2019 DOL Ad. Rev. Bd. LEXIS 27

United States Department of Labor Administrative Review Board

June 12, 2019

ARB CASE NO. 2016-0089; ALJ CASE NO. 2014-FRS-00103

Reporter
2019 DOL Ad. Rev. Bd. LEXIS 27 *

In the Matter of: STEVE BROUGH, COMPLAINANT, v. BNSF RAILWAY COMPANY, RESPONDENT

Core Terms

protected activity, slip opinion, locomotive, terminate, backpay, expungement, track, neck, discipline, punitive damages, contributing factor, tractor, hostler, sore, retaliate, helper, substantial evidence, affirmative defense, standard of review, adverse action, investigatory, dishonesty, notice, award of punitive damages, personnel action, safety rule, disciplinary, retirement, mitigate, foreman

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For the Complainant: James P. Carey, Esq.; Lamb & Carey; For the Respondent: Paul S. Balanon, Esq. and Jacob E. Godard, Esq.; Bryan P. Neal, Esq. and Stephen F., Fink, Esq.

Panel: William T. Barto; James A. Haynes; Daniel T. Gresh

Opinion By: WILLIAM T. BARTO, Chief Administrative Appeals Judge; JAMES A. HAYNES; DANIEL T. GRESH, Administrative Appeals Judges

Opinion

[*1] **FINAL DECISION AND ORDER**

DANIEL T. GRESH, *Administrative Appeals Judge*; Complainant Steve Brough filed a complaint under the whistleblower protection provisions of the Federal Rail Safety Act (FRSA) [1] alleging that the BNSF Railway Company, the Respondent, fired him for reporting a work injury. After a hearing, an Administrative Law Judge (ALJ) concluded that BNSF violated the FRSA and awarded Complainant back pay and damages. BNSF appealed to the Administrative Review Board (ARB or Board). For the following reasons, the Board affirms the ALJ's decision.

BACKGROUND [2]

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[1] *49 U.S.C. § 20109* (2008), as implemented at 29 C.F.R. Part 1982 (2018) and 29 C.F.R. Part 18, Subpart A (2018).

[2] The ALJ fully detailed the mostly undisputed facts and the parties' twenty-four stipulations, and determined the credibility of the witnesses. Decision and Order (D. & O.) at 2-40.

Brough worked at BNSF's Havre, Montana diesel locomotive service shop starting in May 1972. Through the years he worked as a crane operator, electrician helper, hostler, [3] and hostler's helper and trained co-workers in these positions. On February 21, 2011, Brough came in to work overtime prior to his regular 3:00 p.m. shift and was assigned to clear accumulated snow from pathways, parking lots, and walkways [*2] between the tracks in the shop yard, using a tractor with an enclosed cab and a sweeper attachment in front.

Brough was sitting in the cab wearing required ear protection when he noticed train movement on track six. He stopped and waited until the hostler helper waved him across the track and then began clearing snow between tracks four and five to open up the pathways. He saw two connected locomotives on track five but they were stationary and seemed empty. Brough continued sweeping past the locomotives, which "fouled the tracks," [4] and began to turn to his left when the locomotives hit his tractor on the right rear side, flipped it around 180 degrees, wedged it between the tracks, and blew the two right-side tires, denting the steel tire rims.

Wes Anderson was a foreman in charge of all locomotive movement in the yard. He and general foreman Paul McLeod arrived at the scene and investigated. Anderson took statements from Brough, and hostler Nick McLean and his helper, Joseph Hofer, who were moving the locomotives into the service shop, and sent all three men for drug testing. Afterward, Brough worked his regular [*3] shift. [5]

Foreman McLeod prepared an investigative report that characterized the accident as an "obstruction incident," in which Brough fouled the track with the tractor while clearing snow and was struck by the locomotive, damaging both pieces of equipment. [6] Superintendent Beau Price decided to hold investigatory hearings for Brough alone and Hofer and McLean together because they belonged to different working groups. McLeod sent all three notices of a hearing; the notices were worded differently in describing whether the locomotives struck the tractor or the tractor struck the locomotive, but charged each employee with a violation of BNSF's Mechanical Safety Rule S-1.2. (being alert and attentive on duty). [7]

Superintendent Price conducted the investigatory hearing on March 29, 2011. [8] Foreman McLeod testified about his investigation and conclusion that Brough was at fault because he had fouled the tracks. Mechanic [*4] Robert Pitkanen, who witnessed the accident from his locomotive cab about sixty feet away, testified that Brough was ahead of the locomotives when they started moving and that a properly-positioned hostler's helper would have seen the tractor. [9] McLeod agreed with Price that Brough should have seen the locomotives moving but then admitted that the hostler helper (Hofer) "might probably should have seen" the tractor which the locomotives struck from behind. Hofer testified that he had not seen the tractor but agreed that the locomotives were moving when they hit the tractor. [10]

Brough testified that he never had any reportable injuries during his career with BNSF, but that the neck and back pain he had suffered with prior to the accident--none of which were due to reportable injuries--had gotten progressively worse since the accident and he was having more headaches; he was still hoping, however, that his stiffness and soreness "would go away and

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[3] A hostler operates a locomotive in the service yard, and a helper stands on the steps alongside the driver's side to watch out for anything on the track as the hostler moves the train into the shed for service. Hearing Transcript (TR) at 29-30.

[4] "Fouling a track" is defined under a Federal Railroad Administration regulation at 49 C.F.R. § 220.5 (2018) to "mean[] the placement of an individual in such proximity to a track that the individual could be struck by a moving train or other on-track equipment, or in any case is within four feet of the nearest rail."

[5] Respondent's Exhibit (RX) B.

[6] Complainant's Exhibit (CX) 8; *see* CX 3, 11; RX D, E.

[7] CX 1, 4, 5.

[8] RX D.

[9] RX C; CX 2 at 10-26, 33-51.

[10] *Id.* at 123-31, 133-41.

there would be no injuries." Later, Brough was upset about the conduct of the hearing and complained to [*5] Anderson that the hearing was a "joke" with "rehearsed statements" and a "doctored video." [11]

Earlier in March, after the collision but before the investigatory hearing, Brough had seen a chiropractor twice for adjustments to his neck and back. However, his neck and back pain and headaches were not going away as he had hoped, so Brough then consulted his physician, Dr. Bruce Richardson, who examined him on Thursday, April 14, 2011. X-rays showed severe degenerative disc disease in Brough's cervical and lumbar spine with facet arthroplasty and foraminal narrowing. Dr. Richardson diagnosed cervical and lumbosacral strain with myospasm and associated headaches due to the accident. [12]

Meanwhile, Superintendent Price reviewed the evidence and testimony from the investigatory hearing and decided that Brough was at fault because he had fouled the track and failed to be alert and attentive when putting himself in front of a moving locomotive. Price determined that Hofer and McLean were not at fault because they could not have seen Brough. Price assessed [*6] Brough with a serious Level-S violation under BNSF's Policy for Employee Performance Accountability due to the resulting damage and was put on probation for one year. [13]

On Tuesday, April 19, 2011, McLeod called Brough and his union representative to his office to have Brough sign the letter imposing the Level-S penalty. After Brough expressed his misgiving that his signing could be taken as an admission of any wrongdoing, McLeod stated that his signature was not necessary. [14] Brough then informed McLeod of his visit with his doctor and completed an employee injury report in which he stated that he had been hurt in the collision on February 21, first noticed some symptoms afterwards, visited a chiropractor twice, and had mentioned to Anderson "on at least two occasions of having a sore neck. " [15]

Because Brough claimed in his report that he had informed Anderson of having a sore neck, McLeod asked Anderson to prepare a statement about what Brough had said to him on February 21, [*7] 2011, after the accident, and afterwards. [16] Anderson's statement indicated that after the February accident, he had asked Brough several times at the shift briefing if he was okay and Brough replied, "I'm fine." But at one point when Anderson informed Brough's co-workers that Brough wasn't hurt, Brough grabbed his neck and said, "I don't know about that." [17] McLeod informed Price in an e-mail that Brough had refused to sign his disciplinary letter, had reported an injury occurring on February 21, and claimed he had told Anderson several times about being stiff and sore, which Anderson denied. McLeod forwarded this e-mail to chief mechanical officer Brandon Mabry, who instructed McLeod to draft an investigation letter to be given to Brough alleging that he was insubordinate for refusing to sign the disciplinary letter, falsely stating that he had informed Anderson earlier about his injury, and failing to comply with safety rules and to report his injuries promptly. Mabry copied his instructions to McLeod on to Superintendent Price, Joseph Ryan Heenan, [*8] labor relations director, and Chris Roberts, vice president of mechanical operations, while also stating, "I would like to pursue dismissal." [18]

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[11] *Id.* at 147, 174-75; TR at 218-19.

[12] CX 28. With his doctor's diagnosis, Brough decided he had an obligation to report his injury, which he hadn't wanted to do because he knew doing so would upset his superiors as it would interfere with their injury and safety records. TR at 176-77. *See* CX 29-30.

[13] RX D, TR at 464-70.

[14] TR at 181. The previous day when Price asked Brough to sign the penalty letter he became "visibly upset and agitated," refused to sign without a union representative, and told Price that BNSF managers "probably weren't going to like the results" or "what he was going to do next." CX 56, RX F; TR at 179, 475.

[15] CX 15, 19, 37, 66.

[16] TR at 428-430.

[17] CX 38-39, TR at 428-32.

[18] CX 24.

Meanwhile, McLeod had Brough escorted off the railroad's property because he had not signed the disciplinary letter, and BNSF set an investigatory hearing for these new offenses to be held on May 11, 2011. [19]

At this hearing, Price testified first, recounting how he believed Brough had violated the safety rules. McLeod testified about the events on April 19 and reiterated that Brough told him he had reported his neck stiffness and soreness to Anderson, who denied that Brough had reported any injury. Anderson followed with his account of the accident on February 21 and Brough's comment made at the shift briefing while grabbing his neck, which Anderson thought was made in jest. Machinist Lowell Alcock testified, recalling Brough's comments on the day of the accident and again a few days later that he felt stiff and sore. Union representative Kuntz testified that Brough told him on February 21 that he felt [*9] stiff and sore; Kuntz asked Brough if he had told anyone, and Brough said he had told Anderson. Finally, Brough testified, explaining that he had informed Anderson at least twice that his neck and back were sore and felt that Anderson should have given him forms to complete an injury report. McLeod testified that Brough stated that he waited to report his injury until April 19 because "he thought the outcome of the . . . investigation would have been different and . . . it would bring [matters] to a head" as he believed the "investigation was a conspiracy." [20]

On May 20, 2011, hearing officer and Foreman Mike Collier e-mailed his conclusions to Price, Mabry, and Heenan, finding that Brough admitted violating BNSF's Mechanical Safety Rule 28.2.5 "Reporting - Injuries to Employees" by not filing a written report of his injury and not notifying management of his medical treatment and also therefore Rule 33 of the collective bargaining agreement between BNSF and Complainant's union, which requires injury reporting to be written; further, the "dishonest reason" Brough reported his injury late was because he believed the [*10] investigation was a conspiracy to blame him for the accident, and he wanted to bring the matter to a head. [21]

On May 25, 2011 BNSF fired Brough for violating BNSF's Mechanical Safety Rules 28.2.5 (reporting injuries) and 28.6 (conduct). The dismissal letter stated that Brough had failed to report a personal injury in a timely manner to the proper manager on February 21, 2011 and was dishonest and immoral in reporting an injury on April 19. [22]

Brough filed a timely complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on June 13, 2011, alleging that BNSF fired him in retaliation for reporting a work injury. After an investigation, OSHA determined on April 22, 2014 that BNSF had not violated the FRSA. [23] Brough objected and timely requested a hearing, which was held in on November 13-14, 2014.

The ALJ concluded that Brough engaged in protected activity when he participated in the investigation of the accident that occurred on February 21, 2011, [*11] and when he reported his injury on April 19, 2011, and found that BNSF and the relevant decision-makers at BNSF had knowledge of his protected activities. [24] The ALJ further noted that the parties stipulated that BNSF took adverse action against Brough when he was disciplined on April 18, 2011, after the investigation of the February 21, 2011 accident, and when he was terminated on May 25, 2011. [25] Next, while the ALJ found that Brough did not establish that his protected activity was a contributory factor in his discipline on April 18, 2011, the ALJ concluded that because his subsequent termination on May 25, 2011, was inextricably intertwined with his protected activity, his protected activity was necessarily a contributory factor in his termination. [26] Finally, the ALJ found the evidence insufficient to establish by clear and convincing evidence that Brough's termination would have occurred absent his protected activity of

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[19] RX H, CX 23; TR at 182.

[20] CX 22 at 33-34.

[21] CX 57, RX W; *see* CX 58, RX J.

[22] CX 25, RX U.

[23] RX S, CX 5.

[24] D. & O. at 42, 49.

[25] *Id.* at 50.

[26] *Id.* at 61-64.

filing his injury report and, therefore, BNSF failed [*12] to sustain its affirmative defense. [27] Thus, the ALJ concluded that BNSF violated the FRSA and awarded Brough $ 79,170.51 in back pay less retirement benefits, $ 29,900.00 in compensation for emotional distress and expenses, and $ 75,000.00 in punitive damages. [28] He also ordered expungement of the record of Brough's discharge. BNSF appealed to the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to review appeals of ALJ's decisions pursuant to the FRSA. [29] The ARB reviews the ALJ's conclusions of law de novo. [30] We will affirm the ALJ's factual findings as long as they are supported by substantial evidence. [31] We generally defer to an ALJ's credibility findings unless they are "inherently incredible or patently unreasonable." [*13] [32]

DISCUSSION

The FRSA prohibits a railroad carrier engaged in interstate commerce or its officers or employees from discharging, demoting, suspending, reprimanding, or in any other way retaliating against an employee because the employee engages in any of the protected activities identified under *49 U.S.C. § 20109*(a).

Under the FRSA, a complainant must establish the following facts by a preponderance of the evidence: (1) he engaged in a protected activity as statutorily defined; (2) he suffered an unfavorable personnel action; (3) and the protected activity was a contributing factor in the unfavorable personnel action. [33] If a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity. [34]

Initially, we affirm as unchallenged on appeal the ALJ's conclusions [*14] that Brough engaged in protected activity under subsections 20109(a)(1)(C) and (a)(4) when he participated in the March 30, 2011 investigation of the accident and when he reported his injury on April 19, 2011. Also, the parties stipulated that Brough's thirty-day suspension and one-year probation imposed on April 18 and his dismissal imposed on May 25, 2011 were adverse actions. [35]

On appeal, BNSF challenges the ALJ's decision about contributory causation. In addition, BNSF contends that the ALJ erred in rejecting its affirmative defense that it would have fired Brough absent any of his protected activity. Finally, BNSF contests the ALJ's order of the expungement of Brough's discipline from his employment records, and her award to Brough of both punitive damages and back pay. [36]

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[27] *Id.* at 84.

[28] The FRSA provides for payment of punitive damages up to $ 250,000.00. *49 U.S.C. § 20109*(e)(3), 29 C.F.R. § 1982.105(a)(1).

[29] Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), *84 Fed. Reg. 13072* (Apr. 3, 2019); 29 C.F.R. § 24.110(a).

[30] *Kruse v. Norfolk S. Ry. Co.*, ARB Nos 12-081, 106 ALJ No. 2011-FRS-022, slip op. at 3 (ARB Jan. 28, 2014).

[31] 29 C.F.R. § 1982.110(b).

[32] *Mizusawa v. United Parcel Serv.*, ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 3 (ARB June 15, 2012).

[33] U.S.C. §§ 20109(d)(2)(A)(i), 42121(b)(2)(B)(iii)-(iv).

[34] *49 U.S.C. § 42121*(b)(2)(B)(iv); *see Bruckner v. BNSF Ry. Co.*, ARB No. 14-071, ALJ No. 2013-FRS-070, slip op. at 7 (ARB Jul. 29, 2016); *Hamilton v. CSX Trans., Inc.*, ARB No.; 12-022, ALJ No. 2010-FRS-025, slip op. at 2 (ARB Apr. 30, 2015).

[35] D. & O. at 5.

[36] BNSF's Brief at 1-4.

The ALJ's determination that Brough's protected activity was a contributory factor in his termination is supported by substantial evidence

The ALJ determined that BNSF terminated Brough on May 25, 2011, for his untimely reporting of his injury on February 21, 2011, in [*15] violation of BNSF's own reporting rule, and for his dishonest and immoral conduct when he ultimately did so on April 19, 2011. [37] Notwithstanding BNSF's stated reason for Brough's termination, the ALJ found that Brough's injury report and his termination were "inextricably intertwined" since his protected activity of reporting his injury was the underlying act supporting BNSF's justification for his termination. Thus, the ALJ concluded that Brough established that his protected activity was a contributory factor in his termination as a matter of law. [38]

BNSF initially urges the Board to reverse the ALJ's decision on contributory causation because it argues that under the FRSA, a complainant must prove that an employer's intentional discriminatory animus against the complainant's protected activity, and not merely the complainant's protected activity alone, is a contributing factor in an employer's adverse action. However, for the reasons the Board has repeatedly stated in its previous decisions, we decline to hold that an employee must prove a separate [*16] discriminatory or retaliatory animus, motivation or intent in order to establish that his protected activity was a contributing factor to the adverse employment action alleged in the complaint. [39] Proof of the causal relationship between the protected activity and the adverse action is sufficient to establish any discriminatory intent that the statutory text implicitly requires.

BNSF further asserts that courts have rejected the inextricably-intertwined theory of contributory causation. Under facts similar to those in this case, in *BNSF Ry. Co. u. USDOL (Cain)*, [40] an employee's late reporting of his injury resulted in discipline for not reporting that he had received medical treatment. The United States Court of Appeals for the Tenth Circuit held that an employee cannot immunize himself against discipline for wrong-doing simply by disclosing his injury as part of his protected activity. The court required the employee to show more to establish causation than the simple fact that his injury report led to his discharge. Because the ALJ in that [*17] case relied on other factors, such as temporal proximity and the employee's credibility, the court affirmed the ALJ's conclusion that the employee's filing of his injury report was a contributing factor in the decision to fire him as it was supported by substantial evidence. [41]

In this case, the ALJ had also received evidence concerning other relevant factors: the particular circumstances of the injury itself, Mabry's negative reaction to the late injury report, Brough's removal from his work station on April 18 for refusing to sign the disciplinary report which did not require a signature, the allusions to disciplinary action during BNSF's cross-examination of Brough's witnesses at the investigatory hearing, the immoral conduct charge based on no "clear contradiction" between Brough's and Anderson's account of an "injury," the "troubling shift" in charges from reporting an injury "too late" to "not reporting" an injury, and a perceived "culture of hostility" at BNSF to injury reporting. [42]

Regardless of whether Brough's report of his injury was [*18] untimely, Brough reported his injury. The ALJ found credible Brough's assertions that he was reluctant to report a work injury, he wanted the injury to go away as his other previous aches

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[37] D. & O. at 61.

[38] D. & O. at 62-64 citing *DeFrancesco v. Union Pac. R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 5 (ARB Sept. 30, 2015) (DeFrancesco *II*), citing *DeFrancesco I* (when the manner of the protected activity provides the grounds for the adverse action, contribution is shown as a matter of law). See *also Cain v. BNSF Ry. Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019, slip op. at 6 (ARB Sept. 18, 2014).

[39] See *Rathburn v. The Belt Ry. Co. of Chi*, ARB No. 16-036, ALJ No. 2014-FRS-035, slip op. at 8, n.42 (ARB Dec. 8, 2017); *Menendez v. Haliburton, Inc.*, ARB No. 12-026, ALJ No. 2007- SOX-005, slip op. at 9 (ARB Mar. 15, 2013), *aff'd sub nam, Halliburton, Inc. v. Admin. Review Bd., 771 F.3d 254, 263 (5th Cir. 2014); Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. 7-9 (ARB June 20, 2012).

[40] *816 F.3d 628, 639 (10th Cir. 2016),* citing *Marano v. Dept. of Justice, 2 F.3d 1137 (Fed. Cir. 1993).*

[41] *Id.* at 639-640.

[42] *See* D. & O. at 20, 31, 35, 62, 73, 76, 81-82, 83-84, 95-96.

and pains had, and he went to a chiropractor to try to achieve that end. When that treatment didn't get the results he desired, he went to a physician who diagnosed his resultant work injury. Brough then reported his injury, which contributed to his termination.

After a review of the record, we conclude that substantial evidence supports the ALJ's findings of fact and her legal conclusions are in accord with the FRSA. Thus, the ALJ's determination that Brough's protected activity was a contributory factor in his termination is affirmed. Consequently, BNSF must now prove that it would have taken the same action even if Brough had not reported his injury.

BNSF has failed to prove its affirmative defense

BNSF provided three reasons before the ALJ for terminating Brough: Brough's dishonesty in initially reporting the condition of his neck to Anderson, the late reporting or failure to report his injury, and Brough's immoral conduct in reporting his alleged injury in retaliation for BNSF's previously [*19] disciplining Brough. On appeal, BNSF argues that the ALJ erred in failing to accept its affirmative defense based on its comparative evidence that the "vast majority" of its employees who reported injuries were not disciplined and that other employees had been disciplined for conduct similar to Brough's. While BNSF admits that the ALJ properly considered this comparative evidence, it relies on its previous arguments against contributory causation to contend that it would have fired Brough even absent his protected activity.

The affirmative defense requires the employer to prove with clear and convincing evidence that absent the protected activity it would have taken the same adverse action. The ALJ found the comparative evidence BNSF offered to be insufficient to meet this standard. Specifically, while Heenan, a BNSF manager, claimed to have reviewed other BNSF cases similar to Brough's involving dishonesty that resulted in dismissal, the ALJ reached the following conclusions about Heenan's testimony: 1) Heenan's "generalized reflections based on an unspecified review of cases" were insufficient to carry BNSF's burden; 2) the putative comparators' dishonesty did not compare to Brough's [*20] alleged dishonesty in reporting the condition of his neck to Anderson, as dishonesty requires an intent to deceive as opposed to being merely wrong in the characterization of one's condition; and 3) "the dishonesty charge was neither substantiated nor crucial in the decision-making process" to fire Brough, [43] In addition, while it was Mabry's and the other BNSF managers' perception that Brough had reported his injury in retaliation for BNSF imposing discipline on him after the February 2011 collision, the ALJ instead found that BNSF would have fired any employee whom it perceived to be retaliating against the company. [44] "Rather than showing that [BNSF] would have acted in the same way absent the protected activity, the reaction of BNSF managers who perceived hostility and retaliation against them by [Brough's] actions demonstrates the opposite, the protected activity itself is the driving force of the discipline because that is what it deems hostile and retaliatory against it." [*21] [45]

Moreover, absent Brough's protected activity in this case, which was his injury report on April 19, 2011, BNSF would not have known about Borough's chiropractic visits, his subsequent medical treatment, and his late injury reporting, and consequently BNSF's stated reasons to fire him would not have existed. Thus, because substantial evidence supports the ALJ's finding that BNSF failed to establish by clear and convincing evidence that Brough would have been terminated absent his protected activity, the ALJ's finding that BNSF failed to sustain its affirmative defense is affirmed.

The ALJ properly awarded back pay and ordered expungement, but erred in awarding punitive damages

Based on its arguments on the merits, BNSF objects to any award of back pay or punitive damages and expungement of Brough's discharge. BNSF argues that (1) back pay cannot be awarded because Brough withdrew from the workplace, (2) punitive damages are not permitted because the ALJ found that BNSF had no intent to discriminate against Brough, and (3) the FRSA does not authorize expungement. [*22] [46]

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[43] D. & O. at 74-75.

[44] D. & O. at 82-83.

[45] D. & O. at 83-84.

[46] BNSF Brief at 20-23. As BNSF does not specifically contest the ALJ's award of $ 29,000.00 of compensatory damages for out-of-pocket expenses and emotional distress, D. & O. at 99, the ALJ's determination is affirmed.

First, BNSF argues that an employee's deliberate withdrawal from the employment market constitutes failure to mitigate damages. [47] BNSF avers that the statute does not permit an employee to recover from his or her employer wage "losses" that the employee deliberately self-inflicted. [48]

The ALJ awarded back pay from January 2, 2013, when Brough's physician pronounced him fit to return to work, until June 2, 2014, when Brough chose to retire. [49] The ALJ ordered BNSF to pay Brough $ 74,962.97, minus any retirement benefits he received from November 1, 2013, until June 2, 2014, the exact amounts for the parties to determine. [50]

A wrongfully-discharged employee seeking back pay has a duty to exercise reasonable diligence to mitigate his damages by searching for substantially equivalent work. [*23] [51] However, the employer must prove that its employee failed to mitigate by submitting evidence that would establish that substantially equivalent positions were available and that the employee failed to attempt diligently to secure such positions. [52]

BNSF submitted no evidence of available comparable jobs for any of the times during which Brough was not working; thus, the ALJ was unable to decide whether mitigation was possible and to determine a suitable amount of back pay. BNSF instead relied solely on Brough's admission that he did not look for a comparable job during these times.

Brough testified that the last facet injections for his neck pain occurred around January 2013 and that he could have returned to work in some fashion at that point. But he added that the Public Law Board's stipulation of probation and no back pay, along with his feeling that he "would be walking around with a target on my back," prompted him to retire "rather than take a chance on being fired again." [*24] [53] Further, when Dr. Richardson diagnosed his work injury in 2011, Dr. Richardson stated that Brough was not expected to return to work until 2016. Subsequently, another physician certified to the Railroad Retirement Board that Brough was unable to return to work until December 2012. [54] Because BNSF failed to meet its burden of proof and the ALJ thoroughly discussed the reasons for her award of back pay, we affirm the ALJ's award as supported by substantial evidence.

However, we agree with BNSF's contention that the ALJ erred in awarding punitive damages [55] because of the ALJ's unchallenged finding that BNSF did not intentionally discriminate or violate the FRSA. [56] A punitive damages award is warranted "where there has been 'reckless or callous disregard for the plaintiff's rights, as well as intentional violations of

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[47] *See* Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1527 (11th Circ. 1991); Sellers v. Delgado Community College, 902 F.2d 1189, 1193 (5th Cir. 1990). Both cases involved complaints under Title VII of the Civil Rights Act of 1964. Under both statutes, the burden is on the employer to prove that substantially equivalent jobs were available.

[48] BNSF Brief at 23. Contrary to BNSF's assertion, the ARB did not "reject" the mitigation rule in *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, -095; ALJ No. 2002-STA-035, slip op, at 17-18 (ARB Aug. 6, 2004). Rather, the ARB applied the rule and awarded appropriate back pay based on the facts of that case.

[49] TR at 194-95, 241-42. This was after the Public Law Board decided Brough's appeal in his favor, reinstated him, but declined to award back pay and imposed a year-long probation on top of his previous Level-S violation

[50] D. & O. at 86-88, 99.

[51] *Williams*, ARB Nos. 14-091, 15-008, citing *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 6-7 (ARB Mar. 31, 2005). *See* 49 U.S.C. § 20109(c); 29 C.F.R. § 1982.105(a)(1).

[52] *Anderson v. Timex Logistics*, ARB No. 13-016, ALJ No. 2012-STA-011, slip op. at 7 (ARB Apr. 30, 2014)..

[53] TR at 191-92, 94-95, 243-46.

[54] CX 28-29, TR at 243-46, 258-60.

[55] *See* 49 U.S.C. § 20109(e)(3).

[56] BNSF's Brief at 20-21.

federal law," [57] Gross or [*25] reckless indifference to the law can establish the intentional component needed for willfulness. [58] An employer may avoid punitive damages when it has made a good-faith effort to comply with the law. [59]

The size of a punitive damages award is fundamentally a fact-based determination driven by the circumstances of the case, so the Board is bound by the ALJ's findings if they are supported by substantial evidence on the record considered as a whole. [60] But neither the FRSA nor its implementing regulations specify the standard of review of an ALJ's conclusion, following a hearing, as to whether a punitive damages award is warranted in the first instance. The Administrative Procedure Act (APA), *5 U.S.C. § 553* et seq. (1966), states the standard of review when the subordinate official, such as the ALJ in this case, conducts a formal APA hearing. [61] Specifically, Section 557(b) of [*26] the APA provides, in relevant part:

> (a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title. [62]
>
> (b) When the agency did not preside at the reception of the evidence, the presiding employee [. . .] shall initially decide the case [. . .]. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. *On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.*

(emphasis added). The *Attorney General's Manual on the Administrative Procedure Act* (1947) provides that, in reviewing an initial or recommended decision of a subordinate officer, "the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision -- as though it had heard the evidence itself." "Thus, if the initial [*27] decision had been made by an ALJ . . . following a formal evidentiary hearing, and the governing statute or regulation did not specify the standard of review, the standard of review by the final agency decision maker would be de novo pursuant to the APA's default standard of review at Section 557(b). [63] Consequently, we conclude that the Board exercises de novo review of an ALJ's determination, following a hearing, as to whether a punitive damages award is warranted.

In considering the imposition of punitive damages, the ALJ stated that after "reviewing the managers' decisions and acts in this case, I find no intentional violation of the FRSA." [64] Indeed, the ALJ credited the managers' belief that they were punishing unprotected misconduct. [65] As the ALJ's finding that BNSF did not intentionally violate the FRSA is supported by

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[57] *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 8 (ARB Aug. 31, 2011), citing *Smith v. Wade, 461 U.S. 30, 51 (1983).*

[58] *Beatty v. Celadon Trucking Servs., Inc*, ARB Nos. 15-085, 15-086, ALJ No. 2015-STA-010, slip op. at 12 (ARB Dec. 8, 2017).

[59] *D'Hooge v. BNSF Rys.*, ARB Nos. 15-042, 15-066; ALJ No. 2014-FRS-002, slip op. at 11 (ARB Apr. 25, 2017).

[60] *Beatty*, ARB Nos. 15-085, 15-086, slip op. at 12, citing *Cooper Indus. v. Leatherman Tool Grp., 532 U.S. 424, 435 (2001).*

[61] In regard to hearings conducted in cases involving retaliation complaints under the FRSA, 29 C.F.R. § 1982.107(a) provides that "proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A of part 18 of this title." In turn, the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A of part 18 of title 29, provides at 29 C.F.R. 18.12(b) that "[i]n all proceedings under this part, the judge has all powers necessary to conduct fair and impartial proceedings, including those described in the Administrative Procedure Act, ***5 U.S.C. 556.***"

[62] Section 556 describes requirements for formal APA hearings.

[63] *Albert Einstein Med. Ctr.*, BALCA No. 2009-PER-00379, slip op. at 29 (BALCA Nov. 21, 2011) (en banc).

[64] M D. & O. at 95.

[65] *Id.*

substantial evidence, the ALJ's conclusion of law that a punitive damages award is warranted in this case is reversed. [*28] [66]

Finally, *49 U.S.C. § 20109*(e)(1) provides that "[a]n employee prevailing in any action under" the FRSA's whistleblower provisions "shall be entitled to all relief necessary to make the employee whole." BNSF argues that while the ALJ correctly characterized his order of the expungement of the record of Brough's discharge as equitable relief, other federal statutes authorizing such relief include that specific remedy or they order some other affirmative action, whereas subsection 20109(e)(1) does neither. BNSF asserts that "make whole" language in a statute generally refers to economic damages that would place the injured party back in the position he or she would have been absent the fault of another. Moreover, BNSF contends that the FRSA's implementing regulations cannot confer jurisdiction upon the ALJ to order "appropriate affirmative action to make the employee whole" that the FRSA itself does not mandate. [67]

The ALJ noted that subsection 20109(e)(1) does not specifically list expungement as a remedy, but [*29] that subsection 20109(e)(1)'s directive is for "all relief necessary to make the employee whole." The ALJ found that expungement of the May 25, 2011, discharge was appropriate because she had concluded that BNSF violated the FRSA only due to that action. [68] Brough contends that "make whole" relief encompasses cleansing his personnel record of the action that violated the FRSA so that his near-40 years of work history does not reveal BNSF's unlawful discharge. [69]

We note, however, that it may be futile to order an employer to "expunge" information which other laws may require the employer to maintain. Because businesses may not be able to legally destroy company or corporate records, ALJs should be cautious and specific when ordering an employer to "expunge" information from an employee's personnel record. Where an ALJ finds it necessary to order an employer to disregard certain information which had been placed in an employee's personnel record, it would be more realistic, for example, for the ALJ to require that the information be placed in a sealed [*30] and/or restricted subfolder or that the employer be specifically prohibited from relying on the information in future personnel actions or referencing it to prospective employers. Thus, we affirm the ALJ's order that BNSF expunge any employment records referencing Brough's discipline issued on May 25, 2011, [70] but modify her order to require that the information be placed in a sealed and/or restricted access subfolder and that the employer be specifically prohibited from relying on the information in future personnel actions or referencing it to prospective employers.

CONCLUSION

Accordingly, the ALJ's decision concluding that Respondent violated the FRSA and order granting appropriate relief is **AFFIRMED**, with modifications as noted above, but that portion of the ALJ's order awarding punitive damages is **REVERSED**.

SO ORDERED.

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[66] *Ferguson*, ARB No. 10-075, slip op. at 8, citing *Smith, 461 U.S. at 51.*

[67] BNSF's Brief at 21-22. *See* 29 C.F.R. §§ 1982.109(d)(1), 1982.110(d) (order relief, including, "where appropriate: Affirmative action to abate the violation"). Brough's counsel sought the expungement of the record of Brough's discharge at the hearing. TR at 22-23.

[68] D. & O. at 85-86. *See Scott u. Roadway Express, Inc.*, ARB No. 99-013, ALJ No. 1998-STA-8, slip op. at 14 (ARB July 28, 1999) (the "ALJ fashioned relief in keeping with the statutory directive to abate the violation" when "[h]e ordered [the employer] to expunge from its personnel files and records system" warning letters and any notice of suspension of the complainant).

[69] Brough's Brief at 29.

[70] *See Scott*, ARB No. 99-013, slip op. at 14.