

Jury Awards Track Inspector Whistleblower \$1.05M in Damages

Article By:

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On February 19th, a Colorado jury awarded Brandon Fresquez \$1,050,000 in damages in his FRSA whistleblower retaliation claim against BNSF Railway Company. The [verdict form](#) reveals that the jury awarded \$800,000 in emotional distress damages and \$250,000 in punitive damages. This significant win underscores the substantial exposure that an employer can face when firing an employee due to their protected whistleblowing.

Fresquez's FRSA Retaliation Claim

As a track inspector at BNSF, Fresquez was tasked with identifying track defects and remediating the defects by repairing or reporting them. When Fresquez discovered that two supervisors were putting tracks back in service prior to repairing defects, he confronted a supervisor about this unsafe practice. The supervisor berated Fresquez and warned him that if he did not turn a blind eye to this unlawful practice, he would be terminated. Soon after Fresquez reported his concerns, he experienced retaliation. Nevertheless, he continued to report defects and take tracks out of service.

In early May 2016, Fresquez demanded that a supervisor named Paz admit to falsifying track defect reports. Several days later, Fresquez refused Paz's instruction to reclassify another defect and Paz allegedly threatened to fire Fresquez. That afternoon, Paz called Fresquez and directed him to investigate another defect that was identified by a geometry car. Fresquez met Paz at the site of the defect, and Fresquez allegedly warned Paz that he had called his "friends in very high places," to which Paz responded that he does not "lose."

According to Paz, he directed Fresquez to measure the track to confirm whether there was an alignment defect, and Fresquez allegedly refused to follow that order, saying "there is no point." Fresquez, however, claimed that Paz never asked him to measure the defect. Fresquez drove away from the investigation site without measuring the potential defect, and Paz initiated disciplinary action against Fresquez for insubordination.

BNSF performed an investigatory hearing regarding Fresquez's alleged insubordination and then fired him. Fresquez appealed the termination, and the termination was upheld in arbitration. He then brought a FRSA whistleblower retaliation claim at OSHA, and following an investigation, OSHA determined that there was reasonable cause to believe that BNSF violated the FRSA's whistleblower

protection provision. BSNF appealed OSHA's findings, and Fresquez removed his claim from DOL and litigated it in federal court.

BNSF moved for summary judgment, and in an [order denying the motion](#), Judge Daniel found that Fresquez engaged in protected conduct by refusing to reclassify a defect, which is a protected "refus[al] to violate or assist in the violation of any Federal law, rule, or regulation" under the FRSA whistleblower protection law. Judge Daniel also found that Fresquez could demonstrate that his protected activity contributed to his termination because there was close temporal proximity between Fresquez's protected whistleblowing and his termination, and there was evidence suggesting that BNSF's basis for terminating his employment was pretextual.

Judge Daniel also rejected BNSF's motion for summary judgment on punitive damages because there was at least a dispute over whether Paz recklessly or callously disregarded Fresquez's rights under the FRSA and whether these violations were intentional. He also held that BNSF's adoption of an anti-retaliation policy did not enable it to establish a *Kolstad* good-faith exception (a defense to punitive damages where "the discriminatory employment decisions of managerial agents . . . are contrary to the employer's good faith efforts to comply with Title VII."). BNSF failed to investigate Fresquez's allegation that Paz retaliated against him, and Paz had previously been disciplined for retaliation. Accordingly, BNSF failed to demonstrate efforts to comply with the FRSA whistleblower protection law.

The [jury instructions](#) in Fresquez are available [here](#). Nicholas Thompson represented Fresquez.

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