

**U.S. Department of Labor**

Administrative Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



**IN THE MATTER OF:**

**STEPHEN THORSTENSON,**

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

**COMPLAINANT,**

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

**ALJ STEVEN B. BERLIN**

**v.**

**DATE: May 15, 2023**

**BNSF RAILWAY COMPANY,**

**RESPONDENT.**

**Before HARTHILL, Chief Administrative Appeals Judge, and BURRELL,  
Administrative Appeals Judge**

### **ORDER OF REMAND**

**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,<sup>1</sup> with the Department of Labor's Occupational Safety and Health Administration (OSHA). Thorstenson alleged that his employer, BNSF Railway Company (Respondent), retaliated against him for reporting a workplace injury. OSHA concluded there was reasonable cause to believe that Respondent violated the whistleblower provisions of the FRSA. BNSF timely objected and requested a hearing before the Office of Administrative Law Judges (OALJ).

On July 31, 2018, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O) concluding that Thorstenson engaged in protected activity, and the

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<sup>1</sup> 49 U.S.C. § 20109, as implemented by 29 C.F.R. Part 1982 (2022) and 29 C.F.R. Part 18, Subpart A (2022).

activity was a contributing factor in the discipline he received.<sup>2</sup> The ALJ also found that BNSF established by clear and convincing evidence that it would have disciplined Thorstenson even if he had not engaged in protected activity.<sup>3</sup> Both Thorstenson and BNSF appealed the ALJ's D. & O. to the Administrative Review Board (ARB or Board).

On November 25, 2019, the ARB issued a Final Decision and Order (F. D. & O.) affirming the ALJ's D. & O.<sup>4</sup> The Board held that the ALJ committed legal error in his contributing factor analysis but affirmed the ALJ's finding that BNSF would have imposed the same adverse actions in the absence of Thorstenson's FRSA-protected activity.<sup>5</sup>

Thorstenson appealed the ARB ruling to the U.S. Court of Appeals for the Ninth Circuit. On December 21, 2020, the Court issued an unpublished Memorandum in which it reversed and remanded the case to the Board for further proceedings consistent with its disposition.<sup>6</sup>

On remand, the ARB affirmed the ALJ's affirmative defense findings.<sup>7</sup> Thorstenson again appealed the Board's ruling to the Ninth Circuit. On March 15, 2023, the Court issued a second Memorandum in which it held that we erred in our interpretation of their prior decision. The Court stated that "substantial evidence does not support the ALJ's conclusion that BNSF proved by clear and convincing evidence that it would have disciplined Thorstenson in the absence of his protected activity."<sup>8</sup> It reiterated its conclusion that, "because it was virtually impossible for Thorstenson to comply with the injury reporting rule, he was effectively disciplined for the protected activity of reporting a workplace injury."<sup>9</sup> The Ninth Circuit's prior ruling "foreclosed [a] determination on remand that BNSF established its

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<sup>2</sup> *Thorstenson v. BNSF Ry. Co.*, ALJ No. 2015-FRS-00052, slip op. at 19 (ALJ July 31, 2018).

<sup>3</sup> *Id.* at 22-27.

<sup>4</sup> *Thorstenson v. BNSF Ry. Co.*, ARB Nos. 2018-0059, -0060, ALJ No. 2015-FRS-00052 (ARB Nov. 25, 2019).

<sup>5</sup> *Id.* at 10-12.

<sup>6</sup> *Thorstenson v. U.S. Dep't of Lab.*, 831 F. App'x 842, 843 (9th Cir. 2020) (unpublished).

<sup>7</sup> *Thorstenson v. BNSF Ry. Co.*, ARB Nos. 2018-0059, -0060, ALJ No. 2015-FRS-00052 (ARB Dec. 21, 2021).

<sup>8</sup> *Thorstenson v. U.S. Dep't of Lab.*, 2023 WL 2523831 at \*1 (9th Cir. 2023) (unpublished).

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

affirmative defense by clear and convincing evidence.”<sup>10</sup> And the Court held that, because Thorstenson has prevailed on his FRSA complaint, he is entitled to damages.

The Ninth Circuit’s March 15, 2023 Memorandum and May 8, 2023 Mandate is clear and unequivocal. There is no room for further adjudication on the merits. “It is clear from the administrative record that Thorstenson is entitled to damages for his termination.”<sup>11</sup> Accordingly, in line with the Ninth Circuit’s Memorandum, we remand to the ALJ for the limited purpose of determining compensatory damages based on the existing record, to be supplemented only as to post-hearing damages.

**SO ORDERED.**



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**SUSAN HARTHILL**

**Chief Administrative Appeals Judge**



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**THOMAS H. BURRELL**

**Administrative Appeals Judge**

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

# CERTIFICATE OF SERVICE

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ARB-2018-0059 BNSF Railway Company(Stephen Thorstenson) and Stephen Thorstenson v. BNSF Railway Company(Stephen Thorstenson) (Case No: 2015-FRS-00052)

I certify that the parties below were served this day.

05/15/2023

(DATE)



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Thomas O. Shepherd, Jr., Esq.  
Clerk of the Appellate Boards

Administrator, WHD  
200 Constitution Ave, N.W.  
Washington, DC 20210

Directorate of Enforcement Programs  
U.S. Department of Labor, OSHA  
Room N-4618, FPB  
200 Constitution Ave., N.W.  
Washington, DC 20210

Dean Romhilt  
U.S. Department of Labor  
Fair Labor Standards, Room N-2716  
200 Constitution Avenue, NW  
Washington, DC 20210  
--Electronic

Hon. Stephen R. Henley  
Chief Administrative Law Judge  
Office of the Administrative Law Judges  
800 K Street, N.W., Suite 400  
Washington, DC 20001-8002

Megan Guenther  
Office of the Solicitor  
U.S. Department of Labor  
200 Constitution Ave. NW  
Washington, DC 20210  
--Electronic

Mr. Stephen Thorstenson  
18525 E. Burnside #208  
Portland, OR 97233

Ms. Jacqueline M. Holmes  
Jones Day  
51 Louisiana Avenue, N.W.  
Washington, DC 20001  
--Electronic

Ms. Shenoa Payne  
805 SW Broadway Street, Suite 470  
Portland, OR 97205  
--Electronic