In the Matter of:

STEPHEN THORSTENSON, **ARB CASE NOS. 2018-0059**
2018-0060

COMPLAINANT, **ALJ CASE NO. 2015-FRS-00052**

v. **DATE: November 25, 2019**

BNSF RAILWAY COMPANY,

RESPONDENT.

Appearances:

***For the Complainant*:**
Paul Bovarnick, Esq.; *Rose Senders & Bovarnick LLC*; Portland Oregon and Shenoa L. Payne, Esq.; *Richardson Wright LLP*; Portland, Oregon

***For the Respondent*:**
Jacqueline M. Holmes, Esq.; Nikki L. McArthur, Esq.; *Jones Day*; Washington, D.C.

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes, Thomas H. Burrell, and Heather C. Leslie, *Administrative Appeals Judges*

FINAL DECISION AND ORDER

PER CURIAM. The Complainant, Stephen Thorstenson, filed a retaliation complaint under the employee protection provision of the Federal Rail Safety Act of

1982 (FRSA), as amended,[1] with the Department of Labor's Occupational Safety and Health Administration (OSHA). Thorstenson alleged that he was a victim of retaliation by BNSF (Respondent), his employer, for reporting a workplace injury. OSHA concluded that there was reasonable cause to believe that Respondent violated the whistleblower provisions of the FRSA and awarded back pay, compensatory damages and punitive damages, expungement of Complainant's employment records, and ordered Respondent to post a Notice to Employees. BNSF timely objected and requested a hearing before the Office of Administrative Law Judges (OALJ). The Administrative Law Judge (ALJ) found that Thorstenson engaged in protected activity and that that activity was a contributing factor in the discipline he received. The ALJ further found that BNSF established by clear and convincing evidence that it would have disciplined Thorstenson even if he had not engaged in protected activity. Both Thorstenson and BNSF appealed the ALJ's decision to the Administrative Review Board (ARB or Board). Under the authority granted by the Secretary of Labor,[2] the Chief Administrative Appeals Judge directed that this appeal would be decided by the full Board due to the exceptional importance of the issues presented. For the following reasons, we affirm the ALJ's Decision and Order.

BACKGROUND[3]

At the relevant time at issue in this case, Thorstenson worked as a conductor for BNSF in and around Vancouver, Washington. On February 2, 2009, Thorstenson injured his left knee when he slipped on steps while boarding a train, and he made a timely report of the injury. D. & O. at 3. He was off work due to the injury for almost six months. When he returned to work, he still had swelling, stiffness, and some pain in his knee after he completed work trips, and occasionally saw a doctor for these symptoms. Thorstenson provided verbal updates to BNSF managers regarding the condition of his knee. He asked the treating physician to discharge

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[1] 49 U.S.C. § 20109 (2008), as implemented at 29 C.F.R. Part 1982 (2018) and 29 C.F.R. Part 18, Subpart A (2018).

[2] Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (April 3, 2019).

[3] This background follows the ALJ's Decision and Order and undisputed facts. In reciting these background facts, we make no findings of fact.

him after an appointment on October 20, 2010, and he was able to return to work without restrictions.

On November 17, 2010, Thorstenson banged his left kneecap against something metal (a desk onboard the train) and felt pain, but thought that it was from the injury he sustained in February 2009. On the next day, November 18, he had more than the usual swelling, stiffness, and pain in his knee. He was not scheduled to work on November 19 and returned to the orthopedic office where he saw a physician's assistant. Thorstenson informed the physician's assistant that he had bumped a desk and was afraid that he had aggravated his earlier injury. D. & O. at 4. The physician's assistant prescribed pain medication. After returning to work on November 20 and 21, Thorstenson continued having swelling, stiffness, and pain and returned to the doctor on November 22, 2010. The doctor drained fluid from the knee, took x-rays, injected cortisone, and recommended that Thorstenson remain off work.[4] On November 22, Thorstenson contacted the trainmaster and filled out an injury report. D. & O. at 4. The ALJ found that Thorstenson reported the injury to BNSF on November 22, 2010, which was five days after the injury on November 17, 2010. D. & O. at 4.

On November 24, 2010, BNSF notified Thorstenson that it was investigating his apparent late report of the workplace injury and would conduct a hearing on January 21, 2011. Following the hearing, a decision maker, General Manager Doug Jones, concluded that Thorstenson had violated the rules because he did not report an injury within 72 hours, and he did not report the injury before going to the doctor.[5] Jones recommended a Level S or serious violation which resulted in a 30-day "record suspension."[6] Although Thorstenson did not have a history of discipline

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[4] On December 6, 2010, Thorstenson returned to the doctor, who diagnosed several injuries to the knee. Complainant was off work until he recovered from surgery and returned to full duty on January 17, 2011.

[5] D. & O. at 7-8. BNSF follows the General Code of Operating Rules (GCOR). These rules include a duty to report an injury immediately to the proper manager and submit a written report. GCOR 1.2.5, RX 5 at 15. In addition, BNSF has a Policy for Employee Performance Accountability which provides that employees will not be disciplined for late reporting of muscular-skeletal injuries, as long as the injury is reported within 72 hours of the probable triggering event. RX 5 at 18.

[6] For a "record suspension," the suspension is noted on the employee's work history in his personnel file, but he may work and earn regular wages. This discipline can be imposed for "Level S" or serious violations.

within the previous five years, he had reported an injury during that time. Therefore, Jones imposed a 36-month review period to attach to the Level S violation and record suspension. D. & O. at 8. At the time in question, the review period that attaches to a Level S violation for an employee that was "discipline free" and "injury free" was 12 months. *Id.*

Thorstenson filed a complaint with OSHA on February 7, 2011, alleging that the suspension was in retaliation for requesting medical treatment, following the orders of a treating physician, and for notifying BNSF of a work-related injury.[7]

On June 26, 2011, five months after receiving the Level S for late reporting, Thorstenson was working as a conductor aboard a train. D. & O. at 9. Under BNSF rules, the engineer and conductor are jointly responsible for the operation of the train. The conductor's control of the train's speed is limited to pulling the emergency brake and he is required to do this if the maximum authorized speed is exceeded by five miles an hour or more. At the time of the incident, the train exceeded the 55 miles-per-hour limit for 44 seconds, of which twelve seconds were at 60 mph. The "alerter system" activated for the last six seconds the train was speeding, and the engineer moved the throttle down from position eight to position one and then to idle. D. & O. at 10. About six or seven seconds after the engineer moved the throttle from position eight to one, Thorstenson noticed that the train was travelling at 60 mph. He pulled the emergency brake. As this can cause the cars to bunch together and throw people aboard the train forward or backward, he braced himself but failed to tell the engineer to do the same. The train passed through a crossing during this incident, but neither Thorstenson nor the engineer sounded the whistle. D. & O. at 10.

On June 29, 2011, BNSF's Superintendent of Operations in Vancouver, Chris Lucero, issued a Notice of Investigation into the incident on June 26, and the charges against the two employees were heard together. At the investigation hearing, an expert on event records testified that the train had been slowed to 59 mph at the time Thorstenson pulled the emergency brake, and that Thorstenson could have read this on his speedometer. The Conducting Officer and Terminal Manager Michael Cart told Superintendent Lucero that he thought the Company

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[7] D. & O. at 9. Subsequently, Complainant elected not to pursue the claim concerning following the orders of a treating physician. H.Tr. at 13.

had shown the violation. Lucero concluded that BNSF should dismiss both Thorstenson and the engineer based solely on this incident (a standalone dismissal), including the failure to blow the whistle as the train passed through a crossing. D. & O. at 11. The human resources manager disagreed and advised that it would be difficult to support a standalone dismissal for the engineer's case. She recommended that the June event be treated as a Level S violation for both employees. D. & O. at 12. The General Manager, Johnson, agreed with the H. R. advice and imposed Level S violations for Thorstenson and the engineer.

However, due to its progressive discipline policy, and Thorstenson's 36-month review period imposed in January 2011 for the previous Level S violation, BNSF terminated his employment. Thorstenson was notified of his discharge on August 30, 2011. On August 31, 2011, Complainant amended his OSHA complaint. He asserted that he would not have been terminated had he not been previously disciplined for late-filing of an injury report.

Following a hearing, the ALJ found that Thorstenson established that he engaged in protected activity by filing an injury report and filing a claim of retaliation with OSHA. The ALJ found that Thorstenson's injury report was a contributing factor in the first Level S violation that he received. However, the ALJ found that BNSF established its affirmative defense that it disciplined Thorstenson because his report was late, not because he reported an injury. In addition, the ALJ found that BNSF established that BNSF would have imposed a second Level S violation based on Thorstenson's role in the June 2011 safety incident in the absence of protected activity. Thus, the ALJ found, based on BNSF's policy of progressive discipline, that BNSF would have terminated Thorstenson's employment absent the protected injury report or the complaint with OSHA. Thorstenson appealed the ALJ's decision to the Administrative Review Board, and BNSF cross-appealed.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board authority to review ALJ decisions and issue final agency decisions in cases arising under the FRSA. Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (April 3, 2019); 29 C.F.R. § 1982.110(a). The ARB will affirm the ALJ's

factual findings if supported by substantial evidence but reviews all conclusions of law de novo. *Austin v. BNSF Ry. Co.*, ARB No. 17-024, ALJ No. 2016-FRS-013, slip op. at 7 (ARB Mar. 11, 2019). As the United States Supreme Court has recently noted, "[t]he threshold for such evidentiary sufficiency is not high." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019). Substantial evidence is "'more than a mere scintilla.' It means—and means only—'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (citing and quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

The FRSA prohibits a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith protected activity. 49 U.S.C. §§ 20109(a) & (b). To prevail, an FRSA complainant must establish the following by a preponderance of the evidence: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action. If a complainant meets this burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action absent the complainant's protected activity.[8]

1. Thorstenson engaged in protected activity

The parties do not dispute that Thorstenson engaged in protected activity by filing a report of injury in February 2009 and by filing a report of injury in November 2010. We affirm these findings as they are unchallenged on appeal. *See Brough v. BNSF Ry. Co.*, ARB No. 16-089, ALJ No. 2014-FRS-103, slip op. at 5 (ARB June 12, 2019).

On appeal, BNSF contends that the ALJ improperly considered protected activity that was alleged for the first time in an interrogatory response before the

[8] 49 U.S.C. § 20109(d)(2)(A)(i); 49 U.S.C. § 42121(b)(2)(B)(i)(2000); *Riley v. Canadian Pac. R.R. Corp.,* ARB Nos. 16-010, -052, ALJ No. 2014-FRS-044, slip op. at 4 (ARB Jul. 6, 2018).

ALJ, specifically the filing of an OSHA whistleblower retaliation claim on February 7, 2011. The ALJ found that Thorstenson had raised the February 2011 OSHA complaint as protected activity in response to BNSF's pre-hearing interrogatories, which was sufficient notice that it would be litigated. D. & O. at 16.

We agree with the ALJ and affirm the ALJ's decision to amend the pleadings to conform to the evidence as Respondent has not shown an abuse of discretion. 29 C.F.R. § 18.36 (permitting the ALJ to amend pleadings). As the ALJ noted, BNSF did not contend that it was prejudiced by or that it was unable to prepare a defense to the additional claim of protected activity identified in pre-hearing discovery.

2. BNSF imposed several adverse actions on Thorstenson

The parties do not dispute that both BNSF's imposition of a Level S violation as a result of the late injury report and its termination of Thorstenson's employment following the second Level S violation are adverse employment actions. We affirm these findings as they are unchallenged on appeal.

BNSF also contends that the ALJ erred in finding that the 36-month review period and the Notice of Investigation following the November 2010 injury report were adverse actions. In considering whether an action is adverse, the Board has referenced the United States Supreme Court's decision in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), a case decided under Title VII of the Civil Rights Act of 1964.[9] In describing the injury or harm alleged as retaliation, the Court held that: "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' " *Id* at 68. Moreover, the Court held that the significance of any given act of retaliation will often depend upon the particular circumstances and context. *Id* at 69. We affirm the ALJ's finding that the 36-month review period is an adverse action as it formed part of Thorstenson's progressive discipline.

We agree that any alleged adverse action must be considered in context, including internal investigations and hearings which may result in the imposition

[9] 42 U.S.C. § 2000e (1977).

of discipline. *See, e.g., Petronio v. Nat'l R.R. Pas. Corp.*, 2019 WL 4857579 (SDNY 2019) (bringing a disciplinary charge alone, in and of itself, does not automatically constitute an adverse action, although it can constitute one if such action would dissuade a reasonable employee from engaging in the protected conduct). However, given our disposition of this case we need not address Respondent's specific arguments regarding whether the Notice of Investigation was an adverse employment action.

3. The ALJ erred in his contributing factor analysis

To establish a violation under the FRSA, a complainant must show that the protected activity was a "contributing factor" in the adverse employment action. 49 U.S.C. § 20109(d)(2)(A), referring to 49 U.S.C. § 42121(b)(2)(B)(i). "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.'" *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 461-62 (9th Cir. 2018), *quoting Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017). "[T]he contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity." *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014). In satisfying this statutory standard, a complainant need not prove a retaliatory motive beyond showing that the employee's protected activity was a contributing factor in the adverse action. *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013).

On appeal, BNSF contends that the ALJ erred in finding that Thorstenson's November 22, 2010 report of an injury contributed to his discipline. The ALJ relied on "chain of events" or "inextricably intertwined" analysis to conclude that Complainant's protected activity of filing an injury report in November 2010 contributed to the Notice of Investigation and the imposition of the Level S violation for untimely filing. Specifically, the ALJ found that "there cannot be a late report unless there is a report, and the report is protected."[10]

[10] D. & O. at 19. We note that the ALJ referred to the complainant's burden to prove contributing factor causation as establishing or proving a "prima facie case." After a hearing, the complainant must prove causation by a preponderance of the evidence. A prima facie case is usually associated with an inference of causation. *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-008 (ARB Jan. 31, 2006). Although the ALJ used "prima facie case," he applied the correct standard. D. & O. at 15.

The ARB has held that where protected activity directly leads to an investigation and the investigation leads to discovery of wrongdoing which results in an unfavorable employment action, the report and the discipline are inextricably intertwined and causation is established presumptively as a matter of law. In *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB Feb. 29, 2012), for example, the ARB observed the following:

> If DeFrancesco had not reported his injury as he was required to do, Kepic would never have reviewed the video of DeFrancesco's fall or his employment records. Kepic admitted this at the hearing, testifying that such a review was routine after an employee reported an injury and that the purpose of the review was to determine "the root cause." Kepic stated that after seeing the video he reviewed DeFrancesco's injury and disciplinary records to determine whether there was a pattern of safety rule violations and what corrective action, if any, needed to be taken.
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> While DeFrancesco's records may indicate a history and pattern of safety violations, the fact remains that his report of the injury on December 6 triggered Kepic's review of his personnel records, which led to the 15-day suspension. If DeFrancesco had not reported his fall and Kepic had not seen the video, Kepic would have had no reason to conduct a review of DeFrancesco's injury and disciplinary records, decide that he exhibited a pattern of unsafe conduct, and impose disciplinary action.
>
> … Applying the framework of proving a contributing factor under AIR 21, we can only conclude *as a matter of law* that DeFrancesco's reporting of his injury was a contributing factor to his suspension.

Id. at 7-8 (footnotes omitted and emphasis added).

The ALJ's findings and reasoning in this case are analogous to that in *DeFrancesco*. Thorstenson filed an untimely report. BNSF, which had a clear policy on timely reporting injuries, disciplined Thorstenson for untimely reporting. The

ALJ, following ARB precedent, found that the discipline was "inextricably intertwined" with the protected report. Had there been no report, there would have been no discipline for untimely filing it.[11] Through this reasoning, the ALJ found that Thorstenson met his burden to prove contributing factor causation by a preponderance of the evidence. D. & O. at 19.

We hold that the ALJ committed legal error. We take this opportunity to clarify that we no longer require that ALJs apply the "inextricably intertwined" or "chain of events" analysis.[12] We note that the plain language of the statute does not include the term "inextricably intertwined." Rather, this is a construction that substitutes for, and in some cases circumvents, the ALJ's contributing factor or affirmative defense analyses.

By placing the focus on how the employer came to learn of the employee's wrongdoing rather than the employer's actions based on that wrongdoing or protected activity, "chain of events" causation departs from the statute's "contributing factor" text. In *Gunderson v. BNSF Ry. Co.*, the Eighth Circuit noted that Congress did not intend to insulate wrongdoing because the employee engaged in protected activity. 850 F.3d 962, 969-70 (8th Cir. 2017) ("An employee who engages in protected activity is not insulated from adverse action for violating workplace rules, and an employer's belief that the employee committed misconduct is a legitimate, non-discriminatory reason for adverse action."). The Seventh Circuit has also criticized the inextricably intertwined doctrine, noting that reporting the injury is not a *proximate cause* to the termination when the employee is terminated for carelessness in creating the injury or for some other conduct discovered as part

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[11] *See, e.g., Riley v Dakota, Minnesota & Eastern RR Corp.*, ARB Nos. 16-010, 16-052 (July 6, 2018), slip op. at 5, citing *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, slip op. at 14 (ARB Oct. 26, 2012) (Riley was charged with failure to promptly report an incident to his supervisor and was not found to have violated any other work rule or regulation); *see also Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 4 (ARB June 20, 2012) (the termination decision by Smith's managers stemmed solely from Smith's seven-day delay in reporting false log signatures, and not on the bare fact that Smith made the report, thus the Board held that Smith's act of reporting the information to the managers triggered the decision to terminate him).

[12] In overturning our rule of "inextricably intertwined" and "chain of events" causation, we note that several Circuit Courts of Appeal have disagreed with our prior analysis. We further explain our departure by emphasizing the language of the statute. *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs,* 545 U.S. 967 (2005).

of the review process initiated by the report of the injury. *Koziara v. BNSF Ry. Co.*, 840 F.3d 873, 877 (7th Cir. 2016) ("[p]roximate causation creates legal liability, 'proximate' denoting in law a relation that has legal significance"). We agree with this analysis.

This is not to say that an ALJ may not find that an adverse action and protected activity are intertwined such that contributing factor causation is factually established. For these cases, the ALJ must explain how the protected activity is a proximate cause of the adverse action, not merely an initiating event. *Koziara*, 840 F.3d at 877 (finding that the district court erred in relying on the fact that the "injury report initiated the events that led to his discipline"). In *Koziara*, the Seventh Circuit held that the "[the district court] failed to distinguish between causation and proximate causation. The former term embraces causes that have no legal significance. Had the plaintiff never been born or never worked for BNSF he would neither have been hurt by the plank flung at him by the energetic front-end loader nor have stolen railroad ties from the railroad. But that doesn't mean that his being born or his being employed by the railroad were legally cognizable [proximate] causes of his being fired." *Id.* at 877.

By applying the ARB's precedent on "inextricably intertwined" or "chain of causation," the ALJ erred. For the reasons discussed below, that error does not require remand in this case because the ALJ also found that BNSF established its affirmative defense, and we affirm those findings.

4. BNSF would have imposed a Level S discipline for untimely reporting in the absence of protected activity

If a complainant meets his or her burden of proof that he or she engaged in protected activity and that protected activity contributed to an adverse action, the employer may avoid liability only if it proves by clear and convincing evidence that

it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity.[13]

The ALJ concluded that BNSF established by clear and convincing evidence that it disciplined Thorstenson in January 2011 because his report of injury on November 22, 2010, was late, not because he reported an injury. The ALJ found that the overwhelming evidence establishes that BNSF imposes no discipline when a report is timely and imposes discipline when the report is late. D. & O. at 23.

The ALJ noted that Complainant himself had previously filed seven injury reports and was not disciplined, but discipline was imposed on the one occasion when he reported late. In addition, BNSF submitted the personnel files of seventeen workers who reported injuries in 2011 and were not disciplined and seven Public Law Board decisions that upheld its decisions to discipline employees for late reporting of an injury. The ALJ gave some weight to the Public Law Board's determination that imposition of Level S discipline for a late injury report was consistent with BNSF's disciplinary policy.

The ALJ found that there was no evidence of pretext or personal animus and that Thorstenson testified that the trainmaster did not seem upset with him when he went into the office to complete the injury report. Thus, the ALJ found that Respondent established the affirmative defense by clear and convincing evidence, a burden that is higher than that faced when establishing contributing factor causation.

We affirm the ALJ's rejection of Complainant's contention that BNSF's enforcement of its timely injury reporting policy is unreasonable and unduly burdensome. The ALJ found that so long as a rule is lawful, an employer is entitled to its disciplinary rules even if the rules are unwise, counterproductive, or arbitrary. "'Courts do not sit as a super-personnel department that re-examines an employer's disciplinary decisions." *See Kuduk*, 768 F.3d at 792. The ALJ noted that "[w]hen a

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[13] "Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." *See* 49 U.S.C. § 20109 (incorporating the burdens of proof found in 49 U.S.C. § 42121(b)(2)(B)(iv)); *cf. Clem v. Computer Sciences Corp*., ARB No. 16-096, ALJ No. 2015-ERA-003, -004, slip op. at 18 n.8 (ARB Sept. 17, 2019) (discussing the clear and convincing standard in context of statutory requirements).

worker reports an injury, the railroad is in a position to investigate to determine whether there are unsafe conditions that must be corrected for the protection of the public and of rail workers. Without notice of an injury, a railroad cannot take these steps." D. & O. at 23.

We conclude that the ALJ's findings are supported by substantial evidence. We affirm the ALJ's finding that Respondent established by clear and convincing evidence that it would have disciplined Complainant with a Level S violation for the sole reason that his report was late, not because he reported an injury.

5. BNSF would have terminated Thorstenson under its progressive discipline policy in the absence of protected activity

The ALJ found that there was "no dispute" that BNSF would have imposed the second Level S violation for Thorstenson's role in the June 2011 safety incident in the absence of protected activity. D. & O. at 25-26. The ALJ factored in that the other employee involved in the incident was also given a Level S violation, and that it was possible that Complainant could have received a standalone dismissal given the seriousness of the charges against him in connection with the event.

However, in Thorstenson's case, he was terminated because the second Level S violation occurred while Thorstenson was under a 36-month review period for the prior Level S violation. The ALJ found that it was part of BNSF's progressive discipline policy to terminate an employee for receiving a second Level S violation within the review period. The ALJ's findings are supported by substantial evidence.

As we affirm the ALJ's finding that BNSF established by clear and convincing evidence that it would have disciplined Thorstenson with a Level S violation for untimely reporting an injury, and we affirm the ALJ's finding that BNSF would have imposed a second Level S discipline, we therefore also affirm the ALJ's finding that BNSF would have terminated Thorstenson's employment following his second Level S violation, even absent the protected injury report or his filing a claim with OSHA.

6. BNSF's 36-month review period

General Manager Jones imposed a 36-month review period following Thorstenson's first Level S violation for untimely reporting because Thorstenson had filed an injury report within the previous five years. The ALJ found that this was a violation of the FRSA. The ALJ also found that BNSF failed to establish its affirmative defense as to the imposition of a 36-month review period for the late-reported injury. D. & O. at 24-25. We agree with the ALJ that BNSF violated the FRSA with its imposition of the 36-month review period. At the time, the review period following a Level S violation was 12 months for "injury free" and "discipline free" employees, and the reason that Jones extended it to 36 months was because of Thorstenson's prior injury report.

The ALJ further found that Thorstenson did not establish any damages due to the imposition of the 36-month review period because the second Level S violation triggering progressive discipline occurred within 12 months and would have caused the termination whether BNSF had imposed the 12-month or the 36-month review period. Nonetheless, the ALJ ordered that BNSF cease and desist from its policy of imposing the 36-month review periods for persons who receive discipline but have reported an injury prior to receiving that discipline.[14]

BNSF appealed the ALJ's order, asserting that the "cease and desist" order was beyond the ALJ's powers. We agree. The ALJ's cease and desist order is *ultra vires* and we vacate the order. *See Hoffman v. NetJets Aviation, Inc.*, ARB No. 09-021, ALJ No. 2007-AIR-007 (ARB Mar. 24, 2011) (Board only has power to abate a proven violation); *see also Yates v. Superior Air Charter, LLC*, ARB No. 17-061, ALJ No. 2015-AIR-028, n. 9 (ARB Sept. 26, 2019).

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's finding that Thorstenson established that he engaged in protected activity and that the imposition of a Level S violation as a result of the late injury report, the 36-month review period, and the

[14] The ALJ acknowledged that BNSF has since discontinued that practice. D. & O. at 8.

termination of employment following the second Level S violation are adverse employment actions. In addition, while we conclude that the ALJ erred in his contributing factor analysis, we hold that it is unnecessary to remand for further findings because we **AFFIRM** the ALJ's finding that BNSF established by clear and convincing evidence that it would have imposed the Level S violations and terminated Thorstenson in the absence of the Complainant's protected activity. However, we **VACATE** the ALJ's order that BNSF must cease and desist its policy of imposing a greater discipline on employees based solely on account of an employee's history of workplace injuries as it is beyond the power of the ALJ.

SO ORDERED.