**UNITED STATES DEPARTMENT OF LABOR**
**ADMINISTRATIVE REVIEW BOARD**
**WASHINGTON, D.C.**

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| **In the Matter Of:**<br><br>**ROBERT POWERS,**<br><br>**COMPLAINANT,**<br><br>**v.**<br><br>**UNION PACIFIC RAILROAD CO.,**<br><br>**RESPONDENT.** | **ARB Case No. 13-034**<br>**ALJ Case No. 2010-FRS-030** |

**_AMICUS CURIAE_ BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF RESPONDENT**

## INTEREST OF THE AAR

The Association of American Railroads ("AAR") is a trade association whose membership includes freight railroads that operate approximately 77 percent of the rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 94 percent of all railroad employees. The AAR's members also include passenger railroads that operate intercity passenger trains and provide commuter rail service. The AAR frequently appears before Congress, the courts, and administrative agencies on behalf of the railroad industry. AAR's members are subject to the employee protections in the Federal Railroad Safety Act ("FRSA") and other federal whistleblower statutes, which incorporate the legal burdens of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b).

## SUMMARY OF ARGUMENT

The Board, by order dated October 17, 2014, invited amicus briefs from interested parties in connection with its en banc review of the Complainant's appeal from a decision and order denying his retaliation claim under the FRSA. Specifically, the Board asked that interested parties address the contributing factor analysis contained in the majority and dissenting opinions in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (Oct. 9, 2014). The *Fordham* majority found that the "central issue" presented there was "[w]hat evidence is appropriately to be considered at the hearing stage in determining whether a complainant has met his or her burden of proving 'contributory factor' causation by a preponderance of the evidence test?" *Fordham*, slip op. at 19. After reviewing Board precedents and finding them "inconclusive," the majority considered this question to be a "matter of first impression." *Id.* at

20. The majority then held that, "the determination whether a complainant has met his or her initial burden of proving that protected activity was a contributing factor in the adverse personnel action at issue is required to be made based on the evidence submitted by the complainant, in disregard of any evidence submitted by the respondent in support of its affirmative defense that it would have taken the same personnel action for legitimate, non-retaliatory reasons only." *Id.* at 3. The *Fordham* majority further held that, if the complainant met this burden, then the burden shifted to the respondent to show by clear and convincing evidence that its non-retaliatory reason for the employment action was "the sole basis or reason for its action." *Id.* at 20.

The AAR respectfully submits that the *Fordham* majority's new paradigm for assessing contributing factor causation evidence after a hearing is clear legal error, contrary to the text and structure of AIR 21's legal burdens, and should not be applied in FRSA cases or any whistleblower cases that incorporate the AIR 21 burdens. As explained in the separate opinion of Judge Corchado, the issue of what evidence can be considered when determining whether a complainant has demonstrated that his or her protected activity was a contributing factor has been definitively answered by the text and structure of AIR 21. Section 42121(b)(2)(B)(iii) specifies that, before the Secretary can find a "violation," the "complainant" must first "demonstrate[]" that protected activity was a contributing factor to the adverse action. The majority simply ignores this text. Supreme Court precedents are clear that, by use of the word "demonstrate," Congress intended that the traditional rules regarding burdens of proof apply unless Congress indicated otherwise in clear language. As the AAR explains, the traditional burdens incorporated in Section 42121(b)(2)(B)(iii) are that a complainant retains the burden of persuasion on all elements of his or her case, including contributing factor causation; that the

complainant's standard of proof to meet this burden is preponderance of the evidence; and that, in applying the preponderance of the evidence standard, the fact finder considers the evidence of both the complainant and the respondent.

This conclusion is self-evident, as reflected in the fact that Board and judicial precedents have consistently recognized for more than fifteen years that the evidence of both the employer and employee are to be assessed in determining whether the employee has demonstrated that his protected activity was a contributing factor to an adverse action. While the AAR disagrees with the majority's jumping off point, that the Board's precedents are inconclusive on the "central issue," the AAR begins with the more fundamental problem with the *Fordham* majority opinion—that it is untethered from and contrary to the actual language and structure of the controlling statutory terms.

## ARGUMENT

### I. *Fordham*'s Holding Is Contrary To The Language And Structure Of AIR 21

The majority observed that "[s]tatutory analysis . . . begins with the plain language of the statute." *Fordham*, slip op. at 21. However, as pointed out by the dissent, the majority's analysis is contrary to the text and structure of AIR 21, which requires a complainant to show by a preponderance of the evidence that protected activity was a contributing factor in an adverse employment action. Moreover, the traditional standard of proof adopted by Section 42121(b)(2)(B)(iii) requires that all relevant evidence be considered in determining whether a complaint has shown by a preponderance of the evidence that protected activity was a contributing factor. The Board is not free to deviate from these statutory burdens.

### A. AIR 21 Statutory Burdens Require Consideration of the Complainant and Respondent's Causation Evidence as Part of a Contributing Factor Analysis

As the Board knows, FRSA adopts the legal burdens in AIR 21. 49 U.S.C. § 20109(d)(2)(A)(i). AIR 21 provides that the Secretary may determine that a "violation of [FRSA Sections 20109(a)-(c)] has occurred only if the complainant demonstrates that any behavior described in [FRSA Sections 20109(a)-(c)] was a contributing factor in the unlawful personnel action alleged in the complaint." 49 U.S.C.§ 42121(b)(2)(B)(iii).

AIR 21 does not expressly define the term "demonstrates." The 1991 amendments to Title VII define "demonstrates" as "meet[ing] the burdens of production and persuasion." 42 U.S.C.§ 2000e(m). Presumably, Congress intended that the word "demonstrates" have the same meaning under AIR 21 as it does under Title VII since they are both employment statutes. *Cf. Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) ("logical to assume that the term 'demonstrates' would carry the same meaning with respect to both provisions").

In any event, even though Congress did not define the term "demonstrates" in AIR 21, Supreme Court precedent shows that Congress clearly intended through its use of that term that the default rules for allocation of burdens of proof apply in the absence of a different allocation in the statute. "Where the statutory text is 'silent on the allocation of the burden of persuasion,' we 'begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.'" *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009) (quoting *Schaffer v. Weast*, 546 U.S. 49, 56 (2005)); *see also, e.g., Costa*, 539 U.S. at 99 ("In addition, Title VII's silence with respect to the type of evidence required in mixed-motive cases also suggests that we should not depart from the conventional rule of civil litigation that generally applies in Title VII cases. That rule requires a plaintiff to prove his case by a preponderance of the evidence.") (citation &

quotation marks omitted); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 92 (2008) ("Absent some reason to believe that Congress intended otherwise . . . we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.") (citation & quotation marks omitted).

The Court has also explained that the concept of "burden of proof" has historically "encompassed two separate burdens." *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2245 n.4 (2011). The "burden of persuasion" specifies "which party loses if the evidence is balanced." *Id.* And the "burden of production" specifies "which party must come forward with evidence at various stages in the litigation." *Id.* The term "standard of proof" refers "to the degree of certainty by which the fact finder must be persuaded of a factual conclusion to find in favor of the party bearing the burden of persuasion." *Id.* As noted above by the Supreme Court in *Costa*, the default rule for standard of proof in civil litigation is preponderance of the evidence. 539 U.S. at 99; *see also, e.g.*, *Addington v. Tex.*, 441 U.S. 418, 423 (1979). Congress specified in AIR 21 that the complainant's standard of proof at the investigation stage is a "prima facie showing," 49 U.S.C. § 42121(b)(2)(B)(i), and the respondent's standard of proof for its affirmative defense is "clear and convincing evidence," 49 U.S.C. § 42121(b)(2)(B)(iv). By not specifying the standard of proof for a complainant at the hearing stage, Congress intended that the default standard of preponderance of the evidence apply. *See, e.g.*, *Costa*, 539 U.S. at 99. As noted by the *Fordham* majority, the Secretary has recognized that the complainant's standard of proof to "demonstrate" the elements of a whistleblower case is preponderance of the evidence.

*Fordham*, slip op. at 18 (citing 29 C.F.R. § 1980.109(a)). Thus, the Secretary's position on the applicable standard of proof is congruent with the standard in the statute.[1]

As noted above, under the traditional rules incorporated by AIR 21, determining whether a complainant has satisfied his or her burden of persuasion requires a balancing of both sides' evidence. *Microsoft*, 131 S. Ct. at 2245 n.4 (burden of persuasion means "which party loses if the evidence is balanced"). Likewise, the preponderance of the evidence standard requires that both parties' evidence will be considered and weighed. *See, e.g.*, 2 Kenneth Broun, *et al.*, *McCormick on Evidence* § 339 (7th ed. 2013) ("[E]vidence preponderates when it is more convincing to the trier than the opposing evidence."); *Black's Law Dictionary* (9th ed. 2009) (under preponderance of the evidence standard, "jury is instructed to find for the party that, on the whole, has the stronger evidence"); *Almerfedi v. Obama*, 654 F.3d 1, 5 (D.C. Cir. 2011) (preponderance standard requires court to "make[] a judgment about the persuasiveness of the evidence offered by each party"); *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 187 (2d Cir. 1992) (fact has been proven by a preponderance if "'the scales tip, however slightly, in favor of the party with the burden of proof'") (quoting Leonard B. Sand, *et al.*, *Modern Federal Jury Instructions* 73.01, at 73-4 (1992)).

Obviously, and as shown by the above cited authorities, the concepts of a "balance" or "weighing" make no sense if only one party's evidence may be considered. There certainly is

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[1] The majority seems to invite the Secretary to revisit the position approved in *Dysert v. U.S. Sec'y of Labor*, 105 F.3d 607 (11th Cir. 1997), and carried forward in § 1980.109(a) that the complainant's legal burden to "demonstrate" means that she must prove her case by a preponderance of the evidence. *Fordham*, slip op. at 27 n.60. However, as explained, Congress has already addressed the complainant's standard of proof at the hearing stage under AIR 21, and the Secretary is not free to amend that statutory standard.

nothing in the legislative text to suggest that when Congress adopted the traditional burdens here, it intended that preponderance of the evidence meant only the complainant's evidence.

Indeed, consistent with the traditional rules of civil litigation, the Board recently confirmed that all the evidence submitted by both parties must be considered in determining if protected activity was a contributing factor, writing that:

> [W]here the complainant presents his case by circumstantial evidence, we repeatedly stated that the ALJ must consider "all" the evidence "as a whole" to determine if the protected activity did or did not "contribute." By "all" of the evidence, we mean all the evidence that is relevant to the question of causation. This requires collecting the complainant's evidence on causation, assessing the weight of each piece; and then determining its collective weight. The same must be done with all of the employer's evidence offered to rebut the complainant's claim of contributory factor. For the complainant to prove contributory factor before the ALJ, all of his circumstantial evidence weighed together against the defendant's countervailing evidence must not only permit the conclusion, but also convince the ALJ, that his protected activity did in fact contribute to the unfavorable personnel action.

*Bobreski v. J. Givoo Consultants*, ARB No. 13-001, 2014 DOL Ad. Rev. Bd. LEXIS 61, at *36-37 (Aug. 29, 2014)[2]; *see also Benninger v. Flight Safety Int'l*, ARB No. 11-064, 2013 DOL Ad. Rev. Bd. LEXIS 10, at *1-6 (Feb. 26, 2013) (affirming an ALJ's rejection of causation based on the employer's reasons for firing the employee and finding that the Board did not need to review the issue of clear and convincing evidence).

The *Fordham* majority itself acknowledges that in "the traditional evaluation of evidence under the preponderance of the evidence burden of proof standard . . . findings of fact are based on the weighing of all the evidence introduced by both parties." *Fordham*, slip op. at 34. And,

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[2] As noted in the *Fordham* dissent, although *Bobreski* was a nuclear safety case, the ERA whistleblower statute includes the "same critical words . . . in a similar manner" as AIR 21. Slip op. at 44 n.112.

the majority acknowledged that it was bound by the Secretary's position that the complainant's burden under AIR 21 was preponderance of the evidence. *Id.* at 27 n.60. Nonetheless, the *Fordham* majority ignored the legal burdens in AIR 21 and invented a new standard that only considers a complainant's evidence on contributing factor causation. AAR submits that the majority's analysis violates both AIR 21 and the Secretary's regulation.

### B. The Adoption of a Contributing Factor Causation Standard Did Not Eliminate Weighing of Causation Evidence

The *Fordham* majority agreed that, at the hearing stage, the ALJ "may consider" an employer's evidence challenging a complainant's proof of three of the four elements of a complainant's case: protected activity, adverse effect, and decision maker knowledge. *Fordham*, slip op. at 33 n.84. However, it held that the ALJ could not consider the employer's evidence with respect to the fourth element, causation. *Id.* at 23 ("An employer's legitimate business reasons may neither factually nor legally negate an employee's proof that protected activity contributed to an adverse action."). The majority reasoned that by lowering the complainant's causation showing from "but for" or a "motivating" or "substantial" factor to a contributing factor, Congress intended to eliminate any weighing of causation evidence as part of the complainant's burden of proof, stating as follows:

> Regarding Congress's elimination of the previously existing requirement that the complainant prove that protected activity was a "significant," "motivating," "substantial," or "predominant" factor in the personnel action by adoption of the "contributing factor" test, it is pointed out that the prior requirement necessitated the *weighing* of the parties' respective causation evidence under the preponderance of the evidence test. This weighing is *exactly* what the "contributing factor" statutory provision was designed to eliminate.

*Id.* at 22-23 (emphasis in original, footnote omitted). But, as discussed above, there is no support in the text of Section 42121(b)(2)(B)(iii) for the conclusion that Congress intended one burden of

proof paradigm for three elements of a complainant's case and a different one for the contributing factor element. The "complainant" must "demonstrate" that protected activity was "a contributing factor" in the alleged adverse personnel action. There is no ambiguity. And there is no indication that Congress intended "demonstrate" to have one meaning for the contributing factor element and a different meaning for the other three elements of a complainant's case.

To be sure, Congress reduced the level of causation necessary for employees to prove discrimination for whistleblowing activity by specifying that a complainant only had to show that protected activity was a "contributing" factor, rather than a "significant" or "substantial" one. But, the majority has confused the standard of causation the complainant must satisfy with the evidentiary burden by which that standard must be satisfied. In other words, as explained in the *Fordham* dissent, "[b]y choosing 'contributory factor,' Congress only re-defined how strong the causal link must be between protected activity and the unfavorable employment action, but it did not eliminate the need to prove a causal link based on all of the evidence." *Fordham*, slip op. at 44.

While Congress lessened the causation element for complainants in Section 42121(b)(2)(B)(iii), the same statutory provision relied upon by the majority shows that, by the word "demonstrates," Congress retained the traditional burden of proof on a complainant to prove that lessened causation element. A complainant still has to prove that protected activity

was a contributing factor by a preponderance of the evidence submitted by the complainant and respondent.[3]

The 1991 amendments to Title VII are an especially useful analogy in demonstrating that, just because Congress lessens the necessary causal link to establish a violation, that does not lessen the complainant's burden of persuasion absent some other change to the statute. Similar to several whistleblower statutes, Congress lessened the standard of causation for employees, from substantial factor to a requirement that the plaintiff "demonstrate[]" "a motivating factor." 42 U.S.C. § 2000e-2(m); *Costa*, 539 U.S. at 94-95. Congress also provided a partial affirmative defense for the employer. If the employer could "demonstrate[] that [it] would have taken the same action in the absence of the impermissible motivating factor," then it was not liable for monetary remedies. 42 U.S.C. § 2000e-5(g)(2)(B). Significantly, the reduction of the employee's causation burden and the existence of the employer's affirmative defense did not alter plaintiff's burden to prove a motivating factor. The plaintiff still retained the burden of persuasion to show, by a preponderance of the evidence, that the protected factor was a motivating factor in the adverse action. And, under those traditional burdens and standards, the evidence of both the employee and employer are considered in determining whether the employee has met his burden of persuasion. *See, e.g.*, *Holcomb v. Iona College*, 521 F.3d 130,

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[3] The majority cites *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), as support for its proposition that the contributing factor analysis was designed to eliminate weighing of causation evidence. *Fordham*, slip op. at 22. However, in *Marano*, which was decided before the 1994 amendment of the Whistleblower Protection Act, the court actually considered the evidence of the employee and agency in deciding whether the protected disclosure was a contributing factor. *See* 2 F.3d at 1141-43. After weighing the evidence, the court concluded that a contributing factor had been shown and remanded for further proceedings to allow the agency to present its affirmative defense by clear and convincing evidence.

144 (2d Cir. 2008) ("The jury, of course, will be expected to take the defendant's contentions into account in reaching its ultimate conclusion as to whether Holcomb has established by a preponderance of the evidence that his termination was the result of racial discrimination."); *Tysinger v. Police Dep't*, 463 F.3d 569, 578 (6th Cir. 2006) ("[I]t is abundantly clear, in any event, that plaintiff Tysinger bears the ultimate burden of demonstrating by a preponderance of the evidence that pregnancy discrimination was at least *a motivating* factor . . . .") (emphasis in original).

There is no support in the statutory text for the conclusion that, by lessening a complainant's burden to show causation, Congress also intended to eliminate the weighing of the parties' evidence when considering whether the complainant met his or her burden of persuasion. To the contrary, the same statutory text upon which the majority relied shows that Congress intended that the traditional standards of proof would continue to apply when evaluating the evidence of causation.

### C. The Majority's New Contributing Factor Analysis Is Contrary to the Structure of AIR 21's Burdens

Besides being contrary to the text of Section 42121(b)(2)(B)(iii), the majority's new contributing factor analysis is also contrary to the structure of the legal burdens contained in Section 42121(b)(2)(B) in at least two ways. "Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices." *Univ. of Tex. Se. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013).

First, the majority opinion is contrary to the relationship between the complainant's burdens at the investigation phase under Section 42121(b)(2)(B)(i) and the hearing phase under 42121(b)(2)(B)(iii). In effect, by not allowing the employer's evidence to be considered, the

ARB's new burden paradigm allows a complainant to satisfy her burden to "demonstrate" that protected activity was a contributing factor merely by raising an inference of causation from the facts that she engaged in protected activity and that something bad happened to her. Thus, under the *Fordham* majority's analysis, the employee's burden of proof at the hearing phase would be indistinguishable from the prima facie showing she is required to make before OSHA will conduct an investigation. 49 U.S.C. § 42121(b)(2)(B)(i). While the majority recognizes that the statute places a higher burden on complainants at the hearing than the investigation stage, *Fordham*, slip op. at 18-19, the majority makes no effort to explain how its new paradigm can be reconciled with the structure of AIR 21 on legal burdens.

The majority's new paradigm is similarly contrary to Board precedent that recognizes that a complainant cannot satisfy his or her burden at the hearing stage with inferences; the complainant must prove that protected activity was a contributing factor. For example, the Board explained as follows: "Before OSHA an inference of causation is sufficient to establish the prima facie showing required to warrant an investigation. On the other hand, an inference of causation alone is insufficient once the case goes to hearing before an ALJ, where proof of a contributing factor is required by a preponderance of the evidence." *Zinn v. Am. Commercial Lines Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, 2012 DOL Ad. Rev. Bd. LEXIS 31, at *21 (Mar. 28, 2012) (footnotes omitted).

Second, under the legal burdens as structured by Congress, the burden does not shift to the respondent to prove its affirmative defense until the complainant has first demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse personnel action. However, the majority's opinion would allow the burden of proof to be shifted

to the respondent on a prima facie showing or, in any event, a lower showing than preponderance of the evidence.

### D. The Respondent's Affirmative Defense Does Not Preclude Consideration of Its Causation Evidence as Part of the Contributing Factor Analysis

The *Fordham* majority believed that allowing any consideration of an employer's legitimate reasons for taking the adverse personnel action at the contributing factor step would "render the statutory requirement of proof of the employer's . . . affirmative defense 'by clear and convincing evidence' meaningless." *Fordham*, slip op. at 21-22. This assertion again fundamentally misapplies AIR 21's statutory burdens of proof.

The majority reasoned that, to allow the respondent's evidence of non-retaliatory reasons to defeat the complainant's evidence that protected activity was a factor would allow the respondent "to avoid liability" under the lower preponderance of the evidence standard without being held to the higher standard of proof of clear and convincing evidence for its affirmative defense. *Id.* at 20. But the majority is assuming that the complainant has at this point in the analysis demonstrated liability for which the respondent needs an affirmative defense. That is not so. As explained, the statute is written to allow the respondent to submit evidence that the adverse action was not a contributing factor at the preponderance of the evidence stage. This is inherent in the complainant's burden to prove by a preponderance of all the evidence that protected activity was "a" factor. The respondent's affirmative defense has not yet come into play.

The respondent can only avoid liability under the preponderance of the evidence standard if the complainant fails to meet this statutory burden. If a preponderance of all the evidence submitted by the complainant and the respondent fails to establish that protected activity was a

contributing factor, there is no liability. On the other hand, if a preponderance of the evidene does establish that protected activity was a contributing factor, only then does the burden shift to the respondent to establish by clear and convincing evidence that it would have taken the same action in the absence of any protected conduct.

If and when the respondent's affirmative defense does come into play, the majority is also incorrect that the respondent must demonstrate that the "sole basis" for an adverse action was non-retaliatory.[4] A carrier will not even be called on to present its affirmative defense until a complainant has proven, by a preponderance of the evidence, that her protected activity contributed in some manner to the personnel action at issue; thus, protected activity necessarily was a factor in combination with others. So, a carrier's affirmative defense does not require it to disprove that protected activity was a factor. Rather, the carrier's burden is to show that, even though a protected activity contributed to an adverse employment action, it did not contribute to such an extent that the carrier would not have made the same decision in the absence of the employee's protected behavior.

When the affirmative defense is thus (properly) understood, there is no logical basis for the majority's conclusion that affording an employer the opportunity to defeat a complainant's proof of contributing factor causation would render the statutory affirmative defense "meaningless." *Fordham*, slip op. at 22. Moreover, given the lower burden that a complainant

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[4] Indeed, the respondent must have an opportunity at the contributing factor stage, not the affirmative defense stage, to present evidence that the "sole basis" for an adverse action was non-retaliatory. If the evidence shows that the "sole basis" for an adverse action was non-retaliatory, then the complainant cannot meet her burden of proving by a preponderance of the evidence that protected activity was a contributing factor.

has to show that protected activity was a factor, there is no indication in the Board's precedents that consideration of the respondent's causation evidence at the contributing factor stage has posed some obstacle to complainants.

In the final analysis, the burdens work the way they do because that is how Congress wrote them.

## II. Precedents Under Title VII, The WPA, And The ERA Do Not Provide Any Support For The *Fordham* Majority's New Burden Paradigm

Lacking support in the text or structure of AIR 21 or Board precedent, the *Fordham* majority looked for support for its new contributing factor analysis in the legislative history of the WPA and the ERA, as well as in Title VII case law. These sources merely confirm that the majority's contributing factor analysis is contrary to the text of AIR 21.

### A. The Legislative History of Other Statutes Does Not Support the Majority's Conclusion

The majority improperly relies on the legislative history of the Whistleblower Protection Act and the Federal Circuit's decision in *Kewley v. Department of Health and Human Services*, 153 F.3d 1357 (Fed. Cir. 1998), to support its conclusion in *Fordham*. Congress passed the Whistleblower Protection Act ("WPA") in 1989 to protect the rights of Federal employees who reported government wrongdoing. *See* Pub. L. No. 101-12, 103 Stat. 16 (1989). The Act sets out an evidentiary scheme similar to AIR 21 and is administered by the Merit Systems Protection

Board. The U.S. Court of Appeals for the Federal Circuit hears appeals of the Board's decisions.[5]

In one such appeal heard in 1993, the Federal Circuit held that the WPA did not contain a "per se" rule that an employee automatically proves her case by demonstrating that an employer knew about her protected activity and took an adverse personnel action shortly thereafter. *See Clark v. Dep't of the Army*, 997 F.2d 1466, 1472 (Fed. Cir. 1993). In direct response to this holding, Congress amended the WPA in 1994 to add the following language:

> The employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence, such as evidence that: (A) the official taking the personnel action knew of the disclosure or protected activity; and (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.

5 U.S.C. § 1221(e). Solely because of this 1994 amendment, the Federal Circuit held in *Kewley* that an ALJ could not consider evidence of an agency's legitimate reasons for an adverse personnel action at the contributing factor stage. 153 F.3d at 1361-62.

The *Fordham* majority relies on *Kewley* and the 1994 amendment to the WPA to support its conclusion that the same analysis applies to AIR 21—that is, that evidence of an employer's legitimate, non-discriminatory reasons may not be offered to undermine an employee's case. The majority's reliance is misplaced. As an initial matter, the WPA is a separate statute administered by a separate Federal agency. Its legislative history therefore provides limited insight into Congress' intent when it passed AIR 21 and incorporated its burdens into the FRSA.

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[5] The Whistleblower Protection Enhancement Act suspended the Federal Circuit's exclusive jurisdiction over whistleblower appeals from the MSPB in 2012. Pub. L. No. 112-199, § 108(a), 126 Stat. 1465, 1469 (2012) (codified at 5 U.S.C. § 7703(b)(1)(B)).

*See, e.g.*, *Gross*, 557 U.S. at 174 ("When conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'") (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)).

This conclusion is particularly true in this case, where Congress amended the WPA but did not incorporate this amendment into other statutes containing similar evidentiary frameworks. *See Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (Court will not impute provisions of amended statute to application of statute that Congress could have, but did not, expressly amend). For example, Congress amended the Energy Reorganization Act ("ERA") in 1992 to incorporate new whistleblower protection provisions, on which AIR 21's burden of proof scheme is modeled. *Fordham*, slip op. at 28 (citing 42 U.S.C. § 5851; *Peck v. Safe Air Int'l*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 9 (Jan. 30, 2004)). But Congress did not amend the ERA's provisions in 1994 to incorporate the WPA's new *per se* test. Nor did Congress incorporate the language of the 1994 WPA amendment when it passed AIR 21 six years later. Far from being evidence of Congress' intent that these three statutes should be interpreted identically, the legislative history thus shows that the WPA sets out different burdens of proof than either the ERA or AIR 21.

Similarly, the majority's citations to the legislative history of the ERA show only that Congress intended to reduce the standard of causation in whistleblower cases from "motivating" to "contributing" factor. *Fordham*, slip op. at 28 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 281 (1977)). In fact, rather than showing that Congress primarily intended to lighten the burden on complaining employees, the legislative history of the 1992 amendments demonstrates that the final bill reflected a series of compromises designed to

balance the interest of whistleblowers against the interest of employers in heading off frivolous complaints. In the words of Representative Lent, then ranking member of the House Committee on Energy and Commerce, Congress "sought to strike a balance that insures that employees are provided adequate relief . . . while at the same time attempting to send a clear message that *any attempt to burden the system with frivolous complaints about employment actions that have their origins in legitimate considerations will meet with a swift dismissal and denial of any relief.*" 138 Cong. Rec. H11,412 (daily ed. Oct. 5, 1992) (emphasis added). Consistent with this statement, the section of the final bill that added the "contributing factor" language to the ERA is entitled "Avoidance of Frivolous Complaints." Pub. Law 102-486 § 2902, 106 Stat. 2776, 3123 (1992). Obviously, this expressed desire for "swift dismissal" of complaints that have their origins in an employer's "legitimate considerations" is inconsistent with the *Fordham* majority's new interpretation of the evidentiary burdens at the contributing factor stage. The majority's selective presentation of legislative history for two statutes—neither one of which is the statute under consideration in this case—does not support its abrupt departure from ARB precedent and the standard burden of persuasion.

### B. Title VII Precedents Do Not Support the *Fordham* Majority

The majority also claims that its departure from the "traditional evaluation of evidence under the preponderance of the evidence burden of proof standard" is justified because it is not "inconsistent with the Supreme Court's basic allocation of burdens and order of presentation of proof in Title VII cases alleging discriminatory treatment, as initially established in *McDonnell-Douglas*." *Fordham*, slip op. at 34. This assertion, however, conflates the allocation of burdens

of production in *McDonnell-Douglas* with the majority's allocation of burdens of persuasion under the FRSA.

The Supreme Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), "established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). A Title VII plaintiff "must first establish, by a preponderance of the evidence, a 'prima facie' case of racial discrimination." *Id.* (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981)). He can do this, for example, by showing that (1) he is a member of a protected class; (2) he was qualified for the position at issue; (3) he was rejected from the position; and (4) the position was ultimately filled by an employee who is not a member of a protected class. *Id.*[6]

Once the employee has proven his prima facie case, the burden shifts to the employer to produce evidence "that the adverse employment actions were taken 'for a legitimate, nondiscriminatory reason.'" *St. Mary's Honor Ctr.*, 509 U.S. at 506-507 (quoting *Burdine*, 450 U.S. at 254). "It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of production to the defendant, 'the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Id.* at 507 (citing *Burdine* 450 U.S. at 253) (emphasis omitted). Indeed, once the employer responds to a plaintiff's prima facie case, the evidentiary presumption

[6] In this context, "prima facie case" describes a "legally mandatory, rebuttable presumption"—if the employer does not respond to the plaintiff's evidence, the plaintiff is entitled to judgment against the employer. *Burdine*, 450 U.S. at 254 n.7; 9 Wigmore, *Evidence* § 2494 (Chadbourn rev. 1981).

created by *McDonnell Douglas* drops out of the case entirely, and the employee remains responsible for proving, by a preponderance of the evidence, that he was a victim of intentional discrimination. *Id.* at 509-11.

*McDonnell Douglas*' burden-shifting scheme is thus wholly different than the burden-shifting scheme the *Fordham* majority imposes. As is "traditional" under the preponderance of the evidence standard, *McDonnell Douglas* expressly provides that both an employer's evidence and the employee's evidence must be considered when determining whether an employee has met his burden of persuasion. In contrast to *McDonnell Douglas*, the majority in *Fordham* would shift the employee's burden of persuasion to the employer before the employer's evidence has even been evaluated. There is no basis in the language of the FRSA or in case law for such an unprecedented interpretation.

## III. The Majority's New Burden Paradigm Is A Radical Departure From ARB And Appellate Precedent

The majority started from a mistaken premise that Board precedent on the question of whether the reasons an employer gives for its personnel actions can be considered when evaluating an employee's evidence of causation is "inconclusive[]" and therefore presents a "matter of first impression." *Fordham*, slip op. at 20. As explained in Part I, *supra*, the traditional standards of proof incorporated by Section 42121(b)(2)(B)(iii) require as a matter of statute that the evidence of both parties on causation be considered when determining whether a complainant has met his or her burden that protected activity was a contributing factor. This statutory requirement is reflected in many Board decisions, which recognize that both the complainant's and the respondent's causation evidence are to be weighed when assessing whether the complainant has satisfied his burden of proof on contributing factor.

### A. The ARB Has Consistently Weighed Both Employer and Employee Evidence at the Contributing Factor Stage

The majority did not identify a single case in which an ALJ or the ARB refused to consider an employer's evidence when evaluating a complaining employee's proof of contributing factor causation. This failure makes sense: the ARB has repeatedly held that an employer's evidence should be considered in determining whether an employee has proved his or her case. In *Hamilton v. CSX Transportation*, for example, the ARB affirmed an ALJ's decision which considered both the carrier's evidence and the employee's evidence, and found that the complainant could not establish that his reports of safety concerns contributed to the decision to reprimand him. *Hamilton*, ARB No. 12-022, ALJ No. 2010-FRS-025, 2013 DOL Ad. Rev. Bd. LEXIS 36, at *4 (Apr. 30, 2013). Although the complainant in *Hamilton* had presented circumstantial evidence of retaliation, the ALJ credited the employer's explanation that he was disciplined for unacceptable behavior, including banging his hands on his desk and loudly growling in frustration. *Id.*; *see also Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, 2011 DOL Ad. Rev. Bd. LEXIS 93, at *31-33 (ARB Sept. 30, 2011) (affirming ALJ's conclusion that—despite circumstantial evidence of retaliation—the employer's "financial condition and revenue problems concerns were the reasons for discharging [the complainant], not his protected activity").

Likewise, the ARB has often explained that an employer's evidence of a legitimate, intervening basis for an adverse employment decision may break an inference of causation created by temporal proximity. In *Abbs v. Con-way Freight, Inc.*, for example, the ARB held that an employee who was discharged just three days after he engaged in protected activity had not demonstrated contributing factor causation because the employee's falsification of his log

book and payroll records was the true basis for his dismissal. ARB No. 12-016, 2012 DOL Ad. Rev. Bd. LEXIS 100, at *12 (Oct. 17, 2012) (citing *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 8 (Dec. 30, 2004); *Robinson v. Nw. Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (Nov. 30, 2005)).

Finally, the ARB has consistently held that an employer's improper motive or pretextual justification for an adverse employment decision is circumstantial evidence of retaliation. *See Cain v. BNSF Ry. Co.*, ARB No. 13-006, ALJ No. 2012-FRSA-019, 2014 DOL Ad. Rev. Bd. LEXIS 72, at *13 (Sept. 18, 2014); *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, 2012 DOL Ad. Rev. Bd. LEXIS 23, at *11 (Feb. 29, 2012). This holding in itself presumes that an employer's and an employee's evidence will be presented and considered simultaneously. *See Fordham*, slip op. at 24 ("legally acceptable" for ALJ to examine the legitimacy of the employer's articulated reasons for adverse action to determine if they were pretextual). Indeed, it is impossible to imagine how an ALJ could weigh a complainant's evidence of pretext if that ALJ did not also consider the employer's evidence of justifications for acting.

These cases belie the majority's assertion that the question in *Fordham* is one that the ARB has not yet addressed. To the contrary, the majority's opinion is opposed to years of ARB precedent, under which both an employer's and an employee's evidence has been considered and weighed at the contributing factor stage.

**B. The Majority Has Not Shown That Precedent Is "Inconclusive"**

The majority also inaccurately characterizes ARB precedent as "inconclusive" on the question of whether an employer's evidence should be included in the contributing factor

analysis. *Fordham*, slip op. at 23. To be sure, ARB decisions have created some confusion about how ALJs should apply the contributing factor standard of causation and, in particular, whether Title VII's burden shifting scheme is applicable to cases under AIR 21. None of these decisions show any confusion, however, about the question that *Fordham* addresses—namely, whether an ALJ may consider an employer's evidence that protected activity was not a contributing factor in an adverse personnel decision before the burden of persuasion shifts from the employee to the employer. This is not surprising given that the statutory burdens in AIR 21 control this issue. The majority identified no cases holding that such evidence is inadmissible at the contributing factor stage, when the employee has the burden to prove his claim by a preponderance of the evidence—and there are none.

Instead, the majority cites to *Hutton v. Union Pacific* as an example of "the inconclusive nature of ARB decisions." *Fordham*, slip op. at 23. In *Hutton*, the ARB reversed an ALJ's dismissal of a FRSA complaint because it appeared to be based "solely on a finding that [the complainant] committed a dismissible offense." ARB No. 11-091, ALJ No. 2010-FRS-020, 2013 DOL Ad. Rev. Bd. LEXIS 43, at *25-26 (May 31, 2013) (emphasis added). The ARB explained that a FRSA complainant need not disprove a carrier's evidence of a legitimate business reason for its actions; instead, he may succeed by showing simply that his protected activity contributed to his termination—even if his employer was also motivated by other, legitimate reasons. *Id.* Importantly, the ARB did not suggest in *Hutton* that the employer's evidence should not have been considered; it held only that the ALJ applied the wrong standard of causation.

Likewise, the majority points to *Brune v. Horizon Air Industries*, ARB No. 04-037, ALJ No. 2002-AIR-008 (Jan. 31, 2006), as creating confusion over whether Title VII's burden-shifting framework should apply in determining "contributing factor" causation. *Fordham*, slip op. at 24. Again, the question of whether Title VII standards apply to determine whether an employee relying on circumstantial evidence has proven his claim by a preponderance of the evidence does not implicate the question in *Fordham* of whether an employer's evidence may even be considered at the contributing factor stage.

In sum, none of the cases cited by the majority demonstrate any confusion about whether an employer's evidence may be considered at the contributing factor stage.

## CONCLUSION

For the reasons explained in this brief, the Board should reverse the position taken by the majority in *Fordham*. Instead, the Board should follow the statutory burdens and its own, long-settled precedents applying those burdens that recognize that evidence of the respondent's legitimate, non-retaliatory reasons for a personnel action may be considered when determining whether a complainant has met his or her burden to show that protected activity was a factor.

Respectfully submitted,

Dated: December 17, 2014

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