APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-3218

Clyde O. Carter, Jr.

Petitioner

v.

Secretary, Department of Labor

Respondent

BNSF Railway Company

Intervenor

Petition for Review of an Order of the Department of Labor (except OSHA) (2021-0035) (2013-FRSA-00082)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Benton, Judge Kelly and Judge Loken did not participate in the consideration or decision of this matter.

September 25, 2024

Order Entered at the Direction of the Court: Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

APPENDIX B

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102
United States Court of Appeals
For the Eighth Circuit

No. 22-3218

Clyde O. Carter, Jr.
Petitioner
v.
Secretary, Department of Labor
Respondent
BNSF Railway Company
Intervenor

Petition for Review of an Order of the
Department of Labor (except OSHA)

Submitted: April 9, 2024
Filed: July 18, 2024

Before SMITH, WOLLMAN, and GRASZ, Circuit Judges.

WOLLMAN, Circuit Judge.

The Federal Rail Safety Act (FRSA) prohibits railroad carriers from retaliating against employees for reporting any "work-related personal injury." 49 U.S.C. § 20109(a)(4). Clyde O. Carter, Jr., filed a FRSA complaint with the Department of Labor, alleging that BNSF Railway Company (BNSF) initiated disciplinary investigations and thereafter terminated him in retaliation for reporting an injury he had suffered at work. An administrative law judge (ALJ) determined that BNSF had violated the FRSA, and the Administrative Review Board (ARB) affirmed. We granted BNSF's petition for review and vacated the ARB's order. BNSF Ry. Co. v. U.S. Dep't of Labor Admin. Review Bd., 867 F.3d 942 (8th Cir. 2017) (hereinafter Carter I).

A different ALJ denied Carter's claim on remand, finding that his injury report was not a contributing factor in BNSF's decisions to investigate and terminate him and that BNSF had instead investigated and terminated him for dishonesty. The ARB affirmed. Carter argues in his petition for review that substantial evidence does not

support the contributing factor determination and that the ALJ committed procedural errors. We deny the petition for review.

I. Background

A. Factual Background

Carter applied to work for BNSF in 2005. The application included a medical questionnaire, on which Carter indicated that he had not missed more than two days of work due to illness, injury, hospitalization, or surgery and that he had not had any previous surgeries, back injuries, or back pain. Carter disclosed on his application that he had served in the Army and had received an honorable discharge. Carter signed the application, acknowledging that any misrepresentation or omission could be grounds for dismissal at any time. Following a medical examination and an interview, BNSF hired Carter as a carman in November 2005.

Carter injured his shoulder and neck at work in August 2007. BNSF manager Bryan Thompson was present at the time of the accident and spoke with Carter. Another supervisor brought Carter to a BNSF clinic, where a company

doctor diagnosed him with a sprain and prescribed over-the-counter pain medication. Further evaluation by Carter's own physicians resulted in referrals for surgery, injections, and other therapy.

Carter filed a claim against BNSF under the Federal Employers' Liability Act (FELA) in 2008, alleging that BNSF's negligence had caused his injury. In July 2009 and again in January 2012, Carter was deposed in relation to the FELA lawsuit. A jury returned a verdict in favor of Carter in November 2012.

When reviewing materials related to Carter's FELA lawsuit in January 2012, Thompson discovered discrepancies between Carter's application materials and his 2009 deposition testimony and exhibits. Carter's testimony and documentation revealed that he had suffered knee and back injuries, had been excused from work for eleven days for the knee injury, had had his knee scoped, and had received worker's compensation for work-related injuries. Thompson also learned that Carter's military service included approximately three years in the Navy, from which he received an "other than honorable" discharge. BNSF thereafter initiated a disciplinary investigation into whether Carter had been dishonest in his application and related medical questionnaire.

Carter did not clock in on February 5, 2012. When a supervisor conducted a time-keeping review, Carter stated orally and in writing that he had been on time. BNSF manager Jeremiah Thomas reviewed the time-stamped security footage, which showed Carter arriving late. BNSF thereafter initiated a second disciplinary investigation to determine whether Carter had made a false statement regarding his on-time arrival at work.

BNSF general foreman Charles Sherrill presided over two internal hearings in March 2012. Sherrill found that Carter had been dishonest in his employment application and in his statement that he arrived to work on time on February 5. Sherrill recommended discipline in accordance with BNSF policies. BNSF's field superintendent of operations, Phillip McNaul submitted the hearing records and Sherrill's findings to Joseph Heenan, a director of labor relations, who recommended that Carter be discharged for dishonesty. BNSF terminated Carter's employment in
two letters dated April 5 and April 16, 2012.

B. Procedural Background

Carter filed a FRSA complaint in June 2012, alleging that BNSF retaliated against him for reporting his August 2007 work-related injury. To prevail on his claim, Carter was required to show by a preponderance of the evidence that he engaged in a protected activity, that BNSF knew or suspected that he had engaged in a protected activity, that he suffered an adverse action, and that "the circumstances raise[d] an inference that the protected activity was a contributing factor in the adverse action." Carter I, 867 F.3d at 945 (quoting Gunderson v. BNSF Ry. Co., 850 F.3d 962, 968 (8th Cir. 2017)). If Carter proved his affirmative case, BNSF could nonetheless avoid liability by demonstrating by clear and convincing evidence that it would have investigated and terminated him in the absence of his protected activity. Id. Only two issues were disputed: "whether Carter could prove the circumstances raised an inference that the injury report was a contributing factor in his termination, and if so, whether BNSF could prove that it would have fired Carter regardless of his protected activity." Id.

The Occupational Safety and Health Administration conducted the initial review of Carter's complaint and found that BNSF had not violated the FRSA. After Carter filed objections and requested a hearing, the matter was

transferred to an ALJ. Carter testified at an evidentiary hearing regarding the application process, his injury,

the events leading to his disciplinary hearings, as well as the hearings themselves and his termination. Carter stated that his supervisors treated him differently after the injury and injury report, requiring him to speak to a supervisor when he called in sick and assigning him the work of an apprentice carman. Carter's former supervisor Larry Lee Mills testified that he had overheard Sherrill threatening to "nail Carter," an allegation that Sherrill denied. Mills also testified that he had seen a memo from McNaul instructing supervisors to write up employees who had been injured at work.

McNaul testified that he had never written such a memo. Sherrill testified that he had based his decision as a hearing officer solely on his findings of Carter's dishonesty.

Thomas testified regarding the time-keeping review. Thompson did not testify. Heenan testified that based on his review of the transcript and exhibits presented in the disciplinary hearings, he believed Carter was a dishonest person. Heenan specifically found that Carter had been untruthful on his application and medical questionnaire when he stated that no injury caused him to miss more than two

days of work, when he said that he had not experienced back pain or injuries, and when he disclosed only part of his military service. With respect to the second investigation, Heenan testified that although Carter had told his supervisors that he had arrived on time, security footage showed that he had been late.

The ALJ found that Carter's 2007 injury report initiated a series of events that led BNSF to terminate his employment and that BNSF would not have terminated Carter in the absence of the report. The ARB affirmed on other grounds, basing its decision on evidence of Carter's supervisors' post-injury change of attitude, its conclusion that Carter's FELA litigation was itself FRSA-protected, and its disbelief in BNSF's reasons for the disciplinary investigations and terminations.

We granted BNSF's petition for review, concluding that the ALJ had applied a flawed theory of causation and thus erred when it concluded that Carter's injury report contributed to his termination. Carter I, 867 F.3d at 946. We further

concluded that the ALJ's findings did not support the ARB's decision to affirm. With respect to Carter's claim that BNSF supervisors targeted him for discipline, the ALJ did not decide whether Mills's and Carter's testimony was credible and "made no finding of discriminatory animus by any BNSF supervisor." Id. at 947. Moreover, the ARB failed to follow its precedent when it considered Carter's FELA litigation as FRSA-protected, for the ALJ had made no finding that the FELA litigation "provided BNSF with 'more specific notification' of [Carter's] injury report." Id. At 948 (quoting LeDure v. BNSF Ry. Co., ARB No. 13-044, 2015 WL 4071574, at *4 (Admin. Rev. Bd. June 2, 2015)). Finally, we concluded that substantial evidence did not support the finding that "BNSF's justifications for terminating Carter were 'unworthy of credence.'" Id. at 947. We vacated the ARB's order and remanded to the ARB, which, in turn, remanded the matter to the Office of Administrative Law Judges for further proceedings.

Carter thereafter moved to amend the complaint to add a claim that BNSF interfered with his medical treatment, among other allegations. He also requested that the ALJ take judicial notice of the fact that a BNSF policy may have "incentivized retaliation," Wooten v. BNSF Ry. Co., 2018 WL

2417858, at *5 (D. Mont. May 29,2018), and asked the ALJ to draw an adverse inference against BNSF for not calling Thompson as a witness. The motions were denied.1

1We find no error in the ARB's conclusions that the medical-interference claim was untimely and that an amendment to include that claim thus would be futile. See 49 U.S.C. § 20109(d)(2)(A)(ii) (statute of limitations); Foster v. BNSF Ry. Co., 866 F.3d 962, 966-67 (8th Cir. 2017) (scope of FRSA claim). We conclude that the ALJ acted within her discretion when she declined to take judicial notice of a magistrate judge's description of a BNSF policy that the judge had reviewed in camera at summary judgment, see 29 C.F.R. § 18.201(b) ("[a]n officially noticed fact must be one not subject to reasonable dispute"), and when she declined to draw an adverse inference against BNSF for not calling Thompson to testify, see New World Comm'cns v. N.L.R.B., 232 F.3d 943, 946 (8th Cir. 2000) (no error in declining to apply an adverse inference for failing to call a witness when "it does not appear why [the objecting party] could not have called her as a witness").

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The ALJ on remand concluded that BNSF did not violate the FRSA when it investigated or terminated Carter.2 The ALJ adopted the findings that Carter had credibly described his application process and his failure to clock in. She found Mills's testimony not credible, however, citing the fact that BNSF had terminated him for falsifying a leave

request. The ALJ instead found that Sherrill and McNaul harbored no discriminatory animus against Carter and that Heenan, who ultimately recommended termination, did not know about Carter's injury or his FELA lawsuit. "Mr. Heenan believed in good faith that Mr. Carter was guilty of the conduct charged, that is dishonesty on his application and dishonesty surrounding the events of February 5, 2012, and that the notification of his injury or the FELA lawsuit played no part in his decision." Finally, the ALJ concluded that the FELA lawsuit was not itself FRSA-protected activity because Thompson knew of Carter's injury the day it occurred and the lawsuit did not provide him "with any further notice of the injury."

The ARB affirmed.

II. Discussion

We review the ARB's decision under the deferential standard articulated in the Administrative Procedures Act. 49 U.S.C. § 20109(d)(4); 5 U.S.C. § 706(2). "We set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accord with law.'" Carter I, 867 F.3d at 945 (quoting 5 U.S.C. § 706(2)(A)). We review the agency's legal determinations *de novo* and its factual

2 The ALJ correctly concluded that Carter was required to prove his case by a preponderance of the evidence, and we reject Carter's argument to the contrary. See

Carter I, 867 F.3d at 945; Acosta v. Union Pac. R.R. Co., ARB No. 2018-0020, 2020 WL 624343, at *4 (Admin. Rev. Bd. Jan. 22, 2020) ("At the evidentiary stage after
hearing, the complainant is required to prove the elements by a preponderance of the
evidence, including proof that protected activity was a contributing factor in the adverse action . . . ."); 29 C.F.R. § 1982.109(a) ("A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.").
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findings "for substantial evidence on the record as a whole, considering evidence that both supports and detracts from the ALJ's decision." Id. "Substantial evidence is less than a preponderance, but enough that a reasonable mind would find adequate to support the ALJ's decision." Mercier v. U.S. Dep't of Labor, 850 F.3d 382, 388 (8th Cir. 2017) (quoting Gonzales v. Barnhart, 465 F.3d 890, 894 (8th Cir. 2006)). The ALJ's credibility determinations are given great deference. Id.

Carter argues that the ARB erred by concluding that his injury report did not contribute to BNSF's decision to investigate and terminate him. "A 'contributing factor'

includes any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the [adverse] decision." Carter I, 867 F.3d at 945 (alteration in original) (quoting Gunderson, 850 F.3d at 969). In a FRSA retaliation case, "[t]he contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity." Id. at 946 (quoting Kuduk v. BNSF Ry. Co., 768 F.3d 786, 791 (8th Cir. 2014)). Temporal proximity between the protected activity and the adverse decision can serve as evidence of retaliation, but "[a] gap in time between the protected activity and the adverse employment action weakens an inference of retaliatory motive." Id. at 945 (quoting Wells v. SCI Mgmt., L.P., 469 F.3d 697, 702 (8th Cir. 2006)).

Carter argues that the ARB erred by failing to consider as FRSA-protected activity his January 2012 FELA deposition. He submitted the transcript on remand as an exhibit and now claims that his second FELA deposition provided BNSF with further notification of his injury and that the close temporal proximity between that deposition and his termination is undeniable evidence of BNSF's retaliatory motive. Carter did not make this argument below. The ALJ

thus made no findings whether the January 2012 deposition provided BNSF further notice of injury. See LeDure, 2015 WL 4071574, at *4 (explaining that FELA litigation can expand an employee's FRSA-protected notice to the employer). We decline to consider this argument, raised for the first time on appeal. See Maverick Transp., LLC v. U.S. Dep't of Labor, Admin. Review Bd., 739 F.3d 1149, 1153 (8th Cir. 2014) ("There is a basic

principle of administrative law that ordinarily an appellate court does not give consideration to issues not raised below." (quoting Etchu-Njang v. Gonzales, 403 F.3d 577, 583 (8th Cir. 2005) (internal alterations, quotation marks, and citation omitted))).

The ALJ found that the gap between Carter's termination in 2012 and his injury in 2007 or his deposition in July 2009 weighed against a finding of retaliatory motive. Substantial evidence supports that finding. Even assuming *arguendo* that the July 2009 deposition constituted an additional FRSA-protected report, the yearslong gap

between the report and Carter's termination "suggests, by itself, no causality at all." Carter I, 867 F.3d at 945 (quoting Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 274 (2001) (per curiam)). The record supports the ALJ's finding that the July 2009 deposition notified Thompson in January 2012 of Carter's undisclosed prior injuries and military service, but did not further notify him of Carter's injury. Substantial evidence also supports the ALJ's finding that Carter was not targeted for discipline after his injury report. In Carter I, we explained that "[i]f credited, Carter's and Mills's testimony could support an ultimate finding of intentional retaliation," but the ALJ had "made no credibility finding as to Mills's testimony" and did not identify whether Carter's testimony on the subject was part of his credible testimony or his "contradictory or inconsistent" testimony. 867 F.3d at 947. We defer to the ALJ's decision on remand to credit the testimony of Sherrill, McNaul, Thomas, and Heenan—whose consistent testimony supported a finding that supervisors had not retaliated against Carter—and to not give any weight to the testimony of Mills—who had been fired for dishonesty. That these managers were performing their roles pursuant to company policy refuted Carter's testimony that the managers had worked together to retaliate against him. On remand, the ALJ answered the

"highly relevant questions" that we identified in Carter I and that the first ALJ avoided. Id. at 947. A reasonable mind would find the evidence adequate
to support the finding that Carter's injury report neither resulted in workplace animus nor contributed to BNSF's decision to investigate or terminate Carter. Id.

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Conclusion

We conclude that substantial evidence supports the finding that "the notification of [Carter's] injury or the FELA lawsuit played no part in [Sherrill's or Heenan's] recommendations or the ultimate decision to terminate his employment." Because Carter did not prove that his injury report was a contributing factor in BNSF's decision, we need not consider whether BNSF would have terminated him regardless of his protected activity.

The petition for review is denied.3

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3 Carter argued in his reply brief that this court lacked jurisdiction over BNSF's petition for review in Carter I because BNSF named the ARB as the respondent, not the Secretary of the Department of Labor. He contends that the first ARB decision thus controls. The Department's Office

of the Solicitor, which represented the ARB in the first appeal and represents the Secretary here, has not complained. We conclude that any error in naming the respondent in Carter I did not deprive this court of jurisdiction over BNSF's petition. See Chicago G.W. Ry. Co. v. First Methodist Episcopal Church, 102 F. 85, 87 (8th Cir. 1900) (assuming the mistake in name was well founded, no benefit would accrue and no harm would come to the complaining party, for "this court would merely direct the substitution of" the correct party).

APPENDIX C

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

CLYDE O. CARTER, JR., ARB CASE NO. 2021-0035

COMPLAINANT, ALJ CASE NO. 2013-FRSA-00082

v. **DATE: September 26, 2022**

BNSF RAILWAY COMPANY,
RESPONDENT.

Appearances:
For the Complainant:
David Bony, Esq.; Kansas City, Missouri
For the Respondent:
Jacqueline M. Holmes, Esq.; *Jones Day*; Washington, District of Columbia; Autumn Hamit Patterson, Esq.; *Jones Day*; Dallas, Texas

Before HARTHILL, Chief Administrative Appeals Judge, and BURRELL

DECISION AND ORDER

HARTHILL, Chief Administrative Appeals Judge:

This case arises under the employee protection provisions of the Federal Railroad Safety Act of 1982 (FRSA).1 Complainant Clyde Carter (Complainant or Carter) filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Respondent BNSF Railway Company (BNSF) violated the FRSA by terminating his [1] employment.2

OSHA determined that Carter's discharge did not violate the FRSA and Carter requested a hearing before an Administrative Law Judge (ALJ). In 2014, ALJ Linda Chapman (ALJ Chapman) presided over a formal hearing and issued a Decision and Order (D. & O.) in which she concluded that Carter's discharge violated the FRSA.3 The ARB affirmed ALJ

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[1] 49 U.S.C. § 20109, as implemented by regulations at 29 C.F.R. Part 1982 (2021

Chapman's ruling, and BNSF appealed the ARB's decision to the Eighth Circuit Court of Appeals.

In 2017, the Eighth Circuit held that the ALJ erred in analyzing Carter's case and vacated and remanded the case to the Board. We remanded the case for further proceedings before an ALJ, consistent with the Eighth Circuit's opinion and instructions. On April 29, 2021, ALJ Heather C. Leslie (ALJ Leslie) issued a Decision and Order on Remand (D. O. R.) in which she concluded that Respondent did not violate the FRSA when it terminated Carter's employment.[4] Carter timely appealed to the Board. We affirm.

BACKGROUND[5][2]

Carter applied for employment with BNSF in 2005. The application included a medical

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[2] [2] *Carter v. BNSF Ry. Co.*, ALJ No. 2013-FRS-00082, slip op. at 1 (ALJ Apr. 29, 2021) (D.O.R.).

[3] *Carter v. BNSF Ry. Co.*, ALJ No. 2013-FRS-00082 (ALJ July 30, 2014).

[4] D. O. R. at 20.

[5] The D. O. R. developed and issued by ALJ Leslie contained thorough and detailed findings of fact (see *id.* at 6-12), which we summarize herein. ALJ Chapman's D. & O. provided a full description of the hearing testimony and exhibits (see D. & O. at 2-36).

[6] D. O. R. at 18.

[7] *Id.* at 5-7.

[8] Id. at 7.

[9] *Id.*; *see also* Respondent's Exhibit (RX) 1 (Carter's Application).

questionnaire that asked if he had missed more than two days of work in his previous jobs due to illness, injury, hospitalization, or surgery. The questionnaire also asked if he had any previous surgeries, back injuries, or back pain.6 Carter answered "no" to these questions.7 The application also asked questions about military service, in response to which Carter identified his past service with the Army but did not disclose his service with the Navy.8 The application stated that providing false information would be grounds for dismissal at any time.9 BNSF hired Carter as a carman on November 20, 2005.

On August 30, 2007, Carter was working at BNSF's Argentine Yard in Kansas City, Kansas, when he injured his shoulder and neck. Supervisor Chuck Spencer drove Carter to a company clinic where he was diagnosed with a sprain and prescribed over-the-counter pain medication.10 [3]Carter was later

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[11] 10 D. O. R at 8.
11 Id.
12 45 U.S.C. §§ 51-60.
13 D. O. R. at 8.
14 *Id.* at 10, 14.
15 Id.
16 *Id.* at 9-10, 12.
17 D. O. R. at 10; *see also* Transcript (Tr.) at 437; RX 8 (PEPA).
18 D. O. R. at 8-9.

examined by his own physicians and referred for surgery, injections, and therapy for his shoulder and neck.11

In 2008, Carter filed a claim under the Federal Employer's Liability Act (FELA),12 alleging that BNSF's negligence caused his injury. As part of his FELA litigation, Carter provided deposition testimony to BNSF on July 20, 2009.13

In January 2012, BNSF Manager Bryan Thompson (Thompson), who was acting as the Designated Corporate Representative in Complainant's FELA matter, reviewed discovery materials submitted by Carter in the FELA litigation and discovered discrepancies between Carter's 2009 deposition testimony and his 2005 employment application.14 BNSF then initiated a disciplinary investigation into potentially dishonest statements made by Carter in his application.15 In February 2012, the company initiated a second disciplinary investigation to determine whether Carter had signed a false statement regarding the timing of his arrival to determine whether Carter had signed a false statement regarding the timing of his arrival to work on February 5, 2012.16

On March 20, 2012, BNSF conducted an internal hearing regarding the validity of information provided on Carter's 2005 employment application, specifically Carter's failure to reveal his prior knee and back injuries and his omission of any reference to his prior service with the Navy. BNSF conducted a second internal hearing on March 28, 2012, regarding Carter's alleged failure to timely clock in on February 5, 2012. BNSF General Foreman Charles Sherrill (Sherrill) officiated at both hearings. After the hearings, Sherrill concluded in both matters that Carter had violated company policies prohibiting dishonesty, and that any discipline imposed should comport with BNSF's Policy for Employee Performance Accountability (PEPA).17 The PEPA policy defines various severity levels of discipline and specifically notes that dishonesty about any job-related subject is a sufficient dismissible violation.18

Sherrill's recommendation that Carter be disciplined in accordance with the PEPA policy was submitted to Phillip McNaul (McNaul), BNSF's Field Superintendent of Operations, who then submitted the hearing records and Sherrill's findings to Joseph

Heenan (Heenan), a Director of Labor Relations.19 Heenan was responsible for discipline policy and employee performance and accountability.20 He concluded that the evidence supported Sherrill's findings and recommended that Carter be discharged for dishonesty, as provided for under the PEPA. BNSF terminated Carter's employment in two letters dated April 5 and April 16, 2012.21

19 *Id.* at 10-11.
20 *Id.* at 11.
21 *Id.* at 6. Sherrill signed the letters. *See* Complainant's Exhibits (CX) 1 and 2.
22 D. & O. at 48.
23 ALJ's Supplemental Decision and Order Awarding Damages, ALJ No. 2013-FRS-00082 (ALJ Nov. 25, 2014).
24 *Carter v. BNSF Ry. Co.*, ARB Nos. 2014-0089, 2015-0016, -022, ALJ No. 2013-FRS-00082 (ARB June 21, 2016). 25 *BNSF Ry. Co. v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 867 F.3d 942, 945-46 (8th Cir. 2017) ("The ALJ nonetheless found that the injury report was a contributing factor by applying a "chain of events" theory of causation. The ALJ reasoned: 'In establishing that a protected activity was a contributing factor ... it is not necessary to show that the employer was motivated by the activity or even

give any significance to the activity . . .. [A]ll a complainant need do is show that the employer knew about the protected activity and the protected activity was a necessary link in a chain of events leading to On June 26, 2012, Carter filed a timely complaint with OSHA alleging that BNSF violated the FRSA by terminating his employment in retaliation for his reporting a work-related injury in 2007. OSHA found no violation, and Carter requested a hearing before an ALJ.

After a formal hearing, ALJ Chapman issued a D. & O. finding that BNSF violated the FRSA and unlawfully discriminated against Carter.22 In a separate decision, she ordered BNSF to reinstate Carter and pay him back pay with interest, punitive damages, and attorney's fees.23 BNSF appealed both the merits and damages orders, and Carter [4]appealed

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19 *Id.* at 10-11.
20 *Id.* at 11.
21 *Id.* at 6. Sherrill signed the letters. *See* Complainant's Exhibits (CX) 1 and 2.
22 D. & O. at 48.
23 ALJ's Supplemental Decision and Order Awarding Damages, ALJ No. 2013-FRS-00082 (ALJ Nov. 25, 2014).

the ALJ's damages decision. The Board affirmed both decisions.24 BNSF appealed the rulings to the United States Court of Appeals for the Eighth Circuit.

In its decision issued on August 14, 2017, the Eighth Circuit determined that ALJ Chapman had ascribed to a "flawed chain-of-events causation theory,"25 "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."26

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24 *Carter v. BNSF Ry. Co.*, ARB Nos. 2014-0089, 2015-0016, -022, ALJ No. 2013-FRS-00082 (ARB June 21, 2016).

25 *BNSF Ry. Co. v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 867 F.3d 942, 945-46 (8th Cir. 2017) ("The ALJ nonetheless found that the injury report was a contributing factor by applying a "chain of events" theory of causation. The ALJ reasoned: 'In establishing that a protected activity was a contributing factor ... it is not necessary to show that the employer was motivated by the activity or even give any significance to the activity . . .. [A]ll a complainant need do is show that the employer knew about the protected activity and the protected activity was a necessary link in a chain of events leading to the adverse activity.'").

Specifically, the Eighth Circuit determined that the ALJ failed to make findings of fact regarding whether: (1) Carter's supervisors targeted him; (2) there was discriminatory animus against Carter; (3) BNSF in good faith believed that Carter was guilty of the conduct justifying discharge; (4) Carter's FELA lawsuit provided BNSF with "more specific notification" about Carter's injury report; and (5) credibility issues had been appropriately determined.27 Further, the court concluded that the Board exceeded its scope of review to the extent it filled in missing findings and "misstat[ed] the scope of [our] decision in *Ledure.*"28 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."29 The court vacated and remanded the case to the Board and, on June 18, 2018, the Board remanded the case to the Office of Administrative Law Judges for further proceedings.[5]30

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26 Id.

The case was first assigned on remand to ALJ Jennifer Whang (ALJ Whang), before whom Carter submitted a motion which included a request to amend his complaint to add additional allegations. On September 13, 2019, ALJ Whang denied the request to amend the complaint.31

This case was then transferred to ALJ Leslie. On remand, the parties agreed that the case could be disposed of on briefs. On April 29, 2021, ALJ Leslie issued a D. O. R. in which she concluded that Carter failed to prove that BNSF retaliated against him for engaging in activities protected by the FRSA in 2007.32 She also concluded that BNSF had proven by clear and convincing evidence that it would 6 have fired Carter for dishonesty in the absence of any FRSA-protected activity.33 Carter timely appealed the D. O. R. to the Board.34

Carter's Petition for Review identified numerous points of error which can be summarized as

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27 *BNSF Ry. Co. v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 867 F.3d at 947-48.

28 *Id.* at 948 (citing *Ledure v. BNSF Ry. Co.*, ARB No. 2013-044, ALJ No. 2012-FRS-00020 (ARB June 2, 2015)).

29 *Id.* For discussion of this aspect of the case, see discussion at Section 3.A below.

30 *Carter v. BNSF Ry. Co.*, ARB Nos. 2014-0089, 2015-0016, -0022, ALJ No. 2013-FRSA-00082 (ARB June 21, 2018).

31 Order Denying in Part Complainant's Motion to Amend Complaint.

32 D. O. R. at 20.

follows: (1) ALJ Whang abused her discretion by denying his motion to amend his complaint; (2) ALJ Leslie made unsupported findings of fact and failed to credit ALJ Chapman's credibility findings, which undermined the resulting analysis;35 (3) ALJ Leslie failed to draw an adverse inference against BNSF for failing to call Thompson as a witness; (4) ALJ Leslie failed to take notice of facts in other cases involving BNSF; (5) ALJ Leslie mischaracterized the roles played by certain managers in his discharge; and (6) ALJ Leslie imposed incorrect legal burdens and failed to find retaliatory motive.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue agency decisions under the FRSA.36 The Board will affirm the ALJ's factual findings if supported by substantial evidence but reviews all conclusions of law de novo.37 Substantial evidence is "such relevant evidence as a reasonable

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33 Id.

34 *See* Complainant Clyde Carter's Petition for Review on Remand (Petition for Review).

35 Carter's appeal briefs contain several arguments regarding alleged errors in ALJ Leslie's factual

findings. After careful review of the petition and briefs, we have identified the following factual findings that Carter takes issue with: (1) Heenan terminated Carter's employment, not Sherrill (Complainant's Brief at 9-10); (2) BNSF incentivized retaliation by linking managers' performance reviews and compensation to the number of on-the-job injuries reported (*id.* at 3-4, 13-16); (3) Thompson decided to discharge Carter in retaliation for the 2007 injury report (*id.* at 10); and (4) Carter arrived to work on time on February 5, 2012 (*id.* at 23). Although Carter does not clearly articulate how each of these factual findings undermines the ALJ's legal analysis, they are all findings that supported the ALJ's analysis that Carter's 2007 injury report was not a contributing factor in BNSF's decision to terminate his employment in 2012 and that BNSF would have made the same decision to dismiss Carter absent any protected activity.

36 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

37 29 C.F.R. § 1982.110(b); *Austin v. BNSF Ry. Co.*, ARB No. 2017-0024, ALJ No. 2016-FRS-00013, slip op. at 7 (ARB Mar. 11, 2019) (citation omitted).

38 *McCarty v. Union Pac. R.R. Co.*, ARB No. 2018-0016, ALJ No. 2016-FRS-00066, slip op. at 3 (ARB Sept. 23, 2020) (quoting *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019); mind might accept as adequate to support a conclusion."38 The Board has held that an ALJ's factual

findings will be upheld where supported by substantial evidence even if we "would justifiably have made a different choice had the matter been before us *de novo*."39 The ARB reviews an ALJ's procedural and evidentiary rulings for abuse of discretion.40

DISCUSSION

Carter's FRSA-Protected Conduct Did Not Contribute to His Employment Termination

The FRSA prohibits a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith protected activity.41 To prevail on an FRSA retaliation complaint, a complainant must prove by preponderance of the evidence that: (1) he engaged in protected activity; (2) his employer took an adverse employment action against him; and (3) the protected activity was a contributing factor in the unfavorable personnel action.42 If the complainant successfully proves that the protected conduct was a contributing factor, the

employer may avoid liability by proving, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the protected activity.43

Carter established the first two elements of his claim: he engaged in protected activity when he reported his workplace injury in 200744 and he suffered

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38 Mercier v. U.S. Dep't of Labor, Admin. Rev. Bd., 850 F.3d 382, 388 (8th Cir. 2017) (quoting *Gonzales v. Barnhart*, 465 F.3d 26 890, 894 (8th Cir. 2006)).

39 *Henrich v. Ecolab, Inc.*, ARB No. 2005-0030, ALJ No. 2004-SOX-00051, slip op. at 8 (ARB June 29, 2006) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

40 *See Chambers v. BNSF*, ARB No. 2019-0074, ALJ No. 2018-FRS-00086, slip op. at 6 n.24 (ARB Mar. 5, 2021) (per curiam); *Bechtel v. Competitive Techs., Inc.*, ARB No. 2009-0052, ALJ No. 2005-SOX-00033, slip op. at 19 (ARB Sept. 30, 2011).

41 49 U.S.C. § 20109(a).

42 49 U.S.C. § 20109(d)(2), incorporating the burdens of proof set forth in 49 U.S.C. § 42121(b); *Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 2014-0047, ALJ No. 2013-FRS-00035, slip op. at 5 (ARB Nov. 24, 2015) (citing 49 U.S.C. § 42121(b)(2)(B)(iii)).

43 *Fricka*, ARB No. 2014-0047, slip op. at 5 (citing 49 U.S.C. § 42121(b)(2)(B)(iv)). Per the Eighth Circuit and ARB's remand instructions, ALJ Leslie did not apply the "chain-of-events causation" analysis when she ruled on this case.

44 Regarding Complainant's assertion that his 2008 FELA claim constituted additional protected activity, see discussion at Section 3.A below.

FRSA-Protected Conduct Did Not Contribute to His Employment Termination

The FRSA prohibits a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith protected activity.41 To prevail on an FRSA retaliation complaint, a complainant must prove by preponderance of the evidence that: (1) he engaged in protected activity; (2) his employer took an adverse employment action against him; and (3) the protected activity was a contributing factor in the unfavorable personnel action.42 If the complainant successfully proves that the protected conduct was a contributing factor, the employer may avoid liability by proving, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the protected activity.43

Carter established the first two elements of his claim: he engaged in protected activity when he reported his workplace injury in 200744 and he suffered 8 adverse employment action when his employment was terminated in 2012.45 This case turns on the third required element of the claim: whether Carter's protected activity was a contributing factor with respect to his termination.

A "contributing factor" includes "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the [adverse] decision."46 While this element can be established by either direct or circumstantial evidence,47 it must be established. Carter failed to establish this element of his claim. BNSF fired Carter over four years after he reported his injury. We agree with ALJ Leslie's conclusion that the lack of temporal proximity between the injury and the discharge supports a conclusion that Carter was fired for his dishonesty which BNSF discovered in 2012.48 As we have noted in prior cases, "the probative-value of temporal proximity decreases as the time gap between protected activity and adverse action lengthens, particularly when other precipitating events have

occurred closer to the time of the unfavorable action."[49]

While there are several factual assertions by both parties that are contradicted by the record,[50] the Eighth Circuit noted that the "critical inquiry" in

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when BNSF fired him." *See BNSF Ry. Co. v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 867 F.3d at 945.

46 *Id.* (quoting *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017)).

47 *DeFrancesco v. Union R.R. Co.*, ARB No. 2010-0114, ALJ No. 2009-FRS-00009, slip op. at 6-7 (ARB Feb. 29, 2012).

48 D. O. R. at 14 ("The fact that Respondents fired Mr. Carter over four years after the injury, and two years after the FELA deposition, weighs against a finding of retaliatory motive. The lack of temporal proximity supports a conclusion that Mr. Carter was fired for dishonesty as his termination occurred after this discovery, and . . . not the work injury of four years prior.").

49 *Brucker v. BNSF Ry. Co.*, ARB Nos. 2018-0067, -0068, ALJ No. 2013-FRS-00070, slip op. at 9 (ARB Nov. 5, 2020); *see also Tyler v. Univ. of Arkansas Bd. of Trustees*, 628 F.3d 980, 986 (8th Cir. 2011) ("As more time passes between the protected conduct and the retaliatory act, the inference of retaliation becomes weaker and requires stronger alternate evidence of causation." (citations omitted)).

50 For example, there is conflicting evidence regarding Murray's assertion that Carter was on probation for absenteeism. *See* D. & O. at 31 n.18. And former Mayor Emanuel

this case is whether BNSF "in good faith believed that the employee was guilty of the conduct justifying discharge."51 The record supports ALJ Leslie's conclusion that BNSF believed Carter was guilty of several acts of dishonesty which, when discovered, resulted in the termination of his employment in accordance with workplace policies. The ALJ thoroughly discussed the evidence in the record in support of her determination that Carter failed to meet his burden of proving by a preponderance of the evidence that his FRSA-protected activity contributed to his discharge. We affirm that determination.

A. Carter Was Dishonest on His Application for Employment

The record supports ALJ Leslie's finding that Carter engaged in dishonesty when he applied for a position at BNSF. The employment application informed applicants that omissions or misrepresentations would be grounds for dismissal at any time.52 Carter checked "no" on the application where it asked if he had missed more than two days of work due to illness, injury, hospitalization or surgery as well as where it asked if he had experienced any other surgeries, back injuries, or back pain.53 The record established that Carter had failed to disclose three injuries, one of which required surgery.54 Although Carter testified as to his explanations for

why he checked "no" to these questions and ALJ Leslie found that his testimony regarding the completion of his application was credible, she also found that it did not "negate the fact that he did check off 'no.'"55

Carter was also required to disclose his complete military history on the application but failed to do so. BNSF introduced evidence at the investigative hearing that Carter omitted his naval history from his employment application. Carter attempted to defend this omission by arguing that he had "top secret clearance."56 The fact that he had disclosed his Army career, which he also asserted was top secret, weighed against his argument that he had not been dishonest by failing to disclose his complete record of military service.57

Cleaver did not change Carter's "other than honorable" discharge to an "honorable discharge. *See* D. O. R. at 5. However, such inconsistencies do not change the fact that Carter committed at least one offense that was grounds for discharge.

51 *BNSF Ry. Co. v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 867 F.3d at 947-48 (quoting *Gunderson*, 850 F.3d at 969).

52 D. O. R. at 7-8.

53 *Id.* at 18.

54 Id.

55 D. O. R. at 18.

56 *Id.* at 7, 19 n.30.

57 *Id.* at 19.

Reviewing the complete record, ALJ Leslie found that Carter was dishonest on his application for employment in 2005. We agree that this finding is supported by substantial evidence.

B. Carter Was Dishonest About Clocking in on February 9, 2021

According to evidence in the record, Tom Murray (Murray), a BNSF supervisor, conducted a timekeeping review on February 9, 2012, and noticed that Carter had failed to clock in on February 5, 2012. Murray asked Carter to provide a written statement about his failure to clock in.58 Carter submitted two written statements indicating that he arrived at work on time, but a security video contained a time stamp indicating that Carter arrived after his shift was scheduled to begin.59

58 *Id.* at 9; *see also* Tr. 111, 166-67.

59 D. O. R. at 12.

60 Id.

The record supports ALJ Leslie's finding that Carter clocked in late to work on the date in

question.60 The record further supports the ALJ's determination that Carter provided conflicting statements at the investigative hearing about his attendance, and these statements led to BNSF's conclusion that Carter was being dishonest.61 Carter indicated that he was unsure whether he had clocked in on time, was confused about the date in question, was late because he had been dealing with his wife's health issues, and got stuck behind a transportation van.62 Based on the complete record, we agree with ALJ Leslie's conclusion that BNSF "had a sincere belief that Mr. Carter was in fact late and was dishonest in reporting his time on February 5, 2012."63

ALJ Leslie's finding about Carter's attendance is supported by substantial evidence. BNSF fired Carter for his dishonesty, and Carter failed to prove that his FRSA-protected conduct was a contributing factor in his discharge.

58 *Id.* at 9; *see also* Tr. 111, 166-67.
59 D. O. R. at 12.
60 *Id.* at 18.
61 *Id.* at 12 ("I find that based on his review, Mr. Heenan believed Mr. Carter was a dishonest individual and found it noteworthy that Mr. Carter

had multiple opportunities to clear the record and did not.").

62 D. & O. at 33; *see also* RX 7.

63 D. O. R. at 19.

C. BNSF Did Not Target Carter for Discharge

Carter argues that he was targeted for discharge because of his 2007 protected activity.64 The only evidence Carter provided to support this claim was his own testimony and that of Larry Lee Mills (Mills), another former BNSF employee. ALJ Leslie did not find either of their testimony persuasive. She found that Carter's assertion that managers colluded to fire him was contradicted by the evidence showing that BNSF managers were performing their jobs pursuant to the PEPA.65

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64 Complainant's Brief at 4, 7-8.

65 D. O. R. at 16.

66 Id.

67 Id.

68 Complainant's Brief at 13-16 (citing *Blackorby v. BNSF Ry. Co.*, 849 F.3d 716 (8th Cir. 2017), and *Wooten v. BNSF Ry. Co.*, 2018 WL 2417858 (D. Mont. 2018) (not reported)).

69 *Wooten v. BNSF Ry. Co.*, 2018 WL 2417858 at *5.

70 *Blackorby*, 849 F. 3d at 722.

71 We review the ALJ's decision not to take judicial notice for abuse of discretion. *See Cravens v. Smith*, 610 F.3d 1019, 1029 (8th Cir. 2010). We note that Carter did not ask ALJ

We review the ALJ's decision not to take judicial notice for abuse of discretion. *See Cravens v. Smith*, 610 F.3d 1019, 1029 (8th Cir. 2010). We note that Carter did not ask ALJ Leslie to take judicial notice of the facts in *Blackorby*, and so has waived that argument on appeal. *See, e.g., Sandra Lee Bart*, ARB No. 2018-0004, ALJ No. 2017-TAE-00014, slip op. at 4-5 (ARB Sept. 22, 2020) ("Under our well-established precedent, we decline to consider arguments that a party raises for the first time on appeal.").

The ALJ did not give any weight to the testimony of Mills and questioned his credibility because he had been fired by BNSF and his testimony, given after his firing, was inconsistent with that of McNaul, Thomas, and Sherrill.66 Further, the ALJ found credible Sherrill's testimony

that he did not target Carter, never had any phone conversations wherein he said he was going to "get Carter," but instead based his decision as hearing officer solely on his finding of Carter's dishonesty and not on Carter's prior protected activity.67

To counter the ALJ's determination, Carter argues that ALJ Leslie abused her discretion by declining to take judicial notice of the facts in *Wooten v. BNSF Ry. Co.*, and *Blackorby v. BNSF Ry. Co.* to establish that BNSF utilized a "bonus program" that incentivized retaliation against employees who filed injury reports.68 In *Wooten*, the court noted that "BNSF may have incentivized retaliation by managers and supervisors by linking their individual performance reviews to the number of on-the-job injuries reported."69 In *Blackorby* the court noted that "BNSF stipulated, moreover, that managers may earn bonuses based on the rates of employee injuries—one of the very concerns examined by Congress before incorporating the contributing-factor standard into the FRSA."70 Carter asks the Board to take notice of the facts of both cases regarding the bonus program.71

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64 Complainant's Brief at 4, 7-8.
65 D. O. R. at 16.
66 Id.
67 Id.
68 Complainant's Brief at 13-16 (citing *Blackorby v. BNSF Ry. Co.*, 849 F.3d 716 (8th Cir. 2017), and *Wooten v. BNSF Ry. Co.*, 2018 WL 2417858 (D. Mont. 2018) (not reported)).
69 *Wooten v. BNSF Ry. Co.*, 2018 WL 2417858 at *5.
70 *Blackorby*, 849 F. 3d at 722.
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Under 29 C.F.R. § 18.201, an ALJ may take official notice of adjudicative facts generally known within a local area or capable of accurate determination by sources whose accuracy cannot be reasonably questioned. The rule defines adjudicative facts subject to judicial notice as follows:
(b) Kinds of facts. An officially noticed fact must be one not subject to reasonable dispute in that it is either: (1) Generally known within the local area, (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, or (3) Derived from a not reasonably

questioned scientific, medical or other technical process, technique, principle, or explanatory theory within the administrative agency's specialized field of knowledge.72

We have previously held that documents may be judicially noticed to show, for example, that a proceeding occurred or that a document was filed in another court case, but an ALJ cannot take judicial notice of findings of fact from another case to support a contention before it.73 Likewise, the Eighth Circuit has held that courts "should not use the doctrine of judicial notice to go outside the record unless the facts are matters of common knowledge or are capable of certain verification."74 Thus, ALJ Leslie correctly determined that she could not take judicial notice of the facts in *Wooten*, and we refuse to do so with respect to *Blackorby*.

Even if ALJ Leslie had chosen to take judicial notice of the existence of bonus policies in *Blackorby* or *Wooten,* those facts would have been irrelevant to the determination in Carter's case. Carter would have needed to present evidence that, between 2007 and 2012, BNSF had a bonus policy in place that encouraged *his* supervisors to retaliate against him for his 2007 injury report. The testimony in the record on this point from BNSF's witnesses specifically disputed this assertion and Carter did not present any evidence to establish that any bonus policy served as an incentive for the decision-makers in his case to terminate his employment.

Based on these findings, ALJ Leslie concluded that the weight of the evidence did not support Carter's assertion that BNSF targeted him for termination in 2012

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72 29 C.F.R. § 18.201(b).
73 *See, e.g., Adm'r, Wage & Hour Div. v. Global Horizons Manpower, Inc.*, ARB No. 2009-0016, ALJ No. 2008-TAE-00003, slip op. at 14 (ARB Dec. 21, 2010).
74 *Am. Prairie Constr. Co. v. Hoich*, 560 F.3d 780, 798 (8th Cir. 2009) (citing *Alvary v. United States*, 302 F.2d 790, 794 (2d Cir. 1962)).

based on his injury report made four years earlier. We hold that ALJ Leslie's conclusion is supported by substantial evidence.

2. BNSF Would Have Fired Carter Even If He Had Not Engaged in FRSA-Protected Activity

If a complainant meets his burden of proof to establish that his protected activity contributed to adverse employment action, an employer may avoid liability by proving by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.75 As noted by the Eighth Circuit, "The critical inquiry in a pretext analysis is . . . whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge."76

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75 29 C.F.R. § 1982.109(b).
76 *BNSF Ry. Co. v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 867 F.3d at 947.

77 D. O. R. at 8, 18; *see also* RX 1, 2, and 6A at RX000236.
78 D. O. R. at 18.
79 Id. at 19.
80 Id.

In Carter's case, the record supports ALJ Leslie's conclusion that BNSF proved by clear and convincing evidence that it would have fired Carter in the absence of his protected activity. We affirm this conclusion as well.

BNSF's employment application indicated that omissions or misrepresentations would be sufficient cause for dismissal.77 As noted above, ALJ Leslie found that, while Carter's testimony regarding the reasons he completed his application as he did was credible, it did not "negate the fact that he did check off 'no' when asked if he had missed more than two days of work due to illness, injury, hospitalization or surgery, and when asked if he had any other surgeries, back injuries, or back pain."78 The ALJ also found that Carter's omission of any reference to his naval career from his employment application was dishonest.79

With respect to the time clock incident, ALJ Leslie found that BNSF had a "sincere belief" that Carter was dishonest in reporting his time on February 5, 2012. This determination is supported by substantial evidence in that there was video footage showing that Carter was late and his explanations of his actions on that day were inconsistent.80

McNaul submitted the investigative hearing records and Sherrill's findings to Heenan, whose responsibilities included ensuring disciplinary consistency. After reviewing the records, Heenan concluded substantial evidence supported Sherrill's findings and recommended terminating Carter's employment for dishonesty, a "stand-alone dismissible offense."81 BNSF sent Carter dismissal letters dated April 5 and April 16, 2012, terminating his employment for dishonesty.82

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81 *Id.* at 11-12.
82 *Id.* at 6.
83 Id. at 16-19.
84 *Jay v. Alcon Lab'ys, Inc.*, ARB No. 2008-0089, ALJ No. 2007-WPC-00002, slip op. at 4 (ARB Apr. 10, 2009) (denial of motion to amend complaint reviewed under abuse of discretion standard).
85 D. O. R. at 17.

Substantial evidence supports ALJ Leslie's conclusion that BNSF would have fired Carter even if he had not complained about his injury on August 30, 2007. ALJ Leslie concluded that both Heenan and Sherrill believed in good faith that Carter was guilty of dishonesty on his application and surrounding his untimely clocking-in on February 5, 2012, and that the notification of his injury or the FELA lawsuit played no part in their recommendations or the ultimate decision to terminate his employment.83

These conclusions are supported by substantial evidence in the record.

3. The ALJs Did Not Abuse Their Discretion or Commit Errors of Law in Making Procedural and Evidentiary Rulings

The Board reviews an ALJ's determinations on procedural issues and evidentiary rulings under an abuse of discretion standard.84 We conclude that ALJ Leslie did not abuse her discretion, or commit errors of law, in the matters raised by Carter in this appeal and addressed below.

A. Denial of Carter's Motion to Amend His Complaint Was Not an Abuse of Discretion

Carter filed his FRSA complaint with OSHA in 2012, identifying his protected conduct as his 2007 report of a workplace injury. On appeal, Carter argues that he should have been allowed to amend his complaint in 2019 to add his 2008 FELA claim as an additional protected activity and therefore additional grounds for retaliatory conduct, and to add a claim that BNSF interfered with his medical treatment in 2007. ALJ Whang denied Complainant's motion to amend and, on remand, ALJ Leslie addressed whether the FELA claim provided sufficient notice of protected activity to relevant decision-makers.85 We disagree with Complainant's assertion of error and conclude that the motion to amend was properly denied.

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81 *Id.* at 11-12.

82 *Id.* at 6.

83 Id. at 16-19.

84 *Jay v. Alcon Lab'ys, Inc.*, ARB No. 2008-0089, ALJ No. 2007-WPC-00002, slip op. at 4 (ARB Apr. 10, 2009) (denial of motion to amend complaint reviewed under abuse of discretion standard).

85 D. O. R. at 17.

Carter filed his FELA claim nine months after his 2007 injury report.86 The Eighth Circuit has already noted in this case that the FRSA may protect a notice of injury made in the course of FELA litigation, but it does not protect the FELA litigation itself.87 To qualify as protected activity, Carter needed to prove that his FELA claim provided BNSF with "more specific notification" of his original injury report.88 The record supports ALJ Leslie's finding that Thompson knew about Carter's 2007 injury on the day it occurred and learned nothing new about the injury from the FELA litigation that would qualify the litigation itself as an additional FRSA-protected activity.89 We therefore agree with the conclusion that Carter's FELA claim does not constitute a separate FRSA-protected activity.

Carter's claim that BNSF interfered with his medical treatment in 2007 is barred by FRSA's statute of limitations because he did not file his OSHA complaint until 2012.90 As an amendment to add either the time barred claim or a claim based on his FELA litigation would be futile, it was not an abuse of discretion to deny Carter's motion to amend.

B. ALJ Leslie Made Sufficient Credibility Determinations

Carter argues on appeal that ALJ Leslie erred by not considering the credibility determinations made by ALJ Chapman.91 The record does not support Carter's position. We remanded this matter to allow the ALJ to make specific findings of fact as directed by the Eighth Circuit. ALJ Leslie adopted ALJ Chapman's credibility determinations where

appropriate while also making her own credibility determinations as instructed by the Board and the Eighth Circuit.

ALJ Leslie acknowledged that ALJ Chapman characterized some of BNSF's arguments as "disingenuous,"92 and adopted the determination that Carter was a credible witness even though Carter's testimony was inconsistent on crucial points. She also made her own specific credibility determinations. She described Heenan's

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86 *Id.; see also* RX 28.

87 *BNSF Ry. Co. v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 867 F.3d at 948 (citing *LeDure v. BNSF Ry. Co.*, ARB No. 2013-0044, ALJ No. 2012-FRS-00020 (ARB June 2, 2015)).

88 Id.

89 D. O. R. at 37, 40 n.21.

90 *Id.* at 1.

91 Complainant's Brief at 4, 16-18.

92 D. O. R. at 5.

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testimony as informative, uncontested, and credible.93 In contrast, she found that Mills, the only person Carter called to provide testimony that Carter was targeted for discharge, was not a credible witness.94 Therefore, ALJ Leslie made sufficient and supported credibility determinations as required and did not abuse her discretion in so doing.

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93 Id.

94 *Id.* at 16.

95 Id. at 4.

96 Id. at 12.

97 *New World Commc'ns v. NLRB*, 232 F.3d 943, 946 (8th Cir. 2000) (citing *Rockingham Machine-Lunex v. NLRB*, 665 F.2d 303, 305 (8th Cir. 1981)).
98 D. O. R. at 16 n.24.
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C. ALJ Leslie Did Not Err in Refusing to Draw an Adverse Inference Against BNSF for Not Calling Thompson as a Witness

Carter argues that ALJ Leslie erred as a matter of law by refusing to "find an adverse inference against BNSF for not calling" Thompson to testify.95 He asserts that "ALJ Leslie should have recognized that not calling Thompson, (who next to Carter is the most probative witness in the trial of Carter's Complaint), is circumstantial proof of an inference that the notification(s) of injury were contributing factors in Carter's two dismissals."96 While the argument is creative, it is not supported by the law. The Eighth Circuit has held that "the inference rule 'permits an adverse inference to be drawn; it does not create a conclusive presumption against the party failing to call the witness.'" 97 ALJ Leslie correctly held that there was nothing preventing Carter himself from calling Thompson.98 More directly important, ALJ Leslie properly determined that establishing that protected activity was a contributing factor was Complainant's burden to prove by a preponderance of the evidence, which he failed to do.99

D. ALJ Leslie Did Not Harmfully Mischaracterize Heenan's Role in Carter's Discharge

In concluding that BNSF would have fired Carter in the absence of his protected activity, ALJ Leslie emphasized the role Heenan played in Carter's discharge:

I find persuasive Mr. Heenan's testimony on this point as it establishes, with reasonable certainty, that he fired Mr. Carter for reasons other than FRSA protected activity, his injury. He did not know of the injury or FELA lawsuit nor was his motive in firing Mr. Carter in any way related to his FRSA protected activity. He fired Mr. Carter after looking at all the evidence presented to him, including dishonesty on his application and in clocking in. Mr. Heenan also noted other employees who were fired because of being dishonest on their application, similar to Mr. Carter. As I stated above, I find his testimony to be credible as it is consistent with the other testimony and evidence submitted, including Respondent's PEPA policy.100

100 Id. at 19.

101 Complainant's Brief at 9-10

Carter argues that ALJ Leslie erred by ruling that Heenan, and not Sherrill, discharged him.101 But even if it is erroneous to state that Heenan "fired" Carter, such mistake does not change the essential facts that led to Carter's discharge. Although he did not sign the discharge letters, Heenan was the person ultimately responsible for reviewing Sherrill's recommended action in light of the investigation files and making a recommendation of dismissal in accordance with the dictates of the PEPA policy. Therefore, while references to Heenan's "firing" Carter may more accurately have been stated as "making the final recommendation for firing Carter," any statement in ALJ Leslie's decision that describes

Heenan as the person who "fired" Carter does not constitute reversible error.

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100 Id. at 19.
101 Complainant's Brief at 9-10.

CONCLUSION

For the reasons stated above, we **AFFIRM** ALJ Leslie's conclusion that BNSF did not violate the FRSA by terminating Carter's employment. Accordingly, Carter's complaint is **DENIED**.
SO ORDERED.102
102 In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor, and not the Administrative Review Board.

SUSAN HARTHILL
Chief Administrative Appeals Judge

THOMAS H. BURRELL
Administrative Appeals Judge

TAMMY L. PUST
Administrative Appeals Judge