

Fresquez v. Bnsf Ry. Co.

United States District Court for the District of Colorado

December 17, 2019, Decided

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

Reporter

2019 U.S. Dist. LEXIS 216402 *

BRANDON FRESQUEZ, Plaintiff, v. BNSF RAILWAY CO., Defendant.

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Opinion

[*1] 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 [*2] 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 wages 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 [*3] to calculate prejudgment interest as of December 17, 18, and 19. (*Id.* at 34.)

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.

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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 [*4] 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

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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 [*5] 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. [*6] (ECF No. 194-1 at 4.) Erwin also deducted "unreimbursed railroad

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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 [*7] 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

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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 [*8] 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

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the model or to appropriately calculate interest. BNSF added certain factors not previously raised to [*9] 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 [*10] 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.

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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 [*11] 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 Fresquez'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").)

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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, [*12] 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 [*13] therefore

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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 [*14] 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.

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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. [*15] 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	BNSF Estimate	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 [*16]
			\$139,321.33

Table 2A: But-For Earnings Unmodified

Fresquez v. BNSF

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

Date of Verdict: 02/19/19 *In 2019:*

Date of Judgment: 12/17/19
 10\$9,459Expected0Expected

8.98%But-forBut-for

GrossGrossCost6.20%4.90%1.45%But-forRR
 HealthtimesEarningsEarnings

YearRealRR PayRR PaySharingCreditableEmployeeTier
 ITier IIMCEarningsInsuranceProbability&
 BenefitsIncome& Benefits

YearAgeFracECI (Annual) (Period) (Period)
 EarningsExpensesTaxesTaxesTaxes (before-tax) (single)
 of LFP (before-tax) Taxes (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 [*17] 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** [*18]
 \$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:10.00years, per orderExpected Years Active
 in Labor Force, Post-verdict:9.28 [*19]**

Table 2B: But-For Earnings Modified

Fresquez v. BNSF

**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

Date of Verdict: 02/19/19 *In 2019:*

Date of Judgment: 12/17/19

1089,459Expected0Expected

8.98%But-forBut-for

**GrossGrossCost6.20%4.90%1.45%But-forRR
 HealthtimesEarningsEarnings**

**YearRealRR PayRR PaySharingCreditableEmployeeTier
 ITier IIMCEarningsInsuranceProbability&
 BenefitsIncome& Benefits**

**YearAgeFracECI (Annual) (Period) (Period)
 EarningsExpensesTaxesTaxesTaxes (before-tax) (single)
 of LFP (before-tax) Taxes (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**

[*20] 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 [*21]		(\$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:10.00years, per orderExpected Years Active
in Labor Force, Post-verdict:10.00

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Table 3A: Post-Railroad Earnings Unmodified

Fresquez v. BNSF

**Brandon K. Fresquez' Post-Railroad Earnings & Benefits
- If Judgement is on December [*22] 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
110\$5,946ExpectedExpected

11.66%4.83%Post-RRPost-RR

Post-RR Earnings6.20%1.45%Post-RRHealthRetirementtimesEarningsEarnings

**YearRealEntry Town of Charles
SSMCEarningsInsuranceBenefitsProbability&
BenefitsIncome& Benefits**

**YearAgeFracECIto Med Castle Rock SAFEbuilt Abbott
TotalTaxesTaxes (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 [*23] 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) [*24] \$53,970

2026 41 1.00 147.14 185.36 \$68,750 \$68,750 (\$3,057) (\$715) \$45,535 1.00 \$45,535 (\$6,014)
 (\$4,263) (\$997) \$63,491 \$6,363 \$3,321 0.91 \$66,490 \$39,522
 (\$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

2019 34 0.13 \$6,847 \$6,847 (\$424) (\$99)
 \$6,323 1.00 \$6,323 (\$907) \$5,416

Verdict

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

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

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

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

Post-verdict:10.00years, per orderExpected 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

2020 35 1.00 138.99 144.18 \$53,479 \$53,479
 (\$3,316) (\$775) \$49,388 \$6,010 \$2,583 [*26] 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

Date of Termination: 05/27/16

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

Date of Verdict: 02/19/19 *In 2019:*

Date of Judgment: 12/17/19
 110\$5,946ExpectedExpected

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

11.66%4.83%Post-RRPost-RR

Post-RR Earnings6.20%1.45%Post-
 RRHealthRetirementtimesEarningsEarnings

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

YearRealEntry Town of [*25] Charles
 SSMCEarningsInsuranceBenefitsProbability&
 BenefitsIncome& Benefits

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

YearAgeFracECIto Med Castle Rock SAFEbuilt Abbott
 TotalTaxesTaxes (before-tax) (single) (private ind.) of
 LFP (before-tax) Taxes (after-tax)

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

Termination

2016 31 0.60 \$16,701 \$16,701 (\$1,035)
 (\$242) \$15,423 1.00 \$15,423 (\$2,498) \$12,925

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

2017 32 1.00 \$1,920 \$18,998 \$20,918
 (\$1,297) (\$303) \$19,318 1.00 \$19,318 (\$1,598)
 \$17,719

2028 43 1.00 149.57 199.25 \$73,902 \$73,902
 (\$4,582) [*27] (\$1,072) \$68,249 \$6,468 \$3,570 1.00
 \$78,286 (\$16,164) \$62,122

2018 33 1.00 \$43,385 \$5,923 \$49,308

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:10.00years, per orderExpected Years Active
in Labor Force, Post-verdict:10.00

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Table 4A: Pre-Judgment Interest Unmodified

Fresquez v. BNSF

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-judgment

Pre-

5.54%OrdinaryEndingjudgementBeginningBeginningInte
restTotal Pre-

judgementPeriodNumber
ofMonthlyPeriodAnnuityAnnuityInterestInterestBeginnin
gBeginningBalanceEnding (Beginning judgment

YearLossMonthsLoss FlowRateFactorAmount (Annuity)
AccruedPrincipleBalanceFactorBalance balances)
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[*28] 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

Fresquez v. BNSF

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-judgment

Pre-

5.54%OrdinaryEndingjudgementBeginningBeginningInte
restTotal Pre-

judgementPeriodNumber
ofMonthlyPeriodAnnuityAnnuityInterestInterestBeginnin
gBeginningBalanceEnding (Beginning judgment

YearLossMonthsLoss FlowRateFactorAmount (Annuity)
AccruedPrincipleBalanceFactorBalance balances)
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 [*29]
\$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

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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

5.54%

98.26% 97.85% \$18,827

Expected Earnings & Benefits Present Pre-
Year (net of income taxes) Discount Value judgment

2028 43 1.00 \$74,888 \$56,606 [*31] \$18,282
 98.00% 97.66% \$17,497

Year Age Frac But-for Post-RR Delta POL Factor Loss Interest

2029 44 0.13 \$10,058 \$7,577 \$2,481 97.73%
 97.19% \$2,356

Termination - Loss of Back Pay Begins

Loss of Front Pay: \$242,600

2016 31 0.60 \$35,556 \$12,925 \$22,631
 100.00% 100.00% \$22,631 \$325

Post-verdict: 10.00 years, per order

2017 32 1.00 \$68,422 \$17,719 \$50,702
 100.00% 100.00% \$50,702 \$2,612

Loss of Back Pay: \$106,768

plus Loss of Front Pay, Pre-judgment: \$25,473

2018 [*30] 33 1.00 \$69,073 \$39,522 \$29,551
 100.00% 100.00% \$29,551 \$5,096

equals Basis for Pre-judgment Interest: \$132,241

plus Pre-judgment Interest: \$14,808

2019 34 0.13 \$9,300 \$5,416 \$3,884 100.00%
 100.00% \$3,884 \$832

equals Pre-judgment Loss: \$147,049

Loss of Back Pay: \$106,768

plus Loss of Front Pay, Post-judgment: \$217,127

Verdict - Loss of Front Pay Begins

equals Loss Excluding Post-Retirement Benefits: \$364,176

2019 34 0.83 \$65,813 \$40,340 \$25,473
 100.00% 100.00% \$25,473 \$5,942

plus Loss of Tier I / Social Security Benefits: \$19,298

plus Loss of Tier II Benefits: \$56,871

Pre-judgment Interest: \$14,808

plus Associated Income Taxes: \$2,507

Judgment

equals Total Loss Award: \$442,852

2019 34 0.04 \$3,138 \$1,824 \$1,314 99.91%
 99.97% \$1,312

plus Income Taxes on Award: \$140,700

2020 35 1.00 \$77,250 \$46,921 \$30,329
 99.73% 99.49% \$30,094

equals Tax-adjusted Award: \$583,553

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2021 36 1.00 \$76,631 \$47,884 \$28,748
 99.54% 99.18% \$28,382

Table 5B: Summation Modified

Fresquez v. BNSF

2022 37 1.00 \$76,427 \$49,153 \$27,273
 99.35% 99.09% \$26,849

Brandon K. Fresquez' Present Value Loss of Back and Front Pay

2023 38 1.00 \$76,565 \$50,789 \$25,776
 99.15% 99.08% \$25,323

Date of Termination: 05/27/16

2024 39 1.00 \$76,795 \$52,347 \$24,448
 98.94% 98.86% \$23,914

Date of Verdict: 02/19/19

Date of Judgement: 12/17/19

2025 40 1.00 \$77,047 \$53,970 \$23,077
 98.72% 98.49% \$22,439

5.54%

2026 41 1.00 \$74,621 \$53,793 \$20,828
 98.50% 98.14% \$20,134

Expected Earnings & Benefits Present Pre-

Year (net of income taxes) Discount Value judgment

2027 42 1.00 \$74,800 \$55,217 \$19,583

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

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End of Document