No. 14-9602

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BNSF RAILWAY COMPANY,
Petitioner,
v.
ADMINISTRATIVE REVIEW BOARD,
U.S. DEPARTMENT OF LABOR,
Respondent,
and
CHRISTOPHER CAIN,
Respondent-Intervenor.

On Petition for Review of the Final Decision and Order of the United States Department of Labor's Administrative Review Board, before Honorable Luis A. Corchado, Joanne Royce, and Lisa Wilson Edwards, Administrative Appeals Judges, ARB No. 13-006

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STATEMENT OF RELATED CASES

The undersigned is not aware of any related cases.

GLOSSARY

"AIR 21" means the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121.

"ALJ" means the Administrative Law Judge.

"APA" means the Administrative Procedure Act, 5 U.S.C. 551 *et seq*.

"ARB" or "Board" means the Administrative Review Board.

"CX" means Exhibits submitted by the Complainant Christopher Cain during the ALJ Hearing.

"Department" means the Respondent United States Department of Labor.

"ERA" means the Energy Reorganization Act of 1974, 42 U.S.C. 5851.

"FRSA" or "Act" means the Federal Railroad Safety Act of 1970, 49 U.S.C. 20101 et seq.

"OSHA" means the Occupational Safety and Health Administration.

"RX" means the Respondent BNSF Railway Company Exhibits to the ALJ Hearing.

"Secretary" means the Secretary of Labor.

"SOX" means the Sarbanes-Oxley Act of 2002, 18 U.S.C. 1516A.

"TR" means the Transcript of the June 20, 2012 ALJ Hearing.

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BRIEF FOR THE SECRETARY OF LABOR

On behalf of Respondent United States Department of Labor ("Department") Administrative Review Board ("ARB" or "Board"), the Secretary of Labor ("Secretary") submits this brief in response to the briefs filed by Petitioners BNSF Railway Company ("BNSF") and Christopher Cain ("Cain").

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 had subject matter jurisdiction over this case based on a complaint filed with the Occupational Safety and Health Administration ("OSHA") by Cain against his employer, BNSF, pursuant to 49 U.S.C. 20109(d)(1). The Administrative Review Board issued its Decision and Order ("Order") on September 18, 2014, affirming the decision of the Administrative Law Judge ("ALJ") that BNSF terminated Cain in violation of FRSA, and modifying the ALJ's awards of back pay and damages.[1] BNSF filed a timely petition for review of that Order in this court on November 10, 2014.[2] This Court has jurisdiction to review the ARB's decision because the alleged violation occurred in Kansas City, Kansas. *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

[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).

[2] Cain also filed a petition for review of the ARB's order, which was docketed as Case No. 14-9600, but voluntarily dismissed his petition on Feb. 17, 2015.

which the violation allegedly occurred); 49 U.S.C. 42121(b)(4) (same); *see also* 29 C.F.R. 1982.112(a).[3]

STATEMENT OF THE ISSUES

1. Whether substantial evidence and applicable law support the ALJ's finding, as affirmed by the ARB, that Cain's injury report contributed to BNSF's decision to fire him.
2. Whether the ARB applied the correct legal standard in holding that BNSF did not prove by clear and convincing evidence that it would have fired Cain in the absence of his protected activity.
3. Whether substantial evidence supports the ARB's reduced punitive damages award, and whether it comports with due process.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

This case arises under the anti-retaliation provision of FRSA, which protects railroad employees who "notify … the railroad carrier … of a work-related personal injury or work-related illness of an employee." 49 U.S.C. 20109(a)(4), 29 C.F.R. Part 1982. An employer is prohibited from discharging or otherwise

[3] Proceedings under FRSA are governed by the rules, procedures, and burdens of proof, set forth in 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).

discriminating against an employee who engages in such protected activity. *Id.* An employee who believes that he or she has been retaliated against in violation of FRSA may file a complaint alleging such retaliation with the Secretary of Labor. *See* 49 U.S.C. 20109(d); 29 C.F.R. 1982.103. Here, Cain filed such a complaint with OSHA on November 24, 2010. ALJ Decision and Order dated Oct. 9, 2012 (hereafter "ALJD"), at 5.[4] In his complaint, Cain alleged that BNSF suspended and then terminated him for reporting an on-the-job injury. ALJD 2 (citing Joint Stipulations (hereafter "JS"), ALJX 1). OSHA conducted an investigation in accordance with the statute and regulations, 49 U.S.C. 20109(d)(2)(A); 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1982.105, and dismissed the complaint. Cain filed timely objections and requested a hearing, which was held before ALJ Daniel F. Solomon on June 20, 2012. ALJD 1; 29 C.F.R. 1982.106.

The ALJ found that Cain had engaged in protected activity, that BNSF had first suspended and then terminated him because of that activity, and that BNSF had not proven by clear and convincing evidence that it would have both suspended and terminated Cain in the absence of protected activity. ALJD 7, 10,

[4] Documents contained in the administrative record have been identified in the Certified List filed by the Administrative Review Board on December 11, 2014, and in the Amended Certified List filed on February 17, 2015, and will be filed with the Court within twenty-one days after filing of Respondent's Brief, as directed by the Court. The original Joint Stipulations are included in the record as ALJX Joint Stipulations, dated June 20, 2012, along with the other Hearing Exhibits.

14-16. BNSF appealed the ALJ decision to the Board. On September 18, 2014, the Board issued a decision affirming in part and reversing in part, and modifying the ALJ's awards of back pay and damages. *See* Order. BNSF petitioned this Court to review the Board's Order.

B. Statement of Facts[5]

Cain was employed by BNSF as a sheet metal worker from 2006 until June 8, 2010. ALJD 3. On January 27, 2010, while driving a BNSF work truck from the Argentine railyard in Kansas City, Kansas to the Murray railyard in North Kansas City, Missouri, Cain was involved in a collision with another vehicle. *Id.*

Cain promptly reported the accident and filled out an Employee Personal Injury/Occupational Illness Report. See Complainant Exhibit ("CX") 4; Respondent Exhibit ("RX") 7, ALJD 4, citing JS 37. On the form, Cain described his injuries as a skinned knuckle and a bruise below his kneecap. CX 4. The parties stipulated:

> According to Mr. Cain, he has no memory of filling out this injury report. He alleges that he was in shock while he was filling out the report, as demonstrated by what he contends are shaky handwriting and one-word answers on the report. He contends that his lack of memory and state of shock are consistent with his later discovery that he was bleeding internally into his pleural cavity.

[5] Unless otherwise indicated, this statement of facts is based on the facts as determined by the ALJ in his Decision and Order.

ALJD 4. For several weeks prior to the accident, Cain had been suffering chest pain, and had gone to the emergency room on January 9, 2010 after feeling a "pop" in his chest after a hard cough. ALJD 11, 12, citing Hearing Transcript ("TR") 120, 123, 126, 129; RX 1, CX 16. He had also seen a doctor on January 13, 2010 complaining about "left lateral rib pain," and been prescribed pain medication. RX 3. Cain testified that he did not realize at the time that he had suffered further injury, since his chest was already hurting before the collision. *See, e.g*. TR 114-15, 137-38.

The day after the accident, Cain emailed his supervisor, John Reppond, asking for the day off, explaining that "[he] didn't sleep last night worried about damage to truck and [his] side is a little sore from coughing." ALJD 13; CX 7. He also took the next day off, and informed Reppond that his cough had caused "restrain [sic] on my ribs." CX 8.

On February 17, Cain went back to the doctor, stating that he had sneezed that morning and felt a "pop" in the left rib area, and that the pain was much worse, and he was short of breath. The doctor thought he had a fractured rib and a large left pleural effusion, and suggested a procedure to drain fluid from his lung. CX 10, RX 11. During the visit, the nurse told him there was a "high probability" that his injuries were caused by his seatbelt during the collision. ALJD 11, citing RX 49, at 2; TR 80-81. He postponed the procedure a day so that he could "fill out the

paperwork to stay within the rules." ALJD 11, quoting TR 88. He asked for and received a medical leave of absence, stating on the Leave of Absence Form that the cause was "unknown at this time." He also completed a Medical Status Form for Non-Work-Related Medical Conditions, and informed Reppond that the procedure was unrelated to his accident. See ALJD 12-13, CX 9, RX 12, RX 13.

On February 22, he was examined by Dr. Shantikumar Gandhi, who performed a CT scan and diagnosed him with a fractured rib, fluid on the lungs, and a "trapped segment of the left lung." RX 14, at 3. The doctor's notes indicate that Cain's left ribs had been hurting for six weeks. *Id.* at 1. Dr. Gandhi performed the surgery on February 23, and predicted that Cain could return to work on April 19. RX 13.

On February 23, BNSF also charged Cain with carelessness and rule violations relating to the January 27 accident, and scheduled an investigation. RX 22, Exh. 1 (charging letter dated Feb. 23, 2010).

On April 8, Cain returned to Dr. Gandhi for a follow up visit, at which the doctor informed him "for the first time" that his lung injury had been caused by the seatbelt impact during the accident, "because of the greenstick fracture and the way the rib had entered the lung." ALJD 14; TR 80, 117. That same day, Cain consulted his union and was advised to file an amended Injury Report, which he did, citing a "Broken Rib due to Seat Belt Hitting Chest ... causing Trauma to

Lungs and Thoracotomy Surgery ... Broken Rib – Bleeding in Pleural Cavity and collapsed lung leading to Thoracotomy Surgery…." ALJD 14; CX 12, CX 13, RX 16.

Cain testified that he informed Reppond about his need to amend his prior injury report, and that Reppond discouraged him from doing so, telling him "[t]his is not going to go well for you." ALJD 15, citing TR 84-85. Paul Schakel, Cain's direct supervisor, also urged him not to file the amended report, saying that it "was going to be announced in lineups and ... was going to hurt the managers and supervision also because it was an FRA reportable injury because it was lost time." ALJD 16, citing TR 92-93.[6]

Cain returned to work in April, as scheduled, and was transferred to a diesel railyard. ALJD 16. On April 30, BNSF issued Cain a letter stating that "in connection with your alleged violation on April 8, 2010, you allegedly failed to report to the proper manager that you had received medical treatment related to your vehicle accident on January 27, 2010." RX 21, Exh. 1 (charging letter dated

[6] Federal Railroad Administration ("FRA") rules require railroad carriers to report certain workplace injuries monthly to the FRA, including those that result in an employee receiving medical treatment or missing a day or more of work. *See* 49 C.F.R. 225.11; 49 C.F.R. 225.19(d). When a railroad learns that a reportable injury has been omitted or not fully reported in its monthly report, it must immediately report the injury to the FRA, along with an explanation for why the injury was not in the regular monthly report. 49 C.F.R. 225.13.

April 30, 2010). The basis for this notice was "the second injury report," according to Reppond. CX 20, at 25.

On May 13, BNSF held a formal investigation to determine Cain's responsibility, in connection with his alleged "failure to report ... [his] medical treatment related to the vehicle accident on January 27." ALJD 5, JS 41; RX 21. Assistant General Foreman Darrin Suttles was the presiding official. ALJD 8, citing TR 160-73; RX 21.

Five days later, on May 18, BNSF held a formal investigation to determine whether Cain was responsible for the January 27 accident. ALJD 5, JS 42; RX 22. Suttles also presided over this investigation. *Id.*

On June 2, Suttles found that Cain had caused the accident and violated several rules, and assessed a thirty-day suspension, as well as a three-year probation retroactive to January 27, 2010. ALJD 5, JS 43; CX 14, RX 23. Six days later, on June 8, Suttles issued a second notice terminating Cain's employment "for the violation on April 8, 2010, you failed to report to the proper manager that you had received medical treatment related to your vehicle accident on January 27, 2010." CX 15, RX 25. The letter stated that Cain had violated MSRP Rule S-28.2.5, Reporting, Section A, which requires "[i]f, after the initial report of an injury, employees seek medical attention for a work-related injury, they must contact the appropriate supervisor and update their status." ALJD 12.

Suttles testified that Cain had no excuse or explanation for the late notice. ALJD 11, citing TR 167-68. Evidence in the record suggests that both Suttles and Labor Relations Director Joe Heenan recommended dismissal, although the latter acknowledged that Cain did not receive the benefit of a probationary period between the two offenses. RX 24.

Cain filed a complaint with OSHA, alleging that the suspension, probation and termination were retaliatory. ALJD 5, citing JS 45; CX 17.

C. The ALJ's Decision and Order

After a full hearing, including joint stipulations agreed to by both parties, the ALJ concluded that Cain had established by a preponderance of the evidence that his protected activity contributed to his suspension and ultimate dismissal. See ALJD 7. The ALJ further found that BNSF had failed to prove by clear and convincing evidence that it would have taken the same actions absent the protected activity. *Id.* at 10, 15.

The parties stipulated that Cain had engaged in protected activity by filing the January 27 injury report, and the ALJ held that Cain remained in protected status through April, finding that "the facts of the latter [April 8 injury report and investigation] are, to a reasonable degree of probability, intertwined with those of the former [January 27 injury report and investigation]." ALJD 6, citing JS 7. The parties stipulated that Cain's suspension and termination were both adverse

actions. ALJD 6, citing JS 8. After considering all the evidence, the ALJ stated that "[b]ased upon the common nexus of the accident in January and the sequences of events surrounding the internal investigation, I find that Complainant has established that the reporting of the accident[] and the reporting of injury relating to accident were contributing factors as construed under FRS[A]." ALJD 7.

The ALJ then considered whether BNSF had proven by clear and convincing evidence that it would have suspended Cain for causing the accident in the absence of protected activity, and whether BNSF had proven by clear and convincing evidence that it would have terminated Cain for filing a late injury report in the absence of protected activity. In both cases, he found that it had not. ALJD 10 (suspension), 15 (termination).

The ALJ considered and rejected BNSF's evidence regarding the termination, including its arguments that Cain did not file his April 8 injury report in good faith, and that Cain actually knew that he had injured his chest and/or lungs when the accident occurred (and should have so informed BNSF in January), as well as its alternative argument that Cain's injury actually did occur off-duty and was not work-related (implying that the April report was false). ALJD 12-13. Instead, the ALJ "accept[ed] that Complainant was probably in shock while he was filling out the January 27 report, as demonstrated by what he contends are shaky handwriting and one-word answers on the report," and noted his later discovery

that he had a fractured rib and was bleeding internally. *Id.* at 13. After considering the entire sequence of events, including Cain's medical history of chest and lung problems predating the accident, and noting that there was no place on the form to indicate that medical history, the ALJ found that Cain had substantially complied with the rule by providing "notice of injury," communicating with Reppond about his medical condition in January and February, and taking medical leave for examinations, diagnostic procedures, lung drainage, and eventually surgery. *Id.* at 11-13. The ALJ found that "Respondent was placed on inquiry notice when Complainant took leave without pay for medical reasons." *Id.* at 13. He discredited Suttles' assertion that Cain offered no excuse or explanation for the late notice, instead finding that "the record shows otherwise" based on the factors listed above. *Id.* at 14. He also found that BNSF had "discouraged" Cain from amending his injury report, that "both Reppond and Schakel [had] exhibited animus to influence Complainant not to make a second filing," and that BNSF management had "conspired to defeat [Cain's] right to submit a medical claim and deprive him of his job." *Id.* at 13, 16, 18.

The ALJ also rejected BNSF's arguments that the termination was based on a fair and impartial investigation, found "inconsistencies" in BNSF's explanations of the reason for the termination, and held that BNSF had failed to carry its burden of proving that it would have terminated Cain regardless of the two injury reports.

ALJD 14-15. Specifically, he found that the termination decision was "actually dependent upon" the January 27 injury report, and that BNSF did not consider mitigating factors (such as Cain's ongoing notice of his continuing medical problems, which the ALJ found were "consistently communicated since the day after the accident"). *Id.* at 14. He also found that BNSF had improperly considered the June 2 "retroactive" probation stemming from the accident as an aggravating factor in deciding to terminate Cain for the April 8 "violation." *Id.* Finally, he found that BNSF had provided shifting explanations for the termination, noting that Suttles, Heenan, and Shop Superintendent Dennis Bossolono each claimed that they had selected the penalty of termination, and that Labor Relations Director Derek Cargill testified that termination was appropriate in cases of gross negligence and misrepresentation, but Cain was not charged with either of these offenses, but with a simple rule violation. He concluded that BNSF did not explain why the penalty was appropriate or apply its own policy of progressive discipline in deciding to terminate Cain. *Id.* at 14-15. In sum, the ALJ found "that Respondent failed to provide convincing proof that termination was not related to the protected activity." *Id.* at 15.

The ALJ thus found that Cain's suspension and termination violated FRSA and that he was entitled to lost wages in the amount of $10,511.05, with interest. The amount was based on stipulations totaling $20,405.18, less $9,894.13 in

interim earnings. The parties agreed that Cain had received $4,730.53 in unemployment benefits, which the ALJ discounted as "collateral sources." ALJD 17. He also awarded Cain $1 in nominal compensatory damages for pain and suffering. *Id.*

Finally, the ALJ awarded punitive damages in the amount of $250,000. He explained that the amount was based on 1) the degree of the defendant's culpability, 2) the relationship between the penalty and the harm to the victim, 3) sanctions in other cases for comparable misconduct, and 4) the goal of deterring such wanton or reckless conduct in the future. ALJD 17-18. Noting "that several of the Respondent's management employees conspired to defeat the Complainant's right to submit a medical claim and deprive him of his job," and that BNSF had transferred Cain to work in a dirty, smoky diesel service facility upon his return to work, despite his breathing problems, the Judge found that "the conspiracy to deny Complainant his right to pursue his medical claim" was "as obnoxious" as in other cases where comparable amounts were awarded. He therefore awarded the statutory maximum punitive damages award. *Id.* at 17-19.

D. The Board's Final Decision and Order

On September 18, 2014, the ARB affirmed the ALJ's decision in part and reversed in part. See Order 3. The Board concluded that the ALJ's factual findings were supported by substantial record evidence, and that the judge's

credibility determinations were entitled to deference. *Id.* at 2. The ARB also determined that the ALJ's legal conclusions were in accordance with the law and that most of BNSF's challenges were not meritorious. *Id.* In particular, it affirmed as supported by substantial evidence the ALJ's factual findings that the two injury reports were "inextricably intertwined," as were the two investigations, and that the April 8 report was protected activity. *Id.* at 5 & n.8. It also affirmed the ALJ's finding that the protected activity on January 27 contributed to the unfavorable personnel action. It further stated:

> In addition, the charge against Cain of failing to file a timely report, which he received notice of on April 30, was directly linked to the amended injury report filed on April 8. Thus, we also affirm the ALJ's finding that the protected action of filing an injury report contributed to the subsequent decision to terminate Cain's employment as it is supported by the credited evidence of record.

Id. at 6.

The Board also affirmed the ALJ's determination that BNSF failed to establish by clear and convincing evidence that the decision to terminate Cain's employment would have been made absent his protected April 8 amended injury report. Order 9. In addition to noting that BNSF raised no allegation that it would have terminated Cain absent that report, the Board also noted that the ALJ had found that there was no evidence that the April report was based on fraud, that two supervisors had discouraged Cain from making the amended report, and that BNSF's stated reasons for terminating Cain's employment shifted between

explanations by Heenan, Suttles, and Cargill. *Id.* at 8-9. However, the ARB reversed the ALJ's holding that the suspension violated FRSA, finding that BNSF had proved by clear and convincing evidence that it would have suspended Cain for thirty days for the accident even without his protected injury report. *Id.* at 10.

The Board also reduced the damages awarded by the ALJ. It held that the parties had stipulated to the proper amount of back pay, and that their stipulation should be enforced; it therefore reduced the back pay award to the agreed-upon amount of $5,780.52. Order 9. It also reversed the award of $1 in compensatory damages, for lack of evidence. *Id.* at 10.

Finally, it found that substantial evidence supported the ALJ's finding that "several of BNSF's management employees 'conspired to defeat [Cain's] right to submit a medical claim and deprive him of his job," and that such retaliatory and ""outrageous conduct" warranted an award of punitive damages. Order 10-11. However, it agreed with BNSF that the ALJ had failed to provide sufficient justification for the amount of punitive damages, noting that the ALJ had partially based his award on Cain's transfer to the diesel facility, but that Cain had not alleged that the transfer was an adverse action. Therefore, the ARB reversed the award for punitive damages based on the transfer, and reduced the total amount of punitive damages by half, resulting in an award of $125,000. *Id.* at 12.

SUMMARY OF ARGUMENT

This Court should affirm the ARB's final decision and order. As the ARB correctly held, Cain proved by a preponderance of the evidence that he engaged in protected activity by making two injury reports, that he was terminated, and that his protected activity was a contributing factor in his termination. The ALJ's factual findings were supported by substantial record evidence, and his credibility determinations are entitled to deference.

BNSF failed to prove by clear and convincing evidence that it would have terminated Cain in the absence of the second injury report. In so holding, the ARB applied the appropriate legal standards. Indeed, the ARB applied the same legal standards to the termination as it did in considering the suspension, where it reversed the ALJ's holding that the suspension violated FRSA and held that BNSF had proved by clear and convincing evidence that it would have suspended Cain for thirty days for the accident even without his protected injury report. Its approach here was also consistent with the statute and with the approach taken by the Board and by courts in similar cases.

Finally, the Board's reduced award of punitive damages was supported by substantial evidence and did not violate due process, since it was well within the statutory cap authorized by Congress, and was not inconsistent with civil penalties or with punitive damages awarded in similar cases.

ARGUMENT

THE BOARD APPLIED THE CORRECT LEGAL STANDARDS AND SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S FINDINGS, AS AFFIRMED BY THE BOARD, THAT BNSF FIRED CAIN IN RETALIATION FOR REPORTING HIS INJURY AND THAT PUNITIVE DAMAGES WERE WARRANTED.

A. 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); *Lockheed Martin Corp. v. Admin. Review Bd.,* 717 F.3d 1121, 1131 (10th Cir. 2013); *Hall v. U.S. Dep't of Labor,* 476 F.3d 847, 850 (10th Cir. 2007); *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1102 (10th Cir. 1999). Under this deferential 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). "The Board's decision is entitled to a presumption of regularity, and the challenger bears the burden of persuasion." *Lockheed Martin*, 717 F.3d at 1129, quoting *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1045 (10th Cir. 2011) (internal quotation marks and citation omitted). The Board's factual determinations may be set aside only if they are "unsupported by substantial evidence." 5 U.S.C. 706(2)(E). "Substantial evidence is such relevant

evidence a reasonable person would deem adequate to support the ultimate conclusion." *Lockheed Martin*, 717 F.3d at 1129, quoting *Hall*, 476 F.3d at 854 (internal quotation marks omitted). The substantial-evidence standard "requires more than a scintilla but less than a preponderance of the evidence." *Id.* The standard "does not allow a court to displace the agency's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Trimmer*, 174 F.3d at 1102 (internal quotation marks and citation omitted). Credibility findings in particular are "entitled to great deference." *Id.*

The Board's legal determinations are reviewed *de novo*, and its interpretation of any ambiguities in FRSA's whistleblower provision should be upheld as long as it is reasonable. *Lockheed Martin*, 717 F.3d at 1131-32 (granting *Chevron* deference to ARB's interpretation of Sarbanes-Oxley (SOX) whistleblower provision, citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 843-44 (1984); *Trimmer*, 174 F.3d at 1102 (granting *Chevron* deference to ARB's interpretation of Energy Reorganization Act of 1974 (ERA) whistleblower provision). *See also United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (courts should grant *Chevron* deference to an agency's statutory interpretations when made through formal adjudication)*; Ray v. Union Pac. R.R.*,

971 F. Supp. 2d 869, 880-881 (S.D. Iowa 2013) (granting *Chevron* deference to ARB's interpretation of FRSA's whistleblower provision).

B. Substantial Evidence and the Applicable Law Support the ALJ's Factual Findings, As Affirmed by the Board, That Cain's Protected Activity Contributed to BNSF's Decision to Fire Him.

Actions under the whistleblower provisions of FRSA are governed by the legal burdens set forth in AIR 21, 49 U.S.C. 42121(b)(2)(B), and the applicable regulations at 29 C.F.R. Part 1982. *See* 49 U.S.C. 20109(d)(2). 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 of such activity; (3) he suffered an adverse employment action; and (4) his protected activity was a contributing factor in the adverse employment actions. *See* 49 U.S.C. 42121(b)(2)(B)(iii); 29 C.F.R. 1982.104(e); *see also Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013).

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." *Lockheed Martin*, 717 F.3d at 1136, quoting *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, 2006 WL 3246904, at *13 (ARB May 31, 2006) (emphasis in original) (internal quotation marks omitted).[7] Judge Murphy explained, "[t]his element is

[7] *See also Kuduk v. BNSF Ry.*, 768 F.3d 786, 791 (8th Cir. 2014) (same). For example, a complainant may prove that his protected activity was a contributing factor in the adverse action by direct or circumstantial evidence, including

broad and forgiving," and "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." *Lockheed Martin*, 717 F.3d at 1136, quoting *Klopfenstein*, 2006 WL 3246904, at *13 (quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (construing Whistleblower Protection Act ("WPA"), 5 U.S.C. 1221(e)(1)). This standard is "less onerous than the showing required under Title VII, the ADEA, or USERRA." *Lockheed Martin*, 717 F.3d at 1137. A complainant need not show that his protected activity was "the sole or even predominant cause" of the adverse action, and need not demonstrate retaliatory animus or bad motive. *Araujo*, 708 F.3d at 158 (citing 49 U.S.C. 42121(b)(2)(B)(ii)); *see also Halliburton v. Admin. Review Bd.*, 771 F.3d 254, 262-63 (5th Cir. 2014); *Marano*, 2 F.3d at 1141.

As *Araujo* explains, this standard was intended to be protective of whistleblowers. FRSA's legislative history suggests that it was enacted to "ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers," *Araujo*, 708 F.3d at 157 n. 3 & 159 (quoting H.

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temporal proximity, pretext, shifting explanations by the employer, antagonism or hostility toward the plaintiff's protected activity, the falsity of the employer's explanation or a change in the employer's attitude toward plaintiff after he/she engaged in protected activity. *See Lockheed Martin Corp.*, 717 F.3d at 1136; *Araujo*, 708 F.3d at 161; *DeFrancesco v. Union R.R.*, ARB No. 10-114, 2012 WL 759336, at *3 (ARB Feb. 29, 2012); *Ray*, 971 F. Supp. 2d at 888.

R. Rep. No. 110-259 at 348 (2007) ("Conf. Rep."), *reprinted in* 2007 U.S.C.C.A.N. 119, 181), because testimony showed that railroads sometimes "either subtly or overtly intimidate[d] employees from reporting on-the-job injuries." *Araujo*, 708 F.3d at 159 (quoting *Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearings Before the House Comm. on Transportation and Infrastructure*, 110th Cong. (Oct. 22, 2007)). *See also Norfolk S. Ry. v. Perez*, 778 F.3d 507, 510 (6th Cir. 2015) (Congress amended statute to expand protections for railroad employees and "to ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers") (quoting Conf. Rep. at 348).

Other cases involving railroad employees and injury reports have found that injury reports "contributed" to disciplinary action in situations similar to this one. *See, e.g.*, *Koziara v. BNSF Ry.*, No. 13-CV-834, 2015 WL 137272, at *9 (W.D. Wis. Jan. 9, 2015). For example, in *Koziara*, the court held that the railroad worker had established causation because the undisputed evidence showed that Koziara's injury report, like Cain's, had triggered the investigation which led to his termination. *Id.* at *9-11. Similarly, in *Ray*, another railroad worker was fired for failure to timely report an injury, and the court found that "if Plaintiff had not reported the alleged work-related injury, Defendant would not have undertaken an investigation into either the honesty of Plaintiff's statement to [his supervisor] in

October 2009 or the timeliness of Plaintiff's injury report, and Plaintiff would not have been terminated." 971 F. Supp. 2d at 888. *See also Smith-Bunge v. Wis. Cent., Ltd.*, No. 13–cv–2736, 2014 WL 5023471, at *7 (D. Minn. Oct. 8, 2014) (employee's injury report was a "contributing factor" in a railroad's decision to suspend him for failing to timely report injuries); *DeFrancesco v. Union R.R.*, ARB No. 10-114, 2012 WL 759336, at *4 (ARB Feb. 29, 2012) (injury report was contributing factor because it triggered investigation, which led to discipline); *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, 2012 WL 5391422, at *6-9 (ARB Oct. 6, 2012) (adverse action was "inextricably intertwined" with protected activity because the disciplinary investigation into whether the injury was timely reported and whether he worked safely to avoid injury arose directly from the protected injury report, thus giving rise to a presumption that the protected activity was a contributing factor in the adverse action).

Here, BNSF admits that there was a factual connection between the April 8 report and Cain's termination, but complains that Cain failed to prove that the April 8 report "contributed to the employer's thought process in administering discipline for the misconduct." BNSF Br. 16-17. However, BNSF overlooks the fact that the termination notice itself referred to the April 8 injury report, stating that Cain violated the rules when "on April 8, 2010, you failed to report to the proper manager that you had received medical treatment related to your vehicle

accident on January 27, 2010." CX 15, RX 25. Therefore, the undisputed evidence shows that the amended injury report triggered the investigation which led to the termination, and thus contributed to the adverse action as a matter of law, as the ALJ and the ARB properly found.

BNSF's arguments also overlook or ignore nearly all of the ALJ's other factual findings and inferences, which were affirmed by the ARB and are entitled to "great deference" here. Taken together, these indicate that the ALJ and the ARB concluded that the April 8 injury report did play a role in BNSF's decision to undertake the disciplinary investigation that led to Cain's termination. In particular, the ALJ found that Cain did not commit misconduct or act in bad faith by filing the April 8 report; that he had a medical history of chest and lung problems predating the accident, that he "consistently communicated" with his supervisors about his medical problems "since the day after the accident," that BNSF knew he was taking medical leave for examinations, diagnostic procedures, lung drainage, and eventually surgery, and that he did not learn that his chest pain was connected to the accident until he met with Dr. Gandhi in April. *See*, *e.g.*, ALJD 11-14. The ALJ also expressly rejected BNSF's arguments that Cain did not file his April 8 injury report in good faith, and discredited Suttles' assertion that Cain offered no excuse or explanation for the late notice, finding that "the record shows otherwise." See *id.* at 12-14. Finally, the ALJ also found that BNSF

had "discouraged" Cain from amending his injury report, that "both Reppond and Schakel [had] exhibited animus to influence Complainant not to make a second filing," and that BNSF management had "conspired to defeat [Cain's] right to submit a medical claim and deprive him of his job." *Id.* at 13, 16, 18. The ALJ and the ARB's discussion of these findings indicates that both the ALJ and the ARB concluded that Cain's April 8 amendment to his injury report contributed to BNSF's decision to conduct a disciplinary investigation based on the April 8 report, which in turn led to his termination.

The approach taken by the ALJ and the ARB correctly recognizes that a protected injury report "contributes" to discipline when it leads to an investigation into the worker's conduct aimed at determining whether to discipline the worker, especially where the focus of the investigation is the report itself. The April 8 injury report was not merely part of the chain of events leading to an adverse action, it caused the decision to initiate a disciplinary investigation of Cain that resulted in termination. Such a showing is all that is required for a complainant to make out his or her prima facie case. *See Araujo*, 708 F.3d at 158 (worker's accident report contributed to investigation and ultimate termination for rule violations); *Marano*, 2 F.3d at 1140 (whistleblower's report contributed to reorganization which led to transfer of whistleblower). To hold otherwise would

"sanction the use of a purely retaliatory tool, selective investigations." *Russell v. Dep't of Justice*, 76 M.S.P.R. 317, 324-26 (MSPB 1997).

The ALJ and the ARB's approach properly incentivizes employers to proceed cautiously in this area lest they send the message that injury reports are not welcome and may be punished. As OSHA, which performs the first-line investigation of FRSA retaliation cases, has explained, discipline for violating an employer rule about the time or manner for reporting injuries and illnesses deserves "careful scrutiny ... [b]ecause the act of reporting the injury directly results in discipline, [and] there is a clear potential for violating ... FRSA." *See* Memorandum from Richard E. Fairfax, Deputy Assistant Secretary for Occupational Safety and Health, U.S. Dep't of Labor, for Regional Administrators, Whistleblower Program Managers, Employer Safety Incentive and Disincentive Policies and Practices (Mar. 12, 2012), available at https://www.osha.gov/as/opa/whistleblowermemo.html ("Fairfax memo") (attached). "For example, the rules cannot penalize workers who do not realize immediately that their injuries are serious enough to report, or even that they are injured at all." *Id*. Here, that is exactly what happened. BNSF penalized Cain for not realizing immediately that his injuries were work-related and that they were serious enough to report. That they cannot do. *See also Smith-Bunge*, 2014 WL 5023471, at *7 (employee did not realize he had injured his back and filed report

six days later; injury report was "contributing factor" in railroad's decision to suspend employee for violation of "prompt reporting rule," and railroad therefore violated FRSA).

Contrary to BNSF's contentions, the ALJ and the ARB's approach does not immunize employees in every situation in which their protected injury report is "factually linked" to a disciplinary decision. BNSF Br. 16-18. Instead, once the "contributing factor" test is satisfied, the employer may prove by clear and convincing evidence that it would have taken the same action in the absence of the protected activity. *See Koziara*, 2015 WL 137272, at *10 (explaining that a railroad is not liable for retaliation if it can meet FRSA's affirmative defense; "the burden simply shifts to the employer to explain why its actions were lawful"); *Russell v. Dep't of Justice*, 76 M.S.P.R. at 324-26 (explaining "contributing factor" analysis in the context of retaliatory investigations under analogous provisions in the WPA and explaining how the employer can meet the affirmative defense in such cases).

In this case, as in *Koziara*, *Ray*, and the other cases cited above, the injury report led directly to the disciplinary investigation, which led directly to the adverse action. *See Koziara*, 2015 WL 137272, at *10 ("injury report was the first link in a chain of events that culminated in BNSF's termination decision"); *Ray*, 971 F. Supp. at 888 (same); *Smith-Bunge*, 2014 WL 5023471, at *6-7. Therefore,

the ARB correctly applied the statutory test to find that Cain's protected injury report "contributed" to the adverse action as a matter of law, under the "broad and forgiving" contributing factor test.

C. The Board Applied the Proper Test in Finding that BNSF Failed to Prove by Clear and Convincing Evidence That It Would Have Fired Cain in the Absence of Protected Activity.

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). BNSF argues that the Board applied too stringent a standard and that the Board's decision would foreclose railroad employers from disciplining employees who commit serious misconduct simply because the employer happened to learn of the misconduct through a protected injury report. Contrary to BNSF's arguments, the Board applied the correct legal standard and its decision does not preclude railroad employers from taking appropriate disciplinary action in cases where the employer can show that it would have taken the same action based on employee misconduct if it had learned of the misconduct unconnected to a protected injury report.

The Board described the clear and convincing evidence affirmative defense as requiring BNSF to "prove what it 'would have done' in the 'absence of' the

protected activity, which includes consideration of the facts that would have changed in the absence of the protected activity." Order 8-9, citing *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, 2014 WL 1758321, at *7 (ARB Apr. 25, 2014).[8] In other words, BNSF, to escape liability, had to show by clear and convincing evidence that it had a basis for the discipline that was independent of the protected injury report and that it would have taken the same action for that reason. *See Speegle v. Stone & Webster Constr., Inc.*, ARB No. 14-079, 2014 WL 7507218, at *4-5 (ARB Dec. 15, 2014) (affirming ALJ's determination that employer proved by clear and convincing evidence that it would have fired employee for insubordination even absent protected nuclear safety complaints);[9] *see also Smith v. Duke Energy Carolinas, LLC*, ARB No. 14-027, 2015 WL 1005047, at *8-10 (ARB Feb. 25, 2015) (employer proved that it would have fired Smith for failing to report falsification of a fire watch log even though his

[8] Although *Speegle* arose under the ERA, which has slightly different language than FRSA regarding the "clear and convincing" affirmative defense, the differences are immaterial. *Compare* 42 U.S.C. 5851(b)(3)(D) with 49 U.S.C. 20109(d)(2)(A)(i).

[9] As the ARB indicated in *Speegle*, an employer may meet the clear and convincing evidence affirmative defense through circumstantial evidence, which may "include, among other things: (1) evidence of the temporal proximity between the non-protected conduct and the adverse actions; (2) the employee's work record; (3) statements contained in relevant office policies; (4) evidence of other similarly situated employees who suffered the same fate; and (5) the proportional relationship between the adverse actions and the bases for the actions." *Speegle*, 2014 WL 7507218, at *3, quoting *Speegle*, 2014 WL 1758321, at *7.

termination was "inextricably intertwined" with his protected activity, by proving that his misconduct was extremely serious, and that it also terminated the two other employees involved in the falsification); *Menendez v. Halliburton, Inc*., ARB No. 12-026, 2013 WL 1385561, at *9 (ARB Mar. 15, 2013), *aff'd sub nom.*, *Halliburton v. Admin. Rev. Bd.*, 771 F.3d 254 (5th Cir. 2014) (relevant question in assessing affirmative defense is whether there is "a ground for [the adverse action] … extrinsic to the whistleblowing activity itself"). For example, an employer in BNSF's position, who terminated an employee for alleged misconduct (delay in reporting an injury), could attempt to show by clear and convincing evidence that it would have taken the same action if it learned of the misconduct/delay through means other than a protected report; it could also attempt to prove that the misconduct was very serious, and/or that it had fired other employees who were similarly situated but had not filed protected injury reports.

BNSF failed to carry its burden in this case. Here, the ALJ considered and expressly rejected BNSF's arguments that it would have terminated Cain regardless of the April 8 injury report. He found "inconsistencies" in BNSF's explanations of the reason for the termination, made factual findings in favor of Cain and against BNSF's witnesses, and held that BNSF had failed to carry its burden. ALJD 14-15. Specifically, he found that there was no evidence that Cain's injury report was in bad faith or fraudulent, as BNSF had alleged, and found

that BNSF did not consider mitigating factors (such as Cain's prior medical history and his ongoing efforts to keep Reppond informed about his continuing medical problems), and that it had unfairly relied on the "retroactive probation" as an aggravating factor. *Id.* at 14. The ALJ and the Board also found that BNSF had provided "shifting explanations" for the termination and that its managers had "conspired to defeat [Cain's] right to submit a medical claim and deprive him of his job." *Id.* at 15, 18. BNSF did not offer any reason for terminating Cain other than his alleged misconduct in filing a "late" injury report. The ALJ and Board found that Cain did not delay in reporting the extent of his workplace injury once he became aware of it. And, they found that BNSF did not produce or point to any evidence, let alone clear and convincing evidence, that it would have terminated Cain if he had not made the April 8 injury report.

The ALJ and the Board's approach here is consistent with the statute and with the approach that the Board and the courts have taken in other cases involving terminations of railroad employees in the wake of a protected injury report. For example, *Araujo* and *Henderson* both involved disciplinary investigations prompted by protected injury reports that revealed alleged rule violations for which the complainants were fired. In both cases, the railroads alleged that they terminated the complainants not for reporting the injuries, but because for alleged violations of work rules. In *Araujo*, the court remanded for consideration of

evidence that the railroad had selectively enforced the cited safety rule, as Araujo claimed, or whether the railroad could prove that it impartially applied appropriate discipline to all those involved in the accident, regardless of their reporting status. 708 F.3d at 163. In *Henderson*, the Board considered the railroad's evidence that it would have taken the same action absent the protected conduct, i.e., if it had learned of Henderson's alleged rule violations but he had not filed an injury report, and remanded for further fact-finding. 2012 WL 5391422, at *9-10. The Board cautioned that charges of "'untimely filing of medical injury' [reports] ... could easily be used as a pretext for eviscerating protection for injured employees." *Id.* at *8.[10] The Board then instructed the ALJ to consider on remand whether the railroad could meet its steep burden of proving by clear and convincing evidence that Henderson would have been terminated had he never reported his occupational injury:

> Because the burden is high, resolving the issue of [the] affirmative defense ... is a fact-intensive determination, involving questions of

[10] Henderson reported a back injury, and was later terminated for his alleged "failure to report" his injury in a timely manner, along with other rule violations. *Henderson*, 2012 WL 5391422, at *7-8. Henderson verbally reported the injury sometime after it occurred, then submitted a written report some time later, after which the railroad conducted an investigation and then fired him. Among the factors influencing the Board's remand decision were that no single event caused the back injury, that his back pain increased over time, and that the date on which a cumulative trauma injury becomes known is subjective and can only be determined by the injured individual. *Id.* at *10.

> intent and motivation, since Henderson argues that [the employer's] asserted reasons were not the real reasons for its actions.
>
> In such circumstantially-based cases, the fact finder must carefully evaluate all evidence, as a whole, of the employer's "mindset" regarding the protected activity and the adverse action taken. The fact finder should examine each piece of evidence in connection with all the other evidence to determine if it supports or detracts from the employee's claim of discrimination…. This analysis requires us to determine, on the record as a whole, how clear and convincing [the employer's] lawful reasons were for terminating Henderson's employment…. [W]e must assess whether they are so powerful and clear that termination would have occurred apart from the protected activity.

Id. at *9. The Board specifically directed consideration of whether Henderson suffered disparate treatment as compared to employees who did not report a workplace injury, whether the rules cited to terminate him had been selectively enforced, whether the deciding official was aware of the past violations and whether he relied upon them, and other circumstantial evidence in the record, including Henderson's past violations and performance evaluations. *Id.* at *11. *See also Smith-Bunge*, 2014 WL 5023471, at *8 (railroad failed to show by clear and convincing evidence that it "would have disciplined Smith absent a late report of his injury"); *Vernace v. Port Auth. Trans-Hudson Corp.*, ALJ No. 2010-FSR-00018, slip op. at 28 (ALJ Sept. 23, 2011), *aff'd*, ARB No. 12-003, 2012 WL 6849446 (ARB Dec. 21, 2012) (employer failed to prove that it would have disciplined complainant absent her injury report, where railroad disciplined complainant for submitting "ambiguous or inconsistent" injury report, and singled

her out for violating an ambiguous rule which was not enforced against any other employee.). Overall, these cases show that that when an employer disciplines an employee in connection with an injury report, as here, to escape liability the employer must demonstrate by clear and convincing evidence that misconduct, apart from the injury report, would have prompted the discipline.

Finally, BNSF is incorrect that the Board's approach in this case means that an employer can never prevail in a case where it learns of misconduct because of an injury report. Indeed, the Board's case law makes clear that an employer can discipline for misconduct even when it learns of the misconduct in connection with activity protected by one of the whistleblower statutes, as long as it shows by clear and convincing evidence that the misconduct would have prompted the discipline. For example, in *Smith v. Duke Energy Carolinas, LLC*, a case arising under the ERA, which protects whistleblowing by nuclear industry employees, Duke Energy learned that Smith had committed serious misconduct by failing to promptly report that he knew another employee had falsified a fire watch log, when Smith eventually informed it of the falsification. The ARB held that even though the protected safety complaint contributed to Smith's termination because it triggered the investigation into Smith's misconduct, Duke Energy had shown by clear and convincing evidence that failure to report falsification of the fire watch log was so serious that it would have terminated Smith for that misconduct absent the safety

complaint. *Smith*, 2015 WL 1005047, at *8-9; *see also Speegle*, 2014 WL 7507218, at *5 (employer demonstrated by clear and convincing evidence that it would have fired Speegle for insubordination, even absent his protected safety complaints, after he stood up and yelled profanity about apprentices performing journeyman work in a public safety meeting, and was understood as refusing to perform the work).

The Board's decisions in this regard are fully consistent with the approach that the courts of appeals have taken on the same issue. For example, in *Hoffman v. Solis*, 636 F.3d 262 (6th Cir. 2011), the Board held, and the court affirmed, that the employer had proven that it would have declined to promote Hoffman even absent his safety complaints, and deferred to the Secretary's credibility findings and factual determinations in favor of the employer. The employer proved that it had evaluated his qualifications objectively against thirty other candidates, that he had less international experience than other candidates, and that the decision makers were not aware of his safety complaints. *Id.* at 269-272, *aff'g sub nom., Hoffman v. Netjets Aviation, Inc.*, ARB No. 09-021, 2011 WL 1663615 (ARB Apr. 13, 2011). *Similarly, in Kuduk v. BNSF Ry.*, 768 F.3d 786 (8th Cir. 2014), BNSF proved that it would have discharged Kuduk whether or not he had made unrelated safety reports, by showing that its decision makers had no knowledge of Kuduk's protected activity, that it consistently enforced the safety rules and disciplinary

policies at issue in that case, that Kuduk's infraction was serious, and that it had fired two other employees who had committed similar infractions. *Id.* at 792-93; *see also Kalil v. Dep't of Agric.*, 479 F.3d 821, 824-25 (Fed. Cir. 2007) (upholding discipline against an attorney because of the "outrageous" nature of the disclosure, even though the employer would not have known of any misconduct or undertaken the disciplinary action in the absence of the protected conduct; employee was not immunized from discipline where misconduct was extremely serious); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 279 (7th Cir. 1995) (insubordination, even when engaged in protected activity, may justify discipline under some circumstances).

Contrary to BNSF's contention that the statutory test "immunizes" employees who self-report misconduct resulting in injury, an employer remains free to discipline employees for serious misconduct, such as coming to work drunk, or filing a false report, or causing an accident, as it in fact disciplined Cain after the January 27 accident. In such a case, BNSF or any other employer may offer eyewitness testimony, photographs, blood tests or other physical evidence, video surveillance, evidence of damage to a vehicle or other property, evidence of similar discipline given to comparators, tables of penalties, and other available evidence in addition to the employee's own injury report, just as BNSF did here in investigating and finding Cain liable for the January 27 accident. As in *Hoffman*, *Speegle*, *Smith* and similar cases, the employer may also prove that the discipline is

appropriate to the offense, that it is consistent with that meted out to other employees who committed identical conduct but did not file injury reports, and that the decision makers had no knowledge of the protected activity. However, BNSF did not present any such evidence here, and did not convince the factfinder that it would have fired Cain based on the alleged misconduct of failing to notify BNSF of medical treatment for his lung injury absent the April 8 injury report. Therefore, the railroad is liable to Cain.

D. The Board's Reduced Award of Punitive Damages Was Supported By Substantial Evidence and Consistent With Applicable Law.

BNSF argues that the punitive damages award of $125,000, as modified by the ARB, is not supported by substantial evidence, and is "unreasonably excessive in violation of the ... Constitution." BNSF Br. 27-32. It is wrong on both points. The ALJ based his award on several factors: 1) the degree of the defendant's culpability, 2) the relationship between the penalty and the harm to the victim, 3) sanctions in other cases for comparable misconduct, and 4) the goal of deterring such wanton or reckless conduct in the future. ALJD 17-18. He found "that several of the Respondent's management employees conspired to defeat the Complainant's right to submit a medical claim and deprive him of his job," and that "the conspiracy to deny Complainant his right to pursue his medical claim" was "as obnoxious" as in other cases where comparable amounts were awarded.

Id. at 18-19. The Board found that substantial evidence supported the ALJ's findings, and that such conduct warranted an award of punitive damages. Order 10-11. However, the Board struck down the second basis for the punitive damages award, on the grounds that Cain had not alleged that his transfer to a diesel service facility was an adverse action, and reduced the total amount of punitive damages by half, resulting in an award of $125,000. *Id*. at 12.

Contrary to BNSF's suggestion, the ARB specifically considered and affirmed the ALJ's factual finding that "several of BNSF's management employees 'conspired to defeat [Cain's] right to submit a medical claim and deprive him of his job," that such retaliatory and "outrageous conduct" warranted an award of punitive damages. Order 10-11. Although BNSF admits that a number of managers were involved, it completely ignores the ALJ's factual finding that those managers "conspired" to retaliate against Cain. BNSF also ignores Cain's testimony, which the ALJ credited, that Reppond "looked me right in the eye and told me this wasn't going to go well for me," and threatened his job, and his unrebutted testimony that Schakel also urged him not to file the amended report, saying that it "would be announced in lineups and ... was going to hurt the managers and supervision because it was an FRA reportable injury because it was lost time." ALJD 15-16, citing TR 84-85, 92-93. The ALJ found that "Complainant is credible that both Mr. Reppond and Mr. Schakel exhibited animus

to influence Complainant not to make a second filing." *Id.* Finally, the ALJ also found, and the ARB affirmed, that BNSF had provided shifting explanations for the termination, noting that Suttles, Heenan, Bossolono and Cargill each provided inconsistent explanations for the decision, and that BNSF did not explain why the penalty was appropriate or apply its own policy of progressive discipline in deciding to terminate Cain. *Id.* at 14-15, citing TR 169, 175-77, RX 21 3 (Suttles); RX 24 (Heenan); TR 235, 248-49 (Bossolono), RX 21, RX 22; Order 8. The ARB, in affirming these findings and that portion of the award, correctly held that such conduct represented "'reckless or callous disregard for the plaintiff's rights, as well as [an] intentional violation[] of federal law.'" Order 10, quoting *Youngermann v. United Parcel Servs., Inc.*, ARB No. 11-056, 2013 WL 1182311, at *3 (ARB Feb. 27, 2013). BNSF is simply wrong about the credibility-based factual findings in this case, which are "entitled to great deference" by this court. *Trimmer*, 174 F.3d at 1102. Thus, BNSF misses the mark.

BNSF also fails to note that FRSA expressly authorizes punitive damages in appropriate cases, as the ARB correctly held, and specifies that the amount is "not to exceed $250,000." 49 U.S.C. 20109(e)(3). *See* Order 10; *see also Griebel v. Union Pac. R.R.*, ARB No. 13-038, 2014 WL 1314291, at *1 (ARB Mar. 18, 2014) (awarding $100,000 in punitive damages). In *Griebel*, the ARB explained that "[t]he size of the punitive award 'is fundamentally a fact-based determination,'"

and that in analyzing the appropriate amount of damages, the focus is on the employer's conduct and "'whether it is of the sort that calls for deterrence and punishment.'" 2014 WL 1314291, at *1, quoting *Youngermann*, 2013 WL 1182311, at *6 (affirming award of $100,000 in punitive damages in STAA whistleblower action); *see also Petersen v. Union Pac. R.R.,* ARB No. 13-090, 2014 WL 7227266, at *3 (ARB Nov. 20, 2014) (affirming award of $100,000 in punitive damages case where employee was fired for filing injury report in violation of FRSA).

Because of the statutory cap in FRSA, the ARB also correctly held that *State Farm Mutual Automobile Insurance Co. v. Campbell,* 538 U.S. 408 (2003), is not controlling. *See Barati v. Metro-North R.R. Commuter R.R.,* 939 F. Supp. 2d 143, 145 (D. Conn. 2013) (noting in FRSA whistleblower case that punitive damages decisions that do not involve a statutory cap **"**are not instructive as to how a legislative determination of a permissible punitive damages maximum affects the analysis of excessiveness"). The Ninth Circuit agrees that "[t]he landscape of [judicial] review is different when we consider a punitive damages award arising from a statute that rigidly dictates the standard a jury must apply in awarding punitive damages and narrowly caps hard-to-quantify compensatory damages and punitive damages. [By enacting the statutory cap,] 'Congress has effectively set the tolerable proportion' in [such] … cases, and ... the statutory cap does not

offend due process." *Arizona v. Asarco LLC*, 773 F.3d 1050, 1055 (9th Cir. 2014) (*en banc*) (discussing Title VII) (citing Joseph A. Seiner, *Punitive Damages, Due Process, and Employment Discrimination*, 97 Iowa L. Rev. 473, 490–91 (2012) ("courts need not reach the due process issues raised in *Gore* and *State Farm* when addressing employment discrimination claims brought under [a statute]")).

Therefore, contrary to BNSF's contention, the ARB is not bound by the due process analysis of *State Farm* and its predecessor, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), since those cases focus on reining in runaway awards under state common law, and the ARB is administering federal whistleblower statutes with a Congressionally-imposed statutory cap. "[W]hen a punitive damages award arises from a robust statutory regime, the rigid application of the *Gore* guideposts is less necessary or appropriate. Thus, the more relevant first consideration is the statute itself, through which the legislature has spoken explicitly on the proper scope of punitive damages." *Arizona*, 773 F.3d at 1056, *see also EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1249 (10th Cir. 1999) ("The reasonableness of the punitive award is buttressed by the fact that the statute Wal-Mart was found to have violated caps punitive awards for an employer of Wal-Mart's size at $300,000."). Here, of course, the statute expressly provides for a cap of $250,000, and the modified award reduced it to $125,000, well within the cap. Even if *State Farm* was applicable, as BNSF argues, the court need not

concern itself with the constitutional concerns underlying the Court's due process analysis in that case, since the statute itself provides defendants with fair notice of both "'the conduct that will subject [them] to punishment, but also the severity of the penalty' that may be imposed." *Arizona*, 773 F.3d at 1055, quoting *Gore*, 517 U.S. at 574; *accord Deters v. Equifax Credit Info. Servs.*, 202 F.3d 1262, 1272 (10th Cir. 2000) ("Equifax certainly had notice that it could be subject to punitive damages for involvement in discriminatory practices with malice or with reckless indifference to an individual's federally protected rights, by virtue of the plain language of Title VII itself.").

Nevertheless, a comparison of the ARB's decision here to the three "guideposts" demonstrates that the award comports with due process as laid out by *State Farm* and *Gore.* First, as explained above, BNSF's conspiracy to deprive Cain of his job was reprehensible. FRSA was enacted and amended in order "to comprehensively address and prohibit harassment, in all its guises, of injured rail employees" to help prevent "chronic under-reporting of rail injuries, [and] widespread harassment of employees reporting work-related injuries." *Henderson*, 2012 WL 5391422, at *4 (quoting 110th Cong. Legislative History). Here, the factual findings show that BNSF did just that, harassing and discouraging Cain from reporting his injury, and then terminating him for filing an honest, updated report, and following the advice of his doctor and his union. As the ARB found,

such behavior merits punitive damages, since it exhibits "'reckless or callous disregard for the plaintiff's rights, as well as [an] intentional violation[] of federal law.'" See Order 10, quoting *Youngermann*, 2013 WL 1182311, at *3.

Second, the ratio between the actual or potential harm suffered by the plaintiff and the damages award is not excessive in this case, as the ARB found. Although the general goal is to make punitive damages proportional to the actual injury suffered, high ratios often occur in cases of employment discrimination, where the amount of actual damages or back pay is too small to have any deterrent effect. *See, e.g.*, *State Farm*, 538 U.S. at 425 ("[R]atios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'") (quoting *Gore*, 517 U.S. at 582); *Gore*, 517 U.S. at 582-83 (the general aim of the ratio guidepost is "reasonableness," and ratios could be higher where the monetary value of noneconomic harm is difficult to determine); *Deters*, 202 F.3d at 1273 ("[B]oth the Supreme Court and this court acknowledge that low awards of compensatory damages may support a higher ratio if a particularly egregious act has resulted in a small amount of economic damages"); *Arizona*, 773 F.3d at 1057 (same). Here, as both the ALJ and the ARB expressly found, the amount of back pay is too small to have any deterrent effect on a company the size of BNSF, and punitive damages

are appropriate both to punish Respondent and to deter it from such retaliatory behavior in the future.

Finally, the award is not inconsistent with civil penalties authorized or imposed in comparable cases, or with punitive damages awarded in similar cases, the third guidepost. "The size of the punitive award is fundamentally a fact-based determination," and in analyzing the appropriate amount of damages, the focus is on the employer's conduct and "whether it is of the sort that calls for deterrence and punishment." Order 10, quoting *Youngermann*, 2013 WL 1182311, at *6 (internal quotation marks omitted). Furthermore, the Supreme Court has declared that courts should accord "substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." *Gore*, 517 U.S. at 583 (internal quotation marks and citation omitted). *Accord, Arizona*, 773 F.3d at 1056, 1058 (Where "Congress has made a reasoned judgment ... as to punitive damages awarded in cases like the one at hand[,] … [w]e need not search outside the statutory scheme Congress enacted....").

As the ALJ noted, awards of $100,000 and $250,000 have been made and upheld in similar cases under FRSA and other whistleblower statutes, including some cases in which the complainants were not terminated. *See, e.g. Barati*, 939 F. Supp. 2d at 147 (refusing to reduce $250,000 punitive damage award); *Griebel*, 2014 WL 1314291, at *1 (awarding $100,000 in punitive damages); *Petersen,*

2014 WL 7227266, at *3 (also awarding $100,000 in punitive damages); *Youngermann*, 2013 WL 1182311, at *7-8 (awarding $100,000 in punitive damages under STAA); *Anderson v. AMTRAK*, ALJ No. 2009-FRS-00003 (ALJ Oct. 21, 2010) (also awarding $100,000 in punitive damages); *Erickson v. EPA*, ALJ No. 1999-CAA-00002 (ALJ Sept. 24, 2002) (awarding $250,000). Here, Congress has already set the amount of the maximum potential penalty at $250,000. The award in this case is well within those bounds and in line with cases involving similar misconduct, and is therefore reasonable and consistent with due process.

CONCLUSION

For all of the reasons stated above, substantial evidence supports the ALJ's findings, as affirmed by the ARB, that Cain's amended injury report contributed to BNSF's decision to terminate him, that BNSF would not have fired him absent his protected activity, and the ARB's reduced award of punitive damages was warranted and consistent with due process. Therefore, the Secretary requests that this Court affirm the Board's Final Decision and Order finding that BNSF violated FRSA, and ordering appropriate relief.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Secretary concurs with the suggestions of BNSF and Cain that oral argument is appropriate in this case because it presents issues of first impression under the Federal Railroad Safety Act.

Respectfully submitted,

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

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Dated: May 5, 2015

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I hereby certify that a virus check, using McAfee VirusScan Enterprise and AntiSpyware Enterprise 8.8, was performed on the PDF version of this brief and no viruses were found.

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I hereby certify as follows:

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2015, a true and correct copy of the foregoing Brief for the Secretary of Labor was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system, and that service on counsel of record will be accomplished by this system, including the following:

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