

**U.S. Department of Labor**

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**Issue Date: 19 March 2020**

Case No.: 2018-FRS-00145  
OSHA No.: 7-3620-18-047

*In the Matter of:*

**CHRISTOPHER HELMS,**  
*Complainant,*

v.

**BNSF RAILWAY COMPANY,**  
*Respondent.*

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*For the Complainant*

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*For the Respondent*

**DECISION AND ORDER DENYING COMPLAINT**

**PROCEDURAL BACKGROUND**

On or about April 24, 2018, Christopher Helms (“Complainant” or “Helms”) filed a complaint with the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”) alleging that BNSF Railway Company (“BNSF” or “Respondent”)<sup>1</sup> violated the employee protection provisions of the Federal Railroad Safety Act (“FRSA” or “the Act”) when

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<sup>1</sup> The BNSF Railway Company is the largest freight railroad network in North America, operating transcontinental routes providing rail connections between the eastern and western United States. It has some 35,000 employees, 32,500 miles of track in 28 states, and more than 8,000 locomotives. Tr. at 229.

it terminated his employment on April 24, 2018 in retaliation for reporting a work-related injury suffered on or about January 14, 2018. 49 U.S.C. § 20109(a)(4); 29 C.F.R. Part 1982. After investigating, OSHA’s Regional Supervisory Investigator dismissed the complaint on August 16, 2018, finding no violation of the Act. Complainant timely filed objections to the findings and requested a hearing before the Office of Administrative Law Judges (“OALJ”). The matter was then assigned to me and I presided over a de novo hearing on April 4, 2019 in Omaha, Nebraska.<sup>2</sup> Without objection, I admitted Complainant’s Exhibits 1-17. (Tr. at 5). Without objection, I admitted Respondent’s Exhibits 1-67. (Tr. at 5). Eight witnesses, including the Complainant, testified. (Tr. at 18-241). Both parties filed post-hearing briefs on July 12, 2019 and replies on July 26 and 29, 2019. I base my decision on all of the evidence admitted, relevant controlling statutory and regulatory authorities, and the arguments of the parties.<sup>3</sup> As explained in greater detail below, I find Complainant did not prove that any activity protected under the STAA was a factor in Respondent’s decision to fire him, and deny his complaint.

### **ISSUES TO BE DECIDED**

1. Can Complainant show by a preponderance of the evidence that his report of a work-related injury on or about January 14, 2018 contributed to Respondent’s decision to fire him on April 24, 2018?
2. If so, can the Respondent show by clear and convincing evidence that it would have fired Complainant regardless of the protected activity?
3. If not, what relief, if any, is Complainant entitled to receive?

### **LEGAL FRAMEWORK AND BURDENS OF PROOF**

The FRSA generally prohibits a railroad company from retaliating against an employee because the employee engaged in activity protected under the Act. Section 20109(a)(4) prohibits employers from disciplining employees for reporting a work-related personal injury.

The current version of the FRSA provides that whistleblower complaints shall be governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121(b)(2)(B)(i). 49 U.S.C. § 20109(b)(1). Under the AIR 21 standard, complainants must initially prove by a preponderance of the evidence that a protected activity was a contributing

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<sup>2</sup> The following abbreviations are used in this decision: “Tr.” for the hearing transcript; “CX” for a Complainant’s Exhibit; “RX” for a Respondent’s Exhibit; and “JX” for a Joint Exhibit.

<sup>3</sup> In *Austin v. BNSF Railway Co.*, ARB No. 17-024, ALJ No. 2016-FRS-13, slip op. at 2 n. 3 (ARB Mar. 11, 2019) (per curiam), the Administrative Review Board (“ARB”) noted that an administrative law judge (“ALJ”) need not include a summary of the record in the Decision and Order, as it is assumed that the ALJ reviewed and considered the entire record in making his or her decision. The ARB stated that what is more helpful for its review of whether the ALJ’s findings of fact are supported by substantial evidence of record is a tightly-focused set of findings of fact. Accordingly, in this Decision and Order I focus specifically on findings of fact pertinent to the issues in dispute. I have, however, reviewed and considered the *entire* record.

factor in the unfavorable personnel action alleged in the complaint. *Yowell v. Fort Worth & Western R.R.*, ARB No. 2019-0039, ALJ No. 2018-FRS-00009 (ARB Feb. 5, 2020). A “contributing factor” is “any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.”<sup>4</sup> If a complainant makes this showing, an employer can avoid liability by demonstrating with clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected behavior. 49 U.S.C. § 42121(b)(2)(B)(ii).

Thus, in order to prevail in this case, Helms must prove: (i) that he engaged in a protected activity; (ii) he suffered an adverse action against him; and (iii) that the protected activity was a contributing factor in the adverse action.<sup>5</sup> If Helms satisfies this initial burden by a preponderance of the evidence, BNSF may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action even if Helms had not engaged in the protected activity.

BNSF concedes the first two elements – that Helms’s report of injury was protected and Helms suffered an adverse action when he was fired – and, in addition, that BNSF knew of the report. (Resp. Br. At 1; RX 49). What remains to be decided is whether Helms proved his report of a work-place injury was a contributing factor in his firing.

### **Stipulations**<sup>6</sup>

1. BNSF is a railroad carrier within in the meaning of 49 U.S.C. § 20109.
2. Complainant began his employment with BNSF on January 3, 2011.
3. Complainant was employed as a conductor brakeman.
4. Complainant was a member of the United Transportation Union.
5. Complainant went on medical leave of absence on November 14, 2016 for an off the job right shoulder injury and returned from medical leave of absence on November 17, 2017.
6. BNSF granted Complainant a medical leave of absence on January 18, 2018.
7. BNSF extended Complainant’s medical leave of absence on January 26, 2018.

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<sup>4</sup> *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 11 (Jan. 6, 2017) (internal citations omitted).

<sup>5</sup> “[T]he contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity.” *Gunderson v. BNSF Ry.*, 850 F.3d 962, 968 (8th Cir. 2017), quoting *Kuduk v. BNSF Ry.*, 768 F.3d 786, 789 (8th Cir. 2014). See also *Yowell v. Fort Worth & Western R.R.*, ARB No. 2019-0039, ALJ No. 2018-FRS-09, PDF at 6-7 (ARB Feb. 5, 2020) (per curiam) (also quoting *Kuduk*).

<sup>6</sup> Tr. at 5-6.

8. Complainant was dismissed from his employment on April 24, 2018 for unauthorized absence and failure to comply with instructions.
9. On April 24, 2018, Complainant filed a complaint with OSHA alleging BNSF terminated his employment in retaliation for reporting a work-related injury.
10. On August 16, 2018, OSHA issued findings dismissing the complaint.

### **FINDINGS OF FACT**

BNSF hired Christopher Helms on January 3, 2011, where he served as a brakeman, conductor and engineer. (Tr. at 19, 55).

Helms suffered a non-work related injury in 2016 and BNSF granted him a medical leave of absence beginning November 14, 2016. (Tr. at 19-23; RX 19, 34, 35). Dr. Jonathan E. Buzzell of OrthoNebraska was Helms' treating physician and his office faxed documentation to BNSF supporting medical leave extensions, usually at 60-day increments. (CX 10; EX 6). BNSF did not discipline or otherwise take any adverse action against Helms for reporting this injury or for taking an extended medical leave of absence. Helms was eventually medically cleared for duty and returned to work at BNSF on November 17, 2017.

On December 16, 2017, Helms updated his mailing address in the BNSF employee portal. (Tr. at 60; CX 17, RX 37).

On January 14, 2018, Helms suffered an on-the-job work-related shoulder injury. (RX 2; CX 13). Helms immediately notified his foreman and filled out a personal injury report, (CX 17; Tr. at 30), which included the same address he put in the employee portal the month before. (RX 38; Tr. at 59).

All BNSF employees are required to comply with BNSF General Notice 130, which was in effect at the time of Helms' 2018 injury. Section C2 provides that if an employee is unable to report for duty by the leave of absence end date, the employee must request a leave extension. Section C3 provides that a new physician statement is required to support medical leave extensions and must be submitted in time to permit action by the supervisor prior to the expiration of the leave. BNSF considers failure to report as "absent without authority" and grounds for dismissal. (RX 25).

While a physician can extend medical leave by submitting a statement about an employee's ability to work, the BNSF Director of Administration actually places an employee on medical leave and approves any extensions. (Tr. at 125).

Jeff Wetta was Director of Administration for BNSF in 2018. Wetta notified Helms by letter dated January 18, 2018 that he was placing him on a 10-day medical leave of absence commencing January 18, 2018 through January 27, 2018 for the January 14, 2018 injury so that he could see a doctor. (CX 2; RX 39). Wetta sent the letter to the same address Helms used on

the personal injury report and updated in the employee portal. Helms received the letter. (Tr. at 33; RX 68). The letter reminded Helms that he was responsible for submitting leave extensions, which had to be accompanied by an updated physician's statement estimating the duration he would be unable to perform service. The letter also advised Helms he was not permitted to engage in outside employment while on medical leave. Helms was aware of the requirement to submit extensions because of his previous medical leave of absence in 2016-2017. (Tr. at 59).

Dr. Buzzell examined Helms on January 25, 2018 and recommended an MRI, which was scheduled for February 19, 2018. (Tr. at 63-64). Dr. Buzzell issued an off-work note and his office faxed it to BNSF. The note reflected no work for a right shoulder injury, but no end date, and that Helms was approved for an MRI. (Tr. at 34; CX 5; RX 50).

On January 26, 2018, Wetta sent Helms a letter to the same address on file extending his leave of absence from January 28, 2018 to February 28, 2018. (Tr. at 187; CX 6; RX 41). Helms received this letter. (Tr. at 35; 68). The letter again reminded Helms that it was his responsibility to obtain an extension, accompanied by a new/updated physician statement and submitted to the employee's leave administrator. (Tr. at 67).

Lisa Gladney is a field manager for medical and employee health and assists BNSF employees in returning to work after medical leave of absences. When an employee's medical leave is close to expiring, Wetta would sometimes contact Gladney to see if she was aware of a basis to extend the leave.

Gladney was assigned Helms' case in January 2018. (RX 59). Her first contact with Helms was by telephone on January 18, 2018 where she discussed his upcoming medical appointment and her role in helping him return to work. (Tr. at 127). Helms told Gladney he was working at BNSF for the insurance and that was possibly coming to an end soon as he wasn't sure how much longer he would be working there. (Tr. at 128). Gladney told Helms that regardless of the reason he was off duty, it was his responsibility to maintain his leave of absence with his supervisor and that he could contact her if he needed assistance. Gladney then sent Helms a letter thanking him for taking the time to talk to her and reminding him that all employees are required to obtain an authorized medical leave of absence from their supervisor for time away from work, whether for an on-duty or off-duty injury.

Gladney left Helms a voicemail message on March 6, 2018 telling him that his medical leave of absence had expired and he needed to provide a work status update from his doctor. (Tr. at 129; RX 57). Helms called back, but did not reach Gladney and did not leave a message.

After leaving the message for Helms, Gladney sent Dr. Buzzell's office a fax on March 6, 2018 asking for copy of Helms' MRI results and an updated treatment plan and requested that they be faxed to her at 866-371-1484. (CX 11; RX 59 page 47; Tr. at 131). Gladney did receive a fax sent to 866-371-1484 from Tiffany Ketelsen of OrthoNebraska on March 6, 2018. While the fax included a copy of the MRI results as well as a note that the employee was going to be scheduled for an injection, nothing in the document indicated whether Helms was capable of returning to work. (CX 15; RX 59 pages 43-46). Gladney did not call the doctor's office and ask for updates for Mr. Helms.

Because the March 6, 2018 fax from Buzzell's office did not contain any work status information, Wetta sent Helms a letter on March 6, 2018, advising him that his leave had expired on February 28, 2018, that he had not furnished any documentation to justify his continued absence, and he was now AWOL (absent without leave). However, as a one-time courtesy, Wetta gave Helms 10 days to either return to work or request additional leave. To request additional leave, Wetta advised Helms that he must furnish BNSF a current physician's statement supporting his continued absence from work. (CX 7). Wetta also advised Helms in the letter that failure to report for duty or provide a physician's statement supporting further leave of absence may subject him to discipline. (RX 30; 43). Although sent to the same address as the January 18 and January 26, 2018 letters, Helms did not immediately receive the March 6, 2018 letter and did not learn of the letter's existence until Wetta called him on March 20, 2018.

When Helms did not report for work or provide documentation to Wetta or Gladney supporting his continued absences, Wetta sent Helms a letter on March 16, 2018 informing him he would be investigated on March 27, 2018 for failing to comply with instructions by not requesting additional leave or returning to work. (CX 3; RX 44). Although sent to the same address as the January 18, January 26, and March 6, 2018 letters, Helms did not immediately receive this letter and was unaware of its existence until Wetta called on March 20, 2018. (Tr. at 45).

Failure to comply with instructions is a conduct violation of GCOR 1.6: Indifference to duty or to the performance of duty will not be tolerated and GCOR 1.15: Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. (RX 24; Tr. at 168).

Wetta called Helms on March 20, 2018 when he learned that Helms had not been picking up his mail. (Tr. at 69; 191). Wetta told Helms that BNSF was trying to send him letters and he was going to be investigated for not returning work status forms. Helms told Wetta that he tried to contact Ms. Gladney by telephone on January 8, 2018, February 15, 2018, February 19, 2018 and March 6, 2018. (Tr. at 32, 38; RX 46).

Wetta advised Helms to retrieve the March 6 and March 16, 2018 letters, which he did. (CX 3). Wetta reminded Helms it was his responsibility to provide an updated physician's statement. Helms told Wetta he would get the necessary paperwork. (Tr.1 at 91-92). Wetta then emailed Helms copies of the March 6 and March 16 letters. (Tr. at 192). After speaking with Wetta, Helms called Andrew Foust, his union representative, and asked that he represent him at the investigation.

Helms called Dr. Buzzell's office on March 21, 2020 and told them that BNSF needed an updated work status. (Tr. at 40, 71). On March 21, 2018, OrthoNebraska faxed a document to 817-352-7321 -- a different number than the one faxed on March 6, 2018. The document states: "Next appointment 3-29-18. Patient called 3/21/18 to schedule injection. Work status won't be updated until patient seen 3/29/18." (CX 12; RX 59 pages 48-49).

Lisa Gladney's fax number is 866-371-1484, the number OrthoNebraska used to send the March 6, 2018 fax. The BNSF Injury Care Billing Department fax number is 817-352-7321, the number OrthoNebraska used to send the March 21, 2018 fax. (RX 59, page 55). Lisa Gladney does not work in the Billing Department and did not receive the March 21, 2018 fax from Buzzell's office until on or about April 23, 2018. (RX 50). In other words, the fax by Dr. Buzzell's office on March 21, 2018 was sent to the wrong BNSF office.

Helms tried to call Gladney on March 26, 2018. He left her a voicemail. Gladney called Helms back the same day but also had to leave a voicemail. Gladney specifically told Helms that BNSF was still missing his work status updates. (RX 45; Tr. at 131).

Helms did nothing to follow up Gladney's message. He did not call Gladney back to tell her he called Dr. Buzzell's office on March 21 and told them to send a work status update. He also did not follow up with Dr. Buzzell's office to find out what happened to his March 21, 2018 request to send the work status update. (Tr. at 72).

Helms did not personally send BNSF any medical documentation to support his continued leave of absence for the January 14, 2018 injury, instead relying on Dr. Buzzell's office to do so. (Tr. at 71).

If Gladney had received the March 21, 2018 fax before Helms' investigation, she would have notified Wetta and recommended he extend Helms' leave until March 29, the date of his next appointment. (Tr. at 133).

The March 27, 2018 investigation was continued to April 10, 2018. Helms was notified of the change by letter dated March 27, 2018, which Helms received. (CX 4; RX 30). However, on the advice of Andrew Foust, Helms did not attend the investigation. Foust did represent Helms at the investigation but did not call any witnesses and submitted only two documents for the investigating officer's consideration, the March 26, 2018 voicemail from Lisa Gladney and Helms' phone records. (Tr. at 75-6). Helms did not ask and Foust did not submit a work status note from Dr. Buzzell's office or any other documentation to support extending Helms' medical leave and Foust did not tell the investigating officer that Helms had called Dr. Buzzell's office on March 21, 2018 asking them to resend his work status update to BNSF.

Matthew Schweitzer was the investigating officer. He has never met Helms. Schweitzer requested the labor relations office review the investigation file. Brian Clunn, BNSF Director of Labor Relations, emailed Schweitzer on April 23, 2018 at 9:24 am and advised him that he had "reviewed the investigation transcript and dismissal is supported as a standalone basis for unauthorized absence, as well as a second Level S." (RX 54).

Schweitzer forwarded the email to Michael Harvey, Assistant Terminal Superintendent, at 9:37 am on April 23, 2018 and "recommended [Mr. Helms'] dismissal on the ground of employee failing to submit the necessary medical paperwork to extend his medical leave." (RX 54).

Harvey forwarded the email to Ben Sharpe, BNSF General Manager, at 9:42 am on April 23, 2018. Harvey did not make a recommendation as to discipline. (RX 55). After reviewing the investigative files, and considering the recommendations from Schweitzer and Clunn, Sharpe concluded Helms did not provide the required medical documentation to extend his leave of absence, thereby making him AWOL, and made the decision to dismiss Helms' BNSF employment. (Tr. at 234). At the time he made the decision, Sharpe was not aware of the March 21, 2018 OrthNebraska fax to the BNSF billing department holding Helms off work. (Tr. at 240).

At the time of the April 10, 2018 investigation, neither Wetta nor Gladney had received the March 21, 2018 work status update from Dr. Buzzell's office because it was sent to the BNSF Injury Billing Department at fax number 817-352-7321. While the billing department did not forward the work status update to Wetta or Gladney or call and tell them to pick it up before the April 10, 2018 investigation, there is no evidence that anyone in the billing department intentionally delayed forwarding it to Gladney or purposely withheld the information from Gladney or Wetta or anyone involved in the decision to terminate Helms' BNSF employment. (Tr. at 140).

The BNSF injury reporting policy prohibits retaliation for reporting injuries. (RX 20).

Helms had previously received a Level S 30-day record suspension on March 28, 2018 for walking on train tracks. The suspension came with a one-year review period, which meant that any rules violation during the period could result in further disciplinary action. (RX 36). Helms knew that this meant "he could pretty much get fired for anything." (Tr. at 51).

BNSF's Employee Performance Accountability policy provides that dismissal is authorized for two Level S violations or for a stand-alone dismissible offense. An AWOL of five or more consecutive days is a stand-alone dismissible offense. (RX 26).

Harvey notified Helms by letter dated April 24, 2018 that he was dismissed for violating GCOR 1.15 and GCOR 1.3.3, for failing to comply with instructions by not returning to work or extending medical leave following the expiration of his medical leave of absence. (CX 8; RX 47). Harvey also called Helms by phone and informed him he was dismissed effective immediately. (Tr. at 48).

Helms filed a Certificate of Organization with the State of Nebraska for a car detailing service on February 27, 2017. (RX 32). Helms was detailing cars throughout his BNSF employment and while on medical leave for his shoulder injury. (RX 62; Tr. at 79). BNSF employees are not permitted to work while on medical leave without approval. Instead, BNSF employees are supposed to be getting medical help in order to return to work and not allowed to pursue other employment. Helms did not seek and did not have approval to run his car detailing business while on medical leave. (RX 25).

BNSF has dismissed other employees for failing to comply with instructions on providing doctor's notes. (RX 7).

No BNSF employee involved in the decision to do so told Helms he was fired because he reported an injury. (Tr. at 78).

Approximately 4,300 BNSF employees go through the return to work process each year. (Tr. at 135).

The sole protected activity alleged by Complainant in this case is reporting a work-related injury on or about January 14, 2018. (Tr. at 241, 243; RX 48; RX 49 Interrogatory 5). The sole adverse action is Complainant's April 24, 2018 dismissal. (Tr. at 24-3).

## CONCLUSIONS OF LAW

### Contributing Factor Causation

As noted above, an FRS complainant must establish by a preponderance of the evidence that the protected activity was a contributing factor in the unfavorable personnel action. A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008). The trier of fact must consider all relevant evidence in determining whether there was a causal relationship between a complainant's protected activity and the adverse employment action alleged. *Powers v. Union Pacific R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, slip op. at 21 (ARB Jan. 6, 2017), *aff'd Powers v. U.S. Dep't of Labor*, 723 Fed. Appx. 522 (9th Cir. May 22, 2018) (unpub.); *Austin v. BNSF Railway Co.*, ARB No. 17-024, ALJ No. 2016-FRS-13 (ARB Mar. 11, 2019) (per curiam) (emphasizing that the *Powers* decision allows the trier of fact to consider all relevant evidence at the contributory factor causation stage).

The parties have dramatically different views of what motivated Respondent to fire Complainant, largely focusing on whether Respondent's articulated reason – its belief that Complainant had not provided a work status update to extend his medical leave of absence – was the real reason for the discharge.

Complainant argues that he was discharged because he reported an on-the-job medical injury. (Complainant's closing brief at 1). In contrast, Respondent focuses on the fact that the decision to discharge Complainant was made some six weeks after Complainant's leave had expired and more than three months after reporting his injury and only taken after Helms failed to timely provide to the right people documentation to support extending his approved medical leave of absence. (Respondent's closing brief at 3).

### *Temporal proximity*

Evidence of proximity in time between the protected activity and the adverse employment action, along with other circumstantial evidence, can raise an inference of causation. The Administrative Review Board ("ARB") has cautioned that temporal proximity is of limited value in proving causation by a preponderance of the evidence. *See Acosta v. Union Pacific*, ARB No. 2018-0020, ALJ No. 2016-FRS-82, PDF at 8 (ARB Jan. 22, 2020) (stating that "[g]enerally, temporal proximity is associated with an inference to avoid summary judgment and

is not sufficient to prove contributing factor causation by a preponderance of the evidence.”). Temporal proximity is not a dispositive factor, but just one piece of evidence for the trier of fact to weigh. See *Spelson v. United Express Systems*, ARB No. 09-063, ALJ No. 2008-STA-39, PDF at 3, n.3 (ARB Feb. 23, 2011).

Temporal proximity is evaluated based “on the record as a whole, including the nature of the protected activity and the evolution of the unfavorable personnel action.” *Franchini v. Argonne National Laboratory*, ARB No. 11-006, ALJ No. 2009-ERA-14, PDF at 11 (ARB Sept. 26, 2012). The ARB has emphasized that determining the strength of a temporal relationship is fact-specific and has declined to set outer time parameters. See *Franchini*, ARB No. 11-006, PDF at 10 (ARB Sept. 26, 2012) (“[d]etermining what, if any, logical inference may be drawn from the temporal relationship between the protected activity and the unfavorable employment action is not a simple and exact science but requires a ‘fact-intensive’ analysis” that “involves more than determining the length of the temporal gap and comparing it to other cases”); *Hukman v. U.S. Airways*, ARB No. 2018-0048, ALJ No. 2015-AIR-03, PDF at 17 (ARB Jan. 16, 2020) (stating that a temporal gap of less than five months “is neither so short nor so long as to be definitively close or distant temporal proximity” as a matter of law).

After considering the record as a whole, I find that there was temporal proximity between the timing of Complainant’s protected activity and the adverse action taken. Complainant filed his injury report on January 14, 2018. Complainant was fired on April 24, 2018. Although separated by more than three months, Complainant’s report is one of a small number of interactions with Respondent before the adverse action was taken.

#### *Intervening event and other factors*

Even with evidence of temporal proximity, the complainant still has the burden of establishing the causation element by a preponderance of the evidence. *Id.* An inference of causation may be broken by an intervening event or by lack of knowledge of the protected activity by the decision-maker. See *Dho-Thomas v. Pacer Energy Marketing*, ARB No. 13-051, ALJ Nos. 2012-STA-46, 2012-TSC-1 (ARB May 27, 2015); *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-37 (ARB Oct. 17, 2012); *Wevers v. Montana Rail Link, Inc.*, ARB No. 2016-0088, ALJ No. 2014-FRS-00062 (ARB June 17, 2019) (per curiam) (causal inference based on temporal proximity diminished by intervening events showing a reasonable concern by employer that complainant was charging official time while engaged in personal activities); *Acosta v. Union Pacific*, ARB No. 2018-0020, ALJ No. 2016-FRS-82, PDF at 9 (ARB Jan. 22, 2020) (stating that “[t]he insufficiency of temporal proximity [alone] as a basis for proving causation is even more apparent when the facts reveal an intervening event occurring between the protected activity and the adverse personnel action.”).

Although I find that there was temporal proximity between the discharge and the report of injury, other factors undercut its weight. First, there was an even closer temporal relationship between Complainant’s discharge on April 24, 2018 and two intervening events: (1) Gladney’s voicemail of March 26, 2018 telling Helms that BNSF still did not have the required work status update and (2) the April 10, 2018 investigation where, though given the opportunity, Helms did

not submit any evidence that he had contacted his doctor on March 21, 2018 and had asked them to send the information to BNSF.

I find that Wetta and Gladney were credible witnesses. Their testimony was precise and not embellished. They conceded in a non-evasive way when their memories were not good. Their testimony was also consistent with the timeline of events and with the documentary evidence of record. BNSF's goal was to get Helms back to duty and Wetta and Gladney both explained well what they did to try and accomplish it. I find that Wetta and Gladney's sole concern was affording Helms the opportunity, actually several opportunities, to submit the necessary work status paperwork to extend his medical leave. There is no evidence that either was concerned at all with disciplining or retaliating against Helms for reporting the injury in the first place. If they had been, they could have fired Helms on March 6, 2018, the first day BNSF learned that Helms had not submitted the extension documentation, instead of giving him additional chances to do so.

Against Wetta and Gladney's precise testimony, Complainant offers only speculation. Complainant points to evidence that Respondent could have done more, that he was treated differently this time than during his previous medical leave of absence, that his union rep believed the outcome of the investigation was preordained and BNSF was rushing to fire him. Based on a review of the entire record, I find some circumstantial evidence suggesting that *plausibly*, Complainant's past activities contributed to the decision to discharge him. An FRSA complainant's burden of proof on contributory factor causation, however, is not plausibility – it is a preponderance of the evidence. Having a merely plausible theory of motivation is insufficient to carry Complainant's burden of establishing contributory factor causation by a preponderance of the evidence.<sup>7</sup>

It is beyond peradventure that a railroad may not discharge an employee if such action is due, in whole or in part, to the employee's reporting of a work-related personal injury. 49 U.S.C. § 20109(a)(4). However, the issue in this case is not whether Helms should have been fired or whether the BNSF personnel system provided Helms with due process before doing so. If the answer to those questions is no, he may in fact have a cause of action, but before a different judge in another venue. Instead, the narrow issue before me in this federal administrative proceeding is whether Helms's reporting a work-place injury on or about January 14, 2018 was a contributing factor in any way to his April 24, 2018 termination. I find it was not.

Employers are permitted under the FRSA to require employees to provide reasonable documentation supporting claimed medical absences. But Helms did not comply with BNSF's reasonable policy requiring absent employees to file work status documentation before an approved medical leave of absence expires so BNSF personnel can determine whether to extend the leave. It is undisputed that Dr. Buzzell's office did not file the proper documentation before Helms' leave expired on March 6, 2018. BNSF then gave Helms a 10-day grace period to do so. Gladney called Helms and advised him to do so. Helms eventually did, on March 21, 2018. However, Dr. Buzzell's office mistakenly sent it to the wrong BNSF office where it

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<sup>7</sup> See *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451 (9th Cir. 2018) (at the merits stage, an FRSA complainant must show by a preponderance of the evidence that the protected activity was a contributory factor in the adverse action, not just that circumstances would permit that inference).

unfortunately sat until after the decision to fire Helms was made because Helms had not returned to work and BNSF believed, mistakenly, that he failed to comply with BNSF instructions when he did not submit work status updates from his doctor to justify extending his medical leave yet again.

Complainant does not challenge BNSF's right to require reasonable documentation to substantiate an employee's claimed medical leave of absence. He claims, however, his doctor did provide it, albeit faxing it to the wrong BNSF department. Complainant submits that an employee's obligation is satisfied once his doctor provides documentation to anyone in Employer's employment and it is incumbent upon the Employer to ensure that otherwise timely-filed documentation is directed to the appropriate personnel. In other words, Helms submits he complied with all BNSF directives once Dr. Buzzell's office faxed his medical status update to BNSF on March 21, 2018 and that it may have been sent to the wrong office is irrelevant. I disagree.

This is a situation where a series of unfortunate events resulted in the employer not having all the necessary information. First, if Helms had picked up his mail, he would have learned in the March 6 letter that he had ten days to get Dr. Buzzell's office to submit work status documentation or even the March 16 letter where he was notified of the investigation for not reporting to work or providing documentation to extend his leave. Instead, he first learned of the potential problem when Wetta called him on March 20, 2018 and told him about the investigation. Second, Helms did not follow up with Gladney or Wetta after calling Dr. Buzzell's office on March 21, 2018 to see if they had received the update or what other documentation might be necessary. Third, Helms did not call Gladney back after she left a message on March 26, 2018 that BNSF still did not have the work status update. Fourth, Helms did not attend his own April 10, 2018 investigation where he at least could have testified that he asked Dr. Buzzell's office to send the update. Fifth, Dr. Buzzell's office sent the work status update to BNSF on March 21, 2018, but to the wrong office.

However, simply having the wrong information is a long way from concluding that Helms was fired, in part, for reporting a workplace injury. Could Wetta and Gladney have done more? Maybe, but with some 4300 employees going through the BNSF return to work process each year, there is only so much BNSF can do to assist each individual employee. Ultimately, and consistent with the BNSF regulations, it is incumbent on the employee to ensure the right BNSF people get the necessary paperwork to extend one's medical leave. Helms instead chose to rely on his doctor's office to send in the work status updates. Unfortunately, the office faxed the correct updates to the wrong office. However, that mistake does not mean that Helms' report of injury was a factor in the decision to terminate his employment. That decision was based solely on the belief, albeit incorrect, that Helms had not submitted the appropriate work status update to extend his leave.

Regarding Respondent's contributing factor burden, my role is not to question whether the decision to fire Christopher Helms was wise or based on sufficient "cause" under BNSF's personnel policies, but only whether, looking at all the evidence, the protected activity

contributed at all to the decision to do so.<sup>8</sup> I find it did not. The decision to terminate Complainant was based solely on the mistaken belief that Helms had not submitted the appropriate work status update to extend his medical leave, despite being given numerous opportunities to do so. The decision was not in retaliation for reporting the injury in the first place. Whether this court would have made the same decision is not the issue as “federal courts do not sit as a super-personnel department that re-examines” an employment decision. *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 792 (8th Cir. 2014). I find that Complainant has not established by a preponderance of the evidence that any protected activity contributed to Respondent’s decision to fire Complainant. In other words, Respondent did not retaliate against Complainant under the Act.

### **Conclusion**

Complainant’s firing is an adverse action under the Act. I also find Complainant engaged in protected activity under the Act when he reported a workplace injury on January 14, 2018. However, I find such protected activity did not contribute in any way to Complainant’s April 24, 2018 discharge, which was based solely on Respondent’s reasonable, albeit mistaken, belief that he did not comply with instructions to timely submit documentation to extend his medical leave of absence.

### **Respondent’s Affirmative Defense**

As I find that Complainant’s protected activity did not contribute to Respondent’s decision to fire him, Respondent is not required to establish by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.

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<sup>8</sup> The STAA does not forbid unfair employment actions; it forbids retaliatory ones. *See, e.g., Toy Collins v. American Red Cross*, 715 F.3d 994, 999 (7th Cir. 2013); *Brown v. Advocate S. Suburban Hosp.*, 700 F.3d 1101, 1106 (7th Cir. 2012).

## **ORDER**

Because Complainant did not establish by a preponderance of the evidence that protected activity contributed to Respondent's decision to discharge him, Complainant has not established a necessary element of his FRSA retaliation claim. Accordingly, IT IS ORDERED that the complaint filed by Christopher Helms with the Occupational Safety and Health Administration against BNSF is DENIED.<sup>9</sup>

**SO ORDERED:**

**STEPHEN R. HENLEY**  
Chief Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

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<sup>9</sup> The regulations [at 29 C.F.R. 1982.109(d)(2)] provide that "[i]f the ALJ determines that the respondent has not violated the law, an order will be issued denying the complaint." *Buie v. Spee-Dee Delivery Services, Inc.*, ARB No. 2019-015, OALJ No. 2014-STA-00037, slip op. at 2 (ARB Oct. 31, 2019) (per curiam).

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).