

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez**

Civil Action No. 17-cv-0844-WJM-SKC

BRANDON FRESQUEZ,

Plaintiff,

v.

BNSF RAILWAY CO.,

Defendant.

**ORDER GRANTING IN PART REMAINDER OF PLAINTIFF'S MOTION FOR
BACK PAY AND DIRECTING ENTRY OF JUDGMENT**

Plaintiff Brandon Fresquez sued Defendant BNSF Railway Co. ("BNSF"), his former employer, for retaliating against him for engaging in protected activity, in violation of the Federal Railroad Safety Act, 49 U.S.C. § 20109 ("FRSA"). The case proceeded to a 6-day jury trial before Senior U.S. District Court Judge Wiley Y. Daniel. On February 19, 2019, the jury returned a verdict in favor of Fresquez, finding that BNSF retaliated against Fresquez in violation of the FRSA, and awarded Fresquez \$800,000 in compensatory damages and \$250,000 in punitive damages. (ECF No. 152.)

Judge Daniel reserved questions of back pay and front pay for judicial determination. (ECF No. 159 at 131–32.) The parties briefed the issues of back pay and front pay, and Judge Daniel set a hearing on the matter. (ECF Nos. 155 & 166.) Sadly, prior to the hearing, Judge Daniel passed away. On May 16, 2019, the matter

was drawn to the undersigned, and the Court held a hearing on the issues on September 6, 2019. (ECF Nos. 171 & 192.)

After the hearing, the Court entered an Order resolving certain disputes between the parties regarding calculation of back pay and front pay, taking under advisement the precise dollar amount of back pay and front pay to be awarded, and directing the parties to submit simultaneous, supplemental briefs on the issue of the dollar amount to be awarded consistent with the Court's rulings in the Order. (ECF No. 193 at 34.)

Among the disputes resolved, the Court found that Fresquez is entitled to ten years of front pay from the date of the jury verdict, or until February 19, 2029. (*Id.* at 17.) Implicit in this finding was that back pay should run from the date Fresquez was fired to the date of the jury verdict. The Court also instructed the parties to not reduce Fresquez's back pay by the amount Fresquez received in unemployment benefits (*id.* at 25); to omit any health insurance payments from the back pay calculation for failure to prove the amount spent due to lack of health insurance (*id.* at 29); to calculate Fresquez's estimated but-for wages¹ using the method of expert witness Jeffrey Opp (*id.* at 26); to calculate the relative loss in health benefits using a multiplier (*id.* at 30); and include prejudgment interest using a fixed rate of 5.54%, compounded monthly and according to a formula approved by the Tenth Circuit (*id.* at 33). The parties were also instructed to calculate prejudgment interest as of December 17, 18, and 19. (*Id.* at 34.)

¹ The Court will refer to the amounts Fresquez would have earned absent the unlawful termination as "but-for" wages, and the amounts Fresquez instead earned between the trial and today's date, or is projected to earn until 2029, as his "non-railroad" wages.

I. SUPPLEMENTAL BRIEFING ON AMOUNT DUE TO FRESQUEZ

BNSF timely filed its supplemental brief on November 25, 2019. (ECF No. 194.) Due to a scheduling error at Fresquez's counsel's firm, Fresquez filed his supplemental brief the following day, along with an unopposed motion for leave to belatedly file the supplement as well as another supplement brief with interest calculations the following week. (ECF Nos. 196 & 198.) The Court granted the Motion for Leave. (ECF No. 197.) Because both sets of calculations deviated from the Court's Order directing supplemental briefing, the Court requested the native file used by each expert to calculate back pay, front pay, and prejudgment interest.

A. Fresquez Calculations

Contrary to the Court's Order that front pay be calculated for ten years from the jury verdict on February 19, 2019, Fresquez calculated front pay for ten year after the date of September 6, 2019 hearing. (*Compare* ECF No. 193 at 17 ("Fresquez is entitled to ten years of front pay from the date of the jury verdict") *with* ECF No. 198-2 at 2 (front pay calculated from September 7, 2019 to September 7, 2029) *and id.* at 3 ("Date of Report/Trial: 09/06/19").) It also appears that Fresquez calculated back pay from the date of his termination until the date of the hearing. (ECF No. 198-2 at 2; *see id.* at 3 ("Date of Report/Trial: 09/06/19").) Plaintiff's expert calculations for back pay and front pay are therefore inconsistent with the Court's Order, and of little use to the Court. This error influenced the Court's decision to request the native files with calculations from the experts.

The Court also ordered the parties to "calculate prejudgment interest using a fixed interest rate of 5.54% with such interest compounded monthly" and to "use the

formula approved by the Tenth Circuit in *Reed v. Mineta*, 438 F.3d 1063, 1067 n.4 (10th Cir. 2006).” (ECF No. 193 at 33.) The formula used in *Reed* takes the future value of each payment owed to a plaintiff from the date the each payment was due, subtracts the original value of each payment, thus leaving only the interest component, and then adds the interest components of each payment. 438 F.3d at 1067 n.4. In other words, it calculates the amount of interest due on the amount owed over time, and takes into account that, absent the discriminatory action, the plaintiff would have earned money over time. Contrary to the Court’s Order, Fresquez calculated prejudgment interest on the entire amount of the award from May 27, 2016. (ECF No. 198-2 at 15.)

These two errors make it difficult for the Court to rely on Fresquez’s model for calculating front pay and back pay. Even if the Court were to adjust the date ranges for back pay and front pay in Fresquez’s model, the Court would still need to separately calculate prejudgment interest in accordance with its ruling, rather than rely on Fresquez’s model to calculate prejudgment interest.

B. BNSF Calculations

Although BNSF did not present an expert at the hearing on back pay and front pay, after the Court issued its Order, BNSF retained economist Mark Erwin to calculate the amount of back pay, front pay, benefits, and interest to be awarded. (ECF No. 194 at 2.)

1. Back Pay

Erwin calculated back pay from termination (May 27, 2016) to the jury verdict (February 19, 2019) omitting any health benefits or unemployment benefits from the calculations. (ECF No. 194-1 at 4.) Erwin also deducted “unreimbursed railroad

employee expenses” (essentially, union dues) from Fresquez’s but-for wages. He also deducted income taxes on Fresquez’s but-for wages and non-railroad wages. However, once Erwin arrived at a final recommended back pay and front pay award, he provided an estimate of taxes on that lump sum.

2. Front Pay

Consistent with the Court’s Order, Erwin calculated lost front pay from February 19, 2019 through February 18, 2029. (ECF No. 194-1.)

To calculate estimated future wages, Erwin began with Opp’s 2019 but-for wage estimate and Fresquez’s actual 2019 wages for his non-railroad wages. (*Id.* at 6.) Erwin then projected the but-for wages forward from 2019 using forecasted changes in the Employment Cost Index. (*Id.*) For projected non-railroad wages, Erwin used the forecasted changes in the Employment Cost Index and gradually adjusted Fresquez’s earnings from the entry-level wage to median-occupational earnings by 2029.

Erwin calculated health benefits in the following manner: He found that in 2019, Fresquez’s health benefits at BNSF would have been approximately \$9,459, or 8.98% of Fresquez’s but-for wages. He therefore added 8.98% to Fresquez’s but-for wages each year. For non-railroad healthcare benefits, Erwin assumed, based on a Kaiser Family Foundation report, that employers typically pay \$5,946 in annual premiums for employee-only coverage. This amount was equal to 11.66% of Fresquez’s 2019 post-railroad wages. Thus, Erwin added 11.66% to Fresquez’s post-railroad wages each year.

Erwin’s calculations include three data points that BNSF did not raise in the briefing on back pay and front pay or at the hearing: (1) unreimbursed railroad

employee expenses; (2) income taxes; and (3) life/employment expectancy. As with the back pay calculations, Erwin deducted unreimbursed railroad employee expenses from Fresquez's projected but-for wages, and deducted income taxes from Fresquez's but-for wages and non-railroad wages. Also as noted above, Erwin estimated the taxes due on the lump sum, and provided an estimate to the Court of the tax liability that would accompany the award.

Finally, Erwin adjusted but-for earnings and post-railroad earnings based on "Plaintiff's expected likelihood of remaining in the labor force from the date of judgment through the end of his lost front pay period in 2029." (ECF No. 194-1 at 10.) He therefore concluded that, on average during the ten-year front pay period Fresquez had 9.28 expected active years in the labor force. (*Id.*)

In the prior Order, the Court explicitly held that on the record before it, Fresquez would likely have remained at BNSF for an additional ten years. BNSF's assumption of 9.28 years of labor force participation is contrary to the Court's Order that Fresquez should receive ten years of front pay from the date of the trial. The ten-year front pay period is not subject to further diminution based on work-life expectancy by an expert.

C. Court's Approach and Calculations

At this point, the Court has two options: order supplemental briefing on the supplemental briefing (forcing the parties to incur additional expert expenses and billable hours), or take the parties' experts' reports and underlying data under advisement and perform the calculations itself. The Court is frustrated that neither party adhered to the Court's rulings in the prior Order, further complicating an already complicated matter. Specifically, Fresquez failed to make basic changes to the dates in

the model or to appropriately calculate interest. BNSF added certain factors not previously raised to the Court in the briefing on back pay and front pay or at the hearing, and seemingly did so to reduce its liability to Fresquez.

Out of this frustration with the parties inability to follow the Court's Order, the Court requested the expert models from the parties to make necessary adjustments. The Court is concerned that ordering further updates to the experts' models would only raise additional issues, rather than resolve this litigation. At some point, litigation must end. The Court exercises its discretion to modify the numbers presented by the parties consistent with its prior rulings, recalculate back pay and front pay using BNSF's model, and, at long last, enter final judgment in favor of Fresquez.

The Court will use BNSF's model. As discussed above, even were the Court to adjust the dates in Fresquez's model, there is still the significant issue of calculating prejudgment interest, and Fresquez's model is inadequate for that task. The Court understands that each model makes numerous assumptions and adjustments, far more than were explained in the parties' briefs, that ultimately impact the final amount owed. However, the Court must proceed in some way, and it exercises its discretion to do so using the BNSF model.

The Court makes the following rulings regarding elements of BNSF's model, and adjusts the model accordingly. The Court makes these adjustments in its discretion and to the best of its ability to arrive at an amount that fairly represents the amount of back pay, front pay, and prejudgment interest to which Fresquez is entitled.

1. But-For and Post-Railroad Gross Annual Front Pay

BNSF objected to Opp's calculation of Fresquez's estimated gross annual but-for railroad earnings. Opp used a method that took into account how much employees are paid under union contracts, the amount of work available, and how much Fresquez elected to work on a historical basis to arrive at wage estimates for 2015 to 2019. The Court found that "Opp's method to calculate Fresquez's front pay ha[d] a reasonable factual basis." (ECF No. 193 at 26.) Both parties appropriately used these numbers for Fresquez's 2015 to 2019 gross annual but-for earnings. (ECF No. 194-1 at 3; ECF No. 198-2 at 11.)

The Court's prior order did not directly address how but-for and post-railroad gross annual front pay should be estimated from 2019 to 2029. Opp simply assumed a 4% growth rate in annual gross wages to account for inflation and any raises Fresquez may have received. He applied this growth rate to Fresquez's but-for wages and post-railroad wages.

Erwin assumed that Fresquez's but-for wages would increase by the amount of annual inflation. For Frequez's post-railroad wages, however, Erwin factored in annual inflation as well as an assumption that Fresquez's wages would rise with his increasing experience in the building inspector industry. While the Court did not explicitly approve this formula for projecting future non-railroad wages, the Court notes that the resulting annual non-railroad wages are less than those projected by Opp, thereby ultimately benefitting Fresquez. (*Compare* ECF No. 198-2 at 12 ("alternate wages") *with* ECF No. 194-1 at 5 ("Post-RR Earnings Charles Total").)

With respect to but-for gross wages, the Court finds that Erwin's approach underestimates Fresquez's potential for raises, and Opp's approach overestimates the same. In order to avoid additional delay, the Court will exercise its discretion and use the average of these two but-for gross wage estimates for its calculations. See Part I.C.5, Table 1, below. For the post-railroad gross wage estimates, the Court will use Erwin's numbers that, as discussed above, are lower than Opp's projections and thereby ultimately benefit Fresquez.

2. Unreimbursable Railroad Employee Expenses

The Court will not allow BNSF to subtract unreimbursable railroad employee expenses from but-for wages. BNSF did not challenge Opp's failure to deduct these expenses from Fresquez's but-for wages in its briefing or at the hearing. The Court finds that such an approach is an unnecessary nickel-and-diming of Fresquez's damages at the eleventh hour. BNSF had the opportunity to object to Opp's report and the calculations involved, but elected not to do so. The Court will therefore omit this reduction in Fresquez's but-for earnings calculations. See Part I.C.5, Table 2B ("employee expenses" column).

3. Labor Force Participation

As discussed above, Erwin adjusted both but-for earnings and post-railroad earnings based on his estimate that Fresquez would remain in the labor force for 9.28 years (on average over a ten-year period). Also as discussed above, the Court's prior ruling that Plaintiff would remain at BNSF for ten years was intended to account for future uncertainty about Fresquez's employment at BNSF. The Court therefore

modifies Fresquez's probability of remaining in the workforce to one hundred percent until 2029. It does so for both Fresquez's but-for and post-railroad employment.

To achieve that result, the Court edited BNSF's underlying spreadsheet that estimated "labor force probability"—thus updating the linked cells in the but-for earnings and post-railroad earnings sheets—in the event that other figures in BNSF's model were also keyed off of the data. Specifically, the Court modified the LFP sheet, cells H9:H19 to be 100%, thereby changing the "Probability of LFP" on the but-for table and post-railroad table to "1.00." See Part I.C.5, Tables 2B and 3B, below.

4. Income Taxes

Erwin deducted income taxes from Fresquez's earnings estimates, and added an approximation of taxes on the lump sum award. Opp did not deduct income taxes from estimated earnings. The Court notes that, unmodified, BNSF's after-tax model plus lump sum income tax is nearly equivalent to the before-tax model with no lump sum income tax. (ECF No. 194-1 at 34 (total loss award plus income taxes on award is \$583,598); see *id.* at 70 ("before-tax model: \$582,967).)

According to an Internal Revenue Service ("IRS") Memorandum submitted by BNSF, the IRS generally considers back pay and front pay taxable income. (ECF No. 194-1 at 45.) The Court finds it reasonable to consider the taxes that Fresquez would have paid, either by not deducting income taxes from estimated earnings or by deducting income tax from expected but-for and post-railroad earnings and adding a lump sum amount for taxes to the entire award. The Court notes that if it were to rely on the BNSF model with post-tax earnings estimates and not add a lump sum for taxes, Fresquez would, in essence, be taxed twice.

The Court adopts BNSF's approach of deducting income taxes on Fresquez's annual earnings, and adding a lump sum to account for taxes on the award. This approach is reasonable, and has the added benefit of minimizing the number of modifications to BNSF's model.

5. Tables

To calculate the award, the Court made the modifications to the BNSF model discussed above. The cells highlighted in yellow in Tables 2A, 2B, 3A, and 3B show where the Court modified the data. After making these alterations, the Court ran the "Backsolver" macro imbedded on the "Inputs" page to, presumably, update the entire model consistent with the Court's alterations. (See ECF No. 194-1 at 70.) The Court also made sure that taxes were calculated on the new amount of the award. The final result is that Fresquez is entitled to \$696,173, which includes back pay, front pay, pre-judgment interest, and estimated income taxes. The tables below show BNSF's calculations (Tables 2A, 3A, 4A & 5A), the Court's modifications to BNSF's model and resulting impacts (Tables 1, 2B, 3B, 4B & 5B), and the amount due to Fresquez.

Table 1: Average of Estimated But-For Gross Annual Wages

Year	Fresquez Estimate (ECF No. 198-1 at 11)	BNSF Estimate (ECF No. 194-1 at 4)	Average
2019	\$108,122.01	\$108,122.01	\$108,122.01
2020	\$112,446.89	\$109,294.41	\$110,870.65
2021	\$116,944.76	\$110,338.63	\$113,641.69
2022	\$121,622.55	\$111,392.82	\$116,507.69
2023	\$126,487.46	\$112,548.17	\$119,517.82
2024	\$131,546.95	\$113,605.53	\$122,576.24
2025	\$136,808.83	\$114,650.85	\$125,729.84
2026	\$142,281.19	\$115,705.79	\$128,993.49
2027	\$147,972.43	\$116,657.29	\$132,314.86
2028	\$153,891.33	\$117,616.61	\$135,753.97
2029	\$160,046.98	\$118,595.69	\$139,321.33

Table 2A: But-For Earnings Unmodified

<i>Fresquez v. BNSF</i>																					
Brandon K. Fresquez' But-for Railroad Earnings & Benefits - If Judgement is on December 17, 2019 and Lost Post-retirement Benefits Considered																					
Date of Termination:		05/27/16																In 2019:			
Date of Verdict:		02/19/19																\$9,459		0	
Date of Judgment:		12/17/19																8.98%		0	
Year	Age	Year Frac	Real ECI	Gross RR Pay (Annual)	Gross RR Pay (Period)	Cost Sharing (Period)	Creditable Earnings	Employee Expenses	6.20% Tier I Taxes	4.90% Tier II Taxes	1.45% MC Taxes	But-for Earnings (before-tax)	RR Health Insurance (single)	times Probability of LFP	Expected But-for Earnings & Benefits (before-tax)	Income Taxes	Expected But-for Earnings & Benefits (after-tax)				
Termination																					
2016	31	0.60		\$107,306	\$64,207	(\$1,571)	\$62,636	(\$705)	(\$3,883)	(\$2,704)	(\$908)	\$54,435		1.00	\$54,435	(\$18,879)	\$35,556				
2017	32	1.00		\$110,169	\$110,169	(\$2,747)	\$107,422	(\$1,512)	(\$6,660)	(\$4,631)	(\$1,558)	\$93,062		1.00	\$93,062	(\$24,640)	\$68,422				
2018	33	1.00		\$106,524	\$106,524	(\$2,747)	\$103,777	(\$1,526)	(\$6,434)	(\$4,675)	(\$1,505)	\$89,638		1.00	\$89,638	(\$20,565)	\$69,073				
2019	34	0.13		\$108,122	\$14,301	(\$229)	\$14,072	(\$205)	(\$872)	(\$690)	(\$204)	\$12,100		1.00	\$12,100	(\$2,800)	\$9,300				
Verdict																					
2019	34	0.83	137.50	\$108,122	\$89,613	(\$2,289)	\$87,324	(\$1,265)	(\$5,414)	(\$4,147)	(\$1,266)	\$75,232	\$7,839	1.00	\$83,071	(\$17,258)	\$65,813				
Judgment																					
2019	34	0.04	137.50	\$108,122	\$4,208	(\$229)	\$3,980	(\$59)	(\$247)	\$0	(\$58)	\$3,616	\$357	0.98	\$3,913	(\$775)	\$3,138				
2020	35	1.00	138.99	\$109,294	\$109,294	(\$2,776)	\$106,518	(\$1,545)	(\$6,604)	(\$4,874)	(\$1,545)	\$91,950	\$9,562	0.96	\$97,189	(\$19,938)	\$77,250				
2021	36	1.00	140.32	\$110,339	\$110,339	(\$2,803)	\$107,536	(\$1,560)	(\$6,667)	(\$4,922)	(\$1,559)	\$92,827	\$9,653	0.94	\$96,340	(\$19,709)	\$76,631				
2022	37	1.00	141.66	\$111,393	\$111,393	(\$2,830)	\$108,563	(\$1,575)	(\$6,731)	(\$5,320)	(\$1,574)	\$93,363	\$9,745	0.93	\$96,067	(\$19,641)	\$76,427				
2023	38	1.00	143.13	\$112,548	\$112,548	(\$2,859)	\$109,689	(\$1,591)	(\$6,801)	(\$5,375)	(\$1,590)	\$94,332	\$9,846	0.92	\$96,266	(\$19,700)	\$76,565				
2024	39	1.00	144.47	\$113,606	\$113,606	(\$2,886)	\$110,720	(\$1,606)	(\$6,865)	(\$5,425)	(\$1,605)	\$95,218	\$9,939	0.92	\$96,594	(\$19,800)	\$76,795				
2025	40	1.00	145.80	\$114,651	\$114,651	(\$2,913)	\$111,738	(\$1,621)	(\$6,928)	(\$5,475)	(\$1,620)	\$96,094	\$10,030	0.91	\$96,955	(\$19,908)	\$77,047				
2026	41	1.00	147.14	\$115,706	\$115,706	(\$2,939)	\$112,766	(\$1,636)	(\$6,992)	(\$5,526)	(\$1,635)	\$96,978	\$10,123	0.91	\$97,317	(\$22,695)	\$74,621				
2027	42	1.00	148.35	\$116,657	\$116,657	(\$2,964)	\$113,694	(\$1,649)	(\$7,049)	(\$5,571)	(\$1,649)	\$97,776	\$10,206	0.90	\$97,576	(\$22,776)	\$74,800				
2028	43	1.00	149.57	\$117,617	\$117,617	(\$2,988)	\$114,629	(\$1,663)	(\$7,107)	(\$5,617)	(\$1,662)	\$98,580	\$10,290	0.90	\$97,704	(\$22,816)	\$74,888				
2029	44	0.13	150.82	\$118,596	\$15,921	(\$404)	\$15,517	(\$225)	(\$962)	(\$760)	(\$225)	\$13,344	\$1,393	0.89	\$13,123	(\$3,065)	\$10,058				
Post-verdict:		10.00 years, per order																Expected Years Active in Labor Force, Post-verdict:		9.28	

Table 2B: But-For Earnings Modified

<i>Fresquez v. BNSF</i>																					
Brandon K. Fresquez' But-for Railroad Earnings & Benefits - If Judgement is on December 17, 2019 and Lost Post-retirement Benefits Considered																					
Date of Termination:		05/27/16																In 2019:			
Date of Verdict:		02/19/19																\$9,459		0	
Date of Judgment:		12/17/19																8.98%		0	
Year	Age	Year Frac	Real ECI	Gross RR Pay (Annual)	Gross RR Pay (Period)	Cost Sharing (Period)	Creditable Earnings	Employee Expenses	6.20% Tier I Taxes	4.90% Tier II Taxes	1.45% MC Taxes	But-for Earnings (before-tax)	RR Health Insurance (single)	times Probability of LFP	Expected But-for Earnings & Benefits (before-tax)	Income Taxes	Expected But-for Earnings & Benefits (after-tax)				
Termination																					
2016	31	0.60		\$107,306	\$64,207	(\$1,571)	\$62,636		(\$3,883)	(\$2,704)	(\$908)	\$55,140		1.00	\$55,140	(\$18,879)	\$36,262				
2017	32	1.00		\$110,169	\$110,169	(\$2,747)	\$107,422		(\$6,660)	(\$4,631)	(\$1,558)	\$94,574		1.00	\$94,574	(\$24,640)	\$69,934				
2018	33	1.00		\$106,524	\$106,524	(\$2,747)	\$103,777		(\$6,434)	(\$4,675)	(\$1,505)	\$91,164		1.00	\$91,164	(\$20,565)	\$70,599				
2019	34	0.13		\$108,122	\$14,301	(\$229)	\$14,072		(\$872)	(\$690)	(\$204)	\$12,306		1.00	\$12,306	(\$2,801)	\$9,505				
Verdict																					
2019	34	0.83	137.50	\$108,122	\$89,613	(\$2,289)	\$87,324		(\$5,414)	(\$4,147)	(\$1,266)	\$76,497	\$7,839	1.00	\$84,336	(\$17,262)	\$67,073				
Judgment																					
2019	34	0.04	137.50	\$108,122.01	\$4,208	(\$229)	\$3,980		(\$247)	\$0	(\$58)	\$3,675	\$357	1.00	\$4,032	(\$787)	\$3,245				
2020	35	1.00	138.99	\$110,870.65	\$110,871	(\$2,776)	\$108,094		(\$6,702)	(\$4,874)	(\$1,567)	\$94,951	\$9,703	1.00	\$104,655	(\$21,629)	\$83,026				
2021	36	1.00	140.32	\$113,641.69	\$113,642	(\$2,803)	\$110,839		(\$6,872)	(\$4,922)	(\$1,607)	\$97,438	\$9,950	1.00	\$107,387	(\$22,415)	\$84,973				
2022	37	1.00	141.66	\$116,507.69	\$116,508	(\$2,830)	\$113,678		(\$7,048)	(\$5,570)	(\$1,648)	\$99,411	\$10,204	1.00	\$109,616	(\$23,228)	\$86,388				
2023	38	1.00	143.13	\$119,517.82	\$119,518	(\$2,859)	\$116,659		(\$7,233)	(\$5,716)	(\$1,692)	\$102,018	\$10,472	1.00	\$112,490	(\$24,081)	\$88,409				
2024	39	1.00	144.47	\$122,576.24	\$122,576	(\$2,886)	\$119,690		(\$7,421)	(\$5,865)	(\$1,736)	\$104,669	\$10,744	1.00	\$115,413	(\$24,949)	\$90,464				
2025	40	1.00	145.80	\$125,729.84	\$125,730	(\$2,913)	\$122,817		(\$7,615)	(\$6,018)	(\$1,781)	\$107,404	\$11,025	1.00	\$118,429	(\$25,844)	\$92,584				
2026	41	1.00	147.14	\$128,993.49	\$128,993	(\$2,939)	\$126,054		(\$7,815)	(\$6,177)	(\$1,828)	\$110,234	\$11,315	1.00	\$121,550	(\$29,993)	\$91,557				
2027	42	1.00	148.35	\$132,314.86	\$132,315	(\$2,964)	\$129,351		(\$8,020)	(\$6,338)	(\$1,876)	\$113,118	\$11,611	1.00	\$124,729	(\$31,069)	\$93,660				
2028	43	1.00	149.57	\$135,753.97	\$135,754	(\$2,988)	\$132,766		(\$8,231)	(\$6,506)	(\$1,925)	\$116,104	\$11,918	1.00	\$128,022	(\$32,183)	\$95,839				
2029	44	0.13	150.82	\$139,321.33	\$18,703	(\$404)	\$18,299		(\$1,135)	(\$897)	(\$265)	\$16,002	\$1,643	1.00	\$17,645	(\$4,476)	\$13,169				
Post-verdict:		10.00 years, per order																Expected Years Active in Labor Force, Post-verdict:		10.00	

Table 3A: Post-Railroad Earnings Unmodified

Fresquez v. BNSF																				
Brandon K. Fresquez' Post-Railroad Earnings & Benefits - If Judgement is on December 17, 2019 and Lost Post-retirement Benefits Considered																				
		Date of Termination:		05/27/16																
		Date of Verdict:		02/19/19								In 2019:								
		Date of Judgment:		12/17/19		1		1		0		\$5,946		11.66%		4.83%				
						Post-RR Earnings				6.20%	1.45%	Post-RR	Health	Retirement	times	Expected	Expected			
Year	Age	Year	Real	Entry	Town of	SAFEbuilt	Charles	Total	SS	MC	Earnings	Insurance	Benefits	Probability	& Benefits	Income	Earnings			
		Frac	ECI	to Med	Castle Rock		Abbott		Taxes	Taxes	(before-tax)	(single)	(private ind.)	of LFP	(before-tax)	Taxes	(after-tax)			
Termination																				
2016	31	0.60			\$16,701			\$16,701	(\$1,035)	(\$242)	\$15,423			1.00	\$15,423	(\$2,498)	\$12,925			
2017	32	1.00			\$1,920	\$18,998		\$20,918	(\$1,297)	(\$303)	\$19,318			1.00	\$19,318	(\$1,598)	\$17,719			
2018	33	1.00				\$43,385	\$5,923	\$49,308	(\$3,057)	(\$715)	\$45,535			1.00	\$45,535	(\$6,014)	\$39,522			
2019	34	0.13					\$6,847	\$6,847	(\$424)	(\$99)	\$6,323			1.00	\$6,323	(\$907)	\$5,416			
Verdict																				
2019	34	0.83	137.50	137.50			\$42,197	\$42,197	(\$2,616)	(\$612)	\$38,969	\$4,920	\$2,038	1.00	\$45,927	(\$5,587)	\$40,340			
Judgment																				
2019	34	0.04	137.50	137.50			\$1,956	\$1,956	(\$121)	(\$28)	\$1,807	\$228	\$94	0.98	\$2,096	(\$272)	\$1,824			
2020	35	1.00	138.99	144.18			\$53,479	\$53,479	(\$3,316)	(\$775)	\$49,388	\$6,010	\$2,583	0.96	\$55,625	(\$8,704)	\$46,921			
2021	36	1.00	140.32	150.35			\$55,768	\$55,768	(\$3,458)	(\$809)	\$51,501	\$6,068	\$2,694	0.94	\$56,818	(\$8,934)	\$47,884			
2022	37	1.00	141.66	156.79			\$58,154	\$58,154	(\$3,606)	(\$843)	\$53,705	\$6,126	\$2,809	0.93	\$58,362	(\$9,209)	\$49,153			
2023	38	1.00	143.13	164.08			\$60,857	\$60,857	(\$3,773)	(\$882)	\$56,201	\$6,189	\$2,939	0.92	\$60,368	(\$9,579)	\$50,789			
2024	39	1.00	144.47	170.98			\$63,417	\$63,417	(\$3,932)	(\$920)	\$58,566	\$6,248	\$3,063	0.92	\$62,350	(\$10,003)	\$52,347			
2025	40	1.00	145.80	178.02			\$66,030	\$66,030	(\$4,094)	(\$957)	\$60,979	\$6,305	\$3,189	0.91	\$64,384	(\$10,414)	\$53,970			
2026	41	1.00	147.14	185.36			\$68,750	\$68,750	(\$4,263)	(\$997)	\$63,491	\$6,363	\$3,321	0.91	\$66,490	(\$12,696)	\$53,793			
2027	42	1.00	148.35	192.18			\$71,280	\$71,280	(\$4,419)	(\$1,034)	\$65,827	\$6,415	\$3,443	0.90	\$68,392	(\$13,175)	\$55,217			
2028	43	1.00	149.57	199.25			\$73,902	\$73,902	(\$4,582)	(\$1,072)	\$68,249	\$6,468	\$3,570	0.90	\$70,257	(\$13,651)	\$56,606			
2029	44	0.13	150.82	206.67			\$10,291	\$10,291	(\$638)	(\$149)	\$9,503	\$876	\$497	0.89	\$9,685	(\$2,108)	\$7,577			
Post-verdict:												10.00	years, per order	Expected Years Active in Labor Force, Post-verdict:					9.28	

Table 3B: Post-Railroad Earnings Modified

Fresquez v. BNSF																				
Brandon K. Fresquez' Post-Railroad Earnings & Benefits - If Judgement is on December 17, 2019 and Lost Post-retirement Benefits Considered																				
		Date of Termination:		05/27/16																
		Date of Verdict:		02/19/19								In 2019:								
		Date of Judgment:		12/17/19		1		1		0		\$5,946		11.66%		4.83%				
						Post-RR Earnings				6.20%	1.45%	Post-RR	Health	Retirement	times	Expected	Expected			
Year	Age	Year	Real	Entry	Town of	SAFEbuilt	Charles	Total	SS	MC	Earnings	Insurance	Benefits	Probability	& Benefits	Income	Earnings			
		Frac	ECI	to Med	Castle Rock		Abbott		Taxes	Taxes	(before-tax)	(single)	(private ind.)	of LFP	(before-tax)	Taxes	(after-tax)			
Termination																				
2016	31	0.60			\$16,701			\$16,701	(\$1,035)	(\$242)	\$15,423			1.00	\$15,423	(\$2,498)	\$12,925			
2017	32	1.00			\$1,920	\$18,998		\$20,918	(\$1,297)	(\$303)	\$19,318			1.00	\$19,318	(\$1,598)	\$17,719			
2018	33	1.00				\$43,385	\$5,923	\$49,308	(\$3,057)	(\$715)	\$45,535			1.00	\$45,535	(\$6,014)	\$39,522			
2019	34	0.13					\$6,847	\$6,847	(\$424)	(\$99)	\$6,323			1.00	\$6,323	(\$907)	\$5,416			
Verdict																				
2019	34	0.83	137.50	137.50			\$42,197	\$42,197	(\$2,616)	(\$612)	\$38,969	\$4,920	\$2,038	1.00	\$45,927	(\$5,591)	\$40,336			
Judgment																				
2019	34	0.04	137.50	137.50			\$1,956	\$1,956	(\$121)	(\$28)	\$1,807	\$228	\$94	1.00	\$2,129	(\$299)	\$1,830			
2020	35	1.00	138.99	144.18			\$53,479	\$53,479	(\$3,316)	(\$775)	\$49,388	\$6,010	\$2,583	1.00	\$57,982	(\$9,903)	\$48,079			
2021	36	1.00	140.32	150.35			\$55,768	\$55,768	(\$3,458)	(\$809)	\$51,501	\$6,068	\$2,694	1.00	\$60,263	(\$10,410)	\$49,853			
2022	37	1.00	141.66	156.79			\$58,154	\$58,154	(\$3,606)	(\$843)	\$53,705	\$6,126	\$2,809	1.00	\$62,640	(\$10,865)	\$51,775			
2023	38	1.00	143.13	164.08			\$60,857	\$60,857	(\$3,773)	(\$882)	\$56,201	\$6,189	\$2,939	1.00	\$65,330	(\$11,354)	\$53,976			
2024	39	1.00	144.47	170.98			\$63,417	\$63,417	(\$3,932)	(\$920)	\$58,566	\$6,248	\$3,063	1.00	\$67,876	(\$11,877)	\$55,999			
2025	40	1.00	145.80	178.02			\$66,030	\$66,030	(\$4,094)	(\$957)	\$60,979	\$6,305	\$3,189	1.00	\$70,473	(\$12,367)	\$58,106			
2026	41	1.00	147.14	185.36			\$68,750	\$68,750	(\$4,263)	(\$997)	\$63,491	\$6,363	\$3,321	1.00	\$73,175	(\$14,982)	\$58,193			
2027	42	1.00	148.35	192.18			\$71,280	\$71,280	(\$4,419)	(\$1,034)	\$65,827	\$6,415	\$3,443	1.00	\$75,685	(\$15,560)	\$60,125			
2028	43	1.00	149.57	199.25			\$73,902	\$73,902	(\$4,582)	(\$1,072)	\$68,249	\$6,468	\$3,570	1.00	\$78,286	(\$16,164)	\$62,122			
2029	44	0.13	150.82	206.67			\$10,291	\$10,291	(\$638)	(\$149)	\$9,503	\$876	\$497	1.00	\$10,876	(\$2,596)	\$8,280			
Post-verdict:												10.00	years, per order	Expected Years Active in Labor Force, Post-verdict:					10.00	

Table 4A: Pre-Judgment Interest Unmodified

<i>Fresquez v. BNSF</i>														
Brandon K. Fresquez' Pre-judgment Interest														
Date of Termination:		05/27/16												
Date of Verdict:		02/19/19												
Date of Judgement:		12/17/19												
Pre-judgement Year	Period Loss	Number of Months	Monthly Loss Flow	5.54% Period Rate	Ordinary Annuity Factor	Ending Annuity Amount	Pre-judgement Interest (Annuity)	Beginning Interest Accrued	Beginning Principle	Beginning Balance	Beginning Balance Factor	Ending Balance	Pre-judgement Interest (Beginning balances)	Total Pre-judgement Interest
2016	\$22,631	7.2	\$3,152	0.46%	7.284	\$22,956	\$325	\$0	\$0	\$0	1.034	\$0	\$0	\$325
2017	\$50,702	12.0	\$4,225	0.46%	12.309	\$52,010	\$1,307	\$325	\$22,631	\$22,956	1.057	\$24,261	\$1,305	\$2,612
2018	\$29,551	12.0	\$2,463	0.46%	12.309	\$30,313	\$762	\$2,937	\$73,333	\$76,271	1.057	\$80,605	\$4,334	\$5,096
2019	\$3,884	1.6	\$2,411	0.46%	1.613	\$3,889	\$5	\$8,034	\$102,884	\$110,918	1.007	\$111,744	\$826	\$832
2019	\$25,473	9.9	\$2,566	0.46%	10.136	\$26,005	\$531	\$8,865	\$106,768	\$115,634	1.047	\$121,045	\$5,411	\$5,942
Total Pre-judgment Interest:													\$14,808	

Table 4B: Pre-Judgment Interest Modified

<i>Fresquez v. BNSF</i>														
Brandon K. Fresquez' Pre-judgment Interest														
Date of Termination:		05/27/16												
Date of Verdict:		02/19/19												
Date of Judgement:		12/17/19												
Pre-judgement Year	Period Loss	Number of Months	Monthly Loss Flow	5.54% Period Rate	Ordinary Annuity Factor	Ending Annuity Amount	Pre-judgement Interest (Annuity)	Beginning Interest Accrued	Beginning Principle	Beginning Balance	Beginning Balance Factor	Ending Balance	Pre-judgement Interest (Beginning balances)	Total Pre-judgement Interest
2016	\$23,336	7.2	\$3,250	0.46%	7.284	\$23,672	\$336	\$0	\$0	\$0	1.034	\$0	\$0	\$336
2017	\$52,214	12.0	\$4,351	0.46%	12.309	\$53,561	\$1,346	\$336	\$23,336	\$23,672	1.057	\$25,017	\$1,345	\$2,692
2018	\$31,077	12.0	\$2,590	0.46%	12.309	\$31,878	\$801	\$3,027	\$75,551	\$78,578	1.057	\$83,043	\$4,465	\$5,267
2019	\$4,089	1.6	\$2,538	0.46%	1.613	\$4,095	\$6	\$8,294	\$106,627	\$114,922	1.007	\$115,777	\$856	\$862
2019	\$26,737	9.9	\$2,693	0.46%	10.136	\$27,295	\$558	\$9,156	\$110,717	\$119,872	1.047	\$125,482	\$5,609	\$6,167
Total Pre-judgment Interest:													\$15,323	

Table 5A: Summation Unmodified

Fresquez v. BNSF										
Brandon K. Fresquez' Present Value Loss of Back and Front Pay										
Date of Termination:		05/27/16								
Date of Verdict:		02/19/19								
Date of Judgement:		12/17/19								
				Expected Earnings & Benefits <i>(net of income taxes)</i>					Present Value	5.54%
Year	Age	Year	But-for	Post-RR	Delta	POL	Discount Factor	Loss	Pre-judgment Interest	
Termination - Loss of Back Pay Begins										
2016	31	0.60	\$35,556	\$12,925	\$22,631	100.00%	100.00%	\$22,631	\$325	
2017	32	1.00	\$68,422	\$17,719	\$50,702	100.00%	100.00%	\$50,702	\$2,612	
2018	33	1.00	\$69,073	\$39,522	\$29,551	100.00%	100.00%	\$29,551	\$5,096	
2019	34	0.13	\$9,300	\$5,416	\$3,884	100.00%	100.00%	\$3,884	\$832	
								Loss of Back Pay:	\$106,768	
Verdict - Loss of Front Pay Begins										
2019	34	0.83	\$65,813	\$40,340	\$25,473	100.00%	100.00%	\$25,473	\$5,942	
								Pre-judgment Interest:	\$14,808	
Judgment										
2019	34	0.04	\$3,138	\$1,824	\$1,314	99.91%	99.97%	\$1,312		
2020	35	1.00	\$77,250	\$46,921	\$30,329	99.73%	99.49%	\$30,094		
2021	36	1.00	\$76,631	\$47,884	\$28,748	99.54%	99.18%	\$28,382		
2022	37	1.00	\$76,427	\$49,153	\$27,273	99.35%	99.09%	\$26,849		
2023	38	1.00	\$76,565	\$50,789	\$25,776	99.15%	99.08%	\$25,323		
2024	39	1.00	\$76,795	\$52,347	\$24,448	98.94%	98.86%	\$23,914		
2025	40	1.00	\$77,047	\$53,970	\$23,077	98.72%	98.49%	\$22,439		
2026	41	1.00	\$74,621	\$53,793	\$20,828	98.50%	98.14%	\$20,134		
2027	42	1.00	\$74,800	\$55,217	\$19,583	98.26%	97.85%	\$18,827		
2028	43	1.00	\$74,888	\$56,606	\$18,282	98.00%	97.66%	\$17,497		
2029	44	0.13	\$10,058	\$7,577	\$2,481	97.73%	97.19%	\$2,356		
								Loss of Front Pay:	\$242,600	
Post-verdict:		10.00 years, per order								
								Loss of Back Pay:	\$106,768	
								<i>plus</i> Loss of Front Pay, Pre-judgment:	\$25,473	
								<i>equals</i> Basis for Pre-judgment Interest:	\$132,241	
								<i>plus</i> Pre-judgment Interest:	\$14,808	
								<i>equals</i> Pre-judgment Loss:	\$147,049	
								<i>plus</i> Loss of Front Pay, Post-judgment:	\$217,127	
								<i>equals</i> Loss Excluding Post-Retirement Benefits:	\$364,176	
								<i>plus</i> Loss of Tier I / Social Security Benefits:	\$19,298	
								<i>plus</i> Loss of Tier II Benefits:	\$56,871	
								<i>plus</i> Associated Income Taxes:	\$2,507	
								<i>equals</i> Total Loss Award:	\$442,852	
								<i>plus</i> Income Taxes on Award:	\$140,700	
								<i>equals</i> Tax-adjusted Award:	\$583,553	

Table 5B: Summation Modified

<i>Fresquez v. BNSF</i>										
Brandon K. Fresquez' Present Value Loss of Back and Front Pay										
Date of Termination:		05/27/16								
Date of Verdict:		02/19/19								
Date of Judgement:		12/17/19								
				Expected Earnings & Benefits <i>(net of income taxes)</i>					Present Value	5.54%
Year	Age	Year	But-for	Post-RR	Delta	POL	Discount Factor	Loss	Pre-judgment Interest	
Termination - Loss of Back Pay Begins										
2016	31	0.60	\$36,262	\$12,925	\$23,336	100.00%	100.00%	\$23,336	\$336	
2017	32	1.00	\$69,934	\$17,719	\$52,214	100.00%	100.00%	\$52,214	\$2,692	
2018	33	1.00	\$70,599	\$39,522	\$31,077	100.00%	100.00%	\$31,077	\$5,267	
2019	34	0.13	\$9,505	\$5,416	\$4,089	100.00%	100.00%	\$4,089	\$862	
								Loss of Back Pay:	\$110,717	
Verdict - Loss of Front Pay Begins										
2019	34	0.83	\$67,073	\$40,336	\$26,737	100.00%	100.00%	\$26,737	\$6,167	
								Pre-judgment Interest:	\$15,323	
Judgment										
2019	34	0.04	\$3,245	\$1,830	\$1,415	99.91%	99.97%	\$1,414		
2020	35	1.00	\$83,026	\$48,079	\$34,947	99.73%	99.49%	\$34,676		
2021	36	1.00	\$84,973	\$49,853	\$35,119	99.54%	99.18%	\$34,672		
2022	37	1.00	\$86,388	\$51,775	\$34,613	99.35%	99.09%	\$34,075		
2023	38	1.00	\$88,409	\$53,976	\$34,433	99.15%	99.08%	\$33,826		
2024	39	1.00	\$90,464	\$55,999	\$34,465	98.94%	98.86%	\$33,713		
2025	40	1.00	\$92,584	\$58,106	\$34,478	98.72%	98.49%	\$33,525		
2026	41	1.00	\$91,557	\$58,193	\$33,364	98.50%	98.14%	\$32,251		
2027	42	1.00	\$93,660	\$60,125	\$33,535	98.26%	97.85%	\$32,241		
2028	43	1.00	\$95,839	\$62,122	\$33,717	98.00%	97.66%	\$32,270		
2029	44	0.13	\$13,169	\$8,280	\$4,889	97.73%	97.19%	\$4,644		
								Loss of Front Pay:	\$334,044	
Post-verdict:		10.00 years, per order								
								Loss of Back Pay:	\$110,717	
								<i>plus</i> Loss of Front Pay, Pre-judgment:	\$26,737	
								<i>equals</i> Basis for Pre-judgment Interest:	\$137,454	
								<i>plus</i> Pre-judgment Interest:	\$15,323	
								<i>equals</i> Pre-judgment Loss:	\$152,777	
								<i>plus</i> Loss of Front Pay, Post-judgment:	\$307,307	
								<i>equals</i> Loss Excluding Post-Retirement Benefits:	\$460,084	
								<i>plus</i> Loss of Tier I / Social Security Benefits:	\$20,917	
								<i>plus</i> Loss of Tier II Benefits:	\$60,726	
								<i>plus</i> Associated Income Taxes:	\$8,764	
								<i>equals</i> Total Loss Award:	\$550,489	
								<i>plus</i> Income Taxes on Award:	\$145,684	
								<i>equals</i> Tax-adjusted Award:	\$696,173	

II. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. The portion of the Motion for Back and Front Pay (ECF No. 166) previously taken under advisement is GRANTED IN PART and DENIED IN PART as discussed above;
2. The Court finds that Plaintiff Brandon Fresquez is entitled to a total tax-adjusted award of back pay, front pay, and prejudgment interest through December 17, 2019 of **\$696,173**;
3. The Clerk of Court shall enter judgment in favor of Plaintiff and against Defendant in the principal amount of **\$1,746,173**—comprised of \$696,173 for back pay, front pay, and prejudgment interest; \$800,000 in compensatory damages; and \$250,000 in punitive damages—with postjudgment interest at the federal statutory rate;
4. The Court will resolve the pending Motion for Fees and Costs (ECF No. 165) by way of separate Order; and
5. The Clerk shall terminate this case.

Dated this 17th day of December, 2019.

BY THE COURT:



William J. Martínez
United States District Judge