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

IN THE UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

KENNETH PALMER,

Complainant,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

COMPLAINANT'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

In response to the Board's request for supplemental briefs addressing the extent to which the employer's justification evidence may be lawfully regarded to decide the contributing factor element of an employee's unlawful retaliation claim under the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109, Complainant Kenneth Palmer answers as follows:

Beginning with the general rule, it is error to weigh an employer's evidence of legitimate, non-retaliatory reasons against the employee's causation evidence when deciding "contributing factor" in cases governed by the two-part burden shifting procedure that Congress selected for FRSA. Under that procedure, "an employer's affirmative defense evidence (supporting a legitimate, non-retaliatory reason for the adverse action in the absence of any protected activity) is, with rare exception, not to be considered at the initial causation stage, where the complainant is required to prove by a preponderance of the evidence that his or her protected activity was a contributing factor in the adverse personnel action at issue. The employer's affirmative defense evidence is instead reserved for proof by clear and convincing evidence should the complainant prevail in establishing contributing-factor causation." *DeFrancesco v. Union Railroad Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Sept. 30, 2015) (citing *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014) and *Powers v Union Pacific R.R.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Apr.

21, 2015)). The general rule, however, does not bar consideration of employer evidence at the contributing factor stage to the extent that it is either relevant to issues of credibility or potential contributing factor determinants like pretext, temporal proximity, and employer knowledge.

Here, the ALJ applied the proper legal standard to the facts as he found them from the evidence presented. He held each party to the burden imposed upon it by Congress and reached a fair and well-reasoned decision.

II. THE ALJ'S FINDINGS AND DECISION

The Board reviews the ALJ's factual findings under the "substantial evidence" standard. 29 C.F.R. § 1982.110. This standard is satisfied where a "reasonable mind might accept" the ALJ's factual findings "as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The material facts supporting the ALJ's decision that relate to the supplemental briefing issue include the following:

When Kenneth Palmer injured his arm while mounting a railcar at Crystal Springs, Mississippi, on the night of June 18, 2013, he worried that reporting the injury to his employer would result in retaliation. (D&O at 7-8). Putting those worries aside, Palmer reported the injury as required by the railroad's rules. (Id.) That decision proved costly.

Assistant Superintendent Brad McDaniel tried to dissuade Palmer from reporting the injury. (Id. at 44-45). McDaniel asked Palmer if he was "sure" he wanted to "report a

personal injury" and if he was "trying to get fired". (Id. at 8). When Palmer would not be talked out of reporting the injury, McDaniel initiated disciplinary proceedings against him by issuing a notice of formal investigation "to determine whether [Palmer] violated any company rules, regulations and/or policies in connection with your alleged personal injury." (RX 15).

McDaniel then advised Palmer's local chairman that Illinois Central would not "offer (or honor) a waiver for a separate incident" involving a run-through switch the month before. (D&O at 14, 39). Illinois Central admits that Palmer is "the only conductor ever denied a waiver in connection with a run-through switch." (Id. at 27).

McDaniel presided over the formal disciplinary hearing for the run-through switch. (Id. at 28). During the hearing, Palmer accepted responsibility for the switch run-through, just as he had from the moment it happened. (Id. at 7, 14). Undisputed evidence proved that Palmer's mistake did not result in a derailment, damage to railcars, and that the harm to the switch was "minor." (Id. at 6, 14).

After the hearing, McDaniel sent an email to his immediate supervisor, Superintendent Will Noland, recommending that Palmer be suspended for 60 days or terminated. (Id. at 33). McDaniel noted in the email that "Mr. Palmer has 2 injuries in the 2 years I have been in Jackson." (Id.). McDaniel admits that Palmer's Crystal Springs injury, reported just days before, was one of the two injuries to which he referred. (Id. at 29, 32). According to McDaniel, his recommendation "was based on the entire

work history, *not just the two injuries*." (Id. at 32, emphasis added). Thus, McDaniel admitted that Palmer's reported injury at Crystal Springs formed part of the basis for the discipline he advocated.

On July 7, 2013, a few days after receiving McDaniel's recommendation, Superintendent Noland sent his boss, General Manager John Klaus, the following email: "Need permission to terminate. Has another investigation coming up for the rules violated which resulted in an injury." (Id. at 33). Klaus emailed back to ask: "Is the next investigation tied to an injury? Is this the Crystal Springs last injury?" (Id. at 34). Five minutes after receiving confirmation that the next investigation was tied to the Crystal Springs injury that Palmer reported, Klaus emailed the following message to Noland and McDaniel: "Dismiss. We won't need to hold the next one." (Id.).

The next day, McDaniel called Palmer to read him the letter dismissing him and the letter cancelling the investigation into the Crystal Springs incident. (Id. at 8). Kenneth Palmer is the only conductor ever to be terminated for running through a switch. (Id. at 42).

Superintendent Noland testified for Illinois Central at the trial before the ALJ. General Manager Klaus did not. On direct examination, Noland swore that he alone was the decision-maker in Palmer's termination. (Id. at 18, 23). Noland also swore that he had not "connect[ed] the dots" between Palmer and the Crystal Springs injury before the termination decision was made. (Id. at 23). On cross-examination, Noland was

confronted with the email in which he asked Klaus for permission to terminate Palmer and mentions the upcoming investigation for Palmer's reported injury. (Id.) Noland "acknowledged that the email says that he needed permission from his boss, that the investigation it references is the Crystal Springs injury incident, and it is "true" he did know about the injury at Crystal Springs." (Id.) By Noland's own admission, his testimony on direct examination about "not connecting the dots" was false. Noland went on to concede that he needs Klaus' permission to even take off for the weekend. (Id. at 27). When asked whether the emails that led to Palmer's termination mention any details about the switch run-through, Noland acknowledged the obvious: "no one was asking any questions about the switch run through." (Id. at 24).

Assistant Superintendent McDaniel, Illinois Central's only other witness, testified by deposition. According to him, Klaus' ("Dismiss. We won't need to hold the next one.") email was the decision to terminate Palmer. (Id. at 29). "When asked whether, at the time the decision to dismiss was made and approved by Klaus, it followed discussions of [Palmer's] on-duty injury, McDaniel answered, 'Yes. Somewhat, yes.'" (Id. at 31).

After receiving and considering the evidence presented by both parties at trial, the ALJ issued a Decision and Order sustaining Palmer's claim. In reaching his decision, the ALJ found Palmer met his burden of establishing the contributing factor element with direct and circumstantial evidence that included: (1) "temporal proximity between the protected activity and the adverse action (June 18, 2013 and July 8, 2013)"; (2) "hostility

expressed to Complainant by McDaniel" when he reported the injury; (3) "inconsistent application of and change in Respondent's policies regarding the holding of formal hearings of run-throughs that were applied only to Palmer"; (4) inconsistent application of Employer policies in granting waivers"; (5) "that the termination and the refusal of waiver are inextricably intertwined with the Complainant's reporting of injuries"; (6) "direct evidence that [Palmer] was the only employee to be terminated for such an infraction"; (7) "and, most important, the presence of e-mails showing the connection between Complainant's protected activity and his discharge." (Id. at 41-42). Next, the ALJ applied the clear and convincing evidence burden to determine whether Illinois Central established its affirmative liability defense. The ALJ determined that the railroad utterly failed in this regard: "The record is devoid of any proof that Complainant would have been discharged without any regard to his subsequent injury report." (Id. at 44). The ALJ rejected Illinois Central's argument that it consistently enforced its rules against employees without regard to protected activity because "[t]he record shows that Complainant was the only employee not offered a waiver for a switch run-through." (Id. at 45). As for the bare assertions offered by the company officials, the ALJ dismissed them as insubstantial and not credible:

> Further, the fact that Noland and McDaniel testified that Complainant would have been discharged even if an injury had not been reported does not meet the burden of providing clear and convincing evidence. Also, the record is unclear as to who had the authority to terminate Complainant. While Noland testified he had the authority, it appears email

> evidence shows Klaus actually had the power to make the decision. Based on the email evidence, it is clear not only that McDaniel, Nolan, and Klaus knew of Complainant's injury, but that the injury was a factor in his termination.

(Id., internal record citations omitted).

III. SUPPLEMENTAL ARGUMENT

A. FRSA Burdens of Proof and Analytical Framework.

Congress selected the two-step burden-shifting procedure of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) as the analytical framework for determining liability in FRSA claims. 49 U.S.C. § 20109(d)(2)(A). At AIR 21's first step, it is the complainant's burden to establish three elements by a preponderance of the evidence: (1) that he engaged in a protected activity; (2) that he suffered an unfavorable personnel action; and (3) that the protected activity was a "contributing factor" to the unfavorable personnel action. 49 U.S.C. § 42121(b). The complainant who meets this burden has not yet won his case on liability. Meeting this initial burden merely shifts the liability analysis to AIR 21's second step where it becomes the respondent's burden to prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's protected activity. (Id.) The respondent who successfully meets this burden overcomes the complainant's initial showing and avoids liability. *Abbs v. Con-way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037 (ARB Oct. 17, 2012); *Rudolph v. National Railroad Passenger Corp. (Amtrak)*, ARB Nos. 14-053 and 14-056, ALJ No. 2009-FRS-015

(ARB Apr. 5, 2016).

Congress intentionally lowered the bar for FRSA complainants by choosing "contributing factor" as the causation burden for step one of the liability analysis. The contributing factor standard relieves complainants of having to establish that protected activity was a "significant", "motivating", "substantial", or "predominant" factor to recover under FRSA. *Araujo v. N. J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3rd Cir. 2013), quoting *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). A contributing factor is simply "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision." (Id.) Under a contributing factor standard, the employee meets his initial causation burden if he establishes his protected activity was just one of a hundred reasons for the adverse action. *See, Ray v. Union Pacific R.R.*, 971 F.Supp.2d 869, 886, n. 19 (S. D. Iowa 2013) (finding that the railroad's arguments that it had "ample basis to discipline" "misses the mark" because "even if dishonesty and late reporting comprised 99.9% of the reason Defendant discharged Plaintiff, Plaintiff's FRSA action would still be viable because his injury report could still have been 'a contributing factor' in the disciplinary action.").

In contrast, Congress raised the bar for employers by forcing them to establish their affirmative defense by clear and convincing evidence. This heightened standard requires FRSA respondents to show that their asserted justifications for unfavorable personnel decisions are "highly probably" and "sufficiently strong as to command the

unhesitating assent of every reasonable mind." *Araujo*, 708 F.3d at 159; *Sheehan v. Sullivan*, 126 Cal. 189, 193, 58 P. 543 (1899).

As with other whistleblower statutes for which Congress adopted the two-step shifting of unequal burdens, Congress had its reasons for choosing it for FRSA claims. Congress enacted FRSA in response to finding extensive retaliation against injured railroad employees and under-reporting of injuries by the nation's railroads. *Araujo*, 708 F.3d at 159-160 (citing *Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of American's Railroads: Hearings Before the H. Comm. on Transportation and Infrastructure*, 110th Cong. (Oct. 22, 2007); *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013; ALJ No. 2010-FRS-012, slip op. at 6, n. 20; 7, n. 21 (ARB Oct. 26, 2012) (citing numerous congressional hearings).

B. The General Rule Forbids "Weighing" Respondent's Stated Reasons When Deciding the "Contributing Factor" Element of FRSA.

The integrity of the two-stage burden shifting procedure selected for FRSA depends on adjudicators not weighing the employer's affirmative defense evidence of legitimate, non-retaliatory reasons against the complainant's causation evidence when deciding the "contributing factor" element. "Weighing" the employer's stated reasons before the burden shifts is incompatible with the plain meaning of the applicable procedure and fundamentally alters the burdens that Congress chose for the parties in these cases.

AIR 21's analytical framework is entirely different and independent of the

McDonnell Douglas procedure that permits proof of the employer's legitimate, nondiscriminatory reasons to overcome and defeat the complainant's causation evidence in Title VII discrimination cases. *Araujo*, 708 F.3d at 157-159; (noting that by incorporating AIR 21 burdens and procedures into FRSA "Congress specifically intended to alter any presumption that *McDonnell Douglas* is applicable" and "It is worth emphasizing that the AIR 21 burden-shifting framework that is applicable to FRSA cases is much easier for a plaintiff to satisfy than the *McDonnell-Douglas* standard."). In fact, it is "legal error" to employ *McDonnell Douglas'* analytical framework in cases governed by AIR 21 procedures. *Beatty v. Inman Trucking Management Co.*, ARB No. 13-039, ALJ Nos. 2008-STA-020 and 2008-STA-021, slip op. at 9-10 (ARB May 13, 2014); *White v. Action Expediting, Inc.*, ARB No. 13-059, ALJ No. 2011-STA-011, slip op. at 6 (ARB June 6, 2014).

The Board addressed when and how to analyze the employer's justification evidence in cases governed by AIR 21 burdens and procedures in *Fordham* and *Powers*. In holding 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), these decisions recognize that to allow otherwise would corrupt AIR 21's two-stage analytical framework for judging the parties' respective evidence pertaining to causation. *Fordham*, ARB No. 12-061, slip op. at 16-37; *Powers*, ARB No. 13-034, slip op. at 13-

30. "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., slip op. at 21-22 (emphasis added)).

Weighing the employer's proffered reasons before the affirmative defense stage usurps congressional authority by altering the burdens that Congress chose in this class of cases. By design, the FRSA complainant only needs to establish that his protected activity was a "contributing factor" to the adverse action in order to shift the burden. The complainant does not need to prove that his protected activity was the main reason nor must he disprove the reasons that his employer proffers as excuses in order to meet his contributing factor burden. Because "contributing factor permits lawful reasons to co-exist with unlawful reasons", *Bobreski v. J. Givro Consultants, Inc.,* ARB No. 13-001, ALJ No. 2008-ERA-003, slip op. at 16-17 (Aug. 28, 2014), it is illogical to argue that the unlawful reasons outweigh the lawful reasons. To require unlawful reasons to outweigh lawful ones raises the complainant's burden from demonstrating "contributing factor" to demonstrating "preponderant factor." Likewise, doing so lowers the respondent's burden from "clear and convincing" to any amount that outweighs the complainant's reasons, no matter how slight.

Fordham and *Powers* do not represent a paradigm shift in AIR 21 liability

analysis, they simply clarify it. The Board had already recognized that it is reversible error to consider an employer's legitimate, nondiscriminatory, non-retaliatory reasons to defeat an employee's proof of contributing factor when AIR 21 applies. *White*, ARB 13-059. And the Board had already recognized "clear and convincing" evidence as "*the appropriate rebuttal burden of proof*" to defeat a complainant's showing. *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009 slip op. at 7 (emphasis added) (Jan. 31, 2012). Fairly read, in *Fordham* and *Powers*, the Board did not raise the bar for employers – it simply held employers to the clear and convincing bar imposed upon them by Congress.

Even though AIR 21's "contributing factor" versus "clear and convincing" dichotomy creates a "tough standard" for employers, *Araujo*, 708 F.3d at 159, there is nothing unfair about it. Under AIR 21, there is never a finding of liability until both sides have been heard and both sides' evidence has been considered. The employer's excuses will always get the consideration they deserve before the employer is held accountable under FRSA. Indeed, the only situation when the employer's proffered reasons are not considered is when the employee fails to shift the burden, in which case the employer has already won.

C. Permissible Considerations for Respondent's Evidence when Deciding the "Contributing Factor" Element of FRSA.

The FRSA complainant can meet his contributing factor burden with "direct proof of contribution", "with indirect proof by way of circumstantial evidence", or with both

direct and circumstantial evidence as Palmer did in this case. *White*, ARB No. 13-015, slip op. at 5; Palmer D&O at 41-42. Here, the ALJ correctly observed that circumstantial proof capable of establishing contributing factor at the first step of AIR 21 includes "temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, or a change in the employer's attitude toward the complainant after he or she engages in protected activity." Palmer D&O at 41; accord *White*, ARB No. 13-015, slip op. at 5-6, n.18. When the complainant relies upon circumstantial evidence that invokes the employer's justifications, such as pretext or temporal proximity, a limited consideration of the employer's stated reasons is permitted.

1. **Pretext.**

Proving pretext requires the consideration of the credibility of employer's stated reasons for the adverse action. A complainant is not required to prove pretext in order to carry his burden of proving contributing factor causation, but proof of pretext is one of the ways by which a complainant can establish contributing factor. See, e.g., *Zinn v. American Commercial Lines, Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 12-13 (ARB Mar. 28, 2012); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09057, ALJ No. 2008-ERA-003, slip op. at 18-19 (ARB June 24, 2011) ("an employee can prove or buttress a whistleblower claim by proving that the employer's proffered reasons were

pretextual (not credible)."). In addition to proving the employer's proffered reasons for the adverse action are false, pretext may be established by showing an employer's shifting explanations, the conspicuous absence of the employer's stated reasons in previous documentation, and the vagueness and subjectiveness of those reasons. (Id.). That the ALJ may consider the employer's reasons at the contributing factor stage for pretext is not controversial. As the Board recently observed, "[w]hile there is disagreement on this Board about the merits of *Fordham*, we all 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." *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002, slip op. at 20-21 (ARB Mar. 30, 2016).

2. Temporal Proximity

Temporal proximity is another method by which a complainant can establish a contributing factor. "Indeed, by itself, temporal proximity can suffice to establish that protected activity was a contributing factor to an adverse personnel action." *Dietz*, slip op. at 20. When a complainant relies on temporal proximity to establish contributing factor causation, it is appropriate for the adjudicator to consider the logical impact of intervening events. Where the protected activity are separated by an intervening event that independently could have caused the adverse action, there is no longer a logical

reason to infer a causal relationship between the activity and the adverse action. *Tracanna v. Arctic Slope Inspection Service*, ARB No. 98-168, ALJ No. 97-WPC-1, slip op. at 8 (ARB July 31, 2001); *Robinson v. Northwest Airlines, Inc.,* ARB No. 04-041, ALJ No. 2003-AIR-22 (ARB Nov. 30, 2005). *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037 (ARB Oct. 17, 2012) provides a clear example of how proof of an intervening event may be sufficient to break the temporal proximity inference of causation. The ALJ found there to be "no dispute that [Abbs] falsified the log book and that falsification is sufficient to warrant discharge." Slip op at 4, quoting ALJ D&O. In affirming, the ARB found Abbs argument that the ALJ erroneously discounted the temporal proximity between his protected safety break and his dismissal to be unpersuasive given his intervening deceit: "The ALJ's determination that Abb's falsification of his log book and payroll records broke any inference of causation based on temporal proximity is supported by the record and consistent with applicable law." Slip op. at 6.

3. <u>Employer Knowledge.</u>

In order to prove his case under FRSA, the employee must demonstrate by a preponderance of the evidence that the employer knew that he engaged in protected activity. Some federal courts have listed employer knowledge as a separate element of the FRSA plaintiff's case. See, *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3rd Cir. 2013); *Conrail v. United States DOL*, 567 Fed. Appx. 334, 2014 U.S.

App. LEXIS 10031, 2014 FED App. 0390N (6th Cir. 2014). The Board, however, considers employer knowledge to be part of the contributing factor causation analysis. *Coates v. Grand Trunk Western Railroad Co.*, ARB No. 14-019, ALJ No. 2013-FRS-3 (ARB July 17, 2015). Thus, in the Board's analysis, an employee's failure to demonstrate the requisite employer knowledge constitutes a failure to establish contributing factor causation. Illustrative on this point is *Zurcher v. Southern Air, Inc.*, ARB No. 11-002, ALJ No. 2009-AIR-007 (ARB June 27, 2012). Zurcher was terminated from his job as a flight engineer for his use of profanity during a telephone conversation with a company scheduler.[1] Chief Operating Officer Thomas Gillies witnessed the scheduler's reaction to the call, and through tears, she told Gillies what Zurcher had said. Shortly thereafter, Gillies ordered Zurcher's termination, which took place the following day. Zurcher filed an AIR 21 complaint claiming unlawful retaliation. The ALJ found that Zurcher engaged in several protected activities but failed to demonstrate that his doing so contributed to his termination. Significant to the ARB's analysis in affirming the ALJ's conclusion was Gillies' ignorance of Zurcher's protected activities: "Gillies did not know about Zurcher's protected activity . . . [and] it was Gillies who made the decision to terminate Zurcher's employment and who had the ultimate decision-making power." Slip op. at 6.

Here, the ALJ expressly addressed the railroad's knowledge as part of his

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[1]The scheduler called Zurcher on his Guaranteed Off Day (GDO) to ask how he was recovering from an illness and when he expected to return to work. Zurcher told her that he did not appreciate being called on this GDO, said "What part of f - - king GDO do you not understand?" and hung up.

contributing factor analysis:

> While the complainant in *Kuduk* failed to show Respondent had any actual or constructive knowledge of his protected activity and that his protected activity was a contributing factor in his termination, Complainant in this case presented evidence showing Respondent knew of his protected activity as well as Respondent's acknowledgment that he was the only employee to be refused a waiver for his infraction. Further, Complainant presented direct evidence that he was the only employee to be terminated for such an infraction.

D&O at 42. In the face of the repeated "reference[s] [to] Complainant's injury in emails leading up to Complainant's termination", it is plain that substantial evidence supports the ALJ's finding of employer knowledge and contributing factor causation. (Id.).

D. Palmer Prevails Under Any Analysis.

If the Board chooses to set aside its general rule against weighing the employer's proffered reasons when deciding contributing factor in FRSA cases, it will make the uphill battle that railroad employees face in these cases even harder. But it should not affect the outcome in this case. Kenneth Palmer should still prevail, because no matter how the Board comes down on this issue, the smoking gun emails will still leave no doubt that reporting the injury at Crystal Springs was a factor, if not the sole reason, for Palmer's termination. The undisputed evidence will still prove that Palmer is the only employee that Illinois Central has ever denied a waiver for running through a switch and the only conductor it has ever terminated for such a mistake. Testimonial admissions and wide-ranging circumstantial evidence (establishing temporal proximity, inconsistent

application of policies and inextricably intertwined connection between the reported injury, the refusal of the waiver and the termination) provide additional, substantial evidence in support of the ALJ's decision.

The observation that Palmer is entitled to prevail under any analysis is not intended to belittle the importance of the general rule against weighing the employer's evidence to decide contributing factor. The rule's importance to railroad employees can hardly be overstated. As this case demonstrates, railroads and their managers are willing to present testimony that they did not "connect the dots" or consider protected activity even when patently false. Palmer was fortunate to secure emails demonstrating that testimony to be false. Most complainants are not so fortunate.

IV. CONCLUSION

As the ALJ found, Kenneth Palmer met his burden of establishing that his injury report was a contributing factor in his termination and Illinois Central failed to meet its burden of showing by clear and convincing evidence that the injury report played no role. The ALJ correctly applied the AIR 21 procedure and his factual findings are supported by substantial evidence. For the reasons stated herein and in amicus briefs filed in support of Palmer and the ALJ's analysis, Complainant asks the Board to affirm the decision of the ALJ.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of August, 2016, I electronically filed the above and foregoing document with 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:

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