



**In the Matter of:**

**GREGORY CHAMBERS,**

**ARB CASE NO. 2019-0074**

**COMPLAINANT,**

**ALJ CASE NO. 2018-FRS-00086**

**v.**

**DATE: March 5, 2021**

**BNSF RAILWAY COMPANY,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***

**Joseph L. Bauer, Jr., Esq.; *The Bauer Law Firm, LLC*; Saint Louis, Missouri**

***For the Respondent:***

**Susan J. Travis, Esq.; *Robbins Travis PLLC*; Southlake, Texas; and Paul S. Balanon, Esq.; *BNSF Railway Company*; Fort Worth, Texas**

**Before: James D. McGinley, *Chief Administrative Appeals Judge*, James A. Haynes and Randel K. Johnson, *Administrative Appeals Judges***

**DECISION AND ORDER**

PER CURIAM. This case arises under the employee protection provisions of the Federal Railroad Safety Act of 1982 (FRSA).<sup>1</sup> Gregory Chambers (Complainant) filed a complaint alleging that BNSF Railway Company (Respondent or BNSF) violated the FRSA by terminating his employment for reporting an injury. On July 23, 2019, an Administrative Law Judge (ALJ) issued a Decision & Order Dismissing

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<sup>1</sup> 49 U.S.C. § 20109 (2008), as implemented by federal regulations at 29 C.F.R. Part 1982 (2020) and 29 C.F.R. Part 18, Subpart A (2020).

Complaint (D. & O.) based upon his findings that Complainant did not meet his burden for contributing factor causation and that Respondent proved its affirmative defense. We affirm because there is substantial evidence in the record to support the ALJ's finding as to the affirmative defense.

### BACKGROUND

Complainant worked for BNSF from May 20, 2013, to June 20, 2017, when BNSF dismissed Complainant. Complainant contends that BNSF terminated his employment in retaliation for filing an injury report on September 11, 2016, while BNSF argues it dismissed Complainant for dishonesty in completing his April 2, 2013, pre-employment medical questionnaire.

Prior to his employment with BNSF, Complainant worked for Union Pacific Railroad Company (UP). At UP, Complainant suffered an injury to his back, knee, and neck.<sup>2</sup> As a result of the injury, Complainant underwent neck surgery and filed a lawsuit against UP.

Subsequently, on March 25, 2013, Complainant interviewed for a position with BNSF, and on April 2, 2013, Complainant completed a pre-employment medical questionnaire for BNSF. On the questionnaire, Complainant failed to disclose his previous lawsuit, injury, and surgery.<sup>3</sup> Instead, Complainant answered “no” to the related questions and certified his answers. The questionnaire warned that “any incomplete or false answer may be grounds for withdrawal or termination of employment.”<sup>4</sup> On May 20, 2013, Complainant began working for BNSF.<sup>5</sup>

A few years later, on September 11, 2016, Complainant reported an injury to BNSF. Subsequently, Respondent discovered potential dishonesty on Complainant's pre-employment medical questionnaire, and on May 11, 2017, Respondent issued an

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<sup>2</sup> D. & O. at 2.

<sup>3</sup> *Id.* at 4-5.

<sup>4</sup> *Id.* at 5.

<sup>5</sup> *Id.* at 2.

investigation notice into the alleged dishonesty.<sup>6</sup> On June 7, 2017, BNSF held an investigation hearing, which ascertained that Complainant had previously worked for UP and filed a lawsuit against UP related to an injury.<sup>7</sup>

The investigation hearing's testimony and exhibits were reviewed by three BNSF decision-makers, who concluded that the evidence supported Complainant's dismissal for dishonesty because Complainant's answer of "no" to several questions on the pre-employment questionnaire was not truthful in light of the UP lawsuit, injuries, and neck surgery.<sup>8</sup> On June 20, 2017, BNSF dismissed Complainant for dishonesty on his pre-employment medical questionnaire, and for violating the General Code of Operating Rules, specifically Rule 1.6.<sup>9</sup>

Complainant subsequently filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Respondent had retaliated against Complainant for reporting an injury. OSHA dismissed the complaint. Complainant objected and requested a hearing before an ALJ.

After analyzing all of the evidence in the record as a whole, the ALJ found that Complainant failed to meet his burden in showing that his injury report was a contributing factor to his dismissal. Moreover, the ALJ found that Respondent proved its affirmative defense, demonstrating by clear and convincing evidence that Respondent would have taken the same adverse action against Complainant absent his protected activity.

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<sup>6</sup> *Id.* at 3.

<sup>7</sup> *Id.* at 3-4.

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Id.*

Complainant appealed to the Administrative Review Board (ARB or Board) regarding the ALJ's findings as to contributing factor and affirmative defense.<sup>10</sup>

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to review ALJ decisions in cases arising under the FRSA and to issue agency decisions in these matters.<sup>11</sup> The Board reviews the ALJ's factual determinations under the substantial evidence standard.<sup>12</sup> 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.’”<sup>13</sup> In addition, the Board reviews an ALJ's conclusions of law de novo.<sup>14</sup>

### DISCUSSION

The FRSA is governed by the burdens of proof set out under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).<sup>15</sup> Accordingly, to prevail, an FRSA complainant must establish by a preponderance of the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a

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<sup>10</sup> In his opening brief, Complainant failed to contest the ALJ's findings as to the affirmative defense, only raising the issue in his reply brief. Thus, the Board has the authority to decline consideration of the issue. Nonetheless, the Board has decided it will consider the issue. *See U.S. v. Head*, 340 F.3d 628, 630 n. 4 (8th Cir. 2003) (“Although we retain the authority to decline consideration of an issue raised for the first time in a reply brief, we are not precluded from considering the issue.”) (inner citations omitted).

<sup>11</sup> Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020); see 29 C.F.R. § 1982.110(a).

<sup>12</sup> 29 C.F.R. § 1982.110(b).

<sup>13</sup> *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (citing and quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

<sup>14</sup> *Hamilton v. CSX Transp., Inc.*, ARB No. 2012-0022, ALJ No. 2010-FRS-00025, slip op. at 2 (ARB Apr. 30, 2013) (citations omitted).

<sup>15</sup> 49 U.S.C. § 20109(d)(2)(A)(i), citing 49 U.S.C. § 42121(b).

contributing factor, in whole or in part, in the unfavorable personnel action.<sup>16</sup> If a complainant meets this burden of proof, the employer may avoid liability only if it proves its affirmative defense, which requires demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action absent the complainant's protected activity.<sup>17</sup>

The issue before us is whether substantial evidence supports the ALJ's finding that Respondent proved its affirmative defense by clear and convincing evidence.<sup>18</sup> For the following reasons, we affirm the ALJ's finding as to Respondent's affirmative defense.

The ALJ's affirmative defense analysis was based in part on his credibility determinations. The Board "gives considerable deference to an ALJ's credibility determinations and defers to such determinations unless they are inherently incredible or patently unreasonable."<sup>19</sup> The ALJ found that Complainant lacked credibility based on his demeanor, inconsistency, and implausible testimony.<sup>20</sup> In contrast, BNSF's decision-makers were "unbiased, sincere, and credible witnesses."<sup>21</sup> We defer to the ALJ's credibility determinations, while also noting that the determinations were well-reasoned and supported by substantial evidence in the record.

In addition, the ALJ made several factual findings in support of his conclusion that the Respondent proved its affirmative defense by clear and

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<sup>16</sup> 49 U.S.C. § 42121(b)(2)(B)(iii).

<sup>17</sup> *Id.* at § 42121(b)(2)(B)(iv).

<sup>18</sup> This case also presents a number of contributing factor issues, but we need not consider or address those issues because substantial evidence supports the ALJ's findings as to Respondent's affirmative defense. Thus, Respondent's affirmative defense is sufficient to affirm the ALJ's dismissal of the complaint. Furthermore, even though we do not consider contributing factor, we see no reason to disturb the ALJ's findings on the issue.

<sup>19</sup> *Riddell v. CSX Transp., Inc.*, ARB No. 2019-0016, ALJ No. 2014-FRS-00054, slip op. 13 (ARB May 19, 2020) (citation omitted).

<sup>20</sup> D. & O. at 9.

<sup>21</sup> *Id.*

convincing evidence. The ALJ found that the BNSF decision-makers dismissed Complainant solely because they honestly believed that Complainant falsified his answers on his pre-employment questionnaire.<sup>22</sup> Similarly, the ALJ found that BNSF has policies prohibiting dishonesty and a legitimate interest in enforcing those policies. Moreover, in accordance with those policies, BNSF consistently dismisses employees found to be dishonest.<sup>23</sup>

Upon consideration of the parties' briefs on appeal, and having reviewed the evidentiary record as a whole, we agree with the ALJ's factual determination and conclusion that Respondent proved, by clear and convincing evidence, that it would have taken the same adverse action even if Complainant had not engaged in protected activity. The ALJ's finding and conclusion that Respondent proved his affirmative defense is supported by substantial evidence and in accordance with the law.<sup>24</sup>

#### CONCLUSION

Accordingly, we **AFFIRM** the ALJ's finding and conclusion that Respondent proved its affirmative defense. The complaint in this matter is **DENIED**.

**SO ORDERED.**

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<sup>22</sup> *Id.* at 20.

<sup>23</sup> *Id.* at 21.

<sup>24</sup> Complainant also argued that the ALJ erred in excluding Complainant's exhibit, CX-16. The ARB reviews an ALJ's evidentiary rulings under the deferential abuse of discretion standard. *Carter v. BNSF Ry. Co.*, ARB Nos. 2014-0089, 2015-0016,-022, ALJ No. 2013-FRS-00082, slip op. at 9 (ARB June 2, 2016). We find the ALJ did not abuse his discretion because Complainant's evidence was irrelevant.