ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, DC

In the Matter of

ROBERT POWERS,

Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

ARB Case No. 13-034

ALJ Case No. 2010-FRS-00030

RESPONDENT UNION PACIFIC RAILROAD COMPANY'S SUPPLEMENTAL BRIEFING

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I. INTRODUCTION

To establish a claim under the Federal Railroad Safety Act, the complainant must prove that his protected activity contributed, in whole or in part, to the employer's adverse action against him. In *Fordham v. Fannie Mae*,[1] the Administrative Review Board (the "Board") held that the employer's evidence concerning the actual reasons for its actions must be ignored in determining whether the complainant met this statutory burden. *Fordham*'s holding is at odds with the governing statute's plain language, finds no support in relevant precedent or legislative history, and is fundamentally unfair. Union Pacific respectfully requests that the *en banc* Board overrule *Fordham* for the reasons discussed below.

II. STATEMENT OF THE CASE

This case arises under the employee-protection provision of the Federal Railroad Safety Act, 49 U.S.C. § 20109 ("FRSA"). On May 18, 2007, Complainant Robert Powers reported a work-related injury. On September 3, 2008, Union Pacific discharged Powers for dishonesty. Powers filed a complaint with the Department of Labor's Occupational Safety and Health Administration ("OSHA"), contending that Union Pacific retaliated against him in response to his injury report—a FRSA-protected activity. OSHA investigated the allegations and issued a preliminary order in the Complainant's favor, which Union Pacific appealed. Following a two-day trial in January 2013, Administrative Law Judge Steven Berlin issued a 30-page Decision and Order denying Powers' claim for failure to establish the causation element of his *prima facie* case: that his injury report was a "contributing factor" in his discipline over a year later.

Powers timely petitioned the Board to review the ALJ's findings. The Board accepted Powers' petition, and the parties briefed this appeal in Spring 2013. While the appeal was pending, the Board issued two opinions potentially bearing on this matter: (1) *Hutton v. Union Pacific Railroad Company,*[2] which held, in relevant part, that a FRSA complainant may prove

[1] ARB Case No. 12-061 (Oct. 9, 2014).

[2] ARB Case No. 13-034 (May 31, 2013). Powers recently filed a "Notice of Additional Authority" enclosing the *Hutton* decision in support of his argument that a series of "continuous acts" causally linked Powers' May 2007 protected activity to his September 2008 discharge.

causation where his protected activity represents a link in a "chain of events" that ultimately results in an adverse employment decision; and (2) *Fordham,* which held, in the Sarbanes-Oxley Act ("SOX") context,[3] that an ALJ may not consider the employer's causation evidence in deciding whether a complainant has established the "contributing factor" element of his *prima facie* case.

On October 17, 2014, the Chief Administrative Appeals Judge ordered the Board's *en banc* review of this appeal in light of "the widespread impact of the causation issue *Fordham* addressed." Specifically, the Board invited the parties to file supplemental briefs addressing the *Fordham* majority's "contributory factor" analysis.

III. STATEMENT OF FACTS

Union Pacific incorporates by reference the Statement of Facts set forth in its March 21, 2013, Response Brief, which more fully covers the relevant background. For purposes of this Supplemental Briefing, the key facts (as detailed in the ALJ's Decision and Order Denying Claim),[4] are as follows: On May 18, 2007, while at work for Union Pacific, Powers struck a machine with his hand, injuring his left thumb and wrist. X-rays taken days later showed bruising but "were negative for fracture or dislocation." At trial, Powers' treating physician "acknowledged that workers who sustain injuries such as Complainant's generally recover within eight to twelve weeks, sixteen weeks at the outside." (D. & O. at 2-3 and 22 n.31.) Powers' physician assigned him initial work restrictions to avoid heavy pulling, tugging, and lifting greater than five to ten pounds. (D. & O. at 4.)

With the involvement and assistance of Leroy Sharrah, who at the time was Union Pacific's Manager, Track Maintenance in Eugene, Oregon, and Powers' direct supervisor, "Union Pacific accommodated all of the restrictions that [the treating physician] imposed." For almost five months, Union Pacific arranged for Powers to work a "light duty truck driving job"

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[3] Both FRSA and SOX employ the burden-shifting standard found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b).

[4] *Powers v. Union Pac. R.R. Co.*, ALJ No. 2010-FRS-00030 (Jan. 15, 2013) Decision and Order ("D. & O.").

at his regular wage rate. On September 26, 2007, Powers' treating physician relaxed the work restrictions to lifting no more than 50 pounds and avoiding vibratory equipment and repetitive use of his left wrist and hand. The next month, Powers was "force recalled" to "a higher paying system welding job." The force recall was made in accordance with what the ALJ accurately described as a "mechanical operation of the collective bargaining agreement." Subsequently, Powers chose not to bid on numerous open positions within his local region, opting instead to pursue a medical leave of absence.[5] At that point, Union Pacific's Senior Claim Specialist, Bill Loomis, helped Powers secure medical leave, assisted him in successfully attaining disability benefits from the Railroad Retirement Board and Aetna, and offered him free vocational rehabilitation services. As a November 12, 2007, letter to Powers from Union Pacific's Director of Disability Management emphasized, "Union Pacific Railroad employees are the Company's most valuable resources," and Powers' skills and experience "may be transferable to another railroad position" if work restrictions continued to limit his abilities. Powers neither sought transfer nor responded to Union Pacific's invitation to meet with a rehabilitation counselor. (D. & O. at 4-8.)

In mid-May 2008—following a year's worth of changing and, at times, discrepant work restrictions—Loomis received tips that Powers "might have been involved in some activities that were worth 'taking a look at,' apparently because they might show him as capable of work." (D. & O. at 10.) Based on this information and Powers' inexplicable continued lack of improvement, Loomis retained an investigator to determine whether these claims could be validated. Over the course of three days, the investigator video-recorded Powers performing a variety of physical tasks. Specifically, video evidence showed Powers repeatedly removing, carrying, and lifting eight-foot long 6x6 pieces of lumbar out of his truck for use in a major backyard construction project; shoveling dirt for twenty-two minutes; using a power hand drill;

[5] As the ALJ noted, confusion and misunderstanding led Powers to mistakenly believe he could not "bid" on a *local* (as opposed to system) district truck-driving job without losing his system seniority. Consequently, "he made no effort to get back into his job with the local district." (D. & O. at 7.)

operating a soil compactor; pushing a wheelbarrow; and using various hand tools and repeatedly swinging a sledgehammer, among other things.[6] Video footage also depicted Powers at a gun show carrying "several boxes of ammunition" (the heaviest weighing 49.4 pounds) and removing a pallet from his trailer—"pushing the pallet, using both arms and hands, and putting his full weight into it." (D. & O. at 24.)

Less than two weeks later, on May 29, 2008—now more than a year after the initial thumb-bruising incident, and nine months past the *outside* recovery window established by his own treating physician[7]—Mike Gilliam (Union Pacific's Manager, Track Projects) called Powers to discuss his return-to-work progress and clarify some seemingly inconsistent work restrictions concerning Powers' ability to make repetitive motions. During the phone call, Powers told Gilliam that his current physical activities consisted of "light gardening, 'nothing major,'" leading Gilliam to believe he was "basically 'taking it easy.'" At the end of the call, Powers promised Gilliam he would clarify his work restrictions with his physician and follow-up with Gilliam about returning to work. Powers never got back to Gilliam, and no evidence suggests he followed-up with his physician. (D. & O. at 13-14.)

On July 15, 2008, while Union Pacific was continuing its efforts to try to return Powers to work, Gilliam for the first time was provided with a copy of the investigator's video footage. He watched it two days later. After viewing portions of the video, Gilliam considered Powers' actual physical-activity level, as revealed by the video recordings, to be clearly inconsistent with Powers' reports during their May 29 phone call. After Gilliam consulted with John Taylor (Union Pacific's Director, Track Maintenance), the decision was made to charge Powers with a

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[6] Ex. T at Chapter 1 - 15:15-20:00, 32:00-32:15; Chapter 1 - 47:10-48:30; Chapter 1 - 53:00-56:00; *see also* D. & O. at 24.

[7] Union Pacific's medical consultant reviewed the records and advised Loomis "that there was no reasonable explanation for Complainant's lack of improvement." The ALJ agreed that Loomis's questioning of Powers' restrictions was also "reasonable from a lay perspective, in that Complainant had no pre-existing medical problems with his thumb or wrist, laboratory testing was largely negative, when imaging showed a problem, it could be addressed with steroids, and a year had passed since the incident." (D. & O. at 22.)

violation of General Code of Operating Rule ("GCOR") 1.6, which prohibits dishonesty.[8] (D. & O. at 15.)

After hearing the parties' evidence over the course of two days, the ALJ issued a Decision and Order denying Powers' claim that he had been fired in retaliation for reporting an injury. In so ruling, the ALJ concluded that there was "no persuasive evidence to link the discharge decision to Complainant's filing of the injury report in May 2007." The ALJ based his decision on the complete lack of temporal proximity between the injury report and the disciplinary proceedings (more than 15 months), Union Pacific's repeated efforts to accommodate Powers' work restrictions, and the fact that none of the managers involved in the discharge decision (Gilliam, Taylor, and Meriwether) were involved in Powers' injury report. The ALJ determined that Gilliam's belief that Powers had been dishonest about his physical-activity level during their May 29 phone call—correct or not—was the sole cause of the discharge. (D. & O. at 26-27.) Because he found that Powers' protected activity was not a "contributing factor" in the discharge decision, the ALJ did not consider whether Union Pacific clearly and convincingly showed it would have taken the same action against Powers in the absence of his injury report, as required to establish its affirmative defense.

IV. SUPPLEMENTAL ARGUMENT AND AUTHORITY

As stated in Union Pacific's opening brief, the Board reviews the ALJ's factual findings under the "substantial evidence" standard and its legal conclusions *de novo*. 29 C.F.R. § 1982.110; *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991). Where a "reasonable mind might accept" the ALJ's factual findings "as adequate to support a conclusion," the substantial evidence standard is satisfied. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). For the reasons argued below, Union Pacific respectfully asks the *en banc* Board to overrule *Fordham*, limit or clarify *Hutton*, and affirm the ALJ's Order.

[8] Union Pacific Superintendent William Meriwether, who was unconnected to Powers' initial injury report, reviewed the disciplinary-proceeding transcript and ultimately made the decision to terminate Powers' employment. A Public Law Board, however, later ordered reinstatement, payment of back wages, and expungement of discipline from Powers' personnel file after finding the dishonesty charges inconclusive. (D. & O. at 16-18.)

A. The *En Banc* Board Should Reverse *Fordham*'s Holding that ALJs Must Ignore the Employer's Relevant Causation Evidence in Deciding the "Contributory Factor" Element of the Complainant's *Prima Facie* Case.

While acknowledging the near-ubiquitous "traditional" model whereby an adjudicator's "findings of fact are based on the weighing of ***all the evidence*** introduced by ***both parties***,"[9] *Fordham* bucked the norm, instead requiring factfinders to ignore some of the record evidence in reaching their legal conclusions. Specifically, *Fordham* forbids an ALJ—in determining whether an employee has proven that protected activity contributed to the employer's adverse action—from considering any of the employer's evidence explaining why it took the adverse action. *Fordham* thus demands that ALJs blind themselves, after a full evidentiary hearing, to key information bearing on causation: the employer's actual stated reasons for its actions and evidence offered in support thereof. Effectively, *Fordham* requires that the employer's evidence of its motive in acting not be considered in determining whether the employer acted with an improper motive. *Fordham*'s holding contradicts the plain words and structure of AIR 21's burden-shifting framework, finds no support in the language of the FRSA or its legislative history or interpretive case law, and is fundamentally unfair to FRSA respondents.

1. The Relevant Statutory Framework

Any analysis of the meaning of FRSA must begin with the language of the statute. FRSA prohibits a railroad from discharging, demoting, or otherwise discriminating against an employee "if such discrimination is due, in whole or in part," to enumerated categories of protected conduct. 49 U.S.C. § 20109(a). Thus, a railroad does not violate the law if the employee's protected conduct plays no role in the employer's decisions.

Under § 20109(d)(2)(A)(i), the respective burdens of proof in FRSA cases are incorporated from AIR 21, specifically 49 U.S.C. § 42121(b). After addressing the burdens at the complaint investigation stage (49 U.S.C. § 42121(b)(2)(B)(i)(ii)),[10] AIR 21 contains two

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[9] *Fordham*, ARB Case No. 12-061, slip op. at 35 (emphasis added).

[10] The instant appeal only addresses the analysis of the evidence after a trial on the merits and does not apply to pre-trial procedures, thereby distinguishing cases cited by *Fordham*. *E.g., Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002) (motion to dismiss); *Wright v. Southland Corp.*, 187 F.3d 1287 (11th Cir. 1999) (summary judgment). The Supreme Court has recognized the critical distinction between pre- and post-trial analysis of evidence. In Title VII

provisions governing final rulings by the Secretary of Labor. First, 49 U.S.C. § 42121(b)(2)(B)(iii) states that "[t]he Secretary may determine that a ***violation . . . has occurred***" where the complainant "demonstrates" that his FRSA-protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." (emphasis added) (the "Violation Clause"). Thus, by the statute's plain terms (and consistent with 49 U.S.C. § 20109(a)'s language quoted above), a complainant proves a violation of the FRSA by demonstrating that his or her protected conduct played any role in the employer's decision. If the complainant meets this burden, the railroad can no longer prove that it did not commit a statutory violation, but it can avoid an award of relief to the complainant. To do so, the railroad must demonstrate "by clear and convincing evidence that [it] would have taken the same unfavorable personnel action in the absence of that [protected] behavior." 49 U.S.C. § 42121(b)(2)(B)(iv) (the "Relief Clause").

2. Fordham *Ignores The Board's Prior Cases and The Statutory Language*

The Board and the courts have consistently interpreted these statutory provisions (and those in other statutes that incorporate AIR 21) for many years. In order to establish a statutory violation, the complainant must demonstrate "by a preponderance of the evidence" that: (a) the complainant engaged in protected conduct; (b) the railroad was aware of that conduct; (c) the complainant suffered an unfavorable personnel action; and (d) the protected activity was a contributing factor in the unfavorable action." *Araujo v. New Jersey Transit Rail Operations*, 708 F.3d 152, 157 (3rd Cir. 2013). As the statute and interpretive law make clear, the complainant bears the burden of "demonstrating" the requisite causal link through proof by a preponderance of the evidence. *Dysert v. U.S. Secretary of Labor*, 105 F.3d 607 (11th Cir. 1997) (affirming Secretary's interpretation of "demonstrate" to mean to prove by a preponderance of

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cases, courts follow the shifting burdens set forth in *McDonnell Douglas v. Greene*, 411 U.S. 792 (1973), prior to trial. However, once a trial has taken place, the only question is whether the complainant proved that unlawful discrimination caused an adverse employment action, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993), and it is error to use the *McDonnell Douglas prima facie* case/pretext analysis at that stage of the litigation. *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 347 n.1 (3d Cir. 1999).

the evidence). The preponderance of the evidence standard is also enshrined in Department of Labor regulations that are binding on the Board. 29 C.F.R. § 1982.109(a).

Prior to *Fordham*, the Board followed the statutory and regulatory framework by requiring complainants under the statutes governed by AIR 21 to "demonstrate" that protected conduct played some role in the employment decisions under review based on a preponderance of all of the evidence developed at trial. As the Board recently stressed:

> [We have] 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 of 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 contributing 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, Inc., ARB Case No. 13-001 (Aug. 29, 2014), slip op. at 16-17 (emphasis added). *See also Bechtel v. Competitive Techs., Inc.*, 2011 DOL Ad. Rev. Bd. LEXIS 93, *31-32 (Sept. 30, 2011) (employee's circumstantial evidence of retaliation rebutted by employer's explanations for its conduct; contributing factor therefore not proven); *Pierce v. U.S. Enrichment Corp.*, ARB No. 06-55 (Aug. 29, 2008) (same).

The holdings in cases like *Bobreski*, *Bechtel*, and *Pierce*—that the adjudicator must consider the entire record to determine whether the complainant has demonstrated the contributing factor prong of the *prima facie* case—are indisputably logical. After all, the contributing factor determination requires an analysis of why the employer acted as it did. To answer that question, the factfinder must consider the employer's evidence of why it acted as it did.

Fordham toppled this sound rationale and turned the statute's plain meaning on its head. The Board changed the FRSA's straightforward causation requirement—that a complainant demonstrate by a preponderance of the evidence that his or her protected activity ***actually*** (albeit minimally) "contributed" to an adverse employment action—for a novel approach that requires the ALJ to make a factual finding under the Violation Clause without even considering all of the employer's evidence relevant to that topic. Instead, *Fordham* concludes that in determining whether the contributing factor burden is met, the ALJ cannot look at the employer's explanation for its actions. Only after a contributing factor finding is made—meaning after the ALJ has concluded that an unlawful act has taken place under the Violation Clause—is the employer's evidence regarding why it took the contested action even considered, and then only as part of its affirmative defense under the Remedy Clause. At that point, the employer is limited to avoiding a monetary or injunctive award against it by proving, by clear and convincing evidence, that it would have taken the same action regardless of the protected conduct.

In making this holding, the Board ignored the statutory, case law, and regulatory language that requires the complainant to "demonstrate," "by a preponderance of the evidence," that his or her protected conduct played some role in the decision at issue. Instead, the Board changed the standard, creating a new rule that a complainant's FRSA and AIR 21 burden is met by demonstrating that a preponderance of ***some*** of the evidence suggests an unlawful motive played some role in the decision. This cannot be. The factfinder cannot decide whether the employer considered an illegal factor in acting against the employee without considering the employer's reasons for acting against the employee. At a FRSA trial, like at any other, both parties adduce evidence and the preponderance of the evidence standard requires the complainant

to show that it is more likely than not, based on the record as a whole, that unlawful conduct took place.

Fordham also relied upon the flawed proposition that the complainant's causation case may be "inferred" whenever the employer is aware of the protected conduct and there is "close temporal proximity between the protected activity and the adverse action." *Fordham*, ARB Case No. 12-061, slip op. at 37 n.91.[11] Taken together, these rulings—allowing the complainant to infer away his *prima facie* case, while ignoring the employer's causation evidence—eliminate the complainant's FRSA-mandated causation burden. Far from requiring that the complainant "demonstrate," by a preponderance of the evidence, that his protected activity ***actually contributed*** to some adverse consequence, *Fordham* allows the complainant to ***bypass any causal showing***—unhindered by the nuisance of the employer's evidence on the issue—as long as he can point to some protected activity that proximately preceded the personnel action.

Fordham's holding also makes AIR 21's burdens inconsistent with the language of FRSA. It is certainly possible that a complainant could produce some circumstantial evidence that his or her protected activity played some role in the employer's decision, only to have that evidence completely rebutted by the employer's proof of the actual reason for its actions such that the ALJ is clearly convinced that the protected activity played no role in the decision. Under *Fordham*, because the ALJ's analysis of the Violation Clause takes place without considering the employer's reason for acting, a violation of the statute would be found, even though the ALJ eventually concludes that the record as a whole does not establish that the complainant's conduct

[11] Sounder logic holds that close temporal proximity is but one of several factors the ALJ may consider in determining whether the complainant has made his showing on causation. *See, e.g. Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 792 (8th Cir. 2014) (rejecting "the notion—suggested in some ARB decisions—that temporal proximity, without more, is sufficient to establish a *prima facie* case" and emphasizing that under federal case law, "more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation").

played any role in the decision. *Fordham* would therefore lead to a finding of a statutory violation under AIR 21's Violation Clause, even though the complainant had not met the FRSA burden to show that protected conduct caused the adverse action "in whole or in part." 49 U.S.C. § 20109(a).

A simple example illustrates the point. Imagine that an employee engages in protected activity, and his manager criticizes him for doing so. Two days later, the employee is terminated. Under *Fordham*, these facts alone can lead the ALJ to find that the Violation Clause's light contributory factor showing has been satisfied. However, assume that the employer's evidence shows that the complainant and three other employees—none of whom had ever engaged in protected conduct—were dismissed by a different manager after all four were caught stealing computer equipment from the employer. The ALJ could easily find, based on this evidence, that the protected conduct played no role whatsoever in the termination decision. Yet, under *Fordham*, the ALJ would have already found a statutory violation to have occurred, even though the ALJ, upon consideration of all of the evidence, would conclude the opposite.

These inconstancies are quite likely to occur in employment litigation because, in almost all cases, the employer's method of rebutting circumstantial evidence of retaliation will be to explain why it actually acted. When an employee tries to raise an inference of retaliation from, for example, temporal proximity, the employer's response will almost always involve some intervening act that refutes the inference and shows what actually motivated the employer to act. As discussed above, such an intervening act can completely eliminate any finding of causation—even under the low contributing factor standard. *Fordham* wrongly requires factfinders to eliminate this evidence from their analysis of whether the complainant has proven the contributing factor element of his or her case by a preponderance of the evidence.

Besides contorting the statute's plain language, *Fordham*'s result is simply unfair to responding parties. "Fundamental fairness requires that the factfinder consider both the employee's version and the employer's version of events before deciding that an employer violated whistleblower laws. It seems universally accepted that there are always two sides to every story." *Fordham*, ARB Case No. 12-061, slip op. at 48 (Corchado, dissenting). *Fordham* wrongly requires the factfinder to make decisions about whether an employer violated the law without considering the vast majority of its side of the story.

When the statute is read in a logical and consistent manner, a more coherent result emerges: following a trial on the merits, a factfinder first looks at all of the evidence in the record and determines if the complainant has proven, by a preponderance of the evidence, each of the four elements of the *prima facie* case, including proof that the complainant's protected conduct was a contributing factor in the employer's actions. If the complainant fails to meet this burden, no statutory violation is found and the case is dismissed. If, on the other hand, the complainant meets his or her burden, the factfinder asks whether, based on the record as a whole, the respondent has established by clear and convincing evidence that it would have taken the same decision absent the protected conduct. If so, no relief is ordered. If not, the complainant is entitled to relief. This simple process, mandated by the statutory language, avoids any of the inconsistent results discussed above.

3. Fordham *Finds No Support In Any Relevant Legislative History Or Case Law*

Fordham candidly admits that its holding finds no support in Board precedent, federal case law precedent interpreting Board-enforced statutes, or any relevant legislative history. *Fordham*, slip op. at 27 (acknowledging that ARB precedent is "of no avail" and federal case law "of no greater assistance" in formulating the majority's holding); slip op. at 29 ("there is nothing

in AIR 21's legislative history that addresses the 'contributing factor'/'clear and convincing evidence' delineation"). And, as discussed above, *Fordham*'s holding is completely at odds with repeated cases holding that the complainant bears the burden of proving that his or her protected conduct was a contributing factor by a preponderance of the evidence (not by a preponderance of some of the evidence).

Unable to find any support from these relevant materials, *Fordham* instead turns to a different statute enforced by a different agency, the Whistleblower Protection Act (the "WPA"). Like FRSA, the WPA (as amended) provides both: (1) that a complainant establishes his *prima facie* case by showing his protected activity was a "contributing factor" to a subsequent unfavorable personnel action; and (2) after the complainant makes this showing, the employer may avoid liability only if it proves by clear and convincing evidence that it "would have taken the same personnel action in the absence of such disclosure." 5 U.S.C. §§ 1221(e)(1) and (2). Citing these statutory similarities, the *Fordham* majority noted that the WPA's statutory framework is "virtually identical" to AIR 21 and, as support for its holding, relied on a 1998 Federal Circuit opinion finding that the WPA prohibits ALJs from weighing "the respondent's evidence supporting a non-retaliatory basis for its action against the complainant's causation evidence in determining that the protected activity was not a contributing factor." *Fordham*, slip op. at 31 (citing *Kewley v. Department of Health & Human Servs.*, 153 F.3d 1357 (Fed. Cir. 1998)).

But the WPA's requisite causal showing materially differs from FRSA in a critical way: as amended in 1994, the WPA expressly provides that the complainant may "demonstrate" that his protected disclosure was a "contributing factor" in a personnel action through "circumstantial evidence, such as evidence that: (A) the official taking the personnel action knew of the

disclosure; and (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action." 5 U.S.C. § 1221(e)(1). In other words, the WPA specifies that the complainant may establish causation by proving only (1) the employer's knowledge, plus (2) temporal proximity. In *Kewley*, the ALJ agreed that the employer knew about the protected activity and acted against the former employee within a "reasonable" timeframe thereafter—the WPA's precise statutory showing for circumstantial causation. 153 F.3d at 1363. The ALJ nonetheless determined, in light of the employer's contrary evidence, that the complainant failed to establish causation. The Federal Circuit found this was error, emphasizing that, under the 1994 amendments to the WPA, if "the knowledge/time test of section 1221(e)(1)" is satisfied, then "no other factor may be taken into account" in negating the factfinder's causation finding. *Id.* Thus, if "a whistleblower demonstrates both that the deciding official knew of the disclosure and that the removal action was initiated within a reasonable time of that disclosure, no further nexus need be shown, and no countervailing evidence may negate the petitioner's showing." *Id.*

Neither the FRSA nor AIR 21, however, contain any language similar to the knowledge/time test enacted in the 1994 amendments to the WPA. *Kewley*, as well as the legislative history of the 1994 amendments cited by Fordham, are therefore completely irrelevant to the proper interpretation of FRSA or AIR 21.[12] As the Supreme Court has emphasized, 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.'" *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (citation omitted). *Fordham* improperly carried over WPA precedent grounded in the specific language of that statute to the later-enacted FRSA and AIR 21

[12] *See Fordham*, slip op. at 49 n.116 (Corchado, dissenting) ("For many reasons, aside from being an entirely different statute serving a different purpose under the jurisdiction of another board, the WPA does not justify fundamentally altering the statutory burdens of proof in SOX/AIR 21 whistleblower law.").

laws in which Congress chose to ***omit*** such language. *Fordham*, slip op. at 49. (Corchado, dissenting) ("Congress has never included the 1994 WPA language in any of the many whistleblower laws and amendments to whistleblower laws it passed after 1994 and under the Board's jurisdiction (AIR 21, SOX, STAA amendments, and Pipeline Safety Improvement Act of 2002, among others)."). Put simply, had Congress intended to prohibit FRSA judges from considering the employer's evidence on causation at the *prima facie* stage, as *Fordham* holds, it would have adopted language saying so. At the very least, Congress would have incorporated the WPA's "knowledge/time" clause, knowing courts may construe it as in *Kewley*. It did not.

Because the WPA is materially different from FRSA and AIR 21, the WPA's legislative history and case-law interpretations are inapplicable here. *Fordham*'s reliance on those items is misplaced.

Given the inapplicability of the WPA, *Fordham* lacks any precedential support. As discussed above, *Fordham* is inconsistent with the language of the FRSA and AIR 21, as well as prior cases interpreting the AIR 21 burdens. *Fordham*'s holding that an examination of the reasons for an employer's actions should be undertaken without considering all of the employer's evidence on that very subject lacks logic and is fundamentally unfair. Union Pacific therefore respectfully asks that the *en banc* Board overrule *Fordham*.

B. <u>The *En Banc* Board Should Limit or Clarify *Hutton* to the Extent It Suggests the Complainant Establishes a FRSA Violation Whenever an Adverse Employment Action Can Be Traced to Some Protected Activity, However Far Attenuated.</u>

After the parties' initial briefing in this matter, but before the Board invited supplemental briefing, Powers filed a "Notice of Additional Authority" enclosing the Board's recent opinion in *Hutton v. Union Pac. R.R.* Because that decision touches on causation issues bearing on this appeal, Union Pacific briefly addresses it here. *Hutton* involved a Union Pacific worker whose

medical condition prohibited him from performing the essential functions of his regular trainman job. But Union Pacific determined it ***could*** accommodate Hutton's work restrictions as a locomotive engineer. The railroad informed Hutton that he needed to take certain examinations to complete his return-to-work process. Despite being warned that failing to appear for the exams "may result in discipline," Hutton failed to do so. Shortly thereafter, Union Pacific charged Hutton with refusing to comply with his supervisor's instructions. When Hutton failed to appear for the disciplinary hearing he was permitted under his collective bargaining agreement, his employment automatically terminated under the terms of the same agreement. At trial, the railroad's Director of Labor Relations testified that Hutton was not "treated any differently than the employees in other cases" involving a failure to appear at disciplinary hearings. Based on this evidence, the ALJ denied Hutton's claim, holding that his injury report was not "a contributing cause in Respondent's decision to terminate him." *Hutton v. Union Pac. R.R. Co.*, ALJ Case No. 2010-FRS-00020 (Sept. 14, 2011), slip op. at 2-7 and 12.

On appeal, the Board reversed and remanded, emphasizing that "the 'chain of events' culminating in Hutton's termination would likely never have occurred had he not reported his injury," and this alone could "substantiate a finding of contributory factor." *Hutton*, ARB Case No. 13-034, slip op. at 6-7. The majority reasoned that if Hutton "had not reported his injury, he would never have been urged and/or required to comply with the provisions of three separate 'return to work' programs.'" Moreover, had Hutton not "run afoul" of the return-to-work programs made necessary by his injury report, "Union Pacific would not have disciplined him." And had Union Pacific not pursued discipline, Hutton would not have failed to appear for his hearing—the misstep that the ALJ determined actually prompted his dismissal. *Id.* at 9-10.

Union Pacific challenges *Hutton* to the extent it "suggests that the reporting of an injury automatically and inextricably latches onto every personnel decision that 'would never have happened' but for the reporting of the injury." *Id.* at 15 (Corchado, concurring). Sometimes, even though a protected activity may be conceptually linked to a "chain of events" that ultimately results in an adverse employment action, the connection may be so attenuated—or an intervening and superseding event so overwhelming—that the protected activity itself cannot fairly be deemed a "contributing factor" in the personnel decision.

This case demonstrates the fundamental flaw in the Board's reasoning. Powers admittedly reported a work injury, a FRSA-protected activity. For months, Union Pacific accommodated Powers' work restrictions, helped him secure disability benefits, and offered to help him find alternative work via transfer or vocational rehabilitation services. More than a year after Powers reported his injury, a manager unconnected to the initial injury report determined (and, after an investigatory hearing, an independent superintendent agreed) that Powers had lied about his physical activity level, resulting in discipline. Under *Hutton*'s misguided causation analysis, Powers' report of injury, made over a year before his discipline, establishes a causal link in the "chain of events" that culminated in an adverse employment action. The tortured logic would be that, had Powers not suffered (and reported) a work injury, he would not have gone on medical leave; had Powers not gone on medical leave, Union Pacific would never have learned of his health condition and work restrictions; had Union Pacific never learned of his condition and restrictions, no one would have expressed concerns about Powers' absence from work and actual physical activity level; had Union Pacific never had reason to question Powers' actual physical ability level, it would not have hired an investigator to look into it; and had Union Pacific never investigated Powers, it would not have secured the video

evidence that ultimately led the decision makers to determine that Powers had been dishonest. (Presumably, this type of conceptual roadmap is why Powers filed the Notice of Additional Authority in this appeal.)

Without stretching the imagination, one can conjure up more absurdities that arguably track *Hutton*'s logical conclusion: Is FRSA violated if a track laborer reports a hazardous condition, and a supervisor—investigating the report—learns that laborer has stolen company property and charges him with theft? Does a railroad violate FRSA if a train conductor reports an accident-related injury, and—as a result of that report—the railroad's first responders learn the conductor is inebriated, prompting a disciplinary charge? And how can the railroad prove its affirmative defense that "it would have taken the same action absent the employee's protected activity"[13] since, absent the accident and injury report, its first responders would never have learned that the conductor was intoxicated? *Hutton*, ARB Case No. 13-034, slip op. at 15-16 (Corchado, concurring) (stating that the majority's affirmative-defense instructions "may be an impossible standard in cases like this one unless a respondent could travel back in time and change history").

Union Pacific respectfully urges the Board to limit and clarify *Hutton* to allow ALJs to conclude that a protected activity is ***not necessarily*** a "contributory factor" to a down-the-road personnel action, even if it represents a "link" in the decision's causal chain. *See, e.g., Kuduk*, 768 F.3d 786 (rejecting causation finding where protected activity "shared no nexus" with the "incident that led to" the adverse employment action); *Hutton*, ARB Case No. 13-034, slip op. at 17 (Corchado, concurring) (explaining that a "*complete* break in 'chain of events'" may justify the ALJ's determination that alleged adverse action "was *not at all* influenced" by a protected activity). Similarly, the factfinder may reach the same conclusion where she determines that an

[13] *Hutton*, ARB Case No. 13-034, slip op. at 13.

intervening event dwarfs the protected activity for purposes of assessing causation. *See, e.g., Barber v. Planet Airways, Inc.*, ARB Case No. 04-056 (Apr. 28, 2006), slip op. at 6 ("[I]nferring a causal relationship between the protected activity and the adverse action is not logical when the two are separated by an intervening event that *independently* could have caused the adverse action."); *Mizusawa v. USDOL*, 524 Fed. Appx. 443, 448 (10th Cir. 2013) (employer need not establish its "clear and convincing" defense where it proves that an intervening act independently justified the adverse employment action).

V. CONCLUSION

For the reasons argued above, Union Pacific respectfully requests that the *en banc* Board reverse *Fordham*, limit or clarify *Hutton*, and affirm the ALJ's decision.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Respondent Union Pacific Railroad Company's Supplemental Briefing was filed via the Department of Labor's Electronic File & Service Request System (EFSR) on this 17th day of December, 2014.

I further certify that a copy of the foregoing Respondent Union Pacific Railroad Company's Supplemental Briefing was served on the following persons/entities in the manner indicated below this 17th day of December, 2014:

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