UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

KENNETH PALMER, Complainant,	)	ARB Case No. 16-035 ALJ Case No. 2014-FRS-154
v.	)	
CANADIAN NATIONAL RAILWAY/ ILLINOIS CENTRAL RAILROAD COMPANY, Respondent.	)	

***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 of the Federal Railroad Safety Act ("FRSA") and other statutes that 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).

ISSUES PRESENTED

The Board invited amicus briefs from interested parties in connection with its *en banc* review of the Respondent's appeal from a decision and order finding that Respondent dismissed Complainant in violation of FRSA. *Palmer v. Canadian Nat'l Ry./Ill. Cent. R.R. Co.*, ARB Case No. 16-035, ALJ Case No. 2014-FRS-154 (ARB June 17, 2016). The ARB has requested briefing on the following issues:

> 1) In deciding, after an evidentiary hearing, if a complainant has proven by a preponderance of the evidence that his protected activity was a "contributing factor" in the adverse action taken against him, is the Administrative Law Judge (ALJ) required to disregard the evidence, if any, the respondent offers to show that the protected activity did not contribute to the adverse action?
>
> 2) If the ALJ is not required to disregard all such evidence, are there any limitations on the types of evidence that the ALJ may consider?

ARGUMENT

The ARB should answer both of the questions on which it has sought advice in the negative: an ALJ should not be required to disregard the employer's evidence in assessing whether Complainant has proven that his/her protected activity was a contributing factor in the challenged adverse action, and there should be no limitations on the ALJ's ability to consider relevant evidence in deciding that question. Those are the only conclusions that are consistent with the text and structure of the FRSA, and the provisions of AIR 21 that it incorporates. At the hearing stage, AIR 21 requires the Complainant to "demonstrate" that protected activity was a contributing factor in an adverse action she suffered. It is well settled that to "demonstrate" means to prove by a preponderance of the evidence. And a preponderance of the evidence, in turn, dictates consideration of both sides' evidence; otherwise, the evidence has not truly been weighed.

A Board panel previously considered these same questions in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014) and they were considered again by the Board sitting *en banc* in *Powers v. Union Pacific Railroad, Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Apr. 21, 2015, reissued with full dissent) (vacated May 23, 2016). In *Fordham*, the majority 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.

Fordham, slip op. at 3. According to the majority, once the complainant has met this burden, the burden shifts 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 21.

The ARB's 3-2 *en banc* decision in *Powers* purported to "fully adopt[]" *Fordham*. *Powers*, slip op. at 14, 21. However, as the *Powers* dissent recognized, the majority arguably rejected *Fordham*'s rigid evidentiary rule. *Powers*, slip op. at 34 ("The rejection of *Fordham's* clear-cut evidentiary rule has unanimous support.") (Corchado, J., dissenting). The *Powers* majority "clarifie[d]" that *Fordham* should not be "read so narrowly" as to "foreclose consideration [at the contributing factor stage] of specific evidence that may otherwise support a respondent's affirmative defense." *Id.* at 14. "While the entire record . . . constitutes the administrative record for purposes of decision (5 U.S.C.A. § 556(e)), it does not mean that just any item of evidence can be utilized for purposes of determining whether the complainant has met his or her burden of proof under the Act. . . . the evidence must be *relevant* to the element that is sought to be proven." *Id.* at 21. Accordingly, the touchstone is relevance—the "trier-of-fact bears the responsibility to ensure that specific evidence advanced at hearing to rebut an element of complainant's claim be relevant to that showing." *Id.* However, as the *Powers* dissent pointed out, the majority opinion, and its purported full adoption of *Fordham*, is "confusing at best and even self-contradictory," *Powers*, slip op. at 39 n.32 (Corchado, J., dissenting).

The AAR respectfully submits that *Fordham's* evidentiary paradigm for assessing contributing factor causation evidence after a hearing is contrary to AIR 21's text, and as such is clear legal error. To be faithful to the plain language of the text and Congress's clear intent, the

ARB should hold, in answer to the first question on review, that an ALJ must consider all relevant evidence in assessing whether a complainant has proven contributing factor by a preponderance of the evidence, regardless of which party has presented it. As this conclusion implies, the ARB should also hold, in answer to the second question, that there are no limitations on the types of relevant evidence that the ALJ should consider.

I. AIR 21 REQUIRES CONSIDERATION OF ALL THE EMPLOYER'S EVIDENCE WHEN DETERMINING WHETHER A COMPLAINANT HAS ESTABLISHED THAT PROTECTED ACTIVITY WAS A CONTRIBUTING FACTOR TO THE ADVERSE ACTION.

The majorities in both *Fordham* and *Powers* failed to properly interpret the AIR 21 framework. Doing so is critically important because so many federal statutes incorporate it.[1] The plain language and structure of AIR 21 makes clear that the statute requires an ALJ to consider both parties' evidence in assessing contributing factor. Existing case law confirms this interpretation.

A. AIR 21's Statutory Text and Structure Requires Consideration of Both Parties' Causation Evidence as Part of the Contributing Factor Analysis.

The *Fordham* majority properly recognized that "[s]tatutory analysis . . . begins with the plain language of the statute." *Fordham*, slip op. at 22. However, the majority's analysis was contrary to the text and structure of AIR 21, which requires a complainant to show by a preponderance of the evidence that protected activity contributed to the adverse employment action. Moreover, the traditional standard of proof prescribed by Section 42121(b)(2)(B)(iii)

[1] In addition to FRSA, the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(b)(2)(C), and the Surface Transportation Assistance Act, as amended in 2007, 49 U.S.C. § 31105(b)(1), expressly incorporate the burdens of proof in AIR 21. Other statutes employ the same structure. *See* Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851(b)(3)(A)-(D); Consumer Financial Protection Act, 12 U.S.C. § 5567(c)(3)(A)-(C) (part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010); and Consumer Product Safety Improvements Act, 15 U.S.C. § 2087(b)(2)(B)(i)-(iv).

requires that all relevant evidence be considered in determining whether a complainant has shown by a preponderance of the evidence that protected activity was a contributing factor. The Board is not free to deviate from this statutory proof framework.

1. The plain language of AIR 21 requires consideration of all evidence at the contributing factor stage.

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 unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(iii) (emphasis added).

While AIR 21 does not define the term "demonstrates," the ARB repeatedly has recognized that "demonstrate" is equivalent to "prove by a preponderance of the evidence." *Powers*, slip op. at 10 n.1 ("case authority is clear that in the absence of express congressional imposition of proof requirements, the 'preponderance of evidence' standard is considered the default burden of proof standard in civil and administrative proceedings, as well as the one contemplated by the APA"). The ARB consistently has applied this preponderance of the evidence standard in post-*Powers* decisions (as it did before *Powers*). *See Nelson v. Energy Nw.*, ARB No. 13-75, ALJ No. 2012-ERA-2, slip op. at 18 (ARB Sept. 30, 2015) (employing preponderance of the evidence standard); *Keeler v. J.E. Williams Trucking, Inc. et al.*, ARB Case No. 13-070, ALJ Case No. 2012-STA-049, slip op. at 5-6 (ARB June 2, 2015) (same). And the Secretary of Labor has recognized that in order to "demonstrate" the elements of a retaliation, the complainant must prove them by a preponderance of the evidence. 29 C.F.R. § 1980.109(a) ("A determination that a violation has occurred may be made only if the complainant has

demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.").

Supreme Court precedent confirms that this interpretation is correct. "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., Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) ("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[.]'") (internal citation 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 omitted).

That these default rules apply is also evident by comparing the complainant's burdens at the investigative stage, which is handled by OSHA, with that at the hearing stage in front of an ALJ. The Supreme Court has 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" identifies "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.* Under AIR 21, a burden of production applies at the investigative phase, requiring the complainant to make a "prima facie showing," 49 U.S.C. §

42121(b)(2)(B)(i), in order to obtain an investigation. This prima facie showing serves a "gatekeeping function" that "stems frivolous complaints." 80 Fed. Reg. 69,115, 69,122 (2015) (alteration omitted).

In contrast, the burden of proof at the hearing stage requires the complainant to "demonstrate[]" the elements of her claim. 49 U.S.C.§ 42121(b)(2)(B)(iii). This is a burden of persuasion, requiring a showing by a preponderance of the evidence. Determining whether a complainant has satisfied this 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"). The preponderance of the evidence standard requires that both parties' evidence 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 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" of the evidence make no sense if only one party's evidence can be considered. There certainly is nothing in the legislative text to suggest that when Congress adopted the traditional burdens in AIR 21 and FRSA, it intended that preponderance of the evidence meant only

consideration of the complainant's evidence.

Prior to *Fordham*, and consistent with the traditional rules of civil litigation, the Board repeatedly held that all the evidence submitted by both parties must be considered in determining if the complainant had established that 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, Inc., ARB No. 13-001, ALJ No. 2008-ERA-003, 2014 DOL Ad. Rev. Bd. LEXIS 61, at *36–37 (ARB 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 (ARB 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 *Powers* majority itself relied on decisions in which the Board had weighed the Respondent's reasons for acting in assessing contributing factor, and did so without overruling them. *See Powers*, slip op. at 23, 26 (citing *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037 (ARB Oct. 17, 2012) (affirming summary dismissal where ALJ relied

[2] As noted in the *Fordham* dissent, although *Bobreski* was a nuclear safety case, the ERA includes the "same critical words . . . in a similar manner" as AIR 21. Slip op. at 46 n.112.

on employer's reasons for termination despite temporal proximity of the protected activity and termination); *Zurcher v. S. Air, Inc.*, ARB No. 11-002, ALJ No. 2009-AIR-007 (ARB June 27, 2012) (affirming ALJ's reliance on employer's explanations in finding no contributing factor).

The *Fordham* majority itself acknowledged 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 35. Nonetheless, the *Fordham* majority rejected this "traditional evaluation," even though it is the only one consistent with AIR 21's text, and invented a new standard that only considers a complainant's evidence with respect to contributing factor causation. And *Powers* continued to improperly limit the evidence an ALJ may consider on the contributing factor element. Thus, *Fordham* and *Powers* failed to follow Board precedent, and are inconsistent with the plain language of AIR 21.

2. The structure of AIR 21's burdens requires consideration of all evidence.

Besides being contrary to the text of Section 42121(b)(2)(B)(iii), the *Fordham* and *Powers* contributing factor analyses were 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. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013).

First, prohibiting consideration of respondent's contributing factor evidence is contrary to the contrast 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). At the investigative stage, Congress specified in AIR 21 that the complainant's standard of proof is a "prima facie

showing." 49 U.S.C. § 42121(b)(2)(B)(i). In contrast, at the hearing stage, as discussed above, the complainant must "demonstrate," *id.* § 42121(b)(2)(B)(iii), by a "preponderance of the evidence." In effect, by not allowing the employer's explanatory evidence to be considered, this new burden paradigm allows a complainant to satisfy the 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 later happened to her for unexplained reasons. Thus, under the *Fordham* majority's analysis, the employee's burden of proof at the hearing phase is indistinguishable from the prima facie showing she is required to make before OSHA is permitted to conduct an investigation—essentially nullifying Section 42121(b)(2)(B)(iii). While *Fordham* recognizes that the statute places a higher burden on complainants at the hearing than at the investigation stage, *Fordham*, slip op. at 18-19, the majority makes no effort to explain how its new paradigm could be reconciled with the structure of AIR 21's legal burdens. *Powers* fails to consider this issue at all.

This new paradigm similarly is contrary to Board precedent that has recognized that a complainant cannot satisfy his or her burden at the hearing stage with mere inferences; the complainant must prove that protected activity was a contributing factor. For example, the Board has explained: "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. Com. Lines Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, 2012 DOL Ad. Rev. Bd. LEXIS 31, at *21 (ARB Mar. 28, 2012) (footnotes omitted).

Second, under AIR 21 and FRSA, 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. In effect, this paradigm 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.

3. 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 22–23. This assertion is based on two false assumptions.

First, *Fordham* falsely concluded that a claimant's burden to demonstrate a contributing factor, 49 U.S.C. § 42121(b)(2)(B)(iii), and a respondent's burden prove its affirmative defense by clear and convincing evidence, 49 U.S.C. § 42121(b)(2)(B)(iv), are two sides of the same coin. However, these two provisions focus on different issues. The former asks whether the protected conduct contributed at all to the adverse employment action. The latter assumes that the complainant has shown that protected conduct was a contributing factor and asks whether the employer would have taken the action regardless of the activity. Secondly, *Fordham* failed to recognize that evidence can be used for more than one purpose—something the majority in *Powers* expressly noted. *Powers*, slip op. at 25 ("it is clear that specific documentary and testimonial evidence can serve more than one purpose."); *id.* at 26 n.15 ("*Abbs* demonstrates how close the relationship can be as to evidence demonstrating the contributing factor element at the

preponderance of evidence showing, and that can alternatively support an employer's affirmative defense at the clear and convincing evidentiary showing.") (citing *Abbs v. Con-way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037 (ARB Oct. 17, 2012)). The Board and ALJs are quite capable of considering evidence for one issue under a preponderance of the evidence standard and then, later, applying the same evidence to a different question under a clear and convincing standard. The issues and the burdens of proof are each different at each stage of the analysis.

As explained above, the statute is written to allow the respondent to submit evidence at the contributing factor stage that the adverse action was not a contributing factor. 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 avoid liability under the preponderance of the evidence standard only 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 violation. On the other hand, if a preponderance of the evidence does establish that protected activity was a contributing factor, then the burden shifts 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 comes into play, the *Fordham* majority is also incorrect that the respondent must demonstrate that the "sole basis" for an adverse action

was non-retaliatory.[3] Slip op. at 21. 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 to the personnel action at issue; thus, protected activity necessarily was at least "a" factor, perhaps in combination with others. Accordingly, a carrier's affirmative defense does not require it to disprove that protected activity was a factor. Instead, the carrier must show that, even though a protected activity contributed to the adverse employment action, it did not contribute to such an extent that the carrier would not have made the same decision absent the employee's protected conduct.

When the affirmative defense is thus correctly understood, there is no logical basis for *Fordham's* conclusion that affording the employer the opportunity to defeat a complainant's proof of contributing factor causation would render the statutory affirmative defense "meaningless." *Fordham*, slip op. at 23. Moreover, in light of the lower burden that a complainant has to show that protected activity was a factor, (a burden of establishing that protected activity merely "contributed" to the adverse action) there is no indication in the Board's precedents that consideration of the respondent's causation evidence at the contributing factor stage has posed an obstacle to complainants.

[3] 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.

4. The adoption of a contributing factor causation standard did not eliminate weighing of causation evidence.

The *Fordham* majority agreed that the ALJ "may consider" at the hearing stage an employer's evidence challenging a complainant's proof with respect to three of the four elements of a complainant's case: protected activity, adverse effect, and decision maker knowledge. *Fordham*, slip op. at 35 n.84. However, it held that the ALJ could not consider the employer's evidence with respect to the fourth element, causation. *Id.* at 24 ("An employer's legitimate business reasons may neither factually nor legally negate an employee's proof that protected activity contributed to an adverse action."). *Fordham* 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 24 (emphasis in original, footnote omitted). But there is no support in the statutory text for the conclusion that Congress intended one burden of proof paradigm to be used for three elements of the complainant's case and a different one to be used 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 the word "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 protected 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, *Fordham* confused the standard of causation the complainant must satisfy with the evidentiary burden by which that standard must be satisfied. As the *Fordham* dissent explained, "[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." *Id.* at 46.

The 1991 amendments to Title VII of the Civil Rights Act of 1964 are an especially useful analogy in demonstrating that a Congressional decision to lighten a plaintiff's causal burden does not eliminate the burden of persuasion. In those amendments, Congress lessened the standard of causation that employees are required to prove from a "substantial" factor to 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, permitting it to avoid monetary damages if it could "demonstrate[] that [it] would have taken the same action in the absence of the impermissible motivating factor." 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 his/her protected status was a motivating factor in the adverse action. And, under those traditional burdens and standards,

evidence submitted by both the employee and employer are considered in determining whether the employee has met his/her burden of persuasion. *See, e.g., Holcomb v. Iona College*, 521 F.3d 130, 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 AIR 21's or FRSA's text or structure for the conclusion that, by lessening the level of causation that the complainant must establish to "a contributing factor," Congress also intended to eliminate the weighing of the parties' evidence when considering whether the complainant has met that burden. To the contrary, the same statutory text upon which the *Fordham* majority relied shows that Congress intended that the traditional standards of proof continue to apply when evaluating the evidence of causation.

B. Prohibiting Employer Evidence at the Contributing Factor Stage is a Radical Departure From ARB Precedent and Causes Confusion.

As explained above, the traditional standards of proof incorporated by Section 42121(b)(2)(B)(iii) require as a matter of statute that both parties' evidence on the issue of causation be considered when determining whether a complainant has met the burden of establishing that protected activity was a contributing factor. This statutory requirement is reflected in many Board decisions that recognize that both the complainant's and the

respondent's causation evidence must be weighed when assessing whether the complainant has established contributing factor causation.

1. Pre-Fordham/Powers, the ARB consistently weighed both employer and employee evidence at the contributing factor stage.

In *Fordham*, 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. Indeed, the ARB has repeatedly held that an employer's evidence should be considered in determining whether an employee has proved contribution. In *Hamilton v. CSX Transportation*, for example, the ARB affirmed an ALJ's decision that had 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. ARB No. 12-022, ALJ No. 2010-FRS-025, 2013 DOL Ad. Rev. Bd. LEXIS 36, at *4 (ARB Apr. 30, 2013). Although the complainant in *Hamilton* had presented circumstantial evidence of retaliation, the ALJ credited the employer's explanation that he had been disciplined for unacceptable behavior. *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 frequently has 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 had been discharged just three days after he had 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 reason for his dismissal. ARB No. 12-016, ALJ No. 2007-STA-037, 2012 DOL Ad. Rev. Bd. LEXIS 100, at *12 (ARB Oct. 17, 2012) (citing *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 8 (ARB 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 consistently has held that an employer's improper motive or pretextual justification for an adverse employment decision is circumstantial evidence that protected activity contributed to that decition. *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 presumes that both the employer's and employee's evidence will be presented and considered at the contributing factor stage. *See Fordham*, slip op. at 25 ("legally acceptable" for ALJ to examine the legitimacy of the employer's articulated reasons for adverse action in order to consider the claimant's pretext argument at the contributing factor stage). 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 explaining its decision.

In *Fordham*, the majority inaccurately characterized ARB precedent as "inconclusive" on the question of whether an employer's evidence should be considered in the contributing factor analysis. *Fordham*, slip op. at 24. Leading up to *Fordham* and *Powers*, years of ARB precedent

supported the proposition that both an employer's and an employee's evidence should be weighed at the contributing factor stage.

2. Post-Powers ARB decisions continue to create confusion.

The majority decision in *Powers*, and its reaffirmation of *Fordham*, is "confusing at best and even self-contradictory." *Powers*, slip op. at 37 (Corchado, J., dissenting). Subsequent Board decisions have failed to offer any clarity regarding how relevance should be determined.

Several post-*Powers* Board decisions have stated that *Powers* overruled a strict interpretation of *Fordham* and have held that an employer's explanations for an adverse action can be relevant to contributing factor causation. *See LeDure v. BNSF Ry. Co.*, ARB Case No. 13-044, ALJ Case No. 2012-FRS-020, slip op. at 8–9 (ARB June 2, 2015) (affirming the ALJ and explaining that "[s]tanding alone, the totality of LeDure's evidence might be sufficient for some triers of fact to suspect that something other than 'fitness for duty' was influencing BNSF's decision, for example, protected activity. But, in this case, the ALJ makes clear that BNSF's non-retaliatory explanations for its actions persuaded him that protected activity did not contribute to BNSF's refusal to allow LeDure to return to his job. The ALJ has the right to consider any evidence that is relevant to the question of causation, including the employer's explanation for why it did what it did."); *Nelson*, slip op. at 10–12 (affirming ALJ decision that relied on employer's explanations for adverse action in contributing factor analysis); *Stewart v. Lockheed Martin Aeronautics Co.*, ARB No. 14-33, ALJ No. 2013-SOX-019, slip op. at 2–3 (ARB Sept. 10, 2015) (same).

In contrast, other Board decision have cited *Powers* for the proposition that a "respondent's affirmative defense evidence (supporting a legitimate, non-retaliatory reason for

the adverse action at issue in the absence of any protected activity) is, with rare exception, not to be taken into consideration at the initial causation stage." *Franchini v. Argonne Nat'l Lab.*, ARB No. 13-81, ALJ No. 2009-ERA-14, slip op. at 17 (ARB Sept. 28, 2015) (reversing ALJ because "the ALJ ignored or discounted Franchini's circumstantial evidence of causation in favor of evidence submitted by Argonne in support of its affirmative defense as to why it terminated Franchini's employment."); *Nevarez v. Werner Enters.*, ARB Case No. 14-010, ALJ Case No. 2013-STA-012, slip op. at 13 (ARB Oct. 30, 2015) (same); *DeFrancesco v. Union R.R. Co.*, ARB Case No. 13-057, ALJ Case No. 2009-FRS-009, slip op. at 6 (ARB Sept. 20, 2015) (same); *Keeler*, slip op. at 7 ("the weighing of a respondent's affirmative defense evidence supporting a non-retaliatory reason or basis for the personnel action at issue against a complainant's causation evidence at the 'contributing factor' proof stage is not, as the ARB has recently held, legally permissible").

These latter decision are incorrect. Instead, evidence of an employer's explanations for its actions is unquestionably relevant to deciding why the employer acted—i.e., whether it did so for prohibited reasons, in whole or in part, or whether it did so for entirely legitimate ones. AAR therefore urges the Board to adopt an interpretation that is consistent with the AIR 21's language and structure, and years of case law.

C. Circuit Court Decisions Support the Argument that the ALJ Must Consider All Relevant Evidence.

The federal courts of appeals applying the AIR 21 framework also recognize that they must weigh the employer's evidence when determining whether the complainant has demonstrated by a preponderance of the evidence that his protected activity was a contributing factor in the adverse employment action. In *Kuduk v. BNSF Ry. Co.*, the Eighth Circuit

"reject[ed] the notion – suggested in some ARB decisions – that temporal proximity, without more, is sufficient" to satisfy the complainant's burden on contributing factor. 768 F.3d 786, 792 (8th Cir. 2014). Instead, "the contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity." *Id.* at 791. *Kuduk* considered ecidence of the employer's reason for the adverse action in its contributing factor analysis and held that, despite the protected activity being "close in time," the employer's evidence of an "intervening event [] *independently* justified adverse disciplinary action." 768 F.3d at 792; *see also Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 161 (3d Cir. 2013) (reversing grant of summary judgment to the employer even though the court carefully "[c]onsider[ed] all of the evidence in the light most favorable to" complainant in its contributing factor analysis).

Similarly, in *BNSF Railway Co. v. U.S. Department of Labor*, the court factored evidence of the employer's reason for terminating the complainant as part of its causation analysis. 816 F.3d 628, 639 (10th Cir. 2016). There, complainant had filed an injury report following an accident and, a couple months later, he had filed an updated report after identifying additional injuries from the accident. *Id.* at 634. "Because BNSF contends that it fired Cain for misconduct he revealed in his updated Report," and because "employees cannot immunize themselves against wrongdoing by disclosing it in a protected-activity report," the court explained that "Cain cannot satisfy the contributing-factor standard merely by arguing that BNSF would not have known of his delays in reporting his injuries absent his filing the updated Report." *Id.* 639. Instead, complainant was required "to show more" as a result of the employer's reasons for its

termination decision. *Id.* Thus, appellate case law requires the ARB to consider an employer's reasons for its adverse action at the contributing factor stage.

D. Precedents Under The WPA, The ERA, and Title VII Do Not Provide Any Support For *Fordham's* or *Powers'* New Evidentiary Paradigm.

Lacking support in the text or structure of AIR 21 or Board precedent, the *Fordham* and *Powers* majorities looked for support 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.

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

Fordham and *Powers* improperly rely on the Whistleblower Protection Act's ("WPA") legislative history and the Federal Circuit's decision in *Kewley v. Department of Health & Human Services*, 153 F.3d 1357 (Fed. Cir. 1998). Congress passed the WPA in 1989 to protect Federal employees who have reported government wrongdoing. *See* Pub. L. No. 101-12, 103 Stat. 16 (1989). The Act's evidentiary scheme is similar to AIR 21; it is administered by the Merit Systems Protection Board, with appeals to the U.S. Court of Appeals Federal Circuit.[4]

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:

[4] 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)).

> 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)(1). 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 majorities in *Fordham* and *Powers* both rely on *Kewley* and the 1994 amendment to the WPA to support the 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 causation proof. This reliance was 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. *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 here, 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, 29 n. 61 (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 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 mandates different burdens of proof than either the ERA or AIR 21.

Similarly, *Fordham's* and *Powers'* citations to the legislative history of the ERA show only that Congress intended to reduce the standard of causation in whistleblower cases from "motivating factor" to "contributing factor." *Fordham*, slip op. at 23-24, 29 n.62 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 281 (1977)); *Powers*, slip op. at 14-15. 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 ensures that employees are provided adequate relief . . . while at the same time sending a clear message that *any attempt to burden the system with frivolous complaints about employment actions that have their origins in legitimate consideration 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(d), 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 interpretation of the evidentiary burdens at the contributing factor stage. The selective presentation of legislative history for two other statutes—neither of which is the statute under consideration in this case—does not support *Fordham's* abrupt departure from the text of AIR 21 and the complainant's standard burden of persuasion to prove all of his/her elements by a preponderance of evidence.

2. Title VII Precedents Do Not Support the Fordham Majority

Fordham 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 35–36; *see also Powers*, slip op. at 15–16. This assertion, however, improperly 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 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.*[5]

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.'" *Id.* 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, '[t]he 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). Once the employer responds to a plaintiff's prima facie case, the evidentiary presumption created by *McDonnell Douglas* drops away 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 imposed by *Fordham* and *Powers*. 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*, *Fordham* and *Powers* have shifted the burden of persuasion to the employer before the employer's evidence

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[5] 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).

has even been considered. There is no basis in the language of the FRSA or in case law for such an unprecedented interpretation.

E. The Weighing of Both Parties' Evidence Is Supported by Substantial Policy Considerations, Particularly in the Railroad Industry.

In addition to being supported by the statutory text and structure, substantial policy considerations support the consideration of both parties' evidence in assessing contributing factor causation. Refusing to consider an employer's explanations for its actions at the contributing factor stage, in effect, allows an employee who has been legitimately disciplined to use his/her protected conduct as a shield to avoid the consequences of violating the railroad's safety or other rules. As many courts have held, that is contrary to the purpose of the federal employee protection statutes. *BNSF Ry. Co.*, 816 F.3d at 639 ("employees cannot immunize themselves against wrongdoing by disclosing it in a protected-activity report."); *Marano v. U.S. Dep't of Justice*, 2 F.3d 1137, 1142 n.5 (Fed. Cir. 1993) (WPA "will not shield employees who engage in wrongful conduct;" acknowledging that the court was "not faced with a situation in which an employee in essence blew the whistle on his own misconduct . . . [and] doubt[ing] that the WPA would protect such an individual from an agency's remedial actions.").

This concern is particularly weighty in the railroad industry, where enforcement of carrier safety and operating rules is crucial to ensuring the safety of railroad employees and of the communities in which they operate. For this reason, the Federal Railroad Administration requires rail carriers to (1) file their operating rules with the FRA (*see* 49 C.F.R. § 217.7(a)); (2) train employees on those rules (*id.* § 217.11(a)); and (3) periodically test employees for compliance with those rules. *See id.* § 217.9(a). OSHA has similarly acknowledged that employers have the right—and, indeed, the obligation—"to maintain and enforce legitimate

workplace safety rules in order to eliminate or reduce workplace hazards and prevent injuries from occurring in the first place."[6] In the railroad industry, employees often work remotely from their managers, and therefore railroads' ability to ensure strict rule compliance is critical to ensuring both employee and public safety. Giving employees a pass on discipline by refusing to consider the rule violations for which they were disciplined in assessing whether a carrier violated the FRSA is directly contrary to these important policy considerations.

II. THERE IS NO LIMITATION ON THE TYPES OF EVIDENCE AN ALJ MAY CONSIDER IN ITS CONTRIBUTING FACTOR ANALYSIS.

As established above, AIR 21 requires the Board and ALJs to consider both parties' evidence at the contributing factor stage. Moreover, no statute or regulation categorically limits the types of evidence that may be considered in the contributing factor analysis. The regulations provide which evidence is admissible during a hearing: "[t]he ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious." 29 C.F.R. § 1982.107(d). These regulations do not prohibit consideration of evidence from one party as part of the contributing factor analysis. On appeal, "[t]he ARB will review the factual determinations of the ALJ under the substantial evidence standard." 29 C.F.R. § 1982.110(b). Again, this standard does not preclude the ALJ from considering any admissible evidence in connection with the contributing factor analysis. Thus, under applicable regulations, ALJs have broad discretion in deciding whether an employer's evidence of its justifications for an adverse employment action are relevant at the contributing factor stage.

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[6] Memorandum from Deputy Assistant Sec'y Richard E. Fairfax to Reg'l Adm'rs, Whistleblower Program Managers, U.S. Dep't of Labor, Occupational Safety and Health Administration, (Mar. 12, 2012), https://www.osha.gov/as/opa/whistleblowermemo.html.

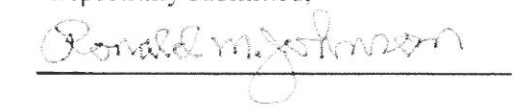
Moreover, the *Powers* majority recognized that "there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor *as long as the evidence is relevant to that element of proof*." *Powers*, slip op. at 22 (italics in original); *see also id.* at 33–34 (Corchado, J., dissenting) ("the age-old rule that relevance governs the way that evidence is used on a case-by-case basis in FRSA and AIR 21 whistleblower cases, and ALJs have discretion to decide relevance."). Pre-*Fordham* decisions are in accord with this holding. *See, e.g., Bobreski*, 2014 DOL Ad. Rev. Bd. LEXIS 61, at *35 (ALJ determines the "preponderance of all the relevant evidence presented"). Neither AIR 21, nor any statute or regulation places a prohibition on the types of evidence an ALJ may weigh in its contributing factor analysis.

CONCLUSION

For the reasons explained above, the Board should reverse the position taken by the majority in *Fordham* and *Powers*. 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, and all other relevant evidence, must be considered when determining whether a complainant has met the burden to show that protected activity was a factor in the challenged adverse action.

Dated: August 3, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2016, a true and correct copy of the foregoing *Amicus Curiae* Brief of the Association of American Railroads was served by facsimile:

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