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December 16, 2014

VIA Fed-Ex
Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, NW
Suite S-5220
Washington, DC 20210

Re: Robert Powers v. Union Pacific Railroad Company
ALJ Case No.: 2010-FRS-00030
ARB Case No. 13-034

To whom it may concern,

Please find enclosed one original and five (5) copies of Supplemental Brief of Complainant Robert Powers along with one copy of Complainant's Appendix in the above styled case.

If you have any questions of concerns, please feel free to contact me at (501)758-0278.

Very Truly Yours,

James R. Ferguson

ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPOARTMENT OF LABOR
WASHINGTON, DC 20210

In the Matter of

ROBERT POWERS,
Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

ARB Case No. 13-034

ALJ Case No. 2010-FRS-00030

SUPPLEMENTAL BRIEF OF COMPLAINANT ROBERT POWERS

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INTRODUCTION

On October 17, 2014, the Administrative Review Board ("ARB") requested supplemental briefing from Complainant Robert Powers and Respondent Union Pacific Railroad Company addressing "contributing factor" causation with emphasis on how the ARB's recent decision in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (Oct. 9, 2014) and its effect if any on this appeal. *Fordham* clarified that the "contributing factor" causation standard that is shared between the Sarbanes-Oxley Act of 2002 ("SOX") and the Federal Rail Safety Act of 1982 ("FRSA"). *Fordham* states that the determination of whether a complainant has met his or her burden of proving that the protected activity was a contributing factor in the adverse personnel action at issue may not include the weighing of the respondent's evidence supporting its statutorily-prescribed affirmative defense.

For the reasons set forth below, Complainant respectfully submits that the Decision of the ALJ should be overturned because there was more than substantial evidence to support a *prima facie* case under the FRSA and that Complainant's protected activity was a contributing factor to his discipline.

ISSUE PRESENTED

A. Whether there was substantial evidence to show that Complainant's report of injury was in any way a contributing factor to Respondent's decision to terminate him.

STATEMENT OF THE CASE

Complainant incorporated by reference his Statement of the Case contained in his initial Brief of Complainant Robert Powers filed with the ARB on February 24, 2014.

STANDARD OF REVIEW

The Secretary of Labor has delegated authority and assigned responsibility to the Administrative Review Board ("ARB") to act for the Secretary in review of an appeal of an ALJ's decision pursuant the Federal Rail Safety Act of 1982 ("FRSA"). Secretary's Order No. 1-2010, 75 Fed. Reg. 3924, § 5(c)(15) (Jan. 15, 2010). The ARB reviews the ALJ's factual findings to determine whether they are supported by substantial evidence. 29 C.F.R. § 1982.110 (2011). The ARB generally reviews the ALJ's conclusions of law under the de novo standard. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

ARGUMENT

In order to establish an FRSA employment discrimination violation, a claimant must show he engaged in a protected activity, that he was subject to an adverse personal action, and that his protected activity was a contributing cause for the unfavorable personnel action. *Rudolph v. National Railroad Passenger Corp. (Amtrak)*, ALJ No. 2009-FRS-15, slip op. at 72 (Mar. 14, 2011). In this action, there has been no contention that Claimant engaged in a protected activity, when he filed his injury report, or that he was subject to an adverse personnel action, his termination from the railroad. The ALJ made no findings to dispute either of these first two prongs of the test. Instead, he focused on the third prong. Judge Berlin found that Claimant could not establish a *prima facie* case because his report of personal injury was not a contributing factor for the adverse action. Judge Berlin reached this conclusion based on his weighing of the evidence presented by Claimant and the evidence presented by Respondent to counter Claimant's position. In Fordham, the ARB specifically addressed whether it is proper for a respondent's evidence of legitimate, non-retaliatory reasons for its action may be weighed against the claimant's causation evidence in determining whether the claimant has met his

burden of proving by a preponderance of the evidence that his protected activity was a contributing factor in the adverse personnel action.

A. The Contributing Factor Analysis Was Intentionally Designed By Congress To Make It Easier For Employees To Prove Causation.

In *Fordham*, the ARB was asked specifically to address whether a respondent's evidence of lawful reasons for its action should be weighed against a claimant's evidence that his protected activity was a contributing factor to the adverse action. The ARB in *Fordham* clarified that the FRSA imposes a bifurcated standard of proof. The first standard is that of the claimant. Namely, a claimant must show four basic elements by a preponderance of the evidence to establish a *prima facie* case under the FRSA. Those elements are: (1) claimant engaged in a protected activity; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Fordham* at 18 (*citing* Bechtel *v. Administrative Review Bd., U.S. Dep't of Labor*, 710 F.3d 443, 447 (2d Cir. 2013)). Once this showing is made, a respondent may only avoid liability if it can show by the higher standard of clear and convincing evidence that it would have taken the same adverse employment action in the absence of the protected activity. *Fordham* at 21. The *Fordham* Board thoughtfully points out that this clear distinction made by Congress would naturally indicate that the evidence put forth by the respondent "in support of its affirmative defense as to why it took the action in question is not to be considered at the initial contributing factor causation stage where proof is subject to the preponderance of the evidence test." *Fordham* at 21.

This distinction is not novel to the construction and interpretation of SOX or the FRSA burden shifting analysis. In *Araujo v. New Jersey Transit Rail Operations, Inc.*, 12-2148, slip op. at 11 (3d Cir. Feb. 19, 2013), the Third Circuit engages in a thorough discussion of what

evidence is needed by a claimant in order to show that his protected activity was a contributing factor in bringing about the adverse personnel action. The Third Circuit opined that a Complainant need only show that his protected activity was a "contributing factor" in the retaliatory discharge, not the sole or even predominant cause. *Id.* at 14 (*citing* 49 U.S.C. § 42121(b)(2)(B)(ii)). "In other words, 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." *Id.* (*citing Ameristar Airways, Inc. v. Admin. Rev. Bd.*, 650 F.3d 563, 567 (5th Cir. 2011) (emphasis added) (internal quotation omitted).

> The words "a contributing factor" . . . mean *any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.* This test is specifically intended to overrule existing case law, which required a whistleblower to prove that his protected conduct was a "significant", "motivating", "substantial", or "predominant" factor in a personnel action in order to overturn that action.

Araujo, 12-2148 at 15 (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))) (emphasis added by Federal Circuit). It is also further clarified that an employee "*need not* demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action." *Id.* (quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993) (emphasis in original). From this discussion in *Araujo*, it stands to reason that "to afford an employer the opportunity of defeating a complainant's proof of "contributing factor" causation by proof at this stage of legitimate, non-retaliatory reasons for its action by a preponderance of evidence would render the statutory requirement of proof of the employer's statutorily prescribed affirmative defense by "clear and convincing evidence" meaningless." *Fordham* at 21-22.

This standard is again alluded to, if not specifically addressed, in *Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020 (ARB May 31, 2013). In *Hutton*, the ARB reversed the decision of the ALJ who found that the claimant could not sustain a *prima facie* case under the FRSA because respondent could show that claimant committed a dismissible offense. The ARB held that claimant had produced some evidence that tended to show that his protected activity was a contributing factor. Specifically, Hutton had produced evidence sufficient to show that had he not reported his injury, he would not have been required to comply with the return to work programs and he would not have run afoul of the programs and Union Pacific would not have disciplined him. The ALJ's reliance on Union Pacific's evidence that it took a legitimate business action when it terminated him for not attending a discipline hearing was error because under the FRSA, the causation question is not whether a respondent had good reasons for its adverse action, but whether the prohibited discrimination was contributing factor which, alone or in connection with other factors, tends to affect in any way the decision to take an adverse action. *Hutton* at 11-12.

The ARB decision in *Hutton* mirrors the *Fordham* language and without specifically stating, tends to show that there is a clear distinction between what evidence is to be considered at what stage of the burden shifting test. This distinction in *Hutton* logically leads to the ruling in *Fordham.* Like the *Hutton* case, Powers' report of personal injury was the instigating factor that directly led to Powers' termination. As was shown during the Hearing, had Powers not reported a personal injury, he would not have been put on restrictions by his doctor, Union Pacific would have had no reason to order a private investigator to record his actions, and he would not have been brought up on charges for being dishonest about whether he was acting within his medical restrictions.

In the instant case, the ALJ ignored the evidence presented by Claimant and, instead, relied upon evidence presented by Respondent, all without making mention of the higher standard placed on a Respondent to show it would have made the same decision, regardless of any protected action. This is precisely the reason that the decision in *Fordham* was necessary, i.e., to clarify that there is a distinction in the statute as to what must be proved by each party and to what standard each is subjected. Without this distinction, there are cases such as the ALJ decision in *Hutton* where evidence of a contributing factor is ignored because the judge incorrectly relies upon evidence produced by a respondent and applies the preponderance of evidence standard which is statutorily reserved for the claimant's offer of proof.

This standard may seem unfair to respondents because it is overly simple and easy for a claimant to meet, but, that is precisely the intent of Congress's adoption in 2007 of the comparatively lower contributory factor standard to promote effective enforcement of the FRSA by making it easier for employees to prove causation. *Hutton* at 8. "Indeed, The Third Circuit recently held that the 2007 FRSA amendments adopting the contributing factor standard for FRSA whistleblower complaints reflects Congress's intent to be 'protective of plaintiff-employees.'" *Id* (citing *Araujo v. New Jersey Transit Rail Operations, Inc.*, 12-2148, slip op. at 18 (3d Cir. Feb. 19, 2013)).

B. The Evidence Presented at the ALJ Hearing Was More Than Sufficient To Show That Plaintiff's Report Of Personal Injury Was A Contributing Factor To His Termination.

Applying the contributing factor standard along with the clarification made in *Fordham* to the evidence presented at the ALJ hearing, it is quite easy to see that absent Claimant's report of personal injury, he would not have been subjected to discipline. To begin with, the ALJ found that immediately following the injury, Complainant's manager, Sharrah, had reason to keep Complainant from filing his injury report. Sharrah had been and was being disciplined because

too many of the employees that reported to him were getting injured. The ALJ found that a person in Sharrah's position could have retaliatory animus against a subordinate who filed an injury report. At the time of Claimant's injury, a report could have adversely affected the manager's year-end bonus or pay raise. *Powers,* 2010-FRS-00030, p. 5 n.6. This position is again bolstered by Powers' testimony that a few days after the injury occurred, Sharrah approached Powers and tried to get him to sign a letter stating that the injury was Powers' fault and it would have assessed him a Level 1 or 2 action. *Tr.* 83.

Following Sharrah's attempt to get Powers to sign the discipline letter, Sharrah made Powers' injury the subject of a conference call wherein Sharrah stated that Powers was at fault for his own injury. *Tr.* 84-85. Additionally, a letter was also filed by Sharrah stating that Powers was at fault for the incident. *Tr.* 85. No other discipline was taken immediately because Plaintiff was able to return to a limited role and was not missing any work, which means that the injury was not a reportable lost time injury under the FRA. *Tr.* 133. It is quite telling that as soon as Plaintiff was transferred to another gang and sent home because he was unable to be accommodated, the events leading to his termination intensified. Once Powers was removed from service, he began receiving letters from different sources contradicting each other.

The ALJ found that throughout the time between Complainant being force recalled and his termination, claims manager Loomis and manager Gilliam were extremely concerned with getting Complainant back to work. However, neither of these persons contacted him to let him know that he could bid back onto his lower level job or that to tell him that the letters he was receiving which stated his restrictions could not be accommodated were only from the system gang and did not include the local level. *Tr.* 429. (The letters did not state which department

they originated from. The only way to know where they came from was to know that the title of the signatory was a person on the system level.) *Tr.* 438-439.

During this time when Powers was off on medical leave, Union Pacific became aware that he had retained counsel in preparation for an Federal Employers' Liability Act claim. *Tr.* 165. The ALJ noted that at this point, Loomis took several steps. The first was to offer Plaintiff vocational rehabilitation, an action which the ALJ stated was at least partially because if Powers pursued an FELA claim, this could limit Union Pacific's exposure to damages as a result of Powers being on medical leave because of his reported injury. *Powers,* 2010-FRS-00030, p. 10-11.

Throughout this time, Powers was submitting medical leave of absence forms to Loomis in order to maintain his medical leave. Loomis indicated that the forms did not match the restrictions on the chart notes. *Tr.* 154-156. Rather than contact Dr. Abraham's office, Powers, or Powers' attorneys to clarify the restrictions, Loomis just used the chart note, not the medical leave of absence form (which had less restrictions indicated). *Tr.* 155-156.

Next, Loomis hired a private investigator to follow Powers and film him. The private investigator followed Powers and recorded him on several occasions between May 15 and May 18, 2008. The films showed Powers engaged in gardening activities including building a raised flower bed with his wife, wrapping a dry line onto a spool, using a shovel, using a drill and lifting wooden posts. The ALJ found that Powers spent 20 seconds on one occasion wrapping the spool, seven minutes carrying wooden posts with his wife, 22 minutes including breaks shoveling dirt. According to the ALJ's findings, all of this took less than one hour. *Powers,* 2010-FRS-00030, p. 11. The next day, Powers worked on the raised planter for eight minutes pushing a wheeled soil compactor, shoveling dirt and swinging a sledge hammer nine times. *Id.*

Later that day, Powers drove a truck and trailer to a gun show and unloaded 10-12 boxes and set up his booth. *Id.* at 11-12. Once he had unloaded the boxes from the truck, he used a dolly to move the boxes to the booth position. *Id.* at 12. The ALJ noted that even with the dolly heavily loaded, the total weight was not too considerable as Powers' young son wheeled the dolly away easily. *Id.* This process took approximately 1 hour, 45 miuntes. Two days later, Powers spent approximately 30 minutes cleaning up the booth at the gun show and loading the items back into the truck and trailer. *Id.*

At this point, Dr. Abraham had submitted at least two medical progress reports that did not contain a restriction for repetitive motion and all of his medical progress reports for the past several months had put a 50 lbs lifting restriction on Powers. *Powers,* 2010-FRS-00030, p. 9-10. Additionally, nine days later, Dr. Abraham submitted another medical progress report which did not list a restriction on repetitive movement. *Id.*

Shortly thereafter, on May 29, 2008 Manager Gilliam called Powers to ask some questions regarding whether he had been following his medical restrictions and what type of work he thought he could do. *Id.* Gilliam was the manager that had replaced Sharrah when Sharrah was terminated, partially for allowing too many reportable injuries. *Id.* at 5 n. 6. Gilliam asked Powers about his restrictions, whether he had been following his restrictions and a series of questions regarding specific work. Powers informed Gilliam that he had been acting within his restrictions and had been doing some gardening. *Id.* at 13. He also stated he could grip and swing a spike maul, that shoveling ballast would not be a problem as he had been gardening (presumably doing a similar motion), no issue being on his feet for an extended period of time, he would not be able to lift and carry joint bars because of the pain in his thumb and wrist, no issue lifting and carrying a track jack, unsure about lifting and carrying a spike driver,

but would try, no issue lifting and carrying a spike puller, no issue lifting and carrying a rail drill, unsure about lifting and carrying the rail saw, and that he wears his hand brace with anything more than minimal tasks. *Id.* At this time, Powers was still off work as he had been notified that the section gang still could not accommodate his restrictions. *Id.*

About 45 days later, Loomis gave Gilliam a copy of the video. *Id.* at 15. After watching the video on July 17, 2008, Gilliam determined that Powers had not been truthful during their conversation and sought permission to file disciplinary charges against him. *Id.* Meanwhile, one day later, Gilliam notified Loomis that he could accommodate Powers' restrictions. However, rather than inform Powers that he could return to work, Union Pacific continued down the disciplinary track. *Id.* at 16. Gilliam even acknowledged at the ALJ hearing that the "efforts" to get Powers back to work seem inconsistent with the disciplinary effort. *Tr.* 347. Powers was charged with being dishonest on the phone call with Gilliam by not staying within his restrictions.

Once the investigation was over, the transcript was reviewed by company manager Meriweather. Meriweather testified that he reviewed the transcript and spoke with Gilliam and investigating officer Posh before making his decision to terminate Powers. *Powers,* 2010-FRS-00030, 17. Incredibly, Meriweather testified that he reached the conclusion that Powers had acted outside his 50 lbs lifting restriction when he lifted the 6x6 posts and when he lifted the ammo boxes. *Id.* This is incredible since there was no testimony at the investigation about the weight of the 6x6 posts and Meriweather admitted that he did not even know there was testimony that the heaviest ammo box was weighed by Union Pacific's private investigator and it weighed less than 50 lbs. *Id.* This clearly shows that Meriweather was not interested in the facts of the investigation, he was simply making sure that Union Pacific's position was enforced.

Meriweather also found that swinging a sledge hammer nine times was inconsistent with the phone conversation with Gilliam, although Powers informed Gilliam that he would be able to swing a spike maul, a tool that the ALJ found to be substantially similar to a sledge hammer. *Id.* at 17; 14 n. 19. Apparently, Meriweather determined that doing a motion for approximately 20 seconds, such as wrapping a dry line onto a spool was a repetitive motion that was against Powers' restrictions. Dr. Abraham, Powers' doctor who Powers had many discussions with over the months of treatment, testified that he did not consider a task repetitive if it was repeated for less than 33% of any given hour. *Id.* at 25 n. 34. Rather than confirm with Powers whether Abraham had informed him of this type of distinction, Meriweather took it on himself to determine that Powers violated his medical restrictions by engaging in activity that at the very most lasted 18 minutes, less than 33% of an hour, and terminated Powers for that violation. Meriweather came to all of these conclusions without even watching the surveillance video. *Tr.* 250-251.

CONCLUSION

The ALJ's finding that Complainant did not meet his burden to show that his protected activity played any part in Respondent's decision to terminate Complainant was not supported by substantial evidence. Complainant brought forth evidence that he was discriminated against immediately following his injury and suffered continued discrimination which ultimately culminated in his termination.

For the reasons explained above, Complainant asks this Board to reverse the decision of the ALJ and remand the case for a determination on whether Respondent proved by clear and convincing evidence that it would have terminated Claimant absent his protected action.

Respectfully Submitted
on Behalf of Complainant,

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CERTIFICATE OF SERVICE

I hereby certify that one (1) original and four (5) copies of the foregoing Supplemental Brief of Complainant Robert Powers via FedEx overnight delivery to the following persons/entities this 16 day of December, 2014.

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I hereby certify that one (1) copy of the foregoing Supplemental Brief of Complainant Robert Powers was served via FedEx overnight delivery to the following persons/entities this 16 day of December, 2014.

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