BEFORE THE ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

In the Matter of:

KENNETH PALMER,

COMPLAINANT,

v.

ARB CASE NO. 16-035
ALJ CASE NO. 2014-FRS-154

CANADIAN NATIONAL RAILWAY/
ILLINOIS CENTRAL RAILROAD COMPANY,

RESPONDENT.

BRIEF OF AMICI CURIAE

RAIL LABOR DIVISION OF THE TRANSPORTATION TRADES DEPARTMENT, AFL-CIO

AND

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, A DIVISION OF THE RAIL CONFERENCE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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INTERESTS OF THE AMICI CURIAE

The Rail Labor Division of the Transportation Trades Department, AFL-CIO (RLD-TTD), is comprised of eleven affiliated unions who represent railroad craft workers in the operating, maintenance of equipment, train dispatching, clerical, communications and signal departments of the nation's rail carriers.[1] The Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference of the International Brotherhood of Teamsters, is a labor organization that represents locomotive engineers and trainmen on virtually all of the nation's rail carriers.

Safety concerns are so prevalent in the rail industry that a separate federal agency - the Federal Railroad Administration ("FRA") - was created to oversee and regulate them. Together, the amici Unions represent the interests of approximately 165,000 railroad workers who are protected by the Federal Railroad Safety Act (49 U.S.C. §20109) ("FRSA") and numerous other federal statutes regulating rail safety. They are directly affected by the issues raised in this case.

THE UNIONS' POSITIONS ON THE QUESTIONS PRESENTED

In directing *en banc* consideration in this case, the Administrative Review Board ("ARB") posed two questions to be answered by the filers:

> **(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

[1] They are: American Train Dispatchers Association (ATDA); Brotherhood of Railroad Signalmen (BRS); International Association of Machinists and Aerospace Workers (IAM); International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (IBB); International Brotherhood of Electrical Workers (IBEW); National Conference of Firemen and Oilers, SEIU (NCFO, SEIU); Sheet Metal, Air, Rail and Transportation Workers (SMART); SMART-Transportation Division; Transportation Communications Union /IAM (TCU); Transport Workers Union of America (TWU); and UNITE HERE!

(ALJ) required to disregard the evidence, if any, the respondent offers to show that the protected activity did not contribute to the adverse action?

UNIONS' ANSWER: When deciding whether a complainant has proven by a preponderance of the evidence whether his protected activity was a "contributing factor" in the adverse action taken against him/her, the ALJ may only consider employer evidence that addresses whether the employee engaged in protected activity, the employer was aware of that activity, and the employee subsequently was subjected to an adverse action, except when the complainant, as part of his/her initial presentation, specifically challenges the employer's justification for 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?

UNIONS' ANSWER: In circumstances where the complainant, as part of his/her initial presentation, specifically relies upon evidence that challenges the employer's justification for the adverse action, the ALJ may consider evidence from the respondent limited to refuting the complainant's evidence.

ARGUMENT

This matter is before the Board following the vacatur of the Board's April 21, 2015, decision in *Powers v. Union Pacific Railroad Co.*, ARB Case No. 13-034. *Powers* addressed the respective burdens of proof borne by employees and rail carriers when litigating complaints of retaliation under the FRSA. By law, a railroad employer "may not discharge...or in any other way discriminate against an employee if such discrimination is due, in whole or in part," to the employee engaging on any of the protected activities outlined in the FRSA. 49 U.S.C.

§20109(a).[2] Consequently, once a railroad employee has shown that protected activity has contributed in any way to a railroad's decision to discipline or otherwise take action that adversely affects his/her employment, the employee is entitled to remedial relief unless the railroad can show that it would have taken the same action had the employee not engaged in that activity.

The FRSA incorporates by reference the burdens of proof applicable in the Wendell H. Ford Investment and Reform Act for the 21st Century ("AIR 21") (49 U.S.C. §42121(b)(2)(B)). 49 U.S.C. §20109(d)(2). As described in AIR 21, those burdens are met in two distinctly different steps:

> iii. The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any [protected] behavior...*was a contributing factor* in the unfavorable personnel action alleged in the complaint.
>
> iv. Relief may not be ordered...if the employer *demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.*

Id. Emphasis added. The Department's regulations require that the complainant's showing that his/her protected conduct was a "contributing factor" to the adverse action be by a "preponderance of the evidence." 29 C.F.R. §1982.109(a).

The ARB majority in *Powers* explained in great depth the evidentiary burden of proof a complaining employee must bear and the even more stringent standard the employer must satisfy if the complainant carries that initial burden. We submit that the majority was correct in *Powers* (and in *Fordham v. Fannie Mae*, ARB No. 12-061 (ARB Oct. 9, 2014), which *Powers* clarified)

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[2] A railroad employee also may not be disciplined or have discipline threatened for "following orders or a treatment plan of a treating physician." 49 U.S.C. §20109(c).

and there is no good reason to change its application. The holding to which it subscribed should be applied in this and future retaliation cases.

In *Powers*, the ARB explained that each step has a different quantum of proof associated with it. The complainant has the initial burden to show by a "preponderance of the evidence"[3] that protected activity was a contributing factor in the adverse personnel action. The burden then shifts to the carrier to prove, by "clear and convincing evidence," a higher threshold to satisfy,[4] that it would have made the same decision even if the protected activity had not occurred.[5]

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[3] *Black's Law Dictionary* (10th ed.) defines "preponderance of the evidence" as follows:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

[4] *Black's Law Dictionary* (10th ed.) defines "clear and convincing evidence" as follows:

> Evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.

[5] In *Powers*, no member of the Board disagreed with the proposition that a contributing factor is "any factor, which alone or in connection with other factors tends to affect in any way the outcome of the decision":

> The "contributing factor" standard was employed to remove any requirement on a whistleblower to prove that protected activity was a "'significant', 'motivating', 'substantial', or 'predominant' factor in a personnel action in order to overturn that action[.]..." Consequently, "[a] complainant needs not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected' activity."...[citations omitted]

Slip Op. at 11.

The majority in *Powers* "fully adopted" the ARB's holding in *Fordham* (slip op. at 20-37), a Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("SOX") whistleblower protection case, "that legitimate, non-retaliatory reasons for employer action (which must be proven by clear and convincing evidence) may not be weighed against a complainant's showing of contribution (which must be proven by a preponderance of the evidence)." *Powers* at 13. At issue here is whether that holding should be adopted for all FRSA cases. Because a violation is established once an employee satisfies the burden of showing that protected activity contributed to an adverse action, and because the employer's higher burden exists to allow for an employer to avoid a remedy for its action, we submit that the *Fordham* holding should be confirmed.

In *Fordham*, the Board explained that there is a difference in what a complainant must show during the *investigatory* stage and what he/she must put forward at the *hearing* stage before an ALJ:

> The requirement at the investigatory stage before OSHA that a complainant allege circumstances sufficient to raise the *inference* that protected activity was a contributing factor in the adverse action at issue is not a burden of proof requirement, but a pleading requirement. Where a complainant's allegations are found to be sufficient, a rebuttable presumption is established of a *prima facie* case of retaliation. On the other hand, for a complainant to prove at hearing before an ALJ a *prima facie* case of retaliation through circumstantial evidence, that evidence must establish by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action.

Fordham at 19-20. That led the Board to "the central issue" in *Fordham*: what evidence an ALJ may consider when determining whether a complainant has satisfied his/her burden of proof.[6]

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[6] "What evidence is appropriately to be considered at the hearing stage in determining whether a complainant has met his or her burden of proving 'contributory factor' causation by a preponderance of the evidence test? More specifically: Whether the respondent's evidence of legitimate, non-retaliatory reasons for its action may be weighed against the complainant's causation evidence in determining whether the complainant has met his or her burden of proving

The Board's answer: "the evidentiary basis upon which the determination of whether a complainant has met his or her burden under SOX of proving 'contributing factor' causation does *not* involve the weighing of the respondent's evidence of lawful, non-retaliatory reasons for its action against the complainant's evidence of causation under the 'preponderance of the evidence' test." *Id.* at 21. Emphasis added. The Board supported this answer with the statutory provision itself, and its plain rationale,[7] as well as the legislative history underlying AIR 21 and other related whistleblower legislation. *Id.* at 29-35. This was the heart of the Board's analysis:

> 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. [Fn. omitted] This weighing is *exactly* what the "contributing factor" statutory provision was designed to eliminate. Different ultimate facts are at issue in the two separate stages of proof. In the first stage, the question is whether protected activity (or whistleblowing) was *a factor* in the adverse action. Certainly at this stage an ALJ may consider an employer's evidence challenging whether the complainant's actions were protected or whether the employer's action constituted an adverse action, as well as the credibility of the complainant's causation evidence. However, the question of whether the employer has a legitimate, non-retaliatory reason for the personnel action and the question of whether the employer would have taken the same adverse action *in the absence of the protected activity* for that reason only require proving different ultimate facts than what is required to be proven under the

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by a preponderance of the evidence that protected activity was a contributing factor in the adverse personnel action at issue?" *Fordham* at 20.

[7] "It would thus seem self-evident from this statutory delineation that the respondent's evidence in support of its affirmative defense as to why it took the action in question is not to be considered at the initial 'contributing factor' causation stage where proof is subject to the 'preponderance of the evidence' test. To afford an employer the opportunity of defeating a complainant's proof of 'contributing factor' causation by proof at this stage of legitimate, non-retaliatory reasons for its action by a preponderance of the evidence would render the statutory requirement of proof of the employer's statutorily prescribed affirmative defense by 'clear and convincing evidence' meaningless." *Id.* at 22-23.

> "contributing factor" test. An employer's legitimate business reasons may neither factually nor legally negate an employee's proof that protected activity contributed to an adverse action. Rather, the respondent must prove the statutorily prescribed affirmative defense that it would have taken the same personnel action had the complainant not engaged in protected activity by the statutorily prescribed "clear and convincing" evidentiary burden of proof.

Id. at 24. (Emphasis in original).

The *Fordham* majority found particularly convincing the decision in *Kewley v. Dep't of Health and Human Services*, 153 F.3d 1357 (Fed. Cir. 1998), which addressed the same question under the "virtually identical whistleblower protection provisions" in the Whistleblower Protection Act ("WPA"). *Id.* at 30, 31. There, the Federal Circuit

> held that the ALJ committed reversible error by relying upon the respondent's affirmative defense evidence of legitimate, non-retaliatory reasons for its action in concluding that the claimant failed to prove "contributing factor" causation by a preponderance of the evidence. [] Citing WPA's legislative history, the court rejected the respondent's argument that its countervailing evidence of non-retaliatory reasons for why it acted as it did negated the complainant's showing at the "contributing factor" causation stage. The court held that it was error for the ALJ to weigh 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. "Evidence such as responsiveness to the suggestions in a protected disclosure or lack of animus against petitioner may form part of [the respondent's] rebuttal case. Such evidence is not, however, relevant to a [claimant's] prima facie case under section 1221(e)(1)(A) and (B)." [] "[B]ecause the agency's affirmative defense under section 1221(e)(2) requires a higher burden of proof, we hold that the ALJ's causation finding that Ms. Kewley's protected disclosure was not 'a contributing factor' was legally erroneous as contrary to the statutory command as correctly construed." [].

Id. at 31-32. (Footnotes omitted). The similarity in purpose and language between the WPA and SOX make the reasoning in *Kewley*, and hence the Board's reliance upon it in *Fordham*, inescapable.

Finally, the Board reiterated in *Fordham* that its holding foreclosed the consideration of only *some* employer evidence at the initial stage:

> *To be clear, our ruling does not preclude an ALJ's consideration, under the preponderance of the evidence test, of a respondent's evidence directed at three of the four basic elements required to be proven by a whistleblower complainant in order to prevail, i.e.* whether the complainant engaged in protected activity, whether the employer knew that complainant engaged in the protected activity, and whether the complainant suffered an unfavorable personnel action. As we stated earlier...in addressing the question of whether the complainant has met his or her burden of proving these elements by a preponderance of the evidence, an ALJ may consider (among other relevant evidence) an employer's evidence challenging whether the complainant's actions were protected or whether the employer's action constituted an adverse action, as well as the credibility of the complainant's causation evidence. It is only with regard to the fourth element, of whether the complainant's protected activity was a contributing factor in the unfavorable action, that the statutory distinction is drawn. As discussed, in determining whether or not the complainant has met his or her burden of demonstrating a "contributing factor" causal relationship between the protected activity and the adverse personnel action, the employer's evidence supporting its affirmative defense of a legitimate, non-retaliatory basis or reason for its action is not weighed against the complainant's causation evidence, given that the statutory affirmative defense of a legitimate, non-retaliatory basis or reason for its action had there been no protected activity must be proven by clear and convincing evidence.

Id. at 35, fn. 84. Emphasis added.

The retracted *Powers* decision clarified that *Fordham* did not "foreclose consideration of specific evidence that may otherwise support a respondent's affirmative defense." *Powers* at 13.[8] *Powers* explained that, within specific limits, evidence an employer offers to support its defense may be considered in weighing whether the complainant's proof of contributing factor is supported by a preponderance of the evidence. *If* that evidence is relevant to (a) whether the complainant engaged in protected activity, or (b) whether the employer knew that complainant engaged in the protected activity, or (c) whether the complainant suffered an unfavorable

[8] "While the decision in *Fordham* may seem to foreclose consideration of specific evidence that may otherwise support a respondent's affirmative defense, the *Fordham* decision should not be read so narrowly. This decision clarifies *Fordham's* holding." *Powers* at 13.

personnel action, it may be considered; *but, if* the employer's evidence only goes to whether the employer would have taken the same action in the absence of the protected activity, it should not be considered at the initial stage because it is not relevant to what the law requires the complainant to prove by a preponderance of the evidence. Thus, because a complainant does not have to prove there was a retaliatory motive as part of his burden, employer evidence that it acted without a retaliatory motive is irrelevant to the issue whether the proof offered by the employee satisfied his/her burden. We believe this analysis was correct and should be adopted here.[9]

Our position is consistent with the rationale behind the 1994 amendment of the WPA (5 U.S.C. §1221(e)(1)(B)) to reverse what Congress considered an erroneous application of the "contributing factor" proof requirement by the U.S. Court of Appeals for the Federal Circuit in

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[9] The Board's recent panel decision in *Dietz v Cypress Semiconductor Corp.*, ARB No. 15-017 (March 30, 2016), found the respondent to be "wrong when it argues that ALJs are categorically prohibited from considering employer evidence in assessing whether an employee's protected activity was a contributing factor in the adverse personnel action." Slip op. at 20. The decision declared that all members of the Board "agree that ALJs are not precluded from considering evidence of pretext, inconsistent application of an employer's policies, and inconsistent explanations for the adverse personnel actions to support a finding that a complainant has met his burden to show that his protected activity was a contributing factor. " *Id.* at 21. It is not clear from the opinion in *Dietz* whether the employer-submitted evidence that the ALJ considered and found not credible, which partly formed the basis for the ALJ's "contributing factor" finding, was submitted in response to Dietz's position, as part of his prima facie case, that the basis for Cypress's actions against him were pretextual, that he was treated differently from other similarly-situated employees under the same employer policies, and/or that Cypress had given him shifting reasons for its actions. If that was the posture of the case when the employer submitted its evidence, then we do not take issue with the Board's statement. However, if Dietz did not rely on those grounds as bases for carrying his burden of showing that his protected activity was a contributing factor, Cypress's evidence should not have been considered in determining whether Dietz had carried that burden. In any event, the employer evidence was not needed for Dietz to carry his burden; the decision reveals that Dietz clearly presented more than

Clark v. Department of the Army, 997 F.2d 1466 (Fed. Cir. 1993). *See* S. Rep. 103-358 (August 23, 1994) 1994 WL 461737. The Report of the Senate Committee on Governmental Affairs described how the WPA was intended to "allow[] a petitioner to prove that whistleblowing was a contributing factor by showing that 'the official taking the action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.'" *Id.* at 4. The Committee rejected *Clark*'s holding that the WPA "did not incorporate a per se knowledge/timing test."[10] *Id.* at 6. Thus, the Report explained that the amendment was intended to revert the statute to its original intent by "defin[ing] how an employee can prove that a disclosure is a contributing factor in a personnel action":

> [T]he amendment in Section 4(b) would restore the balance intended in the Whistleblower Protection Act, by permitting a whistleblower to prove his/her prima facie case by showing that the "official taking that action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." As stated in the Joint Explanatory Statement, this would be only one of many possible ways that a whistleblower could use to establish a prima facie case.

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enough to carry his burden without it; the discredited employer evidence was the proverbial "icing on the cake." Slip Op. at 19.

[10] *Clark* asked whether "the statute incorporate[s] a 'per se' rule that requires an analysis of whether the deciding officials had actual or constructive knowledge of the employee's disclosure, and whether the timing of the adverse action was such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action" and whether "when the agency offers evidence to prove that the disclosure was not a contributing factor (an issue evaluated under the preponderant evidence standard), and this evidence is also relevant to the agency's affirmative defense that the same action would have been taken absent the disclosure, must the agency meet the higher 'clear and convincing' evidence standard reserved for its affirmative defense?" 997 F.2d at 1470.

> The Committee also notes that the Whistleblower Protection Act creates a clear division between a whistleblower's prima facie case, which must be proven by a preponderance of the evidence, and an agency's affirmative defense, which must be proven by clear and convincing evidence. The Committee amendment reaffirms that Congress intends for a agency's evidence of reasons why it may have acted (other than retaliation) to be presented as part of the affirmative defense and subject to the higher burden of proof.

Id. at 6. As for when each side was to present its proof, the Committee explained that the WPA

> creates a clear division between a whistleblower's prima facie case, which must be proven by a preponderance of the evidence, and an agency's affirmative defense, which must be proven by clear and convincing evidence. The Committee amendment reaffirms that Congress intends for a agency's evidence of reasons why it may have acted (other than retaliation) to be presented as part of the affirmative defense and subject to the higher burden of proof.

Id.

Considering the intent underlying both the WPA and AIR 21, the striking similarities between the relevant language in the two statutes setting forth the requirements for an employee to obtain relief lead to but one reasonable conclusion - that Congress did not intend there to be a distinction in the way in which whistleblower cases under the statutes were to be resolved:

WPA (5 U.S.C. §1221(e)):

(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure or protected activity described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) *was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant.* 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.

(2) Corrective action under paragraph (1) may not be ordered if, after a finding that a protected disclosure was a contributing factor, the agency *demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.*

AIR 21 (49 U.S.C. §42121(b)(2)(B)):

(iii) Criteria for determination by secretary. - The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was *a contributing factor in the unfavorable personnel action* alleged in the complaint.[11]

(iv) Prohibition. - Relief may not be ordered under subparagraph (A) if the employer *demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.*

(Emphasis added)

[11] The Board has held that railroad employees may prove "contributing factor" "by direct evidence or indirectly by circumstantial evidence," just like employees covered by the WPA. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114 , slip op. at 6-7 (February 29, 2012).

In other words, the majority in *Fordham*, as clarified by the majority in *Powers*, was correct.

We recognize that the dissenting ARB Members in *Powers* were highly critical of the majority opinion, describing it not only as erroneous, but confusing as well. Preliminarily, however, they acknowledged two important majority rulings "that have unanimous support." *Powers*, Slip Op. at 33. The first one was that "there is no inherent limitation on specific admissible evidence that can be evaluated [by an ALJ] for determining contributing factor *as long as the evidence is relevant to that element of proof.*" *Id.* at 33-34. Second, the dissenters agreed with the majority's reaffirmation of the ALJ's authority to decide questions of relevance. *Id.* at 34.[12]

It is the Unions' position that employer evidence is only "relevant to that element of proof" when it addresses the three specific criteria the employee must prove to demonstrate a prima facie case that his protected activity contributed to the adverse action – *i.e.*, that the conduct was protected, that the employer knew about it, and that the timing of the adverse action came after the employer became aware of the protected conduct.[13] Employer motive-related evidence does not fit that category unless the employee introduces evidence to show that the actual basis for the action is pretextual.

What the dissenters miss in criticizing the exclusion of employer evidence when weighing whether a prima facie has been presented is that the difference in evidentiary burdens

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[12] Their main objection to the majority's decision was that it usurped the role of the ALJ in weighing and evaluating evidence in determining whether causation had been established. *Id.* at 35.

[13] The length of time between the employer's knowledge and the adverse action is a factor that goes to the strength of the employee's evidence. Plainly, the shorter the time, the more likely the protected conduct and the adverse action are connected.

that AIR 21 imposes, which they seem to believe that as applied is unfair, was the product of serious and spirited debate over how the troublesome number of employees being subject to retaliation for reporting injuries and the significant underreporting of accidents and other deficiencies was affecting workplace and transportation safety and national security after 9/11. That they were extended verbatim to the rail industry against a background of increased legislative scrutiny of railroad safety is indisputable. As explained in the Conference Report to accompany H.R. 1 - Implementing Recommendations of the 9/11 Commission Act of 2007, which led to the passage of Public Law No. 110-53 (August 3, 2007), codifying changes to then-existing law in 49 U.S.C. § 20109:

> *Section 1521. Railroad employee protections*
>
> There is no comparable House provision.
>
> Section 1430 of the Senate bill updates the existing railroad employee protections statute to protect railroad employees from adverse employment impacts due to whistleblower activities related to rail security. The provision precludes railroad carriers from discharging, or otherwise discriminating against, a railroad employee because the employee, or the employee's representative: provided, caused to be provided, or is about to provide, to the employer or the Federal government information relating to a reasonably perceived threat to security; provided, caused to be provided, or is about to provide testimony before a Federal or State proceeding; or refused to violate or assist in violation of any law or regulation related to rail security.
>
> The Conference substitute adopts a modified version of the Senate language. It modifies the railroad carrier employee whistleblower provisions and expands the protected acts of employees, including refusals to authorize the use of safety-related equipment, track or structures that are in a hazardous condition. Additionally, the Conference substitute enhances administrative and civil remedies for employees, similar to those in subsection 42121(b) of title 49, United States Code. The language also provides for de novo review of a complaint in Federal District Court if the Department of Labor does not timely issue an order related to the complaint. The Conference substitute also raises the cap on punitive damages that could be awarded under this provision from $20,000 to $250,000.
>
> The Conference notes that railroad carrier employees must be protected when reporting a safety or security threat or refusing to work when confronted by a hazardous safety or security condition to enhance the oversight measures that improve transparency

> and accountability of the railroad carriers. The Conference, through this provision, intends to protect covered employees in the course of their ordinary duties. The intent of this provision is to ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers.

H.R. Report 110-259, 110th Congress, (July 25, 2007) p. 348.

(https://www.congress.gov/110/crpt/hrpt259/CRPT-110hrpt259.pdf) *See*, *Araujo v. New Jersey Transit*, 708 F.3d 152, 156-161 (3rd Cir. 2013).

There is no question that requiring an ALJ to disregard employer "motive" evidence when weighing whether a complainant has made out a prima facie case may make it more difficult for a respondent to defeat a whistleblower claim, but that is the nature of the statute and the unmistakable intent of Congress. The FRSA does not require that complaining employees anticipate and rebut employer defenses in order to satisfy their burden. If the complainant's burden of proof for showing a violation is to be heightened by having to refute employer evidence in the first instance, and the respondent's burden consequently lightened (i.e., it may never have to reach the "clear and convincing" level), that is for Congress, not the ARB, to decide. We simply do not agree with the suggestion in the *Powers* dissent that there was "obfuscation" at the heart of the *Fordham* decision.

What AIR 21 intends is that an ALJ may consider evidence presented by both the employee and employer in deciding whether the employee has shown that his protected activity was a contributing factor in the adverse personnel action taken against him, *but* employer evidence of its alleged "real reason" for the disciplinary action is not relevant to this first stage of the analysis, unless the employee makes it so. The employee's burden is simple, straightforward, and three-fold - he must show that he engaged in protected activity, that the

employer knew about it, and that he was disciplined after the employer became aware of the protected activity. (That may be all he/she needs to present a prima facie case.). If the employee's evidence demonstrates that protected activity contributed in any way to the employer's action, the employee's burden is satisfied. The employer may present evidence to rebut the employee's evidence (i.e., to show the employee has not made out a prima facie case), but the evidence it relies on to do so must be directed solely at the three elements of the employee's proof - ordinarily that the employee did *not* engage in protected activity, or, if he did, the employer did *not* know about it, or that the employee was *not* subjected to an adverse action after the employer found out.[14] This employer evidence can be considered by the ALJ in weighing whether what the employee has shown satisfies the employee's burden to prove a contributing factor by a preponderance of the evidence. The credibility of both the employee's and the employer's evidence may be weighed by the ALJ in making this determination.

Again, employer evidence that it would have taken the same action in the absence of the protected activity does not address the three requisite elements of the employee's prima facie case. Therefore, that evidence is not relevant at this stage and should not be considered *unless* the employee has made rebuking the charges upon which an adverse action was based essential to establishing the bona fides of his/her position. For example, an employee may believe that the charges upon which an adverse action was based are so false, exaggerated or otherwise outlandish that they prove retaliation *per se*. Or, the employee might want to show that the

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[14] For example, it would be proper for an ALJ to consider employer evidence that an intervening event occurred that necessitated the employer's action, such as a weather catastrophe making the employee's work no longer possible to perform or an unexpected discontinuance of a contract the employee was working on thereby rendering his job no longer necessary.

employer was specifically motivated to punish him/her or that other employees who engaged in the same allegedly improper behavior as he/she did were treated differently. Absent the employee relying on grounds like that, which opens the door to consideration of the merits of an employer defense as part of the employee's case in chief, employer motive-related evidence should only be considered *if* the ALJ is satisfied that the employee has carried his burden. Only at that point should the ALJ weigh the employer's evidence, if any, that the employer would have undertaken the adverse personnel action even if the employee had not engaged in the protected activity. Consistent with the statute, the weight the ALJ gives the employer's defense evidence is always subject to the clear and convincing standard of proof.[15]

Were the Board to adopt what up to now has been the minority view, complainants would be required to rebut management's defense/motive evidence as part of proving the elements of a prima facie case. Essentially, the shifting burden provided in the statute would change – employees would have to show not only that they engaged in protected activity, that their employer was aware of it, and that they were subjected to an adverse action, but also that the employer's evidence that their protected activity was not considered is false or otherwise not credible. If they could not satisfy this fourth element, the case would be over and the burden would never shift to the employer to refute the employee's case with clear and convincing evidence showing that the adverse action would have occurred anyway – there would be no prima facie case to rebut. This would eviscerate the burden that AIR 21 imposes on respondents.

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[15] As for the Board's inquiry regarding "limitations on the types of evidence that the ALJ may consider," we believe that the standards that govern the admissibility of evidence contained in the Federal Rules of Evidence are appropriate.

To say that result would be startling is an understatement, as it is exactly what Congress intended AIR 21 to avoid.

CONCLUSION

The amici Unions maintain that when deciding whether a complainant has proven by a preponderance of the evidence that protected activity was a "contributing factor" in the adverse action taken against the employee, the ALJ should not consider evidence related to the employer's motive in taking an adverse action. The only employer evidence the ALJ may examine at that stage of a case is evidence offered to show either that the employee did not engage in protected activity, that the employer did not know about the protected activity, or that no adverse action was taken against the employee after the employer became aware of the protected activity.

There is only one exception to this rule: if as part of his/her case-in-chief, the employee relies on evidence offered to show that the basis for the employer's adverse action is specious or that adverse action was not taken against other employees who engaged in the same behavior that the employer relies upon as justification, so as to demonstrate that the action must have been taken in retaliation for the employee's protected activity, then and only then may the employer submit and the ALJ consider employer evidence that the protected activity did not contribute to the adverse action. Otherwise, the ALJ must disregard all such employer evidence until *after* the employee has carried his burden of going forward, when the ALJ is deciding whether the employer's evidence clearly and convincingly proves that "the employer would have taken the same unfavorable personnel action in the absence of" the protected activity. Of course, the employee may offer evidence at both stages to rebut or otherwise discredit the employer's proof.

It is important that the Board provide straightforward answers to the questions it raised, consistent with the legislative history, so that in the future, ALJs have a firm basis to issue decisions that are less likely to be appealed due to confusion over what evidence is relevant and necessary to satisfy each party's required burden.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that this Brief has been filed via the Electronic File and Service Request system and paper copies have been served on all parties of record through their counsel this 3rd day of August 2016.

/s/ Michael S. Wolly
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