



In the Matter of:

**BANKRUPTCY ESTATE
OF DONALD M. GRAFF,**

COMPLAINANT,

v.

BNSF RAILWAY COMPANY,

RESPONDENT.

ARB CASE NO. 2021-0002

ALJ CASE NO. 2018-FRS-00018

DATE: September 30, 2021

Appearances:

For the Complainant:

Richard L. Boucher, Esq. and Bradley H. Supernaw, Esq.; *Boucher Law Firm*; Lincoln, Nebraska

For the Respondent:

Paul S. Balanon, Esq.; *BNSF Railway Company*; Fort Worth, Texas

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. Donald Graff (Complainant) worked for BNSF Railway Company (Respondent) as a foreman. Complainant made several safety-related complaints. Soon after, Respondent suspended and then fired Complainant for attempting to destroy company property and insubordination. Complainant subsequently filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that Respondent violated the whistleblower protection provisions of the Federal Railroad Safety Act (FRSA). OSHA conducted an investigation and dismissed the complaint. Complainant filed objections to the

findings with the Office of Administrative Law Judges (OALJ). After a hearing, an Administrative Law Judge (ALJ) issued a Decision and Order denying the complaint. Complainant appealed the ALJ's decision to the Administrative Review Board (Board).

BACKGROUND

Complainant worked for Respondent, a railroad carrier, from 2007 to 2017, as an electronics technician and then as a foreman in Lincoln, Nebraska.¹ As foreman, Complainant managed “the safety process for all telecom employees” and “performed repairs and maintenance of all telecommunications equipment.”² Complainant often worked with Michael Warrington, another foreman for Respondent.³ Complainant stated that he ran the shop in a “militaristic” manner.⁴

Robert Mize, an electrical engineer, supervised Complainant and met monthly with him to discuss personnel and safety issues.⁵ Complainant made several safety complaints to Mize regarding Daniel Wolken, an employee who Complainant supervised. Complainant claimed that Wolken did not follow personal protective equipment rules and frequently failed to show up at his assigned location.⁶

Respondent had a radio shop at its depot in downtown Lincoln, Nebraska.⁷ In addition, Respondent had a small radio site located in David City, Nebraska, which is approximately 50 miles from the Lincoln radio site.⁸ The David City site is a battery plant that serves as secondary support “in case AC power fails” at the Lincoln radio site.⁹ The battery keeps the site up and running until power is restored and is used to power dispatcher radios and equipment used to communicate trains on the tracks.¹⁰

¹ Decision and Order (D. & O.) at 2-4.

² *Id.* at 3.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 3, 17.

⁶ *Id.* at 3-4.

⁷ *Id.* at 4.

⁸ *Id.* at 5 n.6.

⁹ *Id.* at 5.

¹⁰ *Id.*

On May 9, 2017, Complainant raised a concern that Wolken, who is not an electrician, had wired an alarm relay inside an electrical breaker panel at Respondent's radio site in David City, which Complainant claimed could have caused an electrical fire.¹¹ Mize told Complainant that he would "take care of it."¹² Mize did not discipline Wolken because he did not think the incident was serious but informed Wolken that an electrician should perform such work.¹³

During a briefing on April 12, 2017, Mize's work group discussed a battery cell with bad readings at the David City site and potential solutions, and Mize chose Wolken's idea to install four spare batteries.¹⁴ After the meeting, Wolken went to the David City site to install the spare batteries.¹⁵ On April 13, 2017, Complainant had to verify Respondent's FCC license at the David City site when a second antenna was being installed.¹⁶ Complainant testified he had called Respondent's system that monitors its buildings' alarms to report that he was at the site and entered the building to take pictures of the radio rack to ensure there was room for a new radio.¹⁷ According to Respondent's alarm logs, Complainant entered the building at 10:34 AM and stayed for approximately 45 minutes.¹⁸ The Eltek system, which records changes to the battery charger, recorded several "configuration changes" spanning from 09:17 to 09:20 a.m.¹⁹

Five days later on April 18, 2017, Wolken went to the David City site to retrieve a wrench.²⁰ When Wolken went to pick up the wrench he noticed that the batteries "felt hot" and also saw that the battery charger had been changed to 59.0 volts from 54.0 volts.²¹ The next day, Wolken reported what he had found at David City and noted that he thought Complainant had been at the site on April 13,

11 *Id.* at 4.

12 *Id.*

13 *Id.* at 5.

14 *Id.*

15 *Id.*

16 *Id.* at 6.

17 *Id.*

18 *Id.* at 7.

19 *Id.* at 5-7.

20 *Id.* at 7.

21 *Id.*

2017.²² On April 21, 2017, Wolken emailed Kevin Kautzman, Director of Technology Services-Telecommunications, to report the issue but did not mention Complainant as the person who entered the David City site at 10:34 a.m.²³ Mize also received the e-mail sent to Kautzman and forwarded it to Complainant to determine if someone had been at the site when the configuration change occurred.²⁴ Complainant did not respond to the email from Mize.²⁵ It was later determined that whoever made the configuration change on April 13, 2017, also disconnected the wires to the alarm system.²⁶

On April 23, 2017, Complainant sent an email to a Human Resources (HR) employee for Respondent to complain about a hostile work environment, including bullying and threatening tactics by Wolken and another electronics technician.²⁷ HR informed Complainant that it would take care of the issue.²⁸ Later that day, Complainant alleges that Mize came to his office and told him “Don’t you ever call HR: “I’m taking care of the issue.”²⁹ Complainant testified that Mize had told him several other times not to report issues to HR, which Mize denies.³⁰

On May 10, 2017, Mize told the shop team that the investigation of the David City incident was inconclusive and that they were going to move on from it.³¹ Wolken, however, met with Mize the following day to show him a picture of his computer screen that indicated the Eltek time system was an hour and nineteen minutes slow.³² Based on this information, Mr. Mize determined that it appeared that Complainant was at the site when the configuration change had occurred.³³

22 *Id.*

23 *Id.* at 7-8.

24 *Id.* at 8.

25 *Id.*

26 *Id.* at 7.

27 *Id.* at 8.

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.* The picture showed the actual date and time on his laptop and the date and time provided in the Eltek application on his laptop. *Id.* at 8-9.

33 *Id.* at 9.

On May 17, 2017, David Mensch, Operations Manager for the North Region, and Kautzman visited the Lincoln shop to learn more about Complainant's HR complaint.³⁴ Kautzman met with Complainant in his office later that day for 15 minutes.³⁵ During that meeting, Complainant appeared nervous, "jumping around stories," and not "focused on one thing or another."³⁶ After Complainant left, Kautzman and Mensch spoke with the other shop technicians, who all expressed problems they had with Complainant as their foreman and that they were upset with his management style.³⁷

On May 18, 2017, Mize emailed Kautzman and Mensch all the compiled information regarding the David City incident.³⁸ Kautzman, Mensch, Mize, and Respondent's Labor Relations Representative, Rachel Yurek, held a conference call to discuss the matter.³⁹ The group determined that there was enough information to conduct an investigation of the incident.⁴⁰ Yurek drafted two letters of investigation, one for the intentional and malicious attempt to destroy a telecom battery and a second for insubordination, to give to Complainant.⁴¹

At 3:05 p.m. on May 18, Mize texted Complainant telling him to remain at the shop after the work day was complete at 3:30 p.m.⁴² Mize did not respond to Complainant's question regarding why he needed to stay.⁴³ Mize testified that he had wanted Complainant to stay late to avoid walking him out in front of the rest of the employees after giving him the investigation letter.⁴⁴ Complainant testified that he had remained at the shop until 4:00 p.m., but had to leave for an appointment to get allergy shots at 4:30 p.m.⁴⁵ Mize had not returned to the shop when he left.⁴⁶

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 10.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 10.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 10-11.

⁴⁶ *Id.* at 10.

Complainant also testified that he had been suffering from a migraine.⁴⁷ At 6:00 p.m., Complainant called Mize to inform him of the appointment and migraine, and Mize told him “he was very disappointed” that he would leave before seeing him.⁴⁸

The next day, Respondent issued two notices of investigation and suspended Complainant for an “intentional and malicious attempt to destroy a telecom battery plant at David City” and insubordination.⁴⁹ This was the first disciplinary action against Complainant during his employment with Respondent.⁵⁰ On June 1, 2017, Respondent held an investigative hearing with General Foreman Joseph Ow serving as the conducting officer.⁵¹ Complainant’s union represented him, and both sides were able to call witnesses, present evidence, and make closing statements.⁵² Ow admitted all evidence that the parties presented, and Complainant, Wolken, Mize, and an electronics technician, Jason Koch, testified.⁵³ Ow did not have any decision-making functions and sent the collected evidence to Respondent’s Policy for Employee Performance Accountability (PEPA) team to review.⁵⁴ The evidence did not mention Complainant’s safety complaints about Wolken.⁵⁵

Derek Cargill, the Director of PEPA, testified that the team provides “an objective review of the transcript removed from supervisors and the employee in the field” to ensure any discipline is issued “fairly and consistently.”⁵⁶ After reviewing the evidence in the investigative file, Cargill concluded that “there was substantial evidence to prove the charges” and that the nature of violations warranted Complainant’s dismissal.⁵⁷ Cargill testified that his review of the transcript associated with the investigation showed that Complainant admitted to being on the David City site on the day the configuration was changed.⁵⁸ Cargill also testified that his decision was based on the findings that: 1) no one else visited the David

⁴⁷ *Id.* at 11.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 12.

⁵⁵ *Id.* at 20.

⁵⁶ *Id.* at 12.

⁵⁷ *Id.*

⁵⁸ *Id.*

City site the day that the battery voltage changed; and 2) the evidence that wires had been removed indicated “an attempt to cover his tracks.”⁵⁹ Cargill further noted there was no evidence that demonstrated Wolken was there that day or that he had anything to do with the configuration on the batteries.⁶⁰ Cargill also concluded that substantial evidence supported the insubordination charge.⁶¹

Cargill provided dismissal recommendations to Ow, who then informed Kautzman, Mensch, and Mize of them.⁶² Gary Grissum, Assistant Vice President of Telecom & IT Infrastructure, supported the dismissal.⁶³ Kautzman testified that he had agreed with the dismissal.⁶⁴ On June 15, 2017, Respondent issued two dismissal letters to Complainant, effective that day.⁶⁵

On August 24, 2017, Complainant filed a complaint with OSHA alleging that Respondent violated the whistleblower protection provisions of the FRSA when it terminated his employment in retaliation for his workplace safety reports.⁶⁶ On November 24, 2017, OSHA dismissed the complaint after an investigation, finding no violation of the statute.⁶⁷ Complainant filed objections to the OALJ, and an ALJ presided over a hearing on June 13, and 14, 2018.⁶⁸ On September 11, 2018, Complainant filed a Notice of Bankruptcy Filing, and the ALJ substituted the Bankruptcy Estate of Complainant with Complainant as a party on November 13, 2018.⁶⁹

ALJ DECISION

On September 29, 2020, the ALJ issued a Decision and Order Denying Complaint. The ALJ first found that Complainant had engaged in numerous protected activities, including reporting Wolken’s defiance of Respondent’s PPE

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 12-13.

⁶² *Id.* at 13.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 1.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1-2.

⁶⁹ Order Granting Motion to Substitute Party Complainant at 1.

policy and his faulty wiring.⁷⁰ The ALJ also found that Complainant had suffered an adverse employment action when he was suspended and then terminated.⁷¹

The ALJ then discussed whether Complainant's protected activities had contributed to his adverse action. The ALJ addressed several forms of evidence that may indicate a link between the protected activity and his employment termination. First, the ALJ discussed the temporal proximity between the protected activity and the termination. The ALJ found that the short time of ten days between Complainant's suspension and his May 9, 2017 email reporting Wolken's safety violations supports a finding of temporal proximity.⁷² However, the ALJ noted that this finding, standing alone, was not enough to satisfy Complainant's burden of proving that his protected activities were a contributing factor in the adverse employment action.⁷³

Second, the ALJ discussed whether Respondent treated employees similarly situated to Complainant in a disparate manner. Complainant argued he was treated in a disparate manner because Wolken should have been punished for incorrectly wiring the alarm delay.⁷⁴ The ALJ found Wolken was similarly situated to Complainant but that distinguishing circumstances of their actions rendered their treatment not disparate.⁷⁵ The ALJ afforded more weight to the testimony of Mize and Kautzman based on their respective education, experience as electrical engineers, and Kautzman's precise explanation regarding why Wolken's faulty wiring did not pose an electrical shock hazard.⁷⁶ On the other hand, the ALJ found that Complainant did not articulate why Wolken's faulty wiring created a safety hazard.⁷⁷ The ALJ also explained that Complainant was accused of deliberately tampering with the battery chargers, which could have caused an explosion or fire.⁷⁸ Therefore, the ALJ found that the violations were not of comparable seriousness and could not be used to show disparate treatment.⁷⁹

⁷⁰ D. & O. at 14.

⁷¹ *Id.*

⁷² *Id.* at 16.

⁷³ *Id.*

⁷⁴ *Id.* at 17.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

Third, the ALJ discussed Complainant's contention that Respondent's stated reason for discharging him was pretext and "based on false or misleading information."⁸⁰ More specifically, Complainant argued that Respondent's determination that he attempted to destroy the David City battery plant was factually incorrect, and, therefore, was a pretext.⁸¹ The ALJ explained that pretext is not established merely if an employer was mistaken in its belief, if it was honestly held.⁸² The ALJ further explained that whether Respondent's conclusion was correct was irrelevant unless Respondent did not in good faith believe that Complainant attempted to destroy the David City battery plant, but nonetheless relied on that allegation in a bad faith manner to discriminate against him.⁸³ Although the ALJ noted that Complainant had presented evidence that demonstrated he had not tampered with the batteries, the ALJ found that he had not presented evidence that Respondent's belief, even if improper, was not held in good faith.⁸⁴ The ALJ noted that there were four people involved in issuing the notices of investigations (Mize, Kautzman, Mensch and Yurek), all four of whom knew of Complainant's issues with Wolken and the protected activity.⁸⁵ However, the ALJ found the testimony of Mize and Kautzman revealed that they had honestly believed the information provided to them by Wolken and relied upon that information in good faith.⁸⁶

The ALJ noted that Cargill, Kautzman, and Grissum made the final decision to terminate the Complainant's employment.⁸⁷ The ALJ found that Cargill credibly

⁸⁰ *Id.* at 18.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* The ALJ noted that the evidence used to find Complainant tampered with the batteries was unconvincing. *Id.* at 18 n.20. The ALJ explained that the alarm logs made it unlikely that Complainant had made the configuration changes because he entered the building one hour and 13 minutes after the last change was made. *Id.* at 19. The ALJ further explained that the only evidence placing Complainant at the site when the configuration changes occurred was the photo of Wolken's computer, which was not authenticated or corroborated, and that Wolken had only produced the photo after he learned that the initial investigation had been concluded. *Id.*

⁸⁵ *Id.* at 20.

⁸⁶ *Id.*

⁸⁷ *Id.*

testified that he had no previous knowledge of anyone involved in the investigation and that he only reviewed the documents in the investigative file provided by Ow.⁸⁸ The documents presented to Cargill did not mention Complainant's conflict with Wolken or Complainant's protected activity.⁸⁹ Without additional context, Cargill concluded the documents supported a finding that Complainant tampered with the batteries, and he recommended Complainant's dismissal.⁹⁰ Because Cargill was unaware of Complainant's protected activity, the ALJ found Cargill's belief that Complainant's attempted destruction of the David City battery plant was honestly held.⁹¹ Grissum authorized the termination decision based on Cargill's recommendation, and Kautzman agreed.⁹²

Though the ALJ disagreed with Respondent's finding, he noted that he does "not sit as a super-personnel department" that re-examines employment decisions.⁹³ The ALJ therefore found that Complainant did not establish by a preponderance of the evidence that his protected activity contributed to the adverse employment action and denied the complaint.⁹⁴ Because Complainant had failed to prove his protected activity was a contributing factor in his termination for attempting to destroy property, the ALJ declined to address Respondent's affirmative defense for that adverse action and also declined to discuss the contribution factor for the termination for insubordination.⁹⁵ Complainant appealed the ALJ's decision to the Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to review appeals of ALJ's decisions pursuant to the FRSA.⁹⁶ The Board will affirm the ALJ's factual findings if supported by substantial evidence but reviews

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.* at 21.

94 *Id.*

95 *Id.* at 21 n.25.

96 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

all conclusions of law de novo.⁹⁷ Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁹⁸

DISCUSSION

The FRSA prohibits a railroad carrier engaged in interstate commerce or its officers or employees from retaliating against an employee because the employee engaged in a protected activity identified under the Act’s whistleblower statute, including providing information regarding a violation of railroad safety regulations to a person with supervisory authority over the employee.⁹⁹ To prevail on a FRSA retaliation complaint, complainants must prove by preponderance of the evidence that: 1) they engaged in protected activity; 2) their employer took an adverse employment action against them; and 3) the protected activity was a contributing factor in the unfavorable personnel action.¹⁰⁰ If the complainant successfully proves contributing factor causation, the employer may avoid liability by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.¹⁰¹

Complainant’s contends that the ALJ’s finding that Complainant failed to prove by a preponderance of the evidence that his protected activity was a contributing factor in his suspension and firing lacked substantial evidence. A “contributing factor” is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.”¹⁰² A complainant may prove contribution with circumstantial evidence, which may include evidence of temporal proximity, indications of pretext, inconsistent application of an employer’s policies, hostility toward a complainant’s protected activity, and a change in the employer’s

⁹⁷ 29 C.F.R. § 1982.110(b); *Austin v. BNSF Ry. Co.*, ARB No. 2017-0024, ALJ No. 2016-FRS-00013, slip op. at 7 (ARB Mar. 11, 2019) (citations omitted).

⁹⁸ *McCarty v. Union Pac. R.R. Co.*, ARB No. 2018-0016, ALJ No. 2016-FRS-00066, slip op. at 3 (ARB Sept. 23, 2020) (quoting *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (citing and quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938))).

⁹⁹ 49 U.S.C. § 20109(a).

¹⁰⁰ *Fricka v. Nat’l R.R. Passenger Corp.*, ARB No. 2014-0047, ALJ No. 2013-FRS-00035, slip op. at 5 (ARB Nov. 24, 2015) (citing 49 U.S.C.A. § 42121(b)(2)(B)(iii)).

¹⁰¹ *Id.* (citing 49 U.S.C.A. § 42121(b)(2)(B)(iv)).

¹⁰² *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013) (quoting *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed.Cir.1993) (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20))).

attitude toward the complainant after he or she engages in protected activity.¹⁰³ Complainant outlines several types of evidence that he believes demonstrate that he had met his burden, which we address in turn.

First, Complainant notes the temporal proximity between his protected activity and the adverse actions. Complainant's suspension came only ten days after his complaint to Mize about Wolken's incorrect wiring of an alarm relay at the David City site. While this evidence may be probative of contributing factor causation, the ALJ correctly determined that temporal proximity alone is generally insufficient to prove contribution by a preponderance of the evidence.¹⁰⁴

Second, Complainant alleges that there is evidence of disparate treatment between him and Wolken. A whistleblower who argues that disparate treatment occurred "must prove that similarly-situated employees" who were "involved in or accused of the same or similar conduct were disciplined differently."¹⁰⁵ Complainant argues that he was disciplined for his purported unsafe conduct but that Wolken was not disciplined for his faulty wiring. Complainant testified that Wolken double-tapped a breaker and wired an alarm relay contact inside a break panel, which could be a fire hazard that could burn the building down and create an electrical hazard that could shock building occupants.¹⁰⁶ In support of his argument, Complainant cites to Warrington's testimony that Wolken's improper wiring could have caused a fire.¹⁰⁷ Wize and Kautzman both disagreed with Complainant's argument.¹⁰⁸

Disparate treatment requires that both employees committed similar conduct with comparable seriousness. The ALJ afforded more weight to Mize and Kautzman's testimony that Wolken's actions were not a serious safety violation and

¹⁰³ *DeFrancesco v. Union R.R. Co.*, ARB No. 2010-0114, ALJ No. 2009-FRS-00009, slip op. at 7 (ARB Feb. 29, 2012).

¹⁰⁴ *Acosta v. Union Pac. R.R. Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082, slip op. at 8 (ARB Jan. 22, 2020).

¹⁰⁵ *Smith v. BNSF Ry. Co.*, ARB No. 2015-0055, ALJ No. 2013-FRS-00071, slip op. at 5 (ARB Apr. 11, 2017) (citations omitted). This test "is a rigorous one." *Bone v. G4S Youth Servs., LLC*, 686 F.3d 948, 956 (8th Cir. 2012) (quoting *Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 853 (8th Cir. 2005)).

¹⁰⁶ D. & O. at 17 citing Hearing Transcript at 35.

¹⁰⁷ Hearing Transcript at 298.

¹⁰⁸ D. & O. at 17.

did not warrant his dismissal.¹⁰⁹ The ALJ afforded Mize’s and Kautzman’s assessments of the incident more weight than Complainant’s opinion based on their respective experiences and explanations.¹¹⁰ For example, the ALJ noted that Mize, an electrical engineer, testified he did not believe that Wolken’s incorrect installation of the electrical wiring was a serious violation.¹¹¹ The ALJ also noted that Kautzman, also an electrical engineer, testified that “based on [his] 29 years and [his] formal education,” that he did not believe the faulty wiring was a serious violation.¹¹² The ALJ found that Kautzman had articulated precisely why Wolken’s wiring did not pose an electrical shock hazard, while Complainant “did not articulate why this was a safety hazard other than to say that it was one.”¹¹³ The ALJ thus found that Wolken’s wiring of the alarm relay posed a relatively minor risk.¹¹⁴ Further, Complainant was accused of committing intentional acts of destroying property, while Wolken was never alleged to have deliberately caused a safety hazard. We therefore affirm the ALJ’s finding that Complainant failed to show disparate treatment.

Third, Complainant alleges that evidence of antagonism and hostility towards Complainant’s safety reports and a change in management’s attitude toward Complainant demonstrates a contributing factor to his termination. Complainant cites Mize’s demands to him to not “call HR” and “quit bringing [him] these damn safety concerns” and that Mize was the employee who collected the information leading to the initiation of the investigation. Complainant also notes that he had never been disciplined in the ten years he worked for Respondent until Mize showed animosity toward him. Respondent counters that Complainant was also never disciplined after making several safety complaints in the past, including a May 2015 safety report directed by Mize.¹¹⁵ Further, Mize denied making such comments to Complainant, and no evidence corroborated Complainant’s testimony that Mize had made them. While Complainant’s evidence has some probative value,

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Respondent’s Exhibit 3.

it does not compel us to reverse the ALJ's finding that Complainant failed to prove his protected activity was a contributing factor.¹¹⁶

Last, Complainant alleges that he demonstrated pretext by showing that Respondent's investigation was flawed. The critical inquiry in pretext analysis is "whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge," rather than "whether the employee actually engaged in the conduct for which he was terminated."¹¹⁷ Complainant points out many inconsistencies in the evidence Respondent relied on to justify his termination, including the lack of credibility for Wolken's picture of the time log difference. Complainant also highlights the ALJ's criticism of Respondent's finding that Complainant tampered with the battery voltage at David City. Complainant argues that the flawed case against him indicates that Respondent could not have had a good faith belief that he committed a serious safety violation.

Respondent contends that the ALJ correctly found that Complainant failed to meet his burden to prove pretext and that the evidence Complainant highlights does not pertain to whether the decision-makers believed in good faith that Complainant had tampered with the batteries. Respondent focuses on the ALJ's finding that Cargill, who provided the dismissal recommendations, had no knowledge of Complainant's protected activity when considering the case, and that the ALJ credited Mize and Kautzman's testimonies that they honestly believed that Complainant committed the act.¹¹⁸

We agree with the ALJ and Complainant that Respondent's finding that Complainant attempted to destroy the battery plant at the David City site was based on limited and unreliable evidence. Nonetheless, the ultimate decision-

¹¹⁶ Complainant notes that the ALJ did not discuss Mize's statements in the discussion section of the decision. However, an ALJ "need not discuss all evidence presented to her" and only must explain why "significant probative evidence has been rejected." *Vincent on Behalf of Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (quoting *Cotter v. Harris*, 642 F.2d 700, 706 (3d Cir.1981)). As noted, the evidence of animosity is not significantly probative. Further, the ALJ did refer to the statements in the Findings of Fact and Conclusions of Law section, indicating the he did consider the evidence. D. & O. at 8.

¹¹⁷ *Perez v. BNSF Ry. Co.*, ARB Nos. 2017-0014, -0040, ALJ No. 2014-FRS-00043, slip op. at 12-13 (ARB Sept. 24, 2020) (quoting *McCullough v. Univ. of Ark. for Med. Scis.*, 559 F.3d 855, 861-62 (8th Cir. 2009)).

¹¹⁸ D. & O. at 20.

maker, Cargill, could not have been influenced by Complainant's protected activity when he recommended dismissal, and the ALJ accepted Mize and Kautzman's testimonies that they believed Complainant had committed the violation. Complainant does not present any further evidence of pretext.

We therefore conclude the ALJ's finding that Complainant failed to establish by a preponderance of the evidence that his protected activity contributed to Respondent's decision to terminate his employment is supported by substantial evidence. Accordingly, we **AFFIRM** the ALJ's Decision and Order Denying Complaint.¹¹⁹

SO ORDERED.

¹¹⁹ In its response brief, Respondent asserted that Complainant had no standing to petition the Board to review the ALJ's decision because Complainant was replaced by his bankruptcy estate during the pendency of the litigation before the ALJ and was therefore no longer a party to the case. However, we need not discuss this contention because we affirm the ALJ's decision.