No. 15-73548

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD L. NELSON,
Petitioner,

v.

U.S. DEPARTMENT OF LABOR,
Respondent,

ENERGY NORTHWEST,
Respondent-Intervenor.

On Petition for Review of the Final Decision and Order of the United States Department of Labor's Administrative Review Board

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BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT OF JURISDICTION

This case arises under the employee protection provision of the Energy Reorganization Act of 1974 ("ERA" or "Act"), 42 U.S.C. 5851; *see* 29 C.F.R. Part 24. The Secretary of Labor ("Secretary") had subject matter jurisdiction of this dispute based on a complaint filed pursuant to 42 U.S.C. 5851(b) with the Occupational Safety and Health Administration ("OSHA") by Petitioner Richard Nelson against Energy Northwest ("ENW") on June 21, 2011. ER 30. Mr. Nelson's complaint alleged ENW retaliated against him for engaging in ERA-protected whistlebowing activity. *Id*.

On September 30, 2015, the Department of Labor's Administrative Review Board ("ARB" or "Board") issued a Final Decision and Order affirming the Administrative Law Judge's ("ALJ") Decision and Order, which had held that Mr. Nelson failed to prove by a preponderance of the evidence that ENW retaliated against him in violation of the ERA. Mr. Nelson filed a timely petition for review of the ARB's decision with this Court on November 20, 2015. *See* 42 U.S.C. 5851(c). This Court has jurisdiction because the alleged retaliation occurred in Washington State. *Id*.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the ALJ's ruling, as affirmed by the Board, that Nelson did not engage in protected activity under the ERA.[1]

STATEMENT OF THE CASE

1. Nature of the Case

The ERA aims to benefit both employees and the public by proscribing employer retaliation against employees that engage in certain protected whistleblowing activities that impact nuclear safety. *See* 42 U.S.C. 5851(a)(1)(A)-(F). *See also Tamosaitis v. URS, Inc.,* 781 F.3d 468, 482 (9th Cir. 2015) (the "purpose of the ERA's anti-retaliation provision is to root out retaliation against

[1] If the Court concludes that the ALJ and the Board erred in dismissing this case for lack of protected activity, the Secretary asks that the Court remand the case to the Board for the reasons discussed herein. *See infra* pp. 22-24.

whistleblowers, for the benefit of both the public and the employee"); *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) (noting the "broad remedial purpose" of the ERA is to "protect[] workers from retaliation based on their concerns for safety and quality"). An employee complaining under the ERA must demonstrate four things: 1.) that he engaged in protected activity; 2.) employer knowledge of the activity; 3.) an adverse action; and 4.) that the protected activity was a contributing factor in the adverse action. *See, e.g., Tamosaitis*, 781 F.3d at 481. Mr. Nelson asserts that he engaged in protected activity by "declin[ing] to confirm the version of facts and law espoused by" an ENW representative at an interview ENW conducted with Nelson to determine his involvement in a suspected arrangement to bill ENW improperly for per diem and travel expenses. *See* Brief of Petitioner ("Pet. Br.") at 20. He further contends that this protected activity was a contributing factor in ENW's decision to revoke his Unescorted Access Authorization ("UAA") privilege. The ALJ, as affirmed by the ARB, concluded that Mr. Nelson failed to prove by a preponderance of the evidence that he engaged in protected activity and that, even assuming he engaged in protected activity, his protected activity was not a contributing factor in ENW's decision to revoke the UAA privilege.[2]

[2] In order to work inside a Nuclear Regulatory Commission-licensed nuclear power plant like the ENW facility at which Mr. Nelson worked, it is necessary to have an

2. Statement of Facts

ENW is a municipal corporation and joint operating agency of Washington State with headquarters in Richland, Washington. ER 31. ENW owns and operates the Columbia Generating Station ("CGS"). *Id*. CGS is a nuclear power plant and licensee of the Nuclear Regulatory Commission ("NRC"). *Id*.

Mr. Nelson has owned and operated Nelson Nuclear Corporation ("NNC") since 2006. ER 31. NNC contracts with nuclear facilities to supply temporary labor. *Id*. NNC had an active contract with ENW to supply temporary labor in April 2009. ER 33.

ENW employed Dave Sanders at CGS as a Major Maintenance Supervisor from 2009 until approximately April 2011. ER 33. Mr. Sanders and Mr. Nelson are friends and former colleagues. *Id*. Mr. Sanders was ENW's Technical Representative responsible for administering ENW's contracts with NNC. ER 35. The Technical Representative's duties include ensuring compliance with ENW contracting policies and the review and approval of invoices. ER 35.

On April 28, 2009, Mr. Sanders requested that Mr. Nelson employ Rick Hayes, beginning the following day, as a security observer under NNC's contract with ENW. ER 33. Mr. Hayes and Sharese Sanders, Mr. Sanders' daughter, had a

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UAA privilege. ER 83. Thus, revoking Mr. Nelson's UAA privilege resulted in his inability to work at the ENW facility.

child together in December 2008. ER 37. Mr. Nelson has known Ms. Sanders since she was a young girl. ER 40. Mr. Nelson had met Mr. Hayes in August 2008 at a party. ER 215. Mr. Hayes was accompanying Ms. Sanders who was pregnant at the time with their child. *Id*. Mr. Nelson learned at the party that Mr. Hayes and Ms. Sanders were living with Sanders' mother and looking for work in the area. *Id*.

Mr. Nelson met with Mr. Hayes on the evening of April 28, 2009 to complete the paperwork necessary for Hayes to begin work at ENW the following day. ER 40. Mr. Nelson assisted Mr. Hayes to draft a resume to present to ENW, which Nelson testified he prepared by "cutting and pasting" a draft resume Ms. Sanders emailed him. ER 40, 697-700. The draft resume Ms. Sanders sent included Mr. Hayes' Kennewick, Washington address, ER 698, and Mr. Nelson testified that he knew that Hayes was living in the area with Ms. Sanders at Ms. Sanders' mother's home when he made the employment offer to Hayes on April 28, 2009. ER 40, 216. However, Mr. Nelson did not include Mr. Hayes' Kennewick, Washington address on the revised resume. ER 40, 700. In addition, Mr. Nelson addressed the NNC employment offer letter to Mr. Hayes' parents' address in South Carolina, even though Hayes was present and he gave Hayes the document to sign that evening. ER 40, 702. Mr. Nelson also received a voided check from Mr. Hayes that evening that identified Hayes as the holder of a joint

bank account with Ms. Sanders at a local bank. ER 40, 705. The check contained their Kennewick street address. ER 40, 705. Mr. Hayes additionally provided Mr. Nelson a list of references from sources within the Kennewick area. ER 40, 698.

Dale Atkinson became the ENW Vice President of Employee Development and Corporate Services in October 2010. ER 34. In this position, Mr. Atkinson was responsible for all ENW vendor contracting and purchasing. *Id*. In carrying out his new responsibilities, Mr. Atkinson learned in November 2010 that there was concern within ENW that unusual contracting practices were occurring in the Maintenance Department, particularly with respect to NNC and TLD, another ENW contractor. ER 35-36, 337-38. Mr. Atkinson accordingly instructed ENW Acting General Counsel Pam Bradley to examine the Maintenance Department's contracting practices with a specific focus on NNC and TDL. ER 36.

Mr. Atkinson testified that after he directed Ms. Bradley to investigate the Maintenance Department's contracting practices, Bill Penwell, a Maintenance Department employee, informed Mr. Atkinson that there might be an oddity in some per diem practices in maintenance. ER 341. Mr. Penwell particularly identified Mr. Hayes' receipt of per diem as an example. ER 36, 341. Mr. Atkinson subsequently contacted Ms. Bradley and directed her to broaden the initial investigation to include NNC's per diem practices. ER 36, 341.

In furtherance of Mr. Atkinson's request, Ms. Bradley obtained copies of NNC contracts, copies of NNC invoices, and personal history questionnaire ("PHQ") records. ER 37.[3] Ms. Bradley determined NNC had invoiced ENW $7,177.30 in May and June, 2009, for round trip travel and per diem for Mr. Hayes. *Id*. Ms. Bradley further reviewed three separate PHQs Mr. Hayes had submitted to ENW that appeared to establish he had lived and worked in the Kennewick area since mid-2008. *Id*.

In early March 2011, Ms. Bradley attended a meeting with Bruce Pease, ENW's Security Compliance Supervisor in 2010 with responsibility to review PHQs, Jerry Ainsworth, a Technical Specialist who reported to Pease in 2010, and Kurt Gosney, the newly appointed Security Compliance Supervisor, to discuss the Hayes per diem matter. ER 34, 37, 408. The meeting participants decided to conduct interviews of Mr. Hayes, Mr. Nelson, Mr. Sanders, and Ms. Sanders to further the investigation. ER 37. They also decided the Security unit comprised of Pease, Gosney, and Ainsworth would conduct the interviews. *Id*.

Mr. Pease, Mr. Gosney, and Mr. Ainsworth interviewed Mr. Hayes on March 16, 2011. ER 38. In the interview, Mr. Hayes confirmed that he did not live in South Carolina in May-June 2009, and had been living continuously in

[3] The NRC requires its licensees, prior to providing an UAA, to collect the information contained in the PHQs for use in making the determination whether a particular individual, like Hayes, is trustworthy, reliable, and fit for duty. ER 34.

Kennewick, Washington since the summer of 2008. *Id*. Although Mr. Hayes had lived in Kennewick for nearly a year prior to beginning work at the ENW site, he did not include his Washington address in the PHQ he filled out in April 2009, even though the form required a listing of any address lived in for more than 30 days in the preceding 5 years. *Id*.

Mr. Pease, Mr. Gosney, and Mr. Ainsworth also interviewed Mr. Sanders on March 16, 2011. ER 38. Mr. Sanders was informed that ENW was investigating Mr. Hayes' receipt of per diem in 2009. *Id*. In the interview, Mr. Sanders confirmed Ms. Sanders was his daughter and that Mr. Hayes was her fiancé prior to May 2009. ER 127. ENW's summary of its interview with Mr. Sanders indicates that Sanders additionally acknowledged that he knew Ms. Sanders and Mr. Hayes had been living in Kennewick prior to Hayes' employment by NNC. ER 657. The summary further indicates that Mr. Sanders verified in the interview that he knew Mr. Hayes had worked at Target in Kennewick prior to his employment by NNC, and that Hayes had not travelled from South Carolina for the sole purpose of obtaining employment at ENW. *Id*.

Mr. Pease, Mr. Gosney, and Mr. Ainsworth interviewed Mr. Nelson on March 17, 2011. ER 39-40. ENW's summary of its interview with Mr. Nelson indicates that Nelson confirmed in the interview that he knew Mr. Hayes had lived in Kennewick since mid-2008, and that he knew that Hayes had not travelled from

South Carolina solely to obtain employment at ENW. ER 658. ENW's summary also indicates that Mr. Nelson further confirmed in the interview that he knew Mr. Hayes had been working at Target in Kennewick prior to May 2009. *Id*.

Mr. Gosney was ENW's "Reviewing Official" in March 2011. ER 41. This position charged him with responsibility to administer the NRC access authorization regulations on behalf of ENW. ER 41, 403. Mr. Gosney testified he (alone) made the decision to revoke Mr. Nelson's UAA privilege because Nelson provided false information to support per diem for Mr. Hayes and was untruthful in the interview. ER 41. Mr. Gosney prepared a Security Investigation Summary Report, dated March 22, 2011, that outlined the Hayes per diem investigative steps, the documents ENW reviewed, the information obtained in interviews, and the conclusion that all personnel interviewed, including Mr. Nelson, knew the per diem and travel expenses were not warranted and nevertheless submitted false documentation to support such payments on Mr. Hayes' behalf. ER 655-60. Mr. Gosney determined Mr. Nelson's conduct established that Nelson failed to satisfy the trustworthy and reliable requirements of an UAA holder as required by NRC regulation. ER 349-50.

3. Course of Proceedings

On June 21, 2011, Mr. Nelson filed a complaint with the Department of Labor's OSHA against ENW. ER 30. The complaint alleged ENW retaliated

against Mr. Nelson in violation of the ERA. *Id*. The Secretary dismissed the complaint and Mr. Nelson subsequently requested a hearing before an ALJ. *Id*.

An ALJ conducted a hearing in the matter on May 24 and 25, 2012. ER 31. The parties submitted posthearing briefs on September 14, 2012. *Id*. The ALJ issued his decision on June 24, 2013. ER 30.

The ALJ's decision first concluded that Mr. Nelson was an employee of ENW under the ERA. ER 42-50. The ALJ then stated that Nelson must establish by a preponderance of the evidence that 1.) he engaged in protected activity; 2.) ENW took adverse action against him; 3.) ENW knew he engaged in protected activity; and 4.) that his protected activity was a contributing factor in the adverse action. ER 51. The ALJ further stated that if Nelson makes that showing, Continental may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. *Id*.

The ALJ concluded that the revocation of Mr. Nelson's UAA constituted adverse action. ER 52. However, the ALJ then held that Nelson had failed to establish that he engaged in protected activity. *Id.* The ALJ rejected Nelson's contention that his participation as an interviewee in the investigation of the Hayes per diem matter constituted engagement in a protected activity. *Id*. The ALJ reasoned that participation as an interviewee under the instant circumstances was

not protected activity because "[Nelson] . . . was not engaged in reporting any security or safety concerns . . . [;][r]ather, he was being investigated for his personal participation in a *per diem* matter that was found by his superiors to be against the practices of the company and had his UAA card taken away because his superiors believed that he participated in the matter and did not admit to the wrongfulness of the scheme." ER 52-53. The ALJ additionally concluded that, even assuming Nelson had engaged in protected activity, he could not "establish [such] whistle-blowing activities as a contributing factor to the adverse employment action that he suffered" because ENW's "withdr[awal] of his UAA privileges [was] based solely on Respondent's *belief* that [Nelson] had shown a lack of honesty and trustworthiness in regard to the payment of per diem to Mr. Hayes." ER 53.

Because the ALJ concluded Mr. Nelson had not engaged in protected activity and, even if he had, could not demonstrate that such protected activity was a contributing factor in the revocation of his UAA privilege, he dismissed Nelson's claim. ER 54.

On September 30, 2015, the ARB issued a Final Decision and Order affirming the ALJ's dismissal of Mr. Nelson's claim. ER 4.[4] The Board stated

[4] The Board did, however, affirm the ALJ's ruling that Mr. Nelson was an employee of ENW. ER 8-9.

that it reviews the ALJ's factual findings under the substantial evidence standard, (citing 29 C.F.R. 24.110(b)), and conclusions of law de novo (citing *Speegle v. Stone & Webster Constr., Inc.,* ARB No. 13-074, 2014 WL 1758321, at *5 (ARB Apr. 25, 2014)). ER 8. With respect to Mr. Nelson's assertion that he engaged in protected activity by participating as an interviewee in the investigation of possibly improper per diem and travel payments to Mr. Hayes, the ARB acknowledged that 42 U.S.C. 5851(a)(1)(F) "is very broadly worded," requiring only that an employee "'assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [AEA].'" ER 10. The ARB further acknowledged the ALJ had not addressed "the question of whether calling Nelson into an investigation about improper per diem payments, where he denied that the per diem payments were improper, qualifies as 'participating' in a protected 'proceeding' 'to carry out the purposes' of the ERA or AEA." *Id*.

The ARB observed, however, that "[t]o secure protection [under the ERA], an employee must reasonably believe that his actions, whether in the form of a complaint, participation in an investigation, or other conduct, are in furtherance of the relevant act." ER 10 (citing *Williams v. Dallas Ind. Sch. Dist.*, ARB No. 12-024, 2012 WL 6849447, at *7 (ARB Dec. 28, 2012) (explaining that to be

protected, activity must "touch on" public health and safety concerns furthered by the statute)). Relying on the ALJ's findings that Nelson made "no complaint relating to nuclear safety" and "he was not engaged in reporting any security or safety concerns to his superiors or others," as well as the ALJ's conclusion that "'the evidence in this matter is overwhelming that [ENW] withdrew [Nelson's] UAA privileges based solely on ENW's belief that Nelson was dishonest and untrustworthy regarding the per diem issue," the ARB "underst[ood] the ALJ to mean that Nelson's participation in the interview was not in furtherance of the ERA or AEA." *Id.* Thus, the ARB concluded substantial evidence supported the ALJ's conclusion that Nelson failed to demonstrate that he engaged in protected activity. ER 10-11.

The ARB found that substantial evidence in the record also supported the ALJ's conclusion that, even if Mr. Nelson engaged in protected activity, he could not demonstrate that such activity was a contributing factor in the revocation of his UAA because "'the evidence in this matter is overwhelming that [ENW] withdrew his UAA privileges based solely on [ENW's] *belief* that [Nelson] had shown a lack of honesty and trustworthiness in regard to the payment of per diem to Mr. Hayes.'" ER 11. The ARB identified as evidence in the record supporting this finding that "Nelson admitted that when he submitted Hayes's employment information to ENW, Nelson knew that Hayes had been living locally in

Kennewick, Washington, for at least nine months and that Hayes intended to make Washington his permanent home," and that "Nelson knew this information when he . . . invoic[ed] ENW for Hayes's per diem and travel to and from Washington to South Carolina." *Id*. (citing ER 171-72, 176). The ARB also noted that Nelson's testimony that "he addressed his offer letter to Hayes to an address in South Carolina, even though he physically handed the offer letter to Hayes in Washington, again, with knowledge that Hayes had lived in Washington for the past nine months and intended Washington to be his permanent home," supported the finding that the only basis for revoking Nelson's UAA privilege was ENW's belief that he was dishonest and untrustworthy related to the Hayes per diem and travel expense matter. *Id*.

SUMMARY OF ARGUMENT

Substantial evidence supports the ALJ's determination, affirmed by the Board, that Mr. Nelson did not engage in protected activity. The only conduct Mr. Nelson contends constituted protected activity is his participation as an interviewee in the investigation of the receipt by Mr. Hayes of per diem and travel expenses. However, there is substantial record evidence to support the conclusion that neither the investigation itself nor Mr. Nelson's participation in the investigation as an interviewee was in furtherance of the ERA or AEA safety-related concerns. Rather, as the evidence shows, ENW was merely investigating general contracting

practices with NNC that specifically focused on Mr. Nelson's, and others', personal involvement in a suspected arrangement to bill ENW improperly for Mr. Hayes's per diem and travel expenses. And as the evidence further shows, Mr. Nelson's interview focused entirely on the per diem and travel expense issue with no mention of safety-related topics. Because substantial evidence supports the ALJ's determination, affirmed by the ARB, that Mr. Nelson's did not engage in protected activity, this Court should affirm the ARB's ruling.

ARGUMENT

I. STANDARD OF REVIEW.

This Court reviews the ARB's Final Decision and Order under the narrow standard of review established by the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2)(A). *See* 42 U.S.C. 5851(c)(1). Under this standard, the Court may not overturn the agency's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A); *see also Coppinger-Martin v. Solis*, 627 F.3d 745, 748 (9th Cir. 2010). Unless the Board "relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem," "offered an explanation that runs counter to the evidence before the agency" or reached a conclusion "so implausible that it could not be ascribed to a difference in view," this Court may not reverse the

Secretary's decision. *Greater Yellowstone Coal v. Lewis*, 628 F.3d 1143, 1148 (9th Cir. 2010).

The Secretary's findings of fact, moreover, "must be sustained unless they are unsupported by substantial evidence in the record as a whole." *Calmat Co. v. U.S. Dep't of Labor*, 364 F.3d 1117, 1121 (9th Cir. 2004). "Substantial evidence is more than a mere scintilla, but less than a preponderance." *N.L.R.B. v. Int'l Bhd. of Elec. Workers, Local 48,* 345 F.3d 1049, 1053-54 (9th Cir. 2003) (internal quotation marks and citation omitted); *Sievers v. U.S. Dep't of Labor*, 349 F. App'x 201, 203 (9th Cir. 2009). Thus, even if "the evidence is susceptible to more than one rational interpretation," this Court "may not substitute its judgment for that of the" Secretary. *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1212 (9th Cir. 2008); *see also Sievers*, 349 F. App'x at 203.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S RULING, AFFIRMED BY THE BOARD, THAT NELSON DID NOT ENGAGE IN PROTECTED ACTIVITY.

Substantial evidence supports the ALJ's and ARB's ruling that Mr. Nelson did not engage in protected whistleblowing under the ERA. The ERA contains six provisions that identify the manner in which an employee can engage in protected activity. *See* 42 U.S.C. 5851(a)(1)(A)-(F). Mr. Nelson is not asserting to this Court that he engaged in any form of protected whistleblowing identified in the first five of these provisions, 42 U.S.C. 5851(a)(1)(A)-(E). Rather, he relies solely

on the sixth provision, *see* Pet. Br. at 19-21, contending that by participating as an interviewee in the per diem/travel expense matter and refusing to answer ENW's questions, he "assisted or participated . . . in any manner in . . . any . . . action to carry out the purposes of th[e] [ERA] or the Atomic Energy Act of 1954, as amended." 42 U.S.C. 5851(a)(1)(F). However, based on the facts found in this case, which are supported by substantial evidence in the record, the ALJ and the Board reasonably concluded that Mr. Nelson did not engage in protected activity because 1.) ENW's investigation of the per diem/travel expense matter, which resulted in Mr. Nelson's interview, was not in furtherance of the ERA or AEA, and 2.) Mr. Nelson engaged in no conduct during the interview that constituted protected activity.

The record evidence demonstrates that Mr. Atkinson instructed Ms. Bradley to open an investigation into its contracting relationship with NNC based on his understanding that "unusual" contracting practices might exist between the parties. ER 337. The evidence further demonstrates that Mr. Atkinson informed Ms. Bradley to expand the investigation to include per diem practices at NNC based on information Mr. Penwell conveyed to Mr. Atkinson, which included a specific representation that Mr. Hayes may have improperly received per diem. ER 340-41. The evidence also demonstrates that after receiving this additional information from Mr. Atkinson, Ms. Bradley consulted copies of invoices NNC submitted to

cover Mr. Hayes' per diem and travel expenses in May-June 2009, as well as Hayes' PHQs, and that the invoices indicated Hayes had received $7,177.30 in per diem and travel expenses in this period, even though the PHQs appeared to establish that Hayes had been living and working in the area since mid-2008.

The record evidence also indicates that the purpose of ENW's interview of Mr. Nelson was to investigate his involvement in the payment to Mr. Hayes of per diem and travel expenses in May-June 2009 to which ENW believed Hayes was not entitled. ER 37. It further indicates that the focus of ENW's questioning during its interview of Mr. Nelson was the per diem and travel expense issue, ER 40, and that the questioning of Mr. Sanders, Mr. Hayes, and Ms. Sanders in their interviews likewise focused on the per diem and travel expense issue. ER 38-39. Mr. Nelson expressed no safety concerns during his interview. ER 41. Indeed, Mr. Nelson submitted no evidence that he ever expressed any safety concerns to ENW. *Id*.

The record evidence further indicates that after conducting the interview of Mr. Nelson, Mr. Gosney alone, as the authorized reviewing official for ENW, determined that Nelson's untruthfulness in the interview and provision of false information to support per diem/travel expenses for Mr. Hayes in 2009 disqualified him under NRC regulations from retaining his UAA. *Id*. Mr. Gosney prepared a Security Investigation Summary Report, dated March 22, 2011, that explained the

course of ENW's investigation, including the documents ENW reviewed and information it obtained through witness interviews. ER 41, 655-60. The Report concluded that "'all personnel interviewed had knowledge that the travel/per diem was not warranted and knowingly and willfully submitted falsified documentation with the intent to support payment of travel/per diem to Mr. Hayes.'" ER 41, 660.

These facts constitute substantial record evidence demonstrating that ENW's investigation, which resulted in Mr. Nelson's interview, was not in furtherance of the ERA or AEA. They show ENW was not conducting its investigation (and interviewing Mr. Nelson) in furtherance of a safety-related complaint Nelson or another individual lodged, or with respect to an incident at the plant that specifically implicated safety. Rather, ENW was conducting an investigation into the possibly improper receipt by Mr. Hayes of per diem and travel expenses, and interviewing Mr. Nelson to determine his involvement in the matter. Because ENW's investigation of Mr. Hayes' receipt of per diem and travel expenses, and the determination of Mr. Nelson's involvement in the matter, "lack[] a sufficient nexus to a concrete, ongoing safety concern," neither ENW's investigation, nor the interview of Mr. Nelson, was a proceeding or an action to carry out the purposes of the ERA or AEA under section 5851(a)(1)(F). *Sanders v. Energy Northwest*, 812 F.3d 1193, 1198 (9th Cir. 2016), *cf. Williams*, 2012 WL at *7 (explaining that to be protected, activity must "touch on" public health and safety concerns furthered by

the statute). Thus, ENW's investigation, including its interview of Nelson, was not in furtherance of the ERA or AEA.

These facts additionally constitute substantial record evidence demonstrating that Mr. Nelson engaged in no conduct during the interview that constitutes protected activity. First, Mr. Nelson lodged no safety-related complaint in the interview. Indeed, he never articulated to ENW or an outside entity the type of safety-related complaint that is the typical trigger for protected whistleblowing under section 5851(a)(1)(F). *See Boschek v. J&L Testing, Inc.*, ARB No. 97-020, 1997 WL 591351, at *6 (ARB Sept. 23, 1997) (threat to cooperate with Nuclear Regulatory Commission investigation is protected activity under 5851(a)(1)(F) because "cooperation would be an action designed to carry out the purposes of the [AEA]"); *Hooker v. Westinghouse Savannah River Co.*, ARB No. 03-036, 2004 WL 1923131, at *3 (ARB Aug. 26, 2004) (letter to Centers for Disease Control and Prevention "expressing concern about contamination in the streams and mud" where complainant worked is protected activity under 5851(a)(1)(F) because it is "action to carry out the purposes of the ERA"); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, 2002 WL 31662915, at *5 (ARB Nov. 13, 2002) ("publicly revealing information related to safety and health issues" at the Los Alamos National Laboratory constitutes action to carry out the purposes of the ERA or AEA).

Second, Mr. Nelson's asserted failure to participate or testify in the manner ENW desired, Pet. Br. at 20-21, is not protected activity because, as described above, neither ENW's investigation nor the interview itself was a "proceeding" or "action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended" as required for protection under section 5851(a)(1)(F). Indeed, the authority Mr. Nelson cites undercuts, rather than bolsters, his position because it highlights the need for a predicate finding that a covered proceeding (or action) is underway to ground a retaliation claim based on a refusal to testify theory. *See Smith v. Columbus Metro. Hous. Auth.,* 443 F. Supp. 61, 64 (S.D. Ohio 1997) (finding adverse action against worker that declined to assist and employer to defend a pending Title VII race discrimination charge constitutes unlawful retaliation because the decision not to assist constitutes "participation in an investigation or proceeding under Title VII"). The asserted proceeding in this case, though termed a "Security Investigation," solely addressed whether Nelson (and others) had been dishonest with regard to Hayes entitlement to per diem and travel expenses.[5] Thus, the ALJ's and the Board's conclusion that Mr. Nelson

[5] The ARB's majority decision is consistent with an interpretation of section 5851(a)(1)(F) that generally provides protection to employees who participate as fact witnesses in a safety investigation and either do not corroborate the employer's version of events or do not express safety concerns during their participation. *See, e.g.,* Judge Royce's *dissent* at ER 18-19 (noting Title VII's protection of employees who refuse to confirm the employer's version of the facts

engaged in no conduct in the interview that constituted protected activity is reasonable, supported by substantial evidence in the record as whole, and should be affirmed.

III. IF THE COURT DETERMINES THAT MR NELSON ENGAGED IN PROTECTED ACTIVITY, IT SHOULD REMAND THE MATTER TO THE ARB.

The ALJ and the ARB both considered all relevant evidence, including employer evidence, to determine whether protected activity was a contributing factor in ENW's decision to revoke Mr. Nelson's UAA privilege. Mr. Nelson erroneously suggests that by considering relevant employer evidence to determine whether Mr. Nelson's protected activity contributed to the adverse action the ARB "failed to follow prior Board precedent." Pet. Br. 23. Mr. Nelson cites the Board's decision in *Fordham v. Fannie Mae*, ARB No. 12-061, 2014 WL 5511070 (ARB Oct. 9, 2014), as the precedent the ARB did not follow. However, the *Fordham* decision was issued more than a year after the ALJ issued his decision on June 24, 2013. And at the time the ARB issued its opinion, *Fordham* was not the most recent ARB decision addressing whether it is appropriate to consider all relevant evidence, including an employer's evidence, to determine whether whistleblowing

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during an investigation); Pet. Br. at 20 (same). Here, however, the ARB looked beyond the title of the "Security Investigation" at issue, and reasonably concluded that, even giving the ERA a broad construction consistent with its remedial purposes, the investigation into improper per diem and travel expense payments was not in furtherance of the safety concerns advanced by the statute.

contributed to an adverse action. Rather, *Powers v. Union Pacific Railroad*, ARB No. 13-034, 2015 WL 1959425 (ARB Mar. 20, 2015) was, and as the ARB noted in its decision below, the Board had opined in *Powers* that "'there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor causation as long as the evidence is relevant to that element of proof.'" ER 12 (quoting *Powers*, 2015 WL, at *19). Because the ARB cited, and adhered to, the most recent Board precedent, *i.e., Powers*, with respect to whether it is appropriate to consider all relevant evidence, including an employer's evidence, to determine whether whistleblowing contributed to an adverse action, the decision, when issued, was consistent with the Board's own precedent.

However, the ARB vacated its decision in *Powers* on May 23, 2016 while this appeal was pending. *See Powers v. Union Pac. R.R.*, ARB No. 13-034 (ARB May 23, 2016).[6] If this Court determines that Mr. Nelson engaged in protected activity, the intervening vacatur of *Powers* might render questionable the portion of the ARB's decision that relied on *Powers* to conclude Nelson could not show protected activity contributed to ENW's revocation of the UAA privilege. Courts have recognized remand to a federal administrative agency would be appropriate under similar circumstances. *See, e.g., SKF U.S.A., Inc. v. United States,* 254 F.3d

[6] The vacatur order is available on the Administrative Review Board website at *http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/FRS/13_034_scanned_Redacted.pdf*.

1022, 1028 (Fed. Cir. 2001) (noting a "remand is generally required if [an] intervening event may affect the validity of the agency action"); *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993) (identifying "the tradition of allowing agencies to reconsider their actions where events pending appeal draw their decision in question"). The Department believes that, applying *Powers* to the facts of this case, there is substantial evidence to support the ALJ's determination, affirmed by the Board, that even if Mr. Nelson engaged in protected activity, he is unable to demonstrate that such protected activity was a contributing factor in ENW's decision to revoke his UAA privilege because the sole reason that ENW withdrew the privilege was its belief that Nelson was dishonest and untrustworthy regarding the per diem issue. However, the Department also believes it would be improper to allow *Powers* to affect the outcome in this matter because the Board has vacated the *Powers* decision. Thus, if the Court determines Mr. Nelson engaged in protected activity, it should remand the matter to the ARB for a determination as to whether Mr. Nelson's protected activity contributed to ENW's decision to revoke the UAA privilege.

CONCLUSION.

Substantial record evidence supports the ALJ's holding, affirmed by the ARB, that Mr. Nelson failed to demonstrate he engaged in protected activity. The Court should accordingly affirm the ARB's decision. If, however, the Court

concludes Mr. Nelson has demonstrated that he engaged in protected activity, the Court should remand this matter to the ARB to determine whether Mr. Nelson's protected activity contributed to ENW's decision to revoke the UAA privilege for the reasons described herein.

Respectfully Submitted,

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FORM 8. CERTIFICATE OF COMPLIANCE PURSUANT TO 9TH CIRCUIT RULE 32-1 FOR CASE NUMBER 15-73548 AND VIRUS CHECK

This brief complies with the length limits permitted by Fed. R. Civ. P. 32. The brief complies with the page length limitation in Fed. R. Civ. P. 32(a)(7)(A) because it is 25 pages. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

I further certify that a virus scan was performed on the Brief using McAfee and that no viruses were detected.

Dated: , 2016

/s/ Quinn Philbin
QUINN PHILBIN

CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I certify that on this day of , 2016, a copy of the foregoing Brief for the Secretary of Labor was filed electronically through the Court's CM/ECF system (via the Clerk's office). I further certify that upon receipt of a directive, I will serve seven (7) copies of this Brief in paper format to the Clerk of this Court by express mail. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: , 2016

/s/ Quinn Philbin
QUINN PHILBIN