 101, A.R. 29)). However, the ALJ "made no explicit finding" on whether BNSF "target[ed]" Carter for discharge; "made no credibility finding as to Mills's testimony"; and did not analyze whether BNSF "in good faith believed that [Carter] was guilty of the conduct justifying discharge." *Id.* (internal quotations omitted). Thus, ALJ Leslie—not the ARB—engaged in further factfinding to fill these gaps. (App. 24-30, A.R. 110).

Carter's assertion that the ARB made improper credibility findings on remand appears to rest on a view that because ALJ Chapman found Carter's

[17] For instance, in concluding that "the record supports ALJ Leslie's conclusion that BNSF believed Carter was guilty of several acts of dishonesty which … resulted in the termination of his employment," the ARB noted that "ALJ Leslie found that [Carter] testimony regarding the completion of his application was credible, [however,] she also found that it did not 'negate the fact that he did check off 'no'" when asked about prior work injuries. (App. 09, A.R. 125). And in concluding that the record supported ALJ Leslie's finding that BNSF did not target Carter for discharge, the ARB noted that "[t]he ALJ did not give any weight to the testimony of Mills … because he had been fired by BNSF and his testimony, given after his firing, was inconsistent with that of McNaul, Thomas, and Sherrill." *Id.* at 11.

testimony regarding the application process credible, the ARB was precluded from affirming that BNSF discharged Carter for dishonesty. *See* Carter Br. 16 ("[U]nlike ALJ Chapman in the original hearing and, ALJ Leslie OR, who both found Carter credible about issues related to the employment application and timing in on time … [t]he ARB OR, found Carter was terminated by [BNSF] for being dishonest."). This reasoning is incompatible with *Carter I,* which held that ALJ Chapman's limited findings were insufficient to support the ALJ's rejection of BNSF's nonretaliatory justifications for discharging Carter. ALJ Leslie, as affirmed by the ARB, reasonably concluded based on the additional factfinding she conducted that Carter was discharged based on a good-faith belief that he was dishonest. This court should uphold this conclusion.

3. This court should not disturb ALJ Leslie's reasonable inferences and credibility determinations.

Carter also contests some of ALJ Leslie's specific factual findings, urging this court to find Mills a credible witness and asserting that he established contributing factor causation with evidence of "antagonism[,] … hostility … and a change in his employer's attitude … after he [] engage[d] in protected activity." Carter Br. 20, 23.[18] And he asserts in his statement of facts that ALJ Leslie's

[18] Carter also contends that he established contributing factor causation with evidence of temporal proximity. Carter Br. 20. For the reasons discussed above, this is erroneous.

reliance on Heenan's testimony was "flawed" because "Heenen [sic] did not terminate Carter Sherrill did." *Id*. at 11. These claims are without merit.

When applying the substantial evidence standard, it not the role of a reviewing court to "reweigh the evidence." *Myers v. Apfel*, 238 F.3d 617, 619 (5th Cir. 2001). Substantial evidence is such "relevant evidence that a reasonable mind would accept as adequate to support the [agency's] conclusion." *Maverick Transp.*, 739 F.3d at 1153. And, as discussed above, ALJ Leslie reasonably concluded that Mills' testimony was not entitled to any weight and that there was no discriminatory animus towards Carter. (App. 33-34, A.R. 110). In affirming ALJ Leslie's decision, the ARB also reasonably determined that although Heenan did not sign Carter's discharge notices, he was still the one who recommended that Carter be discharged in accordance with BNSF's policy against dishonesty. (App. 17, A.R. 125).

III. SUBSTANTIAL EVIDENCE SUPPORTS ALJ LESLIE'S DETERMINATION ON REMAND, AS AFFIRMED BY THE BOARD, THAT BNSF WOULD HAVE DISCHARGED CARTER ABSENT ANY PROTECTED ACTIVITY

Carter additionally argues that "BNSF… failed to prove by clear and convincing evidence Carter's notification of his workplace injury was not a factor in either of its two decisions to terminate Carter." Carter Br. 14. The Secretary understands this to be an argument that the ARB erred in affirming that BNSF met

its affirmative defense. 49 U.S.C. 42121(b)(2)(B)(iv). This Court need not reach this issue, since the ALJ's determination that Carter failed to establish contributing factor causation, as affirmed by the Board, is supported by substantial evidence. *See Gunderson,* 850 F.3d at 970. However, if this Court concludes that the ALJ and the Board erred in concluding that Carter's protected activity did not contribute to Carter's discharge, it should nonetheless uphold the ALJ's finding, as affirmed by the ARB, that BNSF showed that it would have taken the same action in the absence of protected activity.

For an employer to establish an affirmative defense to liability under the FRSA whistleblower provision, it must show by clear and convincing evidence that it would have taken the same adverse action against the employee in the absence of protected activity. 49 U.S.C. 42121(b)(2)(B)(ii); 29 C.F.R. 1982.109(b). "Clear and convincing evidence 'denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain.'" *Brousil v. BNSF*, ARB Case Nos. 16-025, 16-031, 2018 WL 6978217, at *3 (ARB July 9, 2018) (quoting *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, 2015 WL 5781070, at *5 (ARB Sept. 30, 2015)); *see also Blackorby v. BNSF Ry. Co.,* 936 F.3d 733, 737 (8th Cir. 2019) (an employer's "honestly held belief that the employee engaged in misconduct" is insufficient to establish an affirmative defense "if the employer fails to carry the burden of proving by clear and

convincing evidence that it would have taken the same action in the absence of the protected report."). ALJ Leslie determined that BNSF met this burden here, and her decision is supported by substantial evidence.

In support of her conclusion that BNSF met its affirmative defense by clear and convincing evidence, ALJ Leslie pointed to much of the same evidence which, as noted above, establishes BNSF discharged Carter based solely on a belief that he was dishonest. In particular, ALJ pointed to Heenan's "persuasive" "testimony," which, she found, "establishes, with reasonable certainty" that Carter was terminated "for reasons other than FRSA protected activity." (App. 37, A.R. 110). The ALJ noted that Heenan's testimony was consistent with that of other BNSF witnesses and BNSF's PEPA policy. *Id.* And the ALJ recounted the other evidence which supports Heenan's testimony, stating that Carter's credible testimony regarding the events surrounding his application "[did] not negate the fact," that he still checked "no" when asked if he had missed more than two days of work due to injury or illness and whether he had had any prior surgeries or back pain; finding that Carter "answered untruthfully to his employment history in omitting his Navy career completely"; and finding that, even though she accepted as true Carter's testimony that he clocked in late but arrived on time on February 5, 2012, BNSF "sincerely believed he was late" that day "and acted accordingly." *Id.* at 36-37. On the basis of these findings, the ALJ concluded that "[BNSF] believed

that Mr. Carter was dishonest on his application and in reporting when he clocked in on February 5, 2012." *Id.* at 38.

Based on the evidence in the administrative record, a factfinder could reasonably conclude, as the ALJ did, that BNSF would have discharged Carter for violating its prohibition against dishonesty on his job application and in his statements regarding his whereabouts on February 5, 2012. *See Kuduk,* 768 F.3d at 792–93 (employer established by clear and convincing evidence that it would have discharged employee in absence of protected activity where it discharged the employee for an official policy violation following a "thorough[] investigat[ion]" and "formal hearing"; the policy made clear that the violation "might result in discharge"; and the employer presented evidence that it consistently enforced its policy). As with the ALJ's contributing factor finding, even if a different factfinder could have drawn different inferences from the record, that is not sufficient grounds to overturn the ALJ's well-reasoned conclusion, affirmed by the Board, that BNSF clearly and convincingly met its burden of establishing an affirmative defense to liability. *See Syverson v. USDA*, 601 F.3d at 800.[19] The

[19] Carter claims that the temporal proximity between his January 2012 deposition and his discharge created an "overwhelming presumption [of] retaliation" that "BNSF did not overcome with clear and convincing evidence." Carter Br. 8. However, as discussed in the previous section, Carter failed to raise his 2012 deposition before the ARB, thereby forfeiting this argument. He has also failed to

ALJ's conclusion that BNSF met its burden of establishing its affirmative defense is thus supported by substantial evidence.

IV. ALJs LESLIE AND WHANG, AS AFFIRMED BY THE BOARD, PROPERLY EXERCISED THEIR DISCRETION IN THEIR PROCEDURAL AND EVIDENTIARY RULINGS ON REMAND

Carter also takes issue with ALJ Whang's denial of his motion to amend his complaint to add an allegation that BNSF unlawfully interfered with his medical treatment, ALJ Leslie's denial of his request that an adverse inference be drawn against BNSF for not calling Thompson as a witness, and ALJ Leslie's denial of his request that she take judicial notice of the facts of another FRSA case. Carter Br. 24-26. Like Carter's attempts to undermine the evidentiary basis of ALJ Leslie's decision, these assertions are without merit. This court reviews denials of requests for leave to amend a complaint, for an adverse inference, and for judicial notice under an abuse of discretion standard, reviewing any underlying legal conclusions de novo. *See Zutz v. Nelson*, 601 F.3d 842, 850 (8th Cir. 2010) ("[w]e … review the denial of leave to amend a complaint for abuse of discretion, but when the district court denies leave on the basis of futility[,] we review the underlying legal conclusions de novo"); *JHP & Assocs., LLC v. NLRB.*, 360 F.3d 904, 910 (8th Cir. 2004) ("[t]he Board, as the factfinder, [is] free to reject the

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show that this deposition provided BNSF with any additional information regarding his 2007 injury.

adverse inference rule if the facts warrant[] such a rejection"); *Cravens*, 610 F.3d at 1029 ("[w]e review a district court's decision [not] to take judicial notice for abuse of discretion"). As the ARB affirmed, ALJ Whang and ALJ Leslie did not abuse their discretion or commit any errors of law in these procedural and evidentiary rulings.

A. The ARB properly affirmed that it would have been futile to permit Carter to amend his complaint.

The ARB properly affirmed ALJ Whang's denial of his motion to amend his complaint to add an allegation of medical interference, (App. 15, A.R. 125),[20] since it would have been futile to permit Carter to do so. *Zutz*, 601 F.3d at 850. FRSA explicitly prohibits covered employers from "interfere[ing] with the medical … treatment of an employee who is injured during the course of employment"; however, it requires employees to bring a claim with OSHA within 180 days of the alleged violation. 49 U.S.C. 20109(c)(1), (d)(2)(A)(ii); *see also Przytula v. Grand Trunk Western Rail Co.,* Case No. 2017-0007, 2019 WL 5089593, at *3 (ARB Sept. 26, 2019) (FRSA "prohibits an employer from … interfering with medical

[20] In his motion, Carter sought leave to amend his complaint to allege both that BNSF interfered with his medical treatment and that his FELA claim constituted protected activity. (App. 001046, A.R. 84). He appears to have abandoned the latter argument on appeal, as Carter's brief alleges only that it was error to deny his motion to amend his complaint to include an allegation of medical interference. Carter Br. 24-25.

treatment or first aid … in the temporal period immediately following a workplace injury"). Carter seeks to amend his complaint to allege that BNSF interfered with his medical treatment when it "refused to transport him to a hospital" following his 2007 injury, Carter Br. 24-25, but he did not file his FRSA claim with OSHA until 2012—years after the 180-day limitations period expired. (App. 14, A.R. 125). The ARB thus correctly concluded that it would have been futile to permit Carter to allege that this constituted unlawful medical interference and, therefore, appropriately affirmed the denial of his motion to add this allegation to his complaint.[21]

B. ALJ Leslie reasonably exercised her discretion in denying Carter's request for an adverse inference.

ALJ Leslie, as affirmed by the ARB, also properly exercised her discretion in denying Carter's requests that she draw an adverse inference against BNSF for not calling Thompson as a witness at the evidentiary hearing. (App. 16, A.R. 125); *see JHP & Assocs.*, 360 F.3d at 910; *see also Samson v. ARB*, 732 F. App'x 444, 447 (7th Cir. 2018) ("imposing an adverse inference against a party is left to the

[21] If this court holds that the ARB erred in affirming the denial of Carter's motion to amend his complaint to add an allegation that BNSF interfered with his medical treatment in 2007, the Secretary submits that such a holding would not undermine the ALJ's conclusion, as affirmed by the ARB, that Carter's 2012 discharge was not in violation of FRSA; as explained above, this conclusion is grounded in the ALJ's well-supported finding that BNSF discharged Carter based on a good-faith belief that he was dishonest.

discretion of the factfinder"). In analogous cases under the National Labor Relations Act, this court has held that an adverse inference is appropriate in limited circumstances—for instance, it applied the adverse inference rule in a case in which the agency did not call the employee charging retaliation as a witness where the employee was both the "most critical" witness (the case turned on whether the employee was discharged or quit) and had already provided contrary testimony to a state agency. *NLRB v. MDI Com. Servs.*, 175 F.3d 621, 628 (8th Cir. 1999). However, this court has made clear that "the adverse inference rule is generally permissive." *JHP*, 360 F.3d at 910. And it has held that an adverse inference is not required even where the charging party does not testify. *Id.* (declining to apply adverse inference rule where agency failed to call charging party in case that turned on evaluation of employer's mixed motives).

In this case, as the ALJ and ARB noted, Carter is the charging party, and thus bears the burden of establishing that BNSF retaliated against him for engaging in protected activity. (App. 16, A.R. 125); (App. 34 n.24, A.R. 110); 49 U.S.C. 42121(b)(2)(B)(iv). Carter is correct that Thompson played an important role in his discharge. Carter Br. 25. However, Thompson testified at BNSF's investigative hearing. *See, e.g.,* (App. 000834-36, 000885-86, A.R. 16). And consistent with Thompson's testimony at BNSF's investigative hearing, all the BNSF witnesses who appeared at ALJ Chapman's evidentiary hearing testified that

Carter was discharged for dishonesty. (App. 16, A.R. 125); (App. 30-34, 34 n.24, A.R. 110). Moreover, Carter could have also called Thompson as a witness himself. ALJ Leslie, as affirmed by the ARB, thus appropriately exercised her discretion in refusing to grant Carter's request for an adverse inference.[22]

C. ALJ Leslie reasonably exercised her discretion in denying Carter's request to take judicial notice of the findings in another FRSA case.

As affirmed by the ARB, ALJ Leslie also properly exercised her discretion in denying Carter's request that she take judicial notice of the district court's

[22] Carter alleges that BNSF could only establish "by clear and convincing evidence" that Carter's injury report "was not a factor in [his] discharge" by "calling Thompson to testify as to his motives." Carter Br. 25. This is erroneous. ALJ Leslie's conclusion, affirmed by the ARB, that BNSF met its affirmative defense is supported the evidence of record, which includes the consistent testimony of BNSF officials Heenan, Sherrill, McNaul, and Thomas at ALJ Chapman's hearing, plus Thompson's testimony at BNSF's investigative hearing. *See* (App. 16, A.R. 125); (App. 30-34, 34 n.24, A.R. 110); (App. 000834-36, 000885-86, A.R. 16). BNSF's affirmative defense does not collapse because Thompson did not testify at the evidentiary hearing. In any event, even if the ALJ had granted Carter's request for an adverse inference to be drawn against BNSF for not calling Thompson as a witness, substantial evidence would still support ALJ Leslie's conclusion that Carter's protected activity did not contribute to his discharge, as well as the ALJ's finding in the alternative that BNSF met its affirmative defense. "[T]he inference rule 'permits an adverse inference to be drawn; it does not create a conclusive presumption against the party failing to call the witness.'" *See New World Commc'ns v. NLRB,* 232 F.3d 943, 946 (8th Cir. 2000). And, as discussed above, the ALJ's conclusions that BNSF discharged for dishonesty and would have done so even if he had not engaged in protected activity are supported by her credibility determinations and reasonable inferences based on the record as a whole, in particular, the testimony of the four BNSF representatives who testified at the evidentiary hearing.

finding in *Wooten* that BNSF may have "incentivized retaliation" through the bonus policy at issue in that case, 2018 WL 2417858 at *5. *See Cravens*, 610 F.3d at 1029. The Department's regulation governing official notice—which mirrors an analogous Federal Rule of Evidence—provides that an ALJ may only take judicial notice of a fact "'not subject to reasonable dispute'" because, for instance, it is "'[g]enerally known within the local area'" or "'[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" (App. 33 n.22, A.R. 110) (quoting 29 C.F.R. 18.201(b)); *see Cravens v. Smith*, 610 F.3d 1019, 1029 (8th Cir. 2010) (summarizing Federal Rule of Evidence 201(b), which governs judicial notice).[23] As the ARB appropriately held, a factfinder generally cannot "take judicial notice of findings of fact from another case to support a contention before it." (App. 12, A.R. 125) (citing *Global Horizons*, 2010 WL 5535813, at *12); *see M/V Am. Queen v. San Diego Marine Const. Corp.,* 708 F.2d 1483, 1491 (9th Cir. 1983) ("a court may not take judicial notice of proceedings … in another cause so as to supply … facts essential to

[23] Although ALJs are not required to follow the rules of evidence in Subpart B of Title 18 of the Department's regulations in FRSA whistleblower proceedings, it was an appropriate exercise of discretion for ALJ Leslie to base her decision not to grant Carter's request for judicial notice on the principles enumerated in section 18.201 of the Department's rules of evidence. *See* 29 C.F.R. 1982.107(d) ("Formal rules of evidence will not apply [to FRSA proceedings], but rules or principles designed to assure production of the most probative evidence will be applied.").

support a contention in a cause then before it"); *Holloway v. Lockhart*, 813 F.2d 874, 878-79 (8th Cir. 1987) (district court could not take judicial notice of finding from another case as predicate for collateral estoppel). However, this is precisely what Carter alleges ALJ Leslie should have done here.

According to Carter, ALJ Leslie should have taken judicial notice of the *Wooten* court's finding regarding the bonus policy in that case, since it would have "supported the credibility of Carter's witness Mills," "attacked the credibility" of BNSF witnesses, and "lent more weight to" his claim that he was discharged for engaging in protected activity. Carter Br. 26. As Carter's request for judicial notice is for an inappropriate purpose—to use a finding from another case to support contentions he made before the ALJ—ALJ Leslie clearly did not abuse her discretion in denying Carter's request. Moreover, Carter does not allege, let alone establish, that the *Wooten* court's finding is "not subject to reasonable dispute." 29 C.F.R. 18.201(b).[24]

In any event, a failure "to take judicial notice of a fact is not ground for reversal unless it is shown that the appellant is prejudiced by the error." *Cravens v. Smith*, 610 F.3d at 1029. And there was no prejudice here. As the ARB noted,

[24] Carter erroneously claims that ALJ Leslie declined to take judicial notice of the *Wooten* court's findings since the ALJ found "it was too late to do so." Carter Br. 26. As noted above, ALJ Leslie elected not to "impute any findings or conclusions in *Wooten* to the case at bar" as it is would "not fall within the standards set out in the regulations" at 29 C.F.R. 18.201(b). (App. 33, A.R. 110).

[e]ven if ALJ Leslie had chosen to take judicial notice of the existence of bonus policies" in *Wooten*, it was Carter's burden to "present evidence that … BNSF had a bonus policy in place that encouraged *his* supervisors to retaliate against him for his 2007 injury report." This he failed to do. (App. 12, A.R. 125) (emphasis in original).

CONCLUSION

For the foregoing reasons, this Court should affirm the ARB's decision and deny Carter's Petition for Review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND EIGHTH CIRCUIT RULE 28A(h)

Pursuant to Fed. R. App. P. 32(a) the undersigned certifies that the foregoing brief of the Secretary of Labor:

(1) Complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,805 words, including footnotes but excluding the parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii);

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(3) complies with the Eighth Cir. R. 28A(h) because the brief has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on July 31, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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