



In the Matter of:

CLYDE O. CARTER, JR.,

COMPLAINANT,

v.

BNSF RAILWAY, CO.,

RESPONDENT.

**ARB CASE NOS. 14-089
15-016
15-022**

ALJ CASE NO. 2013-FRS-082

DATE: June 21, 2018

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

David Bony, Esq.; *Sole Practitioner*; Kansas City, Missouri

For the Respondent:

Jacqueline M. Holmes, Esq.; *Jones Day*; Washington, District of Columbia

Before: Joanne Royce, *Administrative Appeals Judge*; Leonard J. Howie, III, *Administrative Appeals Judge*.

REMAND ORDER

This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (FRSA).¹ On June 26, 2012, Clyde Carter filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his employer, Burlington Northern Santa Fe Railway Co., (BNSF), violated the FRSA by retaliating against him because he filed an injury report on August 30, 2007. OSHA found no violation, and Carter requested a hearing before a Department of Labor (DOL) Administrative Law Judge (ALJ). After a formal hearing, the ALJ issued a decision finding that BNSF violated the FRSA and unlawfully discriminated against Carter.² In a separate decision, the ALJ ordered BNSF to reinstate Carter and to pay him back pay with interest, punitive damages, and attorney’s fees.³ BNSF appealed both the merits and damages orders, and Carter appealed the ALJ’s damages decision. The Board affirmed both ALJ decisions. BNSF appealed to the United States Court of Appeals for the Eighth Circuit.

The court determined that the ALJ ascribed to a “flawed chain-of-events causation theory,”⁴ “erred in interpreting and applying the FRSA, and failed to make findings of fact that are critical to a decision applying the proper legal standard.”⁵ Specifically, the ALJ failed to make findings of fact regarding whether Carter’s supervisors targeted him, if there was discriminatory animus against Carter,⁶ if BNSF in good faith believed that Carter was guilty of the conduct justifying discharge, if Carter’s FELA lawsuit provided BNSF with “more specific notification” about Carter’s injury report, and about credibility issues.⁷ Further, the court found that the Board exceeded its scope of review to the extent it filled in missing findings and

¹ 49 U.S.C.A. § 20109 (Thomson Reuters 2016), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53, and as implemented by federal regulations at 29 C.F.R. Part 1982 (2017) and 29 C.F.R. Part 18 Subpart A (2017).

² *Carter v. BNSF Ry. Co.*, ALJ No. 2013-FRS-082 (ALJ July 30, 2014) (D. & O.).

³ ALJ’s Supplemental Decision and Order Awarding Damages, ALJ No. 2013-FRS-082 (ALJ Nov. 25, 2014) (Supplemental D. & O.).

⁴ *BNSF Ry. Co. v. U.S. Dep’t of Labor, Admin. Rev. Bd.*, 867 F.3d 942, 945-46 (8th Cir. 2017).

⁵ *Id.* at 945.

⁶ We note that the Court in *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014) explicitly recognized that, under the FRSA’s “contributing factor” causation standard, a complainant need not demonstrate “retaliatory motive.”

⁷ *Id.* at 947-48.

“misstat[ed] the scope of [our] decision in *Ledure*.”⁸ Because the ALJ order could not be upheld, the Eighth Circuit vacated the Board’s decision and remanded.

Accordingly, consistent with the Eighth Circuit’s opinion, the ARB remands this case to the Office of Administrative Law Judges for further proceedings consistent with its August 14, 2017 opinion.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

LEONARD J. HOWIE, III
Administrative Appeals Judge

⁸ *Id.* at 948-49 (citing *Ledure v. BNSF Ry. Co.*, ARB No. 13-044, ALJ No. 2012-FRS-020 (ARB June 2, 2015)). According to the Eighth Circuit, [t]o base its decision on *Ledure*, the ARB needed a finding that Carter’s FELA lawsuit provided BNSF with “more specific notification” of his injury report, a fact question relevant to the temporal proximity between the protected activity and Carter’s termination.” *Id.* at 948.