UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

KENNETH PALMER,	:	
	:	
Complainant,	:	ARB Case No. 2016-0035
	:	ALJ Case No. 2014-FRS-00154
v.	:	
	:	
ILLINOIS CENTRAL RAILROAD COMPANY,	:	
	:	
Respondent.	:	

SUPPLEMENTAL BRIEF OF RESPONDENT ILLINOIS CENTRAL RAILROAD COMPANY

George H. Ritter (MSB #5372)
Jennifer H. Scott (MSB #101553)
Charles E. Cowan (MSB #104478)
WISE, CARTER, CHILD & CARAWAY, P.A.
401 East Capitol Street, Suite 600
Jackson, Mississippi 39201
Post Office Box 651
Jackson, Mississippi 39205

Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other sources

RESPONDENT'S SUPPLEMENTAL BRIEF

Respondent Illinois Central Railroad Company ("Illinois Central") submits this supplemental brief pursuant to the Administrative Review Board ("ARB's") June 17, 2016, Order Setting En Banc Review, in which it directed the parties to submit supplemental briefs addressing two legal issues discussed in *Fordham v. Fannie Mae*, ARB No. 12-061 (ARB Oct. 9, 2014)[1].

I. In deciding, after an evidentiary hearing, if a complainant has proven by a preponderance of the evidence that his protected activity was a "contributing factor" in the adverse action taken against him, is the Administrative Law Judge ("ALJ") required to disregard the evidence, if any, the respondent offers to show that the protected activity did not contribute to the adverse action?

ANSWER: NO.

A. The preponderance of the evidence standard requires the trier of fact to consider the evidence of both parties.

The ARB's first question presupposes that the "complainant has proven by a preponderance of the evidence that his protected activity was a 'contributing factor' in the adverse action taken against him." No doubt this is because all authorities agree this is the complainant's burden for each of the elements of his or her claim. Inherent in the preponderance of the evidence standard is that *both* parties present evidence on the pertinent issue. "A determination of where the preponderance lies requires a measuring and weighing of all the evidence, pro and con." *United States v. Ricks*, 639 F.2d 1305, 1309 (5th Cir. 1981). Preponderance of the evidence means "[t]he greater *weight* of the evidence . . . superior

[1] Although the majority decision in *Powers v. Union Pacific Railroad Co.*, ARB Case No. 12-061 (ARB Oct. 9, 2014), has been vacated, for the same reasons explained herein, that decision was equally flawed and should not be adopted.

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." BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added).

The preponderance of the evidence standard describes the complainant's burden of proof—"the ultimate burden of persuasion"—in order to convince a fact finder, by the appropriate standard, based on *all the evidence*." *Bruner v. Office of Pers. Mgmt.*, 996 F.2d 290, 293 n. 1 (Fed. Cir. Ct. 1993). The burden of production describes the proof required to allow a claim or defense to be determined by the trier of fact, while the burden of persuasion describes the weight of the evidence necessary for a party to prevail on that claim or defense. Burdens of production are satisfied by merely "producing *evidence* (whether ultimately persuasive or not)" and involve no credibility determinations. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993) (emphasis in original). "A standard of proof, such as preponderance of the evidence, can apply only to a burden of persuasion, not to a burden of production." *Director, Office of Worker's Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 278 (1994).

Jury instructions, for example, commonly instruct juries to "consider all the evidence, regardless of" whether it is produced by a plaintiff or defendant. OHIO JURY INSTRUCTIONS-CIVIL 303.05, Dec. 11, 2010. Thus, California's model jury instruction states: "After weighing all of the evidence, if you cannot decide that something is more likely to be true than not, you must conclude that the party did not prove it. *You should consider all the evidence, no matter which party produced the evidence*." 200 Obligation to Prove—More Likely True Than Not True, JUDICIAL COUNCIL OF CALIFORNIA JURY INSTRUCTION 200 (2016) (emphasis added). Similarly, by regulation, the Department of Labor requires ALJ's decision to be "based on the

whole record." 29 C.F.R. § 18.57.[2]

Also inherent in preponderance of the evidence standard is the idea of equality. The Supreme Court has explained that the preponderance of the evidence standard "allows both parties to share the risk of error in roughly equal fashion." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks and citation omitted). "Any other standard expresses a preference for one side's interests." *Id.*

Disregarding the respondent's proof on a material element of the complainant's claim results in unequal treatment of the parties and obliterates the complainant's burden of proving the elements of his claim by a preponderance of the evidence. If the respondent's non-contribution evidence is disregarded, then only the complainant's evidence is considered. The respondent is then completely deprived of any ability to contest the complainant's proof, no matter how outlandish it might be. With no ability to challenge the complainant's evidence, summary judgment or judgment as a matter of law would be entered against the respondent on this material element in virtually every case. This is certainly not what was intended by Congress when it enacted the FRSA or by the Secretary of Labor when it adopted the preponderance of the evidence standard by regulation.

B. The FRSA and Secretary of Labor require the ALJ to consider all evidence relevant to the contributing factor element.

It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S.

---

[2] *See* also 29 C.F.R. § 1471.990 ("Preponderance of the evidence means proof by information that, compared with information opposing it, leads to the conclusion that the fact at issue is more probably true then not.").

1, 6 (2000). *See Johnson v. Siemens*, ARB No. 08-032 (ARB Mar. 31, 2011) (statutory construction begins with the statute itself). "If the statute's meaning is plain and unambiguous, there is no need for further inquiry and the plain language of the statute will control its interpretation." *Luckie v. United States*, ARB Nos. 05-026, -054, at *1, *7 (ARB June 29, 2007) (citation omitted). If an ambiguity exists, courts then look to the interpretation given by the applicable agency. If reasonable, that interpretation will be upheld. *Bechtel Constr. Co. v. Sec'y. of Labor*, 50 F.3d 926, 932 (11th Cir. 1995).

The FRSA prohibits a railroad carrier from taking adverse action, "or in other way discriminat[ing] against an employee if such discrimination is due, in whole or in part" to an employee's protected activity. 49 U.S.C. § 20109(a). The FRSA incorporates the legal burdens found in AIR 21. *See id.* at § 20109(d)(2)(A) (incorporating 49 U.S.C. § 42121(b)(2)(B)). A complainant succeeds at the hearing by "demonstrating" that the employer's statutorily prohibited action "was a contributing factor in the unfavorable personnel action alleged in the complaint." *Id.* at § 42121(b)(2)(B)(iii). A contributing factor is any factor "which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Ameristar Airways, Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 567 (5th Cir. 2011). Federal courts and the Secretary of Labor have conclusively determined that the term "demonstrating" or "demonstrate" means to prove by a preponderance of the evidence.[3] 49 C.F.R. § 1982.109(a); *Dysert v. U.S. Sec'y. of Labor*, 105 F.3d 607, 609 (11th Cir. 1997) ("Having engaged in a careful

[3] The *Fordham* panel's refusal to give effect to the word "demonstrates" is contrary to the canon of statutory construction that requires courts "to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). The term "demonstrates" is rendered mere surplusage if a complainant is not required to prove an element of his or her claim by a preponderance of the evidence.

analysis, the Secretary noted that the term "demonstrate" means to prove by a preponderance of the evidence."); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475-76 n.c1 (5th Cir. 2008); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 152, 160 (3rd Cir. 2013). Thus, by statute and regulation, the complainant must demonstrate by a preponderance of the evidence that his protected activity, alone or in combination with other factors, affected the employer's decision.

By adopting the preponderance of the evidence standard, Congress and the Secretary have directed that all relevant and otherwise admissible evidence be considered. Nothing in 49 U.S.C. § 20109 or 49 U.S.C. § 42121(b)(2)(B) even hints that the respondent employer may not introduce evidence that the protected activity did not contribute to the unfavorable personnel action. Thus, the *Fordham* panel's view that the respondent's evidence on this issue must be disregarded clearly contravenes the express language in the statute and 49 C.F.R. § 1982.109(a) and is based upon an improper surmise as to what Congress intended. *See United States v. Deluxe Cleaners & Laundry, Inc.*, 511 F.2d 926, 929 (4th Cir. 1975) ("[W]e do not think it permissible to construe a statute on the basis of a mere surmise as to what the Legislature intended . . . .").

C. Even if the statute or regulation were ambiguous, accepted rules of statutory construction require consideration of all relevant evidence.

"[L]ongstanding is the principle that '[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Isbrandsten Co. v. Johnson*, 343 U.S. 779, 783 (1952)). The Supreme Court has made clear that "[i]n order to abrogate a common-law principle, the statute must '*speak directly*' to the question addressed by the common law." *Id.* (citation omitted) (emphasis

added). The *Fordham* panel's opinion points to nothing in the FRSA or the incorporated AIR 21 burdens statute that suggests Congress intended to deviate from the common law preponderance of the evidence standard, which requires a trier of fact to weigh *both* parties' admissible and relevant evidence. Yet, this is exactly what the *Fordham* panel's categorical evidentiary bar did. Under the *Fordham* panel's rule, the plaintiff's burden is treated merely as one of production; the complainant is completely relieved of his burden of persuasion. This is contrary to the preponderance of the evidence standard, which must be applied absent an unmistakable intent to derogate from the common law. The *Fordham* panel's holding violated this basic principle of statutory construction.

D. Congress's adoption of the contributing factor standard was not intended to bar an employer's contributing factor evidence.

The *Fordham* panel concluded that allowing an employer to introduce evidence of the reasons for an adverse action to rebut a complainant's proof of contributory factor would somehow relieve the employer of its burden of proving its affirmative defense by clear and convincing evidence. ARB No. 12-061, at *23. In so holding, the panel failed to recognize that the contributing factor element of the complainant's claim and the respondent's affirmative defense ask two different questions. The contributing factor element asks the question: Did the protected activity contribute, in whole or in part, to the employer's decision? This question is decided using the preponderance of the evidence standard. The employer's affirmative defense presents a different question: Even if the protected activity did contribute to the decision, does clear and convincing evidence show that the employer would have made the same decision without the influence of the protected activity? Although the questions are different, some evidence will certainly be relevant to both.

Congress adopted the contributory factor standard in order to overrule case law suggesting that a complainant must prove that the protected activity was a "significant, motiving, substantial, or predominant factor in a personnel action in order to overturn that action." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. Ct. 1993). It was not, however, adopted to abrogate the preponderance of the evidence standard or to handicap employers in rebutting contributing factor evidence offered by a complainant. Complainants must still prove by a preponderance of the evidence that the protected activity was a factor in the employer's decision. The trier of fact must "believe that the existence of [this] fact is more probable than its nonexistence before [it] may find in favor" of the complainant. *In re Winship*, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring).

Thus, on this element, the complainant offers his or her evidence showing that the protected activity contributed to the decision. The employer is equally entitled to offer evidence that the protected activity did not contribute to the decision. If the complainant's evidence is more convincing than the employer's evidence, he or she prevails on this element. If not, the employer prevails. It is that simple.

With respect to the employer's affirmative defense, the employer offers evidence to show that, even if the protected activity was a factor in the decision, the same action would have been taken even if the complainant had not engaged in the protected activity. The complainant offers evidence to disprove this proposition. The trier of fact then determines, again based on all the evidence, whether the employer has shown by clear and convincing evidence that it would have taken the same action anyway. This heightened standard protects the rights of employees by making it more difficult for the employer to prevail once the complainant has shown a violation.

It does not, however, relieve the complainant of proving the contributing factor element by a preponderance of the evidence.

Considering the employer's non-contribution evidence, including the reasons for the adverse action, as part of the contributing factor element does not relieve the employer of proving its affirmative defense by the higher clear and convincing evidence standard. Upon proper evidence, the ALJ can believe that the employer's non-discriminatory reasons played a part in the negative personnel action, but also find by a preponderance of the evidence that *the protected activity did as well*. If the ALJ makes this determination, the complainant meets his or her burden of proof and the ALJ must then determine if the employer has proved by clear and convincing evidence that it would have taken the same act regardless of the protected activity. The "clear and convincing" affirmative defense is not rendered meaningless by allowing an employer to rebut a complainant's proof in support of the contributory factor element as the *Fordham* panel claims.[4] *See* ARB No. 12-061, at *23.

If, however, the employer's evidence disproving the complainant's contributing factor evidence is disregarded, the complainant's burden of proving this element of his claim by a preponderance of the evidence is rendered meaningless. The complainant is required to do nothing more than make a prima facie showing—i.e., create a triable issue of fact—that the protected activity contributed to the action.

---

[4] This was recognized by the *Fordham* panel itself: "Even if the [employer] establishes a legitimate basis for its action, the complainant will nevertheless prevail at the 'contributing factor' causation stage as long as the complainant can prove by a preponderance of the evidence that his or her protected activity was also a factor in the adverse personnel action." ARB No. 12-061, at *28.

E. The *Fordham* panel's reliance upon the ERA and the WPA is misplaced and its analysis incomplete.

Finding that existing ARB case authority to be "of no avail"[5] and "federal appellate case law arising under SOX, AIR 21, and similar whistleblower protection provisions such as the Energy Reorganization Act [("ERA")] . . . of no greater assistance," [6] *id.* at *27, the *Fordham* majority dug into the legislative history of the ERA's 1992 amendments, upon which the statutory burden of proof provisions in AIR 21 and the FRSA were modeled. *Id.* at *29. It cited comments from two of the 1992 ERA amendment bill's co-sponsors regarding the burdens of proof. One such comment stated:

> At the [ALJ] hearing . . . [o]nce the complainant makes a *prima facie* showing that protected activity contributed 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.'"

Id. (quoting 138 Cong. Rec. H11, 409; H11, 444 (daily ed. Oct. 5 1992)) (emphasis in original). The *Fordham* panel then declared that this comment --

> indicate[d] that Congress intended a two-stage evidentiary process for determining causation and assessing liability in which the complainant's evidence of 'contributing factor' causation was to first be considered, with the employer's evidence of any non-retaliatory reason or basis for its action considered only should the complainant's evidence prove sufficient to meet the 'contributory factor' proof requirement.

Id. at *30.

---

[5] The likely reason that the ARB has not previously addressed this issue is because the ARB has routinely considered all admissible and relevant evidence employers offered to rebut a complainant's proof of contributory factor in the past. *See infra* pp. 15-18.

[6] This is not surprising since the rule adopted in *Fordham* contravenes basic understandings of the preponderance of the evidence standard of proof.

First, these comments obviously confused the ERA's standard of proof during the *investigatory* stage and the *hearing* stage. The ERA, like AIR 21, requires that complaints at the hearing stage "demonstrate[] that any behavior [that is statutorily proscribed] was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. § 5851(b)(3)(C). A complainant is not merely making a *prima facie* case at the hearing stage like he is at the investigatory stage, rather he must "demonstrate" – by a preponderance of the evidence – the elements of his claim. The comments regarding the "prima facie showing" drew from the statutory provision for the Secretary's investigatory stage. *See id.* at § 5851(b)(3)(A). Thus, the representatives' comments do not support this "two-stage evidentiary process" as the *Fordham* panel claimed. Moreover, the referenced amendments did not change the requirement that an ERA whistleblower complainant must meet his burden of proof on the contributory factor element by a preponderance of the evidence. *See* 29 C.F.R. § 24.109 (requiring complainants under the ERA whistleblower provision to demonstrate by a preponderance of the evidence that a protected activity was a contributory factor).

Second, *Fordham* erroneously applied the Whistleblower Protection Act's ("WPA's") burden of proof provisions to the AIR 21 burdens of proof. *Fordham*, ARB No. 12-061 at *30. The panel cited *Kewley v. Dep't of Health & Human Servs.*, 153 F.3d 1357 (Fed. Cir. 1998), for the proposition that an ALJ may not "rely[] upon the respondent's affirmative defense 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." *See Fordham*, ARB No. 12-061 at *31. In doing so, the *Fordham* panel failed to recognize a fundamental difference

between the WPA and AIR 21 statutory text. As noted in *Kewley*, the WPA whistleblower provision contains the following language not found in AIR 21 or the FRSA:

> The employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—
>
> (A) the official taking the personnel action knew of the disclosure or protected activity; and
>
> (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.

5 U.S.C. § 1221(e)(1)(A)-(B). The *Kewley* court described this additional statutory language as the "knowledge/timing" test and noted that "Congress intended th[e] satisfaction of this 'knowledge/timing' test [to] establish[], *prima facie*, that the disclosure was a contributing factor to the personnel action." 153 F.3d at 1361. In other words, proof that the employer "'had knowledge of the protected disclosure and a reasonable relationship between the time of the protected disclosure and the time of the personnel action'" establishes a *per se* violation of the WPA whistleblower provision. *Id.* at 1362 (quoting *Horton v. Dep't of the Navy*, 66 F.3d 279 (Fed. Cir. 1995)).[7] The court clarified that its holding was limited to proof of causation under subsections (A) and (B) of § 1221(e)(1):

> *If a whistleblower demonstrates both that the deciding official knew of the disclosure and that the removal action was initiated within a reasonable time of the disclosure*, no further nexus need be shown, and no countervailing evidence

[7] Even the additional language found in the WPA does not support the creation of such a *per se* violation. The language merely clarifies that the employee "may" use circumstantial evidence "such as" knowledge of protected activity coupled with temporal proximity. Moreover, mere temporal proximity is not sufficient to establish causation under the AIR 21 standards. *Kuduk v. BNSF Railway Co.*, 768 F.3d 786, 792 (8th Cir. 2014) ("more than a temporal connection between the protected conduct and the adverse employment action is required").

> may negate the petitioner's showing. The burden of persuasion shifts to the agency to prove by clear and convincing evidence, a higher standard, that it would have taken the action even in the absence of the protected disclosure . . . Evidence such as responsiveness to the suggestions in a protected disclosure or lack of animus against petitioner may form part of such a rebuttal case. Such evidence is not, however, relevant to a petitioner's prima facie case *under section 1221(e)(1)(A) and (B).*

Id. at 1362-63 (emphasis added).

Thus, the *Fordham* panel's description of the WPA's burden of proof provisions as "nearly identical" to those of AIR 21 is simply not correct. Neither AIR 21 nor the FRSA whistleblower provisions incorporate a *per se* test like the one found in the WPA.[8] The Supreme Court has cautioned that courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008). Because the WPA text fundamentally differs from that of AIR 21, *Kewley* does not support the reading of a statutory "bar" into the AIR 21 statutory burden provisions.

Other decisions demonstrate that even under the WPA, the employer's rebuttal evidence may be considered on the contributing factor element where the complainant fails to meet the *per se* knowledge/timing test. In *Salinas v. Dep't of Army*, 94 M.S.P.R. 54, 59 (2003), the Merit System Protection Board ("MSPB") explained that: "[i]n addition to the knowledge/timing test, however, there are other possible ways for an appellant to satisfy the contributory factor

[8] In *Clark v. Dep't of Army*, 997 F.2d 1466, 1472 (Fed. Cir. 1993), the court refused to read a *per se* knowledge/timing test into the pre-amendment version of the WPA (5 U.S.C. § 1221(e)(1)) based upon the fact that the WPA did not contain any statutory text referencing such a test. The statute was amended in 1994 to add the *per se* knowledge/timing test, superseding the *Clark* decision by statute. *Kewley*, 153 F.3d at 1361-62. The rationale in *Clark* applies here. Since there is no statutory text adopting any sort of *per se* rule in the AIR 21/FRSA, the employer should have the opportunity to submit "countervailing evidence [to] negate the [complainant's] showing." *Kewley*, 153 F.3d at 1362-63.

standard." *Id.* It then explained what it would consider when a complainant cannot satisfy the knowledge/timing test:

> The Board will consider *any relevant evidence* on the contributing factor question, including the strength or weakness of the agency's reasons for taking the personnel action, whether the whistleblowing was personally directed at the proposing or deciding officials, and *whether these individuals had a desire or motive to retaliate against the appellant.*

Id. (citation omitted) (emphasis added). This language shows that the knowledge/timing test was the true catalyst for the evidentiary bar the *Kewley* court recognized in the WPA. Weighing of both parties' evidence is still required where a complainant is unable to meet the knowledge/timing *per se* test. *See also Powers v. Dep't of Navy*, 69 M.S.P.R. 150, 156 n. 7 (1995) (where the *per se* test is not met, "any and all relevant evidence, including 'the reason for the agency's action,' may be considered in determining the contributing factor issue"). The Federal Circuit Court of Appeals has also recognized this same rule. *See Goines v. Dep't of Agric.*, 113 F. App'x 925, 929 (Fed. Cir. 2004) (where complainant failed to prove knowledge and timing, the MSPB's consideration of agency's reasons for adverse action was warranted).

Accordingly, in the absence of any language in the AIR 21 burden of proof provisions adopting a *per se* knowledge/timing test, *Kewley* and the WPA do not support the *Fordham* panel's reading of an evidentiary bar into AIR 21's statutory text. To the contrary, these authorities show that that because the AIR 21 burdens do not incorporate a *per se* test, ALJs should consider *all* admissible and relevant evidence on the contributory factor element, including evidence offered by the employer. *See Clark*, 997 F.2d at 1472.

F. The ARB has routinely considered employers' evidence including the legitimate, non-retaliatory reasons for the adverse action.

As an ARB panel noted in *Nelson v. Energy Nw.*, ARB No. 13-075, at *1, *7 n. 52 (ARB Sep. 30, 2015), it is questionable whether a two judge panel decision had the authority to disregard ARB precedent and create a new causation standard. The *Nelson* panel suggested that the *Fordham* panel overreached by ignoring precedent. This is supported by the Secretary's delegation of authority to the ARB that requires panels to "adhere to the rules of decision and precedent applicable under each of the laws enumerated . . . until and unless the Board or other authority explicitly reverses such rules of decision or precedent." Secretary's Order 1-2002, 67 FR 64272, 64273 (Oct. 17, 2002). The *Fordham* panel failed to do this by instituting the novel evidentiary bar that previously did not exist previously under the FRSA or AIR 21.

The ARB has considered an employer's relevant evidence disproving the contributory factor element in numerous prior decisions. For example, in *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, at *1, *10-11 (ARB Aug. 29, 2014), decided only months before *Fordham*, the ARB held that an ALJ erred by refusing to consider all of an employer's rebuttal evidence on the contributory factor element. The *Brobeski* panel stated that an ALJ is required to consider and weigh "all of the employer's evidence offered to rebut the complainant's claim of contributory factor." *Id.* (citation omitted). In *Hall v. U.S. Army Dugway Proving Ground*, ARB Nos. 02-108, 03-013, at *1, *25 (ARB Dec. 30, 2004), this Board held that it was error to apply anything but the preponderance of the evidence standard in evaluating a complainant's claim and to do otherwise was reversible error. It explained that the ALJ clearly failed to consider evidence that rebutted that of the complainant. *Id.* It further explained that "[f]or an ALJ to consider only evidence that supports a particular conclusion is error" and that "[a]n administrative adjudicator must consider not only evidence that would support a particular

finding of fact but also '*whatever in the record fairly detracts from its weight.*'" *Id.* (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951)) (emphasis added). Even after *Fordham*, the ARB has considered employers' non-discriminatory reasons when addressing the contributory factor element. *See, e.g., Ledure v. BNSF Ry. Co.*, ARB Case No. 13-044, ALJ Case No. 2012-FRS-020, slip op. at 8-9 (ARB June 2, 2015)("BNSF's non-retaliatory explanations for its actions persuaded him [the ALJ] that protected activity did not contribute to BNSF's" personnel action); *Stewart v. Lockheed Martin Aeronautics Co.*, ARB No. 14-33, ALJ No. 2013-SOX-019, slip op. at 2-3 (ARB Sep. 10, 2015).

Similar cases considering an employer's admissible and relevant rebuttal evidence are too numerous to discuss in detail. *See Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, at *1 (ARB Apr. 30, 2013) (ALJ weighed testimony from complainant and the decision makers regarding the cause of the reprimand and found decision maker's to be more credible); *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, at *1, *4 (ARB Oct. 17, 2012) (considering employer's evidence that complainant falsified log book and payroll records to conclude complainant failed to prove contributory factor); *Zurcher v. S. Air, Inc.*, ARB No. 11-002, at *1, *4 (ARB June 27, 2012) (affirming dismissal of complainant's claim for failure to prove contributory factor where it found credible the employer's reasons for why it decided to discharge complainant); *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, at *1, *8 (ARB Sep. 30, 2011) (complainant failed to prove contributory factor in light of employer's overwhelming evidence that it was in dire financial straits and faced impending bankruptcy); *Majali v. Airtran Airlines*, ARB No. 04-163, at *1, *14 (ARB Oct. 31, 2007) (failure to prove contributory factor where employer's testimony regarding the reason for the discharge was found to be more credible than the complainant's);

Peck v. Safe Air Int'l, Inc., ARB No. 02-028, at *1, *13-15 (ARB Jan. 30, 2004) (testimony of decision makers established that motives for discharging complainant "were distrust and dissatisfaction" and that protected activity did not contribute to the decision); *Timmons v. Mattingly Testing Servs.*, ARB No. 95-ERA-40, at *1, *4 (ARB June 21, 1996) ("the determination of whether retaliatory intent has been established requires careful evaluation of all evidence *pertinent to the mindset of the employer and its agents regarding the protected activity and the adverse action taken*") (emphasis added).

Federal courts have affirmed cases where an employer's evidence was weighed by the ALJ in determining whether the complainant has proved the contributory factor element by a preponderance of the evidence. *See Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 349-50 (4th Cir. 2014) (complainant failed to prove contributory factor by preponderance of the evidence where employer's overwhelming evidence of complainant's insubordination weighed against finding); *Addis v. Dep't of Labor*, 575 F.3d 688, 692 (7th Cir. 2009) (complainant failed to meet his burden of proof where his evidence "was outweighed by the entire record"; ALJ "resolved credibility determinations in favor of [his employer], finding that they were focused on safety, receptive to complaints, and exhibited no retaliatory animus"); *Hasan v. Dep't of Labor*, 553 Fed. App'x 135, 140 (3d Cir. 2014) (ALJ credited employer's testimony that complainant's resume "was treated in the same fashion as any other resume" and that no other person "was instructed to discriminate against him in any way"); *Mizusawa v. Dep't of Labor*, 524 Fed. App'x 443, 447-48 (10th Cir. 2013) (complainant failed to prove contributing cause where ALJ weighed employer's evidence that violation of video policy was the legitimate, non-retaliatory reason for complainant's discharge); *Klopfenstein vs. Dep't of Labor*, 402 Fed. App'x 936, 939

(5th Cir. 2010) (substantial evidence established that complainant's breach of company's accounting policies rather than his protected activity is what "resulted in the loss of his job").

As shown above, *Fordham* departs from the ARB's and federal courts' consistent application of the ordinary preponderance of the evidence standard. This standard, prior to the *Fordham* panel's decision, required ALJs to weigh the complainant's contribution evidence with the employer's evidence showing no contribution. This Board should correct this mistake and remove any hindrance on an employer's ability to present relevant evidence on this element of a complainant's claim.

G. Disregarding the employer's admissible and relevant evidence rebutting an essential element of complainants' claims violates the employer's procedural due process rights.

The *Fordham* panel violated this cannon of statutory construction that courts and agencies avoid statutory interpretations that render a statute unconstitutional. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). Specifically, the *Fordham* majority's interpretation results in a violation of the employers' procedural due process rights under the Fifth Amendment of the United States Constitution by preventing them from presenting admissible and relevant evidence on a key element of a complainant's claim.

It has been long established that procedural due process applies to adjudicative administrative proceedings. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Allowing a complainant to present evidence in support of an essential element of his or her claim while

disregarding the respondent's evidence on that element violates "[f]undamental concepts of fairness [that] require litigants be given equal opportunities to present their respective positions." *Coughlan v. Director, Office of Workers' Comp. Programs*, 757 F.2d 966, 969 (8th Cir. 1985). In administrative proceedings, a party must be given "an opportunity to respond." *Id.* The Supreme Court has stated that although the Fifth Amendment guarantees "no particular form of procedure[,]" a party in an employment related administrative procedure should be "afforded full opportunity to justify the action of its officers as innocent rather than discriminatory." *N.L.R.B. v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 350 (1938). *See ASSE Intern., Inc. v. Kerry*, 803 F.3d 1059, 1075 (9th Cir. 2015) ("The opportunity to refute unfavorable evidence *in some fashion* . . . is an 'immutable' principle of procedural due process.") (emphasis in original).

In *N. Am. Coal Co. v. Miller*, 870 F.2d 948, 949-50 (3d Cir. 1989), the Third Circuit heard an appeal from a final order of the Department of Labor Benefits Review Board upholding an ALJ's decision granting black lung benefits. The court there held that the employer had a due process right to, *inter alia*, submit reports to rebut medical evidence justifying the ALJ's award. *Id.* at 951. After a hearing in the matter, the ALJ had denied the employer's request to re-open the record so it could submit additional medical evidence to rebut the examining physician's report. *Id.* at 949. Relying upon 5 U.S.C. § 556(d) of the Administrative Procedures Act ("APA"),[9] the court held that it was error for the ALJ to refuse the employer's request to submit

[9] The *Fordham* rule appears to expressly contravene the Administrative Procedure Act's instruction that parties, as part of their defense, are entitled "to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d). The *Fordham* evidentiary bar handicaps employers and prevents them from presenting admissible and relevant rebuttal evidence to on the contributory factor element of a complainant's FRSA claim.

additional medical evidence to rebut the examining physician's hearing testimony because the additional evidence was required for a fundamentally fair presentation of both parties' positions. *Id.* at 952. Noting that "[t]he APA specifically requires that rebuttal evidence be permitted[,]" it found that the failure to consider important rebuttal evidence was a violation of procedural due process. *Id.* at 951.

In *Carnation Co. v. Sec'y of Labor*, 641 F.2d 801, 802-03 (9th Cir. 1981), a can manufacturer was prevented from presenting evidence to rebut the Occupational Safety and Health Administration's ("OSHA's") evidence that lowering the sound level for several of its machines was economically feasible. The Ninth Circuit noted that "[p]rocedural due process requires that a party against whom an agency has proceeded be allowed to rebut evidence offered by the agency if that evidence is relevant." *Id.* at 803 (citation omitted). The manufacturer contended that lowering the sound of the machines plant-wide, as required by OSHA, was economically infeasible, but OSHA refused to allow evidence in support of this contention. *Id.* "The failure to permit [the manufacturer] to rebut the Secretary's evidence of economic feasibility was therefore a denial of due process." *Id.*

This constitutional right to contest evidence offered in support of a complainant's claim in administrative proceedings is not unique.[10] *See*, e.g., *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1050 (6th Cir. 1990) (error for ALJ to refuse to consider employer's evidence to rebut complainant's disabling heart, back, and respiratory problems). It applies equally where a

[10] In *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005), a case brought by inmates alleging that Ohio's procedure for choosing who was housed in state super-max prisons violated due process, the Supreme Court held that an opportunity to offer a rebuttal is "among the most important procedural mechanisms for purposes of avoiding erroneous deprivations" of life, liberty, or property.

governmental agency is the decision-maker. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n. 4 (1974) (due process clause forbids agency to act "in a way that forecloses [parties from having] an opportunity to offer a contrary presentation"); *Circu v. Gonzales*, 450 F.3d 990, 995 (9th Cir. 2006) (refusal to allow alien to present rebuttal evidence to refute evidence by agency was violation of alien's procedural due process rights); *Hatch v. Fed. Energy Regulatory Comm'n*, 654 F.2d 825, 835 (D.C. Cir. 1981) (agency must allow litigants to "have a meaningful opportunity to submit conforming proof"); *In re George W. Myers Co.*, 412 F.2d 785, 786 (3d Cir. 1969) (bankrupt individual denied procedural due process when he was not allowed to rebut evidence offered by petitioning creditors on whether bankrupt was solvent or insolvent).

This constitutional violation can be easily avoided by construing the FRSA and AIR21 to allow the trier of fact to consider all otherwise relevant and admissible evidence on each element of the complainant's claim.

II. 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?

ANSWER: The only limitations are admissibility and relevance.

The OALJ Rules of Evidence govern admissibility of evidence. 29 C.F.R. § 18.1101, et seq. These rules apply unless "otherwise specifically provided by an Act of Congress, or by a rule or regulation of specific application prescribed by the United States Department of Labor pursuant to statutory authority, or pursuant to executive order." *Id.* at § 18.1101(c). The Rules further provide that they "shall be construed to secure fairness in administration . . . to the end that truth may be ascertained and proceedings justly determined." *Id.* at § 18.1102. No act, rule or regulation specifically restricts the evidence a respondent may introduce to contest the

evidence introduced by the complainant in his case-in-chief. Any such restriction would be unfair and at odds with the search for truth. *Fordham*, ARB No. 12-061, at *23 (Corchado, A.A.J., concurring in part and dissenting in part) ("majority's view . . . violates principles of fundamental fairness"). Consequently, no additional limitations are necessary or appropriate.

A. An employer's reasons for the adverse action are relevant to the contributory factor element.

As Judge Corchado pointed out in his dissent in the now vacated decision in *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, *1, *33 (ARB Mar. 20, 2015) (Corchado, J. dissenting), the *Powers* majority appeared to chip away at the full evidentiary bar established in *Fordham*. The *Powers* panel framed the *Fordham* panel's evidentiary bar as one based upon "relevance," stating that "there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor as long as the evidence is relevant to that element of proof." ARB No. 13-034, at *22. Although the *Powers* decision appeared to retreat some from the total evidentiary bar in *Fordham*, it nonetheless improperly suggested that an employer's evidence of legitimate reasons for the complainant's discharge, including testimony from decision maker's regarding their subjective mindset in making the decision, is not relevant to the question of whether that complainant's protected activity was a contributing factor in the adverse action.

After discussing the *Fordham* decision at length, the Board discussed the procedural and evidentiary rules that guide the ALJ's decision. *Id.* at *20. Pertinent here, relevant evidence is defined as "evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 29 C.F.R. § 18.401 (emphasis added). The relevancy test in 29 C.F.R.

§ 18.401 derives directly from its counterpart, Rule 401 of the Federal Rules of Evidence.[11] *See* FED. R. EVID. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."). *See also Blanton v. Biogen Idec, Inc.*, ARB No. 2006-SOX-4, at *1, *2 (ARB Apr. 18, 2006) (utilizing 29 C.F.R. § 18.401 along with FRE 401).

The ARB utilizes decisions from federal courts in interpreting and applying the analogous evidentiary rule in section 18 of the C.F.R. *See Dolan v. EMC Corp.*, 2004-SOX-1, at *1, *3 (ARB Mar. 24, 2004). These established rules of evidence are more than sufficient limitation on evidence that can be considered regarding the contributing factor element of an FRSA claim.

It does not follow, however, that the employer's reasons for the adverse action are irrelevant to this issue. The contributing factor issue asks the simple question whether the protected activity contributed in whole or in part to the adverse action. To answer this question, logically, it makes perfect sense to consider what factors did contribute to the action, which in most instances will include the employer's reasons for the action. The complainant is not required to prove that the illegitimate reason was the only factor that contributed to the action or that the employer's stated reasons are false or pretextual. The employer's reasons, however, are clearly relevant to this inquiry.

---

[11] Most federal courts understand the relevancy standard found in Rule 401 and its analogue 29 C.F.R. § 18.401 to be a liberal one, one that favors admissibility over exclusion. *See United States v. Pollard*, 790 F.2d 1309, 1312 (7th Cir. 1986) (noting that the definition of relevancy found in Rule 401 is an "expansive one"); *United States v. Miranda-Uriarte*, 649 F.2d 1345, 1353 (9th Cir. 1981) (the standard is "not strict").

The relevance of the employer's stated reasons for the action is demonstrated in the following real-life questions of the employer's decision-maker:

> Q. What contributed to your decision to discipline the complainant?
> Q. Why did you make the decision to discipline the complainant?
> Q. Did any other factors contribute to you decision?
> Q. Did the complainant's injury report [or other protected activity] contribute to your decision to discipline the complainant? Why not?

Without asking these questions and allowing the trier of fact to consider the answers, the trier of fact will be deprived of useful evidence that would clearly help the ALJ determine if the protected activity contributed in whole or in part to the adverse action. Without the answers to these questions, the ALJ is deprived of all context and explanation for the respondent's actions.

The *Powers* majority acknowledged that under the FRSA whistleblower provision, a "complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged personnel action."[12] ARB No. 13-034, at *26. It then expanded this concept, concluding that by the same token the "complainant has no obligation to *disprove* evidence of a subjective non-retaliatory motive in the context of advancing evidence supporting a showing of contributory factor." *Id.* at *27 (emphasis in original). In conclusory fashion, the majority stated that an "employer's motivation" and its evidence of "non-retaliatory motive cannot rebut complainant's evidence of contribution when that rebuttal evidence is comprised of the self-serving testimony of Company managers." *Id.*

---

[12] An examination of what factors contribute to a decision often involves an examination of the decision-maker's intent. Thus, even if proof of intent is not a requirement, it is certainly relevant to the contributing factor element. As explained in Illinois Central's principal brief, the FRSA requires that a complainant prove intentional retaliation as an element of its claim. *Kuduk v. BNSF Railway Co.*, 768 F.3d 786, 791 (8th Cir. 2014).

This Board, however, has recognized that proving a retaliatory intent is a proper way for a complainant to prove a violation of a whistleblower provision. In *Seater v. S. Cal. Edison Co.*, ARB No. 96-013, at *1, *3 (ARB Sep. 27, 1996), this Board noted that "[i]n retaliatory intent cases that are based on circumstantial evidence, as here, fair adjudication of the complaint requires full presentation of a broad range of evidence that may prove, *or disprove*, retaliatory animus and its contribution to the adverse action taken." *Id.* (emphasis added). Thus, evidence that the employer had a potential retaliatory motive "[can] provide support for the [complainant's] view that [the employer] was anxious to ensure [his] prompt departure." *Id.* at *3.

Logically, if a complainant's evidence of the employer's retaliatory intent is admissible to show that the protected activity contributed to the adverse action, the converse is also true. Evidence of an employer's good faith reliance on legitimate, non-protected factors in making the disciplinary decision is relevant to show that the protected activity did not contribute to the decision. The strength of the non-protected factors clearly bears on the question of what contributed to the employer's decision. To suggest otherwise defies common sense and well established principles of relevance.

B. The *Powers* majority conflated the weight of the decision maker's reasons with its relevance under 29 C.F.R. § 18.401.

The testimony of a witness who has personal knowledge of a fact is admissible to prove that fact. 29 C.F.R. § 18.602. Thus, the person who makes a personnel decision may testify to the factors that contributed to the decision as well as those factors that did not contribute. *Moore v. Sears, Roebuck & Co.*, 683 F.2d 1321, 1322 (11th Cir.1982) (internal corporate memoranda prepared by employee's supervisors were not hearsay in age discrimination **case** when offered

not to prove employee's poor performance, but to prove that employer thought his performance was poor); *Tuttle v. Tyco Electronics Installation Services, Inc.* 2008 WL 343178, at *2 (S. D. Ohio 2008). The *Powers* majority, unfortunately, mistook the weight of the reasons for the adverse action with the admissibility of those reasons. *See* ARB No. 13-034, at *28. In its criticism of the subjective witness testimony of the decision maker, the majority relied on cases addressing the use of subjective criteria in evaluating a complainant's performance when making employment decisions. *Id.* These cases, however, do not support the majority's view that this evidence should be ignored when considering whether the protected activity contributed to the adverse action. They deal with a company's use of subjective criteria or standards rather than objective criteria in evaluating an employee's performance.[13] They have nothing to do with evaluating the employer's *mens rea* or reasons for the personnel action.

In cases like the instant one, the decision maker's mindset or motive *is* relevant because, if his testimony regarding his or her mindset is found to be credible, it may make it more or less likely that the protected activity played a part in the employer's adverse employment action. The ALJ may place less weight on this evidence because he finds the decision maker's testimony "self-serving"[14] or not genuine, but this *does not mean that evidence is not relevant* under 29 C.F.R. § 18.401. *See United States v. Bedonie*, 913 F.2d 782, 801 (10th Cir. 1990) (witness's

[13] The standards applied by Illinois Central in this case were objective safety rules (Rules 701, 708, and 710) governing the protocol for performing switching maneuvers on Illinois Central rail lines. Whether Palmer violated these rules was never in dispute as Palmer readily admitted he violated them and accepted responsibility for the incident that resulted in his discharge. *See* Tr. 52, 132-34.

[14] That testimony is "self-serving" is no ground for exclusion. Most testimony of a party is self-serving to some degree or the party's attorney would not ask the question. Sometimes "self-serving" testimony can be compelling or even dispositive, particularly when corroborated by other evidence.

credibility is for the fact finder and courts cannot exclude evidence because a witness was of low credibility).

C. The ARB and federal courts alike routinely uphold an ALJ's consideration of testimony from the decision makers explaining the reasons why an employer took the adverse action as part of the contributory factor analysis.

A multitude of ARB cases uphold the ALJ's consideration of the decision maker's mindset in taking the adverse action as part of the ALJ's contributory factor analysis. In *Hall*, ARB Nos. 02-108, 03-013, at *25, for example, this Board affirmed the ALJ's consideration of evidence that included the decision maker's subjective testimony that he was receptive, rather than hostile, to the complainant's safety complaint. *Id.* (also finding credible testimony from the decision maker "that he wanted to enlist [the complainant's] support" in investigating the safety concern). This evidence explained the *subjective* mindset of the decision maker upon his hearing of the complainant's protected activity (a safety complaint). Based on this evidence, the ALJ found that the complainant failed to prove contributory factor by a preponderance of the evidence.

In *Zurcher*, the ALJ weighed the decision maker's testimony that he discharged the complainant based on his use of profanity rather than any of the protected activities he engaged in. ARB No. 11-002, at *4. Other cases show that ALJs have routinely considered this type of evidence as relevant. *See Bobreski*, ARB No. 13-001, at *15-16 (ALJ weighed testimony from decision makers where they testified they had no qualms with hiring the complainant); *Hamilton*, ARB No. 12-022, at *1 (ALJ weighed employer's subjective testimony regarding the cause of the reprimand and found it to be more credible than the complainant's testimony); *Peck*, ARB No. 02-028, at *13-15 (weighing the decision makers' testimony that protected activity did not

contribute to the decision and that the real reason for discharging the complainant was "distrust and dissatisfaction"); *Timmons*, ARB No. 95-ERA-40, at *4 (where a complainant relies upon allegations of retaliatory intent, "the determination of whether retaliatory intent has been established requires careful evaluation of all evidence pertinent to the mindset of the employer and its agents regarding the protected activity and the adverse action taken"); *Seater*, ARB No. 96-013, at *11, *12 (reviewing testimony from the complainant and the decision makers regarding the decision maker's mindset).

Federal court decisions further establish that the employer's reasons for the adverse action and testimony from decision makers that they lacked retaliatory animus *are* relevant as part of the contributory factor analysis. *See Addis,* 575 F.3d at 692 (affirming decision where ALJ considered subjective testimony from the employer's decision makers and "resolved credibility determinations in favor of [the employer], finding that [the decision makers] were focused on safety, receptive to complaints, and *exhibited no retaliatory animus toward* [the complainant]") (emphasis added); *Hasan*, 553 Fed. App'x at 140 (ALJ credited decision maker's testimony that complainant's resume "was treated in the same fashion as any other resume" and that they did not instruct anyone "to discriminate against him in any way"); *Mizusawa*, 524 Fed. App'x at 447-48 (affirming ALJ's decision weighing subjective testimony from decision maker that other reasons such as the complainant's behavior and unwillingness to fix problems motivated the decision to discharge the complainant as part of its contributory factor analysis).

The *Powers* majority's decision contravenes prior practice of this Board and decisions of the federal courts holding that testimony from the decision makers is relevant to rebut a complainant's evidence on the contributory factor element of his or her whistleblower claim. All

admissible and relevant evidence should be considered by the ALJ in deciding the contributory factor element including the testimony – subjective or objective -- of the employer's decision makers. Such evidence *is* relevant in determining whether the protected activity played any part in the adverse employment action because if the ALJ finds it credible, it is less likely that the protected activity contributed to the adverse employment action.[15]

III. CONCLUSION

For the reasons stated herein and in its initial brief, Illinois Central asks the ARB to reverse the ALJ's judgment and, in so doing, reconsider and overturn the majority decision in *Fordham*.

This the 3rd day of August, 2016.

Respectfully submitted,

ILLINOIS CENTRAL RAILROAD COMPANY,
RESPONDENT

By: */s/ George H. Ritter*
GEORGE H. RITTER (MSB #5372)
JENNIFER H. SCOTT (MSB #101553)
CHARLES E. COWAN (MSB #104478)

OF COUNSEL:
WISE CARTER CHILD & CARAWAY, P.A.
401 East Capitol Street, Suite 600
Jackson, Mississippi 39201
Post Office Box 651
Jackson, Mississippi 39205
Phone: 601-968-5500
Fax: 601-944-7738

[15] Numerous other examples of evidence that may be admitted and considered on the contributing factor element are discussed in part I, F, *supra* at pp. 14-17.

SERVICE SHEET

Case Name: ***Kenneth Palmer v. Canadian Nat'l Railway/Illinois Central Railroad Company***

ARB CASE NO. : 16-035

ALJ CASE NO. : 2014-FRS-154

Document Title: Supplemental Brief of Respondent Illinois Central Railroad Company

I, the undersigned, hereby certify that a copy of the above-referenced document was sent to the following:

Tucker Burge, Esq.
2001 Park Place North, Ste. 850
Birmingham, AL 35203
(Hard Copy - Regular Mail)

Chief Administrative Law Judge
U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, NW, Suite 400-North
Washington, DC 20001-8002

David Michaels
Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
Occupational Safety and Health Administration (OSHA)
200 Constitution Avenue, N.W.
Washington, D.C. 20210

CLEMENT J. KENNINGTON
Administrative Law Judge
Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

THIS the 3rd day of August, 2016.

/s/ George H. Ritter
GEORGE H. RITTER
JENNIFER H. SCOTT
CHARLES E. COWAN