No. 18-2888

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION, D/B/A CANADIAN PACIFIC,

Petitioner,

v.

U.S. DEPARTMENT OF LABOR, ADMINISTRATIVE REVIEW BOARD,

Respondent,

and

MARK RILEY,

Intervenor.

On Petition for Review of an Order of the Department of Labor's Administrative Review Board, Case Nos. 16-010, 16-052

RESPONSE BRIEF FOR THE SECRETARY OF LABOR

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SUMMARY OF THE CASE

Intervenor Mark Riley ("Riley") was violently assaulted by a coworker while on duty and later that same day reported both the assault and the resulting injury to his employer, Dakota, Minnesota & Eastern Railroad Corporation, doing business as Canadian Pacific ("Canadian Pacific"). Shortly after submitting his report, Riley was removed from service pending an investigation of the incident. An unidentified Canadian Pacific manager ultimately concluded that Riley had violated a company policy by failing to timely report the incident and assessed the 47 days that Riley had been suspended without pay as his discipline. Riley subsequently filed a complaint under the whistleblower protection provision of the Federal Railroad Safety Act, alleging that Canadian Pacific suspended him without pay in retaliation for his protected reporting.

Substantial evidence supports the administrative law judge's ("ALJ") findings, affirmed by the Administrative Review Board ("ARB" or "Board"), that Riley's protected report contributed to his suspension and that Canadian Pacific failed to show by clear and convincing evidence that it would have taken the adverse action absent his protected activity. Moreover, the ALJ and ARB did not abuse their discretion in awarding certain relief to Riley. Although the Secretary will gladly participate in any oral argument scheduled by this Court, he does not believe that oral argument is necessary.

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STATEMENT OF JURISDICTION

This case arises under the employee protection provisions of the Federal Railroad Safety Act ("FRSA" or "Act"), 49 U.S.C. 20109, and its implementing regulations, 29 C.F.R. Part 1982. The Secretary of Labor ("Secretary") had subject matter jurisdiction over this case based on a complaint filed with the Occupational Safety and Health Administration ("OSHA") by Riley against Canadian Pacific pursuant to 49 U.S.C. 20109(d)(1).

On July 6, 2018, the ARB issued a Final Decision and Order affirming the ALJ's decision that Canadian Pacific suspended Riley without pay in violation of FRSA as well as the ALJ's decision to award certain relief to Riley.[1] Canadian Pacific filed a timely Petition for Review in this Court on August 31, 2018. This Court has jurisdiction to review the ARB's decision because Riley resided in Iowa at the time of the violation. *See* 49 U.S.C. 20109(d)(4) (review of Secretary's final order may be obtained in the court of appeals for the circuit in which the complainant resided on the date of the alleged violation); 29 C.F.R. 1982.112(a) (same).

[1] The Secretary of Labor has delegated authority to the ARB to issue final agency decisions under the employee protection provisions of FRSA. *See* Sec'y of Labor's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378 (Nov. 16, 2012); *see also* 29 C.F.R. 1982.110(a).

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the ALJ's determination, as affirmed by the ARB, that Riley's protected report was a contributing factor in Canadian Pacific's decision to suspend him without pay.

- 49 U.S.C. 20109(d)(2)(A)
- 49 U.S.C. 42121(b)(2)(B)
- *BNSF Ry. Co. v. U.S. Dep't of Labor*, 867 F.3d 942 (8th Cir. 2017)
- *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786 (8th Cir. 2014)

2. Whether substantial evidence supports the ALJ's conclusion, affirmed by the ARB, that Canadian Pacific did not prove by clear and convincing evidence that it would have suspended Riley without pay in the absence of his protected report.

- 49 U.S.C. 20109(d)(2)(A)
- 49 U.S.C. 42121(b)(2)(B)
- *Ebersole v. Novo Nordisk, Inc.*, 758 F.3d 917 (8th Cir. 2014)
- *BNSF Ry. Co. v. U.S. Dep't of Labor*, 816 F.3d 628 (10th Cir. 2016)

3. Whether the ALJ and the ARB abused their discretion in awarding certain damages, attorney's fees, and costs to Riley.

- *Loggins v. Delo*, 999 F.2d 364 (8th Cir. 1993)
- *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137 (8th Cir. 1982)

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The anti-retaliation provisions of FRSA protect railroad employees from suspension or other discrimination for engaging in protected activity under the Act, including notifying the railroad of "a work-related personal injury" and "reporting, in good faith, a hazardous safety or security condition" to the railroad. 49 U.S.C. 20109(a)(4), (b)(1)(A). An employee who believes that he or she has been retaliated against in violation of FRSA may file a complaint with the Secretary. *See* 49 U.S.C. 20109(d); 29 C.F.R. 1982.103. Following an investigation, OSHA issues a determination either dismissing the complaint or finding reasonable cause to believe that retaliation occurred and ordering 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 the complainant or the respondent may file objections to OSHA's determination with an ALJ. *See* 49 U.S.C. 20109(d)(2)(A); 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1982.106. The ALJ's decision is subject to discretionary review by the Board, which issues the final order of the Secretary. *See* 29 C.F.R. 1982.110.

B. Statement of Facts[2]

On July 4, 2012, Riley was working for Canadian Pacific as a locomotive engineer on a loaded ethanol train traveling to Chicago, Illinois from Dubuque,

[2] Citations to the Addendum are abbreviated as "Add." Citations to the Joint Appendix are abbreviated as "JA."

Iowa. *See* Add. 2. He was assigned to work with Jonathan Bollman ("Bollman"), an assistant locomotive engineer. The train on which Riley and Bollman were working arrived in Chicago at 2 a.m. on July 5, 2012. *Id.*

According to Riley, when the train arrived in Chicago, he requested that Bollman perform a work-related task. *See* Add. 2, 18. Bollman became angry and entered the train car where Riley was seated. Upon entering the car, Bollman struck Riley with a lantern, punched him in the face, and knocked him to the ground. *Id.* After the assault, Riley and Bollman proceeded to bring the train into the yard, thereby remaining in close proximity to each other as they finished their work. *Id.* Riley testified that he did not want to provoke Bollman by using the train's radio to report the attack. *Id.* at 18; JA 29-30. Riley and Bollman subsequently shared a taxicab to their hotel. *See* Add. 2, 18. At the hotel, both men clocked out of their on-duty time on designated computers in the lobby. *Id.* Riley stated that they clocked out at approximately 4:25 a.m., and each then proceeded to their respective hotel rooms. *Id.*

Riley testified that, as soon as he arrived in his hotel room, he attempted to call one of his immediate supervisors, Jeremiah Christensen ("Christensen") or Brandon Pregler, to report the assault. *See* Add. 2; JA 32-33. Riley stated that his supervisor did not answer his phone call, so he sent a text message to a coworker regarding the incident and then fell asleep. *Id.* Later that morning, Riley again

called Christensen and informed him about the incident. *See* Add. 2; JA 34. Riley told Christensen that he did not want to work with Bollman on the return trip to Iowa. *Id.* Christensen encouraged Riley to file a formal report regarding the incident with Canadian Pacific. Christensen then called his own supervisor, Steve Cork ("Cork"), to notify him of the situation. *Id.*

Riley was concerned about the consequences that filing a formal report might have for Bollman's career so he contacted several coworkers and family members for advice. *See* Add. 19; JA 34-35. After being encouraged to report the assault, Riley decided to file a formal complaint about the incident and called Christensen back to tell him of this decision around 2:30 pm, approximately 12 hours after the assault occurred. *See* JA 34-36, 228. He also informed Christensen about bruising on his chest sustained as a result of his attack that he had only just noticed. *See* Add. 19; JA 35-36. Riley then drafted a written statement regarding the incident from his hotel room. *See* JA 36. Christensen sent an email to Cork summarizing Riley's report at 4:44 p.m. on July 5th. *Id.* at 228. Riley returned to Iowa separately from Bollman and then met with supervisors Christensen and Dustin Heichel ("Heichel") to discuss the incident and show them his bruising. *See* Add. 19.

After receiving Riley's report as well as a conflicting account of the incident from Bollman, Canadian Pacific suspended both men pending the results of a

formal investigation, which took 47 days to complete. *See* Add. 2; JA 229. After reviewing the investigatory hearing transcript and exhibits, hearing officer Mike Morris ("Morris") concluded that the "transcript clearly establishes the fact that Engineer Mark Riley was assaulted by Assistant Engineer John Bollman." JA 366. Morris did believe, however, that Riley had engaged in name-calling and/or horseplay prior to the incident. *Id.* at 363-67. Morris recommended that both Riley and Bollman be dismissed for late reporting and violations of several general rules related to safe conduct, altercations, and horseplay. *See* Add. 22; JA 145. Morris, however, was not the final decisionmaker. *See* Add. 7; JA 137. An unidentified Canadian Pacific manager ultimately concluded that Riley had only violated the railroad's policy regarding the prompt reporting of incidents and determined that his discipline for this violation should be forfeiture of pay for the 47 days that he had spent out of service during the investigation. *Id.*; JA 230.[3] Canadian Pacific decided to terminate Bollman for a variety of rule violations, but

[3] The record does not contain any evidence as to the identity of the decisionmaker responsible for assessing Riley's discipline. Morris was not the final decisionmaker and did not know who had made the final disciplinary decision. *See* JA 137. Indeed, Morris testified that he had not drafted, reviewed, or signed Riley's disciplinary letter, despite his name appearing in the signature block. *Id.* at 137-38, 230. Brian Scudes ("Scudes"), a labor relations manager who testified at the ALJ hearing, similarly stated that he was not the final decisionmaker, did not know the identity of the final decisionmaker, and confirmed that there was no documentation in Canadian Pacific's labor relations files identifying the final decisionmaker. *Id.* at 197-99.

his disciplinary letter made no mention of a violation for late reporting. *See* JA 231.

On September 5, 2012, Riley filed a complaint with OSHA alleging that Canadian Pacific suspended him without pay in retaliation for reporting a workplace injury and a hazardous safety or security condition in violation of FRSA. *See* Add. 13; JA 5-7. OSHA dismissed the complaint. *See* JA 1-3. Riley timely objected to OSHA's findings and requested a hearing before an ALJ pursuant to 29 C.F.R. 1982.106. *See* JA 8-10.

C. The ALJ's Decisions and Orders

After conducting an evidentiary hearing and considering the complete record in the case, the ALJ issued a Decision and Order on October 16, 2015. *See* Add. 12-34. In his decision, the ALJ thoroughly discussed the testimony presented by the four witnesses in the case, Riley, Christensen, Morris, and Scudes, as well as the relevant documentary evidence. *Id.* at 18-23.[4]

The judge explained that, in order to satisfy his burden of proving a FRSA violation, Riley needed to prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) Canadian Pacific knew of the protected act; (3)

[4] As a threshold matter, the ALJ rejected Canadian Pacific's argument that he did not have jurisdiction over the case because the Railway Labor Act provides the exclusive remedy for Riley's claim. *See* Add. 13-15. Canadian Pacific has not appealed the ALJ's decision on this issue.

he suffered an adverse action; and (4) his protected activity contributed to the adverse action. *See* Add. 15-16. Based on relevant testimonial and documentary evidence, the ALJ concluded that Riley's report of his physical assault and resulting injury constituted protected activity under FRSA, specifically by notifying the railroad "of a work-related personal injury" and "reporting, in good faith, a hazardous safety or security condition" to the railroad. 49 U.S.C. 20109(a)(4), (b)(1)(A); *see* Add. 23-25. The ALJ then determined that Riley's unpaid 47-day suspension was an adverse action under FRSA, which he noted was not disputed by Canadian Pacific. *Id.* at 25.

The ALJ further concluded that Riley's protected report was a contributing factor in Canadian Pacific's decision to suspend him without pay. *See* Add. 25-26. The ALJ explained that, under FRSA, a complainant need only show that his protected activity was a "contributing factor" in the adverse action, which means "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of a decision." *Id.* at 25 (internal quotation marks omitted). The ALJ stated that a complainant does not need to prove that his protected activity was the only, or even the most significant reason, for the adverse action; rather, he must only establish that the protected activity "affected in any way" the adverse action taken. *Id.* The ALJ explained that, under FRSA, complainants must prove "'intentional retaliation'" prompted by the protected activity but are not required to

conclusively demonstrate the existence of a "'retaliatory motive'" in order to satisfy the contributing factor test. *Id.* at 16 (quoting *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014)). The judge further stated that "[n]either motive nor animus is required to prove causation under FRSA as long as protected activity contributed in any way to the adverse action." *Id.* at 25.

The ALJ then determined that Canadian Pacific's decision to suspend Riley without pay was based, at least in part, on his protected report. *See* Add. 25-26. As the ALJ observed, Canadian Pacific only became aware of the assault when Riley reported it to his supervisors. *Id.* at 26. The ALJ explained that Riley's report of the incident and his injury thus influenced Canadian Pacific's decision to investigate the timeliness of his report and/or the underlying facts as to how his injury was sustained. *Id.* The judge stated, "Where such a report sets the subsequent investigation and disciplinary process in motion, this chain of events is sufficient evidence of a contributing factor." *Id.* The ALJ, however, specifically noted that he was "not suggesting that a complainant automatically establishes a causal nexus by simply demonstrating an employer took any unfavorable personnel action after a report of injury." *Id.* Rather, the judge explained that Riley's protected reporting was "inextricably intertwined" with his discipline. *Id.* The court thus determined that Riley's protected activity contributed to Canadian Pacific's decision to discipline Riley. *Id.*

The ALJ then concluded that Canadian Pacific had failed to satisfy its statutory burden of proving by clear and convincing evidence that it would have taken the same action absent Riley's protected activity. *See* Add. 26-27. The ALJ stated that in cases where the protected activity at issue involves the filing of an injury report and the employer argues that the adverse action was instead related to the complainant's underlying unsafe conduct, the relevant focus in evaluating whether the employer has met its affirmative defense burden is "whether the employer establishes that it would have taken the same action against an uninjured employee who engaged in identical unsafe conduct." *Id.* at 26 (citing *DeFrancesco v. Union R.R.,* ARB Case No. 13-057, 2015 WL 5781070, at *7 (ARB Sept. 30, 2015)).

The court explained that applying this analysis necessitates "balancing the railroad employer's ability to maintain and enforce legitimate workplace safety rules against the manipulation of such investigations as pretext for retaliation against employees who report workplace injuries." Add. 26-27. The ALJ noted that employers may satisfy this burden with evidence of extrinsic factors that would independently lead to the ultimate decision to take adverse action, such as whether the employer "consistently imposes equivalent discipline against uninjured employees who violate the work rules Complainant was cited for

violating, and whether Respondent routinely monitors and enforces discipline for late reporting." *Id.* at 27.

The ALJ acknowledged Canadian Pacific's argument that it had disciplined both Riley and Bollman, even though Bollman did not engage in protected activity, but concluded that the railroad had nonetheless failed to satisfy its affirmative defense. *See* Add. 27. The judge explained that Bollman was not an appropriate comparator for Riley because Bollman was not disciplined for engaging in the same conduct as Riley. *Id.* The ALJ stated that the more appropriate comparators in this case were Riley's supervisors, who did not immediately file required formal reports of Riley's assault but were not investigated or disciplined. *Id.*

The court found that Canadian Pacific "did not submit evidence regarding the discipline of other employees who failed to promptly report incidents, regardless of whether they reported injuries" and did not present evidence "to suggest that [Canadian Pacific] monitors employees for compliance with the prompt reporting rule in the absence of an injury." Add. 27. Finally, the ALJ concluded that nothing in the record showed that a 47-day suspension without pay would be "routine or reasonable" punishment for a violation of the prompt reporting rule. *Id.*

Finally, the ALJ evaluated the proper remedies in this case pursuant to FRSA's instruction that a prevailing employee is generally "'entitled to all relief

necessary to make the employee whole.'" Add. 27 (quoting 49 U.S.C. 20109(e)(1)). The ALJ awarded Riley $11,000 in lost wages suffered as a result of his 47-day suspension as well as $786 for missing three days of work to attend his deposition and the hearing, as well as interest. *Id.* at 28, 30. The ALJ declined to award damages for emotional distress or punitive damages. *Id.* at 28-29.

On November 30, 2015, Riley petitioned for $28,130 in attorney's fees and $5,001.10 in litigation costs pursuant to 49 U.S.C. 20109(e). *See* JA 451-82. After considering the parties' briefs on the issue, the ALJ determined in a separate order issued on March 21, 2016, that Riley was entitled to recover $27,985 in fees and $4,954.10 in litigation costs. *See* Add. 35-45.

D. The ARB's Final Decision and Order

Canadian Pacific timely petitioned for review of the ALJ's decisions to the ARB. *See* JA 549-56, 557-62.[5] The Board affirmed the ALJ's decisions in a Final Decision and Order issued on July 6, 2018. *See* Add. 1-11. The Board concluded that the ALJ's factual findings were supported by substantial record evidence, and that the ALJ's legal conclusions were in accordance with the law. *Id.*

[5] On October 30, 2015, the same day that Canadian Pacific appealed the ALJ's merits decision to the Board, the railroad also filed a Motion to Alter and Clarify Judgment or, Alternatively, to Relieve Judgment with the ALJ. *See* JA 437-49. The ARB decided this motion in the first instance in its July 6, 2018 decision. *Id.* at 601-02.

In relevant part, with respect to the ALJ's causation analysis, the Board affirmed the ALJ's determination that Riley's protected activity contributed to his adverse action. *See* Add. 5-7. The Board explained that it is "impossible to separate the cause of Riley's discipline—for filing his injury report late—from his protected activity of filing the injury report." *Id.* at 5. The ARB affirmed, however, the ALJ's conclusion that a complainant cannot automatically prove "a causal nexus by simply demonstrating an employer took any unfavorable personnel action after a report of injury." *Id*. Rather, the Board explained, under the specific facts of this case, the protected act and the adverse action could not be unwound. *Id.* The Board further acknowledged that this Court requires a complainant to prove "'intentional retaliation'" to prevail on a FRSA claim. *Id.* at 6 n.13 (quoting *Kuduk*, 768 F.3d at 791). The Board questioned this holding as potentially inconsistent with the lenient contributing factor standard that applies to FRSA and expressed confusion about this Court's conclusions that whistleblowers need to prove "intentional retaliation" but do not need to conclusively demonstrate "retaliatory motive." *Id.* (internal quotation marks omitted). The Board also questioned this Court's determination that a whistleblower must demonstrate more than temporal proximity in order to satisfy the contributing factor test. *Id.* The ARB, however, then determined that the ALJ's conclusions were in accordance with Eighth Circuit law. *Id.* at 7 n.14. The Board distinguished *Kuduk* on the

grounds that the plaintiff's protected activity in that case was "'completely unrelated'" to the incident that ultimately led to his termination. *Id.* at 6-7 (quoting *Kuduk*, 768 F.3d at 792).

The Board also affirmed the ALJ's determination that Canadian Pacific had not shown by clear and convincing evidence that it would have taken the adverse action absent Riley's protected activity. *See* Add. 7. The ARB explained that the ALJ had properly rejected the "comparator evidence" offered by Canadian Pacific and correctly determined that Canadian Pacific's "discipline for late injury reporting was inconsistent." *Id.* The Board also noted that there was no evidence establishing the identity of the final decisionmaker in this case. *Id.*

The Board also affirmed the ALJ's factual findings and legal conclusions with respect to its award of certain damages. *See* Add. 7-8. The ARB acknowledged that, on the same day that Canadian Pacific had appealed the ALJ's underlying merits decision to the Board, the railroad had also filed a Motion to Alter and Clarify Judgment Or, Alternatively, to Relieve Judgment with the ALJ. *Id.* at 7. The Board explained that, in that motion, Canadian Pacific had challenged the ALJ's calculation of the backpay award on the grounds that he should have calculated the award in accordance with an applicable collective bargaining agreement ("CBA") and should have reduced the award based on back wages awarded to Riley by the Public Law Board ("PLB") in his CBA grievance

proceeding. *Id.* at 7-8. The Board stated that the ALJ based its backpay award on Riley's testimony, which he had determined to be credible. The Board also explained that, contrary to Canadian Pacific's arguments, the CBA does not control review of a case under federal law. *Id.* at 8. The ARB thus affirmed the ALJ's backpay award as supported by substantial evidence and reasonable. The Board also noted that Canadian Pacific had effectively waived its argument that the backpay award should have been reduced based on an award that Riley had received from the PLB. Canadian Pacific knew of this award approximately ten months before the ALJ issued his decision but did not raise the issue until two weeks after the ALJ issued his decision. *Id.* The ARB also affirmed the ALJ's decisions with respect to the award of certain attorney's fees and litigation costs. *Id.* at 8-9.

SUMMARY OF ARGUMENT

Following an evidentiary hearing and after considering all relevant record evidence, the ALJ correctly concluded that Riley had proved by a preponderance of the evidence that his protected report regarding his assault and resulting injury contributed to Canadian Pacific's decision to suspend him without pay. Contrary to Canadian Pacific's arguments, the ALJ and ARB properly applied the contributing factor standard and evaluated whether Riley had proved that the railroad had engaged in intentional retaliation. As a threshold matter, Riley was

not required to produce direct evidence establishing the retaliatory motive of Canadian Pacific; rather, he could satisfy his burden through the production of sufficient circumstantial evidence.

As this Court has specifically recognized, the close relationship between a protected report and discipline for late reporting is a relevant piece of circumstantial evidence to consider when determining whether the contributing factor standard has been met. In this case, the ALJ found that the filing of Riley's report was "inextricably intertwined" with his discipline, which was solely based on the alleged untimeliness of his report. Importantly, however, the ALJ determined that Riley's protected reporting was not merely a *fact* in a lengthy series of events ultimately leading to discipline, it was indeed a *factor* that actually influenced the railroad to take the adverse action against Riley. Contrary to Canadian Pacific's arguments, the ALJ did not rely solely on a "chain-of-events" causation theory in this case. As reflected by the decisions of the ALJ and ARB, substantial circumstantial evidence, such as evidence of temporal proximity and the railroad's inconsistent application of its policies, supports the conclusion that Riley's protected report contributed to his unpaid suspension.

Substantial evidence also supports the ALJ's conclusion, as upheld by the Board, that Canadian Pacific failed to show by clear and convincing evidence that it would have suspended Riley without pay absent his protected activity. The

Board correctly recognized that Canadian Pacific's inability or unwillingness to identify the final decisionmaker who assessed Riley's discipline presents a significant hurdle to the railroad's ability to satisfy its affirmative defense. Moreover, the ALJ and ARB correctly found that Canadian Pacific had not consistently applied its prompt reporting rule and that there was no record evidence that the railroad routinely monitored its workforce for compliance with the rule or that a 47-day unpaid suspension was a customary punishment for violation of the rule. Specifically, Canadian Pacific did not show by clear and convincing evidence that it issued similar discipline to similarly situated employees who did not file protected reports. Two of Riley's supervisors, for example, apparently failed to comply with the railroad's prompt reporting rule regarding Riley's assault but neither of them was investigated or disciplined.

Finally, the ALJ and ARB did not abuse their discretion in concluding that Riley was entitled to recover certain damages, attorney's fees, and litigation costs. This Court should affirm the ARB's final decision and order, upholding the ALJ's decisions.

STANDARD OF REVIEW

Judicial review of the ARB's final decision is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2). *See* 49 U.S.C. 20109(d)(4); 49 U.S.C. 42121(b)(4)(A); *Mercier v. U.S. Dep't of Labor*, 850 F.3d

382, 387-88 (8th Cir. 2017). Under this standard, this Court must affirm the agency's decision if it is supported by substantial evidence and is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A),(E); *Maverick Transp., LLC v. U.S. Dep't of Labor*, 739 F.3d 1149, 1153 (8th Cir. 2014).

The ALJ's factual determinations, as affirmed by the ARB, may be set aside only if they are "unsupported by substantial evidence." 5 U.S.C. 706(2)(E). Substantial evidence is "relevant evidence that a reasonable mind would accept as adequate to support the [agency's] conclusion." *Maverick Transp.*, 739 F.3d at 1153 (internal quotation marks omitted). Substantial evidence is "more than a scintilla but less than a preponderance." *Midgett v. Wash. Grp. Int'l Long Term Disability Plan*, 561 F.3d 887, 897 (8th Cir. 2009) (internal quotation marks omitted).

Under this "deferential" substantial evidence standard, the reviewing court may not substitute its judgment for that of the agency. *Mercier*, 850 F.3d at 387-88. "Evidence may be substantial even when two inconsistent conclusions might have been drawn from it." *Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793, 800 (8th Cir. 2010). Thus, the question is "whether substantial evidence supports the Secretary's conclusion, not whether substantial evidence exists to support [an]

alternative view." *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 358 (8th Cir. 1996) (citing *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992)).

In considering whether the agency's decision is supported by substantial evidence, the Court considers the "the record as a whole, considering evidence that both supports and detracts from the ALJ's decision." *BNSF Ry. Co. v. U.S. Dep't of Labor*, 867 F.3d 942, 945 (8th Cir. 2017). This Court also accords "great deference" to an ALJ's credibility determinations. *Mercier*, 850 F.3d at 388 (internal quotation marks omitted).

Legal determinations by an ALJ or the Board are reviewed *de novo*, with appropriate deference given to the agency's "reasonable interpretation" of the statute. *BNSF Ry.*, 867 F.3d at 945; *Pattison Sand Co. v. Fed. Mine Safety & Health Review Comm'n*, 688 F.3d 507, 512 (8th Cir. 2012) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)). Thus, "[a]s long as the ARB correctly applied the law and the ALJ's factual findings are supported by substantial evidence on the record considered as a whole," this Court "will affirm the ARB's decision even though [the Court] might have reached a different decision[.]" *Maverick Transp.*, 739 F.3d at 1153 (internal quotation marks omitted).

Finally, courts generally review awards of damages, attorneys' fees, and costs by ALJs and the ARB for an abuse of discretion. *See Maverick Transp.*, 739

F.3d at 1158 (reviewing ALJ's award of compensatory damages under an abuse of discretion standard); *Hanig v. Lee*, 415 F.3d 822, 825 (8th Cir. 2005) ("Attorney's fees are within the broad discretion of the district court and will not be reversed absent an abuse of discretion."); *Roadway Express, Inc. v. Admin. Review Bd.*, 116 F. App'x 674, 676 (6th Cir. 2004) (applying abuse of discretion standard to ALJ fee award upheld by ARB).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S CONCLUSION, AS AFFIRMED BY THE BOARD, THAT RILEY'S PROTECTED REPORT CONTRIBUTED TO CANADIAN PACIFIC'S DECISION TO SUSPEND HIM WITHOUT PAY

A. FRSA and its Applicable Burdens

To prevail on a FRSA claim, a complainant must prove by a preponderance of the evidence that (1) he engaged in protected activity; (2) the employer knew or suspected that the complainant engaged in such activity; (3) he suffered an adverse employment action; and (4) his protected activity was a contributing factor in the adverse employment action. *See* 49 U.S.C. 42121(b)(2)(B)(iii); 29 C.F.R. 1982.104(e).[6] If the complainant makes this showing, the burden of proof shifts to the employer to prove "by clear and convincing evidence that the employer would

[6] FRSA incorporates the rules and procedures, as well as the burdens of proof, set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121. *See* 49 U.S.C. 20109(d)(2)(A).

have taken the same unfavorable personnel action in the absence of [the protected conduct]." 49 U.S.C. 42121(b)(2)(B)(iv); *see* 29 C.F.R. 1982.109(b).

In this case, Canadian Pacific has not appealed the ALJ's findings that Riley engaged in protected activity, that Canadian Pacific knew of the protected activity, or that Riley sustained an adverse action. On appeal, Canadian Pacific challenges the conclusion of the ALJ and ARB that Riley's protected reporting contributed to his unpaid suspension. As explained in greater detail below, substantial evidence and controlling precedent of this Court support the ALJ's and ARB's causation analysis.

B. The ALJ and ARB Correctly Applied the Contributing Factor Standard and Concluded That Riley Had Established That Canadian Pacific Engaged in Intentional Retaliation

The contributing factor standard is a "broad and forgiving" burden of proof for employees who need only demonstrate that protected activity contributed to the adverse action in some small way in order to prove a violation of the statute. *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1136 (10th Cir. 2013). As this Court has recognized, a contributing factor is "*any* factor which, alone or in connection with other factors, tends to affect *in any way* the outcome of the decision." *Kuduk*, 768 F.3d at 791 (internal quotation marks omitted and emphasis added); *see Hess v. Union Pac. R.R.*, 898 F.3d 852, 857-58 (8th Cir. 2018). The contributing factor standard is distinct from and "more lenient than the

standard applied in Title VII and ADEA retaliation cases." *Porter v. City of Lake Lotawana*, 651 F.3d 894, 898 (8th Cir. 2011); *see Kuduk*, 768 F.3d at 791. The contributing factor test was "intended to overrule existing case law, which require[d] a whistleblower to prove that his protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action." *BNSF Ry. Co. v. U.S. Dep't of Labor ("Cain"),* 816 F.3d 628, 639 (10th Cir. 2016) (citations omitted).

Applying the standard set forth above, this Court has held that "the contributing factor that an employee must prove is *intentional retaliation* prompted by the employee engaging in protected activity." *Kuduk*, 768 F.3d at 791 (emphasis added); *see Heim v. BNSF Ry. Co.*, 849 F.3d 723, 727 (8th Cir. 2017); *Blackorby v. BNSF Ry. Co.*, 849 F.3d 716, 721 (8th Cir. 2017). Because the FRSA establishes that a railroad may not discharge "or in any other way *discriminate* against" an employee for engaging in protected activity, 49 U.S.C. 20109(a) (emphasis added), this Court has stated that "the essence of this intentional tort is 'discriminatory animus.'" *Kuduk*, 768 F.3d at 791 (quoting *Staub v. Proctor Hosp.*, 562 U.S. 411, 421 (2011)). This Court has explained, however, that an employee need not "*conclusively* demonstrate the employer's retaliatory motive" in

FRSA cases. *Id*. (emphasis added and internal quotation marks omitted); *see Heim*, 849 F.3d at 727; *Blackorby*, 849 F.3d at 722.[7]

In its opening brief, Canadian Pacific repeatedly asserts that this Court's conclusion that a whistleblower must demonstrate "intentional retaliation" to satisfy the contributing factor test means that the whistleblower must prove the employer's retaliatory "motive" or "animus." *See, e.g.,* Opening Br. at 30, 36-39. Canadian Pacific does not explain what it means by these terms, but repeatedly suggests that a complainant must have direct or conclusive evidence of an employer's hostility towards the protected activity. That proposition is inconsistent with the contributing factor test as interpreted by this Court.[8]

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[7] As the ARB noted in this case, this Court's statements that a whistleblower must prove "intentional retaliation" but need not conclusively show that the employer possessed a "retaliatory motive" appear to be in some tension. *See* Add. 6 n.13. Although this Court has frequently differentiated between "intentional retaliation" and "retaliatory motive," *see, e.g., Kuduk*, 768 F.3d at 791, the Court has occasionally used the phrases interchangeably without explanation. *See, e.g., Blackorby*, 849 F.3d at 717, 719, 722-23 (characterizing a jury instruction regarding "retaliatory motive" as an instruction about "intentional retaliation"). While it is certainly true that the ARB "questioned" some of the Eighth Circuit's conclusions with respect to the proper causation analysis under FRSA, Canadian Pacific's assertion that the Board somehow disregarded controlling Eighth Circuit precedent is inaccurate. Indeed, the Board viewed itself as bound by this Court's holdings. *See* Add. 7 n.14 ("Respondent's attempt to challenge the ALJ's contributing factor analysis as contrary to Eighth Circuit law is unavailing legally as well as factually.").

[8] Some of the confusion regarding the proper interpretation of the contributing factor test, as reflected in Canadian Pacific's opening brief, may stem from the fact

A close examination of *Kuduk* and its progeny demonstrates that this Court has generally used the phrase "intentional retaliation" to mean that an employer must have *knowledge* of the protected activity and that such activity must have been a factor that *actually contributed* to the adverse action. *See, e.g., Mercier*, 850 F.3d at 391 (explaining that *Kuduk* held that a "FRSA violation was an intentional tort requiring discriminatory animus, *and cannot be committed unwittingly*") (emphasis added). In this case, there is no question that Canadian Pacific knew about Riley's protected activity. The sole violation for which Riley was disciplined was a failure to promptly report the incident. Although the identity of Canadian Pacific's final decisionmaker is unknown, Riley's disciplinary letter specifically states that the decisionmaker reviewed his investigatory hearing transcript, which is replete with references to his protected activity. As will be discussed below, *see infra* p. 26-32, Riley further proved that his protected activity was an actual factor influencing the railroad's disciplinary decision.

C. The ALJ and ARB Correctly Did Not Require Riley to Produce Direct Evidence of Canadian Pacific's Motive for Taking the Adverse Action

Insofar as Canadian Pacific is urging an interpretation of FRSA that would require the complainant in a FRSA case to have direct proof of an employer's ill-will or hostility towards the protected activity, such an argument must be rejected.

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that the term "animus" itself has two distinct meanings: "[i]ll will; animosity" and "[i]ntention." Black's Law Dictionary (10th ed. 2014).

This Court has consistently held that an employee need not "'*conclusively* demonstrate the employer's retaliatory motive.'" *Kuduk*, 768 F.3d at 791 (quoting *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010)) (emphasis added).[9] As this Court has consistently recognized, where there is no direct evidence that the protected act was a contributing factor, the employee may offer circumstantial evidence. *See Hess*, 898 F.3d at 858; *Loos v. BNSF Ry. Co.*, 865 F.3d 1106, 1112-13 (8th Cir. 2017), *cert. granted on an unrelated issue*, 86 U.S.L.W. 3569 (U.S. May 14, 2018) (No. 17-1042) (citing *DeFrancesco v. Union R.R.*, ARB Case No. 10-114, 2012 WL 759336, at *3 (ARB Feb. 29, 2012)). This Court has explained that relevant circumstantial evidence in this context may include "the temporal proximity between the protected activity and the adverse action, indications of pretext such as inconsistent application of policies and shifting explanations, antagonism or hostility toward protected activity, the relation between the discipline and the protected activity, and the presence of intervening events that

[9] *See also Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 2019 WL 361436, at *5 (9th Cir. 2019) (holding that although FRSA "ultimately requires a showing of the employer's discriminatory or retaliatory intent, FRSA plaintiffs satisfy that burden by proving that their protected activity was a contributing factor" and clarifying that "[t]here is no requirement, at either the prima facie stage or the substantive stage, that a plaintiff make any additional showing of discriminatory intent"); *cf. Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 263 (5th Cir. 2014) (rejecting argument that the ARB erred by failing to require proof that the employer had a "wrongful motive"); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013) (concluding that "an employee 'need not demonstrate the existence of a retaliatory motive'" to prove contributing factor) (internal quotation marks omitted).

independently justify discharge." *Loos*, 865 F.3d at 1112-13 (citations omitted); *see Hess*, 898 F.3d at 858. An interpretation of the contributing factor test that effectively requires a whistleblower to have direct evidence of the employer's animosity towards FRSA-protected activity would be inconsistent with this Court's precedent permitting a complainant to prove contributing-factor causation through the types of circumstantial evidence listed above and would impose a tremendously heightened burden on whistleblowers under FRSA, which was designed to have a far more lenient causation standard than Title VII.[10]

D. The ALJ Did Not Solely Rely on a "Chain-of-Events" Causation Theory in Concluding That Riley's Report Contributed to His Discipline, and the ARB Did Not Impermissibly "Fill In" Findings Regarding the Temporal Proximity Between the Report and the Discipline

Related to its arguments that the ALJ and the ARB failed to require a showing of "intentional retaliation," Canadian Pacific repeatedly asserts that reversal is warranted because the ALJ "relied solely on a fatally defective 'chain-of-events' causation theory in finding for Riley on the contributory factor element," and the ARB impermissibly tried to salvage the opinion by filling in its own temporal proximity findings. Opening Br. at 32. These arguments are factually inaccurate and legally incorrect.

[10] Notably, not even Title VII requires the type of proof of hostility or animosity that Canadian Pacific seems to suggest that FRSA requires. *See, e.g., Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101-02 (2003) (declining to require direct evidence of discrimination in Title VII mixed-motive cases and noting that such evidence is not generally required under other provisions of Title VII).

Although it is true that the ALJ stated that where an injury report "sets the subsequent investigation and disciplinary process in motion, this chain of events is sufficient evidence of a contributing factor," Add. 26, Canadian Pacific focuses on this single statement out of context. After making that statement, the judge immediately continued by explaining, "This court is not suggesting that a complainant automatically establishes a causal nexus by simply demonstrating an employer took any unfavorable personnel action after a report of injury." *Id.* The ALJ further found that, instead, Riley's protected activity was "inextricably intertwined" with his discipline. *Id*.

As the Tenth Circuit explained in *Cain*, a FRSA case that like this one involved discipline for late-reporting of an injury, where a personnel action results from the content declared in a protected report, the report and the personnel action are generally inextricably intertwined, meaning that the protected activity contributed to the personnel action. *See* 816 F.3d at 639. However, where the protected report reveals that the employee might have violated workplace rules, an employee is required to show more than a report "loosely leading" to adverse action. *Id.* In other words, in a case such as this one, the employee is required to present sufficient direct or circumstantial evidence for the factfinder to conclude that the report itself, not merely its timing, was a contributing factor in the decision to take action against the employee. *Id.* ("Cain cannot satisfy the contributing-

factor standard merely by arguing that BNSF would not have known of his delays in reporting his injuries absent his filing the updated Report"). As this Court has similarly concluded, a FRSA complainant must prove that his protected activity was both the cause-in-fact and the proximate cause of the adverse action. *See, e.g., BNSF Ry.*, 867 F.3d at 946 (citing *Koziara v. BNSF Ry. Co.*, 840 F.3d 873, 878 (7th Cir. 2016)).

In this case, as in *Cain*, substantial evidence supports the ALJ's findings that there was more than a report loosely leading to the decision to suspend Riley. Based on circumstantial evidence, the ALJ reasonably concluded and the ARB properly affirmed that Riley's protected activity was not simply a *fact* that set in motion a lengthy chain of events ultimately resulting in discipline unrelated to the protected activity. Here, it truly was a *factor* influencing the disciplinary decision.

First, it is worth noting that the close relationship between a report and discipline for late reporting is a relevant piece of circumstantial evidence for determining whether the contributing factor standard is met, and this Court's precedent supports relying on it as such. *See, e.g., Loos*, 865 F.3d at 1112-13 (noting the relationship between protected conduct and discipline as a piece of circumstantial evidence that can support contributing factor causation). As a matter of common sense, the *filing of Riley's report* unquestionably led to his employer's decision to suspend him for not promptly *filing his report*. Riley's

discipline for the untimely filing of his report would not have occurred "but for" the filing of his report and the report's existence necessarily played some role in the decision to discipline. This is not a case in which the filing of an injury report prompted a railroad investigation that ultimately revealed misconduct unrelated to the protected activity for which the employee was allegedly disciplined.[11] Nor is this a case in which an intervening act may have severed an otherwise apparent causation chain.[12] As the ALJ observed, this is a case in which the protected activity truly cannot be unwound from the adverse action.

More importantly, the ALJ and the ARB did not rely exclusively on the close relationship between the protected report and the suspension to satisfy the contributing factor test. As reflected by the ALJ and ARB decisions, the record is replete with evidence that Riley's injury report contributed to his unpaid suspension. First, it is undisputed that the final decisionmaker knew of the protected report and chose to discipline Riley *solely* for the alleged late reporting

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[11] In this regard, this case is distinguishable from *BNSF Railway*, 867 F.3d at 945-47, where, although a FRSA-protected injury report was part of a factual chain that led to the employee's termination, it was not a contributing factor because the employee's dishonest statements on his job application (for which the employee was terminated) were discovered in the course of Federal Employers' Liability Act litigation years after the injury report and were unrelated to the injury report.

[12] Thus, this case is distinguishable from *Kuduk* where Kuduk's protected report "shared no nexus with the later fouling-the-tracks incident. Rather, Kuduk's fouling of the tracks . . . was an intervening event that *independently* justified adverse disciplinary action." 768 F.3d at 792 (emphasis in original).

despite the recommendation of hearing officer Morris to rely on additional rules violations. *See* Add. 5; JA 229-30.

In addition, strong temporal proximity exists between Riley's protected reporting and his discipline. In his decision, the ALJ expressly found that Riley reported his injury on July 5, 2012, *see* Add. 23; he was pulled out of service on that same day; and his discipline was issued on August 21, 2012. *Id.* at 17, 19. Despite Canadian Pacific's argument to the contrary, the ARB did not exceed the scope of its authority in relying on this strong temporal proximity between the filing of Riley's report and his discipline. Although the ALJ did not explicitly use the phrase "temporal proximity" in his analysis of contributing factor causation, the ALJ's decision contains these undisputed factual findings supporting a determination of temporal proximity. *See BNSF Ry.*, 867 F.3d at 947 (explaining that, "[i]f sound, we [will] uphold the agency's reliance on a *factually supported* alternative ground") (emphasis added).[13]

Significantly, the ALJ and ARB questioned whether concern for the timing of the report truly motivated Canadian Pacific's decision to take action against Riley, and ultimately found circumstantial evidence that it did not. They expressed

[13] The Court need not address Canadian Pacific's arguments regarding whether temporal proximity *alone* is sufficient to satisfy the contributing factor test. *See* Opening Br. at 24, 33. As discussed herein, this is not a case in which temporal proximity is the sole evidence supporting contributing factor causation.

skepticism regarding the reasonableness of Canadian Pacific's determination that the filing of Riley's injury report was untimely. *See, e.g.,* Add. 4-5 (affirming the ALJ's crediting of Riley's statements that "he remained in fear of Bollman until he returned to the hotel at 4:25 a.m., that he tried and failed to report the incident immediately, and did report it as soon as he woke up the next morning"). They also noted facts suggesting that it appeared that Canadian Pacific's reporting policy was inconsistently applied. For instance, the ALJ noted that Christensen, Riley's direct supervisor, testified that he believed Riley "had not done anything wrong in the manner or timing of reporting his injury of [sic] Mr. Bollman's attack" and was "shocked" to hear the results of the formal investigation. *Id.* at 21; *see* JA 114. Further, Riley testified that, on July 5, 2012, neither Christensen nor Heichel indicated to him that his report of the attack and related injury was untimely. *See* JA 38. Christensen similarly testified that, on July 5, 2012, neither he, Heichel, nor Cork mentioned the possibility that Riley had failed to timely report the incident or related injury. *Id.* at 111.

Furthermore, though discussed in the context of Canadian Pacific's affirmative defense, the ALJ found that Canadian Pacific did not take any action against two of Riley's managers, who similar to Riley, did not take immediate action to report the assault and resulting injury as soon as they learned of it, despite apparently having an obligation to do so under Canadian Pacific's rules. *See* Add.

27; JA 173-76. Nor did Canadian Pacific present any evidence that it regularly monitored for compliance with its prompt reporting rules or that a 47-day suspension would be routine or reasonable discipline for violation of the prompt reporting rules. *See* Add. 27. In fact, labor relations manager Scudes testified that he was not aware of any instances where an employee was pulled out of service for more than a month for an alleged failure to report. *See* Add. 23; JA 199.

As this Court has expressly recognized, each of these facts constitutes relevant circumstantial evidence that the protected activity contributed to the adverse action. *See Hess*, 898 F.3d at 858 (noting that temporal proximity and indications of pretext, such as inconsistent application of policies and shifting explanations, are circumstantial evidence that can support contributing-factor causation); *Loos*, 865 F.3d at 1112-13 (same). Based on this substantial circumstantial evidence, the Court should affirm the conclusions of the ALJ and ARB that Riley's protected reports contributed to his suspension.[14]

[14] In the event that this Court were to agree with Canadian Pacific that the ALJ erred by relying solely on an impermissible chain-of-events causation analysis in determining that Riley had satisfied the contributing factor test, a remand to the ARB for further proceedings consistent with this Court's decision would be appropriate. In *BNSF Railway*, this Court rejected the ALJ's chain-of-events causation theory and concluded that the ARB was "unable to salvage" that analysis because the Board "lacked critical fact findings needed to affirm the ALJ's decision when applying the appropriate legal standard." 867 F.3d at 948. In that case, the Court determined that the appropriate remedy was to reverse the ARB's decision and remand the case "for further proceedings not inconsistent with this

E. The ALJ Properly Considered All Record Evidence in Determining That Riley Had Satisfied His Burden Under the Contributing Factor Test

In its opening brief, Canadian Pacific asserts that the ALJ erred by concluding that he did not have to consider evidence of Canadian Pacific's legitimate, non-retaliatory reasons for its disciplinary decision at the causation stage. *See* Opening Br. at 31-32. In accordance with the ARB's controlling case law at the time, the ALJ observed in his discussion of the contributing factor test that "an employer's evidence of a legitimate, non-retaliatory reason for the adverse action in the absence of any protected activity is, with rare exception, not to be considered at the initial causation stage, and is instead reserved for proof by clear and convincing evidence as an affirmative defense." Add. 26. The Secretary acknowledges that the ALJ's observation is incorrect. The ARB has since clarified its case law to make clear that ALJs must consider all relevant record evidence in evaluating whether a complainant has satisfied his or her burden under the contributing factor test. *See Palmer v. Canadian Nat'l Ry.*, ARB Case No. 16-035, 2016 WL 5868560 (ARB Jan. 4, 2017); *accord Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017); *BNSF Ry.*, 867 F.3d at 946.

Notwithstanding the ALJ's incorrect statement, the ALJ's decision as a whole reflects that he did in fact consider all record evidence, including Canadian

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opinion" rather than to outright dismiss the case, as Canadian Pacific urges here. *Id*. at 945, 949.

Pacific's proffered reasons for taking the adverse action, in evaluating whether Riley had satisfied his burden under the contributing factor test. In the very same paragraph in which he made the above statement, the ALJ expressly considered Riley's disciplinary history and the fact that he was employed under a last chance agreement ("LCA")—two reasons proffered by the railroad as justifying the adverse action—and explained why such facts were insufficient to defeat Riley's proof that his injury report contributed to his suspension. *See* Add. 26. Moreover, the ALJ repeatedly and correctly made clear that he was applying a "preponderance of the evidence" standard to the contributing factor analysis, *see, e.g.*, *id.* at 16, 26, 29, and that his findings and conclusions were "based on a complete review of the record." *Id.* at 13. Thus, this erroneous statement by the ALJ should not preclude the Court from affirming the ARB's final decision in this case.[15]

F. The ALJ's Finding That Punitive Damages Were Not Appropriate Does Not Undermine His Finding That Riley Satisfied the Contributing Factor Test

In its opening brief, Canadian Pacific asserts that the ALJ's finding that punitive damages were not warranted because the railroad acted in "good faith"

[15] In any event, even if the ALJ had technically erred by declining to consider Canadian Pacific's evidence of its legitimate, non-retaliatory reasons for its adverse action at the causation stage, such an error would be harmless because the ALJ did not find such evidence credible or persuasive based on his discussion in the context of the affirmative defense. *See, e.g., United States v. Brewer*, 766 F.3d 884, 890 (8th Cir. 2014) ("The APA instructs courts reviewing agency action to take 'due account . . . of the rule of prejudicial error.'") (quoting 5 U.S.C. 706).

precludes a showing of intentional retaliation, thereby warranting dismissal of the case. *See* Opening Br. at 36-39. Such an argument erroneously conflates FRSA's causation and punitive damages standards and must be rejected.

Punitive damages are appropriate under FRSA where the railroad demonstrated "reckless or callous disregard for the plaintiff's rights." *Griebel v. Union Pac. R.R.*, ARB Case No. 13-038, 2014 WL 1314291, at *1 (ARB Mar. 18, 2014) (internal quotation marks omitted); *see BNSF Ry.*, 867 F.3d at 949 (recognizing that the "malice or reckless indifference standard" applies to an award of punitive damages under FRSA). "The terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999). The Supreme Court has therefore acknowledged that "[t]here will be circumstances where intentional discrimination does not give rise to punitive damages liability under this standard." *Id.* at 536. As this Court has recognized, even in cases in which a complainant has demonstrated that unlawful retaliation occurred, the railroad may avoid punitive damages "by showing that it made good faith efforts to comply" with the law. *BNSF Ry.*, 867 F.3d at 949 (internal quotation marks omitted). Indeed, as a matter of common sense, courts do not engage in a discussion of punitive damages *unless* the complainant has already established a violation of the statute. There are many

cases, as here, in which courts have determined that an employer violated FRSA but should not be held liable for punitive damages because the employer did not act with reckless indifference towards the employee's rights. *See, e.g.*, *Jackson v. Union Pac. R.R.*, ARB Case No. 13-042, 2015 WL 1519814 (ARB March 20, 2015); *Bailey v. Consol. Rail Corp.*, ARB Case Nos. 13-030, 13-033, 2013 WL 1874825 (ARB April 22, 2013), *aff'd sub nom. Consol. Rail Corp. v. U.S. Dep't of Labor*, 567 F. App'x 334 (6th Cir. 2014). Such conclusions are not in tension, and Canadian Pacific's argument that the ALJ's finding of good faith is inconsistent with his finding of retaliation must be rejected.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S CONCLUSION, AS AFFIRMED BY THE ARB, THAT CANADIAN PACIFIC DID NOT SHOW THAT IT WOULD HAVE SUSPENDED RILEY WITHOUT PAY ABSENT HIS PROTECTED REPORT

Under FRSA, if the complainant proves that his protected activity contributed to the employer's adverse action, the burden of proof shifts to the employer to prove "by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of [the protected conduct]." 49 U.S.C. 42121(b)(2)(B)(iv); 29 C.F.R. 1982.109(b). The "clear and convincing evidence" standard is a higher standard than the "preponderance of the evidence" standard. *Addington v. Texas*, 441 U.S. 418, 425 (1979). It requires an employer to show that "the truth of its factual contentions are highly probable."

Colorado v. New Mexico, 467 U.S. 310, 316 (1984) (internal quotation marks omitted).

As a threshold matter, and as correctly recognized by the ARB, Canadian Pacific's inability or unwillingness to identify the final decisionmaker who imposed discipline in this case presents a significant hurdle to the railroad's ability to demonstrate clear and convincing evidence that it would have issued Riley an unpaid suspension absent his protected activity. Canadian Pacific itself has argued that whether investigatory hearing evidence was "referred to disinterested managers for review and decisionmaking" is a relevant consideration in the affirmative defense analysis. Opening Br. at 40. Here, it is impossible for Canadian Pacific to prove that an unbiased investigatory process existed or that a "disinterested" manager made the final decision to suspend Riley without pay given that the record does not reflect the identity of such manager. *See, e.g., Cain*, 816 F.3d at 641 (affirming ALJ's affirmative defense analysis in favor of complainant, in part because railroad "personnel had not even agreed about who had fired" him).

Canadian Pacific asserts that this Court has effectively adopted a multi-factored test, which, if satisfied, establishes an employer's affirmative defense under FRSA as a matter of law. *See* Opening Br. at 40-41, 44-46. Relying primarily on *Kuduk*, Canadian Pacific notes that these factors include whether the

railroad had "relevant policies addressing the alleged misconduct," "whether the railroad thoroughly investigated the charge," and "other instances of employee discipline for similar violations." Opening Br. at 40. Although it is true that this Court in *Kuduk* identified such facts as relevant in that case, nothing in that decision suggests in any way that this Court has adopted a specific list of considerations which, if established, per se satisfy FRSA's affirmative defense. *See* 768 F.3d at 792. Evaluation of an employer's proffered legitimate, nondiscriminatory reasons for its disciplinary decision is necessarily a fact-specific analysis.

Substantial evidence supports the conclusion of the ALJ, as affirmed by the ARB, that Canadian Pacific failed to prove its affirmative defense. In his decision, the ALJ properly explained that, in cases where the protected activity at issue involves the filing of an injury report and the employer argues that the adverse action was instead related to the complainant's underlying unsafe conduct, the relevant focus in evaluating whether the employer has met its affirmative defense burden is "whether the employer establishes that it would have taken the same action against an uninjured employee who engaged in identical unsafe conduct." Add. 26 (citing *DeFrancesco*, 2015 WL 5781070, at *7). The ALJ noted that employers may satisfy this burden with evidence of extrinsic factors that would independently lead to the ultimate decision to take adverse action, such as whether

the employer "consistently imposes equivalent discipline against uninjured employees who violate the work rules Complainant was cited for violating, and whether Respondent routinely monitors and enforces discipline for late reporting." *Id.* at 26-27; *accord Smith v. Dep't of Labor*, 674 F. App'x 309, 315-16 (4th Cir. 2017) (adopting framework suggested in *DeFrancesco* and noting "[w]hen an employee's protected activity triggers an investigation that reveals the employee's own misconduct, the pertinent question is whether the employer is selectively enforcing rules or selectively imposing extraordinarily harsh discipline against whistleblowers as a pretext for unlawful retaliation").

As the ALJ and ARB concluded, Canadian Pacific has presented no evidence of similarly situated individuals who were disciplined for similar conduct but had not engaged in protected activity. The question whether two employees are similarly situated is a question of fact. *See Jones v. Evergreen Packaging, Inc.*, 536 F. App'x 661, 662 (8th Cir. 2013). While the comparator employees need not be clones of the plaintiff, they "must be similarly situated in all relevant respects." *Ebersole v. Novo Nordisk, Inc.*, 758 F.3d 917, 925 (8th Cir. 2014) (internal quotation marks omitted).

Although Bollman and Riley were obviously involved in the same altercation, they are not sufficiently similar for purposes of evaluating Canadian Pacific's affirmative defense. As the ALJ and ARB recognized, Bollman's

termination letter stated that he was discharged for numerous rule violations but did not identify a failure to promptly report the incident as one of them. *See* JA 231. Riley's discipline letter, on the other hand, states only that he was found guilty of a "failure to promptly report the incident." *Id.* at 230.

As the ALJ correctly determined, and the ARB affirmed, the more appropriate comparators in this case were Riley's supervisors, Christensen and Heichel, because they were uninjured individuals who apparently engaged in the same rule violation as Riley (i.e., did not immediately file or cause to be filed a formal report of Riley's assault and related injury) but were not investigated or disciplined at all by Canadian Pacific, let alone assessed a 47-day unpaid suspension. *See* JA 173-76.

On appeal, Canadian Pacific challenges this conclusion by summarily asserting that the supervisors cannot be similarly situated to Riley because they are "at-will, non-unionized managers." Opening Br. at 42. Canadian Pacific offers no rationale for why the union status, or lack thereof, of otherwise nearly identically situated individuals is relevant to this analysis. The fact that Riley's supervisors were not unionized is wholly irrelevant to whether they engaged in misconduct (i.e., failure to timely report the assault and injury) comparable to Riley's alleged misconduct. This distinction is particularly meaningless given that hearing officer Morris confirmed that Canadian Pacific supervisors have an independent

responsibility to formally report incidents and related injuries of which they are aware, that Riley's supervisors failed to do so, and that those supervisors were not investigated or disciplined in any way.

The lack of discipline of Riley's supervisors is precisely the type of comparative evidence that this Court considers as relevant in evaluating whether an employer's proffered reasons for taking an adverse action are pretextual. *See, e.g.*, *Schaffhauser v. United Parcel Serv., Inc.*, 794 F.3d 899, 904 (8th Cir. 2015) (explaining that "potential comparators must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances") (internal quotation marks omitted). Here, Riley and his immediate supervisors were part of the same supervisory chain, were subject to the same or similar Canadian Pacific mandatory reporting rules, and engaged in similar conduct by failing to immediately file formal reports or complete required incident forms regarding Riley's assault and related injury. Their status as managers here is not a relevant distinguishing circumstance.

In its opening brief, Canadian Pacific asserts that the ALJ erred by failing to consider evidence that Canadian Pacific had terminated two employees for insulting coworkers and making verbal threats of violence, neither of which involved protected reports. *See* Opening Br. at 43, 45 (citing JA 194-95). It is

wholly unclear why Canadian Pacific believes such employees are similarly situated to Riley, particularly given that they committed entirely different rule violations. While comparator employees need not have committed the exact same offense, they "must have engaged in conduct of comparable seriousness." *Ebersole*, 758 F.3d at 925 (internal quotation marks omitted). Although Canadian Pacific does not address this issue, it seems obvious that threatening violence is a more serious rule violation than failing to promptly report an injury and thus these comparators are not sufficiently similarly situated.

As the ALJ correctly concluded, and the ARB affirmed, Canadian Pacific did not submit evidence regarding the discipline of other employees who failed to promptly report incidents at work, regardless of whether they reported injuries. Indeed, labor relations manager Scudes testified that he was not aware of any other employee who had ever been assessed similar discipline for late reporting. *See* JA 194-95, 199. Nor did Canadian Pacific present any evidence that it routinely monitors its workforce for compliance with the prompt reporting rule in the absence of an injury. *See* Add. 27. The ALJ similarly determined that no record evidence showed that a 47-day suspension was "routine" or "reasonable" discipline

for a late reporting violation. *Id.* Substantial evidence supports these critical factual findings, and Canadian Pacific has not appealed any of these conclusions.[16]

III. THE ALJ AND ARB DID NOT ABUSE THEIR DISCRETION IN AWARDING CERTAIN DAMAGES, ATTORNEYS' FEES, AND COSTS TO RILEY

A. The ARB Properly Denied Canadian Pacific's Motion to Alter and Clarify Judgment

On the same day that Canadian Pacific appealed the ALJ's underlying merits decision to the Board, the railroad also filed a Motion to Alter and Clarify Judgment Or, Alternatively, to Relieve Judgment with the ALJ. *See* JA 437-49. The motion essentially raised two arguments: (1) that the ALJ erred by failing to calculate backpay based on the governing CBA, and (2) that the ALJ granted Riley an impermissible double-recovery windfall because he had received some amount

[16] To the extent that Canadian Pacific argues that the ALJ erred by "simply disregard[ing]" the fact that Riley was employed under an LCA, which would have justified his dismissal for any rule violation, Opening Br. at 43, such an assertion is incorrect. The ALJ expressly addressed that Riley was employed under an LCA and in fact acknowledged that, given such context, Riley's suspension "may have constituted leniency." Add. 26-27. The judge continued, however, that he did not find that such fact in and of itself meets the employer's high bar of presenting clear and convincing evidence showing that it would have engaged in the same adverse action absent the protected activity. *Id.* In their decisions, the ALJ and ARB both expressed skepticism that Riley should have been found guilty of late reporting in the first place given that he tried to reach his supervisors to inform them of his assault as soon as he felt it was safe to do so. *See, e.g.*, *id.* at 4-5, 18, 23. Moreover, the fact that Riley was employed under an LCA does not give Canadian Pacific carte blanche to take adverse actions that would violate federal whistleblower protection law. *See* 49 U.S.C. 20109(h) ("The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.").

of backpay from the Public Law Board in his CBA grievance proceeding. *Id.* The ALJ never ruled on the motion, which was pending from October 30, 2015 until the ARB issued its decision on July 6, 2018, so the ARB ultimately addressed it in its final decision and order. *See* Add. 7-8.

Contrary to Canadian Pacific's assertions, the Board did not exceed its authority by ruling on the motion in the first instance. As Canadian Pacific itself has explained, its motion "was essentially a Fed. R. Civ. P. 59 or 60 motion." Opening Br. at 48. Although trial courts will "[o]rdinarily" rule upon motions for relief from judgment, "appellate courts may, in their discretion, decide the merits of a Rule 60(b) motion in the first instance on appeal." *Phelps v. Alameida*, 569 F.3d 1120, 1134-35 (9th Cir. 2009) (citing *Gonzalez v. Crosby*, 545 U.S. 524, 536-38 (2005)); *see Jones v. Ryan*, 733 F.3d 825, 838-39 (9th Cir. 2013) (same). Such an outcome is particularly appropriate here, where adjudication of Canadian Pacific's motion required no additional factfinding.[17]

As to Canadian Pacific's argument that the ALJ's backpay award should have been reduced based on an award that Riley received through his grievance process, the ARB properly determined that Canadian Pacific had effectively

[17] With respect to Canadian Pacific's argument that backpay should have been calculated based on its CBA, the Board rejected such an argument as a matter of law, concluding that federal law controls the proper adjudication of FRSA claims. *See* Add. 8. Canadian Pacific does not appear to have challenged the merits of the Board's holding on this issue.

waived this argument by failing to timely raise it to the ALJ. *See Nagle v. Unified Turbines, Inc.*, ARB Case No. 13-010, 2013 WL 4928254, at *3 (ARB Aug. 8, 2013) ("[W]e will not consider arguments a party did not, but could have, presented to the ALJ."); *Rollins v. Am. Airlines, Inc.*, ARB Case No. 04-140, 2007 WL 1031362, at *2 n.11 (ARB Apr. 3, 2007) ("Under our well-established precedent, we decline to consider an argument that a party raises for the first time on appeal."). The Board did not abuse its discretion by so finding. The PLB issued its decision on January 9, 2015, awarding $6,118.69 in lost wages to Riley. *See* JA 438, 444-48. The ALJ's merits decision in this case awarding back wages to Riley was issued on October 16, 2015. At no time during the more than nine months preceding the ALJ's decision did Canadian Pacific alert the ALJ to the fact of the PLB award or move to reopen the record for the ALJ to consider such award, despite the fact that such evidence was clearly available. Instead, the railroad waited until two weeks *after* the ALJ issued his decision to present this evidence to the court and it offered no explanation, let alone made a showing of good cause, for its delay.[18]

[18] The ALJ's procedural rules currently require motions to reopen the record to "be made promptly after the additional evidence is discovered" and specifically state that "[n]o additional evidence may be admitted unless the offering party shows that new and material evidence has become available that could not have been discovered with reasonable diligence before the record closed." 29 C.F.R. 18.90(b)(1); *see* former 29 C.F.R. 18.54-.55 (2014) (similarly stating that

B. The ALJ and ARB Did Not Abuse Their Discretion in Concluding That Riley's Award of Attorney's Fees and Costs Should Not Be Reduced on the Basis of His Partial Success in Obtaining Damages

On appeal, Canadian Pacific repeatedly argues that the ALJ's award of reasonable attorney's fees should have been reduced because Riley was only awarded approximately 5% of the damages that he initially sought. *See* Opening Br. at 49-50. Canadian Pacific asserts that, in evaluating the reasonableness of the fees, the "most important factor" to be considered by a court is the requesting party's "[o]verall success." *Id.* at 49. The railroad thus argues that "the ARB erred by refusing to limit the attorney's fees sought in proportionality to [Riley's] limited success." *Id.* at 50.

The Supreme Court has rejected the proposition that fee awards must be proportionate to the amount of damages recovered by a prevailing party in a civil rights suit brought under section 1988. *See City of Riverside v. Rivera*, 477 U.S. 561 (1986). In *Rivera*, a plurality of the Court observed that a rule necessarily limiting the recovery of attorney's fees to a proportion of the monetary damages awarded in such cases would undermine congressional intent by making it difficult for plaintiffs to find competent counsel to represent them in cases with low

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"[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record" and that documents submitted for the record after the close of the hearing must be received within twenty days after the hearing "except for good cause shown").

monetary value but important societal benefits. *Id.* at 574, 577-79. As this Court has recognized, the Supreme Court in *Rivera* thus concluded that, while the amount of damages recovered by a plaintiff in a civil rights action is relevant to the amount of the attorney's fee award, it is "only one of many factors that a court should consider in calculating an award of attorney's fees." *Rivera*, 477 U.S. at 574; *Loggins v. Delo*, 999 F.2d 364, 369-70 (8th Cir. 1993). The Court's analysis in *Rivera* should apply with equal force to claims brought under FRSA.

Here, the ALJ considered Canadian Pacific's arguments but exercised his discretion to award reasonable attorney's fees and costs to Riley even though he did not achieve the full amount of compensatory and punitive damages that he requested. The judge correctly noted that Riley had prevailed in the litigation by proving a violation of the FRSA and obtaining an award of back wages. *See* JA 543. As this Court has recognized, the Supreme Court has "indicated that a district court retain[s] discretion to award a full fee even if a plaintiff did not obtain all requested relief." *Loggins*, 999 F.2d at 369 n.5 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 435-36 n.11 (1983)). Canadian Pacific has pointed to no authority *requiring* the ALJ to reduce the amount of his attorney's fee award; here, the ALJ considered the fact that Riley had not achieved full success in obtaining damages but nonetheless exercised his discretion to award a full fee. The ALJ's reasonable determination does not constitute an abuse of discretion.

C. The ALJ and ARB Properly Determined That Texas Rates Were the Applicable Attorney Rates In This Case

Canadian Pacific further argues that the ALJ erred by awarding attorney's fees based on the legal market in Houston, Texas rather than Iowa, where the litigation exclusively occurred. *See* Opening Br. at 50-52. Canadian Pacific states that fees for non-local counsel are limited to local rates unless the requesting party can "show that he was unable through diligent, good-faith efforts, to retain local counsel." *Id.* at 51. In support of this argument, Canadian Pacific asserts—without any citation to the record or legal support—that Riley "conjure[d] up evidence of a diligent search" for local counsel. *Id.* Contrary to Canadian Pacific's argument, the ALJ and ARB did not abuse their discretion in concluding that Riley did in fact demonstrate that he exercised diligent, good faith efforts but was unable to retain local counsel in Iowa to handle his FRSA case.

As the ALJ correctly explained, an attorney's reasonable hourly rate is "'to be calculated according to the prevailing market rates in the relevant community.'" Add. 38 (quoting *Blum v. Stenson*, 465 U.S. 886, 895 (1984)). However, "non-local counsel is not limited to lower local rates if 'a plaintiff can show he has been unable through diligent, good faith efforts to retain local counsel.'" *Id.* (quoting *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137, 140-41 (8th Cir. 1982)). The ALJ also has discretion to award a higher hourly rate to attorneys where

determined to be appropriate. *See Evans v. Miami Valley Hosp.*, ARB Case Nos. 08-039, 08-043, 2009 WL 2844816, at *3 (ARB Aug. 31, 2009).

Here, as the ALJ expressly noted, Riley explained that he was unable to find local counsel to represent him due to the specialized and complex nature of FRSA litigation. *See* Add. 38. Riley submitted a declaration that he "utilized the local phone book, as well as online resources such as Google, online yellow pages, and lawyer referral websites" to attempt to find local counsel to represent him, but was unable to do so. *Id.*; *see* JA 490-91. In the declaration, Riley further stated that he had contacted approximately 20 law firms in Iowa, but none of them agreed to represent him. *Id.* Riley explained that he was repeatedly told by the Iowa law firms that he contacted that "railroad law was a very unique area of the law and that [he] needed to find a firm that primarily practiced railroad law." *Id.*

The ALJ explicitly considered the arguments raised by Canadian Pacific casting doubt on the veracity of Riley's declaration and rejected such assertions, concluding that he was "convinced that Mr. Riley made a diligent, good-faith effort to retain local counsel in Iowa." Add. 39. The judge also noted that Riley had presented three declarations from Iowa attorneys, two of whom stated that their firms would not have represented Riley and one of whom said that he does not "know of any attorneys in Iowa who primarily handle FRSA whistleblower cases and who have advanced knowledge of the railroad industry in relation

thereto." *Id.*; *see* JA 496-98, 507-16. That third attorney also stated that if he was asked for a referral to another Iowa attorney to represent a FRSA complainant, he would not know of anyone to recommend. *Id.* at 508. The ALJ acknowledged that, although Riley's evidence to this effect was not submitted in the original fee petition itself, he properly supplemented the record to include the additional evidence. *See* Add. 39. As the ALJ determined, "Contrary to [Canadian Pacific's] implications that Mr. Riley fabricated his account of seeking legal representation, I find his supplemental affidavit credible, his efforts to retain local counsel reasonable and note that the FRSA does not require a complainant to contact every local law firm." *Id.* This Court accords "great deference" to an ALJ's credibility determinations, *Mercier*, 850 F.3d at 388 (internal quotation marks omitted), and Canadian Pacific has presented no legitimate reason to undermine the ALJ's determinations on this issue.

D. The ALJ and ARB Properly Exercised Their Discretion to Award Travel Costs

Canadian Pacific asserts that the ALJ and ARB erred by awarding the travel costs of Riley's counsel for two reasons: (1) Riley did not demonstrate that non-local counsel was necessary, and (2) neither FRSA nor its regulations provide for the recovery of attorney travel costs. *See* Opening Br. at 52-53. The Secretary has already explained that the ALJ and ARB did not abuse their discretion in determining that Riley sufficiently showed that he needed to obtain non-local

counsel to represent him in this matter. *See supra* p. 48-50. With respect to Canadian Pacific's second argument, Riley was entitled to recover "[r]easonable associated travel costs," particularly because he had demonstrated the necessity of obtaining non-local counsel. JA 543-44. *See, e.g., Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 426 F.3d 694, 710 (3rd Cir. 2005) (explaining that "under normal circumstances, a party that hires counsel from outside the forum of the litigation may not be compensated for travel time, travel costs, or the costs of local counsel" but that "where forum counsel are unwilling to represent the plaintiff, such costs are compensable").

E. The ALJ and ARB Properly Awarded Attorney's Fees Incurred at the OSHA Stage of this Proceeding

Finally, Canadian Pacific asserts without any legal citation that the ALJ's decision to award attorney's fees based on 4.75 hours of time billed for representation during the OSHA proceedings in this matter was arbitrary and capricious. *See* Opening Br. at 53-54. The ALJ properly rejected this argument. *See* Add. 39-40. Although OSHA dismissed Riley's complaint, the ALJ correctly concluded that legal services rendered by counsel before OSHA are compensable because the OSHA complaint "was a necessary step to reach the proceedings before this Office, in which Petitioner ultimately prevailed." *Id.* at 40; *see Brig v. Port Auth. Trans Hudson*, No. 12-civ-5371, 2014 WL 1318345, at *4 (S.D.N.Y. March 28, 2014) (awarding attorney's fees for time related to filing OSHA

complaint in FRSA case where complainant kicked out to district court prior to obtaining a final agency order because filing an OSHA complaint "is a step that is required by the FRSA before an employee plaintiff is allowed to bring an FRSA action before a district court" where plaintiff later prevailed); *cf. Skokos v. Rhoades*, 440 F.3d 957, 962-63 (8th Cir. 2006) (explaining that the "Supreme Court . . . has permitted Title VII plaintiffs to recover attorney's fees for state administrative proceedings that they were required to exhaust") (citing *N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 71 (1980)). The ALJ did not abuse his discretion in determining to award these fees to Riley because the filing of his OSHA complaint, regardless of the outcome, was a statutory prerequisite to his subsequent litigation. *See* 49 U.S.C. 20109(d)(1).

CONCLUSION

For the reasons set forth above, the Secretary requests that this Court affirm the Board's decision affirming the ALJ's findings and conclusions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32 AND LOCAL RULE 28A(h)

Pursuant to Federal Rule of Appellate Procedure 32(a), the undersigned certifies that the foregoing Response Brief for the Secretary of Labor:

(1) Complies with the type volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,995 words, including footnotes but excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f);

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Date: February 21, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of February, 2019, I electronically filed the foregoing Response Brief for the Secretary of Labor with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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