No. 20-60274

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JEFF YOWELL,

Petitioner,

v.

ADMINISTRATIVE REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR,

Respondent,

FORT WORTH & WESTERN RAILROAD COMPANY,

Intervenor.

On Petition for Review of the Final Decision and Order of the
Administrative Review Board

BRIEF FOR RESPONDENT THE SECRETARY OF LABOR

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rules 26.1 and 27-1(a)(9), counsel for Respondent U.S. Department of Labor certifies that the following persons and entities have or may have an interest in the outcome of this appeal:

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STATEMENT REGARDING ORAL ARGUMENT

The Secretary believes that oral argument may assist the Court in resolving this case, and will gladly participate in any oral argument the Court schedules.

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JURISDICTIONAL STATEMENT

This case arises under the anti-retaliation provision of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20109, and its implementing regulations, 29 C.F.R. pt. 1982. The Secretary of Labor had subject-matter jurisdiction based on Jeff Yowell's whistleblower complaint, filed on September 15, 2017, with the Occupational Safety and Health Administration ("OSHA"). Excerpts of Record ("ER") 6;[1] 49 U.S.C. § 20109(d)(1); 29 C.F.R. §§ 1982.103-.104.

On February 5, 2020, the Administrative Review Board ("ARB"), to whom the Secretary had delegated authority and assigned responsibility to make final agency decisions under the FRSA's anti-retaliation provision, dismissed Yowell's complaint. ER-86; Secretary's Order 01-2019 ¶ 5(b)(19) (Apr. 3, 2019); 29 C.F.R. §§ 1982.100, 1982.110. Yowell timely filed a petition for review of the ARB's order with this Court on April 3, 2020. This Court has jurisdiction because the alleged violation occurred in Texas. 49 U.S.C. § 20109(d)(4); ER-7.

QUESTIONS PRESENTED

1. Yowell failed to report his workplace injury timely, as FWWR's safety policy required. He instead waited a week to disclose it, and then only did so under questioning about a different injury that he claimed to have suffered that day. FWWR fired Yowell for violating its rule requiring timely injury reporting. Did the

[1] Citations to the ER are to the PDF file page number.

ARB correctly conclude that Yowell failed to show, based solely on this chain of events, that his late injury report was a contributing factor to his discharge?

2. Did FWWR meet its burden to prove by clear and convincing evidence that it would have fired Yowell for failing to report his injury timely even if he had never reported it at all?

STATEMENT OF THE CASE

A. The FRSA's Anti-Retaliation Provision

Congress enacted the FRSA "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Under the FRSA's anti-retaliation provision, a railroad carrier "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done ... to notify, or attempt to notify, the railroad carrier ... of a work-related personal injury." *Id.* § 20109(a)(4). An employee who alleges that a carrier unlawfully retaliated against him may seek relief by filing a complaint with the Secretary of Labor. *Id.* § 20109(d)(1). The Secretary has assigned OSHA responsibility to adjudicate FRSA anti-retaliation complaints. 29 C.F.R. §§ 1982.103-.104.

The FRSA's anti-retaliation provision incorporates the rules, procedures, and burdens of proof that apply to enforcement actions under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21"). *See* 49 U.S.C.

§ 20109(d)(2)(A)(i). To prove that a violation has occurred, an employee must show that his protected activity "was a contributing factor in the unfavorable personnel action" taken against him. *Id.* § 42121(b)(2)(B)(iii). A "contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Ameristar Airways, Inc. v. Admin. Review Bd.*, 650 F.3d 562, 567 (5th Cir. 2011) (quotation marks omitted). Even if an employee makes this showing, however, he is not entitled to relief "if the employer demonstrates by clear and convincing evidence that [it] would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(B)(iv).

Either party may file objections to OSHA's findings and request a de novo hearing before an ALJ. 29 C.F.R. §§ 1982.106-.107. A party may seek review of the ALJ's decision before the ARB, *id.* § 1982.110, and of the ARB's decision in the appropriate U.S. Court of Appeals, 49 U.S.C. § 20109(d)(4).

B. Factual Background

Fort Worth & Western Railroad ("FWWR") requires its employees to report promptly any workplace injuries they suffer. ER-79. An employee must report an injury "immediately, no matter how small," and "even if no pain is experienced." *Id.* This rule promotes railroad safety, enabling FWWR to investigate the scene of an accident immediately for unsafe conditions. *Id.* Employees who violate this rule are subject to discipline on a case-by-case basis, up to and including termination. *Id.*

FWWR hired Yowell in May 2017. ER-78. On August 28, 2017, Yowell reported for an overnight shift at 11:00 PM. *Id.* Sometime the next morning, while still on shift, Yowell reported that he had injured his knee when he slipped climbing out of a boxcar. ER-8, 78. His supervisor alerted FWWR's Chief Transportation Officer, Jared Steinkamp, and General Director of Operating Policies, James Gibson, who spoke to Yowell. ER-78. Yowell provided Gibson a location where his injury supposedly had occurred. *Id.* When Gibson questioned Yowell's account based on internal inconsistencies, Yowell gave a second location where it might have occurred, then a third location. *Id.* Gibson told Yowell to write a statement of his account. *Id.*

Yowell eventually acknowledged that he had injured his knee the week before, on or about August 21, but had not reported it at the time because he had not felt pain. ER-12, 78. Steinkamp instructed Yowell to write down that he had been injured the prior week. ER-78-79. He then asked Yowell to write a second statement, due to Yowell's conflicting accounts and disclosure that he had suffered an unreported injury a week earlier. ER-79. Neither Steinkamp nor Gibson told Yowell to write anything false. *Id.* Yowell then sought medical treatment for his injury. *Id.*

Gibson believed that Yowell had not actually suffered any injury that day, but merely felt pain stemming from his unreported injury the week before. *Id.* He recommended that Yowell be fired for failing to report his injury from the prior week when it first happened. *Id.* Steinkamp felt that Yowell's failure to report his injury

promptly warranted termination because it had prevented FWWR from inspecting the scene of the injury for unsafe conditions. *Id.* After discussing the matter with FWWR's President, CEO, and Human Resources Department, as company policy required, Steinkamp fired Yowell on September 13, 2017. ER-25, 79.

C. Procedural Background

Yowell filed a complaint against FWWR under the FRSA's anti-retaliation provision. ER-79. OSHA investigated Yowell's complaint and determined that the evidence did not support a finding that FWWR had retaliated against him. *Id.* Yowell objected to OSHA's determination and requested a hearing before an Administrative Law Judge ("ALJ"). *Id.* At the hearing, Steinkamp testified that he "made the decision to terminate [Yowell] because he failed to timely report an injury one week prior." ER-22. Gibson, meanwhile, testified that he would personally walk an employee who did not report an injury timely off the worksite. ER-15. The ALJ found Steinkamp and Gibson "to be unbiased, sincere, and credible witnesses." ER-36.

Yowell also testified at the hearing, but the ALJ found his testimony to be not credible, being "contradictory, inconsistent, and unpersuasive" with respect to when and how he had been injured. ER-7-12, 35-36. The ALJ also heard evidence that FWWR had previously fired another employee, Benito Aceves, for failing to timely report an injury. ER-23. FWWR rehired Aceves only after he clarified that he had

injured himself while exercising at the gym, not at work. *Id.* Four other employees had timely reported their workplace injuries and had not been terminated. ER-58.

The ALJ explained that under ARB precedent, "[p]rotected activity and employment actions are inextricably intertwined when protected activity directly leads to the adverse employment action in question, or the employment action cannot be explained without discussing the protected activity." ER-45 (cleaned up). These circumstances, he said, create a "presumptive inference of causation." *Id.* The ALJ held that Yowell "was terminated because he did not promptly or immediately report his right knee injury," explaining that had Yowell not reported his injury, albeit belatedly, FWWR would not have learned of his failure to report it timely, and thus would not have fired him. ER-47. As such, he concluded, Yowell's injury report was "inextricably intertwined" with, and thus a contributing factor to, his firing. ER-47, 58.

For similar reasons, the ALJ further concluded that FWWR had not proven by clear and convincing evidence that it would have fired Yowell absent his injury report. ER-64. He explained that FWWR would not have known of Yowell's failure to report his injury timely had Yowell not reported it belatedly. *Id.* The ALJ awarded Yowell back pay, reinstatement, costs, and attorney's fees, as well as expungement of any references to his termination in his employee personnel file. ER-72.

The ARB reversed. ER-78. It explained that the "'inextricably intertwined' or 'chain of events' analysis" supporting the ALJ's contributing factor determination

was no longer good law. ER-83. "By placing the focus on how the employer came to learn of the employee's wrongdoing rather than the employer's actions based on that wrongdoing or protected activity," the ARB explained, the "'chain of events' causation [standard] departs from the [FRSA's] 'contributing factor' text." *Id.* In reaching this conclusion, the ARB relied on its recent decision *Thorstenson v. BNSF Railway Co.*, *id.*, which had explained that "Congress did not intend to insulate wrongdoing because the employee engaged in protected activity," and thus that "reporting the injury is not a *proximate cause* to the termination when the employee is terminated ... for some other conduct discovered as part of the review process initiated by the report of the injury," ARB Nos. 18-0059, 18-0060, 2019 WL 7042958, at *6 (Nov. 25, 2019). The ALJ's analysis of FWWR's same-action defense, the ARB further concluded, "presents the same error." ER-84.

The ARB saw no need to remand the case, concluding that the ALJ's factual findings established that FWWR had fired Yowell solely for failing to report his injury timely, and thus proven its same-action defense. ER-85. It vacated the ALJ's award and dismissed Yowell's complaint. ER-86. Yowell filed a petition for review.

SUMMARY OF ARGUMENT

The ARB correctly dismissed Yowell's complaint based on the ALJ's undisputed factual findings. Yowell's late injury report was not a contributing factor to his discharge because FWWR fired Yowell for failing to report his injury timely, not

for his belated decision to report it a week later. Yowell argues that FWWR would never have learned of his failure to report his injury timely had he not reported it belatedly. But even if his injury report factually caused his discharge, it was not a proximate cause. When a carrier disciplines an employee for workplace misconduct that his own injury report disclosed, he cannot rely solely on a bare chain of events between his report and his discipline to show that his report proximately caused—and thus, was a contributing factor to—his discipline. He may still rely on other evidence, whether direct or circumstantial, in conjunction with the factual relationship between the protected report and carrier's asserted basis for discipline to show that his report contributed to his disciple, but Yowell offers no such evidence here.

For similar reasons, the ARB did not err in concluding that FWWR had proven by clear and convincing evidence that it would have fired Yowell for failing to report his injury timely even absent his belated injury report. Yowell argues that disciplining an employee for reporting his injury late unduly burdens his right to report the injury, but again, Yowell was not fired for reporting his injury late—he was fired for failing to report it immediately. His eventual decision to report his injury belatedly did not undo his initial failure to report his injury when he should have.

In any event, nothing in the FRSA prohibits a carrier from imposing a reasonable, non-pretextual safety rule requiring an employee to timely report a workplace injury. Nor does it matter whether FWWR would have known about Yowell's failure

to report his injury timely absent his injury report. The relevant question is whether, absent Yowell's late injury report, FWWR would have fired him *if it had known* that he had not reported his injury timely. The FRSA does not require FWWR to go even further and show that it would have inevitably discovered Yowell's misconduct independently of his injury report. For all these reasons, this Court should affirm the ARB's dismissal of Yowell's complaint.

STANDARD OF REVIEW

The Administrative Procedure Act, 5 U.S.C. § 706(2), governs judicial review of the ARB's decisions. *See* 49 U.S.C. § 20109(d)(4); 49 U.S.C. § 42121(b)(4)(A). Under this standard, this Court reviews the ARB's legal conclusions de novo and its factual findings for substantial evidence. *See Ameristar Airways, Inc.*, 650 F.3d at 566. "The [ARB's] decision will be upheld unless it is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 258 (5th Cir. 2014) (quotation marks omitted).

ARGUMENT

The ARB correctly dismissed Yowell's complaint, concluding that he had failed to show that his injury report was a contributing factor to his discharge and that, in any event, FWWR had proven by clear and convincing evidence that it would have fired Yowell even absent the injury report. Yowell challenges the ARB's reasoning on various grounds, but his arguments essentially boil down to the contention

that a carrier cannot discipline an employee for failing to report his workplace injury timely when it only learned of such misconduct from the employee's own belatedly-filed injury report. As explained further below, Yowell's arguments lack merit.

I. THE ARB CORRECTLY CONCLUDED THAT YOWELL'S LATE INJURY REPORT WAS NOT A CONTRIBUTING FACTOR TO HIS FIRING

The ARB correctly concluded that Yowell's injury report was not a contributing factor to FWWR's decision to discharge him based on the facts the ALJ found. ER-83. As the ARB explained, the ALJ credited evidence that FWWR fired Yowell not for reporting his injury, but for violating a safety rule that required him to report his injury promptly. ER-85.[2] FWWR holds its employees to "a very strict policy to timely report injuries" as soon as they occur, so that it "may investigate the scene for safety" straight away. ER-79. Employees must report any injuries "immediately, no matter how small," and "even if no pain is experienced." *Id.* Gibson "would personally walk an employee off grounds for failing to timely file an injury report." *Id.* FWWR's disciplinary policy "provides that discipline is decided on a case-by-case

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[2] While ARB used the term "late reporting" to describe the conduct for which FWWR fired Yowell, ER-82, 84, that term is something of a misnomer here. In context, "late reporting" is a shorthand for Yowell's failure to report his injury promptly, not for his eventual decision to report it belatedly. The ARB made clear that FWWR fired Yowell "because he did not promptly or immediately report his right knee injury," not for his act of reporting his injury late. ER-84-85.

basis," and allows for termination with the approval of a supervisor above the employee's own supervisor, after discussion with the company president, CEO, and human resources office. *Id.*

Yowell does not contest these findings. Nor does he dispute that he failed to report his injury for roughly a week; that as a result, "FWWR was not able to investigate the scene of the first injury to make sure that it was safe," thus jeopardizing other workers' safety, *id.*;[3] or that even if he had never reported his injury at all, FWWR would have still fired him if it ever discovered that he had not reported his injury promptly. Thus, as Steinkamp credibly testified and the ARB concluded, FWWR discharged Yowell not for reporting his injury, but for *failing to report it timely*, in violation of FWWR's safety policy. ER-79, 84-85 (Yowell "was terminated because he did not promptly or immediately report his right knee injury").[4]

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[3] Yowell argues that FWWR's justification for firing him—that his failure to report his injury timely prevented it from inspecting the scene for unsafe conditions—necessarily means that it was not in compliance with a federal regulation, 49 C.F.R. § 229.21, that requires it to inspect locomotives daily for defects. Appellant's Opening Br. ("AOB") 40. But FWWR can inspect its locomotives on a daily basis, while still recognizing that even reasonably diligent inspections may sometimes fail to detect a dangerous condition. It thus relies on injured employees to report any dangerous conditions that the inspections have overlooked. Indeed, the very fact that a workplace injury has occurred can give a carrier reason to believe that its daily inspections may have overlooked a safety hazard. And even if FWWR was in violation of § 229.21, that would not bear on the validity of its reason for firing Yowell.

[4] The ARB reiterated this point several more times. *See* ER-85 (FWWR officials "agreed [that] Complainant's employment should be terminated for failing to promptly report his knee injury."); *id.* ("Complainant violated Respondent's policy

That distinction matters under the FRSA, which protects an employee's decision to report his injury, but not his decision to *fail* to report an injury timely where the carrier's safety policy requires him to do so. *See* 49 U.S.C. § 20109(a)-(c); *cf. Heim v. BNSF Ry. Co.*, 849 F.3d 723, 727 (8th Cir. 2017) (contributing factor standard unmet where "there is no dispute that [carrier] requested [that employee] submit a formal injury report. On the contrary, [he] contends that [it] *pressured* him to fill out the report."). Indeed, because carriers may rely on timely-filed safety reports to remedy safety hazards before other workers are harmed, ER-79, protecting an employee's failure to report an injury timely would undermine, not serve, the FRSA's purpose "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101.

Two recent Eighth Circuit decisions recognize that a carrier does not necessarily violate the FRSA's anti-retaliation provision by disciplining an employee for failing to report an injury timely, even if he eventually reports it later. First, in *Dakota, Minnesota & Eastern Railroad Corp. v. Administrative Review Board* ("*Dakota*"), a carrier disciplined an employee for waiting about twelve hours to report his workplace injury. 948 F.3d 940, 942-43 (8th Cir. 2020). The Eighth Circuit held that the employee could not satisfy the contributing factor standard because the carrier

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and did not promptly report his right knee injury."); *id.* ("Respondent terminated Complainant for violating its employee handbook work and safety rule, which requires an injury to be accurately and promptly reported to a supervisor.").

had disciplined him "not for filing the report, but for failure to promptly report the incident, which is required by [its] operating rules, consistent with [its] rail safety obligations." *Id.* at 946 (quotation marks omitted). When "the protected activity [i]s the *untimely* filing of a report that [a carrier's] operating rules require employees to promptly file, consistent with railroad safety," it held, discipline "imposed for violating that rule does not, without more," violate the FRSA. *Id.* (emphasis added).

The Eighth Circuit reached a similar conclusion in *Neylon v. BNSF Railway Co.*, 968 F.3d 724 (8th Cir. 2020). There as in *Dakota*, a carrier fired an employee for failing to report his injury until well after it occurred, and the Eighth Circuit held the employee could not satisfy the contributing factor standard. *Id.* at 729-30. Relying on *Dakota*, it recognized that the carrier had fired him not for reporting his injury, but for failing to obey its "rules requir[ing] employees to promptly file" an injury report "consistent with railroad safety." *Id.* Here, as in *Dakota* and *Neylon*, FWWR's decision to fire Yowell for failing to report his injury timely, as its policy required, does not necessarily make his injury report a contributing factor to his discharge.

A. An Employee Cannot Satisfy The Contributing Factor Standard By Showing Only That A Carrier Disciplined Him For A Failure To Report His Injury Timely That His Own Late Report Disclosed To It

Yowell does not dispute that FWWR's safety policy required him to promptly report his injury, that he violated that policy, that FWWR fired him for violating that policy, or that a carrier generally may fire an employee for violating its safety policy.

He argues that his injury report was a contributing factor to his discharge nonetheless because FWWR only learned that he did not report his injury timely from the report that he eventually did make. Under his view, an injury report is a contributing factor to an adverse employment action when it merely alerts a carrier to an employee's workplace misconduct, for which the carrier then disciplines the employee. Such a far-sweeping theory would read the principle of proximate causation out of the anti-retaliation provision, enabling an employee to shield himself from discipline for his own workplace misconduct by essentially blowing the whistle on himself. Every Circuit to consider such a theory has rejected it, as has the ARB. This Court should reject it as well. Instead, it should hold that an employee cannot show that his injury report proximately caused (and thus, cannot show that it was a contributing factor to) his discipline when the carrier disciplined him solely for workplace misconduct that the report first brought to its attention. He may still be able to show that he suffered retaliation for reporting his injury through other direct or circumstantial evidence—just not through the bare chain of events between his injury report, the carrier's discovery of his own workplace misconduct as a result of his report, and its decision to discipline him for that misconduct.

1. <u>The FRSA's contributing factor standard incorporates proximate causation principles.</u>

In construing federal statutes, courts "start from the premise that when Congress creates a federal tort it adopts the background of general tort law." *Staub v.*

Proctor Hosp., 562 U.S. 411, 417 (2011) (construing the Uniformed Services Employment and Reemployment Rights Act anti-retaliation provision's proximate causation standard); *see also Paroline v. United States*, 572 U.S. 434, 458 (2014) (considering "the background legal tradition against which Congress has legislated" in construing a statutory causation standard). "In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (quotation marks omitted).

At common law, an "essential element" of any tort cause of action was proximate causation—the basic requirement, although formulated differently in different contexts, "that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." *Prosser and Keaton on the Law of Torts* § 41 (5th ed. 1984). "In a philosophical sense," after all, "the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would set society on edge and fill the courts with endless litigation." *Id.* Proximate causation is "generally thought to be a necessary limitation on liability," *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 838 (1996), reflecting the commonsensical notion that "[i]njuries have countless causes, and not all should give rise to legal liability," *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011).

“At bottom, the notion of proximate cause reflects ideas of what justice demands.” *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 268 (1992) (quotation marks omitted). It thus looks to considerations “of public policy” and “a rough sense of justice” to limit the scope of liability that factual causation otherwise would yield. *McBride*, 564 U.S. at 692-93 (quotation marks omitted); *see also Moser v. Texas Trailer Corp.*, 623 F.2d 1006, 1012 (5th Cir. 1980) (noting “the policy considerations embraced by the term ‘proximate cause’”); *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 983 (5th Cir. 1978) (“A court makes a policy judgment on the limits of liability when causation in fact has been established.”); *CFTC v. S. Tr. Metals, Inc.*, 894 F.3d 1313, 1330 (11th Cir. 2018) (proximate causation “is as much a question of public policy as it is of direct causality.”); *Restatement (Third) of Torts: Physical & Emotional Harm* (“*Restatement*”) § 29 (2010) (proximate causation turns “upon mixed considerations of logic, common sense, justice, policy and precedent” (quotation marks omitted)).

Thus Supreme Court thus has routinely “found a proximate-cause requirement built into a statute that did not expressly impose one.” *Paroline*, 572 U.S. at 446; *see, e.g.*, *Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336, 342-46 (2005) (Securities Exchange Act); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-70 (1992) (Racketeer Influenced and Corrupt Organizations Act); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S.

519, 529-36 (1983) (Clayton Act); *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (National Environmental Policy Act).

The FRSA's anti-retaliation provision does not "speak directly to the question" of proximate causation, and so should not be read "to abrogate [that] common-law principle" entirely. *Texas*, 507 U.S. at 534. As the Sixth, Seventh, and Eighth Circuits, and the ARB, thus have concluded, its contributing factor standard, while broad, incorporates a proximate causation requirement. *See BNSF Ry. Co. v. Admin. Review Bd.* ("*Carter*"), 867 F.3d 942, 946 n.2 (8th Cir. 2017) ("Though 'contributing factor' is a lenient causation standard, an FRSA plaintiff must still prove that his injury report not only was a 'but for' cause of his injury, but was the proximate cause as well." (quotation marks omitted)); *Koziara v. BNSF Ry. Co.*, 840 F.3d 873, 877 (7th Cir. 2016) (FRSA requires employee to show "proximate causation"); *Lemon v. Norfolk S. Ry. Co.*, 958 F.3d 417, 420 (6th Cir. 2020) ("[I]t's hard to think of any event in a person's life that could not be viewed as a contributing factor under this theory"); *Thorstenson*, 2019 WL 7042958, at *7 ("[T]he protected activity [must be] a proximate cause of the adverse action, not merely an initiating event.").

2. An injury report does not proximately cause an employee's firing when it merely alerts the carrier to his own misconduct.

To say that the FRSA's contributing factor standard incorporates some kind of proximate causation requirement does not tell us what precise form this requirement takes. "Common-law 'proximate cause' formulations varied," after all.

McBride, 564 U.S. at 693; *see also id.* at 701 (noting "the lack of consensus on any one definition of 'proximate cause'").[5] While a statute may adopt some "test for proximate causation," when "the legislative purpose is to loosen constraints on recovery, there is little reason for courts to hark back to stock, judge-made proximate-cause formulations." *Id.* at 701-03. That Congress enacted the FRSA's anti-retaliation provision specifically "to ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers," *Norfolk S. Ry. Co. v. Solis*, 915 F. Supp. 2d 32, 38 (D.D.C. 2013) (quoting H.R. REP. NO. 110-259 at 348 (2007)), counsels against reading it to include a particularly "constricted" form of proximate causation, although not for ignoring proximate causation altogether. *McBride*, 564 U.S. at 693. But where is the line?

A policy concern that courts repeatedly voice in FRSA anti-retaliation cases is that an employee should not be able to shield himself from discipline for his own workplace misconduct merely by reporting it to the carrier himself. *See, e.g.*, *Neylon*, 968 F.3d at 729 ("[E]mployees cannot immunize themselves against wrongdoing by

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[5] Although no single uniform formulation of the proximate causation requirement existed at common law, the fact that the general notion of proximate causation was a fundamental common law concept counsels for reading the FRSA to incorporate some formulation of proximate causation. *Cf. Jaffee v. Redmond*, 518 U.S. 1, 14 n.13 (1996) (recognizing a federal psychotherapist privilege based in part on "the force of the States' unanimous judgment that some form of psychotherapist privilege is appropriate," notwithstanding "divergence among the States concerning the types of therapy relationships protected and the exceptions recognized").

disclosing it in a protected-activity report."); *BNSF Ry. Co. v. U.S. Dep't of Labor* ("*Cain*"), 816 F.3d 628, 639 (10th Cir. 2016) ("Because BNSF contends that it fired Cain for misconduct he revealed in his updated Report, Cain cannot satisfy the contributing-factor standard merely by arguing that BNSF would not have known of his delays in reporting his injuries absent his filing the updated Report."); *Dakota*, 948 F.3d at 944, 946 (rejecting idea that "an employee can be free of discipline and recover FRSA damages simply by disclosing misconduct of which the employer is otherwise unaware in a report that will be considered protected FRSA activity"); *Lemon*, 958 F.3d at 420 (rejecting theory of liability "because it would authorize employees to engage in banned behavior so long as it occurs during protected conduct."); *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969-70 (8th Cir. 2017) ("An employee who engages in protected activity is not insulated from adverse action for violating workplace rules." (cleaned up)).

Courts have also voiced this concern in cases under other statutes that protect employees' rights. *See, e.g.*, *Marano v. Dep't of Justice*, 2 F.3d 1137, 1142 n.5 (Fed. Cir. 1993) (doubting that Whistleblower Protection Act [WPA] protects employee who "in essence blew the whistle on his own misconduct in an effort to acquire [its] protection");[6] *Richey v. City of Indep.*, 540 F.3d 779, 784 (8th Cir. 2008) (noting

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[6] As this Court has recognized, *Marano* is on-point in FRSA anti-retaliation cases because the WPA and FRSA both use the contributing factor test. *See* 5 U.S.C.

under § 1983 and state civil rights law that "[a]n employee who engages in protected activity is not insulated from adverse action for violating workplace rules.").

The Sixth Circuit illustrated this concern with the following hypothetical: "Imagine an employee who makes a pass at his manager while reporting an injury. Discipline in that case would clearly be caused—and justified—by the harassment, whether or not it occurred when he gave his boss the injury report." *Lemon*, 958 F.3d at 420. The FRSA should not shield such an employee from consequences for his own misconduct. That is all the more so when the misconduct in question is a violation of a carrier's safety rules. Allowing an employee to avoid discipline for behavior that endangers other employees and/or railroad passengers undermines the FRSA's central purpose to promote railroad safety. *See* 49 U.S.C. § 20101.

These concerns fit comfortably within the "considerations of logic, common sense, justice, policy and precedent," *Restatement* § 29, that animate proximate causation jurisprudence. Unsurprisingly, courts and the ARB have relied on proximate causation principles to hold that an employee cannot satisfy the FRSA's contributing factor standard by showing only that the carrier disciplined him for workplace misconduct that his own injury report revealed. *See Lemon*, 958 F.3d at 420 (rejecting

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§ 1221(e)(1); *Halliburton, Inc.*, 771 F.3d at 263 n.8; *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008).

argument that carrier violated FRSA by firing employee after his injury report revealed that he lied about his injury, because it "eliminates causation from the liability inquiry"); *Carter*, 867 F.3d at 944, 946 n.2 (employee could not "prove that his injury report ... was the proximate cause" of his discharge when it merely alerted carrier that he had lied on his job application (quotation marks omitted)); *Koziara*, 840 F.3d at 877 (employee's "filing of [his injury] report was not a proximate cause of his being fired" when it merely alerted carrier that he had stolen from it); *Thorstenson*, 2019 WL 7042958, at *7 ("[R]eporting [an] injury is not a *proximate cause* to the termination when the employee is terminated… for some [wrongful] conduct discovered as part of the review process initiated by the report of the injury."). No Circuit has held otherwise. Thus, wherever the appropriate line for proximate causation under the FRSA's anti-retaliation provision falls, at a minimum, an employee's injury report does not proximately cause his discipline simply because the employer imposed the discipline for misconduct that it learned of through the report.

3. Preventing an employee from relying solely on the chain of events between the misconduct that his injury report disclosed to the carrier and the discipline that he suffered as a consequence does not prevent him from establishing FRSA liability through other evidence.

This is not to say that an employee who has committed workplace misconduct loses his right to invoke the anti-retaliation provision's protections. He may still satisfy the contributing factor standard through any other evidence, whether direct or circumstantial, so long as it amounts more than a bare chain of events between his

injury report and his discipline for misconduct that his report revealed. *See Loos v. BNSF Ry. Co.*, 865 F.3d 1106, 1112 (8th Cir. 2017), *rev'd*, 139 S. Ct. 893 (2019), *reinstated in relevant part*, 920 F.3d 1218 (8th Cir. 2019) (employee can prove retaliation through "circumstantial evidence" in the "absence of direct evidence"); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 163 (3d Cir. 2013) (employee can prove retaliation through "evidence [that] is entirely circumstantial"). He simply cannot rely solely on such chain-of-events evidence to shield himself from discipline for his own wrongdoing.

Cain illustrates this principle. There, the Tenth Circuit correctly concluded that an employee could not "satisfy the contributing-factor standard merely by arguing that [the carrier] would not have known of his delays in reporting his injuries absent his filing the [injury] [r]eport." 816 F.3d at 639. But it nonetheless determined that he had met his burden by offering evidence that went beyond this bare chain of events—specifically, that (1) his "supervisors had discouraged him from filing the … [r]eport and hinted darkly at unfavorable consequences if he did so," (2) he was fired soon after filing the report, and (3) "the investigation that led to the firing was initiated before the investigation of whether he was responsible for the accident." *Id.* at 639-40. The fact that this evidence was circumstantial made no difference to the court. What mattered was that the employee had shown more than that he was fired for misconduct to which his own injury report had merely alerted the carrier.

And in *Blackorby v. BNSF Railway Co.*, a carrier disciplined an employee for failing to report his injury timely. 849 F.3d 716, 718-19 (8th Cir. 2017). As in *Cain*, the Eighth Circuit determined that the employee had offered sufficient evidence of retaliation to merit a new trial—this time, by showing that his managers (1) "repeatedly discouraged him from filing his injury report" and (2) "may earn bonuses based on the rates of employee injuries." *Id.* at 722.

Similarly, in *James v. CSX Transportation, Inc.*, a district court determined that the jury could reasonably find that the employee's protected report of a software malfunction that led to a speeding incident reportable to the Federal Railroad Authority was a contributing factor to his discipline for speeding where the evidence supported a finding "that [his] report was the only way that [the carrier] would have acquired knowledge of" the behavior for which it disciplined him. No. 4:15-CV-204-CDL, 2017 WL 2471828, at *8 (M.D. Ga. Feb. 21, 2017). But *James* did not rely solely on a bare chain of events between the protected report and discipline—the evidence also showed, among other things, that the carrier "did not ordinarily punish employees who" for the same behavior, which suggested pretext. *Id.* Here, in contrast, Yowell offered no evidence that FWWR's reason for firing him was "pretext." ER-85.

Blackorby, *Cain*, and *James* thus make clear that even if an employee commits workplace misconduct, he still may prove retaliation—even through circumstantial

evidence alone—so long as he does not rely solely on a bare chain of events between his injury report and the discipline he experienced when his report revealed his misconduct to the carrier.

4. <u>An employee who has not engaged in misconduct may still rely on chain-of-events evidence to satisfy the contributing factor standard.</u>

Finally, an employee who has *not* engaged in misconduct remains free to rely on chain-of-events evidence to satisfy the contributing factor standard. In *Marano*, for example, an employee blew the whistle on misconduct and mismanagement by his office's supervisors. 2 F.3d at 1138. His report sparked an investigation that resulted in a reorganization of his office. *Id.* As part of that reorganization, he was reassigned to a different office. *Id.* The employee challenged his reassignment under the WPA, which, like the FRSA, uses the contributing factor standard. *Id.* at 1138, 1140. The Federal Circuit accepted the ALJ's factual finding that the employer had not considered his "whistleblower status, and the bare fact that he blew the whistle," in reassigning him, but rather had reassigned him as part of a broader reorganizational effort to remedy the mismanagement that he had identified. *Id.* at 1141-42.

The court nonetheless ruled for the employee. *Id.* at 1143. It explained that when an "employee discloses information that is closely related to [his] day-to-day responsibilities, ... structuring a remedy to the situation revealed in the disclosure could foreseeably affect the whistleblower." *Id.* at 1142. In such a situation, the court recognized, "a tension exists between the WPA's protection of the individual and

the [employer]'s need to act on the basis of the information revealed to remedy the disclosed wrongdoing." *Id.* But "to prevent subversion of the WPA's policy goals," it held, the "uncontested sequence of events" connecting the employee's report to his reassignment sufficed to satisfy the contributing factor test. *Id.* at 1143.

In reaching this conclusion, the court stressed that the employee "ha[d] done no wrong." *Id.* at 1142. It voiced "doubt that the WPA would protect [an employee] from an [employer]'s remedial actions" in "a situation in which [he] in essence blew the whistle on his own misconduct in an effort to acquire the WPA's protection." *Id.* at 1142 n.5. *Marano* thus drew a bright line—an employee may satisfy the contributing factor standard by showing that he suffered discipline due to filing a protected report if, but only if, his report did not alert his employer to his own misconduct.

This Court followed *Marano*'s approach in *Halliburton, Inc. v. Administrative Review Board*. *Halliburton* arose under the Sarbanes-Oxley Act's anti-retaliation provision, which like the FRSA's anti-retaliation provision incorporates AIR-21's "rules and procedures." 18 U.S.C. § 1514A(b)(2). In *Halliburton*, an accountant filed a complaint with the Securities and Exchange Commission ("SEC") alleging that his firm "was engaged in questionable accounting practices." 771 F.3d at 256 (quotation marks omitted). The SEC informed the firm's General Counsel that it was investigating the complaint. *Id.* at 256-57. Although the SEC did not identify the accountant as the whistleblower, the General Counsel was able to deduce his identity. *Id.* at 257.

Another executive then alerted the accountant's colleagues of the SEC investigation and the fact that the accountant had informed the SEC of their accounting practices. *Id.* The accountant's colleagues began to avoid him and treat him differently. *Id.*

This Court recognized that *Marano* was on-point because the WPA "contains the same contributing factor test as SOX." *Id.* at 263 n.8. Applying *Marano*, it determined that the firm's disclosure of the accountant's identity to his colleagues was an adverse action under SOX, and that his SEC complaint had been a contributing factor to it. *Id.* at 259, 262-63. This Court rejected the firm's argument that it had not acted with a wrongful motive, relying on *Marano* for the proposition that no wrongful motive was required. *Id.* (citing 2 F.3d at 1141). This Court's analysis thus conformed to the line *Marano* had drawn—the accountant's complaint had not disclosed any wrongdoing on his own part, so the bare chain of events between it and the adverse action he suffered sufficed to satisfy the contributing factor standard.

* * *

Here, of course, Yowell's injury report *did* disclose to FWWR his own wrongdoing—namely, his failure to report his injury timely, as FWWR's safety policy requires. He thus cannot rely solely on the fact that FWWR fired him for misconduct that his report revealed to it to satisfy the contributing factor standard. But that is the only theory of FRSA liability he has offered. He does not claim, nor do the ALJ's factual findings support a claim, that FWWR used his failure to report his injury

timely as a pretext to fire him for reporting it at all. Because Yowell hangs his entire claim on the bare chain of events between his injury report and his discharge, he cannot satisfy the FRSA's contributing factor standard.

B. The ARB Did Not Err In Concluding That A Bare Chain of Events Between An Employee's Injury Report And A Carrier's Decision To Fire Him For The Misconduct That His Report Revealed Does Not Satisfy The Contributing Factor Standard

Yowell argues that the ARB's *Thorstenson* decision, which it relied on here to conclude that he had not shown that his injury report was a contributing factor to his firing, is flawed in two ways. First, he argues that the ARB erred in reading the contributing factor standard to adopt proximate causation principles. AOB 31. Second, he argues that the ARB erroneously rejected his chain-of-events theory on the ground that the ALJ used the term "inextricably intertwined," which is absent from the FRSA's text. *Id.* at 27. Neither argument has merit.

1. The ARB did not err in construing the FRSA's contributing factor standard to embrace proximate causation principles.

First, Yowell argues that the ARB erred in reading proximate causation into the contributing factor standard. He relies on *CSX Transportation v. McBride, Inc.*, which held that the Federal Employers' Liability Act ("FELA") "resulting in whole or in part" causation standard imposes liability on a carrier if its "negligence played any part in bringing about [an employee's] injury," 564 U.S. at 688, and *Rogers v. Missouri Pacific Railroad Co.*, which held the same, 352 U.S. 500, 506 (1957). But

neither *McBride* nor *Rogers* held that FELA's "in whole or in part" standard eschews proximate causation principles. Indeed, *McBride* explained that the FELA *does* adopt proximate causation principles, 564 U.S. at 705 ("That, indeed, is the test Congress prescribed for proximate causation in FELA cases."), squarely rejecting the idea that *Rogers* had "eliminated the *concept* of proximate cause in FELA cases," *id.* at 700 ("*Rogers* describes the test for proximate causation applicable in FELA suits." (cleaned up)).

Under the FELA, *McBride* held, an employee's "injury is proximately caused by the railroad's negligence if that negligence played any part in causing the injury." *Id.* (cleaned up). The same would be true of the FRSA—protected activity proximately caused the employer's adverse action if it was a contributing factor to it. *See Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1195 (9th Cir. 2019) ("[T]he only proof of discriminatory intent that a plaintiff is required to show is that his or her protected activity was a "contributing factor" in the resulting adverse employment action.") But to say that a carrier terminated an employee for misconduct that it discovered from his own injury report is hardly the same as saying that the injury report "played [a] part," *McBride*, 564 U.S. at 700, in the employee's firing. Yowell cites no authority for such a claim, and as discussed, every Circuit to have considered it has rejected it. Of course, as *Marano* and *Halliburton* make clear, an employee's injury

report plays a part in his adverse employment action if it causes the action other than by alerting the carrier to his own misconduct. But this is not such a case.

McBride emphasized, moreover, that the "in whole or in part" standard would not compel relief for any employee who can "show mere 'but for' causation," or else "open[] the door to unlimited liability" by allowing such "absurd or untoward award[s]." *Id.* at 699, 700 & n.9. *McBride* explained that the contributing factor standard is subject to "the constraints of common sense," and must apply "in light of [one's] experience and common sense." *Id.* at 700, 704. Yet Yowell's theory of liability would expand the contributing factor standard to encompass any situation involving a bare chain of events between an injury report that alerts a carrier to an employee's workplace misconduct and the carrier's resulting decision to discipline him. It would grant relief, for example, to employees who sexually harass their managers while reporting injuries, *see Lemon*, 958 F.3d at 420, or who report injuries they incurred while stealing the carrier's property, *see Koziara*, 840 F.3d at 877. These are just the sort of "absurd and untoward award[s]" that *McBride* made clear the contributing factor standard does not tolerate. 564 U.S. at 700.

Yowell's remaining citations are no more on-point. He cites *Allen v. Administrative Review Board* for the generic proposition that "[a] contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." 514 F.3d 468, 476 n.3 (5th Cir. 2008). That is true

enough, but nothing in *Allen* indicated that an employee may satisfy this standard by alerting the carrier to his own workplace misconduct through his injury report. *Allen* did not involve such a scenario, nor did it even reach the issue of causation, as the employee there could not show he had suffered an adverse action at all. *Id.* at 482.

Yowell's reliance on *Bostock v. Clayton County*, which held that "[a]n employer who fires an individual merely for being gay or transgender" violates Title VII's ban on sex discrimination in employment, 140 S. Ct. 1731, 1754 (2020), likewise is misplaced. *Bostock* did not involve a situation like this one, where an employee's protected status initiated a chain of events that led the employer to discover the employee's misconduct. It thus had no occasion to consider whether proximate causation principles would foreclose liability under such circumstances. Suppose, for example, that an employee takes leave to attend an event for an all-woman's organization. Her employer assigns her co-worker to cover her responsibilities while she is out, and the co-worker discovers that she has been embezzling money from the firm, leading the employer to fire her. As a purely factual matter, the employee's sex set off the chain of events leading to her firing. Yet nothing in *Bostock* suggests that she may use Title VII to shield herself from the consequences of her own theft in this manner. That would be absurd. *Bostock* thus provides Yowell no support.[7]

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[7] Nor does *Araujo* support Yowell's chain-of-events theory. Unlike Yowell, the employee there offered evidence that he had suffered "adverse disparate treatment."

2. <u>The ARB did not reject Yowell's chain-of-events theory on the basis that the FRSA does not use the term "inextricably intertwined."</u>

In holding that Yowell had failed to show that his injury report was a contributing factor to his discharge, the ARB relied on its recent *Thorstenson* decision, ER-83, which held that a protected activity is a contributing factor to a disciplinary action if it "is a proximate cause of the adverse action, not merely an initiating event." 2019 WL 7042958, at *7. *Thorstenson* explained that "the 'inextricably intertwined' or 'chain of events' analysis … is a construction that substitutes for, and in some cases circumvents, the [] contributing factor" analysis. *Id.* It further "note[d] that the plain language of the [anti-retaliation provision] does not include the term 'inextricably intertwined.'" *Id.* Yowell argues that *Thorstenson* erred by ascribing undue significance to the absence of the term "inextricably intertwined" in the FRSA's text. AOB 27. This argument reflects a misreading of *Thorstenson*.

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708 F.3d at 160. Moreover, *Araujo* was decided under a lower burden of proof. Although an employee must show retaliation by a preponderance of the evidence to prevail on the merits at trial, the issue in *Araujo* was simply whether the employee had made a prima facie case. *See* 708 F.3d at 161 ("[W]e conclude that Araujo has asserted a prima facie case."); *see also* 49 U.S.C. §§ 42121(b)(2)(B)(iii), (iv) (employee must make prima facie case to trigger investigation, but "demonstrate" retaliation to prevail on the merits); *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 460 (9th Cir. 2018) (prima facie standard is less stringent than the preponderance standard an employee must satisfy to prevail on the merits); *Brune v. Horizon Air Indus.*, ARB No. 04-037, 2006 WL 282113, at *7-8 (Jan. 31, 2006) ("OSHA employs [a] 'gatekeeper' standard that is used during the preliminary investigatory stage," under which it "will not *investigate a complaint* unless the complainant makes a prima facie showing" of retaliation, but "appl[ies] a different standard" at the merits stage (quotation marks omitted)).

Prior to *Thorstenson*, the ARB's case law had held that when a carrier disciplines an employee for misconduct to which the employee's own injury report had alerted it, the report and the discipline are "inextricably intertwined," satisfying the contributing factor standard. 2019 WL 7042958, at *6. *Thorstenson* repudiated this doctrine, explaining that it ignores proximate causation principles. *Id.* ("[R]eporting the injury is not a *proximate cause* to the termination when the employee is terminated for carelessness in creating the injury or for some other conduct discovered as part of the review process initiated by the report of the injury."). Moreover, *Thorstenson* reasoned, a chain-of-events rule enabled an employee to shield himself from discipline for his own misconduct by reporting it himself. *See id.* ("Congress did not intend to insulate wrongdoing because the employee engaged in protected activity."). Going forward, *Thorstenson* explained, an employee must show that his injury report *proximately caused* the discipline he suffered, and cannot shield himself from consequences for his misconduct merely by reporting it to the carrier himself. *Id.*

Thorstenson did not, as Yowell mistakenly claims, reject the chain-of-events theory merely on the ground that the term "inextricably intertwined" does not appear in the anti-retaliation provision's text. Rather, it explained that proximate causation principles and basic fairness counsel against enabling an employee to claim whistleblower protections by reporting his own misconduct. It noted the absence of the term

"inextricably intertwined" from the statutory text simply to emphasize that the statute's plain language does not compel a different result. *Id.* ("We note that the plain language of the statute does not include the term 'inextricably intertwined.'"). Footnote 6 of the opinion—which said, "We *further* explain[s] our departure [from the pre-*Thorstenson* standard] by emphasizing the language of the statute," *id.* at *6 n.12 (emphasis added)—further clarified that proximate causation and fairness, not the absence of the statutory term "inextricably intertwined," primarily drove its analysis.

Yowell next argues that the ARB in this case wrongly rejected his chain-of-events theory "purely because of the [ALJ's] use of the phrase 'inextricably intertwined.'" AOB 27. But the ARB said nothing like that. Nothing in its decision rejected Yowell's theory on the ground that the ALJ used the forbidden words "inextricably intertwined." To the contrary, it cited *Thorstenson*, ER-83, which in turn specified that an ALJ *may* "find that an adverse action and protected activity are intertwined such that contributing factor causation is factually established," so long as the protected activity "proximate[ly] cause[d]" the adverse action and did not merely "initiate" it. 2019 WL 7042958, at *7. At no point has the ARB suggested that the words "inextricably intertwined" will result in an ALJ's automatic reversal.

* * *

For all of these reasons, the ARB correctly determined that Yowell failed to show that his injury report was a contributing factor to his discharge.

II. THE ARB CORRECTLY CONCLUDED THAT FWWR HAD PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT IT WOULD HAVE FIRED YOWELL EVEN ABSENT HIS INJURY REPORT

Even if Yowell's injury report was a contributing factor to his discharge, he still would not be entitled to relief under the FRSA's anti-retaliation provision. That is because, as the ARB concluded, FWWR proved by clear and convincing evidence that it would have fired Yowell even absent his late injury report. *See* 49 U.S.C. § 42121(b)(2)(B)(iv). Proof by clear and convincing evidence under the anti-retaliation provision requires a carrier to show "that the truth of its factual contentions are highly probable." *Araujo*, 708 F.3d at 159 (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (quotation marks omitted)); *accord Pan Am Rys., Inc. v. U.S. Dep't of Labor*, 855 F.3d 29, 36 n.6 (1st Cir. 2017) (same). As explained below, FWWR has made that showing here.

A. FWWR Proved By Clear And Convincing Evidence That It Would Have Fired Yowell For Failing To Report His Injury Timely Even If He Had Never Reported His Injury Late

The anti-retaliation provision's same-action defense "does not require that the adverse personnel action be based on facts completely separate and distinct from protected whistleblowing disclosures." *Duggan v. Dep't of Def.*, 883 F.3d 842, 846 (9th Cir. 2018).[8] More specifically, it does not require that the carrier prove that it

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[8] *Duggan* was decided under the WPA, 883 F.3d at 843, which creates a same-action defense identical to the FRSA's, *see* 5 U.S.C. § 1221(e)(2).

"would have learned of an employee's misconduct through channels other than the employee's protected activity." *DeFrancesco v. Union R.R. Co.*., ARB No. 13-057, 2015 WL 5781070, at *6 (Sept. 30, 2015). Instead, it focuses on whether the carrier would have taken the same action in response to the misconduct for reasons extrinsic to the protected activity. *See id.* at *6. As such, "the question is whether the same discipline to which [the employee] was subjected would have occurred were [the carrier] aware of identical conduct ... in the absence of an injury report." *Id.* at *8.

In *DeFrancesco*, the ARB identified five factors to guide its same-action inquiry when the employer learned of alleged employee misconduct through the employee's protected injury report: whether (1) the carrier "monitors for compliance with [its safety] rules ... in the absence of an injury," (2) the carrier "consistently imposes equivalent discipline against employees who violate [its safety] rules ... but who are not injured as a result of the violation," (3) the carrier's safety rules "[are] routinely applied," (4) the carrier's safety rules are "vague and thus subject to manipulation and use as pretext for unlawful discrimination," and (5) other evidence suggests that the carrier "was genuinely concerned about rooting out safety problems," or else "that its conduct of the investigation was pretext designed to unearth some plausible basis on which to punish [the employee] for the injury report." *Id.* Based on these factors, the ARB evaluated whether the carrier would have taken the same action in the absence of the protected injury report. *Id.*

For essentially the same reasons that Yowell cannot satisfy the contributing factor standard, the ARB correctly concluded that FWWR met its same action defense by proving through clear and convincing evidence that it would have fired Yowell even absent his late injury report. As explained in Part I, the ALJ found that FWWR's safety policy requires an employee to immediately report any injury he incurs, no matter how small or painless, so that FWWR can immediately inspect the scene for safety. ER-79. Yowell did not report his injury when it occurred, but instead waited about a week. ER-78, 85. FWWR's disciplinary policy authorizes discharge of an employee who violates its timely-injury-reporting rule. ER-79. FWWR determined that firing was appropriate here because Yowell's failure to report his injury timely prevented FWWR from investigating the scene of the injury for dangerous conditions, thus jeopardizing other employees' safety. *Id.* Based on these ALJ findings, the ARB concluded that FWWR "would have fired Yowell for late reporting even in the absence of Yowell having engaged in protected activity." ER-85.

In reaching this conclusion, the ARB emphasized the ALJ's finding that FWWR "has not inconsistently applied its disciplinary policy." ER-85. The ALJ explained that FWWR's disciplinary policy allowed it to "discharg[e] an employee without prior warning and regardless of past practice," and that Yowell's firing for failing to report his injury timely fell within the policy's scope. ER-60. The ARB

also emphasized the ALJ's finding that Yowell "has failed to prevent any circumstantial evidence that [FWWR] used [his] report of injury, or his medical treatment as a pretext to his discharge." ER-85.

The ALJ also found that FWWR had fired another employee, Benito Aceves, whom FWWR believed had failed to report timely a workplace injury. ER-23-24, 57-58. FWWR eventually reinstated him, but only after he clarified that his injury was personal, not work-related. *Id.* The ALJ ascribed "great significance" to Aceves's firing for what FWWR believed was a "work-related" injury, finding it "persuasive evidence that arguably [FWWR] uniformly applies its rule concerning accurate and prompt reporting of all accidents, injuries, and/or incidents." ER-57; *compare Cain*, 816 F.3d at 641 (carrier could not establish same-action defense where it "had not presented evidence that it had fired any employees with similar violations"); *Consol. Rail Corp. v. U.S. Dep't of Labor*, 567 F. App'x 334, 339 (6th Cir. 2014) (unpublished) (same).[9]

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[9] The ARB did not discuss this comparator evidence specifically, but adopted wholesale "the ALJ's underlying fact-finding and credibility determinations" supporting its "conclu[sion] that FWWR ... has proven its affirmative defense." ER-85; *see also* ER-84 (relying on ALJ's "subordinate findings to the effect that FWWR terminated Yowell solely for late reporting," not for reporting his injury at all). Indeed, the ARB "ma[d]e no findings of fact" of its own, relying instead entirely on the ALJ's findings and the undisputed facts. ER-78. While the ARB highlighted several specific ALJ findings, it stressed that these were mere "*examples* of the ALJ's ... thorough fact-finding" that "compels a finding in favor of FWWR," not an exhaustive list of all the ALJ findings on which it relied. ER-85 (emphasis added). And it expressly noted the ALJ's findings that (1) "FWWR has not inconsistently applied

Yowell, for his part, identified no other FWWR employees who had reported a workplace injury untimely and was not fired for it. He points to four employees who had reported injuries but were not fired, and argues that several of them "could not identify the mechanism or the exact location of the injury" AOB 40 n.3. But as the ALJ explained, none of these four employees are proper comparators because each of them reported their injury timely. ER-58.

Yowell argues that Aceves' firing shows "that FWWR is merely concerned with the possibility of a late injury report, not any actual safety hazards." AOB 41.

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its disciplinary policy" and (2) Yowell "failed to present *any* circumstantial evidence that [FWWR] used [his] report of injury, or his medical treatment as a pretext to his discharge." ER-85 (emphasis added, alterations omitted).

These statements collectively suffice to make clear that the ARB relied on the comparator evidence in concluding that FWWR had proven its same-action defense. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (courts "should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned" (quotation marks omitted)); *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 380 (5th Cir. 2008) (same); *see also Fla. Sugar Cane League, Inc. v. Usery*, 531 F.2d 299, 303 (5th Cir. 1976) (Secretary of Labor properly explained how he had calculated a wage rate even to the "partial extent [that his] reasons for calculating the rate in the way he did are implicit rather than explicit"). Notably, Yowell discussed this comparator evidence in his own opening brief without doubting that the ARB had relied on it. *See* AOB 40-41.

Even if any ambiguity remained as to whether the ARB relied on the comparator evidence in its analysis, remand is unnecessary because the ARB's statements and reasoning eliminate any doubt that it would rely on such evidence on remand. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (remand of agency decision is unnecessary where "[t]here is not the slightest uncertainty as to the outcome of [a] proceeding" on remand); *Sealed Appellee #1 v. Sealed Appellant*, 199 F.3d 437, at *4 (5th Cir. 1999) (unpublished) (same); *see also Wilson v. Fed. Mine Safety & Health Review Comm'n*, 863 F.3d 876, 883 (D.C. Cir. 2017) (applying this rule to a decision of an agency within the Department of Labor).

But these concerns are linked—as the ARB explained, the reason FWWR requires its employees to report their injuries timely is so it can inspect the scene of the injury for safety concerns. ER-79. Yowell also asserts that “the Aceves situation shows that FWWR will impose less discipline on an employee for being untruthful rather than an employee who comes forward with an on the job injury report.” AOB 41. But nothing in the record suggests that Aceves lied about his injury to regain his job, and Yowell offers nothing to support this accusation beyond baseless conjecture.

Given these facts, three of *DeFrancesco*’s factors weigh against Yowell. First, the evidence adduced before the ALJ showed that FWWR’s workplace policies “are routinely applied.” 2015 WL 5781070, at *8. FWWR fired one employee when it believed he had failed to report a workplace injury timely, reinstating him only after he clarified that his injury had not been work-related. ER-57-58. Four other employees who reported workplace injuries timely, meanwhile, suffered no discipline. ER-58. Second, a requirement to report any injury immediately is not “vague;” it is a straightforward bright-line rule. *Id.* It is unlike a rule that an employee must “maintain situation awareness” or “work carefully,” two rules that *DeFrancesco* described as easily “manipulated and used as a pretext for unlawful discrimination.” *Id.*

Third, the ALJ found that the evidence suggested that FWWR’s investigation reflected, in *DeFrancesco*’s language, “genuine concern[] about rooting out safety problems,” not a search for pretext to justify retaliating against Yowell for reporting

his injury. *Id.* Steinkamp testified that Yowell was fired solely for failing to report his injury timely, while Gibson testified that he would personally escort an employee from FWWR's grounds for failing to timely report an injury. ER-79, 85. The ALJ found their testimony credible. ER-81. He did not find Yowell credible, in contrast, deeming it to be "inconsistent, contradictory, and unpersuasive." *Id.*

Only one *DeFrancesco* factor weighs in Yowell's favor—the record contains no evidence that FWWR affirmatively monitored for compliance with its safety rules in the absence of an employee's injury report. 2015 WL 5781070, at *8. To be sure, nothing in the record suggests that FWWR did *not* monitor for compliance, either. The record is simply silent on this point, which weighs in Yowell's favor.

The final *DeFrancesco* factor—whether the carrier imposes equal discipline on employees who violate the same safety rule but "are not injured," *id.*—is inapplicable in this case, because an employee's obligation to report immediately a workplace injury logically cannot be triggered until he first suffers an injury. *See* ER-64 (ALJ explaining that "it is not possible to" apply this factor here). As noted above, however, the record shows that FWWR did fire an employee whom it believed had violated the same safety rule that Yowell violated, suggesting that it treats like cases of failure to report an injury alike.

In sum, FWWR offered credible evidence that it terminated Yowell solely for failing to report his workplace injury timely, and that it would have fired him even

had he never reported his injury at all. Yowell offered no evidence, meanwhile, that FWWR's stated reason for firing him was pretextual. Three of the *DeFrancesco* factors weigh in FWWR's favor, while only one weighs in Yowell's favor. Under these circumstances, FWWR met its burden to prove by clear and convincing evidence that it would have fired Yowell even absent his injury report.

B. The Anti-Retaliation Provision Does Not Prevent A Carrier From Requiring Employees To Report Their Workplace Injuries Timely

Yowell acknowledges that a carrier that "becomes aware of an employee's misconduct" through information gained from his injury report can establish a same-action defense by showing that the "misconduct standing alone, without any dependence on the protected activity, justified the adverse action." AOB 35. Nor does he deny that he violated FWWR's safety rule requiring timely reporting of workplace injuries, or that FWWR's disciplinary policy authorizes discharge for this offense. He nonetheless argues that FWWR cannot prove its same-action defense because it fired him for the "manner" in which he reported his injury. "manner in which [he] engage[d] in a protected activity," in violation of the FRSA. AOB 37. As he sees it, a carrier cannot limit the "time or manner for reporting injuries," *id.*, or otherwise "put requirements on how an employee *must* engage in FRSA protected acts, and then fire an employee for not following the carrier's requirements when the employee engages in FRSA protected acts," *id.* at 8.

This argument conflates the misconduct for which Yowell was fired (failing to report his workplace injury timely) with how FWWR learned of that misconduct (his late injury report). As explained in Part I.A, FWWR did not fire Yowell for reporting his injury belatedly—it fired him for *not* reporting his injury timely, when he should have. Once Yowell failed to report his injury promptly when it occurred, his misconduct was complete. His belated injury report, made only after Gibson pressed him on inconsistencies in his claim to have been injured that day, did not undo his failure to report his injury when it first happened.

Moreover, nothing in the anti-retaliation provision prohibits a carrier from adopting reasonable procedural rules for receiving injury reports that serve a bona fide safety purpose, including rules requiring employees to report injuries promptly. To the contrary, such rules can promote railroad safety, and thus further the FRSA's purpose. As the Seventh Circuit has recognized, "[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." *Koziara*, 840 F.3d at 878. Without prompt notice of a workplace injury, a carrier may be unable to quickly eliminate an unsafe condition. *See Thorstenson*, 2019 WL 7042958, at *8 ("[W]hen a worker reports an injury, the railroad is in a position to investigate to determine whether there are unsafe conditions that must be corrected for the protection of the public and of rail workers. Without notice of an injury, a railroad cannot take these steps.").

A carrier thus may require its employees to timely report workplace injuries so long as its rules are reasonable, does not unduly burden an employee's right to report, and is not used as pretext for retaliation. *See id.* (rejecting "contention that BNSFs enforcement of its timely injury reporting policy is unreasonable and unduly burdensome"); Memorandum from Richard E. Fairfax, Deputy Assistant Sec'y for OSHA, to Regional Adm'rs, Whistleblower Program Managers, Re: Employer Safety Incentive and Disincentive Policies and Practices (Mar. 12, 2012) ("OSHA Guidance"), https://www.osha.gov/as/opa/whistleblowermemo.html ("OSHA recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries," so long as the procedures are reasonable and not unduly burdensome or pretextual); *see also Smith-Bunge v. Wisc. Cent., Ltd.*, 60 F. Supp. 3d 1034, 1041 (D. Minn. 2014) ("The considerations highlighted in the [OSHA Guidance] are instructive and will be considered here.").

By way of analogy, the Federal Circuit has recognized that the WPA allows an employer to discipline an employee for failing to make a protected report timely. *See Watson v. Dep't of Justice*, 64 F.3d 1524, 1530 (Fed. Cir. 1995) ("[A] protected disclosure may be made as part of an employee's duties, but [] an employee may nevertheless be disciplined for violating agency policy if his disclosure is untimely"). More generally, courts recognize that under the WPA, "an employee may be disciplined for the *way* in which he or she communicates a protected disclosure,"

rejecting the idea "that the manner in which an employee communicates a protected disclosure cannot be disciplined." *Duggan*, 883 F.3d at 847; *see also Greenspan v. Dep't of Veterans Affairs*, 464 F.3d 1297, 1305 (Fed. Cir. 2006) ("[W]rongful or disruptive conduct is not shielded by the presence of a protected disclosure"); *Kalil v. Dep't of Agric.*, 479 F.3d 821, 825 (Fed. Cir. 2007) (rejecting argument that "once a disclosure qualifies as protected, the character or nature of that disclosure can never supply support for any disciplinary action"); *Cerulli v. Dep't of Def.*, No. 19-2022, 2020 WL 3053997, at *6 (Fed. Cir. June 9, 2020) (unpublished) (same).

Here, FWWR's policy required an employee to report a workplace injury promptly. Yowell admitted that knew he was injured, but chose not to report his injury for a week, and then did so only under questioning. ER-78. This is not a case where an employee did not realize "that [he is] injured at all," or made only a "minor" or "inadvertent" delay in reporting his injury. OSHA Guidance. Yowell fails to explain how FWWR's policy unduly burdened his right to report a workplace injury. Under these circumstances, the FRSA's anti-retaliation provision does not prevent FWWR from implementing and enforcing its policy requiring immediate reporting of workplace injuries.

Yowell relies on *Smith-Bunge v. Wisconsin Central, Ltd.*, which held that a carrier unlawfully retaliated against an employee by firing him pursuant to a policy requiring employees to report workplace injuries within 24 hours, "regardless of the

circumstances." 60 F. Supp. 3d at 1041. A "worker may not appreciate a new injury, or the extent of an initial injury, until several days pass," *Smith-Bunge* reasoned, by which time the fear of discipline for late reporting may chill him from reporting the injury. *Id.* But *Smith-Bunge* is distinguishable, because Yowell knew he was injured, yet still chose not to report his injury. ER-78. *Smith-Bunge*'s concern that a rigidly-enforced timely-reporting rule may discourage employees from reporting injuries they did not initially notice thus has no force here.

C. To Prove Its Same-Action Defense, A Carrier Need Not Show That It Would Have Discovered An Employee's Failure To Report His Injury Independently Of His Own Late Injury Report

To the extent Yowell argues that FWWR must show that it would have learned of his failure to report his injury timely independently of his late injury report, the anti-retaliation provision imposes no such requirement. The same-action defense requires a carrier to show that it "would have taken the same unfavorable personnel action *in the absence of* [the protected] behavior." 49 U.S.C. § 42121(b)(2)(B)(iv) (emphasis added). Yowell reads this language to require the carrier to show that "the adverse employment action logically and literally would never have come about but for the protected activity," but the ARB has squarely rejected this contention. *DeFrancesco*, 2015 WL 5781070, at *6 (ALJ erred by using this standard). Rather, as it has explained, "the question is whether the same discipline to which [the employee] was subjected *would have occurred were* [*the carrier*] *aware of identical*

conduct ... in the absence of an injury report." *Id.* at *8 (emphasis added); *see also Koziara*, 840 F.3d at 879 (carrier proved same-action defense where "[t]here [was] no basis in the record for supposing that had the plaintiff not submitted an injury report but [the carrier] had nonetheless discovered the stolen railroad property, he wouldn't have been fired."). The same-action defense thus allows a carrier to assume that it would have discovered the employee's misconduct, then prove merely that it would have imposed the same discipline based on that knowledge.

The case for an "inevitable discovery" rule seems to be that the term "in the absence of [the protected] behavior," 49 U.S.C. § 42121(b)(2)(B)(iv), connotes the absence not only of the protected behavior itself, but also its fruits. But this language just as easily can be, and most sensibly is, read to require a carrier to show only that it would have administered the same discipline to the employee for engaging in misconduct *assuming the carrier knew about that misconduct through means other than the protected report*. In other words, it contemplates the absence of *only* the protected behavior itself, not also its fruits.

This reading best serves the statute's anti-retaliation purpose. *See Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 n.4 (8th Cir. 2014) (anti-retaliation provision targets "discrimination," not mere "causation in fact"). Under the same-action defense, "the pertinent question is whether the employer is selectively enforcing rules or se-

lectively imposing extraordinarily harsh discipline against whistleblowers as a pretext for unlawful retaliation." *Smith v. Dep't of Labor*, 674 F. App'x 309, 315-16 (4th Cir. 2017) (unpublished). Whether the carrier actually would have learned of the rule violation has no bearing on that question. What matters is simply whether the carrier would have imposed the same discipline absent the protected activity *if* it knew of the violation of its rules. And just as at the contributing factor stage, a contrary "rule would permit wrongdoers to shield their own misconduct by providing negative information about their own activities." *Id.* at 316. Nor would such a requirement serve any important FRSA purpose or fulfill any important FRSA value. Rather, as the Seventh Circuit has recognized, "once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during … the course of some other procedure." *Koziara*, 840 F.3d at 875 (quotation marks omitted).

As best the Secretary knows, no Circuit to confront the issue under the FRSA, the WPA, or any other statute has held that the same-action defense requires an employer to prove it would have learned of an employee's misconduct independently of his protected activity. *See Carter*, 867 F.3d at 949 (rejecting argument that carrier could not prove same-action defense because "had [employee] not suffered this injury, ... [carrier] would not have learned about the [misconduct] that were the basis for [his] dismissal …. This reasoning is nothing more than the ALJ's flawed chain-

of-events causation theory and should be disregarded on remand"); *Smith*, 674 F. App'x at 316 ("[T]he employer is not required to prove that it independently would have discovered the whistleblower's misconduct. Instead, the employer must demonstrate by clear and convincing evidence that it would have imposed the same type of discipline for the same infraction by a non-whistleblowing employee, regardless of the manner in which the employer discovered the misconduct."); *Watson*, 64 F.3d at 1528 ("We decline to establish such an 'inevitable discovery' rule" requiring an employer to prove "that it would have eventually discovered the content of the disclosures from another source.").[10]

This Court should not endorse such a rule either. Instead, it should affirm the ARB's conclusion that FWWR met its burden to prove by clear and convincing evidence that it would have fired Yowell for failing to report his injury timely even if he had never reported his injury at all.

* * *

For these reasons, the ARB correctly concluded that FWWR proved its same-action defense by clear and convincing evidence.

CONCLUSION

This Court should affirm the ARB's dismissal of Yowell's complaint.

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[10] *Smith* arose under the Energy Reorganization Act, 674 F. App'x at 310, which has a same-action defense identical to the FRSA's. *See* 42 U.S.C. § 5851(b)(3)(D).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation of Fed R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed R. App. P. 32(f), this brief contains 12,467 words.

This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type-style requirements of Fed R. App. P. 32(a)(6) because this brief has been prepared in Microsoft Word 2016 using plain roman style, with exceptions for case names and emphasis, and using Times New Roman 14-point font, which is a proportionately spaced font, including serifs.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on September 22, 2020. I hereby certify that a copy of the foregoing was served via USPS to the following person on September 22, 2020:

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