UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

KENNETH PALMER,

Complainant,

against,

CANADIAN NATIONAL RAILWAY/
ILLINOIS CENTRAL RAILWAY COMPANY,

Respondent.

ARB No. 16-035

ALJ Case No. 2014-FRS-00154

AMICUS BRIEF OF KALIJARVI, CHUZI, NEWMAN & FITCH, P.C.

Other briefs before this Board have not clearly addressed (1) the order of analysis in determining causation, (2) protection from an employer's mistaken belief about protected activity, and (3) a "contributing factor" does not require proof of the decision-maker's knowledge.

STATEMENT OF INTEREST

Kalijarvi, Chuzi, Newman & Fitch, P.C., is a private law firm of ten attorneys. Founded by June Kalijarvi over 40 years ago, the firm remains devoted to providing high-quality legal representation in employment matters. The firm handles employment law matters for both employees and employers in both the private and federal sectors, at the administrative, trial court and appellate levels. The firm maintains an interest in the advancement of the law and regularly participates in opportunities for public comment on issues affecting employment law.

Undersigned counsel has handled whistleblower matters before the U.S. Department of Labor and federal appellate courts over the last 20 years. Representative cases include *Charvat v. Eastern Ohio Regional Waste Water Authority*, 96-ERA-37 (RD & O of ALJ, July 20, 1998); *Charvat v. Eastern Ohio Regional Waste Water Authority*, 246 F.3d 607 (6th Cir. 2001); *Bonds v. Leavitt*, 629 F.3d 369 (4th Cir. 2011); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-3, Order of Remand (ARB June 24, 2011); and *Wallace v. Tesoro Corp.*, 796 F.3d 468 (5th Cir. 2015).

Undersigned submitted *amicus* briefs in *Lucas v. Duncan*, 574 F.3d 772 (D.C.Cir. 2009); *Stone v. Instrumentation Laboratory Co.*, 591 F.3d 239 (4th Cir. 2009); *Schroeder v. Greater New Orleans Federal Credit Union*, 664 F.3d 1016 (5th Cir. 2011); *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, 2011 WL 2165854 (en banc); *Foster v. University of Maryland Eastern Shore*, 787 F.3d 243 (4th Cir 2015); and *Bala v. Port Authority Trans-Hudson Corporation*, ARB Case No. 12-048, ALJ No. 2010-FRS-26, Order Awarding Attorney's Fees (ARB Mar. 5, 2014). Undersigned was the lead author of the only *amicus* brief asking the Supreme Court to accept *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014), arguing that the Supreme Court needs to restore whistleblower protections for the employees of corporate contractors. The Supreme Court agreed.

LEGAL ARGUMENT

1. The WPA's history shows why an employer's affirmative defense is considered after the employee's showing of a contributing factor.

While 49 U.S.C. § 42121(b)(2)(B)(i) requires a complainant to make a "prima facie showing" that protected activity was a "contributing factor in the unfavorable personnel action[,]" the statute is not so specific about when in the analysis such a showing must be determined.

Imagine that an ALJ decides to consider first the employer's showing under 49 U.S.C. § 42121(b)(2)(B)(ii), "by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." This way, the employer could have its evidence considered *before* the "contributing factor" analysis is conducted. However, by mandate of the statute, this consideration must be for "clear and convincing evidence" – the employer's burden of proof on causation pursuant to 49 U.S.C. § 42121(b)(2)(B)(ii). If the employer's evidence is not "clear and convincing," then it does not affect the outcome. If an employer is asking that its evidence be considered *during* the determination of the "contributing factor" and that it not be subject to the "clear and convincing" burden, then the employer is seeking to evade the statutory burden.

Since 1989, the Whistleblower Protection Act has required federal agencies to prove their "same decision" defenses by the same "clear and convincing" standard. Since 2012, Congress has made explicit that this showing must be made "after a finding that a protected disclosure was a contributing factor[.]" 5 U.S.C. § 1221(e)(2). AIR 21, by comparison, begins this provision with, "Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (I) ...." 49 U.S.C. § 42121(b)(2)(B)(ii). While this wording is different than the WPA's, it still conveys a sense that the employer showing follows the complainant's.

More pointedly, when the Merit Systems Protection Board (MSPB) actually tried WPA claims by considering only the agency's affirmative defense, Congress reacted with this finding:

> Board case law has created a disturbing trend of denying employees' right to a due process hearing and a public record to resolve their WPA claims. The Board currently allows an agency to present its affirmative defense that the agency would have taken the same personnel action for lawful reasons, independent of any retaliation against the employee for protected whistleblowing, without first allowing the employee to present his or her case proving that the whistleblower retaliation occurred.
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> S. Rep. 112-155 (April 19, 2012), p. 23, 2012 U.S.C.C.A.N. 589, 611.

Congress then amended 5 U.S.C. § 1221(e)(2) to add the phrase quoted above requiring that the employer showing must be made "after a finding that a protected disclosure was a contributing factor[.]"

This history of the WPA amply demonstrates that Congress really does want the whistleblower's evidence of causation to be considered first, and only for the lesser burden of a "contributing factor."

2. An employer's mistaken belief about protected activity can lead to protection.

This year, the U.S. Supreme Court made clear that an employer's mistake belief that an employee engaged in protected activity is sufficient for that employee's retaliation claim. *Heffernan v. City of Patterson*, 136 S. Ct. 1412 (2016). This Department as long recognized that the remedial purpose of whistleblower protection laws requires protecting those mistakenly identified as

whistleblowers. *Reich v. Hoy Shoe, Inc.*, 32 F.3d 361, 368 (8th Cir. 1994); *Brock v. Richardson*, 812 F.2d 121, 123-25 (3d Cir. 1987); *Willy v. Coastal Corp.*, 85-CAA-1, SOL D&O, pp. 13-14 (June 1, 1994); *Assistant Secretary v. S&S Sand & Gravel, Inc.*, 92-STA-30, SOL D&O, p. 15 (Feb. 5, 1993).

While this issue is not one listed in the Board's Order Setting En Banc Review, it would be unfortunate and damaging if this Board's *en banc* decision carelessly stated a boilerplate requirement that a complainant engage in protected activity. The actual requirement is that protected activity contributed to the adverse action, whether it be by actual protected activity, or through the employer's mistaken belief of protected activity.

3. Complainants need not show decision-maker knowledge to establish a contributing factor.

A complainant's burden is to show causation, not knowledge of the decision-maker. This Board made this point in *Rudolph v. National Railroad Passenger Corporation (AMTRAK)*, ARB No. 11-037, ALJ No. 2009-FRS-15, Decision and Order of Remand (ARB Mar. 29, 2013), p. 16:

> The ALJ's exclusive focus on the knowledge possessed by the final responsible decision-maker constitutes error as a matter of law. As the ARB explained in *Bobreski* [*v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 29, 2011)], proof that an employee's protected activity contributed to the adverse action does not necessarily rest on the decision-maker's knowledge alone. It may be established through a wide range of circumstantial evidence, including the acts or knowledge of a combination of individuals involved in the decision-making process.

Too often, employers attempt to evade liability by selecting a "decision-maker" who can plausibly claim lack of any knowledge of the protected activity. See, *e.g.*, *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365 (N.D. Ga. 2004) ("To permit an employer to simply bring in a manager to be the 'sole decisionmaker' for the purpose of terminating a complainant would eviscerate the protection ...."). The employer's total control over the decision-making process makes the statutory burdens particularly appropriate for this scenario. If the employer fails to preserve and present clear and convincing evidence of its internal process, it will fail to meet its elevated burden.

The Federal Rail Safety Act (FRSA), 49 U.S.C. § 20109, does not use the word "knowledge." It incorporates "the legal burdens of proof set forth in [49 U.S.C.] section 42121(b)[.]" 49 U.S.C. § 20109(d)(2)(A)(i). AIR 21, in turn, does use the word "knowledge," but not in its provision for "the legal burdens of proof." Instead, 49 U.S.C. § 42121(a)(1) provides, parenthetically, that protected activity be "with any knowledge of the employer[.]" This standard comports with cases finding causation based on some knowledge by the *employer*, not necessarily the decision-maker. *Henry v. Wyeth Pharm., Inc.*, 616 F.3d 134, 148 (2d Cir. 2010) (noting that "general corporate knowledge that the plaintiff has engaged in a protected activity" is necessary to show illegal retaliation); *Jones v. Bernanke*, 557 F.3d 670 (D.C. Cir. 2009). The Supreme Court made clear that animus of someone contributing to the decision making process is sufficient to show causation. *Staub v. Proctor Hospital*, 562 U.S. 411 (2011). AIR 21 only requires "any knowledge of the employer." The FRSA does not even have this requirement. It does require, through incorporation of the AIR 21 burdens, that protected activity be a "contributing factor."

In *Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013), p. 3, n. 7, this Board explained why decision-maker knowledge is not a separate element of a whistleblower claim as follows:

> the final-decision-maker's "knowledge" and "animus" are factors to consider in the causation analysis but not always dispositive factors.

Employer knowledge of protected activity can be inferred from the temporal proximity of the activity to the adverse action. *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152 (2013); citing. *Kewley v. Dep't of Health and Human Servs.*, 153 F.3d 1357, 1362 (Fed.Cir. 1998).

In *Petersen v. Union Pacific Railroad Co.*, ARB No. 13-090, ALJ No. 2011-FRS-17 (ARB Nov. 20, 2014), the ARB stated that it "has made clear that a 'chain of events' can substantiate a finding of contributory factor."

The bottom line is that a complainant must show that protected activity was a contributing factor. Any employer evidence to the contrary must be clear and convincing to comply with 49 U.S.C.

§ 42121(b)(2)(B)(ii).

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I certify that the foregoing was served on the following by email or facsimile as indicated, otherwise by regular U.S. mail, postage prepaid, on this 3rd day of August, 2016:

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Undersigned also plans to file this brief through the Board's EFSR system upon acceptance of the undersigned as a filer in this case.

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