No. 16-2271

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PAN AM RAILWAYS, INC.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent,

and

JASON RAYE,

Intervenor.

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

BRIEF FOR THE ACTING SECRETARY OF LABOR

NICHOLAS C. GEALE
Acting Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower
Programs

DEAN A. ROMHILT
Senior Attorney

U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5550

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases (continued):

Page

Cases (continued):

Page

Cases (continued):

Statutes:

Page

Regulations:

Other Authorities:

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On behalf of Respondent United States Department of Labor ("Department"), the Acting Secretary of Labor ("Secretary") submits this response to the brief of Petitioner Pan Am Railways, Inc. ("Pan Am").

JURISDICTIONAL STATEMENT

This case arises under the employee protection provision of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. 20109, and its implementing regulations, 29 C.F.R. Part 1982. The Secretary

had jurisdiction based on a complaint alleging a FRSA violation filed by Intervenor Jason Raye ("Raye") with the Department's Occupational Safety and Health Administration ("OSHA"), which investigates complaints on the Secretary's behalf. See 49 U.S.C. 20109(d)(1); 29 C.F.R. 1982.103.

The Secretary delegated to the Department's Administrative Review Board ("Board" or "ARB") the authority to issue final decisions on his behalf. See U.S. Dep't of Labor, Secretary's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378-69,380 (Nov. 16, 2012); see also 29 C.F.R. 1982.110(a). On September 8, 2016, the Board issued a Final Decision and Order finding that Pan Am retaliated against Raye in violation of FRSA. See Addendum to Pan Am's Brief ("ADD"), 1-13. After the Board's Final Decision and Order, Raye petitioned to recover attorneys' fees. Pan Am and Raye subsequently stipulated that no payment of attorneys' fees would be made until after the conclusion of this appeal. See Appendix filed by Pan Am ("APPX"), 392-95. Thus, the Board's proceedings are concluded.

On October 14, 2016, Pan Am filed with this Court a timely Petition for Review. See 29 C.F.R. 1982.112(a); see also 49 U.S.C. 42121(b)(4)(A).[1] Because Raye resided in Maine on the

[1] Per 49 U.S.C. 20109(d)(2)(A), FRSA proceedings are governed by the rules and procedures of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. 42121(b).

date of the FRSA violation, see APPX 213-14, 217-18, this Court has jurisdiction to review the Board's decision. See 29 C.F.R. 1982.112(a); see also 49 U.S.C. 42121(b)(4)(A).

STATEMENT OF THE ISSUES

1. Whether Pan Am waived the argument that Raye suffered no adverse personnel action by failing to contest the issue before the agency.

2. If the argument was not waived, whether the broad scope of retaliatory conduct prohibited by FRSA and substantial evidence support a finding that Raye suffered an adverse personnel action.

3. Whether Pan Am showed by clear and convincing evidence that it would have taken the same adverse action against Raye even in the absence of his protected activity.

4. Whether substantial evidence supports awarding punitive damages and whether awarding $250,000 was an abuse of discretion.

STATEMENT OF THE CASE

1. FRSA's Employee Protections

FRSA prohibits a railroad from discharging, demoting, suspending, reprimanding, or "in any other way" discriminating against an employee for reporting to the railroad a safety violation, notifying the railroad of "a work-related personal injury," or filing a FRSA complaint. 49 U.S.C. 20109(a). An

employee who believes that a railroad retaliated against him in violation of this prohibition may seek relief by filing a complaint with the Secretary. See 49 U.S.C. 20109(d)(1). An employee who prevails "shall be entitled to all relief necessary to make the employee whole," including "compensatory damages." 49 U.S.C. 20109(e)(1)-(2). Relief to a prevailing employee may also include "punitive damages in an amount not to exceed $250,000." 49 U.S.C. 20109(e)(3).

2. Statement of Facts

On October 5, 2011, Raye, a conductor employed by Pan Am, observed a pile of old railroad ties by a railroad track in a railyard. See APPX 213. He believed that the pile of railroad ties was a safety hazard and reported it to his manager. See id. Pan Am did not remedy the safety hazard. See APPX 195-97, 260-63.

On October 24, Raye stepped down from a train car, stepped onto the pile of railroad ties, and rolled his left ankle. See APPX 362-63. Raye went to a hospital and was instructed to be careful for several days when putting weight on his left foot. See APPX 213, 363. Raye completed and submitted a Pan Am accident report. See APPX 362. He returned to work on October 28. See APPX 214.

On November 1, 2011, Pan Am sent Raye a Notice of Hearing alleging that, on October 24, he violated Pan Am's rule

requiring employees to "carefully observe ground condition and be assured of firm footing" before getting on and off train cars. APPX 209-211. The hearing was a disciplinary proceeding during which Raye or his representative could produce and/or cross-examine witnesses. See APPX 364-65. At the hearing, Raye testified that, after stepping down onto the pile of railroad ties and rolling his ankle, he "caught [him]self," "did not fall over," and "sat down" to compose himself. APPX 271-73.

On November 28, Pan Am issued a decision letter finding that Raye violated the safety rule as charged "by not carefully observing the ground condition and assuring yourself of firm footing when alighting from this car." APPX 210. The decision letter served as "discipline in the form of a formal Reprimand," and a copy was placed in his personnel file. APPX 211-12. To Raye's knowledge, Pan Am did not discipline anyone for failing to remove the safety hazard (the pile of old railroad ties) that he had identified. See APPX 345.

On December 6, 2011, Raye filed a complaint with OSHA alleging that Pan Am retaliated against him in violation of FRSA for reporting a safety hazard and an injury. See APPX 213-14. The complaint stated that he stepped down from the train car onto the pile of railroad ties and "fell hard to the ground injuring my left ankle." APPX 213.

On December 12, OSHA served a copy of Raye's complaint on Pan Am. See APPX 215-16. According to Pan Am's Vice President of Transportation, John Schultz ("Schultz"), he reviewed the complaint at the insistence of Pan Am's legal department and determined that there was a "major discrepancy" between Raye's complaint (stating that he fell hard to the ground) and his testimony at the hearing (that he did not fall and sat down). APPX 128-19. In order to "clear up" this "major discrepancy," Pan Am decided to charge Raye with multiple rules violations, which could have resulted in his employment termination. APPX 129, 153, 172; see also APPX 217-18.

On December 23, Pan Am sent Raye a second Notice of Hearing. See APPX 217-18. The notice stated that the hearing's purpose was to "place your responsibility, if any," in connection with making false statements to Pan Am and/or OSHA when describing the October 24 injury. Id. The notice stated that making false statements was a violation of Pan Am's rules prohibiting "[a]ny act of insubordination, hostility, or willful disregard of the Company's interests," requiring employees to conduct themselves in a manner that will not subject Pan Am "to criticism or loss of good will," and prohibiting employees from behaving in a "dishonest, immoral, vicious, quarrelsome, and uncivil" manner. Id. According to the notice, a violation was grounds for employment termination. See APPX 218. The notice

set a second disciplinary hearing for December 29 (the hearing was postponed to January 4, 2012). See APPX 217, 230.

Pan Am chose to proceed with a second disciplinary hearing rather than contact Raye and give him an opportunity to explain any discrepancy between his OSHA complaint and his earlier testimony. See APPX 91.

After receiving the second Notice of Hearing, Raye amended the complaint that he had filed with OSHA to allege that the additional charges were retaliation in violation of FRSA for filing a complaint with OSHA. See APPX 219.

At the second hearing, Raye testified that the OSHA complaint was prepared by an attorney on his behalf, was not signed by him, and was not reviewed by him before it was submitted. See APPX 341-42. Raye further testified that he had not known that the complaint asserted that he "fell hard to the ground," his attorney was responsible for the assertion, and the assertion was not correct. See APPX 342-45. According to Raye, his testimony at the prior hearing (that he did not fall but sat down) was accurate. See APPX 343-44.

Pan Am issued a decision on January 13, 2012. See APPX 230-32. Pan Am determined that the charges were not sustained and took no disciplinary action. See APPX 230. Pan Am relied on Raye's testimony that his attorney wrote the statement that he fell hard to the ground, that Raye did not review that

statement or sign the complaint, and that the statement was not correct. See APPX 230-32.

3. Procedural History

OSHA determined that there was not reasonable cause to believe that Pan Am retaliated against Raye in violation of FRSA for reporting the safety hazard and injury. See APPX 3-4. OSHA further determined, however, that there was reasonable cause to believe that Pan Am retaliated against him for filing the complaint with OSHA. See APPX 4-5. OSHA found that accusing Raye of lying in the complaint, charging him with violating rules that could result in his employment termination, and "conducting trial proceedings" have a "chilling effect" on Pan Am's employees and could dissuade others from asserting their FRSA rights. APPX 5. OSHA also found that the second disciplinary hearing was "overreaching at best and interfering with a federal investigation at worst," and that "such a heavy-handed approach would clearly chill other employees from filing similar claims." Id.

Pan Am objected to OSHA's findings, and an Administrative Law Judge ("ALJ") held an evidentiary hearing during which the parties submitted exhibits and Raye and Schultz testified. See ADD 15. The parties submitted post-hearing briefs. See id. The ALJ's briefing order warned the parties (in bold): "Issues or arguments not specifically addressed in the brief will be

deemed to have been waived." Addendum attached to this Brief ("Respondent's Addendum"), 2.

a. ALJ's Finding that Pan Am Violated FRSA

The ALJ issued a Decision and Order finding that Pan Am retaliated against Raye in violation of FRSA. See ADD 14-39.

Applying AIR 21's burden-shifting framework, the ALJ required Raye to prove by a preponderance of the evidence that he engaged in protected activity, he suffered an adverse personnel action, and the protected activity was a contributing factor in the adverse action. See ADD 20. The evidence established, and Pan Am conceded, that Raye engaged in protected activity by filing the OSHA complaint and that Pan Am was aware of his complaint. See ADD 21. Pan Am did "not contest in its brief that there was adverse action in this case." ADD 21 n.4. The ALJ found that Raye suffered an adverse action when Pan Am charged him with additional rules violations (for making false statements) and subjected him to a disciplinary hearing on those charges. See ADD 21.

The ALJ determined that Raye proved by a preponderance of the evidence that his OSHA complaint was a contributing factor in his adverse action. See ADD 21-25. The ALJ found that the second charges and disciplinary hearing "would not have occurred but for Raye's protected activity of filing a complaint under the FRSA, as the charges and investigation arose out of

statements made in the complaint." ADD 23. The ALJ cited Schultz's testimony acknowledging "that if Raye had not filed an FRSA complaint, there would have been no charge letter on December 23, 2011 or a second hearing." ADD 23-24 (citing APPX 181, 332). The "temporal proximity" — Pan Am took action against Raye "only ten days after it became aware of the complaint ... based on the allegations made in the complaint" — was "additional circumstantial evidence" of causation. ADD 24.

The ALJ further found "strong circumstantial evidence" that Pan Am's explanations for taking adverse action were "unworthy of credence." ADD 24. As the ALJ noted, Schultz testified that the OSHA complaint "was entirely consistent with Raye's prior hearing testimony except for the five words that he 'fell hard to the ground,'" which undercut Pan Am's claim that the second charges were brought because of a "major discrepancy" between the complaint and Raye's prior testimony. Id. Additionally, the ALJ found Pan Am's claim that the second hearing was to find out how the injury occurred was "inconsistent with ... charging Raye with serious, terminable offenses including dishonesty, insubordination, and hostility." Id.

Once Raye proved by a preponderance of the evidence that his protected activity was a contributing factor to his adverse personnel action, Pan Am was liable unless it could "prove by clear and convincing evidence that it would have taken the same

action absent the protected activity." ADD 25 (citing 49 U.S.C. 42121(b)(2)(B)(iv)).

Pan Am argued that there was a lawful and valid reason for the second charges and hearing against Raye because of a "major discrepancy" between his OSHA complaint and his testimony at the first hearing. See ADD 25. The ALJ cited testimony, however, from Schultz conceding that:

- the "sole discrepancy" in Raye's complaint was that he fell hard to the ground and the remainder of his complaint "was entirely consistent" with his prior testimony;
- Raye's testimony both in his complaint and at the prior hearing was that he hurt his ankle stepping from the train car onto the pile of rail ties and ended up on the ground — the only difference in his testimony was whether he fell or sat down; and
- if Raye violated the Pan Am safety rule by failing to assure firm footing when he stepped off the train car, "it would not make a difference whether he then fell, or rolled his ankle before sitting down."

ADD 26 (citing APPX 163, 166, 184). Based on this testimony, the ALJ concluded that "Pan Am's allegation that there was a 'major discrepancy' is wholly incredible and unsupported by the evidence" and did not justify the second charges and hearing. Id.

Pan Am further argued that the second hearing was necessary to clarify how Raye's injury occurred and to determine whether there were additional safety violations. See ADD 26. The ALJ found that this assertion was belied by the fact that the notice

of hearing "made no mention of further fact finding into how the original injury occurred or the possibility of additional safety rule violations, but instead charged Raye with serious rule violations including insubordination, hostility, and dishonesty, that could lead to termination." Id. (citing APPX 217-18). The ALJ also noted that, "if Pan Am's primary concern was to determine how the injury occurred, it could have informally asked Raye about the inconsistent statement rather than rushing to bring serious charges against him." Id.

Pan Am also argued that it charged two other employees with making false statements based on testimony given at hearings and therefore would have taken the same action against Raye absent his protected activity. See ADD 27. The ALJ noted that Pan Am's documentary evidence was not sufficient to "compare the degree of false statements in those instances with the inconsistent statement made in the present case." Id. The ALJ further noted that Schultz testified that the two other employees made statements at their hearings that were "'completely contrary'" to the factual information and physical evidence in their cases. Id. (quoting APPX 138). The ALJ therefore determined that Raye's "very minor discrepancy" did "not rise to the level of false statements involved in the other two occurrences and is not comparable." ADD 27-28.

The ALJ noted that the two other employees made false statements during Pan Am's internal disciplinary process, see ADD 28, while Pan Am believed that Raye made a false statement in his OSHA complaint, see ADD 28 n.9 (citing APPX 199). The ALJ concluded that it was "wholly inappropriate for Pan Am to use its own disciplinary rules to allege false statements made in a formal complaint to the federal government" as "Pan Am would have had a full opportunity to address any discrepancies or alleged false statements made in the FRSA complaint during the OSHA investigation process, and this is in fact the proper venue for establishing the veracity of the parties' assertions." ADD 28.

Accordingly, the ALJ found that Pan Am failed to show by clear and convincing evidence that it would have taken the same adverse action against Raye absent his protected activity of filing an OSHA complaint. See ADD 28.

b. ALJ's Damages Award

The ALJ awarded Raye $10,000 in damages for emotional distress. See ADD 29-30. The ALJ credited Raye's testimony that the prospect of losing his job caused him to lose sleep and his appetite, become anxious about being able to support his family, act out toward his family, and be "a 'wreck' waiting for the hearing" — all of which "worsened as he waited for a determination." Id. (quoting APPX 95 and citing APPX 93-97).

The ALJ awarded Raye $250,000 in punitive damages. See ADD 31-35. The ALJ noted that FRSA authorizes punitive damages awards up to that amount and that punitive damages "are appropriate for cases involving 'reckless or callous disregard'" for an individual's rights, "'as well as intentional violations of federal law.'" ADD 31 (quoting Smith v. Wade, 461 U.S. 30, 51 (1983)). The ALJ stated that factors relevant to determining whether to assess punitive damages and in what amount include the degree of Pan Am's reprehensibility or culpability, the relationship between the penalty and the harm to Raye caused by Pan Am, and punitive damages awarded in comparable cases. See id. The ALJ noted that the Board requires consideration of whether punitive damages are necessary to deter further violations and whether the unlawful behavior reflected corporate policy. See id.

The ALJ found that Pan Am "consciously disregarded Raye's statutorily-protected rights" under FRSA and "intentionally interfered with the exercise of those rights," based on evidence that:

- Pan Am's "first reaction" after becoming aware of Raye's complaint to OSHA was to charge him with "serious and terminable offenses" including "dishonesty, insubordination, and hostility";
- Pan Am "failed to provide a legitimate reason" for the charges;

- the sole discrepancy in Raye's complaint was five words that were "immaterial" to how his injury occurred and the initial investigation conducted; and

- Pan Am brought the charges without first giving Raye an opportunity to explain the discrepancy.

ADD 31-32. The ALJ concluded:

> The only rational explanation for bringing such baseless and serious charges against Raye following the filing of the FRSA complaint is that Pan Am utilized the process to intimidate and discourage protected activity, not only by Raye, but other employees of Pan Am as well. Although the charges were eventually dismissed, the fact that Raye was charged with such severe violations is sufficient alone of cause a serious chilling effect of dissuading employees from asserting their rights under the FRSA. I find that Pan Am's actions are an egregious, blatant, and willful act of retaliation.

ADD 32.

The ALJ also considered "the context of Pan Am's retaliation for filing" the OSHA complaint while acknowledging that Raye's claims of retaliation for reporting a safety hazard and injury were not before the ALJ. ADD 32. Citing testimony from both Raye and Schultz, the ALJ found that:

- Pan Am's managers "directly discourage" employees from filing injury reports;

- Raye is "reluctant to report any injury or safety complaint at work for fear of going through another investigative process and the (real) risk of receiving discipline";

- he is also "reluctant to file any further complaints with OSHA" and "questions" whether he should have filed the complaint that he did file;

- when an employee reports an injury, an "adversarial process" results;

- when there is a reportable injury, formal charges are almost always brought against the injured employee;

- this investigative process can influence an employee's "decision to even report an injury"; and

- "by holding disciplinary hearings in virtually all instances where an injury is reported," Pan Am "attributes the cause of injury to the negligent actions of the injured employee rather than the railway."

ADD 32-34 (citing APPX 58, 60, 62-63, 78, 94, 100, 124, 173-74, 184-86, 189, 195-97). The ALJ concluded that "Pan Am fosters a workplace culture that discourages employees from reporting on the job injuries," ADD 32, and that its "corporate mantra appears to be that if an injury occurs on the job, it must be the fault of the employee who was injured," ADD 33. The ALJ further concluded that Pan Am's behavior is "the exact type of behavior Congress was trying to prevent" when enacting FRSA. Id.

The ALJ then reviewed FRSA decisions awarding significant punitive damages, including the statutory maximum, and concluded that those cases involved "egregious and systematic" obstacles to protected activity and the need to deter company conduct in the future. ADD 34. The ALJ found that Pan Am's conduct was comparable to the conduct in those cases:

> Although the harm to Raye is somewhat limited in this case as he was not ultimately disciplined, ... a substantial award of punitive damages is necessary in light of the degree of culpability and egregious conduct by Pan Am and the need to deter similar conduct in the future.

ADD 34-35.

c. The Board's Affirmance

The Board issued a Final Decision and Order affirming the ALJ's decision. See ADD 1-13.

Pan Am did not seek the Board's review of the ALJ's determination (which Pan Am had not contested) that Raye suffered an adverse personnel action. See ADD 4. Pan Am included a footnote in its Petition for Review to the Board stating that it "preserves its right to appeal the conclusion that Raye was subjected to an adverse employment action." Respondent's Addendum, 15.

Pan Am did seek the Board's review of the ALJ's determination that it failed to prove its affirmative defense (that it would have taken the same action absent protected activity) by clear and convincing evidence. See ADD 4.[2] Noting that clear and convincing evidence is a "very high burden of proof," the Board found that the ALJ "thoroughly examined" Pan Am's evidence that it would have brought the second charges against Raye absent his OSHA complaint. ADD 5. The Board agreed with the ALJ that Pan Am fell short of its burden, "particularly where the only discrepancy cited in Raye's FRSA complaint as justifying Pan Am's action was the allegation that

[2] The Board "reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations if they are supported by substantial evidence." ADD 2 (citing 29 C.F.R. 1982.110(b)).

Raye 'fell hard to the ground.'" Id. The Board found that Pan Am failed to establish that whether he fell to the ground was material to whether he violated the safety rule of assuring firm footing when stepping down from a train car. See id. The Board noted that the ALJ did not believe Pan Am's assertion that the second disciplinary hearing was necessary to clarify how Raye's injury occurred because it charged him with additional rules violations, including dishonesty and hostility, and threatened him with employment termination. See ADD 5-6. The Board further noted that the ALJ found Pan Am's comparator evidence to not be comparable, and the Board ruled that the ALJ's evidentiary rulings regarding that evidence were not an abuse of discretion. See ADD 6. The Board concluded that substantial evidence supports the ALJ's decision that Pan Am failed to prove its affirmative defense by clear and convincing evidence. See id.

Pan Am also sought the Board's review of the punitive damages award. See ADD 4. The Board stated that it follows the "common law rule" recognized by the Supreme Court that "'reckless or callous disregard for the plaintiff's rights, as well [as] intentional violations of federal law,'" are "sufficient to trigger a punitive damages award." ADD 8 (quoting Smith, 461 U.S. at 51 (alteration added)). Thus, determining "whether punitive damages are warranted focuses on the employer's state of mind," and "egregious or outrageous

conduct may serve as evidence supporting an inference of the requisite state of mind." Id. (citing Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 538 (1999)). The Board noted that the ALJ found that Pan Am "consciously disregarded Raye's FRSA-protected rights," "intentionally interfered" with his exercise of those rights, acted egregiously, and engaged in a willful act of retaliation by bringing "baseless and serious charges" against him for filing a complaint. Id. The Board concluded that substantial evidence supports the ALJ's findings of egregious and intentional conduct warranting punitive damages. See id.

The Board stated that, after finding the requisite state of mind, "whether to award punitive damages is in the ALJ's discretion," ADD 9, and determining "the amount necessary for punishment and deterrence" is "'a discretionary moral judgment,'" ADD 10 (quoting Smith, 461 U.S. at 52). The Board rejected Pan Am's arguments that the award was excessive and ruled that the ALJ did not abuse his discretion in determining that $250,000 was necessary "in furtherance of the goal of punitive damages awards to punish and deter future misconduct." ADD 9. The Board ruled that the ALJ's consideration, as part of the analysis, of Pan Am's actions relating to Raye's reports of a safety hazard and his injury were not an abuse of discretion:

> This consideration did not change the intentional and reprehensible nature of Pan Am's conduct in targeting Raye because he filed a FRSA complaint. Further, the ALJ did

> not rely on this evidence but only viewed it in context, so the error was harmless.

See id.

The Board further stated that a statutory limit on punitive damages awards, such as FRSA's $250,000 cap, "'strongly undermines the concerns that underlie the reluctance to award punitive damages where minimal or no compensatory damages have been awarded.'" ADD 10 (quoting Youngermann v. United Parcel Serv., Inc., No. 11-056, 2013 WL 1182311, at *7 (ARB Feb. 27, 2013)). For these reasons, the Board held that awarding $250,000 in punitive damages was not an abuse of discretion. See id.

STANDARD OF REVIEW

The Administrative Procedure Act ("APA") governs the review of the Board's decision. See 49 U.S.C. 20109(d)(4); R & B Transp., LLC v. U.S. Dep't of Labor, Admin. Review Bd., 618 F.3d 37, 44 (1st Cir. 2010). Thus, this Court must affirm the Board's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or is "unsupported by substantial evidence." 5 U.S.C. 706(2)(A), (E). This standard of review is deferential. See Upper Blackstone Water Pollution Abatement Dist. v. EPA, 690 F.3d 9, 20 (1st Cir. 2012).

Although questions of law are reviewed de novo, this Court gives deference to the Board's interpretation of FRSA. See Worcester v. Springfield Terminal Ry. Co., 827 F.3d 179, 182-84 (1st Cir. 2016) (finding Board's interpretation of FRSA standard for awarding punitive damages to be persuasive and deferring to it); see also Welch v. Chao, 536 F.3d 269, 276 (4th Cir. 2008).

Additionally, this Court must uphold the Board's findings of fact if they are supported by substantial evidence. See R & B Transp., 618 F.3d at 44. Substantial evidence is "'more than a scintilla'" and "'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" BSP Trans, Inc. v. U.S. Dep't of Labor, 160 F.3d 38, 47 (1st Cir. 1998) (quoting NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939), and omitting internal quotation marks and citation); see also R & B Transp., 618 F.3d at 44. The substantial evidence standard is "'notoriously difficult to overcome on appellate review.'" Vieques Air Link, Inc. v. U.S. Dep't of Labor, 437 F.3d 102, 104 (1st Cir. 2006) (per curiam) (quoting Bath Iron Works Corp. v. U.S. Dep't of Labor, 336 F.3d 51, 56 (1st Cir. 2003)). This Court recognizes that "it is the ALJ's unique prerogative in the first instance to 'draw inferences and make credibility assessments.'" Bath Iron Works, 336 F.3d at 56 (quoting Bath Iron Works Corp. v. Dir., Office of Workers Comp. Programs, U.S. Dep't of Labor, 244 F.3d 222, 231

(1st Cir. 2001)). Thus, this Court "will accept the findings and inferences drawn by the ALJ, whatever they may be, unless they are 'irrational.'" Id. (quoting Barker v. U.S. Dep't of Labor, 138 F.3d 431, 434 (1st Cir. 1998)).

This Court reviews an ALJ's evidentiary rulings, as affirmed by the Board, for abuse of discretion. See R & B Transp., 618 F.3d at 44; see also Barker v. Admin. Review Bd., U.S. Dep't of Labor, 302 F. App'x 248, 249 (5th Cir. 2008) (ALJs have "broad discretion to make evidentiary determinations.") (cited by R & B Transp., 618 F.3d at 44). Even if an ALJ abuses his discretion, the error may be harmless, in which case the ALJ should be affirmed. See R & B Transp., 618 F.3d at 46 (citing Mekhoukh v. Ashcroft, 358 F.3d 118, 130 (1st Cir. 2004)).

SUMMARY OF ARGUMENT

Pan Am waived the argument that it took no adverse personnel action against Raye by failing to contest the issue before the agency, despite having been warned that issues not raised would be deemed waived. In any event, substantial evidence supports the finding that Raye suffered an adverse personnel action. FRSA and its regulations prohibit a broad scope of retaliatory conduct, including intimidating or threatening an employee for engaging in protected activity. Because of Raye's OSHA complaint, Pan Am charged him with dishonesty and additional rules violations. Pan Am subjected

him to a disciplinary hearing and threatened employment termination if it found a violation. The possibility of losing his job caused Raye significant emotional distress. Raye is reluctant to file further complaints with OSHA or Pan Am for fear of being subjected to another disciplinary hearing and risking discipline. Pan Am's action toward Raye was more than trivially unfavorable, was materially adverse, and could dissuade a reasonable employee from engaging in protected activity.

Pam Am does not contest that Raye's protected OSHA complaint contributed to the adverse action, and Pan Am did not show by clear and convincing evidence that it would have taken the action in the absence of his protected activity. Pan Am asserted that there was a major discrepancy between Raye's OSHA complaint and his prior hearing testimony and that the purpose of the second disciplinary hearing was to learn more about his injury. However, Schultz's testimony, the notice of the second hearing, the transcript of the hearing, and Pan Am's decision letter after the hearing refuted Pan Am's assertions. Substantial evidence thus supports the ALJ's finding, affirmed by the Board, that Pan Am failed to meet its high burden.

Pan Am's comparator evidence likewise failed to meet the clear and convincing standard, as the ALJ reasonably found that the two employees whom Pan Am offered as comparators had engaged

in more serious misconduct than Raye. These two employees gave patently false testimony that was completely contrary to the evidence in their cases whereas Raye's complaint contained a minor discrepancy that did not fundamentally change his description of his injury. Moreover, the ALJ did not abuse his discretion by excluding exhibits regarding additional employees whom Pan Am alleged were comparable to Raye. The exhibits on their face did not suggest that the employees were comparable to Raye, and Pan Am offered no testimony to prove that they were comparable. Accordingly, the exhibits were not helpful, were more prejudicial than probative, and in any event would have been only cumulative evidence.

The ALJ appropriately awarded, and the Board appropriately affirmed, punitive damages based on a finding that Pan Am intentionally interfered with Raye's rights under FRSA. Pan Am responded to Raye's OSHA complaint by, at the insistence of its legal department, reviewing the complaint and generating an inconsistency between the complaint and his prior hearing testimony. Pan Am accused Raye of dishonesty and used the inconsistency to charge him with multiple rules violations that could have resulted in his employment termination. Pan Am chose not to pursue available, less aggressive options to resolve the inconsistency. Pan Am's assertion that the additional disciplinary charges were to learn more about Raye's injury and

whether there were additional safety violations was refuted by the record evidence. FRSA exists to allow railroad employees to make complaints without fear of retaliation, and the "baseless and serious charges" that Pan Am pursued against Raye in response to his OSHA complaint struck directly at FRSA's protections. Pan Am's "egregious, blatant, and willful act of retaliation" warranted an award of punitive damages.

The ALJ did not abuse his discretion in awarding $250,000 in punitive damages, the maximum permitted by FRSA. The fact that Raye's employment was not ultimately terminated does not make the award excessive. The amount of a FRSA punitive damages award is determined by the railroad's conduct and must be sufficient to punish its retaliatory conduct and deter future misconduct. The evidence supports the ALJ's finding that Pan Am placed "egregious and systematic" obstacles to engaging in activity protected by FRSA. The ALJ reviewed other FRSA punitive damage awards and correctly determined that substantial awards, including $250,000, are necessary when railroads engage in retaliatory conduct comparable to Pan Am's conduct here.

ARGUMENT

1. Pan Am Waived the Argument that Raye Suffered No Adverse Personnel Action.

a. Pan Am did not argue before the ALJ that Raye suffered no adverse personnel action. See ADD 21 n.4 ("Pan Am does not

contest in its brief that there was adverse action in this case."). Pan Am failed to raise the issue despite the ALJ's warning (in bold) that issues "not specifically addressed in the brief will be deemed to have been waived." Respondent's Addendum, 2. Pan Am included a brief footnote in its Petition for Review to the Board purporting to preserve the issue for appeal, see Respondent's Addendum, 15, but did not further develop the issue before the Board.

Pan Am waived any argument that it took no adverse action against Raye by failing raise the argument before the ALJ. As an appellate body, the Board generally does not consider an argument raised for the first time on appeal. See Seehusen v. Mayo Clinic, No. 12-047, 2013 WL 5773494, at *2 (ARB Sept. 11, 2013); Rollins v. Am. Airlines, Inc., 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."). Accordingly, the Board properly did not address the ALJ's uncontested finding that Raye suffered an adverse action. See ADD 4 (identifying the only issues on appeal before the Board). Pan Am's footnote in its Petition for Review was immaterial; it had not raised the issue before the ALJ and had already waived it.

b. When reviewing agency decisions, this Court deems waived any argument not properly raised before the agency. See

Upper Blackstone, 690 F.3d at 30; Mass. Soc'y for Prevention of Cruelty to Children v. NLRB, 297 F.3d 41, 49-50 (1st Cir. 2002) (affirming NLRB's decision that failure to raise argument earlier in administrative process meant that argument was waived); Northern Wind, Inc. v. Daley, 200 F.3d 13, 17-18 (1st Cir. 1999) (failure to raise argument to ALJ constitutes an administrative waiver, precluding its assertion on appeal). "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952). "This rule preserves 'judicial economy, agency autonomy, and accuracy of result' by requiring full development of issues in the administrative setting to obtain judicial review." Northern Wind, 200 F.3d at 18 (quoting Eagle Eye Fishing Corp. v. U.S. Dep't of Commerce, 20 F.3d 503, 505 (1st Cir. 1994)); see also Upper Blackstone, 690 F.3d at 30 (waiver rule accords respect to the agency's decision-making process by providing the agency with the opportunity to address objections, apply its expertise, exercise its informed discretion, and create a more complete record for judicial review).

Because Pan Am did not argue before the ALJ or (in a meaningful way) before the Board that Raye suffered no adverse personnel action, the ALJ did not identify in a detailed way the evidence in support of a finding that there was an adverse action or address in depth the legal standard for making such a finding, and the Board undertook no review of the issue. This Court thus does not have before it the benefit of the agency's fact-finding, determination of the relevant evidence, or administrative expertise. Therefore, this Court should not consider Pan Am's argument that there was no adverse action.

c. Pan Am may not avoid waiver in this case by asserting that raising its arguments would have been futile because of contrary Board precedent. That "is an excuse that has been roundly rejected by the Supreme Court." Edward S. Quirk Co. v. NLRB, 241 F.3d 41, 43-44 (1st Cir. 2001) (citing L.A. Tucker Truck Lines, 344 U.S. at 37). In L.A. Tucker Truck Lines, the Supreme Court explained:

> It is urged in this case that the Commission had a predetermined policy on this subject which would have required it to overrule the objection if made. While this may well be true, the Commission is obliged to deal with a large number of like cases. Repetition of the objection in them might lead to a change of policy, or, if it did not, the Commission would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence.

344 U.S. at 37; see also Sousa v. INS, 226 F.3d 28, 32 (1st Cir. 2000) (noting that agency's previous rejection of an argument

"is no basis for failing to make the claim in one's own case") (citing L.A. Tucker Truck Lines, 344 U.S. at 37).

Pan Am should have argued before the ALJ that there was no adverse action, acknowledged and addressed the contrary Board precedent, and allowed the ALJ to decide the issue and the Board to review the decision. Because Pan Am did not do so, it waived the argument.

2. In Any Event, the Broad Scope of Retaliatory Conduct Prohibited by FRSA and Substantial Evidence Support a Finding that Raye Suffered an Adverse Personnel Action.

a. In light of Pan Am's failure to contest the issue, the ALJ summarily found that Raye suffered an adverse personnel action when Pan Am charged him with making false statements and related rules violations and subjected him to a disciplinary hearing on those charges. See ADD 21 (citing Vernace v. Port Auth. Trans-Hudson Corp., No. 12-003, 2012 WL 6849446, at *1 (ARB Dec. 21, 2012)). As discussed above, the Board correctly did not address the issue. Yet, Pan Am urges this Court "to reverse the ARB's decision and expressly hold that merely conducting an investigation into suspected misconduct, without more, does not constitute an adverse action for purposes of the FRSA." Pan Am's Br. 18. Pan Am apparently considers this appeal to be an opportunity to challenge the Board's decision in Vernace. See id. at 18-22.

However, this Court, if Pan Am has not waived the argument, should limit its review to whether a finding of adverse action is warranted in this case. Pan Am characterizes its actions toward Raye as a mere investigation following an injury report and nothing more. However, as discussed below in the context of the substantial evidence that Raye suffered an adverse action, Pan Am's actions toward him were significantly more involved and impactful. Moreover, Pan Am assumes that the Board in fact decided in this case that a mere investigation into suspected misconduct, without more, is an adverse action under FRSA. However, because Pan Am did not contest the issue, the Board did not make any decision. See ADD 4 (identifying the issues that it did decide). This case is simply not the vehicle for the ruling that Pan Am seeks. Pan Am overreaches by requesting such a ruling given that it did not give the agency the opportunity to first decide the issue.[3]

b. Focusing on whether Raye suffered an adverse personnel action, the broad scope of retaliatory conduct prohibited by FRSA and substantial evidence support a finding that he suffered an adverse action.

[3] In Vernace, the Board affirmed the ALJ's determination that there was an adverse personnel action, finding that "[t]he disciplinary investigation stretching one year in this case" qualifies as an adverse action. 2012 WL 6849446, at *1. The Board's decision regarding Raye, not its decision regarding Ms. Vernace, is on appeal here.

FRSA prohibits railroads from discharging, demoting, suspending, reprimanding, or "in any other way" discriminating against employees for engaging in protected activity. 49 U.S.C. 20109(a). The Department's regulations implementing FRSA interpret the "in any other way" discriminating language to include "intimidating" or "threatening" an employee for engaging in protected activity. 29 C.F.R. 1982.102(b)(1). In determining what constitutes adverse action, the Board has stated that "the starting point is the language of the statute itself and the implementing regulations construing the relevant statutory text, which we are duty bound to follow." Williams v. Am. Airlines, Inc., No. 09-018, 2010 WL 5535815, at *6 (ARB Dec. 29, 2010) (internal quotation marks omitted) (discussing AIR 21's similar statutory and regulatory language).

The Board has held that Sarbanes-Oxley's similar prohibition against "in any other manner" discriminating against employees because of protected activity "bespeaks a clear congressional intent to prohibit a very broad spectrum of adverse action" because it "explicitly proscrib[es] non-tangible activity." Menendez v. Halliburton, Inc., Nos. 09-002 & 09-003, 2011 WL 4915750, at *9 (ARB Sept. 13, 2011).[4] In Williams, the

[4] The Fifth Circuit affirmed the Board's finding of adverse action in Menendez although it disagreed in part with the Board's legal analysis. See Halliburton, Inc. v. Admin. Review Bd., U.S. Dep't of Labor, 771 F.3d 254, 259-262 (5th Cir. 2014).

Board held that adverse action "refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions." 2010 WL 5535815, at *8. For example, a "written warning or counseling session is presumptively adverse" if it "expressly references potential discipline." Id. at *6. Thus, the action need not have "tangible job consequences" to be adverse. See id. at 7-8; Menendez, 2011 WL 4915750, at *9-13; see also Almendarez v. BNSF Ry. Co., No. C13-0086-MAT, 2014 WL 931530, at *6 (W.D. Wash. Mar. 10, 2014) (rejecting argument that action must have "a resulting effect on the terms and conditions of employment" to be adverse under FRSA).

The Board has further held that the standard for adverse action adopted for Title VII anti-retaliation cases in Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006), although not controlling given the statutory language in the anti-retaliation statutes at issue before the Board, is a "particularly helpful interpretive tool." Menendez, 2011 WL 4915750, at *9; see also Williams, 2010 WL 5535815, at *7 (Burlington Northern standard "lends support" for adverse action finding). In Burlington Northern, the Supreme Court held that adverse actions under Title VII's anti-retaliation provision are actions that "a reasonable employee would have found materially adverse, which in this context means it might well have

dissuaded a reasonable worker from making a complaint or supporting a charge of discrimination." See 548 U.S. at 68 (internal quotation marks and citations omitted). Actions that are not tangible employment actions may be adverse actions for purposes of Title VII's anti-retaliation provision. See Menendez, 2011 WL 4915750, at *11 (citing Burlington N., 548 U.S. at 61-63, 67); Williams, 2010 WL 5535815, at *7.

Because FRSA's statutory and regulatory language are similar to the statutory and regulatory language of Sarbanes-Oxley and AIR 21, the Board has ruled that the Menendez and Williams adverse action standard applies in FRSA cases. See Fricka v. Nat'l R.R. Passenger Corp., No. 14-047, 2015 WL 7904894, at *4-5 (ARB Nov. 24, 2015). This Court should defer to the Board's interpretation, developed through administrative adjudication, that FRSA's statutory and regulatory language mean that it prohibits a broad scope of retaliatory adverse actions, i.e., actions that are more than trivial. See Worcester, 827 F.3d at 183-84 (deferring to Board's persuasive FRSA interpretation); see also Blackorby v. BNSF Ry. Co., No. 13-CV-00908-FJG, 2015 WL 58601, at *3 (W.D. Mo. Jan. 5, 2015) (citing FRSA's statutory language to hold that it provides "broader protection" against adverse actions than Title VII); Araujo v. N.J. Transit Rail Operations, Inc., 708 F.3d 152, 158 (3d Cir. 2013) (considering its "plain meaning," FRSA is generally "much

more protective" of employees than Title VII).[5] Applying that standard, there is substantial evidence that Pan Am's actions toward Raye were more than trivial. In the event that the Burlington Northern standard is the standard, cf. Halliburton, 771 F.3d at 259-260 (Burlington Northern standard applies in Sarbanes-Oxley case, rejecting the Board's view that the standard does not control), there is substantial evidence that Pan Am's actions might dissuade a reasonable employee from making a retaliation complaint.

Specifically, because of Raye's OSHA complaint, Pan Am subjected him to a second disciplinary hearing to determine whether he made false statements in the complaint. The purpose of the second hearing was not to further investigate his injury or whether safety rules were violated. See APPX 217-18; see also supra pp. 11-12. Pan Am threw everything but the kitchen sink at Raye, alleging that he violated rules prohibiting: insubordination; hostility; willful disregard of Pan Am's interests; dishonest, immoral, vicious, quarrelsome, and uncivil behavior; and conduct subjecting Pan Am to criticism or a loss of good will. See APPX 217-18. The notice of hearing made

[5] In Blackorby, the railroad appealed the final judgment against it but is not contesting on appeal whether the plaintiff suffered an adverse action. See No. 15-3192 (appeal docketed 8th Cir. Oct. 1, 2015).

clear that a violation could result in his employment termination. See id.

After receiving the notice of hearing, the possibility of losing his job caused Raye to lose sleep and his appetite, become anxious about being able to support his family, act out toward his family, and be a "wreck" as he waited for a resolution. The ALJ found that his suffering caused him emotional distress and awarded him $10,000 as compensation. See supra p. 13. Raye questions whether he should have ever filed the complaint with OSHA, is reluctant to file any further complaints with OSHA, and is reluctant to report any injury or safety concern to Pan Am for fear of going through another disciplinary hearing and risking discipline. See APPX 58-59, 94, 100. The foregoing findings constitute substantial evidence that Pan Am's action toward Raye was unfavorable in a more than trivial manner, was materially adverse, and could dissuade a reasonable employee from making a complaint. Accordingly, the action was adverse under FRSA.

c. Pan Am's assertions that its action was not adverse because it was following the collective bargaining agreement and ultimately did not discipline Raye are unavailing. The collective bargaining agreement did not force Pan Am to charge Raye with multiple rules violations that could have resulted in his employment termination; it merely governed the process if

Pan Am chose such an action. Likewise, Pan Am's ultimate "exoneration" of Raye does not prevent its prior action toward him from being adverse under FRSA. Cf. Burlington N., 548 U.S. at 72-73 (holding that suspension later rescinded with backpay provided was an adverse action under Title VII's anti-retaliation provision and noting: "A reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former."). As discussed above, an action need not have tangible employment consequences to be adverse. It would severely undermine FRSA's protections for employees who report safety concerns or injuries if railroads who threaten employees with employment termination are able to automatically absolve themselves by ultimately imposing no discipline.

Moreover, Pan Am does not base its argument that Raye suffered no adverse action on FRSA's statutory language, the Department's regulations, or the Board's decisions. Instead, Pan Am relies primarily on a district court decision that "merely being *accused* of violating workplace rules——and having to address those accusations at a disciplinary hearing" is not an adverse action under FRSA, although it is "by no means a frivolous argument." Brisbois v. Soo Line R.R. Co., 124 F.

Supp.3d 891, 902 (D. Minn. 2015) (emphasis in original).[6] The district court's decision is, of course, not binding on this Court.

In Brisbois, the district court did not base its decision on FRSA's statutory text or regulations, did not cite any Board decision, and found the Burlington Northern standard applicable when determining adverse actions in FRSA cases. See 124 F. Supp.3d at 901-03. However, the Board has persuasively explained why FRSA prohibits a broader scope of retaliatory conduct than Title VII. See Fricka, 2015 WL 7904894, at *4 (citing Williams and Menendez). And Brisbois is contrary to the Blackorby, Araujo, and Almendarez decisions cited above. In any event, Pan Am's action was adverse under the Burlington Northern standard. See supra pp. 34-35. In addition, Brisbois was decided on a motion to dismiss, and there was no factual development of the circumstances of the plaintiff's disciplinary hearing. Brisbois thus provides no basis for concluding that the particular action taken by Pan Am against Raye cannot be an adverse action under FRSA.

[6] In Brisbois, there was no agency decision before the district court as the plaintiff pursued her FRSA claim in the district court pursuant to 49 U.S.C. 20109(d)(3) (complainants may take their FRSA claims to district court if the Secretary does not issue a final decision within 210 days). See 124 F. Supp.3d at 895. The plaintiff has appealed the district court's final judgment. See No. 17-1144 (appeal docketed 8th Cir. Jan. 20, 2017).

Pan Am's reliance on Koziara v. BNSF Railway Co., 840 F.3d 873 (7th Cir. 2016), is similarly misplaced. In Koziara, adverse action was not at issue; causation was the issue. See id. at 877-79. In any event, the court's statement that "[a]n injury report is a normal trigger for an investigation designed to uncover facts that can prompt corrective action that will reduce the likelihood of a future injury," id. at 878, is not relevant here. The "report" at issue here is Raye's complaint to OSHA, and the purpose of the second disciplinary hearing was to determine whether he lied in that report — not to reduce future injuries. See supra pp. 10-12.

In sum, substantial evidence supports the finding that the charges of making false statements in the OSHA complaint and additional rules violations, the second disciplinary hearing, and the possibility of losing employment constituted an adverse personnel action under FRSA.

3. Pan Am Failed to Show by Clear and Convincing Evidence that It Would Have Taken the Same Adverse Action against Raye Absent His Protected Activity.

To avoid liability once Raye proved by a preponderance of the evidence that his protected activity was a contributing factor in his adverse personnel action, Pan Am was required to show by clear and convincing evidence that it would have taken the same action in the absence of his protected activity. 29 C.F.R. 1982.109(b); 49 U.S.C. 42121(b)(2)(B). A party satisfies

the clear and convincing standard only by placing "in the ultimate factfinder an abiding conviction that the truth of its factual contentions are highly probable." Colorado v. New Mexico, 467 U.S. 310, 316 (1984) (internal quotation marks omitted); see also Speegle v. Stone & Webster Constr., Inc., No. 13-074, 2014 WL 1758321, at *6 (ARB Apr. 25, 2014) ("The burden of proof under the 'clear and convincing' standard is more rigorous than the 'preponderance of the evidence' standard and denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain.").

a. Schultz testified that Pan Am would have charged Raye with making false statements and subjected him to a second disciplinary hearing had Raye made the statement that he "fell hard to the ground" in "some other venue" than the OSHA complaint. APPX 181-82. However, the ALJ was entitled to find the employer's assertion alone insufficient to meet the clear and convincing standard. See Deltek, Inc. v. U.S. Dep't of Labor, Admin. Review Bd., 649 F. App'x 320, 331-33 (4th Cir. 2016) (employer's written policies and "self-serving testimony that their violation would have led to termination" are insufficient to meet clear and convincing burden; employer's "testimony that 'this kind of action would not be tolerated' was by itself insufficient to meet" burden). As set forth below, considering the totality of the evidence, substantial evidence

supports the ALJ's finding, affirmed by the Board, that Pan Am failed to meet the clear and convincing standard.

b. Pan Am argues that the inconsistency between Raye's OSHA complaint and his testimony at the prior hearing was a major discrepancy, and that it undertook the second disciplinary hearing to learn more about his injury. See ADD 25-26. However, Schultz testified that the OSHA complaint was entirely consistent with Raye's prior testimony except for the five words that he "fell hard to the ground". See APPX 163, 166. Whether he fell or sat down, Raye's accounts of his injury in his OSHA complaint and the prior hearing were substantively the same: he hurt his ankle stepping from the train car onto the pile of rail ties and ended up on the ground. See APPX 213, 271-73. And, Schultz confirmed that Raye violated the rule requiring him to secure firm footing before stepping off a train car regardless whether he fell or not. See APPX 184. Thus, contrary to Pan Am's assertion, see Pan Am's Br. 32, Raye's OSHA complaint was not "completely irreconcilable" with his prior hearing testimony.

Moreover, the second notice of disciplinary hearing to Raye did not suggest any further inquiry into his injury, stated instead that the hearing's purpose was to determine whether he made false statements in describing how the injury occurred, and charged him with dishonesty and other rules violations as

opposed to any safety violations. See APPX 217-18; see also ADD 26 (second notice of hearing "made no mention of further fact finding into how the original injury occurred or the possibility of additional safety rule violations"). The transcript of the second disciplinary hearing shows that its focus was whether there was any discrepancy between Raye's OSHA complaint and his prior testimony. See APPX 310-348; see also APPX 329 ("As Mr. S[c]hultz has said, we are here to determine whether we have conflicting statements and which one of them is correct ... that is what the charge is all about.") (statement of the Hearing Officer). Likewise, Pan Am's decision letter following the hearing did not address the circumstances of the injury or whether there were any additional safety violations and instead determined that the charges of making false statements were not sustained. See APPX 230-32.

Additionally, although the collective bargaining agreement requires a disciplinary hearing if Pan Am seeks to discipline an employee, Pan Am could have further investigated the circumstances of Raye's injury following his OSHA complaint without bringing charges, including by informally investigating the injury or simply asking him what happened on the day of the injury, and then later decided whether to bring charges. See APPX 175-77. Pan Am's decision not to pursue any of these

options further rebuts its argument that the purpose of the second hearing was to learn more about his injury.

In sum, substantial evidence supports the ALJ's findings that the assertion that there was a major discrepancy was not credible, and that the purpose of the second disciplinary hearing was not to inquire further into the circumstances of the injury. See ADD 26.[7]

c. Pan Am argues that Speegle required the ALJ to consider "'the proportional relationship between the adverse actions and the bases for the actions.'" Pan Am's Br. 31 (quoting Speegle, 2014 WL 1758321, at *7). However, the Board's decision in Speegle does not impose that requirement. Instead, Speegle states that an employer's "circumstantial evidence can include, among other things: ... (5) the proportional relationship between the adverse actions and the bases for the actions." 2014 WL 1758321, at *7. In any event, the evidence refutes the argument that Pan Am's adverse action toward Raye was "proportional" and belies its effort to downplay the severity of its action. As discussed above (pp. 34-35): Raye was charged with making false statements in his OSHA complaint and violating rules prohibiting insubordination, hostility, willful disregard of Pan Am's interests, and dishonest behavior; he was threatened

[7] This Court should accept the ALJ's credibility assessments. See Bath Iron Works, 336 F.3d at 56.

with employment termination; he was subjected to a second disciplinary hearing; he suffered significant emotional distress; and he is reluctant to file further complaints. The fact that Pan Am did not ultimately terminate Raye's employment is not clear and convincing evidence that it would have taken the adverse action absent his OSHA complaint.

d. Pan Am's argument that the ALJ erred by finding that "the temporal proximity between Raye's OSHA complaint and Pan Am's issuance of the second notice of investigation demonstrated that Pan Am could not meet its burden of proof," Pan Am's Br. 31 (citing ADD 24), is misplaced. The ALJ made no such finding; instead, the ALJ found that, although Raye had already met *his burden* of showing causation between his protected activity and the adverse action, the temporal proximity was "additional circumstantial evidence" of causation. ADD 24.[8]

Circumstantial evidence supporting the employer's affirmative defense "can include, among other things: (1) evidence of the temporal proximity between the non-protected conduct and the adverse actions." Speegle, 2014 WL 1758321, at *7. However, temporal proximity between the employer's discovery of alleged misconduct that is unprotected and the

[8] The ALJ did not consider temporal proximity when evaluating whether Pan Am met its clear and convincing evidence burden, see ADD 25-28, because Pan Am did not make the argument before the ALJ.

employer's adverse action is not necessarily enough evidence for the employer to meet the clear and convincing standard. See id. at *2-3, 9. Here, the ALJ reasonably found that the temporal proximity between Pan Am's knowledge of Raye's OSHA complaint and its adverse action toward him was additional evidence of retaliation. See ADD 24.

e. Pan Am's comparator evidence was unpersuasive and failed to meet the clear and convincing evidence standard.

At the ALJ hearing, Schultz testified and Pan Am submitted exhibits (see APPX 242-44) regarding two other employees who allegedly made false statements and were subjected to disciplinary hearings like Raye. The ALJ, however, found these two other employees to not be comparable to Raye, primarily because "the very minor discrepancy" in his OSHA complaint was not comparable to the other two employees' patently false testimony. ADD 27-28. As the ALJ noted, "Pan Am did not provide the hearing transcripts or determination letters from these two instances of employee discipline." ADD 27. The exhibits that Pan Am did provide show that it charged one employee with providing "false testimony during an investigative hearing," and the notice to the employee did not state that his employment could be terminated. APPX 242. Schultz testified that the employee's account of how a vehicle accident occurred was impossible given the evidence. See APPX 141.

The exhibits show that Pan Am charged the second employee with giving testimony at a hearing that "directly conflicted with a statement you made to an officer of the law and company official," and that the employee accepted responsibility for providing false statements in exchange for a suspension. APPX 243. Schultz testified that the employee's testimony "was completely at odds with the police officer's testimony." APPX 141. As Schultz testified, both employees' false testimony "ran completely contrary to the factual information, physical evidence." APPX 138.

Based on the evidence, the ALJ found that "the very minor discrepancy" in Raye's complaint "does not rise to the level of false statements involved in the other two occurrences and is not comparable." ADD 27-28. Moreover, in the cases of the other two employees, Pan Am had actual evidence that their hearing testimony was false when it charged them with making false statements. In Raye's case, there was simply an inconsistency between his OSHA complaint and his prior testimony — and not evidence that his prior testimony was false — when it charged him. Substantial evidence supports the ALJ's finding that the other two employees were not comparable to Raye.[9]

[9] Pan Am argues that a comparator employee need be only "roughly equivalent." See Pan Am's Br. 35 (citing Conward v. Cambridge Sch. Comm., 171 F.3d 12, 20 (1st Cir. 1999)). Given that Raye's OSHA complaint contained only a minor inconsistency with his

Pan Am argues that the ALJ "demanded" that it prove that "it had conducted investigations in other cases in which employees had submitted apparently false statements ***to OSHA***." Pan Am's Br. 35-36 (emphasis in original). Although the ALJ expressed a concern during the hearing that the other two employees were not comparable to Raye because his allegedly false statement was in an OSHA complaint and their false statements were made during internal investigations, the ALJ *allowed* Pan Am's testimony and *admitted* its exhibits regarding the other two employees. See APPX 134-36, 147-48. Moreover, the ALJ *considered* in his decision Pan Am's arguments and evidence that the other two employees were comparable to Raye and rejected the argument primarily because their patently false statements did not compare to Raye's slightly inconsistent statement (which factual finding is supported by substantial evidence as set forth above). See ADD 27-28. Thus, the ALJ did not require Pan Am to put forth comparator employees who had made false statements in OSHA complaints.

f. The ALJ did not abuse his discretion by declining to admit exhibits from Pan Am relating to additional employees whom Pan Am alleged were comparators to Raye.

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prior testimony and that the other two employees' testimony was completely contrary to the factual information and physical evidence in their cases (and thus their testimony was demonstrably false when they were charged), Raye and the other two employees were not roughly equivalent.

Pan Am's exhibits 10-13 were: a notice of disciplinary hearing to an employee who was told he could not leave the property, left the property, was seen leaving the property by his supervisor, yet told his supervisor that he did not leave the property; a notice of disciplinary hearing to an employee who stole company material for personal gain; a notice of disciplinary hearing to an employee who falsified time records; and a decision letter to that employee finding him guilty of falsifying time records and terminating his employment. See APPX 371-78. Pan Am's exhibits 19-22 were four decisions of the Public Law Board or the National Railroad Adjustment Board during the past twenty-five years involving employees who: totally fabricated a complaint against another employee; failed to admit responsibility for an accident; willfully falsified an inspection report; and failed to disclose a medical condition and threatened to file a false injury report. See APPX 379-391.

The ALJ expressed concerns that there was no Pan Am witness available to further explain the circumstances of these employees' misconduct. See APPX 22-23, 26-30. Even if the documents were admissible under the business records exception to the hearsay rule, the ALJ nonetheless excluded them because their prejudicial nature outweighed any probative value. See APPX 23 ("I think that outweighs the potential -- the prejudicial value certainly could outweigh the potential

probative value given that there's no witness to help in this process."); APPX 28-29 ("And I want to be careful in terms of prejudicial versus probative, and I think just letting them in wholesale without some testimony ... would be more prejudicial than probative."); APPX 30 ("just letting them in and without any further information ... is not going to be helpful to the trier of fact"). The Board agreed that these exhibits were not "not admissible as prejudicial." ADD 6.

Excluding these exhibits was not an abuse of discretion. The exhibits were "very short" and "very brief" (APPX 23, 27), and it was not clear from the face of the exhibits that these employees had engaged in conduct similar to Raye's conduct. Pan Am was unable to provide witnesses to explain the circumstances of these employees' misconduct. Accordingly, the ALJ struggled to determine whether the circumstances of these employees' misconduct were "on par with this case." APPX 26; see also APPX 27 ("I'm not sure that these facts are on par with the facts of this case."). For these reasons, the exhibits had little, if any, probative value and were prejudicial in that they were "not going to be helpful to the trier of fact." APPX 30. Excluding these exhibits was well within the ALJ's "broad discretion" to

make evidentiary determinations. R & B Transp., 618 F.3d at 46.[10]

If the ALJ did err, any error was harmless. See R & B Transp., 618 F.3d at 46 (ALJ's "purported error was harmless in light of the other evidence."). As discussed above (p. 46), Pan Am presented, and the ALJ allowed, testimony and exhibits regarding two other employees who allegedly engaged in similar conduct as Raye. The ALJ did not disbelieve Pan Am's assertion that it disciplined employees who made false statements. Instead, it found that the "very minor discrepancy" in the OSHA complaint did "not rise to the level of false statements involved in the other two occurrences and is not comparable." ADD 27-28. However, nothing on the face of the excluded exhibits suggests that these employees made such minor discrepancies, and Pan Am did not provide testimony elaborating on these employees' circumstances. These exhibits would have been nothing more than cumulative evidence that Pan Am disciplined employees who made false statements — which was not at issue. Their exclusion did not affect the ALJ's determination that Pan Am's comparator evidence was not comparable and failed to meet its clear and convincing burden.

[10] The ALJ excluded the exhibits without prejudice and would have reconsidered had Pan Am provided witnesses regarding the employees' misconduct. See APPX 22-23, 28.

4. Substantial Evidence Supports Awarding Punitive Damages, and Awarding $250,000 Was Not an Abuse of Discretion.

Pan Am argues that the award of punitive damages was not supported by substantial evidence. See Pan Am's Br. 45-51. Pan Am additionally, briefly argues that the $250,000 award was excessive. See id. at 52.

a. At common law, "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law, should be sufficient to trigger ... consideration of the appropriateness of punitive damages." Smith, 461 U.S. at 51. Thus, punitive damages are permissible "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." Id. at 56. The Board has applied the common law standard when determining whether to award punitive damages for violations of statutes protecting against retaliation, including FRSA. See Petersen v. Union Pac. R.R. Co., No. 13-090, 2014 WL 6850019, at *3 (ARB Nov. 20, 2014); Youngermann, 2013 WL 1182311, at *7. The Board and ALJ both correctly identified that standard as applicable here. See ADD 8, 31. This Court has found the Board's decisions to be persuasive and has adopted Smith's common law standard for determining whether to award punitive damages in FRSA cases. See Worcester, 827 F.3d at 182-83.

b. Substantial evidence supports awarding punitive damages to Raye. Consistent with Smith, the ALJ awarded punitive damages, and the Board affirmed, because Pan Am "consciously disregarded Raye's statutorily-protected rights under the FRSA" and "intentionally interfered with the exercise of those rights." ADD 31. Pan Am's first action upon receiving Raye's OSHA complaint was for Pan Am's legal department to ask Schultz to review the complaint. See id. Schultz's review produced a minor discrepancy between the OSHA complaint and Raye's prior hearing testimony. However, as Schultz conceded, the discrepancy had no impact on the outcome of the prior hearing as Raye violated the safety rule of failing to assure firm footing when stepping off the railcar whether he ended up on the ground because he sat down or fell hard. See APPX 184; see also supra p. 40.

Emboldened by this minor discrepancy in the OSHA complaint, Pan Am charged Raye with multiple, severe rules violations, ranging from dishonesty to insubordination, hostility, and behaving in an immoral, vicious, quarrelsome, and uncivil manner. See APPX 217-18. Pan Am explicitly threatened to terminate Raye's employment for these violations. See id. Pan Am chose to aggressively pursue Raye for his OSHA complaint instead of further investigating the matter without charging him (such as by informally investigating, including by simply asking

him what happened) and then deciding whether charges were warranted. See APPX 175-77. Finally, Pan Am's after-the-fact explanation for pursuing discipline against Raye for his OSHA complaint did not hold water. The assertion that the second disciplinary hearing was to learn more about his injury and whether there were any additional safety violations was refuted by Pan Am's notice of disciplinary hearing to Raye, the transcript from that hearing, and its decision letter following the hearing. See APPX 217-18, 230-32, 310-348; see also supra pp. 40-41.

Substantial evidence thus supports the ALJ's conclusion that the "only rational explanation for bringing such baseless and serious charges" against Raye following his OSHA complaint was that "Pan Am utilized the process to intimidate and discourage protected activity, not only by Raye, but other employees of Pan Am as well." ADD 32. Pan Am's "egregious, blatant, and willful act of retaliation," id., more than satisfies Smith's standard for awarding punitive damages.

In response to the ALJ's conclusion that Pan Am's conduct warranted punitive damages, Pan Am restates arguments, see Pan Am's Br. 47-50 ("[l]ike his finding of liability, the ALJ's finding that punitive damages were necessary ..."), that the record evidence rejects. The evidence supports the finding that the inconsistency in Raye's OSHA complaint was a minor

discrepancy, see supra pp. 40-42, instead of an "irreconcilable conflict," Pan Am's Br. 47. Although the fact that the inconsistency totaled a mere five words was relevant to the finding, the ALJ relied on the totality of the evidence, including Pan Am's documents and Schultz's testimony, to find that the inconsistency did not support Pan Am's aggressive actions toward Raye and that those actions were a willful act of retaliation. See ADD 25-27, 31-32. Moreover, the ALJ did not impose on Pan Am "some imaginary obligation to conduct an informal investigation," Pan Am's Br. 48; instead, as the ALJ noted based on Schultz's testimony, Pan Am had options other than immediately pursuing termination of Raye's employment, see ADD 26-27. The fact that Pan Am did not pursue these other options supports the conclusion that it willfully retaliated against Raye and that punitive damages were warranted. Moreover, the availability of investigative options other than pursuing dishonesty charges and employment termination in response to an inconsistency in an OSHA complaint and the fact that OSHA found that the safety investigation that Pan Am did pursue was not retaliation under FRSA (see APPX 3-4) refute Pan Am's argument that upholding the punitive damages award will have "dramatic consequences for railroad safety" (Pan Am's Br. 50-51).

c. Contrary to Pan Am's argument, see Pan Am's Br. 49-50, the ALJ did not consider as support for the punitive damages award Raye's claim that his first disciplinary hearing was retaliation for reporting an injury. OSHA found no reasonable cause to believe that the first hearing was retaliation in violation of FRSA. See APPX 3-4. The ALJ was well aware that OSHA's finding regarding the first hearing was not part of the ALJ proceeding; the ALJ had earlier rejected Raye's argument that the finding was part of the proceeding because he failed to appeal OSHA's determination. See APPX 32-37; see also ADD 15 n.2.

Separate and apart from the retaliation claim that OSHA denied, the ALJ did consider the "context of Pan Am's retaliation for filing the FRSA complaint" and concluded that "Pan Am fosters a workplace culture that discourages employees from reporting on the job injuries." ADD 32.[11] A railroad's workplace culture regarding reporting injuries is a proper consideration when determining whether to award punitive damages

[11] To the extent that the ALJ did consider Pan Am's action which OSHA found not to be retaliation, the Board correctly ruled that the ALJ "did not rely on this evidence but only viewed it in context." ADD 9. Moreover, any consideration of this evidence "did not change the intentional and reprehensible nature of Pan Am's conduct in targeting Raye because he filed a FRSA complaint." Id. Given the substantial evidence that Pan Am engaged in egregious, blatant, and willful retaliation warranting punitive damages, see supra pp. 51-53, any consideration "was harmless." ADD 9.

for a violation of FRSA's anti-retaliation provisions given that Congress enacted the provisions to remove retaliation for reporting injuries from railroads' workplace cultures. See Araujo, 708 F.3d at 159 (discussing FRSA's legislative history); Henderson v. Wheeling & Lake Erie Ry., No. 11-013, 2012 WL 5391422, at *3-4 (ARB Oct. 26, 2012) (same). Indeed, the Board has held that whether an employer's retaliatory conduct reflected a corporate policy is part of the punitive damages consideration. See Ferguson v. New Prime, Inc., No. 10-075, 2011 WL 3882480, at *6 (ARB Aug. 31, 2011).

Moreover, the ALJ's conclusion regarding Pan Am's workplace culture was supported by substantial evidence. Based on testimony at the hearing, the ALJ found that: Pan Am's managers directly discourage employees from filing injury reports; when an employee reports an injury, charges are almost always brought against the employee and an adversarial process results; and Pan Am seeks to place fault for the injury on the injured employee rather than Pan Am. See ADD 32-34; see also supra pp. 14-16. Pan Am's actions toward Raye reflected this behavior: the safety hazard identified by him was not remedied, see APPX 195-97, 260-63; there was no evidence that Pan Am disciplined anyone for not remedying the hazard, see APPX 345; Pan Am retaliated against him for filing the OSHA complaint; and the ALJ credited Raye's testimony that he is reluctant to file any further complaints

with OSHA, see APPX 100. As the ALJ concluded, Pan Am's behavior is "the exact type of behavior Congress was trying to prevent in enacting the FRSA." ADD 33.

In sum, the ALJ reasonably concluded that it appeared that "the only conceivable reason to bring internal charges against a claimant for statements made in a whistleblower complaint is to intimidate the complainant and discourage him from engaging in protected activity." ADD 28. Such conscious disregard for, and intentional interference with, FRSA rights warranted punitive damages.

d. Whether the punitive damages award was excessive is reviewed for abuse of discretion. See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432-33 (2001).[12]

Pan Am's argument that the award was excessive primarily relies on the $1,000 award in Vernace. See Pan Am's Br. 52. However, unlike in Vernace: Raye was threatened with employment termination as a result of his OSHA complaint; the threat of losing his job caused Raye significant emotional distress; the ALJ found that Pan Am committed a willful, blatant, and egregious act of retaliation; and the retaliation reflected a larger workplace culture that was at odds with FRSA's purposes.

[12] Had Pan Am argued that the amount of the award violated its Constitutional Due Process rights, the standard of review would be different, and State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003), could apply. See ADD 9 n.37.

Pan Am's retaliatory conduct toward Raye endangered FRSA's very foundation — the ability to file retaliation complaints with OSHA free from retaliation; the employer's conduct in Vernace did not implicate the same concern.

Moreover, Pan Am's reliance on the fact that Raye was ultimately exonerated following the disciplinary hearing misses the point of punitive damages. The "focus" of punitive damages "is on the character of the tortfeasor's conduct——whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards." Smith, 461 U.S. at 54. Additionally, FRSA's statutory cap on the amount of punitive damages awards "strongly undermines" any resistance to awarding punitive damages where "minimal or no compensatory damages" are awarded. Youngermann, 2013 WL 1182311, at *7. Here, the ALJ found, and the Board affirmed, that "the degree of culpability and egregious conduct by Pan Am and the need to deter similar conduct in the future" necessitated a "substantial award of punitive damages." ADD 34-35. The ALJ correctly reviewed FRSA cases where railroads had engaged in similar conduct and determined that the punitive damages awards in those comparable cases ranged from $100,000 to $250,000. See ADD 34 (citing cases). Given the focus on the severity of Pan Am's conduct and the range of punitive damages awards in FRSA cases

involving comparable conduct, awarding $250,000 in punitive damages was not an abuse of discretion.

CONCLUSION

For the foregoing reasons, this Court should deny Pan Am's Petition for Review.

Respectfully submitted,

NICHOLAS C. GEALE
Acting Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

/s/ Dean A. Romhilt
DEAN A. ROMHILT
Senior Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5550

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing Brief for the Acting Secretary of Labor:

(1) was prepared in a monospaced typeface (Courier New 12-point font) containing no more than 10.5 characters per inch, and

(2) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 12,850 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ Dean A. Romhilt
DEAN A. ROMHILT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Acting Secretary of Labor was served this 24th day of February, 2017, via this Court's ECF system and by pre-paid delivery, on each of the following:

Andrew J. Rolfes
Robert S. Hawkins
Buchanan Ingersoll & Rooney PC
Two Liberty Place
50 S. 16th Street, Suite 3200
Philadelphia, PA 19102

Stephen J. Fitzgerald
Garrison, Levin-Epstein, Richardson,
Fitzgerald & Pirrotti, P.C.
405 Orange Street
New Haven, CT 06511

/s/ Dean A. Romhilt
DEAN A. ROMHILT

ADDENDUM