
**DEPARTMENT OF LABOR**
**ADMINISTRATIVE REVIEW BOARD**

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| **KENNETH PALMER** | ) | |
| | ) | |
| **Complainant** | ) | |
| | ) | **ARB Case No. 2016-0035** |
| **v.** | ) | **ALJ Case No. 2014-FRS-154** |
| | ) | |
| **CANADIAN NATIONAL RAILWAY, ILLINOIS CENTRAL RAILROAD COMPANY** | ) | |
| | ) | |
| **Respondent** | ) | |

## Brief of *Amicus Curiae* Academy of Rail Labor Attorneys

*Amicus curiae* Academy of Rail Labor Attorneys("ARLA") submits this brief, urging the Board to reaffirm the analysis in the vacated decision of *Powers v. Union Pacific Railroad Company*[1], and hold—consistent with the legislative history of the federal railroad safety laws that an employer-respondent's allegedly non-retaliatory reason for taking an adverse employment action should not be considered during the complainant's case in chief in the two-stage whistleblower analysis.

## I. Interests of *Amicus* Academy of Rail Labor Attorneys

The Academy of Rail Labor Attorneys is a professional association of attorneys founded in 1990 whose practice includes the representation of

[1] No. 13-034, 2015 WL 1881001 (ARB March 20, 2015).

injured railroad workers both in whistleblower cases and in cases filed under the Federal Employers' Liability Act.

Its primary purposes are to promote rail safety for the traveling public, to promote safe working conditions and standards for railroad employees, to promote public safety with respect to rail transportation at grade crossings and in connection with rail passenger and commuter service, to promote the rendering of whatever aid, comfort or assistance may be required of an injured railroad employee or his or her family, to provide continuing legal education opportunities for attorneys through seminars and other educational programs, and to promote and maintain high standards of professional ethics, competency and demeanor in the bench and bar.

**II.Legislative History**

At the outset, the ARB should keep in mind the clear intent of the railroad whistleblower law is to protect the employee in order to effect a positive culture change in our nation's railroads. To adopt the views of the railroads and their proponents will undermine that congressional intent. The purpose of the Federal Railroad Safety Act("FRSA") is "to promote safety in every area of railroad operations…." 49 U.S.C. §20101. The primary purpose of the railroad whistleblower law is to protect against discrimination toward the employee

resulting "in whole or in part" from, among other things, reporting an injury. The issue in this proceeding is whether a railroad's affirmative defense that, in the absence of the employee reporting an injury, it would have disciplined the employee anyway, is relevant evidence for a factfinder to consider when deciding the complainant's case. We submit that such evidence is, and must be, irrelevant when deciding the "contributing factor" element. The reason is that the paramount purpose of the law is to protect the employee. If the ARB allows such defense to control the factfinder's decision at the complainant's stage of the proceedings, it will give the railroad two bites at the apple and, ultimately, discourage the complete and accurate reporting of accidents and injuries. The ARB must recognize that its adoption of the railroad's position, the railroad's position, will enable railroads to continue engaging in the retaliatory behavior Section 20109 was enacted to eliminate.

Prior to enactment of the whistleblower law, history demonstrated that, when an employee reported an injury, the railroads would automatically charge the employee with the violation of some railroad rule. Often the rule was only enforced against injured employees, or was absurdly vague(e.g., "Employees must work safely at all times" or "Employees must avoid injuries.").

The legislative history is replete with examples of railroads firing employees after an injury, and this is what Congress intended to protect against. Congress said

that the intent of the whistleblower provision "...is to ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers." H.R. Rep. No. 110-259 at 348(2007)(Conf. Rep.)(underlining added).

For many years, railroad employees complained to Congress that the railroads intimidated and harassed employees who report injuries. *See,* e.g., *Hearing on Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads:* Before the House Committee on Transportation and Infrastructure, 110th Cong. (Oct. 22, 2007)( "Hearing"). The Hearing was held to "examine allegations...suggesting that railroad safety management programs sometimes either subtly or overtly intimidate employees from reporting on-the-job-injuries." *Id.* at 1.

Over the years, the accuracy and underreporting of injuries by railroads was criticized by various government agencies. And, in fact, the rail industry has a long history of underreporting injuries. The Chairman of the House Committee, Representative James Oberstar, stated in his introductory remarks at the Hearing that "Reports have documented a long history of under-reporting...and underreporting of rail injuries is significant because employees frequently report harassment of those who do report incidents, being hurt on the job, is a common practice in the rail sector." He noted further:

... the issue we consider today is that of railroad injury, accident, and discipline policies. The accuracy of the

databases for rail safety has been criticized by a number of government reports over the years. Reports have documented a long history of under-reporting of accidents, under-reporting incidents, of noncompliance with Federal regulations; and under-reporting of rail injuries is significant because employees frequently report that harassment of those who do report incidents, being hurt on the job, is a common practice in the rail sector.

One of the reasons for this pressure is the 1908 law itself, the Federal Employers Liability Act, and under-reporting or withholding of reporting makes accident statistics look better than they really are, but it denies the public, it denies regulators, and it denies the Congress a full understanding of the nature and extent of safety problems in the rail industry, and that is vital to improving safety. And it is not right for people on the job to be told you shouldn't report this injury; maybe you can just sit here in the health room, maybe you just need an aspirin or maybe you just need a little time, and don't put this on the report because then it becomes an accident, and then that looks bad for the railroad. Most often, these incidents happen at inconvenient times: late hours, during bad weather.

....

So when I began hearing reports, which was a few years ago, about these matters, I said this is serious stuff: intimidation, threats on the job; some not so subtle, some perhaps subtle. So I directed the Oversight and Investigation Staff to get out in the field and go out and talk about injury accident reporting. Since then, we have had a floodgate of e-mails of alleged harassment of railroad employees. Some are cases where employees were cautioned by managers not to file an injury report in order to avoid future problems or disciplinary action. We have 200 individual cases with documentation of alleged management intimidation following injury reports, and they have been provided to the Committee.

We have reviewed the most recent FRA comprehensive accident incident reporting and recording audits. Those audits, conducted at major railroads. FRA found 352 violations of Federal law for under-reporting in the largest category: failure to report employee injuries. That is only the number of

under-reported injury events that FRA was able to identify.
May be just the tip of the iceberg.[2]

Hearing at 2- 3.

Various witnesses confirmed those comments. *See,* Hearing, 38-69, 145-146, 179-191, 271-679, 710-725, 764-778. Moreover, Congress learned from the written statement of the Administrator of the Federal Railroad Administration, that "The underlying motivators driving harassment and intimidation are varied and powerful, and deeply ingrained in the railroad culture." Hearing, at 140; *see also,* FRA report dated July 2002 entitled *An Examination of Railroad Yard Workers Safety.* In the Report, the FRA stated "Perhaps of most significance, rail labor painted generally adversarial picture of the safety climate in the rail industry. They felt that harassment and intimidation were commonplace, and were used to pressure employees to not report an injury…" *Id.* at 2-3. In April, 1989(GAO/RCED-89-109), the GAO issued a report on its investigation of railroads underreporting injuries and accidents, and confirmed that the injury and accident data base is unreliable because of serious underreporting. (pg.2).

Prior to the enactment of the railroad whistleblower law, the Federal Railroad Administration("FRA") attempted to address this problem of harassment and intimidation, by requiring the railroads to adopt an Internal Control

[2] We are citing extensively from the congressional hearings because it is important that the ARB clearly understand the congressional intent is to protect the employee from harassment and intimidation.

Plan("ICP"). The FRA required that every railroad's ICP include a policy statement declaring the railroad's commitment "that harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting such accident, incident, injury, or illness will not be permitted or tolerated...." 49 C.F.R. §225.33(a)(1). In issuing the regulation, the FRA found that, in some instances, supervisory personnel and mid-level managers are urged to engage in practices that may undermine or circumvent the reporting of injuries and illnesses. 118 Fed. Reg. 30940, 30943(June 18, 1996). The FRA noted that many times FRA inspectors are called to investigate complaints from employees alleging their injury/or work related illness was not reported at all, and that the railroad reports the injury/or illness to the FRA only after FRA informs management of the situation. *Id.* The FRA's ICP policy sounded good, but there have been little or no enforcement of the ICP violations. Employees continued to complain they were being retaliated against when they reported injuries, and that led to the Hearing discussed above, and is a primary reason Congress enacted Section 20109 whistleblower law.

In *Arujo v New Jersey Transit Rail Operations, Inc.*, 708 F. 3d 152, 157, n.3(3d Cir. 2013), the Circuit Court note the changes embodied in Section 20109 "were intended to 'enhance the oversight measures that improve transparency and accountability of the railroad carriers' and...'ensure that employees can report their

concerns with the fear of possible retaliation or discrimination from employers.'" *See also, Ratledge v. Norfolk Southern Ry. Co.,* 2013 WL 3872793 at *15(E.D. Tenn. July 25, 2013).

If the ARB adopts the railroad's position in this proceeding, it will allow the harassment and intimidation of railroad employees to continue unabated, defeating the purpose of Section 20109.

**III. The Railroad and its Proponents Failed to Accurately Address the Statutory Mandate that the Employee's Discrimination Burden of Proof is "in whole or in part."**

It is settled law that every word of a statute should be given effect. *George Duncan v. Sherman Walker,* 533 U.S. 1671-1674(2011); *U.S.v. Menasche,* 348 U.S. 528, 538-539(1955); *see also, Statutory Interpretation: General Principles and Recent Trends,* American Law Division, Congressional Research Service(Aug. 31, 2008). Additionally, neither courts nor agencies should add language that Congress has not included. *See, Iselin v. U.S.,* 270 U.S. 245, 250(1990); *Lamie v. U.S., Trustee,* 540 U.S. 526, 537(2004).

Title 49 U.S.C. §42121(b)(2)(B)(ii) requires the complainant to make a showing that his or her protected activity was a contributing factor in the unfavorable personnel action. However, the employee's burden of proof under the whistleblower law is reduced to showing that the alleged discrimination was due "in whole or in part." 49 U.S.C. §20109(a). That phrase was adopted from the text

of the Federal Employers Liability Act's causation burden of proof. 45 U.S.C. §51. The Supreme Court, in *CSX Transportation, Inc. v. McBride,* 564 U.S. 685 (2011), recently reconfirmed interpreted the meaning of that "in whole or in part" phrase. It means that an employee need only prove that the railroad's negligence "played any part, no matter how small, in bringing about the injury." *Id.,* at 70;. *see also, Rogers v. Missouri Pacific R. Co.,* 352 U.S. 500, 506(1957). The railroads argued in *McBride,* as they do here, that the minimal "in whole or in part" standard of proving "any part" at all opens the door to unlimited liability and would impose liability on the basis of "but for" causation. 564 U.S. at 699-700; *see,* Association of American Railroads *Amicus* brief at 8-9, in *Powers v. Union Pacific Railroad Co.,* ARB Case No. 13-034, ALJ Case No. 2010-FRS-030. But that argument was rejected by the Supreme Court in *McBride,* and should be rejected here as well.

It logically follows from the definition of "in whole or in part" and the definition of "contributing factor" that a railroad's supposedly non-discriminatory reasons for its adverse actions are irrelevant during the complainant's stage of proof. *See, e.g., Marano v. Department of Justice,* 2 F.3d 1137, 1143(Fed. Cir. 1993); *Kewley v. Dep't of Health & Human Services.*, 153 F.3d 1357 (Fed. Cir.1998). Also, in *Ray v. Union Pacific*, 971 F. Supp. 2d 869, 894 (S.D. Iowa 2013), the court stated: "even if [the employee's workplace rule violation is] the

primary and predominant basis for [the adverse action], this does not preclude the possibility that [his or her] injury report could still have been a contributing factor in his discharge . . . ." (emphasis in original). To hold otherwise would effectively re-impose the same burden of proving discrimination *vel non* that Congress explicitly rejected. *See, Marano v. Department of Justice, supra,* 2 F.3d at 1140 ("[t]he legislative history . . . emphasizes that 'any' weight given to the protected [activity], either alone or even in combination with other factors, can satisfy the 'contributing factor' test"). So, even if a railroad's justification is true(e.g., the employee did in fact violate a rule), the railroad still violates Section 20109 if the protected activity played "any part at all"(e.g., non-injured employees who violate the same rule are not charged, whereas injured employees are, indicating the reporting of the injury played "a part" in the filing of the disciplinary charge).

The same point applies in cases where the employee's protected activity and the adverse action are "inextricably intertwined." In the words of one court that read Section 20109's plain language and legislative history:

> This cited [workplace rule violation] cannot be unwound from [the plaintiff's] decision to [engage in protected activity]. Even viewing this evidence in the light most favorable to BNSF, [the plaintiff] has met the low bar set by the "contributing factor" element of his prima facie case with respect to his decision to [engage in protected activity].

*Rookaird v. BNSF Ry. Co.*, No. 14-cv-176, 2015 WL 6626069, at *5 (W.D. Wash. Oct. 29, 2015); *see also, Davis v. Union Pac. R.R. Co.*, No. 12-cv-2738, 2015 WL

5519115, at *3 (W.D. La. Sept. 17, 2015) ("[The plaintiff] argues that the injury report and his termination are not only temporally related but also inextricably intertwined, because without the injury report, there would have been no discipline. The Court agrees. . . . [T]he facts of this case . . . collectively meet the broad definition of 'contributing factor' for purposes of the FRSA."); *Smith-Bunge v. Wisconsin Cent., Ltd.*, 60 F. Supp. 3d 1034, 1040-42 (D. Minn. 2014).

**IV. After a complainant establishes his or/her case, the burden then shifts to the railroad to prove by clear and convincing evidence that that it uniformly disciplines non- injured employees for the same alleged offense.**

Neither the railroad, nor its proponents, accurately interpret the statutory mandate under 49 U.S.C. §42121. Under subsection (b)(2)(B)(iii), the complainant makes his or/her case "in whole or in part" that the railroad's actions were a contributing factor in the unfavorable personnel action. Next, the railroad must demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of that behavior. §42121(b)(2)(B)(iv). Under this standard, the railroad is required to prove it is "highly probable" it would have taken the same action absent the protected activity. *U.S. v. Boos,* 329 F. 3d 907, 911(7th Cir. 2003); *see also, Araujo v New Jersey Transit Rail Operations, Inc., supra,* 708 F. 3d at 159. The railroad cannot meet that heavy burden merely by alleging that the complainant violated some railroad rule. Rather, the clear and convincing evidence standard requires the railroad to clearly

demonstrate it uniformly disciplines other non- injured employees for the same offense. It must be kept in mind that the law is intended, primarily, to protect the employee from harassment and intimidation. To adopt the railroad's views would effectively rescind the robust protections Congress wrote into Section 20109.

It is important to distinguish the evidence that is controlling at each stage of a Section 20109 case. The railroad and its proponents are asking the ARB to allow the railroads to use their affirmative evidence to defeat the complainant's proof of the "contributing factor." In effect, the railroads want two bites at the apple. That is unfair, and improperly inverts Section 20109's distinct two stage burden-shifting framework. Moreover, it is not what Congress intended.

The trial before an Administrative Law Judge should be no different than a trial before a district judge in a typical civil litigation case. That is, the plaintiff puts on his or/her case in chief with the defendant cross examining the witnesses. At this stage of a trial, the defendant does not introduce evidence. That is reserved to the point in the trial after the plaintiff completes the initial proof.

Next, the defendant presents the evidence it believes will prove its defenses in the case, including affirmative defenses. As noted by the sponsors of the whistleblower legislation, "At the administrative law judge hearing...[o]nce the complainant makes a prima facie showing that protected activity contributed[in whole or in part] to the unfavorable personnel action alleged in the complaint, a

violation is established unless the employer establishes by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." 138 Cong. Rec. H11, 409(daily ed. Oct. 5, 1992). The intent is clear—once the complainant's case is presented, only then does the respondent submit its affirmative defenses. *Kewley v. Department of Health and Human Services*, 153 F. 3d 1357, 1362-1363(Fed. Cir. 1998), answered this point. It held that if the complainant establishes the elements of the case in chief, the burden then shifts to the employer to prove its affirmative defenses. As the Western District of Wisconsin correctly noted, the parade of horribles cited by the railroads here is entirely imaginary:

> Permitting [FRSA plaintiffs] to establish causation through a "chain of events" theory does not, as BNSF contends, prevent the company from ever disciplining its employees. Nor does it impose "strict liability" on a railroad carrier any time it disciplines an employee who filed an incident report. Under § 42121(b)(2)(B)(ii), which FRSA incorporates, employers are not liable for retaliation if they "demonstrate[ ], by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the employee's protected] behavior." Thus, when an employee establishes a prima facie case of retaliation, he does not automatically win his case, as BNSF apparently fears; the burden simply shifts to the employer to explain why its actions were lawful.

*Koziara v. BNSF Ry. Co.*, No. 13-cv-834, 2015 WL 137272, at *10 (W.D. Wis. Jan. 9, 2015); *see also Harp v. Charter Communications, Inc.*, 558 F.3d 722, 726 (7th Cir. 2009). In other words, a railroad's justifications for its retaliatory actions are irrelevant when deciding if the complainant has proved his or/her case in chief.

It certainly cannot be used to defeat a complainant's proof of the "contributing factor" element. And that does not change the fact a railroad can always discipline an injured employee for violating workplace rules without fear of violating Section 20109 as long as the railroad shows it would have disciplined those employees for that rule violation in the absence of the the injury reports. *Id.*

The various *amici* supporting the complainant in this case have fully briefed the above points, and ARLA adopts, and incorporates by reference, those arguments.

## CONCLUSION

For all of the foregoing reasons, ARLA urges the Board to follow the congressional intent and the relevant case law, and hold that a railroad may present its affirmative defense evidence only after the complainant concludes his or/her case in chief.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that this 3rd day of August, 2016, I electronically filed the above and foregoing document with the Administrative Review Board using the ARB electronic filing system, with copies of same placed in the United States mail, postage prepaid and properly addressed to: George H. Ritter, Jennifer H. Scott, Wise Carter Child & Caraway, P.A., 401 East Capitol Street, Suite 600, P.O. Box 651, Jackson, MS 39205, attorneys for Respondent, and to Tucker Burge, Burge & Burge, 2001 Park Place, Suite 850, Birmingham, AL 35203, attorneys for Complainant.

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## CERTIFICATION

I hereby certify that the Complainant did not provide any funds toward the preparation of this brief.

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# Fax Cover Sheet

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