No. 17-2862

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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JACEK SAMSON,
Petitioner,
v.

UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD,
Respondent,

SOO LINE RAILROAD COMPANY, d/b/a Canadian Pacific,
Intervening Respondent.

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On Appeal from the U.S. Dep't of Labor Administrative Review Board,
Hons. Paul M. Igasaki, E. Cooper Brown, and Leonard J. Howie

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# BRIEF FOR RESPONDENT UNITED STATES DEPARTMENT OF LABOR ADMINISTRATIVE REVIEW BOARD

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KATE S. O'SCANNLAIN
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

WILLIAM C. LESSER
Deputy Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

JESSE Z. GRAUMAN
Senior Attorney

U.S. Department of Labor
Office of the Solicitor
Room N-2716
200 Constitution Ave., N.W.
Washington, D.C. 20210
(202) 693-5563
grauman.jesse.z@dol.gov

## STATEMENT REGARDING ORAL ARGUMENT

Although the Department of Labor will gladly participate in any oral argument scheduled by this Court, the Department does not believe that oral argument is necessary because the issues may be resolved based on the briefs submitted by the parties.

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## JURISDICTIONAL STATEMENT

Pursuant to Circuit Rule 28(b), the jurisdictional summary in Petitioner's brief is essentially correct. Respondent provides the following additional details for completeness:

This case arises under the employee protection provisions of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. 20109. The Secretary of Labor had jurisdiction based on a complaint that Jacek Samson filed with the Occupational Safety and Health Administration. *See* 49 U.S.C. 20109(d)(1); 29 C.F.R. 1982.103.

The Department of Labor's Administrative Review Board ("ARB") issued its final decision and order on July 11, 2017. The Secretary has delegated authority to the ARB to issue final agency decisions under FRSA's employee protection provisions. *See* Sec'y of Labor's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

This Court has jurisdiction to review the ARB's decision because the alleged FRSA violations occurred in Illinois, and because Samson resided in Illinois on the dates of the alleged violations. *See* 49 U.S.C. 20109(d)(4).

## STATEMENT OF THE ISSUES

1) Whether an Administrative Law Judge ("ALJ") and the ARB reasonably interpreted FRSA's protection from retaliation for railroad employees who report, in good faith, a "hazardous safety or security condition," to require the employee's belief that a hazardous condition exists to be objectively reasonable.

2) Whether substantial evidence supports the ARB's affirmance of the ALJ's conclusion that Samson did not engage in FRSA-protected activity when he abandoned his position twice in three days after conflicts with his supervisors, where the ALJ carefully articulated why he found Samson's supervisors' testimony that there was no hazardous condition, that they were engaged in normal supervisory activities, and that Samson had not voiced any safety concerns before refusing to work more credible than Samson's testimony to the contrary.

3) Whether the ALJ abused his discretion by declining to draw an adverse inference against Canadian Pacific ("CP") for alleged spoliation of evidence, where Samson did not request an adverse inference at trial or in his post-trial brief and presented no evidence that CP had destroyed records in bad faith.

## STATEMENT OF THE CASE

This case involves a whistleblower complaint by Petitioner Jacek Samson under the Federal Railroad Safety Act ("FRSA") against his former employer, Intervening Respondent Soo Line Railroad, which does business as Canadian Pacific ("CP").[1] The Department of Labor ("DOL") dismissed the complaint, finding that CP had not violated FRSA. DOL's decision is now before this Court for review pursuant to the Administrative Procedure Act.

### I. Statutory Framework

FRSA seeks "to promote safety in every area of railroad operations[.]" 49 U.S.C. 20101. FRSA's whistleblower provision furthers that purpose by protecting railroad employees from retaliation for engaging in certain safety-related protected activities, including (1) "reporting, in good faith, a hazardous safety or security condition;" and (2) "refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties," provided that certain conditions are met. 49 U.S.C. 20109(b)(1)(A), (b)(1)(B). In

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[1] Like the proceedings below, this brief refers to Soo Line as CP.

order to be protected for refusing to work when confronted with a hazardous safety condition, the employee must show that:

> [A] reasonable individual in the circumstances then confronting the employee would conclude that—
>
> > (i) the hazardous condition presents an imminent danger of death or serious injury; and
> >
> > (ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and . . .
>
> the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work . . . unless the condition is corrected immediately . . . .

49 U.S.C. 20109(b)(2).[2]

Claims under FRSA's whistleblower provisions are subject to the procedural framework of the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21"), 49 U.S.C. 42121(b). *See* 49 U.S.C. 20109(d)(2)(A)(i). Under AIR-21, "a complainant must first show by a preponderance of the evidence that he engaged in protected activity and that the protected activity

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[2] Pursuant to Federal Rule of Appellate Procedure 28(f), relevant provisions of 49 U.S.C. 20109 are reproduced in an addendum to this brief.

was a contributing factor in the employer's adverse employment action." *Jones v. U.S. Dep't of Labor*, 556 F. App'x 535 (Mem), 536 (7th Cir. June 4, 2014) (unpublished) (citing *Formella v. U.S. Dep't of Labor*, 628 F.3d 381, 389 (7th Cir. 2010)). If the complainant makes this showing, the employer may still prevail if it demonstrates by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the protected activity. *Id.*

An employee alleging FRSA whistleblower violations must file a complaint with DOL's Occupational Safety and Health Administration ("OSHA"). *See* 49 U.S.C. 20109(d)(1); 29 C.F.R. 1982.103. After an investigation, OSHA either dismisses the complaint or finds reasonable cause to believe that a violation occurred and orders appropriate relief. *See* 49 U.S.C. 20109(d)(2)(A); 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1982.105. Either party may file objections and request a hearing *de novo* before an administrative law judge ("ALJ"). *See* 49 U.S.C. 20109(d)(2)(A); 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1982.106, 1982.107. The ALJ's decision is subject to review by DOL's Administrative Review Board ("ARB"), which has authority to issue final agency decisions on FRSA whistleblower complaints. *See* 29 C.F.R. 1982.110; 77 Fed. Reg.

at 69,378. The ARB's order may be challenged in a petition for review in the appropriate court of appeals. *See* 49 U.S.C. 20109(d)(4); 29 C.F.R. 1982.112(a).

## II. Statement of the Facts

### A. Background

Jacek Samson began working for CP in 2008 and was trained to be a freight conductor, the crewmember who is in charge of a train or yard crew. RA58-63, TR85:5-90:9; RA337; 49 C.F.R. 242.7.[3] Samson was stationed at Bensenville Yard, about 20 miles west of Chicago. RA64-65, TR91:13-92:18. After two years as a conductor, Samson worked for two years as an engineer, and then became a conductor again in October 2012 due to downsizing. RA63-65, TR90:14-92:16.

As a conductor, one of Samson's primary duties was switching, which involves disassembling a train that has arrived in a yard, either car by car or in groups of cars, and coupling those cars together to form

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[3] This brief cites the record below using the convention "RA__," with the number following "RA" reflecting the page of Respondent's Appendix. Parallel citations are also included to reflect the page and line numbers from the ALJ hearing transcript ("TR"), the first investigative hearing transcript ("TR-I-"), and the second investigative hearing transcript ("TR-II-").

outbound trains. RA68, TR108:6-19; RA141, TR239:13-20. A three-person switching crew includes a conductor, who is the foreman, an engineer, and a brakeman or helper. RA62, TR89:18-21, RA68, TR108:20-25. The crew is supervised by a yardmaster, who reports to a trainmaster. RA66-67, TR101:22-102:1; RA70, TR115:10-14. During the period relevant to this litigation, Bensenville Yard had two trainmasters, an inside trainmaster, who planned the assigned tasks, and an outside trainmaster, who executed tasks outdoors and supervised and assisted crews. RA142-43, TR240:24-241:7; RA170, TR275:2-7; RA199, TR313:3-20.

In late 2012 through early 2013, Bensenville Yard transitioned from "hump switching" to "flat switching." RA288-90, TR502:20-504:11. In hump switching, a more automated process, a locomotive pushes a train up a small hill, and at or near the top, a pin puller uncouples the cars, which roll downhill and are routed, using remotely-thrown switches, to different tracks. RA73, TR118:13-21; RA142, TR240:3-6.[4]

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[4] *See generally* Perry Stoner, *Train Tuesdays: World's Largest Train Yard Employs Unusual Ally to Sort Cars*, NET News (June 4, 2012),

In contrast, flat switching is done on flat ground, where workers throw switches manually. RA289-90, TR503:17-504:11. A locomotive pushes, or "shoves," a group of cars toward a track, and the switch is completed using either "kicking" or "shoving" to rest. RA188-89, TR300:19-301:15. In kicking—the more common and efficient method—the front car or cars are uncoupled from the old train while in motion and roll on their own momentum, coupling with the new train upon impact. RA177, TR282:9-13; RA187-88, TR299:25-300:1; RA189, TR301:3-15.[5] When cars are shoved to rest, the locomotive pushes the cars all the way to the new train, and they are not uncoupled from the old train until they have already coupled with the new train. RA188, TR300:19-24.

During Bensenville's transition, CP's supervisors worked with employees to ensure that they were familiar with flat switching. RA256-57, TR429:3-430:10; RA290-91, TR504:12-505:11. Additionally,

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http://netnebraska.org/article/news/train-tuesdays-worlds-largest-train-yard-employs-unusual-ally-sort-cars.

[5] *See* Kicking Freight Cars at Delta Yard, Everett, WA, 1-11-2011 (published Feb. 7, 2011), https://www.youtube.com/watch?v=zEWE3df6Q2s (video of flat switching using kicking).

CP initially moderated its productivity expectations, first aiming to switch only 50 to 60 cars per shift, then increasing expectations gradually through late 2013 to about 260 cars switched per shift. RA257-58, TR430:11-431:6. In February 2013, the time of the events underlying this litigation, CP's expectation was 150 cars per shift, which its senior vice president, Doug McFarlane, considered a "fairly conservative" expectation. RA258, TR431:7-11; RA292-93, TR506:20-507:9.

### B. February 20, 2013 Incident

On February 20, 2013, Samson was the brakeman on a switching crew consisting of himself, a conductor/foreman, Tim Allen, and an engineer, Mike Romano. RA71-72, TR116:17-117:9; RA143, TR241:8-11; RA3. Samson's immediate supervisor was yardmaster Kevin Best, who reported to the outside trainmaster, Nicholas Mugavero. RA69, TR111:3-12; RA142-43, TR240:18-241:7.

Allen provided Samson and Romano with a job briefing—a discussion outlining the assigned tasks and any related safety considerations. RA72, TR117:11-24; *see* RA300. While the crew was working, according to Samson, Best called down and critiqued their

productivity, noting that it took them an hour to switch a track. RA611. Samson responded that Best should come outside and help and that might make things go faster. *Id.*

Shortly thereafter, Mugavero arrived to perform a "train ride," a procedure in which a supervisor observes a crew's performance and makes any necessary suggestions. RA73-75, TR118:22-120:5; RA143, TR241:8-15; RA158-59, TR259:13-260:1. Samson's crew's train had stopped because it was blocked by another train, and Samson was preparing switches for the next move. RA75-76, TR120:8-121:12.

Mugavero instructed Samson that while the train was blocked, the crew should switch out a different part of the train in another direction. RA76, TR121:14-25; RA143-44, TR241:14-242:11. Samson relayed those instructions to Allen, who followed them and also made his own suggestion, which the crew followed with Mugavero's permission. RA76-77, TR121:25-122:2; RA78, TR123:11-123:22; RA127-28, TR215:5-216:13; RA144, TR242:11-15; RA163, TR265:2-16. As Allen followed Mugavero's directions, Mugavero gave Samson additional instructions, which Samson said he understood. RA77, TR122:4-13.

As the train began to move, Mugavero noticed an error on the list

of cars to be switched—two cars were mismarked, meaning they were marked for one track but were supposed to go to another. RA79, TR124:10-14; RA144, TR242:16-23. Mugavero approached Samson—the closest crew member to him at the time—and asked him about the discrepancy. RA78-79, TR123:24-124:14; RA144-45, TR242:24-243:2; RA156-57, TR257:5-258:20; RA161-62, TR262:17-263:1.

Mugavero testified that he was providing normal instructions and supervision, and would not have interrupted Samson had it been dangerous to do so. RA148-49, TR246:16-247:11; RA158-59, TR259:2-260:17; RA162, TR263:9-20. Samson, however, testified that he believed Mugavero was distracting him and changing the instructions without a job briefing, and making the operation unsafe by increasing the risk of an accident. RA79-83, TR124:10-128:2.

In response to Mugavero's input, Samson asked Mugavero if Mugavero was the conductor or foreman on the job—reflecting his belief that Mugavero was micromanaging the crew. RA84, TR129:8-17; RA145, TR243:2-4; RA415-16, TR-I-46:20-47:11. According to Mugavero, Samson also stated that if Mugavero wanted to switch cars, he should come back "to the ground," i.e., be a member of a switching

crew rather than a trainmaster. RA145, TR243:4-5. Samson testified that before asking Mugavero if he was the conductor, he requested that Mugavero stand in a safe position and wait until the train had stopped, because providing direction while the train was moving was unsafe. RA83, TR128:3-24. Mugavero denied that Samson made this request or commented that his actions were unsafe. RA159-60, TR260:25-261:5.

Mugavero told Samson that he was Samson's manager, and Samson had to follow his instructions. RA84, TR129:1-4; RA145, TR243:5-7.[6] Mugavero testified that he tried to explain that it appeared that Best had made a mistake marking the cars, but Samson would not let him get a word in and responded that his union told him that he did not have to listen to Mugavero. RA145, TR243:8-12.

Mugavero gave Samson two options: Samson could follow Mugavero's instructions, or he could go home and the situation would be addressed in "Room 224"—where investigations for rules violations took place. RA85, TR130:11-13; RA145-46; TR243:14-244:1. Samson

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[6] According to Samson, Mugavero made this statement before Samson asked him if he was the conductor on the job; according to Mugavero, he did so afterwards. RA84, TR129:1-17; RA145, TR243:2-7.

responded that he would go home. RA85, TR130:14-19.

Mugavero suggested that Samson talk to the rest of his crew first. RA85, TR130:22-131:1; RA146, TR244:2-4. Samson met with Allen and Romano in the locomotive with the train stopped. RA86, TR131:1-9; RA146, TR244:5-9; RA612. According to Samson, he told them he was going home because Mugavero's involvement was distracting and unsafe. RA86, TR131:10-17. Mugavero, who arrived while Samson was talking to the crew, told Allen and Romano that if they felt that there was something wrong, they could go home as well. RA86, TR131:20-25; RA146, TR244:10-13. Neither responded, and both continued working that day. RA87, TR132:1-9; RA146, TR244:13-14; RA147, TR245:7-9.

Samson left the engine and began walking away. RA87, TR132:18-22; RA146, TR244:20-23. Mugavero followed him, asking if Samson was sure he wanted to do this, and Samson replied that he was. RA87, TR132:22-25; RA146, TR244:23-25. According to Mugavero, he also requested that Samson go to the yard office, hoping that Samson would "cool down" and they could resolve their differences. RA146-47, TR244:25-245:4.

Samson went to the office of Steve Cork, the yard superintendent.

RA88, TR133:2-23. Cork had already been advised of the incident by his assistant superintendent, Tom Murphy. RA213-14, TR345:10-346:17. According to Cork, he asked Samson if anything was bothering him, and Samson responded that nothing was bothering him. RA215, TR347:5-7. Cork then asked Samson if there was anything he could do to help, and Samson asked to fill out a hazardous condition report, which Cork provided him. RA215, TR347:8-12. Samson filled out the report as follows:

> Trainmaster Nick Mugavero came to the East End C-Yard and began telling 1399 two men crew how to switch tracks, creating unsafe for conditions for the crew. He was constantly interferring [sic] and causing confussion [sic]. Crew member insisted on being able to do the switching, trainmaster Mugavero refused.

RA88, TR133:4-5; RA595.

Cork testified that he left to use the restroom while Samson filled out the report, and when he returned, Samson had left the report on his desk and was gone. RA215, TR347:12-16. According to Samson, Cork signed the report in his presence. RA89, TR134:16-17. After encountering Mugavero once more in the office, Samson went home. RA89-91, TR134:19-136:20; RA147, TR245:4-6. Mugavero contemporaneously documented the events in an email to three of his

supervisors. RA598-99; RA147, TR245:10-25.

Cork reviewed Samson's report and provided a copy to CP's safety department. RA215-17, TR347:22-349:6; RA218-19, TR352:19-353:8. Cork concluded that the report "certainly" did not document an unsafe condition but rather a manager providing appropriate guidance and direction. RA217, TR349:8-19; RA219, TR353:9-23. A discussion with Mugavero reinforced Cork's view that the incident was "frustration or something else [rather] than a genuine unsafe condition." RA216-17, TR348:16-349:2; RA220, TR354:1-20. Accordingly, he wrote the following on the report in the "supervisor's reply" section:

> Providing supervision to crew member is not a hazardous condition, nor is it considered unsafe. Observing crews perform duties and giving guidance/feedback is a supervisory fundamental.

RA596; RA219, TR353:24-25.

### C. February 22, 2013 Incident

Samson was not immediately removed from duty after the February 20 incident, as CP rarely removed employees from service pending an investigation. RA234-35, TR373:13-374:21. On February 22, Samson was the conductor on a switching crew on the nighttime shift. RA98, TR151:18-21; RA170, TR275:22-24. His immediate

supervisor was yardmaster Ricky Hall, who was supervised by outside trainmaster Mark Lashbrook. RA98-99, TR151:23-152:1; RA169-70, TR274:22-275:1; RA182, TR287:6-13.[7]

Lashbrook noticed that Samson's crew was on pace to be well short of the expected 150 cars per eight-hour shift. RA171, TR276:8-18. He decided to talk to the crew to determine the cause. RA171, TR276:18-19.

Lashbrook drove toward the crew and observed Samson riding a tank car that was being shoved into a coupling. RA172, TR277:4-8. He considered that "odd" because the typical, and more efficient, practice was to "kick" cars and let them couple on their own momentum. RA177, TR282:5-13; RA187-90, TR299:18-302:15. After driving around to get a better view, Lashbrook testified, he saw Samson ride the car all the way into the "joint," or coupling. RA177-79, TR282:23-284:11; RA191-93, TR303:16-305:7. While riding a car during switching can be "perfectly fine," riding a car into a joint is unsafe because the force could jostle or throw the rider. RA103-04, TR160:21-161:4; RA178, TR283:10-18.

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[7] Portions of the transcript misidentify Hall as "Holt." RA99, TR152:1; RA106, TR163:9; RA109, TR168:3.

Although Lashbrook considered Samson's action unsafe, he did not raise it immediately to avoid creating tension. RA173, TR278:15-22; RA187, TR299:3-17. Instead, after approaching Samson cordially, he asked Samson why he had shoved the cars to rest instead of kicking them. RA100, TR156:4-9; RA184, TR289:12-13; RA613. Samson explained that he did so because one of the cars contained hazardous materials. RA100, TR156:9-13; RA184, TR289:13-14.

As Lashbrook testified, Samson's belief that it was unsafe to kick the tank cars was mistaken. Only cars containing certain hazardous materials may not be kicked. RA184-85, TR289:2-290:12; RA347 (CP's instructions for handling hazardous material, showing which types of hazardous cars may not be "cut off in motion," i.e., kicked). The cars at issue, Lashbrook recalled, contained "class 3" flammable materials, which may be kicked safely. RA184-85, TR289:2-290:12; RA346 (showing classes of hazardous materials), RA347 (showing that loaded tank cars in "Group E," which includes class 3 flammable materials, may be cut off in motion).

Recognizing that unnecessarily shoving cars into couplings might have contributed to the crew's low productivity, Lashbrook advised

Samson that he was permitted to kick these cars. RA100, TR156:15-17; RA184, TR289:14-17; RA191-92, TR303:16-304:7. According to Samson, Samson then requested permission to go on the radio so he could create a record that Lashbrook had instructed him to kick the cars regardless of whether the crew believed it was safer to shove them. RA100, TR156:17-25.

Lashbrook began to discuss the crew's productivity. RA101, TR157:8-16; RA172, TR277:9-13. Lashbrook recognized that Samson and the brakeman, Max Perry, had both recently been demoted from engineer and could have been "rusty" in their new jobs. RA172, TR277:14-19. He explained that the crew needed to figure out a way to work "smarter" to meet the expectation of 150 cars per shift. RA101, TR157:14-16; RA172-73, TR277:24-278:12. Samson responded that he was switching safely. RA101, TR157:16-17; RA173, TR278:12-13. According to Lashbrook, Samson became "irritated" and "agitated." RA172, TR277:20-23; RA173, TR278:9-12.

Given that Samson had asserted that he was operating safely, Lashbrook asked Samson why he had unsafely ridden the tank car into

a joint. RA103, TR160:7-11; RA173, TR278:12-25.[8] Samson denied having done so, and believed Lashbrook could not have seen him ride the car into the joint given their positions and the nighttime conditions. RA103-04, TR160:12-161:12; RA173, TR278:22-25. According to Samson, he believed that Lashbrook was falsely accusing him to pressure him to work faster and in retaliation for the report he filed two days earlier. RA103-04, TR160:15-161:22; RA105, TR162:23-163:5.

Samson and Lashbrook's accounts differed regarding what Samson did and said next. Samson testified that he began to experience labored breathing and heart palpitations, which a doctor later told him were likely symptoms of a panic attack. RA104-06, TR161:23-163:14; RA108, TR166:5-11; *see* RA305. Samson testified that he called Hall and told him he was pulling himself out of service and going home because he had been falsely accused by Lashbrook of violating a rule and did not think he could safely continue to perform his duties. RA106, TR163:9-14. Samson also testified that he told

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[8] According to Samson, Lashbrook raised the tank car issue after calling him aside so they could speak privately. RA103, TR160:4-11. As Lashbrook related it, he mentioned this issue immediately after Samson claimed to have been switching safely. RA173, TR278:9-25.

Lashbrook, "you have accused me of something I haven't done and I am going home." RA107, TR164:5-10. Lashbrook, in contrast, testified that Samson became "more agitated" and walked away with no explanation, and that when Lashbrook called out to him, Samson responded that he didn't have to listen to him. RA174, TR279:1-6.

Lashbrook conveyed the events to his supervisor, Murphy, during two phone calls. RA174-75, TR279:9-280:5. Murphy, who was at home, told Lashbrook to tell Samson that he would be there in 15 minutes, and that Samson was not to leave until he arrived. RA174-75, TR279:9-280:5; RA245, TR400:1-19. Lashbrook testified that he relayed these instructions to Samson in the locker room, where Samson was preparing to leave, and Samson again responded that he was not required to listen to him. RA175, TR280:5-19.

Lashbrook left the locker room and spoke to Nick Walker, the inside trainmaster, who volunteered to speak to Samson because he had a good working relationship with him. RA175-76, TR280:20-281:7; RA203-04, TR317:5-318:5. Like Lashbrook, Walker asked Samson to stay until Murphy arrived. RA109-10, TR168:16-169:17; RA204-05, TR318:17-319:3. Samson declined and began to leave. RA110-12,

TR169:16-171:12; RA205, TR319:3-14. Samson testified that he told Walker that Lashbrook had falsely accused him of a rule violation, and that this made him feel unsafe; Walker testified that Samson did not explain why he was leaving. RA110, TR169:3-7; RA208, TR322:6-8. Samson exited the locker room, and according to Lashbrook, who was waiting outside, told Walker that he didn't have to listen to him or Lashbrook. RA176, TR281:8-17. Lashbrook urged Samson a final time to stay until Murphy arrived. RA137-38, TR232:21-233:12; RA176, TR281:18-22; RA205-06, TR319:20-320:5. Samson responded that if Lashbrook had anything else to discuss, he could bring it up with Samson's union representative or in an investigation. RA176, TR281:22-24; RA206, TR320:5-10; RA511, TR-II-32:6-15.

Samson did not tell Lashbrook, Walker, or anyone at Bensenville Yard that he was experiencing a panic attack or any particular symptoms. RA113, TR180:25-181:11; RA177, TR282:1-4; RA206-08, TR320:23-322:8. Samson testified only that he told Walker he was not feeling well and might see a doctor. RA109, TR168:19-25. Walker denied this, and testified that had Samson said so, he would have asked him if he needed medical attention and offered to take him to the

hospital, as he had done for employees previously. RA207-08, TR321:12-322:5.

When Murphy arrived, he called Robert Denson, Samson's union representative, to try to resolve the matter. RA247, TR403:1-8. Denson told him that Samson would not be returning. RA247, TR403:9-14.

### D. Investigations and Termination of Samson's Employment

The February 20 and 22 events were investigated pursuant to the collective bargaining agreement between CP and Samson's union. RA117-19, TR203:8-205:18; RA221-24, TR355:23-358:7; RA275-78, TR464:7-467:21. Samson was directed to appear at two formal hearings, one for each incident. RA301-03. Murphy presided over the hearing regarding the February 20 incident, and John Sullivan, another assistant superintendent at Bensenville, presided over the February 22 hearing. RA241-42, TR392:12-393:1; RA271-72, TR453:2-454:4.

Samson testified at each hearing and was represented by Denson. RA118-19, TR204:12-205:18. Mugavero and Lashbrook testified that they believed Samson had violated Rule 1.6 of the General Code of Operating Rules ("GCOR"). RA462-63, TR-I-93:10-94:7; RA534-35, TR-II-55:5-56:2. The GCOR is a rulebook governing the operations of CP

and other railroads in North America. RA338-42. Rule 1.6 states:

> 1.6 Conduct
>
> Employees must not be:
>
> 1. Careless of the safety of themselves or others.
> 2. Negligent.
> 3. Insubordinate.
> 4. Dishonest.
> 5. Immoral.
> 6. Quarrelsome.
>
> or
>
> 7. Discourteous.
>
> Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.

RA344.

Rule 1.6 violations include "the more severe charges that can be issued by a [railroad] carrier," and are "cardinal rule violations." RA231-32, TR366:22-367:3; RA252-53, TR425:18-426:5. While CP handles lesser infractions through a progressive discipline system, Rule 1.6 violations can warrant immediate termination because they can "disrupt not only the chain of command, but the entire operation and in some cases, public safety." RA253-54, TR426:6-427:4; *see* RA122-23, TR209:11-210:13; RA231-33, TR366:15-368:4; RA248, TR414:1-9;

RA274, TR456:9-13; RA280-81, TR479:1-480:20; RA288, TR502:4-19. In the previous year, CP had fired at least three other employees for Rule 1.6 violations. RA283-85, TR489:3-491:6; RA616-32.

Mugavero testified that he believed Samson's conduct on February 20 was insubordinate and quarrelsome, and also violated the last paragraph of Rule 1.6. RA462-63, TR-I-93:10-94:7. Lashbrook testified that he believed Samson was quarrelsome, discourteous, and insubordinate on February 22. RA534-35, TR-II-55:5-56:2. Following the hearings, each hearing officer concluded, respectively, that the Rule 1.6 violations were substantiated for the February 20 and 22 incidents, and recommended to Jerry Peck, CP's general manager, that Samson's employment be terminated. RA477-78, RA589-90.

Cork reviewed these recommendations and the hearing transcripts, and also recommended to Peck that Samson be dismissed. RA225-28, TR360:2-363:18. Cork noted that Samson had more than one opportunity to engage his managers productively, but instead chose to walk off the job. RA226-27, TR361:21-362:1. Cork could not recall one instance in his over-20-year career involving an employee charged with similar insubordination. RA226, TR361:1-4.

Peck reviewed the transcripts and Murphy and Sullivan's recommendations, and considered Cork's recommendation as well, and also concluded that each of the incidents warranted dismissal. RA259-62, TR432:16-435:17. Peck conveyed this to McFarlane, CP's Senior Vice President of Operations. RA267-68, TR446:14-447:5. McFarlane agreed that dismissal was appropriate. RA295-96, TR509:5-510:11. Cork sent Samson a letter of dismissal on March 28, 2013. RA304.

## III. Procedural History

### A. ALJ Proceedings

Samson filed a timely complaint with OSHA, alleging that CP violated his rights under FRSA's whistleblower protection provisions. RA1-8. On February 14, 2014, OSHA issued findings dismissing the complaint. RA9-13. Samson, proceeding *pro se*, objected to OSHA's determination and requested a hearing before an ALJ. RA14-18. Following discovery, the ALJ denied CP's motion for a summary decision. RA49-53. A hearing took place on January 13-14, 2015, after which both parties submitted written closing arguments. RA54-299; RA633-84. On May 29, 2015, the ALJ issued a decision and order dismissing Samson's complaint. RA685-740.

### 1. Factual Findings

After summarizing the evidence, the ALJ made detailed credibility determinations. RA726-27. He found that Walker, Cork, Peck, Sullivan, and McFarlane, as well as Christine Marier and Amanda Cobb, two other witnesses for CP, were credible. RA726. The ALJ also determined that Mugavero and Lashbrook were more credible than Samson, and that when testimonies conflicted, he would give their testimony greater weight. RA726-27.

The ALJ explained that he based this decision on his assessment that Samson had manifested a "demonstrated inclination to react in opposition to supervisory comments about his work," and had "consistently challenged, confronted, implicitly argued with, and on at least two occasions rebuked, three supervisors who tried to talk to him about his work as a conductor, and related issues." RA727. This confrontational behavior, which the ALJ found was influenced by Samson's belief that CP had imposed "unrealistic" productivity expectations after the transition to flat switching, diminished the ALJ's confidence in the accuracy of Samson's testimony. *Id.* Additionally, the ALJ found Samson's account of the February 22 events less reliable

given Samson's admission that his memory of that date was clouded by his panic attack. RA731. Conversely, the ALJ explained that he did not find any reason to disbelieve Mugavero and Lashbrook, who were "engaged in no more than the execution of their normal and usual supervisory responsibilities," and he found the rest of CP's witnesses credible "based on their demeanor, consistently direct answers, and general lack of equivocation." RA726, RA727.

Based on these credibility determinations, the ALJ found, consistent with Mugavero's testimony, that on February 20, Samson never told Mugavero that Mugavero's actions made him feel unsafe or confused. RA728-29.

Regarding the February 22 events, while the ALJ was unable to determine whether Samson rode the tank car into the joint, he found that Lashbrook believed that Samson had done so, whereas Samson believed that Lashbrook could not have seen him and thus believed Lashbrook had fabricated the accusation. RA729-30. He also found, consistent with Walker and Lashbrook's accounts and contrary to Samson's, that Samson did not tell Hall, Lashbrook, or Walker why he was leaving work; rather, he found that Samson walked away from

Lashbrook, responding that he didn't have to listen to him, and failed to relate the details of his exchange with Lashbrook to Hall or Walker. RA730-31. Additionally, the ALJ found that Samson did not tell Walker he was not feeling well and might see a doctor. RA731. He grounded these findings in his credibility determinations and on Samson's admission that his panic attack on February 22 affected his memory. RA731.

### 2. Legal Conclusions

The ALJ concluded that dismissal of Samson's complaint was warranted because Samson had not engaged in protected activity under FRSA on either February 20 or February 22. He analyzed each incident under 49 U.S.C. 20109(b)(1)(B) ("(b)(1)(B)"), which protects covered work refusals, and 49 U.S.C. 20109(b)(1)(A) ("(b)(1)(A)"), which protects employees who report hazardous conditions.

#### i. February 20 Incident

##### a. Work Refusal

The ALJ determined that Samson's refusal on February 20 was not protected under (b)(1)(B) for two independent reasons.

First, based on his finding that Samson had not told Mugavero that he felt unsafe or confused, he concluded that Samson had not

provided notice of his work refusal, as required by 49 U.S.C. 20109(b)(2)(C). RA734.

Second, he concluded that although Samson's work refusal was made in good faith, it was not objectively reasonable because a reasonable person would not have viewed Mugavero as creating a hazardous condition. RA734-35. Additionally, the ALJ concluded that even assuming that the condition was hazardous, it did not reasonably present an imminent danger of death or serious injury, as required by 49 U.S.C. 20109(b)(2)(B)(i), nor was there insufficient time to eliminate any danger without a work refusal, as required by 49 U.S.C. 20109(b)(2)(B)(ii). *Id.*

The ALJ noted, among other things, that Mugavero credibly testified that he was simply engaged in normal supervision, that Samson's other crew members followed Mugavero's instructions without objection, that Mugavero's revised instructions and questions happened while the train was stopped, and that Samson had numerous opportunities to address any concerns safely, such as by discussing the situation with his crew and Mugavero in the engine once the train had stopped, accepting Mugavero's numerous offers to return, or speaking to

another supervisor such as Cork. RA735. Rather, concluded the ALJ, the objective issue Samson had was with Mugavero, a trainmaster, instructing the crew how to switch. RA734.

**b. Reporting**

The ALJ also concluded that Samson's report to Cork did not constitute protected activity under (b)(1)(A). While he found that Samson made his report in subjective good faith, he held that (b)(1)(A) also requires that a hazardous condition report must be objectively reasonable. RA686 n.1. Because the ALJ found that a reasonable person would not have viewed Mugavero's actions as creating a hazardous condition, he also determined that Samson's report of those actions as hazardous was not objectively reasonable and therefore not protected. RA737-38.

**ii. February 22 incident**

**a. Work Refusal**

The ALJ also concluded that Samson's refusal to continue working on February 22 was not protected under (b)(1)(B). RA736-37.

First, because he found that Samson did not explain to Hall, Lashbrook, or Walker, why he was leaving work, the ALJ concluded

that Samson had not notified CP of the allegedly dangerous condition. RA736.

Second, although he again found that Samson's work refusal was in subjective good faith, the ALJ concluded that it was not objectively reasonable for Samson to presume that Lashbrook had fabricated an accusation against him in retaliation for Samson's February 20 report or to coerce Samson into working less safely. RA736-37. He concluded that Lashbrook's question about riding the car into the joint, which Lashbrook believed was an unsafe maneuver, was neither hazardous nor created an imminent danger of death or serious injury, and that Samson's belief to the contrary was unreasonable. RA737.

**b. Reporting**

The ALJ also concluded that Samson had not engaged in any protected activity under (b)(1)(A) on February 22. RA738. First, he concluded that the evidence was insufficient to establish that Samson had reported the allegedly unsafe condition at all. *Id.* Additionally, for the reasons discussed above, he concluded that even if Samson had reported the incident, any report that Lashbrook had created a dangerous situation would not have been objectively reasonable and

therefore would not have been protected. *Id.*

### B. ARB Proceedings

On July 11, 2017, the ARB affirmed the ALJ's decision, rejecting Samson's appeal. RA811-815. The ARB found that "substantial evidence" supported the ALJ's factual findings, and that the ALJ's legal conclusions were consistent with applicable law. RA814. The ARB noted that Samson's arguments to the contrary were "based on his own rendition of the facts" and his challenges to the ALJ's credibility determinations. RA814-15. The ARB concluded that the ALJ's credibility determinations were "neither inherently incredible nor patently unreasonable," and therefore deferred to them in affirming the ALJ's decisions. RA815. This appeal followed.

## SUMMARY OF THE ARGUMENT

This Court should deny Samson's petition for review. Substantial record evidence supports the ALJ and ARB's decisions, which were not arbitrary, capricious, contrary to law, or abuses of discretion.

As an initial matter, the ARB and the ALJ correctly read 49 U.S.C. 20109(b)(1)(A) to protect only objectively reasonable reports of hazardous safety or security conditions. Their construction of the statute is consistent with the principle that whistleblower protection

statutes protect employees from retaliation for reporting conduct that they reasonably believe violates the law or causes a hazard, but not for raising frivolous or unreasonable concerns. This Court similarly interpreted analogous employee protections in the False Claims Act, and the majority of case law addressing this question under various subsections of FRSA's whistleblower protection provisions reaches this same conclusion. To the extent that (b)(1)(A) is ambiguous, the ARB and the ALJ's interpretation was reasonable and should receive controlling *Chevron* deference.

On the merits, substantial record evidence supports the ALJ and ARB's determination that Samson did not engage in any protected activity because neither his work refusals nor his hazardous activity reports were objectively reasonable.

In reaching the factual findings on which he based his conclusions, the ALJ did not arbitrarily deem CP's witnesses more credible than Samson. Rather, the bases for his determinations that CP's witnesses were more credible were thoroughly explained in his decision, and these determinations are entitled to significant deference.

As the ALJ found, and the ARB affirmed, while Samson may have

acted in good faith, the events of February 20 and 22 were not objectively hazardous and did not present an imminent danger of death or serious injury, and Samson had options to resolve any concerns besides refusing to work and going home. Additionally, substantial evidence, grounded in the ALJ's credibility determinations, supports the ALJ's findings that Samson had not notified CP of any allegedly hazardous conditions prior to his work refusals on either date, and did not report the February 22 incident at all.

Finally, the ALJ did not abuse his discretion by declining to sanction CP for spoliation for failing to turn over recordings of the February 20 and 22 events. Samson's arguments to the contrary were potentially waived and are speculative in any event. The record contains no evidence that CP destroyed recordings, much less that it did so in bad faith, as required for a spoliation sanction. Moreover, the adverse inference that Samson seeks would not have affected the ALJ's analysis of whether Samson reasonably believed that his superiors' conduct created hazardous safety conditions, and therefore would not have resulted in a different outcome below.

## ARGUMENT

### I. Standard of Review

This Court's review is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. 706. *See* 49 U.S.C. 20109(d)(4). Under this "deferential standard of review," the Court must affirm the ARB's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Roadway Express, Inc. v. U.S. Dep't of Labor*, 612 F.3d 660, 664 (7th Cir. 2010) (quoting 5 U.S.C. 706(2)(A)).

The Secretary's factual findings must be affirmed if they are supported by "substantial evidence," which means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Roadway Express*, 612 F.3d at 664 (quoting *Roadway Express, Inc. v. U.S. Dep't of Labor*, 495 F.3d 477, 483 (7th Cir. 2007) ("*Roadway I*")). Substantial evidence "may be less than a preponderance" but must be "more than a mere scintilla." *Addis v. Dep't of Labor*, 575 F.3d 688, 690 (7th Cir. 2009) (quoting *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 276 (7th Cir. 1995)). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by

substantial evidence." *Johnson v. Nat'l Transp. Safety Bd.*, 979 F.2d 618, 620 (7th Cir. 1992) (quoting *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966)). This Court "may not set aside an inference merely because it finds the opposite conclusion more reasonable." *Addis*, 575 F.3d at 690 (quoting *Kahn*, 64 F.3d at 276).

On APA review, this Court gives "substantial deference" to an ALJ's factual findings, and "even greater" deference to an ALJ's credibility determinations, which, are not to be disturbed "unless the disputed testimony shows on its face that it is beyond credibility." *Gimbel v. Commodity Futures Trading Comm'n*, 872 F.2d 196, 199 (7th Cir. 1989); *First Lakewood Assocs. v. NLRB*, 582 F.2d 416, 420 (7th Cir. 1978); *see also Mercier v. U.S. Dep't of Labor*, 850 F.3d 382, 388 (8th Cir. 2017) (court gives "great deference" to an ALJ's credibility determinations).

The Court reviews an ALJ's evidentiary rulings, including decisions regarding whether to sanction a party, under an abuse of discretion standard. *See Mercier*, 850 F.3d at 388; *Roadway I*, 495 F.3d at 484. The ARB's conclusions of law are reviewed de novo, giving deference to the ARB's reasonable interpretations of statutory

ambiguities. *See, e.g., BNSF Ry. Co. v. U.S. Dep't of Labor Admin. Rev. Bd.*, 867 F.3d 942, 945 (8th Cir. 2017); *BNSF Ry. Co. v. U.S. Dep't of Labor*, 816 F.3d 628, 638 (10th Cir. 2016).[9]

## II. In Holding that Samson Did Not Engage in FRSA-Protected Activity, the ALJ and ARB Applied the Correct Legal Standard for Reports of Hazardous Safety Conditions.

Samson argues that the ALJ and ARB erred in concluding that a report of a hazardous condition under 49 U.S.C. 20109(b)(1)(A) requires more than subjective good faith. *See* Pet'r's Br. 25-27. He contends that the ALJ incorrectly imposed the conditions of (b)(1)(B), the work-refusal provision, including the requirement that an objectively reasonable

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[9] The Secretary believes that deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), should be accorded to the ARB's reasonable construction of FRSA in this case. Several courts of appeals have concluded that the ARB should receive *Chevron* deference to its interpretations of ambiguous whistleblower provisions. *See, e.g., Wiest v. Lynch*, 710 F.3d 121, 131 (3d Cir. 2013) (granting *Chevron* deference to the ARB's interpretation of the reasonable belief standard in the Sarbanes-Oxley Act); *Welch v. Chao*, 536 F.3d 269, 276 n.2 (4th Cir. 2008) (same); *Anderson v. U.S. Dep't of Labor*, 422 F.3d 1155, 1173-74, 1181 (10th Cir. 2005) (deferring under *Chevron* to ARB's interpretation of environmental whistleblower statutes). In any event, at minimum, the ARB's interpretation should receive deference to the extent it has "power to persuade." *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 220-21 (2d Cir. 2014) (*citing Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

person would perceive an imminent danger of death or serious injury. *Id.* Samson, however, misconstrues the Secretary's holding on this issue, which was only that a report under (b)(1)(A) must be objectively reasonable. This interpretation is consistent with other whistleblower protection laws, makes sense as matter of policy, and at minimum was a reasonable construction of (b)(1)(A) to which this Court should defer.

### A. The ALJ and the ARB Did Not Erroneously Impose Additional Conditions for Protecting Reports of Hazardous Safety Conditions.

Samson draws his conclusion that the Secretary imposed additional requirements for protection under (b)(1)(A) from a single ambiguous sentence in the ALJ's order that can be read as suggesting that a report under (b)(1)(A) must involve circumstances that a reasonable person would conclude present an imminent danger of death or serious injury and do not allow time to eliminate the danger without refusing to work. *See* Pet'r's Br. 3-4, 25-27.[10] The Secretary agrees with

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[10] The sentence at issue is, "And, as previously discussed, the reasonableness of the complainant's belief concerning the protected activity is to be determined on the basis of the knowledge available to a reasonable person in the same circumstances with the complainant's training and experience would have concluded that a hazardous

Samson that these additional, more demanding conditions are not required under (b)(1)(A), but only for work refusals under (b)(1)(B) and (b)(1)(C). *See* 49 U.S.C. 20109(b)(2).

But neither the ALJ nor the ARB actually imposed these additional conditions as prerequisites for protection under (b)(1)(A). The ALJ's actual holding was simply that "the same objective reasonableness standard [that applies to protected activity for reported violations of law, such as under 20109(a)(1)] is warranted for FRS protected activities under Section 20109(b)(1)(A) involving a hazardous condition." RA686 n.1. And more importantly, in affirming the ALJ, the ARB likewise held only that a report must be "objectively reasonable" to be protected under (b)(1)(A). RA814 ("The ALJ also found that even if Sampson [sic] had notified his employer of what he believed was a hazardous condition, that belief was not objectively reasonable, *as it must be to invoke the employee protection provisions at Sections 20109(b)(1)(A) and (B) of the Act*.") (emphasis added).

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condition presented an imminent danger of death or serious injury and the urgency of the situation did not allow sufficient time to eliminate the danger without refusal to work." RA737.

Even assuming *arguendo* that the ALJ believed that additional preconditions apply to (b)(1)(A), it made no difference in this case. The ALJ expressly found that an objectively reasonable person would not have viewed either the February 20 or 22 events as hazardous *at all*, let alone as conditions posing an imminent danger of death or serious injury. RA735, RA736-37. Therefore, as the ALJ found, any hazardous condition reports of those events that Samson might have made were not objectively reasonable either. RA738.[11] Because the correct reading of (b)(1)(A), which the ARB adopted, requires that an employee making a hazardous condition report have an objectively reasonable belief, *see infra* § B, these findings foreclosed any protected activity, regardless of whether the ALJ believed that protected activity under (b)(1)(A) requires even more.

### B. The ARB and ALJ Correctly Understood 49 U.S.C. 20109(b)(1)(A) to Require that a Hazardous Condition Report Must Be Objectively Reasonable.

In analyzing whether Samson reported in good faith a hazardous safety or security condition, the ALJ and the ARB correctly read

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[11] The ALJ also found, based on substantial evidence, that Samson had not reported the February 22 event at all. RA738; *infra* § III.B.2.

(b)(1)(A), which protects railroad employees from retaliation for "reporting, in good faith, a hazardous safety or security condition," to require Samson to show that his belief that a hazardous safety condition existed was objectively reasonable. The ARB and the ALJ's reading was consistent with the ARB and the courts' reading of (b)(1)(A), other provisions of FRSA, and analogous anti-retaliation provisions, which have been read to require an employee's report of a hazard or violation of the law to be objectively reasonable, whether or not the statutory language of the anti-retaliation provision explicitly references a reasonable belief standard.

For example, in *Lang v. Northwestern University*, 472 F.3d 493 (7th Cir. 2006), this Court interpreted the False Claims Act's whistleblower provision, which, as then worded, protected employees who engaged in "lawful acts . . . in furtherance of an action under [the False Claims Act], including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under [the False Claims Act]," as applying only to employees whose actions have "a reasonable objective basis." *Lang*, 472 F.3d at 495. As *Lang* explained, while "people believe the most fantastic things in perfect [subjective] good

faith," anti-retaliation statutes do not protect such beliefs. *Id.* Rather, in addition to the False Claims Act, "[o]ther anti-retaliation statutes, such as the one in Title VII of the Civil Rights Act of 1964, also are limited to the protection of objectively reasonable reports" despite the absence of explicit statutory language. *Lang*, 472 F.3d at 495 (citations omitted); *see Magyar v. Saint Joseph Reg'l Med. Ctr.*, 544 F.3d 766, 771 (7th Cir. 2008) (Title VII); *Talanda v. KFC Nat'l Mgmt. Co.*, 140 F.3d 1090, 1096 (7th Cir. 1998) (Americans with Disabilities Act).

Likewise, other circuits have approved of the ARB's interpretations of other whistleblower protection statutes under its authority as requiring an employee to have a reasonable belief of a hazard or violation even absent explicit statutory references to a reasonable belief standard. *See, e.g., DeKalb Cnty. v. U.S. Dep't of Labor,* 812 F.3d 1015, 1021 (11th Cir. 2016) (agreeing with the Secretary that the Clean Water Act, 33 U.S.C. 1367(a), "protects activity undertaken with a reasonable, good-faith basis, even if it is incorrect"); *Continental Airlines, Inc. v. Admin. Review Bd.*, 638 F. App'x 283, 287 n.12 (5th Cir. 2016) (noting ARB's application of a reasonable belief standard to AIR-21's protection for providing

information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration, 49 U.S.C. 42121(a)) (per curiam); *Nelson v. Energy Northwest*, ARB Case No. 13-075, 2015 WL 5921330, at *5 (ARB Sept. 30, 2015) (noting that reasonable belief requirement applies to broad whistleblower protections in the Energy Reorganization Act, 42 U.S.C. 5851(a)(1)), *pet. for rev. denied, Nelson v. U.S. Dep't of Labor*, 706 F. App'x. 343 (9th Cir. 2017). And other federal whistleblower statutes contain explicit objective reasonableness requirements. *See, e.g., Monahon v. BNSF Ry. Co.*, No. 4:14cv305, 2016 WL 7426581, at *5 (S.D. Iowa May 11, 2016) (unpublished) (stating that "the vast majority" of federal retaliation and whistleblower statutes require objective reasonableness); *id.* at *4 n.4 (citing statutes). Thus, requiring objective reasonableness in (b)(1)(A) is consistent with what is required, explicitly or implicitly, by other similar laws.

The ARB's interpretation is also consistent with the substantial majority of federal courts to have squarely addressed this issue under FRSA. These courts have interpreted (b)(1)(A), and other FRSA provisions requiring "good faith," to require objective reasonableness.

*See Head v. Norfolk S. Ry. Co.*, No. 2:15-cv-02118, 2017 WL 4030580, at *14 (N.D. Ala. Sept. 13, 2017) (unpublished) (interpreting (b)(1)(A)); *Lillian v. Nat'l R.R. Passenger Corp.*, 259 F. Supp. 3d 837, 843 (N.D. Ill. 2017) (same, citing *Lang*, 472 F.3d at 495); *Rookaird v. BNSF Ry. Co.*, No. C14–176RSL, 2015 WL 6626069, at *3 (W.D. Wash. Oct. 29, 2015) (unpublished) (interpreting 20109(a)(2), which protects good-faith refusals to violate or assist in the violations of federal laws, rules, or regulations relating to railroad safety or security); *Armstrong v. BNSF Ry. Co.*, 128 F. Supp. 3d 1079, 1089 (N.D. Ill. 2015) (interpreting 20109(a)(4), which protects good-faith reporting of work-related injuries or illnesses); *Koziara v. BNSF Ry. Co.*, No. 13-CV-834-JDP, 2015 WL 137272, at *6 (W.D. Wis. Jan. 9, 2015) (unpublished) (interpreting 20109(a)(4), and citing *Lang*, 472 F.3d at 495).[12]

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[12] One district court reached the opposite conclusion, as did the ALJ that decided this matter in a prior case. *See Monahon*, 2016 WL 7426581, at *5 (holding that "good faith" under (b)(1)(A) requires only subjective honesty, not objective reasonableness); *D'Hooge v. BNSF Rys.*, ALJ Case No. 2014-FRS-2 (Mar. 25, 2015), https://www.oalj.dol.gov/Decisions/ALJ/FRS/2014/D-HOOGE_GERALD_v_BNSF_RAILWAY_COMPANY_2014FRS00002_(MAR_25_2015)_105019_CADEC_SD.PDF, at 53-54 (same). For the reasons explained herein, those decisions are in error, and the ALJ's

The requirement that reports of hazardous safety conditions be objectively reasonable is faithful to FRSA's purpose of promoting safety in every area of railroad operations. The reasonable belief standard is a flexible, protective standard that takes into account the education, training and experience of an employee and permits protection of a reasonable but mistaken belief. *See, e.g.*, *Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008). As such, requiring reports to be objectively reasonable to be protected under (b)(1)(A) ensures that while employees raising potentially legitimate safety issues will not be chilled from doing so, railroads will not face liability based on an employee's frivolous or unreasonable concern.

For these reasons, the ARB's and the ALJ's reading of (b)(1)(A) was correct and consistent with the weight of the relevant case law.

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prior decision is not binding on the ARB, which did not adopt the ALJ's holding in the prior case. *See D'Hooge v. BNSF Rys.*, ARB Case Nos. 15-042, 15-066, 2017 WL 1968504, at *6 (Apr. 25, 2017) (finding that the complainant's actions "were protected under either the subjective or objective standard of good faith"). Two additional district court cases holding that "good faith" under 20109(a)(4) requires a subjectively honest belief are not on point because neither court addressed whether objective reasonableness is also required, *See Davis v. Union Pac. R.R. Co.*, No. 5:12-cv-2738, 2014 WL 3499228, at *7 (W.D. La. July 14, 2014); *Ray v. Union Pac. R.R. Co.*, 971 F. Supp. 2d 869, 884 (S.D. Iowa 2013).

However, to the extent that (b)(1)(A) is ambiguous as to whether objective reasonableness is required, *see Worcester v. Springfield Terminal Ry. Co.*, No. 2:12-CV-328, 2014 WL 1321114, at *4 (D. Me. Mar. 31, 2014) (characterizing the provision as ambiguous and declining to resolve the ambiguity), the Court should find that the ARB's interpretation was reasonable for the same reasons explained above, and the ARB's interpretation should receive controlling *Chevron* deference. *See supra* at 37 n.9.

## III. The ALJ and ARB's Conclusions that Samson Did Not Engage in Protected Activity Were Based on Substantial Evidence and Were Not Arbitrary, Capricious, or Abuses of Discretion.

Samson's arguments on appeal primarily fault the ALJ for crediting the testimony by Mugavero, Lashbrook, and CP's other witnesses over his own. Such arguments fail in light of the significant deference to which the ALJ's detailed, non-arbitrary credibility determinations are entitled. Based on these credibility determinations, the factual findings that stemmed from them, and the entire record, substantial evidence supported the ALJ and ARB's conclusion that Samson neither reported a hazardous condition nor refused to work when confronted with one.

### A. The ALJ's Credibility Determinations Were Reasonable and Should Not Be Disturbed.

Faced with competing accounts of certain details, the ALJ had to choose whom to believe. He carefully articulated how Samson's "confrontational" behavior toward his supervisors reduced his confidence in the accuracy of Samson's testimony, in contrast with that of CP's witnesses, whom the ALJ generally found credible based on their demeanor, the nature of their answers, and the lack of significant reasons to disbelieve their testimony. *See supra* at 26-27; RA726-27.[13] This choice was reasonable and easily survives the highly deferential review applicable here. *See Gimbel,* 872 F.2d at 199; *First Lakewood Assocs.*, 582 F.2d at 420.

None of Samson's arguments to the contrary are persuasive. For instance, Samson takes issue with the ALJ's citation of his statement, attached to his Complaint, characterizing CP's productivity

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[13] Additionally, although the ALJ did not mention this fact, it is also noteworthy that Lashbrook, Cork, Murphy, Peck, and Sullivan were no longer employed by CP by the time of the ALJ hearing, diminishing any incentive they might have had to provide testimony favorable to CP. RA167-68, TR272:25-273:3; RA211, TR341:11-14; RA240, TR385:19-20; RA249, TR422:18-19; RA270, TR450:4-5.

expectations as "unrealistic." Pet'r's Br. 29-31; *see* RA614; RA726. Samson contends that the ALJ gave this statement outsized importance and wrongly interpreted it as indicative of an employee who was resistant to criticism. But Samson's disagreement with CP's productivity expectations was hardly limited to this statement; he expressed the same views at the hearing. RA102, TR158:15-19. And the ALJ listed several other examples of Samson's unnecessary hostility to his supervisors' instructions, such as Samson remarking that Best should come outside and help to make things go faster; asking whether Mugavero was a conductor or foreman; seeking to go on the radio to record what he incorrectly believed to be Lashbrook's unsafe advice; retorting to Lashbrook that he was switching safely when advised to switch smarter; and refusing his supervisors' admonitions to stay at the yard. *See* RA726-27. Based on the totality of this evidence, the ALJ reasonably concluded that Samson had a defiant attitude toward his supervisors that rendered his testimony about his interactions with those supervisors less reliable.

Samson similarly misses the mark with his contentions that inconsistencies call Mugavero and Lashbrook's credibility into question.

*See* Pet'r's Br. 33-34. While Samson argues that Mugavero's testimony at CP's investigative hearing was "undecided" as to whether he sent Samson home or gave him a choice, *id.* at 33; *see, e.g.,* RA458-62, TR-I-89:3-93:7, this is irrelevant. Samson and Mugavero both understood Mugavero to have directed Samson to work as directed or face an investigation for insubordination. RA85, TR130:11-16; RA145-46, TR243:14-244:1. Mugavero's opinion on whether Samson technically had a choice in the matter does not call his credibility into question.

As to Lashbrook, Samson contends that one aspect of Lashbrook's testimony—that he did not know Samson was going home because Samson walked away from him without telling him that he was leaving—was contradicted by Murphy, who testified that Lashbrook had told him that Samson was going home. Pet'r's Br. 33-34; *see* RA246, TR402:9-18. But Lashbrook and Murphy's testimonies are fully consistent with each other. Lashbrook testified that he *initially* believed Samson had merely stepped into a switchman's shanty, but then learned from the brakeman, Perry, that Samson was going home, and called Murphy to inform him. RA174-75, TR279:4-280:4. Thus, Murphy's account does not undermine Lashbrook's credibility at all.

In short, Samson's arguments do nothing to suggest that the testimony the ALJ credited "show[ed] on its face that it [was] beyond credibility." *First Lakewood Assocs.*, 582 F.2d at 420. The ARB appropriately upheld the ALJ's credibility determinations, as should this Court.

### B. The ALJ's Conclusions on the Merits Were Based on Substantial Evidence.

#### 1. Work Refusals

Two independent reasons supported the ALJ's conclusion that Samson had not engaged in protected activity under (b)(1)(B) when he refused to perform his duties on February 20 and 22: lack of objective reasonableness and failure to notify CP.

##### i. Objective Reasonableness

In addition to good faith, a protected work refusal must objectively involve (1) a "hazardous safety or security condition," 49 U.S.C. 20109(b)(1)(B), (2) an "imminent danger of death or serious injury," *id.* § 20109(b)(2)(B)(i), and a situation so pressing that (3) no reasonable alternative to refusal is available, *id.* § 20109(b)(2)(A), and (4) there is no time to eliminate the danger without a work refusal, *id.* § 20109(b)(2)(B)(ii). Substantial evidence supported the ALJ's

conclusion that Mugavero and Lashbrook's supervision of Samson on February 20 and 22 was neither hazardous nor presented an imminent danger of death or serious injury, and that Samson had alternatives to refusal that he chose not to pursue.

**a. February 20 Incident**

Substantial evidence supported a conclusion that on February 20, Mugavero was simply engaged in the ordinary tasks of a supervisor conducting a "train ride." Mugavero and Cork—both of whom the ALJ deemed credible—testified to that effect. RA148-49, TR246:16-247:11; RA158-59, TR259:2-260:17; RA216-17, TR348:21-349:2; RA218-20, TR352:20-354:6. As Cork explained, supervisory "guidance and direction" were particularly warranted given the recent transition to flat switching. RA216, TR348:8-15. No witnesses corroborated Samson's view that Mugavero had created a hazardous situation. Neither of Samson's crewmembers voiced any safety concerns, and both continued working after Samson left. RA86-87, TR131:20-132:9; RA146-47, TR244:3-245:9.

Additionally, Samson admitted that Mugavero's instructions themselves were safe; he only took issue with Mugavero issuing them

while he was working, rather than providing a new job briefing first. RA92-94, TR137:13-140:16. Samson argues that Mugavero's questions prevented him from being "alert and attentive," as required by the GCOR, *see* RA343, and notes that federal regulations and the GCOR require a job briefing when a work plan is changed, *see* 49 C.F.R. 218.103; RA306. *See* Pet'r's Br. 8-9, 32. But Mugavero credibly testified that job briefings are typically informal "quick conversation[s]," and that his conversation with Samson and Allen constituted a job briefing. RA165-66, TR268:16-269:25. And the record contains no evidence, beyond Samson's opinions, that Mugavero's input was so disruptive, or deviated so significantly from the original plan, that it rendered the situation hazardous. Additionally, Samson's views regarding an acceptable level of guidance during a switching operation were entitled to less weight than Mugavero's given that Samson had 14 years less experience than Mugavero and admitted to being "rusty" at switching, having recently been demoted from engineer. RA419, TR-I-50:9-11; RA58, TR85:5-12; RA139-40, TR237:25-238:19.

Moreover, while Samson contends that he was distracted because Mugavero spoke to him while the train was moving, as the ALJ found,

Mugavero gave his instructions to Samson while the train was stopped. RA735; *see* RA75-77, TR120:4-122:22; RA152-55, TR253:17-256:22. At most, Samson only testified that the train was moving when Mugavero questioned him about the mismarked cars, although the ALJ found that this exchange, too, happened while the train was stopped. RA735; *see* RA81, TR126:11-17.[14] Even assuming that Samson felt distracted by that question, he conceded that any distraction was eliminated when the crew and Mugavero gathered in the engine, with the train stopped, for what Samson himself described as a "job briefing." RA612; RA85-86, TR130:22-131:9; RA95-97, TR140:8-142:13; RA131, TR219:7-16. Samson was unable to explain why, at that point, he had to go home rather than sort out his concerns at the very job briefing he contends he wanted. RA95-97, TR140:8-142:13, RA131, TR219:7-23.

Samson agreed that this job briefing provided "an option to correct

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[14] Based on Mugavero's testimony that he posed the question about the mismarked cars after the train had "cleared" him, RA144-45, TR242:16-243:2; RA155, TR256:21-24, the ALJ's finding that the train was stopped was based on substantial evidence. But even assuming *arguendo* that the train was moving, as discussed above, substantial evidence still supported the ALJ's finding that Mugavero's question did not create an objectively hazardous condition.

the situation," to the extent anything needed correcting. RA131, TR219:7-13. But instead, as Mugavero urged him to stay, Samson chose to leave. Under these circumstances, substantial evidence supported the ALJ's finding that Samson was not "confronted by a hazardous safety or security condition" when he went home. And for essentially the same reasons, substantial evidence supported the ALJ's conclusions that these conditions did not present imminent danger of death or serious injury, that Samson had alternatives to refusing to work, and that there was sufficient time to eliminate any alleged danger without refusing to work. Accordingly, substantial evidence supported the ALJ's conclusion that Samson's work refusal was not protected under (b)(1)(B).

**b. February 22 Incident**

Similarly, substantial evidence supported the ALJ's conclusion that no objectively reasonable person would have viewed Lashbrook's interaction with Samson on February 22 as creating a hazardous condition that presented an imminent danger of death or serious injury.

Rather, as the ALJ found, Samson acted unreasonably.[15]

Samson's unreasonable behavior began when, instead of heeding Lashbrook's advice that kicking hazardous tank cars could be done safely, he reacted in a hostile manner, requesting to repeat the advice over the radio to create a record of what he incorrectly and unreasonably presumed was an unsafe practice. While Samson contends, *see* Pet'r's Br. 32, that Lashbrook was preventing him from "tak[ing] the safe course," as GCOR Rule 1.1.1 directs, RA343, as explained above, Lashbrook's advice to kick the cars was entirely consistent with CP's rules for handling cars containing hazardous materials. *See supra* at 17. Particularly given that he had recently returned to working as a conductor, a reasonable individual in Samson's

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[15] In passing, Samson's brief mentions two additional actions on February 22 that he contends were protected: his request to Lashbrook to repeat his instructions over the radio, which he asserts was a protected activity without providing any detail, and his alleged statement that he was not feeling well, which he contends was protected activity under 49 U.S.C. 20109(a)(4). Pet'r's Br. 32, 37. Samson did not raise either of these arguments below, *see* RA678-84; RA741-62; RA800-10, and thus cannot raise them now. *See Freeman United Coal Mining Co. v. Office of Workers' Comp. Program*, 988 F.2d 706, 709 n.3 (7th Cir. 1993), *vacated on other grounds by Freeman United Coal Mining Co. v. Jones*, 512 U.S. 1231 (1994).

position would have taken the advice of a supervisor, not presumed that it was wrong.

Samson then compounded his unreasonableness by concluding that Lashbrook was falsely accusing him of riding the tank car into the joint. Even assuming that Samson did not ride the car into the joint, had he acted reasonably, he would have given Lashbrook, who had approached him cordially, the benefit of the doubt and presumed that Lashbrook believed that he had seen Samson do so. Finally, Samson unreasonably ignored alternatives to refusing to work when he rejected Lashbrook and Walker's requests to stay at the yard until Murphy arrived.

Moreover, even assuming, contrary to the ALJ's explicit finding, that Lashbrook *did* fabricate his accusation to pressure Samson into working faster, Samson fails to explain how this created a hazardous condition, let alone presented an imminent danger of death or serious injury. *Cf. Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014) (concluding that an employee's complaint that a test was "inappropriately and unfairly conducted" did not amount to a report of a hazardous condition). Other than Samson's self-serving opinions, no

record evidence supports his assertion that CP's expectation of 150 cars per shift was unsafe. To the contrary, Lashbrook, Peck, and McFarlane all credibly testified that it was reasonable, and it was far less than the 260-car benchmark CP would set in late 2013. RA185, TR290:16-22; RA258, TR431:7-11; RA292-93, TR506:20-507:9.

Samson's contention that he suffered a panic attack following his interaction with Lashbrook does not convert his unreasonable work refusal into protected activity. Assuming that a panic attack can constitute a hazardous condition, and accepting the ALJ's finding that Samson suffered one, substantial evidence supported a conclusion that Samson's work refusal ultimately stemmed from his unreasonable assumptions about Lashbrook, not from a panic attack that presented an imminent danger of death or serious injury. Samson testified that Lashbrook's accusation itself made him feel unsafe. RA106, TR163:10-14; RA107, TR164:5-10. Similarly, Samson's written statement characterized the "hostile work environment created by Trainmaster Lashbrook" as the condition that was "too dangerous for [Samson] to safely perform [his] duties," and does not even mention a panic attack. RA615. And Samson's actions on February 22—leaving work abruptly

after a conflict with his supervisor, ignoring requests to stay—mirror his actions on February 20, when does not allege that he suffered a panic attack.

Moreover, Samson's actions were not consistent with someone suffering a medical event so debilitating that it created a hazardous condition that presented an imminent danger of death or serious injury and left him with no choice but to refuse to work. Samson never advised anyone he was suffering serious symptoms; Walker, whom the ALJ found credible, testified that Samson said nothing about his medical state, and even Samson's testimony, which the ALJ did not credit, was only that he told Walker he was not feeling well and might see a doctor. RA109, TR168:19-25; RA207-08, TR321:12-322:14.[16] And Samson did not seek medical attention after leaving Bensenville Yard. RA115-16, TR182:6-183:6. Nor is there any evidence that he attempted to contact his supervisors after any symptoms had subsided, as a reasonable employee would have done if his departure was caused by medical reasons rather than a workplace disagreement.

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[16] Samson's failure to inform CP of his condition is also fatal under (b)(1)(B) because of the notification requirement. *See infra* § III.B.1.ii.

In short, substantial evidence supported a conclusion that Samson left Bensenville Yard on February 22 primarily because of a conflict with his supervisor caused by his own unreasonable assumptions. Such conduct is not protected under FRSA.

**ii. Notification**

For a work refusal to qualify as protected activity, the employee, "where possible," must "notif[y] the railroad carrier of the existence of the hazardous condition and the intention not to perform further work . . . unless the condition is corrected immediately[.]" 49 U.S.C. 20109(b)(2)(C). Based on his credibility determinations, the ALJ found that Samson had not informed Mugavero that he felt unsafe on February 20. RA729.[17] Similarly, the ALJ's credibility determinations influenced his finding that Samson never told Lashbrook, Hall or Walker that he was leaving work on February 22 due to Lashbrook's allegedly false accusation, nor did he tell anyone about his medical

[17] In addition to the ALJ's credibility determinations, it is also notable that Samson did not check the box on the hazardous activity form to indicate that he had advised a supervisor. RA595. Samson claimed that he did not notice the box. RA132, TR225:14-23.

condition. RA731.[18]

Consequently, the ALJ determined that on both occasions, Samson failed to notify CP that he intended to stop working due to a hazardous condition, as required by section 20109(b)(2)(C). RA734, RA736. Because these conclusions are traceable directly to the ALJ's credibility determinations, they are entitled to significant deference, *see supra* § I, and independently justify the ALJ's conclusion that neither of Samson's work refusals was protected.[19]

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[18] Even if one were to credit Samson's testimony that he told Walker he was not feeling well and might see a doctor, such a communication is a far cry from informing CP that he was refusing to work due to a hazardous safety or security condition. *See Winch v. U.S. Dep't of Labor*, No. 16-15999, 2018 WL 834194, at *3 (11th Cir. Feb. 13, 2018) (unpublished) (employee who called in sick, without providing further details, did not report a hazardous condition under (b)(1)(A) or notify the railroad of a hazardous condition under (b)(1)(B)).

[19] Samson's report to Cork on February 20 did not qualify as notification, because notification must *precede* the work refusal. *See* 49 U.S.C. 20109(b)(2)(C) (stating that the employee must notify the railroad of "the *intention* not to perform further work . . . unless the condition is corrected immediately") (emphasis added); *Stokes v. Se. Pa. Transp. Auth.*, 657 F. App'x 79, 82 (3d Cir. Aug. 9, 2016) (unpublished) (describing 20109(b)(2)(C) as "contemplating advanced notice to the railroad carrier that could allow the hazardous condition to be 'corrected' before work stoppage takes place"). Samson only notified Cork of the hazardous condition *after* he had refused to work. Additionally, according to Cork's credited testimony, Samson left the

### 2. Reports

The ALJ's conclusions that Samson's reports were not protected, and the ARB's affirmance of those conclusions, were also based on substantial evidence and were neither arbitrary nor capricious. As explained above, the ALJ and ARB reasonably concluded that a report under (b)(1)(A) must be objectively reasonable. *See supra* § II. For the reasons discussed above, substantial evidence supported the ALJ's finding that neither the February 20 nor the February 22 events could reasonably be viewed as a "hazardous safety or security condition." Therefore, the ALJ's conclusion that any reports of those events were also objectively unreasonable and did not constitute protected activity was in accordance with the law as reasonably interpreted by the ALJ and ARB.[20]

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report on Cork's desk and left the office while Cork was using the restroom, leaving Cork no opportunity to address the situation before Samson went home. RA215, TR347:8-16.

[20] Although neither the ALJ nor the ARB reached this issue, even assuming that the February 20 report constituted protected activity, the undisputed, credible testimony was that the report played no role in Samson's dismissal. *See* RA228-29, TR363:22-364:3; RA244, TR396:15-25; RA262-64, TR435:18-437:8; RA272-73, TR454:18-455:10; RA296, TR510:12-23. Indeed, Samson had previously brought safety concerns

Additionally, substantial evidence supported the ALJ's finding that Samson did not report the February 22 events at all. As discussed above, the ALJ found, based on his credibility determination and Lashbrook and Walker's testimony, that Samson did not convey to Lashbrook, Hall, or Walker that he believed that Lashbrook had created a hazardous situation by falsely accusing him of riding a car into a joint, or that he was suffering from a medical condition that would create a hazardous condition if he continued to work. RA731. Given the significant deference to which the ALJ's credibility determination is entitled, this testimony constitutes substantial evidence supporting the ALJ's determination that Samson did not report any hazardous condition on February 22.

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to CP without adverse consequences. RA133-34, TR226:22-227:12. Nor is there any evidence that Samson's February 20 report influenced Lashbrook's interactions with Samson on February 22. Lashbrook knew only that Samson had a "run-in" with Mugavero two days earlier; he did not know about Samson's hazardous condition report. RA181-83, TR286:20-288:20; RA186, TR292:8-18. Thus, beyond temporal proximity, there was no evidence supporting a conclusion that the report was a contributing factor in Samson's dismissal.

## IV. The ALJ Did Not Abuse His Discretion in Declining to Draw an Adverse Inference Against CP Based on a Discovery Response.

### A. Background

Samson argues that the ALJ abused his discretion when he declined to draw an adverse inference against CP for spoliation based on CP's failure to produce radio and video recordings of the events of February 20 and 22. Pet'r's Br. 21-24. Samson had requested these recordings during discovery. After the ALJ compelled production of responsive recordings that CP could locate and retrieve without unreasonable burden, CP represented that it conducted a reasonable search and determined that the radio channels Samson sought were not recorded in the regular course of business, and that the areas described by Samson were not video-recorded in the regular course of business, and therefore, that the recordings Samson sought did not exist. *See* Pet'r's App'x (ECF No. 5-1) at 110 ("Supplemental Responses to Previous Discovery Requests"); RA23-24 (item 6); RA31 (item 6); RA40 (item 6); RA46 (item 6). Samson never submitted CP's written response, which is attached to his opening brief in this Court and not part of the record below, to the ALJ or ARB.

At the hearing, under cross-examination, Mugavero testified that

radio communications typically are recorded, and that he had these recordings during the investigation but no longer knew where they were since he was no longer in a management position. RA149, TR247:24-248:20. This was consistent with Mugavero's testimony during CP's investigative hearing. RA432-33, TR-I-63:3-64:4; RA439-40, TR-I-70:20-71:1; RA445, TR-I-76:14-15. The ALJ then cautioned Samson that he was "more interested" in hearing questions that were within the scope of Mugavero's direct examination. RA150, TR248:23-24. Samson then told the ALJ:

> I was just referring for the spoliation of evidence, Your Honor, because I made a specific request for the tapes that existed before and the management should have known to preserve those tapes for the future.

RA150-51, TR248-25-249:4. The ALJ instructed Samson to "move on." RA151, TR249:5-6.

**B. Analysis**

As an initial matter, it is far from clear that Samson has preserved this issue for appeal. While he briefly referenced spoliation at the hearing, Samson never actually asked the ALJ to sanction CP or

objected to the ALJ's dismissal of the spoliation issue, and did not raise it in his post-hearing closing argument. *See* RA678-84.[21] Because arguments not raised before an administrative agency at the appropriate point generally are waived, *see Freeman United Coal Mining Co.*, 988 F.2d at 709 n.3, Samson has arguably forfeited his opportunity to pursue this argument.

Even if this issue was preserved, the ALJ did not abuse his discretion by declining to impose sanctions. A sanction for spoliation is only warranted if a party with a duty to preserve evidence destroyed it in bad faith, i.e., "for the purpose of hiding adverse information." *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681 (7th Cir. 2008) (internal citations and quotations omitted). Even assuming that CP had a duty to maintain the records and that they once existed but were destroyed, Samson presented no evidence whatsoever that they were destroyed in bad faith. *See Bracey v. Grondin*, 712 F.3d 1012, 1019-20 (7th Cir. 2013) (district court did not abuse its discretion by declining to draw adverse inference where there was no evidence

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[21] Samson did raise the spoliation issue in his ARB brief. RA742-45; RA748; RA756.

defendants destroyed videotapes in bad faith).[22]

Finally, even if the ALJ had drawn an adverse inference against CP, any such inference would have been limited to whether Samson notified CP of the allegedly hazardous conditions and whether he reported the February 22 incident. Those are the only relevant discrepancies between Samson's versions of events and Mugavero and Lashbrook's versions that the recordings might have been able to resolve. Samson has identified nothing in the recordings that might have altered the ALJ and ARB's conclusions that neither of his work refusals or alleged reports were objectively reasonable, which was an independent ground for finding that none of Samson's activities were protected. Thus, even had the ALJ granted the adverse inference, it would not have changed the outcome below.

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[22] The ALJ also was within his discretion to curtail Samson's cross-examination on this issue. Cross-examination must be "reasonably related to the subject matter of direct examination." *United States v. Bozovich*, 782 F.3d 814, 816 (7th Cir. 2015) (quoting *United States v. Harbour*, 809 F.2d 384, 388 (7th Cir. 1987)). Since Mugavero did not discuss the recordings during his direct examination, *see* RA139-49, TR237:23-247:18, it was not an abuse of discretion to rule that extensive questioning about them was beyond the scope of the direct examination.

## CONCLUSION

For the foregoing reasons, this Court should deny Samson's petition for review.[23]

Dated: February 28, 2018

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

WILLIAM C. LESSER
Deputy Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

s/ Jesse Z. Grauman
JESSE Z. GRAUMAN
Senior Attorney

U.S. Department of Labor

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[23] Even if this Court were to find that reversal is warranted regarding one of the two incidents, Samson's petition should be denied unless the Court finds this to be the case for *both* February 20 and 22. The testimony by Cork, Peck, and McFarlane that Samson would have been dismissed for either incident independently, RA230-31, TR365:12-366:10; RA269, TR448:7-25; RA298-99, TR527:1-528:11, constitutes clear and convincing evidence that CP would have taken the same action against Samson even absent any protected activity on one of the two dates.

Office of the Solicitor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5563
grauman.jesse.z@dol.gov

## ADDENDUM

Pursuant to Federal Rule of Appellate Procedure 28(f), relevant provisions of 49 U.S.C. 20109 are reproduced below:

**(b) Hazardous safety or security conditions. (1)** A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for—

(A) reporting, in good faith, a hazardous safety or security condition; [or]

(B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist[.]

. . .

**(2)** A refusal is protected under paragraph (1)(B) and (C) if—

**(A)** the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

**(B)** a reasonable individual in the circumstances then confronting the employee would conclude that—

**(i)** the hazardous condition presents an imminent danger of death or serious injury; and

**(ii)** the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

**(C)** the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

Pursuant to Federal Rule of Appellate Procedure 32(a) and Circuit Rule 32, the undersigned certifies that this brief complies with the applicable type-volume limitation, typeface requirements, and type-style requirements.

1. This brief complies with the type-volume limitations of Circuit Rule 32(c) because the brief contains 12,390 words, excluding exempt portions.

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point Century Schoolbook font in text and footnotes.

Dated: February 28, 2018

s/ Jesse Z. Grauman
JESSE Z. GRAUMAN

## CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following participant:

Jacek Samson
255 Ascot Lane
Streamwood, IL 60107

/s Jesse Z. Grauman
JESSE Z. GRAUMAN