

FRSA Whistleblower Scores Win Despite Possible Wrongdoing

By [Colleen E. Coveney](#)

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The following scenario should be familiar to railroad employees: An employee sustains a workplace injury; the employee reports the workplace injury to the railroad; the railroad conducts an investigation into the injury; the railroad concludes that the employee's statements about the injury are false or misleading; and the railroad fires the employee for the allegedly false or misleading report.

On its face, this scenario presents an innocuous for-cause termination. And while that may often be the case, a recent decision from the United States Court of Appeals for the 10th Circuit illustrates circumstances under which such conduct can also constitute unlawful retaliation in violation of the Federal Railroad Safety Act (FRSA) and other whistleblower statutes.

The Facts of the FRSA Whistleblower Case

In *BNSF R. Co. v. U.S. Dept. of Labor*, --- F. 3d ---, 2016 WL 861101 (10th Cir. 2016), the complainant, Christopher Cain, sustained injuries on Jan. 27, 2010, as a result of an on-the-job car accident. Immediately following the accident, Mr. Cain promptly filed a BNSF Injury Report and notified his supervisor of his injuries, as required by BNSF policy. A couple weeks later, Mr. Cain experienced chest pains, which a doctor diagnosed as a rib fracture and excess fluid around his lungs. At the time, Mr. Cain claimed he did not know whether the accident or a pre-existing respiratory condition caused the fracture and lung fluid and therefore did not update the BNSF Injury Report at this time. Approximately one month later, on April 8, 2010, after Mr. Cain's doctor concluded that his on-the-job car accident caused his rib and lung injuries, Mr. Cain amended his BNSF Injury Report to reflect these injuries, despite being discouraged by two supervisors from doing so.

Within a few weeks of updating his BNSF Injury Report, BNSF commenced an investigation into whether Mr. Cain violated company rules by the late reporting of his injuries and medical treatment. BNSF conducted this investigation alongside a previous investigation it had initiated into whether Mr. Cain violated its rules on safe driving. On June 2, 2010, BNSF concluded that Mr. Cain had violated its rules associated with safe driving, suspended him for 30 days, and placed him on probation for three years, during which time BNSF reserved the right to terminate Mr. Cain for any further rules violation. Six days later, on June 8, 2010, BNSF terminated Mr. Cain's employment for failing to report the extent of injuries in a prompt manner and thereby violating the probation it had retroactively applied per the June 2 discipline findings.

Following his termination, Mr. Cain filed a claim under the FRSA, which prohibits retaliation against railroad employees who report on the job injuries or related medical treatment to the railroad. He alleged that his Jan. 27 and April 8 Injury Reports were contributing factors in BNSF's decision to terminate him. Both the Department of Labor administrative law judge (ALJ) and Administrative Review Board (ARB) agreed, finding that Mr. Cain had engaged in protected activity when he filed the Jan. 27 and April 8 Injury Reports and that these reports contributed to BNSF's decision to terminate

him.

The ALJ ordered BNSF to pay Mr. Cain back pay and the maximum punitive damages permitted under the FRSA, \$250,000. The ARB upheld the ALJ's findings but reduced the back pay based on the parties' stipulations as to amount and cut the punitive award in half. BNSF petitioned the 10th Circuit for review of the ARB's decision.

Contributing Factors in Whistleblower Termination

Among the central questions before the 10th Circuit was whether Mr. Cain's April 8 updated Injury Report was a "contributing factor" in his termination. BNSF argued that it was not, asserting instead that it terminated Mr. Cain for valid reasons, namely because he had violated the company's rules regarding prompt reporting of workplace injuries.

The 10th Circuit agreed with the ALJ and the ARB that the April 8 report was a [contributing factor](#) in Mr. Cain's termination. While the court did not delineate a test to assess the "contributing factor" standard in cases such as this, its discussion of the facts relevant to its findings in Mr. Cain's case is illustrative:

Not surprisingly, the court first took particular note of the short temporal proximity between Mr. Cain's filing of his updated Injury Report and his termination. This factor is almost always relevant in retaliation cases and is especially determinative in cases such as these, where the temporal proximity between the protected activity and adverse action is very short in time.

In addition, the court also found it relevant that the "investigation that led to the firing was initiated before the investigation of whether he was responsible for the accident."

Finally, the court found it especially important that the ALJ credited Mr. Cain's account that his supervisors had discouraged him from filing the updated BNSF Injury Report on April 8 and "hinted darkly at unfavorable consequences if he did."

While the court did not say so expressly, these facts suggest an improper motive on the part of BNSF, which casts doubt on its contention that the termination was undertaken for legitimate reasons. Indeed, the court later observed that it was "[o]nly after Cain filed the updated Report did BNSF begin investigating (and ultimately fire) Cain for allegedly delaying the reporting of his full injuries sustained in the accident."

A Win for Whistleblowers

Although the 10th Circuit ultimately upheld the Labor Department's finding that Mr. Cain's injury report contributed to his termination, it was careful to limit its holding. According to the court, Mr. Cain's termination presented a unique fact pattern, whereby his protected activity revealed his own potential wrongdoing that could have justified his termination. Appreciating that a broad holding in cases such as these may open the door for employees to try to, as BSNF argued, "immunize themselves against wrongdoing by disclosing it in a protected activity report," the Court emphasized that in circumstances such as these, the employee cannot satisfy the contributing-factor standard merely by arguing that the employer would not have known of the employee's wrongdoing absent his protected activity. Fortunately for Mr. Cain, the court found that he had shown more than "his updated Report's loosely leading to his firing" and upheld the ARB's finding that Mr. Cain's protected activity was a contributing factor in BSNF's decision to terminate him.

Though the 10th Circuit's holding rejected some of the more employee-friendly language that has been floating around the United States Department of Labor in recent years, its holding is nevertheless important for whistleblowers who engage in protected activity that also implicates wrongdoing on their part. By upholding the ARB's finding that Mr. Cain's April 8 report was a contributing factor in his termination (exposure of his potential wrongdoing notwithstanding), the

court's holding ensured that employees who legitimately face retaliation for engaging in protected activity that implicates wrongdoing on their part are protected against retaliation. This is significant not just for railroad employees, but also for employees who seek protection under any of the 11 whistleblower statutes administered by the United States Occupational Health and Safety Administration that employ a "contributing factor" standard of causation. Though not exhaustive, examples of such whistleblower statutes include the [Energy Reorganization Act](#), the [Wendell H. Ford Aviation Investment and Reform Act for the 21st Century](#), the [Sarbanes-Oxley Act of 2002](#), and the [Consumer Financial Protection Act of 2010](#).