

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
WESTERN DIVISION**

---

THOMAS LAHART,  
Plaintiff,  
vs.

No. 4:15-cv-00464-JAJ

BNSF RAILWAY COMPANY,  
Defendant.

**ORDER**

---

This matter comes before the Court pursuant to Defendant's March 23, 2017 Motion for Summary Judgment under Federal Rule of Civil Procedure 56. [Dkt. No. 41] Plaintiff filed a Motion for Partial Summary Judgment on March 23, 2017 and resisted Defendant's motion on April 13, 2017. [Dkt. Nos. 43, 48] Defendant replied to the resistance on April 20, 2017. [Dkt. No. 51] For the reasons that follow, Defendant's Motion for Summary Judgment is **DENIED** as to Count I (the FRSA claim), **GRANTED** as to Count II (the FELA claim), and Plaintiff's Motion for Partial Summary Judgment is **DENIED**.

**I. STATEMENT OF UNDISPUTED MATERIAL FACTS<sup>1</sup>**

Defendant BNSF Railway Company ("BNSF") is a railroad corporation doing business in the state of Iowa. BNSF operates a railroad system as a common carrier of freight in and though the country. At the time of the incident in question, plaintiff Thomas Lahart ("Lahart") was employed by BNSF as a conductor/switchman.<sup>2</sup> Lahart had been trained on the General Code of Operating Rules and TY&E Safety Rules and was expected to follow the rules. On February 21, 2014, Lahart and another BNSF employee, Steve Shryack ("Shryack"), were working at a BNSF railroad facility in Ottumwa, Iowa. At the time, Trainmasters Eric Campbell ("Campbell") and Jim Oliver ("Oliver") were on site, observing employees for compliance with operational and safety rules and conducting operations testing. Lahart was aware that Campbell and Oliver were

---

<sup>1</sup> Disputed facts are noted as necessary for later analysis.

<sup>2</sup> Unless otherwise noted, the following undisputed facts are taken from Docket Number 48-1, Plaintiff's Response to Defendant's Statement of Material Facts in Support of Its Motion for Summary Judgment, or Docket Number 52-2, Defendant's Response to Plaintiff's Proposed Material Facts. These undisputed facts were stated by one party and admitted by the other party.

observing his work.

In the course of his duties on that day, Lahart operated a “Winger switch” by “throwing” it at least twice. BNSF Track Inspector Mike Gilbert (“Gilbert”) conducted monthly inspections of the switches. At the most recent prior inspection, on January 23, 2014, Gilbert recorded that this switch had no defects.<sup>3</sup> Before throwing it the first time, Lahart inspected it and found no issues that would cause the switch to catch or prevent it from moving properly. Lahart operated the switch; it is undisputed that the switch did not operate normally and “caught” some of the way through its movement cycle. It is also undisputed that when the switch abruptly stopped, Lahart’s legs gave out a little and he slid because of the muddy conditions. Lahart heard a pop in his back or shoulder. Lahart admits that after operating the switch, he “determined that it was just needing oil and that should fix it,” and that he radioed Campbell to tell him the switch needed oil. He did not report any kind of injury at the time he radioed Campbell, and he threw the switch a second time without incident. After throwing it the second time, Lahart did not “tag it out” or report the switch as defective.

Campbell and Oliver testified that on the same day, they observed Lahart going between still-moving equipment,<sup>4</sup> which is severe rule violation called a “deadly decision,” and that they discussed this rule violation with Lahart immediately after it occurred. Lahart admits that he, Campbell, Oliver, and Shryack had a conversation in the office about radio communications between Lahart and Shryack. Beyond that, much of the content of the conversation is disputed. Oliver testified: (1) that Lahart was informed of the rule violation during the conversation in the office;<sup>5</sup> (2) that after being informed of the rule violation, Lahart cursed, slammed his fist on a table, and said he needed a personal injury report;<sup>6</sup> (3) that Lahart said, “something to the effect that, ‘if you’re going to pull this shit, I’m going to file a personal injury;’”<sup>7</sup> and (4) that Oliver did not observe Lahart displaying any signs of physical discomfort or injury.<sup>8</sup> Lahart denies the content

---

<sup>3</sup> At deposition, Gilbert testified that he could not recall inspecting that particular switch on that particular day at the beginning of 2014. As such, his recollection does not match BNSF records of the inspection. To the extent there is any conflict between these statements, the Court notes that the BNSF records reflect Gilbert’s contemporaneous observation of the switch, whereas the deposition was held years after the investigation.

<sup>4</sup> Dkt. No. 48-1 ¶ 21 (App. 39 at 50:20-51:15; App. 41 at 60:2-3; App. 42 at 70:10-15; App. 59 and 60 at 26:16-27:10; App. 72 at 50:19-22).

<sup>5</sup> Dkt. No. 48-1 ¶ 26 (App. 62 at 31:14-17; App. 46 at 22:15-20).

<sup>6</sup> Dkt. No. 48-1 ¶ 27 (App. 62, 63 and 64 at 31:18-33:1; App. 68 and 69 at 39:21-40:11; App. 97 at 19:8-18, App. 98 at 20:1-6; App. 101 at 45:18-26).

<sup>7</sup> Dkt. No. 48-1 ¶ 28 (App. 73 and 74 at 63:24-64:2; App. 97 at 19:8-18; App. 98 at 20:1-6; *see also* App. 101 at 45:18-26).

<sup>8</sup> Dkt. No. 48-1 ¶ 32 (App. 65 and 66 at 35:15-36:19; App. 100 at 22:4-14).

of Oliver's testimony and testified: (1) that he was never belligerent nor did he curse;<sup>9</sup> (2) that he did not say the sentence in quotation marks above;<sup>10</sup> (3) he did not move between still-moving equipment;<sup>11</sup> and (4) that Oliver did not discuss rule compliance with him during the office conversation.<sup>12</sup>

During the conversation in the office, Lahart reported that he had injured himself while operating the switch, and BNSF called an ambulance for him. On February 24, 2014, BNSF notified Lahart it had scheduled an investigation of his "alleged failure to wait for movement to stop and slack adjust before going in between equipment (rail cars)" on the date of his injury. [Dkt. No. 41-2 ¶ 35; Dkt. No. 43-2 ¶ 2 (including Ex. B, the Charge Letter from BNSF)] On February 25, 2014, BNSF further notified Lahart that it had scheduled another investigation, this time "for the purpose of ascertaining the facts and determining [his] responsibility, if any, in connection with [his] alleged misrepresentation of an injury or late reporting of an injury" on February 21, 2014. [Dkt. No. 41-2 ¶ 36; Dkt. No. 43-2 ¶ 3 (including Ex. C, the Charge Letter from BNSF)] Lahart filled out a personal injury report on the incident during the first week in March, 2014.

Investigation hearings were held on April 2 and 3, 2014 regarding the movement allegation and the personal injury allegation, respectively. The Collective Bargaining Agreement between Lahart's union and BNSF governed the procedures for the investigation, including notice, content, and timing; Lahart was represented by his union representative, Jarrod Sammons. Lahart and Sammons had notice and opportunity to present witnesses and enter evidence.<sup>13</sup>

BNSF General Manager Janssen Thompson ("Thompson") reviewed all the testimony and exhibits from both hearings and concluded that substantial evidence supported the findings that on February 21, 2014: (1) Lahart failed to wait for movement to stop and lack to adjust before going in-between equipment in violation of BNSF Safety Rule S-13.11; and (2) Lahart misrepresented his injury in violation of General Code of Operating Rule 1.6, "Negligent, Dishonest, Quarrelsome, and Discourteous." Pursuant to BNSF's Policy for Employee Performance Accountability ("PEPA"), Thompson disciplined Lahart with a 30-day suspension for the Rule S-13.11 violation and dismissed Lahart for the violation of Rule 1.6. PEPA states that misrepresentation of an injury

---

<sup>9</sup> Dkt. No. 48-1 ¶ 27, Response (PL App. 2 at 14:5 – 17; PL App. 4 at 182:1– 10; BNSF App. 33 at 181:2 – 5; BNSF App. 46 at 25:13 – 15, 25:23 – 25).

<sup>10</sup> Dkt. No. 48-1 ¶ 28, Response (BNSF App. 33 at 180:23 – 181:1)

<sup>11</sup> Dkt. No. 48-1 ¶ 26, Response (BNSF App. 30 at 169:19–22, Dkt. No. 1 ¶ 12).

<sup>12</sup> *See id.*

<sup>13</sup> Discovery has included expert testimony regarding Lahart's alleged injury, emergency room visit, and prognosis.

and dishonesty are stand-alone dismissible offenses. After the conclusion of the investigation, Thompson asked BNSF Labor Relations to review the discipline and dismissal, and that group concluded: (1) Thompson's actions were consistent with PEPA; and (2) substantial evidence supported Thompson's conclusion that Lahart violated Rule 1.6. Lahart does not accuse Thompson of retaliation.

Lahart and his union had further opportunities for appeal and review of Thompson's decision and action. First, they appealed to the Assistant Vice-President of Labor Relations at BNSF, who denied the appeal and upheld the dismissal. Second, they appealed to the Public Law Board, which is an arbitration board, including at least one neutral party, established under the Railway Labor Act ("RLA"). The Public Law Board also denied Lahart's claim and upheld his dismissal. Finally, the Occupational Safety and Health Administration ("OSHA") found no reasonable cause to believe that BNSF violated the FRSA as to Lahart's allegations that he was dismissed in retaliation for a reporting a work-related injury.

## II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56 provides that a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *see also Med. Liab. Mut. Ins. Co. v. Alan Curtis L.L.C.*, 519 F.3d 466, 471 (8th Cir. 2008); *Kountze ex rel. Hitchcock Found. v. Gaines*, 536 F.3d 813, 817 (8th Cir. 2008) ("[S]ummary judgment is appropriate where the pleadings, discovery materials, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law."). In making this determination, the Court must examine the evidence in the light most favorable to the nonmoving party. *See HDC Med., Inc. v. Minntech Corp.*, 474 F.3d 543, 546 (8th Cir. 2007).

To survive a motion for summary judgment, a plaintiff must "set out specific facts showing a genuine issue for trial." FED. R. CIV. P. 56(e). "[A]n issue of material fact is genuine if the evidence is sufficient to allow a reasonable jury verdict for the nonmoving party." *Great Plains Real Estate Dev., L.L.C. v. Union Cent. Life Ins. et al.*, 536 F.3d 939, 944 (8th Cir. 2008) (internal citation omitted). "A genuine issue of fact is material if it 'might affect the outcome of the suit under the governing law.'" *Saffels v. Rice*, 40 F.3d 1546, 1550 (8th Cir. 1994) (internal citation omitted). "[T]he substantive law will identify which facts are material." *Guinan v. Boehringer Ingelheim Vetmedica, Inc.*, 803 F. Supp. 2d 984, 993 (N.D. Iowa 2011) (quoting *Anderson v.*

*Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). “The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 252.

### III. ANALYSIS

#### A. LAHART’S COMPLAINT AND BNSF’S ANSWER

Lahart’s Complaint is stated in two counts. Count I alleges that BNSF violated the Federal Railroad Safety Act (“FRSA”) by retaliating against him by firing Lahart for engaging in a protected activity, namely reporting an on-the-job injury. [Dkt. No. 1; *see also* 49 U.S.C. § 200109(a)(1)(C), (a)(4)] Lahart seeks: (1) reinstatement with his seniority and benefits unimpaired; (2) punitive damages of the statutory limit; (3) reimbursement for his legal fees and expenses as well as for compensatory and non-compensatory losses; (4) removal from BNSF’s employment files of any records related to the discipline at issue in this lawsuit and any reference to Lahart’s exercise of his rights under the FRSA; (5) the cessation of retribution against employees reporting unsafe working conditions and injuries and for BNSF to provide all employees with a copy of the FRSA Fact Sheet. *Id.*

Count II alleges that BNSF violated the Federal Employers’ Liability Act (“FELA”) by negligently and carelessly failing to provide Lahart with a safe place to work. [Dkt. No. 1; *see also* 45 U.S.C. § 51, et seq] Lahart alleges that BNSF committed one or more of the following negligent acts or omissions: (1) failed to adopt, install, implement, and enforce a safe method and procedure for the operation of switches, the periodic inspection of switches, and the maintenance and upkeep of switches; (2) failed to properly inspect maintain, and clean the switches such that their operation because hazardous; (3) failed to provide adequate and efficient equipment for the operation of the switches; (4) failed to properly inspect, maintain, and repair the switch described; (5) failed to properly warn Lahart the switch was defective; (6) failed to properly have safe and secure footing and ballast conditions in and around switches and/or walkway areas; and (7) otherwise failed to exercise ordinary care in providing Lahart a safe work environment. [Dkt. No. 1] Lahart alleges he suffered injuries as a result of BNSF’s negligence as just described, causing him suffering, inconvenience, anguish, and disability as well as medical, hospital, and related expenses. He seeks the sum of \$2,000,000 plus costs. *Id.*

BNSF filed an Answer denying all of the allegations in Lahart’s Complaint, except: (1) that Lahart was at one time an employee of BNSF; (2) Lahart’s mailing address; (3) that BNSF

was and is a railroad corporation authorized and doing business in Iowa including a railroad yard containing tracks and switches at or near Ottumwa, Iowa; (4) that BNSF operated the railroad system as a common carrier of freight; and (5) those constituting admissions against Lahart's interest. [Dkt. No. 10] BSNF asserted 22 affirmative defenses against Count I, including: failure to state a claim upon which relief can be granted; preemption by federal or Iowa law; exhaustion; statute of limitations; waiver, laches, and estoppel; failure to mitigate damages; election of remedies; prior release or agreement; misjoinder of claims; and general denial of any retaliation as well as of Lahart's engaging in any protected activity. *Id.* (including further detail and additional affirmative defenses). Additionally, BNSF asserted 17 affirmative defenses against Count II, including: failure to state a claim upon which relief can be granted; lack of causation on the part of BNSF; failure to mitigate damages; preemption by federal or Iowa law; statute of limitations; estoppel; entitlement to an off-set for monies paid to Lahart by other persons, corporations, or entities, including the Railroad Retirement Board; and misjoinder of claims. *Id.* (including further detail and additional affirmative defenses).

#### **B. SUMMARY JUDGMENT IS DENIED TO EITHER PARTY ON COUNT I**

The FRSA makes it unlawful for a railroad to discharge an employee for reporting, in good faith, a work-related personal injury. 49 U.S.C. § 20109(a)(4). To establish a prima facie case of FRSA retaliation, a plaintiff must prove: (1) he engaged in a protected activity in good faith; (2) the railroad was aware that he engaged in the good faith protected activity; (3) he suffered an adverse action; and (4) the circumstances raise an inference that the protected activity was a contributing factor in the adverse action. *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014) (citing 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. § 1982.104(e)(2)). If the plaintiff fails to meet the burden on any of the four elements, then the action must be dismissed. If the plaintiff meets the burden on all four elements, the FRSA provides the defendant with an affirmative defense. The railroad may defeat liability by showing, through clear and convincing evidence, that it would have taken the same adverse action even if the plaintiff had not engaged in the protected activity. *Id.* (citing 49 U.S.C. § 42121(b)(2)(B)(ii)).

The Eighth Circuit Court of Appeals has repeatedly "held that, under the FRSA's employee-protections provision, 'the contributing factor . . . an employee must prove is intentional retaliation prompted by the employee engaging in protected activity.'" *Heim v. BNSF Ry. Co.*, 849 F.3d 723, 727 (8th Cir. 2017) (quoting *Kuduk*, 768 F.3d at 791); *see also Blackorby v. BNSF Ry.*

*Co.*, 849 F.3d 716, 721–22 (8th Cir. 2017) (“[W]e are bound to follow *Kuduk*. . . . [W]e hold that the district court abused its discretion when it instructed the jury that Blackorby need not establish intentional retaliation.”). It is not enough that there is a factual connection between the timing of the injury report and that of the disciplinary action, the plaintiff “must demonstrate that BNSF’s discipline was at least in part, intentional retaliation prompted by his injury report.” While the court in *Kuduk* recognized there is a more lenient “contributing factor” standard in FRSA cases that increases somewhat the value of temporal proximity, it “rejected the notion . . . that temporal proximity, without more, is sufficient to establish a prima facie case.” *Id.* (quoting *Kuduk*, 768 F.3d at 792). The critical inquiry “is not whether the employee actually engaged in the conduct for which he was terminated, but whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge.” *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017) (quoting *McCullough v. Univ. of Ark. for Med. Scis.*, 559 F.3d 855, 861–62 (8th Cir. 2009)).

BNSF concedes that issues of fact preclude summary judgment on the first three elements of Lahart’s FRSA retaliation claim. The Court agrees and will focus its analysis on the fourth element required by the FRSA claim as well as BNSF’s affirmative defense. To prevail on its motion for summary judgment, BNSF must show either that there is no inference that Lahart’s injury report was a contributing factor in its decision to dismiss him or demonstrate by clear and convincing evidence it would have dismissed Lahart even if he had not reported an injury. To prevail on his partial motion for summary judgment, Lahart must show the undisputed facts raise an inference that his injury report was a contributing factor in BNSF’s decision to fire him.

Summary judgment is about undisputed facts. Here, the parties dispute large swaths of the narrative that are crucial to the resolution of the FRSA claim. Critically, there is directly contradictory testimony regarding: (1) whether Oliver and Campbell discussed the rule violation with Lahart during the conversation in the office; and (2) whether Lahart was belligerent and profane during the conversation in the office, including whether his filing of the injury report was in response to the threat of other disciplinary action. Even with the benefit of viewing the facts in the most favorable light to either party, neither BNSF nor Lahart can surmount the bar set by the summary judgment standard. First, the content of the conversation in the office, particularly Lahart’s statements, profanity, and behavior, bears directly on whether BNSF had a good faith belief that Lahart fraudulently reported an injury and whether Lahart has more than temporal

proximity to infer that his injury report was a contributing factor in his dismissal. Second, Rule 1.6 is called, “Negligent, Dishonest, Quarrelsome, and Discourteous,” and violations of the Rule are stand-alone dismissible offenses. If Lahart indeed reported an injury as a response to other threatened disciplinary action, or swore at Oliver and Campbell while acting belligerently, such action would give rise to BNSF’s affirmative defense. However, weighing the credibility of directly contradictory testimony on these matters is a responsibility for a jury. These remaining issues of disputed fact preclude the Court from granting summary judgment to either on the FRSA claim. Defendant’s Motion for Summary Judgment as to Count I is **DENIED**. Plaintiff’s Partial Motion for Summary Judgment is **DENIED**.

### C. SUMMARY JUDGMENT IS GRANTED TO DEFENDANT ON COUNT II

The FELA allows railroad employees a federal claim for injuries “resulting in whole or in part from the negligence” of the railroad. 45 U.S.C. § 51. Because the basis of the claim must be negligence, the plaintiff must prove traditional common law elements of negligence, including duty, breach, foreseeability, and causation. *See Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 544–45 (1994), *overruled in part on other grounds by Norfolk S. Ry. Co. v. Sorrell*, 127 S.Ct. 799 (2007), (quoting *Urie v. Thompson*, 337 U.S. 163, 174 (1949) (“[T]he Federal Employers’ Liability Act is founded on common-law concepts of negligence and injury, subject to qualifications as Congress has imported into those terms.”) (internal quotation marks omitted, alteration in original)). The FELA is not a worker’s compensation statute, and the railroad is not an insurer of worker’s safety. *See Inman v. Baltimore & O.R. Co.*, 361 U.S. 138, 140 (1959). However, “[i]t is well established that the quantum of evidence required to establish liability in an FELA case is much less than in an ordinary negligence action.” *Cowden v. BNSF Ry Co.*, 690 F.3d 884, 896 (8th Cir. 2012) (quoting *Harbin v. Burlington N. R.R. Co.*, 921 F.2d 129, 131 (7th Cir.1990)). With regard to foreseeability, “the Court reasoned that a defendant’s duty of care under FELA should be ‘measured by what a reasonably prudent person would anticipate as resulting from a particular condition.’” *Id.* (quoting *Gallick v. Baltimore*, 372 U.S. 108, 118 (1963)).

BNSF argues that it is entitled to summary judgment on this issue because it had no actual or constructive notice of the switch’s allegedly defective condition, and therefore could not have foreseen the possibility of Lahart’s injury. BNSF records establish that it conducted at least monthly track inspections. On the day of the incident, Lahart himself inspected the switch prior to operating it and found no defect and nothing that would prevent the switch from operating

normally. After he threw the switch for the first time, Lahart reported that the switch needed oil, but said nothing about a defect, the switch being hard to throw, or needing to be taken out of service. He then continued to work and then *willingly* threw the switch a second time—without an issue. Lahart argues that if BNSF was performing track inspections as it claims, it should have detected and corrected the conditions causing the switch to malfunction. Thus, he claims, there is a jury question as to whether BNSF had constructive notice of the alleged defect. He presents the sworn testimony of an expert witness, Alan Blackwell, to support his claims, and argues that BNSF's inspection was inadequate.

The undisputed evidence shows that BNSF conducted adequate monthly track inspections. Further, *by Lahart's own admission*, there was nothing defective about the switch when he inspected it prior to using it at the very time in question. While he reported that the switch needed oil, he did not report a defect, and he willingly used the switch a second time with no issue. If the monthly track inspection did not reveal an issue and Lahart did not find an issue with the switch directly before he used it to his detriment, BNSF could not have had actual or constructive notice of the alleged defect. The undisputed facts show that BNSF acted with reasonably prudent care and could not have foreseen Lahart's injury. The Court **GRANTS** Defendant's Motion for Summary Judgment as to Count II.

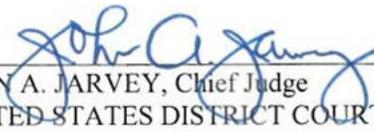
#### IV. CONCLUSION

Both Motions for Summary Judgment fail as to Count I because genuine issues of material fact exist regarding the conversation between Lahart and his supervisors in the office. The directly contradictory testimony as to whether Lahart was belligerent and profane and as to the content of the conversation requires a credibility determination between witnesses that is within the province of the jury. Lahart's Partial Motion for Summary Judgment also fails because he relies on attacking the credibility of the disciplinary process. Defendant's Motion for Summary Judgment as to Count II succeeds because the undisputed evidence shows that BNSF acted with reasonably prudent care and had no actual or constructive notice of a defect in the switch; therefore, it could not have foreseen Lahart's injury.

Upon the foregoing,

**IT IS ORDERED** that Defendant's Motion for Summary Judgment is **DENIED** as to Count I and **GRANTED** as to Count II. **IT IS FURTHER ORDERED** that Plaintiff's Partial Motion for Summary Judgment is **DENIED**.

**DATED** this 30th day of May, 2017.

  
\_\_\_\_\_  
JOHN A. JARVEY, Chief Judge  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF IOWA