

FEDERAL RAILROAD SAFETY ACT (“FRSA”)

WHISTLEBLOWER DIGEST

JUNE 12, 2019

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[*Editor's Note:* The digest is organized topically and sub-topically. Within each sub-topic, sections for the statute, regulations, cases from the Federal Courts of Appeals, cases from the Federal District Courts, and cases from the U.S. Department of Labor Administrative Review Board are listed in separate sections, as applicable. Cases are organized in reverse chronological order, and are included regardless of their current status as “good law.” Subsequent editorial notes attempt to flag decisions that may have been reversed or where the legal rule has significantly changed. Researchers, however, should take care to verify the current status of cases included below.]

I. STATUTE AND REGULATIONS

- *Statute*

Federal Railroad Safety Act, 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Act"), Pub. L. No. 110-53. (Aug. 3, 2007)

U.S. Code: [49 U.S.C. § 20109](#)

Public Law: [P.L. 110-53](#), § 1521, 121 Stat. 444 (Aug. 3, 2007); [P.L. 110-432](#), 122 Stat. 4892, Div. A, Title IV, section 419 (Oct. 16, 2008)

49 U.S.C. § 20109: Employee Protections (Current through PL 116-8, approved 3/8/19)

(a) In general. A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done--

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by-

(A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452);

(B) any Member of Congress, any committee of Congress, or the Government Accountability Office; or

(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

(2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security;

(3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title [49 USCS §§ 5101 et seq. or 5701 et seq.], or to testify in that proceeding;

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

(5) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;

(6) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation; or

(7) to accurately report hours on duty pursuant to chapter 211 [49 USCS §§ 21101 et seq.].

(b) Hazardous safety or security conditions.

(1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for--

(A) reporting, in good faith, a hazardous safety or security condition;

(B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist; or

(C) refusing to authorize the use of any safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in paragraph (2) exist.

(2) A refusal is protected under paragraph (1)(B) and (C) if--

(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) a reasonable individual in the circumstances then confronting the employee would conclude that--

(i) the hazardous condition presents an imminent danger of death or serious injury; and

(ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

(C) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

(3) In this subsection, only paragraph (1)(A) shall apply to security personnel employed by a railroad carrier to protect individuals and property transported by railroad.

(c) Prompt medical attention.

(1) Prohibition. A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly

arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

(2) Discipline. A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

(d) Enforcement action.

(1) In general. An employee who alleges discharge, discipline, or other discrimination in violation of subsection (a), (b), or (c) of this section, may seek relief in accordance with the provisions of this section, with any petition or other request for relief under this section to be initiated by filing a complaint with the Secretary of Labor.

(2) Procedure.

(A) In general. Any action under paragraph (1) shall be governed under the rules and procedures set forth in section 42121(b) [49 USCS § 42121(b)], including:

(i) Burdens of proof. Any action brought under [subsection] (d)(1) shall be governed by the legal burdens of proof set forth in section 42121(b) [49 USCS § 42121(b)].

(ii) Statute of limitations. An action under paragraph (1) shall be commenced not later than 180 days after the date on which the alleged violation of subsection (a), (b), or (c) of this section occurs.

(iii) Civil actions to enforce. If a person fails to comply with an order issued by the Secretary of Labor pursuant to the procedures in section 42121(b) [49 USCS § 42121(b)], the Secretary of Labor may bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred, as set forth in [section] 42121 [49 USCS § 42121].

(B) Exception. Notification made under section 42121(b)(1) [49 USCS § 42121(b)(1)] shall be made to the person named in the complaint and the person's employer.

(3) De novo review. With respect to a complaint under paragraph (1), if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an

original action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.

(4) Appeals. Any person adversely affected or aggrieved by an order issued pursuant to the procedures in section 42121(b) [49 USCS § 42121(b)][,] may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. The review shall conform to chapter 7 of title 5 [5 USCS §§ 701 et seq.]. The commencement of proceedings under this paragraph shall not, unless ordered by the court, operate as a stay of the order.

(e) Remedies.

(1) In general. An employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole.

(2) Damages. Relief in an action under subsection (d) (including an action described in subsection (d)(3)) shall include--

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) any backpay, with interest; and

(C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(3) Possible relief. Relief in any action under subsection (d) may include punitive damages in an amount not to exceed \$ 250,000.

(f) Election of remedies. An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.

(g) No preemption. Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.

(h) Rights retained by employee. Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.

(i) Disclosure of identity.

(1) Except as provided in paragraph (2) of this subsection, or with the written consent of the employee, the Secretary of Transportation or the Secretary of Homeland Security may not disclose the name of an employee of a railroad carrier who has provided information about an alleged violation of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title [49 USCS §§ 5101 et seq. or 5701 et seq.], or a regulation prescribed or order issued under any of those provisions.

(2) The Secretary of Transportation or the Secretary of Homeland Security shall disclose to the Attorney General the name of an employee described in paragraph (1) if the matter is referred to the Attorney General for enforcement. The Secretary making such disclosures shall provide reasonable advance notice to the affected employee if disclosure of that person's identity or identifying information is to occur.

(j) Process for reporting security problems to the Department of Homeland Security.

(1) Establishment of process. The Secretary of Homeland Security shall establish through regulations, after an opportunity for notice and comment, a process by which any person may report to the Secretary of Homeland Security regarding railroad security problems, deficiencies, or vulnerabilities.

(2) Acknowledgment of receipt. If a report submitted under paragraph (1) identifies the person making the report, the Secretary of Homeland Security shall respond promptly to such person and acknowledge receipt of the report.

(3) Steps to address problem. The Secretary of Homeland Security shall review and consider the information provided in any report submitted under paragraph (1) and shall take appropriate steps to address any problems or deficiencies identified.

- Regulations

Code of Federal Regulations: [29 C.F.R. Part 1982](#)

Federal Register:

Final Rule [80 Fed. Reg. 69115](#) (Nov. 9, 2015)

Interim Final Rule, [75 Fed. Reg. 53521](#) (Aug. 31, 2010)

- Statutory and Regulatory History

On August 10, 2007, President George W. Bush signed “The Implementing Recommendations of the 9/11 Commission Act of 2007,” designated as Public Law No: 110-053. The 9/11 Act was the result of a Conference Report, H.R. Rep. 110-259 (July 25, 2007) (Conf. Rep.). Section 1521 of the 9/11 Act amends the FRSA by modifying the railroad carrier employee whistleblower

provision section both expanding what constitutes protected activity and enhancing administrative and civil remedies for employees to mirror those found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21”), 49 U.S.C. §42121. Additionally, the amended FRSA Section 20109 will follow the AIR21 procedure for adjudication at the Department of Labor.

The FRSA prohibits a railroad carrier engaged in interstate or foreign commerce, a contractor or subcontractor of such a carrier, or an officer or employee of such a carrier, from discharging or otherwise discriminating against an employee because he or she (1) provides or is about to provide information, or otherwise directly assists in an investigation regarding conduct that the individual believes is a violation of a federal law, rule, or regulation relating to railroad safety or security, or constitutes gross fraud, waste, or abuse of a federal grant or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to specified government entities or a person with supervisory authority over the employee; (2) refuses to violate or assist in the violation a federal law, rule, or regulation related to railroad safety or security; (3) files a complaint, causes a proceeding to enforce the FRSA or railroad safety or security, or testifies in that proceeding; (4) notifies or attempts to notify the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee; (5) cooperates with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; (6) furnishes information to specified entities related to an railroad accident or incident resulting in injury or death to an individual or damage to property; or (7) accurately reports hours on duty pursuant to the Hours of Service Act. 49 U.S.C. § 20109(a).

In addition, a railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a carrier, may not discharge or otherwise discriminate against an employee for (1) reporting, in good faith, a hazardous safety or security condition; (2) refusing to work when confronted by a hazardous safety or security issue, if certain conditions exist; or (3) refusing to authorize the use of safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of such items and believes that they are in a hazardous safety or security state. 49 U.S.C. § 20109(b).

- *Retroactive Application*

U.S. Circuit Court of Appeals Decisions

RETROACTIVITY; SUMMARY JUDGMENT; EIGHTH CIRCUIT DECLINES TO APPLY FRSA AMENDMENTS RETROACTIVELY TO COVER EVENTS IN 2006, AFFIRMS SUMMARY JUDGMENT FOR RAILROAD WHERE STATUTE AS IT

EXISTED AT THE TIME OF THE EVENTS DID NOT PROVIDE ENTITLEMENT TO RELIEF

Purcell v. Union Pac. R.R., 420 Fed. Appx. 650 (8th Cir. July 8, 2011): The Eighth Circuit summarily affirmed summary judgment in a railroad in an FRSA case on the grounds that the statute as it existed in 2006, when the relevant events happened, did not provide entitlement to relief on the complaint. It also “decline[d] [plaintiff’s] invitation to retroactively apply a subsequent amendment to the statute.

DOL Administrative Review Board Decisions

RETROACTIVE APPLICATION OF FRSA SECTION 20109(c)(2) IS NOT IMPLICATED WHERE, ALTHOUGH A DISCIPLINARY CHARGE LETTER WAS ISSUED PRIOR TO THE ENACTMENT OF SECTION 20109(c)(2), THE COMPLAINANT DID NOT EXPERIENCE AN ADVERSE ACTION UNTIL HIS LATER SUSPENSION FOLLOWING A DISCIPLINARY HEARING

In *Bala v. Port Authority Trans-Hudson Corp.*, ARB No. 12-048, ALJ No. 2010-FRS-26 (ARB Sept. 27, 2013), the Respondent argued that a July 14, 2008 Disciplinary Charge Letter which charged the Complainant with violation of the Respondent’s attendance policy, preceded the date of enactment of FRSA Section 20109(c)(2), October 16, 2008, and thus the statute could not be applied retroactively. The ARB held that

“This is not a case involving retroactive application of a statute. While the charging letter informing [the Complainant] of disciplinary proceedings was dated July 2008, [the Complainant] did not experience an adverse action until January 2009, when [the Respondent] suspended him immediately following a disciplinary hearing. 49 U.S.C.A. § 20109(a); *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB Feb. 29, 2012) (suspension constitutes an adverse action under FRSA). Since [the Complainant] was not disciplined until three months after the statute was enacted, there is no issue in this case pertaining to retroactivity.”

USDOL/OALJ Reporter at 16.

- *Preemption*

Statute

49 U.S.C. § 20109

(g) No preemption. Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.

U.S. Circuit Court of Appeals Decisions

PREEMPTION; TENTH CIRCUIT AFFIRMS FINDING THAT PRE-2007 AMENDMENT FRSA PREEMPTED STATE LAW CLAIM FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY PREMISED ON A CLAIM OF RETALIATION WITHIN THE SCOPE OF THE FRSA, BUT ADDS THAT AMENDMENTS ADDED A “NO PREEMPTION” PROVISION (49 U.S.C. § 20109(g)) THAT WOULD CHANGE THE RESULT

Abbott v. BNSF Ry. Co., 383 Fed. Appx. 703 (10th Cir. 2010): Plaintiff filed a suit alleging retaliatory discharge in violation of public policy and breach of contract in state court.

Plaintiff had been employed by Defendant since 1979 and in 2006 was promoted to general director of railroad training services. He became aware that a vice-president who maintained an engineering license and needed to be recertified had conspired with another employee to obscure the security cameras so that the other employee could take the recertification test on the vice-president’s behalf. This was reported, and led to the retirement of the vice-president and salary grade reduction for the other employee. Later that year issues were raised about Plaintiff’s performance, which led in 2007 to his removal from a salaried position. He stayed with the railroad by exercising union seniority rights to take an engineering position. There was no FRSA complaint—rather, Plaintiff

Defendant railroad removed the suit to federal court, claiming both diversity jurisdiction and federal question jurisdiction on the grounds that the FRSA preempted the state causes of action. The district granted a motion to dismiss the retaliatory discharge claim, agreeing that it was preempted by the FRSA. The district court later granted summary judgment to the railroad on the contract claim on other grounds. Plaintiff appealed.

The Tenth Circuit affirmed. The amendments to the current version of the FRSA became effective in August 2007, after the date that Plaintiff was effectively demoted. The amendments added 49 U.S.C. § 20109(g): “No preemption. Nothing in this sections preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats,

harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.” But the Tenth Circuit agreed with the district court that the FRSA as it existed before this addition did preempt the state law claim. Plaintiff argued that since the FRSA as it existed had incorporated the Railway Labor Act, and it was established that the Railway Labor Act did not preempt state law claims of this sort, the same result should follow. But the Tenth Circuit disagreed, noting that the FRSA as it existed at the relevant time only adopted the dispute resolution mechanisms of the Railway Labor Act. Preemption is a question of federal intent, and the district court’s conclusion that the intent with the earlier version of the FRSA was to preempt state law claims for violations of railway safety was sound.

The Tenth Circuit added: “Congress later decided not to preempt state law claims like [Plaintiff’s] claim for wrongful discharge, so our holding will likely have little effect in future cases.”

- *Sovereign Immunity*

U.S. District Court Decisions

SOVEREIGN IMMUNITY; CONGRESS DID NOT ABROGATE SOVEREIGN IMMUNITY IN THE FRSA

Flakker v. New Jersey Transit Rail Operations, Inc., No. 18-cv-1046 (E.D. Pa. June 18, 2018) (2018 U.S. Dist. LEXIS 101272; 2018 WL 3029258) (Memorandum): Plaintiff filed an FRSA complaint against his employer, New Jersey Transit Rail Operations, alleging that it retaliated against him for reporting a work-related injury. Defendant filed a motion for judgment on the pleadings on the grounds that it was immune from suit under the Eleventh Amendment. The Third Circuit Court of Appeals had recently held that NJ Transit was an arm of the state and thus immune from suit under the Eleventh Amendment. There was no dispute that the Defendant was part of NJ Transit. The court further determined that Congress did not abrogate sovereign immunity for the Whistleblower Provision of the Federal Railroad Safety Act. And it found that sovereign immunity had not been waived in this case. It thus granted the motion and issued judgment on the pleadings to Defendant.

II. FILING OF COMPLAINT

Statute

49 U.S.C. § 20109

(d) Enforcement action.

(1) In general. An employee who alleges discharge, discipline, or other discrimination in violation of subsection (a), (b), or (c) of this section, may seek relief in accordance with the provisions of this section, with any petition or other request for relief under this section to be initiated by filing a complaint with the Secretary of Labor.

Regulations

29 C.F.R. § 1982.103: Filing of retaliation complaints.

(a) *Who may file.* An employee who believes that he or she has been retaliated against in violation of NTSSA or FRSA may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation.

(b) *Nature of filing.* No particular form of complaint is required. A complaint may be filed orally or in writing. Oral complaints will be reduced to writing by OSHA. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language.

(c) *Place of filing.* The complaint should be filed with the OSHA office responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee. Addresses and telephone numbers for these officials are set forth in local directories and at the following Internet address:

<http://www.osha.gov>.

[Sub-section (d) omitted (see below)]

29 C.F.R. § 1982.104: Investigation

(a) Upon receipt of a complaint in the investigating office, OSHA will notify the respondent of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint. Such materials will be redacted, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA will also notify the respondent of its rights under paragraphs (b) and (f) of this section and §1982.110(e). OSHA will provide an unredacted copy of these same materials to the complainant (or the complainant's legal counsel if complainant is represented by counsel), and to

the Federal Railroad Administration, the Federal Transit Administration, or the Transportation Security Administration as appropriate.

(b) Within 20 days of receipt of the notice of the filing of the complaint provided under paragraph (a) of this section, the respondent may submit to OSHA a written statement and any affidavits or documents substantiating its position. Within the same 20 days, the respondent may request a meeting with OSHA to present its position.

(c) During the investigation, OSHA will request that each party provide the other parties to the whistleblower complaint with a copy of submissions to OSHA that are pertinent to the whistleblower complaint. Alternatively, if a party does not provide its submissions to OSHA to the other party, OSHA will provide them to the other party (or the party's legal counsel if the party is represented by counsel) at a time permitting the other party an opportunity to respond. Before providing such materials to the other party, OSHA will redact them, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA will also provide each party with an opportunity to respond to the other party's submissions.

(d) Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant, in accordance with part 70 of this title.

(e)(1) A complaint will be dismissed unless the complainant has made a prima facie showing that protected activity was a contributing factor in the adverse action alleged in the complaint.

(2) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing as follows:

(i) The employee engaged in a protected activity (or, in circumstances covered by NTSSA and FRSA, was perceived to have engaged or to be about to engage in protected activity);

(ii) The respondent knew or suspected that the employee engaged in the protected activity (or, in circumstances covered by NTSSA and FRSA, perceived the employee to have engaged or to be about to engage in protected activity);

(iii) The employee suffered an adverse action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity (or perception thereof) was a contributing factor in the adverse action.

(3) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, *i.e.*, to give rise to an inference that the

respondent knew or suspected that the employee engaged in protected activity (or, in circumstances covered by NTSSA and FRSA, perceived the employee to have engaged or to be about to engage in protected activity), and that the protected activity (or perception thereof) was a contributing factor in the adverse action. The burden may be satisfied, for example, if the complaint shows that the adverse action took place shortly after the protected activity, or at the first opportunity available to the respondent, giving rise to the inference that it was a contributing factor in the adverse action. If the required showing has not been made, the complainant (or the complainant's legal counsel if complainant is represented by counsel) will be so notified and the investigation will not commence.

(4) Notwithstanding a finding that a complainant has made a prima facie showing, as required by this section, further investigation of the complaint will not be conducted if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity.

(5) If the respondent fails to make a timely response or fails to satisfy the burden set forth in the prior paragraph, OSHA will proceed with the investigation. The investigation will proceed whenever it is necessary or appropriate to confirm or verify the information provided by the respondent.

(f) Prior to the issuance of findings and a preliminary order as provided for in §1982.105, if OSHA has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the respondent has violated NTSSA or FRSA and that preliminary reinstatement is warranted, OSHA will contact the respondent (or the respondent's legal counsel if respondent is represented by counsel) to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. The complainant will also receive a copy of the materials that must be provided to the respondent under this paragraph. Before providing such materials, OSHA will redact them, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The respondent will be given the opportunity to submit a written response, to meet with the investigators, to present statements from witnesses in support of its position, and to present legal and factual arguments. The respondent must present this evidence within 10 business days of OSHA's notification pursuant to this paragraph, or as soon afterwards as OSHA and the respondent can agree, if the interests of justice so require.

29 C.F.R. § 1982.105: Issuance of findings and preliminary orders.

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary will issue, within 60 days of filing of the complaint, written findings as to whether or not there is reasonable cause to believe that the respondent has retaliated against the complainant in violation of NTSSA or FRSA.

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, the Assistant Secretary will accompany the findings with a preliminary order providing relief to the complainant. The preliminary order will include, where appropriate: Affirmative action to abate the violation; reinstatement with the same seniority status that the employee would have had, but for the retaliation; any back pay with interest; and payment of compensatory damages, including compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The preliminary order will also require the respondent to submit documentation to the Social Security Administration or the Railroad Retirement Board, as appropriate, allocating any back pay award to the appropriate months or calendar quarters. The preliminary order may also require the respondent to pay punitive damages up to \$250,000.

(2) If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding.

(b) The findings and, where appropriate, the preliminary order will be sent by certified mail, return receipt requested, to all parties of record (and each party's legal counsel if the party is represented by counsel). The findings and, where appropriate, the preliminary order will inform the parties of the right to object to the findings and/or order and to request a hearing, and of the right of the respondent under NTSSA to request award of attorney fees not exceeding \$1,000 from the administrative law judge (ALJ) regardless of whether the respondent has filed objections, if the respondent alleges that the complaint was frivolous or brought in bad faith. The findings and, where appropriate, the preliminary order also will give the address of the Chief Administrative Law Judge, U.S. Department of Labor. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge a copy of the original complaint and a copy of the findings and/or order.

(c) The findings and any preliminary order will be effective 30 days after receipt by the respondent (or the respondent's legal counsel if the respondent is represented by counsel), or on the compliance date set forth in the preliminary order, whichever is later, unless an objection and/or a request for a hearing has been timely filed as provided at §1982.106. However, the portion of any preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and of the preliminary order, regardless of any objections to the findings and/or the order.

- *Timeliness Generally*

Statute

49 U.S.C. § 20109

(d) Enforcement action.

...

(2) Procedure.

(A) In general. Any action under paragraph (1) shall be governed under the rules and procedures set forth in section 42121(b) [49 USCS § 42121(b)], including:

...

(ii) Statute of limitations. An action under paragraph (1) shall be commenced not later than 180 days after the date on which the alleged violation of subsection (a), (b), or (c) of this section occurs.

Regulations

29 C.F.R. § 1982.103

...

(d) *Time for Filing.* Within 180 days after an alleged violation of NTSSA or FRSA occurs, any employee who believes that he or she has been retaliated against in violation of NTSSA or FRSA may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, electronic communication transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a complaint equitably tolled if a complainant mistakenly files a complaint with another agency instead of OSHA within 180 days after becoming aware of the alleged violation.

U.S. Circuit Court of Appeals Decisions

TIMELINESS OF ADMINISTRATIVE COMPLAINT; SEVENTH CIRCUIT AFFIRMS DISTRICT COURT'S HOLDING THAT CLOCK STARTS RUNNING FOR FRSA'S

STATUTORY FILING DEADLINE ON THE DATE THAT COMPLAINANT BECAME AWARE OF THE ADVERSE ACTION

TIMELINESS OF ADMINISTRATIVE COMPLAINT; SEVENTH CIRCUIT AFFIRMS DISTRICT COURT'S HOLDING THAT, FOR PURPOSES OF FRSA'S STATUTORY FILING DEADLINE, RENEWING REQUESTS THAT RESPONDENT PAY FOR MEDICAL EXPENSES THAT IT HAS ALREADY DECLINED DOES NOT RESET THE CLOCK

In *Sweatt v. Union Pacific Railroad Co.*, No. 16-1236 (7th Cir. Mar. 6, 2017) (2017 U.S. App. LEXIS 3761; 2017 WL 903527) (unpublished) (case below N.D. Ill. No. 14-cv-7891), the Seventh Circuit affirmed the District Court's grant of summary judgment for Respondent, finding that Complainant did not exhaust his administrative remedies under the FRSA before filing suit. *Sweatt*, slip op. at 1. Complainant requested that his employer, Respondent, pay for surgery for his carpal tunnel syndrome, which his doctor asserted was work-related. *Id.* at 2. Complainant filed a complaint with OSHA alleging a violation of FRSA, 49 U.S.C. § 20109(c)(1) and Complainant subsequently used the kick-out provision of FRSA to bring the suit in federal court. The District Court found that Complainant "knew by the summer of 2012 that the company would not pay for his surgery and yet he did not file his administrative complaint until January 2014, long after the 180-day deadline" of § 20109(d)(2)(A)(ii). *Id.* at 2.

U.S. District Court Decisions

COURT DISMISSED FRSA CLAIM FOR LACK OF SUBJECT MATTER JURISDICTION ON THE GROUND THAT A TIMELY FRSA ADMINISTRATIVE COMPLAINT HAD NOT BEEN FILED, WHERE PLAINTIFF FAILED TO RESPOND TO DEFENDANT'S FRCP 12(b) MOTION WITH SUFFICIENT DOCUMENTATION TO ESTABLISH GROUNDS FOR INVOCATION OF MAILBOX RULE; AFFIDAVIT OF ATTORNEY INSUFFICIENT WHERE IT WAS NOT ACCOMPANIED BY AN AFFIDAVIT FROM UNIDENTIFIED PERSON WHO PURPORTEDLY MAILED THE ADMINISTRATIVE COMPLAINT, AND WHERE PLAINTIFF CONCEDED THAT THE REGULAR LAW OFFICE PROCEDURE WAS NOT FOLLOWED BECAUSE THE COMPLAINT WAS SENT BY REGULAR MAIL INSTEAD OF CERTIFIED MAIL AND FAX

Guerra v. Consolidated Rail Corp., 2:17-cv-6497 (D. N.J. June 13, 2018) (2018 U.S. Dist. LEXIS 98779) (case below 2017-FRS-00047): The Defendant filed a FRCP 12(b)(1) motion for dismissal based on lack of jurisdiction, contending that the court did not have jurisdiction because the Plaintiff had not filed a timely FRSA administrative complaint. The Plaintiff did not challenge whether failure to file a timely complaint would divest the court of subject-matter jurisdiction, but instead contended that the complaint was timely. The court found, however, that

the Plaintiff failed to present a sufficient sworn affidavit to take advantage of the mailbox rule presumption. Although the Plaintiff presented an affidavit from his attorney, there was no affidavit from the unidentified person who would have mailed the administrative complaint. Moreover, the Plaintiff acknowledged that typical office procedures had not been followed because the complaint was allegedly sent by regular mail, and not by certified mail and fax. The court thus granted the motion to dismiss. However, it stated that “[t]o the extent that the pleading deficiencies identified by this Court can be cured by way of amendment, Plaintiff is hereby granted thirty (30) days to file an amended pleading.”

TIMELINESS; SUMMARY JUDGMENT; TO BE TIMELY A COMPLAINT MUST BE FILED WITH OSHA WITHIN 180 DAYS OF AN ADVERSE ACTION; EARLIER ADVERSE ACTIONS ARE NOT ACTIONABLE, BUT MAY BE USED AS EVIDENCE IN SUPPORT OF A CLAIM OF RETALIATION IN A TIMELY COMPLAINT

Roop v. Kan. City Southern Ry., No. 16-cv-413 (E.D. Okla. Oct. 26, 2017) (2017 U.S. Dist. LEXIS 177646; 2017 WL 4844832): Plaintiff alleged that Defendant railroad intimidated, harassed, and ultimately terminated him in retaliation for the testifying on behalf of another employee in a FELA proceeding, in violation of the FRSA. Defendant sought summary judgment on multiple grounds. The district court denied the motion.

The railroad argued that the claim was time-barred. To be actionable, a complaint must be filed with OSHA within 180 days of the retaliatory action. However, evidence of prior adverse actions may be used as support for a timely claim. Here only 127 days had passed between the termination and the complaint, so the complaint for that adverse action was timely. The court noted that earlier adverse actions that pre-dated the 180 day window would not be actionable.

MOTION TO DISMISS UNDER FRCP 12(b)(1) BASED ON LACK OF TIMELINESS OF ADMINISTRATIVE COMPLAINT; TIMELINESS OF ADMINISTRATIVE COMPLAINT IS NOT JURISDICTIONAL, AND THEREFORE A MOTION TO DISMISS ON THAT BASIS WOULD NEED TO PROCEED UNDER FRCP 12(b)(6)

In *King v. Ind. Harbor Belt R.R. Co.*, No. 15-CV-245 (N.D. Ind. Mar. 23, 2017) (2017 U.S. Dist. LEXIS 41908; 2017 WL 1089212) (case below 2015-FRS-3), the Defendant filed a motion to dismiss for lack of jurisdiction based on the contention that the Plaintiff’s DOL FRSA complaint was filed one day late and that the timeliness of an administrative complaint is jurisdictional, and therefore the case should be dismissed under FRCP 12(b)(1). The Plaintiff responded that “the timeliness of an administrative complaint is not a jurisdictional requirement but an affirmative defense, and that it is thus not suitable to resolution on a motion under Rule 12 when, as here, it depends on evidence outside of the complaint.” Slip op. at 1.

The court referred the motion to a Magistrate Judge who “concluded that the timeliness of an administrative complaint is not a jurisdictional requirement under the FRSA. A motion to dismiss on that basis would thus have to proceed under Rule 12(b)(6), which does not permit consideration of extrinsic materials. [The Magistrate Judge] thus recommended that [the

Defendant's] motion be denied, without reaching the substance of IHB's argument that Mr. King's administrative complaint was untimely." *Id.* at 2. The Defendant "objected to this recommendation, solely on the basis that the timeliness of an administrative complaint should be considered jurisdictional." *Id.* The court summarized its ruling accepting the Magistrate Judge's Report and Recommendation:

The sole question at issue is whether the timely filing of an administrative complaint is a jurisdictional requirement for suits filed in federal court under the FRSA. If so, then it can be raised and decided on a motion to dismiss under Rule 12(b)(1) (a motion to dismiss for lack of subject-matter jurisdiction), which permits consideration of materials extrinsic to the complaint. If not, then [the Defendant] cannot properly raise this defense on a motion to dismiss under Rule 12, as its arguments depend on evidence outside of the complaint. The [Magistrate Judge's] Report and Recommendation found that this requirement is not jurisdictional. The Court agrees.

Id. at 3. The court noted that the Defendant had "not requested that the Court treat its motion as a motion for summary judgment should the requirement not be deemed jurisdictional" and the court declined to treat it as such.

TIMELINESS OF COMPLAINT; DISCRETE ACTS; CLOCK IS NOT RE-SET BY SECOND REQUEST FOR SURGERY THAT WAS PREVIOUSLY DENIED; DISTINCTION FROM ISSUING OF PAYCHECKS DISCUSSED IN *AMTRAK v. MORGAN*

In *Sweatt v. Union Pac. R.R. Co.*, No. 14-cv-7891 (N.D. Ill. Jan. 12, 2016) (2016 U.S. Dist. LEXIS 3609; 2016 WL 128036), the District Court granted Defendant's motion for summary judgment, holding that Plaintiff had not timely filed his complaint. Specifically, the court found that the 180-day limitations period for filing a complaint was triggered by Defendant's first denial to pay for a surgical procedure, and that Plaintiff could not restart the limitations period by filing a second request for the same surgery.

Plaintiff Ronald Sweatt claimed that Defendant Union Pacific Railroad Company violated the Federal Rail Safety Act (FRSA), 49 U.S.C. § 20106 et seq., by refusing his request that the company pay for surgery to treat his bilateral carpal tunnel syndrome. In a previous case against Defendant, Sweatt had claimed that Union Pacific was liable under the Federal Employer's Liability Act (FELA) for his development of carpal tunnel syndrome. During a November 2013 deposition in the previous case, Sweatt's treating physician testified that Sweatt's carpal tunnel syndrome was a work-related injury. The district court in that case concluded that Sweatt's FELA claim was time-barred and granted summary judgment to Union Pacific. *See Sweatt*, 2014 U.S. Dist. LEXIS 76156, 2014 WL 2536807, at *5-*6. The Seventh Circuit affirmed the decision on the same basis. *Sweatt v. Union Pac. R. Co.*, 796 F.3d 701, 707-08 (7th Cir. 2015).

Following the physician's November 2013 deposition, Sweatt again requested that Union Pacific approve the surgery. Union Pacific provided no formal response to this request, but the parties

agreed that the company consistently maintained its refusal to authorize payment for the proposed surgery. On January 31, 2014, Sweatt filed a complaint with the Occupational Safety and Health Administration (OSHA), claiming that Union Pacific's refusal to approve payment for the surgery violated the FRSA.

Before the District Court, Union Pacific moved for summary judgment on the basis that Sweatt failed to file a timely administrative complaint. Sweatt responded that the FRSA's limitations period should not be measured from the day Union Pacific denied his initial request for surgery, but should instead be measured from the day the company denied his subsequent request for the same surgery. Sweatt detailed that the violation alleged in his complaint was Union Pacific's denial of his subsequent request for surgery in November 2013—not the denial in 2012—and measured from the later denial, his complaint in January 2014 fell well within the limitations period. In support of his arguments, Sweatt contended that the 2013 denial was the sort of "discrete act" of discrimination described in *AMTRAK v. Morgan*, 536 U.S. 101, 113, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002).

In response, Union Pacific contended that the discrete act triggering the limitations period was its denial of his request in 2012. The company stressed that the 180-day limitations period of § 20109(d)(2)(A)(ii) would be meaningless if Sweatt could reset it simply by requesting the same surgery a second time and again being told "no."

The court considered *Morgan*, a Title VII case, and stated that the point of the case was to distinguish discrete acts from "continuing violations." The court provided examples of discrete acts including "termination, failure to promote, denial of transfer, or refusal to hire," as well as the issuing of individual paychecks that each reflects a policy of discrimination. The court agreed with Union Pacific's argument that its 2012 denial of Sweatt's request for surgery triggered the 180-day limitations period, and that the denial of his 2013 request for the same surgery to treat the same injury did not restart it. The court found that the 2013 denial of Sweatt's second request for the same surgery could not be viewed as a "discrete act" within the meaning of *Morgan*. Unlike individual paychecks or the other acts discussed in *Morgan*, the denial of Sweatt's second request for the same surgery did not injure him afresh. Rather, the second denial changed nothing, and although Sweatt may have been worse off the longer he was without treatment, a "lingering effect of an unlawful act is not itself an unlawful act . . . so it does not revive an already time-barred illegality."

The court found that Sweatt's situation was instead analogous to the situation presented in *Brown v. Unified School District 501, Topeka Public Schools*, 465 F.3d 1184, 1186 (10th Cir. 2006), a Title VII case, where the plaintiff was fired from his position as a physical education teacher and then asked the school district to rehire him. In *Brown*, the school district informed the Plaintiff unequivocally that it would not consider him for rehire. Plaintiff filed an EEOC charge about this refusal, but he did not file a lawsuit within the 90-day limitations period after receiving his right-to-sue notice. Instead, he again asked the district to rehire him, and the district again refused. He then filed a new EEOC charge and, upon receiving a second right-to-sue notice, filed a lawsuit. The Tenth Circuit held that the plaintiff's lawsuit was untimely because the evidence showed that district's most recent refusal was a "mere reiteration" of the earlier refusal.

The court concluded that Union Pacific's 2013 refusal, like the refusal to rehire at issue in *Brown*, was a "mere reiteration" of its earlier refusal and must not be treated as a second discrete act. According to the court, accepting Sweatt's position would render the limitations period of 49 U.S.C. § 20109(d)(2)(A)(ii) a nullity because Sweatt would be able to restart the period as many times as he liked. The court therefore granted Union Pacific's motion for summary judgment.

DOL Administrative Review Board Decisions

TIMELINESS OF FRSA COMPLAINT; WHERE DISCHARGE NOTICE INFORMED COMPLAINANT THAT HE WAS NOT ELIGIBLE FOR REEMPLOYMENT, LIMITATIONS PERIOD COMMENCED ON THAT DATE RATHER THAN ON DATE THAT COMPLAINANT ATTEMPTED REEMPLOYMENT AND WAS DENIED; DENIAL OF REEMPLOYMENT APPLICATION WAS CONSEQUENCE OF ADVERSE ACTION AND NOT A NEW ADVERSE ACTION; ACCRUAL OF DAMAGES IS NOT A PREREQUISITE FOR A FRSA CAUSE OF ACTION

In *Dugger v. Union Pacific Railroad Co.*, ARB No. 16-079, ALJ No. 2016-FRS-36 (ARB Aug. 17, 2017), the Complainant resigned from a management position with the Respondent. A week later, August 18, 2015, the Respondent gave the Complainant a letter terminating his employment and stating in pertinent part that the Complainant was "disqualified from returning to any agreement craft where you may retain seniority and will not be considered for any future employment with the Union Pacific Railroad Company or any related companies." On September 9, 2015, the Complainant attempted to return to work by exercising his union seniority rights in a locomotive engineer position, but Respondent denied his request. The Complainant filed a FRSA complaint on March 1, 2016. Under the FRSA limitations provision, the complaint was untimely if the alleged violation occurred on the date of the termination letter, but timely if the relevant violation was the date the Respondent denied the request to return to work. The ALJ found that the relevant violation occurred on the date of the termination letter and the denial of the return to work was only a consequence of the adverse action and not a new one. The ARB affirmed the ALJ's decision.

Within 180 days after an alleged FRSA violation occurs, any employee who believes that he or she has been retaliated against in violation of the FRSA may file a complaint alleging such retaliation. "[The] limitations period begins to run from the time that the complainant knows or reasonably should know that the challenged act has occurred." Thus, an employer violates the FRSA on the date that it communicates to the employee its intent to take an adverse employment action, rather than the date on which the employee experiences the adverse consequences of the employer's action.

In whistleblower cases, statutes of limitation, such as section 20109(d)(2)(ii), run from the date an employee receives “final, definitive, and unequivocal notice” of an adverse employment decision. “Final” and “definitive” notice is a communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change. “Unequivocal” notice means communication that is not ambiguous, i.e., free of misleading possibilities.

USDOL/OALJ Reporter at 2 (footnotes omitted). The Complainant argued on appeal that “only once his bid for a position was denied did he have the requisite damages to pursue a cause of action.” The ARB rejected this argument, writing:

[G]iven the public policy of the whistleblower laws, the issue of whether a complainant has sustained damages has never been a prerequisite to a finding of retaliation; “the absence of a tangible injury goes only to remedy, not to whether the employer committed a violation of the law.” Further, the August notice not only terminated Dugger’s employment, but denied him the right to bid upon the job he subsequently was denied, so Dugger did, in fact sustain a compensable damage by virtue of this notice and the Secretary could have ordered reinstatement and reversal of Respondent’s order that Dugger was forbidden to “mark up.”

Id. at 5 (footnote omitted). The ARB also held that the ALJ’s conclusion that the Respondent’s refusal to allow the Complainant to “mark up” was a consequence of the August 15, 2015 adverse action rather than a new one was consistent with Board precedent in *Johnsen v. Houston Nana, Inc. JV*, ARB No. 00-064, ALJ No. 1999-TSC-4 (ARB Feb. 10, 2003).

- *Equitable Tolling*

DOL Administrative Review Board Decisions

EQUITABLE ESTOPPEL; RESPONDENT’S ACTIONS, WHETHER INTENTIONAL OR NOT, THAT LULLED COMPLAINANT INTO INACTION REGARDING AN FRSA COMPLAINT; EVIDENCE THAT RESPONDENT LED COMPLAINANT TO BELIEVE HE WOULD BE REINSTATED SUFFICIENT TO SURVIVE MOTION FOR SUMMARY DECISION

In *Jenkins v. CSX Transportation, Inc.*, ARB No. 13-029, ALJ No. 2012-FRS-73 (ARB May 15, 2014), the Complainant’s FRSA was not timely filed, and the ALJ granted the Respondent’s motion for summary decision, finding that the Complainant failed to establish equitable estoppel

grounds for excusing the untimely filing. On appeal, the ARB stated that in addition to the three equitable estoppel principles identified in *School District of Allentown*, the ARB had recognized a fourth principle: "equitable estoppel will also apply to toll the running of a statute of limitations in situations 'where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.'" USDOL/OALJ Reporter at 7 (footnote with citations omitted). The Board stated:

Under this test it is immaterial whether the employer engaged in intentional misconduct. The equitable principle justifies tolling because one party "lull[ed] another into a false security, and into a position he would not take only because of such conduct." For estoppel to apply in this context, "the issue is whether the [employer]'s conduct, innocent or not, reasonably induced the [employee] not to file suit within the limitations period." "It is only necessary to show that the person estopped, by his statements or conduct, misled another to his prejudice."

Id. (footnotes omitted). Reviewing the Administrative Record, the ARB found that the Complainant had submitted sufficient evidence to create a genuine issue as to whether equitable estoppel applied in the form of three uncontested affidavits indicating that the Respondent led him to believe that he would be reinstated. The Respondent argued that discussions to resolve the Complainant's grievance could not be used as evidence to toll the filing period. The Board, however, wrote:

If Jenkins were merely invoking the existence of his pending grievance to toll the statute of limitations, we might agree with CSXT. Grievance proceedings are little different from settlement negotiations in this respect, which we distinguished in *Hyman* from the current situation. As we there noted, the Board has held that settlement negotiations alone will not toll the running of the statute of limitations. *Hyman*, ARB No. 09-076, slip op. at 8 (citing *Beckmann v. Alyeska Pipeline Servs. Co.*, ARB No. 97-057, ALJ No. 1995-TSC-016 (ARB Sept. 16, 1997) (settlement negotiations in the absence of any showing that the employer misled or otherwise prevented the employee from filing a complaint held insufficient to toll running of limitations period)). Unlike the situation in *Beckmann*, the showing in this case is to the effect, as in *Hyman*, that one party "lull[ed] another into a false security, and into a position he would not take only because of such conduct." *Humble Oil v. The Fidelity & Casualty Co. of N.Y.*, 402 F.2d 893, 897-98 (4th Cir. 1968). No showing of actual fraud is required. "It is only necessary to show that the person estopped, by his statements or conduct, misled another to his prejudice." *Id.*

USDOL/OALJ Reporter at 9-10. The ARB therefore remanded to the ALJ for further proceedings, noting that equitable modification to toll a statute of limitations is a fact intensive question, rarely appropriate for summary decision. One member of the ARB dissented, stating that he would find that the Complainant had not "presented legally sufficient evidence to support an equitable relief from the statute of limitations." *Id.* at 11.

- *Timeliness and Removal Provision*

U.S. District Court Decisions

TIMELINESS OF COMPLAINT; KICK-OUT PROVISION

Despain v. BNSF Railway Co., No. 15-cv-08294 (D. Ariz. May 13, 2016) (2016 WL 2770144; 2016 U.S. Dist. LEXIS 63455) (case below 2015-FRS-00067) (Order denying motion to dismiss): A district court action under the kick-out provision is essentially a continuation of the pending agency action and therefore governed by the already-satisfied 180-day limitations period, not the separate catch-all four year statute of limitations for federal actions.

III. PROCEDURE BEFORE OALJ

Regulations

29 C.F.R. § 106: Objections to the findings and the preliminary order and requests for a hearing.

(a) Any party who desires review, including judicial review, of the findings and preliminary order, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney fees under NTSSA, must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to §1982.105. The objections, request for a hearing, and/or request for attorney fees must be in writing and state whether the objections are to the findings, the preliminary order, and/or whether there should be an award of attorney fees. The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who

issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

(b) If a timely objection is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement, which will not be automatically stayed. The portion of the preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and preliminary order, regardless of any objections to the order. The respondent may file a motion with the Office of Administrative Law Judges for a stay of the Assistant Secretary's preliminary order of reinstatement, which shall be granted only based on exceptional circumstances. If no timely objection is filed with respect to either the findings and/or the preliminary order, the findings or preliminary order will become the final decision of the Secretary, not subject to judicial review.

29 C.F.R. § 106: Hearings

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A of part 18 of this title.

(b) Upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly assign the case to an ALJ who will notify the parties, by certified mail, of the day, time, and place of hearing. The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted de novo on the record. Administrative Law Judges have broad discretion to limit discovery in order to expedite the hearing.

(c) If both the complainant and the respondent object to the findings and/or order, the objections will be consolidated and a single hearing will be conducted.

(d) Formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious.

29 C.F.R. Part 18 Subpart A

[*Editor's Note:* The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges can be found at 29 C.F.R. §§ 18.10, *et seq.*]

29 C.F.R. § 108: Role of Federal agencies

(a)(1) The complainant and the respondent will be parties in every proceeding and must be served with copies of all documents in the case. At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or as amicus curiae at any time at any stage of the proceeding. This right to participate includes, but is not limited to, the right to petition for review of a decision of an ALJ, including a decision approving or rejecting a settlement agreement between the complainant and the respondent.

(2) Parties must send copies of documents to OSHA and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, only upon request of OSHA, or when OSHA is participating in the proceeding, or when service on OSHA and the Associate Solicitor is otherwise required by these rules.

(b) The Department of Homeland Security or the Department of Transportation, if interested in a proceeding, may participate as amicus curiae at any time in the proceeding, at those agencies' discretion. At the request of the interested federal agency, copies of all documents in a case must be sent to the federal agency, whether or not the agency is participating in the proceeding.

29 C.F.R. § 109: Decision and orders of the administrative law judge

(a) The decision of the ALJ will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (d) of this section, as appropriate. A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.

(b) If the complainant has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

(c) Neither OSHA's determination to dismiss a complaint without completing an investigation pursuant to §1982.104(e) nor OSHA's determination to proceed with an investigation is subject to review by the ALJ, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if the facts and circumstances warrant.

...

(e) The decision will be served upon all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. Any ALJ's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. All other portions of the ALJ's order will be effective 14 days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board (ARB), U.S. Department of Labor. The decision of the ALJ will become the final order of the Secretary unless a petition for review is timely filed with the ARB and the ARB accepts the petition for review.

29 C.F.R. § 115: Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of these rules, or for good cause shown, the ALJ or the ARB on review may, upon application, after three days' notice to all parties, waive any rule or issue such orders that justice or the administration of NTSSA or FRSA requires.

- *Amendment of Complaint*

DOL Administrative Review Board Decisions

AMENDMENTS TO COMPLAINT TO ALLEGE ADDITIONAL PROTECTED ACTIVITY PERMITTED WHERE THE AMENDMENTS RELATED BACK TO THE TIMELY COMPLAINT AND THE RESPONDENT SUFFERED NO PREJUDICE

In *D'Hooge v. BNSF Railways*, ARB Nos. 15-042, -066, ALJ No. 2014-FRS-2 (ARB Apr. 25, 2017), the Complainant amended his FRSA complaint to include two separate categories of protected activities. The ALJ found that the amendments (a report of a neck injury due to cumulative stress, and a report of a rough track) related back to the Complainant's timely complaint of based of his report of rough riding or unsafe locomotives. The ALJ thus considered all of the alleged protected activities. On appeal, the Respondent argued that the ALJ erred in ruling that the amendments to the complaint were timely, but the ARB agreed with the ALJ that the amendments related back to the original complaint arising out of the same fact pattern. *See* 29 C.F.R. § 18.36 (2016); Fed R. Civ. P. 15(c). The ARB also determined that the Respondent suffered no prejudice by the amendment to include additional protected activities.

- *Decision and Order*

DOL Administrative Review Board Decisions

ALJ's DECISION AND ORDER; TIGHTLY FOCUSED SET OF FINDINGS OF FACT IS HELPFUL FOR SUBSTANTIAL EVIDENCE APPELLATE REVIEW; SUMMARY OF THE RECORD IS NOT NECESSARY AS IT IS ASSUMED THAT ALJ CONSIDERED ENTIRE RECORD

In [*Austin v. BNSF Railway Co.*](#), ARB No. 17-024, ALJ No. 2016-FRS-13 (ARB Mar. 11, 2019) (per curium), the ARB noted that an ALJ need not include a summary of the record in the decision and order, as it is assumed that the ALJ reviewed and considered the entire record in making his or her decision. The ARB indicated that what is more helpful for its review of whether the ALJ's findings of fact are supported by substantial evidence of record is a tightly focused set of findings of fact.

PROTECTED ACTIVITY; ALJ FOUND NOT TO HAVE EXCEEDED HIS AUTHORITY IN FINDING PROTECTED ACTIVITY BASED ON LEGAL THEORY NOT ARTICULATED BY COMPLAINANT AS LONG AS IT IS SUPPORTED BY THE RECORD AND WAS ADEQUATELY LITIGATED

In [*Seay v. Norfolk Southern Railway Co.*](#), ARB No. 14-022, 13-034, ALJ No., 2013-FRS-34 (ARB Oct. 27, 2016), the Complainant was one of two employees (the other being his supervisor) in a hi-rail vehicle that drove beyond the applicable track authority (a protocol that ensures that the track section is out of service while it is being inspected). The supervisor was driving. Both employees were disciplined. The Complainant refused to waive an investigatory hearing. After the hearing, but before a determination, the Complainant accepted a waiver (under protest) accepting responsibility for the incident. On appeal, the Respondent contended that the ALJ erred by finding that the Complainant engaged in protected activity. The ARB affirmed the ALJ's finding because the Complainant had provided information about the incident.

The Respondent argued that the ALJ overstepped his authority by finding protected activity on a theory not advanced by the Complainant (presumably that the Complainant provided information about safety issues as opposed to merely refusing to waive his right to a hearing). The ARB rejected this argument, finding that the Complainant had said "numerous times" that his "reported activity included accusing [the supervisor] of violating a safety rule and that his refusal to forego a hearing led him to provide information about safety." The ARB found that this supported the ALJ's ruling that the Complainant engaged in protected activity. The ARB cited *Funke v. Federal Express Corp.*, ARB No. 09-004, ALJ No. 2007-SOX-43 (ARB July 8, 2011).

(“As long as an issue is adequately litigated below and part of the record, we are not necessarily bound by the legal theory of any party in determining” a question of law.”).

- Sanctions / Adverse Inferences

U.S. Circuit Court of Appeals Decisions

ALJ DISCRETION TO IMPOSE ADVERSE INFERENCE FOR FAILURE TO PRODUCE EVIDENCE; ALJ CANNOT BE HELD TO HAVE ABUSED THAT DISCRETION WHERE APPEALING PARTY NEVER ASKED FOR ADVERSE INFERENCE TO BE DRAWN

In *Samson v. USDOL*, No. 17-2862 (7th Cir. May 21, 2018) (2018 U.S. App. LEXIS 13174; 2018 WL 2304223) (unpublished) (case below ARB No. 15-065; ALJ No. 2014-FRS-00091), the 7th Circuit dismissed the complainant’s petition for review of the ARB’s affirmance of the ALJ’s dismissal of his FRSA retaliation complaint. One of the complainant’s arguments on appeal was that the ALJ should have drawn an adverse inference sanctioning the respondent for not providing recordings of certain radio conversations that the complainant believed still existed. The court observed that imposing an adverse inference against a party is left to the discretion of the factfinder, and the ALJ could not have abused that discretion where the complainant had not asked the ALJ to draw an adverse inference.

- Evidentiary Determinations

U.S. Circuit Court of Appeals Decisions

EVIDENTIARY DETERMINATIONS; FIRST CIRCUIT AFFIRMS EXCLUSION OF COMPARATOR EVIDENCE WHERE LACK OF CONTEXT WOULD RENDER IT OF LITTLE PROBATIVE VALUE

Pan Am Railways, Inc. v. USDOL, 855 F.3d 29, No. 16-2271 (1st Cir. Apr. 20, 2017) (2017 U.S. App. LEXIS 7047; 2017 WL 1422369) (case below ARB No. 14-074; ALJ No. 2013-FRS-84)

Complainant in the case reported that a pile of railroad ties were a safety hazard. It was not abated. He later tripped on the pile and injured his ankle. He reported his injury and was taken to the hospital. A manager told him to expect a disciplinary hearing. He had two days off but took three days to recover, missing a day, which meant the railroad had to report the injury. A hearing was then initiated based on the alleged failure to make sure he had secure footing before getting off a train. He was disciplined with a formal reprimand. Complainant then filed an OSHA complaint based on report the hazard and reporting the injury. It was drafted by a lawyer without review of the Complainant and contained a discrepancy with the testimony at the hearing injury as to whether after hurting his ankle he caught himself and say down or fell down. A manager deemed this major and the railroad decided to bring a second set of charges against plaintiff for filing the OSHA complaint containing a different account in one part. Complainant amended his OSHA complaint to include retaliation for bringing the initial OSHA complaint. At the second hearing, which threatened dismissal, Complainant explained that the lawyer had prepared the OSHA complaint and had gotten that one detail wrong. He also explained that no one at the railroad had asked him about the discrepancy before initiating the second round of discipline. The charge was not sustained.

OSHA found for Complainant on the second, but not first, complaint. The railroad sought a hearing. The ALJ found the manager not very credible and found for the Complainant, rejecting the affirmative defense because the comparator evidence did not match the situation. The ALJ awarded \$10K in emotional distress and the maximum amount, \$250K, in punitive damages. The ARB affirmed on the grounds that substantial evidence supported the findings and the punitive damage award was not an abuse of discretion. The railroad appealed to the First Circuit.

The First Circuit affirmed. First, the railroad argued that it had established its affirmative defense. It challenged the exclusion of certain comparator evidence, arguing that it was not hearsay under the business records exception. But they hadn't been excluded because they were hearsay. The ALJ excluded some of the comparator evidence because there weren't any witnesses who could provide context to them and so they didn't have probative value. This was not an abuse of discretion. Moreover, any error was harmless since they would have only shown that there was prior discipline for false statements, which would not make the circumstances similar to those in this case. This was the same deficiency the ALJ assigned to the evidence that did come in, which the First Circuit held was permissibly found insufficient. The railroad also argued based on its not-retaliatory motive in the discrepancy, but the First Circuit held that substantial evidence supported the ALJ's reasons for rejecting that explanation: adverse credibility findings as to the key manager. The First Circuit also flatly rejected the claim that the ALJ had improperly evaluated the evidence regarding the circumstances of the disciplinary hearing.

WEIGHING OF EVIDENCE; THE EIGHTH CIRCUIT FINDS THAT THE BACKGROUND EVIDENCE RULE WAS APPLIED CORRECTLY BY CONSIDERING

ALL RELEVANT ACTIONS THAT OCCURRED OUTSIDE OF THE STATUTE OF LIMITATIONS

In *Mercier v. USDOL*, 850 F.3d 382 (8th Cir. 2017) (case below ARB No. 13-048, ALJ No. 2008-FRS-004), the Eighth Circuit found the ARB's final decision to be supported by substantial evidence and affirmed it, dismissing Michael Mercier's ("Plaintiff") FRSA complaint against Union Pacific Railroad Company ("UP"). Plaintiff alleged that UP terminated him for numerous reports of safety issues, and that UP's stated reason for termination, violation of a waiver agreement, was pretextual. Plaintiff contended that the ALJ failed to consider evidence of conduct that occurred prior to September 29, 2007, "the operative cutoff date" for the 180-day filing period of the FRSA, 49 U.S.C. § 20109(d)(2)(A)(ii). The court found that the ALJ "correctly applied the background evidence rule" because he "consider[ed] all of the relevant actions that occurred prior to, and after, September 2007 in evaluating the case."

HEARSAY; THE EIGHTH CIRCUIT FINDS THAT THE ALJ DID NOT IMPROPERLY RELY ON HEARSAY EVIDENCE; THE CHALLENGED TESTIMONY WAS NOT HEARSAY BECAUSE IT WAS OFFERED FOR ITS EFFECT ON THE DECISIONMAKER AND NOT OFFERED FOR THE TRUTH OF THE MATTER ASSERTED

In *Mercier v. USDOL*, 850 F.3d 382 (8th Cir. 2017) (case below ARB No. 13-048, ALJ No. 2008-FRS-004), the Eighth Circuit found the ARB's final decision to be supported by substantial evidence and affirmed it, dismissing Michael Mercier's ("Plaintiff") FRSA complaint against Union Pacific Railroad Company ("UP"). *Mercier* at 385. Plaintiff alleged that UP terminated him for numerous reports of safety issues, and that UP's stated reason for termination, violation of a waiver agreement, was pretextual. *Id.* at 387. Plaintiff contended that the ALJ improperly relied on hearsay testimony. The testimony at issue detailed conversations between UP employees and between the decisionmaker and a UP employee. *Id.* at 389. Reasoning that the challenged testimony was offered for its effect on the decisionmaker, not for the truth of the matter asserted in it, the court found that the testimony was not hearsay. *Id.* at 389-90.

- *Dismissal for Cause*

**DISMISSAL FOR CAUSE; FAILURE TO RESPONSE TO ALJ'S ORDERS;
DIFFICULTY WITH FAXING AND NEED TO FILE DOCUMENTS IN COURT
PROCEEDING FOUND NOT TO EXCUSE FAILURE**

In [Lee v. Norfolk Southern Railway Co.](#), ARB No. 17-015, ALJ No. 2014-FRS-24 (ARB May 25, 2018), the ARB summarily affirmed the ALJ's order dismissing the Complainant's FRSA complaint where the Complainant failed to respond to an order to show cause why the claim should not be dismissed for failure to respond to an earlier order directing the Complainant to provide a status report on whether he would be proceeding with the FRSA complaint without a representative after the ALJ granted the Complainant's counsel's motion to withdraw from representation. The ARB found that the Complainant's purported problems with faxing responses and need to make filings in a Court of Appeals matter did not excuse the failure to respond to the ALJ's order to show cause. Moreover, the ARB found that the ALJ did not abuse her discretion in not mentioning in the order to show cause that the Complainant had filed a 60 page fax that was a status report on civil litigation in the Federal courts. That fax had not addressed the question of whether the Complainant intended to proceed with the FRSA claim before the ALJ without a representative, and was dated prior to the ALJ issued the order to show cause.

- Summary Decision

U.S. Circuit Court of Appeals Decisions

**SUMMARY JUDGMENT UNDER THE FRSA WHISTLEBLOWER PROVISION;
EVIDENCE OF TEMPORAL PROXIMITY AND DISPARATE TREATMENT FOUND
TO BE SUFFICIENT TO SURVIVE DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT; CONGRESS' INTENT TO BE PROTECTIVE OF PLAINTIFF-
EMPLOYEES**

In [Araujo v. New Jersey Transit Rail Operations, Inc.](#), No. 12-2148, __ F.3d __, 2013 WL 600208 (3rd Cir. Feb. 19, 2013), the Plaintiff filed an action alleging that he had been disciplined by the Defendant in retaliation for his participation in activity protected by Federal Rail Safety Act (FRSA) -- reporting an emotional injury after he witnessed a fatal accident. The district court found that the discipline was not retaliatory and granted summary judgment the Defendant.

First, the district court held that the Plaintiff did not establish a prima facie case of retaliation because the record lacked evidence from which a reasonable factfinder could infer that the protected activity - the report of employee injury - was a contributing factor in the Defendant's decision to discipline the Plaintiff for operational rules he was found by the employer to have violated relating to the fatal accident. The Court of Appeals, however, found that although the

Plaintiff had not offered overwhelming evidence in opposition to the motion for summary judgment he had identified evidence of temporal proximity and adverse disparate treatment, sufficient to withstand summary judgment.

The court observed that "[t]emporal proximity between the employee's engagement in a protected activity and the unfavorable personnel action can be circumstantial evidence that the protected activity was a contributing factor to the adverse employment action. *See Kewley v. Dep't of Health and Human Servs.*, 153 F.3d 1357, 1362 (Fed.Cir.1998) (noting that, under the Whistleblower Protection Act, 'the circumstantial evidence of knowledge of the protected disclosure and a reasonable relationship between the time of the protected disclosure and the time of the personnel action will establish, prima facie, that the disclosure was a contributing factor to the personnel action') (internal quotation omitted)." *Araujo, supra*, slip op. at 19. The court acknowledged that the evidence on the Plaintiff's temporal proximity argument was entirely circumstantial, and that he had not provided any evidence about the Defendant's motive, but ruled that direct evidence of motive is not required.

The Court of Appeals also found that the Defendant's had not carried its "clear and convincing evidence" burden sufficient to be entitled to summary judgment. The Defendant's proffered facts to rebut the temporal proximity and disparate treatment proffered facts were insufficient in view of the steep burden on employers under the AIR-21 burden-shifting framework. Although the Defendant showed that the Plaintiff was in technical violation of written rules, they did not shed any light on whether the Defendant's decision to file disciplinary charges was retaliatory.

The Court of Appeals emphasized that the Complainant had not articulated an overwhelming case of retaliation: for example he had not proffered any evidence that the Defendant dissuaded him from reporting his injury or expressed animus at him for doing so. The Plaintiff's evidence was entirely circumstantial, and the Court expressed no opinion as to the strength of the Plaintiff's evidence. The Court noted, however, that "by amending the FRSA, Congress expressed an intent to be protective of plaintiff-employees." *Araujo, supra*, slip op. at 26. Thus, applying the AIR-21 burden-shifting framework applicable to FRSA whistleblower cases, the Plaintiff had shown enough to survive the Defendant's motion for summary judgment.

DOL Administrative Review Board Decisions

SUMMARY DECISION ON RESPONDENT'S AFFIRMATIVE DEFENSE, WHICH HAS TO BE ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE IS PARTICULARLY CHALLENGING; EVEN WHERE A RESPONDENT ASSERTS A LEGITIMATE, NON-DISCRIMINATORY REASON FOR THE ADVERSE ACTION, SUMMARY DECISION IS DEFEATED WHERE THE COMPLAINANT POINTS TO FACTS OR EVIDENCE THAT COULD DISCREDIT THAT REASON

In *Stallard v. Norfolk Southern Railway Co.*, ARB No. 16-028, ALJ No. 2014-FRS-149 (ARB Sept. 29, 2017), the Complainant reported a back injury at work and received medical care. The

Complainant's personal physician accidentally checked a box in a follow-up examination stating that the injury occurred at home rather than on-duty. A claim agent noticed the discrepancy about where the injury occurred. A company physician was consulted, and after reviewing hospital records, concluded that there was no way of knowing whether the injury occurred at home or at work. In the meantime, the Complainant's personal physician faxed in a correction to state that the injury occurred at work. This correction was not immediately reported through channels, and a charge letter was sent scheduling a hearing to determine whether the Complainant provided false statements to the Respondent. The Complainant's supervisor was provided Facebook photographs indicating that the Complainant apparently had been physically active at a social event, and learned of a rumor that the Complainant had been working at a golf course. The hearing was postponed at the Complainant's request. The personal physician re-sent his correction memo. Upon learning of the correction, the Respondent's officials debated whether to cancel the hearing, but decided to keep it scheduled in the event that the rumors and suspicions about the severity of the Complainant's injury could be confirmed. The hearing was canceled about a month later when the Complainant requested an indefinite postponement due to his medical treatment for the injury. The Complainant ultimately had back surgery and never returned to work. The Complainant filed an FRSA retaliation complaint with OSHA. OSHA dismissed the complaint. The Complainant requested an ALJ hearing. The ALJ granted summary decision in favor of the Respondent finding that the Respondent had established by clear and convincing evidence that the Complainant's report of a work injury was not a contributing factor in the alleged adverse action. The ARB vacated the ALJ's decision and remanded.

The ARB noted that a respondent's burden of proof on this affirmative defense is to prove "by clear and convincing evidence" that it would have taken the adverse action in the absence of the injury. The ARB stated that this is an intentionally high burden because "Congress intended to be protective of plaintiff-employees." Thus, resolving the issue of the Respondent's affirmative defense by summary decision is "challenging." The ARB stated such "a fact-intensive assessment ... requires a determination, on the record as a whole, how clear and convincing [the Respondent]'s lawful reasons were for scheduling and then cancelling a hearing into [the Complainant]'s injury. In analyzing the affirmative defense, it is not enough to confirm the rational basis of [the Respondent]'s employment policies and decisions. Instead, we must assess whether they are so powerful and clear that [the Respondent] would have charged [the Complainant] apart from the protected activity." USDOL/OALJ Reporter at 14.

In the instant case, the Respondent contended that it presented undisputed facts consistent with the factors discussed by the ARB in *DeFrancesco II*, ARB No. 13-057, slip op. at 11-12, for determining whether a respondent has sufficiently demonstrated its affirmative defense in the context of a reported injury. The ARB observed, however, that it has ruled that "even where a respondent asserts legitimate, non-discriminatory reasons as part of its affirmative defense, a complainant can create a genuine issue of fact by pointing to specific facts or evidence that, if believed, could discredit the respondent's reasons, making them less convincing on summary decision." USDOL/OALJ Reporter at 14, quoting *Henderson*, ARB No. 11-013, slip op. at 15. The ARB found that in the instant case there were disputed facts on motivation that prevented summary decision on the affirmative defense. For example, the Complainant provided sufficient evidence to create an issue of fact that the Respondent's conduct surrounding the

charge letter suggested pretext designed to unearth some plausible basis on which to punish the Complainant for the injury report.

SUMMARY DECISION; WEIGHING EVIDENCE ERROR

In *Stallard v. Norfolk Southern Railway Co.*, ARB No. 16-028, ALJ No. 2014-FRS-149 (ARB Sept. 29, 2017), the Complainant reported a back injury at work and received medical care. The Complainant's personal physician accidentally checked a box in a follow-up examination stating that the injury occurred at home rather than on-duty. A claim agent noticed the discrepancy about where the injury occurred. A company physician was consulted, and after reviewing hospital records, concluded that there was no way of knowing whether the injury occurred at home or at work. In the meantime, the Complainant's personal physician faxed in a correction to state that the injury occurred at work. This correction was not immediately reported through channels, and a charge letter was sent scheduling a hearing to determine whether the Complainant provided false statements to the Respondent. The Complainant's supervisor was provided Facebook photographs indicating that the Complainant apparently had been physically active at a social event, and learned of a rumor that the Complainant had been working at a golf course. The hearing was postponed at the Complainant's request. The personal physician re-sent his correction memo. Upon learning of the correction, the Respondent's officials debated whether to cancel the hearing, but decided to keep it scheduled in the event that the rumors and suspicions about the severity of the Complainant's injury could be confirmed. The hearing was canceled about a month later when the Complainant requested an indefinite postponement due to his medical treatment for the injury. The Complainant ultimately had back surgery and never returned to work. The Complainant filed an FRSA retaliation complaint with OSHA. OSHA dismissed the complaint. The Complainant requested an ALJ hearing. The ALJ granted summary decision in favor of the Respondent finding no genuine issue of material fact regarding whether the Complainant suffered an adverse action. The ARB vacated the ALJ's decision and remanded.

Factual disputes precluded summary decision

Initially, the ARB noted that that the ALJ had apparently weighed evidence and made factual inferences inconsistent with the summary decision phase, during which the question was not whether an adverse action occurred, but only whether, given the evidence presented, there was a reasonable question whether an adverse action occurred.

The ARB noted that the Complainant's allegation was that the Respondent's scheduling of a disciplinary investigation constituted deliberate retaliation, intimidation and harassment for reporting an on-duty injury. The Complainant alleged that the charge affected his personnel record, and that he suffered anxiety and emotional distress because of the scheduled hearing and the implicit threat of termination. The Respondent countered that the Complainant suffered no consequences and that nothing was placed on his permanent record. There was a dispute as to whether the internal hearing was routine or a pretext for retaliation. The ARB found that

viewing the evidence in the light most favorable to the Complainant, a reasonable person could find the charge letter to be materially adverse.

- Witnesses

DOL Administrative Review Board Decisions

VIOLATION OF ALJ'S SEQUESTRATION OF WITNESSES ORDER; ALJ HAS DISCRETION ON EVIDENTIARY RULINGS AND DID NOT ABUSE HIS DISCRETION IN CREDITING TESTIMONY OF WITNESS OVER WHICH THE WITNESS HAD PERSONAL KNOWLEDGE

In [Rathburn v. The Belt Railway Co. of Chicago](#), ARB No. 16-036, ALJ No. 2014-FRS-35 (ARB Dec. 8, 2017), the Complainant filed a complaint alleging that the Respondent retaliated against him in violation of the FRSA whistleblower provision for reporting an injury and seeking medical treatment for the injury. The Complainant had sustained the injury during an altercation with a co-worker. On appeal, the Complainant argued that the ALJ erred in relying on testimony presented by the Respondent's Director of Human Resources and General Counsel ("HR Director"), because the witness had evidently violated the ALJ's order granting the Complainant's motion to exclude all witnesses from the hearing room during the testimony of other witnesses. Specifically, the Complainant had called three witnesses about a previous altercation. The next day at the hearing, the Complainant called the HR Director and asked whether he had heard about the previous altercation, to which the HR Director responded that the first time he heard about it was yesterday. The Complainant argued before the ARB that the ALJ should have not given weight to the HR Director's testimony and that the violation of the ALJ sequestration order cast doubt as to other testimony. The ARB noted that the Federal Rules of Evidence do not apply to FRSA hearings, found that 29 C.F.R. § 18.615 (sequestration request) does apply, and that pursuant to 29 C.F.R. § 18.602 a witness may only testify about matters on which the witness has personal knowledge. The ARB then stated that "[e]videntiary rulings are within the ALJ's discretion and [the Complainant] has not shown how he was harmed or prejudiced as a result of [the HR Director's] testimony or that the ALJ abused his discretion." The ARB found that the ALJ had only credited testimony from the HR Director about which the witness had personal knowledge.

- Remands from ARB

ALJ WAS WITHIN HIS DISCRETION IN NOT ISSUING BRIEFING ORDER ON REMAND WHERE RESPONDENT HAD OVER EIGHT MONTHS TO REQUEST OPPORTUNITY TO SUBMIT ADDITIONAL EVIDENCE OR ARGUMENT

In [*Rudolph v. National Railroad Passenger Corp. \(AMTRAK\)*](#), ARB Nos. 14-053, -056, ALJ No. 2009-FRS-15 (ARB Apr. 5, 2016), the ARB affirmed the ALJ’s decision and order on remand finding that the Respondent violated the employee protection provision of the Federal Railroad Safety Act, when it determined that the Complainant was medically disqualified from working as a conductor. On appeal, the Respondent argued that the ALJ denied it an opportunity to be heard on remand because the ALJ failed to issue a briefing order, thus depriving the Respondent of its right to submit additional evidence and argument to supplement the record. The ARB was not persuaded:

The ALJ regulation governing re-opening of the record [at 29 C.F.R. § 18.54(c)] states: “When there is a hearing, the record shall be closed at the conclusion of the hearing *unless the administrative law judge directs otherwise.*” This section affords the ALJ discretion to reopen the record on remand. For eight months Amtrak never filed a motion to submit additional evidence on its fitness-for-duty standards or to offer argument on the issue of contributory causation. The ALJ obviously found no need to issue a scheduling order. His decision was well within his discretion.

USDOL/OALJ Reporter at 18 (footnote omitted) (emphasis as in original).

[Editor’s note: The ALJ procedural regulation at 29 C.F.R. § 18.54(c) was in effect at the time of the ALJ hearing in *Rudolph*. The ALJ procedural regulations have since been revised, and the current rule on reopening a record is found at 29 C.F.R. § 18.90(b) (2015).]

IV. PROCEDURE BEFORE ARB

Regulations

29 C.F.R. § 110: Decision and orders of the Administrative Review Board

...

(a) Any party desiring to seek review, including judicial review, of a decision of the ALJ, or a respondent alleging that the complaint under NTSSA was frivolous or brought in bad faith who seeks an award of attorney fees, must file a written petition for review with the ARB, which has been delegated the authority to act for the Secretary and issue final decisions under this part. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. A petition must be filed within 14 days of the date of the decision of the ALJ. The date of the postmark, facsimile transmittal, or electronic communication transmittal will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the ARB. Copies of the petition for review must be served on the Assistant Secretary, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the ALJ will become the final order of the Secretary unless the ARB, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the ALJ will be inoperative unless and until the ARB issues an order adopting the decision, except that any order of reinstatement will be effective while review is conducted by the ARB, unless the ARB grants a motion by the respondent to stay that order based on exceptional circumstances. The ARB will specify the terms under which any briefs are to be filed. The ARB will review the factual determinations of the ALJ under the substantial evidence standard. If no timely petition for review is filed, or the ARB denies review, the decision of the ALJ will become the final order of the Secretary. If no timely petition for review is filed, the resulting final order is not subject to judicial review.

(c) The final decision of the ARB will be issued within 120 days of the conclusion of the hearing, which will be deemed to be 14 days after the date of the decision of the ALJ, unless a motion for reconsideration has been filed with the ALJ in the interim. In such case, the conclusion of the hearing is the date the motion for reconsideration is denied or 14 days after a new decision is issued. The ARB's final decision will be served upon all parties and the Chief Administrative Law Judge by mail. The final decision also will be served on the Assistant Secretary, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, even if the Assistant Secretary is not a party.

29 C.F.R. § 115: Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of these rules, or for good cause shown, the ALJ or the ARB on review may, upon application, after three-days' notice to

all parties, waive any rule or issue such orders that justice or the administration of NTSSA or FRSA requires.

- Briefing

DOL Administrative Review Board Decisions

BRIEFING; FAILURE TO FILE OPENING APPELLATE BRIEF

Gardner v. Union Pacific Railroad Co., ARB No. 17-025, ALJ No. 2016-FRS-71 (ARB May 24, 2017): Appeal dismissed because the Complainant did not respond to the ARB's order to show cause why the appeal should not be dismissed for failure to file an opening appellate brief. The ARB noted that because of the Complainant's pro se status, it had reviewed his petition for review to determine whether the Respondent should be required to respond. The ARB determined, however, that the Complainant's petition did not specify any facts as found by the ALJ that the Complainant believed were not supported by substantial evidence, and did not state that the ALJ had erred in applying the applicable law to the facts of the case. The ARB thus found no reason to require the Respondent to respond.

BRIEFING; UNTIMELINESS: UNTIMELY BRIEF NONRESPONSIVE TO ARB'S SHOW CAUSE ORDER RESULTS IN DISMISSAL OF CASE BEFORE ARB

In [*Phillips v. Norfolk Southern Railway Co.*](#), ARB No. 15-059, ALJ No. 2014-FRS-133 (ARB Aug. 11, 2015), the ARB issued a dismissal after Complainant failed to timely file opening brief and, then, in response to ARB's Show Cause Order, filed a brief responding to the merits of the case and not the Order to Show Cause.

- Withdrawal of Petition for Review

DOL Administrative Review Board Decisions

WITHDRAWAL OF PETITION FOR REVIEW; ARB GRANTS WITHDRAWAL OF PETITION FOR REVIEW BASED ON ELECTION OF REMEDIES PROVISION WHERE SETTLEMENT WAS REACHED IN STATE ACTION

In *Boucher v. BNSF Railway Co.*, ARB No. 2016-0085, ALJ No. 2014-FRS-00072 (ARB Mar. 22, 2019) (per curiam), the Complainant filed a FRSA complaint and a Montana state court action. The DOL ALJ granted the Respondent’s motion for summary decision on the ground that the Complainant could not seek relief for his discharge under both the FRSA and the Montana law. The ALJ also noted that it would be improper for Complainant to receive duplicate remedies for the Respondent’s same alleged unlawful act. The Complainant appealed to the ARB, but later filed a motion to withdraw the petition for review based on a settlement of the Montana suit. The ARB directed the parties to submit a copy of the settlement agreement because the FRSA regulations require ARB approval where a withdrawal is based on a settlement agreement.

The Respondent filed a redacted copy of the settlement agreement. The ARB denied the motion to withdraw, stating that it would not approve a redacted settlement agreement because the amount of money or other consideration provided in the settlement was a matter of public concern. The ARB directed submission of an unredacted copy of the settlement within 30 days. The ARB stated that if such was not timely submitted, it would consider the case on its merits. In response, the Complainant conceded that the Respondent was entitled to summary decision because he had now elected his remedy—i.e., the settlement in the Montana action.

The ARB noted that the FRSA “election of remedies” provision at 49 U.S.C. § 20109(f) prohibits a complainant from bringing separate claims under two different provisions of law for the same allegedly unlawful act. The ARB wrote:

Montana law provides a cause of action to railway workers who suffer adverse actions because of a railroad’s mismanagement, negligence, or wrongdoing. It is “another provision of law” and it provides “protection” because it provides a remedy for wrongful discharge. Because Complainant has elected to seek protection under “another provision of law” in addition to the FRSA, the “election of remedies” provision of the Act renders withdrawal and dismissal of the instant action appropriate.

Slip op. at 4 (footnote omitted). Accordingly, the ARB granted the Complainant’s motion to withdraw his petition for review, and dismissed the complaint.

WITHDRAWAL OF PETITION FOR REVIEW; ALJ’S DECISION BECOMES SECRETARY’S FINAL ORDER

Meyer v. BNSF Railway Co., ARB No. 17-030, ALJ No. 2015-FRS-24 (ARB Apr. 6, 2017): Appeal dismissed based on Respondent's withdrawal of its petition for review. The ALJ's decision thereby became the Secretary of Labor's final order in the case.

WITHDRAWAL OF PETITION FOR REVIEW; ALJ'S DECISION BECOMES SECRETARY'S FINAL ORDER

Williams v. Union Pacific Railroad Co., ARB No. 16-058, ALJ No. 2014-FRS-153 (ARB May 23, 2016): The ARB granted the Complainant's withdrawal of her petition for review, with the result that the ALJ's Order Granting Respondent's Motion for Summary Decision and Order Cancelling Hearing issued on April 8, 2016 became the Secretary of Labor's final order in the case.

- *Removal to Federal Court*

DOL Administrative Review Board Decisions

ARB DISMISSES COMPLAINT AFTER NOTICE FILED WITH ARB OF INTENT TO FILE ACTION IN DISTRICT COURT

Henin v. Soo Line Railroad Co., ARB No. 2019-0028, ALJ No. 2017-FRS-00011 (ARB Mar. 22, 2019) (per curiam) (Order Granting Reconsideration, Reinstating Complainant's Appeal As Timely and Dismissing Complaint): The Respondent filed a motion to dismiss the Complainant's petition for ARB review as untimely. The Complainant later filed a notice of intent to file an action in district court, and that same day, the ARB granted the Respondent's motion to dismiss the petition as untimely. The Complainant filed a motion to reconsider the grounds for the dismissal because he had not received the ALJ's decision and order until 11 days after the ALJ issued the decision. The ARB also received a copy of a filing of a complaint in the U.S. District Court for the District of Minnesota. Upon review of the administrative file, the ARB found, inexplicably, evidence of two different dates for issuance of the ALJ's decision. A certified mail receipt supported the date of receipt claimed by the Complainant. Applying FRAP 26(c), the ARB reconsidered, reinstated the appeal as timely filed, and then dismissed the administrative complaint because the Complainant had filed an action in U.S. district court.

ARB DISMISSES COMPLAINT AFTER NOTICE FILED WITH ARB OF INTENT TO FILE ACTION IN DISTRICT COURT

Johnson v. Grand Trunk Western Railroad Co., ARB No. 2019-0003, ALJ NO. 2018-FRS-10 (ARB Jan. 31, 2019) (Order Dismissing Complaint): The ARB dismissed the Complainant's administrative complaint because the Complainant filed a notice of his filing an action in the United States District Court for Eastern District of Michigan as authorized by 49 U.S.C.A. § 20109(d)(3).

DISMISSAL OF APPEAL ON REMOVAL

Sirois v. Long Island Railroad Co., ARB No. 2018-043, ALJ No. 2017-FRS-78 (ARB June 26, 2018): The ARB dismissed a FRSA case pending before it upon the Complainant's filing of a notice of the filing of action in U.S. district court.

FILING OF FRSA COMPLAINT IN U.S. DISTRICT COURT ENDS DOL JURISDICTION; ARB DISMISSES PENDING APPEAL UPON LEARNING OF DISTRICT COURT ACTION

On August 23, 2017, the Complainant in *Guerra v. Consolidated Rail Corp. (Conrail)*, ARB No. 2017-069, ALJ No. 2017-FRS-47 (ARB June 29, 2018), petitioned the ARB for review of the ALJ's order dismissing his FRSA retaliation complaint. In its June 29, 2018, Order Dismissing Appeal, the ARB noted that in *Guerra v. Consolidated Rail Corp.*, No.: 2:17-cv-6497, 2018 WL 2947857 (D. N.J. June 13, 2018), the district court granted Conrail's motion to dismiss the Guerra's whistleblower complaint on the grounds that he failed to timely file it with OSHA. The ARB found that because the Complainant chose to proceed in district court pursuant to 49 U.S.C.A. § 20109(d)(3), the Department of Labor no longer has jurisdiction over the case. The ARB noted that it had no record of receiving notice of the filing of the district court complaint as required by 29 C.F.R. § 1982.114(c).

- *Self-Represented Litigants*

DOL Administrative Review Board Decisions

SELF-REPRESENTED LITIGANTS; FAILURE TO FILE OPENING APPELLATE BRIEF; ARB REVIEW OF PETITION OF REVIEW

Gardner v. Union Pacific Railroad Co., ARB No. 17-025, ALJ No. 2016-FRS-71 (ARB May 24, 2017): Appeal dismissed because the Complainant did not respond to the ARB's order to show cause why the appeal should not be dismissed for failure to file an opening appellate brief. The ARB noted that because of the Complainant's pro se status, it had reviewed his petition for review to determine whether the Respondent should be required to respond. The ARB determined, however, that the Complainant's petition did not specify any facts as found by the ALJ that the Complainant believed were not supported by substantial evidence, and did not state that the ALJ had erred in applying the applicable law to the facts of the case. The ARB thus found no reason to require the Respondent to respond.

- Reconsideration

DOL Administrative Review Board Decisions

MOTION FOR RECONSIDERATION OF DECISION FINDING THAT APPEAL WAS UNTIMELY DENIED WHERE GROUND PRESENTED HAD BEEN CONSIDERED BY THE ARB IN ITS DECISION

In [*Bohanon v. Grand Trunk Western Railroad Co.*](#), ARB No. 16-048, ALJ No. 2014-FRS-3 (ARB May 18, 2016), the Respondent filed a motion for reconsideration of the ARB's Final Decision and Order Denying Motion to File Petition for Review, After Time for the Filing Has Expired. The Respondent relied on the parties' desire to settle the case as the ground for reconsideration. This factor, however, had already been considered by the ARB in its decision, in which it had found that the parties' motion for approval of a settlement was not an exceptional circumstance warranting tolling of the limitations period for requesting ARB review.

- Standard and Scope of Review
 - ALJ Findings of Fact

U.S. Circuit Court of Appeals Decisions

APPELLATE REVIEW; EIGHTH CIRCUIT VACATES ARB DECISION ON GROUNDS THAT IT ALTERED ALJ'S LEGAL REASONING BUT IMPROPERLY FILLED-IN FACTUAL FINDINGS TO REACH SAME CONCLUSION

BNSF Ry. Co. v. United States DOL Admin. Review Bd. [Carter], 867 F.3d 942, No. 16-3093, 2017 U.S. App. LEXIS 15020, 2017 WL 3469224 (8th Cir. 2017) (case below ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82).

The Complainant started working for BNSF in 2005. He injured his shoulder in 2007 and immediately reported it. He later filed a Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, action based on that injury. During discovery in that case, BNSF deposed him. During trial preparation in 2012, a manager reviewed the deposition and noticed inconsistencies between information given in the deposition and that provided on the original employment application back in 2005. This led to a disciplinary investigation. A second investigation was launched regarding potential false statement in 2012 about getting to work on time. Both investigations produced findings that the Complainant had been dishonest, which under BNSF's policy can result in a standalone dismissal. So they dismissed him twice in April 2012. Complainant filed a complaint under the whistleblower protection provisions of the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109, alleging that he was retaliated against for reporting his 2007 injury. An Administrative Law Judge ("ALJ") found for Complainant and awarded \$50,000 in punitive damages as well as reinstatement and various other remedies. 867 F.3d at 944-45. The Administrative Review Board ("ARB") affirmed. *See Carter v. BNSF Ry. Co.*, ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82 (ARB June 21, 2016).

The ALJ's decision was based on a chain-of-events finding such that even if the employer was not motivated by and gave no significance to an event, if it is a necessary link in a chain, that establishes contribution. The Eighth Circuit held this was error. But the ARB hadn't adopted the chain-of-events basis for the decision. Instead, it had affirmed by noting evidence of a change in attitude, deficient explanations for the adverse action, and circumstantial evidence of retaliatory motive. The Eighth Circuit allowed that if such findings were sound, then the decision could be affirmed. But it determined that the findings either weren't in the record or were insufficient. On the change in attitude, the ALJ had not made credibility findings that would sustain the conclusion that the supervisors were targeting the Complainant. Further, no finding was made as to whether the change in attitude related to the injury report or the FELA litigation. The panel implied that retaliation for the FELA litigation would not be a violation of the FRSA (though given the rest of the opinion, they appear to leave this as an open issue for the ARB to decide in the first instance).

Turning to the "other circumstantial evidence," the reasoning was based on a finding that the FELA litigation involved the injury and so kept the protected injury report fresh in the minds of the decision-makers. The Eighth Circuit found this finding legally deficient in that it was based on a misreading and incorrect extension of a prior ARB case (*LeDure v. BNSF Ry.*, ARB No. 13-044, ALJ No. 2012-FRS-00020 (ARB June 2, 2015)) that had held that reporting an injury during a FELA case was protected by the FRSA—not that the FELA litigation itself was protected or was sufficient to keep the protected activity "current." By doing so, the ARB had "decided without discussion a significant issue" that hadn't been alleged and hadn't been considered by any of the

circuit courts. The lack of explanation for such an expansion frustrated judicial review and so had to be vacated. *Id.* at 948. In sum, “[t]he ARB was unable to salvage an ALJ analysis built upon a flawed theory of causation because the ARB lacked critical fact findings needed to affirm the ALJ’s decision when applying the appropriate legal standard. To the extent the ARB filled in the missing findings, it exceeded its scope of review.” The complaint was thus remanded. *Id.*

DOL Administrative Review Board Decisions

CONTRIBUTING FACTOR CAUSATION; STANDARD OF REVIEW IS WHETHER SUBSTANTIAL EVIDENCE SUPPORTS ALJ’S FINDINGS OF FACT, NOT WHETHER SUBSTANTIAL EVIDENCE SUPPORTS A DIFFERENT VIEW OF THE CASE; ARB AFFIRMED ALJ’S FINDING THAT SUPERVISOR HAD GENUINE GOOD FAITH BELIEF THAT COMPLAINANT VIOLATED WORK RULE AGAINST THEFT AND COMPLAINANT’S HONEST BELIEF THAT SHE HAD NOT COMMITTED THEFT DID NOT CHANGE THE SUPERVISOR’S BELIEF; ARB ALSO NOTED THAT THE ALJ HAD FOUND NO EVIDENCE OF PRETEXT, AND THAT COMPLAINANT’S TESTIMONY LACKED MUCH PROBATIVE VALUE

In *Austin v. BNSF Railway Co.*, ARB No. 17-024, ALJ No. 2016-FRS-13 (ARB Mar. 11, 2019) (per curiam), the ARB affirmed the ALJ’s dismissal of the Complainant’s FRSA retaliation complaint on the ground that the Complainant failed to demonstrate that any protected activity was a contributing factor in Respondent’s decision to terminate her employment. The Complainant had slipped and fell and injured her tailbone. She reported the hazard, the fall and the injury to the Respondent’s chief dispatcher. The Complainant declined transport to the hospital by ambulance, and instead informed the Respondent that she would seek medical care on her own. She went to an urgent medical care facility across the street from the workplace, and upon advice from the medical providers, stayed out of work for two days. Supervisors were notified within 24 hours of the fall and injury. Later, a co-worker reported a theft of personal property, and surveillance video showed the Complainant removing medication from the co-worker’s desk area. After learning that it was the Complainant who had taken the medicine, the co-worker indicated that she had given the Complainant permission to use her Advil or Aleve and did not want to pursue the matter. The Advil bottle, however, had included prescription medications, and the video appeared to show that the Complainant took the bottle surreptitiously. After an internal investigation/hearing, the Respondent concluded that the Complainant had taken the medication without consent and had violated the Respondent’s rule against dishonesty and theft. The Respondent then terminated the Complainant’s employment.

On appeal the Complainant did not argue that the ALJ’s decision was not supported by substantial evidence, but rather that substantial evidence supported a finding that the Complainant was treated differently than other employees, and therefore the Respondent must have been discriminating against the Complainant for reporting an injury at work, medical

treatment and a work hazard. The ARB found that the argument misconstrued its standard of review. The ARB stated: “The ARB reviews an ALJ’s decision on the merits to determine whether substantial evidence in the record supports any factual findings. Even if there is also substantial evidence for the other party and even if we as the trier of fact might have made a different choice, the standard of review is unchanged.” Slip op at 8 (citation omitted).

The ARB noted that the ALJ had largely relied on a supervisor’s credible testimony to find that the supervisor had a good faith belief that the Complainant had taken the co-worker’s property without consent and had genuinely believed that she violated the Respondent’s rule against dishonesty or theft. The ARB found this belief supported by the video evidence and the Complainant’s own testimony. The ARB found that the ALJ correctly determined that even if the Complainant sincerely believed that she was not stealing, it would not change the effect of the supervisor’s belief that there had been a theft when making the determination to fire the Complainant. The ARB noted that the ALJ had found no pretext in the Respondent’s reasons for making its decision to fire the Complainant. The ARB afforded deference to the ALJ’s findings that the Complainant’s testimony was, at times, evasive, contradictory, inconsistent and unpersuasive.

- ALJ Credibility Findings

DOL Administrative Review Board Decisions

STANDARD OF REVIEW; ARB WILL GIVE DEFERENCE TO ALJ CREDIBILITY FINDINGS UNLESS THEY ARE INHERENTLY INCREDIBLY OR PATENTLY UNREASONABLE

Hunter v. CSX Transportation, Inc., ARB Nos. 2018-0044, and -0045, ALJ No. 2017-FRS-00007 (ARB Apr. 25, 2019) (per curiam) (Final Decision and Order): FRSA case in which the ALJ found that Complainant had engaged in protected activity but not that the protected activity was a contributing factor in the decision to terminate him. The ALJ also found that the Respondent had established by clear and convincing evidence that it would have taken the same action absent the protected activity. Complainant appealed both causal findings. Respondent appealed the finding that Complainant engaged in protected activity.

Complainant reported that a wheel slip alarm was sounding. Respondent argued that this wasn’t an actual hazardous safety condition and so couldn’t be a report of such, or a good faith report of such. The ARB summarily rejected this, stating that they were the same arguments fully considered and properly rejected by the ALJ. Complainant’s arguments turned on claims that certain testimony was credible, certain evidence was significant, and Respondent’s explanations were “bunk.” But ALJs receive deference in their credibility assessments unless they are inherently incredible or patently unreasonable. They were not in this case, so they received

deference and the findings were affirmed. The ARB thus affirmed the ALJ's decision in full and “adopt it as our own and attach it.”

- ALJ Evidentiary Rulings

DOL Administrative Review Board Decisions

VIOLATION OF ALJ’S SEQUESTRATION OF WITNESSES ORDER; ALJ HAS DISCRETION ON EVIDENTIARY RULINGS AND DID NOT ABUSE HIS DISCRETION IN CREDITING TESTIMONY OF WITNESS OVER WHICH THE WITNESS HAD PERSONAL KNOWLEDGE

In [Rathburn v. The Belt Railway Co. of Chicago](#), ARB No. 16-036, ALJ No. 2014-FRS-35 (ARB Dec. 8, 2017), the Complainant filed a complaint alleging that the Respondent retaliated against him in violation of the FRSA whistleblower provision for reporting an injury and seeking medical treatment for the injury. The Complainant had sustained the injury during an altercation with a co-worker. On appeal, the Complainant argued that the ALJ erred in relying on testimony presented by the Respondent’s Director of Human Resources and General Counsel (“HR Director”), because the witness had evidently violated the ALJ’s order granting the Complainant’s motion to exclude all witnesses from the hearing room during the testimony of other witnesses. Specifically, the Complainant had called three witnesses about a previous altercation. The next day at the hearing, the Complainant called the HR Director and asked whether he had heard about the previous altercation, to which the HR Director responded that the first time he heard about it was yesterday. The Complainant argued before the ARB that the ALJ should have not given weight to the HR Director’s testimony and that the violation of the ALJ sequestration order cast doubt as to other testimony. The ARB noted that the Federal Rules of Evidence do not apply to FRSA hearings, found that 29 C.F.R. § 18.615 (sequestration request) does apply, and that pursuant to 29 C.F.R. § 18.602 a witness may only testify about matters on which the witness has personal knowledge. The ARB then stated that “[e]videntiary rulings are within the ALJ’s discretion and [the Complainant] has not shown how he was harmed or prejudiced as a result of [the HR Director’s] testimony or that the ALJ abused his discretion.” The ARB found that the ALJ had only credited testimony from the HR Director about which the witness had personal knowledge.

HARMLESS ERROR; WHERE ALJ PLACED LITTLE OR NO WEIGHT ON EVIDENCE THAT WAS OMITTED OVER RESPONDENT'S OBJECTION, ANY ERROR IN ADMISSION OF THAT EVIDENCE WAS HARMLESS

In *Griebel v. Union Pacific Railroad Co.*, ARB No. 13-038, ALJ No. 2011-FRS-11 (ARB Mar. 18, 2014), the Respondent argued that the ALJ's admission of a Complainant's exhibit consisting of a compilation of FRSA complaints filed against the company, was error and prejudicial. The ARB found no reversible error, as the ALJ expressly stated that he did not rely on the evidence for purposes of determining whether the company's actions violated the Act. As to punitive damages the ALJ stated that he did not place any "real weight" on the number of past FRSA complaints filed against the Respondent without knowing more about the details and outcomes of the complaints, and stated that the award of punitive relief arose "from its own facts and circumstances." The ARB stated: "Since the ALJ made clear that little to no weight was placed on the evidence, any error by the ALJ was harmless. See *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 765 (9th Cir. 1986) (agency may rely on harmless error rule when its mistake does not affect the result)."

- Punitive Damage Awards

DOL Administrative Review Board Decisions

ABUSE OF DISCRETION STANDARD OF REVIEW ON AMOUNT OF PUNITIVE DAMAGES AWARD

The ARB employs an abuse of discretion standard for review on the amount of a punitive damages award in an FRSA case. *Raye v. Pan Am Railways, Inc.*, ARB No. 14-074, ALJ No. 2013-FRS-84 (ARB Sept. 8, 2016), slip op. at 2 and n.5. The ARB, however, noted that the standard of review is different for constitutional challenges. *Id.* at n.37.

- Dismissal for Cause Review

DOL Administrative Review Board Decisions

**DISMISSAL FOR CAUSE; FAILURE TO RESPONSE TO ALJ'S ORDERS;
DIFFICULTY WITH FAXING AND NEED TO FILE DOCUMENTS IN COURT
PROCEEDING FOUND NOT TO EXCUSE FAILURE**

In [Lee v. Norfolk Southern Railway Co.](#), ARB No. 17-015, ALJ No. 2014-FRS-24 (ARB May 25, 2018), the ARB summarily affirmed the ALJ's order dismissing the Complainant's FRSA complaint where the Complainant failed to respond to an order to show cause why the claim should not be dismissed for failure to respond to an earlier order directing the Complainant to provide a status report on whether he would be proceeding with the FRSA complaint without a representative after the ALJ granted the Complainant's counsel motion to withdraw from representation. The ARB found that the Complainant's purported problems with faxing responses and need to make filings in a Court of Appeals matter did not excuse the failure to respond to the ALJ's order to show cause. Moreover, the ARB found that the ALJ did not abuse her discretion in not mentioning in the order to show cause that the Complainant had filed a 60 page fax that was a status report on civil litigation in the Federal courts. That fax had not addressed the question of whether the Complainant intended to proceed with the FRSA claim before the ALJ without a representative, and was dated prior to the ALJ issued the order to show cause.

- *Timeliness of Petition for Review*

U.S. Circuit Court of Appeals Decisions

**EQUITABLE TOLLING OF PERIOD FOR PETITIONING FOR ARB REVIEW; ARB
DID NOT ABUSE ITS DISCRETION IN FINDING THAT "GARDEN VARIETY"
NEGLECT BY COMPLAINANT'S ATTORNEYS DID NOT CONSTITUTE
EXTRAORDINARY CIRCUMSTANCES THAT PREVENTED A TIMELY FILING OF
THE PETITION**

In [Sparre v. United States DOL](#), Nos. 18-1105, 18-2348 (7th Cir. May 10, 2019) (2019 U.S. App. LEXIS 14017) (Opinion) (case below ARB No. 18-022, ALJ No. 2016-FRS-00038), the ALJ had granted summary decision in favor of the Respondent. The ALJ's decision included complete instructions for filing a petition for review and a statement of the 14 day limitations period. The Complainant did not file an appeal with the ARB, but rather—30 days after the ALJ's decision—appealed directly to the 7th Circuit. DOL filed a motion to dismiss for failure to timely exhaust administrative remedies. The 7th Circuit declined to take the case, and remanded to the ARB for the limited purpose of ruling on the petition for review. The ARB ruled that the petition was not timely under 29 C.F.R. § 1982.110(a) (14 days to file for ARB review), that the Complainant was not entitled to equitable tolling, that the ALJ's decision was affirmed, and that

the ARB appeal was dismissed. The Complainant then filed an appeal of the ARB's decision. The 7th Circuit found that the ARB's decision finding the ARB petition to be untimely was not arbitrary or capricious. The court also found that the ARB's decision finding an absence of grounds for equitable tolling was sound and supported, and not an abuse of discretion. The ARB had reviewed the Complainant's "smorgasbord of arguments" to support a finding that he was prevented in some extraordinary way from filing his petition timely, and found that the arguments only showed "garden variety" neglect on the part of the Complainant's attorneys. Because the court affirmed the ARB's dismissal of an untimely petition for ARB review, it also denied for lack of jurisdiction the Complainant's petition for review of the ALJ's grant of summary decision.

DOL Administrative Review Board Decisions

TIMELINESS OF PETITION FOR REVIEW; RECONSIDERATION GRANTED WHEN UNCERTAINTY EXISTED AS TO WHEN THE ALJ DECISION WAS ISSUED

Henin v. Soo Line Railroad Co., ARB No. 2019-0028, ALJ No. 2017-FRS-00011 (ARB Mar. 22, 2019) (per curiam) (Order Granting Reconsideration, Reinstating Complainant's Appeal As Timely and Dismissing Complaint): The Respondent filed a motion to dismiss the Complainant's petition for ARB review as untimely. The Complainant later filed a notice of intent to file an action in district court, and that same day, the ARB granted the Respondent's motion to dismiss the petition as untimely. The Complainant filed a motion to reconsider the grounds for the dismissal because he had not received the ALJ's decision and order until 11 days after the ALJ issued the decision. The ARB also received a copy of a filing of a complaint in the U.S. District Court for the District of Minnesota. Upon review of the administrative file, the ARB found, inexplicably, evidence of two different dates for issuance of the ALJ's decision. A certified mail receipt supported the date of receipt claimed by the Complainant. Applying FRAP 26(c), the ARB reconsidered, reinstated the appeal as timely filed, and then dismissed the administrative complaint because the Complainant had filed an action in U.S. district court.

TIMELINESS OF PETITION FOR REVIEW; ARB USES FRAP 26(a)(1) TO CALCULATE TIME PERIOD

In *Henin v. Soo Line Railroad Co.*, ARB No. 19-028, ALJ No. 2017-FRS-11 (ARB Feb. 26, 2019) (per curiam), the ARB granted the Respondent's motion to dismiss the Complainant's petition for ARB review as untimely. The petition had not been filed within 14 days of ALJ's decision as required by 29 C.F.R. § 1982.110(a). The ARB, citing *OFCCP v. Fla. Hosp. of Orlando*, ARB No. 11-011, ALJ No. 2009-0FC-002, slip op. at 4 (ARB July 22, 2013) and the

absence of its own rule, used FRAP 26(a)(1) to calculate the time period for filing a petition for the ARB to review an ALJ's FRSA decision, and found that the petition was three days late. The Complainant had not responded to the Respondent's motion to dismiss. Pursuant to 29 C.F.R. § 1982.110(b), the ALJ's decision became the final order of the Secretary.

UNTIMELY PETITION FOR ARB REVIEW; WHETHER A PARTY IS REQUIRED TO FILE A TIMELY PETITION FOR ARB REVIEW TO OBTAIN COURT OF APPEALS REVIEW IS NOT RELEVANT AND IS CONTRARY TO DOL REGULATORY AUTHORITY; GARDEN VARIETY EXCUSABLE NEGLIGENCE OF ATTORNEY IS NOT SUFFICIENT TO ESTABLISH EQUITABLE TOLLING; REASONABLE DILIGENCE MAY REQUIRE FILING OF MOTION FOR ENLARGEMENT OF TIME TO FILE PETITION

In [*Sparre v. Norfolk Southern Railway Co.*](#), ARB No. 18-022, ALJ No. 2016-FRS-38 (ARB May 31, 2018), the Complainant's petition for review of the ALJ's order granting the Respondent's motion for summary decision was untimely. The Respondent moved for dismissal of the petition.

Contention of right to direct appeal to the courts

The Complainant first argued in response to the motion to dismiss that a party is not required to file a timely petition for review with the ARB to obtain review in the court of appeals. The ARB found that this argument was irrelevant as to whether to toll the limitations period for ARB review. It was also contrary to the regulation at 29 C.F.R. § 1982.110(a), which provides that "[a]ny party desiring to seek review, including judicial review, of a decision of the ALJ, ... must file a written petition for review with the ARB" Slip op. at 3, quoting regulation (emphasis as added by the ARB). The ARB noted that its delegation of review authority from the Secretary does not include authority to pass on the validity of regulations published by DOL in the Code of Federal Regulations. And, the ARB noted that the Complainant had not cited any appellate court authority in support of the argument that a party may appeal the ALJ's decision directly to the court of appeals.

Standard is not excusable neglect, but extraordinary circumstances

The Complainant then presented a "smorgasbord" of arguments for equitable tolling, none of which were accepted by the ARB. The ARB noted that the Complainant had been represented by counsel, that an attorney practicing before the ARB is expected to familiarize himself with the applicable regulations, and that clients are ultimately accountable for the acts and omissions of their attorneys. The ARB noted that even if the attorney's excuses for failing to file timely could meet an "excusable neglect" standard, the applicable standard was "extraordinary circumstances." The ARB cited caselaw to the effect that a garden variety claim of excusable neglect is insufficient to establish grounds for equitable tolling. The ARB also found a lack of diligence for failure to file a short motion to request an enlargement of time to file the petition.

TIMELINESS OF PETITION FOR ARB REVIEW; ARB'S PARALEGAL'S ERROR IN COUNTING DAYS WHEN INFORMING COMPLAINANT THAT PETITION WOULD BE CONSIDERED TIMELY WAS NOT A GROUND FOR TOLLING WHERE THE COMPLAINANT HAD ALREADY MISSED THE DEADLINE FOR FILING

In [*Baker v. Union Pacific Railroad Co.*](#), ARB No. 17-034, ALJ No. 2016-FRS-79 (ARB May 19, 2017), the Complainant unsuccessfully attempted to file a petition for ARB review using the ARB's Electronic File and Service Request (EFSR) System. The ARB considered the petition to have been filed when he first attempted the filing; however, this date was still five days past the due date, and the ARB ordered the Complainant to show cause why the petition should not be dismissed as untimely. In response, the Complainant contended that an ARB paralegal and IT administrator of the EFSR system had stated that the filing was within the allowable time. The ARB found that a paralegal had told the Complainant that if the petition had been filed on the date of the unsuccessful attempt, it would be considered timely. The ARB found that the paralegal had miscounted the days between the ALJ's decision and the attempted filing, but that this error was harmless because the Complainant had not relied "on this information to his detriment—he had already missed the due date when he spoke to the paralegal." Slip p. at 3. The ARB found that the Complainant had failed to show cause why the limitations period should be tolled, and denied the petition for review.

TIMELINESS OF PETITION FOR ARB REVIEW; RESPONSE TO ARB'S ORDER TO SHOW CAUSE WHY AN UNTIMELY APPEAL SHOULD NOT BE DISMISSED IS INADEQUATE WHERE IT MERELY ALLEGED THAT THE COMPLAINANT DID NOT TIMELY RECEIVE THE ALJ'S DECISION AND FAILED TO ADDRESS WHEN THE COMPLAINANT'S COUNSEL RECEIVED THE DECISION

In [*Ramirez v. Norfolk Southern Railway Co.*](#), ARB No. 17-003, ALJ No. 2016-FRS-22 (ARB Jan. 12, 2017), the Complainant electronically filed his appeal of the ALJ's Order Granting Respondent's Motion to Enforce and Approve the Settlement Agreement more 14 days after the date the ALJ issued the decision. The ARB issued an order to show cause why the petition for review should not be dismissed as untimely. The Complainant sought equitable tolling on the ground that the Complainant did not receive the ALJ's decision until after the 14 days had passed. The ARB found that, even accepting that the Complainant had not received his copy of the ALJ's decision until after 14 day period had already elapsed, the Complainant's response to the order to show cause was inadequate because it failed to address when the Complainant's attorney received his copy of the ALJ's decision. The ARB stated: "Ramirez bears the burden of establishing his entitlement to equitable tolling. Whether his counsel's affirmation was simply perfunctory or carefully crafted with an intent to obfuscate, it is insufficient to carry his burden. Accordingly, because Ramirez failed to file a timely petition for review or establish his entitlement to equitable tolling, his appeal is DISMISSED." Slip op. at 4.

TIMELINESS OF PETITION FOR ARB REVIEW; MISUNDERSTANDING BY COUNSEL OF LIMITATIONS PERIOD FOR FILING PETITION IS NOT GROUNDS FOR EQUITABLE TOLLING

In [*Bohanon v. Grand Trunk Western Railroad Co.*](#), ARB No. 16-048, ALJ No. 2014-FRS-3 (ARB Apr. 27, 2016), the ALJ issued a decision finding that the Respondent violated the employee protection provision of the FRSA. Shortly after the period for filing a petition for review expired, the Respondent filed a request for additional time to file a petition because counsel had misunderstood when the petition was due. The parties later filed a motion for approval of a settlement together with the Complainant's withdrawal of an opposition to the request for additional time to file the petition for review. The ARB determined that the Respondent's counsel's misunderstanding of the limitations period for filing a petition for ARB review was "[a]t most ... a garden variety claim of excusable neglect, which does not qualify as exceptional circumstances under Board and Sixth Circuit precedent [on equitable tolling]." The ARB rejected authority cited by the Respondent as it was decided under the more lenient "excusable neglect" standard. The ARB was not persuaded to toll the limitations period based on the parties' joint motion. The ARB thus denied the motion to enlarge the time for filing a petition for review. One member of the Board dissented.

- *Substitution of Parties*

DOL Administrative Review Board Decisions

SUBSTITUTION OF COMPLAINANT UPON WORKER'S DEATH; ARB APPLIES FRAP 43 AND DENIES SUBSTITUTION MOTION WHERE PUTATIVE WIDOWER WAS NOT IDENTIFIED AS DECEDENT'S PERSONAL REPRESENTATIVE AND IT WAS NOT EXPLAINED HOW THE DECEDENT'S MINOR CHILD'S INTEREST WOULD BE PROTECTED BY A SUBSTITUTION

SUBSTITUTION OF COMPLAINANT UPON WORKER'S DEATH; ALJ IS NOT OBLIGATED TO RESEARCH, CONSTRUE OR APPLY STATE LAW AS TO INTESTATE SUCCESSION LAW OR SIMILAR MATTERS; PREFERRED PRACTICE IS OPENING OF ESTATE, AND THAT EXECUTOR OR PERSONAL REPRESENTATIVE PROCEED IN INTEREST OF THE ESTATE

In [*Austin v. BNSF Railway Co.*](#), ARB No. 17-024, ALJ No. 2016-FRS-13 (ARB Mar. 11, 2019) (per curiam), the Complainant passed away the very day that the ALJ issued his FRSA Decision and Order. After a petition for review was filed, the Complainant's counsel filed a notice of suggestion of death, and 90 days later, filed a motion to substitute the Complainant's putative widower, Sean Lawson, as the Complainant in the case. The putative widower and Complainant's attorney asserted that he and the Complainant's minor child were the Complainant's only successors. The ARB analyzed the motion under the FRAP 42, which

provides that after a notice of appeal is filed, “the decedent’s personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party.” Fed. R. App. P. 43(a)(1)-(2). The ARB denied the motion because it the putative widower had not been identified as the Complainant’s personal representative, had not identified the “minor child,” and had not explained how the child’s interest would be protected if the putative widower was named as the substitute Complainant.

In a footnote, the ARB noted the law on intestate succession law in Texas, and stated:

While the Board has chosen to include a reference to Texas law by way of illustration, we do not intend to impose upon the Board or upon Administrative Law Judges any obligation to research, construe, or apply State law in this or similar matters. The preferred practice is clear that interested persons should open an estate for a deceased party and that the executor or personal representative should proceed in the interest of the estate. In this way legally sufficient documentation can be provided to the ALJ or the Board as necessary.

Slip op. at 8, n.34.

- Waiver / Forfeiture

DOL Administrative Review Board Decisions

WAIVER OF ISSUE NOT RAISED IN PETITION FOR ARB REVIEW

Where the Respondent argued in its appellate brief that the Complainant had not engaged in protected activity because he had not acted in good faith in reporting smoky conditions, but the Respondent had not raised this issue in its petition for ARB review, the ARB deemed the Respondent to have waived the issue. Jackson v. Union Pacific Railroad Co., ARB No. 13-042, ALJ No. 2012-FRS-17 (ARB Mar. 20, 2015).

ISSUE NOT BRIEFED IN PETITION FOR REVIEW IS DEEMED WAIVED

In Griebel v. Union Pacific Railroad Co., ARB No. 13-038, ALJ No. 2011-FRS-11 (ARB Mar. 18, 2014), the Respondent challenged the ALJ's punitive damages award and the ALJ's liability determination. The Respondent did not argue the liability issue in the brief supporting the petition. The ARB held that because the company had not briefed the liability determination, that issue was waived. Adm'r, Wage & Hour Div. v. Global Horizons, ARB No. 11-058, ALJ Nos. 2005-TAE-1, 2005-TLC-6, slip op. at 7 n.7 (ARB May 31, 2013) (citing Dev. Res., Inc., ARB

No. 02-046, slip op. at 4 (ARB Apr. 11, 2002) (quoting *Tolbert v. Queens Coll.*, 242 F.3d 58, 75-76 (2d Cir. 2001) (stating that it is a "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."))).

V. REMOVAL TO FEDERAL DISTRICT COURT

Statute

49 U.S.C. § 20109

(d) Enforcement action.

...

(3) De novo review. With respect to a complaint under paragraph (1), if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.

Regulations

29 C.F.R. § 114: District court jurisdiction of retaliation complaints.

(a) If there is no final order of the Secretary, 210 days have passed since the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy. At the request of either party, the action shall be tried by the court with a jury.

(b) A proceeding under paragraph (a) of this section shall be governed by the same legal burdens of proof specified in §1982.109. An employee prevailing in a proceeding under

paragraph (a) shall be entitled to all relief necessary to make the employee whole, including, where appropriate: Reinstatement with the same seniority status that the employee would have had, but for the retaliation; any back pay with interest; and payment of compensatory damages, including compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. The court may also order punitive damages in an amount not to exceed \$250,000.

(c) Within 7 days after filing a complaint in federal court, a complainant must file with the Assistant Secretary, the ALJ, or the ARB, depending upon where the proceeding is pending, a copy of the file-stamped complaint. In all cases, a copy of the complaint must also be served on the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

- *When Removal Is Available*

U.S. District Court Decisions

KICK OUT PROVISION

DiMauro v. Springfield Terminal Railway Co., No. 16-cv-71, 72 and 73 (D. Me. May 20, 2016) (2016 WL 2992073; 2016 U.S. Dist. LEXIS 66584):

"[W]hen the Department of Labor has not taken action within the 210 days, the worker notifies the Department of Labor that he will proceed in district court, and a Supervising Investigator then notifies the worker that as a result the Department of Labor will dismiss his claim, there is no thirty-day appeal period applicable whose passage results in the dismissal becoming a final Department of Labor decision that can be reviewed only in the court of appeals."

Slip op. at 10.

REMOVAL UNAVAILABLE AFTER DOL ISSUES A FINAL DECISION

Mullen v. Norfolk Southern Railway Co., No. 14-cv-917 (W.D. Pa. May 29, 2015) (case below ARB No. 13-059, ALJ No. 2012-FRS-3) (2015 WL 3457493; 2015 U.S. Dist. LEXIS 69706): District court lacks subject matter jurisdiction under FRSA kick-out provision if district court complaint is filed after DOL issued a final decision, even if that final decision was rendered

more than 210 days after the filing of the administrative complaint (disagreeing with *Glista v. Norfolk S. Ry. Co.*, No. CIV.A. 13-04668, 2014 WL 1123374 (E.D. Pa. Mar. 21, 2014))

PLAINTIFF'S PARTICIPATION IN HEARING PROCESS BEFORE ALJ IS NOT A WAIVER OF THE RIGHT TO FILE IN FEDERAL DISTRICT COURT UNDER 49 U.S.C. § 20109(d)(3)

In *Gunderson v. BNSF Railway Co.*, No. 14-cv-223 (D. Minn. June 30, 2014) (2014 WL 2945762) (case below 2011-FRS-1), the Plaintiff filed an FRSA lawsuit in federal district court nine business days after the ALJ issued his 14-page opinion. The Defendant filed a motion to dismiss (which the court converted to a motion for summary judgment) arguing that although the Plaintiff “*acquired* the right to file a federal lawsuit on the 211th day [pursuant to 49 U.S.C. § 20109(d)(3)], he thereafter *waived* that right by continuing to participate in the administrative process.” Slip op. at 5 (emphasis as in original). Although the court had sympathy for the Defendant's argument, it found that the plain language of the statute, and the weight of the caselaw interpreting that provision, left the court with no choice but to hold that the Plaintiff did not waive his right to bring the FRSA lawsuit. The court noted that the Defendant's framing of the issue as one of waiver was unique, but found that no matter how the issue was framed “courts have repeatedly and unanimously rejected the idea that Congress did not intend for litigants to be able to file a lawsuit even after obtaining a merits decision from an ALJ.” *Id.* at 7. The court stated:

In sum, although BNSF's argument has a great deal of appeal, and although Gunderson has wasted a great deal of scarce resources, the Court is constrained to hold that Gunderson has not waived his statutory right to file this action. As many courts have found, Congress must have been aware of the potential for duplicative proceedings, but nevertheless chose to give employees the right to bring a federal lawsuit whenever the Secretary has failed to issue a final decision within the required period. The Court is obligated to enforce the decisions of Congress, whether or not the Court agrees with them. BNSF's motion is therefore denied.

Id. at 9.

PLAINTIFF'S GAMESMANSHIP IN EMPLOYING FRSA "KICK-OUT" PROVISION DOES NOT DEPRIVE DISTRICT COURT OF JURISDICTION IF THE DELAY IN ISSUANCE OF THE SECRETARY'S FINAL DECISION WAS NOT DUE TO THE BAD FAITH OF THE PLAINTIFF

NORTHERN DISTRICT OF TEXAS INDICATES AGREEMENT WITH DISTRICT OF KANSAS INTERPRETATION THAT FRSA KICK-OUT PROVISION CONFERS DISTRICT COURT JURISDICTION EVEN IF THE SECRETARY ISSUED A FINAL DECISION, PROVIDED THAT THE DECISION WAS RENDERED MORE THAN 210 DAYS AFTER THE FILING OF THE ADMINISTRATIVE COMPLAINT

In *Lynch v. Union Pacific Railroad Co.*, No. 13-cv-2701 (N.D. Tx. June 4, 2011) (2014 WL 2519206) (case below ALJ No. 2012-FRS-49), the court denied the Defendant's motion to dismiss the Plaintiff's FRSA, 49 U.S.C. § 20109 whistleblower claim. The Plaintiff contended that the court lacked subject matter jurisdiction because the Complainant's conduct in waiting 892 days after he filed his initial claim with OSHA, and 682 days after his right to remove his claim to federal district court had vested, constituted "bad faith" under the FRSA "kick-out" provision at 49 U.S.C. § 20109(d)(3). The court found it undisputed that: "(1) Plaintiff was responsible for delay in the OSHA investigator's ruling because he sought further investigation; (2) Plaintiff indicated that he did not intend to file the case in federal court and voluntarily entered into a scheduling order before the ALJ; (3) the ALJ and both parties expended significant resources in preparing for and conducting an extensive hearing; and (4) this lawsuit was filed five months after the hearing, after Defendant and the ALJ spent additional resources on lengthy posthearing briefs." The court, however, stated that gamesmanship was beside the point, the sole issue being whether the court lacks subject matter jurisdiction. Under the "kick-out" provision, the court lacks jurisdiction if the delay in the Secretary of Labor's final decision was due to the Plaintiff's bad faith. The court found that the Defendant had not established bad faith:

Defendant here has failed to establish that the court lacks subject matter jurisdiction. The Secretary of Labor clearly did not issue a final decision within 210 days after the filing of the OSHA complaint, and such delay — even if partially due to Plaintiff taking advantage of the rights afforded by Department of Labor regulations — was not caused by the "dishonesty of belief or purpose" of Plaintiff. *See Pfeifer [v. Union Pacific R.R. Co.]*, No. 12-CV-2485] 2013 WL 1367054, at *5 [(D. Kan. Apr. 3, 2013)] (quoting Black's Law Dictionary 149 (9th ed. 2009)). As the ALJ observed and Defendant concedes, it is oftentimes unlikely that a decision can be reached within the 210-day deadline set by the statute, regardless of the good faith or bad faith of the Plaintiff. The record is clear that the delay resulting in the failure of the Secretary of Labor to issue a final decision within 210 days was not due to the bad faith of Plaintiff.

The removability of this case, for which both parties and the ALJ have already expended significant resources, is an unfortunate and likely unintended consequence of the statutory language used by Congress. There is no exception to federal subject matter jurisdiction when an FRSA case is removed as an act of gamesmanship if the initial delay was not the result of bad faith by the Plaintiff. The statute, as currently written, permits such gamesmanship and regrettably does nothing to promote judicial economy. It is, however, the task of Congress and not this court to remedy such an unintended outcome.

Slip op. at 7. Although the motion in the instant case did not turn on the issue, the court cited *Glista v. Norfolk S. Ry. Co.*, No. 13-04668, 2014 WL 1123374, at *3 (E.D. Pa. Mar. 21, 2014), for the proposition that Section 20109(d)(3) confers district court jurisdiction even if the Secretary issued a final decision, provided that the decision was rendered more than 210 days after the filing of the administrative complaint.

ARB'S ISSUANCE OF FINAL ORDER DISMISSING ADMINISTRATIVE COMPLAINT DID NOT DEPRIVE DISTRICT COURT OF JURISDICTION WHERE THE ARB'S ORDER WAS A ROUTINE AND NON-SUBSTANTIVE CLOSING OF THE ADMINISTRATIVE PROCEEDINGS IN ANTICIPATION OF PLAINTIFF'S FEDERAL COURT FILING

In *Mullen v. Norfolk Southern Railway Co.*, No. 13-cv-06348 (E.D. Pa. Apr. 8, 2014) (2014 WL 1370119) (case below ARB No. 13-059, ALJ No. 2012-FRS-3), the ARB issued an Order to Show Cause why the ARB should not dismiss the claim pursuant to 29 C.F.R. § 1982.114, two days after receiving Plaintiff's Notice of Intention to File Original Action in the United States District Court. The Plaintiff did not respond. The Defendant responded, stating that it did not object to the dismissal but reserved its rights to offer certain defenses in the federal action. The ARB then issued its Final Decision and Order Dismissing Complaint, stating: "Accordingly, in accordance with 29 C.F.R. §1982.114 and Mullen's notification of his intent to proceed in district court and given his failure to respond to the ARB's Order to Show Cause, we DISMISS Mullen's complaint." The Plaintiff did not file the federal court action until after the ARB issued this order. Before the District Court, the Defendant argued that the ARB's issuance of this final decision on the administrative complaint deprived the District Court of jurisdiction. The court, however, agreed with the Plaintiff that the ARB's order was a routine and non-substantive closing of the administrative proceedings in anticipation of Plaintiff's pursuit of his remedies in federal court, and that it did not constitute a final decision for purposes of 49 U.S.C. § 20109(d)(3).

ALJ'S ISSUANCE OF DISMISSAL AFTER PLAINTIFF'S FILING OF NOTICE OF INTENT TO FILE ORIGINAL ACTION IN DISTRICT COURT DID NOT DEPRIVE DISTRICT COURT OF JURISDICTION EVEN THOUGH THE ALJ'S DISMISSAL HAD BECOME THE FINAL DECISION OF THE SECRETARY BY OPERATION OF REGULATION PRIOR TO ACTUAL FILING OF DISTRICT COURT ACTION

In *Glista v. Norfolk Southern Railway Co.*, 13-cv-04668 (E.D. Pa. Mar. 21, 2014) (2014 WL 1123374) (cases below 2013-FRS-45 and 46), 982 days after the filing of the FRSA complaint with OSHA, the Plaintiffs filed with the ALJ a notice of intent to file an original action in district court. The ALJ issued an order to show cause why the Plaintiffs' claims should not be dismissed. The Plaintiffs did not respond, and the ALJ dismissed their complaint with prejudice. Thereafter, the Plaintiffs filed in district court. Before the court, the Defendant argued that the court lacked jurisdiction because the ALJ's decision had become the final order of the Secretary of Labor by operation of 29 C.F.R. § 1982.110 nearly two weeks before the Plaintiffs filed their district court action. The Defendant contended that "once there is a final order of the Secretary, even if it is rendered more than 210 days after a complaint is filed, the federal district court lacks jurisdiction to conduct de novo review of the claim." Slip op. at 3.

The court rejected this contention. The court found that the plain meaning of the FRSA kick-out provision was clear, and that "[i]f Congress had intended to deny a plaintiff de novo review by the federal district court in the event that a final decision was reached after the 210 day period had expired such an exception would be explicit in this portion of the statute." *Id.* at 6. The court

also found that the ALJ's issuance of an order to show cause after receiving notice of a plaintiff's intent to file in district court does not prevent a plaintiff from taking advantage of the statutory kick-out provision. Any answer to the order to show would be redundant of the notice of intent where the plaintiff has a statutory right to remove the claim from the administrative process because 210 days had elapsed. The court noted that the ALJ's order to show cause had become a dismissal order merely by the passage of time and that there had been no evaluation of the merits of the case by the ALJ. The court also rejected the Defendant's arguments about concurrent jurisdiction, finding that the filing of the notice of intent by the Plaintiffs vitiated any concerns about concurrent jurisdiction.

- *Bad Faith*

U.S. District Court Decisions

REMOVAL TO FEDERAL DISTRICT COURT; BAD FAITH CAN PREVENT REMOVAL WHEN IT CAUSES DELAY IN DOL'S ISSUANCE OF A FINAL DECISION, BUT ENGAGING IN LITIGATION PROCESS ALONE IS NOT BAD FAITH

Wagner v. Grand Trunk W. R.R., No. 15-10635 (E.D. Mich. Mar. 23, 2016) (2016 U.S. Dist. LEXIS 38406; 2016 WL 1161351): Plaintiff cut his finger at work and filed an injury report. He was later investigated and suspended for alleged safety violations during the incident. He then filed a complaint with OSHA. OSHA found there had been retaliation and awarded damages. Defendant sought a hearing before an ALJ. Before the ALJ there was some discussion of whether Plaintiff would exercise the "kick-out" option and remove the case to federal court, with Plaintiff's counsel indicating, in some way, that this was not contemplated. The ALJ found for the railroad and Plaintiff appealed. While the appeal was pending, the Plaintiff opted to file suit in federal court, which led to the dismissal of the DOL action.

Defendant filed a motion for judgment on the pleadings arguing that Plaintiff had waived his right to remove the action, Plaintiff had engaged in bad faith, the action was barred by res judicata, and the removal provision of the FRSA, § 20109(d)(3) was unconstitutional. The court denied the motion.

As to the bad faith argument, the court observed that bad faith can preclude removal, but only when the bad faith is the cause of the delay at DOL. There was no evidence of that here other than that the Plaintiff had engaged in the process at DOL and litigated the case. But the FRSA granted the right to remove actions if there was no final decision in 210 days and merely exercising that right did not amount to bad faith. The court observed that this led to unfortunate

duplication between the forums and frustration, but this was the result of the language of the statute.

PLAINTIFF'S GAMESMANSHIP IN EMPLOYING FRSA "KICK-OUT" PROVISION DOES NOT DEPRIVE DISTRICT COURT OF JURISDICTION IF THE DELAY IN ISSUANCE OF THE SECRETARY'S FINAL DECISION WAS NOT DUE TO THE BAD FAITH OF THE PLAINTIFF

In *Lynch v. Union Pacific Railroad Co.*, No. 13-cv-2701 (N.D. Tx. June 4, 2011) (2014 WL 2519206) (case below ALJ No. 2012-FRS-49), the court denied the Defendant's motion to dismiss the Plaintiff's FRSA, 49 U.S.C. § 20109 whistleblower claim. The Plaintiff contended that the court lacked subject matter jurisdiction because the Complainant's conduct in waiting 892 days after he filed his initial claim with OSHA, and 682 days after his right to remove his claim to federal district court had vested, constituted "bad faith" under the FRSA "kick-out" provision at 49 U.S.C. § 20109(d)(3). The court found it undisputed that: "(1) Plaintiff was responsible for delay in the OSHA investigator's ruling because he sought further investigation; (2) Plaintiff indicated that he did not intend to file the case in federal court and voluntarily entered into a scheduling order before the ALJ; (3) the ALJ and both parties expended significant resources in preparing for and conducting an extensive hearing; and (4) this lawsuit was filed five months after the hearing, after Defendant and the ALJ spent additional resources on lengthy posthearing briefs." The court, however, stated that gamesmanship was beside the point, the sole issue being whether the court lacks subject matter jurisdiction. Under the "kick-out" provision, the court lacks jurisdiction if the delay in the Secretary of Labor's final decision was due to the Plaintiff's bad faith. The court found that the Defendant had not established bad faith:

Defendant here has failed to establish that the court lacks subject matter jurisdiction. The Secretary of Labor clearly did not issue a final decision within 210 days after the filing of the OSHA complaint, and such delay — even if partially due to Plaintiff taking advantage of the rights afforded by Department of Labor regulations — was not caused by the "dishonesty of belief or purpose" of Plaintiff. *See Pfeifer [v. Union Pacific R.R. Co.]*, No. 12-CV-2485] 2013 WL 1367054, at *5 [(D. Kan. Apr. 3, 2013)] (quoting Black's Law Dictionary 149 (9th ed. 2009)). As the ALJ observed and Defendant concedes, it is oftentimes unlikely that a decision can be reached within the 210-day deadline set by the statute, regardless of the good faith or bad faith of the Plaintiff. The record is clear that the delay resulting in the failure of the Secretary of Labor to issue a final decision within 210 days was not due to the bad faith of Plaintiff.

The removability of this case, for which both parties and the ALJ have already expended significant resources, is an unfortunate and likely unintended consequence of the statutory language used by Congress. There is no exception to federal subject matter jurisdiction when an FRSA case is removed as an act of gamesmanship if the initial delay was not the result of bad faith by the Plaintiff. The statute, as currently written, permits such gamesmanship and regrettably does

nothing to promote judicial economy. It is, however, the task of Congress and not this court to remedy such an unintended outcome.

Slip op. at 7.

- Venue

U.S. District Court Decisions

VENUE; GENERAL VENUE GUIDELINES AT 28 U.S.C. § 1391(b) APPLY TO FRSA COMPLAINT; TRANSFER WARRANTED WHERE OPERATIVE FACTS AROSE IN OTHER DISTRICT, AND WHERE ONLY CONNECTION TO DISTRICT WHERE CLAIM WAS FILED WAS THE LOCATION OF THE PLAINTIFF'S ATTORNEY

In Mullen v. Norfolk Southern Railway Co., No. 13-cv-06348 (E.D. Pa. Apr. 8, 2014) (2014 WL 1370119) (case below ARB No. 13-059, ALJ No. 2012-FRS-3), the Defendant argued that Congress, in FRSA, 49 U.S.C. § 20109(d)(2)(A)(iii) and (d)(3), made it clear that venue lies only in the district where the violation occurred. The court (the District Court for the Eastern District of Pennsylvania) rejected this argument, agreeing instead with the Southern District of Illinois in Gouge v. CSX Transport., Inc., No. 12-cv-1140, 2013 WL 3283714 (S.D. Ill. June 28, 2013) that Congress had not specified venue in the FRSA. The court found that "§ 20109(d)(3) does not supplant the general venue guidelines set forth in 28 U.S.C. § 1391(b)." Nonetheless, the court noted that it enjoys broad discretion to transfer venue under 28 U.S.C. § 1404(a). The court found that the operative facts in the matter arose in the Western District of Pennsylvania and noted that the Plaintiff had not contested the Defendant's statement that the Plaintiff was a resident of Pittsburgh. The only connection to the Eastern District of Pennsylvania, the court found, was that that it is where the Plaintiff's attorney is located. The court found that the circumstances weighed in favor of transfer of venue to the Western District of Pennsylvania.

- Waiver / Laches

U.S. Circuit Court of Appeals Decisions

EIGHTH CIRCUIT SUGGESTS THAT ON A SUFFICIENTLY DEVELOPED RECORD, LACHES OR EQUITABLE ESTOPPEL MIGHT BE AVAILABLE TO FIND A WAIVER OF THE RIGHT TO FILE A *DE NOVO* HEARING IN DISTRICT COURT, OR AT LEAST TO SEEK EQUITABLE RELIEF, WHERE THE COMPLAINANT ENGAGED IN PROTRACTED ADMINISTRATIVE ADJUDICATION OF HIS FRSA RETALIATION CLAIM BEFORE EXERCISING THE KICK-OUT PROVISION

In *Gunderson v. BNSF Railway Co.*, No. 15-2905 (8th Cir. Mar. 10, 2017) (2017 U.S. App. LEXIS 4258; 2017 WL 942663) (case below D. Minn. No. 14–CV–0223; ALJ No. 2011-FRS-1), the Defendant argued that the Plaintiff waived his right to file a *de novo* action in district court because he engaged in protracted administrative adjudication of his FRSA retaliation claim. The Eighth Circuit first looked to the text of 49 U.S.C. § 20109(d)(3), and noted that if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint, the complainant may abandon agency proceedings and proceed in district court. If a final order has been issued by the Secretary, only the courts of appeal have of jurisdiction to review the final agency action. 49 U.S.C. § 20109(d)(4); 29 C.F.R. § 1982.112(a), (b). The court found, however, that that the statute was silent on the issue raised by the Defendant. The court noted that in other contexts, a party’s wasteful pursuit of duplicate remedies is deemed a waiver of the other, but that here, the statute provides for “sequential” remedies. The court was not persuaded by the Plaintiff’s contention that § 20109(d)(3) gives the complainant an absolute right to kick-out to district court once the 210 days have elapsed, provided that the delay was not attributable to the complainant’s bad faith and that the Secretary has not yet issued a final order. The court observed that the availability of a waiver is the general rule, and that the common law principle of laches may apply to cut off a complainant’s right to sue or at least seek equitable relief at some point. The court, however, did not decide these issues because the Defendant had not developed its waiver argument, raised laches or estoppel as a defense in the district court or on appeal, or presented sufficient proof on the issue. One member of the panel did not join the majority in this part of the opinion on the ground that it was dicta.

U.S. District Court Decisions

WAIVER BASED ON LACHES IS NOT FORECLOSED IN A FRSA CASE, BUT MUST BE SUPPORTED BY A RECORD OF DELAY AND PREJUDICE; FINDING OF WAIVER NOT WARRANTED WHERE THERE WAS ONLY ONE YEAR OF LITIGATION BEFORE ALJ AND WHERE ALL OF THE DISCOVERY BEFORE THE ALJ COULD BE PRESENTED IN THE DISTRICT COURT

In *Hall v. Soo Line R.R. Co.*, No. 17-2120 (D. Minn. Oct. 20, 2017) (2017 U.S. Dist. LEXIS 173761) (case below ALJ No. 2016-FRS-00083), the Defendant moved to dismiss, asking “the Court to determine that an employee who participates in the administrative review process, including engaging in discovery and motion practice, at some point waives his right to bring a lawsuit.” The Defendant noted that it had incurred expenses in defending the administrative action, and contended that it will suffer prejudice from the two-year time period between the Complainant’s injury and discovery before the court. The Defendant argued that equitable principles should bar the Complainant from pursuing the case in district court.

The district court noted that in *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 967 (8th Cir. 2017), the 8th Circuit acknowledged that the common law principles of laches could apply at some point to cut off an employee’s right to sue, or at least seek equitable relief, in an FRSA retaliation case, and although it did not definitively determine whether waiver applied in that case, indicated that a defendant seeking relief under laches should develop a record before the district court. The district court observed that the Defendant in the instant case had attempted to build such a record of delay and prejudice. The district court, however, was not convinced that waiver was appropriate in this case, noting that the Complainant had actively pursued the administrative case for less than a year from the date of the OSHA decision, and that “[w]hile it is undoubtedly frustrating to spend time and money defending an administrative action, all of the discovery the parties engaged in before the ALJ hearing will be applicable to this proceeding.” Slip op. at 6.

REMOVAL TO FEDERAL DISTRICT COURT; WAIVER NOT APPROPRIATE FOR DISPOSITION ON MOTION OF THE PLEADINGS; RIGHT TO REMOVAL WOULD NOT BE WAIVED BY DISPUTED OFF-THE-RECORD CONVERSATION ABOUT INTENT TO REMOVE

Wagner v. Grand Trunk W. R.R., No. 15-10635 (E.D. Mich. Mar. 23, 2016) (2016 U.S. Dist. LEXIS 38406; 2016 WL 1161351): Plaintiff cut his finger at work and filed an injury report. He was later investigated and suspended for alleged safety violations during the incident. He then filed a complaint with OSHA. OSHA found there had been retaliation and awarded damages. Defendant sought a hearing before an ALJ. Before the ALJ there was some discussion of whether Plaintiff would exercise the “kick-out” option and remove the case to federal court, with Plaintiff’s counsel indicating, in some way, that this was not contemplated. The ALJ found for the railroad and Plaintiff appealed. While the appeal was pending, the Plaintiff opted to file suit in federal court, which led to the dismissal of the DOL action.

Defendant filed a motion for judgment on the pleadings arguing that Plaintiff had waived his right to remove the action, Plaintiff had engaged in bad faith, the action was barred by res judicata, and the removal provision of the FRSA, § 20109(d)(3) was unconstitutional. The court denied the motion.

As to the waiver argument, it was based on material outside the pleadings—a declaration from counsel—and so could not succeed at this stage. The content was also a matter of factual dispute between the attorneys as to what happened. And even if the off-the-record conversation occurred, it wouldn’t amount to a knowing and voluntary waiver of rights.

- *Constitutionality of Removal Provision*

U.S. District Court Decisions

REMOVAL TO FEDERAL DISTRICT COURT; CONSTITUTIONALITY; DISTRICT COURT FINDS THAT ONE-SIDED REMOVAL PROVISION DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE EQUAL PROTECTION CLAUSE

Wagner v. Grand Trunk W. R.R., No. 15-10635 (E.D. Mich. Mar. 23, 2016) (2016 U.S. Dist. LEXIS 38406; 2016 WL 1161351): Plaintiff cut his finger at work and filed an injury report. He was later investigated and suspended for alleged safety violations during the incident. He then filed a complaint with OSHA. OSHA found there had been retaliation and awarded damages. Defendant sought a hearing before an ALJ. Before the ALJ there was some discussion of whether Plaintiff would exercise the “kick-out” option and remove the case to federal court, with Plaintiff’s counsel indicating, in some way, that this was not contemplated. The ALJ found for the railroad and Plaintiff appealed. While the appeal was pending, the Plaintiff opted to file suit in federal court, which led to the dismissal of the DOL action.

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As to the bad faith argument, the court observed that bad faith can preclude removal, but only when the bad faith is the cause of the delay at DOL. There was no evidence of that here other than that the Plaintiff had engaged in the process at DOL and litigated the case. But the FRSA granted the right to remove actions if there was no final decision in 210 days and merely exercising that right did not amount to bad faith. The court observed that this led to unfortunate duplication between the forums and frustration, but this was the result of the language of the statute.

As to the res judicata argument, the court observed that administrative adjudications could have preclusive effect but that Congress could also alter the rules. The crux, however, was that in order to have any preclusive effect the decision at DOL had to be final. It was not because Plaintiff had filed a timely appeal that was pending before the ARB.

The constitutional challenge was made on due process and equal protection grounds. The railroad argued that its due process rights were violated because only the Plaintiff could remove the case to federal court in the event that he lost before the ALJ. It also complained that the attorney fee provisions were one-sided. But the court held this was not a cognizable due process claim because it didn't contend that the railroad was deprived of due process requirements—it just complained the Plaintiff had too much process. Removal created duplication, but that burden fell on both parties and did not amount to a denial of due process. The equal protection challenge was also based on the one-sidedness of the provision. The court first rejected the claim that strict scrutiny review applied and then applying the rational basis analysis quickly determined that the removal provisions had a rational relation to an interest in helping railroad workers' get speedy resolution of the claims. Whether it succeeded in that result was another question, but Congress had a rational basis for the provision.

- *Dismissal of DOL Complaint, Procedure*

DOL Administrative Review Board Decisions

ARB DISMISSES COMPLAINT AFTER NOTICE FILED WITH ARB OF INTENT TO FILE ACTION IN DISTRICT COURT

Henin v. Soo Line Railroad Co., ARB No. 2019-0028, ALJ No. 2017-FRS-00011 (ARB Mar. 22, 2019) (per curiam) (Order Granting Reconsideration, Reinstating Complainant's Appeal As Timely and Dismissing Complaint): The Respondent filed a motion to dismiss the Complainant's petition for ARB review as untimely. The Complainant later filed a notice of intent to file an action in district court, and that same day, the ARB granted the Respondent's motion to dismiss the petition as untimely. The Complainant filed a motion to reconsider the grounds for the dismissal because he had not received the ALJ's decision and order until 11 days after the ALJ issued the decision. The ARB also received a copy of a filing of a complaint in the U.S. District Court for the District of Minnesota. Upon review of the administrative file, the ARB found, inexplicably, evidence of two different dates for issuance of the ALJ's decision. A certified mail receipt supported the date of receipt claimed by the Complainant. Applying FRAP 26(c), the ARB reconsidered, reinstated the appeal as timely filed, and then dismissed the administrative complaint because the Complainant had filed an action in U.S. district court.

ARB DISMISSES COMPLAINT AFTER NOTICE FILED WITH ARB OF INTENT TO FILE ACTION IN DISTRICT COURT

Johnson v. Grand Trunk Western Railroad Co., ARB No. 2019-0003, ALJ NO. 2018-FRS-10 (ARB Jan. 31, 2019) (Order Dismissing Complaint): The ARB dismissed the Complainant's administrative complaint because the Complainant filed a notice of his filing an action in the

United States District Court for Eastern District of Michigan as authorized by 49 U.S.C.A. § 20109(d)(3).

FILING OF FRSA COMPLAINT IN U.S. DISTRICT COURT ENDS DOL JURISDICTION; ARB DISMISSES PENDING APPEAL UPON LEARNING OF DISTRICT COURT ACTION

On August 23, 2017, the Complainant in *Guerra v. Consolidated Rail Corp. (Conrail)*, ARB No. 2017-069, ALJ No. 2017-FRS-47 (ARB June 29, 2018), petitioned the ARB for review of the ALJ's order dismissing his FRSA retaliation complaint. In its June 29, 2018, Order Dismissing Appeal, the ARB noted that in *Guerra v. Consolidated Rail Corp.*, No.: 2:17-cv-6497, 2018 WL 2947857 (D. N.J. June 13, 2018), the district court granted Conrail's motion to dismiss the Guerra's whistleblower complaint on the grounds that he failed to timely file it with OSHA. The ARB found that because the Complainant chose to proceed in district court pursuant to 49 U.S.C.A. § 20109(d)(3), the Department of Labor no longer has jurisdiction over the case. The ARB noted that it had no record of receiving notice of the filing of the district court complaint as required by 29 C.F.R. § 1982.114(c).

DISMISSAL OF APPEAL ON REMOVAL

***Sirois v. Long Island Railroad Co.*, ARB No. 2018-043, ALJ No. 2017-FRS-78 (ARB June 26, 2018):** The ARB dismissed a FRSA case pending before it upon the Complainant's filing of a notice of the filing of action in U.S. district court.

FILING OF FRSA COMPLAINT IN U.S. DISTRICT COURT ENDS DOL JURISDICTION; ARB DISMISSES PENDING APPEAL UPON LEARNING OF DISTRICT COURT ACTION

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- *When DOL Jurisdiction Ends*

DOL Administrative Review Board Decisions

FILING OF FRSA COMPLAINT IN U.S. DISTRICT COURT ENDS DOL JURISDICTION; ARB DISMISSES PENDING APPEAL UPON LEARNING OF DISTRICT COURT ACTION

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- *Notice to DOL of Intent to Remove*

U.S. District Court Decisions

REMOVAL TO FEDERAL DISTRICT COURT; NOTICE TO DOL; COURT STRIKES AFFIRMATIVE DEFENSE FOR NON-COMPLIANCE WITH REGULATORY NOTICE PROVISION TO DOL ON GROUNDS THAT THE PROVISION COULD NOT DEPRIVE THE COURT OF JURISDICTION CONFERRED BY STATUTE

Bjornson v. Soo Lin R.R. Co., No. 14-cv-4596, 2015 U.S. Dist. LEXIS 112307 (D. Minn. June 15, 2015) (Report and Recommendation) (case below 2014-FRS-127) [PDF](#): Case involving a Federal Employer's Liability Act, 45 U.S.C. § 51, *et seq.*, negligence claim and a retaliation complaint under whistleblower protection provisions of the Federal Rail Safety Act ("FRSA"), 49 U.S.C.

§ 20109, alleging that the railroad refused a request for a personal day to attend a doctor's appointment for a work-related injury and then initiated an investigation for "failure to protect services" and "laying off under false pretenses." He also challenged the inclusion of the investigation on his personal record. Slip op. at 2. This order contains a report and recommendation by a magistrate judge concerning the Plaintiff's motion to strike three of the railroad's 25 affirmative defenses under Fed. R. Civ. P. 12(f). *Id.* at 1, 3-4. An affirmative defense will not be stricken if it is a sufficient as a matter of law or presents a question of law or fact that the court should hear, but will be stricken if it is legally insufficient, or foreclosed by prior decisions. *Id.* at 5.

The Plaintiff moved to strike an affirmative defense that alleged that because the Plaintiff had not complied with the regulatory requirements regarding giving 15 days' notice to the relevant Department of Labor ("DOL") body before taking advantage of the "kick-out" provision and filing a suit in federal court, the court lacked jurisdiction over the suit. The Plaintiff conceded that he had not complied with the regulations at issue, but argued that DOL regulations could not deprive the district court of jurisdiction and the statute itself created no advance notice requirement. *Id.* at 16-17. The court agreed with the Plaintiff and struck the defense as legally insufficient. The statute itself created the right to pursue the action in federal court and that created the jurisdictional prerequisites. Giving 15 days' notice to DOL was not one of them. By the plain language of the statute then, the court had jurisdiction despite the lack of notice. *Id.* at 18-21.

DOL Administrative Review Board Decisions

DISMISSAL OF APPEAL ON NOTICE OF REMOVAL

***Sirois v. Long Island Railroad Co.*, ARB No. 2018-043, ALJ No. 2017-FRS-78 (ARB June 26, 2018):** The ARB dismissed a FRSA case pending before it upon the Complainant's filing of a notice of the filing of action in U.S. district court.

FILING OF COMPLAINT IN DISTRICT COURT; NO SANCTION FOR FAILURE TO COMPLY WITH ADVANCE NOTICE AND SERVICE REQUIREMENTS OF 29 C.F.R. § 1982.114(b)

In ***Pfeifer v. Union Pacific Railroad Co.***, ARB No. 12-087, ALJ No. 2011-FRS-38 (ARB Nov. 19, 2012), the ARB dismissed the Complainant's FRSA administrative complaint based on the Complainant's filing of an action in U.S. District Court for the District of Kansas. Although the Complainant failed to give 15 days' advance notice of the district court filing, and failed to file with the ARB a copy of the district court complaint, as required by the regulation at 29 C.F.R. §

1982.114(b), the ARB observed that the regulations provide no sanction for failure to comply with the advance notice and service requirements.

VI. PROCEDURE BEFORE AND REVIEW BY FEDERAL COURTS

Statute

49 U.S.C. § 20109

(d) Enforcement action.

...

(2) Procedure.

(A) In general. Any action under paragraph (1) shall be governed under the rules and procedures set forth in section 42121(b) [49 USCS § 42121(b)], including:

...

(iii) Civil actions to enforce. If a person fails to comply with an order issued by the Secretary of Labor pursuant to the procedures in section 42121(b) [49 USCS § 42121(b)], the Secretary of Labor may bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred, as set forth in [section] 42121 [49 USCS § 42121].

...

(4) Appeals. Any person adversely affected or aggrieved by an order issued pursuant to the procedures in section 42121(b) [49 USCS § 42121(b)][,] may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. The review shall conform to chapter 7 of title 5 [5 USCS §§ 701 et seq.]. The commencement of proceedings under this paragraph shall not, unless ordered by the court, operate as a stay of the order.

Regulations

29 C.F.R. § 112: Judicial Review.

(a) Within 60 days after the issuance of a final order under §§1982.109 and 1982.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation.

(b) A final order is not subject to judicial review in any criminal or other civil proceeding.

(c) If a timely petition for review is filed, the record of a case, including the record of proceedings before the ALJ, will be transmitted by the ARB or the ALJ, as the case may be, to the appropriate court pursuant to the Federal Rules of Appellate Procedure and the local rules of such court.

29 C.F.R. § 113: Judicial Enforcement.

(a) Whenever any person has failed to comply with a preliminary order of reinstatement, or a final order, including one approving a settlement agreement, issued under NTSSA, the Secretary may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred. Whenever any person has failed to comply with a preliminary order of reinstatement, or a final order, including one approving a settlement agreement, issued under NTSSA, a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the appropriate United States district court.

(b) Whenever a person has failed to comply with a preliminary order of reinstatement, or a final order, including one approving a settlement agreement, issued under FRSA, the Secretary may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.

- *Jurisdiction in Interlocutory Appeals*

U.S. District Court Decisions

DISTRICT COURT LACKS JURISDICTION TO REVIEW ARB'S DECISION TO DENY INTERLOCUTORY REVIEW OF ALJ'S DISCOVERY ORDER

In *Green v. Grand Trunk Western Railroad*, No. 14-cv-11125 (E.D. Mich. Apr. 13, 2015) (case below ARB No. 13-100, ALJ No. 2013-FRS-51) (2015 WL 1637442; 2015 U.S. Dist. LEXIS 47819), the Petitioner sought de novo review by the U.S. District Court of the ARB's denial of an interlocutory appeal of the ALJ's discovery order compelling the Petitioner to disclose certain relevant medical records and denying the Petitioner's motion for a protective order. The Respondents filed a motion to dismiss. The court granted the motion. The provision of the FRSA at 49 U.S.C. § 20109(d)(4) governing appeals by a "person adversely affected or aggrieved by an order issued pursuant to" the procedures governing the Secretary of Labor's review of a complaint, provides for review by a court of appeals, and only for "final orders" issued by the Secretary of Labor. The court found that the ARB's denial of interlocutory review of a discovery dispute clearly was not a final order. The provision of the FRSA at 49 U.S.C. § 20109(d)(3) provides for district court jurisdiction for de novo consideration of an FRSA claim provided that more than 210 days have lapsed without the Secretary of Labor issuing a final decision on the administrative complaint. The court found, however, that the Petitioner's petition in this case was unambiguously seeking review of the ARB's decision on the interlocutory appeal rather than a commencement of judicial proceedings on the underlying claim of retaliation. The court noted that the ALJ had issued an order dismissing the administrative proceedings for lack of jurisdiction based on the Petitioner's filing in federal district court, but found that the ALJ's views on jurisdiction were not binding on the court. The court also found that jurisdiction did not arise under the APA or the All Writs Act.

DISTRICT COURT REVIEW NOT AVAILABLE CONCERNING NON-FINAL ORDER OF ADMINISTRATIVE REVIEW BOARD RULING THAT § 20109(f) OF THE FRSA DOES NOT PRECLUDE AN EMPLOYEE WHO CHALLENGED HIS TERMINATION IN AN RLA § 3 ARBITRATION FROM FILING A FRSA WHISTLEBLOWER CLAIM

In *Norfolk Southern Railway Co. v. Solis*, No. 12-00306 (D.D.C. Jan. 3, 2013) (case below ARB No. 09-101, ALJ No. 2008-FRS-3), Larry L. Koger filed a FRSA employee protection complaint. The ALJ held that 49 U.S.C. § 20109(f) barred the complaint because the Complainant elected to challenge his dismissal by pursuing the grievance and arbitration procedures under RLA § 3, 45 U.S.C. § 153. *Koger v. Norfolk Southern Ry.*, ALJ No. 2008-FRS-3 (May 29, 2009). On administrative appeal, the ARB consolidated Koger's appeal with an appeal in another case, *Mercier v. Union Pacific R.R.*, ALJ No. 2008-FRS-4 (June 3, 2009), where a different ALJ determined that § 20109(f) did not preclude an employee who had challenged his termination in RLA § 3 arbitration from filing a whistleblower claim under FRSA. The ARB agreed with the decision of the ALJ in *Mercier*, and ruled that, as a matter of law, an employee's pursuit of RLA arbitration does not constitute an election of remedies under 49 U.S.C. § 20109(f). The ARB remanded both *Mercier* and *Koger* for further proceedings.

The Respondent in Koger's administrative proceeding, Norfolk Southern Railway Co. (the "Plaintiff"), filed an action in federal district court claiming that the district court could review the ARB's non-final decision under the doctrine of *Leedom v. Kyne*, 358 U.S. 184 (1958), arguing that the decision was in excess of the Secretary's delegated powers, and that the Plaintiff would have no other meaningful and adequate means to vindicate its statutory right. The Secretary moved to dismiss arguing that the district court lacked subject-matter jurisdiction because 49 U.S.C. § 20109(d)(4) places review of final decisions by the ARB in the appellate court.

The district court noted that the exception under the *Leedom* doctrine is extremely narrow - essentially a "Hail Mary" pass. The doctrine has two predicates: (1) the party must demonstrate that the agency disobeyed a statutory provision that is 'clear and mandatory'; (2) the party must show that, without the district court's exercise of jurisdiction, it lacks any meaningful and adequate means of vindicating its statutory rights. In regard to the first predicate, the court reviewed the Plaintiff's arguments as to why the ARB's decision was allegedly in error, and found that the Plaintiff's argument was flawed in several respects, whereas the ARB's reading was supported by statutory history. The court found that it was not necessary to determine, for the purposes of the jurisdictional question, whether the ARB's ruling was correct, but only that it was colorable under the statute and not in violation of a clear, mandatory directive within the statute. Accordingly, the court found that the *Leedom* doctrine did not apply. In regard to the second predicate, the district determined that it could not be said that the practical effect of making the Plaintiff go through with the FRSA investigation would somehow foreclose all access to the courts.

- Discovery

U.S. District Court Decisions

DISCOVERY; PROTECTIVE ORDER GRANTED FOR DEPOSITION OF CORPORATE REPRESENTATIVE CONCERNING ESI PRACTICES WHEN RELEVANT INFORMATION COULD BE OTHERWISE PROCURED THROUGH INTERROGATORY

Neylon v. BNSF Ry. Co., No. 17-cv-3153 (D. Neb., June 8, 2018) (2018 U.S. Dist. LEXIS 96423) (Order [on motion for protective order]): Plaintiff noticed a deposition of a corporate representative to testify about electronically stored information. Defendant sought a protective order arguing that the topics were not relevant to the merits of the claim but were aimed at investigation to assist discovery, which had just begun. It asserted that Plaintiff could not have a reasonable belief that it had not complied with its discovery obligations. Plaintiff asserted he had a right to the discovery in question and pointed to other cases where Defendant had been

sanctioned for discovery abuses. The court granted the order on the grounds that the information sought at this stage could be procured through the less burdensome means of an interrogatory. It indicated that the issue could be reconsidered later, if the response was insufficient.

DISCOVERY SANTIONS; PRESERVATION OF ESI

Brewer v. BNSF Railway Co., No. 15-cv-65 (D. Mont. Feb. 27, 2018) (2018 U.S. Dist. LEXIS 74508) (Findings and Recommendation), adopted by *Brewer v. BNSF Railway Co.*, No. 15-cv-65 (D. Mont. May 2, 2018) (2018 U.S. Dist. LEXIS 74458; 2018 WL 2047581) (Order [adopting Magistrate's Findings and Recommendations]) Case below: ALJ No. 2014-FRS-00001: Denial of motion for discovery sanctions; although BNSF should have reasonably anticipated litigation and taken reasonable steps to preserve relevant ESI as of February of 2013, the magistrate did not find prejudice on behalf of Mr. Brewer so as to require curative measures under Rule 37(e)(1), and did not find an intent to deprive Mr. Brewer of relevant ESI so as to require sanctions under Rule 37(e)(2).

ALJ'S EXCLUSION OF CERTAIN EXPERTS BASED ON COMPLAINANT'S UNTIMELY DESIGNATION WOULD NOT NECESSARILY BAR THOSE EXPERTS FROM TESTIFYING BEFORE THE DISTRICT COURT; WHERE THERE ALREADY HAD BEEN EXTENSIVE DISCOVERY BEFORE THE ALJ, THE COURT WOULD EXPECT THE PARTIES TO PRESENT A TRUNCATED DISCOVERY SCHEDULE

In *Hall v. Soo Line R.R. Co.*, No. 17-2120 (D. Minn. Oct. 20, 2017) (2017 U.S. Dist. LEXIS 173761) (case below ALJ No. 2016-FRS-00083), the Defendant sought a ruling that the court could rely solely on the record before the ALJ determine that the Complainant's dismissal was not in retaliation for FRSA protected activity. The court, however, was persuaded by the Complainant that the record before the ALJ was not as fully developed as contended by the Defendant, noting for example, that the ALJ had excluded expert testimony from two witnesses because the ALJ found that the expert designations were not made until after the discovery deadline had passed, whereas such testimony will likely be allowed before the district court. The district court judge, however, indicated that his ruling was not an invitation to engage in extensive discovery. The judge noted that the parties had already taken multiple depositions and engaged in document production, and that he expected that the parties would present a greatly truncated discovery schedule so that the case could be resolved.

DISTRICT COURT ADJUDICATION; DISCOVERY; COURT PERMITS DISCOVERY BY PLAINTIFF OR RAILROAD AS TO PLAINTIFF'S ENTIRE JOB HISTORY, LIMITS GENERAL INQUIRIES INTO RAILROAD PRACTICES TO THE RELEVANT TIMEFRAME

Jones v. Union Pac. R.R. Co., No. 14-cv-3908, 2015 U.S. Dist. LEXIS 97327 (N.D. Ill. July 27, 2015): The Plaintiff was injured while working as a conductor with Union Pacific when the train

he was working on collided with a train operated by CSX. The Plaintiff filed suits sounding in negligence against both Union Pacific and CSX. In addition, plaintiff alleged that after reporting his injury and the allegedly unsafe working conditions, he was investigated, disciplined, and then terminated by his employer, Union Pacific, in violation of the whistleblower protection provisions of the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109. Slip op. at 1-3.

This order concerns a discovery dispute and motions by both Union Pacific and CSX for protective orders pertaining to the scope of depositions that Plaintiff had noticed under Fed. R. Civ. P. 30(b)(6) of corporate representatives of both Defendants. The district court denied the motions for protective orders with the exception of limiting several deposition topics. *Id.* at 1. The objections generally alleged that all of topics in the notice of depositions (which including subparts numbering 25 and 20 respectively) were vague, overbroad, and called for irrelevant information. *Id.* at 3, 5. The court, however found that the topics were adequately described and, in general, when read naturally in context pertained to only relevant information. While some topics could be read to pertain to irrelevant information, this “would describe most Rule 30(b)(6) notices” and Plaintiff’s counsel had every incentive to use the permitted time to focus on relevant aspects of the topics. *Id.* at 5. The court then applied those principles to each of the deposition topics, overruling the various objections but expressing an expectation that the depositions would be limited to the events at issue—e.g. to the operating rules pertaining to the accident, rather than any conceivable operating rule of either company. *Id.* at 6-8. The court also, for example, agreed to limit the deposition topic relating to track maintenance to the temporal timeframe of the accident, rather than the entire 75 year history of the track in question. *Id.* at 12-13.

Nearly all of the deposition topics pertain to the negligence dimension of the suit, not the FRSA claim. Pertinent to the FRSA claim, the court overruled objections to the deposition notice relating to the plaintiff’s employment history, noting that the entire history was at issue given the alleged adverse action and Union Pacific’s asserted affirmative defense. *Id.* at 15. The same held for information about wages and benefits provided to similarly situated trainmen. *Id.* at 15-16. The court also declined to limit the deposition notice as to information about the investigation and discipline of plaintiff. *Id.* at 18-19. But it did limit the scope of the deposition notice relating to Union Pacific’s anti-retaliation and injury reporting practices and policies to the temporal timeframe of the accident and discipline at issue and the policies and procedures regarding FRSA anti-retaliation. *Id.* at 19-20. An objection about producing a representative about other whistleblower claims was resolved via a compromise limiting it to the relevant service unit. *Id.* at 20.

DISTRICT COURT ADJUDICATION; DISCOVERY

Jensen v. BNSF Ry. Co., No. 13-cv-5955, 2015 U.S. Dist. LEXIS 66072 (N.D. Ca. May 19, 2015) (Order Re Discovery Letter Brief at ECF No. 53) [PDF](#): Discovery dispute in complaint under the whistleblower protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109, related to an allegation that the Plaintiff was unlawfully disciplined for following the orders and treatment plan of his physician for a right wrist injury. Plaintiff sought to depose BNSF’s general counsel and a senior attorney, BNSF sought a protective order as well as sanctions. At the hearing on the motion, the Plaintiff withdrew the notices of deposition. The court denied the motion for a

protective order as moot and denied the motion for sanctions. Slip op. at 1-2. The court noted that these were not fact-witnesses and their only involvement appeared to be privileged, but denied the motion for sanctions since punitive damages were involved and there had recently been a changed in counsel, which might have impacted the way discovery was being handled. *Id.* at 3.

DISTRICT COURT ADJUDICATION; DISCOVERY

Jensen v. BNSF Ry. Co., No. 13-cv-5955, 2015 WL 3662593 (N.D. Ca. May 19, 2015) (Order Re Discovery Letter Brief at ECF No. 56) [PDF](#): Discovery dispute in complaint under the whistleblower protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109, related to an allegation that the Plaintiff was unlawfully disciplined for following the orders and treatment plan of his physician for a right wrist injury. Plaintiff noticed the depositions of the Executive Vice-President of Operations and a General Attorney in the law department. The court granted a protective order as to the Executive VP and granted it without prejudice as to the general attorney, permitting the Plaintiff to raise the issue again. The court also adjusted discovery deadlines. Slip op. at 1-2. The analysis discussed the principles surrounding “apex” depositions and pointed out that although the case involved punitive damages, neither of the proposed deponents were fact witnesses or trial witnesses and discovery had already been ample on the punitive damages issues. The court suggested that the depositions would be more usefully conducted with other officials. *Id.* at 3-5. It allowed the Plaintiff to contest the protective order as to the attorney if he produced “a more robust factual proffer.” *Id.* at 5.

DISCOVERY; DENIAL OF NATIONWIDE DOCUMENTATION OF DISCIPLINE HISTORIES AND FRSA COMPLAINTS OF ALL OTHER BNSF EMPLOYEES WHERE PLAINTIFF FAILED TO ESTABLISH NEED FOR SUCH INFORMATION

Relying on *Carman v. McDonnell Douglas Corp.*, 114 F. 3d 790, 792 (8th Cir. 1997); *Sallis v. University of Minn.*, 408 F. 3d 470, 478 (8th Cir. 2005); and *Semple v. Federal Exp. Corp.*, 566 F. 3d 788, 794 (8th Cir. 2009), the Magistrate Judge in *Heim v. BNSF Railway Co.*, No. 8:13CV369 (D. Neb. Dec. 9, 2014) (2014 U.S. Dist. LEXIS 171009)(case below 2013-FRS-40), denied the Plaintiff's request in his Federal Railroad Safety Act, 49 U.S.C. § 20109 case for company-wide discovery of discipline histories and FRSA complaints of all other BNSF employees with a FRA-reportable injury five years prior to the complaint. The Plaintiff contended that he needed this information to show a correlation between being injured and being disciplined. The Magistrate held that merely claiming an adverse employment action arose from a company's nationwide policy is insufficient. Company-wide information is usually not helpful in employment cases. The Magistrate noted that the Plaintiff's personal injury report, charges against him, hearing, and discipline, were all imposed at local level, and found that under the prevailing Eighth Circuit law, the Plaintiff "failed to show any particular need to conduct discovery concerning whether, on a company-wide basis, other injured BNSF employees faced disciplinary charges for reporting a personal injury." BNSF produced during discovery a chart listing whether discipline was imposed on 21 employees with FRA-reportable injuries in the relevant geographic division, but did not produce those employees' discipline histories.

- Party Not Named in Administrative Complaint

U.S. District Court Decisions

MOTION TO DISMISS INDIVIDUAL DEFENDANT; EXHAUSTION OF ADMINISTRATIVE REMEDIES; WHETHER MANAGER WAS SUFFICIENTLY NAMED AS RESPONDENT IN ADMINISTRATIVE COMPLAINT FILED WITH OSHA

In Windom v. Norfolk Southern Railway Co., No. 12-cv-345 (M.D. Ga. Feb. 1, 2013), the court denied a motion to dismiss filed by the defendant Norfolk's Manager of Administrative Services ("manager"), who had been also named as a defendant by the plaintiff. The plaintiff was a welder who contended that Norfolk and the manager had acted together to violate the Federal Rail Safety Act when the plaintiff reported an injury. The manager first argued that the FRSA claim should be dismissed because the plaintiff did not name her as a respondent in the administrative complaint filed with OSHA, and therefore the plaintiff did not exhaust his administrative remedies against her and she should be dismissed from the federal district court action.

The plaintiff had named the Norfolk as the establishment and the manager as the management official in the heading of his complaint, and the court agreed with the plaintiff that it was sufficiently clear that the plaintiff intended his OSHA complaint to be directed at both Norfolk and the manager. The court noted that there was no other location on the OSHA complaint form for the plaintiff to have named the manager and that the manager had been clearly listed in the heading of the complaint. Although the manager was not specifically mentioned in the body of the complaint, the complaint stated that Norfolk, through its management official, engaged in improper conduct. Moreover, the specific acts described in the complaint form were acts of the manager, and had OSHA investigated, it would have been apparent to OSHA that the plaintiff was complaining of the manager's actions. The court did not find dispositive OSHA's alleged failure to send a copy of the complaint to the manager. More than 210 days had passed with no decision from OSHA before the plaintiff filed in district court, and the court found that the plaintiff had exhausted his administrative remedies against the manager.

The manager also argued that the FRSA action should be dismissed because the paragraphs in the complaint in which her name was mentioned alleged wrongdoing by Norfolk, and as such did not permit the court to infer more than a mere possibility of misconduct by her. The plaintiff pointed to several specific allegations in the complaint regarding the manager's actions, and argued that they were not general or legal conclusions but specific factual allegations supporting his FRSA claim against the manager.

The court, noting that at this stage of the proceeding the pleadings are construed broadly and the allegations in the complaint are viewed in the light most favorable to the plaintiff, found that the plaintiff had satisfied FRCP 8's pleading requirements. The court summarized the complaint, noting *inter alia*, that the plaintiff's whistleblower claim was based on allegedly unlawful retaliation for reporting an on-the-job injury; that the plaintiff contended that reporting his injury and seeking medical treatment are both activities protected by the FRSA; that the plaintiff contended that Norfolk knew about the injury and the report of injury; that the plaintiff contended that Norfolk planned to punish him at least partly because of his injury report; and that the plaintiff contended that the defendants acted together to violate the FRSA because he reported this injury.

- Standard of Review

U.S. Circuit Court of Appeals Decisions

ALJ DISCRETION TO IMPOSE ADVERSE INFERENCE FOR FAILURE TO PRODUCE EVIDENCE; ALJ CANNOT BE HELD TO HAVE ABUSED THAT DISCRETION WHERE APPEALING PARTY NEVER ASKED FOR ADVERSE INFERENCE TO BE DRAWN

In *Samson v. USDOL*, No. 17-2862 (7th Cir. May 21, 2018) (2018 U.S. App. LEXIS 13174; 2018 WL 2304223) (unpublished) (case below ARB No. 15-065; ALJ No. 2014-FRS-00091), the 7th Circuit dismissed the complainant's petition for review of the ARB's affirmance of the ALJ's dismissal of his FRSA retaliation complaint. One of the complainant's arguments on appeal was that the ALJ should have drawn an adverse inference sanctioning the respondent for not providing recordings of certain radio conversations that the complainant believed still existed. The court observed that imposing an adverse inference against a party is left to the discretion of the factfinder, and the ALJ could not have abused that discretion where the complainant had not asked the ALJ to draw an adverse inference.

SUBSTANTIAL EVIDENCE REVIEW; NINTH CIRCUIT AFFIRMS JURY VERDICT IN FAVOR OF FRSA PLAINTIFF AS SUPPORTED BY SUBSTANTIAL EVIDENCE

STANDARD OF REVIEW; JURY FINDINGS REVIEWED FOR SUBSTANTIAL EVIDENCE; JURY INSTRUCTIONS REVIEWED FOR LEGAL ERROR; EVIDENTIARY DETERMINATIONS REVIEWED FOR ABUSE OF DISCRETION; ALLEGED ERRORS NOT RAISED BEFORE THE DISTRICT COURT REVIEWED FOR PLAIN ERROR

Elliott v. BNSF Railway Co., 714 Fed. Appx. 737 (9th Cir. Mar. 2, 2018) (unpublished) (Nos. 15-35785 and 15-25899) (Memorandum):

In a memorandum decision the Ninth Circuit affirmed a jury verdict in favor of the plaintiff under the FRSA. It rejected the contention that there was legal error in the “same-decision affirmative” defense because the jury instructions properly required only proof that the Defendant sincerely believed misconduct occurred, not that there had actually been misconduct. It also held that substantial evidence supported the jury’s “contributing factor” finding where “retaliatory motive” could be inferred where emails between managers connected the protected activity to an FRA investigation and fine, there was evidence of animus to the Plaintiff, and there was temporal proximity between the protected activity, the investigation, and the alleged retaliation. It further affirmed findings that BNSF did not sincerely and honestly believe that there was misconduct meriting dismissal because a reasonable jury could infer that BNSF manufactured an altercation with a manager as a pretext and that it had known about a prior felony conviction earlier and raised it after the protected activity as a pretext. The Ninth Circuit also quickly rejected challenges to evidentiary determinations, the decision not to give a “business judgement” jury instruction, and challenges to portions of the damages. An objection to an instruction that was not raised before the district court was reviewed for plain error.

APPELLATE REVIEW; EIGHTH CIRCUIT VACATES ARB DECISION ON GROUNDS THAT IT ALTERED ALJ’S LEGAL REASONING BUT IMPROPERLY FILLED-IN FACTUAL FINDINGS TO REACH SAME CONCLUSION

BNSF Ry. Co. v. United States DOL Admin. Review Bd. [Carter], 867 F.3d 942, No. 16-3093, 2017 U.S. App. LEXIS 15020, 2017 WL 3469224 (8th Cir. 2017) (case below ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82).

The Complainant started working for BNSF in 2005. He injured his shoulder in 2007 and immediately reported it. He later filed a Federal Employer’s Liability Act (“FELA”), 45 U.S.C. § 51, *et seq.*, action based on that injury. During discovery in that case, BNSF deposed him. During trial preparation in 2012, a manager reviewed the deposition and noticed inconsistencies between information given in the deposition and that provided on the original employment application back in 2005. This led to a disciplinary investigation. A second investigation was launched regarding potential false statement in 2012 about getting to work on time. Both investigations produced findings that the Complainant had been dishonest, which under BNSF’s policy can result in a standalone dismissal. So they dismissed him twice in April 2012. Complainant filed a complaint under the whistleblower protection provisions of the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109, alleging that he was retaliated against for reporting his 2007 injury. An Administrative Law Judge (“ALJ”) found for Complainant and awarded \$50,000 in punitive damages as well as reinstatement and various other remedies. 867 F.3d at 944-45. The Administrative Review Board (“ARB”) affirmed. *See Carter v. BNSF Ry. Co.*, ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82 (ARB June 21, 2016).

The ALJ’s decision was based on a chain-of-events finding such that even if the employer was not motivated by and gave no significance to an event, if it is a necessary link in a chain, that establishes contribution. *Id.* at 945-946. After noting that over four years had passed between the

protected activity and adverse action and that the proffered reasons for the adverse action had nothing to do with the protected activity (lying on an application and lying about late arrivals at work vs. reporting an injury), the Eighth Circuit rejected the chain-of-events principle, approvingly citing the recent Seventh Circuit case, *Koziara v. BNSF Ry.*, 840 F.3d 873 (7th Cir. 2017), *cert denied*, 137 S. Ct. 1449 (2017), for the proposition that the showing of contribution involves a proximate cause analysis. *BNSF Ry. Co.*, 867 F.3d at 946. Further, the Eighth Circuit held that there must be evidence of intentional retaliation implicating some “discriminatory animus.” *Id.*

This was not the end of the analysis, since the ARB hadn’t adopted the chain-of-events basis for the decision. Instead, it had affirmed by noting evidence of a change in attitude, deficient explanations for the adverse action, and circumstantial evidence of retaliatory motive. The Eighth Circuit allowed that if such findings were sound, then the decision could be affirmed. *Id.* at 946-47. But it determined that the findings either weren’t in the record or were insufficient. On the change in attitude, the ALJ had not made credibility findings that would sustain the conclusion that the supervisors were targeting the Complainant. Further, no finding was made as to whether the change in attitude related to the injury report or the FELA litigation. The panel implied that retaliation for the FELA litigation would not be a violation of the FRSA (though given the rest of the opinion, they appear to leave this as an open issue for the ARB to decide in the first instance). *Id.* at 947.

Next, substantial evidence did not support that finding that BNSF’s asserted rationale was not worthy of credence. The ALJ had reached the conclusion based on procedural deficiencies in BNSF’s disciplinary process. The panel held that BNSF could not be punished for using otherwise valid procedures just because the ALJ perceives them to be unfair. The question of abstract fairness was not germane to the question of whether the protected activity contributed to the decision to take the adverse action. Thus, the critical findings for a pretext determination hadn’t been made. Nor could a finding that the second dishonesty dismissal was pretext be sustained—it was premised on a finding that all of the events were tied together, but the ARB and Eighth Circuit had rejected this chain-of-events theory. *Id.* at 947-48.

Turning to the “other circumstantial evidence,” the reasoning was based on a finding that the FELA litigation involved the injury and so kept the protected injury report fresh in the minds of the decision-makers. The Eighth Circuit found this finding legally deficient in that it was based on a misreading and incorrect extension of a prior ARB case (*LeDure v. BNSF Ry.*, ARB No. 13-044, ALJ No. 2012-FRS-00020 (ARB June 2, 2015)) that had held that reporting an injury during a FELA case was protected by the FRSA—not that the FELA litigation itself was protected or was sufficient to keep the protected activity “current.” By doing so, the ARB had “decided without discussion a significant issue” that hadn’t been alleged and hadn’t been considered by any of the circuit courts. The lack of explanation for such an expansion frustrated judicial review and so had to be vacated. *Id.* at 948. In sum, “[t]he ARB was unable to salvage an ALJ analysis built upon a flawed theory of causation because the ARB lacked critical fact findings needed to affirm the ALJ’s decision when applying the appropriate legal standard. To the extent the ARB filled in the missing findings, it exceeded its scope of review.” The complaint was thus remanded. *Id.*

APPELLATE REVIEW; COURTS OF APPEALS REVIEW FACTUAL FINDINGS FOR SUBSTANTIAL EVIDENCE, EVIDENTIARY DETERMINATIONS FOR ABUSE OF DISCRETION; DETERMINATION OF WHETHER PUNITIVE DAMAGES WERE APPLICABLE FOR SUBSTANTIAL EVIDENCE, AND AMOUNT OF PUNITIVE DAMAGES FOR ABUSE OF DISCRETION/CLEARLY EXCESSIVE

Pan Am Railways, Inc. v. USDOL, No. 16-2271 (1st Cir. Apr. 20, 2017) (2017 U.S. App. LEXIS 7047; 2017 WL 1422369) (case below ARB No. 14-074; ALJ No. 2013-FRS-84)

Complainant in the case reported that a pile of railroad ties were a safety hazard. It was not abated. He later tripped on the pile and injured his ankle. He reported his injury and was taken to the hospital. A manager told him to expect a disciplinary hearing. He had two days off but took three days to recover, missing a day, which meant the railroad had to report the injury. A hearing was then initiated based on the alleged failure to make sure he had secure footing before getting off a train. He was disciplined with a formal reprimand. Complainant then filed an OSHA complaint based on report the hazard and reporting the injury. It was drafted by a lawyer without review of the Complainant and contained a discrepancy with the testimony at the hearing injury as to whether after hurting his ankle he caught himself and say down or fell down. A manager deemed this major and the railroad decided to bring a second set of charges against plaintiff for filing the OSHA complaint containing a different account in one part. Complainant amended his OSHA complaint to include retaliation for bringing the initial OSHA complaint. At the second hearing, which threatened dismissal, Complainant explained that the lawyer had prepared the OSHA complaint and had gotten that one detail wrong. He also explained that no one at the railroad had asked him about the discrepancy before initiating the second round of discipline. The charge was not sustained.

OSHA found for Complainant on the second, but not first, complaint. The railroad sought a hearing. The ALJ found the manager not very credible and found for the Complainant, rejecting the affirmative defense because the comparator evidence did not match the situation. The ALJ awarded \$10K in emotional distress and the maximum amount, \$250K, in punitive damages. The ARB affirmed on the grounds that substantial evidence supported the findings and the punitive damage award was not an abuse of discretion. The railroad appealed to the First Circuit.

The First Circuit affirmed. First, the railroad argued that it had established its affirmative defense. It challenged the exclusion of certain comparator evidence, arguing that it was not hearsay under the business records exception. But they hadn't been excluded because they were hearsay. The ALJ excluded some of the comparator evidence because there weren't any witnesses who could provide context to them and so they didn't have probative value. This was not an abuse of discretion. Moreover, any error was harmless since they would have only shown that there was prior discipline for false statements, which would not make the circumstances similar to those in this case. This was the same deficiency the ALJ assigned to the evidence that did come in, which the First Circuit held was permissibly found insufficient. The railroad also argued based on its not-retaliatory motive in the discrepancy, but the First Circuit held that substantial evidence supported the ALJ's reasons for rejecting that explanation: adverse credibility findings as to the key manager. The First Circuit also flatly rejected the claim that the ALJ had improperly evaluated the evidence regarding the circumstances of the disciplinary hearing.

The railroad also appealed the punitive damages award. The First Circuit explained that the common law test of punitive damages applied to the FRSA. This test looks to reckless disregard or to whether the railroad acted with “malice or ill will or with knowledge that its actions violated federal law or with reckless disregard or callous indifference to the risk that its actions violated federal law.” Substantial evidence supported the finding that punitive damages were warranted due to the railroad’s reckless or callous disregard for the Complainant’s rights in that the ALJ permissibly found that the railroad had willfully retaliated for filing an OSHA complaint. As to the amount, the First Circuit reviewed for an abuse of discretion and found that while it might have chosen a different amount, the ALJ’s award was not clearly excessive. The ALJ had adduced additional reasons for the award, including management’s exaggeration of the discrepancy and concerns about the culture at the railroad. The decision to pursue discipline for an OSHA complaint was made at high levels, not low level management, and showed a disregard for OSHA’s fact-finding process. Evidence also showed that 99% of reportable injuries at the railroad led to discipline, though the record indicated that the railroad’s attitude to safety was nonchalant. Affirming the amount, the First Circuit stressed deference in the abuse of discretion standard and the better placement of fact-finders in making determinations. On that standard, the award survived appeal.

APPELLATE REVIEW; FINDINGS OF FACT REVIEWED ON DEFERENTIAL SUBSTANTIAL EVIDENCE STANDARD, LEGAL CONCLUSIONS ARE REVIEWED DE NOVO

Conrail v. United States DOL, 567 Fed. Appx. 334 (6th Cir. May 28, 2014) (unpub.):
Complainant was terminated for threatening a supervisor. He also made a high number of safety reports. When the supervisor allegedly perceived the threat, he escalated the issue to his supervisor, who suspended complainant indefinitely pending a hearing. There was evidence that the supervisors were unhappy with the safety complaints and when complainant was suspended the more senior supervisor tossed some of his safety complaints back at him. Complainant was terminated in a decision that was made by another subordinate supervisor under the command of the senior supervisor.

The case proceeded to a hearing before an ALJ. There was evidence adduced that there was no threat or altercation at all and that the first supervisor had unreasonably escalated the situation. That supervisor also gave conflicting accounts of events. There was further evidence that the official decision-maker was unaware of basic facts in the hearing transcript and hadn’t reviewed the evidence. There was further evidence that the railroad had not punished threats in this manner in the past. The ALJ concluded that complainant had established by a preponderance of the evidence that his protected activity contributed to the decision to terminate him and that the railroad had not shown it would have taken the same action absent the protected activity by clear and convincing evidence. She awarded reinstatement and compensatory damages. Both parties appealed to the ARB, which affirmed. The railroad appealed to the Sixth Circuit.

After reviewing the legal framework for an FRSA complaint, the panel explained that factual determinations made by the ALJ were reviewed on the substantial evidence standard, which is a deferential form of review. Legal conclusions were reviewed de novo. On appeal, the railroad

challenged the findings that the decision maker knew about the protected activity and that the protected activity contributed to the adverse action. The ALJ had found otherwise because the decision-makers claims were not credible given that he shared an office with someone who knew and the protected activities were reviewed in the transcript of the hearing. This was substantial evidence and so the finding was affirmed.

The panel also found substantial evidence to support the finding of animus in the flicking of safety reports back at complainant, a request that he not file so many, and questioning from managers about why he was still working for the railroad. The ALJ had applied a cat's paw theory and the Sixth Circuit agreed it was appropriate since there was insufficient evidence that the decision-maker had conducted an independent review.

Finally, as to whether the railroad established that it would have taken the same adverse action without the protected activity, the panel determined that the different accounts of the alleged threat meant that there was substantial evidence to support that ALJ's conclusion, especially where there were numerous other incidences of threats that did not result in termination.

- *Futility of Remand Doctrine*

U.S. Circuit Court of Appeals Decisions

FUTILITY OF REMAND UNDER *CHENERY* DOCTRINE; COURT OF APPEALS DECLINED TO REMAND WHERE, ALTHOUGH ALJ HAD ERRONEOUSLY APPLIED THE HEIGHTENED "WORK REFUSAL" STANDARD TO CONSIDER WHETHER A HAZARD REPORT WAS FRSA PROTECTED ACTIVITY, A REMAND WOULD BE FUTILE BECAUSE THE ALJ'S CREDIBILITY FINDINGS INESCAPABLY LEAD TO THE CONCLUSION THAT THE COMPLAINANT WAS FIRED ONLY FOR INSUBORDINATION

In *Samson v. USDOL*, No. 17-2862 (7th Cir. May 21, 2018) (2018 U.S. App. LEXIS 13174; 2018 WL 2304223) (unpublished) (case below ARB No. 15-065; ALJ No. 2014-FRS-00091), the 7th Circuit dismissed the complainant's petition for review of the ARB's affirmance of the ALJ's dismissal of his FRSA retaliation complaint. The ALJ had found that the Plaintiff's belief about hazardous conditions was unreasonable and credited the company's testimony that it fired the complainant only because he abandoned his job. On appeal, the Plaintiff did not challenge the ALJ's conclusion that his work refusals were not objectively reasonable, but argued that the ALJ erroneously applied the heightened requirements for refusals to work under 49 U.S.C. § 20109(b)(2) when deciding whether the complainant's hazard report was protected activity. The court found that the ALJ had recited the wrong standard, but that the ALJ's error of law did not require a remand because it was harmless. The court that the error was harmless because, even if the hazard report was protected, the railroad had fired the complainant solely on the basis of

insubordination. Because the ALJ had not decided this precise issue, the court applied the *Chenery* doctrine to consider whether a remand would be futile. The court found that the ALJ's credibility findings "inescapably lead to the conclusion that the report played no role in [the complainant's] firing. So the discharge was lawful, and a remand to the ALJ on that question is thus pointless." Slip op. at 5.

- *Exhaustion of Administrative Remedies*

U.S. Circuit Court of Appeals Decisions

EXHAUSTION OF ADMINISTRATIVE REMEDIES; SEVENTH CIRCUIT DISMISSES DIRECT APPEAL FROM ALJ DECISION FOR WANT OF JURISDICTION DUE TO FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

In *Sparre v. United States DOL*, Nos. 18-1105, 18-2348 (7th Cir. May 10, 2019) (2019 U.S. App. LEXIS 14017) (Opinion) (case below ARB No. 18-022, ALJ No. 2016-FRS-00038), the ALJ had granted summary decision in favor of the Respondent. The ALJ's decision included complete instructions for filing a petition for review and a statement of the 14 day limitations period. The Complainant did not file an appeal with the ARB, but rather—30 days after the ALJ's decision—appealed directly to the 7th Circuit. DOL filed a motion to dismiss for failure to timely exhaust administrative remedies. The 7th Circuit declined to take the case, and remanded to the ARB for the limited purpose of ruling on the petition for review. In its subsequent ruling on the appeal from the ARB's order, the 7th Circuit denied the original petition for review "for lack of jurisdiction" due to failure "to timely exhaust [] administrative remedies."

ADMINISTRATIVE EXHAUSTION; SUMMARY JUDGMENT; ADVERSE ACTIONS AND PROTECTED ACTIVITIES PLED IN DISTRICT COURT BUT OMITTED FROM OSHA COMPLAINT CANNOT BE PURSUED WHEN THERE WAS A FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES BECAUSE THE SCOPE OF AN INVESTIGATION THAT COULD HAVE REASONABLY BEEN EXPECTED FROM THE COMPLAINT WOULD NOT HAVE INCLUDED THE NEW CLAIMS

Foster v. BNSF Ry. Co., 866 F.3d 962 (8th Cir. Aug. 10, 2017): Three joined complaints under the FRSA relating back to an injury to another worker that occurred during a crew change. The train had stopped across a bridge from the parking area and when of the new crew members fell off the bridge when walking to the train. After a hearing, the three (and others) were disciplined for a variety of safety infractions found in videos of the incident. In interviews before the

hearing and at the hearing they had reported various safety infractions in the area. It was disputed, for instance, where the railroad told them to stop the train. They each received different levels of discipline, where were reduced or eliminated by the Public Law Board. They also filed FRSA complaints and then kicked them out to federal court. The district court granted summary decision for the railroad and the plaintiffs appealed.

First, the Eighth Circuit affirmed the finding that some of the adverse actions and protected activities pled in their complaint had not been administratively exhausted because they had not been presented to OSHA. It quickly held that because the complaint has to be made with OSHA, there is an exhaustion requirement. Assuming that the “generous” Title VII standard applied in FRSA cases, the court found that some claims were still clearly unexhausted. To exhaust a claim, it must be within the scope of an investigation that could have reasonably be expected to result from the initial complaint. Here certain adverse actions hadn’t been mentioned at all and did not flow from those that were presented to the agency. The same held for some of the protected activities claimed in the district court. As to those claims, summary judgment was proper for failure to exhaust.

U.S. District Court Decisions

SUMMARY JUDGMENT; EXHAUSTION OF ADMINISTRATIVE REMEDIES; PROTECTED ACTIVITIES THAT ARE CONTAINED WITHIN THE PROTECTED ACTIVITY PRESENTED TO OSHA HAVE BEEN EXHAUSTED.

Wooten v. BNSF Railway Co., No. 16-cv-139 (D. Mont. Sept. 18, 2018) (2018 U.S. Dist. LEXIS 159199; 2018 WL 4462506) (case below 2016-FRS-00059) (Order [adopting Magistrate’s Findings and Recommendation and Order]), *adopting Wooten v. BNSF Railway Co.*, No. 16-cv-139 (D. Mont. May 29, 2018) (2018 U.S. Dist. LEXIS 89267; 2018 WL 2417858) (case below 2016-FRS-00059) (Findings and Recommendation and Order)

The Plaintiff reported a work-related wrist injury. After investigation a supervisor concluded that the injury had occurred prior to the work and that the Plaintiff had been dishonest in his reports. This led to termination. Plaintiff filed several actions, including an FRSA complaint.

Defendant sought summary judgment on failure to exhaust administrative remedies. This turned on allegedly additional protected activities asserted in the complaint that were not presented to OSHA. The magistrate judge found this wanting since the additional protected activities were contained within the injury report, which was the basis for the complaint to OSHA.

SUMMARY JUDGMENT; FAILURE TO EXHAUST; WHERE THE PLAINTIFF DID NOT FILE A COMPLAINT WITH OSHA, DEFENDANT IS ENTITLED TO SUMMARY JUDGEMENT FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Tilley v. Union Pacific Railroad Co., No. 16-cv-2382 (N.D. Tx. Apr. 12, 2018) (2018 U.S. Dist. LEXIS 63039; 2018 WL 1786965) (Order Accepting the Findings, Conclusion and Recommendation of the United States Magistrate Judge), *adopting*, *Tilley v. Union Pacific Railroad Co.*, No. 16-cv-2382 (N.D. Tx. Mar. 27, 2018) (2018 U.S. Dist. LEXIS 62902) (Findings, Conclusion and Recommendation of the United States Magistrate Judge):

Plaintiff was terminated after the railroad determined that she failed to ensure that switch points on a track fit properly, which resulted in a derailment. Plaintiff filed a complaint containing several claims, including an FRSA retaliation claim. Defendant moved for summary judgment. Plaintiff did not file a response. In this situation, a court is not permitted to enter a default, but may accept the moving papers as unopposed. Where the complaint is not verified, as here, there will be no competent summary judgment evidence except for that provided by the moving party.

As to the FRSA retaliation claim, Defendant argued that Plaintiff had admitted that she never filed a complaint with OSHA. The magistrate thus recommended that summary judgment be granted for failure to exhaust administrative remedies. No objections were filed and the district court adopted the recommendation.

FAILURE TO EXHAUST; AMENDED OF CLAIMS; CLAIMS CANNOT BE AMENDED TO ASSERT NEW ADVERSE ACTIONS THAT WERE NOT PART OF THE ADMINISTRATIVE COMPLAINT AND THUS WERE NOT ADMINISTRATIVELY EXHUASTED

Gibbs v. Norfolk Southern Railway Co., No. 14-cv-587 (W.D. Ky. Mar. 29, 2018) (2018 U.S. Dist. LEXIS 52565; 2018 WL 1542141) (Memorandum Opinion and Order): Plaintiff made safety complaints related to parking arrangements for a time when the entrances to the main parking area at the Louisville yard were to be blocked. Later he and another employee were investigated after some managers found them sitting in a company truck at a restaurant during work hours. Plaintiff maintained that this was normal practice and authorized, but he was terminated for absenteeism, misuse of company property, and sleeping on the job. He filed an FRSA complaint. The court was presented with Defendant's motion for summary judgment.

In his response to the motion, Plaintiff asserted some additional adverse actions, but the court stated that he was barred from relying on these adverse actions because he did not assert them in the operative complaint and it is not permissible to amend pleadings in a brief opposing summary judgment. In addition, they were not included in the OSHA complaint and so they would be dismissed due to a failure to exhaust.

EXHAUSTION OF ADMINISTRATIVE REMEDIES; PLAINTIFFS WHO WERE NOT SELECTED FOR CERTAIN POSITIONS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES UNDER THE FRSA WHERE THEY APPLIED FOR THOSE POSITIONS MORE THAN 180 DAYS BEFORE THE DATE OF THE OSHA COMPLAINT OR AFTER THE COMPLAINT/AMENDED COMPLAINT

In *Lincoln v. BNSF Railway Co.*, No. 15-cv-4936-DDC-KGS (D. Kan. April 24, 2017), the United States District Court for the District of Kansas granted summary judgment for Respondent, BNSF Railway Co. (“BNSF”), dismissing FRSA complaints of two Plaintiffs, Larry D. Lincoln and Brad C. Mosbrucker. *Lincoln*, slip op. at 1. Plaintiffs sent demand letters to BNSF describing an on-duty chemical spill that had taken place two and a half years earlier, their injuries, damages, and anticipated future damages. *Id.* at 3. Plaintiffs were subsequently placed on medical leave, which was extended, pending their submission of updated medical information addressing the safety concerns raised in the demand letters. *Id.* at 4-5. Plaintiffs applied to a number of different positions within BNSF, *Id.* at 15-17, pursuant BNSF’s craft transfer policy, which is triggered when a “physician does not release the employee to work” at his assigned job, *Id.* at 6-7. Plaintiffs were not selected for the positions they applied to. *Id.* at 18.

The court cited the FRSA’s 180-day statute of limitations, 49 U.S.C. § 20109(d)(1)-(2)(ii), and found that both Plaintiffs failed to exhaust administrative remedies in some cases. Specifically, Plaintiffs failed to exhaust administrative remedies for positions that they applied to that were more than 180 days before their OSHA complaints or after their OSHA complaints or amendments. *Id.* at 22-23

EXHAUSTION OF ADMINISTRATIVE REMEDIES; APPLYING GENERAL EXHAUSTION PRINCIPLES, SCOPE OF DISTRICT COURT REVIEW IS LIMITED TO ISSUES IN THE ADMINISTRATIVE COMPLAINT, THE SUBSEQUENT INVESTIGATION, AND THE SCOPE OF AN INVESTIGATION THAT COULD REASONABLY BE EXPECTED TO FOLLOW THE CHARGES IN THE COMPLAINT

Rookaird v. BNSF Railway Co., No. 14-cv-176 (W.D. Wash. Oct. 29, 2015) (2015 U.S. Dist. LEXIS 147950; 2015 WL 6626069) (case below 2014-FRS-9): Plaintiff had been instructed to move roughly 42 cars. Before doing so he conducted air tests on the cars. He and a trainmaster communicated over the radio about whether the testing was necessary. When Plaintiff returned to the depot he was told by the superintendent to “tie up” and go home. He did so, but provided an end time 28 minutes later than the time he completed his tie up and did not sign his time sheet because he could not locate it. Plaintiff also had a confrontation in the break room with another employee, after which the superintendent told him to leave. Defendant investigated the events and terminated Plaintiff. Its stated reasons were failure to work efficiently, dishonest reporting of time, failure to sign the time sheet, and not complying with instructions to leave the property. Plaintiff filed suit under the FRSA on the grounds that his air testing and communications about it were protected activities and led to the termination. This order considered Plaintiff’s Motion for Partial Summary Judgment and Defendant’s Motion for Summary Judgment.

The court explained that the FRSA employs a “two-part burden-shifting test” and that in the first part the plaintiff must “show by a preponderance of the evidence that (1) he engaged in a protected activity; (2) the employer knew he engaged in the allegedly protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action.” “After the employee makes this showing, the burden shifts to the employer to demonstrate by clear and convincing evidence that the employer would have

taken the same unfavorable personnel action in the absence of the protected activity.” Here, Defendant conceded the second and third elements of the Complainant’s case.

The first issue for the court was which alleged protected activities were at issue. To be properly raised, Plaintiff needed to have exhausted his administrative remedies as to the issue. Relying on general principles of exhaustion, this meant that the action was limited to the administrative complaint, the investigation that followed, or the scope of an investigation that reasonably could have been expected to follow the complaint. Moreover, summary judgment is not a tool to flesh out inadequate pleadings, so protected activities and theories needed to be adequately plead prior to the summary judgment motion and opposition. Plaintiff’s administrative complaint *and* the operative complaint before the court limited the protected activity to refusing to violate federal safety rules or regulations related to air testing and his subsequent reports to the railroads hotline of the incident and subsequent harassment. Only those protected activities were properly before the court.

MOTION TO DISMISS INDIVIDUAL DEFENDANT; EXHAUSTION OF ADMINISTRATIVE REMEDIES; WHETHER MANAGER WAS SUFFICIENTLY NAMED AS RESPONDENT IN ADMINISTRATIVE COMPLAINT FILED WITH OSHA

MOTION TO DISMISS INDIVIDUAL DEFENDANT; WHETHER FEDERAL COURT COMPLAINT MET FRCP 8 PLEADING REQUIREMENTS

In *Windom v. Norfolk Southern Railway Co.*, No. 12-cv-345 (M.D. Ga. Feb. 1, 2013), the court denied a motion to dismiss filed by the defendant Norfolk's Manager of Administrative Services ("manager"), who had been also named as a defendant by the plaintiff. The plaintiff was a welder who contended that Norfolk and the manager had acted together to violate the Federal Rail Safety Act when the plaintiff reported an injury. The manager first argued that the FRSA claim should be dismissed because the plaintiff did not name her as a respondent in the administrative complaint filed with OSHA, and therefore the plaintiff did not exhaust his administrative remedies against her and she should be dismissed from the federal district court action.

The plaintiff had named the Norfolk as the establishment and the manager as the management official in the heading of his complaint, and the court agreed with the plaintiff that it was sufficiently clear that the plaintiff intended his OSHA complaint to be directed at both Norfolk and the manager. The court noted that there was no other location on the OSHA complaint form for the plaintiff to have named the manager and that the manager had been clearly listed in the heading of the complaint. Although the manager was not specifically mentioned in the body of the complaint, the complaint stated that Norfolk, through its management official, engaged in improper conduct. Moreover, the specific acts described in the complaint form were acts of the manager, and had OSHA investigated, it would have been apparent to OSHA that the plaintiff was complaining of the manager's actions. The court did not find dispositive OSHA's alleged failure to send a copy of the complaint to the manager. More than 210 days had passed with no decision from OSHA before the plaintiff filed in district court, and the court found that the plaintiff had exhausted his administrative remedies against the manager.

The manager also argued that the FRSA action should be dismissed because the paragraphs in the complaint in which her name was mentioned alleged wrongdoing by Norfolk, and as such did not permit the court to infer more than a mere possibility of misconduct by her. The plaintiff pointed to several specific allegations in the complaint regarding the manager's actions, and argued that they were not general or legal conclusions but specific factual allegations supporting his FRSA claim against the manager.

The court, noting that at this stage of the proceeding the pleadings are construed broadly and the allegations in the complaint are viewed in the light most favorable to the plaintiff, found that the plaintiff had satisfied FRCP 8's pleading requirements. The court summarized the complaint, noting *inter alia*, that the plaintiff's whistleblower claim was based on allegedly unlawful retaliation for reporting an on-the-job injury; that the plaintiff contended that that reporting his injury and seeking medical treatment are both activities protected by the FRSA; that the plaintiff contended that Norfolk knew about the injury and the report of injury; that the plaintiff contended that Norfolk planned to punish him at least partly because of his injury report; and that the plaintiff contended that the defendants acted together to violate the FRSA because he reported this injury.

- *Collateral Estoppel / Res Judicata*

U.S. Circuit Court of Appeals Decisions

COLLATERAL ESTOPPEL; SUMMARY JUDGMENT; FIFTH CIRCUIT HOLDS THAT COLLATERAL ESTOPPEL DOES NOT APPLY TO FINDINGS MADE IN ARBITRATION WHERE ARBITRATION DID NOT INVOLVE NEURAL ARBITERS

Grimes v. BNSF Ry. Co., 746 F.3d 184 (5th Cir. March 18, 2014) (Decision on Petition for Rehearing) [*Editor's Note*: The original decision, which was replaced by this decision, can be found at 743 F.3d 114 (5th Cir. Feb. 17, 2014)]: Plaintiff was injured in an accident that occurred while working with two others on a nonmoving train, which was the result of one of the others operating one of the cars even though he was not certified to do so. He initially stated he could not recall what happened, but in question acknowledged that the other employee had operated the train. After an investigation and hearing, all three were terminated. Plaintiff pursued a collective-bargaining grievance. The Public Law Board upheld the discipline but mitigated the punishment, reinstating him without backpay. Plaintiff then filed a FRSA complaint, which ended up in district court. The district court gave preclusive effect to the arbitration finding that Plaintiff had been dishonest, and on that basis granted the defendant summary judgment.

On appeal Plaintiff argued that the arbitration findings could not collaterally estop issues in independent claims and that the procedures in arbitration were inadequate. The Fifth Circuit rejected plaintiff's position that CBA proceedings could never result in issue preclusion/collateral estoppel and defendant's position that they always do so. "the answer lies somewhere in the middle." Arbitration proceedings can result in collateral estoppel as to facts, but there is discretion in applying the doctrine, which should be guided by consideration of the procedural differences in the proceedings and the nature of the arbiters/arbitration. The issue to be precluded must be within the expertise and authority and the arbitrator and the procedures must adequately protect the rights of the parties. In this case the arbitration in question did not give plaintiff the basic procedural protections of a judicial forum, so it was inappropriate to give preclusive effect to the arbitration findings. Among the inadequacies, the railroad designated the hearing officer and made the termination decision, there was no representation by an attorney, and review was based on the record alone. The crucial point for the Fifth Circuit was that the arbiters were not neutral.

U.S. District Court Decisions

COLLATERAL ESTOPPEL / RES JUDICATA; COLLATERAL ESTOPPEL AND RES JUDICATA APPLY WHEN ADMINISTRATIVE AGENCY ACTS IN A JUDICIAL CAPACITY; SUBSEQUENT STATE LAW CLAIMS BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL WHEN THEY COULD HAVE BEEN RAISED AND LITIGATED IN A PRIOR FRSA COMPLAINT DOL THAT HAD RESULTED IN A FINAL, ADVERSE DETERMINATION

Welch v. Union Pac. R.R. Co., No. 16-cv-00431 (W.D. Mo. Aug. 4, 2016) (2016 U.S. Dist. LEXIS 102193; 2016 WL 4154760): Plaintiff filed an FRSA complaint with OSHA. After investigation, the complaint was dismissed. Plaintiff did not request a hearing, so the OSHA findings became final. Later Plaintiff filed a variety of state law claims in state court based in wrongful termination/public policy claims. The railroad removed the case to federal court and moved for dismissal based on res judicata and collateral estoppel.

The district court granted the motion after taking judicial notice of DOL's decisions, which were part of the public record. The FRSA contains an election of remedies provision at 49 U.S.C. § 20109(f) that provides that "[a]n employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier." In this case the new actions were based on the same allegedly unlawful act of the railroad and the Plaintiff had elected his remedy by filing a complaint with OSHA and exhausting his remedy by letting the adverse determination become final. That barred the state law actions.

Further, even absent the election of remedies, *res judicata* and collateral estoppel precluded the suit. These doctrines extend to determinations made by administrative agencies acting in a judicial capacity. That was the case here, despite no hearing before an ALJ, because the plaintiff had foregone his rights to a *de novo* hearing and appeals by not asking for a hearing. The Plaintiff had a full opportunity to litigate his claims before DOL, so the final decision barred the latter action based on the same allegations.

RES JUDICATA / CLAIM SPLITTING; CLAIM SPLITTING DEFENSE PROHIBITS A PARTY FROM LITIGATING COMPLAINTS PIECEMEAL; COURT FINDS THAT CLAIM SPLITTING DEFENSE UNAVAILABLE WHEN RAILROAD CONSENTED TO PROCEEDING SEPARATELY ON RACE DISCRIMINATION AND WHISTLEBLOWER RETALIATION COMPLAINTS AND WAITED TO RAISE THE DEFENSE UNTIL AFTER ONE OF THE ACTIONS HAD BEEN DISMISSED

Lee v. Norfolk Southern Railway Co., 187 F. Supp. 3d 623, No. 13-cv-4 (W.D. N.C. May 11, 2016) (2016 WL 2746626; 2016 U.S. Dist. LEXIS 62307) (case below 2013-FRS-4): Plaintiff alleged that he was wrongfully give a six month suspension in retaliation for giving too many cars “bad order” citations when he was working as a carman doing safety inspections. He had also filed a lawsuit contending that the suspension was race discrimination prohibited by 42 U.S.C. § 1981. That suit had been dismissed and the railroad argued that the FRSA’s election of remedies provision barred the FRSA action. The district court had agreed, but the Fourth Circuit reversed. On remand the district court considered the remaining arguments for summary decision.

The railroad first argued that Plaintiff had violated the rule against claim splitting, which is part of the doctrine of *res judicata*. It prevents parties from litigating their claims piecemeal. But it can be relinquished. Here, the railroad had consenting to splitting the two claims earlier in the cases and so could not raise the defense now. In addition, since the two claims were pending at the same time, the railroad was required to raise the defense of claim splitting while they were both pending. The defense cannot be used to tactical advantage to wait and see if one action fails, only to then assert the defense in the other.

REMOVAL TO FEDERAL DISTRICT COURT; RES JUDICATA; RES JUDICATA APPLIES TO ADMINISTRATIVE ADJUDICATIONS, BUT ONLY IF FINAL, SO HAD NO APPLICATION WHERE A TIMELY APPEAL WAS MADE OF THE ALJ’S ADVERSE DECISION

Wagner v. Grand Trunk W. R.R., No. 15-10635 (E.D. Mich. Mar. 23, 2016) (2016 U.S. Dist. LEXIS 38406; 2016 WL 1161351): Plaintiff cut his finger at work and filed an injury report. He was later investigated and suspended for alleged safety violations during the incident. He then filed a complaint with OSHA. OSHA found there had been retaliation and awarded damages. Defendant sought a hearing before an ALJ. Before the ALJ there was some discussion of whether Plaintiff would exercise the “kick-out” option and remove the case to federal court, with

Plaintiff's counsel indicating, in some way, that this was not contemplated. The ALJ found for the railroad and Plaintiff appealed. While the appeal was pending, the Plaintiff opted to file suit in federal court, which led to the dismissal of the DOL action.

Defendant filed a motion for judgment on the pleadings arguing that Plaintiff had waived his right to remove the action, Plaintiff had engaged in bad faith, the action was barred by res judicata, and the removal provision of the FRSA, § 20109(d)(3) was unconstitutional. The court denied the motion.

As to the res judicata argument, the court observed that administrative adjudications could have preclusive effect but that Congress could also alter the rules. The crux, however, was that in order to have any preclusive effect the decision at DOL had to be final. It was not because Plaintiff had filed a timely appeal that was pending before the ARB.

ARB'S DISMISSAL OF ADMINISTRATIVE COMPLAINT UPON NOTICE OF COMPLAINANT'S FILING OF ACTION IN FEDERAL DISTRICT COURT DOES NOT HAVE RES JUDICATA EFFECT

In *Pfeifer v. Union Pacific Railroad Co.*, No. 12-cv-2485 (D. Kan. June 9, 2014) (case below ARB No. 12-087, ALJ No. 2011-FRS-38), the Defendant moved for summary judgment on the Plaintiff's whistleblower retaliation action under the FRSA on the grounds that the action was barred by the doctrine of res judicata and by Section 20109(f).

Res Judicata/Claim Preclusion

Following a three day hearing, the ALJ issued a Decision and Order finding in favor of Union Pacific. This decision was rendered well over 210 days after the complaint had been filed with OSHA. The Plaintiff filed a petition for review with the ARB. Prior to serving the ARB with a notice of intent to file an original action in federal court, the Plaintiff filed his complaint with the District Court in Kansas. After receiving the notice of intent, the ARB dismissed the appeal before it. The court had previously denied a motion to dismiss on the same res judicata ground, and the court declined to reconsider its earlier ruling. However, the court went on to explain why even if it reconsidered, it would not change its ruling. First, the court found the ARB dismissed the administrative complaint essentially because it recognized that the district now had jurisdiction. The ARB's decision was not on the merits, but merely in recognition of the Complainant's statutory right to file a federal court action. Moreover, even if the ARB's decision was a final decision on the merits, because it was issued more than 210 days after the filing of the administrative complaint, the ARB decision did not deprive the court of jurisdiction.

- *Motion to Dismiss*

U.S. District Court Decisions

MOTION TO DISMISS; ADMINISTRATIVE REMEDIES MUST BE EXHAUSTED AS TO EACH NAMED PLAINTIFF; COMPLAINT MUST CONTAIN SPECIFIC PLEADINGS AS TO THE ROLE OF EACH NAMED DEFENDANT AND HOW THE ELEMENTS OF THE COMPLAINT ARE SATISFIED AS TO EACH DEFENDANT.

Powell-Coker v. Norfolk S. Ry. Co., 18-cv-01094 (N.D. Ala. Oct. 19, 2018) (2018 U.S. Dist. LEXIS 179590) (Memorandum Opinion and Order): Plaintiff brought an FRSA claim alleging retaliation for internal complaints about the maintenance of employee discipline files, which she alleged was a safety issue. She named the railroad and a variety of employees. The court granted a motion to dismiss the complaint as to several of the named parties because they had not been named or included in the complaint to OSHA, and so administrative remedies had not been exhausted. As to all the defendants, the pleading was an improper “shotgun complaint” that made multiple allegations against multiple defendants without specifying who engaged in what wrongdoing and how. The Plaintiff also failed to make “specific pleadings to establish knowledge of the protected conduct and/or involvement in the adverse conduct” as to the various individual defendants.

MOTION TO DISMISS UNDER FRCP 12(b)(1) BASED ON LACK OF TIMELINESS OF ADMINISTRATIVE COMPLAINT; TIMELINESS OF ADMINISTRATIVE COMPLAINT IS NOT JURISDICTIONAL, AND THEREFORE A MOTION TO DISMISS ON THAT BASIS WOULD NEED TO PROCEED UNDER FRCP 12(b)(6)

In *King v. Ind. Harbor Belt R.R. Co.*, No. 15-CV-245 (N.D. Ind. Mar. 23, 2017) (2017 U.S. Dist. LEXIS 41908; 2017 WL 1089212) (case below 2015-FRS-3), the Defendant filed a motion to dismiss for lack of jurisdiction based on the contention that the Plaintiff’s DOL FRSA complaint was filed one day late and that the timeliness of an administrative complaint is jurisdictional, and therefore the case should be dismissed under FRCP 12(b)(1). The Plaintiff responded that “the timeliness of an administrative complaint is not a jurisdictional requirement but an affirmative defense, and that it is thus not suitable to resolution on a motion under Rule 12 when, as here, it depends on evidence outside of the complaint.” Slip op. at 1. The court referred the motion to a Magistrate Judge who “concluded that the timeliness of an administrative complaint is not a jurisdictional requirement under the FRSA. A motion to dismiss on that basis would thus have to proceed under Rule 12(b)(6), which does not permit consideration of extrinsic materials. [The Magistrate Judge] thus recommended that [the Defendant’s] motion be denied, without reaching the substance of IHB’s argument that Mr. King’s administrative complaint was untimely.” *Id.* at 2. The Defendant “objected to this recommendation, solely on the basis that the timeliness of an administrative complaint should be considered jurisdictional.” *Id.* The court summarized its ruling accepting the Magistrate Judge’s Report and Recommendation:

The sole question at issue is whether the timely filing of an administrative complaint is a jurisdictional requirement for suits filed in federal court under the FRSA. If so, then it can be raised and decided on a motion to dismiss under Rule 12(b)(1) (a motion to dismiss for lack of subject-matter jurisdiction), which permits consideration of materials extrinsic to the complaint. If not, then [the Defendant] cannot properly raise this defense on a motion to dismiss under Rule 12, as its arguments depend on evidence outside of the complaint. The [Magistrate Judge's] Report and Recommendation found that this requirement is not jurisdictional. The Court agrees.

Id. at 3. The court noted that the Defendant had “not requested that the Court treat its motion as a motion for summary judgment should the requirement not be deemed jurisdictional” and the court declined to treat it as such.

MOTION TO DISMISS; COURT MAY TAKE JUDICIAL NOTICE OF MATTERS IN THE PUBLIC RECORD WITHOUT CONVERTING A MOTION TO DISMISS INTO A MOTION FOR SUMMARY DECISION.

Welch v. Union Pac. R.R. Co., No. 16-cv-00431 (W.D. Mo. Aug. 4, 2016) (2016 U.S. Dist. LEXIS 102193; 2016 WL 4154760): Plaintiff filed an FRSA complaint with OSHA. After investigation, the complaint was dismissed. Plaintiff did not request a hearing, so the OSHA findings became final. Later Plaintiff filed a variety of state law claims in state court based in wrongful termination/public policy claims. The railroad removed the case to federal court and moved for dismissal based on res judicata and collateral estoppel.

The district court granted the motion after taking judicial notice of DOL's decisions, which were part of the public record. The FRSA contains an election of remedies provision at 49 U.S.C. § 20109(f) that provides that “[a]n employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.” In this case the new actions were based on the same allegedly unlawful act of the railroad and the Plaintiff had elected his remedy by filing a complaint with OSHA and exhausting his remedy by letting the adverse determination become final. That barred the state law actions.

Further, even absent the election of remedies, res judicata and collateral estoppel precluded the suit. These doctrines extend to determinations made by administrative agencies acting in a judicial capacity. That was the case here, despite no hearing before an ALJ, because the plaintiff had foregone his rights to a de novo hearing and appeals by not asking for a hearing. The Plaintiff had a full opportunity to litigate his claims before DOL, so the final decision barred the latter action based on the same allegations.

- Short and Plain Statement of the Case

U.S. District Court Decisions

MOTION TO DISMISS INDIVIDUAL DEFENDANT; EXHAUSTION OF ADMINISTRATIVE REMEDIES; WHETHER MANAGER WAS SUFFICIENTLY NAMED AS RESPONDENT IN ADMINISTRATIVE COMPLAINT FILED WITH OSHA

MOTION TO DISMISS INDIVIDUAL DEFENDANT; WHETHER FEDERAL COURT COMPLAINT MET FRCP 8 PLEADING REQUIREMENTS

In Windom v. Norfolk Southern Railway Co., No. 12-cv-345 (M.D. Ga. Feb. 1, 2013), the court denied a motion to dismiss filed by the defendant Norfolk's Manager of Administrative Services ("manager"), who had been also named as a defendant by the plaintiff. The plaintiff was a welder who contended that Norfolk and the manager had acted together to violate the Federal Rail Safety Act when the plaintiff reported an injury. The manager first argued that the FRSA claim should be dismissed because the plaintiff did not name her as a respondent in the administrative complaint filed with OSHA, and therefore the plaintiff did not exhaust his administrative remedies against her and she should be dismissed from the federal district court action.

The plaintiff had named the Norfolk as the establishment and the manager as the management official in the heading of his complaint, and the court agreed with the plaintiff that it was sufficiently clear that the plaintiff intended his OSHA complaint to be directed at both Norfolk and the manager. The court noted that there was no other location on the OSHA complaint form for the plaintiff to have named the manager and that the manager had been clearly listed in the heading of the complaint. Although the manager was not specifically mentioned in the body of the complaint, the complaint stated that Norfolk, through its management official, engaged in improper conduct. Moreover, the specific acts described in the complaint form were acts of the manager, and had OSHA investigated, it would have been apparent to OSHA that the plaintiff was complaining of the manager's actions. The court did not find dispositive OSHA's alleged failure to send a copy of the complaint to the manager. More than 210 days had passed with no decision from OSHA before the plaintiff filed in district court, and the court found that the plaintiff had exhausted his administrative remedies against the manager.

The manager also argued that the FRSA action should be dismissed because the paragraphs in the complaint in which her name was mentioned alleged wrongdoing by Norfolk, and as such did not permit the court to infer more than a mere possibility of misconduct by her. The plaintiff pointed to several specific allegations in the complaint regarding the manager's actions, and argued that they were not general or legal conclusions but specific factual allegations supporting his FRSA claim against the manager.

The court, noting that at this stage of the proceeding the pleadings are construed broadly and the allegations in the complaint are viewed in the light most favorable to the plaintiff, found that the plaintiff had satisfied FRCP 8's pleading requirements. The court summarized the complaint, noting *inter alia*, that the plaintiff's whistleblower claim was based on allegedly unlawful retaliation for reporting an on-the-job injury; that the plaintiff contended that reporting his injury and seeking medical treatment are both activities protected by the FRSA; that the plaintiff contended that Norfolk knew about the injury and the report of injury; that the plaintiff contended that Norfolk planned to punish him at least partly because of his injury report; and that the plaintiff contended that the defendants acted together to violate the FRSA because he reported this injury.

- *Evidentiary Determinations*

U.S. District Court Decisions

MOTION TO STRIKE; MEMOS WRITTEN FOR LITIGATION PURPOSES STRUCK ON SUMMARY JUDGMENT WHEN THEY WERE UNAUTHENTICATED AND REPRESENTED INADMISSIBLE HEARSAY.

King v. Ind. Harbor Belt R.R., No. 15-cv-245 (N.D. Ind. Nov. 13, 2018) (2018 U.S. Dist. LEXIS 193891; 2018 WL 5982134) (Opinion and Order): The district court granted a motion to strike two hand-written memorandums submitted as part of an opposition to summary judgment on the grounds that they were not properly authenticated and so would not be admissible at trial and the content of the memos was inadmissible hearsay.

EXPERT WITNESS; MOTION TO STRIKE UNDER *DAUBERT*; OPINION ABOUT BIOMECHANICS ALLOWED BUT OTHER OPINIONS STRUCK AS EITHER NOT RELEVANT TO A DISPUTE OR NOT AN EXPERT OPINION THAT WOULD ASSIST A FACT-FINDER

O'Neal v. Norfolk Southern Railroad Co., No. 16-cv-519 (M.D. Ga. July 6, 2018) (2018 U.S. Dist. LEXIS 112185) (Order [denying cross motions for summary judgment, etc.]): The court granted in part and denied in part a motion to strike expert witness evidence, allowing evidence from a biomechanical engineer concerning the likelihood of the described mechanism of the fall but disallowing opinions about the likely harms from such a fall, since this was not relevant to any dispute, and the likelihood of a witness seeing the accident from the claimed vantage, since this would not assist the fact-finder in making a determination.

- Summary Judgment

[*Editor's Note:* This section collects decisions on motions for summary judgment. The cases are also noted in reference to the substantive areas of law at issue in the decisions.]

U.S. Circuit Court of Appeals Decisions

SUMMARY JUDGMENT; SUMMARY JUDGMENT ON CONTRIBUTING FACTOR AFFIRMED WHERE SIX YEARS PASSED BETWEEN PROTECTED ACTIVITY AND ADVERSE ACTION AND EXCESSIVE ABSENTEEISM INTERVENED

Hess v. Union Pacific Railroad Co., 898 F.3d 852 (8th Cir. Aug. 6, 2018) (No. 17-1167) (2018 U.S. App. LEXIS 21661) (case below 2014-FRS-00006) (Opinion): Railroad terminated the plaintiff, who then filed an FRSA complaint alleging that he was terminated for engaging in protected activity. The Eighth Circuit affirmed the district court's determination that the Plaintiff was terminated for violating the railroad company's absenteeism policy with excessive absences without providing medical documentation. Six years had passed between the original report of an injury and the termination and in that time there was substantial evidence of non-compliance with the attendance policy. The end of the employment also resulted from the Plaintiff's failure to take the steps needed to effect reinstatement. The court also affirmed a determination that no § 20109(c), retaliation for complying with a treating plan, claim had been pled because there was no allegation in the complaint that the treatment contributed to the adverse action.

CONTRIBUTING FACTOR; SUMMARY JUDGMENT; FOURTH CIRCUIT VACATES SUMMARY JUDGMENT FOR RAILROAD WHERE SOME DECISION MAKERS KNEW OF THE PROTECTED ACTIVITY; THERE WAS EVIDENCE THAT LOCAL MANAGEMENT WAS TARGETING PLAINTIFF AND OTHER UNION MEMBERS, THERE WAS EVIDENCE THAT LOCAL MANAGEMENT WAS UNHAPPY WITH THE PROTECTED ACTIVITY, AND TEMPORAL PROXIMITY SUPPORTED AN INFERENCE TO RETALIATORY ANIMUS

DeMott v. CSX Trans. Inc., 701 Fed. Appx. 262 (4th Cir. Aug. 21, 2017) (unpub.): The railroad disciplined plaintiff for a variety of violations, including insubordination. Plaintiff averred that he was actually disciplined for protected activities involving reporting unsafe working conditions, publishing a safety bulletin, and making an OSHA complaint. The district court granted the railroad summary judgment and plaintiff appealed.

After reviewing the legal standard, the panel remarked that plaintiff "undoubtedly" engaged in protected activities and it was "undisputed" that he suffered an adverse action. Plaintiff had also

“adequately demonstrated” that the decision-makers knew about the protected activities. There was also evidence that local management, which encompassed some of the decision makers, were unhappy with plaintiff’s safety activities.

Viewing the facts in the light most favorable to plaintiff, temporal proximity licensed an inference to retaliatory animus (several months from some complaints and nine days from the last complaint). There was also other evidence of retaliatory animus related to union activities and some of the discipline came after plaintiff was asked to do something he had never been told to do before and wasn’t ever told to do again. This was enough to make a case for contributing factor causation. The panel then summarily denied the railroad’s alternative argument that it was entitled to summary judgement on its affirmative defense.

ADMINISTRATIVE EXHAUSTION; SUMMARY JUDGMENT; ADVERSE ACTIONS AND PROTECTED ACTIVITIES PLED IN DISTRICT COURT BUT OMITTED FROM OSHA COMPLAINT CANNOT BE PURSUED WHEN THERE WAS A FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES BECAUSE THE SCOPE OF AN INVESTIGATION THAT COULD HAVE REASONABLY BEEN EXPECTED FROM THE COMPLAINT WOULD NOT HAVE INCLUDED THE NEW CLAIMS

PROTECTED ACTIVITY; SUMMARY JUDGMENT; REPORT OF HAZARDOUS SAFETY CONDITION ASSERTED AS PROTECTED ACTIVITY UNDER § 20109(a)(1) AS VIOLATION OF FELA FAILS WHEN COMPLAINTS DID NOT ALLEGE VIOLATION OF FELA

CONTRIBUTING FACTOR; SUMMARY JUDGMENT; SUMMARY JUDGMENT ON CONTRIBUTING FACTOR AFFIRMED WHERE PROTECTED ACTIVITY AT ISSUE CAME AFTER SOME ADVERSE ACTIONS AND AFTER THE TESTIMONY THAT WAS THE BASIS FOR THE CLAIM OF INTENTIONAL RETALIATION, EIGHTH CIRCUIT REQUIRES THAT THE ADVERSE ACTION BE AT LEAST IN PART INTENTIONAL RETALIATION FOR PROTECTED ACTIVITY AND REJECTS CLAIM THAT AN ASSERTION THAT THE TWO ARE INEXTRICABLY INTERTWINED ALONE CAN MAKE A SHOWING OF CONTRIBUTING FACTOR CAUSATION

Foster v. BNSF Ry. Co., 866 F.3d 962 (8th Cir. Aug. 10, 2017): Three joined complaints under the FRSA relating back to an injury to another worker that occurred during a crew change. The train had stopped across a bridge from the parking area and when of the new crew members fell off the bridge when walking to the train. After a hearing, the three (and others) were disciplined for a variety of safety infractions found in videos of the incident. In interviews before the hearing and at the hearing they had reported various safety infractions in the area. It was disputed, for instance, where the railroad told them to stop the train. They each received different levels of discipline, where were reduced or eliminated by the Public Law Board. They also filed FRSA complaints and then kicked them out to federal court. The district court granted summary decision for the railroad and the plaintiffs appealed.

First, the Eighth Circuit affirmed the finding that some of the adverse actions and protected activities pled in their complaint had not been administratively exhausted because they had not been presented to OSHA. It quickly held that because the complaint has to be made with OSHA, there is an exhaustion requirement. Assuming that the “generous” Title VII standard applied in FRSA cases, the court found that some claims were still clearly unexhausted. To exhaust a claim, it must be within the scope of an investigation that could have reasonably be expected to result from the initial complaint. Here certain adverse actions hadn’t been mentioned at all and did not flow from those that were presented to the agency. The same held for some of the protected activities claimed in the district court. As to those claims, summary judgment was proper for failure to exhaust.

The plaintiffs had presented their reports of dangers on the bridge as protected activities, but abandoned any claim under § 20109(b)(1)(A), since the railroad had not disciplined others who made those complaints, and instead characterized these as protected by § 20109(a)(1) on the theory that they were reports of violations of FELA because the railroad knew about the hazardous safety condition but did not correct it. However, this failed because the statements made as protected activity had not stated that the railroad knew about the conditions or had failed to remedy the hazardous condition.

The last protected activity at issue was the hearing testimony. This could not have contributed to any of the alleged adverse actions except for the final discipline, since it came after that discipline. Moreover, the theory of retaliation alleged that two testifying managers harbored the retaliatory motive and were trying to protect themselves, but this testimony came before the testimony of the plaintiffs. The Eighth Circuit quickly rejected a challenge to the validity of the discipline since erroneous discipline is insufficient to establish a violation. Finally, the court rejected the claim that contribution could be shown on a theory that the protected activity and adverse action were inextricably intertwined since the Eighth Circuit had rejected this theory in *Heim v. BNSF Ry. Co.*, 849 F.3d 723 727 (8th Cir. 2017). To prevail, a plaintiff had to show that the discipline was at least in part intentional retaliation for the protected activity.

CONTRIBUTING FACTOR; SUMMARY JUDGMENT; CAT’S PAW; KNOWLEDGE; TEMPORAL PROXIMITY; WHERE MANAGER WHO KNEW ABOUT THE PROTECTED ACTIVITY INFLUENCED/ADVISED THE DECISION MAKERS AND TESTIFIED AT THE HEARING, CAT’S PAW THEORY CAN APPLY TO MAKE A SHOWING THAT THE DECISION-MAKERS KNEW ABOUT THE PROTECTED ACTIVITY AND MAY HAVE INHERITED ANIMOSITY TO THE PROTECTED ACTIVITY; COURT VACATES SUMMARY JUDGMENT WHEN MANAGERS WHO INFLUENCED DECISION COULD HAVE HAD ANIMOSITY TO THE PROTECTED ACTIVITY, THERE WAS TEMPORAL PROXIMITY, AND THERE WAS EVIDENCE THAT THE EMPLOYEE WAS PUNISHED MORE HARSHLY THAN OTHERS

Lowery v. CSX Transp., Inc., 690 Fed. Appx. 98 (4th Cir. May 26, 2017) (unpublished): Plaintiff was suspended for violation of workplace jewelry guidelines and making false statements. He

contended that he was actually disciplined in retaliation for safety complaints. The district court granted summary judgment for the railroad and plaintiff appealed, alleging a number of errors. Reviewing the record, the panel concluded that Plaintiff “undoubtedly” engaged in protected activity and suffered an adverse action. He also “adequately demonstrated” that the decision-makers were aware of his protected activity. Even if they did not know, the cat’s paw theory applied because another trainmaster knew about the protected activity and had contact with/advised the three decision makers and testified at the hearing. This was sufficient to withstand summary judgment. Further, viewing the evidence in the light most favorable to plaintiff, a fact-finder could conclude that this trainmaster gave testimony as the result of retaliatory animus. In addition, another supervisor who include the trainmaster’s testimony had clear animosity to the plaintiff and knew about his protected activities. The court concluded that there was an issue of material of fact with the jury on the contributing factor evidence, noting that there was temporal proximity and that plaintiff’s discipline was greater than others who violated the policy. The panel also summarily concluded that the defendant had not established by clear and convincing evidence that it would have taken the same action absent the protected activity. The decision below was vacated and the case was remanded for further proceedings.

SUMMARY JUDGMENT; CONTRIBUTORY FACTOR; INTENTIONAL RETALIATION/MOTIVE; EIGHTH CIRCUIT AFFIRMS SUMMARY JUDGMENT TO RAILROAD WHERE PLAINTIFF DID NOT PRODUCE SUFFICIENT EVIDENCE OF INTENTIONAL RETALIATION, HOLDS THAT NATIONWIDE COMPENSATION PROGRAM, TEMPORAL PROXIMITY, AND ADMISSION THAT THE INJURY BROUGHT THE SAFETY VIOLATION IN QUESTION TO LIGHT IS NOT SUFFICIENT TO SUPPORT THE NECESSARY INFERENCE

Heim v. BNSF Ry. Co., 849 F.3d 723 (8th Cir. Feb. 27, 2017) (No. 15-3532) (2017 U.S. App. LEXIS 3460; 2017 WL 744039) (case below ALJ No. 2013-FRS-40), *cert. denied* 138 S. Ct. 268 (2017): Plaintiff was part of a “gang” replacing worn material under the track. That process involves declipping the rail and moving it toward the center. It remains under tension and can move suddenly, creating a “danger zone.” No rule specifically forbids entering the danger zone, but in the daily briefing workers were warned and general rules require taking precautions to avoid injury. Plaintiff’s particular role was picking up stray materials. He saw a rail clip in the danger zone and seeing no machines nearby, thought it was safe to retrieve the clip. When he did so, the declipped rail moved and hit his foot, fracturing it. BNSF disciplined him for a safety violation in the injury, with a 30 day record suspension and probation which, ultimately, did not result in any time off or loss of pay. He filed a complaint and then suit under the FRSA. There was evidence that while stepping into the danger zone was somewhat common and others weren’t discipline to it, as well as evidence that the compensation program for managers was in some way pegged to injury goals, though this was not indexed to local numbers for particular managers and evaluation of safety performance did not turn on the number of injuries.

The district court granted BNSF summary judgment on the grounds that Plaintiff was required to show intentional retaliation but had produced sufficient evidence on the point. The Eighth Circuit affirmed. Complaint argued that because the discipline came directly out of the injury and there would have been no discipline absent the injury, his protected activity and basis for adverse action were inextricably intertwined. But apply *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786

(8th Cir. 2014), the panel held that showing “contributory factor” required a showing of “intentional retaliation.” The factual connection between the two was insufficient. It wasn’t necessary to “conclusively” demonstrate retaliatory motive, but the Plaintiff needed to show that the discipline was at least in part intentional retaliation for the injury report.

Here, the Eighth Circuit agreed that no reasonable fact-finder could reach that conclusion and find for Plaintiff. As to one of the decision-makers, the undisputed evidence showed that he had both asked and pressured the Plaintiff into filing the report. As to the other, the temporal proximity and compensation program were insufficient to support any reasonable inference to intentional retaliation, partly because the compensation program turned on national numbers, not those of particular managers. The admission that Plaintiff’s injury had made this instance of entering the danger zone lead to punishment was also insufficient since the point was that the violation only came to notice because of the injury. That fell short of any support for a finding of intentional retaliation. Absent more specific evidence of some retaliatory motive, summary judgment for BNSF was proper.

U.S. District Court Decisions

SUMMARY JUDGMENT; PROTECTED ACTIVITY; “GOOD FAITH” REPORTING OF HAZARDOUS CONDITION ELEMENT; PLAINTIFF’S OBSTINATE AND UNCOOPERATIVE BEHAVIOR FOUND TO BE INDICATIVE OF LACK OF REASONABLENESS

SUMMARY JUDGMENT; CAUSATION; ALTHOUGH PLAINTIFF IS NOT REQUIRED TO PROVE EMPLOYER’S MOTIVE, ESSENCE OF A RETALIATION CLAIM UNDER THE FRSA IS DISCRIMINATORY ANIMUS; WHERE ONLY DISTINGUISHING FACTOR BETWEEN INSTANT REPORT OF DEFECT AND PRIOR SIMILAR REPORT WAS PLAINTIFF’S OBSTINATE AND UNCOOPERATIVE BEHAVIOR, COURT GRANTED SUMMARY JUDGMENT FINDING THAT THE PLAINTIFF’S TERMINATION WAS BASED ON INSUBORDINATION

In *March v. Metro-North R.R.*, No. 16-cv-8500 (S.D.N.Y. Mar. 28, 2019) (2019 U.S. Dist. LEXIS 53677; 2019 WL 1409728), the Plaintiff brought a FRSA complaint alleging that he suffered retaliation in violation of 49 U.S.C. § 20109 when he was removed from service for insubordination after reporting a defective wiper blade on one of the trains. The Plaintiff had refused a supervisor’s order to change the blade because he believed it was unsafe to use a ladder. The court granted the Defendant’s motion for summary judgment.

Protected Activity

The court found that the only basis in the statute for protected activity in this case was “reporting, in good faith, a hazardous safety or security condition or refusing to work around a

hazardous safety condition.” 49 U.S.C. § 20109 (b)(1)(A). The court rejected the Plaintiff’s contention that this provision only requires a subjective belief that there was a hazardous condition, and instead found that the belief must have also been objectively reasonable. The court noted that it was “appropriate for it to determine what was objectively reasonable insofar as it is relying on undisputed facts. *See e.g., Hernandez v. Metro-N. Commuter R.R.*, 74 F. Supp. 3d 576 (S.D.N.Y. 2015); *Kerman v. City of New York*, 374 F.3d 93, 109 (2d Cir. 2004) (in context of qualified immunity, it was appropriate for court to determine whether “defendant official’s conduct was objectively reasonable” as a matter of law).” Slip op. at 12 n.3.

The court found that “[w]hile Plaintiff may have subjectively believed there was a safety risk with the blade and with using the ladder to fix it, Plaintiff fails to support that his beliefs were objectively reasonable.” *Id.* at 13. Although he testified that the wiper blade was “bending” or “distorting” he did not identify any negative functional effect, and it was undisputed that the Plaintiff never relayed the precise issue or defect with the blade in subsequent conversations with supervisors, or in the contemporaneous ME-9 (defect report) form. Multiple experienced supervisors inspected the blades and could not find a defect.

As to use of the ladder, the court found enough undisputed facts to determine that it was not objectively reasonable for the Plaintiff to refuse to change the wiper. Among other factors, the court considered the Plaintiff’s obstinate behavior refusing to cooperate or to discuss the possibility of reasonable alternatives to using a ladder. The court found that “the overwhelming evidence, including [the Plaintiff’s] own testimony, shows that he was being persistently difficult, vague, and uncooperative and that there was no urgent or imminent threat of danger posed by the blade.” *Id.* at 16. Finally, the court found that the Plaintiff’s knowledge of a good faith process for reporting safety issues that would have protected him from disciplinary action, and his decision not to invoke that process during the wiper blade incident, further cemented the lack of an objectively reasonable safety concern.

Causation; Discriminatory Animus

The court stated that “While a plaintiff does not have to provide proof of the employer’s motive, ’at bottom, the essence of a retaliation claim under the FRSA is “discriminatory animus.”” *Lockhart*, 266 F. Supp. 3d at 663.” Slip op. at 10; see also slip op. at 16-17. As to the instant case, the court noted that the Plaintiff had made the same type of a complaint one month earlier and was not disciplined for it, and that the Defendant had immediately responded to the report of the wiper blade concern underlying the instant FRSA complaint. The court found that the only difference in the two instances was blatant insubordination and uncooperativeness on the second; that was the reason for the dismissal. The court also noted that the timeline of the incident did not support a finding that the termination was related to whether the blade was deficient; rather the termination was for repeated refusal to fix the blade or to cooperate with supervisors.

SUMMARY JUDGMENT; CONTRIBUTING FACTOR CAUSATION; COURT APPLIES FIVE FACTOR TEST OF *TOMKINS v. METRO-NORTH*; WEIGHT GIVEN TO DETERMINATION OF NATIONAL RAILROAD ADJUSTMENT BOARD

SUMMARY JUDGMENT; PROTECTED ACTIVITY NOT SHOWN WHERE SAFETY ISSUE NOT DISCOVERED UNTIL AFTER WORK REFUSAL

SUMMARY JUDGMENT; PROTECTED ACTIVITY NOT SHOWN WHERE ALLEGED VIOLATION WAS OF STATE, AND NOT FEDERAL, CODE, RULE OR REGULATION

SUMMARY JUDGMENT; PROTECTED ACTIVITY NOT SHOWN BY REFUSAL TO MOVE FLOORMATS BECAUSE THEY MIGHT BE TOO HEAVY WHERE PLAINTIFF FAILED TO SHOW THAT IT WAS OBJECTIVELY REASONABLE FOR HER TO BELIEVE THAT THE HAZARDOUS CONDITION PRESENTED AN IMMINENT DANGER OF DEATH OR SERIOUS INJURY

In *Necci v. Long Island R.R. Co.*, No. 16-CV-3250 (E.D. N.Y. Mar. 21, 2019) (2019 U.S. Dist. LEXIS 47231; 2019 WL 1298523), the Plaintiff alleged that the Defendant retaliated against her by decertifying her as a locomotive engineer after an incident in 2013 in which the train was 50 minutes late and after an internal hearing the Defendant found a pattern of improper performance making her an unfit and dangerous train operator. The Plaintiff also alleged retaliation based on her firing after a subsequent incident in 2016, at which time she had been returned to a Station Appearance Maintainer (“SAM”) position. In this second incident, the Defendant found that she had disobeyed and refused to follow direct orders to vacuum and to roll up floormats. The Plaintiff had refused based on her belief that it was unsafe to use electrical outlets in public areas and that she needed instruction and help on rolling up the mats.

2013 Decertification Incident – Five Factor Test on Contributing Factor Causation

On motion for summary judgment, the Defendant argued that the Plaintiff’s protected activities (inspecting the train; reporting safety concerns; slowing the train for a safety hazard) were not contributing factors in her decertification. The court analyzed the contributing factor question under the five factor framework articulated in *Tompkins v. Metro-North Commuter Railroad*, No. 16-CV-9920, 2018 WL 4573008 at * 7 (S.D.N.Y. Sept. 24, 2018), appeal filed, 2d Cir. Case No. 18-3174. The *Tompkins* court had in turn cited *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017). The court found that factors concerning the temporal and substantive connection between the protected activities and the adverse employment action favored the Plaintiff, although the court noted that the protected activities were not part of the charges lodged against the Plaintiff. Weighing against the Plaintiff was the lack of evidence that any of the lower-level supervisors accountable for addressing the Plaintiff’s safety complaints played a decision-making role in the adjudication of the charges against her. The court also noted that the Defendant had only decertified the Plaintiff as a locomotive engineer and reinstalled her as a SAM—which eroded the inference of a causal connection.

The court next analyzed the weight to be given to the National Railroad Adjustment Board of the National Mediation Board’s (NRAB) decision to uphold the decertification. The Plaintiff did not argue that the NRAB was partial, but stressed that her employer conducted the evidentiary hearing. The court found no evidence of prejudice or of an incomplete or tainted record before the NRAB. The court found that the NRAB’s decision was supported by the evidence. In sum, the court found that the fact that the Plaintiff was decertified after disciplinary hearings at which

she was represented by union counsel—and that the decisions to discharge were upheld by the railroad internally and by the NRAB—weighed in favor of the Defendant. The court stated that “while the NRAB’s decision does not preclude Plaintiff’s FRSA claim, it has probative weight in establishing that the charged misconduct—and not Plaintiff’s protected activities—motivated LIRR’s disciplinary action.” Slip op. at 40 (citation omitted). Weighing the factors, the court granted summary judgment as to the decertification element of the complaint.

2016 Discipline

— Protected Activity

As to the refusal to vacuum the floormats based on safety concerns, the court found that this was not protected activity because the Plaintiff had not raised the question of whether it was safe to use a vacuum not rated to handle wet floors until after the incident, and thus a concern about the vacuum’s suitability could not have driven her refusal to vacuum. The court also noted that, even overlooking the chronological flaw in the Plaintiff’s argument, the Plaintiff did not satisfy the criteria of 49 U.S.C. § 20109(b)(2)(B)(i) because she had not shown the “objective reasonableness of her fear that using electrical outlets would have resulted in a fire, an electrical failure, or the electrocution of herself or others.” *Id.* at 44. To the contrary, the court cited the testimony of one of Defendant’s employees that SAMs “vacuum both wet and dry floormats at LIRR stations and regularly use electrical sockets at stations to power the vacuums.” *Id.* at 44-45.

As to the refusal to vacuum based on safety concerns based on asserted illegality, the court noted that 49 U.S.C. § 20109(a)(2) protects against refusals to violate “Federal laws, rules, and regulations” regarding railroad safety and security, and that the Plaintiff had only indicated a belief that the outlets violated New York codes, rules and regulations, and not any federal provision. The court also noted that the Plaintiff offered no evidence or argument that her use of the outlets would actually have violated the New York provisions.

The court found that the Plaintiff’s initial refusal to move floormats because she did not know how heavy they were was not protected because the evidence failed to show that it was objectively reasonable for her to believe that “the hazardous condition present[ed] an imminent danger of death or serious injury. 49 U.S.C. § 20109(b)(2)(B)(i).”

Thus, because there was no protected activity during the 2016 incident, the court limited its consideration of contributory factor causation to the protected activities from the 2013 incident.

— Contributory Factor Causation

The court again applied the five factor test on contributory factor causation, and again granted summary judgment in favor of the Defendant. The court found that the disciplinary action in 2016 was completely unrelated to the 2013 protected activities. The court found that the disciplinary proceedings were remote in time to the protected activities. The court found an intervening event that independently justified the disciplinary action—the charged misconduct. The court found that the official who made the disciplinary decision had not met the Plaintiff and had no knowledge of the circumstances surrounding her disqualification as a locomotive engineer. The court reviewed the disciplinary proceedings and rejected the Plaintiff’s claim that she had not able to introduce evidence, and found that NMB’s decision upholding the charges

was supported by substantial evidence. The court thus found that all five factors weighed against the Plaintiff's claim.

SUMMARY JUDGMENT; CONTRIBUTING FACTOR; SUMMARY JUDGMENT GRANTED TO RAILROAD WHERE NO DIRECT EVIDENCE OF CONTRIBUTION, SIGNIFICANT TIME GAP BETWEEN PROTECTED ACTIVITY AND ADVERSE ACTION; FAVORABLE EMPLOYMENT DECISIONS POST-DATED THE PROTECTED ACTIVITY, AND THERE WAS NO EVIDENCE THAT THE MANAGER ALLEGED THAT HAVE ENGAGED IN THE RETALIATION PARTICIPATED IN THE DECISION TO TAKE THE ADVERSE ACTION

SUMMARY JUDGMENT; NEW ADVERSE ACTIONS AND THEORIES OF RETALIATION INCLUDED FOR THE FIRST TIME IN AN OPPOSITION TO SUMMARY DECISION NOT CONSIDERED

Grell v. UPRR R.R. Co., No. 8:16-cv-00534, 2019 U.S. Dist. LEXIS 43449 (D. Neb. Jan. 4, 2019): Case involving a number of causes of action related to the end of an employment relationship after time off of work on short and long term disability related to psychological conditions attributed, at least in part, to work-related causes. After being cleared to return, Plaintiff sought assignment to a different boss or division. She was allowed time to apply for internal jobs, but when this was unsuccessful her employment was terminated.

The FRSA complaint alleged that Plaintiff had been retaliated against for reporting a work related injury resulting from her boss' treatment. The injury report occurred in October 2014. The alleged adverse action related to verbal discipline came in August 2014, so the court found it could not have been related to the protected injury report. The other adverse action was the December 2015 termination. The district court concluded that there was no issue of material fact as to whether the injury report contributed to the termination, and so granted summary decision to the railroad. There was no direct evidence of a relation between the two and the gap in time between the injury report and termination weakened any inference to contribution. The court also noted that after the injury report the railroad had made a series of employment decisions favorable to Plaintiff. Plaintiff had also alleged that her direct supervisor was responsible for the retaliation, but there was no evidence that this supervisor was involved in the employment decisions that led to the ultimate termination.

In opposition to summary decision, plaintiff claimed a series of other adverse actions that were allegedly in retaliation for the injury report, but the court declined to consider them since they had not been articulated in the amended complaint and though the pleading requirements are permissive, it is not proper to plead new claims late in the litigation in order to defeat summary decision.

SUMMARY JUDGMENT; FAILURE TO OPPOSE MOVING PARTIES' ARGUMENTS; POTENTIAL NEED FOR MORE DISCOVERY

Neylon v. BNSF Ry. Co., No. 4:17-cv-03153-RGK-SMB, 2018 U.S. Dist. LEXIS 209190 (D. Neb. Dec. 12, 2018): Plaintiff claimed retaliation for following a treatment plan in violation of 49 U.S.C. § 20109(c)(2) and for reporting a work-related injury in violation of 49 U.S.C. § 20109(a)(4). Defendant sought summary decision.

On the § 20109(c)(2) complaint, Defendant argued that Complainant failed to exhaust his administrative remedies, that the complaint was barred by the statute of limitations, and that it failed on the merits. The District Court did not reach these arguments. Rather, “[b]ecause Plaintiff has failed to address any of Defendant’s arguments—including neglecting to even mention the statute that provides the basis for his medical treatments claim under 49 U.S.C. § 20109(c)(2)—Defendant’s Motion for Summary Judgement shall be granted on this claim.”

On the § 20109(a)(4) claim Plaintiff argued that there was a pending motion for sanctions against Defendant for failure to produce documents in discovery, and that the documents would be needed to effectively oppose summary judgment. Since the sanctions motion was pending with the magistrate judge, the District Court denied the Defendant’s Motion for Summary Judgement on this complaint without prejudice, pending resolution of the sanctions motion.

SUMMARY JUDGMENT; SEVENTH CIRCUIT REQUIRES A SHOWING OF RETALIATORY MOTIVE TO MAKE OUT A CASE OF RETALIATION; SUMMARY JUDGEMENT APPROPRIATE WHERE NO GENUINE DISPUTE THAT ORDINARY PROCEDURES OF DISCIPLINE WERE FOLLOWED, THERE WAS NO EVIDENCE OF A CHANGE IN ATTITUDE OR DIFFERENT TREATMENT FROM OTHER EMPLOYEES

King v. Ind. Harbor Belt R.R., No. 15-cv-245 (N.D. Ind. Nov. 13, 2018) (2018 U.S. Dist. LEXIS 193891; 2018 WL 5982134) (Opinion and Order): Applying Seventh Circuit law, the court found that to make out a case of retaliation a plaintiff must show the existence of an improper retaliatory motive, which is distinct from the question of whether that motive contributed to the decision to take the adverse action. Temporal proximity could not create an inference to such a motive where the employer followed its standard procedures in determining the amount of discipline for an admitted violation and there was no evidence that they were manipulated or used to retaliate. The court also rejected a claim that the particular facts underlying a discipline was sufficient to render it a departure from ordinary practice. Summary judgment was also found appropriate when the plaintiff had no evidence of a changed attitude towards him in denying or delaying requests for benefits because there was no evidence he was treated differently than others. The court also rejected an inference to a retaliatory motive based on strong vulgar language from a manager when such language was an ordinary part of the workplace.

SUMMARY JUDGMENT; SUMMARY JUDGMENT ONLY APPROPRIATE ON AN UNDISPUTED ISSUE WHEN IT WILL NARROW THE ISSUES FOR TRIAL

SUMMARY JUDGMENT; WHERE GOOD FAITH OF AN INJURY REPORT IS IN GENUINE DISPUTE, SUMMARY JUDGMENT ON THE KNOWLEDGE ELEMENT IS INAPPROPRIATE

SUMMARY JUDGMENT; CONTRIBUTING FACTOR CAUSATION; PROOF OF INTENTIONAL RETALIATION NOT REQUIRED; RATHER, REQUISITE INTENT CAN BE INFERRED BASED ON CIRCUMSTANTIAL EVIDENCE; WHERE GENUINE DISPUTES REMAIN ABOUT THE CIRCUMSTANCES OF THE DISCIPLINE, SUMMARY JUDGMENT IS INAPPROPRIATE

SUMMARY JUDGMENT; AFFIRMATIVE DEFENSE; SUMMARY JUDGMENT DENIED WHEN THERE ARE NO ALTERNATIVE REASONS FOR THE DISCIPLINE AND EVIDENCE OF INCONSISTENT APPLICATION OF THE GENERAL RULE.

SUMMARY JUDGMENT; DAMAGES; FAILURE TO MITIGATE; PLAINTIFF HAS DUTY TO MITIGATE BUT DEFENDANT HAS BURDEN TO SHOW FAILURE TO MITIGATE; WHERE QUESTION IS GEOGRAPHIC REASONABLENESS OF ALTERNATIVE JOBS, SUMMARY JUDGMENT INAPPROPRIATE.

SUMMARY JUDGMENT; PUNITIVE DAMAGES; WHERE EVIDENCE EXISTS THAT COULD SUPPORT AN INFERENCE OF DISCRIMINATORY ANIMUS.

SUMMARY JUDGMENT; EXHAUSTION OF ADMINISTRATIVE REMEDIES; PROTECTED ACTIVITIES THAT ARE CONTAINED WITHIN THE PROTECTED ACTIVITY PRESENTED TO OSHA HAVE BEEN EXHAUSTED.

PROCEDURE; OBJECTIONS TO MAGISTRATE JUDGE'S RECOMMENDATIONS; TO TRIGGER DE NOVO REVIEW A PARTY MUST DO MORE THAN MERELY REPEAT ARGUMENTS MADE TO THE MAGISTRATE JUDGE

Wooten v. BNSF Railway Co., No. 16-cv-139 (D. Mont. Sept. 18, 2018) (2018 U.S. Dist. LEXIS 159199; 2018 WL 4462506) (case below 2016-FRS-00059) (Order [adopting Magistrate's Findings and Recommendation and Order]), *adopting Wooten v. BNSF Railway Co.*, No. 16-cv-139 (D. Mont. May 29, 2018) (2018 U.S. Dist. LEXIS 89267; 2018 WL 2417858) (case below 2016-FRS-00059) (Findings and Recommendation and Order)

The Plaintiff reported a work-related wrist injury. After investigation a supervisor concluded that the injury had occurred prior to the work and that the Plaintiff had been dishonest in his reports. This led to termination. Plaintiff filed several actions, including an FRSA complaint.

The magistrate judge was presented with cross-motions for summary judgment on the issue of whether the protected activity was a contributing factor in the adverse action. The plaintiff also moved for summary judgment on the adverse action and knowledge elements. The parties agreed that summary judgment was not appropriate on the protected activity element since there was genuine dispute over whether the injury report had been made in good faith. The magistrate judge recommended denying the plaintiff's motion for summary judgment on the "knowledge" element because though Defendant had knowledge of the injury report, there was dispute over good faith and derivatively dispute over knowledge of *protected* activity. In addition, though the

adverse action element was not disputed, granting summary judgment served no purpose since it would be an issue at trial anyway.

Turning to the cross-motions on the contributing factor element, the parties disputed the nature of the required showing and, in particular, whether complainant had to make a showing of intentional retaliation and proximate cause. The court held that in the Ninth Circuit it was not necessary for a complainant to conclusively establish a retaliatory motive. Rather, the “requisite degree of discriminatory animus” could be shown by circumstantial evidence including temporal proximity, inconsistent application of policies, shifting explanations, hostility to protected activity, the relation between the protected activity and the discharge, and any intervening events justifying the discipline. On this standard neither party was entitled to summary judgment, as factual disputes affected the application of the factors to the case.

Defendant also sought summary judgment on the ground that it had established by clear and convincing evidence that it would have taken the same action absent the protected activity. But there was no evidence of another reason for the discipline. Insofar as Defendant’s argument was that it would have terminated the Plaintiff for any dishonesty, summary judgment was inappropriate because the plaintiff had produced evidence of discretion and inconsistency in punishing dishonesty.

Plaintiff sought summary judgment on the failure to mitigate defense. The court explained that while the plaintiff has the duty to mitigate, the defendant has the burden to show failure to mitigate, generally by showing the availability of substantially equivalent jobs and the failure of the plaintiff to use reasonable diligence in seeking alternative employment. The underlying issue here was whether the proposed alternate jobs were geographically reasonable. But this was a question of fact that would have to go to the jury.

Defendant sought summary judgment on the punitive damages request. This was inappropriate because evidence had been produced that could be found to establish discriminatory animus. It also sought summary judgment on failure to exhaust administrative remedies. This turned on allegedly additional protected activities asserted in the complaint that were not presented to OSHA. The magistrate judge found this wanting since the additional protected activities were contained within the injury report, which was the basis for the complaint to OSHA.

The magistrate judge also addressed a motion for summary judgment on a related claim and several evidentiary motions.

In a subsequent order, the district court adopted the magistrate judges’ recommendations in full. The objections to the FRSA recommendations were overruled on the grounds that they merely repeated arguments made to the magistrate judge, which is insufficient to trigger an obligation to conduct a de novo review.

SUMMARY JUDGMENT; SUMMARY JUDGMENT DENIED WHERE GENUINE DISPUTES REMAINED OVER WHETHER THERE WAS AN INJURY AND WHETHER EMPLOYER HAD A REASONABLE BASIS FOR ITS DISCIPLINE

Smith v. Norfolk Southern Railroad Co., No. 16-cv-520 (M.D. Ga. July 6, 2018) (2018 U.S. Dist. LEXIS 112419) (Order [denying cross motions for summary judgment]): Plaintiff was

terminated after a determination that he had made false statements to a supervisor when reporting another worker's injury. He filed an FRSA complaint. The court in this order denied cross-motions for summary decision. There remained genuine disputes over whether the other worker had actually fallen from the chair, which made summary decision on the protected activity element impossible. As to the contributing factor element, the court observed that the correctness of the discipline was not at issue and there only needed to be a reasonable basis for the disciplinary decision. But this turned on a question of interpretation of the evidence, which was an issue a jury would need to decide. Genuine disputes also remained over the affirmative defense showing.

SUMMARY JUDGMENT; SUMMARY JUDGMENT DENIED WHERE GENUINE DISPUTES REMAIN OVER WHETHER THERE WAS AN INJURY AND WHETHER EMPLOYER HAD A REASONABLE BASIS FOR ITS DISCIPLINE

O'Neal v. Norfolk Southern Railroad Co., No. 16-cv-519 (M.D. Ga. July 6, 2018) (2018 U.S. Dist. LEXIS 112185) (Order [denying cross motions for summary judgment, etc.]): Plaintiff reported that he was injured when a defective chair broke and caused him to fall. After an investigation a manager determined that the chair was defective but there had been no fall. Plaintiff was charged with making false statements to a supervisor and then terminated. He then filed an FRSA complaint. The parties filed cross-motions for summary decision. Both were denied. There remained genuine disputes over whether the plaintiff had actually fallen from the chair, which made summary decision on the protected activity element impossible. As to the contributing factor element, the court observed that the correctness of the discipline was not at issue and there only needed to be a reasonable basis for the disciplinary decision. But this turned on a question of interpretation of the evidence, which was an issue a jury would need to decide. Genuine disputes also remained over the affirmative defense showing.

COURT DISMISSED FRSA CLAIM FOR LACK OF SUBJECT MATTER JURISDICTION ON THE GROUND THAT A TIMELY FRSA ADMINISTRATIVE COMPLAINT HAD NOT BEEN FILED, WHERE PLAINTIFF FAILED TO RESPOND TO DEFENDANT'S FRCP 12(b) MOTION WITH SUFFICIENT DOCUMENTATION TO ESTABLISH GROUNDS FOR INVOCATION OF MAILBOX RULE; AFFIDAVIT OF ATTORNEY INSUFFICIENT WHERE IT WAS NOT ACCOMPANIED BY AN AFFIDAVIT FROM UNIDENTIFIED PERSON WHO PURPORTEDLY MAILED THE ADMINISTRATIVE COMPLAINT, AND WHERE PLAINTIFF CONCEDED THAT THE REGULAR LAW OFFICE PROCEDURE WAS NOT FOLLOWED BECAUSE THE COMPLAINT WAS SENT BY REGULAR MAIL INSTEAD OF CERTIFIED MAIL AND FAX

Guerra v. Consolidated Rail Corp., 2:17-cv-6497 (D. N.J. June 13, 2018) (2018 U.S. Dist. LEXIS 98779) (unpublished) (case below 2017-FRS-00047), the Defendant filed a FRCP 12(b)(1) motion for dismissal based on lack of jurisdiction, contending that the court did not have jurisdiction because the Plaintiff had not filed a timely FRSA administrative complaint. The Plaintiff did not challenge whether failure to file a timely complaint would divest the court of

subject-matter jurisdiction, but instead contended that the complaint was timely. The court found, however, that the Plaintiff failed to present a sufficient sworn affidavit to take advantage of the mailbox rule presumption. Although the Plaintiff presented an affidavit from his attorney, there was no affidavit from the unidentified person who would have mailed the administrative complaint. Moreover, the Plaintiff acknowledged that typical office procedures had not been followed because the complaint was allegedly sent by regular mail, and not by certified mail and fax. The court thus granted the motion to dismiss. However, it stated that "[t]o the extent that the pleading deficiencies identified by this Court can be cured by way of amendment, Plaintiff is hereby granted thirty (30) days to file an amended pleading."

SUMMARY JUDGMENT; WHERE NO OPPOSITION IS FILED A COURT MAY NOT TAKE A DEFAULT BUT MAY ACCEPT THE MOVING PAPERS AS UNOPPOSED

SUMMARY JUDGMENT; FAILURE TO EXHAUST; WHERE THE PLAINTIFF DID NOT FILE A COMPLAINT WITH OSHA, DEFENDANT IS ENTITLED TO SUMMARY JUDGEMENT FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Tilley v. Union Pacific Railroad Co., No. 16-cv-2382 (N.D. Tx. Apr. 12, 2018) (2018 U.S. Dist. LEXIS 63039; 2018 WL 1786965) (Order Accepting the Findings, Conclusion and Recommendation of the United States Magistrate Judge), *adopting*, *Tilley v. Union Pacific Railroad Co.*, No. 16-cv-2382 (N.D. Tx. Mar. 27, 2018) (2018 U.S. Dist. LEXIS 62902) (Findings, Conclusion and Recommendation of the United States Magistrate Judge):

Plaintiff was terminated after the railroad determined that she failed to ensure that switch points on a track fit properly, which resulted in a derailment. Plaintiff filed a complaint containing several claims, including an FRSA retaliation claim. Defendant moved for summary judgment. Plaintiff did not file a response. In this situation, a court is not permitted to enter a default, but may accept the moving papers as unopposed. Where the complaint is not verified, as here, there will be no competent summary judgment evidence except for that provided by the moving party.

As to the FRSA retaliation claim, Defendant argued that Plaintiff had admitted that she never filed a complaint with OSHA. The magistrate thus recommended that summary judgment be granted for failure to exhaust administrative remedies. No objections were filed and the district court adopted the recommendation.

SUMMARY JUDGMENT; AMENDMENT OF CLAIMS; PLEADINGS CANNOT BE AMENDED IN A BRIEF OPPOSING A MOTION FOR SUMMARY JUDGMENT

FAILURE TO EXHAUST; AMENDED OF CLAIMS; CLAIMS CANNOT BE AMENDED TO ASSERT NEW ADVERSE ACTIONS THAT WERE NOT PART OF THE ADMINISTRATIVE COMPLAINT AND THUS WERE NOT ADMINISTRATIVELY EXHAUSTED

SUMMARY JUDGMENT; KNOWLEDGE; WHERE THERE IS NO EVIDENCE BEYOND SPECULATION THAT THE DECISION-MAKERS HAD KNOWLEDGE OF THE PROTECTED ACTIVITY, SUMMARY JUDGMENT IS APPROPRIATE.

SUMMARY JUDGMENT; CAT'S PAW; TO PREVAIL ON CAT'S PAW THEORY A PLAINTIFF MUST BE ABLE TO SHOW THAT THE INDIVIDUAL WITH THE ALLEGED RETALIATORY MOTIVE PLAYED SOME SUBSTANTIVE ROLE AND WAS ABLE TO INFLUENCE THE OUTCOME

SUMMARY JUDGMENT; CONTRIBUTORY FACTOR; SUMMARY JUDGMENT APPROPRIATE WHERE TEMPORAL PROXIMITY NOT SUGGESTIVE AND BROKEN BY INTERVENING EVENTS, THERE IS NO EVIDENCE OR PRETEXT OR HOSTILITY, AND THERE IS NO EVIDENCE THAT SIMILARLY SITUATED EMPLOYEES WERE TREATED DIFFERENTLY

Gibbs v. Norfolk Southern Railway Co., No. 14-cv-587 (W.D. Ky. Mar. 29, 2018) (2018 U.S. Dist. LEXIS 52565; 2018 WL 1542141) (Memorandum Opinion and Order): Plaintiff made safety complaints related to parking arrangements for a time when the entrances to the main parking area at the Louisville yard were to be blocked. Later he and another employee were investigated after some managers found them sitting in a company truck at a restaurant during work hours. Plaintiff maintained that this was normal practice and authorized, but he was terminated for absenteeism, misuse of company property, and sleeping on the job. He filed an FRSA complaint. The court was presented with Defendant's motion for summary judgment.

In his response to the motion, Plaintiff asserted some additional adverse actions, but the court stated that he was barred from relying on these adverse actions because he did not assert them in the operative complaint and it is not permissible to amend pleadings in a brief opposing summary judgment. In addition, they were not included in the OSHA complaint and so they would be dismissed due to a failure to exhaust.

For the adverse actions that were properly alleged, the court found that Plaintiff could not establish that the decision-makers had knowledge of the protected activity. Both had declared that they had no such knowledge and one wasn't at the company when the protected activity occurred. In response Plaintiff had only speculated that the protected activity was generally known in management, but there was no evidence to support this conclusion. Plaintiff also made a "cat's paw" argument based on influence by a supervisor who did know about the protected activity. But the court found that the undisputed evidence showed that this employee played no substantive role in the decision-making process or actual investigation.

In the alternative, the court granted summary decision on the contributing factor element. The factors did not support an inference of contribution. There was not significant temporal proximity and there was an intervening event. There was no good evidence of disparate treatment because none of the suggested comparators had violated all of the rules in question and the only good comparator, the companion in the truck, had received the same discipline. There was no evidence of hostility to Plaintiff and no evidence that the full range or what Plaintiff had done was common practice or that any of the decision-makers or alleged influencers condoned any of the misconduct alleged. The court added that Plaintiff's shifting theories about who at Defendant had the retaliatory motive against him belied his claims of hostility.

SUMMARY JUDGMENT; CONTRIBUTORY FACTOR; SUMMARY JUDGMENT FOR DEFENDANT ON CONTRIBUTORY FACTOR DENIED WHERE IT DID NOT

CHALLENGE GOOD FAITH OF INJURY REPORT; ITS EVIDENCE OF DISHONESTY WAS WEAK AND DISPUTED; AND TEMPORAL PROXIMITY AND THE MANNER OF INVESTIGATION PROVIDED CIRCUMSTANTIAL EVIDENCE OF CONTRIBUTION

SUMMARY JUDGEMENT, AFFIRMATIVE DEFENSE; SUMMARY JUDGMENT ON AFFIRMATIVE DEFENSE DENIED BECAUSE INJURY REPORT A BUT-FOR CAUSE OF THE ADVERSE ACTION AND COMPARATOR EVIDENCE WAS EITHER WEAK OR CONTEXT-FREE; DECISION OF PUBLIC LAW BOARD DOES NOT SUPPORT SUMMARY JUDGMENT IN A *DE NOVO* PROCEEDING

SUMMARY JUDGMENT; BACKPAY AND DUTY TO MITIGATE; DEFENDANT HAS THE BURDEN TO ESTABLISH FAILURE TO MITIGATE BY SHOWING THE AVAILABILITY OF SUBSTANTIALLY EQUIVALENT EMPLOYMENT AND FAILURE BY THE PLAINTIFF TO EXERCISE REASONABLE DILIGENCE IN SEEKING THAT EMPLOYMENT; SUMMARY JUDGMENT INAPPROPRIATE WHERE RECORD IS TOO INCOMPLETE AND MURKY ON THE AVAILABILITY OF OTHER JOBS

SUMMARY JUDGMENT; PUNITIVE DAMAGES; WHERE DEPENDING ON FACTUAL FINDINGS A JURY COULD INFER RECKLESS OR CALLOUS DISREGARD FOR A PLAINTIFF'S RIGHTS, SUMMARY JUDGMENT ON PUNITIVE DAMAGES INAPPROPRIATE

Despain v. BNSF Railway Co., No. 15-cv-8294 (D. Az. Feb. 20, 2018) (2018 U.S. Dist. LEXIS 95518; 2018 WL 1894708) (Order [denying Defendant's motion for summary judgment]):

The district court denied a motion for summary judgment by the Defendant in an FRSA action. The protected activity in the case involved making an injury report. The Defendant terminated the Plaintiff for dishonesty in making the report and in the investigation. The termination was later converted to a lengthy suspension. The alleged dishonesty concerned when the Plaintiff determined the injury was work-related, when during the shift the injury occurred, and the circumstance of a quip pro quo proposal to drop the injury report in exchange for a paid deadhead trip. The Plaintiff and manager had different accounts of who made that proposal.

Defendant sought summary judgement on the contributing factor element. But it conceded for the purposes of the motion that the injury report was made in good faith. Having done so, the district court concluded that it could not have discharged him for a dishonest report. A reasonable fact finder could conclude from the record that the Plaintiff had not been honest at all and had promptly attempted to file the report but found no one to report it to. The alleged quid pro quo offer could not support summary judgement because it was "squarely disputed." "The weakness of BNSF Railway's assertion of dishonesty suggests it may be pretext for something else. It could well be pretext for telling the truth. The jury can say." The district court also concluded that there was other circumstantial evidence that could support an inference to contribution, including temporal proximity and the manner in which the investigation and hearing proceeded, which evinced bias.

Defendant also sought summary judgment on its affirmative defense. The district court denied the motion on the grounds that the injury report was an obvious "but-for" cause of the

termination and the comparator evidence either focused on instances where injury-reports were not punished (rather than where punishment occurred in similar circumstances without an injury-report) or was provided without the context needed to evaluate it. The district court also dismissed reliance on the Public Law Board finding in favor of the company, noting that the FRSA proceeding was *de novo*.

The district court also quickly denied summary judgment on several other issues. Alleged failure to exhaust administrative remedies did not merit summary judgment because BNSF didn't provide the OSHA complaint. The complainant had provided evidence of medical expenses. Regarding backpay, a defendant is required to prove a failure to mitigate by showing both the availability of substantially equivalent employment and failure by the plaintiff to use reasonable diligence to find employment. The record was "too incomplete and murky" to conclude that substantially equivalent employment was available, so the argument failed. The district court also determined that a jury could infer reckless or callous disregard for the plaintiff's rights, depending on how it resolved the factual disputes. Summary judgment barring punitive damages was thus improper.

SUMMARY JUDGMENT; PROTECTED ACTIVITY; DEPOSITION TESTIMONY IN A FELA ACTION MAY BE A PROTECTED ACTIVITY SINCE IT IS A REPORT AND IT IS MADE TO SOMEONE WITH AUTHORITY TO INVESTIGATE GIVEN THE PRESENCE OF THE RAILROAD'S COUNSEL; WHERE EMPLOYEE'S TERMINATION WAS RESCINDED AND HE WAS REINSTATED WITH SENIORITY INTACT, HE COULD BE DEEMED AN EMPLOYEE AT THE TIME OF THE PROTECTED ACTIVITY

SUMMARY JUDGMENT; DISTRICT COURT DENIES SUMMARY JUDGMENT ON KNOWLEDGE, CONTRIBUTORY FACTOR, AND AFFIRMATIVE DEFENSE WHERE IT CONCLUDES NUMEROUS FACTUAL DISPUTES REMAIN BETWEEN THE PARTIES

Roop v. Kan. City Southern Ry., No. 16-cv-413 (E.D. Okla. Oct. 26, 2017) (2017 U.S. Dist. LEXIS 177646; 2017 WL 4844832): Plaintiff alleged that Defendant railroad intimidated, harassed, and ultimately terminated him in retaliation for the testifying on behalf of another employee in a FELA proceeding, in violation of the FRSA. Defendant sought summary judgment on multiple grounds. The district court denied the motion.

The railroad argued that the claim was time-barred. To be actionable, a complaint must be filed with OSHA within 180 days of the retaliatory action. However, evidence of prior adverse actions may be used as support for a timely claim. Here only 127 days had passed between the termination and the complaint, so the complaint for that adverse action was timely. The court noted that earlier adverse actions that pre-dated the 180 day window would not be actionable.

Defendant sought summary judgment on the grounds that there was no protected activity. The court held that protected activity wasn't limited to the initial report of an injury or hazardous condition, but could extend to later reports as well. Here it occurred in a deposition, per the complaint, but deposition testimony could constitute a report in the meaning of the FRSA and

since counsel for the railroad was present, it was a protected report within the meaning of the act since counsel was an authority who could investigate the allegations further. There were disputes over whether the Plaintiff provided additional detail or new information in his testimony, so the issue was not proper for summary judgment. The railroad also argued that since the Plaintiff was not an employee at the time of the protected activity, the FRSA did not apply. Plaintiff had been terminated prior to the deposition for unrelated reasons, but was later reinstated with seniority intact. The court held that the issue was too undeveloped at this point but that based on the reinstatement, at this stage it would conclude that he was an employee at the time of the report.

The district court also summarily denied summary judgment on the knowledge and contributing factor elements of the Plaintiff's case and Defendant's affirmative defense. It simply stated that there were numerous material factual disputes remaining between the parties, precluding summary judgement.

**SUMMARY JUDGMENT; CONTRIBUTING FACTOR AND KNOWLEDGE;
SUMMARY JUDGMENT GRANTED WHERE EVIDENCE OF RECORD INDICATED
THAT DECISION MAKER HAD NO KNOWLEDGE OF PROTECTED ACTIVITY
AND IT WOULD BE "RANK SPECULATION" TO DRAW AN INFERENCE TO
KNOWLEDGE**

DiMauro v. Springfield Terminal Ry. Co., No. 16-cv-71 (D. Me. July 26, 2017) (2017 U.S. Dist. LEXIS 117550; 2017 WL 3203390): Plaintiff filed a complaint with the Federal Railway Administration, which initiated an investigation and recommendation for penalties. He produced evidence that a supervisor expressed adversity and an intent to retaliate. Separately, Plaintiff had an interaction with the President of the Railway, after which he was investigated for dishonesty in saying that his locomotive was not ready. None of the charges were sustained, however, after witnesses supported Plaintiff's version of the conversation. Plaintiff filed an FRSA complaint and Respondent moved for summary judgment.

The district court granted summary judgment on the contributing factor element. The President had submitted a declaration that he had no knowledge of the report to the FRA or the investigation. Though the court characterized the exchange between the Plaintiff and President as "bizarre," it held that there was not enough evidence to present the issue to a jury. There was no cat's paw theory in the allegations and Plaintiff could only speculate that the President knew about the protected activity. Circumstantial evidence could make the needed showing, but Plaintiff didn't have enough and a jury would have to engage in "rank speculation" to find for him.

**SUMMARY JUDGMENT; CLAIMS NOT ADDRESSED IN RESPONSE TO MOTION
FOR SUMMARY DECISION ARE DEEMED WAIVED**

**ADVERSE ACTION; SUMMARY JUDGEMENT; INVESTIGATIONS AS ADVERSE
ACTION; DISTRICT COURT HOLDS THAT THE INITIATION OF AN
INVESTIGATION AND CONDUCT OF A DISCIPLINARY PROCESS CAN BE**

ADVERSE ACTION EVEN WHERE ULTIMATELY NO DISCIPLINE IS ASSESSED, MATERIAL ADVERSITY IS A QUESTION FOR THE JURY

Short v. Springfield Terminal Ry. Co., No. 16-cv-74 (D. Me. July 26, 2017) (2017 U.S. Dist. LEXIS 117551; 2017 WL 3203391):

Plaintiff injured his knee at work but did not report it until the next day, potentially in violation of a safety rule about prompt reports of injury. The railroad noticed an investigation, but the outcome was that he broke no rule and no discipline was assessed. On summary decision the railroad argued that this was not an adverse action. Plaintiff had asserted other adverse actions, but since they were not addressed in response to Defendant's motion for summary decision, the district court deemed them "waived."

The district court applied the *Burlington Northern* standard for an adverse action, which requires that the action "be harmful to the point that they could well dissuade a reasonable worker" from engaging in protected activity. After reviewing the history of the investigation in this case, the court determined that the issue had to go to a jury. It held that investigation and being subjected to the disciplinary process could be an adverse action if it was materially adverse, a question the jury was properly placed to answer. In so doing, the court disagreed with the analysis in some other district court cases suggesting that investigation could not be an adverse action, concluding that the facts of each case and disciplinary process were different. The court pointed to ARB holdings (*Vernace*) reaching the same conclusion, but explicitly stated that it was not relying on the ARB.

AFFIRMATIVE DEFENSE; SUMMARY JUDGEMENT

Lee v. Norfolk Southern Railway Co., No. 13-cv-4 (W.D. N.C. May 11, 2016) (2016 WL 2746626; 2016 U.S. Dist. LEXIS 62307) (case below 2013-FRS-4) (Memorandum Opinion and Order): Court grants summary judgment because the uncontroverted clear and convincing evidence shows that the Defendant would have taken the same unfavorable personnel action against the Plaintiff in the absence of the Plaintiff's protected activity.

SUMMARY JUDGMENT; CONTRIBUTING FACTOR; COURT GRANTS SUMMARY JUDGMENT WHEN PLAINTIFF'S EVIDENCE OF PRETEXT IS ONLY SPECULATION, CONJECTURE, AND TENUOUS INFERENCES

SUMMARY JUDGMENT; AFFIRMATIVE DEFENSE; SUMMARY JUDGMENT PROPER ON AFFIRMATIVE DEFENSE WHEN EVIDENCE PERTAINING TO ALL RELEVANT FACTORS FAVOR RAILROAD

Dafoe v. BNSF Railway Co., No. 14-439 (D. Minn. Feb. 26, 2016) (2016 WL 778367): Plaintiff was disciplined for three safety violations. The first involved not stopping his train when he was told over the radio that his "angle cock" appeared to be slightly turned. The second two grew out of a random safety inspection/audit in which Plaintiff was accused of improperly bottled air in the braking system when the train was stopped and walking between equipment without following safety procedures. He reached an agreement as to the first that included a probation.

After he was found to have committed the second two he was terminated. He unsuccessfully grieved the dismissal and then filed a complaint with OSHA. He claimed that he was a known safety advocate and pointed to a series of protected safety complaints, both formal and informal. He also pointed to several injuries and injury reports in his long career. OSHA dismissed the complaint and Plaintiff asked for a hearing with an ALJ, but then removed the case to federal court.

The Railroad moved for summary judgment on the contributory factor element and on the affirmative defense. Plaintiff made five arguments for pretext in favor of a finding of contribution, which the court considered in turn. First, Plaintiff pointed to differential treatment of the carman who radioed about the angle cock. But the court found that the two were not similarly situated in that they had acted differently and had different supervisors with different views of discipline. Second, Plaintiff argued that BNSF had a pattern of dismissing safety advocates. The court found the evidence here too speculative to permit a reasonable inference and noted that several of the others mentioned had recently lost FRSA suits. Next, Plaintiff argued that BNSF had a history of retaliating for injury reports, pointing to a 2013 accord between OSHA and the railroad that BNSF would cease increasing suspensions based on prior injuries. But this was too speculative as well and had no application to this particular case. Fourth, Plaintiff argued that he had been coerced to accept discipline on the angle cock violation and this set him up for dismissal in the later investigation. But he had no actual evidence of coercion and the latter two offenses alone were dismissible.

Finally, Plaintiff pointed to alleged deficiencies in the internal process, including difficulty interpreting the relevant data regarding the violations. But the data difficulty was a normal feature of the way the data was kept and courts do not sit as super-personnel departments. Plaintiff pointed to evidence of innocence but this would not show that the decision-makers didn't believe he had committed the violations. Other factors supported the decision and there was no good evidence of hostility by the decision makers. Some had very limited knowledge of any protected activity. The court also found it "significant" that all of the protected activity pled was completely unrelated to the discipline—there was no shared nexus. Plaintiff also had a long history of protected activity without any consequence, with the railroad even reacting positively to the complaints. The court concluded that Plaintiff had "offered only speculation, conjecture, and tenuous inferences" to support a finding of pretext. "Even under the more lenient contributing factor standard, viewing the evidence in the light most favorable to Dafoe, no reasonable jury could find in his favor."

In addition, the court found that BNSF was entitled to summary judgment on its affirmative defense. In evaluating whether a railroad has shown that it would have taken the same action absent the protected activity by clear and convincing evidence, courts look to 1) whether there are written policies addressing the alleged misconduct; 2) whether applicable investigatory procedures were followed; 3) whether the dismissals were approved by others in senior management; 4) whether the dismissal was upheld on appeal; 5) the temporal proximity between the non-protected activities and the adverse action; 6) whether the policies are consistently enforced; and 7) the independent significance of the non-protected activity. Looking at the evidence on offer, the court found that all factors favored BNSF and so summary judgment was proper.

SUMMARY JUDGMENT; CONTRIBUTING FACTOR; EVIDENCE THAT MEDICAL DEPARTMENT CLEARED A RETURN TO WORK BUT IT WAS DELAYED BY THE SUPERVISOR AS WELL AS EVIDENCE OF HOSTILITY FROM THE SUPERVISOR FOUND SUFFICIENT TO DEFEAT SUMMARY JUDGMENT

SUMMARY JUDGMENT; AFFIRMATIVE DEFENSE; RAILROAD NOT ENTITLED TO SUMMARY JUDGMENT ON AFFIRMATIVE DEFENSE BASED ON THE COMMONALITY IN DELAYS IN RETURN TO WORK FOR WORK-RELATED AND NON-WORK-RELATED INJURIES WHERE CASE IN QUESTION DIDN'T INVOLVE A DELAY IN MEDICAL CLEARANCE

SUMMARY JUDGMENT; PUNITIVE DAMAGES; WHERE MATERIAL DISPUTES OF FACT REMAINED ON THE SEQUENCE OF EVENTS AND THE BEHAVIOR OF SUPERVISORS, SUMMARY JUDGMENT ON PUNITIVE DAMAGES FOUND NOT APPROPRIATE

In *Rader v. Norfolk Southern Ry.*, No. 1:13-cv-298 (E.D. Tenn. Feb. 10, 2016) (2016 U.S. Dist. LEXIS 17913), the court denied Defendants' Norfolk Southern Railway Company's ("NSRC") and Norfolk Southern Corporation's ("NSC") Motion for Summary Judgment, finding that Plaintiff had presented sufficient evidence to meet the permissive threshold applicable at the summary judgment stage of proceedings.

The Plaintiff hurt his knee at work and reported the injury. He had surgery and was out for a time. He was then released to return to work, though his doctor also said he should use a Neoprene Sleeve on his knee. The medical department at the railroad cleared Claimant to return to work without restriction. This was transmitted to the relevant supervisors, along with mention of the sleeve. When Plaintiff returned to work he was told that he could not work and had to leave the property. The parties disputed the conversation, but use of the Sleeve was mentioned and emails indicated uncertainty over whether there was a work restriction. Eventually Plaintiff's doctor removed that restriction and after another physical and clearance by the medical department, Plaintiff returned to work. He filed a complaint under the FRSA alleging that his return had been delayed in retaliation for reporting a work-related injury.

The Railroad sought summary judgment. As to the contributing factor element, the court found that the Plaintiff had enough evidence to meet "this very permissive threshold." Given the evidence that the medical department had cleared him to return to work and instructed the supervisors that he should be allowed to work, as well as the evidence of the hostility Plaintiff encountered when he returned, a reasonable jury could find that the injury report contributed to the decision to delay the return.

As to the affirmative defense, the Railroad provided evidence that delays from the medical department are common for both work-related and non-work-related injuries. The court found that this was insufficient—the delay here resulted from the direct supervisor, not the medical department, which had cleared Plaintiff to return. That was conveyed to the supervisor who

made the decision, which undercut the argument that the delay would have occurred regardless of the protected activity.

The court also denied summary judgment as to the punitive claim on the grounds that there were material issues of facts in dispute and denied a motion to strike a notice of supplemental authority.

SUMMARY JUDGMENT; SUMMARY JUDGMENT IS NOT AN OPPORTUNITY TO FLESH OUT INADEQUATE PLEADINGS AND SO ISSUES IN CONSIDERATION ARE LIMITED TO THOSE PROPERLY PLEAD PRIOR TO THE MOTION AND OPPOSITION

Rookaird v. BNSF Railway Co., No. 14-cv-176 (W.D. Wash. Oct. 29, 2015) (2015 U.S. Dist. LEXIS 147950; 2015 WL 6626069) (case below 2014-FRS-9): Plaintiff had been instructed to move roughly 42 cars. Before doing so he conducted air tests on the cars. He and a trainmaster communicated over the radio about whether the testing was necessary. When Plaintiff returned to the depot he was told by the superintendent to “tie up” and go home. He did so, but provided an end time 28 minutes later than the time he completed his tie up and did not sign his time sheet because he could not locate it. Plaintiff also had a confrontation in the break room with another employee, after which the superintendent told him to leave. Defendant investigated the events and terminated Plaintiff. Its stated reasons were failure to work efficiently, dishonest reporting of time, failure to sign the time sheet, and not complying with instructions to leave the property. Plaintiff filed suit under the FRSA on the grounds that his air testing and communications about it were protected activities and led to the termination. This order considered Plaintiff’s Motion for Partial Summary Judgment and Defendant’s Motion for Summary Judgment.

The court explained that the FRSA employs a “two-part burden-shifting test” and that in the first part the plaintiff must “show by a preponderance of the evidence that (1) he engaged in a protected activity; (2) the employer knew he engaged in the allegedly protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action.” “After the employee makes this showing, the burden shifts to the employer to demonstrate by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of the protected activity.” Here, Defendant conceded the second and third elements of the Complainant’s case.

The first issue for the court was which alleged protected activities were at issue. To be properly raised, Plaintiff needed to have exhausted his administrative remedies as to the issue. Relying on general principles of exhaustion, this meant that the action was limited to the administrative complaint, the investigation that followed, or the scope of an investigation that reasonably could have been expected to follow the complaint. Moreover, summary judgment is not a tool to flesh out inadequate pleadings, so protected activities and theories needed to be adequately plead prior to the summary judgment motion and opposition. Plaintiff’s administrative complaint *and* the operative complaint before the court limited the protected activity to refusing to violate federal safety rules or regulations related to air testing and his subsequent reports to the railroads hotline

of the incident and subsequent harassment. Only those protected activities were properly before the court.

PROTECTED ACTIVITY; GOOD FAITH; SUMMARY DECISION; TO BE PROTECTED AN INJURY REPORT MUST BE MADE IN GOOD FAITH, WHICH REQUIRES BOTH AN ACTUAL SUBJECTIVE BELIEF AND AN OBJECTIVELY REASONABLE BELIEF; WHERE MATERIAL DISPUTES REMAINED ABOUT UNDERLYING EVENTS LEADING TO THE REPORT, SUMMARY JUDGMENT DENIED

CONTRIBUTORY FACTOR; SUMMARY JUDGMENT; CHAIN OF EVENTS / INEXTRICABLE INTERTWINEMENT; ANIMUS; COURT DENIES SUMMARY JUDGMENT BASED ON “EXPANSIVE” CAUSATION STANDARD IN FRSA AND POSSIBILITY OF MAKING THE SHOWING DUE TO THE CHAIN OF CAUSATION BETWEEN THE PROTECTED ACTIVITY AND ADVERSE ACTION AS WELL AS EVIDENCE OF TEMPORAL PROXIMITY, INTERTWINEMENT, AND ANIMUS

SECTION 20109(C)(1); SUMMARY JUDGMENT; SECTION 20109(C)(1) ONLY APPLIES WHERE THERE WAS AN INJURY SO COURT DENIES SUMMARY JUDGMENT WHERE FACT OF INJURY, AS WELL AS FACTS ABOUT THE REQUESTS FOR TREATMENT, REMAIN IN DISPUTE

Armstrong v. BNSF Ry. Co., 128 F. Supp. 3d 1079, No. 12-cv-7962 (N.D. Ill. Sept. 4, 2015) (2015 U.S. Dist. LEXIS 118224; 2015 WL 5180589): Plaintiff was called to the “glasshouse” area of a station where he and his supervisor had a dispute over his uniform. Plaintiff alleged that his supervisor assaulted him, injuring his left foot and left knee. He alleged FRSA violations for delays in providing medical care and retaliation, by termination, for filing an injury report. Both parties moved for summary decision and the court denied both motions.

The parties disputed what happened between Plaintiff and his supervisor and in particular whether the supervisor had slammed the door on the Plaintiff’s foot and knee. There was video with a partial view of the relevant area, but it did not capture the full sequence because the manager was out of view. Plaintiff had been taken for medical treatment after his request, but not immediately and not to the closest facility. After an investigation and hearing regarding the incident, the railroad had terminated Plaintiff for insubordination in not remaining in the “glasshouse” as instructed and for dishonesty in reporting the incident and in the injury report.

The relevant protected activity was the injury report and the parties did not dispute that Plaintiff made an injury report. But they disputed whether it was done in good faith. For an injury report to be made in good faith, the employee must “subjectively believe his reported injury was work-related” and that belief must be “objectively reasonable.” The underlying issue was whether the assault had been fabricated. There remained disputed issues of material fact on that question, so summary decision was not appropriate for either party.

As to the contributing factor element, the court observed that the causation standard in the FRSA is “expansive” and can be met by showing that the protected activity initiated a chain of events

that led to the termination and the events in question are temporally close and intertwined. Here there was evidence that could indicate animus as well and thus a jury could reach the conclusion for Plaintiff on the element. It could thus reach a verdict for Defendant. Summary judgment was thus denied.

As to the inference with medical treatment claim under Section 20109(c)(1), the court denied Plaintiff's motion for summary judgment. It first concluded that the claim had been adequately pled. Summary judgment couldn't be granted because a prerequisite to the protections is an actual injury, and that was a question open for the jury. There were additional disputes about how and when Plaintiff requested treatment.

PROTECTED ACTIVITY; GOOD FAITH; SUMMARY DECISION; GOOD FAITH INJURY REPORT REQUIRES BOTH GOOD FAITH BELIEF THAT THE INJURY WAS WORK-RELATED AND GOOD FAITH IN MAKING THE REPORT; GOOD FAITH REQUIREMENT APPLIES TO THE INITIAL REPORT OF INJURY, NOT THE FULL RANGE OF AN EMPLOYEE'S INTERACTIONS WITH THE RAILROAD

CONTRIBUTING FACTOR; SUMMARY DECISION; COURT OBSERVES THAT CONTRIBUTING FACTOR CAUSATION IS A LOW BAR AND DENIES SUMMARY DECISION WHERE THERE IS SOME EVIDENCE, INCLUDING TEMPORAL PROXIMITY, FROM WHICH SOME CONTRIBUTION COULD BE INFERRED, WHERE PROPOSED INTERVENING CAUSES WERE TOO INTERTWINED, AND BECAUSE PUBLIC LAW BOARD DECISIONS AND INDUSTRY PRACTICE ARE NOT RELEVANT

AFFIRMATIVE DEFENSES; SUMMARY JUDGMENT; CLEAR AND CONVINCING EVIDENCE STANDARD IS DIFFICULT TO MEET, SUMMARY JUDGMENT DENIED WHEN NO EVIDENCE THAT RAILROAD UNIFORMLY TERMINATED EMPLOYEES FOR SAME MISCONDUCT

Miller v. CSX Transp., Inc., No. 1:13-cv-734 (S.D. Ohio Aug. 25, 2015) (2015 U.S. Dist. LEXIS 112507; 2015 WL 5016507) (case below 2013-FRS-64): In August 2012 the Plaintiff reported that about a month earlier he had suffered a back injury when his foot slipped on loose ballast while stepping off of the training, resulting in a twist and popping sound. He had gone to an emergency room 5 days after the injury and more recently to an orthopedist. Defendant's rules require immediate reporting of on-duty injuries, so an investigation was initiated. Several days later Plaintiff gave a written statement retracting his injury report and stating that it had actually occurred at home while working on his car. Plaintiff claimed that through gestures and nodding, the managers had conveyed that if he retracted his report, he could go back to work with little or no penalty. After the investigation/hearing, Plaintiff was terminated. He pursued several actions, including an FRSA complaint.

Defendant sought summary judgment on the grounds that the injury report was not made in good faith. The court explained that the good faith requirement implicated both "good faith belief that an injury was work-related, and good faith in making the injury report." Here Defendant argued

that the retraction should be considered as part of the report and since one or the other was not true, Plaintiff had not acted in good faith. After reviewing other cases on the question, the court held that the good faith requirement applies to the initial injury report, not all of an employee's interactions with the railway. Viewing the facts in the light most favorable to Plaintiff, a jury could conclude that he had acted in good faith when he made the initial report. The court also rejected the railroad's argument that it could not be liable unless it knew that the report was made in good faith and was thus protected activity.

Defendant also sought summary judgment on the contributing factor element on the grounds that there was no evidence of intentional retaliation, the dishonesty was an intervening event, and it had followed long-standing industry practices. The court, however, observed that the contributory factor standard was a very low causal bar and considering the evidence presented, including the temporal proximity and indications that the managers had already decided on discipline before the retraction, concluded that there remained factual disputes. As to proposed intervening causes, the court concluded that they were too intertwined in the facts as presented. Finally, the court rejected reliance on industry practice and public law board decisions as not relevant to the contributing factor question.

The Defendant argued that the election of remedies provision, § 20209(f) precluded the FRSA action because Plaintiff had also pursued Title VII and ADA claims at the EEOC that related to the same adverse action. Relying on *Norfolk So. Ry. Co. v. Perez*, 778 F.3d 507, 513 (6th Cir. 2015), the court concluded the subsection was not meant to limit employee's rights in this way. It did not reach the question of whether the Plaintiff could have also pursued Title VII and ADA actions in litigation.

Defendant moved for summary decision on its affirmative defense based on evidence of its termination of other employees for dishonesty and not terminating employees for injury reports. The court denied the motion. The clear and convincing evidence standard is difficult to meet and here the submission could not establish that every employee who was dishonest was discharged or that every employee who didn't report an injury on time was discharged. It added that the termination letter here did not even cite dishonesty.

The court also denied summary decision on punitive damages, quickly determining that considering all of the evidence in the light most favorable to the Plaintiff, a jury could still award punitive damages on the record presented. Separately the court granted Defendant summary judgement on a FELA claim and granted Defendant's motion to exclude testimony from an expert witness for failure to comply with FRCP 26(a)(2).

PROTECTED ACTIVITY; GOOD FAITH; SUMMARY JUDGMENT; CROSS-MOTIONS FOR SUMMARY JUDGMENT DENIED WHERE IT WAS POSSIBLE TO INFER THAT THE INDIVIDUAL ACT OF THE REPORT WAS DONE IN GOOD FAITH OR TO INFER THAT THE PLAINTIFF WAS NOT ACTING WITH HONESTY OF PURPOSE

SUMMARY JUDGMENT; COURT GRANTS SUMMARY JUDGMENT FOR RAILROAD ON INTERFERENCE WITH MEDICAL CARE CLAIM WHEN OPPOSING PAPERS DID NOT ADDRESS THE ISSUE AND NO RECORD EVIDENCE SUPPORTED THE CLAIM; GRANTS SUMMARY DECISION TO RAILROAD ON PUNITIVE DAMAGES WHERE NO EVIDENCE COULD SUPPORT THE AWARD

Murphy v. Norfolk So. Ry. Co., No. 13-cv-863, 2015 WL 914922, 2015 U.S. Dist. LEXIS 25631 (S.D. Ohio Mar. 3, 2015) (case below 2014-FRS-4) [PDF](#): Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109, and Federal Employer’s Liability Act (“FELA”), 45 U.S.C. § 51, *et seq.*, suit with cross-motions for summary judgment. Slip op. at 1. The plaintiff worked in the maintenance of way department and had been called in to help clear some trees from the track. While using a chainsaw to do so, it kicked back, and since he wasn't wearing his protective chaps, he suffered a significant cut and was taken for medical treatment by a co-worker. At the hospital, they called their supervisor and plaintiff asked his supervisor to make no further reports of his injury because he did not want to be ridiculed for the manner of injury, feared retaliation for reporting injury or discipline for violating the safety rule regarding the use of chaps, and did not want to jeopardize incentives offered to his crew for maintaining an injury-free record (e.g. free meals and stock bonuses). The supervisor agreed and the Plaintiff returned to work without incident. *Id.* at 2-3.

Nine months later, someone made an anonymous complaint about Plaintiff and his non-report of the injury. This led to an investigation and the discovery of the injury. Plaintiff then filled out the required form to report the injury. The co-worker received a ten-day time-served suspension for concealing the injury. The supervisor was terminated as a manager but allowed to return to his collective bargaining position with a 78 day suspension and other restrictions. Plaintiff was charged with conduct unbecoming of an employee for concealing the injury and convincing others to do so, as well as improper performance of duty for not wearing his chaps. The charges were sustained and he was issued a one-year suspension along with further restrictions pertaining to his exercise of seniority rights. *Id.* at 4-5. Plaintiff filed an FRSA complaint, but OSHA dismissed it. Plaintiff then took the suit to federal court. *Id.* at 5-6.

After explaining the analytical framework for an FRSA claim, *id.* at 7-8, the court considered Norfolk Southern’s argument that the Plaintiff had not reported his injury in good faith and thus did not engage in protected activity. The railroad focused on the overall conduct in concealing the injury. Plaintiff argued that 1) he had a good faith belief that he suffered a work-related injury when he reported it; and 2) it was not his fault that his co-worker and supervisor had not done their jobs and reported the injury further. *Id.* at 9-10. The court remarked that this argument took “somechutzpah to make,” but that though the evidence supporting good-faith was “not overwhelming,” it was “substantial enough to withstand summary judgment.” *Id.* at 10. It also found substantial evidence supporting the railroad’s argument that the plaintiff had not acted in good faith and a reasonable juror could find that he did not act with “honesty of purpose.” Thus both FRSA-retaliation claim motions for summary judgement were denied. *Id.* at 11-12. A footnote in the order discusses the nature of the good faith requirement, and in particular the determination that it encompasses *both* 1) that there is a good-faith belief that the injury is work-related; and 2) that the making of the injury report was itself done in good faith. *Id.* at 11 n.3.

The Plaintiff also had an FRSA complaint for interference with his medical treatment. Norfolk Southern sought summary judgment, Plaintiff did not respond to that aspect of the motion, and

the court found no evidence in the record to support an inference that there was any interference. The motion was thus granted. *Id.* at 12-13. In addition, the court granted the railroad's motion for summary judgment on the claim for punitive damages on the grounds that there was no evidence of record to support the conclusion that the railroad acted with a reckless or callous disregard for his rights. *Id.* at 13-16. The remainder of the order related to the sorts of damages the plaintiff could claim under FELA. *Id.* at 15-17.

SUMMARY JUDGMENT; KNOWLEDGE; SUMMARY JUDGMENT GRANTED TO RAILROAD WHERE PLAINTIFF DID NOT SUBMIT SUFFICIENT EVIDENCE TO SUPPORT INFERENCE THAT INDIVIDUALS INVOLVED IN THE DISCIPLINE ALSO HAD KNOWLEDGE OF THE PROTECTED ACTIVITY

Conrad v. CSX Transportation, Inc., No. 13-cv-3730 (D. Md. Dec. 15, 2014) (2014 U.S. Dist. LEXIS 172629; 2014 WL 7184747)(case below ALJ No. 2012-FRS-88) [PDF](#): Defendant assessed Plaintiff with two serious offenses, which he alleged were in retaliation for two incidents in which he reported safety violations and objected to a union member being asked to engage in unsafe conduct. In January 2011 a union member was injured while applying a handbrake and contacted Plaintiff, the local union chairman. Plaintiff told him to report the injury and later, not to return to reenact the injury for injury due to a required rest break. Plaintiff reported the incident to the FRA and told management he was doing so. The next month four managers observed him operating a train and charged him with a safety violation for operating a switch without first checking it and doing so with one instead of two hands. He was charged with a serious violation but it was handled through an alternative “time out” procedure. A note was placed in his file. In August 2011, Plaintiff was contacted when a crew that had run out of fuel had been instructed to enter a yard to retrieve a locomotive. They worried of low clearances and dangerous conditions in the yard. Based on a settlement between the railroad and a state agency, Plaintiff forbid the crew from entering the yard because they were not properly trained to do so. He told management as much. Later that month, two managers claimed that they saw Plaintiff operating without his radio on, not use proper ID in a radio check, and fail to use both hands while operating a switch. This led to disciplinary charges, which were still pending at the time of the decision.

The railroad moved for summary judgment on a number of grounds. This order only addressed one issue, knowledge of the protected activity. The FRSA incorporates the burden shifting framework of AIR-21. At the first step, “the employee must show, by a preponderance of the evidence, that ‘(1) [he] engaged in protected activity; (2) the employer knew that [he] engaged in protected activity; (3) [he] suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.’” Slip op. at 6 (quoting *Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 344 (4th Cir. 2014)) (alternations in original). “Then, the burden shifts to the employer to demonstrate ‘by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity].” *Id.* (quoting *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 351 (4th Cir. 2008) (alternations in original)).

In support of summary decision, the railroad submitted declarations from the various supervisors and individuals involved in the two alleged infractions to the effect that they didn't know about the safety complaints and protected activities. Plaintiff replied that knowledge didn't have to be shown directly but could be inferred by the fact-finder from circumstantial evidence including temporal proximity, shifting explanations, deviation from standard practice, and changes in attitude. The court rejected this argument. The point went to the fourth, "contributing factor," element, not the knowledge element. If "knowledge" were simply part of "contributing factor," the Plaintiff's point would hold. But the court understood the AIR-21 analysis to independently require a showing of "knowledge" as a separate element.

On this basis, the court held that to show knowledge the employee must show that someone involved in the adverse employment decision must have knowledge of the protected activity. Here there was not sufficient admissible evidence from which a jury could draw this inference. Plaintiff pointed broadly at his union activities and the ire of management, but this did not establish that the relevant managers had knowledge of the FRSA protected activity. The court also rejected the argument that the element was met because someone at the railroad had knowledge of the protected activity, imputing knowledge to the railroad. Plaintiff speculated that the information was shared, but had no evidence, only speculation. The court thus granted summary judgment to the railroad.

ELECTION OF REMEDIES; SUMMARY JUDGMENT; COURT HOLDS THAT § 20101(F) BARS FRSA SUIT WHERE PLAINTIFF PREVIOUSLY LITIGATED RACE DISCRIMINATION SUIT RELATING TO SAME ADVERSE ACTION

Lee v. Norfolk Southern Railway Co., No. 13-cv-00004 (W.D. N.C. May 20, 2014) [PDF](#): Plaintiff alleged that he was retaliated against in violation of the FRSA by Defendant for tagging too many cars with "bad order" citations. He has been suspended for 6 months. Previously he had pursued an employment discrimination claim against Defendant alleging racial discrimination in reference to the same suspension. Here he alleged that supervisors had bad order quotas and there was pressure not to exceed those marks. He claimed that he did not succumb to the pressure and properly bad ordered unsafe cars, resulting in the retaliation. The railroad's stated reason for the suspension was the consumption of alcohol (one beer) while on the clock. The railroad sought summary judgment under the election of remedies provision. The court granted the motion.

The court began by reviewing the structure of the Railway Labor Act and the FRSA, as well as the history of the FRSA's election of remedies provision and the 2007 amendments that took the FRSA out of the RLA arbitration process and gave the Secretary of Labor responsibility under the FRSA. In this case, it was undisputed that the Plaintiff had sought protection in the discrimination lawsuit and the FRSA suit. The court also found it undisputed that the same allegedly unlawful act was at issue in both suits—the six month suspension. This left the question as whether the first lawsuit was an action brought pursuant to another provision of law.

Plaintiff attempted to forestall this question by arguing that the railroad was estopped from arguing otherwise because of an agreement reached in the first discovery process. The court

found this unavailing since the election of remedies provision limited what actions could even be brought. And the court thought that the Plaintiff had plainly brought suits under different provisions of law. The court saw the FRSA's framework as intended to provide an expedited framework to address complaints and the election of remedies provision as a way of ensuring that the FRSA process did not get bogged down while other suits were pursued.

In initiating the first action the Plaintiff had triggered § 20109(f) and the bar on the second action. It did not matter that in the first action the court had concluded that the forecast of evidence showed that he had been suspended for drinking alcohol on the job and this was a minor grievance subject to the RLA, depriving the court of jurisdiction. But at the same time, the court did have jurisdiction over the § 1981 claim and disposed of it in summary decision. The court acknowledged that if Plaintiff had sought redress under the CBA and RLA, the suit under the FRSA would not be barred because he would have been enforcing collective bargaining rights. But that was not the history in this case; he had not brought a CBA/RLA grievance at all; he brought a race discrimination claim and then an FRSA complaint.

Plaintiff argued that since § 1981 and the FRSA served different purposes, combating race discrimination and retaliation, respectively, and thus the election of remedies provision did not apply. But the court thought that this would prevent the election of remedies provision from serving its purpose since every lawsuit could be directed at a different wrong. As the court saw it, the overlap was in whether the suits concerned the same act, which it saw as the suspension.

Finally, the court rejected reliance on subsections (g) and (h) and the point that the FRSA was not meant to limit rights of employees. It stated that it had not done so because Plaintiff had been permitted to pursue his race discrimination claim to conclusion. As the court saw matters, 20109(f) requires that if an FRSA action is brought, it must be brought first. It did not prevent subsequent claims or side-by-side claims. But it barred subsequent FRSA complaints. If the later subsections were read to allow the action here, the court thought that subsection (f) would be eviscerated. It thus granted summary decision.

[*Editorial Note:* Decision reversed on appeal in *Lee v. Norfolk Southern Railway Co.*, 802 F.3d 656 (4th Cir. 2015)]

- *Motion to Strike Affirmative Defenses*

U.S. District Court Decisions

DISTRICT COURT ADJUDICATION; MOTION TO STRIKE AFFIRMATIVE DEFENSES; COURT DECLINES TO STRIKE POTENTIALLY REDUNDANT AFFIRMATIVE DEFENSE BUT STRIKES TWO THAT ARE FORECLOSED BY LAW

Bjornson v. Soo Lin R.R. Co., No. 14-cv-4596, 2015 U.S. Dist. LEXIS 112307 (D. Minn. June 15, 2015) (Report and Recommendation) (case below 2014-FRS-127) [PDF](#): Case involving a Federal Employer's Liability Act, 45 U.S.C. § 51, *et seq.*, negligence claim and a retaliation complaint under whistleblower protection provisions of the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109, alleging that the railroad refused a request for a personal day to attend a doctor's appointment for a work-related injury and then initiated an investigation for "failure to protect services" and "laying off under false pretenses." He also challenged the inclusion of the investigation on his personal record. Slip op. at 2. This order contains a report and recommendation by a magistrate judge concerning the Plaintiff's motion to strike three of the railroad's 25 affirmative defenses under Fed. R. Civ. P. 12(f). *Id.* at 1, 3-4. An affirmative defense will not be stricken if it is a sufficient as a matter of law or presents a question of law or fact that the court should hear, but will be stricken if it is legally insufficient, or foreclosed by prior decisions. *Id.* at 5.

First, the Plaintiff asked that an affirmative defense that his "claim is barred, in whole or in part, by the operation of 49 U.S.C. § 20109(d)" be stricken because it was redundant with another affirmative defense asserting statute of limitations. The court disagreed. The cited provisions included matters beyond the statute of limitations, so it was not redundant. Even if the two affirmative defenses were redundant, there was no prejudice to the plaintiff so it would be inappropriate to strike one. *Id.* at 6-8.

Next, Plaintiff sought to strike an affirmative defense premised on the election of remedies provision in 49 U.S.C. § 20109(f), which prohibits seeking protection under the FRSA "and another provision of law for the same allegedly unlawful act of the railroad carrier." The affirmative defense relied on the Plaintiff's pursuit of a grievance under the collective bargaining agreement ("CBA"). Plaintiff argued that the CBA was not "another provision of law," that pursuing the CBA rights in the manner prescribed by the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.*, did not qualify because the RLA didn't create any rights, and that even so, the CBA grievance did not concern the same unlawful acts as the FRSA complaint. *Id.* at 8-9. The railroad argued that the scope and reach of the election of remedies provision, and whether it forced choice between CBA grievances that feel under the RLA or an FRSA complaint was an open question in the 8th Circuit and so the defense should not be stricken. *Id.* at 9-11. Though the court acknowledged there was no on point 8th Circuit case, it found that the affirmative defense was foreclosed by the statute itself and so should be stricken. Though the RLA was another provision of law, the plaintiff had not sought protection under it. He had sought protection under the CBA, which was a contract, not a provision of law. The RLA only specified the forum for some of the CBA disputes; it never provided the substantive rights that would be protected. As such, the statutory provision plainly did not provide to this circumstance and the affirmative defense failed as a matter of law. *Id.* at 11-16.

Lastly, the Plaintiff moved to strike an affirmative defense that alleged that because the Plaintiff had not complied with the regulatory requirements regarding giving 15 days' notice to the relevant Department of Labor ("DOL") body before taking advantage of the "kick-out" provision and filing a suit in federal court, the court lacked jurisdiction over the suit. The Plaintiff conceded that he had not complied with the regulations at issue, but argued that DOL regulations could not deprive the district court of jurisdiction and the statute itself created no advance notice requirement. *Id.* at 16-17. The court agreed with the Plaintiff and struck the defense as legally

insufficient. The statute itself created the right to pursue the action in federal court and that created the jurisdictional prerequisites. Giving 15 days' notice to DOL was not one of them. By the plain language of the statute then, the court had jurisdiction despite the lack of notice. *Id.* at 18-21.

- *Motion for Reconsideration*

U.S. District Court Decisions

MOTION FOR RECONSIDERATION; RECONSIDERATION APPROPRIATE WHERE THERE HAS BEEN AN INTERVENING CHANGE IN LAW, NEW EVIDENCE BECOMES AVAILABLE; OR A NEED TO CORRECT CLEAR ERROR OR PREVENT MANIFEST INJUSTICE; RECONSIDERATION NOT APPROPRIATE WHERE PARTY MERELY REHASHES OLD ARGUMENTS OR MAKES ARGUMENTS IT COULD HAVE MADE EARLIER

Jones v. BNSF Ry. Co., No. 14-2616 D. Kan. July 11, 2016) (2016 U.S. Dist. LEXIS 90212; 2016 WL 3671233) (case below 2014-FRS-53 (Jones) and -63 (Hodges)): Plaintiffs filed a Rule 59(e) motion to alter or amend the judgment entered in an earlier order granting the railroad's motion for summary judgment. Reconsideration under Rule 59(e) is appropriate when there is an intervening change in controlling law, new evidence becomes available, or there is a need to correct clear error or prevent manifest injustice. "Such a motion does not permit a losing party to rehash arguments previously addressed or to present new legal theories or facts that could have been raised earlier. A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider."

Summary judgment as to Plaintiff Jones had been granted on the contributory factor element. Plaintiff argued that the court had misapprehended the facts and the parties' positions, but the court found that this was merely a re-hash of old arguments and thus not proper for reconsideration. Plaintiff also argued that the Tenth Circuit's decision in *BNSF Ry. Co. v. U.S. Dep't of Labor [Cain]*, 816 F.3d 628 (10th Cir. 2016) had implicitly rejected the Eighth Circuit's interpretation in *Kuduk* that contributory factor causation required intentional retaliation. The district court had applied *Kuduk* in granting summary decision. After reviewing *Cain*, the court determined that it had not rejected the *Kuduk* holding or even discussed it, but was instead focused on a different issue—showing contributory factor where wrongdoing is disclosed in a protected format. Even if Plaintiff's reading of *Cain* was correct, the result would not change since the cases were similar in that the violation was disclosed in a protected format, requiring a showing of more than a mere connection between the protected activity and adverse action. On the record in the case, there was no evidence of any discriminatory animus.

Plaintiff Hodges argued that the court had omitted an uncontroverted material fact in his favor from its discussion. The court summarily disagreed, stating that it had considered the fact and discussed it, but found that it was insufficient in the face of other evidence to survive summary judgment.

- Post-Trial Motions

U.S. District Court Decisions

POST-TRIAL MOTIONS; DISTRICT COURT DENIES POST-TRIAL MOTION FOR JUDGMENT AS A MATTER OF LAW, REJECTING ALLEGATIONS OF MULTIPLE ERRORS; DENIES REMITTITUR MOTIONS, AWARDS PREJUDGMENT INTEREST; DECLINES TO MAKE ADDITIONAL ADJUSTMENTS TO AWARD, AND AWARDS FEES AND COSTS

In *Wooten v. BNSF Railway Co.*, No. 16-cv-00139, 2019 U.S. Dist. LEXIS 68808, 2019 WL 1778017 (D. Mont. Apr. 23, 2019), the Plaintiff filed a complaint alleging that he was unlawfully terminated by BNSF in retaliation for his report of an on-the-job injury. A jury found in his favor for Federal Employers' Liability Act ("FELA") and Federal Rail Safety Act ("FRSA") violations, but not on a count under the Locomotive Inspection Act ("LIA"). "On his FRSA claim, the jury awarded Wooten \$1,407,978 in lost wages and benefits in the future, reduced to present value, and \$500,000 for his mental and emotional humiliation or pain and anguish. . . . Additionally, after finding that BNSF's conduct was malicious or in reckless disregard for Wooten's rights, the jury awarded Wooten \$249,999 in punitive damages." Both the Plaintiff and Defendant filed post-trial motions.

Defendant's Post-Trial Motions

Asserted Failures of Proof, Errors, Etc.

The court was not persuaded by the Defendant's arguments that it should have been granted judgment as a matter of law, that it was prejudiced by the court's decision not to bifurcate the FRSA claim and the punitive damages question from the FELA and LIA claims, that the Plaintiff had made an argument during trial that the CBA procedures were unfair which improperly influenced the jury, that various of the jury instructions were a misstatement of the law, that the court made a number of errors on evidentiary rulings, and that the jury's verdicts were inconsistent.

Remittitur

— *Front Pay*

The jury awarded the Plaintiff \$1,407,978 for lost wages and benefits in the future, reduced to present value. The first question was whether front pay could be substituted for reinstatement. The court found that “reinstatement has not been so distinctly provided for in the FRSA context that it should be considered to be a legal remedy rather than an equitable one.” *Id.* at. 25. The next question was whether front pay was a proper question for the jury. The court first made a finding that reinstatement was not appropriate in this case because of the passage of time since the incident and because the “protracted and aggressively litigated lawsuit demonstrates significant hostility and animosity between BNSF and Wooten.” *Id.* at 28. The court then treated the jury’s front pay award as advisory. The court noted that the jury had received appropriate instructions and had heard extensive and detailed evidence and testimony on the question. The court accepted the advisory award for front pay as supported by the evidence, not grossly excessive, and consistent with the statutory mandate entitling the Plaintiff “to all relief necessary to make [him] whole.” *Id.* at 29 (quoting 49 U.S.C. § 20109(e)(1)).

— *Emotional Distress*

The jury awarded the Plaintiff \$500,000 for mental and emotional humiliation or pain and anguish. The Defendant argued that the Plaintiff failed to prove that he suffered emotional distress, relying heavily on the contention that emotional distress damages must be supported by objective evidence. The court, however, noted that the Ninth Circuit does not impose an objective evidence requirement on emotional distress damage awards. The court noted that the Plaintiff’s testimony had been compelling, “[p]articularly in light of the fact that Wooten came from a ‘railroad family’ in a small ‘railroad town’ and was wrongfully terminated and decried as a liar by the railroad.” *Id.* at 30.

— *Punitive Damages*

The jury awarded the Plaintiff \$249,999 in punitive damages. The Defendant challenged to the punitive damages award, which according to the court, was grounded in an attempt to apply *Kolstad v. American Dental Ass’n*, 527 U.S. 526 (1999), a Title VII decision, to the FRSA. Under *Kolstad*, a defendant is allowed to escape punitive damage liability if it “undertook good faith efforts by having policies in place to prevent retaliation.” The court noted that the Defendant was relying on the Eighth Circuit’s decision in *BNSF Railway Co. v. US. Department of Labor Administrative Review Board*, 867 F.3d 942 (8th Cir. 2017), as establishing *Kolstad* as the standard for awarding punitive damages under the FRSA, whereas the Plaintiff was relying on the First Circuit’s decision in *Worcester v. Springfield Terminal Railway Co.*, 827 F.3d 179 (1st Cir. 2016). The court found the First Circuit’s decision to be more convincing. The court proffered that *ineffective* safeguards against retaliation should not allow a defendant to escape punitive liability. The court rejected the Defendant’s contention that the Plaintiff’s burden on punitive damages was anything more than preponderance of the evidence.

Plaintiff’s Post-Trial Motions

— *Adjustments to Jury Award*

The jury had only awarded front, and not back pay, on the FRSA claim, and the Plaintiff moved for the court to amend the jury award to include backpay with interest, prejudgment interest on the emotional distress damages award, and a tax “gross up.” The court declined to disturb the jury’s back pay determination, noting that they had awarded the exact amount for backpay calculated by the Plaintiff’s expert in relation to the FELA claims, and that the jury had been instructed not to award a category of damages under the FRSA that had been awarded under FELA.

The court agreed that the Plaintiff should be awarded prejudgment interest on the emotional distress award in order to fully compensate him for his injury. The court was not, however, persuaded to use the DOL regulations rather than 28 U.S.C. § 1961 to calculate the rate.

The court noted that it had declined to give a jury instruction on a tax gross up and similarly declined to include a line of damages on the verdict form for such relief – but that the court had allowed the Plaintiff to present evidence and argument on such. The court denied a gross up, finding that he was not positive that the jury had not already taken tax consequences of a lump sum payment in account, that the Plaintiff had not cited controlling authority requiring the court to exercise equitable powers to order a gross up, and that the balance of equities were not shown to favor requiring the Defendant “to shoulder the tax consequences of a protracted front pay award intended to compensate Wooten for over 30 years of missed employment with BNSF.” *Id.* at 40 (footnote omitted).

— Attorneys’ Fees

The case was tried in Montana. The Plaintiff contended that it was necessary to attain attorneys with nationwide expertise in railroad litigation and that the relevant community for a fees determination should be that community, whereas the Defendant contended that the reasonable fees should be the prevailing rates for counsel in Missoula, Montana. The court acknowledged the absence of Montana law firms that represent claimants in FRSA litigation “at this level,” but declined to apply the Plaintiff’s broad “nationwide experience” definition for the relevant community. Rather, the court looked to the Pacific Northwest, and in particular the Western District of Washington where the Plaintiff’s attorneys had recently had the reasonableness of their fee evaluated in two separate cases. After reviewing the matter, the court determined the prevailing market rate as between \$425 and \$275 an hour for various attorneys, and \$110 an hour for a paralegal. The court declined to consider time of a clerical nature spent by an administrative assistant, apparently on the ground that such is considered firm overhead. The court dismissed as unreasonable BNSF’s objections to all but 33 hours of the Plaintiff’s attorneys claimed hours, noting that the court’s role was to do rough justice and not to achieve auditing perfection. The court agreed to cut 10% of the claimed time because of the intermingling of the FRSA and FELA claims. The court noted that the case had been “fought tooth and nail” and indicated that it was not persuaded by BNSF’s claim that the hours claimed were so “stunning” as to result in “no award at all.” The court did make a few adjustments for certain hours, such as hours litigating a matter that concurring that resulted in the Plaintiff’s attorneys’ being sanctioned.

— Taxable and Non-Taxable Litigation Costs

The court noted that while the FRSA does not define “litigation costs,” the Ninth Circuit allows as compensation “out-of-pocket” expenses that would normally be charged to a fee-paying client. Thus, awards were made for postage charges, travel charges (with certain reductions, such as for flying first class), hotel expenses with per diem, and videography and transcription costs. The court found, however, that expenses for legal research databases were part of the attorneys’ hourly rate and not separately compensable.

— *Expert Witness Fees*

The court declined to get into requiring receipts for all charges based on BNSF’s “insinuation that Wooten has misrepresented what was actually charged on his invoices.” *Id.* at 63. The court reiterated that it “declines to become a ‘green-eyeshade accountant’ and will pursue ‘rough justice’ in relation to this fee award.” The court did reject a few unsupported invoices, but awarded \$233,993.70 in expert witness fees.

Bill of Costs

The Plaintiff submitted a bill of costs, which BNSF objected to in numerous aspects. The court noted that it may tax costs as provided in 28 U.S.C. § 1920. It found that BNSF properly objected to inclusion of pro hac vice fees, and limited recovery to the \$400 clerk of court filing fee. It allowed costs of service of summons and subpoenas, except for a \$75 service fee accrued without a waiver request. It allowed fees for printed or electronically recorded transcripts. It allowed witness fees, except it disallowed fees for deposition testimony that should not be paid under the local rule. It disallowed all fees for explication because the Plaintiff failed to conform his request to the local rule. It disallowed fees for setting up video conferencing to allow to experts to testify remotely.

PROCEDURE BEFORE DISTRICT COURT; JUDGMENT AS MATTER OF LAW APPROPRIATE ONLY WHERE VIEWING FACTS IN LIGHT MOST FAVORABLE TO THE PREVAILING PARTY, A REASONABLE JURY COULD NOT HAVE FOUND FOR THAT PARTY; MOTION FOR A NEW TRIAL APPROPRIATE WHERE A MISCARRIAGE OF JUSTICE HAS RESULTED DUE TO LEGAL ERRORS AT TRIAL, A VERDICT AGAINST THE WEIGHT OF THE EVIDENCE, OR AN EXCESSIVE DAMAGES AWARD; MOTIONS WILL NOT BE GRANTED WHEN DISPUTE IS OVER THE WEIGHING OF EVIDENCE AND CREDIBILITY DETERMINATIONS

Blackorby v. BNSF Ry. Co., No. 4:13-cv-908 (W.D. Mo. Aug. 28, 2015) (2015 WL 5095989; 2015 U.S. Dist. LEXIS 114185) (case below 2013-FRS-68): Plaintiff alleged that he was retaliated against for filing an injury report. Motions for summary judgment were denied and a jury returned a verdict in favor of Plaintiff, awarding \$58,280 in damages but no punitive damages. Defendant’s motion for judgment as a matter of law was denied. Pending before the court was a renewed motion for judgment as a matter of law, or, in the alternative, for a new trial. The motion was denied.

On a motion for judgment as a matter of law, a court must affirm the jury’s verdict unless viewing the facts in the light most favorable to the prevailing party, the court determines that a

reasonable jury could not have returned a verdict in favor of that party. A new trial is appropriate under Rule 59 where there has been a miscarriage of justice due to a verdict against the weight of evidence, an excessive damage award, or legal errors at trial.

Defendant first argued that Plaintiff's 30 day record suspension was not an adverse action as a matter of law. The issue, however, had already been decided at summary decision and the analysis was renewed. The FRSA defines adverse actions broadly, more broadly than Title VII and includes "reprimands" and "any other way discriminate" language that reaches the sort of suspension given in the case.

The court also denied Defendant's argument that it was entitled to judgment or a new trial on the contributory factor element. The issue had been previously considered and turned on the weighing of evidence and credibility determinations. These were questions for the jury.

BNSF challenged the award of emotional distress damages on the grounds that there was insufficient evidence to support the award. But the Plaintiff had testified about the distress he experience due to the disciplinary process and the one year review period. The court held that this was competent evidence of emotional distress and sufficient to support the award.

Last BNSF had raised a challenge to any punitive damages instruction and award. Since the jury had not awarded punitive damages and Plaintiff hadn't sought to revive the issue, the court determined that BNSF had only been preserving an argument that was now moot.

- *Award of Costs*

U.S. Circuit Court of Appeals Decisions

COSTS; SEVENTH CIRCUIT HOLDS THAT FRSA DID NOT OVERCOME THE FRCP 54(d) PRESUMPTION THAT COSTS ARE AWARDED TO A PREVAILING PARTY, AFFIRMS AWARD OF COSTS TO DEFENDANT WHERE IT PREVAILED

Armstrong v. BNSF Railway Co., 880 F.3d 377 (7th Cir. Jan. 18, 2018) (Nos. 16-3674, 17-1088) (2018 U.S. App. LEXIS 1208; 2018 WL 457521) (Opinion [affirming jury verdict]):

After a jury trial the jury returned a verdict for the defendant railroad. The district court then awarded the defendant costs. Plaintiff appealed the award of costs to Respondent under FRCP 54(d) on the grounds that the FRSA only provides for costs to be awarded to the complainant. The court disagreed. FRCP 54(d) creates a presumption that prevailing parties get costs and the FRSA did not provide that costs could not be awarded to a prevailing employer. Statutory silence was not enough to overcome the presumption.

U.S. District Court Decisions

COSTS; DISTRICT COURT MAY DECLINE TO AWARD COSTS TO A PREVAILING DEFENDANT WHEN PRESENTED WITH UNCONTESTED EVIDENCE OF AN INABILITY TO PAY

Gibbs v. Norfolk Southern Railway Co., No. 14-cv-587 (W.D. Ky. June 28, 2018) (Order [adopting Report and Recommendation]); ***Gibbs v. Norfolk Southern Railway Co.***, No. 14-cv-587 (W.D. Ky. June 12, 2018) (Report and Recommendation): Defendant prevailed in this FRSA case and filed a bill of costs seeking \$3,224.60 for stenographically recorded depositions. Plaintiff did not dispute the costs, but asked that they not be billed because of his indigency, providing an affidavit detailing his financial situation. In reply Defendant argued that other factors weighing on the discretion to not award costs did not support waiving them, but did not challenge the claim of poverty or seek an evidentiary hearing. Accepting the contents of the affidavit, the magistrate judge recommended denying assessment of costs to plaintiff. No party objected and the district court adopted the recommendation.

FRSA FRAMEWORK FOUND NOT TO CONSTITUTE AN EXCEPTION TO FRCP 54(d)(1), WHICH ALLOWS COSTS FOR A PREVAILING PARTY; THUS A DISTRICT COURT MAY AWARD COSTS TO DEFENDANT IN AN FRSA RETALIATION CASE

In ***Armstrong v. BNSF Ry. Co.***, No. 12-cv-7962 (N.D. Ill. Dec. 15, 2016) (2016 U.S. Dist. LEXIS 173199), a jury returned a verdict in favor of the Defendant on the Plaintiff's FRSA retaliation claim, and the Clerk of Court entered a judgment against the Plaintiff directing that the Defendant shall recover costs. Plaintiff appealed, and moved the district court to vacate the order of costs. The Defendant filed a bill of costs in the amount of \$31,054.23. The Plaintiff argued, *inter alia*, that the Defendant's bill of costs be vacated or stayed because the FRSA creates a statutory exception to Rule 54(d)(1) of the Federal Rules of Civil Procedure.

Rule 54(d)(1) provides that “[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney’s fees—should be allowed to the prevailing party.” The court noted:

The FRSA provides that “an *employee* prevailing in [an enforcement action] shall be entitled to all relief necessary to make the *employee* whole.” 49 U.S.C. § 20109(e)(1) (emphasis added). Such relief includes, *inter alia*, “compensatory damages, including compensation for any special damages sustained as a result of the discrimination, *including litigation costs*, expert witness fees, and reasonable attorney fees.” *Id.* § 20109(e)(2)(C) (emphasis added). Section 20109 is silent, however, on a prevailing *employer*'s ability to cover costs.

The FRSA further states that enforcement actions shall be governed under the Department of Labor complaint procedure set forth in 49 U.S.C. § 42121(b). Pursuant to that section, if the Secretary of Labor determines that an FRSA violation has occurred, then “at the request of the *complainant*,” the Secretary shall assess against the violator “a sum equal to the aggregate amount of *all costs and expenses* (including attorneys’ and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, *by the complainant* for, or in connection with,” the bringing of the complaint. *Id.* § 42121(b)(3)(B)(iii) (emphasis added). Once again, the statute omits any discussion of fees due to a prevailing *employer*, with one exception: if the Secretary finds that a complaint “is frivolous or has been brought in bad faith,” the Secretary may award the employer “a reasonable attorney’s fee not exceeding \$1,000.” *Id.* § 42121(b)(3)(C).

Slip op. at 3-4.

The Plaintiff argued that this statutory framework constitutes an exception to Rule 54(d)(1). The court disagreed based on the Supreme Court’s decision in *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166 (2013). The court found that the FRSA only confirms “the background rule,” and that “[t]he FRSA’s silence regarding costs in non-frivolous cases is not ‘contrary’ to Rule 54(d)(1)’s presumption, nor does it limit the Court’s discretion in that area.” *Id.* at 7. The court found, therefore, that it may award costs to prevailing defendants in FRSA cases.

VII. PRIMA FACIE CASE AND BURDEN SHIFTING ANALYSIS

[*Editorial Note:* Most cases contain at least background statement of the basic analytical framework. The cases included in this section of the digest either contain particular discussion of the framework or are included as exemplary statements of the framework.]

Statute

49 U.S.C. § 20109

(d) Enforcement action.

(1) In general. An employee who alleges discharge, discipline, or other discrimination in violation of subsection (a), (b), or (c) of this section, may seek relief in accordance with the provisions of this section, with any petition or other request for relief under this section to be initiated by filing a complaint with the Secretary of Labor.

(2) Procedure.

(A) In general. Any action under paragraph (1) shall be governed under the rules and procedures set forth in section 42121(b) [49 USCS § 42121(b)], including:

(i) Burdens of proof. Any action brought under [subsection] (d)(1) shall be governed by the legal burdens of proof set forth in section 42121(b) [49 USCS § 42121(b)].

49 U.S.C. § 42121(b)(2)(B)

Requirements.

(i) Required showing by complainant. The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) Showing by employer. Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

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

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

Regulations

29 C.F.R. § 1982.104: Investigation

...

(e)(1) A complaint will be dismissed unless the complainant has made a prima facie showing that protected activity was a contributing factor in the adverse action alleged in the complaint.

(2) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing as follows:

(i) The employee engaged in a protected activity (or, in circumstances covered by NTSSA and FRSA, was perceived to have engaged or to be about to engage in protected activity);

(ii) The respondent knew or suspected that the employee engaged in the protected activity (or, in circumstances covered by NTSSA and FRSA, perceived the employee to have engaged or to be about to engage in protected activity);

(iii) The employee suffered an adverse action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity (or perception thereof) was a contributing factor in the adverse action.

(3) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, *i.e.*, to give rise to an inference that the respondent knew or suspected that the employee engaged in protected activity (or, in circumstances covered by NTSSA and FRSA, perceived the employee to have engaged or to be about to engage in protected activity), and that the protected activity (or perception thereof) was a contributing factor in the adverse action. The burden may be satisfied, for example, if the complaint shows that the adverse action took place shortly after the protected activity, or at the first opportunity available to the respondent, giving rise to the inference that it was a contributing factor in the adverse action. If the required showing has not been made, the complainant (or the complainant's legal counsel if complainant is represented by counsel) will be so notified and the investigation will not commence.

(4) Notwithstanding a finding that a complainant has made a prima facie showing, as required by this section, further investigation of the complaint will not be conducted if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity.

(5) If the respondent fails to make a timely response or fails to satisfy the burden set forth in the prior paragraph, OSHA will proceed with the investigation. The investigation will proceed whenever it is necessary or appropriate to confirm or verify the information provided by the respondent.

...

(a) The decision of the ALJ will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (d) of this section, as appropriate. A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.

(b) If the complainant has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

...

U.S. Circuit Court of Appeals Decisions

NINTH CIRCUIT STATES FRSA BURNEN SHIFTING ANALYSIS

In *Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1195 (9th Cir. Jan. 30, 2019) (No. 17-35513, 2019 U.S. App. LEXIS 3062), the Ninth Circuit wrote:

We first examine the appropriate standards governing a claim of unlawful discrimination under the FRSA. As we recently explained in *Rookaird v. BNSF Railway Co.*, 908 F.3d 451 (9th Cir. 2018), the FRSA expressly invokes the AIR-21 [Note 3] framework set forth in 49 U.S.C. § 42121(b) for claims of unlawful discrimination. *Id.* at 459. [Note 4]

To establish a claim of unlawful discrimination under the FRSA, the plaintiff must prove by a preponderance of the evidence that his or her protected conduct “was a contributing factor in the unfavorable personnel action alleged in the complaint.” *Id.* at 460 (citing 49 U.S.C. § 42121(b)(2)(B)(iii)). A contributing factor is “any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Rookaird*, 908 F.3d at 461 (internal quotation marks omitted). If the plaintiff succeeds, the employer can attempt to rebut the allegations and defeat the claim by demonstrating “by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity].” 49 U.S.C. § 42121(b)(2)(B)(iv).

Importantly, the only burden the statute places on FRSA plaintiffs is to ultimately prove, by a preponderance of the evidence, that their protected conduct was a contributing factor to the adverse employment action—i.e., that it “tend[ed] to affect” the decision in some way. *Id.* § 42121(b)(2)(B); *Rookaird*, 908 F.3d at 461.

Note 3: “AIR-21” refers to the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, 114 Stat. 61 (2000), which includes protections for whistleblowers and prohibits discrimination against an air carrier employee who reports information related to air carrier safety. Congress expressly adopted the same standard for the FRSA. 49 U.S.C. § 20109(d)(2).

Note 4: We are aware that under this framework there are two stages, a prima facie stage and a substantive stage. We are here concerned primarily with the substantive stage, as this appeal causes us to consider only whether the honest belief instruction altered the substance of what needed to be proven at trial.

BURDENS OF PROOF; ELEMENTS AND STAGES OF ANALYSIS; THE FRSA CONTAINS ELEMENTS FOR A *PRIMA FACIE* CASE AND FOR A SHOWING ON THE MERITS THAT DIFFER IN WHAT MUST BE SHOWN AS TO CONTRIBUTORY FACTOR; ON THE MERITS A COMPLAINANT MUST SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT THE PROTECTED ACTIVITY DID CONTRIBUTE TO THE ADVERSE ACTION, NOT JUST THAT CIRCUMSTANCES WOULD PERMIT THAT INFERENCE.

Rookaird v. BNSF Ry. Co., 908 F.3d 451 (9th Cir. Nov. 8, 2018) (2018 U.S. App. LEXIS 31687; 2018 WL 5831631) (Nos. 16-35786, 16-35931, 16-36062, No. 16-35787) (Opinion): Plaintiff Rookaird was a conductor on (and in charge of) a switcher crew for BNSF. The crew was tasked with moving a train. When it arrived, it performed a 20-45 minute air brake test on the train. Plaintiff’s supervisor, the trainmaster, made comments on the radio during the test suggesting that they stop, but did not order them to do so. They finished the test and then began work. Supervisors became upset at the pace of the work, thinking that it was an intentional slow-down in retaliation for reduced overtime, and pulled the crew out of service. A de-briefing of sorts with Plaintiff followed. He was told to go home. He printed a time sheet just after 8:00 listing an off-duty time of 8:30. At 8:15 he was ordered to go home again. He did so without signing the timesheet. BNSF started an investigation and eventually fired Plaintiff for not working efficiently, dishonesty on his time sheet, failure to sign the timesheet, and failure to leave the property when he was told.

Plaintiff filed an FRSA complaint which was kicked out to federal district court. He alleged that he was retaliated against for refusing to stop the air brake test. To prevail Plaintiff had to show 1) that he engaged in protected activity; 2) that the employer knew about the alleged protected activity; 3) that he suffered an unfavorable personnel action; and 4) that the protected activity was a contributing factor in the unfavorable personnel action. BNSF could defeat liability by showing by clear and convincing evidence that it would have taken the same adverse action absent the protected activity. The District Court granted summary judgement to Plaintiff on 2) knowledge; 3) adverse action; and 4) contribution. On contribution, it noted that the failure to work efficiently “cannot be unwound” from the action of continuing the airbrake test. Before the case went to the jury the District Court held that the airbrake test was not legally required (though it was a “close call”) but that it could still be a protected activity if Plaintiff had an objectively and subjectively reasonable belief that it was required. The jury had to decide a) whether there was protected activity; b) if so whether BNSF had established its affirmative defense; and c) if not, what damages

to award. The jury returned a verdict for Plaintiff and awarded \$1.2 million in damages. Both parties appealed the damages and BNSF appealed liability.

The Ninth Circuit affirmed the denial of summary judgment on the protected activity element but reversed the grant of summary judgment to Plaintiff on the contributing factor element. The verdict and damages were thus vacated and the case was remanded for further proceedings.

Regarding the grant of summary decision to Plaintiff on the contributory factor element, the panel explained that the FRSA contains two distinct phases with a burden shifting framework. In the first, the complainant must make out a prima facie case by showing 1) protected activity; 2) employer's knowledge or suspicion of protected activity; 3) adverse action; and 4) that "[t]he circumstances were sufficient to raise the inference that the protected activity (or perception thereof) was a contributing factor in the adverse action." The prima facie showing can be defeated by a showing by a clear and convincing evidence that the employer would have taken the same action absent the protected activity. At this stage a prevailing means that OSHA will investigate. The second stage is substantive. It is the same except that there is one important difference: the complainant must show, by a preponderance of the evidence, that the protected activity *was* a contributing factor. Prevailing here means winning the case.

In this case the District Court erred by conflating the two stages and granting summary decision on contribution based on the showing that applies at the prima facie case stage, not the substantive stage. The District Court had found that the adverse action and protected activity could not be unwound and on that basis granted summary judgment on "the 'contributing factor' element of his prima facie case." The Ninth Circuit agreed based on its understanding of the framework, but on that understanding it was error to not give the jury the contributing factor question on the "substantive" framework. Summary judgment was improper as to whether the protected activity *was* a contributing factor because BNSF presented evidence that, if believed, could lead a reasonable fact-finder to conclude that the protected activity did not contribute.

Tenth Circuit Statement of a Complainant's Burden

Lincoln v. BNSF Ry. Co., 900 F.3d 1166, 1212 (10th Cir. Aug. 17, 2018) (No. 17-3120, 2018 U.S. App. LEXIS 22930; 2018 WL 3945875) (case below D.C. No. 5:15-CV-04936; ALJ Nos. 2015-FRS-29 and 30):

Relative to a claimant's ability to establish a violation, the FRSA adopts the burden-shifting framework found in 49 U.S.C. § 42121(b). *See* 49 U.S.C. § 20109(d)(2)(A)(i) ("Any action brought under [the enforcement section of the FRSA] shall be governed by the legal burdens of proof set forth in section 42121(b)."). This burden-shifting framework places the initial burden on an employee to establish a prima facie case by showing that "(1) the employee engaged in a protected activity; (2) the employer knew that the employee engaged in the protected activity; (3) the employee suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action." *Conrad v. CSX Transp., Inc.*, 824 F.3d 103, 107 (4th Cir. 2016) (quoting

Feldman v. Law Enft Assocs. Corp., 752 F.3d 339, 344 (4th Cir. 2014)); *see Foster*, 866 F.3d at 967 (using similar language to define elements of prima facie case). "The absence of probative evidence as to any single element necessary to establish a prima facie claim terminates the action." *Conrad*, 824 F.3d at 107.

EIGHTH CIRCUIT STATEMENT OF BASIC FRSA ANALYTICAL FRAMEWORK

BNSF Ry. Co. v. United States DOL Admin. Review Bd. [Carter], 867 F.3d 942, No. 16-3093, 2017 U.S. App. LEXIS 15020, 2017 WL 3469224 (8th Cir. 2017) (case below ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82).

The Eighth Circuit explained that “[t]o prevail on his FRSA complaint, Carter must ‘prove, by a preponderance of the evidence, that (i) he engaged in a protected activity; (ii) BNSF knew or suspected, actually or constructively, that he engaged in the protected activity; (iii) he suffered an adverse action; and (iv) the circumstances raise an inference that the protected activity was a contributing factor in the adverse action.’” *BNSF Ry. Co.*, 867 F.3d at 945 (quoting *Gunderson v. BNSF Ry.*, 850 F.3d 962, 968 (8th Cir. 2017) (quoting *Kuduk v BNSF Ry.*, 768 F.3d 786, 789 (8th Cir. 2014))). “If he meets that burden, BNSF may avoid liability if it ‘demonstrates, by clear and convincing evidence, that [it] would have taken the same unfavorable personnel action in the absence of [Carter's] protected activity.’” *Id.* (quoting 49 U.S.C. § 42121(b)(2)(B)(ii)) (alterations in original). BNSF had conceded that the Complainant engaged in a protected activity that it had knowledge of and that he had suffered an adverse action. *Id.*

FIRST CIRCUIT STATEMENTS OF BURDENS

Pan Am Railways., Inc. v. USDOL, 855 F.3d 29, No. 16-2271 (1st Cir. Apr. 20, 2017) (2017 U.S. App. LEXIS 7047; 2017 WL 1422369) (case below ARB No. 14-074; ALJ No. 2013-FRS-84)

“Under the FRSA, an employee alleging retaliation bears the initial burden of demonstrating that his protected activity ‘was a contributing factor in the unfavorable personnel action alleged in the complaint’” *Id.* at 36 (quoting 49 U.S.C. § 42121(b)(2)(B)(iii)) (citing 49 U.S.C. § 20109(d)(2)(A)). If this is done, the employee “shift[s] the burden to [the railroad] to prove, ‘by clear and convincing evidence,’ that it ‘would have taken the same unfavorable personnel action in the absence of [the protected activity].’” *Id.* (quoting 49 U.S.C. § 42121(b)(2)(B)(iv)) (last alteration in original)

FRSA BURDENS AS STATED BY FOURTH CIRCUIT

In *Conrad v. CSX Transportation, Inc.*, 824 F.3d 103, No. 15-1035, 107 (4th Cir. May 25, 2016) (2016 U.S. App. LEXIS 9570)(case below D. Md. 13-cv-3730; ALJ No. 2012-FRS-88):

Like other federal whistleblower statutes, the FRSA is governed by the burden-shifting framework set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21"). *See id.* § 20109(d)(2)(A)(i); *see also, e.g.*, 18 U.S.C. § 1514A(b)(2)(C) (Sarbanes-Oxley Act) (incorporating the rules and procedures of AIR-21); 42 U.S.C. § 5851(b)(3) (Energy Reorganization Act) (same). Thus, to maintain an FRSA retaliation claim past the summary judgment stage, a plaintiff must project sufficient admissible evidence to establish that: "(1) [the employee] engaged in [a] protected activity; (2) the employer knew that [the employee] engaged in the protected activity; (3) [the employee] suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action." *Feldman v. Law Enft Assocs. Corp.*, 752 F.3d 339, 344 (4th Cir. 2014) (citation and internal quotation marks omitted). The absence of probative evidence as to any single element necessary to establish a prima facie claim terminates the action. *See Litt v. Republic Servs. of S. Nev.*, ARB Case No. 08-130, 2010 DOL Ad. Rev. Bd. LEXIS 81, 2010 WL 3448544, at *3 (Dep't of Labor Aug. 31, 2010). If the employee establishes a prima facie claim, then the burden shifts to the employer to demonstrate "by clear and convincing evidence that the employer would have taken the same personnel action in the absence of the protected activity." *Feldman*, 752 F.3d at 345 (citation omitted).

BACKGROUND STATEMENT OF LAW BY TENTH CIRCUIT

BNSF Ry. Co. v. United States DOL, 816 F.3d 628, 638, No. 14-9602, 2016 U.S. App. LEXIS 4234, 2016 WL 861101 (10th Cir. 2016) (case below ARB No. 13-006, ALJ No. 2012-FRS-19) (Christopher Cain, Intervenor/Complainant):

A railroad cannot discriminate against, suspend, or discharge an employee for notifying or attempting to notify the railroad about an on-the-job injury or medical treatment for that injury. 49 U.S.C. § 20109(a)(4); 29 C.F.R. § 1982.102(b). In pursuing a claim under the Act, an employee has the burden to establish a prima facie case, showing that the employee's protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(i). Upon an employee's doing so, the burden switches to the employer to demonstrate "clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of [the employee's protected activity]." *Id.* § 42121(b)(2)(B)(iv). The Act provides as remedies "all relief necessary to make the employee whole," including reinstatement, back wages with interest, and compensatory and punitive damages *Id.* § 20109(e)(1); *see id.* § 20109(e)(2)-(3).

EIGHTH CIRCUIT STATEMENT OF FRSA BURDENS

In *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. Oct. 7, 2014) (No. 13-3326; 2014 U.S. App. LEXIS 19099), the Eighth Circuit stated the analysis as follows:

To prevail, [an employee] must establish a prima facie case by showing (i) he engaged in a protected activity; (ii) BNSF knew or suspected, actually or constructively, that he engaged in the protected activity; (iii) he suffered an adverse action; and (iv) the circumstances raise an inference that the protected activity was a contributing factor in the adverse action. *See* 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. § 1982.104(e)(2). If [the employee] makes this showing, BNSF is nonetheless not liable if it “demonstrates, by clear and convincing evidence, that [it] would have taken the same unfavorable personnel action in the absence of [[the employee’s] protected activity].” § 421212(b)(2)(B)(ii).

BURDEN OF PROOF AND PRODUCTION IN FRSA WHISTLEBLOWER CASES; AIR21 RATHER TH AN MCDONNELL-DOUGLAS FRAMEWORK APPLIES; FRSA FRAMEWORK IS MEANT TO BE PROTECTIVE OF EMPLOYEES IN VIEW OF LEGISLATIVE FINDING THAT RAILROADS PRESSURE EMPLOYEES NOT TO REPORT INJURIES

In *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, No. 12-2148, 2013 WL 600208 (3rd Cir. Feb. 19, 2013), the Third Circuit Court of Appeals noted that since the FRSA was substantially amended in 2007 regarding anti-retaliation protections, including the AIR21 burden shifting test. The court described the AIR21 test as follows:

Under AIR-21, an employee must show, by a preponderance of the evidence, that "(1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action." *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475-76 (5th Cir.2008). Once the plaintiff makes a showing that the protected activity was a "contributing factor" to the adverse employment action, the burden shifts to the employer to demonstrate "by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." *Id.* § 42121(b)(2)(B)(ii). The Department of Labor has promulgated regulations that adopt this burden-shifting standard to FRSA complaints filed with the Department of Labor. *See* 29 C.F.R. § 1982.104(e)(3)-(4).

Araujo, supra, slip op. at 12 (footnote omitted).

In *Araujo*, the district court noted that it was unable to locate any binding authority regarding burden-shifting, and discussed both *McDonnell Douglas* framework and the regulations promulgated by the Department of Labor, 29 C.F.R. § 1982.104(e)(4), which implement the AIR-21 framework. The Court of Appeals disagreed with this approach because the FRSA unquestionably employs the AIR-21 burden-shifting framework. The court stated:

In the past, we have found that if a statute does not provide for a burden-shifting scheme, *McDonnell Douglas* applies as the default burden-shifting framework. See *Doyle v. United States Sec'y of Labor*, 285 F.3d 243, 250 (3d Cir.2002). This implies that when a burden-shifting framework other than *McDonnell Douglas* is present in a statute, Congress specifically intended to alter any presumption that *McDonnell Douglas* is applicable. The FRSA is clear that AIR-21 burden-shifting applies.

Araujo, supra, slip op. at 12-13 (footnote omitted).

The Court of Appeals paused to note that Congress intended the burden-shifting framework to be protective of employees:

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. As the Eleventh Circuit noted in a case under the Energy Reorganization Act, 42 U.S.C. § 5851, a statute that uses a similar burden-shifting framework, "[f]or employers, this is a tough standard, and not by accident." *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997). The Eleventh Circuit stated that the standard is "tough" because Congress intended for companies in the nuclear industry to "face a difficult time defending themselves," due to a history of whistleblower harassment and retaliation in the industry. *Id.* The 2007 FRSA amendments must be similarly construed, due to the history surrounding their enactment. We note, for example, that the House Committee on Transportation and Infrastructure held a hearing to "examine allegations ... suggesting that railroad safety management programs sometimes either subtly or overtly intimidate employees from reporting on-the-job-injuries." (Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearings Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (Oct. 22, 2007)). As the Majority Staff of the Committee on Transportation and Infrastructure noted to members of the Committee:

The accuracy of rail safety databases has been heavily criticized in a number of government reports over the years. The primary issue identified in many previous government investigations is that the rail industry has a long history of underreporting incidents and accidents in compliance with Federal regulations. The underreporting of railroad employee injuries has long been a particular problem, and railroad labor organizations have frequently complained that harassment of employees who reported injuries is a common railroad management practice.

Id. The report noted that one of the reasons that pressure is put on railroad employees not to report injuries is the compensation system; some railroads base supervisor compensation, in part, on the number of employees under their supervision that report injuries to the Federal Railroad Administration. *Id.* We will leave our discussion of the legislative history here, as the AIR-21 burden-

shifting language is clear, and “[w]here the statutory language is unambiguous, the court should not consider statutory purpose or legislative history.” *See In re Phila. Newspapers, LLC*, 599 F.3d 298, 304 (3d Cir. 2010). We simply note this history to emphasize that, as it did with other statutes that utilize the “contributing factor” and “clear and convincing evidence” burden-shifting framework, Congress intended to be protective of plaintiff-employees.

Araujo, supra, slip op. at 16-18 (footnote omitted).

U.S. District Court Decisions

FRSA BURDEN SHIFTING FRAMEWORK; COURT HOLDS THAT AIR-21 FRAMEWORK INCORPORATED IN FRSA REQUIRES A SHOWING BY THE EMPLOYEE THAT THE EMPLOYER HAD KNOWLEDGE OF THE PROTECTED ACTIVITY AS AN INDEPENDENT ELEMENT OF THE EMPLOYEES CASE

Conrad v. CSX Transportation, Inc., No. 13-cv-3730 (D. Md. Dec. 15, 2014) (2014 U.S. Dist. LEXIS 172629; 2014 WL 7184747)(case below ALJ No. 2012-FRS-88) [PDF](#): Defendant assessed Plaintiff with two serious offenses, which he alleged were in retaliation for two incidents in which he reported safety violations and objected to a union member being asked to engage in unsafe conduct. In January 2011 a union member was injured while applying a handbrake and contacted Plaintiff, the local union chairman. Plaintiff told him to report the injury and later, not to return to reenact the injury for injury due to a required rest break. Plaintiff reported the incident to the FRA and told management he was doing so. The next month four managers observed him operating a train and charged him with a safety violation for operating a switch without first checking it and doing so with one instead of two hands. He was charged with a serious violation but it was handled through an alternative “time out” procedure. A note was placed in his file. In August 2011, Plaintiff was contacted when a crew that had run out of fuel had been instructed to enter a yard to retrieve a locomotive. They worried of low clearances and dangerous conditions in the yard. Based on a settlement between the railroad and a state agency, Plaintiff forbid the crew from entering the yard because they were not properly trained to do so. He told management as much. Later that month, two managers claimed that they saw Plaintiff operating without his radio on, not use proper ID in a radio check, and fail to use both hands while operating a switch. This led to disciplinary charges, which were still pending at the time of the decision.

The railroad moved for summary judgment on a number of grounds. This order only addressed one issue, knowledge of the protected activity. The FRSA incorporates the burden shifting framework of AIR-21. At the first step, “the employee must show, by a preponderance of the evidence, that ‘(1) [he] engaged in protected activity; (2) the employer knew that [he] engaged in protected activity; (3) [he] suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.’” Slip op. at 6 (quoting *Feldman v.*

Law Enforcement Assocs. Corp., 752 F.3d 339, 344 (4th Cir. 2014)) (alternations in original). “Then, the burden shifts to the employer to demonstrate ‘by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity].” *Id.* (quoting *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 351 (4th Cir. 2008) (alternations in original)).

In support of summary decision, the railroad submitted declarations from the various supervisors and individuals involved in the two alleged infractions to the effect that they didn’t know about the safety complaints and protected activities. Plaintiff replied that knowledge didn’t have to be shown directly but could be inferred by the fact-finder from circumstantial evidence including temporal proximity, shifting explanations, deviation from standard practice, and changes in attitude. The court rejected this argument. The point went to the fourth, “contributing factor,” element, not the knowledge element. If “knowledge” were simply part of “contributing factor,” the Plaintiff’s point would hold. But the court understood the AIR-21 analysis to independently require a showing of “knowledge” as a separate element.

On this basis, the court held that to show knowledge the employee must show that someone involved in the adverse employment decision must have knowledge of the protected activity. Here there was not sufficient admissible evidence from which a jury could draw this inference. Plaintiff pointed broadly at his union activities and the ire of management, but this did not establish that the relevant managers had knowledge of the FRSA protected activity. The court also rejected the argument that the element was met because someone at the railroad had knowledge of the protected activity, imputing knowledge to the railroad. Plaintiff speculated that the information was shared, but had no evidence, only speculation. The court thus granted summary judgment to the railroad.

DOL Administrative Review Board Decisions

ARB ISSUES FINAL VERSION OF EN BANC DECISION PROVIDING THE STATE OF THE LAW ON THE TWO-STEP BURDEN OF PROOF IN CASE TYPES THAT EMPLOY THE AIR21 STANDARD (*i.e.*, ACA, AIR21, CFP, CPS, ERA, FDA, FRSA, MAP21, NTS, PSI, SPA, SOX, AND STAA)

ARB PLURALITY REJECTS *FORDHAM/POWERS* LIMITATIONS ON WHAT EVIDENCE ALJ MAY CONSIDER ON CONTRIBUTING FACTOR ELEMENT

LEAD OPINION SUGGESTS THAT CONFUSION CAN BE LESSENERED IF STEPS ARE VIEWED AS FOLLOWS: STEP ONE IS THE COMPLAINANT’S BURDEN TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT PROTECTED ACTIVITY PLAYED SOME ROLE IN THE ADVERSE PERSONNEL ACTION. STEP TWO IS THE RESPONDENT’S “*SAME-ACTION DEFENSE*”

In [Palmer v. Canadian National Railway](#), ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016) (en banc), *reissued with full separate opinions* (Jan. 4, 2017), [erratum with caption correction](#) (Jan. 4, 2017), the ARB considered, en banc, how to interpret the FRSA’s burden-of-proof provision. The FRSA incorporates by reference the AIR21 standard of proof. The four-judge opinion was a plurality decision, with a two-judge lead opinion, and three separate opinions.

Lead opinion of Judges Desai and Igasaki

—Rejection of *Fordham* and *Powers*

The ARB rejected the interpretation set forth in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-51 (ARB Oct. 9, 2014) and *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, slip op. at 24 (ARB Mar. 20, 2015) (en banc), *reissued with full dissent* (Apr. 21, 2015), and *vacated* (May 23, 2016), in the panels concluded that the factfinder was precluded from considering evidence of an employer’s non-retaliatory reasons for its adverse action in determining the contributing-factor question. In *Palmer*, the ARB held that:

nothing in the statute precludes the factfinder from considering evidence of an employer’s nonretaliatory reasons for its adverse action in determining the contributing-factor question. Indeed, the statute contains no limitations on the evidence the factfinder may consider at all. Where the employer’s theory of the case is that protected activity played no role whatsoever in the adverse action, the ALJ must consider the employer’s evidence of its nonretaliatory reasons in order to determine whether protected activity was a contributing factor in the adverse action.

USDOL/OALJ Reporter at 15.

—*Palmer applies to 13 DOL-administered whistleblower provisions*

The *Palmer* decision interprets the language of the AIR-21 burden-of-proof provision, which is found in at least twelve other DOL-administered whistleblower provisions, either incorporated through a cross-referencing incorporation, or directly through the same linguistic formulation. The ARB’s interpretation in *Palmer*, therefore applies equally to the following thirteen “whistleblower” statutes within the jurisdiction of OALJ and the ARB:

AIR21:

(1) (AIR21) - Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 20109(d)(2)(A)(i)

ERA:

(2) (ERA) - Energy Reorganization Act of 1974, as amended by the Energy Policy Act of 1992, 42 U.S.C. § 5851(b)

Statutes incorporating AIR21 by cross-reference:

- (3) (SOX) - Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806(a), 116 Stat. 745, 802 (2002) (codified at 18 U.S.C. § 1514A(b)(2)(C))
- (4) (FRSA) - Federal Rail Safety Act, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1521, 121 Stat. 266, 444 (2007) (codified as amended at 49 U.S.C. § 20109(d)(2)(A)(i))
- (5) (STAA) - Surface Transportation Assistance Act, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1536, 121 Stat. 266, 464 (2007) (codified as amended at 49 U.S.C. § 31105(b)(1))

Statutes using the same linguistic formulation as the AIR-21:

- (6) (PSI) - Pipeline Safety Improvement Act of 2002, Pub. L. No. 107-355, § 6, 116 Stat. 2985, 2989 (2002) (codified at 49 U.S.C. § 60129(b)(2)(B))
- (7) (NTS) - National Transit Systems Security Act of 2007, Title XIV of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1413, 121 Stat. 266, 414 (2007) (codified at 6 U.S.C. § 1142(c)(2)(B))
- (8) (CPS/CPSIA) - Consumer Product Safety Act, as amended by Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 219(a), 122 Stat. 3016, 3062, 3063-64 (2008) (codified at 15 U.S.C. § 2087(b)(2)(B))
- (9) (CFP) - Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 1057(c)(3)(C), 124 Stat. 1376, 2031 (2010) (codified at 12 U.S.C. § 5567(c)(3)(C))
- (10) (FDA) FDA Food Safety Modernization Act, Pub. L. No. 111-353, § 402, 124 Stat. 3885, 3968, 3969 (2011) (codified at 21 U.S.C. § 399d(b)(2)(C))
- (11) (MAP21) Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, 126 Stat. 405, 765, 767 (2012) (codified at 49 U.S.C. § 30171(b)(2)(B))

Statutes cross-referencing another provision with similar language:

- (12) (ACA) - Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1558, 124 Stat. 119, 261 (2010) (codified as amended at 29 U.S.C.A. § 218c(b)(1)) (incorporating by reference the burdens of proof in the CPSIA)
- (13) (SPA) - Seaman's Protection Act, as amended by the Coast Guard Authorization Act of 2010, Pub. L. No. 111-281, § 611(a), 124 Stat. 2905, 2969-70 (2010) (codified as amended at 46 U.S.C. § 2114(b)) (incorporating by reference the burdens of proof in the STAA)

—*Textual analysis supported by statutory framework; best to think of step two as the “same-action defense,” and not as the “clear and convincing” defense*

In rejecting the *Fordham/Powers* interpretation, the ARB lead opinion in *Palmer* focused on the text of the AIR21 two-step burden-of-proof framework. The ARB found that

the text of [§ 42121(b)(2)(B)(iii)]—‘the complainant demonstrates that [protected activity] was a contributing factor in the unfavorable personnel action’—is best interpreted to require a complainant to prove by a preponderance of the evidence

that protected activity played some role in the adverse personnel action and to permit the factfinder to consider any admissible, relevant evidence in making that determination.

USDOL/OALJ Reporter at 18. The ARB also found support for this interpretation in the structure of the AIR21 framework. The ARB noted that

[t]he phrase ‘contributing factor’ describes the substantive factual issue to be decided while the phrase ‘clear and convincing’ only describes the standard of proof, not the factual issue to be decided. The two are thus not analogous monikers [and thus] ... it may thus help cement this crucial aspect of the two-step test to refer to step two as the ‘same-action defense,’ not as the ‘clear and convincing’ defense.

Id. at 22 (footnotes omitted).

—*Support in the legislative history of the ERA whistleblower provision*

The ARB found that the legislative history demonstrated that the AIR21 two-step burden-of-proof derived from the burden-of-proof provision in the 1992 amendments to the ERA’s whistleblower provision, which in turn derived the test first announced by the United States Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). The ARB noted that the *Fordham* panel interpreted the legislative history of the Whistleblower Protection Act’s (WPA) burden-of-proof provision as supporting its interpretation of the ERA and AIR21. The ARB explained in an extended discussion why the *Fordham* panel’s reliance on the WPA’s legislative history was error. Finally, the ARB noted that its interpretation in *Palmer* was supported by at least two decades of consistent jurisprudence in the ARB and the federal courts of appeal.

—*How the AIR burden of proof provision is applied*

The ARB next summarized how the AIR-21 burden-of-proof provision is applied. The ARB wrote:

The AIR-21 burden-of-proof provision requires the factfinder—here, the ALJ—to make two determinations. The first involves answering a question about what happened: did the employee’s protected activity play a role, any role, in the adverse action? On that question, the complainant has the burden of proof, and the standard of proof is by a preponderance.[215] For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee’s protected activity was a contributing factor in the employer’s adverse action.

The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the

same adverse action anyway? On that question, the employer has the burden of proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.

[215] The complainant must also of course prove that he engaged in protected activity and that the respondent took an adverse action against him. ...

USDOL/OALJ Reporter at 52-53.

The ARB elaborated:

A. The ALJ must determine whether it is more likely than not that protected activity was a contributing factor in the adverse personnel action, and to do so, the ALJ must consider all relevant, admissible evidence.

We have said it many a time before, but we cannot say it enough: “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.’” We want to reemphasize how low the standard is for the employee to meet, how “broad and forgiving” it is. “Any” factor really means any factor. It need not be “significant, motivating, substantial or predominant”—it just needs to be a factor. The protected activity need only play some role, and even an “[in]significant” or “[in]substantial” role suffices.

Importantly, if the ALJ believes that the protected activity *and* the employer’s nonretaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question. Thus, consideration of the employer’s nonretaliatory reasons at step one will effectively be premised on the employer pressing the factual theory that nonretaliatory reasons were the *only* reasons for its adverse action. Since the employee need only show that the retaliation played some role, the employee necessarily prevails at step one if there was more than one reason and one of those reasons was the protected activity.

This is why we have often said that the employee does not need to disprove the employer’s stated reasons or show that those reasons were pretext. Showing that an employer’s reasons are pretext can of course be enough for the employee to show protected activity was a “contributing factor” in the adverse personnel action. Indeed, at times, the factfinder’s belief that an employer’s claimed reasons are false can be precisely what makes the factfinder believe that protected activity was the real reason. That is why a categorical rule prohibiting consideration of the evidence of the employer’s nonretaliatory reasons for its adverse action might

actually in some circumstances *undermine* a complainant's ability to establish that protected activity was a contributing factor.

Fordham appears to have expressed the worry that permitting consideration of the employer's nonretaliatory reasons at step one would amount to requiring the employee to disprove the employer's nonretaliatory reasons. But because "unlawful retaliatory reasons [can] co-exist with lawful reasons," and because, in such cases, protected activity would be deemed a contributing factor, consideration of evidence of the employer's nonretaliatory reasons when determining the contributing factor issue does *not* require the employee to disprove the employer's reasons.

That is also why the term "weigh" when describing the ALJ's task may well have added to the confusion. Since the "contributing factor" standard requires only that the protected activity play some role in the adverse action, the employer's nonretaliatory reasons are not "weighed against" the employee's protected activity to determine which reasons might be weightier. In other words, the ALJ should not engage in any comparison of the relative importance of the protected activity and the employer's nonretaliatory reasons. As long as the employee's protected activity played some role, that is enough. But the evidence of the employer's nonretaliatory reasons must be *considered* alongside the employee's evidence in making that determination; for if the employer claims that its nonretaliatory reasons were the only reasons for the adverse action (as is usually the case), the ALJ must usually decide whether that is correct. But, the ALJ never needs to compare the employer's nonretaliatory reasons with the employee's protected activity to determine which is more important in the adverse action.

Moreover, as we have repeatedly emphasized, an employee *may* meet her burden with circumstantial evidence. One reason circumstantial evidence is so important is that, in general, employees are likely to be at a severe disadvantage in access to relevant evidence. When determining whether protected activity was a contributing factor in an adverse personnel action, the ALJ should thus be aware of this differential access to evidence. Key, though, is that the ALJ must make a factual determination and must be persuaded—in other words, must believe—that it is more likely than not that the employee's protected activity played some role in the adverse action. So, for example, even though we reject any notion of a *per se* knowledge/timing rule, an ALJ *could* believe, based on evidence that the relevant decisionmaker knew of the protected activity and that the timing was sufficiently proximate to the adverse action, that the protected activity was a contributing factor in the adverse personnel action. The ALJ is thus *permitted* to infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity. But, before the ALJ can conclude that the employee prevails at step one, the ALJ must *believe* that it is more likely than not that protected activity was a contributing factor in the adverse personnel action and must make that determination after having considered all the relevant, admissible evidence.

We cannot emphasize enough the importance of the ALJ's role here: it is to find facts. The ALJ must consider all the relevant, admissible evidence and make a factual determination, under the preponderance of the evidence standard of proof, about what happened: is it more likely than not that the employee's protected activity played a role, any role whatsoever, in the adverse personnel action? If yes, the employee prevails at step one; if no, the employer prevails at step one. If there is a factual dispute on this question, as is usually the case, the ALJ must sift through the evidence and make a factual determination. This requires the ALJ to articulate clearly what facts he or she found and the specific evidence in the record that persuaded the ALJ of those facts.

B. The ALJ must determine whether the employer has proven, by clear and convincing evidence, that, in the absence of any protected activity, the employer would have taken the same adverse action.

If the complainant proves that protected activity was a contributing factor in the adverse personnel action, the ALJ must then turn to the hypothetical question, the employer's same-action defense: the ALJ must determine whether the employer has proven, by clear and convincing evidence, that, "in the absence of" the protected activity, it would have taken the same adverse action. It is not enough for the employer to show that it *could* have taken the same action; it must show that it *would* have.

The standard of proof that the ALJ must use, "clear and convincing," is usually thought of as the intermediate standard between "a preponderance" and "beyond a reasonable doubt"; it requires that the ALJ believe that it is "highly probable" that the employer would have taken the same adverse action in the absence of the protected activity. "Quantified, the probabilities might be in the order of above 70%"

Again, as when making a determination at step one, the ALJ must consider all relevant, admissible evidence when determining whether the employer has proven that it would have otherwise taken the same adverse action; and again, it is crucial that the ALJ *find* facts and clearly articulate those facts and the specific evidence in the record that persuaded the ALJ of those facts.

USDOL/OALJ Reporter at 53-57 (emphasis as in original) (footnotes omitted).

Concurring opinion of Judge Corchado

—Expansion on lead opinion; notation that causation question inherently involves delving into the respondent's "metaphysical mental process"

Judge Corchado wrote a separate concurring opinion that reiterated and expanded on the lead opinion's analysis. He also noted that the causation issue necessarily involves assessing the respondent's "metaphysical mental process":

The obvious reason an ALJ must consider both sides in deciding “causation” is because the employer’s decision-making is a metaphysical mental process and neither the complainant nor the employer can show the ALJ the actual mental processes that occurred. The invisible influences on the decision-maker’s thoughts cannot be displayed on a movie screen or downloaded as computer data onto a computer monitor. Instead, at the evidentiary hearing, the ALJ faces a complainant trying to prove he was the victim of unlawful mental processes and the employer who denies that protected activity influenced any part of the mental process that led to the employment action in question. The complainant might rely on temporal proximity, inconsistent employer policies, disparate treatment, e-mails, and witness testimony, among other evidence, to prove circumstantially that protected activity contributed. The employer will do the same to prove that protected activity did not contribute. It is this evidence battle that the ALJ must evaluate together to decide as best as possible what the truth is. But whether the causation evidence consists of memoranda, documents, depositions, hearing testimony, etc., all causation evidence presented to the ALJ will be about the influences that did or did not factor into *the employer’s mental processes* that led to the ultimate decision against an employee.

USDOL/OALJ Reporter at 67.

Concurring and dissenting opinion of Judge Royce

—*Disputes that WPA legislative history was not applicable; Fordham was intended to prevent inaccurate analysis*

Judge Royce wrote a concurring and dissenting opinion. She disputed the majority’s conclusion that the statutory text was clear and that the WPA legislative history was not applicable. This member conceded that “[i]n an effort to properly effectuate the remedial purposes of the statute, and avoid too narrowly construing the statute, *Fordham* may have overstated what the statutory language dictates” but maintained that “[n]evertheless *Fordham*’s categorical formula for applying the statute to the facts is ultimately the surest method for factfinders to accurately analyze both parties’ evidence consonant with the overall goal of whistleblower provisions to protect employees who risk careers to speak up concerning violations of law.’ USDOL/OALJ Reporter at 81 (footnotes omitted).

Concurring opinion of Judge Desai

—*If ALJ determines that protected activity was one of the reasons for the adverse action, the ALJ must not weigh that reason against the employer’s nonretaliatory reasons to determine how important the retaliatory reason was*

Finally, although Judge Desai signed the lead opinion, he also wrote separately to specify the points on which the ARB panel members agreed and on which he explained his understanding of the principal disagreements. He summarized: “if the ALJ determines that the protected activity was one of the reasons for the adverse action, the ALJ must not weigh that *reason* against the employer’s nonretaliatory reasons to determine how important the retaliatory reason was: the

whole point of Congress lowering the causation standard from ‘substantial’ to ‘contributing’ in step one was to say that if a retaliatory reason is a factor at all, the employee prevails at step one.”

EMPLOYER KNOWLEDGE OF PROTECTED ACTIVITY IS NOT A SEPARATE ELEMENT OF AN FRSA CLAIM, BUT RATHER IS PART OF THE CAUSATION ANALYSIS

In *Coates v. Grand Trunk Western Railroad Co.*, ARB No. 14-019, ALJ No. 2013-FRS-3 (ARB July 17, 2015), the ALJ had cited employer knowledge as an element of an FRSA claim (in addition to the three elements of protected activity, adverse action, and a causal link). On appeal, the ARB indicated that this was error. Rather, the ARB had “held that knowledge is not a separate element, but instead forms part of the causation analysis. *See Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 29, 2011) (*Bobreski I*). *See also Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987) (citing three elements for a whistleblower claim under the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105 (2011)).”

AN FRSA COMPLAINT TRIED BEFORE AN ALJ HAS ONLY THREE ELEMENTS - PROTECTED ACTIVITY, ADVERSE ACTION, AND CAUSATION; DECISIONMAKER'S KNOWLEDGE AND ANIMUS ARE ONLY FACTORS IN THE CAUSATION ANALYSIS

In *Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013), the ARB found that the ALJ's legal analysis and conclusions of law on the three essential elements of a FRSA whistleblower case (protected activity, adverse action, and causation) were in accordance with applicable law. The ARB noted, however, that the ALJ and the parties had cited four elements tracking the elements necessary to raise an inference for an OSHA investigation. The ARB cited caselaw that provides that the final decisionmaker's “knowledge” and “animus” are only factors to consider in the causation analysis; they are not always determinative factors.

VIII. PROTECTED ACTIVITY

- *20109(a) Protected Activity*

Statute

49 U.S.C. § 20109:

(a) In general. A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done--

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by-

(A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452);

(B) any Member of Congress, any committee of Congress, or the Government Accountability Office; or

(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

(2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security;

(3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title [49 USCS §§ 5101 et seq. or 5701 et seq.], or to testify in that proceeding;

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

(5) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;

(6) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation; or

(7) to accurately report hours on duty pursuant to chapter 211 [49 USCS §§ 21101 et seq.].

Regulations

[The regulations at 29 C.F.R. § 1982.102(b) follow the language of the statute in defining protected activities.]

U.S. Circuit Court of Appeals Decisions

PROTECTED ACTIVITY; ACTUAL REFUSAL OF AN EXPLICIT ORDER FROM THE RAILROAD NOT NECESSARY IF REFUSAL CAN BE INFERRED FROM CONTEXT.

PROTECTED ACTIVITY; REFUSAL PROVISION, 20109(a)(2), DOES NOT REQUIRE A SHOWING OF AN ACTUAL VIOLATION, INSTEAD ONLY A GOOD FAITH BELIEF OF A VIOLATION IS NECESSARY.

Rookaird v. BNSF Ry. Co., 908 F.3d 451 (9th Cir. Nov. 8, 2018) (2018 U.S. App. LEXIS 31687; 2018 WL 5831631) (Nos. 16-35786, 16-35931, 16-36062, No. 16-35787) (Opinion): Plaintiff Rookaird was a conductor on (and in charge of) a switcher crew for BNSF. The crew was tasked with moving a train. When it arrived, it performed a 20-45 minute air brake test on the train. Plaintiff's supervisor, the trainmaster, made comments on the radio during the test suggesting that they stop, but did not order them to do so. They finished the test and then began work. Supervisors became upset at the pace of the work, thinking that it was an intentional slow-down in retaliation for reduced overtime, and pulled the crew out of service. A de-briefing of sorts with Plaintiff followed. He was told to go home. He printed a time sheet just after 8:00 listing an off-duty time of 8:30. At 8:15 he was ordered to go home again. He did so without signing the timesheet. BNSF started an investigation and eventually fired Plaintiff for not working efficiently, dishonesty on his time sheet, failure to sign the timesheet, and failure to leave the property when he was told.

Plaintiff filed an FRSA complaint which was kicked out to federal district court. He alleged that he was retaliated against for refusing to stop the air brake test. To prevail Plaintiff had to show 1) that he engaged in protected activity; 2) that the employer knew about the alleged protected activity; 3) that he suffered an unfavorable personnel action; and 4) that the protected activity was a contributing factor in the unfavorable personnel action. BNSF could defeat liability by showing by clear and convincing evidence that it would have taken the same adverse action absent the protected activity. The District Court granted summary judgment to Plaintiff on 2) knowledge; 3) adverse action; and 4) contribution. On contribution, it noted that the failure to work efficiently "cannot be unwound" from the action of continuing the airbrake test. Before the case went to the

jury the District Court held that the airbrake test was not legally required (though it was a “close call”) but that it could still be a protected activity if Plaintiff had an objectively and subjectively reasonable belief that it was required. The jury had to decide a) whether there was protected activity; b) if so whether BNSF had established its affirmative defense; and c) if not, what damages to award. The jury returned a verdict for Plaintiff and awarded \$1.2 million in damages. Both parties appealed the damages and BNSF appealed liability.

The Ninth Circuit affirmed the denial of summary judgment on the protected activity element but reversed the grant of summary judgment to Plaintiff on the contributing factor element. The verdict and damages were thus vacated and the case was remanded for further proceedings. Judge Ikuta dissented and would have also reversed the denial of summary decision to BNSF on the protected activity element.

BNSF appealed the denial of its motion that as a matter of law there was no protected activity. It argued that there was no actual refusal and that even if there was, since there would have been no actual violation of law the refusal wasn’t protected. The Ninth Circuit disagreed. A “refusal” does not need to be a refusal of an explicit order by the employer; it can be inferred from context. So here a supervisor questioning the need for the test and disapproving of it coupled with the Plaintiff’s statement that they were going to continue it nonetheless could be found to be a refusal. In addition, the panel majority held that the refusal provision, 20109(a)(2), does *not* require that the activity/action refused by the employee be an *actual* violation of a rule or regulation. A good faith belief (subjectively and objectively) that the activity/action would do so is sufficient to make the refusal a protected activity. The panel noted that the statute incorporates a good faith belief requirement in the general section of 20109(a), which would be undercut if it then required that the refusal had to for an actual violation (rather than just one that the employee had a good faith belief was a violation). It would also go against the purpose of the statute in a case like this where whether or not the test was required turned out to be a complicated and difficult legal question. In part this issue turned on statutory construction and what significance to assign to the presence of “reasonably believes” in (a)(1) but not (a)(2). The panel majority didn’t think this had the significance BNSF wanted and noted that district courts interpreting (a)(4) hadn’t required a showing that there was, in fact, a work-related injury. Additionally, (a)(7) contains a qualifier that the report must be “accurate” which belied the argument that in all but (a)(1) the employee had to be objectively correct.

Judge Ikuta dissented in part. She accused the majority of “giving Congress a helping hand by substituting its own policy judgment for the plain language of the statute.” In her view, the fact that “reasonably believes” is present in (a)(1) but not in (a)(2) meant that to succeed under (a)(2), the refusal clause there had to be an actual violation of federal law, rule, or regulation at issue. Because here the District Court determined that the air brake test was not required by federal law, rule, or regulation, the FRSA complaint had to fail as a matter of law—his refusal to do it wasn’t protected.

PROTECTED ACTIVITY; EIGHTH CIRCUIT QUESTIONS WHETHER PURSUIT OF A FELA ACTION IS PROTECTED ACTIVITY UNDER THE FRSA AND REMANDS

ISSUE TO ARB TO RECONSIDER AND PROPERLY DECIDE IN THE FIRST INSTANCE

BNSF Ry. Co. v. United States DOL Admin. Review Bd. [Carter], 867 F.3d 942, No. 16-3093, 2017 U.S. App. LEXIS 15020, 2017 WL 3469224 (8th Cir. 2017) (case below ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82).

The Complainant started working for BNSF in 2005. He injured his shoulder in 2007 and immediately reported it. He later filed a Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, action based on that injury. During discovery in that case, BNSF deposed him. During trial preparation in 2012, a manager reviewed the deposition and noticed inconsistencies between information given in the deposition and that provided on the original employment application back in 2005. This led to a disciplinary investigation. A second investigation was launched regarding potential false statement in 2012 about getting to work on time. Both investigations produced findings that the Complainant had been dishonest, which under BNSF's policy can result in a standalone dismissal. So they dismissed him twice in April 2012. Complainant filed a complaint under the whistleblower protection provisions of the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109, alleging that he was retaliated against for reporting his 2007 injury. An Administrative Law Judge ("ALJ") found for Complainant and awarded \$50,000 in punitive damages as well as reinstatement and various other remedies. 867 F.3d at 944-45. The Administrative Review Board ("ARB") affirmed. *See Carter v. BNSF Ry. Co.*, ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82 (ARB June 21, 2016).

In the course of vacating and remanding the award, the Eighth Circuit noted that no finding had been made as to whether the change in attitude relied upon by the ARB related to the injury report or the FELA litigation. The panel implied that retaliation for the FELA litigation would not be a violation of the FRSA, though it left it as an open issue for the ARB to decide in the first instance.

ADMINISTRATIVE EXHAUSTION; SUMMARY JUDGMENT; ADVERSE ACTIONS AND PROTECTED ACTIVITIES PLED IN DISTRICT COURT BUT OMITTED FROM OSHA COMPLAINT CANNOT BE PURSUED WHEN THERE WAS A FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES BECAUSE THE SCOPE OF AN INVESTIGATION THAT COULD HAVE REASONABLY BEEN EXPECTED FROM THE COMPLAINT WOULD NOT HAVE INCLUDED THE NEW CLAIMS

PROTECTED ACTIVITY; SUMMARY JUDGMENT; REPORT OF HAZARDOUS SAFETY CONDITION ASSERTED AS PROTECTED ACTIVITY UNDER § 20109(a)(1) AS VIOLATION OF FELA FAILS WHEN COMPLAINTS DID NOT ALLEGE VIOLATION OF FELA

Foster v. BNSF Ry. Co., 866 F.3d 962 (8th Cir. Aug. 10, 2017): Three joined complaints under the FRSA relating back to an injury to another worker that occurred during a crew change. The train had stopped across a bridge from the parking area and when of the new crew members fell off the bridge when walking to the train. After a hearing, the three (and others) were disciplined

for a variety of safety infractions found in videos of the incident. In interviews before the hearing and at the hearing they had reported various safety infractions in the area. It was disputed, for instance, where the railroad told them to stop the train. They each received different levels of discipline, where were reduced or eliminated by the Public Law Board. They also filed FRSA complaints and then kicked them out to federal court. The district court granted summary decision for the railroad and the plaintiffs appealed.

The plaintiffs had presented their reports of dangers on the bridge as protected activities, but abandoned any claim under § 20109(b)(1)(A), since the railroad had not disciplined others who made those complaints, and instead characterized these as protected by § 20109(a)(1) on the theory that they were reports of violations of FELA because the railroad knew about the hazardous safety condition but did not correct it. However, this failed because the statements made as protected activity had not stated that the railroad knew about the conditions or had failed to remedy the hazardous condition.

U.S. District Court Decisions

PROTECTED ACTIVITY NOT SHOWN WHERE ALLEGED VIOLATION WAS OF STATE, AND NOT FEDERAL, CODE, RULE OR REGULATION

In *Necci v. Long Island R.R. Co.*, No. 16-CV-3250 (E.D. N.Y. Mar. 21, 2019) (2019 U.S. Dist. LEXIS 47231; 2019 WL 1298523), the Plaintiff alleged that the Defendant retaliated against her by decertifying her as a locomotive engineer after an incident in 2013 in which the train was 50 minutes late and after an internal hearing the Defendant found a pattern of improper performance making her an unfit and dangerous train operator. The Plaintiff also alleged retaliation based on her firing after a subsequent incident in 2016, at which time she had been returned to a Station Appearance Maintainer (“SAM”) position. In this second incident, the Defendant found that she had disobeyed and refused to follow direct orders to vacuum and to roll up floormats. The Plaintiff had refused based on her belief that it was unsafe to use electrical outlets in public areas and that she needed instruction and help on rolling up the mats.

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As to the refusal to vacuum based on safety concerns based on asserted illegality, the court noted that 49 U.S.C. § 20109(a)(2) protects against refusals to violate “Federal laws, rules, and regulations” regarding railroad safety and security, and that the Plaintiff had only indicated a belief that the outlets violated New York codes, rules and regulations, and not any federal provision. The court also noted that the Plaintiff offered no evidence or argument that her use of the outlets would actually have violated the New York provisions.

PROTECTED ACTIVITY; REPORT OF WORK-RELATED INJURY; DISTRICT COURT REJECTS BRIGHT LINE RULE REQUIRING THAT A REPORT OF A HEART ATTACK AT WORK IS PROTECTED ONLY IF WORK CAUSED THE HEART ATTACK; TO BE PROTECTED A REPORT OF A WORK-RELATED INJURY DOES NOT NEED TO BE MADE USING THE FORMAL PROCEDURES OF THE EMPLOYER; WHERE AN EMPLOYEE DOES NOT KNOW WHETHER AN INJURY IS WORK-RELATED, IT IS NOT NECESSARY FOR A PROTECTED REPORT OF A WORK-RELATED INJURY TO CONVEY THAT THE INJURY WAS IN FACT WORK RELATED

Williams v. Illinois Central Railroad Co., No. 16-cv-838 (S.D. Miss. Feb. 5, 2018) (2018 U.S. Dist. LEXIS 18106; 2018 WL 716568) (Order [denying Defendant's motion for summary judgment]):

The Plaintiff had a history of attendance violations. While at work he experienced symptoms of a heart attack. He was taken to the hospital. His symptoms were attributed to stress/anxiety and he was discharged with a note keeping him off of work for a few days, though it was not signed. He then told the Defendant railroad that he would not be working. The Defendant determined that it was an additional unexcused absence and under the terms of its policy terminated Plaintiff, though the public law board later converted this into a suspension without pay. He filed suit under the FRSA claiming he was retaliated against for reporting a work-related injury, protected by § 20109(a)(4), and following a treatment plan, protected by § 20109(c)(2). Defendant sought summary decision.

The district court declined to adopt a bright line rule that in order for a heart attack at work to be a work-related injury it was necessary to show that working conditions caused the heart attack. It also rejected the position that to report a work related injury in the meaning of an FRSA an employee had to use the employer's mandated form, rather than making informal reports. In addition, the district court dismissed the argument that in order to be protected, an injury report must convey that the injury was work-related. Reports of work-related injuries are protected even if, as here, at the time of the report that employee does not know the cause.

SUMMARY JUDGMENT; PROTECTED ACTIVITY; DEPOSITION TESTIMONY IN A FELA ACTION MAY BE A PROTECTED ACTIVITY SINCE IT IS A REPORT AND IT IS MADE TO SOMEONE WITH AUTHORITY TO INVESTIGATE GIVEN THE PRESENCE OF THE RAILROAD'S COUNSEL; WHERE EMPLOYEE'S TERMINATION WAS RESCINDED AND HE WAS REINSTATED WITH SENIORITY INTACT, HE COULD BE DEEMED AN EMPLOYEE AT THE TIME OF THE PROTECTED ACTIVITY

Roop v. Kan. City Southern Ry., No. 16-cv-413 (E.D. Okla. Oct. 26, 2017) (2017 U.S. Dist. LEXIS 177646; 2017 WL 4844832): Plaintiff alleged that Defendant railroad intimidated, harassed, and ultimately terminated him in retaliation for the testifying on behalf of another employee in a FELA proceeding, in violation of the FRSA. Defendant sought summary judgment on multiple grounds. The district court denied the motion.

Defendant sought summary judgment on the grounds that there was no protected activity. The court held that protected activity wasn't limited to the initial report of an injury or hazardous condition, but could extend to later reports as well. Here it occurred in a deposition, per the complaint, but deposition testimony could constitute a report in the meaning of the FRSA and since counsel for the railroad was present, it was a protected report within the meaning of the act since counsel was an authority who could investigate the allegations further. There were disputes over whether the Plaintiff provided additional detail or new information in his testimony, so the issue was not proper for summary judgment. The railroad also argued that since the Plaintiff was not an employee at the time of the protected activity, the FRSA did not apply. Plaintiff had been terminated prior to the deposition for unrelated reasons, but was later reinstated with seniority intact. The court held that the issue was too undeveloped at this point but that based on the reinstatement, at this stage it would conclude that he was an employee at the time of the report.

PROTECTED ACTIVITY; DISTRICT COURT FINDS THAT FRSA 49 U.S.C. § 20109(a)(2) DOES NOT APPLY TO NON-RAILROAD EQUIPMENT-RELATED CONDITIONS SUCH AS NARCOTIC USE BY EMPLOYEES

In *Lockhart v. Long Island Railroad Co.*, No. 16-cv-1035 (S.D.N.Y. Aug. 2, 2017) (2017 U.S. Dist. LEXIS 122631; 2017 WL 3327603) (case below 2015-FRS-00055), the United States District Court for the Southern District of New York granted summary judgment for the Long Island Railroad Company ("Respondent"), dismissing Henry Lockhart's ("Complainant") claims of retaliation under the FRSA. *Lockhart*, slip. op. at 1. Complainant claimed two violations of FRSA, 49 U.S.C. § 20109(a)(2). First, Respondent issued a Letter of Caution following an absence due to Complainant's use of narcotic painkillers prescribed by his doctor for a toothache. *Id.* at 2. The court concluded that Complainant's toothache and related treatment were not work-related, and § 20109(a)(2), like § 20109(c)(2), does not protect an employee who is unable to work "due to his self-reported use of narcotics for non-work-related reasons." *Id.* at 6-7.

Second, Complainant claimed that Respondent retaliated against him by disciplining him for absences due to his use of Oxycodone prescribed for a shoulder injury sustained on duty. *Id.* at 8-10. The court found that subsection (a)(2) does not cover "non-railroad equipment-related conditions such as an employee's inability to report to work due to his use of prescribed narcotics." *Id.* at 8.

PROTECTED ACTIVITY; INJURY REPORTS; COURT HOLDS THAT FRSA PROTECTS INJURY REPORT, NOT THE FACT OF BEING INJURED

Heim v. BNSF Railway Co., No.13-cv-369 (D. Neb. Sept. 30, 2015) (2015 U.S. Dist. LEXIS 133913; 2015 WL 5775599) (case below 2013-FRS-40): Plaintiff was working on a rail seat abrasion project, which involves replacing material under the train track. To do so, rail is declipped from the bed and moved, though it remains under tension. Plaintiff was tasked with

picking up scraps along the track. He stepped over the declipped rail to pick up some material and the rail jumped, landing on his foot, causing injury. It took 30 minutes to free him and he suffered broken bones. He was subsequently disciplined for not being alert and attentive when he placed his foot in harm's way—a point that had been discussed at safety briefings. He was given a 30 record suspension and one year review period. He did not lose pay or benefits and the review period passed without incident.

The parties agreed that Plaintiff had engaged in protected activity when he reported his injury and that the railroad knew about that report. They disputed whether Plaintiff had suffered any adverse action and whether the protected activity contributed to any adverse action. The court noted that although Plaintiff suffered little real consequences in the case, the bar for adverse action in the FRSA is low and it “would not seem inaccurate” to characterize it as a reprimand or discipline. But the court then stated that it did not need to resolve the issue.

Applying Eighth Circuit law, Plaintiff was required to show some intentional relation or discriminatory animus, though he only needed to show that it contributed to the adverse action. Plaintiff argued that the injury report was a but-for cause of the adverse action because it is common to step into the area in question without consequence. The court however, found this insufficient. The injury report was the protected activity, not the injury itself. And it wasn't clear that the report caused anything. Even looking to the injury, there was no inference to be made to intentional retaliation—it had only brought the violation to the attention of management. The court further saw no reason to conclude that the FRSA prevented railroads from taking violations of safety rules more seriously when they resulted in injury. Plaintiff had also not pointed to similarly situated employees who had been treated differently.

PROTECTED ACTIVITY; SUMMARY JUDGMENT; COURT GRANTS RAILROAD SUMMARY DECISION WHERE NO EVIDENCE INDICATED THAT THE PLAINTIFF HAD MADE ANY REPORTS BUT INSTEAD HAD JUST BEEN IN AN ACCIDENT AND DISCIPLINED FOR UNSAFE CONDUCT

Fields v. Southeastern Pennsylvania Transportation Authority, No. 14-cv-2491 (E.D. Pa. July 31, 2015) (2015 U.S. Dist. LEXIS 100839, 2015 WL 4610876): Two joined FRSA complaints in which both plaintiffs were passengers in trucks used in work on the railway that were in a collision. One was injured and received a settlement for his injuries. No discipline was assessed. Roughly two months later they were involved in an accident using the same equipment on the same part of the track in the same conditions. They were disciplined for safety violations. One had no prior discipline and received a written warning that was expunged after the review period was ended. The other was at the termination stage of the progressive discipline policy, but a settlement was reached that preserved his job. After two years of no violations, his record was cleared. They filed FRSA complaints, which were both kicked-out and then joined in the district court. After the close of discovery, Defendant moved for summary decision as to one employee for no protected activity and in part as to the other as to the absence of compensatory and punitive damages.

The first employee claimed that he had made a report of a violation of Federal law, rule, or regulation, and of an injury. But the court found that the record did not support the inference that this employee had reported anything to anyone. He was disciplined for operating a truck at an unsafe speed, but neither that nor being in an accident is protected activity. Defendant was thus summary judgment and the claim was dismissed.

PROTECTED ACTIVITY UNDER FRSA; PLAINTIFF ADDUCED SUFFICIENT EVIDENCE THAT HE REPORTED A WORK-RELATED INJURY TO HIS EMPLOYER AND COOPERATED WITH A SUBSEQUENT INVESTIGATION TO AVOID SUMMARY DECISION

In *Infermo v. New Jersey Transit Rail Operations, Inc.*, CA No. 10-2498, 2012 WL 209359 (D.N.J. Jan. 24, 2012) (unpublished), the plaintiff, a signal maintainer, slipped and broke his leg while walking along a slippery path to reach a signal case. The employer investigated the injury, and ultimately determined that the injured plaintiff had not been "aware of his surroundings and was not alert to the walking conditions," and therefore he violated two of the company's safety rules. The employer held a disciplinary hearing after the plaintiff had recovered from his injuries and returned to work, and as a result, the employer affirmed the investigation's finding and disciplined the plaintiff with a five-day deferred suspension and mandatory safety counseling. The plaintiff filed an OSHA complaint claiming unlawful retaliation under the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109, and after waiting the requisite number of days without a decision from the Secretary of Labor, he filed suit in federal district court.

The district court denied the defendant's motion for summary judgment, rejecting the employer's argument that the plaintiff failed to allege that he engaged in protected activity under FRSA because he merely fell and injured himself. Rather, the court found that the plaintiff offered sufficient proof that he reported his work-related injury to his employer and supplied the employer's investigators with information regarding the accident and possibly unsafe working conditions, which implicate the categories of protected activity listed in 49 U.S.C. § 20109(a)(1) & (4). Additionally, the court found that the plaintiff had adduced sufficient evidence suggesting a connection between his reporting of his injury and his subsequent suspension to avert summary judgment.

DOL Administrative Review Board Decisions

PROTECTED ACTIVITY; ARB RULES THAT RETALIATION FOR LATER NOTIFICATIONS OF THE SAME INJURY IN FELA LITIGATION IS JUST AS UNLAWFUL AS RETALIATION FOR THE INITIAL NOTICE; 8TH CIRCUIT, HOWEVER, CLARIFIES THAT FRSA PROTECTS A NOTICE OF INJURY MADE IN

THE COURSE OF FELA LITIGATION BUT THAT FELA LITIGATION IS NOT *PER SE* PROTECTED BY FRSA

In *Carter v. BNSF Railway Co.*, ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82 (ARB June 21, 2016), the Complainant suffered a workplace injury that was reported to his supervisor. He later filed a FELA claim in state court. He was deposed in relation to the FELA claim. Later, the Respondent notified him that it would be conducting an investigatory hearing about inconsistencies between his deposition testimony and his employment application. In the interim, the Complainant failed to clock in when he was about five minutes late for work. The Respondent notified the Complainant that it would also conduct an investigatory hearing into dishonesty regarding the failure to clock in. Two internal hearings were conducted, and the Respondent sent discharge letters to the Complainant after each hearing. Thus, the Complainant was fired twice. The Complainant filed an FRSA retaliation complaint. After a hearing, the ALJ found that the Respondent violated the FRSA and unlawfully discriminated against the Complainant.

On appeal, the ARB affirmed the ALJ's decision. The ARB observed that the ALJ seemingly relied on a strict "chain of events" type of analysis that it declined to endorse. The ARB found, however, that the ALJ had made sufficient findings on circumstantial evidence to support a finding of contributory causation.

One of the matters on which the ARB affirmed the ALJ was "that it is pure semantics to separate the 'report of injury' from the injury itself." USDOL/OALJ Reporter at 4. After a hearing, the ALJ found in regard to contributing factor causation, at least implicitly, "that the FELA litigation, even if not protected itself, should not be isolated from the original injury or Carter's report of injury: 'Clearly Mr. Carter's August 2007 injury, including his 'report' of that injury, was part of a chain of events that triggered the process which resulted in his FELA lawsuit, which in turn resulted in the Respondent's discovery of the documentation it then used to fire him.'" USDOL/OALJ Reporter at 4. In a footnote to its appellate decision, the ARB observed that the ALJ did not determine whether the FELA claim was FRSA protected activity, and that prior to the ALJ's decision the ARB had not addressed the question. The ARB noted that in the interim, it had, in *LeDure v. BNSF Ry. Co.*, ARB No. 13-044, ALJ No. 2012-FRS-020 (ARB June 2, 2015), affirmed an ALJ's ruling that "because the filing and pursuit of a FELA claim effectively provides notification of a work-related injury, often in greater detail than an initial oral or written notice to an employee's supervisor at the time of injury, a FELA claim constitutes protected activity under the FRSA's whistleblower protection provisions." *Id.* at 4, n.18.

The ARB wrote: "While apparently not alleged as protected activity in its own right, the FELA litigation undisputedly involved the 2007 injury and kept Carter's protected report of injury fresh as the events in the case unfolded. As we stated in *LeDure*, we can see no logical reason why earlier 'protected activity would lose its protected status when it is also discussed in a FELA case. Retaliation for later notifications of the same injury is just as unlawful as retaliation for the initial notice.'" *Id.* (footnote omitted). One member of the ARB pointed out in a concurring opinion that "the Board determined in *LeDure* that the FELA claim in that case was protected activity based on the evidence presented in that case. It left open for another day the question of whether FELA claims constitute protected activity as a matter of law." *Id.* at 12 (footnote omitted).

The 8th Circuit Court of Appeals vacated the ARB's decision sub nom. in *BNSF Ry. Co. v. United States DOL Admin. Review Bd.*, No. 16-3093 (8th Cir. Aug. 14, 2017) (2017 U.S. App. LEXIS 15020; 2017 WL 3469224). The court noted that the ARB had not endorsed the ALJ's chain-of-events analysis, but found that the ARB grounded its affirmance on findings insufficient to support the ARB's contributing factor and affirmative defense rulings.

The court also found that the ARB had misinterpreted its own decision in *LeDure v. BNSF Ry. Co.*, ARB No. 13-044, ALJ No. 2012-FRS-020, slip op. at 5 (ARB June 2, 2015), agreeing with the concurring ARB member in *Carter v. BNSF Railway Co.*, ARB Nos. 14-089, 15-016, 15-022, ALJ No. 2013-FRS-82 (ARB June 21, 2016) that “*LeDure* held only that the FRSA protects a notice of injury made in the course of FELA litigation, not that FELA litigation is per se protected by the FRSA.” The Court wrote:

... By misstating the scope of its decision in *LeDure*, the ARB decided without discussion a significant issue that Carter failed even to allege and that has never been considered by this court or by our sister circuits. This was “such failure to explain administrative action as to frustrate effective judicial review.” *Camp v. Pitts*, 411 U.S. 138, 142 (1973). The ALJ found that Thompson, who initiated the first investigation in January 2012, knew of Carter's injury “on the date it occurred or very soon thereafter,” so it is clear the FELA litigation did not notify Thompson of Carter's injury. To base its decision on *LeDure*, the ARB needed a finding that Carter's FELA lawsuit provided BNSF with “more specific notification” of his injury report, a fact question relevant to the temporal proximity between the protected activity and Carter's termination.

PROTECTED ACTIVITY; INFORMATION PROVIDED IN FELA LAWSUIT CAN BE PROTECTED ACTIVITY UNDER THE FRSA

In *Ledure v. BNSF Railway Co.*, ARB No. 13-044, ALJ No. 2012-FRS-20 (ARB June 2, 2015), the Complainant injured his back while performing duties as a conductor, and began a medical leave of absence and medical treatment. The Complainant filed a claim against the Respondent under Federal Employer's Liability Act (FELA), which was denied by a jury. The Complainant then presented a full medical release to return to work from his treating physician. A field manager chose not to forward the release to the medical director, the field manager finding the release to be ambiguous and insufficient because it contained language advising the Complainant of the hazards and complications attendant to returning to unrestricted heavy industrial activity. The Complainant filed a FRSA retaliation complaint. The ALJ denied the complaint.

Information Provided in FELA Lawsuit as protected activity

On appeal, the Respondent did not contest the ALJ's finding that the refusal to allow the Complainant to return to work was unfavorable employment action. The ARB affirmed the ALJ's finding that the more specific notification about the extent of the Complainant's injury provided during the FELA claim was protected activity.

PROTECTED ACTIVITY; WORKPLACE VIOLENCE AS A SAFETY ISSUE

PROTECTED ACTIVITY; COMPLAINANT'S REASONABLE BELIEF UNDER § 20109(a)(1) THAT HE WAS REPORTING VIOLATION OF A FEDERAL REGULATION WHERE HE HAD BEEN TAUGHT THAT TO FOLLOW FEDERAL REGULATIONS HE MUST FOLLOW THE RESPONDENT'S WORKPLACE REGULATIONS

In *Leiva v. Union Pacific Railroad Co., Inc.*, ARB Nos. 14-016, -017, ALJ No. 2013-FRS-19 (ARB May 29, 2015), the Complainant, who was the train's engineer, became involved in an altercation with the train's conductor. The Complainant, fearing for his safety, made a series of phone calls. A manager asked him to work it out with the conductor, and stated that if they returned to the facility they would both be placed out of service. The Complainant felt that he could not work it out and insisted on being returned to the facility to file a report. Upon arriving at the facility both the Complainant and the conductor filed reports. They were both pulled out of service without pay and charged with workplace violence. The manager admitted that if both men had simply returned to work the Complainant would not have been pulled out of service. The manager considered the information that the Complainant provided about the conductor's conduct to be a safety issue. The Respondent scheduled a hearing. Later, the Respondent proposed that the two men sign a hearing waiver agreeing to (1) termination of employment followed by immediate reinstatement as a probationary employee, (2) no pay for time lost, (3) dismissal of the Complainant's claims, (4) refrain from similar conduct in the future or be subject to disciplinary action, and (5) attend safety intervention and workplace violence training. The Complainant signed the waiver because he needed to recover the lost pay. The Complainant was later informed that the waiver and his participation in workplace violence would be part of his personnel record. The Complainant attempted to clear his name, but obtaining no assistance from Respondent's managers, filed an FRSA complaint.

The ARB affirmed the ALJ's findings that the Complainant proved that he engaged in protected activity under 49 U.S.C. § 20109(a)(1) and § (b)(1)(A). The ARB wrote:

Substantial evidence supports the ALJ's conclusion that Leiva [the Complainant] proved his case by a preponderance of the evidence. First, Leiva proved by a preponderance of the evidence that he engaged in protected activity under 49 U.S.C.A. § 20109(a)(1), which states that an employee is protected when he or she provides information in good faith regarding any conduct that the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security. Union Pacific argues that Leiva never presented any evidence that he reasonably believed that he was reporting a violation of federal law. However, Jenkins testified that he taught engineers, of which Leiva was one, about safety, and taught them specifically that if they complied with Union Pacific's rules then they would be in compliance with the federal regulations because Union Pacific's rules were more stringent than the regulations. Further, and consistent with this testimony, Leiva testified that Union Pacific taught him that to comply with federal regulations, he had to follow Union Pacific rules. He believed that several Union Pacific rules of conduct were violated and implicated safety. Substantial evidence supports the ALJ's finding

that Leiva reasonably believed that he was reporting a violation of a federal regulation as provided in section (a)(1). Union Pacific also argues that Leiva testified that he was not aware of any federal laws or regulations when he reported the fight to his supervisors. This argument fails because the statute does not require that an employee know the specific rules that he reasonably believes are being violated when he makes his report—the statute only requires that an employee have a reasonable belief in a violation of a Federal law, rule, or regulation related to railroad safety or security. Leiva proved that he had such a reasonable belief by a preponderance of the evidence. Leiva also proved that he engaged in protected activity by a preponderance of the evidence under 49 U.S.C.A. § (b)(1)(A), which states that an employee is protected if he reports a hazardous safety or security condition in good faith. Union Pacific argues that Leiva presented no evidence that his report had anything to do with a "hazardous" condition. However, several witnesses including Leiva, Lorange [the manager of operations at the facility from which the train originated], and Jenkins [the manager of operations (safety director) at another facility], testified that Leiva felt threatened by Mr. F. [the conductor] during and after the altercation. Further, Leiva testified that communication between an engineer and a conductor is essential to the safe operation of a train. More importantly, Leiva did not feel that he could adequately communicate with Mr. F. for the safe operation of the train. Thus, the discordant and potentially violent situation between the engineer and the conductor of the train itself had the tendency to create a hazardous safety or security condition. Bolstering this conclusion, Lorange testified that he considered Mr. F.'s conduct to be a safety issue. Finally, Jenkins testified that he had no reason to doubt Leiva's good faith in reporting the incident. Thus, there is substantial evidence in the record to support that Leiva reasonably believed that he was reporting in good faith a hazardous safety or security condition in violation of section (b)(1)(A).

USDOL/OALJ Reporter at 6-7 (footnotes omitted).

- 20109(b): Hazardous Safety or Security Conditions

Statute

49 U.S.C. § 20109:

(b) Hazardous safety or security conditions.

(1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for--

- (A) reporting, in good faith, a hazardous safety or security condition;
- (B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist; or
- (C) refusing to authorize the use of any safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in paragraph (2) exist.

(2) A refusal is protected under paragraph (1)(B) and (C) if--

(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) a reasonable individual in the circumstances then confronting the employee would conclude that--

(i) the hazardous condition presents an imminent danger of death or serious injury; and

(ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

(C) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

(3) In this subsection, only paragraph (1)(A) shall apply to security personnel employed by a railroad carrier to protect individuals and property transported by railroad.

Regulations

[The regulations at 29 C.F.R. § 1982.102(b) follow the language of the statute in defining protected activities.]

PROTECTED ACTIVITY; ASSUMING THAT REPORTING ONE’S OWN ILLNESS CAN QUALIFY AS REPORTING A HAZARDOUS CONDITION UNDER § 20109(b), THE PETITIONER’S FAILURE TO ESTABLISH THAT HE DID ANYTHING OTHER THAN CALL IN SICK WAS NOT SUFFICIENT TO REPORT A HAZARDOUS CONDITION UNDER § 20109(b)(1)(A); LACK OF NOTIFICATION OF HAZARDOUS CONDITION ALSO CAUSED THE COMPLAINT TO FAIL UNDER § 20109(b)(1)(B)

In *Winch v. Secretary of Labor*, 725 Fed. Appx. 768, No. 16-15999 (11th Cir. Feb. 13, 2018) (per curiam) (unpublished) (2018 U.S. App. LEXIS 3584; 2018 WL 834194) (case below ARB No. 15-020, ALJ No. 2013-FRS-14), the Petitioner filed a complaint with OSHA alleging that an absence from work was in compliance with his doctor’s orders not to go to work and that in firing him his employer violated FRSA, 49 U.S.C. § 20109(c)(2). OSHA denied the complaint based on the Petitioner’s history of attendance and safety violations. Before the ALJ, the Petitioner added the contention that his employer also violated the reporting and refusal provisions of 49 U.S.C. § 20109(b)(1)(A) and (B). The ALJ rejected the Petitioner’s § 20109(c)(2) claim, but determined under § 20109(b) that the Petitioner’s dismissal was wrongful because “it was reasonable for Complainant to conclude that it would have been unsafe to go to work.” The ARB reversed. The court described the ARB’s ruling as follows:

The ARB assumed, without deciding, that reporting one’s own illness can constitute “reporting” a hazardous condition, as set forth in § 20109(b)(1)(A). Nevertheless, as relevant here, it concluded that Winch failed to satisfy the conditions for “reporting” under that provision. The ARB explained, “Even the most liberal reading of section 20109(b)(1)(A) requires that some information be reported pointing to the ‘hazardous condition’ at the railroad. As a matter of law, the extremely limited information Winch reported falls short of ‘reporting . . . a hazardous . . . condition.’” The ARB further noted that “‘reporting a hazardous condition’ is [also] essential to a claim of protected ‘refusal’ under section 20109(b)(2).” Finally, as relevant here, the ARB held that the statute requires the employee to “notif[y]” the employer of the hazardous condition if possible, and Winch did not.

Slip op. at 6. The court affirmed the ARB’s decision as supported by substantial evidence:

Like the ARB, we do not opine on whether calling in to report one’s own illness can qualify as “reporting . . . a hazardous . . . condition” under § 20109(b). Assuming for purposes of this opinion that it can, the ARB relied on substantial evidence in concluding that Winch did not actually “report[] . . . a hazardous . . . condition” under § 20109(b)(1)(A). As the ARB noted, when Winch called in sick, he told the crew operator only his name, his identification number, and his desire to be marked off sick; he failed to list or describe any of his symptoms and how they would impact the performance of his duties. Nor did Winch otherwise put CSX on notice that he was “reporting . . . a hazardous . . . condition.” Indeed, nothing in his call indicated that he was attempting to trigger this hazardous-condition provision as opposed to simply requesting a sick day.

And because Winch did not, as § 20109(b)(2)(C) requires, “notif[y]” CSX that a “hazardous condition” existed, despite his ability to do so, the ARB concluded that Winch’s claim fared no better under § 20109(b)(1)(B). This finding is supported by substantial evidence for the same reasons as the ARB’s conclusion that Winch failed to “report[] . . . a hazardous . . . condition” under § 20109(b)(1)(A).

Id. at 7-8.

PROTECTED ACTIVITY; § 20109(b)(1)(B); PROTECTED ACTIVITIES RELATED TO “HAZARDOUS SAFETY CONDITIONS” MUST RELATED TO SAFETY CONDITIONS AFFECTING RAILROAD SAFETY AND UNDER THE RAILROAD’S CONTROL, PERSONAL, NON-WORK-RELATED ILLNESSES OR CONDITIONS ARE NOT “HAZARDOUS SAFETY CONDITIONS” UNDER THE FRSA AND SO CANNOT BE THE BASIS FOR PROTECTED ACTIVITY

Stokes v. SEPTA, 657 Fed. Appx. 79, No. 15-3967 (3d Cir. Aug. 9, 2016) (not precedential) (2016 WL 4191500; 2016 US App LEXIS 14605) (appeal from the E.D. Pa. No. 2:15-cv-02719): Plaintiff was injured at work and went on leave. While on leave she became pregnant, and her leave was extended. It was extended further under the FMLA due to potential complications post-pregnancy. The railroad told her to attend a medical examination, but she declined to do so on the grounds that she believed traveling to it would violate her doctor’s restriction to limit activity. The railroad terminated her and she made a complaint and then filed suit under the FRSA.

The district court dismissed the claim under Rule 12(b)(6) on the grounds that per the holding in *Port Authority Trans-Hudson Corp v. Sec., U.S. Dep’t of Labor*, 776 F.3d 157 (3d Cir. 2015) § 20109(c)(2) does not apply to restrictions derived from conditions that are not work-related. Actions under § 20109(b)(1)(B) were dismissed because based on the complaint the Plaintiff was not reporting a hazardous safety condition or confronted with one in the course of her duties. Plaintiff appealed.

The Third Circuit affirmed. Plaintiff argued that the combination of her non-work-related medical condition and the railroad’s instructions to attend the medical examination created a hazardous safety condition in a work-task and that she had refused to work in the face of that condition, as protected by § 20109(b)(1)(B). But the Third Circuit held that even if the failure to attend the examination could be construed as a failure to work, this was not motivated by the sort of hazardous safety condition contemplated by the FRSA. § 20109(b)(1)(B) relates to hazardous safety conditions in the operation of the railroad that are under the railroad’s control, not personal, non-work related illnesses. Since the risk identified was not connected to railroad safety, Plaintiff had not pled a protected activity under the FRSA. The panel added that Plaintiff might have chosen to proceed under other statutes, but that the FRSA was not the appropriate vehicle for her complaint.

CONTRIBUTING FACTOR CAUSATION; COURT APPLIES FIVE FACTOR TEST OF TOMKINS v. METRO-NORTH; WEIGHT GIVEN TO DETERMINATION OF NATIONAL RAILROAD ADJUSTMENT BOARD

PROTECTED ACTIVITY NOT SHOWN WHERE SAFETY ISSUE NOT DISCOVERED UNTIL AFTER WORK REFUSAL

PROTECTED ACTIVITY NOT SHOWN WHERE ALLEGED VIOLATION WAS OF STATE, AND NOT FEDERAL, CODE, RULE OR REGULATION

PROTECTED ACTIVITY NOT SHOWN BY REFUSAL TO MOVE FLOORMATS BECAUSE THEY MIGHT BE TOO HEAVY WHERE PLAINTIFF FAILED TO SHOW THAT IT WAS OBJECTIVELY REASONABLE FOR HER TO BELIEVE THAT THE HAZARDOUS CONDITION PRESENTED AN IMMINENT DANGER OF DEATH OR SERIOUS INJURY

In *Necci v. Long Island R.R. Co.*, No. 16-CV-3250 (E.D. N.Y. Mar. 21, 2019) (2019 U.S. Dist. LEXIS 47231; 2019 WL 1298523), the Plaintiff alleged that the Defendant retaliated against her by decertifying her as a locomotive engineer after an incident in 2013 in which the train was 50 minutes late and after an internal hearing the Defendant found a pattern of improper performance making her an unfit and dangerous train operator. The Plaintiff also alleged retaliation based on her firing after a subsequent incident in 2016, at which time she had been returned to a Station Appearance Maintainer (“SAM”) position. In this second incident, the Defendant found that she had disobeyed and refused to follow direct orders to vacuum and to roll up floormats. The Plaintiff had refused based on her belief that it was unsafe to use electrical outlets in public areas and that she needed instruction and help on rolling up the mats.

2016 Discipline — Protected Activity

As to the refusal to vacuum the floormats based on safety concerns, the court found that this was not protected activity because the Plaintiff had not raised the question of whether it was safe to use a vacuum not rated to handle wet floors until after the incident, and thus a concern about the vacuum’s suitability could not have driven her refusal to vacuum. The court also noted that, even overlooking the chronological flaw in the Plaintiff’s argument, the Plaintiff did not satisfy the criteria of 49 U.S.C. § 20109(b)(2)(B)(i) because she had not shown the “objective reasonableness of her fear that using electrical outlets would have resulted in a fire, an electrical failure, or the electrocution of herself or others.” *Id.* at 44. To the contrary, the court cited the testimony of one of Defendant’s employees that SAMs “vacuum both wet and dry floormats at LIRR stations and regularly use electrical sockets at stations to power the vacuums.” *Id.* at 44-45.

As to the refusal to vacuum based on safety concerns based on asserted illegality, the court noted that 49 U.S.C. § 20109(a)(2) protects against refusals to violate “Federal laws, rules, and

regulations” regarding railroad safety and security, and that the Plaintiff had only indicated a belief that the outlets violated New York codes, rules and regulations, and not any federal provision. The court also noted that the Plaintiff offered no evidence or argument that her use of the outlets would actually have violated the New York provisions.

The court found that the Plaintiff’s initial refusal to move floormats because she did not know how heavy they were was not protected because the evidence failed to show that it was objectively reasonable for her to believe that “the hazardous condition present[ed] an imminent danger of death or serious injury. 49 U.S.C. § 20109(b)(2)(B)(i).”

PROTECTED ACTIVITY; DISTRICT COURT FINDS THAT FRSA, 49 U.S.C. § 20109(b)(1)(A) DOES NOT COVER PERSONAL, NON-WORK ILLNESS BECAUSE IT DOES NOT EXTEND BEYOND WORK-RELATED SAFETY CONDITIONS UNDER THE RAIL CARRIER’S CONTROL

In *Lockhart v. Long Island Railroad Co.*, No. 16-cv-1035 (S.D.N.Y. Aug. 2, 2017) (2017 U.S. Dist. LEXIS 122631; 2017 WL 3327603) (case below 2015-FRS-00055), the United States District Court for the Southern District of New York granted summary judgment for the Long Island Railroad Company (“Respondent”), dismissing Henry Lockhart’s (“Complainant”) claims of retaliation under the FRSA. *Lockhart*, slip. op. at 1. Complainant claimed that Respondent violated FRSA, 49 U.S.C. § 20109(b)(1)(A) by disciplining him for absences due to his use of Oxycodone prescribed for a shoulder injury sustained on duty. *Id.* at 8-10. The court found that the “hazardous condition” of subsection (b)(1)(A) does not extend beyond “work-related safety conditions under the rail carrier’s control,” and so does not cover “personal, non-work illness.” *Id.* at 8.

DOL Administrative Review Board Decisions

PROTECTED ACTIVITY; PROTECTED ACTIVITY NOT ESTABLISHED MERELY BASED ON DELAY OF TRAIN MOVEMENT—RATHER, COMPLAINANT MUST ALSO SHOW THAT SUCH DELAY ENDANGERED SAFETY OR CAUSED A HAZARDOUS CONDITION

PROTECTED ACTIVITY; PROTECTED ACTIVITY NOT ESTABLISHED BASED MERELY ON COMPLAINANT’S STATUS AS AN EMPLOYEE COVERED BY THE FRSA ENGAGED IN MOVING INTERSTATE COMMERCE

In *Stearns v. Union Pacific Railway Co.*, ARB No. 2017-0001, ALJ No. 2016-FRS-00024 (ARB Apr. 5, 2019), the ARB found that the ALJ properly granted summary decision in favor of the Respondent where the Complainant failed to proffer evidence that any alleged protected

activity contributed to his discharge for violating a workplace rule and policy by making threatening comments directed at a co-worker. The Complainant had become irate when a co-worker had not provided information the Complainant believed was necessary to keep trains moving. The Complainant argued that as yardmaster he was responsible for the safe and efficient operation of train movement. The ARB, however, found that the Complainant had not produced evidence “that a delay in moving a particular train would have endangered safety in the terminal operations or cause any hazardous condition.” Slip op. at 5. The Complainant also argued that he engaged in protected activity “just by being an employee under the FRSA and by moving interstate commerce through the terminal.” The ARB stated that “[t]he FRSA, however, still requires an employee to prove the specific elements of a complaint.” *Id.* at 5-6. The ARB found that the Complainant had “offered no evidence that could prove that he engaged in protected activity or that the activity he did claim contributed to his discharge.” *Id.*

PROTECTED ACTIVITY; CONTEXT CAN DETERMINE WHETHER A REPORT IS A REPORT OF A SAFETY CONCERN; ARGUMENT THAT REPORT WAS OF A “MECHANICAL” AND NOT “SAFETY” ISSUE REJECTED BECAUSE MECHANICAL ISSUES CAN BE SAFETY ISSUES

Hunter v. CSX Transportation, Inc., ARB Nos. 2018-0044, and -0045, ALJ No. 2017-FRS-00007 (ARB Apr. 25, 2019) (per curiam) (Final Decision and Order): FRSA case in which the ALJ found that Complainant had engaged in protected activity but not that the protected activity was a contributing factor in the decision to terminate him. The ALJ also found that the Respondent had established by clear and convincing evidence that it would have taken the same action absent the protected activity. Complainant appealed both causal findings. Respondent appealed the finding that Complainant engaged in protected activity.

Complainant reported that a wheel slip alarm was sounding. Respondent argued that this wasn’t an actual hazardous safety condition and so couldn’t be a report of such, or a good faith report of such. The ARB summarily rejected this, stating that they were the same arguments fully considered and properly rejected by the ALJ. Complainant’s arguments turned on claims that certain testimony was credible, certain evidence was significant, and Respondent’s explanations were “bunk.” But ALJs receive deference in their credibility assessments unless they are inherently incredible or patently unreasonable. They were not in this case, so they received deference and the findings were affirmed. The ARB thus affirmed the ALJ’s decision in full and “adopt it as our own and attach it.”

ALJ Decision

Complaint had been terminated and the parties stipulated that was an adverse action. The case was about two accounts of the termination—Complainant said it was due, in part, to his report of the wheel slip alarm. Respondent said that happened all the time and wasn’t a hazardous condition. It said Claimant was fired for leaving work without the permission of a supervisor

and that the decision makers didn't even know about the alleged protected activity. Complainant asserted that other employees who left without permission weren't fired.

As to the protected activity, Respondent argued that Complainant hadn't sufficiently reported the safety concern connected to the alarm, but the ALJ found that the alarm necessarily implicated a safety concern, crediting the testimony of Complainant and a co-worker. Moreover, when he made the report he was not aware that the engine in question would not be under power, which would have removed the safety concern. The same followed for the good faith belief. The ALJ rejected the claim that Complainant had reported a "mechanical" not "safety" issue because mechanical issues can be safety issues.

PROTECTED ACTIVITY; REFUSAL TO PERFORM ASSIGNED DUTY DUE TO A HAZARDOUS SAFETY CONDITION; REQUIREMENT THAT EMPLOYEE NOTIFY THE RAILROAD WHERE POSSIBLE OF THE EXISTENCE OF THE HAZARDOUS CONDITION AND THE EMPLOYEE'S INTENTION NOT TO PERFORM FURTHER WORK UNLESS CONDITION IS CORRECTED IMMEDIATELY; REMAND WHERE ALJ FAILED TO RECONCILE CONFLICTING TESTIMONY

In *Laidler v. Grand Trunk Western Railroad Co.*, ARB No. 15-087, ALJ No. 2014-FRS-99 (ARB Aug. 3, 2017), the Complainant filed a complaint with OSHA alleging that the Respondent violated the FRSA, 49 U.S.C.A. § 20109(b)(1), by terminating his employment in retaliation for his refusal to perform a roll-by inspection of an oncoming train from the ground, due to a hazardous safety condition. Both OSHA and the ALJ found that the Respondent violated the FRSA retaliation provision. The ALJ awarded damages, including back pay with interest, punitive damages, and other relief.

On appeal, the Respondent contended that the Complainant's refusal to perform the on-the-ground roll-by inspection as required the Respondent's "Rule 523" was not protected activity under 49 U.S.C.A. § 20109(b)(1)(B) because the Complainant failed to prove that he had no reasonable alternative to the refusal and failed to establish that it was not possible to notify the Respondent of the existence of the hazardous condition and his intention not to perform the roll-by inspection. The Respondent argued that the ALJ's holding that no reasonable alternative "sanctioned and explained" by the Respondent was available to the Complainant was inconsistent with the FRSA, which only requires the complainant to establish that no "reasonable alternative" was available. The Respondent contended the ALJ improperly placed the burden on the employer to establish that a "sanctioned and explained" reasonable alternative was available.

The ARB found that substantial evidence supported the ALJ finding that there was no reasonable alternative available to the Complainant to refusing to perform a roll-by inspection from the ground to comply with Rule 523. The Rule provided for no other alternative when the terrain does not permit a roll-by inspection from the ground. The Complainant also had not been provided with notice of the oncoming train.

The ARB, however, found that the ALJ's decision failed to show that he had reconciled seemingly conflicting testimony on whether it would have been possible for the Complainant to

notify the Respondent that he would not be conducting the roll-by inspection. The FRSA “requires an employee to notify the railroad carrier ‘*where possible . . .* of the existence of the hazardous condition’ and of the employee’s ‘intention not to perform further work . . . unless the condition is corrected immediately.’” USDOL/OALJ Reporter at 9-10, quoting 49 U.S.C.A. § 20109(b)(2)(C) (emphasis as added by the ARB). The ARB stated: “Absent discussion in the decision of the evidence and an explanation by the ALJ for why he disregarded the testimony, this Board is unable to fulfill its appellate responsibility to determine whether substantial evidence of record supports the ALJ’s factual finding that it was impossible for Laidler to notify GTW of the existence of the hazardous condition that prevented him from performing the on-the-ground roll-by inspection.” *Id.* at 11. The ARB thus vacated the ALJ’s decision and remanded for the ALJ to reconsider.

PROTECTED ACTIVITY; CALLING IN SICK AS REPORTING A HAZARDOUS CONDITION; § 20109(b)(1)(A) REQUIRES A REPORT POINTING OUT THE “HAZARDOUS CONDITION” AT THE RAILROAD

PROTECTED ACTIVITY; CALLING IN SICK AS A WORK REFUSAL; § 20109(b)(1)(B) and (C) REQUIRE A REPORT OF “HAZARDOUS CONDITION” SUCH THAT A REASONABLE INDIVIDUAL WOULD CONCLUDE THERE IS AN IMMINENT DANGER OF DEATH OR SERIOUS INJURY, AND WHERE POSSIBLE, A NOTIFICATION TO THE RAILROAD CARRIER OF THE EXISTENCE OF THE HAZARDOUS CONDITION AND THE INTENTION NOT TO PERFORM FURTHER WORK

In *Winch v. CSX Transportation, Inc.*, ARB No. 15-020, ALJ No. 2013-FRS-14 (ARB July 19, 2016), the ARB held that the ALJ erred as a matter of law in concluding that the Complainant engaged in protected activity under FRSA, 49 U.S.C. § 20109(b) when calling in sick where the Complainant merely provided his name and identification number and requested that he be marked off as sick.

Reporting a hazardous condition

The first question addressed by the ARB was whether the Complainant reported a “hazardous . . . condition” under § 20109(b)(1)(A). The ARB wrote:

Even the most liberal reading of section 20109(b)(1)(A) requires that some information be reported pointing to the “hazardous condition” at the railroad. As a matter of law, the extremely limited information Winch reported falls short of “reporting . . . a hazardous . . . condition.” Because “reporting a hazardous condition” is essential to a claim of protected “refusal” under section 20109(b)(2), Winch’s remaining legal basis for asserting protected activity also fails as a matter of law. Failing to prove the essential element of protected activity, requires dismissal of Winch’s claim as a matter of law.

USDOL/OALJ Reporter at 8.

Refusal to work

The ARB next considered whether Complainant's call in sick was a protected refusal to work under § 20109(b)(1)(B). The ARB wrote:

[T]he FRSA also “clearly does not protect every refusal to work” under section 20109(b)(1)(B). A refusal to work when confronted by a “hazardous safety” condition related to the performance of the employee’s duties under section 20109(b)(1)(B) is only protected if the hazardous condition is such that a reasonable individual would conclude there is an imminent danger of death or serious injury, *see* 49 U.S.C. § 20109(b)(2)(B)(i). The ALJ made no finding, and we see no evidence in the record, showing that Winch reported to or notified CSX that his condition presented an imminent danger of death or serious injury. A refusal to work when confronted by a hazardous safety condition under section 20109(b)(1)(B) is also only protected if the “employee, where possible, has *notified* the railroad carrier of the existence of the hazardous condition and the intention not to perform further work,” *see* 49 U.S.C. § 20109(b)(2)(C) (emphasis added). Again, there is no ALJ finding nor record evidence showing, that he “notified” CSX of the existence of a “hazardous” condition when Winch called in sick on January 19, 2012. Thus, as a matter of law, Winch failed to establish FRSA-protected activity under section 20109(b)(1)(B).

Id. at 8-9 (footnote omitted).

The ARB noted that this ruling was limited to the narrow facts of the case, and that it was not addressing “whether a railroad employee ‘reporting’ being sick might satisfy the requirements under section 20109(b) to establish protected activity under the FRSA in a different case where more sufficient details are reported to the railroad employer.” *Id.* at 9.

The ARB’s holding was affirmed on appeal by the Eleventh Circuit Court of Appeals, which like the ARB, did not opine on whether calling in to report one’s own illness can qualify as reporting a hazardous condition under § 20109(b). Rather, the court found only that substantial evidence supported the ARB’s conclusions. *Winch v. Secretary of Labor*, No. 16-15999 (11th Cir. Feb. 13, 2018) (per curiam) (unpublished) (2018 U.S. App. LEXIS 3584; 2018 WL 834194).

PROTECTED ACTIVITY; PROVIDING INFORMATION ABOUT RAIL SAFETY VIOLATION IN STATEMENT AFTER TRACK AUTHORITY INCIDENT, AND IN STATEMENTS DURING RESULTANT DISCIPLINARY HEARING

In [*Seay v. Norfolk Southern Railway Co.*](#), ARB No. 14-022, 13-034, ALJ No., 2013-FRS-34 (ARB Oct. 27, 2016), the Complainant was one of two employees (the other being his supervisor) in a hi-rail vehicle that drove beyond the applicable track authority (a protocol that ensures that the track section is out of service while it is being inspected). The supervisor was driving. Both employees were disciplined. The Complainant refused to waive an investigatory hearing. After the hearing, but before a determination, the Complainant accepted a waiver (under

protest) accepting responsibility for the incident. On appeal, the Respondent contended that the ALJ erred by finding that the Complainant engaged in protected activity. The ARB affirmed the ALJ's finding because the Complainant had provided information about the incident. The ARB wrote:

The FRSA protects employees who provide information regarding railroad safety violations. The record indicates that Seay provided information to Norfolk Southern about what he considered to be safety violations [the supervisor] committed on December 8. For example, on the day of the violation, Seay told Erickson that [the supervisor] had "r[u]n outside of his limits and there was nothing [he] could do to prevent it." And Seay provided details about the track authority violation during the December 22, 2011 hearing, including his assertion that he was not responsible for the violation because of his location in the vehicle during the inspection. We therefore agree with the ALJ that the undisputed facts indicate that Seay provided information to Norfolk Southern about a safety violation.

USDOL/OALJ Reporter at 7 (footnotes omitted).

PROTECTED ACTIVITY; WORKPLACE VIOLENCE AS A SAFETY ISSUE

PROTECTED ACTIVITY; COMPLAINANT'S GOOD FAITH REPORTING UNDER § 20109 (b)(1)(A) OF A HAZARDOUS CONDITION BASED ON DISCORDANT AND POTENTIALLY VIOLENT SITUATION BETWEEN ENGINEER AND CONDUCTOR

In *Leiva v. Union Pacific Railroad Co., Inc.*, ARB Nos. 14-016, -017, ALJ No. 2013-FRS-19 (ARB May 29, 2015), the Complainant, who was the train's engineer, became involved in an altercation with the train's conductor. The Complainant, fearing for his safety, made a series of phone calls. A manager asked him to work it out with the conductor, and stated that if they returned to the facility they would both be placed out of service. The Complainant felt that he could not work it out and insisted on being returned to the facility to file a report. Upon arriving at the facility both the Complainant and the conductor filed reports. They were both pulled out of service without pay and charged with workplace violence. The manager admitted that if both men had simply returned to work the Complainant would not have been pulled out of service. The manager considered the information that the Complainant provided about the conductor's conduct to be a safety issue. The Respondent scheduled a hearing. Later, the Respondent proposed that the two men sign a hearing waiver agreeing to (1) termination of employment followed by immediate reinstatement as a probationary employee, (2) no pay for time lost, (3) dismissal of the Complainant's claims, (4) refrain from similar conduct in the future or be subject to disciplinary action, and (5) attend safety intervention and workplace violence training. The Complainant signed the waiver because he needed to recover the lost pay. The Complainant was later informed that the waiver and his participation in workplace violence would be part of his personnel record. The Complainant attempted to clear his name, but obtaining no assistance from Respondent's managers, filed an FRSA complaint.

The ARB affirmed the ALJ's findings that the Complainant proved that he engaged in protected activity under 49 U.S.C. § 20109(a)(1) and § (b)(1)(A). The ARB wrote:

Substantial evidence supports the ALJ's conclusion that Leiva [the Complainant] proved his case by a preponderance of the evidence. First, Leiva proved by a preponderance of the evidence that he engaged in protected activity under 49 U.S.C.A. § 20109(a)(1), which states that an employee is protected when he or she provides information in good faith regarding any conduct that the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security. Union Pacific argues that Leiva never presented any evidence that he reasonably believed that he was reporting a violation of federal law. However, Jenkins testified that he taught engineers, of which Leiva was one, about safety, and taught them specifically that if they complied with Union Pacific's rules then they would be in compliance with the federal regulations because Union Pacific's rules were more stringent than the regulations. Further, and consistent with this testimony, Leiva testified that Union Pacific taught him that to comply with federal regulations, he had to follow Union Pacific rules. He believed that several Union Pacific rules of conduct were violated and implicated safety. Substantial evidence supports the ALJ's finding that Leiva reasonably believed that he was reporting a violation of a federal regulation as provided in section (a)(1). Union Pacific also argues that Leiva testified that he was not aware of any federal laws or regulations when he reported the fight to his supervisors. This argument fails because the statute does not require that an employee know the specific rules that he reasonably believes are being violated when he makes his report—the statute only requires that an employee have a reasonable belief in a violation of a Federal law, rule, or regulation related to railroad safety or security. Leiva proved that he had such a reasonable belief by a preponderance of the evidence. Leiva also proved that he engaged in protected activity by a preponderance of the evidence under 49 U.S.C.A. § (b)(1)(A), which states that an employee is protected if he reports a hazardous safety or security condition in good faith. Union Pacific argues that Leiva presented no evidence that his report had anything to do with a "hazardous" condition. However, several witnesses including Leiva, Lorange [the manager of operations at the facility from which the train originated], and Jenkins [the manager of operations (safety director) at another facility], testified that Leiva felt threatened by Mr. F. [the conductor] during and after the altercation. Further, Leiva testified that communication between an engineer and a conductor is essential to the safe operation of a train. More importantly, Leiva did not feel that he could adequately communicate with Mr. F. for the safe operation of the train. Thus, the discordant and potentially violent situation between the engineer and the conductor of the train itself had the tendency to create a hazardous safety or security condition. Bolstering this conclusion, Lorange testified that he considered Mr. F.'s conduct to be a safety issue. Finally, Jenkins testified that he had no reason to doubt Leiva's good faith in reporting the incident. Thus, there is substantial evidence in the record to support that Leiva reasonably believed that he was reporting in good faith a hazardous safety or security condition in violation of section (b)(1)(A).

USDOL/OALJ Reporter at 6-7 (footnotes omitted).

- *Good Faith / Reasonable Belief*

U.S. District Court Decisions

PROTECTED ACTIVITY; “GOOD FAITH” REPORTING OF HAZARDOUS CONDITION ELEMENT REQUIRES BOTH SUBJECTIVE AND OBJECTIVE REASONABLENESS; WHERE RELYING ON UNDISPUTED FACTS, COURT MAY DETERMINE OBJECTIVE REASONABLENESS AS A MATTER OF LAW

PROTECTED ACTIVITY; “GOOD FAITH” REPORTING OF HAZARDOUS CONDITION ELEMENT; PLAINTIFF’S OBSTINATE AND UNCOOPERATIVE BEHAVIOR FOUND TO BE INDICATIVE OF LACK OF REASONABLENESS

In *March v. Metro-North R.R.*, No. 16-cv-8500 (S.D.N.Y. Mar. 28, 2019) (2019 U.S. Dist. LEXIS 53677; 2019 WL 1409728), the Plaintiff brought a FRSA complaint alleging that he suffered retaliation in violation of 49 U.S.C. § 20109 when he was removed from service for insubordination after reporting a defective wiper blade on one of the trains. The Plaintiff had refused a supervisor’s order to change the blade because he believed it was unsafe to use a ladder. The court granted the Defendant’s motion for summary judgment.

Protected Activity

The court found that the only basis in the statute for protected activity in this case was “reporting, in good faith, a hazardous safety or security condition or refusing to work around a hazardous safety condition.” 49 U.S.C. § 20109 (b)(1)(A). The court rejected the Plaintiff’s contention that this provision only requires a subjective belief that there was a hazardous condition, and instead found that the belief must have also been objectively reasonable. The court noted that it was “appropriate for it to determine what was objectively reasonable insofar as it is relying on undisputed facts. *See e.g., Hernandez v. Metro-N. Commuter R.R.*, 74 F. Supp. 3d 576 (S.D.N.Y. 2015); *Kerman v. City of New York*, 374 F.3d 93, 109 (2d Cir. 2004) (in context of qualified immunity, it was appropriate for court to determine whether “defendant official’s conduct was objectively reasonable” as a matter of law).” Slip op. at 12 n.3.

The court found that “[w]hile Plaintiff may have subjectively believed there was a safety risk with the blade and with using the ladder to fix it, Plaintiff fails to support that his beliefs were objectively reasonable.” *Id.* at 13. Although he testified that the wiper blade was “bending” or “distorting” he did not identify any negative functional effect, and it was undisputed that the Plaintiff never relayed the precise issue or defect with the blade in subsequent conversations with

supervisors, or in the contemporaneous ME-9 (defect report) form. Multiple experienced supervisors inspected the blades and could not find a defect.

As to use of the ladder, the court found enough undisputed facts to determine that it was not objectively reasonable for the Plaintiff to refuse to change the wiper. Among other factors, the court considered the Plaintiff's obstinate behavior refusing to cooperate or to discuss the possibility of reasonable alternatives to using a ladder. The court found that "the overwhelming evidence, including [the Plaintiff's] own testimony, shows that he was being persistently difficult, vague, and uncooperative and that there was no urgent or imminent threat of danger posed by the blade." *Id.* at 16. Finally, the court found that the Plaintiff's knowledge of a good faith process for reporting safety issues that would have protected him from disciplinary action, and his decision not to invoke that process during the wiper blade incident, further cemented the lack of an objectively reasonable safety concern.

SUMMARY JUDGMENT; PROTECTED ACTIVITY; CONTRARY DETERMINATIONS ABOUT SAFETY HAZARD DO NOT RENDER A REPORT OBJECTIVELY UNREASONABLE UNLESS MADE BY SIMILARLY SITUATED EMPLOYEES

Lemieux v. Soo Line R.R. Co., No. 16-cv-1794, 2018 U.S. Dist. LEXIS 207527 (D. Minn. Dec. 10, 2018): Plaintiff alleged that Defendant violated the FRSA by investigating him, suspending him, and then terminating him in retaliation for good faith reports of hazardous and unsafe brakes. The parties filed cross motions for summary decision. The District Court found genuine disputes of material fact and denied both motions.

Plaintiff "bad ordered" about 56 cars on a train for brake problems. Defendant pursued discipline for delaying operations after it determined that all but one were improper determinations and the brakes/brake pads were compliant. This resulted in an investigation, hearing, and five day suspension. While this was ongoing, Plaintiff reported brake defects as signaled by track detectors and a frozen slack adjuster. A supervisor went to observe and the parties disputed what exactly happened. But Defendant pursued discipline against Complainant for not immediately securing the train as ordered by dispatch and not conducting a proper roll-by inspection of a passing train. This led to termination.

Defendant sought summary judgement as to the first protected activity on the grounds that it was not done in good faith arguing that 1) the reports were not objectively reasonable; 2) they were not timely made; and 3) bad-ordering 56 cars was unprecedented. The court quickly rejected the second two—there was evidence that the reports were made in line with the training Plaintiff received and an unprecedented number of reports of problems didn't make them untrue. As to the objective reasonableness, the court observed that there was a disputed question of law about whether "good faith" included an objective component and the Eighth Circuit had not spoken on the issue. The court, however, declined to decide it on the grounds that on either interpretation there were genuine disputes of material fact. Even if "good faith" included an objective component, the question was whether a reasonable person in the same factual circumstances with the same training and experience would have come to the same conclusion. The evidence of what Defendant's mechanics found later didn't resolve that question. The court also somewhat

summarily determined that the first incident could constitute a refusal protected by § 20109(b)(1)(C) and that the second incident was subject to genuine disputes that would need to be resolved by a jury.

PROTECTED ACTIVITY; SUMMARY JUDGMENT GRANTED IN FAVOR OF RAILROAD WHERE THE PLAINTIFF’S REFUSAL TO WALK TO DIFFERENT BUILDING AFTER REPORTING ICY SIDEWALKS WAS NOT SUPPORTED UNDER THE REASONABLE EMPLOYEE TEST; THE RAILROAD, HOWEVER, DID NOT CHALLENGE THAT THE REPORT ITSELF WAS PROTECTED

In *Tompkins v. Metro-North Commuter R.R.*, No. 16-cv-09920 (S.D. N.Y. Sept. 24, 2018) (2018 U.S. Dist. LEXIS 163198; 2018 WL 4573008), the Plaintiff brought a suit alleging that Defendant violated the whistleblower provisions of the Federal Railroad Safety Act (“FRSA”), 49 U.S.C § 20109, by suspending him in retaliation for his protected activities of reporting and refusing to work in unsafe working conditions. The district court granted summary judgment in favor of the Defendant.

First, the court assessed whether the Plaintiff had engaged in protected activity when he refused to walk to another building at the worksite. The Plaintiff believed that the sidewalks were too icy and refused to walk even after supervisors had checked conditions and other employees agreed to make the walk. Applying the “reasonable person with the same training and experience” test, the court noted that other than the Plaintiff, “every individual cited in the record to have evaluated the situation on the night [in question] including at least four other Metro-North employees present that night, two Metro-North hearing officers, and an arbitration panel, all agreed that walking to the [other building] that night was not unsafe.” Slip op. at 10. The court found that the Plaintiff’s subjective assessment of the danger presented of on the walkways, which was supported by no evidence other than his own testimony and was contradicted by all others present on the scene or who had reviewed the events, was “insufficient to create a genuine dispute of material fact with respect to the objective reasonableness of his refusal to work.” *Id.* at 12. The court thus granted summary judgment based on the reasonable belief factor test for establishing protected activity.

The court then noted that it was undisputed that it was protected activity for the Plaintiff to have reported unsafe walking conditions and to have asked for a means of transport to the other building. Thus, the court considered whether the Plaintiff presented sufficient evidence for a reasonable jury to conclude that the Plaintiff’s safety complaints (separate and apart from the refusal to walk) were “contributing factors” to two disciplinary suspensions.

SUMMARY DECISION; SUMMARY DECISION DENIED WHERE GENUINE DISPUTES REMAIN OVER WHETHER THERE WAS AN INJURY AND WHETHER EMPLOYER HAD A REASONABLE BASIS FOR ITS DISCIPLINE

Smith v. Norfolk Southern Railroad Co., No. 16-cv-520 (M.D. Ga. July 6, 2018) (2018 U.S. Dist. LEXIS 112419) (Order [denying cross motions for summary judgment]): Plaintiff was terminated after a determination that he had made false statements to a supervisor when reporting

another worker's injury. He filed an FRSA complaint. The court in this order denied cross-motions for summary decision. There remained genuine disputes over whether the other worker had actually fallen from the chair, which made summary decision on the protected activity element impossible. As to the contributing factor element, the court observed that the correctness of the discipline was not at issue and there only needed to be a reasonable basis for the disciplinary decision. But this turned on a question of interpretation of the evidence, which was an issue a jury would need to decide. Genuine disputes also remained over the affirmative defense showing.

SUMMARY DECISION; SUMMARY DECISION DENIED WHERE GENUINE DISPUTES REMAIN OVER WHETHER THERE WAS AN INJURY AND WHETHER EMPLOYER HAD A REASONABLE BASIS FOR ITS DISCIPLINE

O'Neal v. Norfolk Southern Railroad Co., No. 16-cv-519 (M.D. Ga. July 6, 2018) (2018 U.S. Dist. LEXIS 112185) (Order [denying cross motions for summary judgment, etc.]): Plaintiff reported that he was injured when a defective chair broke and caused him to fall. After an investigation a manager determined that the chair was defective but there had been no fall. Plaintiff was charged with making false statements to a supervisor and then terminated. He then filed an FRSA complaint. The parties filed cross-motions for summary decision. Both were denied. There remained genuine disputes over whether the plaintiff had actually fallen from the chair, which made summary decision on the protected activity element impossible. As to the contributing factor element, the court observed that the correctness of the discipline was not at issue and there only needed to be a reasonable basis for the disciplinary decision. But this turned on a question of interpretation of the evidence, which was an issue a jury would need to decide. Genuine disputes also remained over the affirmative defense showing.

PROTECTED ACTIVITY; GOOD FAITH; COURT STATES THAT AN EMPLOYEE MUST HAVE A GOOD FAITH BELIEF THAT THE REFUSAL TO ENGAGE IN AN ACTION WOULD VIOLATE A FEDERAL RULE OR REGULATION, WHICH CONTAINS BOTH SUBJECTIVE AND OBJECTIVE COMPONENTS, BUT DOES NOT REQUIRE THAT THE EMPLOYEE BE CORRECT ABOUT THE LAW; SUMMARY JUDGMENT INAPPROPRIATE WHERE DISPUTES OF FACT REMAINED AS TO THE REASON FOR THE EMPLOYEES ACTS AND THE INSTRUCTIONS GIVEN BY THE SUPERVISOR

Rookaird v. BNSF Railway Co., No. 14-cv-176 (W.D. Wash. Oct. 29, 2015) (2015 U.S. Dist. LEXIS 147950; 2015 WL 6626069) (case below 2014-FRS-9): Plaintiff had been instructed to move roughly 42 cars. Before doing so he conducted air tests on the cars. He and a trainmaster communicated over the radio about whether the testing was necessary. When Plaintiff returned to the depot he was told by the superintendent to "tie up" and go home. He did so, but provided an end time 28 minutes later than the time he completed his tie up and did not sign his time sheet because he could not locate it. Plaintiff also had a confrontation in the break room with another employee, after which the superintendent told him to leave. Defendant investigated the events and terminated Plaintiff. Its stated reasons were failure to work efficiently, dishonest reporting

of time, failure to sign the time sheet, and not complying with instructions to leave the property. Plaintiff filed suit under the FRSA on the grounds that his air testing and communications about it were protected activities and led to the termination. This order considered Plaintiff's Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment.

The court explained that the FRSA employs a "two-part burden-shifting test" and that in the first part the plaintiff must "show by a preponderance of the evidence that (1) he engaged in a protected activity; (2) the employer knew he engaged in the allegedly protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action." "After the employee makes this showing, the burden shifts to the employer to demonstrate by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of the protected activity." Here, Defendant conceded the second and third elements of the Complainant's case.

The parties disputed whether the air brake test was actually required by federal law. The court stated that the protections of the FRSA would be thwarted if actions were protected only if were later determined that the worker was correct about the law. The requirement was rather, only that the worker have a good faith belief, which contained both objective and subjective components. Both parties sought summary decision on the point, but neither motion was meritorious. Viewing the evidence in the light most favorable to Plaintiff, he believed based on his training that the testing was required and was implicitly instructed by a supervisor to not perform it, an instruction he refused. Viewing the evidence in the light most favorable to Defendant, Plaintiff was actually upset about a schedule change and was conducted a slowdown, and the supervisor never instructed him not to do the test. There were thus disputed facts precluding summary judgment for either party. The court also denied Defendant's motion for summary judgment as to protected activities regarding an FRA inquiry about the necessity of the testing and a call to BNSF's rules hotline, concluding that in the light most favorable to Plaintiff, they were good faith efforts to report activities that violated a federal law, rule, or regulation related to railway safety and a hazardous safety condition and report of discrimination.

PROTECTED ACTIVITY; GOOD FAITH; SUMMARY DECISION; TO BE PROTECTED AN INJURY REPORT MUST BE MADE IN GOOD FAITH, WHICH REQUIRES BOTH AN ACTUAL SUBJECTIVE BELIEF AND AN OBJECTIVELY REASONABLE BELIEF; WHERE MATERIAL DISPUTES REMAINED ABOUT UNDERLYING EVENTS LEADING TO THE REPORT, SUMMARY JUDGMENT DENIED

Armstrong v. BNSF Ry. Co., 128 F. Supp. 3d 1079, No. 12-cv-7962 (N.D. Ill. Sept. 4, 2015) (2015 U.S. Dist. LEXIS 118224; 2015 WL 5180589): Plaintiff was called to the "glasshouse" area of a station where he and his supervisor had a dispute over his uniform. Plaintiff alleged that his supervisor assaulted him, injuring his left foot and left knee. He alleged FRSA violations for delays in providing medical care and retaliation, by termination, for filing an injury report. Both parties moved for summary decision and the court denied both motions.

The parties disputed what happened between Plaintiff and his supervisor and in particular whether the supervisor had slammed the door on the Plaintiff's foot and knee. There was video with a partial view of the relevant area, but it did not capture the full sequence because the manager was out of view. Plaintiff had been taken for medical treatment after his request, but not immediately and not to the closest facility. After an investigation and hearing regarding the incident, the railroad had terminated Plaintiff for insubordination in not remaining in the "glasshouse" as instructed and for dishonesty in reporting the incident and in the injury report.

The relevant protected activity was the injury report and the parties did not dispute that Plaintiff made an injury report. But they disputed whether it was done in good faith. For an injury report to be made in good faith, the employee must "subjectively believe his reported injury was work-related" and that belief must be "objectively reasonable." The underlying issue was whether the assault had been fabricated. There remained disputed issues of material fact on that question, so summary decision was not appropriate for either party.

PROTECTED ACTIVITY; GOOD FAITH; SUMMARY DECISION; GOOD FAITH INJURY REPORT REQUIRES BOTH GOOD FAITH BELIEF THAT THE INJURY WAS WORK-RELATED AND GOOD FAITH IN MAKING THE REPORT; GOOD FAITH REQUIREMENT APPLIES TO THE INITIAL REPORT OF INJURY, NOT THE FULL RANGE OF AN EMPLOYEE'S INTERACTIONS WITH THE RAILROAD

PROTECTED ACTIVITY; GOOD FAITH; KNOWLEDGE; COURT REJECTS ARGUMENT THAT FRSA REQUIRES PROOF THAT IF KNEW THAT THE PROTECTED ACTIVITY WAS DONE IN GOOD FAITH

Miller v. CSX Transp., Inc., No. 1:13-cv-734 (S.D. Ohio Aug. 25, 2015) (2015 U.S. Dist. LEXIS 112507; 2015 WL 5016507) (case below 2013-FRS-64): In August 2012 the Plaintiff reported that about a month earlier he had suffered a back injury when his foot slipped on loose ballast while stepping off of the training, resulting in a twist and popping sound. He had gone to an emergency room 5 days after the injury and more recently to an orthopedist. Defendant's rules require immediate reporting of on-duty injuries, so an investigation was initiated. Several days later Plaintiff gave a written statement retracting his injury report and stating that it had actually occurred at home while working on his car. Plaintiff claimed that through gestures and nodding, the managers had conveyed that if he retracted his report, he could go back to work with little or no penalty. After the investigation/hearing, Plaintiff was terminated. He pursued several actions, including an FRSA complaint.

Defendant sought summary judgment on the grounds that the injury report was not made in good faith. The court explained that the good faith requirement implicated both "good faith belief that an injury was work-related, and good faith in making the injury report." Here Defendant argued that the retraction should be considered as part of the report and since one or the other was not true, Plaintiff had not acted in good faith. After reviewing other cases on the question, the court held that the good faith requirement applies to the initial injury report, not all of an employee's interactions with the railway. Viewing the facts in the light most favorable to Plaintiff, a jury could conclude that he had acted in good faith when he made the initial report. The court also

rejected the railroad's argument that it could not be liable unless it knew that the report was made in good faith and was thus protected activity.

GOOD FAITH REPORT OF WORK RELATED INJURY; DISTRICT COURT DENIES SUMMARY JUDGMENT ON ISSUE OF GOOD FAITH REPORTING OF AN INJURY UNDER THE FRSA WHERE THE EMPLOYEE REPORTED HIS INJURY THREE DAYS AFTER IT OCCURRED BUT CONTENDED THAT HE NOTIFIED HIS EMPLOYER AS SOON AS HE BECAME AWARE OF IT

In *Mosby v. Kansas City Southern Railway Co.*, Case No. CIV-14-472-RAW (E.D. Okla. July 20, 2015), the U.S. District Court for the Eastern District of Oklahoma denied summary judgment under the FRSA. *Mosby*, slip op. at 14. The Defendant railroad company contended that the Plaintiff, Gregory Mosby, did not report his injury in good faith under the FRSA because he concealed it for three days. *Id.* at 9. The Plaintiff contended that he reported his injury immediately after seeing his chiropractor and that it was not until that consultation that he realized that he was seriously injured. *Id.* The court reasoned that, under the FRSA, the Plaintiff must "genuinely believe[] that the injury he [is] reporting [is] work-related"; and that actively concealing an injury from an employer could, in some circumstances, preclude a finding of good faith. *Id.* at 10-11. The court concluded that, on the above facts, "[a] reasonable jury could find that Mosby acted in good faith or did not act in good faith," and accordingly denied summary judgment on the issue of good faith. *Id.* at 11.

PROTECTED ACTIVITY; GOOD FAITH; COURT EXPLAINS THAT GOOD FAITH INJURY REPORT REQUIRES BOTH GOOD-FAITH BELIEF THAT THE INJURY IS WORK-RELATED AND GOOD-FAITH IN THE ACT OF REPORTING THE INJURY

PROTECTED ACTIVITY; GOOD FAITH; SUMMARY JUDGMENT; CROSS-MOTIONS FOR SUMMARY JUDGMENT DENIED WHERE IT WAS POSSIBLE TO INFER THAT THE INDIVIDUAL ACT OF THE REPORT WAS DONE IN GOOD FAITH OR TO INFER THAT THE PLAINTIFF WAS NOT ACTING WITH HONESTY OF PURPOSE

Murphy v. Norfolk So. Ry. Co., No. 13-cv-863, 2015 WL 914922, 2015 U.S. Dist. LEXIS 25631 (S.D. Ohio Mar. 3, 2015) (case below 2014-FRS-4) [PDF](#): Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109, and Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, suit with cross-motions for summary judgment. Slip op. at 1. The plaintiff worked in the maintenance of way department and had been called in to help clear some trees from the track. While using a chainsaw to do so, it kicked back, and since he wasn't wearing his protective chaps, he suffered a significant cut and was taken for medical treatment by a co-worker. At the hospital, they called their supervisor and plaintiff asked his supervisor to make no further reports of his injury because he did not want to be ridiculed for the manner of injury, feared retaliation for reporting injury or discipline for violating the safety rule regarding the use of chaps, and did not want to jeopardize

incentives offered to his crew for maintaining an injury-free record (e.g. free meals and stock bonuses). The supervisor agreed and the Plaintiff returned to work without incident. *Id.* at 2-3.

Nine months later, someone made an anonymous complaint about Plaintiff and his non-report of the injury. This led to an investigation and the discovery of the injury. Plaintiff then filled out the required form to report the injury. The co-worker received a ten-day time-served suspension for concealing the injury. The supervisor was terminated as a manager but allowed to return to his collective bargaining position with a 78 day suspension and other restrictions. Plaintiff was charged with conduct unbecoming of an employee for concealing the injury and convincing others to do so, as well as improper performance of duty for not wearing his chaps. The charges were sustained and he was issued a one-year suspension along with further restrictions pertaining to his exercise of seniority rights. *Id.* at 4-5. Plaintiff filed an FRSA complaint, but OSHA dismissed it. Plaintiff then took the suit to federal court. *Id.* at 5-6.

After explaining the analytical framework for an FRSA claim, *id.* at 7-8, the court considered Norfolk Southern's argument that the Plaintiff had not reported his injury in good faith and thus did not engage in protected activity. The railroad focused on the overall conduct in concealing the injury. Plaintiff argued that 1) he had a good faith belief that he suffered a work-related injury when he reported it; and 2) it was not his fault that his co-worker and supervisor had not done their jobs and reported the injury further. *Id.* at 9-10. The court remarked that this argument took "somechutzpah to make," but that though the evidence supporting good-faith was "not overwhelming," it was "substantial enough to withstand summary judgment." *Id.* at 10. It also found substantial evidence supporting the railroad's argument that the plaintiff had not acted in good faith and a reasonable juror could find that he did not act with "honesty of purpose." Thus both FRSA-retaliation claim motions for summary judgement were denied. *Id.* at 11-12. A footnote in the order discusses the nature of the good faith requirement, and in particular the determination that it encompasses *both* 1) that there is a good-faith belief that the injury is work-related; and 2) that the making of the injury report was itself done in good faith. *Id.* at 11 n.3.

PROTECTED ACTIVITY; REASONABLE BELIEF TEST; COMPLAINANT'S REPORT OF A DE MINIMIS WASTE OF COMPANY TIME FOUND NOT TO REFLECT A SUBJECTIVELY OR OBJECTIVELY REASONABLE BELIEF OF UNLAWFUL BEHAVIOR RELATED TO RAILROAD SAFETY, SECURITY OR GROSS, FRAUD, WASTE OR ABUSE OF FUNDS FOR SAFETY OR SECURITY

In *Hernandez v. Metro-North Commuter Railroad*, No. 1:13-cv-02077 (S.D.N.Y. Jan. 9, 2015) (2015 WL 110793; 2015 U.S. Dist. LEXIS 2457), the Plaintiff reported an incident in which wreck crew employees spent 25-45 minutes repairing scratched paint on an employee's personal car. After an investigation, the Defendant gave a verbal reprimand to all involved. The superintendent considered it to be a minor incident. The Plaintiff alleged, however, was thereafter harassed for being a squealer. The Plaintiff filed an FRSA retaliation complaint. The Defendant filed a motion for summary judgment. The court granted the motion on the ground that the Plaintiff had not satisfied the reasonable belief factor required to establish a protected activity under the FRSA. Drawing all reasonable inferences in the Plaintiff's favor, the court did not question that the Plaintiff honestly believed that the conduct was an unlawful use of company

time. The court, however, found that the FRSA requires a reasonable belief that the unlawfulness was related to railroad safety or security or that the conduct constitutes “gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security.” 49 U.S.C. § 20109(a)(1). The court found no indication that the Plaintiff considered what he reported was a safety concern, and therefore the Plaintiff failed to establish a subjectively reasonable belief. The court likewise found that no objectively reasonable person in the same factual circumstances as the plaintiff could possibly believe that any railroad safety laws were violated by spending less than an hour of company time repairing a personal vehicle in the company paint shop, or that such amounted to a gross fraud, waste or abuse of funds (much less funds to be used for safety or security).

PROTECTED ACTIVITY; WHEN REPORTING WORK PLACE INJURY, THE REPORT IS IN GOOD FAITH IF PLAINTIFF ACTUALLY BELIEVED AT THE TIME OF THE REPORT THAT THE INJURY WAS WORK RELATED

In *Davis v. Union Pacific Railroad Co.*, No. 12-cv-2738 (W.D. La. July 14, 2014) (2014 WL 3499228) (case below 2011-FRS-33), the Defendant filed a motion for summary judgment arguing that the Plaintiff's reporting of a work place injury was not protected activity under the FRSA because it was allegedly not made in good faith. Reviewing the caselaw, the court held that "when a plaintiff brings a claim under the FRSA alleging he was retaliated against for reporting a work-related injury, both *Griebel [v. Union Pacific Railroad Co., No. 2011-FRS-11 (ALJ Jan. 31, 2013)]* and *Ray [v. Union Pacific Railroad Co., 971 F.Supp.2d 869 (S.D. Iowa 2013)]*, require that the plaintiff actually believed, *at the time he reported the injury*, that it was work related. If the plaintiff did so believe, then his activities were in good faith and were protected under the FRSA." Slip op. at 15-16 (emphasis added).

The injury had purportedly occurred on July 15, but the injury report was not filed until August 12. The Defendant alleged that during the interim, the Plaintiff consistently stated that the injury was not work related. The court, however, determined that a genuine issue of material fact existed because the Plaintiff alleged that he was initially diagnosed with gout, a non-work related injury, and that upon being diagnosed with a high ankle sprain, he filed the injury report the next day.

DOL Administrative Review Board Decisions

PROTECTED ACTIVITY; GOOD FAITH; GOOD FAITH OF BELIEF EVALUATED BASED ON FACTS AS KNOWN TO THE COMPLAINANT

Hunter v. CSX Transportation, Inc., ARB Nos. 2018-0044, and -0045, ALJ No. 2017-FRS-00007 (ARB Apr. 25, 2019) (per curiam) (Final Decision and Order): FRSA case in which the

ALJ found that Complainant had engaged in protected activity but not that the protected activity was a contributing factor in the decision to terminate him. The ALJ also found that the Respondent had established by clear and convincing evidence that it would have taken the same action absent the protected activity. Complainant appealed both causal findings. Respondent appealed the finding that Complainant engaged in protected activity.

Complainant reported that a wheel slip alarm was sounding. Respondent argued that this wasn't an actual hazardous safety condition and so couldn't be a report of such, or a good faith report of such. The ARB summarily rejected this, stating that they were the same arguments fully considered and properly rejected by the ALJ. Complainant's arguments turned on claims that certain testimony was credible, certain evidence was significant, and Respondent's explanations were "bunk." But ALJs receive deference in their credibility assessments unless they are inherently incredible or patently unreasonable. They were not in this case, so they received deference and the findings were affirmed. The ARB thus affirmed the ALJ's decision in full and "adopt it as our own and attach it."

ALJ Decision

Complaint had been terminated and the parties stipulated that was an adverse action. The case was about two accounts of the termination—Complainant said it was due, in part, to his report of the wheel slip alarm. Respondent said that happened all the time and wasn't a hazardous condition. It said Claimant was fired for leaving work without the permission of a supervisor and that the decision makers didn't even know about the alleged protected activity. Complainant asserted that other employees who left without permission weren't fired.

As to the protected activity, Respondent argued that Complainant hadn't sufficiently reported the safety concern connected to the alarm, but the ALJ found that the alarm necessarily implicated a safety concern, crediting the testimony of Complainant and a co-worker. Moreover, when he made the report he was not aware that the engine in question would not be under power, which would have removed the safety concern. The same followed for the good faith belief. The ALJ rejected the claim that Complainant had reported a "mechanical" not "safety" issue because mechanical issues can be safety issues.

GOOD FAITH REPORTING; SUBJECTIVE AND OBJECTIVE STANDARDS

In [*D'Hooge v. BNSF Railways*](#), ARB Nos. 15-042, -066, ALJ No. 2014-FRS-2 (ARB Apr. 25, 2017), the Complainant was long-term engineer for BNSF, and had a desirable route because of its pay schedule, regular hours, and infrequent weekend work. The Complainant developed neck and back pain, and complained several times of "rough riding" locomotives and rough track conditions. The Respondent's Yardmaster had become frustrated with performance of the crew the Complainant worked with, and warned several times that the route would be abolished (i.e., the route would be filed from a general board or pool) if performance did not improve. On April 5, 2012, the Complainant reported (or "bad-ordered") all three cars in a consist (a train of joined cars) as too rough. Bad-ordering required the cars to be sent for inspection. The Trainmaster jumped to the conclusion that the crew had bad-ordered the cars in bad faith because the crew

did not want to finish their work and because it was highly unusual to report an entire consist. The Trainmaster took into consideration previous instances with the crew not finishing their work late in the shift which the Trainmaster thought should have been completed. Later that evening, after discussing the matter with the Superintendent of Operations, the Trainmaster abolished the route and decided to fill the work from a rotating off-the-board crew. The Trainmaster later testified before the ALJ that the failure to complete the work and his perception that the bad-ordering had been in bad faith were the straw that broke the camel's back. The Trainmaster acknowledged that he had not followed company procedure when suspecting a fraudulent report, stating he thought abolishing the route would address the performance problem without potential disciplinary action. The Complainant filed an FRSA complaint alleging that the favorable route had been abolished because he had bad-ordered three locomotives. Following a hearing, the ALJ found that FRSA protected activity contributed to the Trainmaster's decision and that he would not have abolished the route at that time if the Complainant had not reported the locomotives. The ALJ awarded \$906 in back pay and \$25,000 in punitive damages. The Respondent appealed the ALJ's finding of a violation of the FRSA and the decision to award punitive damages. The Complainant appealed the ALJ's attorney fee award, the ALJ having denied some expenses and reduced the award for only partial success. The ARB consolidated the appeals and affirmed the ALJ's decision.

Good faith reporting as protected activity

On appeal, the Respondent did not challenge whether the Complainant's reports of an injured neck or rough riding locomotives were protected activity under FRSA, but rather only whether the reports of rough riding had been made in good faith. The ALJ had found that the FRSA requires only that a complainant subjectively believe his or her reporting and does not require that a complainant prove that his safety complaint was objectively held in good faith. The Respondent argued on appeal that the FRSA requires that a complainant prove both a subjective and objective component. The ARB held that substantial evidence supported the ALJ's finding that the Complainant's actions were protected under either the subjective or objective standard of good faith.

PROTECTED ACTIVITY; FILING OF EARLIER COMPLAINT IN GOOD FAITH

In [*Coates v. Grand Trunk Western Railroad Co.*](#), ARB No. 14-019, ALJ No. 2013-FRS-3 (ARB July 17, 2015), the Respondent argued on appeal that the ALJ erred in finding that the Complainant engaged in protected activity when he had filed a prior FRSA complaint. The Respondent contended that the earlier complaint had not been filed in good faith. The ARB found, however, that substantial evidence supported the ALJ's finding that the earlier complaint had been filed in good faith and was protected activity. The ARB noted that it was undisputed that the Complainant left work to go to hospital with racing heart and was not permitted to return to work for about a month, and had consulted with union representative before filing a complaint. The ARB stated that this evidence, among other evidence provided sufficient substantial evidence to support the ALJ's conclusion that the Complainant's earlier complaint alleging that the Respondent retaliated against him for reporting a work-related injury was filed in good faith, even if the Complainant's allegations later proved to be incorrect.

PROTECTED ACTIVITY; WORKPLACE VIOLENCE AS A SAFETY ISSUE

PROTECTED ACTIVITY; COMPLAINANT'S REASONABLE BELIEF UNDER § 20109(a)(1) THAT HE WAS REPORTING VIOLATION OF A FEDERAL REGULATION WHERE HE HAD BEEN TAUGHT THAT TO FOLLOW FEDERAL REGULATIONS HE MUST FOLLOW THE RESPONDENT'S WORKPLACE REGULATIONS

PROTECTED ACTIVITY; COMPLAINANT'S GOOD FAITH REPORTING UNDER § 20109 (b)(1)(A) OF A HAZARDOUS CONDITION BASED ON DISCORDANT AND POTENTIALLY VIOLENT SITUATION BETWEEN ENGINEER AND CONDUCTOR

In *Leiva v. Union Pacific Railroad Co., Inc.*, ARB Nos. 14-016, -017, ALJ No. 2013-FRS-19 (ARB May 29, 2015), the Complainant, who was the train's engineer, became involved in an altercation with the train's conductor. The Complainant, fearing for his safety, made a series of phone calls. A manager asked him to work it out with the conductor, and stated that if they returned to the facility they would both be placed out of service. The Complainant felt that he could not work it out and insisted on being returned to the facility to file a report. Upon arriving at the facility both the Complainant and the conductor filed reports. They were both pulled out of service without pay and charged with workplace violence. The manager admitted that if both men had simply returned to work the Complainant would not have been pulled out of service. The manager considered the information that the Complainant provided about the conductor's conduct to be a safety issue. The Respondent scheduled a hearing. Later, the Respondent proposed that the two men sign a hearing waiver agreeing to (1) termination of employment followed by immediate reinstatement as a probationary employee, (2) no pay for time lost, (3) dismissal of the Complainant's claims, (4) refrain from similar conduct in the future or be subject to disciplinary action, and (5) attend safety intervention and workplace violence training. The Complainant signed the waiver because he needed to recover the lost pay. The Complainant was later informed that the waiver and his participation in workplace violence would be part of his personnel record. The Complainant attempted to clear his name, but obtaining no assistance from Respondent's managers, filed an FRSA complaint.

The ARB affirmed the ALJ's findings that the Complainant proved that he engaged in protected activity under 49 U.S.C. § 20109(a)(1) and § (b)(1)(A). The ARB wrote:

Substantial evidence supports the ALJ's conclusion that Leiva [the Complainant] proved his case by a preponderance of the evidence. First, Leiva proved by a preponderance of the evidence that he engaged in protected activity under 49 U.S.C.A. § 20109(a)(1), which states that an employee is protected when he or she provides information in good faith regarding any conduct that the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security. Union Pacific argues that Leiva never presented any evidence that he reasonably believed that he was reporting a violation of federal law. However, Jenkins testified that he taught engineers, of which Leiva was one, about safety, and taught them specifically that if they

complied with Union Pacific's rules then they would be in compliance with the federal regulations because Union Pacific's rules were more stringent than the regulations. Further, and consistent with this testimony, Leiva testified that Union Pacific taught him that to comply with federal regulations, he had to follow Union Pacific rules. He believed that several Union Pacific rules of conduct were violated and implicated safety. Substantial evidence supports the ALJ's finding that Leiva reasonably believed that he was reporting a violation of a federal regulation as provided in section (a)(1). Union Pacific also argues that Leiva testified that he was not aware of any federal laws or regulations when he reported the fight to his supervisors. This argument fails because the statute does not require that an employee know the specific rules that he reasonably believes are being violated when he makes his report—the statute only requires that an employee have a reasonable belief in a violation of a Federal law, rule, or regulation related to railroad safety or security. Leiva proved that he had such a reasonable belief by a preponderance of the evidence. Leiva also proved that he engaged in protected activity by a preponderance of the evidence under 49 U.S.C.A. § (b)(1)(A), which states that an employee is protected if he reports a hazardous safety or security condition in good faith. Union Pacific argues that Leiva presented no evidence that his report had anything to do with a "hazardous" condition. However, several witnesses including Leiva, Lorange [the manager of operations at the facility from which the train originated], and Jenkins [the manager of operations (safety director) at another facility], testified that Leiva felt threatened by Mr. F. [the conductor] during and after the altercation. Further, Leiva testified that communication between an engineer and a conductor is essential to the safe operation of a train. More importantly, Leiva did not feel that he could adequately communicate with Mr. F. for the safe operation of the train. Thus, the discordant and potentially violent situation between the engineer and the conductor of the train itself had the tendency to create a hazardous safety or security condition. Bolstering this conclusion, Lorange testified that he considered Mr. F.'s conduct to be a safety issue. Finally, Jenkins testified that he had no reason to doubt Leiva's good faith in reporting the incident. Thus, there is substantial evidence in the record to support that Leiva reasonably believed that he was reporting in good faith a hazardous safety or security condition in violation of section (b)(1)(A).

USDOL/OALJ Reporter at 6-7 (footnotes omitted).

- 20109(c)(2): Requesting Treatment or Following Treatment Plan

Statute

49 U.S.C. § 20109

(c) Prompt medical attention.

...

(2) Discipline. A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

Regulations

[The regulations at 29 C.F.R. § 1982.102(b) follow the language of the statute in defining protected activities.]

U.S. Circuit Court of Appeals Decisions

PROTECTED ACTIVITY; PROVISION OF FRSA PROHIBITING RETALIATION FOR FOLLOWING PHYSICIAN'S TREATMENT PLAN DOES NOT APPLY TO OFF-DUTY INJURIES AND ILLNESSES

In *Grand Trunk Western Ry. Co. v. Admin. Review Bd., USDOL*, 875 F.3d 821, No. 17-3083 (6th Cir. Nov. 20, 2017) (2017 U.S. App. LEXIS 23279; 2017 WL 5560154; 2017 FED App. 0262P) (case below ARB Nos. 14-092 and 15-008; ALJ No. 2013-FRS-33), the Sixth Circuit held that the provision of the FRSA prohibiting retaliation against an employee for following a physician's treatment plan, 49 U.S.C. § 20109(c)(2), does not apply to off-duty injuries and illnesses.

The complainant was disciplined for following his physician's treatment plan for several off-duty illnesses. The complainant suffered from anxiety and depression, both of which pre-dated his employment with the respondent. His physician instructed him, as part of a treatment plan, not to

work if he felt unsafe during an episode of anxiety. Slip op. at 2. The complainant subsequently missed eight days of work due to anxiety, six of which the respondent marked as unexcused absences. *Id.* 2-3. The complainant was ultimately terminated for excessive absenteeism. *Id.* at 3.

The ALJ, relying on the ARB's holding in *Bala v. Port Authority Trans-Hudson Corp.*, ARB No. 12-048, ALJ No. 2010-FRS-26 (ARB Sept. 27, 2013), found that subsection (c)(2) applies to both on-duty and off-duty injuries, found for the complainant. The ALJ found that the complainant's absences were protected as pursuant to a treatment plan for an off-duty injury and further found that the complainant was terminated in retaliation. *Williams v. Grand Trunk Western Railroad Co.*, 2013-FRS-33 (ALJ Aug. 11, 2014). The ARB affirmed the ALJ's decision. *Williams v. Grand Trunk Western Railroad Co.*, ARB Nos. 14-092, 15-008 (ARB Dec. 5, 2016). [Editor's note: The Third Circuit ultimately found in the *Bala* case that subsection (c)(2) does not apply to off-duty injuries. *Port Authority Trans-Hudson Corp. v. Sec'y, USDOL*, 776 F.3d 157 (3d. Cir. 2015).]

On appeal in the instant case, the Sixth Circuit determined that subsection (c)(2) applies only to on-duty injuries. The court did not find the lack of language limiting (c)(2) to on-duty injuries as dispositive. Instead, the court reasoned that subsection (c)(2) is properly read in conjunction with subsection (c)(1), which prohibits an employer from denying or delaying treatment to an employee "who is injured during the course of employment." *Id.* at 5-7. The court emphasized that the subsections "are structurally and logically married, joined under a title—'Prompt medical attention'—that limits both of its subsections together to injuries sustained 'during the course of employment.'" *Id.* at 8.

After holding that subsection (c)(2) applies only to on-duty injuries, the court bolstered its position by addressing three issues. First, the court highlighted the language in subsection(c)(2) prohibiting retaliation "for requesting medical or first aid treatment or for following orders or a treatment plan of a treating physician." The court reasoned that "[i]f an employee who is *not* injured during the course of employment, § 20109(c)(1), would not request medical or first aid treatment, § 20109(c)(2), at work, then the Board must assert the text bears a different scope for the connecting clause—'or for following orders or a treatment plan of a treating physician.'" *Id.* at 9-10 (internal quotations omitted) (emphasis as in original). Second, the court discussed the legislative history of the 2008 amendments to the FRSA and concluded that "nothing suggests that *anyone* at the time—including the Unions themselves—contemplated that the simple clause in § 20109(c) would encompass non-work-related illnesses or injuries." *Id.* at 10-12 (footnote omitted) (emphasis as in original). Finally, the court swiftly rejected the notion that either *Chevron* or *Skidmore* deference apply under the circumstances "because traditional tools resolve any 'apparent statutory ambiguity'" in the respondent's favor. *Id.* at 13.

Thus, the Sixth Circuit has joined the Third Circuit in holding that § 20109(c)(2) does not apply to off-duty injuries and illnesses. *Bala v. Port Authority Trans-Hudson Corp.*, *supra*. Additionally, the following district court decisions have agreed that § 20109(c)(2) does not apply to off-duty injuries: *Miller v. BNSF Ry. Co.*, No. 14-2596, 2016 U.S. Dist. LEXIS 64869 (D. Kan. May 17, 2016) (in the Tenth Circuit); and *Goad v. BNSF Ry. Co.*, No. 15-650, 2016 U.S. Dist. LEXIS 178444 (W.D. Mo. Mar. 2, 2016) (in the Eighth Circuit).

THIRD CIRCUIT RULES THAT PROTECTED ACTIVITY UNDER SECTION 20109(c)(2) DOES NOT APPLY TO OFF-DUTY INJURIES

In *Port Authority Trans-Hudson Corp. v. Secy of Labor*, 776 F.3d 157, No. 13-4547 (3rd. Cir Jan. 15, 2015) (2015 WL 178459; 2015 U.S. App. LEXIS 676) ("Bala") (case below ARB No. 12-048, ALJ No. 2010-FRS-26), the U.S. Court of Appeals for the Third Circuit overturned the ARB's decision and held, as a matter of statutory interpretation, that 49 U.S.C. § 20109(c)(2) involving the prohibition against discipline for following the orders or a treatment plan of a treating physician does not apply to off-duty injuries. The Court agreed with the railroad that "during the course of employment" limitation of (c) (1) applies to subsection (c)(2).

Complainant had a long history of absenteeism with excessive sick and personal days beyond what Respondent's policy allowed. He was warned that if his attendance did not improve, he could be disciplined. In June 2008, Complainant had back pain while moving boxes at his home and his doctor took him off of work. Respondent noticed a hearing and gave Complainant a six day suspension for his excessive absences, which included those due to his off-duty back injury. Complainant filed a complaint with DOL.

An ALJ found for Complainant and the ARB affirmed. Sub-section (c)(1) refers to on-duty injuries, but sub-section (c)(2) lacks this qualifier. That led the ALJ and ARB to find coverage in this case, though the ARB had previously referred to (c)(2) as covering work injuries. Respondent appealed to the Third Circuit, which reversed.

The Third Circuit of this provision, with the addition of the (c) sub-section as part of the 2008 amendments. Those amendments inserted a worker protection provision, (c)(1), and a new anti-retaliation provision, (c)(2). Respondent argued that the reference to "treatment" in the second sub-section referred back to the first, incorporating a limit to work-related injuries. The DOL argued that they were independent provisions. The Third Circuit observed that DOL's reading would confer railroad employees indefinite sick-leave. DOL also argued that railroad safety would be protected by a broad provision protecting any treatment plan, i.e. keeping injured employees off work or accommodated. The Third Circuit countenanced this policy objective, but saw no sign that Congress considered this purpose. The Third Circuit rather understood (c)(2) as an anti-retaliation provision protecting the substantive interest in (c)(1).

The ARB had relied on *Russello v. United States*, 464 U.S. 16, 23 (1983) and the canon of interpretation that when language is included in one section but not another, it is generally concluded that Congress acted purposely. The Third Circuit disagreed that *Russello* led to the ARB's reading of these sub-sections. The key issue was whether the two sub-sections could be read apart from each other. If so, the ARB's reading followed, but if not the opposite reading followed and *Russello* did not suggest otherwise.

The Third Circuit concluded that the sub-sections had to be understood together and as advancing a single purpose. Indeed, the FRSA as a whole served a single purpose, promoting rail-road safety, and it was appropriate to read its provisions to relate what occurred at work. Sub-section (c)(2) also contained language that could only refer to work-related events, such as requesting first-aid. The Third Circuit observed that it would be a substantial policy undertaking to provide unlimited sick leave to all workers from a whole industry and thought it very unlikely

that Congress did so implicitly in this provision. Though it was not necessary to look to legislative history, it too supported a more limited reading since nowhere was the broad policy advocated by DOL discussed or considered. Lastly, the Third Circuit concluded that the ARB was not subject to any *Chevron* deference because using the traditional tools of statutory construction the question had been answered.

U.S. District Court Decisions

PROTECTED ACTIVITY; OFF-DUTY PERSONAL ILLNESS IS NOT PROTECTED ACTIVITY UNDER THE FRSA

In ***Murdock v. CSX Transportation, Inc.***, No. 15-cv-1242 (N.D. Ohio May 2, 2018) (2018 U.S. Dist. LEXIS 74341; 2018 WL 2045668), the Plaintiff requested reconsideration of its ruling that the Plaintiff's off-duty personal illness fell outside the scope of the anti-retaliation provisions to the Federal Railway Safety Act under 42 U.S.C. § 20109(c). *See Murdock v. CSX Transp., Inc.*, No. 15-cv-01242 (N.D. Ohio Mar. 29, 2017) (2017 U.S. Dist. LEXIS 46835; 2017 WL 1165995). The court denied the motion for reconsideration. It first noted that it had conducted a statutory analysis and had found persuasive the reasoning of the Third Circuit's decision in *Port Auth. Trans-Hudson Corp. v. Sec'y, U.S. Dep't of Labor*, 776 F.3d 157 (3rd Cir. 2015). Moreover, the district court found that the Sixth Circuit had issued a decision on this precise issue:

In *Grand Trunk Western Railroad Co. v. United States Dep't of Labor*, 875 F.3d 821 (6th Cir. Nov, 20, 2017), *cert. denied sub nom., Williams v. Grand Trunk Western R. Co.*, __ S.Ct. __, 2018 WL 1023094 (April 30, 2018), the Sixth Circuit considered whether an employee's unexcused absences, subject to his doctor's treatment plan but for a non-work related illness, constituted a protected activity under § 20109(c). The Court first conducted a statutory analysis and then considered the statute's legislative history. As a final matter, the Circuit also rejected the *Chevron* deference position advanced by the Board. In finding in favor of the petitioner railroad, the court noted, "we join every other federal court that has interpreted 49 U.S.C. § 20109(c) and reject the Board's reliance on *Russello*." *Id.* at 831.

As the Sixth Circuit has made a clear determination on this issue and that position is consistent with my earlier finding, the Plaintiff's motion for reconsideration is denied.

PROTECTED ACTIVITY; § 20109(C)(2) COMPLIANCE WITH TREATMENT PLAN; WHERE INJURY MANIFESTS AT WORK COMPLIANCE WITH A TREATMENT

PLAN IS COVERED BY § 20109(C)(2) REGARDLESS OF WHETHER WORK CONDITIONS ULTIMATELY CAUSED THE INJURY; DISTRICT COURT ALSO REJECTS CLAIM THE TREATMENT PLANS MUST INCLUDE FORMAL ORDERS AND BE SIGNED BY A DOCTOR

Williams v. Illinois Central Railroad Co., No. 16-cv-838 (S.D. Miss. Feb. 5, 2018) (2018 U.S. Dist. LEXIS 18106; 2018 WL 716568) (Order [denying Defendant's motion for summary judgment]):

The Plaintiff had a history of attendance violations. While at work he experienced symptoms of a heart attack. He was taken to the hospital. His symptoms were attributed to stress/anxiety and he was discharged with a note keeping him off of work for a few days, though it was not signed. He then told the Defendant railroad that he would not be working. The Defendant determined that it was an additional unexcused absence and under the terms of its policy terminated Plaintiff, though the public law board later converted this into a suspension without pay. He filed suit under the FRSA claiming he was retaliated against for reporting a work-related injury, protected by § 20109(a)(4), and following a treatment plan, protected by § 20109(c)(2). Defendant sought summary decision.

The district court rejected Defendant's assertion that in order to come within the scope of § 20109(c)(2) the treatment plan in question must be for an injury caused by work conditions. Assuming that *Port Authority Trans-Hudson Corp. v. Secretary, U.S. Dept. of Labor*, 776 F.3d 157 (3d 2015) applied, the district court held that § 20109(c)(2) applied to an injury that manifest at work, even if it was not caused by work conditions. The district court also rejected arguments that a treatment plan must formally order a particular action for compliance to be protected and that it must be formally signed by a doctor. Additional arguments about the causal role of compliance with a treatment plan were left to a jury.

49 U.S.C. § 20109(C)(2) SAFE HARBOR PROVISION; SUMMARY JUDGMENT; DISTRICT COURT FINDS THAT WHERE WORK RESTRICTIONS IMPOSED IN ACCORDANCE WITH THE RELEVANT GUIDELINES WERE IMPOSED AFTER A REPORT OF A WORK RELATED INJURY AND HAZARDOUS SAFETY CONDITION, § 20109(c)(2) SAFE HARBOR PROVISION APPLIES AND SHIELDS RAILROAD FROM FRSA LIABILITY

Stapleton v. Union Pacific Railroad Co., No. 16-cv-889 (N.D. Ill. Feb. 1, 2018) (2018 U.S. Dist. LEXIS 16031; 2018 WL 656083) (Memorandum Opinion and Order):

The Plaintiff was injured in a locomotive accident. He filed an injury report and report of the hazardous safety condition. He was off work for a time, but then released. A railroad doctor reviewed his medical records as part of the return to work and found that as to the injury he was cleared for work, but that he had a history of seizures. Under railroad policy, this triggered a fitness for duty evaluation. Eventually the Plaintiff was given work-restrictions by the railroad related to his epilepsy. He filed suit under FELA for the injury and the FRSA for restriction his work because of his protected activities. The railroad sought summary judgment on the FRSA claim.

The district court granted the railroad summary judgment on the grounds that its actions were covered by the “safe harbor” provision in § 20109(c)(2), which provides: “except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty.” The Plaintiff had produced no evidence suggesting that the work restrictions the railroad imposed were not in accord with the relevant standards. Hence, the district court held that “the undisputed record demonstrates that Union Pacific’s actions fall under the plain language of the FRSA’s safe harbor provision.”

ADVERSE ACTION; DISTRICT COURT FINDS THAT RESPONDENT DID NOT VIOLATE FRSA, 49 U.S.C. § 20109(h) BY REQUIRING DOCUMENTATION TO VERIFY MEDICAL ABSENCES UNDER § 20109(c)(2); COURT TAKES INTO ACCOUNT LACK OF INTENTIONAL RETALIATORY ANIMUS

In *Lockhart v. Long Island Railroad Co.*, No. 16-cv-1035 (S.D.N.Y. Aug. 2, 2017) (2017 U.S. Dist. LEXIS 122631; 2017 WL 3327603) (case below 2015-FRS-00055), the United States District Court for the Southern District of New York granted summary judgment for the Long Island Railroad Company (“Respondent”), dismissing Henry Lockhart’s (“Complainant”) claims of retaliation under the FRSA. *Lockhart*, slip. op. at 1. Complainant claimed that Respondent violated FRSA, 49 U.S.C., § 20109(c)(2) by disciplining him for absences due to his use of Oxycodone prescribed for a shoulder injury sustained on duty. *Id.* at 8-10. The court found that, although Complainant’s initial injury would fall under subsection (c)(2), he “present[ed] no evidence of intentional retaliatory animus” by Respondent. *Id.* at 8. The court emphasized that Complainant conceded that he failed to submit required documentation regarding his absences and that he would not have been disciplined had he done so. *Id.* at 8-9. The court rejected Complainant’s assertion that requiring documentation to verify medical absences violates § 20109(h), which states that the “rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.” *Id.* at 9.

PROTECTED ACTIVITY; DISTRICT COURT FINDS THAT A CHIROPRACTOR IS NOT A “TREATING PHYSICIAN” UNDER THE FRSA’S PROTECTION FOR FOLLOWING THE TREATMENT PLAN OF A TREATING PHYSICIAN

In *Bjornson v. Soo Line Railroad Co.*, 237 F. Supp. 3d 889 (D. Minn. Feb. 21, 2017), the U.S. District Court for the District of Minnesota granted partial summary judgment for the Defendant under the FRSA after finding that the Plaintiff had not engaged in protected activity. *Bjornson*, 237 F. Supp. 3d at 890. The Plaintiff contended that he engaged in protected activity by seeing a chiropractor for an injury. *Id.* at 892. The Plaintiff was also being treated by a physician’s assistant, who had not referred him to a chiropractor. *Id.* at 891. The court found that the Plaintiff had not engaged in protected activity because a chiropractor is not a “treating physician” under the FRSA’s protection for following the treatment plan of a treating physician. *Id.* at 894. The

court noted that a referral to a chiropractor by a medical doctor as part of a treatment plan might be protected activity. *Id.*

PROTECTED ACTIVITY UNDER THE FRSA; § 20109(c) ONLY APPLIES TO CASES INVOLVING WORK-RELATED INJURIES OR ILLNESSES

In *Miller v. BNSF Ry.*, No. 14-cv-2596 (D. Kan. May 17, 2016) (2016 U.S. Dist. LEXIS 64869; 2016 WL 2866152), the Plaintiff sought protection under the FRSA, 49 U.S.C. § 20109(c). The Defendant contended that the Plaintiff was not “engaged in protected activity” because § 20109(c) only applies to cases involving work-related injuries or illnesses. The court agreed, adopting the reasoning of the Third Circuit in *Port Authority Trans-Hudson Corp. v. Secretary of Labor* (“*PATH*”), 776 F.3d 157 (3d Cir. 2015), and holding that 49 U.S.C. § 20109(c)(2) is limited to addressing on-duty injuries. In the instant case, the Plaintiff “took medication as part of her doctor’s plan for treatment of her bipolar disorder and ADHD, and her sleep disorder was the consequence of following her doctor’s orders. Plaintiff [did] not assert, however, that her bipolar disorder, ADHD, and medication-induced sleep disorder were in any way work-related impairments. Thus, Plaintiff did not engage in protected activity under the FRSA, and BNSF is granted summary judgment on this claim.” Slip op. at 30 (footnotes omitted). The court rejected the Plaintiff’s request to give *Chevron* deference to the ARB decision in *Bala v. Port Authority Trans-Hudson Corp.*, ARB No. 12-048, ALJ Case No. 2010-FRS-26 (ARB Sept. 27, 2013), where the ARB determined the phrase “protected activity” in subsection (c)(2) also referred to non-work-related activity. The court noted that the *PATH* court rejected *Chevron* deference, and concluded that the ARB had misinterpreted the statute. The district court stated: “Accordingly, *Bala* is a nonprecedential, reversed agency decision and is thus not entitled to *Chevron* deference.” Slip op. at 30 (footnote omitted).

DOL Administrative Review Board Decisions

APPLICATION OF 20109(C)(2) TO OFF DUTY INJURIES

In *Williams v. Grand Trunk Western R.R. Co.*, ARB Nos. 14-092, 15-008, ALJ No. 2013-FRS-33 (ARB Dec. 8, 2017), the ARB vacated its December 5, 2016 Final Decision and Order, and dismissed the case, consistent with the Sixth Circuit’s holding in *Grand Trunk Western R.R. Co. v. U.S. Dep’t of Labor*, 875 F.3d 821 (6th Cir. 2017), that 49 U.S.C. § 20109(c)(2) does not protect employees who sustain off-duty injuries. The ARB had held in its 2016 decision that Section 20109(c)(2) protected the Complainant from retaliation for following a treatment plan for non-work-related conditions.

ARB DECLINES TO ACQUIESCE IN THIRD CIRCUIT’S FINDING IN *BALA v. PATH* THAT FRSA SECTION 20109(c)(2) APPLIES ONLY TO TREATMENT PLANS FOR ON-DUTY INJURIES

In [*Williams v. Grand Trunk Western Railroad Co.*](#), ARB Nos. 14-092, 15-008, ALJ No. 2013-FRS-33 (ARB Dec. 5, 2016) (as corrected by erratum), the Complainant had from birth suffered from anxiety, migraine headaches, and depression. The Complainant, a locomotive engineer since 1995, sought treatment for these conditions since 2005, and had been prescribed medication. In 2011, after the Complainant had called in sick or took FMLA leave a number of times, the Respondent investigated, and—despite documentation from the treating physician showing that the Complainant had been absent due to the physician’s treatment plan for the ongoing conditions and that the condition interfered with the Complainant’s job duties—fired the Complainant for failing to work on a regular basis. The Complainant filed an FRSA complaint, and the ALJ found in favor of the Complainant, applying the ARB’s decision in [*Bala v. Port Authority Trans-Hudson Corp.*](#), ARB No. 12-048, ALJ No. 2010-FRS-26 (ARB Sept. 27, 2013).

On appeal, the ARB acknowledged that the Third Circuit had reversed and remanded the its decision in [*Bala v. Port Authority Trans-Hudson Corp. v. Sec’y, U.S. Dep’t of Labor*](#), 776 F.3d 157, 160 (3d Cir. 2015). The Third Circuit held that Section 20109(c)(2) applies only to treatment plans for on-duty injuries. The Third Circuit had found that “subsection (c)(1) is a ‘substantive provision’ while subsection (c)(2) is an ‘anti-retaliation provision.’ ” *Williams, supra*, slip op. at 4. The ARB in *Williams*, however, disagreed with the Third Circuit’s interpretation of the statute. The ARB noted that in *Bala* it had found that “the structure of section 20109(c) in effect provides protection with two substantive provisions, the first for seeking medical treatment and the second for efforts to comply with the treatment plan. While Congress specifically limited the first provision to seeking medical treatment for work-related injuries, it did not do so for the second provision providing protection to employees for following a treatment plan.” *Id.* The ARB thus declined to acquiesce in the Third Circuit’s decision in *Bala* outside the Third Circuit, and affirmed the ALJ’s decision.

WHAT CONSTITUTES A PHYSICIAN’S TREATMENT PLAN UNDER THE FRSA; ADVICE TO TAKE MEDICATION AND STOP WORKING WHEN EXPERIENCING SYMPTOMS, AND STATEMENT OF THESE INSTRUCTIONS IN FMLA LEAVE FORM FOUND SUFFICIENT

In [*Williams v. Grand Trunk Western Railroad Co.*](#), ARB Nos. 14-092, 15-008, ALJ No. 2013-FRS-33 (ARB Dec. 5, 2016) (as corrected by erratum), the Complainant had from birth suffered from anxiety, migraine headaches, and depression. The Complainant, a locomotive engineer since 1995, sought treatment for these conditions since 2005, and had been prescribed medication. In 2011, after the Complainant had called in sick or took FMLA leave a number of times, the Respondent investigated, and—despite documentation from the treating physician showing that the Complainant had been absent due to the physician’s treatment plan for the ongoing conditions and that the condition interfered with the Complainant’s job duties—fired the Complainant for failing to work on a regular basis. The Complainant filed an FRSA complaint,

and the ALJ found in favor of the Complainant, applying the Board's decision in *Bala v. Port Authority Trans-Hudson Corp.*, ARB No. 12-048, ALJ No. 2010-FRS-26 (ARB Sept. 27, 2013). Although the ARB's decision in *Bala* had been reversed by the Third Circuit in *Bala v. Port Authority Trans-Hudson Corp. v. Sec'y, U.S. Dep't of Labor*, 776 F.3d 157, 160 (3d Cir. 2015), the ARB declined to acquiesce in that decision outside the Third Circuit.

On appeal, the Respondent contended that the Complainant was not under a treatment plan because the physician's treatment instructions were just general advice. The ARB rejected this contention, noting that it had "held in *Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-011 (ARB July 25, 2012), that the term 'treatment plan' is generally defined as the management and care of a patient to combat disease or injury and is 'commonly used to include not only medical visits and medical treatment, but also physical therapy and daily medication, among other things.' " (footnote omitted). The ARB found that here, the physician had advised the Complainant that "when he experienced symptoms from his anxiety, depression, and migraines that he should treat the symptoms, take the prescription medication Xanax, and not work." *Williams, supra*, slip op. at 5. The ARB stated that "[t]he fact that Dr. Bernick's instructions were outlined on a FMLA leave form does not negate their identification as a treatment plan, but rather acts as evidence that Grand Trunk had notice of the plan because Dr. Bernick's recertification of the need for medical treatment of Williams's conditions did not substantially change through the repeated applications for FLMA." *Id.*

PROTECTED ACTIVITY; FOLLOWING A PHYSICIAN'S TREATMENT PLAN IS NOT PROTECTED ACTIVITY UNDER § 20109(a) AND (b)

In *Rudolph v. National Railroad Passenger Corp. (AMTRAK)*, ARB Nos. 14-053, -056, ALJ No. 2009-FRS-15 (ARB Apr. 5, 2016), the ARB affirmed the ALJ's decision and order on remand finding that the Respondent violated the employee protection provision of the Federal Railroad Safety Act, when it determined that the Complainant was medically disqualified from working as a conductor. The ALJ found that the Complainant engaged in protected activity when he requested a return to work and that his request was a contributing factor in the Respondent's medical director's actions referring the Complainant for a psychiatric examination and medically disqualifying him. The ARB held that the ALJ erred in terming the Complainant's request to return to work a protected activity. The ARB stated in a footnote:

In requesting a return to work, Rudolph was following Dr. Sedlacek's treatment plan that included his opinion that Rudolph had recovered from his generalized anxiety disorder well enough mentally to work as a conductor. But following a physician's treatment plan is not one of the enumerated protected activities under § 20109(a) and (b). Subsection (c)(2) also defines specific forms of discipline but does not include a return-to-work request. However, Amtrak's refusal to allow Rudolph to return to work, despite the lack of fitness-for-duty standards, effectively terminated his employment.

USDOL/OALJ Reporter at 17-18. The ALJ's error, however, was harmless in the context of the fitness-for-duty issue to be decided on remand because the Respondent failed to put on evidence of an FRA or its own medical standards for fitness for duty.

ALJ PROPERLY CONCLUDED THAT EMPLOYER WAS NOT ENTITLED TO § 20109(c)(2) SAFE HARBOR EXEMPTION WHERE IT FAILED TO OFFER INTO EVIDENCE ANY MEDICAL OR FITNESS FOR DUTY STANDARDS

In [*Rudolph v. National Railroad Passenger Corp. \(AMTRAK\)*](#), ARB Nos. 14-053, -056, ALJ No. 2009-FRS-15 (ARB Apr. 5, 2016), the ARB affirmed the ALJ's decision and order on remand finding that the Respondent violated the employee protection provision of the Federal Railroad Safety Act, when it determined that the Complainant was medically disqualified from working as a conductor. On appeal, the Respondent argued that the ALJ improperly interpreted its fitness-for-duty defense under section 20109(c)(2) as a "special affirmative defense" and applied the wrong burden of proof. The ARB noted that after the ALJ's decision on remand in this case, it had decided the appeal in *Ledure v. BNSF Ry. Co.*, ARB No. 13-044, ALJ No. 2012-FRS-20 (ARB June 2, 2015):

In *Ledure v. BNSF Ry. Co.*, ... we detailed the legislative history of section 20109(c)(2) and held that subsection (c)(2) "carves out an exception" that permits an employer to refuse an employee's return-to-work request if the employee fails to meet FRA medical standards or the employer's standards for fitness for duty. The ARB added that subsection (c)(2) "literally exempts fitness-for-duty situations from coverage" by creating a "safe harbor," defined as "the provision in a law or agreement that will protect from any liability or penalty as long as set conditions have been met."^{49F50} The ARB concluded that the employer bears the burden of proving both elements of the subsection—establishing the relevant fitness-for-duty standards and demonstrating how the employee failed to meet them.

USDOL/OALJ Reporter at 17 (footnotes omitted). The Board found that while the ALJ erred in terming the Complainant's request to return to work a protected activity, the error was harmless because Amtrak failed to offer into evidence either the FRA or Amtrak's medical standards for fitness for duty. The ARB ruled that the ALJ therefore properly concluded that Amtrak was not entitled to the safe-harbor exemption that permits an employer to refuse an employee's return-to-work request if the employee fails to meet FRA medical standards or the employer's standards for fitness for duty.

SECTION 20109(c)(2) PROVIDES A SAFE HARBOR FOR REFUSALS TO PERMIT RETURN TO WORK IF BASED ON FEDERAL RAILROAD ADMINISTRATION OR CARRIER'S FITNESS FOR DUTY STANDARDS; HOWEVER, EMPLOYER MUST SHOW RELEVANT STANDARDS FOR FITNESS FOR DUTY AND HOW EMPLOYEE FAILED TO MEET THEM

In [*Ledure v. BNSF Railway Co.*](#), ARB No. 13-044, ALJ No. 2012-FRS-20 (ARB June 2, 2015), the ARB applied its en banc decision in *Powers v. Union Pac. R.R.*, ARB No. 13-034, ALJ No.

2010-FRS-30 (ARB Mar. 20, 2015)(en banc) (reissued with full dissent Apr. 21, 2015), decision, and found that an ALJ can consider any evidence relevant to the issue of causation, “including the employer's explanation for why it did what it did.” USDOL/OALJ Reporter at 9 (footnote omitted).

In *Ledure*, the Complainant injured his back while performing duties as a conductor, and began a medical leave of absence and medical treatment. The Complainant filed a claim against the Respondent under Federal Employer's Liability Act (FELA), which was denied by a jury. The Complainant then presented a full medical release to return to work from his treating physician. A field manager chose not to forward the release to the medical director, the field manager finding the release to be ambiguous and insufficient because it contained language advising the Complainant of the hazards and complications attendant to returning to unrestricted heavy industrial activity. The Complainant filed a FRSA retaliation complaint. The ALJ denied the complaint.

FRSA fitness for duty safe harbor; burden on respondent to show element met

The ARB also affirmed the ALJ's determination that non-retaliatory reasons were the reasons the Respondent refused to return the Complainant to work, and rejected the protected activity as a contributing factor.

The ARB noted: “In Section 20109(c)(2), the act expressly carves out an “exception” for some unfavorable employment actions and provides that the employer does not violate the Act when it refuses to permit an employee to return to work following medical treatment if the refusal occurs pursuant to Federal Railroad Administration (FRA), or the carrier's, medical standards for fitness of duty. 49 U.S.C.A. § 20109(c)(2). The provision literally exempts fitness for duty situations from coverage.” USDOL/OALJ Reporter at 6. The ARB concluded subsection (c)(2) created a 'safe harbor.’’ The ARB stated: “As the specific language of subsection (c)(2) provides that an employer's refusal to allow an employee to return to work will not be a violation of the Act if it is pursuant to the FRA or the carrier's standards for fitness for duty, for expediency's sake, the ALJ can first decide any claim based on subsection (c)(2) prior to any other analysis.” *Id.* at 7. The ARB determined that the employer bears the burden of persuasion that the elements of that subsection have been met. The ARB stated that “[t]hose elements include establishing the relevant standards for fitness for duty and how the employee has failed to meet them.” *Id.* (footnote omitted).

The ARB continued, stating: “Thus, where the employer has not established the requisite evidence to establish the safe harbor provided by subsection (c)(2), the ALJ must: (1) determine whether the complainant proved its claim of unlawful whistleblower retaliation on the record as a whole and (2) if so, determine whether the employer proved by clear and convincing evidence that it would have taken the same adverse action absent [the complainant's] protected activity.” *Id.* at 7-8.

THE PROTECTION AFFORDED BY FRSA SECTION 20109(c)(2) IS NOT LIMITED IN SCOPE TO ON-DUTY INJURIES; APPLICATION OF THE REGULATION DOES NOT

INTERFERE WITH EMPLOYER'S ABILITY TO DISCIPLINE EMPLOYEES FOR EXCESSIVE ABSENTEEISM

In *Bala v. Port Authority Trans-Hudson Corp.*, ARB No. 12-048, ALJ No. 2010-FRS-26 (ARB Sept. 27, 2013), the Complainant was suspended for three days due to his absence from work under doctor's orders due to the Complainant's re-injury of his back while lifting boxes at home. The Complainant had previously been ordered out of work following a back injury suffered when attempting to lift railroad equipment. The ALJ found that the Respondent violated the FRSA, 49 U.S.C. § 20109(c)(2). The ALJ wrote that Section 20109(c)(2) protects employees from being disciplined "for following orders or a treatment plan of a treating physician" that arise "out of on-duty and off-duty injuries." On appeal, the Respondent challenged the scope of coverage of Section 20109(c), arguing that the use of the term "course of employment" in Section 20109(c)(1) applies as a prerequisite for employees to be afforded protection from unlawful "discipline" under subsection (c)(2), even though the term is not set out in that subsection. The ARB rejected the Respondent's contention, applying the well-established principle that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." USDOL/OALJ Reporter at 6, quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotations and citation omitted). The ARB stated that "Had Congress intended to limit railroad employee protection from discipline for following doctor's orders only in circumstances stemming from injuries that occurred during the 'course of employment' or on-duty injuries, 'it presumably would have done so expressly as it did in the immediately [preceding] subsection [(c)(1)].'" USDOL/OALJ Reporter at 7, quoting *Russello*, 464 U.S. at 23. The ARB found further support for its interpretation in the legislative history to the FRSA -- specifically the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848, Sec. 419. The ARB rejected the Respondent's contentions that the provision's title "Prompt medical attention" limits the scope of the statute to on-duty injuries, and that limitations in similar state statutes on which Section 20109(c) was modeled should apply to the federal statute. The ARB also recited the legislative history's reflection of Congress's broad concern over safety in the railroad industry and protection of injured railroad workers.

The Respondent also argued that application of Subsection (c)(2) to injuries incurred while the worker is off-duty would interfere with a railroad company's ability to discipline employees for excessive absenteeism. The ARB responded that "nothing in Section 20109 precludes an employer from disciplining an employee for excessive absences. The only limitation set out in (c)(2) is that an employee cannot be disciplined because he/she is complying with the orders or treatment plan of a treating physician." USDOL/OALJ Reporter at 13-14 (citation omitted). The ARB also wrote in footnote:

For several reasons, PATH's argument that interpreting Section 20109(c)(2) to protect treatment for off-duty illness or injury will preclude a railroad from disciplining employees for excessive absences is also meritless. First, an employee may be disciplined when absences are not associated with a medical treatment plan. Second, an employee's claim to be following a physician's treatment plan must be in good faith to be protected under the statute. FRSA does not preclude an employer from ascertaining whether an absence is legitimate. *See*,

e.g., Johnson v. Roadway Express, ARB No. 99-111, ALJ No. 1999-STA-005, slip op. at 9 (ARB Mar. 29, 2000) ("Moreover, where a driver's claim of illness is not legitimate, a refusal to drive is not protected activity."). Finally, an employer may avoid liability if it can show by clear and convincing evidence that it would have taken the same action in the absence of protected activity.

USDOL/OALJ Reporter at 14 n.9.

The ARB affirmed the ALJ's decision, holding that that substantial evidence supported the ALJ's findings that the Complainant's reporting and adherence to his physician's medical orders were protected under FRSA, that his protected activity contributed to his discipline, and that the Respondent did not present clear and convincing evidence that the Complainant would have suffered the same discipline absent the activity.

IX. ADVERSE ACTION

- *In General*

Statute

49 U.S.C. § 20109

(a) In general. A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done--

...

(b) Hazardous safety or security conditions.

(1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for--

...

(c) Prompt medical attention.

...

(2) Discipline. A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

Regulations

29 C.F.R. § 1982.102(b)

(1) A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way retaliate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining, an employee if such retaliation is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done—

...

(2)(i) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way retaliate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining, an employee for—

...

(3)(ii) Discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that—

(A) A railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of FRSA if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty.

(B) For purposes of this paragraph, the term “discipline” means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

U.S. District Court Decisions

ADVERSE ACTION; *BURLINGTON NORTHERN* STANDARD; DISTRICT COURT ADOPTS *BURLINGTON NORTHERN* STANDARD FOR ADVERSE ACTION UNDER THE FRSA

Short v. Springfield Terminal Ry. Co., No. 16-cv-74 (D. Me. July 26, 2017) (2017 U.S. Dist. LEXIS 117551; 2017 WL 3203391):

Plaintiff injured his knee at work but did not report it until the next day, potentially in violation of a safety rule about prompt reports of injury. The railroad noticed an investigation, but the outcome was that he broke no rule and no discipline was assessed. On summary decision the railroad argued that this was not an adverse action. Plaintiff had asserted other adverse actions, but since they were not addressed in response to Defendant’s motion for summary decision, the district court deemed them “waived.”

The district court applied the *Burlington Northern* standard for an adverse action, which requires that the action “be harmful to the point that they could well dissuade a reasonable worker” from engaging in protected activity. After reviewing the history of the investigation in this case, the court determined that the issue had to go to a jury. It held that investigation and being subjected to the disciplinary process could be an adverse action if it was materially adverse, a question the jury was properly placed to answer. In so doing, the court disagreed with the analysis in some other district court cases suggesting that investigation could not be an adverse action, concluding that the facts of each case and disciplinary process were different. The court pointed to ARB holdings (*Vernace*) reaching the same conclusion, but explicitly stated that it was not relying on the ARB.

ADVERSE ACTION; DISTRICT COURT FOLLOWS ARB’S *FRICKA* DECISION IN FRSA CASE FOR THE PROPOSITION THAT NON-TANGIBLE ACTIVITY IS INCLUDED IN THE DEFINITION OF ADVERSE ACTION IF IT IS UNFAVORABLE AND NON-TRIVIAL, EITHER “AS A SINGLE EVENT OR IN COMBINATION WITH OTHER DELIBERATE EMPLOYER ACTIONS ALLEGED”

In *Thomas v. Union Pac. R.R. Co.*, No. 15-cv-01375 (D. Or. Aug. 23, 2016) (2016 U.S. Dist. LEXIS 111957; 2016 WL 4473429), the Plaintiff alleged that her former employer, Defendant Union Pacific Railroad Company, terminated her in retaliation for filing a workplace injury report in violation of the Federal Rail Safety Act, 49 U.S.C. § 20109 (FRSA). The Plaintiff

moved for partial summary judgment and the Defendant moved for summary judgment. The court granted the Plaintiff's motion in part and denied the Defendant's motion. One ground on which the Defendant had relied was the contention that "although Plaintiff relies on several adverse actions, only the termination is a sufficient unfavorable employment action." The Plaintiff argued that "her allegations must be viewed in their entirety, not in isolation, and are evidence of a pattern of conduct in violation of the FRSA." The court reviewed the caselaw on the subject in non-FRSA cases, including the ARB's decision in *Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 14-047, 2015 WL 9257754, at *3-4 (ARB Nov. 24, 2015), and noted the expansive construction generally given to adverse action in retaliation cases.

In the instant case, the Plaintiff alleged that following her workplace injury report she was "subject to (1) intimidating and harassing interviews by the [Defendant's Director of Terminal Operations and the Manager of Terminal Operations]; (2) increased surveillance by Defendant's employees; (3) increased employee testing; (4) discipline for a pattern of absenteeism; and (5) dismissal." The Defendant replied with citations to decisions "indicating that investigative interviews standing alone or employer surveillance are not considered adverse action in retaliation cases." The court found, however, that "many of the cases Defendant relies on are not FRSA cases with the expanded concept of unfavorable or adverse employment action. Additionally, these cases are enormously fact-dependent. The facts here, which on this motion must be examined in a light most favorable to Plaintiff, could support an inference that [the Defendant's Director of Terminal Operations] was out to terminate her from the beginning." The court also found that the Plaintiff alleged that when she met with the Director of Terminal Operations to complete her initial injury report, he did not let her have a co-worker present, do not let her verify the date of the incident, told her that her symptoms were the result of cumulative events rather than a single traumatic incident, and warned her about the repercussions for filing a false report. The court found that such facts could suggest that this meeting was more than just an "investigative interview."

The court denied summary judgment on the issue, ruling:

While Fricka is not binding here, it recognizes the broad language of FRSA. Given the Ninth Circuit's expansive view of retaliatory "adverse employment actions" in Title VII cases, and the even more expansive language in FRSA, I believe the Ninth Circuit would rule consistently with Fricka and conclude that non-tangible activity is included in the definition if it is unfavorable and non-trivial, either "as a single event or in combination with other deliberate employer actions alleged." Fricka, 2015 WL 9257754, at *3.

Furthermore, although the Ninth Circuit has made the following observation in the context of discussing the causation element of a retaliation claim and not the adverse employment action element, it has expressly recognized "patterns of antagonism."

When the record is viewed in Plaintiff's favor, a reasonable juror could conclude that Defendant's actions before termination could have had a chilling effect on protected activity, were unfavorable, and were more than trivial. Thus, even when these incidents

are viewed in isolation, there are issues of fact as to whether they are “adverse employment actions” under FRSA. Moreover, whether each of those three acts is a separately cognizable adverse employment action is immaterial because they are properly viewed, when considering the facts in a light most favorable to Plaintiff, as evidence of a pattern of harassing or antagonistic conduct which culminated in termination.

DOL Administrative Review Board Decisions

ADVERSE ACTION; *BURLINGTON-NORTHERN/WILLIAMS/FRICKA/VERNACE* CASELAW CALLS FOR EXPANSIVE VIEW OF WHAT IS MATERIALLY ADVERSE

In *Stallard v. Norfolk Southern Railway Co.*, ARB No. 16-028, ALJ No. 2014-FRS-149 (ARB Sept. 29, 2017), the Complainant reported a back injury at work and received medical care. The Complainant’s personal physician accidentally checked a box in a follow-up examination stating that the injury occurred at home rather than on-duty. A claim agent noticed the discrepancy about where the injury occurred. A company physician was consulted, and after reviewing hospital records, concluded that there was no way of knowing whether the injury occurred at home or at work. In the meantime, the Complainant’s personal physician faxed in a correction to state that the injury occurred at work. This correction was not immediately reported through channels, and a charge letter was sent scheduling a hearing to determine whether the Complainant provided false statements to the Respondent. The Complainant’s supervisor was provided Facebook photographs indicating that the Complainant apparently had been physically active at a social event, and learned of a rumor that the Complainant had been working at a golf course. The hearing was postponed at the Complainant’s request. The personal physician re-sent his correction memo. Upon learning of the correction, the Respondent’s officials debated whether to cancel the hearing, but decided to keep it scheduled in the event that the rumors and suspicions about the severity of the Complainant’s injury could be confirmed. The hearing was canceled about a month later when the Complainant requested an indefinite postponement due to his medical treatment for the injury. The Complainant ultimately had back surgery and never returned to work. The Complainant filed an FRSA retaliation complaint with OSHA. OSHA dismissed the complaint. The Complainant requested an ALJ hearing. The ALJ granted summary decision in favor of the Respondent finding no genuine issue of material fact regarding whether the Complainant suffered an adverse action. The ARB vacated the ALJ’s decision and remanded.

Burlington Northern materially adverse standard applied expansively in FRSA retaliation cases

In her decision, the ALJ had used the adverse action standard from *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), in determining that “it would not be ‘reasonable’ that an employee would be dissuaded from engaging in any protected activity because of the scheduling of a hearing, which was ultimately canceled” USDOL/OALJ Reporter at 7, quoting ALJ’s

ruling. The ARB stated that the ALJ's reliance on *Burlington Northern* was "not necessarily error" but found that the ALJ had failed to consider the ARB's controlling precedent addressing *Burlington Northern* in FRSA retaliation cases. The ARB wrote:

In *Williams v. American Airlines*, the ARB departed somewhat from *Burlington Northern* explaining that it was unnecessary to turn to Title VII cases like *Burlington Northern* to determine what qualifies as adverse action under AIR 21. Instead, the Board must construe adverse action consistently with the language of the AIR 21 whistleblower statute and its implementing regulations. The relevant implementing regulations prohibit actions "to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee" because of protected activity. Given the breadth of this regulatory definition as well as the explicit mention of "threats," we observed in *Williams* that adverse action under AIR 21 should be construed more expansively than under Title VII. Accordingly, we held that a written warning or counseling session is presumptively adverse where: "(a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline." Noting also that AIR 21's statutory language contains no express limitation of adverse actions to those actions that might dissuade a reasonable employee, the Board ruled that an adverse action need only be "more than trivial, either as a single event or in combination with other deliberate employer actions alleged."

In *Fricka v. National Railroad Passenger Corporation*, the ARB applied the *Williams* standard to FRSA cases noting that Congress expressly added "threatening discipline" as prohibited discrimination in FRSA section 20109(c). In *Zavaleta v. Alaska Airlines, Inc.*, the ARB noted that the ALJ's reliance on *Burlington Northern* was not necessarily error as that standard and the ARB's *Williams* standard overlap. Both standards require some level of materiality that must be more than trivial harm. Nevertheless, as we noted in *Vernace v. Port Authority Trans-Hudson Corp.*, "[w]here termination, discipline, and/or threatened discipline are involved, there is no need to consider the alternative question whether the employment action will dissuade other employees."

USDOL/OALJ Reporter at 8-9 (footnotes omitted).

ADVERSE ACTION; ANALYSIS FOUND IN *WILLIAMS V. AMERICAN AIRLINES* APPLIES TO FRSA CLAIMS; THUS ADVERSE ACTION REFERS TO UNFAVORABLE EMPLOYMENT ACTIONS THAT ARE MORE THAN TRIVIAL

ADVERSE ACTION; REFUSAL TO PAY MEDICAL BILLS BASED ON RECLASSIFICATION OF COMPLAINANT'S REPORT OF INJURY FROM "WORK-RELATED" TO "NON-WORK-RELATED" IS ADVERSE ACTION

ADVERSE ACTION: LOWERING OF MIDTERM RATING FROM “COMPETENT” TO FINAL ANNUAL RATING OF “NEEDS DEVELOPMENT,” REGARDLESS OF IMPACT, IS SIGNIFICANT ENOUGH TO CONSTITUTE AN ADVERSE ACTION

In [*Fricka v. National Railroad Passenger Corp. \(AMTRAK\)*](#), ARB No. 14-047, ALJ No. 2013-FRS-35 (ARB Nov. 24, 2015), the Complainant filed a FRSA retaliation complaint alleging retaliation for his reporting of a work-related injuries. The Complainant incurred the injuries during his motorcycle ride to a worksite. His supervisor knew that the Complainant was going to ride his motorcycle, and had informed the Complainant before he took the trip that Respondent would not pay mileage expenses. The supervisor, however, had not addressed the issue of reimbursement for travel time. The Complainant reported the accident to the Respondent as a work-related injury. The Respondent, however, classified the injury as not work related, and therefore did not pay medical expenses.

The ALJ found that the injury was work related, and on appeal, the ARB found substantial evidence to support that finding. The central issue on appeal was whether the Respondent’s refusal to pay the Complainant’s medical bills, and the alleged lowering of the Complainant’s 2011 and 2012 performance appraisals were unfavorable personnel actions under FRSA.

Refusal to pay medical bills – misclassification of injury as not work-related found to constitute adverse action as a matter of law

The ALJ concluded that the Respondent’s classification of the Complainant’s injury as not work related was not an unfavorable personnel action because this action was not one which “would dissuade a reasonable employee from reporting an injury as ‘work-related,’” citing *Menendez v. Halliburton, Inc.*, ARB No. 09-002, -003; ALJ No. 2007-SOX-5, slip op. at 20 (ARB Sept. 13, 2011). The ARB stated that the *Menendez* test was not exclusive and not determinative in this case. Reviewing the statutory language, the ARB concluded that the definition of adverse personnel action contained in *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-4 (ARB Dec. 29, 2010), applies to FRSA claims. In *Williams*, the Board held that “‘adverse actions’ refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” *Williams*, ARB No. 09-018, slip op. at 7. The ARB held that under that definition, the Respondent discriminated against the Complainant when it misclassified his injury as non-work related -- that, as a matter of law, the reclassification was unfavorable and more than trivial, it having led to the Respondent not paying the Complainant’s medical bills of \$297,797.21.

2011 performance appraisal – lowering of rating found significant enough in itself to constitute adverse action as a matter of law

The Complainant’s 2011 mid-year performance appraisal had been scored as “Competent.” The annual review, which included the period of the accident and a three month recovery period, and was rendered only three weeks after the Complainant returned to work was scored as “Needs Improvement.” No employees were offered performance bonuses in the 2011 performance review period. The ALJ concluded that the 2011 performance rating was not an adverse personnel action because there was no evidence of any material impact on the Complainant’s employment,” and because the Complainant did not prove that he would have received a bonus.

The ARB disagreed because, as it had explained earlier in the decision, a tangible or “material impact” on an employee’s terms or conditions of employment is not required given the very broad statutory language prohibiting discrimination “in any [] way.” The ARB held: “[A] performance rating drop of this magnitude from “competent” to “needs development” is more than trivial, and is adverse action as a matter of law. Whether [the Complainant] would have gotten a bonus is not determinative because the lowering of the rating is significant of itself and need not effect a tangible or material impact on his salary to be considered adverse.” USDOL/OALJ Reporter at 9.

2012 performance appraisal – need for further fact finding

The ALJ concluded that the Complainant “failed to prove that he sustained an unfavorable personnel action regarding his 2012 performance review because the rating scale changed from 1-4 to 1-3, no one got higher than a 2 that year, and [the Complainant] had improved that year (to get a score of ‘2’ met goals as opposed to the prior year’s 1.43 ‘needs development.’)” Id. The ARB found that, in view of its explanation of the application of the *Williams* test for analyzing adverse action in FRSA cases, there were insufficient fact findings about the 2012 performance review to make a determination, and therefore directed the ALJ to revisit the question on remand.

Concurring opinion

One member of the Board filed a concurring opinion. This member agreed with the ALJ that “work-related” under the FRSA includes the Complainant’s injuries because “he was driving to another work duty location at the direction of the employer.” The member stated that the FRSA and its implementing regulations provided ample guidance for analysis of whether an unfavorable employment action occurred, and it was unnecessary to, as the majority had done, look to or discuss the law under Title VII. Finally, this member pointed out that, on remand, the ALJ would have to address whether the Respondent believed that the injury was non-work related, and if so, how such a belief pays into the question of contributing factor. This member pointed out that the question was specifically whether the *reporting* of work-related injury was a reason for the refusal to pay the Complainant’s medical bills.

- *Specific Conduct*
 - Charge Letter / Investigation / Caution

ADVERSE ACTION; WHETHER CHARGES AND AN INVESTIGATION WOULD DISSUADE A REASONABLE EMPLOYEE FROM REPORTING WORKPLACE INJURIES; CONTEXT IS IMPORTANT

In *Renzi v. Union Pac. R.R. Co.*, No. 16 C 2641 (N.D. Ill. Aug. 20, 2018) (2018 U.S. Dist. LEXIS 140554; 2018 WL 3970149), the Plaintiff alleged that he was subjected to charges and an investigation in retaliation for reporting a workplace injury. The Defendant filed a motion for summary judgment on the ground that under FRSA a plaintiff must demonstrate that he suffered disciplinary or financial loss relating to the charge. The court reviewed the case precedent and found that “‘adverse actions’ under the FRSA include not just ‘discriminatory actions that affect the terms and conditions of employment,’ but also any action that would dissuade an objectively reasonable employee from exercising her rights under the law.” Slip op. at 9, citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006). The court also cited the admonishment that “context matters” when making this assessment. The court noted the observation in *Brisbois v. Soo Line R.R. Co.*, 124 F. Supp. 3d 891 (D. Minn. 2015), that it would have major implications for the railroad industry if it was an “adverse action” any time a rail carrier attempts to determine whether an employees violated a rule, typically through a formal investigation. The court, however, noted that a materiality requirement may be met where an investigation and its implicit threat of discipline would dissuade a reasonable employee from exercising rights under the FRSA. Here, there was an allegation of disparate treatment of the plaintiff, undisputed evidence that misleading evidence was introduced and then withdrawn at the investigatory hearing, and an allegation that the injury could subject the plaintiff to negative consequences in the Defendant’s performance tracker that may subjected him to additional interventions by supervisors. The court denied summary judgment.

ADVERSE ACTION; WHERE DEFENDANT WITHDREW “LETTER OF CAUTION” AFTER RECEIVING DOCTOR’S NOTE, COMPLAINANT DID NOT SUFFER AN UNFAVORABLE PERSONNEL ACTION

In *Lockhart v. Long Island Railroad Co.*, No. 16-cv-1035 (S.D.N.Y. Aug. 2, 2017) (2017 U.S. Dist. LEXIS 122631; 2017 WL 3327603) (case below 2015-FRS-00055), the United States District Court for the Southern District of New York granted summary judgment for the Long Island Railroad Company (“Respondent”), dismissing Henry Lockhart’s (“Complainant”) claims of retaliation under the FRSA. *Lockhart*, slip. op. at 1. Complainant claimed a violation of FRSA, 49 U.S.C. § 20109(a)(2), where Respondent issued a Letter of Caution following an absence due to Complainant’s use of narcotic painkillers prescribed by his doctor for a toothache. Although the Letter of Caution was the first step in a disciplinary plan, Respondent withdrew it after receiving a doctor’s note from Complainant. *Id.* at 2. The court concluded that Complainant did not show that he suffered an unfavorable personnel action since the Letter of Caution was withdrawn. *Id.* at 6.

ADVERSE ACTION; SUMMARY JUDGEMENT; INVESTIGATIONS AS ADVERSE ACTION; DISTRICT COURT HOLDS THAT THE INITIATION OF AN

INVESTIGATION AND CONDUCT OF A DISCIPLINARY PROCESS CAN BE ADVERSE ACTION EVEN WHERE ULTIMATELY NO DISCIPLINE IS ASSESSED, MATERIAL ADVERSITY IS A QUESTION FOR THE JURY

Short v. Springfield Terminal Ry. Co., No. 16-cv-74 (D. Me. July 26, 2017) (2017 U.S. Dist. LEXIS 117551; 2017 WL 3203391):

Plaintiff injured his knee at work but did not report it until the next day, potentially in violation of a safety rule about prompt reports of injury. The railroad noticed an investigation, but the outcome was that he broke no rule and no discipline was assessed. On summary decision the railroad argued that this was not an adverse action. Plaintiff had asserted other adverse actions, but since they were not addressed in response to Defendant's motion for summary decision, the district court deemed them "waived."

The district court applied the *Burlington Northern* standard for an adverse action, which requires that the action "be harmful to the point that they could well dissuade a reasonable worker" from engaging in protected activity. After reviewing the history of the investigation in this case, the court determined that the issue had to go to a jury. It held that investigation and being subjected to the disciplinary process could be an adverse action if it was materially adverse, a question the jury was properly placed to answer. In so doing, the court disagreed with the analysis in some other district court cases suggesting that investigation could not be an adverse action, concluding that the facts of each case and disciplinary process were different. The court pointed to ARB holdings (*Vernace*) reaching the same conclusion, but stated that it was not relying on the ARB.

DOL Administrative Review Board Decisions

ADVERSE ACTION; IMPLICIT POTENTIAL FOR DISCIPLINE IN CHARGE LETTER IS SUFFICIENT TO SURVIVE MOTION FOR SUMMARY DECISION

In *Stallard v. Norfolk Southern Railway Co.*, ARB No. 16-028, ALJ No. 2014-FRS-149 (ARB Sept. 29, 2017), the Complainant reported a back injury at work and received medical care. The Complainant's personal physician accidentally checked a box in a follow-up examination stating that the injury occurred at home rather than on-duty. A claim agent noticed the discrepancy about where the injury occurred. A company physician was consulted, and after reviewing hospital records, concluded that there was no way of knowing whether the injury occurred at home or at work. In the meantime, the Complainant's personal physician faxed in a correction to state that the injury occurred at work. This correction was not immediately reported through channels, and a charge letter was sent scheduling a hearing to determine whether the Complainant provided false statements to the Respondent. The Complainant's supervisor was provided Facebook photographs indicating that the Complainant apparently had been physically active at a social event, and learned of a rumor that the Complainant had been working at a golf course. The hearing was postponed at the Complainant's request. The personal physician re-

sent his correction memo. Upon learning of the correction, the Respondent's officials debated whether to cancel the hearing, but decided to keep it scheduled in the event that the rumors and suspicions about the severity of the Complainant's injury could be confirmed. The hearing was canceled about a month later when the Complainant requested an indefinite postponement due to his medical treatment for the injury. The Complainant ultimately had back surgery and never returned to work. The Complainant filed an FRSA retaliation complaint with OSHA. OSHA dismissed the complaint. The Complainant requested an ALJ hearing. The ALJ granted summary decision in favor of the Respondent finding no genuine issue of material fact regarding whether the Complainant suffered an adverse action. The ARB vacated the ALJ's decision and remanded.

Charge letter need not explicitly mention potential discipline; such may be inferred by formality of investigation

In the instant case, the ARB found that although the charge letter had not explicitly mentioned potential discipline, it described a formal investigation supporting an inference that the letter contained the potential for discipline.

- Hostile Work Environment

DOL Administrative Review Board Decisions

HOSTILE WORK ENVIRONMENT; IN GENERAL, PRE- AND POST-LIMITATIONS PERIOD INCIDENTS COMPRISE THE SAME HOSTILE ENVIRONMENT WHEN THEY INVOLVE THE SAME TYPE OF EMPLOYMENT ACTIONS, OCCUR RELATIVELY FREQUENTLY, AND ARE PERPETRATED BY THE SAME MANAGERS

In *Williams v. National Railroad Passenger Corp.*, ARB No. 12-068, ALJ No. 2012-FRS-16 (ARB Dec. 19, 2013) (reissued with erratum on Feb. 13, 2015), the ARB affirmed the ALJ's finding that the Complainant did not timely file an FRSA whistleblower complaint for discrete actions that occurred prior to June 2011. The Complainant, however, had referred to incidents in December 2011 concerning which the ALJ did not expressly discuss the legal significance. The ARB determined that in light of the Complainant's pro se status, it would review whether those incidents were either a continuance of alleged hostile environment and/or independent grounds for asserting a whistleblower claim. In December 2011, the Complainant had been asked to assist in performing efficiency tests on one of his crews. The crew failed the tests, and the Complainant was criticized for not following up with the crew after the testing. The Complainant was required

to attend several meetings to discuss the failed tests despite having been scheduled to start a vacation.

The ARB stated: “As general guidance, we rely on the Court’s reasoning in *Morgan* that a series of alleged events comprises the same hostile environment when ‘the pre- and post-limitations period incidents involve the same type of employment actions, occur[] relatively frequently, and [a]re perpetrated by the same managers.’” USDOL/OALJ Reporter at 6-7, quoting *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 120 (2002) (omitting a citation to the court below in the *Morgan* case). In the instant case, the Board held that the December 2011 incidents did not form part of a preceding hostile work environment claim, finding that the alleged criticisms and meetings during a scheduled vacation were materially different from the Complainant’s earlier unsuccessful pursuit of promotional opportunities, and that a ten month gap separated the events. Also different were the timing and nature of earlier allegations of retaliation (probation for failing to submit to a drug and alcohol test and violating hours of service laws).

The Board also found the December 2011 incidents were not a legally sufficient basis for an FRSA whistleblower claim. The Board noted that the Complainant did not describe the criticisms as a reprimand, that the Complainant admitted that it is a manager’s responsibility to ensure compliance with crew efficiency testing, that the Respondent crew testing was proper, and that it was undisputed that the Complainant’s crew failed the test. The ARB stated that

On balance, we find that the general criticism and required meetings do not rise to the level of “discriminatory” conduct needed to form the basis of a FRSA whistleblower complaint, such as discipline, reprimanding, intimidating, threatening, restraining, coercing, or blacklisting. In addition, we also find that Williams failed as a matter of law to present sufficient circumstantial evidence of a causal link between his only protected activity in November 2008 and the December 2011 incidents to raise a genuine issue of material fact on the issue of causation.

USDOL/OALJ Reporter at 7 (footnote omitted).

[Note: On February 13, 2015, the ARB issued an erratum to its December 19, 2013 Decision and Order. The ARB stated in the Erratum: “[O]n pages three and seven of the decision, the Board stated that Respondent placed Williams on probation in part ‘for failing to submit to a drug and alcohol test.’ This was a misstatement of fact. Accordingly, we reissue the decision with the following language to replace the misstatement: ‘for failing to administer a random drug and alcohol test to a crew under his management.’”].

- Record Suspension

ADVERSE ACTION; RECORD SUSPENSION QUALIFIES AS ADVERSE ACTION UNDER FRSA

Blackorby v. BNSF Ry. Co., No. 4:13-cv-908 (W.D. Mo. Aug. 28, 2015) (2015 WL 5095989; 2015 U.S. Dist. LEXIS 114185) (case below 2013-FRS-68): Plaintiff alleged that he was retaliated against for filing an injury report. Motions for summary judgment were denied and a jury returned a verdict in favor of Plaintiff, awarding \$58,280 in damages but no punitive damages. Defendant's motion for judgment as a matter of law was denied. Pending before the court was a renewed motion for judgment as a matter of law, or, in the alternative, for a new trial. The motion was denied.

On a motion for judgment as a matter of law, a court must affirm the jury's verdict unless viewing the facts in the light most favorable to the prevailing party, the court determines that a reasonable jury could not have returned a verdict in favor of that party. A new trial is appropriate under Rule 59 where there has been a miscarriage of justice due to a verdict against the weight of evidence, an excessive damage award, or legal errors at trial.

Defendant first argued that Plaintiff's 30 day record suspension was not an adverse action as a matter of law. The issue, however, had already been decided at summary decision and the analysis was renewed. The FRSA defines adverse actions broadly, more broadly than Title VII and includes "reprimands" and "any other way discriminate" language that reaches the sort of suspension given in the case.

○ Threats / Threatened Discipline

U.S. District Court Decisions

A THREAT RELATED TO PROTECTED ACTIVITY CAN, STANDING ALONE, CONSTITUTE ADVERSE ACTION UNDER THE FRSA WHISTLEBLOWER PROVISION

In *Almendarez v. BNSF Railway Co.*, 13-cv-00086 (W.D. Wash. Mar. 10, 2014) (magistrate) (2014 WL 931530) (case below 2012-FRS-23), the Plaintiffs brought an FRSA, 49 U.S.C. § 20109 suit alleging that the Defendant threatened the Plaintiffs' construction group ("gang") when in a meeting with the construction roadmaster, the roadmaster allegedly stated that the gang's injury record was excessive in comparison with other gangs, and advised that the gang would be abolished if any additional injuries were reported. The Plaintiffs moved for summary judgment. Principally at issue before the Magistrate Judge was whether the alleged threat was

itself an adverse action, and if so, whether there were material facts at issue such that summary judgment was not available.

The gang had not, in fact, been disbanded. OSHA concluded that the Plaintiffs suffered no adverse actions and dismissed the complaint. The ALJ found that OSHA had viewed adverse action too narrowly, and set the matter for hearing. The Plaintiffs, however, opted to seek relief in federal court.

The Plaintiffs cited administrative decisions supporting the conclusion that a threat, standing alone, constitutes an adverse action within the meaning of the FRSA. The Defendant, pointing to other administrative decisions, stressed that the Plaintiffs had suffered no effect on the terms and conditions of their employment, and no actual consequences from the perceived threat.

The Magistrate Judge found no binding or otherwise persuasive authority “for the proposition that a prima facie claim under FRSA requires a showing of both an adverse action and a resulting effect on the terms and conditions of employment.” *Almendarez*, slip op. at 10. The Magistrate Judge stated: “Neither the statute, the implementing regulations, nor the single federal appellate decision addressing FRSA's anti-retaliation provisions, *see Araujo*, 708 F.3d at 157, reflect or provide any support for the existence of this additional burden.” *Id.* The Magistrate Judge, however, found that the matter was inappropriate for a determination on summary judgment because there was a dispute about what the roadmaster actually said during the meeting, and whether her statements actually constituted a threat.

DOL Administrative Review Board Decisions

ADVERSE ACTION UNDER FRSA INCLUDES THREATENED DISCIPLINE

In *Vernace v. Port Authority Trans-Hudson Corp.*, ARB No. 12-003, ALJ No. 2010-FRS-18 (ARB Dec. 21, 2012), the ARB summarily affirmed the ALJ's finding that the Respondent unlawfully discriminated against the Complainant in violation of the employee protection provisions of the Federal Rail Safety Act when the Complainant filed an injury report. On appeal, the Respondent argued that it had taken no disciplinary action against the Complainant. The Respondent had sent a charging letter to the Complainant stating that she had failed to exercise constant care and utilize safe work practices to prevent injury to herself when she failed to inspect a chair before sitting on it.

In the ALJ's decision, she found that the evidence of record showed that charge letters are the first step in a disciplinary process that has the potential to culminate in varying levels of discipline, and which are likely to have a chilling effect on employees regarding the filing of injury reports. *Vernace v. Port Authority Trans-Hudson Corp.*, ALJ No. 2010-FRS-18 (ALJ Sept. 23, 2011), slip op. at 24-27. The ALJ found that under ARB caselaw, "the filing of charges against Complainant which carried the potential for future discipline was an unfavorable personnel action." *Id.* at 27.

The ARB found that substantial evidence supported the ALJ's findings and that the ALJ legal analysis and conclusions were correct. The ARB wrote:

The ALJ noted that the relevant regulations include “intimidating” and “threatening” actions as prohibited discrimination. We agree with the ALJ's reliance on our analysis of a similar regulation in *Williams v. American Airlines*, ARB No. 09-018, 2007-AIR-004 (ARB Dec. 29, 2010). Moreover, Congress re-emphasized the broad reach of FRSA when it expressly added “threatening discipline” as prohibited discrimination in section 20109(c) of the FRSA whistleblower statute. The disciplinary investigation stretching one year in this case qualifies as discrimination under the regulations and as “any other discrimination” prohibited by the statute.

ARB slip op. at 2-3 (footnotes omitted).

- Unpaid Leave

DOL Administrative Review Board Decisions

ADVERSE ACTION; SENDING COMPLAINANT HOME WITHOUT PAY UNTIL HE COULD OBTAIN A MEDICAL RELEASE WHERE RESPONDENT WAS UNABLE TO ACCOMMODATE COMPLAINANT'S REQUEST TO WORK IN AN AREA THAT WAS NOT SMOKY AND WAS ODOR FREE FOUND TO BE ADVERSE EMPLOYMENT ACTION

In *Jackson v. Union Pacific Railroad Co.*, ARB No. 13-042, ALJ No. 2012-FRS-17 (ARB Mar. 20, 2015), the Complainant engaged in protected activity when he reported a foul, smoky odor to the manager of yard operations (which had resulted from marsh fires outside New Orleans). Because of possible health concerns, the Complainant requested to be assigned to an area free from the smoke and smell. Unable to accommodate him, the Complainant's supervisor directed the Complainant to go home and to return to work only after obtaining a medical release. The ALJ found that sending the Complainant home without pay until he returned with medical clearance was an adverse action. The ALJ characterized this as “constructive discharge.” On appeal, the Respondent argued that the ALJ erred in finding a constructive discharge. The ARB found that substantial evidence nevertheless supported the ALJ's finding of adverse employment action.

- Working Conditions

DOL Administrative Review Board Decisions

ADVERSE ACTION; ABOLISHMENT OF FIXED ROUTE WITH FAVORABLE WORKING CONDITIONS FOUND TO CONSTITUTE ADVERSE ACTION UNDER THE FACTS OF THE CASE

In [*D’Hooge v. BNSF Railways*](#), ARB Nos. 15-042, -066, ALJ No. 2014-FRS-2 (ARB Apr. 25, 2017), the ARB found that substantial evidence supported the ALJ’s finding that the conversion of a fixed route to which the Complainant had been assigned to a general bid route was adverse action. In this regard, the Complainant suffered a small loss in pay, regular hours, and a free weekend as a result of the conversion; the route had the most favorable working conditions in the division; and the Complainant had to rebid on other jobs with worse conditions after the abolishment of the fixed route.

- *Adverse Action and Summary Decision*

U.S. District Court Decisions

ADVERSE ACTION; WHETHER CHARGES AND AN INVESTIGATION WOULD DISSUADE A REASONABLE EMPLOYEE FROM REPORTING WORKPLACE INJURIES; CONTEXT IS IMPORTANT

In [*Renzi v. Union Pac. R.R. Co.*](#), No. 16 C 2641 (N.D. Ill. Aug. 20, 2018) (2018 U.S. Dist. LEXIS 140554; 2018 WL 3970149), the Plaintiff alleged that he was subjected to charges and an investigation in retaliation for reporting a workplace injury. The Defendant filed a motion for summary judgment on the ground that under the FRSA, a plaintiff must demonstrate that he suffered disciplinary or financial loss relating to the charge. The court reviewed the case precedent and found that “‘adverse actions’ under the FRSA include not just ‘discriminatory actions that affect the terms and conditions of employment,’ but also any action that would dissuade an objectively reasonable employee from exercising her rights under the law.” Slip op. at 9, citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006). The court also cited the admonishment that “context matters” when making this assessment. The court noted the observation in *Brisbois v. Soo Line R.R. Co.*, 124 F. Supp. 3d 891 (D. Minn. 2015), that it would

have major implications for the railroad industry if it was an “adverse action” any time a rail carrier attempts to determine whether an employees violated a rule, typically through a formal investigation. The court, however, noted that a materiality requirement may be met where an investigation and its implicit threat of discipline would dissuade a reasonable employee from exercising rights under the FRSA. Here, there was an allegation of disparate treatment of the plaintiff, undisputed evidence that misleading evidence was introduced and then withdrawn at the investigatory hearing, and an allegation that the injury could subject the plaintiff to negative consequences in the Defendant’s performance tracker that may subjected him to additional interventions by supervisors. The court denied summary judgment.

ADVERSE ACTION; SUMMARY JUDGEMENT; INVESTIGATIONS AS ADVERSE ACTION; DISTRICT COURT HOLDS THAT THE INITIATION OF AN INVESTIGATION AND CONDUCT OF A DISCIPLINARY PROCESS CAN BE ADVERSE ACTION EVEN WHERE ULTIMATELY NO DISCIPLINE IS ASSESSED, MATERIAL ADVERSITY IS A QUESTION FOR THE JURY

Short v. Springfield Terminal Ry. Co., No. 16-cv-74 (D. Me. July 26, 2017) (2017 U.S. Dist. LEXIS 117551; 2017 WL 3203391):

Plaintiff injured his knee at work but did not report it until the next day, potentially in violation of a safety rule about prompt reports of injury. The railroad noticed an investigation, but the outcome was that he broke no rule and no discipline was assessed. On summary decision the railroad argued that this was not an adverse action. Plaintiff had asserted other adverse actions, but since they were not addressed in response to Defendant’s motion for summary decision, the district court deemed them “waived.”

The district court applied the *Burlington Northern* standard for an adverse action, which requires that the action “be harmful to the point that they could well dissuade a reasonable worker” from engaging in protected activity. After reviewing the history of the investigation in this case, the court determined that the issue had to go to a jury. It held that investigation and being subjected to the disciplinary process could be an adverse action if it was materially adverse, a question the jury was properly placed to answer. In so doing, the court disagreed with the analysis in some other district court cases suggesting that investigation could not be an adverse action, concluding that the facts of each case and disciplinary process were different. The court pointed to ARB holdings (*Vernace*) reaching the same conclusion, but explicitly stated that it was not relying on the ARB.

DOL Administrative Review Board Decisions

SUMMARY DECISION; WEIGHING EVIDENCE ERROR

In *Stallard v. Norfolk Southern Railway Co.*, ARB No. 16-028, ALJ No. 2014-FRS-149 (ARB Sept. 29, 2017), the Complainant reported a back injury at work and received medical care. The Complainant's personal physician accidentally checked a box in a follow-up examination stating that the injury occurred at home rather than on-duty. A claim agent noticed the discrepancy about where the injury occurred. A company physician was consulted, and after reviewing hospital records, concluded that there was no way of knowing whether the injury occurred at home or at work. In the meantime, the Complainant's personal physician faxed in a correction to state that the injury occurred at work. This correction was not immediately reported through channels, and a charge letter was sent scheduling a hearing to determine whether the Complainant provided false statements to the Respondent. The Complainant's supervisor was provided Facebook photographs indicating that the Complainant apparently had been physically active at a social event, and learned of a rumor that the Complainant had been working at a golf course. The hearing was postponed at the Complainant's request. The personal physician re-sent his correction memo. Upon learning of the correction, the Respondent's officials debated whether to cancel the hearing, but decided to keep it scheduled in the event that the rumors and suspicions about the severity of the Complainant's injury could be confirmed. The hearing was canceled about a month later when the Complainant requested an indefinite postponement due to his medical treatment for the injury. The Complainant ultimately had back surgery and never returned to work. The Complainant filed an FRSA retaliation complaint with OSHA. OSHA dismissed the complaint. The Complainant requested an ALJ hearing. The ALJ granted summary decision in favor of the Respondent finding no genuine issue of material fact regarding whether the Complainant suffered an adverse action. The ARB vacated the ALJ's decision and remanded.

Factual disputes precluded summary decision

Initially, the ARB noted that the ALJ had apparently weighed evidence and made factual inferences inconsistent with the summary decision phase, during which the question was not whether an adverse action occurred, but only whether, given the evidence presented, there was a reasonable question whether an adverse action occurred.

The ARB noted that the Complainant's allegation was that the Respondent's scheduling of a disciplinary investigation constituted deliberate retaliation, intimidation and harassment for reporting an on-duty injury. The Complainant alleged that the charge affected his personnel record, and that he suffered anxiety and emotional distress because of the scheduled hearing and the implicit threat of termination. The Respondent countered that the Complainant suffered no consequences and that nothing was placed on his permanent record. There was a dispute as to whether the internal hearing was routine or a pretext for retaliation. The ARB found that viewing the evidence in the light most favorable to the Complainant, a reasonable person could find the charge letter to be materially adverse.

X. CAUSATION / CONTRIBUTING FACTOR

- Contributing Factor Generally

U.S. Circuit Court of Appeals Decisions

NINTH CIRCUIT HOLDS THAT UNDER THE FRSA’S CLEAR STATUTORY SCHEME, A PLAINTIFF MEETS HIS BURDEN OF SHOWING DISCRIMINARY INTENT BY PROVING THAT THE PROTECTED CONDUCT WAS A CONTRIBUTING FACTOR TO THE EMPLOYER’S ADVERSE ACTION; COURT NOTES THAT THIS INTERPRETATION IS CONSISTENT WITH AUTHORITY FROM THE THIRD CIRCUIT BUT IT MAY CONFLICT WITH AUTHORITY FROM THE SEVENTH AND EIGHTH CIRCUITS; “HONEST BELIEF” JURY INSTRUCTION PRESUMPTIVELY PREJUDICIAL

In *Frost v. BNSF Ry. Co.*, 914 F.3d 1189, No. 17-35513 (9th Cir. Jan. 30, 2019) (2019 U.S. App. LEXIS 3062), the Plaintiff-Appellant (Frost) had alleged that the Defendant-Appellee (BNSF) violated the Federal Railroad Safety Act (FRSA) when it disciplined and ultimately terminated him after he committed a pair of safety rule violations and filed an injury report. The district court provided jury instructions that “BNSF could not be liable if it terminated Frost due to an ‘honest belief’ that he violated the company’s safety rules.” Slip op. at 3. The jury returned a verdict in favor of BNSF. On appeal, the Ninth Circuit found that the “honest belief” jury instruction was “inconsistent with the FRSA’s clear statutory mandate and [the court’s] prior caselaw....” *Id.* The court thus reversed and remanded for a new trial.

The court began by reviewing its recent decision in *Rookaird v. BNSF Railway Co.*, 908 F.3d 451 (9th Cir. 2018). The court stated:

Importantly, the only burden the statute places on FRSA plaintiffs is to ultimately prove, by a preponderance of the evidence, that their protected conduct was a contributing factor to the adverse employment action—i.e., that it “tend[ed] to affect” the decision in some way. *Id.* § 42121(b)(2)(B); *Rookaird*, 908 F.3d at 461.

Id. at 9-10. The court was not persuaded by BNSF’s argument that “the FRSA is a ‘discrimination statute’ and that plaintiffs must therefore affirmatively prove that their employers acted with discriminatory intent or animus in order to bring claims for unlawful retaliation.” *Id.* at 10. The court explained:

We recognize that the FRSA, by its terms, describes and forbids intentional retaliation, 49 U.S.C. § 20109(a), meaning that employers must act with impermissible intent or animus to violate the statute. What BNSF misses is that

the only proof of discriminatory intent that a plaintiff is required to show is that his or her protected activity was a “contributing factor” in the resulting adverse employment action. Showing that an employer acted *in retaliation for* protected activity *is* the required showing of intentional discrimination; there is no requirement that FRSA plaintiffs separately prove discriminatory intent. 49 U.S.C. § 42121(b)(2)(B). Indeed, in *Tamosaitis v. URS Inc.*, 781 F.3d 468 (9th Cir. 2015), we reviewed claims under the Energy Reorganization Act’s whistleblower retaliation protections that employ the same statutory framework as the FRSA. *Id.* at 480. We explained: “Under this framework, the presence of an employer’s subjective retaliatory animus is irrelevant. All a plaintiff must show is that his ‘protected activity was a contributing factor in the adverse [employment] action.’” *Id.* at 482 (alterations in original) (quoting 29 C.F.R. § 24.104(f)(1)). *Coppinger-Martin v. Solis*, 627 F.3d 745 (9th Cir. 2010) also involved a retaliation claim arising in the context of a statute with the same “contributing factor” framework. There, we explained that to meet her burden *at the prima facie stage* a plaintiff need not “*conclusively* demonstrate the employer’s retaliatory motive.” *Id.* at 750 (emphasis added). Rather, the employer’s retaliatory motive was established by proving that the protected conduct was a contributing factor to the employer’s adverse action.

Id. at 10-11 (emphasis as in original). The court went on to explain why it did not view the Eighth Circuit’s decision in *Kuduk v. BNSF Railway Co.*, 768 F.3d 786 (8th Cir. 2014), as imposing an obligation on a plaintiff to prove retaliatory intent beyond the FRSA’s statutory scheme. The court further stated

Instead, *Rookaird* simply confirms that although intent or animus is part of an FRSA plaintiff’s case, showing that plaintiff’s protected conduct was a contributing factor is the required showing of intent or “intentional retaliation[.]” *Id.* That is, by proving that an employee’s protected activity contributed in some way to the employer’s adverse conduct, the FRSA plaintiff has proven that the employer acted with some level of retaliatory intent.

Consistent with the language of 49 U.S.C. § 42121(b)(2)(B) and our prior decisions in *Tamosaitis*, *Coppinger-Martin*, and *Rookaird*, we hold that although the FRSA’s prohibition on “discriminat[ing] against an employee” ultimately requires a showing of the employer’s discriminatory or retaliatory intent, FRSA plaintiffs satisfy that burden by proving that their protected activity was a contributing factor to the adverse employment decision. There is no requirement, at either the *prima facie* stage or the substantive stage, that a plaintiff make any additional showing of discriminatory intent.

Id. at 11-12 (footnote omitted; court noted that this interpretation was consistent with that of the Third Circuit, but that it may conflict with authority from the Seventh and Eighth Circuits).

The court then turned to examine the “honest belief” jury instruction and found that it “may have encouraged the jury to skirt the actual issue and improperly focus on whether discipline was

justified for Frost's safety violation instead of whether his protected conduct 'tend[ed] to affect in any way' the decision to terminate him." *Id.* at 13 (quoting *Rookaird*). The court found that the instruction was presumptively prejudicial and that BNSF had not rebutted that presumption.

CONTRIBUTING FACTOR; THE FRSA CONTAINS ELEMENTS FOR A *PRIMA FACIE* CASE AND FOR A SHOWING ON THE MERITS THAT DIFFER IN WHAT MUST BE SHOWN AS TO CONTRIBUTORY FACTOR; ON THE MERITS A COMPLAINANT MUST SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT THE PROTECTED ACTIVITY DID CONTRIBUTE TO THE ADVERSE ACTION, NOT JUST THAT CIRCUMSTANCES WOULD PERMIT THAT INFERENCE.

Rookaird v. BNSF Ry. Co., 908 F.3d 451 (9th Cir. Nov. 8, 2018) (2018 U.S. App. LEXIS 31687; 2018 WL 5831631) (Nos. 16-35786, 16-35931, 16-36062, No. 16-35787) (Opinion): Plaintiff Rookaird was a conductor on (and in charge of) a switcher crew for BNSF. The crew was tasked with moving a train. When it arrived, it performed a 20-45 minute air brake test on the train. Plaintiff's supervisor, the trainmaster, made comments on the radio during the test suggesting that they stop, but did not order them to do so. They finished the test and then began work. Supervisors became upset at the pace of the work, thinking that it was an intentional slow-down in retaliation for reduced overtime, and pulled the crew out of service. A de-briefing of sorts with Plaintiff followed. He was told to go home. He printed a time sheet just after 8:00 listing an off-duty time of 8:30. At 8:15 he was ordered to go home again. He did so without signing the timesheet. BNSF started an investigation and eventually fired Plaintiff for not working efficiently, dishonesty on his time sheet, failure to sign the timesheet, and failure to leave the property when he was told.

Plaintiff filed an FRSA complaint which was kicked out to federal district court. He alleged that he was retaliated against for refusing to stop the air brake test. To prevail Plaintiff had to show 1) that he engaged in protected activity; 2) that the employer knew about the alleged protected activity; 3) that he suffered an unfavorable personnel action; and 4) that the protected activity was a contributing factor in the unfavorable personnel action. BNSF could defeat liability by showing by clear and convincing evidence that it would have taken the same adverse action absent the protected activity. The District Court granted summary judgement to Plaintiff on 2) knowledge; 3) adverse action; and 4) contribution. On contribution, it noted that the failure to work efficiently "cannot be unwound" from the action of continuing the airbrake test. Before the case went to the jury the District Court held that the airbrake test was not legally required (though it was a "close call") but that it could still be a protected activity if Plaintiff had an objectively and subjectively reasonable belief that it was required. The jury had to decide a) whether there was protected activity; b) if so whether BNSF had established its affirmative defense; and c) if not, what damages to award. The jury returned a verdict for Plaintiff and awarded \$1.2 million in damages. Both parties appealed the damages and BNSF appealed liability.

The Ninth Circuit affirmed the denial of summary judgement on the protected activity element but reversed the grant of summary judgment to Plaintiff on the contributing factor element. The verdict and damages were thus vacated and the case was remanded for further proceedings.

Regarding the grant of summary decision to Plaintiff on the contributory factor element, the panel explained that the FRSA contains two distinct phases with a burden shifting framework. In the first, the complainant must make out a prima facie case by showing 1) protected activity; 2) employer's knowledge or suspicion of protected activity; 3) adverse action; and 4) that "[t]he circumstances were sufficient to raise the inference that the protected activity (or perception thereof) was a contributing factor in the adverse action." The prima facie showing can be defeated by a showing by a clear and convincing evidence that the employer would have taken the same action absent the protected activity. At this stage a prevailing means that OSHA will investigate. The second stage is substantive. It is the same except that there is one important difference: the complainant must show, by a preponderance of the evidence, that the protected activity *was* a contributing factor. Prevailing here means winning the case.

In this case the District Court erred by conflating the two stages and granting summary decision on contribution based on the showing that applies at the prima facie case stage, not the substantive stage. The District Court had found that the adverse action and protected activity could not be unwound and on that basis granted summary judgment on "the 'contributing factor' element of his prima facie case." The Ninth Circuit agreed based on its understanding of the framework, but on that understanding it was error to not give the jury the contributing factor question on the "substantive" framework. Summary judgment was improper as to whether the protected activity *was* a contributing factor because BNSF presented evidence that, if believed, could lead a reasonable fact-finder to conclude that the protected activity did not contribute.

CONTRIBUTING FACTOR CAUSATION; NINTH CIRCUIT AFFIRMS FINDING OF NO CONTRIBUTING FACTOR SHOWING WHERE ALJ FOUND DECISION WAS BASED ON A REASONABLE BELIEF OF DISHONESTY

Powers v. USDOL, No. 17-70676 (9th Cir. May 22, 2018) (2018 U.S. App. LEXIS 13297; 2018 WL 2308587) (unpublished) (Memorandum [denying petition for review])

Case below ARB No. 13-034; 2010-FRS-00030: 9th Circuit affirmed the ARB's affirmance of the ALJ's dismissal of the complainant's FRSA complaint. The ALJ had found that the railroad's decision to terminate the complainant was based on its reasonable belief that the complainant had been dishonest about his activities while on medical leave, and that the reporting of his work injury was not a contributing factor to the termination.

CONTRIBUTING FACTOR CAUSATION; THE EIGHTH CIRCUIT FINDS THAT THE ALJ CORRECTLY APPLIED THE CONTRIBUTING-FACTOR TEST BY REQUIRING RETALIATION TO BE A CONTRIBUTING FACTOR, RATHER THAN A BUT-FOR CAUSE

In *Mercier v. USDOL*, 850 F.3d 382 (8th Cir. 2017) (case below ARB No. 13-048, ALJ No. 2008-FRS-004), the Eighth Circuit found the ARB's final decision to be supported by substantial evidence and affirmed it, dismissing Michael Mercier's ("Plaintiff") FRSA complaint against

Union Pacific Railroad Company (“UP”). *Mercier* at 385. Plaintiff alleged that UP terminated him for numerous reports of safety issues, and that UP’s stated reason for termination, violation of a waiver agreement, was pretextual. *Id.* at 387. Plaintiff contended that the ALJ misapplied the contributing-factor test by “requir[ing] him to prove that the termination would not have occurred absent the safety reporting.” *Id.* at 390. The court observes that the ALJ correctly states that retaliation must be “a” contributing factor, and that the ALJ’s analysis does not “otherwise indicate that it held *Mercier* to the wrong standard of causation.” Emphasizing that substantial evidence supports the ALJ’s finding, the court held that the ALJ correctly applied the contributing-factor test. *Id.* The court also notes, although the ALJ did not make a finding on it, that Plaintiff “likely also could not meet” the knowledge prong because the decision to terminate Plaintiff was made by the EEO department, and there was no evidence in the record connecting the knowledge of the safety department to the EEO department. *Id.* at 391.

CONTRIBUTING FACTOR; EIGHTH CIRCUIT REJECTS “CHAIN OF CAUSATION” ANALYSIS AND HOLDS THAT TO ESTABLISH CONTRIBUTION THERE MUST BE EVIDENCE OF INTERNATIONAL RETALIATION AND DISCRIMINATORY ANIMUS

CONTRIBUTING FACTOR; EIGHTH CIRCUIT REJECTS RELIANCE ON PERCEIVED PROCEDURAL DEFICIENCIES IN INTERNAL INVESTIGATORY AND DISCIPLINE PROCESS TO INFER CONTRIBUTION

BNSF Ry. Co. v. United States DOL Admin. Review Bd. [Carter], 867 F.3d 942, No. 16-3093, 2017 U.S. App. LEXIS 15020, 2017 WL 3469224 (8th Cir. 2017) (case below ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82).

The Complainant started working for BNSF in 2005. He injured his shoulder in 2007 and immediately reported it. He later filed a Federal Employer’s Liability Act (“FELA”), 45 U.S.C. § 51, *et seq.*, action based on that injury. During discovery in that case, BNSF deposed him. During trial preparation in 2012, a manager reviewed the deposition and noticed inconsistencies between information given in the deposition and that provided on the original employment application back in 2005. This led to a disciplinary investigation. A second investigation was launched regarding potential false statement in 2012 about getting to work on time. Both investigations produced findings that the Complainant had been dishonest, which under BNSF’s policy can result in a standalone dismissal. So they dismissed him twice in April 2012. Complainant filed a complaint under the whistleblower protection provisions of the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109, alleging that he was retaliated against for reporting his 2007 injury. An Administrative Law Judge (“ALJ”) found for Complainant and awarded \$50,000 in punitive damages as well as reinstatement and various other remedies. 867 F.3d at 944-45. The Administrative Review Board (“ARB”) affirmed. *See Carter v. BNSF Ry. Co.*, ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82 (ARB June 21, 2016).

The Eighth Circuit explained that “[t]o prevail on his FRSA complaint, Carter must ‘prove, by a preponderance of the evidence, that ‘(i) he engaged in a protected activity; (ii) BNSF knew or suspected, actually or constructively, that he engaged in the protected activity; (iii) he suffered an adverse action; and (iv) the circumstances raise an inference that the protected activity was a

contributing factor in the adverse action.’” *BNSF Ry. Co.*, 867 F.3d at 945 (quoting *Gunderson v. BNSF Ry.*, 850 F.3d 962, 968 (8th Cir. 2017) (quoting *Kuduk v BNSF Ry.*, 768 F.3d 786, 789 (8th Cir. 2014))). “If he meets that burden, BNSF may avoid liability if it ‘demonstrates, by clear and convincing evidence, that [it] would have taken the same unfavorable personnel action in the absence of [Carter’s] protected activity.’” *Id.* (quoting 49 U.S.C. § 42121(b)(2)(B)(ii)) (alterations in original). BNSF had conceded that the Complainant engaged in a protected activity that it had knowledge of and that he had suffered an adverse action. *Id.*

The ALJ’s decision was based on a chain-of-events finding such that even if the employer was not motivated by and gave no significance to an event, if it is a necessary link in a chain, that establishes contribution. *Id.* at 945-946. After noting that over four years had passed between the protected activity and adverse action and that the proffered reasons for the adverse action had nothing to do with the protected activity (lying on an application and lying about late arrivals at work vs. reporting an injury), the Eighth Circuit rejected the chain-of-events principle, approvingly citing the recent Seventh Circuit case, *Koziara v. BNSF Ry.*, 840 F.3d 873 (7th Cir. 2017), *cert denied*, 137 S. Ct. 1449 (2017), for the proposition that the showing of contribution involves a proximate cause analysis. *BNSF Ry. Co.*, 867 F.3d at 946. Further, the Eighth Circuit held that there must be evidence of intentional retaliation implicating some “discriminatory animus.” *Id.*

This was not the end of the analysis, since the ARB hadn’t adopted the chain-of-events basis for the decision. Instead, it had affirmed by noting evidence of a change in attitude, deficient explanations for the adverse action, and circumstantial evidence of retaliatory motive. The Eighth Circuit allowed that if such findings were sound, then the decision could be affirmed. *Id.* at 946-47. But it determined that the findings either weren’t in the record or were insufficient. On the change in attitude, the ALJ had not made credibility findings that would sustain the conclusion that the supervisors were targeting the Complainant. Further, no finding was made as to whether the change in attitude related to the injury report or the FELA litigation. The panel implied that retaliation for the FELA litigation would not be a violation of the FRSA (though given the rest of the opinion, they appear to leave this as an open issue for the ARB to decide in the first instance). *Id.* at 947.

Next, substantial evidence did not support that finding that BNSF’s asserted rationale was not worthy of credence. The ALJ had reached the conclusion based on procedural deficiencies in BNSF’s disciplinary process. The panel held that BNSF could not be punished for using otherwise valid procedures just because the ALJ perceives them to be unfair. The question of abstract fairness was not germane to the question of whether the protected activity contributed to the decision to take the adverse action. Thus, the critical findings for a pretext determination hadn’t been made. Nor could a finding that the second dishonesty dismissal was pretext be sustained—it was premised on a finding that all of the events were tied together, but the ARB and Eighth Circuit had rejected this chain-of-events theory. *Id.* at 947-48.

Turning to the “other circumstantial evidence,” the reasoning was based on a finding that the FELA litigation involved the injury and so kept the protected injury report fresh in the minds of the decision-makers. The Eighth Circuit found this finding legally deficient in that it was based on a misreading and incorrect extension of a prior ARB case (*LeDure v. BNSF Ry.*, ARB No. 13-044, ALJ No. 2012-FRS-00020 (ARB June 2, 2015)) that had held that reporting an injury during a FELA case was protected by the FRSA—not that the FELA litigation itself was

protected or was sufficient to keep the protected activity “current.” By doing so, the ARB had “decided without discussion a significant issue” that hadn’t been alleged and hadn’t been considered by any of the circuit courts. The lack of explanation for such an expansion frustrated judicial review and so had to be vacated. *Id.* at 948. In sum, “[t]he ARB was unable to salvage an ALJ analysis built upon a flawed theory of causation because the ARB lacked critical fact findings needed to affirm the ALJ’s decision when applying the appropriate legal standard. To the extent the ARB filled in the missing findings, it exceeded its scope of review.” The complaint was thus remanded. *Id.*

CONTRIBUTING FACTOR CAUSATION IN FRSA CASE; SEVENTH CIRCUIT DISTINGUISHES CAUSATION AND PROXIMATE CAUSATION

In [*Koziara v. BNSF Railway Co.*](#), 840 F.3d 873, No. 16-1577 (7th Cir. Oct. 31, 2016), the Seventh Circuit reversed a jury verdict in favor of the Plaintiff (Koziara) on his Federal Rail Safety Act (FRSA) retaliation claim. The court focused largely on whether the Plaintiff had successfully established the “contributory factor” causation element of a FRSA claim, and whether an injury report was the proximate cause of the Plaintiff’s being fired. The Plaintiff had been fired when, after a reenactment of incident that had led to his injury report, information came to light indicating that the Plaintiff had taken railroad ties without permission in violation of the Defendant’s (BNSF) zero tolerance policy on theft.

Background

The Plaintiff was a track foreman supervising a crew assigned to remove and reinstall crossing planks. The Plaintiff had authorized a crew member to use a front loader to remove a plank. The plank flew loose just as the plaintiff was walking into the center of the track and struck one of his legs. The Plaintiff initially thought his leg was only bruised, but several days later his doctor informed him that he had fractured his shinbone. After first lying to two coworkers that the injury occurred at home, on advice of a union official and an affiliated lawyer, the Plaintiff reported the injury. The Defendant accepted the report and paid his medical bills.

The Defendant’s policy was to investigate all reported injuries by staging a reenactment of the accident in order to learn how it happened. Here, the reenactment resulted in the Plaintiff’s supervisor’s (Veitz) conclusion that the Plaintiff had been careless and had placed himself in danger. Several days after the reenactment a crew member told the supervisor that he thought the Plaintiff might have been injured earlier while removing railroad ties from railroad property. Upon preliminary investigation, the supervisor concluded that theft charges against the Plaintiff were warranted. Under the CBA, two formal investigations were conducted: one on the carelessness, and one on the allegation of theft. The company imposed a 30-day suspension for the carelessness, and a discharge for the theft. The National Railroad Adjustment Board denied the Plaintiff’s appeal. The Plaintiff then filed an FRSA retaliation complaint with OSHA, and later filed an action in federal district court after OSHA had not rendered a final decision within 210 days of the filing of the complaint.

A jury returned a verdict in favor of the Plaintiff, and the Defendant, having failed to persuade the district judge to award judgment to it despite the jury's verdict, appealed to the Seventh Circuit. The Seventh Circuit reversed the judgment.

Contributing Factor/Affirmative Defense

The court found that the Plaintiff failed to show that his injury was a “contributing factor” in his being fired, and that the trial judge erred when he “remarked that the plaintiff’s ‘injury report *initiated* the events that led to his discipline, and was therefore a contributing factor to the adverse actions that he suffered’ (emphasis the judge’s).” Slip op. at 9. The court wrote:

But in so remarking [the trial judge] failed to distinguish between causation and proximate causation. The former term embraces causes that have no legal significance. Had the plaintiff never been born or never worked for BNSF he would neither have been hurt by the plank flung at him by the energetic front-end loader nor have stolen railroad ties from the railroad. But that doesn’t mean that his being born or his being employed by the railroad were legally cognizable causes of his being fired.

Proximate causation in contrast creates legal liability, “proximate” denoting in law a relation that has legal significance. There are different definitions of “proximate cause,” however, and in *CSX Transportation, Inc. v. McBride*, 131 S. Ct. 2630, 2638 (2011), a case under the Federal Employers’ Liability Act, the Supreme Court rejected a definition that required that the defendant’s negligence be “the sole, efficient [or immediate] producing cause” of the injury in order to be actionable. That would be a pertinent consideration in this case were the plaintiff arguing that he was injured by the negligence of his employer, but he is not arguing that. He caused himself to be injured by being careless, and to be fired for stealing railroad property—causal acts that the law deems to have legal consequences if the conduct in question—in this case carelessness and theft—is lawfully forbidden, as it was by a combination of the railroad’s announced employment policies and the terms of its collective bargaining agreement with the union that represents employees such as the plaintiff.

The Federal Railroad Safety Act does not punish railroads for disciplining (including firing) employees unless the discipline is retaliatory. There is no evidence of that in this case—no evidence of the usual forms of employment discrimination, certainly, and no evidence that the suspension and discharge of the plaintiff were motivated by animus. It is true that a workman who was standing near the plaintiff when the plank soared was not disciplined for carelessness; but he wasn’t injured at all, which allowed the company to infer that he wasn’t careless, or at least not sufficiently careless to warrant an investigation. As for the argument in the plaintiff’s brief that it was “common for employees to take used railroad ties” without being disciplined for doing so, the record contains no instances of BNSF’s declining to discipline an employee who was found to have taken ties without permission. The plaintiff does not argue that BNSF believed

that *he* was permitted to take the railroad ties, in which event the stated reason for his being fired would have been pretextual.

The district judge's remark that the plaintiff's injury report to the company had initiated the events that led to his being fired and therefore had contributed to it is a further example of confusing a cause with a proximate cause. The plaintiff's having been born was an initiating event without which he would not exist, but obviously an event devoid of legal significance. Veitz agreed that the plaintiff should submit an injury report, but based his conclusion that the plaintiff had been careless not on the report, which merely described the injury, but on the reenactment of the accident—and the reenactment, which was the proximate cause of the decision to suspend the plaintiff, had no connection to the injury report, which merely described medical treatment—not carelessness and not theft.

And by the way there is nothing sinister, as the term “initiating event” may seem to suggest, in deeming the submission of an injury report a proper occasion for an employer's conducting an investigation. An injury report is a normal trigger for an investigation designed to uncover facts that can prompt corrective action that will reduce the likelihood of a future injury.

In addressing the parties' motions for summary judgment, the district judge made some legal rulings intended to narrow the issues for trial. The critical ruling—a grant of partial summary judgment in favor of the plaintiff—was that the injury report was a “contributing factor” to his being fired. In *Ortiz v. Jordan*, 131 S. Ct. 884, 888–89 (2011), the Supreme Court held that an order denying summary judgment can't be appealed after a full trial on the merits has been held. “The order retains its interlocutory character as simply a step along the route to final judgment. Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion.” *Id.* at 889 (citation omitted). A grant of partial summary judgment is similarly just a way station en route to a final judgment. The grant of partial summary judgment in this case narrowed the case, as the district judge believed, to two issues for trial. The first was whether the injury report had been prepared and submitted by the plaintiff in good faith, and the second whether the railroad would have fired him had he not filed it. And on both those issues the jury sided with the plaintiff. Rightly on the first issue; there is no indication that the injury report was not submitted in good faith—the plaintiff had after all been injured, and the report described the injury accurately.

But as for the second issue—whether the railroad would have terminated the plaintiff had he not made an injury report—the answer was yes (not no, as the jury thought), because there is no evidence that the railroad's decision to fire him was related to his having made the report. So one sees that the district judge's “contributing factor” ruling on summary judgment misled the jury. The railroad provided un rebutted evidence that it believed that the plaintiff had stolen the ties, and the plaintiff points to no evidence that BNSF would fail to fire an employee

whom it discovered to have stolen from the company and no evidence that BNSF disbelieved Veitz's account.

BNSF thus proved its affirmative defense to the charge that it fired the plaintiff because he filed (with his superior's agreement) an injury report citing negligible medical expenses. Consistent with language in its rules of employment quoted earlier, the company appears to have a firm policy of firing employees discovered to have stolen company property. What it does not have, so far as appears, is a policy of singling out for discipline an employee who submits an injury report. There is no basis in the record for supposing that had the plaintiff not submitted an injury report but BNSF had nonetheless discovered the stolen railroad property, he wouldn't have been fired. Therefore we needn't give the plaintiff a do-over trial.

Slip op. at 9-13.

CONTRIBUTING FACTOR; 8TH CIRCUIT RULES THAT COMPLAINANT MUST PROVE INTENTIONAL RETALIATION

CONTRIBUTING FACTOR; 8TH CIRCUIT RULES THAT MORE THAN A TEMPORAL CONNECTION BETWEEN PROTECTED ACTIVITY AND ADVERSE EMPLOYMENT ACTION IS REQUIRED TO ESTABLISH A PRIMA FACIE CASE

In *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786 (8th Cir. Oct. 7, 2014) (No. 13-3326; 2014 U.S. App. LEXIS 19099), the Eighth Circuit upheld a summary judgment disposition by the district court and rejected complainant's reliance on *Araujo v. N.J. Transit Rail Ops., Inc.*, 708 F.3d 152, 158 (3d Cir. 2013) that he "need not demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his [protected activity] was a contributing factor to the personnel action." Citing to *Staub v. Proctor Hosp.*, 131 S.Ct. 1186, 1190 n. 1 (2011) (the "cat's paw" case), the court stated that the essence of a FRSA claim is "discriminatory animus." 131 S.Ct. at 1193. It found that while a "contributing factor" causation does not require that the employee conclusively demonstrate the employer's retaliatory motive in making his prima facie case, he must prove intentional retaliation prompted by the employee engaging in protected activity. In making this distinction, the court opined that *Araujo* may have improperly relied on *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), for its no-need-to-show-motive conclusion.

The court also found that "more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation" and relied on complainant's disciplinary probation status as a result of an earlier derauling incident. The court acknowledged the more lenient "contributing factor" causation standard but rejected the "notion" in some ARB decisions that temporal proximity, without more, is sufficient to establish a prima facie case. The court found that complainant's June 9 fouling of the tracks was an intervening event that *independently* justified adverse disciplinary action rejecting complainant's argument as to whether [he] in fact committed the rule violation. In the absence of

evidence connecting his protected activity to the discharge, Kuduk was not entitled to FRSA relief even if BNSF inaccurately concluded that he committed one of the Eight Deadly Decisions (“Do not walk between rails or foul the track, except when duties require and proper protection is provided”). See *Allen v. City of Pocahontas*, 340 F.3d 551, 558 n. 6 (8th Cir. 2003) (“it is not unlawful for a company to make employment decisions based upon erroneous information and evaluations”), *cert. denied*, 540 U.S. 1182 (2004).

The court also agreed with the district court that BNSF was not liable for wrongful retaliation because it demonstrated by clear and convincing evidence that it would have discharged Kuduk even if he had not engaged in protected activity. See 49 U.S.C. § 42121(b)(2)(B)(ii). In doing so, the court relied on the labor-management investigatory and arbitration procedures.

**CONTRIBUTING FACTOR UNDER FRSA WHISTLEBLOWER FRAMEWORK;
CONTRIBUTING FACTOR MEANS ANY FACTOR WHICH, ALONE OR IN
CONNECTION WITH OTHER FACTORS, TENDS TO AFFECT IN ANY WAY THE
OUTCOME OF THE DECISION.**

In *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, No. 12-2148, 2013 WL 600208 (3rd Cir. Feb. 19, 2013), the Third Circuit Court of Appeals noted that since the FRSA was substantially amended in 2007 regarding anti-retaliation protections, including the AIR21 burden shifting test. In regard to the plaintiff's burden of proof, the court noted that the FRSA burden-shifting is much more protective of plaintiff-employees than the *McDonnell Douglas* framework. The court stated:

The plaintiff-employee need only show that his protected activity was a “contributing factor” in the retaliatory discharge or discrimination, not the sole or even predominant cause. See 49 U.S.C. § 42121(b)(2)(B)(ii). In other words, “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 563, 567 (5th Cir.2011) (quoting *Allen*, 514 F.3d at 476 n. 3) (internal quotation omitted).

The term “contributing factor” is a term of art that has been elaborated upon in the context of other whistleblower statutes. The Federal Circuit noted the following in a Whistleblower Protection Act case:

The words “a contributing factor” ... mean *any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision*. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a “significant”, “motivating”, “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.1993) (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)) (emphasis added by Federal Circuit). Furthermore, an employee “*need not* demonstrate the existence of a

retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action.” *Marano*, 2 F.3d at 1141 (emphasis in original); *see also Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010) (“A prima facie case does not require that the employee conclusively demonstrate the employer’s retaliatory motive.”).

Araujo, supra, slip op. at 14-15 (emphasis as in original).

U.S. District Court Decisions

CONTRIBUTING FACTOR CAUSATION; COURT APPLIES FIVE FACTOR TEST OF *TOMKINS v. METRO-NORTH*; WEIGHT GIVEN TO DETERMINATION OF NATIONAL RAILROAD ADJUSTMENT BOARD

In *Necci v. Long Island R.R. Co.*, No. 16-CV-3250 (E.D. N.Y. Mar. 21, 2019) (2019 U.S. Dist. LEXIS 47231; 2019 WL 1298523), the Plaintiff alleged that the Defendant retaliated against her by decertifying her as a locomotive engineer after an incident in 2013 in which the train was 50 minutes late and after an internal hearing the Defendant found a pattern of improper performance making her an unfit and dangerous train operator. The Plaintiff also alleged retaliation based on her firing after a subsequent incident in 2016, at which time she had been returned to a Station Appearance Maintainer (“SAM”) position. In this second incident, the Defendant found that she had disobeyed and refused to follow direct orders to vacuum and to roll up floormats. The Plaintiff had refused based on her belief that it was unsafe to use electrical outlets in public areas and that she needed instruction and help on rolling up the mats.

2013 Decertification Incident – Five Factor Test on Contributing Factor Causation

On motion for summary judgment, the Defendant argued that the Plaintiff’s protected activities (inspecting the train; reporting safety concerns; slowing the train for a safety hazard) were not contributing factors in her decertification. The court analyzed the contributing factor question under the five factor framework articulated in *Tompkins v. Metro-North Commuter Railroad*, No. 16-CV-9920, 2018 WL 4573008 at * 7 (S.D.N.Y. Sept. 24, 2018), appeal filed, 2d Cir. Case No. 18-3174. The *Tompkins* court had in turn cited *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017). The court found that factors concerning the temporal and substantive connection between the protected activities and the adverse employment action favored the Plaintiff, although the court noted that the protected activities were not part of the charges lodged against the Plaintiff. Weighing against the Plaintiff was the lack of evidence that any of the lower-level supervisors accountable for addressing the Plaintiff’s safety complaints played a decision-making role in the adjudication of the charges against her. The court also noted that the Defendant had only decertified the Plaintiff as a locomotive engineer and reinstalled her as a SAM—which eroded the inference of a causal connection.

The court next analyzed the weight to be given to the National Railroad Adjustment Board of the National Mediation Board's (NRAB) decision to uphold the decertification. The Plaintiff did not argue that the NRAB was partial, but stressed that her employer conducted the evidentiary hearing. The court found no evidence of prejudice or of an incomplete or tainted record before the NRAB. The court found that the NRAB's decision was supported by the evidence. In sum, the court found that the fact that the Plaintiff was decertified after disciplinary hearings at which she was represented by union counsel—and that the decisions to discharge were upheld by the railroad internally and by the NRAB—weighed in favor of the Defendant. The court stated that “while the NRAB’s decision does not preclude Plaintiff’s FRSA claim, it has probative weight in establishing that the charged misconduct—and not Plaintiff’s protected activities—motivated LIRR’s disciplinary action.” Slip op. at 40 (citation omitted). Weighing the factors, the court granted summary judgment as to the decertification element of the complaint.

2016 Discipline — Contributory Factor Causation

The court again applied the five factor test on contributory factor causation, and again granted summary judgment in favor of the Defendant. The court found that the disciplinary action in 2016 was completely unrelated to the 2013 protected activities. The court found that the disciplinary proceedings were remote in time to the protected activities. The court found an intervening event that independently justified the disciplinary action—the charged misconduct. The court found that the official who made the disciplinary decision had not met the Plaintiff and had no knowledge of the circumstances surrounding her disqualification as a locomotive engineer. The court reviewed the disciplinary proceedings and rejected the Plaintiff’s claim that she had not able to introduce evidence, and found that NMB’s decision upholding the charges was supported by substantial evidence. The court thus found that all five factors weighed against the Plaintiff’s claim.

CONTRIBUTING FACTOR CAUSATION; COURT APPLIES *GUNDERSON* FIVE FACTOR TEST AND GRANTS SUMMARY JUDGMENT IN FAVOR OF RAILROAD WHERE DISCIPLINE WAS FOR NON-PROTECTED ACTIVITY AND INTERVENING FACTORS INDEPENDENTLY SUPPORTED DISCIPLINE

In *Tompkins v. Metro-North Commuter R.R.*, No. 16-cv-09920 (S.D. N.Y. Sept. 24, 2018) (2018 U.S. Dist. LEXIS 163198; 2018 WL 4573008), the Plaintiff brought a suit alleging that Defendant violated the whistleblower provisions of the Federal Railroad Safety Act (“FRSA”), 49 U.S.C § 20109, by suspending him in retaliation for his protected activities of reporting and refusing to work in unsafe working conditions. The district court granted summary judgment in favor of the Defendant.

After granting summary decision in favor of Defendant on the grounds that some of the claimed protected activity was not based on a reasonable belief, the court noted that it was undisputed that it was protected activity for the Plaintiff to have reported unsafe walking conditions and to have asked for a means of transport to the other building. Thus, the court considered whether the Plaintiff presented sufficient evidence for a reasonable jury to conclude that the Plaintiff’s safety

complaints (separate and apart from the refusal to walk) were “contributing factors” to two disciplinary suspensions. The court described the legal standard as follows:

To establish a contributing factor, a FRSA plaintiff must produce evidence identifying “intentional retaliation prompted by the employee engaging in protected activity.” *Lockhart*, 266 F. Supp. 3d at 663 (quoting *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014)). The “contributing factor” need not be the sole factor influencing the adverse employment action, and establishing a contributing factor does not require a showing of retaliatory motive. *Araujo v. N.J. Transit Rail Ops., Inc.*, 708 F.3d 152, 158 (3d Cir. 2013). But courts considering FRSA claims have held that “more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation.” *Kuduk*, 768 F.3d at 792 (internal quotation marks omitted). “In considering [the contributing factor] element, [courts] must take into account the evidence of the employer’s nonretaliatory reasons.” *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017) (internal quotation marks omitted).

Id. at 13. The court then applied a five-factor test as described in *Gunderson*, taking care to note that the assessment only related to the Plaintiff’s reporting of icy sidewalks, and not to his refusal to walk in those conditions which had been the basis for the discipline (but not protected activity under the FRSA). The court found several factors weighed in favor of the railroad on the first disciplinary action concerning a refusal to walk to the other building: (1) the Plaintiff had been represented by his union throughout the disciplinary proceedings, and the resulting suspension was upheld both by the railroad internally and by an arbitration panel; (2) the Plaintiff made no showing that a lower-level supervisor accountable for addressing the safety complaints played a decision-making role in the adjudication of the charges against him; (3) although there was temporal proximity, the record was clear that he was not disciplined for raising a safety issue but rather because he was argumentative and defied his supervisor’s instructions.

In regard to a second disciplinary action concerning the Plaintiff’s alleged threats to a supervisor in a lunchroom encounter, one of the factors weighed against the railroad because an arbitration panel overturned the Plaintiff’s suspension. However, other factors clearly weighed in the railroad’s favor given intervening events independently justifying adverse disciplinary action. The court found that “[t]he allegations at issue in Count II were based entirely on Tompkins’ alleged threats to a supervisor, not his safety complaints, and relevant intervening events include not only Tompkins’ insubordination for refusing to walk to the [other building], but also all of the subsequent disciplinary proceedings related to that insubordination and his initiation of the lunchroom confrontation with his supervisor.” *Id.* at 16. The court also granted summary decision as to this count.

CONTRIBUTING FACTOR ANALYSIS UNDER FRSA; COURT GRANTED SUMMARY JUDGMENT WHERE THE PLAINTIFF ADDUCED INSUFFICIENT EVIDENCE THAT HIS REPORTING OF AN INJURY CONTRIBUTED TO THE DECISION TO DISCIPLINE HIM FOR VIOLATION OF WORKPLACE SAFETY

RULES; TEMPORAL PROXIMITY BETWEEN REPORT AND DISCIPLINE WAS NOT SUGGESTIVE OF A CAUSAL RELATIONSHIP BECAUSE THE EMPLOYEE'S UNION'S COLLECTIVE BARGAINING AGREEMENT REQUIRED THE EMPLOYER TO INITIATE RULE VIOLATION DISCIPLINARY PROCEEDINGS WITHIN TEN DAYS OF A WORKPLACE INCIDENT.

In *Araujo v. New Jersey Transit Rail Operations, Inc.*, CA No. 10-3985, 2012 WL 1044619 (D.N.J. Mar. 28, 2012) (unpublished) (case below ALJ No. 2010-FRS-23), the plaintiff was a conductor-flagman for a railroad, and his primary responsibility was "to protect the construction crew members from the movement of trains in the course of using the high rail vehicle." *Araujo* at *1. Due to miscommunication with two linemen that were assigned to de-energize the overhead wires prior to the day's construction project, a member of the crew came into contact with the live wires and suffered a fatal injury. The plaintiff immediately called 911 and also reported the accident to the dispatcher. The defendant and the Federal Rail Administration ("FRA") investigated the accident, and while they found the two linemen that failed to de-energize the wires primarily responsible for the accident, they also found the plaintiff to be partially at-fault, and suspended him for violating several workplace safety rules. As a result of the incident, the plaintiff sought counseling under the defendant's counseling program, and was found to be unfit to return to work. The defendant initially continued paying his salary while on medical leave, BUT even after he received medical clearance to resume working, the defendant held plaintiff out of service. The plaintiff filed a retaliation complaint under 49 U.S.C. § 20109(a)(4), alleging that the defendant disciplined him in retaliation for reporting the deceased crew member's injury, and for reporting his own mental injury to the defendant's medical department. In response, the defendant filed a motion for summary judgment arguing that the plaintiff could not prove that his protected activity was a contributing factor to his discipline.

In granting the defendant's motion, the court dismissed the plaintiff's argument that the temporal proximity between his protected activity and the defendant filing disciplinary charges against him evidenced a causal relationship because the company was required under its collective bargaining agreement with the plaintiff's labor union to initiate rule violation charges within ten days of the incident. In light of the collective bargaining agreement's constraints, the court found "the temporal proximity in this case is not indicative, much less 'unusually suggestive' of a causal relationship between the injury reports and the date the charges were filed." *Araujo* at *7. Equally unpersuasive was the plaintiff's argument that the defendant's decision not to test the plaintiff for drug abuse after the incident constitutes an admission that the plaintiff did not contribute to the incident. The plaintiff also argued that he was disparately punished for his violating safety rules by relying on his lineman's word that they had de-energized the overhead wires, because it was routine for conductor-flagmen to do so in practice. However, the court found that he failed to complete this disparate treatment argument because he failed to point "to a single conductor-flagman, or any other NJT employee, who committed an infraction of the electrical safety rules in connection with an incident involving a fatality yet faced no disciplinary action." *Id.* at *8. Not only did the court find that the plaintiff had failed to raise a question of fact as to causation, but it also found that the defendant proved that "it would have pursued charges and imposed discipline on Araujo regardless of whether he made his FRSA-protected injury reports." *Id.* at *9.

**CONTRIBUTING FACTOR CAUSATION NOT ESTABLISHED WHERE
COMPLAINANT FAILED TO PROFFER ANY EVIDENCE OF PROTECTED
ACTIVITY**

In *Stearns v. Union Pacific Railway Co.*, ARB No. 2017-0001, ALJ No. 2016-FRS-00024 (ARB Apr. 5, 2019), the ARB found that the ALJ properly granted summary decision in favor of the Respondent where the Complainant failed to proffer evidence that any alleged protected activity contributed to his discharge for violating a workplace rule and policy by making threatening comments directed at a co-worker. The Complainant had become irate when a co-worker had not provided information the Complainant believed was necessary to keep trains moving. The Complainant argued that as yardmaster he was responsible for the safe and efficient operation of train movement. The ARB, however, found that the Complainant had not produced evidence “that a delay in moving a particular train would have endangered safety in the terminal operations or cause any hazardous condition.” Slip op. at 5. The Complainant also argued that he engaged in protected activity “just by being an employee under the FRSA and by moving interstate commerce through the terminal.” The ARB stated that “[t]he FRSA, however, still requires an employee to prove the specific elements of a complaint.” *Id.* at 5-6. The ARB found that the Complainant had “offered no evidence that could prove that he engaged in protected activity or that the activity he did claim contributed to his discharge.” *Id.*

**CONTRIBUTING FACTOR; COMPLAINANT FAILS TO MAKE OUT
CONTRIBUTING FACTOR SHOWING WHERE RELEVANT DECISION MAKERS
DID NOT HAVE KNOWLEDGE OF THE PROTECTED ACTIVITY, TEMPORAL
PROXIMITY WAS INTERRUPTED BY INTERVENING EVENTS, AND A
PROFFERED COMPARATOR WAS NOT SIMILARLY SITUATED**

Hunter v. CSX Transportation, Inc., ARB Nos. 2018-0044, and -0045, ALJ No. 2017-FRS-00007 (ARB Apr. 25, 2019) (per curiam) (Final Decision and Order): FRSA case in which the ALJ found that Complainant had engaged in protected activity but not that the protected activity was a contributing factor in the decision to terminate him. The ALJ also found that the Respondent had established by clear and convincing evidence that it would have taken the same action absent the protected activity. Complainant appealed both causal findings. Respondent appealed the finding that Complainant engaged in protected activity.

Complainant reported that a wheel slip alarm was sounding. Respondent argued that this wasn't an actual hazardous safety condition and so couldn't be a report of such, or a good faith report of such. The ARB summarily rejected this, stating that they were the same arguments fully considered and properly rejected by the ALJ. Complainant's arguments turned on claims that certain testimony was credible, certain evidence was significant, and Respondent's explanations were “bunk.” But ALJs receive deference in their credibility assessments unless they are

inherently incredible or patently unreasonable. They were not in this case, so they received deference and the findings were affirmed. The ARB thus affirmed the ALJ's decision in full and “adopt it as our own and attach it.”

ALJ Decision

Complaint had been terminated and the parties stipulated that was an adverse action. The case was about two accounts of the termination—Complainant said it was due, in part, to his report of the wheel slip alarm. Respondent said that happened all the time and wasn't a hazardous condition. It said Claimant was fired for leaving work without the permission of a supervisor and that the decision makers didn't even know about the alleged protected activity. Complainant asserted that other employees who left without permission weren't fired.

The ALJ had first denied the complaint on the contributing factor element. The discussion begins with a nice recitation of relevant law (28-30). There was close temporal proximity, but the ALJ found that the relevant decision makers did not have knowledge of the protected activity--the trainmaster who reported that Complainant had left did have that knowledge, but he didn't report the protected activity to his hire ups and his role was only to receive guidance on what to do, i.e. initiate proceedings. The temporal proximity was also minimized because of intervening events (leaving work and the confusion at the end of the shift) and the commonality of the wheel slip events. Respondent had been consistent in its explanation of events and followed its disciplinary procedures. The ALJ also rejected reliance on a comparator who received less punishment since they weren't similarly situated. Further, the ALJ found that there was no good indication of evidence, which followed from the crediting of the front line supervisor's explanations of his actions as well as listening to the tape of the report in question. The ALJ found that the supervisor had acted reasonably in the circumstances. Thus the ALJ concluded that Complainant had not established that the protected activity was a contributing factor in the termination decision.

CONTRIBUTING FACTOR CAUSATION; STANDARD OF REVIEW IS WHETHER SUBSTANTIAL EVIDENCE SUPPORTS ALJ'S FINDINGS OF FACT, NOT WHETHER SUBSTANTIAL EVIDENCE SUPPORTS A DIFFERENT VIEW OF THE CASE; ARB AFFIRMED ALJ'S FINDING THAT SUPERVISOR HAD GENUINE GOOD FAITH BELIEF THAT COMPLAINANT VIOLATED WORK RULE AGAINST THEFT AND COMPLAINANT'S HONEST BELIEF THAT SHE HAD NOT COMMITTED THEFT DID NOT CHANGE THE SUPERVISOR'S BELIEF; ARB ALSO NOTED THAT THE ALJ HAD FOUND NO EVIDENCE OF PRETEXT, AND THAT COMPLAINANT'S TESTIMONY LACKED MUCH PROBATIVE VALUE

In *Austin v. BNSF Railway Co.*, ARB No. 17-024, ALJ No. 2016-FRS-13 (ARB Mar. 11, 2019) (per curiam), the ARB affirmed the ALJ's dismissal of the Complainant's FRSA retaliation complaint on the ground that the Complainant failed to demonstrate that any protected activity was a contributing factor in Respondent's decision to terminate her employment. The Complainant had slipped and fell and injured her tailbone. She reported the hazard, the fall and the injury to the Respondent's chief dispatcher. The Complainant declined transport to the

hospital by ambulance, and instead informed the Respondent that she would seek medical care on her own. She went to an urgent medical care facility across the street from the workplace, and upon advice from the medical providers, stayed out of work for two days. Supervisors were notified within 24 hours of the fall and injury. Later, a co-worker reported a theft of personal property, and surveillance video showed the Complainant removing medication from the co-worker's desk area. After learning that it was the Complainant who had taken the medicine, the co-worker indicated that she had given the Complainant permission to use her Advil or Aleve and did not want to pursue the matter. The Advil bottle, however, had included prescription medications, and the video appeared to show that the Complainant took the bottle surreptitiously. After an internal investigation/hearing, the Respondent concluded that the Complainant had taken the medication without consent and had violated the Respondent's rule against dishonesty and theft. The Respondent then terminated the Complainant's employment.

On appeal the Complainant did not argue that the ALJ's decision was not supported by substantial evidence, but rather that substantial evidence supported a finding that the Complainant was treated differently than other employees, and therefore the Respondent must have been discriminating against the Complainant for reporting an injury at work, medical treatment and a work hazard. The ARB found that the argument misconstrued its standard of review. The ARB stated: "The ARB reviews an ALJ's decision on the merits to determine whether substantial evidence in the record supports any factual findings. Even if there is also substantial evidence for the other party and even if we as the trier of fact might have made a different choice, the standard of review is unchanged." Slip op at 8 (citation omitted).

The ARB noted that the ALJ had largely relied on a supervisor's credible testimony to find that the supervisor had a good faith belief that the Complainant had taken the co-worker's property without consent and had genuinely believed that she violated the Respondent's rule against dishonesty or theft. The ARB found this belief supported by the video evidence and the Complainant's own testimony. The ARB found that the ALJ correctly determined that even if the Complainant sincerely believed that she was not stealing, it would not change the effect of the supervisor's belief that there had been a theft when making the determination to fire the Complainant. The ARB noted that the ALJ had found no pretext in the Respondent's reasons for making its decision to fire the Complainant. The ARB afforded deference to the ALJ's findings that the Complainant's testimony was, at times, evasive, contradictory, inconsistent and unpersuasive.

CONTRIBUTING FACTOR CAUSATION; REITERATION THAT PURSUANT TO POWERS, DESPITE LOW STANDARD OF PROOF FOR COMPLAINANT TO MEET CONTRIBUTING FACTOR CAUSATION ELEMENT, COMPLAINANT'S EVIDENCE IS NOT VIEWED IN ISOLATION, BUT IN VIEW OF ALL EVIDENCE OF RECORD

In *Austin v. BNSF Railway Co.*, ARB No. 17-024, ALJ No. 2016-FRS-13 (ARB Mar. 11, 2019) (per curiam), the ARB reiterated that the Powers decision had clarified the trier of fact may review consider the entire record in regard to the question of whether a complainant met the low burden of establishing contributory factor causation, and found that under the totality of the

evidence in the instant case, the ALJ's conclusion on the absence of contributory factor causation was amply supported by substantial evidence. Specifically, the ARB wrote:

We are cognizant of the low standard of proof commonly deemed to be sufficient to meet Complainant's burden of proof concerning the causal relationship between her protected activity and the adverse action: 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." *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008). That being noted, the evidence Complainant proffered on this point is not viewed in isolation — the trier of fact and this Board can consider all relevant evidence in determining whether there was a causal relationship between Complainant's protected activity and the adverse employment action alleged. *Powers v. Union Pacific R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS 030, slip op. at 21 (ARB Jan. 6, 2017), *aff'd. Powers v. U.S. Dep't of Labor*, No. 17-70676, 723 Fed. Appx. 522, 2018 IER Cases 180, 768 (9th Cir. May 22, 2018) (unpub.). Under the facts of this case and the totality of the relevant evidence, there is more than substantial evidence to support the ALJ's conclusion that Complainant's protected activity did not affect in any way the decision to terminate Complainant.

Slip op. at 8, n. 37.

CONTRIBUTING FACTOR CAUTION; SUMMARY DECISION GRANTED WHERE RESPONDENT SUBMITTED DOCUMENTATION SHOWING THAT COMPLAINANT HAD BEEN DENIED RE-ENTRY INTO A TRAINING PROGRAM BASED ON AN ESTABLISHED POLICY, AND COMPLAINANT HAD NOT RAISED A GENUINE ISSUE OF MATERIAL FACT ABOUT THAT POLICY; TESTIMONY SHOWING THAT A CO-WORKER HAD BEEN ALLOWED TO RE-ENTER DID NOT CREATE A FACT ISSUE WHERE THAT CO-WORKER WAS NOT SIMILARLY SITUATED

In *Hernandez v. Metro-North Commuter Railroad Co., Inc.*, ARB No. 17-016, ALJ No. 2016-FRS-23 (ARB Mar. 1, 2019) (per curiam), the Complainant alleged that the Respondent retaliated against him in violation of the FRSA by denying him re-entry into its Engineer Training Program (ETP). The Complainant had been previously been accepted for the ETP. He contended that the denial of re-entry was related to his referencing, at the time he was given a warning for failing to advise his ETP instructor before class that he was going to be late or absent, a co-worker's DUI arrest (a fact that Complainant knew the instructor was already aware of). The Respondent contended that the denial of re-entry was based on the fact that the Complainant later had been terminated from the ETP because he had twice failed to pass physical characteristics tests. When the Complainant later re-applied for the ETP he was informed that he was not eligible because of the prior release from the program. Before the ALJ, the Respondent produced an internal HR document that stated that "minimum requirements for the position locomotive engineer include that the candidate must not have failed within a five year period any agency-sponsored training program for the same or similar position requiring comparable qualifications, testing, or training." Slip op. at 3 (footnote omitted). The ALJ granted

summary decision based on the Complainant's failure to establish protected activity or contributory factor causation.

On appeal, the ARB focused on contributory factor causation, and did not decide whether the Complainant's reference to the co-worker's DUI was protected activity. The ARB found that the Respondent's submissions showed that the Complainant was denied re-entry based on the policy. The Complainant failed to raise a genuine issue as to the facts. He did not allege that the policy did not exist. His strongest evidence in opposition to summary decision was deposition testimony that another ETP candidate had been allowed to reenter within five years. The Respondent, however, had submitted evidence showing that the other candidate was not similarly situated as he had been terminated from the ETP due to absences for medical reasons, whereas the Complainant had been terminated for two-time failure of the physical characteristics test.

The ARB noted that the Complainant speculated that he would be able to elicit additional facts in discovery or at a hearing. The ARB stated that, in order to show that the Respondent's submissions had not established the absence of a genuine issue of material fact, the Complainant would have had to have pointed to facts that he hoped to elicit in the face of Respondent's evidence. The ARB stated that an argument that the Respondent's reasons were pretext was not an evidentiary suggestion to oppose summary decision.

The Complainant argued that the ALJ erred when she stayed pre-hearing deadlines and granted Respondent's summary decision motion before he could develop his case. The ARB rejected this argument, noting that the ALJ's stay of pre-hearing deadlines had not stayed discovery, and that the Complainant still had the opportunity to engage in discovery in relation to the summary decision motion.

CONTRIBUTING FACTOR CAUSATION STAGE OF FRSA CAUSE OF ACTION; ALJ ERRED IN CONSIDERING LACK OF MOTIVE TO RETALIATE; REMAND NOT WARRANTED, HOWEVER, WHERE SUBSTANTIAL EVIDENCE SUPPORTED ALJ'S ALTERNATIVE FINDING THAT RESPONDENT MET CLEAR AND CONVINCING EVIDENCE BURDEN

In [*Rathburn v. The Belt Railway Co. of Chicago*](#), ARB No. 16-036, ALJ No. 2014-FRS-35 (ARB Dec. 8, 2017), the Complainant filed a complaint alleging that the Respondent retaliated against him in violation of the FRSA whistleblower provision for reporting an injury and seeking medical treatment for the injury. The ALJ dismissed the complaint following a hearing on the merits, and the ARB affirmed the dismissal.

The Complainant and a coworker were conducting inspections on separate tracks of incoming trains. A dispute arose over whether the Complainant had properly released a blue-flag protection on the track for which the co-worker was doing inspections, leading to a physical altercation in which the Complainant was injured and sought medical treatment. Blue-flag protection rules block entry to a track on which an inspector is working. Both the Complainant and the co-worker were discharged for violating blue-flag protection rules, and rules of conduct relating to altercations and workplace violence.

The ARB found that the ALJ erred in applying the contributing factor causation element of a FRSA complaint because he took into account the lack of evidence that the adverse employment actions were motivated by retaliatory intent. The ARB noted that it “has repeatedly held, an employee need not prove retaliatory animus, or motivation or intent, to prove that his protected activity contributed to the adverse employment action at issue.” Slip op. at 8, citing among other decisions, *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-9, Slip op. at 6 (ARB Feb. 29, 2012).

The ARB nonetheless found that substantial evidence supported the ALJ’s conclusion that the Respondent demonstrated by clear and convincing evidence that it would have taken the same adverse action against the Complainant even had the Complainant not engaged in the protected activity of reporting the injury and seeking treatment for it. The ALJ had found that the Complainant violated the company’s blue-flag rule, and its zero-tolerance policy against workplace violation. The ARB noted that the ALJ had found the Complainant’s testimony unpersuasive and uncorroborated. The ALJ also found that, although there was temporal proximity between the protected activity and the adverse employment action, any inference of causation was negated by lack of evidence of disparate treatment (the company had also fired the co-worker, had a zero-tolerance policy on workplace violence, and had a history of dismissing employees who violated blue-flag rules). There had been hearing testimony indicating that the size of a bonus given to managers could be affected by the number of FRSA-reportable injuries, thereby giving a motive to discourage reporting. The ALJ, however, found no evidence that the Respondent had an attitude or workplace culture that discouraged reporting of injuries—in fact, all witnesses uniformly testified that the Respondent did not have such a policy or culture. The ALJ also found that all the witnesses testified that the Respondent’s blue-flag rules would not have allowed the Complainant to unlock the coworker’s track; that almost all witnesses testified that the Complainant did not have the authority to remove the coworker’s blue-flag on the day in question; and that the testimony of persons who witnessed the argument supported a finding that the Complainant had violated the zero-tolerance workplace violence policy.

ARB ISSUES FINAL VERSION OF EN BANC DECISION PROVIDING THE STATE OF THE LAW ON THE TWO-STEP BURDEN OF PROOF IN CASE TYPES THAT EMPLOY THE AIR21 STANDARD (i.e., ACA, AIR21, CFP, CPS, ERA, FDA, FRSA, MAP21, NTS, PSI, SPA, SOX, AND STAA)

ARB PLURALITY REJECTS *FORDHAM/POWERS* LIMITATIONS ON WHAT EVIDENCE ALJ MAY CONSIDER ON CONTRIBUTING FACTOR ELEMENT

LEAD OPINION SUGGESTS THAT CONFUSION CAN BE LESSENERED IF STEPS ARE VIEWED AS FOLLOWS: STEP ONE IS THE COMPLAINANT’S BURDEN TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT PROTECTED ACTIVITY PLAYED SOME ROLE IN THE ADVERSE PERSONNEL ACTION. STEP TWO IS THE RESPONDENT’S “*SAME-ACTION DEFENSE*”

In [*Palmer v. Canadian National Railway*](#), ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016) (en banc), *reissued with full separate opinions* (Jan. 4, 2017), [erratum with](#)

[caption correction](#) (Jan. 4, 2017), the ARB considered, en banc, how to interpret the FRSA’s burden-of-proof provision. The FRSA incorporates by reference the AIR21 standard of proof. The four-judge opinion was a plurality decision, with a two-judge lead opinion, and three separate opinions.

Lead opinion of Judges Desai and Igasaki

—Rejection of *Fordham* and *Powers*

The ARB rejected the interpretation set forth in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-51 (ARB Oct. 9, 2014) and *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, slip op. at 24 (ARB Mar. 20, 2015) (en banc), *reissued with full dissent* (Apr. 21, 2015), and *vacated* (May 23, 2016), in the panels concluded that the factfinder was precluded from considering evidence of an employer’s non-retaliatory reasons for its adverse action in determining the contributing-factor question. In *Palmer*, the ARB held that:

nothing in the statute precludes the factfinder from considering evidence of an employer’s nonretaliatory reasons for its adverse action in determining the contributing-factor question. Indeed, the statute contains no limitations on the evidence the factfinder may consider at all. Where the employer’s theory of the case is that protected activity played no role whatsoever in the adverse action, the ALJ must consider the employer’s evidence of its nonretaliatory reasons in order to determine whether protected activity was a contributing factor in the adverse action.

USDOL/OALJ Reporter at 15.

—*Palmer* applies to 13 DOL-administered whistleblower provisions

The *Palmer* decision interprets the language of the AIR-21 burden-of-proof provision, which is found in at least twelve other DOL-administered whistleblower provisions, either incorporated through a cross-referencing incorporation, or directly through the same linguistic formulation. The ARB’s interpretation in *Palmer*, therefore applies equally to the following thirteen “whistleblower” statutes within the jurisdiction of OALJ and the ARB:

AIR21:

(1) (AIR21) - Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 20109(d)(2)(A)(i)

ERA:

(2) (ERA) - Energy Reorganization Act of 1974, as amended by the Energy Policy Act of 1992, 42 U.S.C. § 5851(b)

Statutes incorporating AIR21 by cross-reference:

- (3) (SOX) - Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806(a), 116 Stat. 745, 802 (2002) (codified at 18 U.S.C. § 1514A(b)(2)(C))
- (4) (FRSA) - Federal Rail Safety Act, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1521, 121 Stat. 266, 444 (2007) (codified as amended at 49 U.S.C. § 20109(d)(2)(A)(i))
- (5) (STAA) - Surface Transportation Assistance Act, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1536, 121 Stat. 266, 464 (2007) (codified as amended at 49 U.S.C. § 31105(b)(1))

Statutes using the same linguistic formulation as the AIR-21:

- (6) (PSI) - Pipeline Safety Improvement Act of 2002, Pub. L. No. 107-355, § 6, 116 Stat. 2985, 2989 (2002) (codified at 49 U.S.C. § 60129(b)(2)(B))
- (7) (NTS) - National Transit Systems Security Act of 2007, Title XIV of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1413, 121 Stat. 266, 414 (2007) (codified at 6 U.S.C. § 1142(c)(2)(B))
- (8) (CPS/CPSIA) - Consumer Product Safety Act, as amended by Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 219(a), 122 Stat. 3016, 3062, 3063-64 (2008) (codified at 15 U.S.C. § 2087(b)(2)(B))
- (9) (CFP) - Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 1057(c)(3)(C), 124 Stat. 1376, 2031 (2010) (codified at 12 U.S.C. § 5567(c)(3)(C))
- (10) (FDA) FDA Food Safety Modernization Act, Pub. L. No. 111-353, § 402, 124 Stat. 3885, 3968, 3969 (2011) (codified at 21 U.S.C. § 399d(b)(2)(C))
- (11) (MAP21) Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, 126 Stat. 405, 765, 767 (2012) (codified at 49 U.S.C. § 30171(b)(2)(B))

Statutes cross-referencing another provision with similar language:

- (12) (ACA) - Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1558, 124 Stat. 119, 261 (2010) (codified as amended at 29 U.S.C.A. § 218c(b)(1)) (incorporating by reference the burdens of proof in the CPSIA)
- (13) (SPA) - Seaman's Protection Act, as amended by the Coast Guard Authorization Act of 2010, Pub. L. No. 111-281, § 611(a), 124 Stat. 2905, 2969-70 (2010) (codified as amended at 46 U.S.C. § 2114(b)) (incorporating by reference the burdens of proof in the STAA)

—*Textual analysis supported by statutory framework; best to think of step two as the “same-action defense,” and not as the “clear and convincing” defense*

In rejecting the *Fordham/Powers* interpretation, the ARB lead opinion in *Palmer* focused on the text of the AIR21 two-step burden-of-proof framework. The ARB found that

the text of [§ 42121(b)(2)(B)(iii)]—‘the complainant demonstrates that [protected activity] was a contributing factor in the unfavorable personnel action’—is best interpreted to require a complainant to prove by a preponderance of the evidence that protected activity played some role in the adverse personnel action and to

permit the factfinder to consider any admissible, relevant evidence in making that determination.

USDOL/OALJ Reporter at 18. The ARB also found support for this interpretation in the structure of the AIR21 framework. The ARB noted that

[t]he phrase ‘contributing factor’ describes the substantive factual issue to be decided while the phrase ‘clear and convincing’ only describes the standard of proof, not the factual issue to be decided. The two are thus not analogous monikers [and thus] ... it may thus help cement this crucial aspect of the two-step test to refer to step two as the ‘same-action defense,’ not as the ‘clear and convincing’ defense.

Id. at 22 (footnotes omitted).

—*Support in the legislative history of the ERA whistleblower provision*

The ARB found that the legislative history demonstrated that the AIR21 two-step burden-of-proof derived from the burden-of-proof provision in the 1992 amendments to the ERA’s whistleblower provision, which in turn derived the test first announced by the United States Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). The ARB noted that the *Fordham* panel interpreted the legislative history of the Whistleblower Protection Act’s (WPA) burden-of-proof provision as supporting its interpretation of the ERA and AIR21. The ARB explained in an extended discussion why the *Fordham* panel’s reliance on the WPA’s legislative history was error. Finally, the ARB noted that its interpretation in *Palmer* was supported by at least two decades of consistent jurisprudence in the ARB and the federal courts of appeal.

—*How the AIR burden of proof provision is applied*

The ARB next summarized how the AIR-21 burden-of-proof provision is applied. The ARB wrote:

The AIR-21 burden-of-proof provision requires the factfinder—here, the ALJ—to make two determinations. The first involves answering a question about what happened: did the employee’s protected activity play a role, any role, in the adverse action? On that question, the complainant has the burden of proof, and the standard of proof is by a preponderance. For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee’s protected activity was a contributing factor in the employer’s adverse action.

The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of

proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.

The complainant must also of course prove that he engaged in protected activity and that the respondent took an adverse action against him. ...

USDOL/OALJ Reporter at 52-53.

The ARB elaborated:

A. The ALJ must determine whether it is more likely than not that protected activity was a contributing factor in the adverse personnel action, and to do so, the ALJ must consider all relevant, admissible evidence.

We have said it many a time before, but we cannot say it enough: “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.’” We want to reemphasize how low the standard is for the employee to meet, how “broad and forgiving” it is. “Any” factor really means any factor. It need not be “significant, motivating, substantial or predominant”—it just needs to be a factor. The protected activity need only play some role, and even an “[in]significant” or “[in]substantial” role suffices.

Importantly, if the ALJ believes that the protected activity *and* the employer’s nonretaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question. Thus, consideration of the employer’s nonretaliatory reasons at step one will effectively be premised on the employer pressing the factual theory that nonretaliatory reasons were the *only* reasons for its adverse action. Since the employee need only show that the retaliation played some role, the employee necessarily prevails at step one if there was more than one reason and one of those reasons was the protected activity.

This is why we have often said that the employee does not need to disprove the employer’s stated reasons or show that those reasons were pretext. Showing that an employer’s reasons are pretext can of course be enough for the employee to show protected activity was a “contributing factor” in the adverse personnel action. Indeed, at times, the factfinder’s belief that an employer’s claimed reasons are false can be precisely what makes the factfinder believe that protected activity was the real reason. That is why a categorical rule prohibiting consideration of the evidence of the employer’s nonretaliatory reasons for its adverse action might

actually in some circumstances *undermine* a complainant's ability to establish that protected activity was a contributing factor.

Fordham appears to have expressed the worry that permitting consideration of the employer's nonretaliatory reasons at step one would amount to requiring the employee to disprove the employer's nonretaliatory reasons. But because "unlawful retaliatory reasons [can] co-exist with lawful reasons," and because, in such cases, protected activity would be deemed a contributing factor, consideration of evidence of the employer's nonretaliatory reasons when determining the contributing factor issue does *not* require the employee to disprove the employer's reasons.

That is also why the term "weigh" when describing the ALJ's task may well have added to the confusion. Since the "contributing factor" standard requires only that the protected activity play some role in the adverse action, the employer's nonretaliatory reasons are not "weighed against" the employee's protected activity to determine which reasons might be weightier. In other words, the ALJ should not engage in any comparison of the relative importance of the protected activity and the employer's nonretaliatory reasons. As long as the employee's protected activity played some role, that is enough. But the evidence of the employer's nonretaliatory reasons must be *considered* alongside the employee's evidence in making that determination; for if the employer claims that its nonretaliatory reasons were the only reasons for the adverse action (as is usually the case), the ALJ must usually decide whether that is correct. But, the ALJ never needs to compare the employer's nonretaliatory reasons with the employee's protected activity to determine which is more important in the adverse action.

Moreover, as we have repeatedly emphasized, an employee *may* meet her burden with circumstantial evidence. One reason circumstantial evidence is so important is that, in general, employees are likely to be at a severe disadvantage in access to relevant evidence. When determining whether protected activity was a contributing factor in an adverse personnel action, the ALJ should thus be aware of this differential access to evidence. Key, though, is that the ALJ must make a factual determination and must be persuaded—in other words, must believe—that it is more likely than not that the employee's protected activity played some role in the adverse action. So, for example, even though we reject any notion of a *per se* knowledge/timing rule, an ALJ *could* believe, based on evidence that the relevant decisionmaker knew of the protected activity and that the timing was sufficiently proximate to the adverse action, that the protected activity was a contributing factor in the adverse personnel action. The ALJ is thus *permitted* to infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity. But, before the ALJ can conclude that the employee prevails at step one, the ALJ must *believe* that it is more likely than not that protected activity was a contributing factor in the adverse personnel action and must make that determination after having considered all the relevant, admissible evidence.

We cannot emphasize enough the importance of the ALJ's role here: it is to find facts. The ALJ must consider all the relevant, admissible evidence and make a factual determination, under the preponderance of the evidence standard of proof, about what happened: is it more likely than not that the employee's protected activity played a role, any role whatsoever, in the adverse personnel action? If yes, the employee prevails at step one; if no, the employer prevails at step one. If there is a factual dispute on this question, as is usually the case, the ALJ must sift through the evidence and make a factual determination. This requires the ALJ to articulate clearly what facts he or she found and the specific evidence in the record that persuaded the ALJ of those facts.

B. The ALJ must determine whether the employer has proven, by clear and convincing evidence, that, in the absence of any protected activity, the employer would have taken the same adverse action.

If the complainant proves that protected activity was a contributing factor in the adverse personnel action, the ALJ must then turn to the hypothetical question, the employer's same-action defense: the ALJ must determine whether the employer has proven, by clear and convincing evidence, that, "in the absence of" the protected activity, it would have taken the same adverse action. It is not enough for the employer to show that it *could* have taken the same action; it must show that it *would* have.

The standard of proof that the ALJ must use, "clear and convincing," is usually thought of as the intermediate standard between "a preponderance" and "beyond a reasonable doubt"; it requires that the ALJ believe that it is "highly probable" that the employer would have taken the same adverse action in the absence of the protected activity. "Quantified, the probabilities might be in the order of above 70%"

Again, as when making a determination at step one, the ALJ must consider all relevant, admissible evidence when determining whether the employer has proven that it would have otherwise taken the same adverse action; and again, it is crucial that the ALJ *find* facts and clearly articulate those facts and the specific evidence in the record that persuaded the ALJ of those facts.

USDOL/OALJ Reporter at 53-57 (emphasis as in original) (footnotes omitted).

Concurring opinion of Judge Corchado

—Expansion on lead opinion; notation that causation question inherently involves delving into the respondent's "metaphysical mental process"

Judge Corchado wrote a separate concurring opinion that reiterated and expanded on the lead opinion's analysis. He also noted that the causation issue necessarily involves assessing the respondent's "metaphysical mental process":

The obvious reason an ALJ must consider both sides in deciding “causation” is because the employer’s decision-making is a metaphysical mental process and neither the complainant nor the employer can show the ALJ the actual mental processes that occurred. The invisible influences on the decision-maker’s thoughts cannot be displayed on a movie screen or downloaded as computer data onto a computer monitor. Instead, at the evidentiary hearing, the ALJ faces a complainant trying to prove he was the victim of unlawful mental processes and the employer who denies that protected activity influenced any part of the mental process that led to the employment action in question. The complainant might rely on temporal proximity, inconsistent employer policies, disparate treatment, e-mails, and witness testimony, among other evidence, to prove circumstantially that protected activity contributed. The employer will do the same to prove that protected activity did not contribute. It is this evidence battle that the ALJ must evaluate together to decide as best as possible what the truth is. But whether the causation evidence consists of memoranda, documents, depositions, hearing testimony, etc., all causation evidence presented to the ALJ will be about the influences that did or did not factor into *the employer’s mental processes* that led to the ultimate decision against an employee.

USDOL/OALJ Reporter at 67.

Concurring and dissenting opinion of Judge Royce

—Disputes that WPA legislative history was not applicable; Fordham was intended to prevent inaccurate analysis

Judge Royce wrote a concurring and dissenting opinion. She disputed the majority’s conclusion that the statutory text was clear and that the WPA legislative history was not applicable. This member conceded that “[i]n an effort to properly effectuate the remedial purposes of the statute, and avoid too narrowly construing the statute, *Fordham* may have overstated what the statutory language dictates” but maintained that “[n]evertheless *Fordham*’s categorical formula for applying the statute to the facts is ultimately the surest method for factfinders to accurately analyze both parties’ evidence consonant with the overall goal of whistleblower provisions to protect employees who risk careers to speak up concerning violations of law.’ USDOL/OALJ Reporter at 81 (footnotes omitted).

Concurring opinion of Judge Desai

— If ALJ determines that protected activity was one of the reasons for the adverse action, the ALJ must not weigh that reason against the employer’s nonretaliatory reasons to determine how important the retaliatory reason was

Finally, although Judge Desai signed the lead opinion, he also wrote separately to specify the points on which the ARB panel members agreed and on which he explained his understanding of the principal disagreements. He summarized: “if the ALJ determines that the protected activity was one of the reasons for the adverse action, the ALJ must not weigh that *reason* against the employer’s nonretaliatory reasons to determine how important the retaliatory reason was: the

whole point of Congress lowering the causation standard from ‘substantial’ to ‘contributing’ in step one was to say that if a retaliatory reason is a factor at all, the employee prevails at step one.”

CONTRIBUTING FACTOR CAUSATION; ALJ MAY PROPERLY CONSIDER RESPONDENT’S EVIDENCE ON ITS NON-RETIALIATORY REASON FOR ITS EMPLOYMENT ACTION; ALJ PROPERLY CONSIDERED EVIDENCE THAT ONLY REASON FOR FIRING WAS ITS REASONABLE BELIEF THAT THE COMPLAINANT HAD BEEN DISHONEST

In [*Powers v. Union Pacific Railroad Co.*](#), ARB No. 13-034, ALJ No. 2010-FRS-30 (ARB Jan. 6, 2017), the ARB, applying *Palmer v. Canadian Nat’l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 16, 37 (ARB Sept. 30, 2016; reissued Jan. 4, 2017) (en banc), affirmed the ALJ’s determination that the Complainant failed to prove that his protected activity was a contributing factor in the adverse action he suffered as supported by substantial evidence. The ARB stated: “In making that determination, the ALJ properly considered Union Pacific’s evidence supporting its claims about why it fired Powers. In particular, the ALJ properly considered the evidence supporting Union Pacific’s nonretaliatory reason for its action, that the only reason it fired Powers was its officials’ reasonable belief that Powers had been dishonest.” Slip op. at 18-20. One member of the Board dissented, stating that “the strength of Union Pacific’s evidence of Powers’ alleged dishonesty—or proof that Powers was dishonest—is relevant to a determination of causation but proof that Union Pacific believed him to be dishonest is not.” Slip op. at 22. The dissenting member also stated that the ALJ seemed to have improperly required that the Complainant prove pretext in order to prevail.

CONTRIBUTING FACTOR CAUSATION; ARB REJECTS *FORDHAM v. FANNIE MAE*

[*Editorial Note:* A more complete digest note is included for the reissued opinion in the case.]

In [*Palmer v. Canadian National Railway*](#), ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016) (en banc), the ARB rejected the holding from *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-51 (ARB Oct. 9, 2014) in which the panel indicated that “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 ... the Administrative Law Judge (ALJ) [is] required to disregard the evidence, if any, the respondent offers to show that the protected activity did not contribute to the adverse action.” The ARB ruled that “ALJs are *not* required to disregard any of the evidence the respondent might offer to show that the protected activity did not contribute to the adverse action. Moreover, there are *no* limitations on the types of evidence an ALJ may consider when determining whether a complainant has demonstrated that protected activity was a contributing factor in the adverse action (other than limitations found in the rules of evidence).” The ARB also stated that this interpretation applies equally to all DOL-administered whistleblower provisions incorporating the AIR-21 burden-of-proof provision

The ARB summarized its decision as follows:

We divide our analysis into three sections.

Section 1 concludes that the first step of the AIR-21 whistleblower protection provision's burden-of-proof framework requires the complainant to prove, by a preponderance of the evidence, that protected activity was a contributing factor in the unfavorable personnel action. It further concludes that there are no limitations on the evidence the factfinder may consider in making that determination. Section 1 contains a comprehensive analysis of AIR-21's burden-of-proof provision and its provenance, and explains in significant detail why this Board's decision in *Fordham v. Fannie Mae* was wrong. Readers who are not interested in the details of the analysis of the statutory text, structure, and background may skip straight to Section 2.

Section 1's bottom line is that *Fordham's* interpretation is wrong, and we hereby overturn *Fordham*: nothing in the statute precludes the factfinder from considering evidence of an employer's nonretaliatory reasons for its adverse action in determining the contributing-factor question. Indeed, the statute contains no limitations on the evidence the factfinder may consider at all. Where the employer's theory of the case is that protected activity played no role whatsoever in the adverse action, the ALJ must consider the employer's evidence of its nonretaliatory reasons in order to determine whether protected activity was a contributing factor in the adverse action.

Section 2 lays out the legal standard for cases involving whistleblower protection provisions with the AIR-21 burden-of-proof framework and explains how to apply that standard to this and other cases arising under AIR-21, the FRSA, or any other whistleblower protection provision with the same burden-of-proof framework. It explains that the level of causation that a complainant needs to show is extremely low: the protected activity need only be a "contributing factor" in the adverse action. Because of this low level, ALJs should not engage in any comparison of the relative importance of the protected activity and the employer's nonretaliatory reasons. Since in most cases the employer's theory of the facts will be that the protected activity played *no* role in the adverse action, the ALJ must consider the employer's nonretaliatory reasons, but only to determine whether the protected activity played any role at all.

Finally, Section 3 explains why, under the proper legal standard, we remand this case and what the ALJ should do on remand.

ARB AFFIRMS ALJ'S FINDING THAT COMPLAINANT DID NOT ESTABLISH CONTRIBUTING FACTOR CAUSATION

In *Johnson v. BNSF Railway Co.*, ARB No. 14-083, ALJ No. 2013-FRS-59 (ARB June 1, 2016), the two-judge majority of the ARB found that substantial evidence supported the ALJ's determination that a chain of events in which the Complainant failed to comply with the terms of a substance abuse program, and prior disciplinary incidents, were the cause of his removal rather than protected activity. One member of the ARB dissented on the ground that had the ALJ properly analyzed the question of protected activity to find that the Respondent had delayed the Complainant's medical treatment, (a question not addressed by the majority), controlling precedent would mandate, at a minimum, that contributing factor causation be presumed. The dissenting member also found that key findings of fact by the ALJ relating to the reason the Complainant was referred to the substance abuse program were not supported by substantial evidence.

CONTRIBUTING FACTOR CAUSATION; ARB TO REVISIT QUESTION OF EVIDENTIARY LIMITATIONS PREVIOUSLY CONSIDERED UNDER THE NOW VACATED EN BANC DECISION IN *POWERS* AND THE EARLIER PANEL DECISION IN *FORDHAM*

In *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB June 17, 2016), the ARB provided notice that it will review this appeal en banc. The Board stated the following for briefing:

The parties are requested to file supplemental briefs that should address the questions set forth below that were previously considered before a panel of the Board in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014) and before the Board en banc in *Powers v. Union Pacific Railroad, Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Apr. 21, 2015, reissued with full dissent), which the Board vacated on May 23, 2016:

- 1) In deciding, after an evidentiary hearing, if a complainant has proven by a preponderance of the evidence that his protected activity was a "contributing factor" in the adverse action taken against him, is the Administrative Law Judge (ALJ) required to disregard the evidence, if any, the respondent offers to show that the protected activity did not contribute to the adverse action?
- 2) If the ALJ is not required to disregard all such evidence, are there any limitations on the types of evidence that the ALJ may consider?

Slip op. at 1-2.

CONTRIBUTORY FACTOR CAUSATION; ARB'S *POWERS* DECISION VACATED

On May 23, 2016, the ARB vacated its en banc decision in *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30 (ARB Mar. 20, 2015) (en banc), reissued with full dissent (ARB Apr. 21, 2015). [*Powers v. Union Pacific Railroad Co.*](#), ARB No. 13-034, ALJ No. 2010-FRS-30, (ARB May 23, 2016) (en banc).

In the now vacated *Powers* decision, the ARB had addressed, en banc, the contributory factor element of an FRSA whistleblower complaint. The order vacating the en banc decision was prompted by a determination by the ARB that one member of the ARB had engaged in an ex parte communication that created the appearance of lack of impartiality in the case.

CAUSATION: CONCURRENCE STATES ISSUES THAT ALJ MUST ADDRESS ON REMAND: (1) WHETHER RESPONDENT TRULY BELIEVED INJURY WAS NOT WORK-RELATED; AND; IF SO (2) GIVEN THAT REFUSAL BY RESPONDENT TO PAY MEDICAL BILLS COULD ONLY HAVE OCCURRED BECAUSE OF COMPLAINANT'S REPORTING, COULD SUCH GOOD FAITH BELIEF HAVE BEEN THE SOLE CAUSE OF SUCH REFUSAL?

In [*Fricka v. National Railroad Passenger Corp. \(AMTRAK\)*](#), ARB No. 14-047, ALJ No. 2013-FRS-35 (ARB Nov. 24, 2015), the Complainant filed a FRSA retaliation complaint alleging retaliation for his reporting of a work-related injuries resulting from a motorcycle accident during the Complainant ride to a distant worksite. The Respondent had concluded that the accident was not work related, and refused to pay the Complainant's medical bills. The ALJ had found that the Complainant had engaged in protected activity and that the injury was work related, but that the Complainant had not suffered an adverse employment action under the definition of adverse action found in *Menendez v. Halliburton, Inc.*, ARB No. 09-002, -003; ALJ No. 2007-SOX-5, slip op. at 20 (ARB Sept. 13, 2011). The ARB, however, concluded that the definition of adverse personnel action contained in *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-4 (ARB Dec. 29, 2010), applies to FRSA claims, and remanded for further proceedings before the ALJ.

One member of the Board filed a concurring opinion pointing out that, on remand, the ALJ would have to address whether the Respondent believed that the injury was non-work related, and if so, how such a belief pays into the question of contributing factor. This member pointed out that the question was specifically whether the *reporting* of work-related injury was a reason for the refusal to pay the Complainant's medical bills. The member noted: "Stated differently, despite the fact that Amtrak's decision for medical benefits could only have occurred because of Fricka's reporting, can the ALJ find that a good faith belief that the injury was not work related was the sole cause of the refusal to pay medical benefits?"

CONTRIBUTING CAUSE IN CASES INVOLVING INJURY REPORTS AND RELATED INVESTIGATIONS; ARB REJECTS ARGUMENT THAT ITS PRECEDENT ESTABLISHED A "BUT FOR" CAUSATION TEST

In [*DeFrancesco v. Union Railroad Co.*](#), ARB No. 13-057, ALJ No. 2009-FRS-9 (ARB Sept. 30, 2015), the Complainant alleged that his employer violated the FRSA when it suspended him for 15 days after he reported a workplace slip-and-fall injury. The Complainant's supervisor had concluded that slippery conditions caused the fall and that no further investigation was necessary. Other company officials, however, concluded that the Complainant "failed to take

short, deliberate steps at the time of the fall and that his injury history exhibited a pattern of unsafe behavior.” The Complainant accepted a 15 day suspension in lieu of risking more severe discipline if he sought a disciplinary hearing.

In an initial appeal, the ARB reversed the ALJ’s finding that the Complainant had not established contributing factor, the ARB holding that the evidence of record supported a finding of contributory factor as a matter of law. The ARB remanded for the ALJ to consider whether the Respondent could prove by clear and convincing evidence that it would have suspended Complainant even if he had not made the report. On remand, the ALJ found in favor of the Complainant.

ARB rejects contention that it created a “pure but-for” causation standard

Before the ARB on second appeal, the Respondent argued that inasmuch as it based its discipline on “information independently discovered during the ensuing investigation” and not the protected activity itself, the ARB had “erroneously adopted a ‘pure but-for standard’ whereby protected conduct is deemed a contributing factor whenever it is part of a chain of causally-related events leading to the adverse action.” USDOL/OALJ Reporter at 6, quoting Respondent’s brief. The ARB rejected this contention.

The ARB first stated that its prior remand ruling—that, as a matter of law, the Complainant had met his evidentiary burden of establishing that protected activity contributed to the suspension—was consistent with the ARB’s decision in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-51 (ARB Oct. 9, 2014), as reaffirmed and clarified en banc in *Powers v. Union Pac. R.R.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Apr. 21, 2015).

The ARB then cited to its decision in *Henderson v. Wheeling & Lake Erie RR*, ARB No. 11-013, ALJ No. 2010-FRS-12 (ARB, Oct. 6, 2012):

In *Henderson v. Wheeling & Lake Erie RR*, the ARB held that because the adverse action and the protected activity were inextricably intertwined (due to the fact that the investigation resulting in disciplinary action arose directly from Henderson’s injury report), his protected activity was a contributing factor in the adverse action against him, regardless of the employer’s asserted rationale for its action. Contrary to Union Railroad’s argument on appeal and the ALJ’s understanding of the remand decision the Board has not adopted a “pure but-for” causation standard. Rather, we have held, consistent with our precedent,²² that the protected activity was “a factor in,” as opposed to a mere fact “leading to,” a decision to investigate an employee’s injury for the purpose of deciding whether to bring disciplinary charges.

USDOL/OALJ Reporter at 6-7 (footnotes omitted). The ARB stated that “where a complainant’s evidence establishes that his injury report influenced the employer’s decision to investigate to determine whether to bring disciplinary charges, the complainant has met his burden of proving by circumstantial evidence that his protected activity was a contributing factor in the disciplinary action that resulted.” USDOL/OALJ Reporter at 7.

CAUSATION; SUBSTANTIAL EVIDENCE SUPPORTED ALJ'S FINDING THAT COMPLAINANT FAILED TO ESTABLISH CONTRIBUTING FACTOR BY A PREPONDERANCE OF THE EVIDENCE

In [Mercier v. Union Pacific R.R.](#), ARB No. 13-048, ALJ No. 2008-FRS-4 (ARB Aug. 26, 2015), the ARB summarily affirmed the ALJ's decision denying Complainant's claim of a violation of FRSA for disciplining and terminating him. The ARB found that the ALJ's decision that Complainant failed to prove that his protected activity was a contributing factor to the adverse action was supported by substantial evidence. Judge Brown concurred.

CAUSATION; COMPLAINANT'S BURDEN IS TO PROVE CONTRIBUTING FACTOR, AND NOT MERELY TO RAISE AN INFERENCE; COMPLAINANT IS NOT REQUIRED TO PROVIDE PRETEXT

In [Coates v. Grand Trunk Western Railroad Co.](#), ARB No. 14-019, ALJ No. 2013-FRS-3 (ARB July 17, 2015), the ALJ had stated that the Complainant's causation burden was to prove by a preponderance of the evidence that "the circumstances were sufficient to raise [an] inference" of causation. The ARB indicated that this was error, because the statute requires a complainant to prove as a fact and not simply to raise an inference, "that protected activity was a contributing factor in the adverse action." 29 C.F.R. § 1982.109(a). The ARB stated, however, that contributing factor is a low standard of causation. Moreover, under that standard, protected activity and non-retaliatory reasons can coexist, and a complainant is not *required* to prove the employer's proffered non-discriminatory reasons are pretext.

COMPLAINANT'S CONTRIBUTING FACTOR BURDEN OF PROOF; APPLICATION OF POWERS - ALTHOUGH COMPLAINANT PUT ON CIRCUMSTANTIAL EVIDENCE PLAUSIBLY SUPPORTING INFERENCE OF CAUSATION, ARB AFFIRMED ALJ'S DETERMINATION OF LACK OF CONTRIBUTORY CAUSE BASED ON RESPONDENT'S NON-RETALIATORY EXPLANATIONS

In [Ledure v. BNSF Railway Co.](#), ARB No. 13-044, ALJ No. 2012-FRS-20 (ARB June 2, 2015), the ARB applied its en banc decision in *Powers v. Union Pac. R.R.*, ARB No. 13-034, ALJ No. 2010-FRS-30 (ARB Mar. 20, 2015)(en banc) (reissued with full dissent Apr. 21, 2015), decision, and found that an ALJ can consider any evidence relevant to the issue of causation, "including the employer's explanation for why it did what it did." USDOL/OALJ Reporter at 9 (footnote omitted).

In *Ledure*, the Complainant injured his back while performing duties as a conductor, and began a medical leave of absence and medical treatment. The Complainant filed a claim against the Respondent under Federal Employer's Liability Act (FELA), which was denied by a jury. The

Complainant then presented a full medical release to return to work from his treating physician. A field manager chose not to forward the release to the medical director, the field manager finding the release to be ambiguous and insufficient because it contained language advising the Complainant of the hazards and complications attendant to returning to unrestricted heavy industrial activity. The Complainant filed a FRSA retaliation complaint. The ALJ denied the complaint.

Complainant's contributing factor burden of proof; application of Powers

The ARB found that in the instant case, neither the FRA nor the Respondent's medical standards for fitness for duty were offered into evidence, and therefore, as a matter of law, the Respondent was not entitled to the carve-out exception. Consequently, the ARB reviewed the ALJ's finding that the Complainant failed to meet his contributing factor burden of proof. The ARB, quoting *Powers v. Union Pac. R.R.*, ARB No. 13-034, ALJ No. 2010-FRS-30 (ARB Mar. 20, 2015) (en banc) (reissued with full dissent Apr. 21, 2015), slip op. at 16-17, 19, n.6., stated: "In deciding this question, an ALJ must look at the entire record as a whole and keep in mind that there '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.'" *Id.* at 8 ((footnote omitted).

In the instant case, the ALJ had recognized that the contributing factor element is not a demanding standard, and noted examples of the circumstantial evidence proffered by the Complainant and the temporal proximity between the FELA trial verdict, the Complainant's request to be marked up for work and submission of a medical release. The ARB found that, standing alone, this evidence might cause some triers of fact to suspect that protected activity may have influenced the decision not to allow the Complainant to return. However, in this case, the ALJ was persuaded by the Respondent's non-retaliatory explanations. The ARB stated:

The ALJ has the right to consider any evidence that is relevant to the question of causation, including the employer's explanation for why it did what it did. (*Powers*, ARB No. 13-034, slip. op. 22, 33-34 (the Board unanimously agreed there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor causation *as long as the evidence is relevant to that element of proof*")(emphasis original).) The ALJ specifically found that (1) the treating physician's warning in the medical release about returning to full duty would make "any prudent medical manager" ask for more information but the information was not timely submitted and (2) there was "no reason to believe there was any contributing factor between protected activity and the failure to be reinstated to the conductor's position or to be allowed to qualify for the engineer position."

Id. at 9 (quoting ALJ's decision) (footnote omitted).

CONTRIBUTORY FACTOR ELEMENT; REISSUANCE OF *POWERS* EN BANC DECISION WITH EXPANDED DISSENT; CRITICISM OF MAJORITY FOR

USURPING ALJ'S FACTFINDING ROLE, AND FOR ENGAGING IN FAULTY LOGIC AND ANALYSIS; SUGGESTION THAT *POWERS* MAY BE OF LIMITED PRECEDENTIAL VALUE

[*Editor's Note:* On May 23, 2016, the ARB entered an en banc order vacating the *Powers* decision. It is included here only because it enables a fuller understanding of subsequent caselaw.]

On March 20, 2015, the ARB issued its en banc decision in *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, (ARB Mar. 20, 2015) (en banc). When the March decision was issued, dissenting Judge Corchado, joined by Chief Judge Igasaki, offered a “snapshot” dissent due to the imminent departure of one of the Board members.

The Board reissued *Powers* on April 21, 2015 with the full dissent. Judge Corchado authored the expanded dissent, again joined by Judge Igasaki. *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, (ARB Apr. 21, 2015) (en banc) (reissue). Judge Corchado reiterated that while the majority professed to “fully adopt” *Fordham* it in fact rejected the clear-cut evidentiary rule created by the two-judge majority in that case. In this respect, the *Powers* panel was unanimous. Judge Corchado also stated that the panel was unanimous that 29 C.F.R. Part 18 grants ALJs the power to decide relevance questions.

The judge, however, disagreed with much of the rest of the majority decision. He observed that the majority had usurped the ALJ's fact finding role, searching the record to determine if it supported a finding of contributing factor rather than remanding to the ALJ. He noted that the Board's suggestion that an employer's "subjective" explanations should be rejected as “highly suspicious” ignored ARB precedent recognizing that such explanations can rebut a complainant's accusation of unlawful retaliation if the ALJ believes the employer's testimony.

Judge Corchado noted that the ALJ had found that the Complainant had been terminated because the Employer believed that the Complainant was dishonest. He faulted the majority's logic when it concluded that disproving the Complainant's dishonesty means that unlawful retaliation must have been a contributing factor to the termination of employment. Judge Corchado noted that the majority limited its holding to the specific facts of this case “and thereby limited the precedential impact of the decision....” USDOL/OALJ Reporter at 38.

Judge Corchado further noted that “it is unclear why an employee's circumstantial evidence of the employer's mental processes is generally better than the employer's own explanation of its actions. In any event, there is no statute, regulation, or binding case law that requires ALJs to disregard an employer's subjective explanations of its mental processes.” *Id.* at 39. Judge Corchado noted that in several recent Board decisions, the ARB “rejected ‘contributing factor’ due to the employer's explanations of its employment actions and without requiring application of the ‘clear and convincing’ standard.” *Id.* at 39, n. 32 (citations omitted). He proffered that “[t]hree judges in this case cannot overrule the precedent in these cases, among others.” *Id.*

Judge Corchado expressed disagreement with the majority's contention that “‘subjective’ employer testimony should be excluded to avoid ‘confusion of the issues’ because ‘subjective employer motivation is not a required subset of complainant's showing of contribution.’” *Id.* at

40, quoting majority decision, slip op. at 27. Rather, Judge Corchado stated that “[t]o the contrary, the employer’s reasons are *the issue* when deciding the question of ‘contributing factor’ (causation).” *Id.* (emphasis as in original).

CONTRIBUTORY FACTOR ELEMENT; ALJ MAY CONSIDER *RELEVANT* EVIDENCE AT EACH STAGE OF ANALYSIS; COMPLAINANT CANNOT REST ON TEMPORAL PROXIMITY ALONE WHERE RESPONDENT PRESENTED RELEVANT, OBJECTIVE EVIDENCE REBUTTING CONTRIBUTORY FACTOR CAUSATION; EVIDENCE OF LACK OF RETALIATORY MOTIVE DOES NOT REBUT COMPLAINANT’S EVIDENCE OF CONTRIBUTORY FACTOR; RESPONDENT BEARS THE RISK THAT THE INFLUENCE OF LEGAL AND ILLEGAL MOTIVES CANNOT BE SEPARATED

[*Editor’s Note:* On May 23, 2016, the ARB entered an en banc order vacating the *Powers* decision. It is included here only because it enables a fuller understanding of subsequent caselaw.]

In *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, (ARB Mar. 20, 2015) (en banc), the ARB revisited en banc the “contributory factor” evidentiary analysis enunciated in *Fordham v. Fannie Mae*, ARB No. 12-96, ALJ No. 2010-SOX-51 (ARB Oct. 9, 2014). In *Fordham*, a split panel of the ARB had ruled, inter alia, that a respondent’s evidence of a legitimate, non-retaliatory reason for an adverse action may not be weighed by the ALJ when determining whether the complainant met his or her burden of proving contributing factor causation by a preponderance of the evidence. The panel reasoned that that permitting the employer to put on such evidence at the contributory factor stage would render the statutorily prescribed affirmative “clear and convincing” evidence defense meaningless.

In *Powers*, the ARB en banc panel stated that it was affirming, but clarifying the *Fordham* decision:

[T]he ARB in *Fordham* held 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). *Fordham*, ARB No. 12-061, slip op. at 20-37. That holding as set forth in *Fordham* is fully adopted herein. Our decision in this case, considered en banc, reaffirms *Fordham*’s holding upon revisiting the question of what specific evidence can be weighed by the trier of fact, *i.e.*, the ALJ, in determining whether a complainant has proven that protected activity was a contributing factor in the adverse personnel action at issue and, more pointedly, the extent to which the respondent can disprove a complainant’s proof of causation by advancing specific evidence that could also support the respondent’s statutorily-prescribed affirmative defense for the adverse action taken. Yet, while the decision in *Fordham* may seem to foreclose consideration of specific evidence that may otherwise support a respondent’s affirmative defense, the *Fordham*

decision should not be read so narrowly. This decision clarifies *Fordham* on that point.

USDOL/OALJ Reporter at 14. The ARB's clarification is essentially that the employer's evidence must be *relevant* to the issue presented at the contributory factor stage of the analysis, and that proof of the respondent's statutory defense of proving by clear and convincing evidence that it would have taken the personnel action at issue absent the protected activity is legally distinguishable from the complainant's burden to show contributing factor causation. Specifically, the ARB stated:

Contrary to the dissent's assertion in *Fordham* that the majority's holding in that case precluded consideration by an ALJ of all relevant evidence in deciding the question of contributing factor causation (see *Fordham*, slip op. at 37), the majority in *Fordham* only addressed the question of what evidence could properly be weighed under the "preponderance of the evidence" standard in analyzing complainant's proof of contributing factor causation. *Fordham* specifically addressed the question as to evidence that may be weighed to demonstrate the contributing factor element under the preponderance of evidence standard. The majority decision in *Fordham* stated that its ruling "does not preclude an ALJ's consideration, under the preponderance of the evidence test, of respondent's evidence directed at three of the four basic elements required to be proven by a whistleblower in order to prevail," explaining that "[i]t is only with regard to the fourth element, of whether the complainant's protected activity was a contributing factor in the unfavorable action, that the statutory distinction is drawn." *Fordham*, ARB No. 12-061, slip op. at 35, n.84. The distinction should not, however, be interpreted to foreclose the employer from advancing evidence that is relevant to the employee's showing of contribution. It merely recognizes that the relevancy of evidence to a complainant's proof of contribution is legally distinguishable from a respondent's evidence in support of the statutory defense that it would have taken the personnel action at issue absent the protected activity, which must be proven by clear and convincing evidence. Certainly, analyzing specific evidence in the context of the AIR 21 burden shifting framework "requires a 'fact-intensive' analysis." *Franchini v. Argonne Nat'l Lab*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 10 (ARB Sept. 26, 2012).

While, as *Fordham* explains, the legal arguments advanced by a respondent in support of proving the statutory affirmative defense are different from defending against a complainant's proof of contributing factor causation, there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor causation *as long as the evidence is relevant to that element of proof*. 29 C.F.R. § 18.401. Thus, the *Fordham* majority properly acknowledged that "an ALJ may consider an employer's evidence challenging whether the complainant's actions were protected or whether the employer's action constituted an adverse action, as well the credibility of the complainant's causation evidence." *Fordham*, slip op at 23.

Id. at 22 (footnote omitted).

The ARB noted that “while temporal proximity alone may at times be sufficient to satisfy the contributing factor element, ARB precedent has declined to find 'contributing factor' based on temporal proximity *alone* where relevant, objective evidence disproves that element of complainant's case.” *Id.* at 23 (footnotes omitted) (emphasis as in original).

The ARB further noted that where the protected activity and unfavorable personnel action are “inextricably intertwined,” the respondent bears the risk that the influence of legal and illegal motives cannot be separated. *Id.* at 23-24.

Because proof of contributing factor does not require evidence of retaliatory motive, evidence of non-retaliatory motive, such as “self-serving testimony of Company managers” does not rebut a complainant's evidence of contribution. Rather such evidence is more relevant to a respondent's affirmative defense, i.e., at the clear and convincing stage of the analysis. *Id.* at 26-28.

Dissenting Judge Corchado, joined by Chief Judge Igasaki, stated that contrary to the Board majority's assertion that it is “fully” adopting the *Fordham* evidentiary rule, the majority actually rejects it, citing to its language 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.*” *Id.* at 33-34, citing to Decision and Order, slip op. at 21 (italics in original) [USDOL/OALJ Reporter at 22]. The Dissent stressed the Majority's reaffirmance of an ALJ's authority to determine relevance questions. *Id.* at 34.

CONTRIBUTING FACTOR; COMPLAINANT IS NOT REQUIRED TO ESTABLISH THAT RESPONDENT HAD RETALIATORY ANIMUS; WHERE THE RESPONDENT REVIEWED THE COMPLAINANT'S DISCIPLINE AND INJURY HISTORY AFTER THE COMPLAINANT REPORTED A WORK-RELATED PERSONAL INJURY, THE ARB FOUND AS A MATTER OF LAW THAT THE REPORT OF INJURY WAS A CONTRIBUTING FACTOR TO THE SUSPENSION

In *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-9 (ARB Feb. 29, 2012), the Complainant filed a complaint charging that the Respondent violated the FRSA employee protection provision when the Respondent suspended the Complainant for 15 days after he reported a slip-and-fall accident. Following the report of the accident, a supervisor decided to review the Complainant's discipline and injury history to determine whether he exhibited a pattern of unsafe behavior that required corrective action. It was following that review that the Complainant was suspended. After a hearing, the ALJ found that the Complainant failed to establish that his protected activity was a contributing factor in the adverse action and dismissed the complaint. On appeal, the ARB found that the ALJ had erred in his analysis of whether the Complainant's report of his injury was a contributing factor to the suspension because the ALJ had considered the “key inquiry” to be whether the Complainant could establish that supervisors were motivated by “retaliatory animus.” The ARB wrote:

...This is legal error. DeFrancesco is not required to show retaliatory animus (or motivation or intent) to prove that his protected activity contributed to Union's adverse action. Rather, DeFrancesco must prove that the reporting of his injury

was a contributing factor to the suspension. By focusing on the motivation of [the supervisors], the ALJ imposed on DeFrancesco an incorrect burden of proof, thus requiring remand.

The ARB has said often enough that a “contributing factor” includes “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. Circumstantial evidence may include 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, and a change in the employer's attitude toward the complainant after he or she engages in protected activity.

If DeFrancesco had not reported his injury as he was required to do, Kepic would never have reviewed the video of DeFrancesco's fall or his employment records. Kepic admitted this at the hearing, testifying that such a review was routine after an employee reported an injury and that the purpose of the review was to determine “the root cause.” Kepic stated that after seeing the video he reviewed DeFrancesco's injury and disciplinary records to determine whether there was a pattern of safety rule violations and what corrective action, if any, needed to be taken.

While DeFrancesco's records may indicate a history and pattern of safety violations, the fact remains that his report of the injury on December 6 triggered Kepic's review of his personnel records, which led to the 15-day suspension. If DeFrancesco had not reported his fall and Kepic had not seen the video, Kepic would have had no reason to conduct a review of DeFrancesco's injury and disciplinary records, decide that he exhibited a pattern of unsafe conduct, and impose disciplinary action.

Union's decision to suspend DeFrancesco for 15 days thus violated the direct language of the FRSA, which provides that a railroad carrier may not "suspend" an employee when the employee's actions are “due, in whole or in part, to the employee's lawful, good faith act done.” The statute provides that a “good faith act” includes “notify[ing]” his employer of “a work-related personal injury.” Applying the framework of proving a contributing factor under AIR 21, we can only conclude as a matter of law that DeFrancesco's reporting of his injury was a contributing factor to his suspension.

DeFrancesco, ARB No. 10-114, USDOL/OALJ Reporter at 6-8 (footnotes omitted). The ARB remanded the case for the ALJ to consider whether the Respondent showed by clear and convincing evidence that it would have suspended the Complainant absent the protected activity.

- Respondent's Knowledge

U.S. Circuit Court of Appeals Decisions

CONTRIBUTING FACTOR CAUSATION; 10TH CIRCUIT HOLDS THAT FRSA PLAINTIFF MUST DEMONSTRATE THE DECISIONMAKER HAD KNOWLEDGE OF THE PROTECTED ACTIVITY; FAILURE TO IDENTIFY DECISIONMAKER RENDERS COURT UNABLE TO DETERMINE THE QUESTION; AUTOMATIC REJECTION FOR NOT MEETING A PREREQUISITE FOR A POSITION DOES NOT PERMIT INFERENCE OF RETALIATORY MOTIVE

In *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166 (10th Cir. Aug. 17, 2018) (No. 17-3120, 2018 U.S. App. LEXIS 22930; 2018 WL 3945875) (case below D.C. No. 5:15-CV-04936; ALJ Nos. 2015-FRS-29 and 30), the Plaintiffs-Appellants (“Appellants”) had attempted over the course of two years to negotiate a settlement with BNSF as to injuries sustained from a tank car spill accident; during this period they had continued in their jobs. When settlement negotiations broke down, an attorney representing the Appellants sent demand letters. The demand letters advised BNSF that medical conditions attributable to the accident caused the Appellants to be partially, permanently disabled and prevented them from working outdoors. BNSF removed the Appellants from service because their jobs entailed outdoor work. Thereafter, the Appellants applied for, and were not selected for, several positions. The Appellants filed several retaliation complaints, including complaints under the FRSA. The district court determined that the Appellants had failed to exhaust their administrative remedies under FRSA relative to most of the positions to which they applied, and failed to show for the remaining positions that their protected activity contributed to the decision not to select them for those positions. On appeal, the court focused in regard to the FRSA claims only on those job applications on which the Appellants had not failed to exhaust their administrative remedies and had not forfeited their claims by omitting challenges in their opening appellate briefs. The deciding factor was lack of evidence that the demand letters played a role in BNSF not selecting the Appellants for the positions. The court first discussed the question of employer knowledge of the protected activity:

Section 20109(a) of Title 49 makes it illegal for a railroad to “discriminate against an employee if such discrimination is *due*, in whole or in part, *to* the employee’s lawful good faith act” (emphasis added). The section’s use of “due . . . to” suggests that the protected activity must be a cause of the unfavorable personnel action. And a protected activity cannot be a cause of an unfavorable personnel action where the person or persons authorizing the unfavorable personnel action do not know about the protected activity. Similarly, as the FRSA protects employees from *retaliation* for their engagement in a protected activity, *Koziara v. BNSF Ry. Co.*, 840 F.3d 873, 878 (7th Cir. 2016); *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 787 (8th Cir. 2014), it follows that the decisionmaker(s) must have knowledge of the protected activity. For how can decisionmakers retaliate against an employee for taking protected activity if they do not know about the protected

activity? See *Koziara*, 840 F.3d at 878 (employee must produce evidence that unfavorable personnel action was “motivated by animus”). Accordingly, we join those courts that have concluded an FRSA plaintiff advancing a retaliation claim must demonstrate the decisionmaker had knowledge of the protected activity. See *Conrad*, 824 F.3d at 107–08; *Kuduk*, 768 F.3d at 791; see also *Head v. Norfolk S. Ry. Co.*, 2017 WL 4030580, at *16 (N.D. Ala. Sept. 13, 2017) (“To show that Defendant knew of this protected activity, ‘it is not enough for the plaintiff to show that someone in the organization knew of the protected expression; instead, the plaintiff must show that the person taking the adverse action was aware of the protected expression’” (quoting *Bass v. Bd. of Cty. Comm’rs, Orange Cty., Fla.*, 256 F.3d 1095, 1119 (11th Cir. 2001))); *Cyrus v. Union Pac. R.R. Co.*, 2015 WL 5675073, at *10 (N.D. Ill. Sept. 24, 2015) (“An FRSA retaliation claim cannot survive . . . absent a showing that the superiors knew he had engaged in protected activity before taking any adverse action.”).

Slip op. at 77-78 (emphasis as in original). Applying this ruling to the facts of the case, the court found that the Appellants’ FRSA complaints failed. The first Appellant had failed to provide evidence to show who at BNSF decided to reject the union’s appointment of the Appellant to the job in question, making it not possible for the court to determine whether the decisionmaker(s) knew about the demand letter, or rejected the appointment because of the demand letter. The second Appellant had been automatically rejected for the job in question because he had not passed a mechanical aptitude test. The court found both that the second Appellant failed to identify who the decisionmaker was (or even if it was a person rather than a computer program), and that “an automatic rejection for not meeting a prerequisite for a position is not the type of rejection that permits an inference of a retaliatory motive.” *Id.* at 80.

CONTRIBUTING FACTOR; SUMMARY JUDGMENT; CAT’S PAW; KNOWLEDGE; TEMPORAL PROXIMITY; WHERE MANAGER WHO KNEW ABOUT THE PROTECTED ACTIVITY INFLUENCED/ADVISED THE DECISION MAKERS AND TESTIFIED AT THE HEARING, CAT’S PAW THEORY CAN APPLY TO MAKE A SHOWING THAT THE DECISION-MAKERS KNEW ABOUT THE PROTECTED ACTIVITY AND MAY HAVE INHERITED ANIMOSITY TO THE PROTECTED ACTIVITY; COURT VACATES SUMMARY JUDGMENT WHEN MANAGERS WHO INFLUENCED DECISION COULD HAVE HAD ANIMOSITY TO THE PROTECTED ACTIVITY, THERE WAS TEMPORAL PROXIMITY, AND THERE WAS EVIDENCE THAT THE EMPLOYEE WAS PUNISHED MORE HARSHLY THAN OTHERS

Lowery v. CSX Transp., Inc., 690 Fed. Appx. 98 (4th Cir. May 26, 2017) (unpublished): Plaintiff was suspended for violation of workplace jewelry guidelines and making false statements. He contended that he was actually disciplined in retaliation for safety complaints. The district court granted summary judgment for the railroad and plaintiff appealed, alleging a number of errors. Reviewing the record, the panel concluded that Plaintiff “undoubtedly” engaged in protected activity and suffered an adverse action. He also “adequately demonstrated” that the decision-makers were aware of his protected activity. Even if they did not know, the cat’s paw theory

applied because another trainmaster knew about the protected activity and had contact with/advised the three decision makers and testified at the hearing. This was sufficient to withstand summary judgment. Further, viewing the evidence in the light most favorable to plaintiff, a fact-finder could conclude that this trainmaster gave testimony as the result of retaliatory animus. In addition, another supervisor who include the trainmaster's testimony had clear animosity to the plaintiff and knew about his protected activities. The court concluded that there was an issue of material of fact with the jury on the contributing factor evidence, noting that there was temporal proximity and that plaintiff's discipline was greater than others who violated the policy. The panel also summarily concluded that the defendant had not established by clear and convincing evidence that it would have taken the same action absent the protected activity. The decision below was vacated and the case was remanded for further proceedings.

KNOWLEDGE OF PROTECTED ACTIVITY; FOURTH CIRCUIT REJECTS IMPUTED KNOWLEDGE THEORY AND HOLDS THAT DECISIONMAKERS MUST BE SHOWN TO HAVE BEEN AWARE OF THE PROTECTED ACTIVITY

In *Conrad v. CSX Transportation, Inc.*, 824 F.3d 103, No. 15-1035 (4th Cir. May 25, 2016) (2016 U.S. App. LEXIS 9570)(case below D. Md. 13-cv-3730; ALJ No. 2012-FRS-88), the Fourth Circuit affirmed the district court's grant of summary judgment in favor of the Defendant. The district court had found that the Plaintiff failed to show that any of the Defendant's employees involved in the disciplinary process had known about the Plaintiff's union activities. *Conrad v. CSX Transp., Inc.*, No. WMN-13-3730, 2014 WL 7184747, at *5 (D. Md. Dec. 15, 2014). The Fourth Circuit rejected the Plaintiff's argument on appeal that "knowledge of an employee's protected activities may be imputed to the decision-makers if any supervisory employee at the company knew of the subordinate employee's protected activity when the decision-maker took the unfavorable personnel action, regardless of whether the person with knowledge played a role in the disciplinary process." The Fourth Circuit found persuasive ARB authority holding that "an employee 'must establish that the decision-makers who subjected him to the alleged adverse action were aware of the protected activity.' *Rudolph v. Nat'l R.R. Passenger Corp.*, ARB Case No. 11-037, 2013 WL 1385560, at *9 (Dep't of Labor Mar. 29, 2013)..." and that "it is 'insufficient' to 'demonstrat[e] that an employer, as an entity, was aware of the protected activity.' *Rudolph*, 2013 WL 1385560, at *9...."

U.S. District Court Decisions

SUMMARY JUDGMENT; WHERE GOOD FAITH OF AN INJURY REPORT IS IN GENUINE DISPUTE, SUMMARY JUDGMENT ON THE KNOWLEDGE ELEMENT IS INAPPROPRIATE

Wooten v. BNSF Railway Co., No. 16-cv-139 (D. Mont. Sept. 18, 2018) (2018 U.S. Dist. LEXIS 159199; 2018 WL 4462506) (case below 2016-FRS-00059) (Order [adopting Magistrate’s Findings and Recommendation and Order]), *adopting Wooten v. BNSF Railway Co.*, No. 16-cv-139 (D. Mont. May 29, 2018) (2018 U.S. Dist. LEXIS 89267; 2018 WL 2417858) (case below 2016-FRS-00059) (Findings and Recommendation and Order)

The Plaintiff reported a work-related wrist injury. After investigation a supervisor concluded that the injury had occurred prior to the work and that the Plaintiff had been dishonest in his reports. This led to termination. Plaintiff filed several actions, including an FRSA complaint.

The magistrate judge was presented with cross-motions for summary judgment on the issue of whether the protected activity was a contributing factor in the adverse action. The plaintiff also moved for summary judgment on the adverse action and knowledge elements. The parties agreed that summary judgment was not appropriate on the protected activity element since there was genuine dispute over whether the injury report had been made in good faith. The magistrate judge recommended denying the plaintiff’s motion for summary judgment on the “knowledge” element because though Defendant had knowledge of the injury report, there was dispute over good faith and derivatively dispute over knowledge of *protected* activity.

SUMMARY JUDGMENT; KNOWLEDGE; WHERE THERE IS NO EVIDENCE BEYOND SPECULATION THAT THE DECISION-MAKERS HAD KNOWLEDGE OF THE PROTECTED ACTIVITY, SUMMARY JUDGMENT IS APPROPRIATE.

Gibbs v. Norfolk Southern Railway Co., No. 14-cv-587 (W.D. Ky. Mar. 29, 2018) (2018 U.S. Dist. LEXIS 52565; 2018 WL 1542141) (Memorandum Opinion and Order): Plaintiff made safety complaints related to parking arrangements for a time when the entrances to the main parking area at the Louisville yard were to be blocked. Later he and another employee were investigated after some managers found them sitting in a company truck at a restaurant during work hours. Plaintiff maintained that this was normal practice and authorized, but he was terminated for absenteeism, misuse of company property, and sleeping on the job. He filed an FRSA complaint. The court was presented with Defendant’s motion for summary judgment.

For the adverse actions that were properly alleged, the court found that Plaintiff could not establish that the decision-makers had knowledge of the protected activity. Both had declared that they had no such knowledge and one wasn’t at the company when the protected activity occurred. In response Plaintiff had only speculated that the protected activity was generally known in management, but there was no evidence to support this conclusion. Plaintiff also made a “cat’s paw” argument based on influence by a supervisor who did know about the protected activity. But the court found that the undisputed evidence showed that this employee played no substantive role in the decision-making process or actual investigation.

SUMMARY JUDGMENT; KNOWLEDGE; SUMMARY JUDGMENT GRANTED TO RAILROAD WHERE PLAINTIFF DID NOT SUBMIT SUFFICIENT EVIDENCE TO SUPPORT INFERENCE THAT INDIVIDUALS INVOLVED IN THE DISCIPLINE ALSO HAD KNOWLEDGE OF THE PROTECTED ACTIVITY

FRSA BURDEN SHIFTING FRAMEWORK; COURT HOLDS THAT AIR-21 FRAMEWORK INCORPORATED IN FRSA REQUIRES A SHOWING BY THE EMPLOYEE THAT THE EMPLOYER HAD KNOWLEDGE OF THE PROTECTED ACTIVITY AS AN INDEPENDENT ELEMENT OF THE EMPLOYEES CASE

Conrad v. CSX Transportation, Inc., No. 13-cv-3730 (D. Md. Dec. 15, 2014) (2014 U.S. Dist. LEXIS 172629; 2014 WL 7184747)(case below ALJ No. 2012-FRS-88) [PDF](#): Defendant assessed Plaintiff with two serious offenses, which he alleged were in retaliation for two incidents in which he reported safety violations and objected to a union member being asked to engage in unsafe conduct. In January 2011 a union member was injured while applying a handbrake and contacted Plaintiff, the local union chairman. Plaintiff told him to report the injury and later, not to return to reenact the injury for injury due to a required rest break. Plaintiff reported the incident to the FRA and told management he was doing so. The next month four managers observed him operating a train and charged him with a safety violation for operating a switch without first checking it and doing so with one instead of two hands. He was charged with a serious violation but it was handled through an alternative “time out” procedure. A note was placed in his file. In August 2011, Plaintiff was contacted when a crew that had run out of fuel had been instructed to enter a yard to retrieve a locomotive. They worried of low clearances and dangerous conditions in the yard. Based on a settlement between the railroad and a state agency, Plaintiff forbid the crew from entering the yard because they were not properly trained to do so. He told management as much. Later that month, two managers claimed that they saw Plaintiff operating without his radio on, not use proper ID in a radio check, and fail to use both hands while operating a switch. This led to disciplinary charges, which were still pending at the time of the decision.

The railroad moved for summary judgment on a number of grounds. This order only addressed one issue, knowledge of the protected activity. The FRSA incorporates the burden shifting framework of AIR-21. At the first step, “the employee must show, by a preponderance of the evidence, that ‘(1) [he] engaged in protected activity; (2) the employer knew that [he] engaged in protected activity; (3) [he] suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.’” Slip op. at 6 (quoting *Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 344 (4th Cir. 2014)) (alternations in original). “Then, the burden shifts to the employer to demonstrate ‘by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity].” *Id.* (quoting *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 351 (4th Cir. 2008) (alternations in original)).

In support of summary decision, the railroad submitted declarations from the various supervisors and individuals involved in the two alleged infractions to the effect that they didn’t know about the safety complaints and protected activities. Plaintiff replied that knowledge didn’t have to be shown directly but could be inferred by the fact-finder from circumstantial evidence including temporal proximity, shifting explanations, deviation from standard practice, and changes in attitude. The court rejected this argument. The point went to the fourth, “contributing factor,” element, not the knowledge element. If “knowledge” were simply part of “contributing factor,” the Plaintiff’s point would hold. But the court understood the AIR-21 analysis to independently require a showing of “knowledge” as a separate element.

On this basis, the court held that to show knowledge the employee must show that someone involved in the adverse employment decision must have knowledge of the protected activity. Here there was not sufficient admissible evidence from which a jury could draw this inference. Plaintiff pointed broadly at his union activities and the ire of management, but this did not establish that the relevant managers had knowledge of the FRSA protected activity. The court also rejected the argument that the element was met because someone at the railroad had knowledge of the protected activity, imputing knowledge to the railroad. Plaintiff speculated that the information was shared, but had no evidence, only speculation. The court thus granted summary judgment to the railroad.

EMPLOYER'S KNOWLEDGE OF WORK RELATED REPORT; EMPLOYER CANNOT AVOID LIABILITY MERELY BY ALLEGING THAT IT DID NOT BELIEVE THAT THE REPORT WAS MADE IN GOOD FAITH

In *Davis v. Union Pacific Railroad Co.*, No. 12-cv-2738 (W.D.La. July 14, 2014) (2014 WL 3499228) (case below 2011-FRS-33), the Defendant filed a motion for summary judgment arguing that, although it was aware of the Plaintiff's injury report, the Plaintiff could not establish the second element of his burden in an FRSA complaint (that the employer knew that the employee engaged in protected activity), because this element requires a showing that the Defendant's injury report was filed in good faith. The court stated that the Defendant's theory was that "if the employer believes an employee is acting in bad faith--for example, by filing a false or unsubstantiated report of a work-related injury--then the employer cannot be held to have known the employee was engaging in protected activity under the FRSA." The court found the argument unpersuasive because it would immunize employers simply by alleging facts to show they thought the employee might be lying or otherwise acting in bad faith. The court noted that the FRSA is intended to be protective of employees, and concluded that the statute would be far less protective if the employer could avoid liability in this way.

DOL Administrative Review Board Decisions

CONTRIBUTORY FACTOR CAUSATION; LACK OF KNOWLEDGE OF OFFICIALS THAT CERTAIN INFORMATION FROM COMPLAINANT'S PERSONNEL FILE SHOULD HAVE BEEN EXPUNGED BASED ON PRIOR PROTECTED ACTIVITY; WHERE ALJ FOUND SUCH OFFICIALS' TESTIMONY TO BE CREDIBLE, ALJ ERRED IN FINDING CAUSATION BASED ON ORIGINAL DECISION-MAKER'S PLACEMENT OF INFORMATION IN FILE AND FAILURE TO EXPUNGE; ARB FINDS THAT WITHOUT KNOWLEDGE OF THE PROTECTED ACTIVITY, THE LATER DECISION-MAKERS' PROVISION OF THE INFORMATION TO THE PUBLIC LAW BOARD COULD NOT HAVE CONTRIBUTED TO THEIR DECISION TO RELEASE THE INFORMATION

In *Leiva v. Union Pacific Railroad Co.*, ARB No. 2018-0051, ALJ No. 2017-FRS-00036 (ARB May 17, 2019) (per curiam), Complainant and Respondent had settled a 2012 FRSA complaint that had been based on the actions of Respondent in response to Complainant's confrontation with a coworker. The settlement required Respondent to expunge certain information from Complainant's HR record, and ensure that the facts and circumstances relating to the discipline or exercise of Complainant's rights were not used against Complainant in any future disciplinary, employment, or promotional opportunities. In 2016, however, Respondent provided information that should have been expunged to the Public Law Board, resulting in the Board's upholding of Complainant's termination from employment. Complainant filed a new FRSA complaint in 2017. The ALJ found that there had been a continuing violation of the FRSA based on Respondent's maintenance of records that Complainant engaged in workplace violence in 2012 and the consequent disciplinary history. The ALJ found that the submission of the information to the Public Law Board "was the same unlawful act from 2012" that continued to 2017, when the information was finally expunged. As to contributory factor causation, the ALJ found that regardless of Respondent's ignorance about the protected activity when the information was provided to the Public Law Board, the original decision-makers in the first FRSA case knew about the protected activity when it placed the information in the personnel file where it remained as a continuing violation.

The ARB reversed, ruling that this new complaint could not be maintained, but that Complainant's remedies were to file a breach of contract claim in U.S. district court, or to return to arbitration before the Public Law Board. In a footnote, the ARB provided an alternative ruling on the issue of causation, and specifically the lack of knowledge of Complainant's 2012 protected activity by the officials who provided the information that should have been expunged to the Public Law Board. The ARB wrote:

Even if we were somehow able to entertain Complainant's complaint, dismissal of the complaint would still be appropriate. The ALJ found that the Respondent's decision-makers who submitted the "workplace violence" information to the Public Law Board had no knowledge about Complainant's protected activity. Specifically, the ALJ summarized the Respondent's decision-makers' ... testimony indicating that each had stated that they had no knowledge about Complainant's protected activity. . . . The ALJ found each of these witnesses to be "sincere, unbiased, and credible" and their demeanors to be persuasive. . . . But the ALJ found causation despite this and "regardless of Respondent's ignorance," because there was causation in Case #1 when the protected activity and discipline information was placed in Complainant's personnel file. This was error because if the decision-makers did not know about Complainant's protected activity and discipline, it could not have contributed to their decision to use the information. This finding would necessitate dismissal because, with a "no knowledge" finding, there can be no legally sufficient causation.

Slip op. at 6, n.12 (citations to ALJ's decision omitted).

CONTRIBUTING FACTOR; COMPLAINANT FAILS TO MAKE OUT CONTRIBUTING FACTOR SHOWING WHERE RELEVANT DECISION MAKERS DID NOT HAVE KNOWLEDGE OF THE PROTECTED ACTIVITY, TEMPORAL PROXIMITY WAS INTERRUPTED BY INTERVENING EVENTS, AND A PROFFERED COMPARATOR WAS NOT SIMILARLY SITUATED

Hunter v. CSX Transportation, Inc., ARB Nos. 2018-0044, and -0045, ALJ No. 2017-FRS-00007 (ARB Apr. 25, 2019) (per curiam) (Final Decision and Order): FRSA case in which the ALJ found that Complainant had engaged in protected activity but not that the protected activity was a contributing factor in the decision to terminate him. The ALJ also found that the Respondent had established by clear and convincing evidence that it would have taken the same action absent the protected activity. Complainant appealed both causal findings. Respondent appealed the finding that Complainant engaged in protected activity.

Complainant reported that a wheel slip alarm was sounding. Respondent argued that this wasn't an actual hazardous safety condition and so couldn't be a report of such, or a good faith report of such. The ARB summarily rejected this, stating that they were the same arguments fully considered and properly rejected by the ALJ. Complainant's arguments turned on claims that certain testimony was credible, certain evidence was significant, and Respondent's explanations were "bunk." But ALJs receive deference in their credibility assessments unless they are inherently incredible or patently unreasonable. They were not in this case, so they received deference and the findings were affirmed. The ARB thus affirmed the ALJ's decision in full and "adopt it as our own and attach it."

ALJ Decision

Complaint had been terminated and the parties stipulated that was an adverse action. The case was about two accounts of the termination—Complainant said it was due, in part, to his report of the wheel slip alarm. Respondent said that happened all the time and wasn't a hazardous condition. It said Claimant was fired for leaving work without the permission of a supervisor and that the decision makers didn't even know about the alleged protected activity. Complainant asserted that other employees who left without permission weren't fired.

The ALJ had first denied the complaint on the contributing factor element. The discussion begins with a nice recitation of relevant law (28-30). There was close temporal proximity, but the ALJ found that the relevant decision makers did not have knowledge of the protected activity--the trainmaster who reported that Complainant had left did have that knowledge, but he didn't report the protected activity to his hire ups and his role was only to receive guidance on what to do, i.e. initiate proceedings. The temporal proximity was also minimized because of intervening events (leaving work and the confusion at the end of the shift) and the commonality of the wheel slip events. Respondent had been consistent in its explanation of events and followed its disciplinary procedures. The ALJ also rejected reliance on a comparator who received less punishment since they weren't similarly situated. Further, the ALJ found that there was no good indication of evidence, which followed from the crediting of the front line supervisor's explanations of his actions as well as listening to the tape of the report in question. The ALJ found that the supervisor had acted reasonably in the circumstances. Thus the ALJ

concluded that Complainant had not established that the protected activity was a contributing factor in the termination decision.

EMPLOYER KNOWLEDGE OF PROTECTED ACTIVITY IS NOT A SEPARATE ELEMENT OF AN FRSA CLAIM, BUT RATHER IS PART OF THE CAUSATION ANALYSIS

In *Coates v. Grand Trunk Western Railroad Co.*, ARB No. 14-019, ALJ No. 2013-FRS-3 (ARB July 17, 2015), the ALJ had cited employer knowledge as an element of an FRSA claim (in addition to the three elements of protected activity, adverse action, and a causal link). On appeal, the ARB indicated that this was error. Rather, the ARB had “held that knowledge is not a separate element, but instead forms part of the causation analysis. See *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 29, 2011) (*Bobreski I*). See also *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987) (citing three elements for a whistleblower claim under the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105 (2011)).”

AN FRSA COMPLAINT TRIED BEFORE AN ALJ HAS ONLY THREE ELEMENTS - PROTECTED ACTIVITY, ADVERSE ACTION, AND CAUSATION; DECISIONMAKER'S KNOWLEDGE AND ANIMUS ARE ONLY FACTORS IN THE CAUSATION ANALYSIS

In *Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013), the ARB found that the ALJ's legal analysis and conclusions of law on the three essential elements of a FRSA whistleblower case (protected activity, adverse action, and causation) were in accordance with applicable law. The ARB noted, however, that the ALJ and the parties had cited four elements tracking the elements necessary to raise an inference for an OSHA investigation. The ARB cited caselaw that provides that the final decisionmaker's “knowledge” and “animus” are only factors to consider in the causation analysis; they are not always determinative factors.

- *Chain of Events / Inextricable Intertwinement*

U.S. Circuit Court of Appeals Decisions

CONTRIBUTING FACTOR; EIGHTH CIRCUIT REJECTS “CHAIN OF CAUSATION” ANALYSIS AND HOLDS THAT TO ESTABLISH CONTRIBUTION THERE MUST BE EVIDENCE OF INTERNATIONAL RETALIATION AND DISCRIMINATORY ANIMUS

BNSF Ry. Co. v. United States DOL Admin. Review Bd. [Carter], 867 F.3d 942, No. 16-3093, 2017 U.S. App. LEXIS 15020, 2017 WL 3469224 (8th Cir. 2017) (case below ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82).

The Complainant started working for BNSF in 2005. He injured his shoulder in 2007 and immediately reported it. He later filed a Federal Employer’s Liability Act (“FELA”), 45 U.S.C. § 51, *et seq.*, action based on that injury. During discovery in that case, BNSF deposed him. During trial preparation in 2012, a manager reviewed the deposition and noticed inconsistencies between information given in the deposition and that provided on the original employment application back in 2005. This led to a disciplinary investigation. A second investigation was launched regarding potential false statement in 2012 about getting to work on time. Both investigations produced findings that the Complainant had been dishonest, which under BNSF’s policy can result in a standalone dismissal. So they dismissed him twice in April 2012. Complainant filed a complaint under the whistleblower protection provisions of the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109, alleging that he was retaliated against for reporting his 2007 injury. An Administrative Law Judge (“ALJ”) found for Complainant and awarded \$50,000 in punitive damages as well as reinstatement and various other remedies. 867 F.3d at 944-45. The Administrative Review Board (“ARB”) affirmed. *See Carter v. BNSF Ry. Co.*, ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82 (ARB June 21, 2016).

The Eighth Circuit explained that “[t]o prevail on his FRSA complaint, Carter must ‘prove, by a preponderance of the evidence, that (i) he engaged in a protected activity; (ii) BNSF knew or suspected, actually or constructively, that he engaged in the protected activity; (iii) he suffered an adverse action; and (iv) the circumstances raise an inference that the protected activity was a contributing factor in the adverse action.’” *BNSF Ry. Co.*, 867 F.3d at 945 (quoting *Gunderson v. BNSF Ry.*, 850 F.3d 962, 968 (8th Cir. 2017) (quoting *Kuduk v BNSF Ry.*, 768 F.3d 786, 789 (8th Cir. 2014))). “If he meets that burden, BNSF may avoid liability if it ‘demonstrates, by clear and convincing evidence, that [it] would have taken the same unfavorable personnel action in the absence of [Carter’s] protected activity.’” *Id.* (quoting 49 U.S.C. § 42121(b)(2)(B)(ii)) (alterations in original). BNSF had conceded that the Complainant engaged in a protected activity that it had knowledge of and that he had suffered an adverse action. *Id.*

The ALJ’s decision was based on a chain-of-events finding such that even if the employer was not motivated by and gave no significance to an event, if it is a necessary link in a chain, that establishes contribution. *Id.* at 945-946. After noting that over four years had passed between the protected activity and adverse action and that the proffered reasons for the adverse action had nothing to do with the protected activity (lying on an application and lying about late arrivals at work vs. reporting an injury), the Eighth Circuit rejected the chain-of-events principle, approvingly citing the recent Seventh Circuit case, *Koziara v. BNSF Ry.*, 840 F.3d 873 (7th Cir. 2017), *cert denied*, 137 S. Ct. 1449 (2017), for the proposition that the showing of contribution involves a proximate cause analysis. *BNSF Ry. Co.*, 867 F.3d at 946. Further, the Eighth Circuit held that there must be evidence of intentional retaliation implicating some “discriminatory animus.” *Id.*

This was not the end of the analysis, since the ARB hadn't adopted the chain-of-events basis for the decision. Instead, it had affirmed by noting evidence of a change in attitude, deficient explanations for the adverse action, and circumstantial evidence of retaliatory motive. The Eighth Circuit allowed that if such findings were sound, then the decision could be affirmed. *Id.* at 946-47. But it determined that the findings either weren't in the record or were insufficient. On the change in attitude, the ALJ had not made credibility findings that would sustain the conclusion that the supervisors were targeting the Complainant. Further, no finding was made as to whether the change in attitude related to the injury report or the FELA litigation. The panel implied that retaliation for the FELA litigation would not be a violation of the FRSA (though given the rest of the opinion, they appear to leave this as an open issue for the ARB to decide in the first instance). *Id.* at 947.

Next, substantial evidence did not support that finding that BNSF's asserted rationale was not worthy of credence. The ALJ had reached the conclusion based on procedural deficiencies in BNSF's disciplinary process. The panel held that BNSF could not be punished for using otherwise valid procedures just because the ALJ perceives them to be unfair. The question of abstract fairness was not germane to the question of whether the protected activity contributed to the decision to take the adverse action. Thus, the critical findings for a pretext determination hadn't been made. Nor could a finding that the second dishonesty dismissal was pretext be sustained—it was premised on a finding that all of the events were tied together, but the ARB and Eighth Circuit had rejected this chain-of-events theory. *Id.* at 947-48.

Turning to the “other circumstantial evidence,” the reasoning was based on a finding that the FELA litigation involved the injury and so kept the protected injury report fresh in the minds of the decision-makers. The Eighth Circuit found this finding legally deficient in that it was based on a misreading and incorrect extension of a prior ARB case (*LeDure v. BNSF Ry.*, ARB No. 13-044, ALJ No. 2012-FRS-00020 (ARB June 2, 2015)) that had held that reporting an injury during a FELA case was protected by the FRSA—not that the FELA litigation itself was protected or was sufficient to keep the protected activity “current.” By doing so, the ARB had “decided without discussion a significant issue” that hadn't been alleged and hadn't been considered by any of the circuit courts. The lack of explanation for such an expansion frustrated judicial review and so had to be vacated. *Id.* at 948. In sum, “[t]he ARB was unable to salvage an ALJ analysis built upon a flawed theory of causation because the ARB lacked critical fact findings needed to affirm the ALJ's decision when applying the appropriate legal standard. To the extent the ARB filled in the missing findings, it exceeded its scope of review.” The complaint was thus remanded. *Id.*

CONTRIBUTING FACTOR; SUMMARY JUDGMENT; SUMMARY JUDGMENT ON CONTRIBUTING FACTOR AFFIRMED WHERE PROTECTED ACTIVITY AT ISSUE CAME AFTER SOME ADVERSE ACTIONS AND AFTER THE TESTIMONY THAT WAS THE BASIS FOR THE CLAIM OF INTENTIONAL RETALIATION, EIGHTH CIRCUIT REQUIRES THAT THE ADVERSE ACTION BE AT LEAST IN PART INTENTIONAL RETALIATION FOR PROTECTED ACTIVITY AND REJECTS CLAIM THAT AN ASSERTION THAT THE TWO ARE INEXTRICABLY

INTERTWINED ALONE CAN MAKE A SHOWING OF CONTRIBUTING FACTOR CAUSATION

Foster v. BNSF Ry. Co., 866 F.3d 962 (8th Cir. Aug. 10, 2017): Three joined complaints under the FRSA relating back to an injury to another worker that occurred during a crew change. The train had stopped across a bridge from the parking area and when of the new crew members fell off the bridge when walking to the train. After a hearing, the three (and others) were disciplined for a variety of safety infractions found in videos of the incident. In interviews before the hearing and at the hearing they had reported various safety infractions in the area. It was disputed, for instance, where the railroad told them to stop the train. They each received different levels of discipline, where were reduced or eliminated by the Public Law Board. They also filed FRSA complaints and then kicked them out to federal court. The district court granted summary decision for the railroad and the plaintiffs appealed.

After dismissing certain theories on grounds of failure to exhaust or not engaging in the alleged protected activity, the last protected activity at issue was the hearing testimony. This could not have contributed to any of the alleged adverse actions except for the final discipline, since it came after that discipline. Moreover, the theory of retaliation alleged that two testifying managers harbored the retaliatory motive and were trying to protect themselves, but this testimony came before the testimony of the plaintiffs. The Eighth Circuit quickly rejected a challenge to the validity of the discipline since erroneous discipline is insufficient to establish a violation. Finally, the court rejected the claim that contribution could be shown on a theory that the protected activity and adverse action were inextricably intertwined since the Eighth Circuit had rejected this theory in *Heim v. BNSF Ry. Co.*, 849 F.3d 723 727 (8th Cir. 2017). To prevail, a plaintiff had to show that the discipline was at least in part intentional retaliation for the protected activity.

CONTRIBUTING FACTOR STANDARD; INEXTRICABLE INTERTWINEMENT AND CIRCUMSTANTIAL EVIDENCE; WHERE THE PROTECTED ACTIVITY DISCLOSED THE MISCONDUCT THAT WAS THE STATED BASIS FOR DISCIPLINE, A COMPLAINANT MUST DO MORE TO ESTABLISH THE CONTRIBUTING FACTOR ELEMENT THAN SHOW THEY ARE INEXTRICABLY INTERTWINED; CIRCUMSTANTIAL EVIDENCE INCLUDING TEMPORAL PROXIMITY, THE SEQUENCE OF INVESTIGATIONS, HOSTILITY OF SUPERVISORS, HOWEVER, MADE THAT SHOWING.

BNSF Ry. Co. v. United States DOL, 816 F.3d 628, No. 14-9602, 2016 U.S. App. LEXIS 4234, 2016 WL 861101 (10th Cir. 2016) (case below ARB No. 13-006, ALJ No. 2012-FRS-19) (Christopher Cain, Intervenor/Complainant).

BNSF hired the Complainant as a sheet-metal worker in 2006. He worked at two rail yards and traveled between them in a company vehicle. In early January 2010, the Complainant developed chest pains and sought treatment in an emergency room. On January 27, 2010, the Complainant rear-ended a produce truck stopped at a red light while driving the BNSF vehicle between job sites.

He reported that his brakes had malfunctioned. He was not issued a citation. Another employee picked him up and took him to one of the yards, where he filled out an injury report for his knuckle and knee. He did not get treatment for these injuries, but later claimed that he had no memory of filling out the report and had been in shock. He missed the next two days of work due to coughing fits. On February 17, 2010, he sought medical treatment and a nurse practitioner diagnosed a rib fracture, likely due to the seatbelt impact during the accident. The Complainant decided to determine what exactly was going on before reporting additional injuries. He sought additional days off work to have fluid drained from his lungs, but told supervisors that it was not due to the accident. When he returned to work, he was assigned to work in an undesirable location of the yard. *BNSF Ry. Co.*, 816 F.3d at 633-34.

On February 23, 2010, BNSF notified Complainant that it was investigating whether he had violated any safety rules in the accident. While the hearing was pending, Complainant saw a doctor on April 8, 2010, and was told that the work-related accident had caused his chest and lung injuries. He then updated the injury report, though two supervisors discouraged him from doing so. On April 30, 2010, BNSF notified Complainant that it was now also investigating its rules about timely reporting of injuries. The two hearings took place in May. On June 2, 2010, BNSF gave Complainant a 30 day suspension and 3 year probation, retroactive to the date of the accident, for safety violations that occurred in the accident. It warned him that any further violations during the probation could lead to termination. On June 8, 2010, BNSF terminated Complainant for not filing an injury report in a timely manner. The termination occurred because the violation had occurred during the retroactive probationary period. The Complainant unsuccessfully grieved the discipline and then filed a complaint under the whistleblower protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109.

The Occupational Safety and Health Administration dismissed the complaint, but an Administrative Law Judge ("ALJ") found that BNSF had unlawfully retaliated against him and awarded back wages, nominal compensatory damages, and the statutory maximum of \$250,000.00 in punitive damages.¹ *Id.* at 635-36. BNSF appealed, but the Administrative Review Board ("ARB") affirmed the liability finding. In analyzing the punitive damages award, the ARB determined that it did not need to consider the guideposts from *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) because Congress had removed the need for guideposts by setting a statutory cap. The ARB then halved the award to \$125,000.00. The ALJ's award had been based on a finding that managers engaged in a conspiracy against the Complainant and had assigned him to a very undesirable work location to punish him. The ARB noted that the second had not even been alleged as an adverse action and found it could not sustain a punitive damage award. So it cut the award in half. *BNSF Ry. Co.*, 816 F.3d at 636-37.

Turning to the contributing factor standard, the Tenth Circuit explained that

we must decide whether the agency abused its discretion in concluding that Cain's filing the April 8 Report was a factor that tended "to affect *in any way*" BNSF's decision to terminate him. Ordinarily, to meet this standard, an employee need only show "by preponderant evidence that the fact of, or the content of, the protected

¹ Reinstatement was not ordered because the ALJ determined that Complainant was no longer able to perform railroad work. *See Cain v. BNSF Ry. Co.*, ARB No. 14-006, ALJ No. 2012-FRS-019, slip op. at 5 (ARB Sept. 18, 2014).

disclosure was one of the factors that tended to affect in any way the personnel action.” In other words, even if the personnel action resulted not simply from the protected activity itself (filing a report), but also from the content declared in the protected activity, the two parts are “inextricably intertwined with the investigation,” meaning the protected activity was a contributing factor to the personnel action. So if the employer would not have taken the adverse action without the protected activity, the employee's protected activity satisfies the contributing-factor standard.

Id. at 639 (quoting and citing *Lockheed Martin Corp v. Admin Review Bd, U.S. Dep't of Labor*, 717 F.3d 1121, 1136 (10th Cir. 2013); *Marano v. Dep't of Justice*, 2 F.3d 1137, 1143 (Fed. Cir. 1993)) (internal citations omitted).

Yet the Tenth Circuit held that this case “marks an exception to this rule” because “employees cannot immunize themselves against wrongdoing by disclosing it in a protected-activity report.” *Id.* “Accordingly, under these circumstances, we require Cain to show more than his updated Report's loosely leading to his firing. Because BNSF contends that it fired Cain for misconduct he revealed in his updated Report, Cain cannot satisfy the contributing-factor standard merely by arguing that BNSF would not have known of his delays in reporting his injuries absent his filing the updated Report.” *Id.* The Complainant had met his burden nonetheless, due to the temporal proximity, the sequence of the investigations, and the finding that the supervisors had discouraged him from filing the report by hinting to adverse consequences if he did so. *Id.* at 639-640.

Next, the Tenth Circuit affirmed the ARB's determination that BNSF's had not shown by clear and convincing evidence it would have taken the same action absent the protected activity. The determination that the supervisors had encouraged the Complainant not to file the report, made implicit threats, and showed animus to the protected activity undermined any showing by BNSF on the issue. *Id.* at 640-41. Further, there were findings that BNSF had known earlier about the additional injuries but had not sought to discipline Complainant for not reporting them. BNSF had given inconsistent explanations about even who had fired the Complainant. And there was no evidence of actions taken against employees with similar violations. *Id.* at 641.

BNSF also appealed the punitive damage award. The Tenth Circuit began by affirming the finding that some punitive damages should be awarded. The comments from the supervisors discouraging the injury report supported the finding that BNSF had acted with a reckless or callous disregard for the Complainant's rights. *Id.* at 642. Turning to the amount of the punitive damages, the Tenth Circuit found that the ARB acted arbitrarily and capriciously when it halved the award because it found half the ALJ's analysis flawed. Appellate review is confined “to ascertaining ‘whether the agency examined the relevant data and articulated a satisfactory explanation for its decision, including a rational connection between the facts found and the decision made.’” *Id.* (quoting *Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006)). The ARB's “half-for-half approach fails this standard. On remand, the Board must explain why the available facts support the amount of punitive damages it awards.” *Id.* at 642-43.

Lastly, the Tenth Circuit held that it was error for the ARB to disregard the *State Farm* guideposts in assessing a punitive damages award. The *State Farm* guideposts are: 1) the degree of reprehensibility of culpability in the respondent's conduct; 2) the relationship between the punitive

damages and the actual harm to the Complainant; and 3) punitive damages awarded for comparable misconduct. *Id.* at 636, 643. Though the presence of a statutory cap changed the “landscape” of the review, the guideposts still had to be used in a “less rigid review.” *Id.* at 643. In doing so, the ARB was directed to “set forth clear findings about the degree of BNSF's reprehensibility.” *Id.* at 644. And even though the statute set an upper limit, it was still necessary to look at the ration between punitive and other damages. *Id.* at 644-45. Comparable cases should be considered as well. *Id.* at 645. The Tenth Circuit then declined to evaluate the constitutionality of the punitive damages award, instead remanding so that the ARB could apply the guideposts in the first instance. *Id.*

On remand, the parties reached a settlement, which was approved by the ARB. *See Cain v. BNSF Ry. Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019 (ARB Sept. 15, 2016).

U.S. District Court Decisions

CONTRIBUTORY FACTOR CAUSATION; DISTRICT COURT FINDS THAT TENTH CIRCUIT'S *CAIN* DECISION DID NOT REJECT AN INTENTIONAL RETALIATION REQUIREMENT, READS *CAIN* TO REQUIRE A SHOWING OF MORE THAN MERE CONNECTION WHEN WRONGDOING WAS DISCLOSED IN A PROTECTED FORMAT

Jones v. BNSF Ry. Co., No. 14-2616 D. Kan. July 11, 2016) (2016 U.S. Dist. LEXIS 90212; 2016 WL 3671233) (case below 2014-FRS-53 (**Jones**) and -63 (**Hodges**)): Plaintiffs filed a Rule 59(e) motion to alter or amend the judgment entered in an earlier order granting the railroad's motion for summary judgment.

Summary judgment as to Plaintiff Jones had been granted on the contributory factor element. Plaintiff argued that the court had misapprehended the facts and the parties' positions, but the court found that this was merely a re-hash of old arguments and thus not proper for reconsideration. Plaintiff also argued that the Tenth Circuit's decision in *BNSF Ry. Co. v. U.S. Dep't of Labor [Cain]*, 816 F.3d 628 (10th Cir. 2016) had implicitly rejected the Eighth Circuit's interpretation in *Kuduk* that contributory factor causation required intentional retaliation. The district court had applied *Kuduk* in granting summary decision. After reviewing *Cain*, the court determined that it had not rejected the *Kuduk* holding or even discussed it, but was instead focused on a different issue—showing contributory factor where wrongdoing is disclosed in a protected format. Even if Plaintiff's reading of *Cain* was correct, the result would not change since the cases were similar in that the violation was disclosed in a protected format, requiring a showing of more than a mere connection between the protected activity and adverse action. On the record in the case, there was no evidence of any discriminatory animus.

**CONTRIBUTORY FACTOR; SUMMARY JUDGMENT; INTERTWINABLE
INTERTWINEMENT; COURT GRANTS PARTIAL SUMMARY JUDGMENT TO
EMPLOYEE WHERE ONE STATED REASON FOR DISCHARGE, INEFFICIENCY IN
WORKING, COULD NOT “BE UNWOUND” FROM THE PROTECTED ACTIVITY AT
ISSUE, PERFORMING TESTING IN THE FACE OF IMPLICIT INSTRUCTIONS NOT
TO DO SO**

Rookaird v. BNSF Railway Co., No. 14-cv-176 (W.D. Wash. Oct. 29, 2015) (2015 U.S. Dist. LEXIS 147950; 2015 WL 6626069) (case below 2014-FRS-9): Plaintiff had been instructed to move roughly 42 cars. Before doing so he conducted air tests on the cars. He and a trainmaster communicated over the radio about whether the testing was necessary. When Plaintiff returned to the depot he was told by the superintendent to “tie up” and go home. He did so, but provided an end time 28 minutes later than the time he completed his tie up and did not sign his time sheet because he could not locate it. Plaintiff also had a confrontation in the break room with another employee, after which the superintendent told him to leave. Defendant investigated the events and terminated Plaintiff. Its stated reasons were failure to work efficiently, dishonest reporting of time, failure to sign the time sheet, and not complying with instructions to leave the property. Plaintiff filed suit under the FRSA on the grounds that his air testing and communications about it were protected activities and led to the termination. This order considered Plaintiff’s Motion for Partial Summary Judgment and Defendant’s Motion for Summary Judgment.

The court explained that the FRSA employs a “two-part burden-shifting test” and that in the first part the plaintiff must “show by a preponderance of the evidence that (1) he engaged in a protected activity; (2) the employer knew he engaged in the allegedly protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action.” “After the employee makes this showing, the burden shifts to the employer to demonstrate by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of the protected activity.” Here, Defendant conceded the second and third elements of the Complainant’s case.

The court granted partial summary decision to Plaintiff on the contributing factor element. The efficiency of Plaintiff’s work was a stated reason for termination and “[t]his cited failure to work efficiently cannot be unwound from [Plaintiff’s] decision to air test on the same day.” Thus, even in the light most favorable to Defendant, Plaintiff met the “low bar” of the contributory factor element as to the decision to conduct the air brake testing. He did not meet it at the summary judgment phase as to the other protected activities at issue.

**CONTRIBUTORY FACTOR; SUMMARY JUDGMENT; CHAIN OF EVENTS /
INEXTRICABLE INTERTWINEMENT; ANIMUS; COURT DENIES SUMMARY
JUDGMENT BASED ON “EXPANSIVE” CAUSATION STANDARD IN FRSA AND
POSSIBILITY OF MAKING THE SHOWING DUE TO THE CHAIN OF CAUSATION
BETWEEN THE PROTECTED ACTIVITY AND ADVERSE ACTION AS WELL AS
EVIDENCE OF TEMPORAL PROXIMITY, INTERTWINEMENT, AND ANIMUS**

Armstrong v. BNSF Ry. Co., 128 F.Supp. 3d 1079, No. 12-cv-7962 (N.D. Ill. Sept. 4, 2015) (2015 U.S. Dist. LEXIS 118224; 2015 WL 5180589): Plaintiff was called to the “glasshouse” area of a station where he and his supervisor had a dispute over his uniform. Plaintiff alleged that his supervisor assaulted him, injuring his left foot and left knee. He alleged FRSA violations for delays in providing medical care and retaliation, by termination, for filing an injury report. Both parties moved for summary decision and the court denied both motions.

The parties disputed what happened between Plaintiff and his supervisor and in particular whether the supervisor had slammed the door on the Plaintiff’s foot and knee. There was video with a partial view of the relevant area, but it did not capture the full sequence because the manager was out of view. Plaintiff had been taken for medical treatment after his request, but not immediately and not to the closest facility. After an investigation and hearing regarding the incident, the railroad had terminated Plaintiff for insubordination in not remaining in the “glasshouse” as instructed and for dishonesty in reporting the incident and in the injury report.

As to the contributing factor element, the court observed that the causation standard in the FRSA is “expansive” and can be met by showing that the protected activity initiated a chain of events that led to the termination and the events in question are temporally close and intertwined. Here there was evidence that could indicate animus as well and thus a jury could reach the conclusion for Plaintiff on the element. It could thus reach a verdict for Defendant. Summary judgment was thus denied.

DECISION WHERE THERE IS SOME EVIDENCE, INCLUDING TEMPORAL PROXIMITY, FROM WHICH SOME CONTRIBUTION COULD BE INFERRED, WHERE PROPOSED INTERVENING CAUSES WERE TOO INTERTWINED, AND BECAUSE PUBLIC LAW BOARD DECISIONS AND INDUSTRY PRACTICE ARE NOT RELEVANT

Miller v. CSX Transp., Inc., No. 1:13-cv-734 (S.D. Ohio Aug. 25, 2015) (2015 U.S. Dist. LEXIS 112507; 2015 WL 5016507) (case below 2013-FRS-64): In August 2012 the Plaintiff reported that about a month earlier he had suffered a back injury when his foot slipped on loose ballast while stepping off of the train, resulting in a twist and popping sound. He had gone to an emergency room 5 days after the injury and more recently to an orthopedist. Defendant’s rules require immediate reporting of on-duty injuries, so an investigation was initiated. Several days later Plaintiff gave a written statement retracting his injury report and stating that it had actually occurred at home while working on his car. Plaintiff claimed that through gestures and nodding, the managers had conveyed that if he retracted his report, he could go back to work with little or no penalty. After the investigation/hearing, Plaintiff was terminated. He pursued several actions, including an FRSA complaint.

Defendant sought summary judgment on the contributing factor element on the grounds that there was no evidence of intentional retaliation, the dishonesty was an intervening event, and it had followed long-standing industry practices. The court, however, observed that the contributory factor standard was a very low causal bar and considering the evidence presented, including the temporal proximity and indications that the managers had already decided on

discipline before the retraction, concluded that there remained factual disputes. As to proposed intervening causes, the court concluded that they were too intertwined in the facts as presented. Finally, the court rejected reliance on industry practice and public law board decisions as not relevant to the contributing factor question.

CONTRIBUTING FACTOR CAUSATION AND SUMMARY JUDGMENT; DISTRICT COURT DENIES CROSS-MOTIONS FOR SUMMARY JUDGMENT ON THE CONTRIBUTING FACTOR PRONG WHERE THE INJURY REPORT WAS IN CLOSE TEMPORAL PROXIMITY AND WAS INEXTRICABLY INTERTWINED WITH THE DISCIPLINARY ACTION

In *Mosby v. Kansas City Southern Railway Co.*, Case No. CIV-14-472-RAW (E.D. Okla. July 20, 2015), the U.S. District Court for the Eastern District of Oklahoma denied cross-motions for summary judgment under the FRSA on the issue of whether the Plaintiff's protected activity was a contributing factor in the Defendant's decision to take adverse action. *Mosby*, slip op. at 14. The court found that because Plaintiff's "injury report was both close in time to his discipline and inextricably intertwined therewith," it raised a question of fact and the matter could not be dismissed on summary judgment. Similarly, the court found that the close temporal proximity and inextricably intertwined nature of the protected activity and the discipline were "not substantial enough to justify granting [Plaintiff's] summary judgment motion. *Id.* at 13.

DOL Administrative Review Board Decisions

CONTRIBUTORY FACTOR CAUSATION; CAUSATION PRESUMED WHERE COMPLAINANT'S INJURY AND SAFETY REPORTS WERE BOTH CLOSE IN TIME TO THE DISCIPLINE AND INEXTRICABLY INTERTWINED; ARB DISTINGUISHES *KUDUK V. BNSF RAILWAY* IN WHICH, ALTHOUGH PROTECTED ACTIVITY WAS CLOSE IN TIME, IT WAS COMPLETELY UNRELATED TO THE INCIDENT THAT LED TO HIS DISCHARGE

In *Riley v. Dakota, Minnesota & Eastern Railroad Corp. d/b/a Canadian Pacific*, ARB Nos. 16-010, -052, ALJ No. 2014-FRS-44 (ARB July 6, 2018), the ARB affirmed the ALJ's finding that the Respondent violated the FRSA when it suspended the Complainant without pay for 47 days due to his delay in filing an injury/safety report about a small bruise resulting from a physical assault by a co-worker. The Complainant had waited until he reached his hotel room following the return of the train to the yard to attempt to report the altercation. He was unable to reach his immediate supervisors, so he sent a text message to a coworker about the assault, and then proceeded to fall asleep. The next morning the Complainant was able to get in touch with a manager about the attack, and eventually to file a formal complaint about the attack. Both

employees were pulled out of service, and, after a 47 day investigation, the Respondent concluded that the Complainant should have reported the incident. The punishment was forfeiture of pay for the 47 days the Complainant had spent out of service. The ALJ rejected the Respondent's contention that the Complainant's failure to report the bruise showed bad faith. Rather, the ALJ credited the Complainant's contention that he was in fear of the coworker until he returned to the hotel, that he tried and failed to report the incident immediately, and did report it as soon as he woke the next morning. The ARB affirmed these findings.

On appeal, the ARB affirmed the ALJ's finding that causation was presumed because it was impossible to separate the cause of the Complainant's discipline-for-filing-his-injury-report-late from his protected activity of filing the injury report. The ALJ found the two to be inextricably intertwined. The ARB quoted from the materially similar case of *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-12 (ARB Oct. 26, 2012), in which the ARB had explained why disciplinary action taken against an employee for late injury reporting establishes presumptive causation as a matter of law. The ARB in *Henderson* had found that "viewing the 'untimely filing of medical injury' as an 'independent' ground for termination could easily be used as a pretext for eviscerating protection for injured employees. Slip op. at 5 quoting *Henderson*, slip op. at 14.

The Respondent cited the Eighth Circuit's decision in *Kuduk v. BNSF Railway, Co.*, 768 F.3d 786, 792 (8th Cir. 2014), and the circuit cases that follow *Kuduk*, to argue that more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation. The Respondent noted that *Kuduk* requires a complainant to prove intentional retaliation. The ARB, however, found the *Kuduk* was not analogous because in that case, while the complainant's protected activity was close in time, it was completely unrelated to the incident that led to his discharge. Here, the Complainant's injury and safety reports were both close in time to his discipline and inextricably intertwined.

In a footnote, the ARB observed that it questioned the court's holding in *Kuduk* that in establishing contributory factor, an employee must prove intentional retaliation. The ARB stated that this holding was conclusory and contrary to the weight of precedent interpreting the contributing factor element of most whistleblower laws. The ARB further noted that nothing in the FRSA requires a complainant to establish a retaliatory motive. The ARB also found "curious" the court's statement in *Kuduk* that rejects the notion that temporal proximity, without more, is sufficient to establish a prima facie case. The ARB cited the regulations, and *Lockheed Martin Corp. v. ARB*, 717 F.3d 1121, 1136 (10th Cir. 2013) ("Temporal proximity between the protected activity and adverse employment action may alone be sufficient to satisfy the contributing factor test.").

CONTRIBUTING FACTOR CAUSATION; ARB REMANDS TO OALJ WHERE 8TH CIRCUIT FOUND THAT ALJ USED AN IMPROPER "CHAIN-OF-EVENTS" ANALYSIS, AND THAT THE ARB'S AFFIRMANCE ON A DIFFERENT ANALYSIS WAS NOT SUPPORTED BY THE RECORD AND THAT ARB HAD MISSTATED THE SCOPE OF ITS DECISION IN LEDURE; IN REMAND TO OALJ, ARB NOTES

DISAGREEMENT WITH 8TH CIRCUIT'S REMAND ABOUT NEED TO FIND ANIMUS, CITING 8TH CIRCUIT'S KUDUK DECISION

In [Carter v. BNSF Railway Co.](#), ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82 (ARB June 21, 2018), the ARB remanded the case to the Office of Administrative Law Judges for further proceedings consistent with the decision of the Eighth Circuit in *BNSF Ry. Co. v. United States DOL Admin. Review Bd.*, 867 F.3d 942 (8th Cir. 2017). The ARB described the court's ruling as follows:

The court determined that the ALJ ascribed to a "flawed chain-of-events causation theory," "erred in interpreting and applying the FRSA, and failed to make findings of fact that are critical to a decision applying the proper legal standard." Specifically, the ALJ failed to make findings of fact regarding whether Carter's supervisors targeted him, if there was discriminatory animus against Carter, if BNSF in good faith believed that Carter was guilty of the conduct justifying discharge, if Carter's FELA lawsuit provided BNSF with "more specific notification" about Carter's injury report, and about credibility issues. Further, the court found that the Board exceeded its scope of review to the extent it filled in missing findings and "misstat[ed] the scope of [our] decision in *Ledure*." Because the ALJ order could not be upheld, the Eighth Circuit vacated the Board's decision and remanded.

USDOL/OALJ Reporter at 2-3 (footnotes omitted). In regard to the court's finding that the ALJ failed to make a finding on whether there was discriminatory animus, the ARB noted that "the Court in *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014) explicitly recognized that, under the FRSA's 'contributing factor' causation standard, a complainant need not demonstrate 'retaliatory motive.'" *Id.* at 2, n.6.

[Editor's note: The Eighth Circuit in [BNSF Ry. Co. v. United States DOL Admin. Review Bd.](#), 867 F.3d 942 (8th Cir. 2017), said the following about the ALJ's "chain-of-events" analysis:

The ALJ's chain-of-events theory of causation is contrary to judicial precedent construing the causation element of an FRSA retaliation claim. As the Seventh Circuit explained in *Koziara v. BNSF Ry.*, to hold that protected activity is a "contributing factor" to an adverse action simply because it ultimately led to the employer's discovery of misconduct "is a further example of confusing a cause with a proximate cause. ... Absent sufficient evidence of intentional retaliation, a showing that protected activity initiated a series of events leading to an adverse action does not satisfy the FRSA's contributing factor causation standard.

Id. at 946 (footnote omitted). The court noted that the ARB had not endorsed the ALJ's chain-of-events analysis, but then found that the ARB grounded its affirmance on findings insufficient to support the ARB's contributing factor and affirmative defense rulings. The court stated: "The ARB was unable to salvage an ALJ analysis built upon a flawed theory of causation because the ARB lacked critical fact findings needed to affirm the ALJ's decision when applying the appropriate legal standard. To the extent the ARB filled in the missing findings, it

exceeded its scope of review.” Id. at 949 (citation omitted). The court also found that the ARB had misinterpreted its own decision in *LeDure v. BNSF Ry. Co.*, ARB No. 13-044, ALJ No. 2012-FRS-020, slip op. at 5 (ARB June 2, 2015), agreeing with the concurring ARB member in *Carter v. BNSF Railway Co.*, ARB Nos. 14-089, 15-016, 15-022, ALJ No. 2013-FRS-82 (ARB June 21, 2016) that “LeDure held only that the FRSA protects a notice of injury made in the course of FELA litigation, not that FELA litigation is per se protected by the FRSA.”]

SUBSTANTIAL EVIDENCE SUPPORTS FINDING OF CONTRIBUTORY CAUSATION WHERE COMPLAINANT’S MULTIPLE PROTECTED ACTIVITIES WERE “INEXTRICABLY INTERTWINED”

In [*Rudolph v. National Railroad Passenger Corp. \(AMTRAK\)*](#), ARB Nos. 14-053, -056, ALJ No. 2009-FRS-15 (ARB Apr. 5, 2016), a case arising under the Federal Railroad Safety Act, Lawrence J. Rudolph filed a complaint stating that Amtrak violated the Act when, among other claims, it determined that he was medically disqualified from working as a conductor.

Background

The Complainant began working as an assistant conductor with Amtrak in 1999. Prior to the events leading to this case, he took time off on several occasions for anxiety caused by work-related incidents. He eventually applied for reasonable accommodations for his anxiety, which Amtrak denied, stating that the Complainant had submitted inadequate information from his treating physician and that the accommodations were incompatible with his work duties. In July of 2008, the Complainant was forced to exceed his 12-hours-of-service limit after he was allegedly informed by management that no relief conductor was available. He reported this incident to his supervisor, Jack Krueger.

The following month, the Complainant advised Krueger that he would be taking leave due to the stress associated with the hours-of-service violation. He was subsequently diagnosed with acute anxiety and advised by a doctor not to return to work pending further evaluation. He alleges that, with regard to his medical leave, Krueger told him that it would not look good if he reported an on-duty injury every time he felt stressed. The Complainant subsequently filed a report with Krueger detailing the events of the hours-of-service incident and claiming that the resulting anxiety exacerbated an existing medical condition. However, Amtrak maintained that no one had ordered him to violate the hours-of-service rules. The company therefore issued disciplinary charges against him for a violation of said rules.

The Complainant applied for sick leave benefits and obtained a doctor’s statement indicating that he was temporarily totally disabled due to severe anxiety and that his mental limitation would interfere with his work. The doctor later revised his statement to indicate that the Complainant had stabilized and could return to his job as a conductor, and the Complainant requested to return to work. However, Amtrak refused to permit the Complainant to return, stating that he would need a psychiatric return-to-work evaluation in order to return to work without restrictions. After he underwent this evaluation, the physician conducting the evaluation submitted a report stating

that the Complainant could not return to work until he resolved his issues surrounding “fears engendered by the workplace.” Amtrak therefore concluded that the Complainant was medically unfit for duty.

The Complainant filed a complaint with OSHA in January 2009 alleging that his disqualification and termination from employment with Amtrak constituted retaliation in violation of the FRSA. Following a formal hearing, the ALJ initially awarded only punitive damages and denied the Complainant back pay and reinstatement. The Complainant appealed to the Administrative Review Board (ARB), which affirmed in part, reversed in part, and remanded for further proceedings. On remand, the ALJ again found for the Complainant, ordering reinstatement and awarding \$94,312.00 in back pay and \$80,900.00 annually for 2011, 2012, and 2013 until reinstatement, minus the amount of disability benefits the Complainant received. Punitive damages remained at \$5,000.

Opinion

On appeal, the ARB found that substantial evidence supported a finding of contributory causation where the Complainant’s multiple protected activities were “inextricably intertwined” in a chain of events that began with his notification of a violation of his hours of service and his accurate reporting of that violation. This chain of events resulted in Amtrak’s adverse actions against the Complainant, which culminated in his notice of medical disqualification based on his generalized anxiety and panic disorder. The Board agreed with the ALJ that Amtrak failed to establish that it would have initiated the disciplinary charge absent these protected activities. The Board agreed with the ALJ’s reasoning that absent the Complainant’s accurate log entry of 48 minutes of service beyond the 12-hour limit and his assertion that he had been forced to violate the limit, Amtrak would have had no reason to initiate its investigation and its disciplinary charge alleging an hours-of-service violation.

Judge Corchado concurred in part and dissented in part. He disagreed that substantial evidence supported the ALJ’s finding that protected activity was a contributing factor in Amtrak finding the Complainant medically unfit to return to work. He further opined that the “chain of events” theory of contributing factor in this case goes beyond the bounds of the FRSA whistleblower protections.

CONTRIBUTORY FACTOR; A CHAIN OF EVENTS CAN SUBSTANTIATE A FINDING OF CONTRIBUTORY FACTOR

Petersen v. Union Pacific Railroad Co., ARB No. 13-090, ALJ No. 2011-FRS-17 (ARB Nov. 20, 2014): The Complainant had been notified that the Respondent was going to conduct a hearing on whether the Complainant failed to be alert and attentive in violation of work rules while checking messages on his cell phone, and failed to take precaution to avoid having his feet run over by another employee attempting to park. The Complainant was informed that a finding of a rule violation would result in assessment of level 5 discipline and permanent dismissal, but that the Complainant could sign a leniency agreement waiving the right to an investigation, agreeing to an unpaid suspension and a return to work on a probationary basis

during which any breach of workplace safety would be grounds for removal from service without an investigation. The Complainant signed the leniency agreement. Four days later he was observed purportedly working in an unsafe manner, which led to being taken off duty and subsequent termination from employment. The ALJ found that the company's disciplinary rules effectively punish an employee for being injured.

On appeal, the Respondent contended that “evidence showing a ‘sequential connection’ or a ‘chain of events’ cannot alone support a finding of causation because such a ruling would render ‘meaningless the carrier's ability to discipline its employees whenever it discovers a rule violation through an injury report.’” USDOL/OALJ Reporter at 3, quoting Respondent's appellate brief (footnote omitted). The ARB characterized this argument as a straw man, pointing out that a respondent may avoid liability “if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior.” The ARB also stated that it “has made clear that a 'chain of events' can substantiate a finding of contributory factor.” *Id.* at 3 (footnote omitted). Moreover, the ALJ additionally cited evidence of the Respondent's knowledge of protected activity, temporal proximity, disparate treatment, and evidence that the company's disciplinary rules effectively punish an employee for being injured.

CONTRIBUTING FACTOR ANALYSIS; CHAIN OF EVENTS MAY SUBSTANTIATE

In *Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, ALJ No. 2010-FRS-20 (ARB May 31, 2013), the Complainant worked for the Respondent as a brakeman and switchman. He reported a work-related injury, and was referred to the company's Vocational Rehabilitation Program (VRP). After the Complainant found a new job as a dispatcher trainee with a different railroad, but before he started work at that new job, the Respondent notified the Complainant that it could accommodate his medical restrictions on an engineer position. To qualify the Complainant was told that he needed to take some classes and pass a set of exams. The Complainant did not commit to the exams because he believed that the exams were voluntary under the company's return to work program, he was already involved in the VRP program, and he knew that he lacked the necessary seniority to obtain an engineer position. The Complainant was then directed to take the exams because he could work as an engineer at some future date. The Complainant was also told to resign because he had accepted another position. The Complainant emailed back that he would not be able to attend the classes because of his work obligations, and complained that he had only one day notice of an exam. The Respondent investigated the failure to take the exam, and the local union requested a postponement of the hearing because the Complainant was out of the state and would not return until the next month. The Respondent then sent a notice that it was disciplining the Complainant for missing the exam, followed by second notice that it was terminating his employment for failure to attend the investigation hearing.

The Complainant filed an FRSA complaint. After a hearing, the ALJ dismissed the case because he found that the Complainant's injury report was not a contributing factor in the Respondent's decision to terminate his employment. The ALJ ruled that the Complainant's “chain of events” argument could not sustain a finding of contributing factor under the FRSA. The ALJ observed

the lack of animosity against the Complainant for reporting his injury, found that under the CBA failure to attend a hearing was grounds for termination, and that such a termination was the Respondent's prerogative.

Contributing Factor Analysis

The ARB held that the ALJ erred both in his application of the contributing factor analysis and in his finding that the termination comported with the CBA. The ARB wrote:

Although the ALJ stated that the “chain of events” leading to Hutton's termination would likely never have occurred had he not reported his injury, the ALJ determined that this was *not* the test for contributory factor under the FRSA. ... This was error. The ARB has repeatedly ruled that under certain circumstances a "chain of events" may substantiate a finding of contributory factor. Compounding his error, the ALJ determined that no witness demonstrated "animosity" against Hutton, suggesting that Hutton was required to prove retaliatory animus or motive. Neither motive nor animus is a requisite element of causation as long as protected activity contributed in any way - even as a necessary link in a chain of events leading to adverse activity.

Causation or “contributing factor” in a FRSA whistleblower case is not a demanding standard. The FRSA expressly adopts the standard of proof applicable to AIR-21 whistleblower cases. 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.” As the Eleventh Circuit reasoned in the context of the nuclear whistleblower law upon which AIR-21 was based: “For employers, this is a tough standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves.” “The 2007 FRSA amendments [adopting AIR-21's contributing factor standard] must be similarly construed, due to the history surrounding their enactment.”

The FRSA's legislative history ... reveals Congress's intent to comprehensively address the problem of railway retaliation for occupational injury reporting. Congress's adoption in 2007 of the comparatively lower contributory factor standard reflects congressional intent to promote effective enforcement of the Act by making it easier for employees to prove causation. A “contributing factor” includes “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” The contributing factor standard was “intended to overrule existing case law, which required that a complainant prove that his protected activity was a ‘significant,’ ‘motivating,’ ‘substantial,’ or ‘predominant’ factor” in a personnel action. Therefore, a complainant need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent’s “reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected” activity. Indeed, the Third Circuit recently held that the 2007 FRSA amendments adopting the

contributing factor standard for FRSA whistleblower complaints reflects Congress's intent to be "protective of plaintiff-employees."

USDOL Reporter at 6-8 (footnotes omitted). The ARB held that if the Complainant had not reported his injury, he "would never have been urged and/or required to comply with the provisions of three separate 'return to work' programs - programs specially created and offered by the employer to address work-place injury. Had he not run afoul of the confusing, if not contradictory, dictates of the several programs, Union Pacific would not have disciplined him." *Id.* at 9-10. The Board noted that the Respondent's return to work programs, one of which was apparently voluntary while the other was mandatory, and which were ostensibly set up to address the needs of ill and injured railroad employees, must be operated reasonably and in good faith to avoid harming and thereby discriminating against the very employees they were designed to serve. The Board stated that the circumstances of the instant case were analogous to the facts of *DeFrancesco v. Union RR Co.*, in which the ARB held that if DeFrancesco had not reported his injury, the company would not have conducted the investigation that resulted in the discipline and therefore the injury report was a contributing factor in the suspension. The ARB wrote:

Despite correctly identifying evidence that supported a contributing factor finding - the Respondent's knowledge of the protected activity, temporal proximity, and evidence of the Respondent's arbitrary personnel decisions - the ALJ ultimately ignored this evidence and ruled, in effect, that the Respondent need only articulate a legitimate business reason for its action to prevail. Without adequately considering the totality of the circumstances, the ALJ determined that the Respondent had a legitimate business reason to terminate Hutton, which the ALJ declined to "second-guess." D. & O. at 12. In so doing, he short-circuited the statutory burden of proof by concluding that it was the Respondent's prerogative, "in the usual course of business," to terminate Hutton and leaving it at that. The ALJ appeared to base his dismissal solely on a finding that Hutton committed a dismissible offense (failure to attend investigative hearing), similar to the "legitimate business reason" burden of proof analysis that does *not* apply to FRSA whistleblower cases. Under the FRSA whistleblower statute, the causation question is not whether a respondent had good reasons for its adverse action, but whether the prohibited discrimination was a contributing factor "which, alone or in connection with other factors, tends to affect in any way" the decision to take an adverse action.

USDOL/OALJ Reporter at 11-12 (footnotes omitted). The ARB also found that under the CBA, because formal, reasonable efforts had been made to obtain a postponement of the investigatory hearing, the CBA did not support the Respondent's decision to terminate the Complainant's employment.

Concurring Opinion

One member of the ARB agreed to the remand only because he believed that clarification from the ALJ was needed before a causation finding could be made by the ARB. This member indicated that the ALJ may have intended to explain that there was a complete break in the chain

of events such that reporting of the injury dropped out of the causation line leading to employment termination. The concurring member wrote:

To the extent that the majority opinion suggests that the reporting of an injury automatically and inextricably latches onto every personnel decision that "would never have happened" but for the reporting of the injury, I respectfully disagree. Respectfully, I also disagree with the majority that this case resembles other Board cases cited by the majority where the reporting of an injury was "inextricably intertwined" with the termination of employment. In *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 3 (ARB Feb. 29, 2012), a case cited by the majority, the employee's suspension was directly intertwined with his protected activity because the employer investigated the reason for the reported injury and blamed the employee for the injury. In *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 4 (ARB June 20, 2012), the employee reported a rule violation and was fired for reporting the violation late. Similarly, in *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 4 (ARB Oct. 26, 2012), the employee was also fired for an allegedly late reporting of an injury *Smith*, and *Henderson*, the protected activity and adverse action were inextricably intertwined because the basis for the adverse action could not be explained without discussing the protected activity. In this case, if the Respondent fired Hutton solely because he failed to comply with necessary steps to accommodate his return to work, it is not necessary to discuss that he reported his injury. Therefore, the reporting of the injury and the adverse action are not inextricably intertwined.

USDOL/OALJ Reporter at 15-16 (footnotes omitted).

- *Motive, Animus, Intentional Retaliation*

U.S. Circuit Court of Appeals Decisions

NINTH CIRCUIT HOLDS THAT UNDER THE FRSA'S CLEAR STATUTORY SCHEME, A PLAINTIFF MEETS HIS BURDEN OF SHOWING DISCRIMINARY INTENT BY PROVING THAT THE PROTECTED CONDUCT WAS A CONTRIBUTING FACTOR TO THE EMPLOYER'S ADVERSE ACTION; COURT NOTES THAT THIS INTERPRETATION IS CONSISTENT WITH AUTHORITY FROM THE THIRD CIRCUIT BUT IT MAY CONFLICT WITH AUTHORITY FROM

THE SEVENTH AND EIGHTH CIRCUITS; “HONEST BELIEF” JURY INSTRUCTION PRESUMPTIVELY PREJUDICIAL

In *Frost v. BNSF Ry. Co.*, 914 F.3d 1189, No. 17-35513 (9th Cir. Jan. 30, 2019) (2019 U.S. App. LEXIS 3062), the Plaintiff-Appellant (Frost) had alleged that the Defendant-Appellee (BNSF) violated the Federal Railroad Safety Act (FRSA) when it disciplined and ultimately terminated him after he committed a pair of safety rule violations and filed an injury report. The district court provided jury instructions that “BNSF could not be liable if it terminated Frost due to an ‘honest belief’ that he violated the company’s safety rules.” Slip op. at 3. The jury returned a verdict in favor of BNSF. On appeal, the Ninth Circuit found that the “honest belief” jury instruction was “inconsistent with the FRSA’s clear statutory mandate and [the court’s] prior caselaw....” *Id.* The court thus reversed and remanded for a new trial.

The court began by reviewing its recent decision in *Rookaird v. BNSF Railway Co.*, 908 F.3d 451 (9th Cir. 2018). The court stated:

Importantly, the only burden the statute places on FRSA plaintiffs is to ultimately prove, by a preponderance of the evidence, that their protected conduct was a contributing factor to the adverse employment action—i.e., that it “tend[ed] to affect” the decision in some way. *Id.* § 42121(b)(2)(B); *Rookaird*, 908 F.3d at 461.

Id. at 9-10. The court was not persuaded by BNSF’s argument that “the FRSA is a ‘discrimination statute’ and that plaintiffs must therefore affirmatively prove that their employers acted with discriminatory intent or animus in order to bring claims for unlawful retaliation.” *Id.* at 10. The court explained:

We recognize that the FRSA, by its terms, describes and forbids intentional retaliation, 49 U.S.C. § 20109(a), meaning that employers must act with impermissible intent or animus to violate the statute. What BNSF misses is that the only proof of discriminatory intent that a plaintiff is required to show is that his or her protected activity was a “contributing factor” in the resulting adverse employment action. Showing that an employer acted *in retaliation for* protected activity *is* the required showing of intentional discrimination; there is no requirement that FRSA plaintiffs separately prove discriminatory intent. 49 U.S.C. § 42121(b)(2)(B). Indeed, in *Tamosaitis v. URS Inc.*, 781 F.3d 468 (9th Cir. 2015), we reviewed claims under the Energy Reorganization Act’s whistleblower retaliation protections that employ the same statutory framework as the FRSA. *Id.* at 480. We explained: “Under this framework, the presence of an employer’s subjective retaliatory animus is irrelevant. All a plaintiff must show is that his ‘protected activity was a contributing factor in the adverse [employment] action.’” *Id.* at 482 (alterations in original) (quoting 29 C.F.R. § 24.104(f)(1)). *Coppinger-Martin v. Solis*, 627 F.3d 745 (9th Cir. 2010) also involved a retaliation claim arising in the context of a statute with the same “contributing factor” framework. There, we explained that to meet her burden *at the prima facie stage* a plaintiff need not “*conclusively* demonstrate the employer’s retaliatory motive.” *Id.* at 750 (emphasis added). Rather, the

employer's retaliatory motive was established by proving that the protected conduct was a contributing factor to the employer's adverse action.

Id. at 10-11 (emphasis as in original). The court went on to explain why it did not view the Eighth Circuit's decision in *Kuduk v. BNSF Railway Co.*, 768 F.3d 786 (8th Cir. 2014), as imposing an obligation on a plaintiff to prove retaliatory intent beyond the FRSA's statutory scheme. The court further stated

Instead, *Rookaird* simply confirms that although intent or animus is part of an FRSA plaintiff's case, showing that plaintiff's protected conduct was a contributing factor is the required showing of intent or "intentional retaliation[.]" *Id.* That is, by proving that an employee's protected activity contributed in some way to the employer's adverse conduct, the FRSA plaintiff has proven that the employer acted with some level of retaliatory intent.

Consistent with the language of 49 U.S.C. § 42121(b)(2)(B) and our prior decisions in *Tamosaitis*, *Coppinger-Martin*, and *Rookaird*, we hold that although the FRSA's prohibition on "discriminat[ing] against an employee" ultimately requires a showing of the employer's discriminatory or retaliatory intent, FRSA plaintiffs satisfy that burden by proving that their protected activity was a contributing factor to the adverse employment decision. There is no requirement, at either the prima facie stage or the substantive stage, that a plaintiff make any additional showing of discriminatory intent.

Id. at 11-12 (footnote omitted; court noted that this interpretation was consistent with that of the Third Circuit, but that it may conflict with authority from the Seventh and Eighth Circuits).

The court then turned to examine the "honest belief" jury instruction and found that it "may have encouraged the jury to skirt the actual issue and improperly focus on whether discipline was justified for Frost's safety violation instead of whether his protected conduct 'tend[ed] to affect in any way' the decision to terminate him." *Id.* at 13 (quoting *Rookaird*). The court found that the instruction was presumptively prejudicial and that BNSF had not rebutted that presumption.

CONTRIBUTING FACTOR; MOTIVE, ANIMUS, INTENTIONAL RETALIATION; SEVENTH CIRCUIT HOLDS THAT FRSA REQUIRES PROOF OF INTENTIONAL DISCRIMINATION, OR PROOF THAT AN EMPLOY WAS MOTIVATED BY DISCRIMINATORY ANIMUS; SEVENTH CIRCUIT AFFIRMS JURY INSTRUCTION THAT RAILROAD COULD NOT BE LIABLE IF IT HAD AN HONEST BELIEF THAT THE PLAINTIFF DID NOT ENGAGE IN PROTECTED ACTIVITY IN GOOD FAITH

Armstrong v. BNSF Railway Co., 880 F.3d 377 (7th Cir. Jan. 18, 2018) (Nos. 16-3674, 17-1088) (2018 U.S. App. LEXIS 1208; 2018 WL 457521) (Opinion [affirming jury verdict]):

Plaintiff was a conductor. When his train arrived at a station his supervisor observed him from his office in the "Glasshouse" adjacent to the platform. He noted that the Plaintiff was not in the proper uniform, something that had occurred several times already in the prior few weeks, and

asked him to come to the office. The parties disputed what happened next. Plaintiff contended that his supervisor yelled at him and then pushed the door shut on his leg when he tried to leave, injuring his left knee and foot. The supervisor contended that Plaintiff did the yelling, refused to talk without a union representative, was taken out of service for insubordination, and that there was no physical contact between the two. A witness to the start of the interaction supported the manager's version. Video was obtained that showed the events, which tended to support the manager's version, though the two were out of view for roughly 9 seconds. An investigation was conducted and Plaintiff was dismissed for insubordination, dishonesty, and misrepresenting what happened in the Glasshouse.

Plaintiff filed an OSHA complaint, which was then kicked out to federal district court. The first trial ended in a mistrial and the second trial ended in a jury verdict for BNSF. Plaintiff appealed, arguing that he was entitled to a new trial because of an erroneous jury instruction. This instruction was as follows:

In deciding Plaintiff's retaliation claim, you should not concern yourselves with whether the Defendant's actions were wise, reasonable, or fair. Plaintiff has to prove that Defendant's decision to dismiss him was based on unlawful retaliation. Defendant cannot be held liable under the FRSA if you conclude that Defendant terminated Plaintiff's employment based on its honestly held belief that Plaintiff did not engage in protected activity under the FRSA in good faith.

Plaintiff argued that this was in error insofar as it implied that he had to show that BNSF had an improper retaliatory motive to show contribution. He relied on *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152 (3d Cir. 2013), which held that FRSA complainants do not need to show "a retaliatory motive" to make out a *prima facie* case.

The Seventh Circuit disagreed and relied on the Eighth Circuit's *Kuduk* decision:

we find that while a FRSA plaintiff need not show that retaliation was the sole motivating factor in the adverse decision, the statutory text requires a showing that retaliation was a motivating factor. The statute prohibits intentional discrimination in response to an employee's performance of a protected activity. The essence of this intentional tort is discriminatory animus. That is to say, an employer violates the state only if the adverse employment action is, at some level, *motivated* by discriminatory animus."

(Emphasis in original, internal citations and quotations removed.)

The court recognized that the "contributory factor" standard was lower than those used in other anti-discrimination contexts, but held that this was a lower standard of causation and did not obviate the need to show "the existence of an improper motive." "The analysis of whether the employer possessed an improper (i.e. retaliatory) motive is separate from the analysis of whether, and to what extent, that motive influenced the employer's actions."

So the jury instruction was correct. Plaintiff had to show that BNSF had some retaliatory animus, so if it fired him due to an honest belief that he lied when he reported the injury, he could not prevail. While not the "clearest possible statement of the applicable law, it was not

inaccurate.” Moreover, any error would have been harmless since the jury had also returned a verdict for BNSF on the affirmative defense.

CONTRIBUTING FACTOR; EIGHTH CIRCUIT REJECTS “CHAIN OF CAUSATION” ANALYSIS AND HOLDS THAT TO ESTABLISH CONTRIBUTION THERE MUST BE EVIDENCE OF INTERNATIONAL RETALIATION AND DISCRIMINATORY ANIMUS

BNSF Ry. Co. v. United States DOL Admin. Review Bd. [Carter], 867 F.3d 942, No. 16-3093, 2017 U.S. App. LEXIS 15020, 2017 WL 3469224 (8th Cir. 2017) (case below ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82).

The Complainant started working for BNSF in 2005. He injured his shoulder in 2007 and immediately reported it. He later filed a Federal Employer’s Liability Act (“FELA”), 45 U.S.C. § 51, *et seq.*, action based on that injury. During discovery in that case, BNSF deposed him. During trial preparation in 2012, a manager reviewed the deposition and noticed inconsistencies between information given in the deposition and that provided on the original employment application back in 2005. This led to a disciplinary investigation. A second investigation was launched regarding potential false statement in 2012 about getting to work on time. Both investigations produced findings that the Complainant had been dishonest, which under BNSF’s policy can result in a standalone dismissal. So they dismissed him twice in April 2012. Complainant filed a complaint under the whistleblower protection provisions of the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109, alleging that he was retaliated against for reporting his 2007 injury. An Administrative Law Judge (“ALJ”) found for Complainant and awarded \$50,000 in punitive damages as well as reinstatement and various other remedies. 867 F.3d at 944-45. The Administrative Review Board (“ARB”) affirmed. *See Carter v. BNSF Ry. Co.*, ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82 (ARB June 21, 2016).

The Eighth Circuit explained that “[t]o prevail on his FRSA complaint, Carter must ‘prove, by a preponderance of the evidence, that (i) he engaged in a protected activity; (ii) BNSF knew or suspected, actually or constructively, that he engaged in the protected activity; (iii) he suffered an adverse action; and (iv) the circumstances raise an inference that the protected activity was a contributing factor in the adverse action.’” *BNSF Ry. Co.*, 867 F.3d at 945 (quoting *Gunderson v. BNSF Ry.*, 850 F.3d 962, 968 (8th Cir. 2017) (quoting *Kuduk v BNSF Ry.*, 768 F.3d 786, 789 (8th Cir. 2014))). “If he meets that burden, BNSF may avoid liability if it ‘demonstrates, by clear and convincing evidence, that [it] would have taken the same unfavorable personnel action in the absence of [Carter’s] protected activity.’” *Id.* (quoting 49 U.S.C. § 42121(b)(2)(B)(ii)) (alterations in original). BNSF had conceded that the Complainant engaged in a protected activity that it had knowledge of and that he had suffered an adverse action. *Id.*

The ALJ’s decision was based on a chain-of-events finding such that even if the employer was not motivated by and gave no significance to an event, if it is a necessary link in a chain, that establishes contribution. *Id.* at 945-946. After noting that over four years had passed between the protected activity and adverse action and that the proffered reasons for the adverse action had nothing to do with the protected activity (lying on an application and lying about late arrivals at

work vs. reporting an injury), the Eighth Circuit rejected the chain-of-events principle, approvingly citing the recent Seventh Circuit case, *Koziara v. BNSF Ry.*, 840 F.3d 873 (7th Cir. 2017), *cert denied*, 137 S. Ct. 1449 (2017), for the proposition that the showing of contribution involves a proximate cause analysis. *BNSF Ry. Co.*, 867 F.3d at 946. Further, the Eighth Circuit held that there must be evidence of intentional retaliation implicating some “discriminatory animus.” *Id.*

This was not the end of the analysis, since the ARB hadn’t adopted the chain-of-events basis for the decision. Instead, it had affirmed by noting evidence of a change in attitude, deficient explanations for the adverse action, and circumstantial evidence of retaliatory motive. The Eighth Circuit allowed that if such findings were sound, then the decision could be affirmed. *Id.* at 946-47. But it determined that the findings either weren’t in the record or were insufficient. On the change in attitude, the ALJ had not made credibility findings that would sustain the conclusion that the supervisors were targeting the Complainant. Further, no finding was made as to whether the change in attitude related to the injury report or the FELA litigation. The panel implied that retaliation for the FELA litigation would not be a violation of the FRSA (though given the rest of the opinion, they appear to leave this as an open issue for the ARB to decide in the first instance). *Id.* at 947.

Next, substantial evidence did not support that finding that BNSF’s asserted rationale was not worthy of credence. The ALJ had reached the conclusion based on procedural deficiencies in BNSF’s disciplinary process. The panel held that BNSF could not be punished for using otherwise valid procedures just because the ALJ perceives them to be unfair. The question of abstract fairness was not germane to the question of whether the protected activity contributed to the decision to take the adverse action. Thus, the critical findings for a pretext determination hadn’t been made. Nor could a finding that the second dishonesty dismissal was pretext be sustained—it was premised on a finding that all of the events were tied together, but the ARB and Eighth Circuit had rejected this chain-of-events theory. *Id.* at 947-48.

Turning to the “other circumstantial evidence,” the reasoning was based on a finding that the FELA litigation involved the injury and so kept the protected injury report fresh in the minds of the decision-makers. The Eighth Circuit found this finding legally deficient in that it was based on a misreading and incorrect extension of a prior ARB case (*LeDure v. BNSF Ry.*, ARB No. 13-044, ALJ No. 2012-FRS-00020 (ARB June 2, 2015)) that had held that reporting an injury during a FELA case was protected by the FRSA—not that the FELA litigation itself was protected or was sufficient to keep the protected activity “current.” By doing so, the ARB had “decided without discussion a significant issue” that hadn’t been alleged and hadn’t been considered by any of the circuit courts. The lack of explanation for such an expansion frustrated judicial review and so had to be vacated. *Id.* at 948. In sum, “[t]he ARB was unable to salvage an ALJ analysis built upon a flawed theory of causation because the ARB lacked critical fact findings needed to affirm the ALJ’s decision when applying the appropriate legal standard. To the extent the ARB filled in the missing findings, it exceeded its scope of review.” The complaint was thus remanded. *Id.*

CONTRIBUTING FACTOR; SUMMARY JUDGMENT; SUMMARY JUDGMENT ON CONTRIBUTING FACTOR AFFIRMED WHERE PROTECTED ACTIVITY AT ISSUE

CAME AFTER SOME ADVERSE ACTIONS AND AFTER THE TESTIMONY THAT WAS THE BASIS FOR THE CLAIM OF INTENTIONAL RETALIATION, EIGHTH CIRCUIT REQUIRES THAT THE ADVERSE ACTION BE AT LEAST IN PART INTENTIONAL RETALIATION FOR PROTECTED ACTIVITY AND REJECTS CLAIM THAT AN ASSERTION THAT THE TWO ARE INEXTRICABLY INTERTWINED ALONE CAN MAKE A SHOWING OF CONTRIBUTING FACTOR CAUSATION

Foster v. BNSF Ry. Co., 866 F.3d 962 (8th Cir. Aug. 10, 2017): Three joined complaints under the FRSA relating back to an injury to another worker that occurred during a crew change. The train had stopped across a bridge from the parking area and when of the new crew members fell off the bridge when walking to the train. After a hearing, the three (and others) were disciplined for a variety of safety infractions found in videos of the incident. In interviews before the hearing and at the hearing they had reported various safety infractions in the area. It was disputed, for instance, where the railroad told them to stop the train. They each received different levels of discipline, where were reduced or eliminated by the Public Law Board. They also filed FRSA complaints and then kicked them out to federal court. The district court granted summary decision for the railroad and the plaintiffs appealed.

After dismissing certain theories on grounds of failure to exhaust or not engaging in the alleged protected activity, the last protected activity at issue was the hearing testimony. This could not have contributed to any of the alleged adverse actions except for the final discipline, since it came after that discipline. Moreover, the theory of retaliation alleged that two testifying managers harbored the retaliatory motive and were trying to protect themselves, but this testimony came before the testimony of the plaintiffs. The Eighth Circuit quickly rejected a challenge to the validity of the discipline since erroneous discipline is insufficient to establish a violation. Finally, the court rejected the claim that contribution could be shown on a theory that the protected activity and adverse action were inextricably intertwined since the Eighth Circuit had rejected this theory in *Heim v. BNSF Ry. Co.*, 849 F.3d 723 727 (8th Cir. 2017). To prevail, a plaintiff had to show that the discipline was at least in part intentional retaliation for the protected activity.

CONTRIBUTING FACTOR CAUSATION; UNDER *KUKUK*, EIGHTH CIRCUIT REQUIRES A SHOWING OF INTENTIONAL DISCRIMINATION, AND REJECTS THE THIRD CIRCUIT’S ANALYSIS IN *ARAUJO*

In *Blackorby v. BNSF Railway Co.*, No. 15-3192 (8th Cir. Feb. 27, 2017) (2017 U.S. App. LEXIS 3462; 2017 WL 744037) (case below W.D. Mo. 4:13-cv-908; ALJ 2013-FRS-68), the district court trial judge had instructed the jury that the Plaintiff need not establish intentional retaliation to prevail on his FRSA retaliation claim.

On appeal, the Plaintiff and the United States (as *amicus curiae*) urged the Eighth Circuit Court of Appeals to follow *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152 (3d Cir. 2013), in which the Third Circuit stated that a contributing factor is “any factor which, alone or

in connection with other factors, tends to affect in any way the outcome of [the employer's] decision" and that a plaintiff need not demonstrate the existence of a retaliatory motive. The Defendant argued that the Third Circuit had already rejected *Araujo in Kuduk v. BNSF Railway Co.*, 768 F.3d 786 (8th Cir. 2014). The court agreed, found that the Plaintiff was required to establish intentional retaliation, and therefore the jury instructions were improper. The court, however, found that the Plaintiff had presented sufficient evidence to raise an inference that his injury report prompted, at least in part, intentional retaliation by the Defendant. The Plaintiff's evidence showed that two of the Defendant's managers repeatedly discouraged the Plaintiff from filing an injury report. In addition, the Defendant stipulated that that managers may earn bonuses based on the rates of employee injuries. Thus, the Plaintiff was entitled to a new trial.

SUMMARY JUDGMENT; CONTRIBUTORY FACTOR; INTENTIONAL RETALIATION/MOTIVE; EIGHTH CIRCUIT AFFIRMS SUMMARY JUDGMENT TO RAILROAD WHERE PLAINTIFF DID NOT PRODUCE SUFFICIENT EVIDENCE OF INTENTIONAL RETALIATION, HOLDS THAT NATIONWIDE COMPENSATION PROGRAM, TEMPORAL PROXIMITY, AND ADMISSION THAT THE INJURY BROUGHT THE SAFETY VIOLATION IN QUESTION TO LIGHT IS NOT SUFFICIENT TO SUPPORT THE NECESSARY INFERENCE

Heim v. BNSF Ry. Co., 849 F.3d 723 (8th Cir. Feb. 27, 2017) (No. 15-3532) (2017 U.S. App. LEXIS 3460; 2017 WL 744039) (case below ALJ No. 2013-FRS-40), *cert. denied* 138 S. Ct. 268 (2017): Plaintiff was part of a "gang" replacing worn material under the track. That process involves declipping the rail and moving it toward the center. It remains under tension and can move suddenly, creating a "danger zone." No rule specifically forbids entering the danger zone, but in the daily briefing workers were warned and general rules require taking precautions to avoid injury. Plaintiff's particular role was picking up stray materials. He saw a rail clip in the danger zone and seeing no machines nearby, thought it was safe to retrieve the clip. When he did so, the declipped rail moved and hit his foot, fracturing it. BNSF disciplined him for a safety violation in the injury, with a 30 day record suspension and probation which, ultimately, did not result in any time off or loss of pay. He filed a complaint and then suit under the FRSA. There was evidence that while stepping into the danger zone was somewhat common and others weren't discipline to it, as well as evidence that the compensation program for managers was in some way pegged to injury goals, though this was not indexed to local numbers for particular managers and evaluation of safety performance did not turn on the number of injuries.

The district court granted BNSF summary judgment on the grounds that Plaintiff was required to show intentional retaliation but had produced sufficient evidence on the point. The Eighth Circuit affirmed. Complaint argued that because the discipline came directly out of the injury and there would have been no discipline absent the injury, his protected activity and basis for adverse action were inextricably intertwined. But apply *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786 (8th Cir. 2014), the panel held that showing "contributory factor" required a showing of "intentional retaliation." The factual connection between the two was insufficient. It wasn't necessary to "conclusively" demonstrate retaliatory motive, but the Plaintiff needed to show that the discipline was at least in part intentional retaliation for the injury report.

Here, the Eighth Circuit agreed that no reasonable fact-finder could reach that conclusion and find for Plaintiff. As to one of the decision-makers, the undisputed evidence showed that he had both asked and pressured the Plaintiff into filing the report. As to the other, the temporal proximity and compensation program were insufficient to support any reasonable inference to intentional retaliation, partly because the compensation program turned on national numbers, not those of particular managers. The admission that Plaintiff's injury had made this instance of entering the danger zone lead to punishment was also insufficient since the point was that the violation only came to notice because of the injury. That fell short of any support for a finding of intentional retaliation. Absent more specific evidence of some retaliatory motive, summary judgment for BNSF was proper.

CONTRIBUTING FACTOR CAUSATION; EIGHTH CIRCUIT AFFIRMS DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT FOR LACK OF PRIMA FACIE CASE OF CONTRIBUTING FACTOR WHERE IT FOUND NO DIRECT EVIDENCE, NO TEMPORAL PROXIMITY, AND NO CIRCUMSTANTIAL EVIDENCE THAT WOULD SUPPORT AN INFERENCE OF RETALIATORY MOTIVE

In *Loos v. BNSF Ry. Co.*, 865 F.3d 1106 (8th Cir. 2017), the Eighth Circuit affirmed a decision by the United States District Court for the District of Minnesota dismissing Complainant's claim alleging retaliation under the Federal Railroad Safety Act ("FRSA") on summary judgment. *BNSF Ry. Co.*, 865 F.3d 1106, 1116.

Complainant made a number of safety reports and was a member of Respondent's safety committee for a period of time. *Id.* at 1109. Complainant reported a workplace injury sustained on December 19, 2010, which took him out of work until May 16, 2011. In May 2011, Complainant requested, but was denied leave under the Family Medical Leave Act ("FMLA"). Respondent asserted that Complainant had not worked enough hours in the previous year to qualify for FMLA leave. In the summer of 2011, Complainant requested excused absences for flare-ups of his injury, with use of the "injury on duty" ("ION") code. However, Complainant's supervisor informed him that the ION code was unavailable because "[w]e don't do it anymore." *Id.* at 1110.

Complainant incurred a number of attendance violations, beginning in 2006, which resulted in escalating disciplinary actions, and culminated in the dismissal of Complainant after he missed eight-and-a-half weekdays and two weekend days between May and July 2012, when he was only allotted seven-and-a-half weekdays and no weekend days. Complainant missed five of the days due to flare-ups of his injury. Between May and July 2012, Complainant was denied permission to use the ION code to designate his absences as excused. The court states that Respondent "emphasized that it denied [Complainant's] request because he did not provide medical documentation." When the issue went to an internal hearing, Complainant provided a statement from his doctor "explaining that he would have to miss work because of knee-injury flare ups and that these issues were present during May, June, and July of 2012." *Id.* at 1111.

The only issue on appeal was whether there was a genuine dispute over whether Complainant's protected activity was a contributing factor in his discharge. Complainant argued that

Respondent terminated his employment in retaliation for submitting safety reports and serving on a safety committee; reporting an on-duty injury; and testifying before the U.S. Department of Labor, Office of Administrative Law Judges in a FRSA retaliation hearing. *Id.* at 1113.

The court emphasized five main points. First, the court found that there was no direct evidence of causation. Second, the court found that Complainant's protected activities were not in temporal proximity to his discharge, the most recent protected activity having occurred ten months prior to his termination. The court further noted that the Eighth Circuit has found that temporal proximity, alone, is not sufficient to establish causation. *Id.* Third, the court dismissed Complainant's assertion that Respondent retaliated against him "by refusing to allow him to use the ION code when his injury flared up," finding that "the evidence does not support the conclusion that" Respondent acted with "a retaliatory motive" in its refusal. The court emphasized that, at the time Complainant requested the ION code, the only medical documentation Respondent had was a letter from Complainant's doctor "releasing him to work without restriction." *Id.* The court further noted that if Respondent "had an across-the-board practice of disallowing the ION code for injury flare-ups, the denial in [Complainant's] case would not be evidence that BNSF intended to retaliate against [Complainant] specifically for protected activity." *Id.* at 1114. Fourth, the court found that Respondent's decision not to make an exception to Complainant regarding FMLA requirements does not demonstrate retaliatory intent. *Id.* at 1115. Finally, the court finds that the circumstances surrounding Complainant's testimony before the OALJ in a FRSA whistleblower matter "do not support an inference of retaliatory motive." *Id.*

[*Editor's note:* The U.S. Supreme Court granted cert. on this case on the question of whether an employer's payment of back pay to an employee for working time lost due to an on-the-job injury is taxable "compensation" under the Railroad Retirement Tax Act, 26 U.S.C. 3231(e). In *Burlington N. Santa Fe Ry. v. Loos*, 139 S. Ct. 893 (2019), the Supreme Court held that it was taxable compensation, reversing the Eight Circuit on this issue.]

CONTRIBUTING FACTOR CAUSATION; UNDER THE EIGHTH CIRCUIT'S DECISION IN *KUDUK*, TO SURVIVE A MOTION FOR SUMMARY JUDGMENT A PLAINTIFF MUST PRESENT SUFFICIENT EVIDENCE OF *INTENTIONAL* RETALIATION

In *Gunderson v. BNSF Railway Co.*, No. 15-2905 (8th Cir. Mar. 10, 2017) (2017 U.S. App. LEXIS 4258; 2017 WL 942663) (case below D. Minn. No. 14-CV-0223; ALJ No. 2011-FRS-1), the 8th Circuit stated that to avoid summary judgment on the question of whether the Plaintiff's protected activity was a contributing factor in his discharge, the Plaintiff

must submit sufficient evidence of 'intentional retaliation prompted by the employee engaging in protected activity.' [*Kuduk v. BNSF Ry.*, 768 F.3d 786, 791 (8th Cir. 2014)]. A 'contributing factor' includes 'any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.' *Id.* In considering this element, we must take into account 'the evidence

of the employer's nonretaliatory reasons.' *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, 2016 WL 5868560, *33 (DOL Admin. Rev. Bd. Sept. 30, 2016).

Slip op. at 10. In the instant case, the 8th Circuit found that five highly relevant facts stood out in regard to the causation issue: (1) the disciplinary investigations that led to the Plaintiff's discharge were completely unrelated to his protected activity; (2) the Plaintiff's prior safety-related activities were remote in time and disconnected from the disciplinary proceedings by an intervening event that independently justified adverse disciplinary action; (3) the Plaintiff was discharged after disciplinary hearings at which he was represented by union counsel, and the decisions to discharge were upheld by the Defendant internally and by a Railway Labor Act arbitration panel; (4) the merits of the discharge were again reviewed in a six-day hearing before a DOL ALJ, who concluded that the Plaintiff's protected activity of raising safety concerns played no part in the Defendant's decision to terminate: and (4) the decision to discharge was made by the General Manager after consulting with his supervisors and with the Defendant's human relations officers, not by the lower-level supervisors the Plaintiff accused of safety-related bias.

CONTRIBUTING FACTOR; 8TH CIRCUIT RULES THAT COMPLAINANT MUST PROVE INTENTIONAL RETALIATION

CONTRIBUTING FACTOR; 8TH CIRCUIT RULES THAT MORE THAN A TEMPORAL CONNECTION BETWEEN PROTECTED ACTIVITY AND ADVERSE EMPLOYMENT ACTION IS REQUIRED TO ESTABLISH A PRIMA FACIE CASE

In *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786 (8th Cir. Oct. 7, 2014) (No. 13-3326; 2014 U.S. App. LEXIS 19099), the Eighth Circuit upheld a summary judgment disposition by the district court and rejected complainant's reliance on *Araujo v. N.J. Transit Rail Ops., Inc.*, 708 F.3d 152, 158 (3d Cir. 2013) that he "need not demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his [protected activity] was a contributing factor to the personnel action." Citing to *Staub v. Proctor Hosp.*, 131 S.Ct. 1186, 1190 n. 1 (2011) (the "cat's paw" case), the court stated that the essence of a FRSA claim is "discriminatory animus." 131 S.Ct. at 1193. It found that while a "contributing factor" causation does not require that the employee conclusively demonstrate the employer's retaliatory motive in making his prima facie case, he must prove intentional retaliation prompted by the employee engaging in protected activity. In making this distinction, the court opined that *Araujo* may have improperly relied on *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), for its no-need-to-show-motive conclusion.

The court also found that "more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation" and relied on complainant's disciplinary probation status as a result of an earlier derauling incident. The court acknowledged the more lenient "contributing factor" causation standard but rejected the "notion" in some ARB decisions that temporal proximity, without more, is sufficient to establish a prima facie case. The court found that complainant's June 9 fouling of the tracks was an intervening event that *independently* justified adverse disciplinary action rejecting

complainant's argument as to whether [he] in fact committed the rule violation. In the absence of evidence connecting his protected activity to the discharge, Kuduk was not entitled to FRSA relief even if BNSF inaccurately concluded that he committed one of the Eight Deadly Decisions (“Do not walk between rails or foul the track, except when duties require and proper protection is provided”). See *Allen v. City of Pocahontas*, 340 F.3d 551, 558 n. 6 (8th Cir. 2003) (“it is not unlawful for a company to make employment decisions based upon erroneous information and evaluations”), *cert. denied*, 540 U.S. 1182 (2004).

The court also agreed with the district court that BNSF was not liable for wrongful retaliation because it demonstrated by clear and convincing evidence that it would have discharged Kuduk even if he had not engaged in protected activity. See 49 U.S.C. § 42121(b)(2)(B)(ii). In doing so, the court relied on the labor-management investigatory and arbitration procedures.

U.S. District Court Decisions

CAUSATION; ALTHOUGH PLAINTIFF IS NOT REQUIRED TO PROVE EMPLOYER’S MOTIVE, ESSENCE OF A RETALIATION CLAIM UNDER THE FRSA IS DISCRIMINATORY ANIMUS; WHERE ONLY DISTINGUISHING FACTOR BETWEEN INSTANT REPORT OF DEFECT AND PRIOR SIMILAR REPORT WAS PLAINTIFF’S OBSTINATE AND UNCOOPERATIVE BEHAVIOR, COURT GRANTED SUMMARY JUDGMENT FINDING THAT THE PLAINTIFF’S TERMINATION WAS BASED ON INSUBORDINATION

In *March v. Metro-North R.R.*, No. 16-cv-8500 (S.D.N.Y. Mar. 28, 2019) (2019 U.S. Dist. LEXIS 53677; 2019 WL 1409728), the Plaintiff brought a FRSA complaint alleging that he suffered retaliation in violation of 49 U.S.C. § 20109 when he was removed from service for insubordination after reporting a defective wiper blade on one of the trains. The Plaintiff had refused a supervisor’s order to change the blade because he believed it was unsafe to use a ladder. The court granted the Defendant’s motion for summary judgment.

Causation; Discriminatory Animus

The court stated that “While a plaintiff does not have to provide proof of the employer’s motive, ‘at bottom, the essence of a retaliation claim under the FRSA is “discriminatory animus.”’ *Lockhart*, 266 F. Supp. 3d at 663.” Slip op. at 10; see also slip op. at 16-17. As to the instant case, the court noted that the Plaintiff had made the same type of a complaint one month earlier and was not disciplined for it, and that the Defendant had immediately responded to the report of the wiper blade concern underlying the instant FRSA complaint. The court found that the only difference in the two instances was blatant insubordination and uncooperativeness on the second; that was the reason for the dismissal. The court also noted that the timeline of the incident did not support a finding that the termination was related to whether the blade was deficient; rather the termination was for repeated refusal to fix the blade or to cooperate with supervisors.

SUMMARY JUDGMENT; SEVENTH CIRCUIT REQUIRES A SHOWING OF RETALIATORY MOTIVE TO MAKE OUT A CASE OF RETALIATION; SUMMARY JUDGEMENT APPROPRIATE WHERE NO GENUINE DISPUTE THAT ORDINARY PROCEDURES OF DISCIPLINE WERE FOLLOWED, THERE WAS NO EVIDENCE OF A CHANGE IN ATTITUDE OR DIFFERENT TREATMENT FROM OTHER EMPLOYEES

King v. Ind. Harbor Belt R.R., No. 15-cv-245 (N.D. Ind. Nov. 13, 2018) (2018 U.S. Dist. LEXIS 193891; 2018 WL 5982134) (Opinion and Order): Applying Seventh Circuit law, the court found that to make out a case of retaliation a plaintiff must show the existence of an improper retaliatory motive, which is distinct from the question of whether that motive contributed to the decision to take the adverse action. Temporal proximity could not create an inference to such a motive where the employer followed its standard procedures in determining the amount of discipline for an admitted violation and there was no evidence that they were manipulated or used to retaliate. The court also rejected a claim that the particular facts underlying a discipline was sufficient to render it a departure from ordinary practice. Summary judgment was also found appropriate when the plaintiff had no evidence of a changed attitude towards him in denying or delaying requests for benefits because there was no evidence he was treated differently than others. The court also rejected an inference to a retaliatory motive based on strong vulgar language from a manager when such language was an ordinary part of the workplace.

SUMMARY JUDGMENT; CONTRIBUTING FACTOR CAUSATION; PROOF OF INTENTIONAL RETALIATION NOT REQUIRED; RATHER, REQUISITE INTENT CAN BE INFERRED BASED ON CIRCUMSTANTIAL EVIDENCE; WHERE GENUINE DISPUTES REMAIN ABOUT THE CIRCUMSTANCES OF THE DISCIPLINE, SUMMARY JUDGMENT IS INAPPROPRIATE

Wooten v. BNSF Railway Co., No. 16-cv-139 (D. Mont. Sept. 18, 2018) (2018 U.S. Dist. LEXIS 159199; 2018 WL 4462506) (case below 2016-FRS-00059) (Order [adopting Magistrate’s Findings and Recommendation and Order]), *adopting Wooten v. BNSF Railway Co.*, No. 16-cv-139 (D. Mont. May 29, 2018) (2018 U.S. Dist. LEXIS 89267; 2018 WL 2417858) (case below 2016-FRS-00059) (Findings and Recommendation and Order)

The Plaintiff reported a work-related wrist injury. After investigation a supervisor concluded that the injury had occurred prior to the work and that the Plaintiff had been dishonest in his reports. This led to termination. Plaintiff filed several actions, including an FRSA complaint.

The magistrate judge was presented with cross-motions for summary judgment on the issue of whether the protected activity was a contributing factor in the adverse action. The parties disputed the nature of the required showing and, in particular, whether complainant had to make a showing of intentional retaliation and proximate cause. The court held that in the Ninth Circuit it was not necessary for a complainant to conclusively establish a retaliatory motive. Rather, the “requisite degree of discriminatory animus” could be shown by circumstantial evidence

including temporal proximity, inconsistent application of policies, shifting explanations, hostility to protected activity, the relation between the protected activity and the discharge, and any intervening events justifying the discipline. On this standard neither party was entitled to summary judgment, as factual disputes affected the application of the factors to the case.

SUMMARY JUDGMENT; SEVENTH CIRCUIT REQUIRES SHOWING OF DISCRIMINATORY ANIMUS AND PLAINTIFF COULD NOT MAKE THAT SHOWING WHERE THERE WAS NO GENUINE DISPUTE THAT THE DISCIPLINARY RULES APPLIED TO THE PLAINTIFF AND WERE APPLIED CONSISTENTLY; TEMPORAL PROXIMITY ALONE INSUFFICIENT WHEN PROTECTED ACTIVITY IS NOT THE PROXIMATE CAUSE OF THE ADVERSE ACTION.

Jackson v. BNSF Railway Co., No. 16-cv-5518 (N.D. Ill. Aug. 22, 2018) (2018 U.S. Dist. LEXIS 142498; 2018 WL 4003377) (case below 2016-FRS-00015) (Memorandum Opinion and Order): Plaintiff was involved in an altercation at work in which another employee punched him after he repeatedly used profane language. He was given a suspension while the other employee was terminated. He was also disciplined under the attendance policy. He filed a variety of complaints, including an FRSA complaint. Defendant sought summary judgment.

As to the FRSA complaint, applying Seventh Circuit law, the court explained that showing that the protected activity was a contributing factor in the adverse action requires showing “that discriminatory animus at least partially motivated the employer’s action; merely showing a causal link between the protected activity and the employer’s action does not suffice.” Plaintiff could not make this showing because there was no genuine dispute that the workplace violence policy applied to him in this situation and that the Defendant followed that policy. There was no evidence that the attitude of the employer changed after the protected activity, that there was pretext, or that there was inconsistent application of the rules. Temporal proximity was the only factor supporting the inference to contribution, but in this case the protected report was not the proximate cause of his discipline. Thus, summary judgment for defendant was entered on the FRSA complaint.

SUMMARY JUDGMENT; CONTRIBUTING FACTOR CAUSATION; PROOF OF INTENTIONAL RETALIATION NOT REQUIRED; RATHER, REQUISITE INTENT CAN BE INFERRED BASED ON CIRCUMSTANTIAL EVIDENCE; WHERE GENUINE DISPUTES REMAIN ABOUT THE CIRCUMSTANCES OF THE DISCIPLINE, SUMMARY JUDGMENT IS INAPPROPRIATE

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CONTRIBUTING FACTOR CAUSATION; DISTRICT COURT FOLLOWS EIGHTH CIRCUIT PRECEDENT HOLDING THAT COMPLAINT MUST PRESENT SUFFICIENT EVIDENCE OF INTENTIONAL RETALIATION

In *Holloway v. Soo Line R.R.*, No. 16-cv-9191 (N.D. Ill. Jan. 19, 2018) (2018 U.S. Dist. LEXIS 8641; 2018 WL 488259), the Plaintiff brought an action after the Defendant terminated Plaintiff’s employment following an accident involving a Kubota utility vehicle at the Defendant’s rail yard. The Plaintiff, who was a passenger and not the driver of the Kubota, reported an injury and sought medical care. Following an investigation and hearing, the Defendant discharged the Plaintiff on the ground that he violated safety rules by not wearing a seat belt and by failing to inspect the Kubota before riding in it or file a report regarding its safety defects. Part of the consideration in the discharge decision was the Plaintiff’s prior disciplinary record. The third count of the complaint was based on Federal Railroad Safety Act (“FRSA”), 49 U.S.C. § 20109 *et seq.* The parties filed cross-motions for summary judgment on this count. The court focused on whether the Plaintiff met the element of a FRSA retaliatory complaint that his protected activity was a contributing factor in the Defendant’s adverse or unfavorable employment action. The Plaintiff asserted that he reported a work-related injury and sought medical care, and argued that it was obvious that this protected activity was a contributing factor in the Defendant’s termination of his employment. The court found that this response to the summary judgment motion was inadequate, writing:

It is well-settled, however, that “inferences that are supported by only speculation or conjecture will not defeat a summary judgment motion.” *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1099 (7th Cir. 2017) (citation omitted). In short, Holloway’s bare-boned arguments are not supported by “evidence of pretext, shifting explanations, antagonism or hostility toward Plaintiff’s protected activity, or a change in attitude toward Plaintiff after he engaged in the protected activity.” *Kuduk*, 768 F.3d at 790. Moreover, there is “no evidence of the usual forms of employment discrimination, certainly, and no evidence that the suspension and discharge of the plaintiff were motivated by animus.” *Koziara*, 840 F.3d at 878; *see also BNSF Ry. Co. v. United States Dep’t of Labor Admin. Review Bd.*, 867 F.3d 942, 946 (8th Cir. 2017) (“Absent

sufficient evidence of intentional retaliation, a showing that protected activity initiated a series of events leading to an adverse action does not satisfy the FRSA's contributing factor causation standard.”).

Slip op. at 30. The court was not persuaded that the argument that a reasonable inference was raised that the Plaintiff's report of a work-related injury was a contributing factor to his termination for purposes of the FRSA because the driver of the Kubota was not disciplined. The court pointed out that the driver was furloughed at the time of the internal hearing and was seeking new employment at that time. The court thus granted summary judgment on the FRSA count in favor of the Defendant.

CONTRIBUTING FACTOR; RETALIATORY MOTIVE OR DISCRIMINATORY ANIMUS; SUMMARY JUDGMENT GRANTED WHERE NO JURY COULD CONCLUDE THAT DECISION-MAKERS LACKED GOOD FAITH BELIEF IN DISHONESTY CHARGE AND THUS WERE NOT MOTIVATED BY DISCRIMINATORY ANIMUS

Logsdon v. BNSF Railway Co., 262 F.Supp.3d 895 (D. Neb. June 30, 2017) (2017 WL 2838132) (case below 2014-FRS-132):

Plaintiff was a laborer and first line supervisor at a facility that repaired damaged coal cars. Before they could be repaired, excess coal had to be removed. When this was done in the facility, slip paper was placed under the cars, they were emptied, and then a laborer shoveled the coal into a dumpster. Plaintiff alleged that he hurt his back doing this when he pulled on the paper when it had 150-200 pounds of coal. He did not initially report it. Three months later he started to, but alleged his supervisor told him not to report an injury at work but instead to attribute his pain to other causes. He went along with this. He was then investigated for the report and in that process gave the account of the workplace injury. That led to another investigation and hearing in which Plaintiff and the manager testified. The company believed the manager and terminated Plaintiff for dishonesty. He filed a FELA and FRSA suit.

Defendant moved for summary judgment. It was denied as to the FELA claim. But the court granted the motion on the FRSA claim. Defendant argued that Plaintiff could not show that his injury report was a contributing factor in his dismissal. Applying Eighth Circuit law, the Court observed that contribution required showing intentional retaliation prompted by the injury report. Defendant argued that the dismissal was solely based on its finding that Plaintiff had behaved dishonestly. In response Plaintiff alleged that BNSF had shifting explanations, but this was premised on comparing the process before the first hearing, during which Plaintiff pointed the finger at management and changed his story, and the second hearing, based on the dishonesty. As to this second hearing, there had not been any shift. Plaintiff's main argument point to the misconduct of management in attempting to suppress the injury report initially. The Court allowed that this might have happened and reflected hostility to injury reports, but concluded that this would not alter the analysis, which turned on the termination decision. That had been made by other managers after a "thorough investigation" and turned on inconsistencies in reporting the injury. While that decision may have been incorrect, there was no evidence that it was made in

bad faith or was based on “some retaliatory motive or discriminatory animus.” Hence BNSF was granted summary judgment on the FRSA complaint.

CONTRIBUTORY FACTOR CAUSATION; DISTRICT COURT FINDS THAT TENTH CIRCUIT’S *CAIN* DECISION DID NOT REJECT AN INTENTIONAL RETALIATION REQUIREMENT, READS *CAIN* TO REQUIRE A SHOWING OF MORE THAN MERE CONNECTION WHEN WRONGDOING WAS DISCLOSED IN A PROTECTED FORMAT

Jones v. BNSF Ry. Co., No. 14-2616 D. Kan. July 11, 2016) (2016 U.S. Dist. LEXIS 90212; 2016 WL 3671233) (case below 2014-FRS-53 (**Jones**) and -63 (**Hodges**)): Plaintiffs filed a Rule 59(e) motion to alter or amend the judgment entered in an earlier order granting the railroad’s motion for summary judgment.

Summary judgment as to Plaintiff Jones had been granted on the contributory factor element. Plaintiff argued that the court had misapprehended the facts and the parties’ positions, but the court found that this was merely a re-hash of old arguments and thus not proper for reconsideration. Plaintiff also argued that the Tenth Circuit’s decision in *BNSF Ry. Co. v. U.S. Dep’t of Labor [Cain]*, 816 F.3d 628 (10th Cir. 2016) had implicitly rejected the Eighth Circuit’s interpretation in *Kuduk* that contributory factor causation required intentional retaliation. The district court had applied *Kuduk* in granting summary decision. After reviewing *Cain*, the court determined that it had not rejected the *Kuduk* holding or even discussed it, but was instead focused on a different issue—showing contributory factor where wrongdoing is disclosed in a protected format. Even if Plaintiff’s reading of *Cain* was correct, the result would not change since the cases were similar in that the violation was disclosed in a protected format, requiring a showing of more than a mere connection between the protected activity and adverse action. On the record in the case, there was no evidence of any discriminatory animus.

CONTRIBUTORY FACTOR; SUMMARY DECISION; DISCRIMINATORY ANIMUS/INTENTIONAL RETALIATION; BUT-FOR CAUSATION; APPLYING EIGHTH CIRCUIT LAW, COURT GRANTS SUMMARY DECISION FOR RAILROAD WHERE NO DISCRIMINATORY ANIMUS OR INTENTIONAL RETALIATION COULD BE INFERRED BASED SOLELY ON THE PROPOSITION THAT THE SAFETY VIOLATION WAS DISCOVERED AND DEEMED MORE SERIOUS BECAUSE IT RESULTED IN INJURY

CONTRIBUTORY FACTOR; SUMMARY DECISION; COURT FINDS SUBSTANTIVE CHALLENGES TO THE SAFETY RULE AND ITS APPLICATIONS INSUFFICIENT TO SUPPORT INFERENCE TO RETALIATION

Heim v. BNSF Railway Co., No.13-cv-369 (D. Neb. Sept. 30, 2015) (2015 U.S. Dist. LEXIS 133913; 2015 WL 5775599) (case below 2013-FRS-40): Plaintiff was working on a rail seat abrasion project, which involves replacing material under the train track. To do so, rail is declipped from the bed and moved, though it remains under tension. Plaintiff was tasked with

picking up scraps along the track. He stepped over the declipped rail to pick up some material and the rail jumped, landing on his foot, causing injury. It took 30 minutes to free him and he suffered broken bones. He was subsequently disciplined for not being alert and attentive when he placed his foot in harm's way—a point that had been discussed at safety briefings. He was given a 30 record suspension and one year review period. He did not lose pay or benefits and the review period passed without incident.

The parties agreed that Plaintiff had engaged in protected activity when he reported his injury and that the railroad knew about that report. They disputed whether Plaintiff had suffered any adverse action and whether the protected activity contributed to any adverse action. The court noted that although Plaintiff suffered little real consequences in the case, the bar for adverse action in the FRSA is low and it “would not seem inaccurate” to characterize it as a reprimand or discipline. But the court then stated that it did not need to resolve the issue.

Applying Eighth Circuit law, Plaintiff was required to show some intentional relation or discriminatory animus, though he only needed to show that it contributed to the adverse action. Plaintiff argued that the injury report was a but-for cause of the adverse action because it is common to step into the area in question without consequence. The court however, found this insufficient. The injury report was the protected activity, not the injury itself. And it wasn't clear that the report caused anything. Even looking to the injury, there was no inference to be made to intentional retaliation—it had only brought the violation to the attention of management. The court further saw no reason to conclude that the FRSA prevented railroads from taking violations of safety rules more seriously when they resulted in injury. Plaintiff had also not pointed to similarly situated employees who had been treated differently.

Plaintiff's argument was partly a challenge to BNSF's application of the rule and the ambiguity in how they applied to this situation. The court found this irrelevant because it was really a challenge to substance of the disciplinary process and the rule, not an allegation cognizable under the FRSA. Even if the discipline was substantively incorrect, that did not on its own license an inference that the protected activity was a contributing factor in the discipline.

DOL Administrative Review Board Decisions

CONTRIBUTORY FACTOR CAUSATION; ARB QUESTIONS THE VALIDITY OF THE EIGHTH CIRCUIT'S HOLDINGS IN *KUDUK V. BNSF RAILWAY* THAT IN ESTABLISHING CONTRIBUTORY FACTOR, AN EMPLOYEE MUST PROVE INTENTIONAL RETALIATION, AND THAT TEMPORAL PROXIMITY CANNOT BE SUFFICIENT IN ITSELF TO ESTABLISH CONTRIBUTING FACTOR

In *Riley v. Dakota, Minnesota & Eastern Railroad Corp. d/b/a Canadian Pacific*, ARB Nos. 16-010, -052, ALJ No. 2014-FRS-44 (ARB July 6, 2018), the ARB affirmed the ALJ's finding

that the Respondent violated the FRSA when it suspended the Complainant without pay for 47 days due to his delay in filing an injury/safety report about a small bruise resulting from a physical assault by a co-worker. The Complainant had waited until he reached his hotel room following the return of the train to the yard to attempt to report the altercation. He was unable to reach his immediate supervisors, so he sent a text message to a coworker about the assault, and then proceeded to fall asleep. The next morning the Complainant was able to get in touch with a manager about the attack, and eventually to file a formal complaint about the attack. Both employees were pulled out of service, and, after a 47 day investigation, the Respondent concluded that the Complainant should have reported the incident. The punishment was forfeiture of pay for the 47 days the Complainant had spent out of service. The ALJ rejected the Respondent's contention that the Complainant's failure to report the bruise showed bad faith. Rather, the ALJ credited the Complainant's contention that he was in fear of the coworker until he returned to the hotel, that he tried and failed to report the incident immediately, and did report it as soon as he woke the next morning. The ARB affirmed these findings.

On appeal, the ARB affirmed the ALJ's finding that causation was presumed because it was impossible to separate the cause of the Complainant's discipline-for-filing-his-injury-report-late from his protected activity of filing the injury report. The ALJ found the two to be inextricably intertwined. The ARB quoted from the materially similar case of *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-12 (ARB Oct. 26, 2012), in which the ARB had explained why disciplinary action taken against an employee for late injury reporting establishes presumptive causation as a matter of law. The ARB in *Henderson* had found that "viewing the 'untimely filing of medical injury' as an 'independent' ground for termination could easily be used as a pretext for eviscerating protection for injured employees. Slip op. at 5 quoting *Henderson*, slip op. at 14.

The Respondent cited the Eighth Circuit's decision in *Kuduk v. BNSF Railway, Co.*, 768 F.3d 786, 792 (8th Cir. 2014), and the circuit cases that follow *Kuduk*, to argue that more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation. The Respondent noted that *Kuduk* requires a complainant to prove intentional retaliation. The ARB, however, found the *Kuduk* was not analogous because in that case, while the complainant's protected activity was close in time, it was completely unrelated to the incident that led to his discharge. Here, the Complainant's injury and safety reports were both close in time to his discipline and inextricably intertwined.

In a footnote, the ARB observed that it questioned the court's holding in *Kuduk* that in establishing contributory factor, an employee must prove intentional retaliation. The ARB stated that this holding was conclusory and contrary to the weight of precedent interpreting the contributing factor element of most whistleblower laws. The ARB further noted that nothing in the FRSA requires a complainant to establish a retaliatory motive. The ARB also found "curious" the court's statement in *Kuduk* that rejects the notion that temporal proximity, without more, is sufficient to establish a prima facie case. The ARB cited the regulations, and *Lockheed Martin Corp. v. ARB*, 717 F.3d 1121, 1136 (10th Cir. 2013) ("Temporal proximity between the protected activity and adverse employment action may alone be sufficient to satisfy the contributing factor test.").

CONTRIBUTING FACTOR CAUSATION; IN REMAND TO OALJ, ARB NOTES DISAGREEMENT WITH 8TH CIRCUIT’S REMAND ABOUT NEED TO FIND ANIMUS, CITING 8TH CIRCUIT’S KUDUK DECISION

In [Carter v. BNSF Railway Co.](#), ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82 (ARB June 21, 2018), the ARB remanded the case to the Office of Administrative Law Judges for further proceedings consistent with the decision of the Eighth Circuit in *BNSF Ry. Co. v. United States DOL Admin. Review Bd.*, 867 F.3d 942 (8th Cir. 2017). The ARB described the court’s ruling as follows:

The court determined that the ALJ ascribed to a “flawed chain-of-events causation theory,” “erred in interpreting and applying the FRSA, and failed to make findings of fact that are critical to a decision applying the proper legal standard.” Specifically, the ALJ failed to make findings of fact regarding whether Carter’s supervisors targeted him, if there was discriminatory animus against Carter, if BNSF in good faith believed that Carter was guilty of the conduct justifying discharge, if Carter’s FELA lawsuit provided BNSF with “more specific notification” about Carter’s injury report, and about credibility issues. Further, the court found that the Board exceeded its scope of review to the extent it filled in missing findings and “misstat[ed] the scope of [our] decision in *Ledure*.” Because the ALJ order could not be upheld, the Eighth Circuit vacated the Board’s decision and remanded.

USDOL/OALJ Reporter at 2-3 (footnotes omitted). In regard to the court’s finding that the ALJ failed to make a finding on whether there was discriminatory animus, the ARB noted that “the Court in *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014) explicitly recognized that, under the FRSA’s ‘contributing factor’ causation standard, a complainant need not demonstrate ‘retaliatory motive.’” *Id.* at 2, n.6.

CONTRIBUTING CAUSE; COMPLAINANT IN FRSA CASE IS NOT REQUIRED TO PROVE ANIMUS OR MOTIVE TO RETALIATE, AND DECISION MAKER’S BENEVOLENT STATE OF MIND IS NOT A DEFENSE

In [D’Hooge v. BNSF Railways](#), ARB Nos. 15-042, -066, ALJ No. 2014-FRS-2 (ARB Apr. 25, 2017), the Complainant was long-term engineer for BNSF, and had a desirable route because of its pay schedule, regular hours, and infrequent weekend work. The Complainant developed neck and back pain, and complained several times of “rough riding” locomotives and rough track conditions. The Respondent’s Yardmaster had become frustrated with performance of the crew the Complainant worked with, and warned several times that the route would be abolished (i.e., the route would be taken from a general board or pool) if performance did not improve. On April 5, 2012, the Complainant reported (or “bad-ordered”) all three cars in a consist (a train of joined cars) as too rough. Bad-ordering required the cars to be sent for inspection. The Trainmaster jumped to the conclusion that the crew had bad-ordered the cars in bad faith because the crew did not want to finish their work and because it was highly unusual to report an entire consist. The Trainmaster took into consideration previous instances with the crew not finishing their

work late in the shift which the Trainmaster thought should have been completed. Later that evening, after discussing the matter with the Superintendent of Operations, the Trainmaster abolished the route and decided to fill the work from a rotating off-the-board crew. The Trainmaster later testified before the ALJ that the failure to complete the work and his perception that the bad-ordering had been in bad faith were the straw that broke the camel's back. The Trainmaster acknowledged that he had not followed company procedure when suspecting a fraudulent report, stating he thought abolishing the route would address the performance problem without potential disciplinary action. The Complainant filed an FRSA complaint alleging that the favorable route had been abolished because he had bad-ordered three locomotives. Following a hearing, the ALJ found that FRSA protected activity contributed to the Trainmaster's decision and that he would not have abolished the route at that time if the Complainant had not reported the locomotives. The ALJ awarded \$906 in back pay and \$25,000 in punitive damages. The Respondent appealed the ALJ's finding of a violation of the FRSA and the decision to award punitive damages. The Complainant appealed the ALJ's attorney fee award, the ALJ having denied some expenses and reduced the award for only partial success. The ARB consolidated the appeals and affirmed the ALJ's decision.

Contributing cause; complainant is not required to prove animus or motive to retaliate, and decision maker's benevolent state of mind is not a defense

The ARB found that substantial evidence supported the ALJ's findings that the abolishment of the fixed route was adverse action and that the Complainant's bad-ordering the locomotives contributed to the abolishment of the fixed route. The ARB was not persuaded by the Respondent's argument on appeal that the route was abolished only because of the crew's continued nonperformance, there being direct testimony by the Trainmaster that had he not learned of the Complainant's hazardous safety condition report he would not have terminated the route that same evening. The ARB also rejected the Respondent's argument that the route change was a lenient alternative to a disciplinary investigation, and the ALJ erred by concluding that neither animus nor motive are required to prove causation. The ARB ruled that the Trainmaster's benevolent state of mind was not a defense to the statutory contributing cause standard, citing *Petersen v. Union Pac. R.R. Co.*, ARB No.13-090, ALJ No. 2011-FRS-017, slip op. at 3 (ARB Nov. 20, 2014) (“[N]either motive nor animus is required to prove causation under [FRSA] as long as protected activity contributed in any way to the adverse action.”); *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-52, slip op. at 6, 9 n.6; *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, -003; ALJ No. 2007-SOX-005 (ARB Sept. 31, 2011).

CAUSATION; MOTIVE OR ANIMUS IS NOT REQUIRED TO PROVE CAUSATION UNDER THE FRSA

“[N]either motive nor animus is required to prove causation under FRSA as long as protected activity contributed in any way to the adverse action.” *Petersen v. Union Pacific Railroad Co.*, ARB No. 13-090, ALJ No. 2011-FRS-17 (ARB Nov. 20, 2014), USDOL/OALJ Reporter at 3 (footnote omitted).

CONTRIBUTING FACTOR; COMPLAINANT IS NOT REQUIRED TO ESTABLISH THAT RESPONDENT HAD RETALIATORY ANIMUS; WHERE THE RESPONDENT REVIEWED THE COMPLAINANT'S DISCIPLINE AND INJURY HISTORY AFTER THE COMPLAINANT REPORTED A WORK-RELATED PERSONAL INJURY, THE ARB FOUND AS A MATTER OF LAW THAT THE REPORT OF INJURY WAS A CONTRIBUTING FACTOR TO THE SUSPENSION

In *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-9 (ARB Feb. 29, 2012), the Complainant filed a complaint charging that the Respondent violated the FRSA employee protection provision when the Respondent suspended the Complainant for 15 days after he reported a slip-and-fall accident. Following the report of the accident, a supervisor decided to review the Complainant's discipline and injury history to determine whether he exhibited a pattern of unsafe behavior that required corrective action. It was following that review that the Complainant was suspended. After a hearing, the ALJ found that the Complainant failed to establish that his protected activity was a contributing factor in the adverse action and dismissed the complaint. On appeal, the ARB found that the ALJ had erred in his analysis of whether the Complainant's report of his injury was a contributing factor to the suspension because the ALJ had considered the "key inquiry" to be whether the Complainant could establish that supervisors were motivated by "retaliatory animus." The ARB wrote:

...This is legal error. DeFrancesco is not required to show retaliatory animus (or motivation or intent) to prove that his protected activity contributed to Union's adverse action. Rather, DeFrancesco must prove that the reporting of his injury was a contributing factor to the suspension. By focusing on the motivation of [the supervisors], the ALJ imposed on DeFrancesco an incorrect burden of proof, thus requiring remand.

The ARB has said often enough that a "contributing factor" includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. Circumstantial evidence may include 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, and a change in the employer's attitude toward the complainant after he or she engages in protected activity.

If DeFrancesco had not reported his injury as he was required to do, Kopic would never have reviewed the video of DeFrancesco's fall or his employment records. Kopic admitted this at the hearing, testifying that such a review was routine after an employee reported an injury and that the purpose of the review was to determine "the root cause." Kopic stated that after seeing the video he reviewed DeFrancesco's injury and disciplinary records to determine whether there was a pattern of safety rule violations and what corrective action, if any, needed to be taken.

While DeFrancesco's records may indicate a history and pattern of safety violations, the fact remains that his report of the injury on December 6 triggered Kepic's review of his personnel records, which led to the 15-day suspension. If DeFrancesco had not reported his fall and Kepic had not seen the video, Kepic would have had no reason to conduct a review of DeFrancesco's injury and disciplinary records, decide that he exhibited a pattern of unsafe conduct, and impose disciplinary action.

Union's decision to suspend DeFrancesco for 15 days thus violated the direct language of the FRSA, which provides that a railroad carrier may not "suspend" an employee when the employee's actions are "due, in whole or in part, to the employee's lawful, good faith act done." The statute provides that a "good faith act" includes "notify[ing]" his employer of "a work-related personal injury." Applying the framework of proving a contributing factor under AIR 21, we can only conclude as a matter of law that DeFrancesco's reporting of his injury was a contributing factor to his suspension.

DeFrancesco, ARB No. 10-114, USDOL/OALJ Reporter at 6-8 (footnotes omitted). The ARB remanded the case for the ALJ to consider whether the Respondent showed by clear and convincing evidence that it would have suspended the Complainant absent the protected activity.

- *Temporal Proximity*

U.S. Courts of Appeals Decisions

SUMMARY JUDGMENT; SUMMARY JUDGMENT ON CONTRIBUTING FACTOR AFFIRMED WHERE SIX YEARS PASSED BETWEEN PROTECTED ACTIVITY AND ADVERSE ACTION AND EXCESSIVE ABSENTEEISM INTERVENED

Hess v. Union Pacific Railroad Co., 898 F.3d 852 (8th Cir. Aug. 6, 2018) (No. 17-1167) (2018 U.S. App. LEXIS 21661) (case below 2014-FRS-00006) (Opinion): Railroad terminated the plaintiff, who then filed an FRSA complaint alleging that he was terminated for engaging in protected activity. The Eighth Circuit affirmed the district court's determination that the Plaintiff was terminated for violating the railroad company's absenteeism policy with excessive absences without providing medical documentation. Six years had passed between the original report of an injury and the termination and in that time there was substantial evidence of non-compliance with the attendance policy. The end of the employment also resulted from the Plaintiff's failure to take the steps needed to effect reinstatement. The court also affirmed a determination that no § 20109(c), retaliation for complying with a treating plan, claim had been pled because there was no allegation in the complaint that the treatment contributed to the adverse action.

CONTRIBUTING FACTOR; SUMMARY JUDGMENT; FOURTH CIRCUIT VACATES SUMMARY JUDGMENT FOR RAILROAD WHERE SOME DECISION MAKERS KNEW OF THE PROTECTED ACTIVITY; THERE WAS EVIDENCE THAT LOCAL MANAGEMENT WAS TARGETING PLAINTIFF AND OTHER UNION MEMBERS, THERE WAS EVIDENCE THAT LOCAL MANAGEMENT WAS UNHAPPY WITH THE PROTECTED ACTIVITY, AND TEMPORAL PROXIMITY SUPPORTED AN INFERENCE TO RETALIATORY ANIMUS

DeMott v. CSX Trans. Inc., 701 Fed. Appx. 262 (4th Cir. Aug. 21, 2017) (unpub.): The railroad disciplined plaintiff for a variety of violations, including insubordination. Plaintiff averred that he was actually disciplined for protected activities involving reporting unsafe working conditions, publishing a safety bulletin, and making an OSHA complaint. The district court granted the railroad summary judgment and plaintiff appealed.

After reviewing the legal standard, the panel remarked that plaintiff “undoubtedly” engaged in protected activities and it was “undisputed” that he suffered an adverse action. Plaintiff had also “adequately demonstrated” that the decision-makers knew about the protected activities. There was also evidence that local management, which encompassed some of the decision makers, were unhappy with plaintiff’s safety activities.

Viewing the facts in the light most favorable to plaintiff, temporal proximity licensed an inference to retaliatory animus (several months from some complaints and nine days from the last complaint). There was also other evidence of retaliatory animus related to union activities and some of the discipline came after plaintiff was asked to do something he had never been told to do before and wasn’t ever told to do again. This was enough to make a case for contributing factor causation. The panel then summarily denied the railroad’s alternative argument that it was entitled to summary judgment on its affirmative defense.

CONTRIBUTING FACTOR; SUMMARY JUDGMENT; CAT’S PAW; KNOWLEDGE; TEMPORAL PROXIMITY; WHERE MANAGER WHO KNEW ABOUT THE PROTECTED ACTIVITY INFLUENCED/ADVISED THE DECISION MAKERS AND TESTIFIED AT THE HEARING, CAT’S PAW THEORY CAN APPLY TO MAKE A SHOWING THAT THE DECISION-MAKERS KNEW ABOUT THE PROTECTED ACTIVITY AND MAY HAVE INHERITED ANIMOSITY TO THE PROTECTED ACTIVITY; COURT VACATES SUMMARY JUDGMENT WHEN MANAGERS WHO INFLUENCED DECISION COULD HAVE HAD ANIMOSITY TO THE PROTECTED ACTIVITY, THERE WAS TEMPORAL PROXIMITY, AND THERE WAS EVIDENCE THAT THE EMPLOYEE WAS PUNISHED MORE HARSHLY THAN OTHERS

Lowery v. CSX Transp., Inc., 690 Fed. Appx. 98 (4th Cir. May 26, 2017) (unpublished): Plaintiff was suspended for violation of workplace jewelry guidelines and making false statements. He contended that he was actually disciplined in retaliation for safety complaints. The district court granted summary judgment for the railroad and plaintiff appealed, alleging a number of errors.

Reviewing the record, the panel concluded that Plaintiff “undoubtedly” engaged in protected activity and suffered an adverse action. He also “adequately demonstrated” that the decision-makers were aware of his protected activity. Even if they did not know, the cat’s paw theory applied because another trainmaster knew about the protected activity and had contact with/advised the three decision makers and testified at the hearing. This was sufficient to withstand summary judgment. Further, viewing the evidence in the light most favorable to plaintiff, a fact-finder could conclude that this trainmaster gave testimony as the result of retaliatory animus. In addition, another supervisor who include the trainmaster’s testimony had clear animosity to the plaintiff and knew about his protected activities. The court concluded that there was an issue of material of fact with the jury on the contributing factor evidence, noting that there was temporal proximity and that plaintiff’s discipline was greater than others who violated the policy. The panel also summarily concluded that the defendant had not established by clear and convincing evidence that it would have taken the same action absent the protected activity. The decision below was vacated and the case was remanded for further proceedings.

SUMMARY JUDGMENT; CONTRIBUTORY FACTOR; INTENTIONAL RETALIATION/MOTIVE; EIGHTH CIRCUIT AFFIRMS SUMMARY JUDGMENT TO RAILROAD WHERE PLAINTIFF DID NOT PRODUCE SUFFICIENT EVIDENCE OF INTENTIONAL RETALIATION, HOLDS THAT NATIONWIDE COMPENSATION PROGRAM, TEMPORAL PROXIMITY, AND ADMISSION THAT THE INJURY BROUGHT THE SAFETY VIOLATION IN QUESTION TO LIGHT IS NOT SUFFICIENT TO SUPPORT THE NECESSARY INFERENCE

Heim v. BNSF Ry. Co., 849 F.3d 723 (8th Cir. Feb. 27, 2017) (No. 15-3532) (2017 U.S. App. LEXIS 3460; 2017 WL 744039) (case below ALJ No. 2013-FRS-40), *cert. denied* 138 S. Ct. 268 (2017): Plaintiff was part of a “gang” replacing worn material under the track. That process involves declipping the rail and moving it toward the center. It remains under tension and can move suddenly, creating a “danger zone.” No rule specifically forbids entering the danger zone, but in the daily briefing workers were warned and general rules require taking precautions to avoid injury. Plaintiff’s particular role was picking up stray materials. He saw a rail clip in the danger zone and seeing no machines nearby, thought it was safe to retrieve the clip. When he did so, the declipped rail moved and hit his foot, fracturing it. BNSF disciplined him for a safety violation in the injury, with a 30 day record suspension and probation which, ultimately, did not result in any time off or loss of pay. He filed a complaint and then suit under the FRSA. There was evidence that while stepping into the danger zone was somewhat common and others weren’t discipline to it, as well as evidence that the compensation program for managers was in some way pegged to injury goals, though this was not indexed to local numbers for particular managers and evaluation of safety performance did not turn on the number of injuries.

The district court granted BNSF summary judgment on the grounds that Plaintiff was required to show intentional retaliation but had produced sufficient evidence on the point. The Eighth Circuit affirmed. Complaint argued that because the discipline came directly out of the injury and there would have been no discipline absent the injury, his protected activity and basis for adverse action were inextricably intertwined. But apply *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786 (8th Cir. 2014), the panel held that showing “contributory factor” required a showing of “intentional retaliation.” The factual connection between the two was insufficient. It wasn’t

necessary to “conclusively” demonstrate retaliatory motive, but the Plaintiff needed to show that the discipline was at least in part intentional retaliation for the injury report.

Here, the Eighth Circuit agreed that no reasonable fact-finder could reach that conclusion and find for Plaintiff. As to one of the decision-makers, the undisputed evidence showed that he had both asked and pressured the Plaintiff into filing the report. As to the other, the temporal proximity and compensation program were insufficient to support any reasonable inference to intentional retaliation, partly because the compensation program turned on national numbers, not those of particular managers. The admission that Plaintiff’s injury had made this instance of entering the danger zone lead to punishment was also insufficient since the point was that the violation only came to notice because of the injury. That fell short of any support for a finding of intentional retaliation. Absent more specific evidence of some retaliatory motive, summary judgment for BNSF was proper.

U.S. District Court Decisions

SUMMARY JUDGMENT; CONTRIBUTING FACTOR; SUMMARY JUDGMENT GRANTED TO RAILROAD WHERE NO DIRECT EVIDENCE OF CONTRIBUTION, SIGNIFICANT TIME GAP BETWEEN PROTECTED ACTIVITY AND ADVERSE ACTION; FAVORABLE EMPLOYMENT DECISIONS POST-DATED THE PROTECTED ACTIVITY, AND THERE WAS NO EVIDENCE THAT THE MANAGER ALLEGED THAT HAVE ENGAGED IN THE RETALIATION PARTICIPATED IN THE DECISION TO TAKE THE ADVERSE ACTION

Grell v. UPRR R.R. Co., No. 8:16-cv-00534, 2019 U.S. Dist. LEXIS 43449 (D. Neb. Jan. 4, 2019): Case involving a number of causes of action related to the end of an employment relationship after time off of work on short and long term disability related to psychological conditions attributed, at least in part, to work-related causes. After being cleared to return, Plaintiff sought assignment to a different boss or division. She was allowed time to apply for internal jobs, but when this was unsuccessful her employment was terminated.

The FRSA complaint alleged that Plaintiff had been retaliated against for reporting a work related injury resulting from her boss’ treatment. The injury report occurred in October 2014. The alleged adverse action related to verbal discipline came in August 2014, so the court found it could not have been related to the protected injury report. The other adverse action was the December 2015 termination. The district court concluded that there was no issue of material fact as to whether the injury report contributed to the termination, and so granted summary decision to the railroad. There was no direct evidence of a relation between the two and the gap in time between the injury report and termination weakened any inference to contribution. The court also noted that after the injury report the railroad had made a series of employment decisions

favorable to Plaintiff. Plaintiff had also alleged that her direct supervisor was responsible for the retaliation, but there was no evidence that this supervisor was involved in the employment decisions that led to the ultimate termination.

SUMMARY JUDGMENT; SEVENTH CIRCUIT REQUIRES SHOWING OF DISCRIMINATORY ANIMUS AND PLAINTIFF COULD NOT MAKE THAT SHOWING WHERE THERE WAS NO GENUINE DISPUTE THAT THE DISCIPLINARY RULES APPLIED TO THE PLAINTIFF AND WERE APPLIED CONSISTENTLY; TEMPORAL PROXIMITY ALONE INSUFFICIENT WHEN PROTECTED ACTIVITY IS NOT THE PROXIMATE CAUSE OF THE ADVERSE ACTION.

Jackson v. BNSF Railway Co., No. 16-cv-5518 (N.D. Ill. Aug. 22, 2018) (2018 U.S. Dist. LEXIS 142498; 2018 WL 4003377) (case below 2016-FRS-00015) (Memorandum Opinion and Order): Plaintiff was involved in an altercation at work in which another employee punched him after he repeatedly used profane language. He was given a suspension while the other employee was terminated. He was also disciplined under the attendance policy. He filed a variety of complaints, including an FRSA complaint. Defendant sought summary judgment.

As to the FRSA complaint, applying Seventh Circuit law, the court explained that showing that the protected activity was a contributing factor in the adverse action requires showing “that discriminatory animus at least partially motivated the employer’s action; merely showing a causal link between the protected activity and the employer’s action does not suffice.” Plaintiff could not make this showing because there was no genuine dispute that the workplace violence policy applied to him in this situation and that the Defendant followed that policy. There was no evidence that the attitude of the employer changed after the protected activity, that there was pretext, or that there was inconsistent application of the rules. Temporal proximity was the only factor supporting the inference to contribution, but in this case the protected report was not the proximate cause of his discipline. Thus, summary judgment for defendant was entered on the FRSA complaint.

SUMMARY JUDGMENT; CONTRIBUTORY FACTOR; SUMMARY JUDGMENT FOR DEFENDANT ON CONTRIBUTORY FACTOR DENIED WHERE IT DID NOT CHALLENGE GOOD FAITH OF INJURY REPORT; ITS EVIDENCE OF DISHONESTY WAS WEAK AND DISPUTED; AND TEMPORAL PROXIMITY AND THE MANNER OF INVESTIGATION PROVIDED CIRCUMSTANTIAL EVIDENCE OF CONTRIBUTION

Despain v. BNSF Railway Co., No. 15-cv-8294 (D. Az. Feb. 20, 2018) (2018 U.S. Dist. LEXIS 95518; 2018 WL 1894708) (Order [denying Defendant’s motion for summary judgment]):

The district court denied a motion for summary judgment by the Defendant in an FRSA action. The protected activity in the case involved making an injury report. The Defendant terminated the Plaintiff for dishonesty in making the report and in the investigation. The termination was

later converted to a lengthy suspension. The alleged dishonesty concerned when the Plaintiff determined the injury was work-related, when during the shift the injury occurred, and the circumstance of a quip pro quo proposal to drop the injury report in exchange for a paid deadhead trip. The Plaintiff and manger had different accounts of who made that proposal.

Defendant sought summary judgement on the contributing factor element. But it conceded for the purposes of the motion that the injury report was made in good faith. Having done so, the district court concluded that it could not have discharged him for a dishonest report. A reasonable fact finder could conclude from the record that the Plaintiff had not been honest at all and had promptly attempted to file the report but found no one to report it to. The alleged quid pro quo offer could not support summary judgement because it was “squarely disputed.” “The weakness of BNSF Railway’s assertion of dishonesty suggests it may be pretext for something else. It could well be pretext for telling the truth. The jury can say.” The district court also concluded that there was other circumstantial evidence that could support an inference to contribution, including temporal proximity and the manner in which the investigation and hearing proceeded, which evinced bias.

CONTRIBUTING FACTOR CAUSATION; DISTRICT COURT GRANTS SUMMARY JUDGMENT FOR THE EMPLOYER BECAUSE PLAINTIFFS “ADDUCED NO EVIDENCE FROM WHICH A REASONABLE JURY” COULD FIND THAT THEIR PROTECTED ACTIVITY WAS A CONTRIBUTING FACTOR UNDER THE FRSA; TEMPORAL PROXIMITY ALONE DOES NOT PRESENT A GENUINE ISSUE OF MATERIAL FACT

In *Lincoln v. BNSF Railway Co.*, No. 15-cv-4936-DDC-KGS (D. Kan. April 24, 2017), the United States District Court for the District of Kansas granted summary judgment for Respondent, BNSF Railway Co. (“BNSF”), dismissing FRSA complaints of two Plaintiffs, Larry D. Lincoln and Brad C. Mosbrucker. *Lincoln*, slip op. at 1. Plaintiffs sent demand letters to BNSF describing an on-duty chemical spill that had taken place two and a half years earlier, their injuries, damages, and anticipated future damages. *Id.* at 3. Plaintiffs were subsequently placed on medical leave, which was extended, pending their submission of updated medical information addressing the safety concerns raised in the demand letters. *Id.* at 4-5. Plaintiffs applied to a number of different positions within BNSF, *Id.* at 15-17, pursuant BNSF’s craft transfer policy, which is triggered when a “physician does not release the employee to work” at his assigned job, *Id.* at 6-7. Plaintiffs were not selected for the positions they applied to and alleged that they were not selected because they informed BNSF in their demand letters that BNSF “negligently . . . handled the . . . chemical spill and, as a result, violated their rights under the Federal Employees Liability Act” *Id.* at 18, 54-55.

The court found that Plaintiffs “adduced no evidence from which a reasonable jury could conclude that their demand letters were a contributing factor to defendant’s decision not to hire them.” *Id.* at 59. The court noted that circumstantial evidence can be enough to establish the contributing factor element, but that temporal proximity alone “will not present a genuine issue of fact.” *Id.* at 57. Plaintiffs relied on several emails from BNSF’s doctor to other employees informing them about the information in the demand letters. *Id.* at 58. The court emphasized that

the doctor did not make any hiring decisions and “merely referencing the contents of plaintiffs’ demand letter in an email explaining BNSF’s decision to remove plaintiffs from service because of their medical condition does not create a triable factual issue.” *Id.* at 58.

Note: Because the court found that summary judgment was appropriate on the above grounds, it declined to decide whether sending the demand letters qualified as protected activity. *Id.* at 56.

CONTRIBUTING FACTOR; TEMPORAL PROXIMITY ALONE INSUFFICIENT

In *Jones v. BNSF Ry. Co.*, No. 14-2616 D. Kan. Jan. 14, 2016) (2016 U.S. Dist. LEXIS 4887; 2016 WL 183514) (case below 2014-FRS-53 (Jones) and -63 (Hodges)), Plaintiff Brian Jones alleged that Defendant BNSF retaliated against him for reporting an altercation with a fellow employee and for obtaining a restraining order against that employee. Plaintiff Nick Hodges alleged Defendant retaliated against him for reporting verbal threats made against Jones by another employee in the same altercation. The court granted Defendant’s Motions for Summary Judgment on Plaintiffs’ claims and dismissed Plaintiffs’ Complaint.

Plaintiff Jones claimed that BNSF retaliated against him by holding him out from service, with pay, after he reported a threat by a coworker and obtained a temporary restraining order (“TRO”) against that coworker. BNSF argued that Jones failed to make a prima facie case of retaliation under the FRSA.

The court found that Jones failed to establish a prima facie case of unlawful retaliation and BNSF was indeed entitled to summary judgment, because Jones had not presented evidence sufficient to support a finding that his protected activity was a contributing factor to his discipline. Specifically, the court found that Jones did not point to any direct evidence of intentional retaliation, and that evidence of temporal proximity alone was insufficient to present a genuine factual issue when the employer was concerned about the problem before the employee engaged in the protected activity. Jones offered no further evidence of discriminatory animus, and there was no evidence that BNSF was hostile towards or changed its attitude towards Jones because he obtained the TRO. The court found that the record showed that removing an employee who was part of a workplace altercation pending an investigation was contemplated by BNSF policies and procedures, and that Jones’s union representative advised him as much. Furthermore, the court stated that Jones’s argument that his supervisors did not need to remove him from service in order to comply with the TRO in essence would require the court to sit as a “super-personnel department” to second guess the decisions of the employer.

DECISION WHERE THERE IS SOME EVIDENCE, INCLUDING TEMPORAL PROXIMITY, FROM WHICH SOME CONTRIBUTION COULD BE INFERRED, WHERE PROPOSED INTERVENING CAUSES WERE TOO INTERTWINED, AND BECAUSE PUBLIC LAW BOARD DECISIONS AND INDUSTRY PRACTICE ARE NOT RELEVANT

Miller v. CSX Transp., Inc., No. 1:13-cv-734 (S.D. Ohio Aug. 25, 2015) (2015 U.S. Dist. LEXIS 112507; 2015 WL 5016507) (case below 2013-FRS-64): In August 2012 the Plaintiff reported that about a month earlier he had suffered a back injury when his foot slipped on loose ballast while stepping off of the training, resulting in a twist and popping sound. He had gone to an emergency room 5 days after the injury and more recently to an orthopedist. Defendant's rules require immediate reporting of on-duty injuries, so an investigation was initiated. Several days later Plaintiff gave a written statement retracting his injury report and stating that it had actually occurred at home while working on his car. Plaintiff claimed that through gestures and nodding, the managers had conveyed that if he retracted his report, he could go back to work with little or no penalty. After the investigation/hearing, Plaintiff was terminated. He pursued several actions, including an FRSA complaint.

Defendant sought summary judgment on the contributing factor element on the grounds that there was no evidence of intentional retaliation, the dishonesty was an intervening event, and it had followed long-standing industry practices. The court, however, observed that the contributory factor standard was a very low causal bar and considering the evidence presented, including the temporal proximity and indications that the managers had already decided on discipline before the retraction, concluded that there remained factual disputes. As to proposed intervening causes, the court concluded that they were too intertwined in the facts as presented. Finally, the court rejected reliance on industry practice and public law board decisions as not relevant to the contributing factor question.

CONTRIBUTING FACTOR CAUSATION AND SUMMARY JUDGMENT; DISTRICT COURT DENIES CROSS-MOTIONS FOR SUMMARY JUDGMENT ON THE CONTRIBUTING FACTOR PRONG WHERE THE INJURY REPORT WAS IN CLOSE TEMPORAL PROXIMITY AND WAS INEXTRICABLY INTERTWINED WITH THE DISCIPLINARY ACTION

In *Mosby v. Kansas City Southern Railway Co.*, Case No. CIV-14-472-RAW (E.D. Okla. July 20, 2015), the U.S. District Court for the Eastern District of Oklahoma denied cross-motions for summary judgment under the FRSA on the issue of whether the Plaintiff's protected activity was a contributing factor in the Defendant's decision to take adverse action. *Mosby*, slip op. at 14. The court found that because Plaintiff's "injury report was both close in time to his discipline and inextricably intertwined therewith," it raised a question of fact and the matter could not be dismissed on summary judgment. Similarly, the court found that the close temporal proximity and inextricably intertwined nature of the protected activity and the discipline were "not substantial enough to justify granting [Plaintiff's] summary judgment motion. *Id.* at 13.

TEMPORAL PROXIMITY

Cash v. Norfolk S. Ry. Co., No. 6:13-CV-00056, 2015 U.S. Dist. LEXIS 4293, 2015 WL 178065 (W.D. Va. Jan. 14, 2015): The Defendant suspended the Plaintiff following a hearing conducted under CBA procedures. The Plaintiff had suffered an injury to his shoulder in

February 2010, and sought medical attention for the injury, but did not report the injury until December 17, 2012. The failures to report were determined to have violated the Defendant's rules, and the Plaintiff was suspended for 30 days. The Plaintiff filed an FRSA retaliation complaint. The court denied cross motions for summary judgment. The court found that there was sufficient evidence in the record to present a genuine issue of material fact on whether the Plaintiff's act of reporting his shoulder injury as work-related could have been a "contributing factor" that led to the investigation and subsequent suspension. The court observed that the Defendant began disciplinary proceedings the very same day that it claimed to learn that the Plaintiff's injury had been reported as work related.

CONTRIBUTING FACTOR; TEMPORAL PROXIMITY IS SUFFICIENT IN ITSELF TO CREATE A GENUINE ISSUE OF MATERIAL FACT SUFFICIENT TO SURVIVE MOTION FOR SUMMARY JUDGMENT

In *Davis v. Union Pacific Railroad Co.*, No. 12-cv-2738 (W.D.La. July 14, 2014) (2014 WL 3499228) (case below 2011-FRS-33), the Defendant filed a motion for summary judgment arguing that the Plaintiff's report of a work related injury was not a contributing factor in its decision to terminate the Plaintiff's employment, arguing that the Defendant was terminated for dishonesty and that the injury report played no part. The court found that temporal proximity between the Plaintiff's injury report, the Defendant's investigation charging dishonesty, and the Plaintiff's eventual termination, in itself created a genuine issue of material fact on the contributing cause element of the Plaintiff's FRSA claim sufficient to survive summary judgment.

DOL Administrative Review Board Decisions

CONTRIBUTING FACTOR; COMPLAINANT FAILS TO MAKE OUT CONTRIBUTING FACTOR SHOWING WHERE RELEVANT DECISION MAKERS DID NOT HAVE KNOWLEDGE OF THE PROTECTED ACTIVITY, TEMPORAL PROXIMITY WAS INTERRUPTED BY INTERVENING EVENTS, AND A PROFFERED COMPARATOR WAS NOT SIMILARLY SITUATED

Hunter v. CSX Transportation, Inc., ARB Nos. 2018-0044, and -0045, ALJ No. 2017-FRS-00007 (ARB Apr. 25, 2019) (per curiam) (Final Decision and Order): FRSA case in which the ALJ found that Complainant had engaged in protected activity but not that the protected activity was a contributing factor in the decision to terminate him. The ALJ also found that the Respondent had established by clear and convincing evidence that it would have taken the same action absent the protected activity. Complainant appealed both causal findings. Respondent appealed the finding that Complainant engaged in protected activity.

Complainant reported that a wheel slip alarm was sounding. Respondent argued that this wasn't an actual hazardous safety condition and so couldn't be a report of such, or a good faith report of such. The ARB summarily rejected this, stating that they were the same arguments fully considered and properly rejected by the ALJ. Complainant's arguments turned on claims that certain testimony was credible, certain evidence was significant, and Respondent's explanations were "bunk." But ALJs receive deference in their credibility assessments unless they are inherently incredible or patently unreasonable. They were not in this case, so they received deference and the findings were affirmed. The ARB thus affirmed the ALJ's decision in full and "adopt it as our own and attach it."

ALJ Decision

Complaint had been terminated and the parties stipulated that was an adverse action. The case was about two accounts of the termination—Complainant said it was due, in part, to his report of the wheel slip alarm. Respondent said that happened all the time and wasn't a hazardous condition. It said Claimant was fired for leaving work without the permission of a supervisor and that the decision makers didn't even know about the alleged protected activity. Complainant asserted that other employees who left without permission weren't fired.

The ALJ had first denied the complaint on the contributing factor element. The discussion begins with a nice recitation of relevant law (28-30). There was close temporal proximity, but the ALJ found that the relevant decision makers did not have knowledge of the protected activity--the trainmaster who reported that Complainant had left did have that knowledge, but he didn't report the protected activity to his hire ups and his role was only to receive guidance on what to do, i.e. initiate proceedings. The temporal proximity was also minimized because of intervening events (leaving work and the confusion at the end of the shift) and the commonality of the wheel slip events. Respondent had been consistent in its explanation of events and followed its disciplinary procedures. The ALJ also rejected reliance on a comparator who received less punishment since they weren't similarly situated. Further, the ALJ found that there was no good indication of evidence, which followed from the crediting of the front line supervisor's explanations of his actions as well as listening to the tape of the report in question. The ALJ found that the supervisor had acted reasonably in the circumstances. Thus the ALJ concluded that Complainant had not established that the protected activity was a contributing factor in the termination decision.

CONTRIBUTORY FACTOR CAUSATION; CAUSATION PRESUMED WHERE COMPLAINANT'S INJURY AND SAFETY REPORTS WERE BOTH CLOSE IN TIME TO THE DISCIPLINE AND INEXTRICABLY INTERTWINED; ARB DISTINGUISHES *KUDUK V. BNSF RAILWAY* IN WHICH, ALTHOUGH PROTECTED ACTIVITY WAS CLOSE IN TIME, IT WAS COMPLETELY UNRELATED TO THE INCIDENT THAT LED TO HIS DISCHARGE

In *Riley v. Dakota, Minnesota & Eastern Railroad Corp. d/b/a Canadian Pacific*, ARB Nos. 16-010, -052, ALJ No. 2014-FRS-44 (ARB July 6, 2018), the ARB affirmed the ALJ's finding that the Respondent violated the FRSA when it suspended the Complainant without pay for 47

days due to his delay in filing an injury/safety report about a small bruise resulting from a physical assault by a co-worker. The Complainant had waited until he reached his hotel room following the return of the train to the yard to attempt to report the altercation. He was unable to reach his immediate supervisors, so he sent a text message to a coworker about the assault, and then proceeded to fall asleep. The next morning the Complainant was able to get in touch with a manager about the attack, and eventually to file a formal complaint about the attack. Both employees were pulled out of service, and, after a 47 day investigation, the Respondent concluded that the Complainant should have reported the incident. The punishment was forfeiture of pay for the 47 days the Complainant had spent out of service. The ALJ rejected the Respondent's contention that the Complainant's failure to report the bruise showed bad faith. Rather, the ALJ credited the Complainant's contention that he was in fear of the coworker until he returned to the hotel, that he tried and failed to report the incident immediately, and did report it as soon as he woke the next morning. The ARB affirmed these findings.

On appeal, the ARB affirmed the ALJ's finding that causation was presumed because it was impossible to separate the cause of the Complainant's discipline-for-filing-his-injury-report-late from his protected activity of filing the injury report. The ALJ found the two to be inextricably intertwined. The ARB quoted from the materially similar case of *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-12 (ARB Oct. 26, 2012), in which the ARB had explained why disciplinary action taken against an employee for late injury reporting establishes presumptive causation as a matter of law. The ARB in *Henderson* had found that "viewing the 'untimely filing of medical injury' as an 'independent' ground for termination could easily be used as a pretext for eviscerating protection for injured employees. Slip op. at 5 quoting *Henderson*, slip op. at 14.

The Respondent cited the Eighth Circuit's decision in *Kuduk v. BNSF Railway, Co.*, 768 F.3d 786, 792 (8th Cir. 2014), and the circuit cases that follow *Kuduk*, to argue that more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation. The Respondent noted that *Kuduk* requires a complainant to prove intentional retaliation. The ARB, however, found the *Kuduk* was not analogous because in that case, while the complainant's protected activity was close in time, it was completely unrelated to the incident that led to his discharge. Here, the Complainant's injury and safety reports were both close in time to his discipline and inextricably intertwined.

In a footnote, the ARB observed that it questioned the court's holding in *Kuduk* that in establishing contributory factor, an employee must prove intentional retaliation. The ARB stated that this holding was conclusory and contrary to the weight of precedent interpreting the contributing factor element of most whistleblower laws. The ARB further noted that nothing in the FRSA requires a complainant to establish a retaliatory motive. The ARB also found "curious" the court's statement in *Kuduk* that rejects the notion that temporal proximity, without more, is sufficient to establish a prima facie case. The ARB cited the regulations, and *Lockheed Martin Corp. v. ARB*, 717 F.3d 1121, 1136 (10th Cir. 2013) ("Temporal proximity between the protected activity and adverse employment action may alone be sufficient to satisfy the contributing factor test.").

SUMMARY DECISION; CONTRIBUTING FACTOR CAUSATION; TEMPORAL PROXIMITY MUST BE VIEWED UNDER TOTALITY OF THE CIRCUMSTANCES, WHICH MAY INCLUDE “CONTINUING FALLOUT” FROM AN INJURY REPORT

In *Brucker v. BNSF Railway Co.*, ARB No. 14-071, 2013-FRS-70 (ARB July 29, 2016), when the Complainant applied for employment in 1993, he checked the box stating “no” in response to the question, “Other than traffic violations, have you ever been convicted of a crime?” Nineteen years later, the Respondent discovered that the Complainant had been convicted of misdemeanor assault in 1985 and incarcerated for two years. After investigating, the Respondent eventually fired the Complainant. About two and a half years earlier, the Complainant’s attorney had informed the Respondent that he had been retained to represent the Complainant in a claim for work related injuries. The Complainant shortly thereafter filed an injury report. The Complainant testified that after he filed his injury report, his supervisors intensified their scrutiny of his work. The ALJ granted summary decision in favor of the Respondent finding no evidence of a connection between the injury report and the investigation into the criminal background, and finding that the supervisor’s constant observation of the Complainant as he worked played no part in its discovery of the conviction. The Complainant had been disciplined a couple times in the interim between the injury report and the termination, but the ALJ found those isolated incidents did not show that the injury report played a part in the termination. The ARB, reviewing the summary decision question de novo, vacated the ALJ’s decision and remanded. The ARB found several factors that raised a genuine issue of material fact regarding the contributory causation element.

The ARB found that the ALJ had assessed temporal proximity too narrowly. The ARB stated that “[w]hile it is true that Brucker reported his injury some two and one-half years before BNSF fired him, the ramifications of that report were most certainly not resolved on the day that it was filed and in fact, were still ongoing when BNSF fired Brucker.” USDOL/OALJ Reporter at 12 (footnote omitted). The ARB noted that there had been ongoing litigation which kept the Complainant’s injury report fresh. The ARB stated that the “continuing fallout” from the injury report must be considered. The ARB cited *Franchini v. Argonne Nat’l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-14, slip op. at 10 (ARB Sept. 26, 2012) (“Before granting summary decision on the issue of causation, the ALJ must evaluate the temporal proximity evidence presented by the complainant on the record as a whole, including the nature of the protected activity and the evolution of the unfavorable personnel action.”).

The ARB also noted that the Complainant had testified that the Respondent’s attitude toward him changed after he engaged in protected activity, intensifying its scrutiny of his work. The ARB stated that the fact that this scrutiny had not led to discovery of the misdemeanor conviction was irrelevant. The ARB noted that the Complainant testified about three incidents after the injury report that he believed exhibited retaliatory animus. The ARB also noted that the Complainant testified that when he filed out the job application, an Assistant Superintendent instructed him not to check the box because the Respondent was only concerned about felonies. The ARB noted, inter alia, that the Respondent did not “proffer any non-retaliatory reason for its investigation into the accuracy of Brucker’s employment application after 19 years of employment.” The ARB noted that the Respondent cited no cases in which an employee had been fired under similar circumstances. These factors made it possible that the Complainant could prevail on the contributing cause question.

- Stated Reason For Discipline

DOL Administrative Review Board Decisions

CAUSATION UNDER FRSA; BOARD REJECTS AS TOO CLEVER THE RESPONDENT'S ARGUMENT THAT IT INITIATED A DISCIPLINARY INVESTIGATION ONLY BECAUSE THE COMPLAINANT ALLEGEDLY SAT ON A CHAIR WITHOUT FIRST INSPECTING ITS SAFETY, RATHER THAT BECAUSE THE COMPLAINANT REPORTED AN INJURY

In *Vernace v. Port Authority Trans-Hudson Corp.*, ARB No. 12-003, ALJ No. 2010-FRS-18 (ARB Dec. 21, 2012), the ARB summarily affirmed the ALJ's finding that the Respondent unlawfully discriminated against the Complainant in violation of the employee protection provisions of the Federal Rail Safety Act when the Complainant filed an injury report. The Respondent had sent a charging letter to the Complainant stating that she had failed to exercise constant care and utilize safe work practices to prevent injury to herself when she failed to inspect a chair before sitting on it.

The ARB found that substantial evidence supported the ALJ's findings and that the ALJ legal analysis and conclusions were correct. The ARB wrote:

PATH unpersuasively challenges the ALJ's factual finding of causation by arguing that it initiated a disciplinary investigation only because of the allegedly unsafe use of a chair (sitting on it) and not because Vernace reported an injury. As the ALJ explained, this clever distinction ignores the broad and plain language of the statute and regulations. It also ignores FRSA's extensive legislative history citing the rampant practices of abuse and intimidation inflicted on railroad workers who reported or even attempted to report work injuries. The ALJ thoroughly explained her factual and legal findings, and we incorporate them into this decision.

ARB slip op. at 2-3 (footnotes omitted).

- Fairness of Discipline

CONTRIBUTING FACTOR CAUSATION; IF DISCIPLINE WAS WHOLLY UNRELATED TO PROTECTED ACTIVITY, THEN WHETHER IT WAS FAIRLY IMPOSED IS IRRELEVANT

In Gunderson v. BNSF Railway Co., No. 15-2905 (8th Cir. Mar. 10, 2017) (2017 U.S. App. LEXIS 4258; 2017 WL 942663) (case below D. Minn. No. 14–CV–0223; ALJ No. 2011-FRS-1), the Plaintiff had been fired for harassing a co-worker and threatening a supervisor. On appeal, the Plaintiff challenged the merits of the Defendant’s decision to terminate his employment, and argued that they were pretextual and thus retaliatory. The Eighth Circuit was not persuaded by this contention:

We decline to review the merits of the discipline because “federal courts do not sit as a super-personnel department that re-examines an employer’s disciplinary decisions.” *Kuduk*, 768 F.3d at 792 (quotation omitted). The critical inquiry in a pretext analysis “is not whether the employee actually engaged in the conduct for which he was terminated, but whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge.” *McCullough v. Univ. of Ark. for Med. Scis.*, 559 F.3d 855, 861-62 (8th Cir. 2009). Moreover, if the discipline was wholly unrelated to protected activity, as the ALJ found, whether it was fairly imposed is not relevant to the FRSA causal analysis. “An employee who engages in protected activity is not insulated from adverse action for violating workplace rules, and an employer’s belief that the employee committed misconduct is a legitimate, non-discriminatory reason for adverse action.” *Richey v. City of Independence*, 540 F.3d 779, 784 (8th Cir. 2008).

Slip op. at 11.

- “Cat’s Paw” Theory

CONTRIBUTING FACTOR; SUMMARY JUDGMENT; CAT’S PAW; KNOWLEDGE; TEMPORAL PROXIMITY; WHERE MANAGER WHO KNEW ABOUT THE PROTECTED ACTIVITY INFLUENCED/ADVISED THE DECISION MAKERS AND TESTIFIED AT THE HEARING, CAT’S PAW THEORY CAN APPLY TO MAKE A

SHOWING THAT THE DECISION-MAKERS KNEW ABOUT THE PROTECTED ACTIVITY AND MAY HAVE INHERITED ANIMOSITY TO THE PROTECTED ACTIVITY; COURT VACATES SUMMARY JUDGMENT WHEN MANAGERS WHO INFLUENCED DECISION COULD HAVE HAD ANIMOSITY TO THE PROTECTED ACTIVITY, THERE WAS TEMPORAL PROXIMITY, AND THERE WAS EVIDENCE THAT THE EMPLOYEE WAS PUNISHED MORE HARSHLY THAN OTHERS

Lowery v. CSX Transp., Inc., 690 Fed. Appx. 98 (4th Cir. May 26, 2017) (unpublished): Plaintiff was suspended for violation of workplace jewelry guidelines and making false statements. He contended that he was actually disciplined in retaliation for safety complaints. The district court granted summary judgment for the railroad and plaintiff appealed, alleging a number of errors. Reviewing the record, the panel concluded that Plaintiff “undoubtedly” engaged in protected activity and suffered an adverse action. He also “adequately demonstrated” that the decision-makers were aware of his protected activity. Even if they did not know, the cat’s paw theory applied because another trainmaster knew about the protected activity and had contact with/advised the three decision makers and testified at the hearing. This was sufficient to withstand summary judgment. Further, viewing the evidence in the light most favorable to plaintiff, a fact-finder could conclude that this trainmaster gave testimony as the result of retaliatory animus. In addition, another supervisor who include the trainmaster’s testimony had clear animosity to the plaintiff and knew about his protected activities. The court concluded that there was an issue of material of fact with the jury on the contributing factor evidence, noting that there was temporal proximity and that plaintiff’s discipline was greater than others who violated the policy. The panel also summarily concluded that the defendant had not established by clear and convincing evidence that it would have taken the same action absent the protected activity. The decision below was vacated and the case was remanded for further proceedings.

CAT'S PAW THEORY OF LIABILITY; MANAGER'S INADEQUATE REVIEW OF TRANSCRIPT OF INTERNAL HEARING FOUND INADEQUATE TO CONSTITUTE AN INDEPENDENT INVESTIGATION FOR AVOIDING CAT'S PAW LIABILITY

In *Consolidated Rail Corp. v. USDOL*, No. 13-3740 (6th Cir. May 28, 2014) (unpublished) (2014 WL 2198410) (case below ARB Nos. 13-030, -033, ALJ No. 2012-FRS-00012), a train conductor (the Complainant) filed 35 formal written safety complaints in the six months before he was fired. The incident leading to the firing occurred when the Complainant's supervisor had asked to speak with employees about a recent accident. The Complainant had not responded to the supervisor’s “Good Morning” and indicated that he would only speak with the supervisor if it involved a work-related issue. The supervisor stated that he could talk to the Complainant if he wanted to, to which the Complainant responded “Do you want to tangle with me?” The Area Superintendent suspended the Complainant. Following an internal hearing, the Petitioner's Manager of Field Operations terminated the Complainant's employment for violating the Petitioner's zero-tolerance policy for threats. The Complainant filed a Federal Rail Safety Act whistleblower complaint. Following a hearing, the ALJ concluded that the Petitioner terminated the Complainant in violation of the FRSA. The ARB affirmed. On appeal, the Sixth Circuit denied the Petitioner's petition for review under the highly deferential substantial evidence standard of review. Substantial evidence supported the ALJ's finding that the supervisor and the

Area Superintendent had animus against the Complainant which contributed to his termination. The ALJ imputed these employees' hostility to the Manager under a "cat's paw" theory of liability. On appeal, the Petitioner argued that the ALJ's conclusion was contrary to *Staub v. Proctor Hospital*, 131 S.Ct. 1186, 1194 (2011). The court found, however, that substantial evidence supported the ALJ's finding that the Manager's review of the transcript of the internal hearing was not sufficiently independent to avoid liability under the cat's paw theory, and that the ALJ's decision was in line with *Staub*, which observes that mere conducting of an independent investigation does not necessarily preclude a claim of wrongful termination.

U.S. District Court Decisions

SUMMARY JUDGMENT; CAT'S PAW; TO PREVAIL ON CAT'S PAW THEORY A PLAINTIFF MUST BE ABLE TO SHOW THAT THE INDIVIDUAL WITH THE ALLEGED RETALIATORY MOTIVE PLAYED SOME SUBSTANTIVE ROLE AND WAS ABLE TO INFLUENCE THE OUTCOME

Gibbs v. Norfolk Southern Railway Co., No. 14-cv-587 (W.D. Ky. Mar. 29, 2018) (2018 U.S. Dist. LEXIS 52565; 2018 WL 1542141) (Memorandum Opinion and Order): Plaintiff made safety complaints related to parking arrangements for a time when the entrances to the main parking area at the Louisville yard were to be blocked. Later he and another employee were investigated after some managers found them sitting in a company truck at a restaurant during work hours. Plaintiff maintained that this was normal practice and authorized, but he was terminated for absenteeism, misuse of company property, and sleeping on the job. He filed an FRSA complaint. The court was presented with Defendant's motion for summary judgment.

For the adverse actions that were properly alleged, the court found that Plaintiff could not establish that the decision-makers had knowledge of the protected activity. Both had declared that they had no such knowledge and one wasn't at the company when the protected activity occurred. In response Plaintiff had only speculated that the protected activity was generally known in management, but there was no evidence to support this conclusion. Plaintiff also made a "cat's paw" argument based on influence by a supervisor who did know about the protected activity. But the court found that the undisputed evidence showed that this employee played no substantive role in the decision-making process or actual investigation.

- Admission of Misconduct

CONTRIBUTING FACTOR; COMPLAINANT'S CONCEDED EXPRESSION OF FRUSTRATION AS BASIS FOR DISCIPLINE; CREDIBILITY DETERMINATION AS TO WHETHER IT ALONE WAS REASON FOR REPRIMAND

In *Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013), the ARB summarily affirmed the ALJ's decision finding that the Complainant had not established by a preponderance of the evidence that his protected activity contributed to the reprimand he received. The Complainant conceded that he had, in frustration, banged his hands on his desk and made a growling sound, which was the stated basis for the discipline. The issue was the degree to which the Complainant expressed that frustration. The ALJ held that it was a matter of credibility and found that that the manager's testimony was more likely to be accurate. The ARB reviewed the evidentiary record and the parties' briefs on appeal, and found that the ALJ's findings were supported by substantial evidence.

- *Summary Decision on Contributory Factor*

[*Editorial Note:* This section collects appellate cases with guidance on summary decision/judgment on the contributing factor element as well as examples of district court decisions on summary judgment. The cases are also noted topically, as appropriate.]

U.S. Circuit Court of Appeals Decisions

SUMMARY JUDGMENT; SUMMARY JUDGMENT ON CONTRIBUTING FACTOR AFFIRMED WHERE SIX YEARS PASSED BETWEEN PROTECTED ACTIVITY AND ADVERSE ACTION AND EXCESSIVE ABSENTEEISM INTERVENED

Hess v. Union Pacific Railroad Co., 898 F.3d 852 (8th Cir. Aug. 6, 2018) (No. 17-1167) (2018 U.S. App. LEXIS 21661) (case below 2014-FRS-00006) (Opinion): Railroad terminated the plaintiff, who then filed an FRSA complaint alleging that he was terminated for engaging in protected activity. The Eighth Circuit affirmed the district court's determination that the Plaintiff was terminated for violating the railroad company's absenteeism policy with excessive absences without providing medical documentation. Six years had passed between the original report of an injury and the termination and in that time there was substantial evidence of non-compliance with the attendance policy. The end of the employment also resulted from the Plaintiff's failure to take the steps needed to effect reinstatement. The court also affirmed a determination that no § 20109(c), retaliation for complying with a treating plan, claim had been pled because there was no allegation in the complaint that the treatment contributed to the adverse action.

CONTRIBUTING FACTOR; SUMMARY JUDGMENT; FOURTH CIRCUIT VACATES SUMMARY JUDGMENT FOR RAILROAD WHERE SOME DECISION MAKERS KNEW OF THE PROTECTED ACTIVITY; THERE WAS EVIDENCE THAT LOCAL MANAGEMENT WAS TARGETING PLAINTIFF AND OTHER UNION MEMBERS, THERE WAS EVIDENCE THAT LOCAL MANAGEMENT WAS UNHAPPY WITH THE PROTECTED ACTIVITY, AND TEMPORAL PROXIMITY SUPPORTED AN INFERENCE TO RETALIATORY ANIMUS

DeMott v. CSX Trans. Inc., 701 Fed. Appx. 262 (4th Cir. Aug. 21, 2017) (unpub.): The railroad disciplined plaintiff for a variety of violations, including insubordination. Plaintiff averred that he was actually disciplined for protected activities involving reporting unsafe working conditions, publishing a safety bulletin, and making an OSHA complaint. The district court granted the railroad summary judgment and plaintiff appealed.

After reviewing the legal standard, the panel remarked that plaintiff “undoubtedly” engaged in protected activities and it was “undisputed” that he suffered an adverse action. Plaintiff had also “adequately demonstrated” that the decision-makers knew about the protected activities. There was also evidence that local management, which encompassed some of the decision makers, were unhappy with plaintiff’s safety activities.

Viewing the facts in the light most favorable to plaintiff, temporal proximity licensed an inference to retaliatory animus (several months from some complaints and nine days from the last complaint). There was also other evidence of retaliatory animus related to union activities and some of the discipline came after plaintiff was asked to do something he had never been told to do before and wasn’t ever told to do again. This was enough to make a case for contributing factor causation. The panel then summarily denied the railroad’s alternative argument that it was entitled to summary judgement on its affirmative defense.

CONTRIBUTING FACTOR; SUMMARY JUDGMENT; SUMMARY JUDGMENT ON CONTRIBUTING FACTOR AFFIRMED WHERE PROTECTED ACTIVITY AT ISSUE CAME AFTER SOME ADVERSE ACTIONS AND AFTER THE TESTIMONY THAT WAS THE BASIS FOR THE CLAIM OF INTENTIONAL RETALIATION, EIGHTH CIRCUIT REQUIRES THAT THE ADVERSE ACTION BE AT LEAST IN PART INTENTIONAL RETALIATION FOR PROTECTED ACTIVITY AND REJECTS CLAIM THAT AN ASSERTION THAT THE TWO ARE INEXTRICABLY INTERTWINED ALONE CAN MAKE A SHOWING OF CONTRIBUTING FACTOR CAUSATION

Foster v. BNSF Ry. Co., 866 F.3d 962 (8th Cir. Aug. 10, 2017): Three joined complaints under the FRSA relating back to an injury to another worker that occurred during a crew change. The train had stopped across a bridge from the parking area and when one of the new crew members fell

off the bridge when walking to the train. After a hearing, the three (and others) were disciplined for a variety of safety infractions found in videos of the incident. In interviews before the hearing and at the hearing they had reported various safety infractions in the area. It was disputed, for instance, where the railroad told them to stop the train. They each received different levels of discipline, where were reduced or eliminated by the Public Law Board. They also filed FRSA complaints and then kicked them out to federal court. The district court granted summary decision for the railroad and the plaintiffs appealed.

After dismissing certain theories on grounds of failure to exhaust or not engaging in the alleged protected activity, the last protected activity at issue was the hearing testimony. This could not have contributed to any of the alleged adverse actions except for the final discipline, since it came after that discipline. Moreover, the theory of retaliation alleged that two testifying managers harbored the retaliatory motive and were trying to protect themselves, but this testimony came before the testimony of the plaintiffs. The Eighth Circuit quickly rejected a challenge to the validity of the discipline since erroneous discipline is insufficient to establish a violation. Finally, the court rejected the claim that contribution could be shown on a theory that the protected activity and adverse action were inextricably intertwined since the Eighth Circuit had rejected this theory in *Heim v. BNSF Ry. Co.*, 849 F.3d 723 727 (8th Cir. 2017). To prevail, a plaintiff had to show that the discipline was at least in part intentional retaliation for the protected activity.

CONTRIBUTING FACTOR; SUMMARY JUDGMENT; CAT’S PAW; KNOWLEDGE; TEMPORAL PROXIMITY; WHERE MANAGER WHO KNEW ABOUT THE PROTECTED ACTIVITY INFLUENCED/ADVISED THE DECISION MAKERS AND TESTIFIED AT THE HEARING, CAT’S PAW THEORY CAN APPLY TO MAKE A SHOWING THAT THE DECISION-MAKERS KNEW ABOUT THE PROTECTED ACTIVITY AND MAY HAVE INHERITED ANIMOSITY TO THE PROTECTED ACTIVITY; COURT VACATES SUMMARY JUDGMENT WHEN MANAGERS WHO INFLUENCED DECISION COULD HAVE HAD ANIMOSITY TO THE PROTECTED ACTIVITY, THERE WAS TEMPORAL PROXIMITY, AND THERE WAS EVIDENCE THAT THE EMPLOYEE WAS PUNISHED MORE HARSHLY THAN OTHERS

Lowery v. CSX Transp., Inc., 690 Fed. Appx. 98 (4th Cir. May 26, 2017) (unpublished): Plaintiff was suspended for violation of workplace jewelry guidelines and making false statements. He contended that he was actually disciplined in retaliation for safety complaints. The district court granted summary judgment for the railroad and plaintiff appealed, alleging a number of errors. Reviewing the record, the panel concluded that Plaintiff “undoubtedly” engaged in protected activity and suffered an adverse action. He also “adequately demonstrated” that the decision-makers were aware of his protected activity. Even if they did not know, the cat’s paw theory applied because another trainmaster knew about the protected activity and had contact with/advised the three decision makers and testified at the hearing. This was sufficient to withstand summary judgment. Further, viewing the evidence in the light most favorable to plaintiff, a fact-finder could conclude that this trainmaster gave testimony as the result of retaliatory animus. In addition, another supervisor who include the trainmaster’s testimony had

clear animosity to the plaintiff and knew about his protected activities. The court concluded that there was an issue of material of fact with the jury on the contributing factor evidence, noting that there was temporal proximity and that plaintiff's discipline was greater than others who violated the policy. The panel also summarily concluded that the defendant had not established by clear and convincing evidence that it would have taken the same action absent the protected activity. The decision below was vacated and the case was remanded for further proceedings.

SUMMARY JUDGMENT; CONTRIBUTORY FACTOR; INTENTIONAL RETALIATION/MOTIVE; EIGHTH CIRCUIT AFFIRMS SUMMARY JUDGMENT TO RAILROAD WHERE PLAINTIFF DID NOT PRODUCE SUFFICIENT EVIDENCE OF INTENTIONAL RETALIATION, HOLDS THAT NATIONWIDE COMPENSATION PROGRAM, TEMPORAL PROXIMITY, AND ADMISSION THAT THE INJURY BROUGHT THE SAFETY VIOLATION IN QUESTION TO LIGHT IS NOT SUFFICIENT TO SUPPORT THE NECESSARY INFERENCE

Heim v. BNSF Ry. Co., 849 F.3d 723 (8th Cir. Feb. 27, 2017) (No. 15-3532) (2017 U.S. App. LEXIS 3460; 2017 WL 744039) (case below ALJ No. 2013-FRS-40), *cert. denied* 138 S. Ct. 268 (2017): Plaintiff was part of a “gang” replacing worn material under the track. That process involves declipping the rail and moving it toward the center. It remains under tension and can move suddenly, creating a “danger zone.” No rule specifically forbids entering the danger zone, but in the daily briefing workers were warned and general rules require taking precautions to avoid injury. Plaintiff's particular role was picking up stray materials. He saw a rail clip in the danger zone and seeing no machines nearby, thought it was safe to retrieve the clip. When he did so, the declipped rail moved and hit his foot, fracturing it. BNSF disciplined him for a safety violation in the injury, with a 30 day record suspension and probation which, ultimately, did not result in any time off or loss of pay. He filed a complaint and then suit under the FRSA. There was evidence that while stepping into the danger zone was somewhat common and others weren't discipline to it, as well as evidence that the compensation program for managers was in some way pegged to injury goals, though this was not indexed to local numbers for particular managers and evaluation of safety performance did not turn on the number of injuries.

The district court granted BNSF summary judgment on the grounds that Plaintiff was required to show intentional retaliation but had produced sufficient evidence on the point. The Eighth Circuit affirmed. Complaint argued that because the discipline came directly out of the injury and there would have been no discipline absent the injury, his protected activity and basis for adverse action were inextricably intertwined. But apply *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786 (8th Cir. 2014), the panel held that showing “contributory factor” required a showing of “intentional retaliation.” The factual connection between the two was insufficient. It wasn't necessary to “conclusively” demonstrate retaliatory motive, but the Plaintiff needed to show that the discipline was at least in part intentional retaliation for the injury report.

Here, the Eighth Circuit agreed that no reasonable fact-finder could reach that conclusion and find for Plaintiff. As to one of the decision-makers, the undisputed evidence showed that he had both asked and pressured the Plaintiff into filing the report. As to the other, the temporal proximity and compensation program were insufficient to support any reasonable inference to intentional retaliation, partly because the compensation program turned on national numbers, not

those of particular managers. The admission that Plaintiff's injury had made this instance of entering the danger zone lead to punishment was also insufficient since the point was that the violation only came to notice because of the injury. That fell short of any support for a finding of intentional retaliation. Absent more specific evidence of some retaliatory motive, summary judgment for BNSF was proper.

U.S. District Court Decisions

SUMMARY JUDGMENT; CAUSATION; ALTHOUGH PLAINTIFF IS NOT REQUIRED TO PROVE EMPLOYER'S MOTIVE, ESSENCE OF A RETALIATION CLAIM UNDER THE FRSA IS DISCRIMINATORY ANIMUS; WHERE ONLY DISTINGUISHING FACTOR BETWEEN INSTANT REPORT OF DEFECT AND PRIOR SIMILAR REPORT WAS PLAINTIFF'S OBSTINATE AND UNCOOPERATIVE BEHAVIOR, COURT GRANTED SUMMARY JUDGMENT FINDING THAT THE PLAINTIFF'S TERMINATION WAS BASED ON INSUBORDINATION

In *March v. Metro-North R.R.*, No. 16-cv-8500 (S.D.N.Y. Mar. 28, 2019) (2019 U.S. Dist. LEXIS 53677; 2019 WL 1409728), the Plaintiff brought a FRSA complaint alleging that he suffered retaliation in violation of 49 U.S.C. § 20109 when he was removed from service for insubordination after reporting a defective wiper blade on one of the trains. The Plaintiff had refused a supervisor's order to change the blade because he believed it was unsafe to use a ladder. The court granted the Defendant's motion for summary judgment.

Causation; Discriminatory Animus

The court stated that "While a plaintiff does not have to provide proof of the employer's motive, 'at bottom, the essence of a retaliation claim under the FRSA is "discriminatory animus.'" *Lockhart*, 266 F. Supp. 3d at 663.'" Slip op. at 10; see also slip op. at 16-17. As to the instant case, the court noted that the Plaintiff had made the same type of a complaint one month earlier and was not disciplined for it, and that the Defendant had immediately responded to the report of the wiper blade concern underlying the instant FRSA complaint. The court found that the only difference in the two instances was blatant insubordination and uncooperativeness on the second; that was the reason for the dismissal. The court also noted that the timeline of the incident did not support a finding that the termination was related to whether the blade was deficient; rather the termination was for repeated refusal to fix the blade or to cooperate with supervisors.

SUMMARY JUDGMENT; CONTRIBUTING FACTOR CAUSATION; COURT APPLIES FIVE FACTOR TEST OF *TOMKINS v. METRO-NORTH*; WEIGHT GIVEN TO DETERMINATION OF NATIONAL RAILROAD ADJUSTMENT BOARD

In *Necci v. Long Island R.R. Co.*, No. 16-CV-3250 (E.D. N.Y. Mar. 21, 2019) (2019 U.S. Dist. LEXIS 47231; 2019 WL 1298523), the Plaintiff alleged that the Defendant retaliated against her by decertifying her as a locomotive engineer after an incident in 2013 in which the train was 50 minutes late and after an internal hearing the Defendant found a pattern of improper performance making her an unfit and dangerous train operator. The Plaintiff also alleged retaliation based on her firing after a subsequent incident in 2016, at which time she had been returned to a Station Appearance Maintainer (“SAM”) position. In this second incident, the Defendant found that she had disobeyed and refused to follow direct orders to vacuum and to roll up floormats. The Plaintiff had refused based on her belief that it was unsafe to use electrical outlets in public areas and that she needed instruction and help on rolling up the mats.

2013 Decertification Incident – Five Factor Test on Contributing Factor Causation

On motion for summary judgment, the Defendant argued that the Plaintiff’s protected activities (inspecting the train; reporting safety concerns; slowing the train for a safety hazard) were not contributing factors in her decertification. The court analyzed the contributing factor question under the five factor framework articulated in *Tompkins v. Metro-North Commuter Railroad*, No. 16-CV-9920, 2018 WL 4573008 at * 7 (S.D.N.Y. Sept. 24, 2018), appeal filed, 2d Cir. Case No. 18-3174. The *Tompkins* court had in turn cited *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017). The court found that factors concerning the temporal and substantive connection between the protected activities and the adverse employment action favored the Plaintiff, although the court noted that the protected activities were not part of the charges lodged against the Plaintiff. Weighing against the Plaintiff was the lack of evidence that any of the lower-level supervisors accountable for addressing the Plaintiff’s safety complaints played a decision-making role in the adjudication of the charges against her. The court also noted that the Defendant had only decertified the Plaintiff as a locomotive engineer and reinstalled her as a SAM—which eroded the inference of a causal connection.

The court next analyzed the weight to be given to the National Railroad Adjustment Board of the National Mediation Board’s (NRAB) decision to uphold the decertification. The Plaintiff did not argue that the NRAB was partial, but stressed that her employer conducted the evidentiary hearing. The court found no evidence of prejudice or of an incomplete or tainted record before the NRAB. The court found that the NRAB’s decision was supported by the evidence. In sum, the court found that the fact that the Plaintiff was decertified after disciplinary hearings at which she was represented by union counsel—and that the decisions to discharge were upheld by the railroad internally and by the NRAB—weighed in favor of the Defendant. The court stated that “while the NRAB’s decision does not preclude Plaintiff’s FRSA claim, it has probative weight in establishing that the charged misconduct—and not Plaintiff’s protected activities—motivated LIRR’s disciplinary action.” Slip op. at 40 (citation omitted). Weighing the factors, the court granted summary judgment as to the decertification element of the complaint.

2016 Discipline — Contributory Factor Causation

The court again applied the five factor test on contributory factor causation, and again granted summary judgment in favor of the Defendant. The court found that the disciplinary action in 2016 was completely unrelated to the 2013 protected activities. The court found that the disciplinary proceedings were remote in time to the protected activities. The court found an

intervening event that independently justified the disciplinary action—the charged misconduct. The court found that the official who made the disciplinary decision had not met the Plaintiff and had no knowledge of the circumstances surrounding her disqualification as a locomotive engineer. The court reviewed the disciplinary proceedings and rejected the Plaintiff’s claim that she had not able to introduce evidence, and found that NMB’s decision upholding the charges was supported by substantial evidence. The court thus found that all five factors weighed against the Plaintiff’s claim.

SUMMARY JUDGMENT; CONTRIBUTING FACTOR; SUMMARY JUDGMENT GRANTED TO RAILROAD WHERE NO DIRECT EVIDENCE OF CONTRIBUTION, SIGNIFICANT TIME GAP BETWEEN PROTECTED ACTIVITY AND ADVERSE ACTION; FAVORABLE EMPLOYMENT DECISIONS POST-DATED THE PROTECTED ACTIVITY, AND THERE WAS NO EVIDENCE THAT THE MANAGER ALLEGED THAT HAVE ENGAGED IN THE RETALIATION PARTICIPATED IN THE DECISION TO TAKE THE ADVERSE ACTION

Grell v. UPRR R.R. Co., No. 8:16-cv-00534, 2019 U.S. Dist. LEXIS 43449 (D. Neb. Jan. 4, 2019): Case involving a number of causes of action related to the end of an employment relationship after time off of work on short and long term disability related to psychological conditions attributed, at least in part, to work-related causes. After being cleared to return, Plaintiff sought assignment to a different boss or division. She was allowed time to apply for internal jobs, but when this was unsuccessful her employment was terminated.

The FRSA complaint alleged that Plaintiff had been retaliated against for reporting a work related injury resulting from her boss’ treatment. The injury report occurred in October 2014. The alleged adverse action related to verbal discipline came in August 2014, so the court found it could not have been related to the protected injury report. The other adverse action was the December 2015 termination. The district court concluded that there was no issue of material fact as to whether the injury report contributed to the termination, and so granted summary decision to the railroad. There was no direct evidence of a relation between the two and the gap in time between the injury report and termination weakened any inference to contribution. The court also noted that after the injury report the railroad had made a series of employment decisions favorable to Plaintiff. Plaintiff had also alleged that her direct supervisor was responsible for the retaliation, but there was no evidence that this supervisor was involved in the employment decisions that led to the ultimate termination.

SUMMARY JUDGMENT; CONTRIBUTING FACTOR; EVIDENCE OF TEMPORAL PROXIMITY, INTERTWINED PROTECTED ACTIVITY AND REASON FOR DISCIPLINE, INCONSISTENT APPLICATION OF DISCIPLINE, AND IRREGULAR PROCESS SUFFICIENT TO SUPPORT INTERFERENCE OF INTENTIONAL RETALIATION AND ANIMUS

Lemieux v. Soo Line R.R. Co., No. 16-cv-1794, 2018 U.S. Dist. LEXIS 207527 (D. Minn. Dec. 10, 2018): Plaintiff alleged that Defendant violated the FRSA by investigating him, suspending him, and then terminating him in retaliation for good faith reports of hazardous and unsafe brakes. The parties filed cross motions for summary decision. The District Court found genuine disputes of material fact and denied both motions.

Plaintiff “bad ordered” about 56 cars on a train for brake problems. Defendant pursued discipline for delaying operations after it determined that all but one were improper determinations and the brakes/brake pads were compliant. This resulted in an investigation, hearing, and five day suspension. While this was ongoing, Plaintiff reported brake defects as signaled by track detectors and a frozen slack adjuster. A supervisor went to observe and the parties disputed what exactly happened. But Defendant pursued discipline against Complainant for not immediately securing the train as ordered by dispatch and not conducting a proper roll-by inspection of a passing train. This led to termination.

Applying *Kuduk*, the court noted that the more lenient contributory factor standard enhanced the probative value of temporal proximity. It also observed that in this case the protected conduct and the alleged intervening unprotected conducted were “closely intertwined” and so the close proximity remained probative. It also noted that one manager was involved in both incidents, supporting an inference of animus. Plaintiff had produced evidence of selective enforcement of discipline policy, raising a dispute for the jury. Next, the court agreed that the way in which the hearings were conducted (refusal to hear witnesses, the managerial witness in the first hearing presiding in the second, only hearing from a managerial witness in the second hearing who had been involved in deciding the discipline in the first hearing). There was not evidence these shortcomings were standard practice, and the process as a whole were suggestive of pretext. Higher-level managers had also escalated the recommended discipline, which could suggest animus. Defendant pointed to evidence that Plaintiff was not disciplined for many other safety complaints, but though this would weigh against a finding of animus, it was not dispositive. The structure of the compensation program for managers could also support animus. In sum, the Court found that the Plaintiff had presented sufficient evidence to raise an inference of contribution, so the issue had to go to a jury.

SUMMARY JUDGMENT; SEVENTH CIRCUIT REQUIRES A SHOWING OF RETALIATORY MOTIVE TO MAKE OUT A CASE OF RETALIATION; SUMMARY JUDGEMENT APPROPRIATE WHERE NO GENUINE DISPUTE THAT ORDINARY PROCEDURES OF DISCIPLINE WERE FOLLOWED, THERE WAS NO EVIDENCE OF A CHANGE IN ATTITUDE OR DIFFERENT TREATMENT FROM OTHER EMPLOYEES

King v. Ind. Harbor Belt R.R., No. 15-cv-245 (N.D. Ind. Nov. 13, 2018) (2018 U.S. Dist. LEXIS 193891; 2018 WL 5982134) (Opinion and Order): Applying Seventh Circuit law, the court found that to make out a case of retaliation a plaintiff must show the existence of an improper retaliatory motive, which is distinct from the question of whether that motive contributed to the decision to take the adverse action. Temporal proximity could not create an inference to such a motive where the employer followed its standard procedures in determining the amount of discipline for an admitted violation and there was no evidence that they were

manipulated or used to retaliate. The court also rejected a claim that the particular facts underlying a discipline was sufficient to render it a departure from ordinary practice. Summary judgment was also found appropriate when the plaintiff had no evidence of a changed attitude towards him in denying or delaying requests for benefits because there was no evidence he was treated differently than others. The court also rejected an inference to a retaliatory motive based on strong vulgar language from a manager when such language was an ordinary part of the workplace.

CONTRIBUTING FACTOR CAUSATION; COURT APPLIES *GUNDERSON* FIVE FACTOR TEST AND GRANTS SUMMARY JUDGMENT IN FAVOR OF RAILROAD WHERE DISCIPLINE WAS FOR NON-PROTECTED ACTIVITY AND INTERVENING FACTORS INDEPENDENTLY SUPPORTED DISCIPLINE

In *Tompkins v. Metro-North Commuter R.R.*, No. 16-cv-09920 (S.D. N.Y. Sept. 24, 2018) (2018 U.S. Dist. LEXIS 163198; 2018 WL 4573008), the Plaintiff brought a suit alleging that Defendant violated the whistleblower provisions of the Federal Railroad Safety Act (“FRSA”), 49 U.S.C § 20109, by suspending him in retaliation for his protected activities of reporting and refusing to work in unsafe working conditions. The district court granted summary judgment in favor of the Defendant.

After granting summary decision in favor of Defendant on the grounds that some of the claimed protected activity was not based on a reasonable belief, the court noted that it was undisputed that it was protected activity for the Plaintiff to have reported unsafe walking conditions and to have asked for a means of transport to the other building. Thus, the court considered whether the Plaintiff presented sufficient evidence for a reasonable jury to conclude that the Plaintiff’s safety complaints (separate and apart from the refusal to walk) were “contributing factors” to two disciplinary suspensions. The court described the legal standard as follows:

To establish a contributing factor, a FRSA plaintiff must produce evidence identifying “intentional retaliation prompted by the employee engaging in protected activity.” *Lockhart*, 266 F. Supp. 3d at 663 (quoting *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014)). The “contributing factor” need not be the sole factor influencing the adverse employment action, and establishing a contributing factor does not require a showing of retaliatory motive. *Araujo v. N.J. Transit Rail Ops., Inc.*, 708 F.3d 152, 158 (3d Cir. 2013). But courts considering FRSA claims have held that “more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation.” *Kuduk*, 768 F.3d at 792 (internal quotation marks omitted). “In considering [the contributing factor] element, [courts] must take into account the evidence of the employer’s nonretaliatory reasons.” *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017) (internal quotation marks omitted).

Id. at 13. The court then applied a five-factor test as described in *Gunderson*, taking care to note that the assessment only related to the Plaintiff’s reporting of icy sidewalks, and not to his refusal to walk in those conditions which had been the basis for the discipline (but not protected activity under the FRSA). The court found several factors weighed in favor of the railroad on the first

disciplinary action concerning a refusal to walk to the other building: (1) the Plaintiff had been represented by his union throughout the disciplinary proceedings, and the resulting suspension was upheld both by the railroad internally and by an arbitration panel; (2) the Plaintiff made no showing that a lower-level supervisor accountable for addressing the safety complaints played a decision-making role in the adjudication of the charges against him; (3) although there was temporal proximity, the record was clear that he was not disciplined for raising a safety issue but rather because he was argumentative and defied his supervisor's instructions.

In regard to a second disciplinary action concerning the Plaintiff's alleged threats to a supervisor in a lunchroom encounter, one of the factors weighed against the railroad because an arbitration panel overturned the Plaintiff's suspension. However, other factors clearly weighed in the railroad's favor given intervening events independently justifying adverse disciplinary action. The court found that "[t]he allegations at issue in Count II were based entirely on Tompkins' alleged threats to a supervisor, not his safety complaints, and relevant intervening events include not only Tompkins' insubordination for refusing to walk to the [other building], but also all of the subsequent disciplinary proceedings related to that insubordination and his initiation of the lunchroom confrontation with his supervisor." *Id.* at 16. The court also granted summary decision as to this count.

SUMMARY JUDGMENT; CONTRIBUTING FACTOR CAUSATION; PROOF OF INTENTIONAL RETALIATION NOT REQUIRED; RATHER, REQUISITE INTENT CAN BE INFERRED BASED ON CIRCUMSTANTIAL EVIDENCE; WHERE GENUINE DISPUTES REMAIN ABOUT THE CIRCUMSTANCES OF THE DISCIPLINE, SUMMARY JUDGMENT IS INAPPROPRIATE

Wooten v. BNSF Railway Co., No. 16-cv-139 (D. Mont. Sept. 18, 2018) (2018 U.S. Dist. LEXIS 159199; 2018 WL 4462506) (case below 2016-FRS-00059) (Order [adopting Magistrate's Findings and Recommendation and Order]), *adopting Wooten v. BNSF Railway Co.*, No. 16-cv-139 (D. Mont. May 29, 2018) (2018 U.S. Dist. LEXIS 89267; 2018 WL 2417858) (case below 2016-FRS-00059) (Findings and Recommendation and Order)

The Plaintiff reported a work-related wrist injury. After investigation a supervisor concluded that the injury had occurred prior to the work and that the Plaintiff had been dishonest in his reports. This led to termination. Plaintiff filed several actions, including an FRSA complaint.

The magistrate judge was presented with cross-motions for summary judgment on the issue of whether the protected activity was a contributing factor in the adverse action. The parties disputed the nature of the required showing and, in particular, whether complainant had to make a showing of intentional retaliation and proximate cause. The court held that in the Ninth Circuit it was not necessary for a complainant to conclusively establish a retaliatory motive. Rather, the "requisite degree of discriminatory animus" could be shown by circumstantial evidence including temporal proximity, inconsistent application of policies, shifting explanations, hostility to protected activity, the relation between the protected activity and the discharge, and any intervening events justifying the discipline. On this standard neither party was entitled to summary judgment, as factual disputes affected the application of the factors to the case.

SUMMARY JUDGMENT; SEVENTH CIRCUIT REQUIRES SHOWING OF DISCRIMINATORY ANIMUS AND PLAINTIFF COULD NOT MAKE THAT SHOWING WHERE THERE WAS NO GENUINE DISPUTE THAT THE DISCIPLINARY RULES APPLIED TO THE PLAINTIFF AND WERE APPLIED CONSISTENTLY; TEMPORAL PROXIMITY ALONE INSUFFICIENT WHEN PROTECTED ACTIVITY IS NOT THE PROXIMATE CAUSE OF THE ADVERSE ACTION.

Jackson v. BNSF Railway Co., No. 16-cv-5518 (N.D. Ill. Aug. 22, 2018) (2018 U.S. Dist. LEXIS 142498; 2018 WL 4003377) (case below 2016-FRS-00015) (Memorandum Opinion and Order): Plaintiff was involved in an altercation at work in which another employee punched him after he repeatedly used profane language. He was given a suspension while the other employee was terminated. He was also disciplined under the attendance policy. He filed a variety of complaints, including an FRSA complaint. Defendant sought summary judgment.

As to the FRSA complaint, applying Seventh Circuit law, the court explained that showing that the protected activity was a contributing factor in the adverse action requires showing “that discriminatory animus at least partially motivated the employer’s action; merely showing a causal link between the protected activity and the employer’s action does not suffice.” Plaintiff could not make this showing because there was no genuine dispute that the workplace violence policy applied to him in this situation and that the Defendant followed that policy. There was no evidence that the attitude of the employer changed after the protected activity, that there was pretext, or that there was inconsistent application of the rules. Temporal proximity was the only factor supporting the inference to contribution, but in this case the protected report was not the proximate cause of his discipline. Thus, summary judgment for defendant was entered on the FRSA complaint.

SUMMARY DECISION; SUMMARY DECISION DENIED WHERE GENUINE DISPUTES REMAIN OVER WHETHER THERE WAS AN INJURY AND WHETHER EMPLOYER HAD A REASONABLE BASIS FOR ITS DISCIPLINE

Smith v. Norfolk Southern Railroad Co., No. 16-cv-520 (M.D. Ga. July 6, 2018) (2018 U.S. Dist. LEXIS 112419) (Order [denying cross motions for summary judgment]): Plaintiff was terminated after a determination that he had made false statements to a supervisor when reporting another worker’s injury. He filed an FRSA complaint. The court in this order denied cross-motions for summary decision. There remained genuine disputes over whether the other worker had actually fallen from the chair, which made summary decision on the protected activity element impossible. As to the contributing factor element, the court observed that the correctness of the discipline was not at issue and there only needed to be a reasonable basis for the disciplinary decision. But this turned on a question of interpretation of the evidence, which was an issue a jury would need to decide. Genuine disputes also remained over the affirmative defense showing.

SUMMARY DECISION; SUMMARY DECISION DENIED WHERE GENUINE DISPUTES REMAIN OVER WHETHER THERE WAS AN INJURY AND WHETHER EMPLOYER HAD A REASONABLE BASIS FOR ITS DISCIPLINE

O'Neal v. Norfolk Southern Railroad Co., No. 16-cv-519 (M.D. Ga. July 6, 2018) (2018 U.S. Dist. LEXIS 112185) (Order [denying cross motions for summary judgment, etc.]): Plaintiff reported that he was injured when a defective chair broke and caused him to fall. After an investigation a manager determined that the chair was defective but there had been no fall. Plaintiff was charged with making false statements to a supervisor and then terminated. He then filed an FRSA complaint. The parties filed cross-motions for summary decision. Both were denied. There remained genuine disputes over whether the plaintiff had actually fallen from the chair, which made summary decision on the protected activity element impossible. As to the contributing factor element, the court observed that the correctness of the discipline was not at issue and there only needed to be a reasonable basis for the disciplinary decision. But this turned on a question of interpretation of the evidence, which was an issue a jury would need to decide. Genuine disputes also remained over the affirmative defense showing.

SUMMARY JUDGMENT; CONTRIBUTORY FACTOR; SUMMARY JUDGMENT APPROPRIATE WHERE TEMPORAL PROXIMITY NOT SUGGESTIVE AND BROKEN BY INTERVENING EVENTS, THERE IS NO EVIDENCE OR PRETEXT OR HOSTILITY, AND THERE IS NO EVIDENCE THAT SIMILARLY SITUATED EMPLOYEES WERE TREATED DIFFERENTLY

Gibbs v. Norfolk Southern Railway Co., No. 14-cv-587 (W.D. Ky. Mar. 29, 2018) (2018 U.S. Dist. LEXIS 52565; 2018 WL 1542141) (Memorandum Opinion and Order): Plaintiff made safety complaints related to parking arrangements for a time when the entrances to the main parking area at the Louisville yard were to be blocked. Later he and another employee were investigated after some managers found them sitting in a company truck at a restaurant during work hours. Plaintiff maintained that this was normal practice and authorized, but he was terminated for absenteeism, misuse of company property, and sleeping on the job. He filed an FRSA complaint. The court was presented with Defendant's motion for summary judgment.

As an alternative basis, the court granted summary decision on the contributing factor element. The factors did not support an inference of contribution. There was not significant temporal proximity and there was an intervening event. There was no good evidence of disparate treatment because none of the suggested comparators had violated all of the rules in question and the only good comparator, the companion in the truck, had received the same discipline. There was no evidence of hostility to Plaintiff and no evidence that the full range or what Plaintiff had done was common practice or that any of the decision-makers or alleged influencers condoned any of the misconduct alleged. The court added that Plaintiff's shifting theories about who at Defendant had the retaliatory motive against him belied his claims of hostility.

SUMMARY JUDGMENT; CONTRIBUTORY FACTOR; SUMMARY JUDGMENT FOR DEFENDANT ON CONTRIBUTORY FACTOR DENIED WHERE IT DID NOT

CHALLENGE GOOD FAITH OF INJURY REPORT; ITS EVIDENCE OF DISHONESTY WAS WEAK AND DISPUTED; AND TEMPORAL PROXIMITY AND THE MANNER OF INVESTIGATION PROVIDED CIRCUMSTANTIAL EVIDENCE OF CONTRIBUTION

Despain v. BNSF Railway Co., No. 15-cv-8294 (D. Az. Feb. 20, 2018) (2018 U.S. Dist. LEXIS 95518; 2018 WL 1894708) (Order [denying Defendant's motion for summary judgment]):

The district court denied a motion for summary judgment by the Defendant in an FRSA action. The protected activity in the case involved making an injury report. The Defendant terminated the Plaintiff for dishonesty in making the report and in the investigation. The termination was later converted to a lengthy suspension. The alleged dishonesty concerned when the Plaintiff determined the injury was work-related, when during the shift the injury occurred, and the circumstance of a quip pro quo proposal to drop the injury report in exchange for a paid deadhead trip. The Plaintiff and manger had different accounts of who made that proposal.

Defendant sought summary judgement on the contributing factor element. But it conceded for the purposes of the motion that the injury report was made in good faith. Having done so, the district court concluded that it could not have discharged him for a dishonest report. A reasonable fact finder could conclude from the record that the Plaintiff had not been honest at all and had promptly attempted to file the report but found no one to report it to. The alleged quid pro quo offer could not support summary judgement because it was "squarely disputed." "The weakness of BNSF Railway's assertion of dishonesty suggests it may be pretext for something else. It could well be pretext for telling the truth. The jury can say." The district court also concluded that there was other circumstantial evidence that could support an inference to contribution, including temporal proximity and the manner in which the investigation and hearing proceeded, which evinced bias.

SUMMARY DECISION; CONTRIBUTING FACTOR; WHERE EVIDENCE COULD SHOW THAT INJURY AND REPORT OF INJURY CAUSED THE ABSENCE THAT IN TURN WAS THE RATIONALE FOR DISCIPLINE, DEFENDANT NOT ENTITLED TO SUMMARY DECISION ON CONTRIBUTING FACTOR

Williams v. Illinois Central Railroad Co., No. 16-cv-838 (S.D. Miss. Feb. 5, 2018) (2018 U.S. Dist. LEXIS 18106; 2018 WL 716568) (Order [denying Defendant's motion for summary judgment]):

The Plaintiff had a history of attendance violations. While at work he experienced symptoms of a heart attack. He was taken to the hospital. His symptoms were attributed to stress/anxiety and he was discharged with a note keeping him off of work for a few days, though it was not signed. He then told the Defendant railroad that he would not be working. The Defendant determined that it was an additional unexcused absence and under the terms of its policy terminated Plaintiff, though the public law board later converted this into a suspension without pay. He filed suit under the FRSA claiming he was retaliated against for reporting a work-related injury, protected by § 20109(a)(4), and following a treatment plan, protected by § 20109(c)(2). Defendant sought summary decision.

Defendant argued for summary decision on the contribution element. Applying Eighth Circuit law, the district court stated that evidence of intentional relation was required. Summary decision was improper, however, because there was evidence that the heart attack and injury report caused the absence, which was the sole factor in the adverse action.

CONTRIBUTING FACTOR CAUSATION; DISTRICT COURT GRANTS SUMMARY JUDGMENT FOR DEFENDANT WHERE PLAINTIFF'S RESPONSE TO MOTION WAS BARE BONES CONTENTION THAT IT WAS OBVIOUS THAT PROTECTED ACTIVITY CONTRIBUTED TO THE DECISION TO TERMINATE HIS EMPLOYMENT

In *Holloway v. Soo Line R.R.*, No. 16-cv-9191 (N.D. Ill. Jan. 19, 2018) (2018 U.S. Dist. LEXIS 8641; 2018 WL 488259), the Plaintiff brought an action after the Defendant terminated Plaintiff's employment following an accident involving a Kubota utility vehicle at the Defendant's rail yard. The Plaintiff, who was a passenger and not the driver of the Kubota, reported an injury and sought medical care. Following an investigation and hearing, the Defendant discharged the Plaintiff on the ground that he violated safety rules by not wearing a seat belt and by failing to inspect the Kubota before riding in it or file a report regarding its safety defects. Part of the consideration in the discharge decision was the Plaintiff's prior disciplinary record. The third count of the complaint was based on Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20109 *et seq.* The parties filed cross-motions for summary judgment on this count. The court focused on whether the Plaintiff met the element of a FRSA retaliatory complaint that his protected activity was a contributing factor in the Defendant's adverse or unfavorable employment action. The Plaintiff asserted that he reported a work-related injury and sought medical care, and argued that it was obvious that this protected activity was a contributing factor in the Defendant's termination of his employment. The court found that this response to the summary judgment motion was inadequate, writing:

It is well-settled, however, that "inferences that are supported by only speculation or conjecture will not defeat a summary judgment motion." *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1099 (7th Cir. 2017) (citation omitted). In short, Holloway's bare-boned arguments are not supported by "evidence of pretext, shifting explanations, antagonism or hostility toward Plaintiff's protected activity, or a change in attitude toward Plaintiff after he engaged in the protected activity." *Kuduk*, 768 F.3d at 790. Moreover, there is "no evidence of the usual forms of employment discrimination, certainly, and no evidence that the suspension and discharge of the plaintiff were motivated by animus." *Koziara*, 840 F.3d at 878; *see also BNSF Ry. Co. v. United States Dep't of Labor Admin. Review Bd.*, 867 F.3d 942, 946 (8th Cir. 2017) ("Absent sufficient evidence of intentional retaliation, a showing that protected activity initiated a series of events leading to an adverse action does not satisfy the FRSA's contributing factor causation standard.").

Slip op. at 30. The court was not persuaded that the argument that a reasonable inference was raised that the Plaintiff's report of a work-related injury was a contributing factor to his

termination for purposes of the FRSA because the driver of the Kubota was not disciplined. The court pointed out that the driver was furloughed at the time of the internal hearing and was seeking new employment at that time. The court thus granted summary judgment on the FRSA count in favor of the Defendant.

**SUMMARY JUDGMENT; CONTRIBUTING FACTOR AND KNOWLEDGE;
SUMMARY JUDGMENT GRANTED WHERE EVIDENCE OF RECORD INDICATED
THAT DECISION MAKER HAD NO KNOWLEDGE OF PROTECTED ACTIVITY
AND IT WOULD BE “RANK SPECULATION” TO DRAW AN INFERENCE TO
KNOWLEDGE**

DiMauro v. Springfield Terminal Ry. Co., No. 16-cv-71 (D. Me. July 26, 2017) (2017 U.S. Dist. LEXIS 117550; 2017 WL 3203390): Plaintiff filed a complaint with the Federal Railway Administration, which initiated an investigation and recommendation for penalties. He produced evidence that a supervisor expressed adversity and an intent to retaliate. Separately, Plaintiff had an interaction with the President of the Railway, after which he was investigated for dishonesty in saying that his locomotive was not ready. None of the charges were sustained, however, after witnesses supported Plaintiff’s version of the conversation. Plaintiff filed an FRSA complaint and Respondent moved for summary judgment.

The district court granted summary judgment on the contributing factor element. The President had submitted a declaration that he had no knowledge of the report to the FRA or the investigation. Though the court characterized the exchange between the Plaintiff and President as “bizarre,” it held that there was not enough evidence to present the issue to a jury. There was no cat’s paw theory in the allegations and Plaintiff could only speculate that the President knew about the protected activity. Circumstantial evidence could make the needed showing, but Plaintiff didn’t have enough and a jury would have to engage in “rank speculation” to find for him.

**CONTRIBUTING FACTOR CAUSATION; DISTRICT COURT GRANTS SUMMARY
JUDGMENT FOR THE EMPLOYER BECAUSE PLAINTIFFS “ADDUCED NO
EVIDENCE FROM WHICH A REASONABLE JURY” COULD FIND THAT THEIR
PROTECTED ACTIVITY WAS A CONTRIBUTING FACTOR UNDER THE FRSA;
TEMPORAL PROXIMITY ALONE DOES NOT PRESENT A GENUINE ISSUE OF
MATERIAL FACT**

In *Lincoln v. BNSF Railway Co.*, No. 15-cv-4936-DDC-KGS (D. Kan. April 24, 2017), the United States District Court for the District of Kansas granted summary judgment for Respondent, BNSF Railway Co. (“BNSF”), dismissing FRSA complaints of two Plaintiffs, Larry D. Lincoln and Brad C. Mosbrucker. *Lincoln*, slip op. at 1. Plaintiffs sent demand letters to BNSF describing an on-duty chemical spill that had taken place two and a half years earlier, their injuries, damages, and anticipated future damages. *Id.* at 3. Plaintiffs were subsequently placed on medical leave, which was extended, pending their submission of updated medical information addressing the safety concerns raised in the demand letters. *Id.* at 4-5. Plaintiffs applied to a

number of different positions within BNSF, *Id.* at 15-17, pursuant BNSF’s craft transfer policy, which is triggered when a “physician does not release the employee to work” at his assigned job, *Id.* at 6-7. Plaintiffs were not selected for the positions they applied to and alleged that they were not selected because they informed BNSF in their demand letters that BNSF “negligently . . . handled the . . . chemical spill and, as a result, violated their rights under the Federal Employees Liability Act” *Id.* at 18, 54-55.

The court found that Plaintiffs “adduced no evidence from which a reasonable jury could conclude that their demand letters were a contributing factor to defendant’s decision not to hire them.” *Id.* at 59. The court noted that circumstantial evidence can be enough to establish the contributing factor element, but that temporal proximity alone “will not present a genuine issue of fact.” *Id.* at 57. Plaintiffs relied on several emails from BNSF’s doctor to other employees informing them about the information in the demand letters. *Id.* at 58. The court emphasized that the doctor did not make any hiring decisions and “merely referencing the contents of plaintiffs’ demand letter in an email explaining BNSF’s decision to remove plaintiffs from service because of their medical condition does not create a triable factual issue.” *Id.* at 58.

Because the court found that summary judgment was appropriate on the above grounds, it declined to decide whether sending the demand letters qualified as protected activity. *Id.* at 56.

SUMMARY JUDGMENT; CONTRIBUTING FACTOR; COURT GRANTS SUMMARY JUDGMENT ON CONTRIBUTING FACTOR ELEMENT WHERE CIRCUMSTANTIAL EVIDENCE PRESENTED FOUND INSUFFICIENT TO SUPPORT A REASONABLE INFERENCE THAT THE PROTECTED ACTIVITY CONTRIBUTED TO THE ADVERSE ACTION

Lee v. Norfolk Southern Railway Co., 187 F. Supp. 3d 623, No. 13-cv-4 (W.D. N.C. May 11, 2016) (2016 WL 2746626; 2016 U.S. Dist. LEXIS 62307) (case below 2013-FRS-4): Plaintiff alleged that he was wrongfully give a six month suspension in retaliation for giving too many cars “bad order” citations when he was working as a carman doing safety inspections. He had also filed a lawsuit contending that the suspension was race discrimination prohibited by 42 U.S.C. § 1981. That suit had been dismissed and the railroad argued that the FRSA’s election of remedies provision barred the FRSA action. The district court had agreed, but the Fourth Circuit reversed. On remand the district court considered the remaining arguments for summary decision.

It was undisputed that the Plaintiff had engaged in protected activity and had suffered an adverse action. Viewing the evidence in the light most in Plaintiff’s favor and making inferences in his favor, Plaintiff also defeated summary judgment as to the knowledge of the decision makers. In order to show contribution, Plaintiff alleged inconsistent application of company policy, overzealous investigation, temporal proximity, hostility, and a later suspension showing continued retaliation. The court reviewed the evidence on each. Plaintiff had been suspended for drinking alcohol while on duty. Though he claimed others were treated less harshly, the others were in travel status, not on duty. The rule that Plaintiff violated called for termination, but he was only suspended. The uncontroverted evidence also showed that the investigation was

not out of the ordinary and that any zealotry was the result of the Plaintiff's dishonesty in his initial denials. The protected activity was also too temporally remote to support an inference of retaliation. Evidence of hostility was really only evidence of hot-headedness and did not support an inference to contribution, especially when another manager conducted the hearing. The second suspension was another claim and wasn't proper to litigate within the one at issue. The court thus concluded that Plaintiff could not make out a showing on the contributing factor element.

SUMMARY JUDGMENT; CONTRIBUTING FACTOR; COURT GRANTS SUMMARY JUDGMENT WHEN PLAINTIFF'S EVIDENCE OF PRETEXT IS ONLY SPECULATION, CONJECTURE, AND TENUOUS INFERENCES

Dafoe v. BNSF Railway Co., No. 14-439 (D. Minn. Feb. 26, 2016) (2016 WL 778367): Plaintiff was disciplined for three safety violations. The first involved not stopping his train when he was told over the radio that his "angle cock" appeared to be slightly turned. The second two grew out of a random safety inspection/audit in which Plaintiff was accused of improperly bottled air in the braking system when the train was stopped and walking between equipment without following safety procedures. He reached an agreement as to the first that included a probation. After he was found to have committed the second two he was terminated. He unsuccessfully grieved the dismissal and then filed a complaint with OSHA. He claimed that he was a known safety advocate and pointed to a series of protected safety complaints, both formal and informal. He also pointed to several injuries and injury reports in his long career. OSHA dismissed the complaint and Plaintiff asked for a hearing with an ALJ, but then removed the case to federal court.

The Railroad moved for summary judgment on the contributory factor element and on the affirmative defense. Plaintiff made five arguments for pretext in favor of a finding of contribution, which the court considered in turn. First, Plaintiff pointed to differential treatment of the carman who radioed about the angle cock. But the court found that the two were not similarly situated in that they had acted differently and had different supervisors with different views of discipline. Second, Plaintiff argued that BNSF had a pattern of dismissing safety advocates. The court found the evidence here too speculative to permit a reasonable inference and noted that several of the others mentioned had recently lost FRSA suits. Next, Plaintiff argued that BNSF had a history of retaliating for injury reports, pointing to a 2013 accord between OSHA and the railroad that BNSF would cease increasing suspensions based on prior injuries. But this was too speculative as well and had no application to this particular case. Fourth, Plaintiff argued that he had been coerced to accept discipline on the angle cock violation and this set him up for dismissal in the later investigation. But he had no actual evidence of coercion and the latter two offenses alone were dismissible. Finally, Plaintiff pointed to alleged deficiencies in the internal process, including difficulty interpreting the relevant data regarding the violations. But the data difficulty was a normal feature of the way the data was kept and courts do not sit as super-personnel departments. Plaintiff pointed to evidence of innocence but this would not show that the decision-makers didn't believe he had committed the violations. Other factors supported the decision and there was no good evidence of hostility by the decision makers. Some had very limited knowledge of any protected activity. The court also found it

“significant” that all of the protected activity pled was completely unrelated to the discipline—there was no shared nexus. Plaintiff also had a long history of protected activity without any consequence, with the railroad even reacting positively to the complaints. The court concluded that Plaintiff had “offered only speculation, conjecture, and tenuous inferences” to support a finding of pretext. “Even under the more lenient contributing factor standard, viewing the evidence in the light most favorable to Dafoe, no reasonable jury could find in his favor.”

SUMMARY JUDGMENT; CONTRIBUTING FACTOR; EVIDENCE THAT MEDICAL DEPARTMENT CLEARED A RETURN TO WORK BUT IT WAS DELAYED BY THE SUPERVISOR AS WELL AS EVIDENCE OF HOSTILITY FROM THE SUPERVISOR FOUND SUFFICIENT TO DEFEAT SUMMARY JUDGMENT

In *Rader v. Norfolk Southern Ry.*, No. 1:13-cv-298 (E.D. Tenn. Feb. 10, 2016) (2016 U.S. Dist. LEXIS 17913), the court denied Defendants’ Norfolk Southern Railway Company’s (“NSRC”) and Norfolk Southern Corporation’s (“NSC”) Motion for Summary Judgment, finding that Plaintiff had presented sufficient evidence to meet the permissive threshold applicable at the summary judgment stage of proceedings.

The Plaintiff hurt his knee at work and reported the injury. He had surgery and was out for a time. He was then released to return to work, though his doctor also said he should use a Neoprene Sleeve on his knee. The medical department at the railroad cleared Claimant to return to work without restriction. This was transmitted to the relevant supervisors, along with mention of the sleeve. When Plaintiff returned to work he was told that he could not work and had to leave the property. The parties disputed the conversation, but use of the Sleeve was mentioned and emails indicated uncertainty over whether there was a work restriction. Eventually Plaintiff’s doctor removed that restriction and after another physical and clearance by the medical department, Plaintiff returned to work. He filed a complaint under the FRSA alleging that his return had been delayed in retaliation for reporting a work-related injury.

The Railroad sought summary judgment. As to the contributing factor element, the court found that the Plaintiff had enough evidence to meet “this very permissive threshold.” Given the evidence that the medical department had cleared him to return to work and instructed the supervisors that he should be allowed to work, as well as the evidence of the hostility Plaintiff encountered when he returned, a reasonable jury could find that the injury report contributed to the decision to delay the return.

As to the affirmative defense, the Railroad provided evidence that delays from the medical department are common for both work-related and non-work-related injuries. The court found that this was insufficient—the delay here resulted from the direct supervisor, not the medical department, which had cleared Plaintiff to return. That was conveyed to the supervisor who made the decision, which undercut the argument that the delay would have occurred regardless of the protected activity.

The court also denied summary judgment as to the punitive claim on the grounds that there were material issues of facts in dispute and denied a motion to strike a notice of supplemental authority.

CONTRIBUTORY FACTOR; SUMMARY DECISION; DISCRIMINATORY ANIMUS/INTENTIONAL RETALIATION; BUT-FOR CAUSATION; APPLYING EIGHTH CIRCUIT LAW, COURT GRANTS SUMMARY DECISION FOR RAILROAD WHERE NO DISCRIMINATORY ANIMUS OR INTENTIONAL RETALIATION COULD BE INFERRED BASED SOLELY ON THE PROPOSITION THAT THE SAFETY VIOLATION WAS DISCOVERED AND DEEMED MORE SERIOUS BECAUSE IT RESULTED IN INJURY

CONTRIBUTORY FACTOR; SUMMARY DECISION; COURT FINDS SUBSTANTIVE CHALLENGES TO THE SAFETY RULE AND ITS APPLICATIONS INSUFFICIENT TO SUPPORT INFERENCE TO RETALIATION

Heim v. BNSF Railway Co., No.13-cv-369 (D. Neb. Sept. 30, 2015) (2015 U.S. Dist. LEXIS 133913; 2015 WL 5775599) (case below 2013-FRS-40): Plaintiff was working on a rail seat abrasion project, which involves replacing material under the train track. To do so, rail is declipped from the bed and moved, though it remains under tension. Plaintiff was tasked with picking up scraps along the track. He stepped over the declipped rail to pick up some material and the rail jumped, landing on his foot, causing injury. It took 30 minutes to free him and he suffered broken bones. He was subsequently disciplined for not being alert and attentive when he placed his foot in harm's way—a point that had been discussed at safety briefings. He was given a 30 record suspension and one year review period. He did not lose pay or benefits and the review period passed without incident.

The parties agreed that Plaintiff had engaged in protected activity when he reported his injury and that the railroad knew about that report. They disputed whether Plaintiff had suffered any adverse action and whether the protected activity contributed to any adverse action. The court noted that although Plaintiff suffered little real consequences in the case, the bar for adverse action in the FRSA is low and it “would not seem inaccurate” to characterize it as a reprimand or discipline. But the court then stated that it did not need to resolve the issue.

Applying Eighth Circuit law, Plaintiff was required to show some intentional relation or discriminatory animus, though he only needed to show that it contributed to the adverse action. Plaintiff argued that the injury report was a but-for cause of the adverse action because it is common to step into the area in question without consequence. The court however, found this insufficient. The injury report was the protected activity, not the injury itself. And it wasn't clear that the report caused anything. Even looking to the injury, there was no inference to be made to intentional retaliation—it had only brought the violation to the attention of management. The court further saw no reason to conclude that the FRSA prevented railroads from taking violations of safety rules more seriously when they resulted in injury. Plaintiff had also not pointed to similarly situated employees who had been treated differently.

Plaintiff's argument was partly a challenge to BNSF's application of the rule and the ambiguity in how they applied to this situation. The court found this irrelevant because it was really a challenge to substance of the disciplinary process and the rule, not an allegation cognizable under the FRSA. Even if the discipline was substantively incorrect, that did not on its own license an inference that the protected activity was a contributing factor in the discipline.

CONTRIBUTORY FACTOR; SUMMARY JUDGMENT; CHAIN OF EVENTS / INEXTRICABLE INTERTWINEMENT; ANIMUS; COURT DENIES SUMMARY JUDGMENT BASED ON "EXPANSIVE" CAUSATION STANDARD IN FRSA AND POSSIBILITY OF MAKING THE SHOWING DUE TO THE CHAIN OF CAUSATION BETWEEN THE PROTECTED ACTIVITY AND ADVERSE ACTION AS WELL AS EVIDENCE OF TEMPORAL PROXIMITY, INTERTWINEMENT, AND ANIMUS

Armstrong v. BNSF Ry. Co., 128 F.Supp. 3d 1079, No. 12-cv-7962 (N.D. Ill. Sept. 4, 2015) (2015 U.S. Dist. LEXIS 118224; 2015 WL 5180589): Plaintiff was called to the "glasshouse" area of a station where he and his supervisor had a dispute over his uniform. Plaintiff alleged that his supervisor assaulted him, injuring his left foot and left knee. He alleged FRSA violations for delays in providing medical care and retaliation, by termination, for filing an injury report. Both parties moved for summary decision and the court denied both motions.

The parties disputed what happened between Plaintiff and his supervisor and in particular whether the supervisor had slammed the door on the Plaintiff's foot and knee. There was video with a partial view of the relevant area, but it did not capture the full sequence because the manager was out of view. Plaintiff had been taken for medical treatment after his request, but not immediately and not to the closest facility. After an investigation and hearing regarding the incident, the railroad had terminated Plaintiff for insubordination in not remaining in the "glasshouse" as instructed and for dishonesty in reporting the incident and in the injury report.

As to the contributing factor element, the court observed that the causation standard in the FRSA is "expansive" and can be met by showing that the protected activity initiated a chain of events that led to the termination and the events in question are temporally close and intertwined. Here there was evidence that could indicate animus as well and thus a jury could reach the conclusion for Plaintiff on the element. It could thus reach a verdict for Defendant. Summary judgment was thus denied.

CONTRIBUTING FACTOR; SUMMARY DECISION; COURT OBSERVES THAT CONTRIBUTING FACTOR CAUSATION IS A LOW BAR AND DENIES SUMMARY DECISION WHERE THERE IS SOME EVIDENCE, INCLUDING TEMPORAL PROXIMITY, FROM WHICH SOME CONTRIBUTION COULD BE INFERRED, WHERE PROPOSED INTERVENING CAUSES WERE TOO INTERTWINED, AND BECAUSE PUBLIC LAW BOARD DECISIONS AND INDUSTRY PRACTICE ARE NOT RELEVANT

Miller v. CSX Transp., Inc., No. 1:13-cv-734 (S.D. Ohio Aug. 25, 2015) (2015 U.S. Dist. LEXIS 112507; 2015 WL 5016507) (case below 2013-FRS-64): In August 2012 the Plaintiff reported that about a month earlier he had suffered a back injury when his foot slipped on loose ballast while stepping off of the training, resulting in a twist and popping sound. He had gone to an emergency room 5 days after the injury and more recently to an orthopedist. Defendant's rules require immediate reporting of on-duty injuries, so an investigation was initiated. Several days later Plaintiff gave a written statement retracting his injury report and stating that it had actually occurred at home while working on his car. Plaintiff claimed that through gestures and nodding, the managers had conveyed that if he retracted his report, he could go back to work with little or no penalty. After the investigation/hearing, Plaintiff was terminated. He pursued several actions, including an FRSA complaint.

Defendant sought summary judgment on the contributing factor element on the grounds that there was no evidence of intentional retaliation, the dishonesty was an intervening event, and it had followed long-standing industry practices. The court, however, observed that the contributory factor standard was a very low causal bar and considering the evidence presented, including the temporal proximity and indications that the managers had already decided on discipline before the retraction, concluded that there remained factual disputes. As to proposed intervening causes, the court concluded that they were too intertwined in the facts as presented. Finally, the court rejected reliance on industry practice and public law board decisions as not relevant to the contributing factor question.

CONTRIBUTING FACTOR CAUSATION AND SUMMARY JUDGMENT; DISTRICT COURT DENIES CROSS-MOTIONS FOR SUMMARY JUDGMENT ON THE CONTRIBUTING FACTOR PRONG WHERE THE INJURY REPORT WAS IN CLOSE TEMPORAL PROXIMITY AND WAS INEXTRICABLY INTERTWINED WITH THE DISCIPLINARY ACTION

In *Mosby v. Kansas City Southern Railway Co.*, Case No. CIV-14-472-RAW (E.D. Okla. July 20, 2015), the U.S. District Court for the Eastern District of Oklahoma denied cross-motions for summary judgment under the FRSA on the issue of whether the Plaintiff's protected activity was a contributing factor in the Defendant's decision to take adverse action. *Mosby*, slip op. at 14. The court found that because Plaintiff's "injury report was both close in time to his discipline and inextricably intertwined therewith," it raised a question of fact and the matter could not be dismissed on summary judgment. Similarly, the court found that the close temporal proximity and inextricably intertwined nature of the protected activity and the discipline were "not substantial enough to justify granting [Plaintiff's] summary judgment motion. *Id.* at 13.

CONTRIBUTING FACTOR; SUMMARY JUDGMENT; COURT GRANTS SUMMARY JUDGMENT WHERE THERE WAS NO DIRECT EVIDENCE OF RETALIATION AND THE CIRCUMSTANTIAL EVIDENCE DID NOT SUPPORT THE CLAIM DUE TO NO TEMPORAL PROXIMITY, NO EVIDENCE OF ANIMUS, CONSISTENT

EXPLANATIONS, AND INDEPENDENT SUFFICIENT EXPLANATION OF ADVERSE ACTION

Loos v. BNSF Ry. Co., No. 13-cv-03373, 2015 U.S. Dist. LEXIS 84663, 2015 WL 3970169 (D. Minn. June 30, 2015) (not reported) [PDF](#): Defendant terminated the Plaintiff after 15 years of work as a conductor, brakeman, and switchman. During the employment, “his history with the company was marked by three relevant circumstances: his attendance record, his safety efforts, and his workplace injury.” Plaintiff filed suit under the whistleblower protection provisions of the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109. Slip op. at 1. The court observed that throughout his time with the company, the Plaintiff struggled to comply with BNSF's attendance policy, which had resulted in reprimands, a suspension, and “alternative handling.” Plaintiff was counseled and told that continued persistent failure to work full-time hours would be a violation of the attendance policy. The problems continued, leading to further discipline involving alternative handling, counseling, reprimands, and suspensions. *Id.* at 2-4. The Plaintiff also engaged in efforts to improve safety at BNSF, including an 8-12 month stint on the site safety committee in 2007-08. In addition, he testified on behalf of co-workers at an FRSA trial. *Id.* at 4-5. The Plaintiff reported a work-related injury in December 2010 after he twisted his right knee falling onto a drainage gate that had been covered with snow. He was off work through May 2011, when he was released without restrictions. *Id.* at 5.

Plaintiff was discharged after further attendance violations between May and July 2012. During that period, he had requested permission to code the absences as related to his 2010 injury on duty, which would have excused them, but this was denied because the only medical documentation offered was the May 2011 note releasing him to duty. *Id.* at 5-6. An investigation was noticed in August 2012 and conducted in November 2012. At the investigation, the Plaintiff produced a new note from earlier in November stating that due to his work-related injury he would have to periodically miss work, retroactive to the period in question. After the investigation, BNSF terminated Plaintiff for violations of the attendance policy while on probation. *Id.* at 6-7.

Plaintiff brought suit under the Federal Employer's Liability Act (“FELA”), 45 U.S.C. § 51, *et seq.*, alleging that BNSF was negligent in creating the conditions causing the December 2010 injury, and the FRSA, alleging that he had been disciplined for reporting a work-related injury, making safety complaints, serving on the safety committee, testifying in other FRSA proceedings, and following his doctor's treatment plans. BNSF moved for summary judgment on the FRSA claim and the FELA claim insofar as it arose after his discharge. *Id.* at 7. After laying out the relevant legal standard for an FRSA claim, *id.* at 8-9, the court observed that the contested issues concerned only whether the Plaintiff could show that the protected activities were contributing factors in his termination or BNSF could establish its affirmative defense.

Summary judgment was appropriate on the contribution question, so the affirmative defense was not discussed. *Id.* at 9. The court observed that “[w]hile the contributing-factor standard does not require that the employee ‘conclusively demonstrate the employer's retaliatory motive,’ it does require that the employee prove ‘intentional retaliation prompted by the employee engaging in protected activity.’” *Id.* (quoting *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014)). Since Plaintiff did not point

to any direct evidence of intentional retaliation, he must rely on circumstantial evidence, which may include: “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, and a change in the employer's attitude toward the complainant after he or she engages in protected activity.”

Id. (quoting *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, 2012 WL 694502, at *3 (Feb. 29, 2012)).

Summary judgment was appropriate because none of these factors supported an inference of contribution. Temporal proximity undermined the claim since there was a 10 month gap between the last protected activity and the adverse action. The attendance issues pre-existed, continued through, and post-dated all of the protected activity and were not intertwined with any of it. *Id.* at 9-10. BNSF's explanations had been entirely consistent—years of attendance violations. There was no evidence of hostility toward the protected activities or that BNSF's attitude changed. There was no evidence that the Plaintiff was treated differently than other employees. *Id.* at 12-13.

FRSA COMPLAINT; DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WHERE THE PLAINTIFF' SUPERVISOR SUGGESTED IN DEPOSITION TESTIMONY THAT HE WOULD NOT HAVE DISCIPLINED THE PLAINTIFF FOR A SAFETY RULE VIOLATION ABSENT AN INJURY, BUT CLARIFIED IN A SUBSEQUENT DECLARATION THAT HE WAS UNSURE IF HE WOULD HAVE REACTED DIFFERENTLY IF THE PLAINTIFF DID NOT INJURE HIMSELF

In *Cook v. Union Pacific R. Co.*, No. 10-6339-TC, 2011 WL 5842795 (D.Or. Nov. 18, 2011), after "deadheading" home on an Amtrak train at the end of a day's work at another Union Pacific yard, the plaintiff, a locomotive engineer for Union Pacific for over 20 years, discovered that he did not have a ride from the Amtrak station to his home train yard, although he had called ahead to arrange one in accordance with the company's common practice. After waiting forty-five minutes and unsuccessfully attempting to phone the company clerk that previously promised to arrange his transportation, the plaintiff decided to walk the two-and-a-half miles from the Amtrak station to the train yard whilst carrying approximately fifty pounds of luggage and safety gear. Upon arrival at the yard, the plaintiff realized he had had injured his back over course of the walk, and in accordance with company policy, he immediately reported his injury to his union representative, who alerted his supervisor in turn.

The defendant launched disciplinary proceedings against the plaintiff, and after a two day disciplinary hearing, the plaintiff was fired for violating company Rule 1.6, which “prohibits employees from being careless of the safety of themselves or others or being negligent.” *Cook* at *2. The plaintiff filed a whistleblower complaint with OSHA under the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109, and after sufficient time expired without an OSHA decision, filed the instant suit in federal district court. Meanwhile, the Public Law Board ruled upon the

plaintiff's appeal of his termination via his union's collective bargaining agreement with the defendant, finding that the plaintiff improperly left his job to walk to the yard without authority, but nonetheless reinstate the plaintiff without back pay.

The plaintiff filed a motion for summary judgment, claiming that the defendant admitted that it violated FRSA when the plaintiff's supervisor, in his deposition testimony, suggested that the plaintiff would not have violated Rule 1.6 if he had reached the yard without suffering an injury. However, the plaintiff's supervisor subsequently filed a declaration clarifying that he is unsure what he would have done if the plaintiff had survived the walk unscathed, and therefore the Court found it unable to rule for the plaintiff as a matter of law, and denied the motion for summary judgment.

DOL Administrative Review Board Decisions

CONTRIBUTING FACTOR CAUTION; SUMMARY DECISION GRANTED WHERE RESPONDENT SUBMITTED DOCUMENTATION SHOWING THAT COMPLAINANT HAD BEEN DENIED RE-ENTRY INTO A TRAINING PROGRAM BASED ON AN ESTABLISHED POLICY, AND COMPLAINANT HAD NOT RAISED A GENUINE ISSUE OF MATERIAL FACT ABOUT THAT POLICY; TESTIMONY SHOWING THAT A CO-WORKER HAD BEEN ALLOWED TO RE-ENTER DID NOT CREATE A FACT ISSUE WHERE THAT CO-WORKER WAS NOT SIMILARLY SITUATED

In *Hernandez v. Metro-North Commuter Railroad Co., Inc.*, ARB No. 17-016, ALJ No. 2016-FRS-23 (ARB Mar. 1, 2019) (per curiam), the Complainant alleged that the Respondent retaliated against him in violation of the FRSA by denying him re-entry into its Engineer Training Program (ETP). The Complainant had been previously been accepted for the ETP. He contended that the denial of re-entry was related to his referencing, at the time he was given a warning for failing to advise his ETP instructor before class that he was going to be late or absent, a co-worker's DUI arrest (a fact that Complainant knew the instructor was already aware of). The Respondent contended that the denial of re-entry was based on the fact that the Complainant later had been terminated from the ETP because he had twice failed to pass physical characteristics tests. When the Complainant later re-applied for the ETP he was informed that he was not eligible because of the prior release from the program. Before the ALJ, the Respondent produced an internal HR document that stated that "minimum requirements for the position locomotive engineer include that the candidate must not have failed within a five year period any agency-sponsored training program for the same or similar position requiring comparable qualifications, testing, or training." Slip op. at 3 (footnote omitted). The ALJ granted summary decision based on the Complainant's failure to establish protected activity or contributory factor causation.

On appeal, the ARB focused on contributory factor causation, and did not decide whether the Complainant's reference to the co-worker's DUI was protected activity. The ARB found that the

Respondent's submissions showed that the Complainant was denied re-entry based on the policy. The Complainant failed to raise a genuine issue as to the facts. He did not allege that the policy did not exist. His strongest evidence in opposition to summary decision was deposition testimony that another ETP candidate had been allowed to reenter within five years. The Respondent, however, had submitted evidence showing that the other candidate was not similarly situated as he been terminated from the ETP due to absences for medical reasons, whereas the Complainant had been terminated for two-time failure of the physical characteristics test.

The ARB noted that the Complainant speculated that he would be able to elicit additional facts in discovery or at a hearing. The ARB stated that, in order to show that the Respondent's submissions had not established the absence of a genuine issue of material fact, the Complainant would have had to have pointed to facts that he hoped to elicit in the face of Respondent's evidence. The ARB stated that an argument that the Respondent's reasons were pretext was not an evidentiary suggestion to oppose summary decision.

The Complainant argued that the ALJ erred when she stayed pre-hearing deadlines and granted Respondent's summary decision motion before he could develop his case. The ARB rejected this argument, noting that the ALJ's stay of pre-hearing deadlines had not stayed discovery, and that the Complainant still had the opportunity to engage in discovery in relation to the summary decision motion.

SUMMARY DECISION; CONTRIBUTING FACTOR CAUSATION; TEMPORAL PROXIMITY MUST BE VIEWED UNDER TOTALITY OF THE CIRCUMSTANCES, WHICH MAY INCLUDE "CONTINUING FALLOUT" FROM AN INJURY REPORT

In *Brucker v. BNSF Railway Co.*, ARB No. 14-071, 2013-FRS-70 (ARB July 29, 2016), when the Complainant applied for employment in 1993, he checked the box stating "no" in response to the question, "Other than traffic violations, have you ever been convicted of a crime?" Nineteen years later, the Respondent discovered that the Complainant had been convicted of misdemeanor assault in 1985 and incarcerated for two years. After investigating, the Respondent eventually fired the Complainant. About two and a half years earlier, the Complainant's attorney had informed the Respondent that he had been retained to represent the Complainant in a claim for work related injuries. The Complainant shortly thereafter filed an injury report. The Complainant testified that after he filed his injury report, his supervisors intensified their scrutiny of his work. The ALJ granted summary decision in favor of the Respondent finding no evidence of a connection between the injury report and the investigation into the criminal background, and finding that the supervisor's constant observation of the Complainant as he worked played no part in its discovery of the conviction. The Complainant had been disciplined a couple times in the interim between the injury report and the termination, but the ALJ found those isolated incidents did not show that the injury report played a part in the termination. The ARB, reviewing the summary decision question de novo, vacated the ALJ's decision and remanded. The ARB found several factors that raised a genuine issue of material fact regarding the contributory causation element.

The ARB found that the ALJ had assessed temporal proximity too narrowly. The ARB stated that “[w]hile it is true that Brucker reported his injury some two and one-half years before BNSF fired him, the ramifications of that report were most certainly not resolved on the day that it was filed and in fact, were still ongoing when BNSF fired Brucker.” USDOL/OALJ Reporter at 12 (footnote omitted). The ARB noted that there had been ongoing litigation which kept the Complainant’s injury report fresh. The ARB stated that the “continuing fallout” from the injury report must be considered. The ARB cited *Franchini v. Argonne Nat’l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-14, slip op. at 10 (ARB Sept. 26, 2012) (“Before granting summary decision on the issue of causation, the ALJ must evaluate the temporal proximity evidence presented by the complainant on the record as a whole, including the nature of the protected activity and the evolution of the unfavorable personnel action.”).

The ARB also noted that the Complainant had testified that the Respondent’s attitude toward him changed after he engaged in protected activity, intensifying its scrutiny of his work. The ARB stated that the fact that this scrutiny had not led to discovery of the misdemeanor conviction was irrelevant. The ARB noted that the Complainant testified about three incidents after the injury report that he believed exhibited retaliatory animus. The ARB also noted that the Complainant testified that when he filed out the job application, an Assistant Superintendent instructed him not to check the box because the Respondent was only concerned about felonies. The ARB noted, *inter alia*, that the Respondent did not “proffer any non-retaliatory reason for its investigation into the accuracy of Brucker’s employment application after 19 years of employment.” The ARB noted that the Respondent cited no cases in which an employee had been fired under similar circumstances. These factors made it possible that the Complainant could prevail on the contributing cause question.

SUMMARY DECISION ON CAUSATION IS DIFFICULT TO ESTABLISH, ESPECIALLY IN “CONTRIBUTORY FACTOR” CAUTION CASES; WHETHER COMPLAINANT WAS RESPONSIBLE FOR SAFETY INCIDENT IS NOT DETERMINATIVE; EMPLOYER DECLARATIONS ACCOMPANYING SUMMARY DECISION MOION ON HOW DISCIPLINE WAS DETERMINED FOUND NOT TO NULLIFY POSSIBILTY THAT PROTECTED ACTIVITY CONTRIBUTED TO METHODOLOGY USED TO DETERMINE LEVEL OF DISCIPLINE

In [*Seay v. Norfolk Southern Railway Co.*](#), ARB No. 14-022, 13-034, ALJ No., 2013-FRS-34 (ARB Oct. 27, 2016), the Complainant was one of two employees (the other being his supervisor) in a hi-rail vehicle that drove beyond the applicable track authority (a protocol that ensures that the track section is out of service while it is being inspected). The supervisor was driving. Both employees were disciplined. The Complainant refused to waive an investigatory hearing. After the hearing, but before a determination, the Complainant accepted a waiver (under protest) accepting responsibility for the incident. The ALJ granted summary decision in favor of the Respondent, holding that the undisputed material facts established that the Complainant’s protected activity was not a contributing factor in the unfavorable personnel actions. The ARB reversed and remanded. The ARB noted how the contributing factor element of a FRSA claim is particularly suspect as a matter that can be resolved on summary decision:

Summary decisions are difficult in “employment discrimination cases, where intent, motivation and credibility are crucial issues.” Summary decision on the issue of causation is even more difficult in cases arising under laws where the complainant need only prove that his protected activity was “a contributory factor” rather than the more demanding causation standards like “motivating factor,” “substantial factor,” or “but for” (determinative factor) causation. Contributory factor means any factor which, alone or in connection with other factors, “tends to affect in any way the outcome of the [employment] decision.” Even where a respondent asserts legitimate, non-discriminatory reasons for its actions, a complainant can create a genuine issue of fact by pointing to specific facts or evidence that, if believed, could (1) discredit the respondent’s reasons or (2) show that the protected activity was also a contributing factor even if the respondent’s reasons are true.

USDOL/OALJ Reporter at 9 (footnotes omitted). Here, the ALJ had held that the undisputed facts established that the Complainant committed the track authority safety violation. The ARB stated, however, that the Complainant’s FRSA claim did not hinge on whether he was responsible for the incident; rather, the question was whether any of the Complainant’s protected activities after the incident contributed to the alleged unfavorable personnel action. Although the Respondent offered declarations from its supervisors explaining how the level of discipline was determined, the ARB stated that at the summary decision stage, their assertions did not negate the possibility that the Complainant’s protected activity contributed to the methodology used to determine the level of discipline. The ARB stated that “[i]n a motion for summary decision, an employer cannot nullify the complainant’s evidence of contributory factor by simply presenting a different independent and lawful reason for the unfavorable employment action.” *Id.* at 10. Thus, the ALJ erred when he concluded, in deciding the Respondent’s motion for summary decision, that the “Respondent’s change in the level of discipline offered Seay was justified and consistent with established Norfolk Southern policy and procedures.” *Id.*

SUMMARY DECISION ON CAUSATION; ALJ MUST ANALYZE EACH ELEMENT OF FRSA CLAIM, MUST APPLY PROPER "CONTRIBUTING CAUSE" ANALYSIS AND OTHER BURDENS OF PROOF, MUST NOT DECIDE ISSUES OF FACT, AND MUST VIEW EVIDENCE IN LIGHT MOST FAVORABLE TO NONMOVING PARTY

In *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-12 (ARB Oct. 26, 2012), the ALJ granted summary decision on the ground that the Complainant had not raised a genuine issue of material fact as to whether he violated the Respondent's rules requiring prompt reporting of personal injuries. The ARB found that the ALJ made a series of errors.

1. *ALJ must analyze each element of FRSA claim in order to reach causation issue*

First, although the ALJ correctly cited the elements of a FRSA whistleblower case, and the Respondent had not expressly challenged the elements of protected activity and adverse action, the ALJ "needed to expressly identify the alleged protected activity and adverse action to analyze

whether a genuine issue of material fact existed on the issue of causation. Without identifying the protected activity and adverse action the ALJ cannot determine if the facts and evidence in the record support the claim that protected activity was a contributing factor in the adverse action." The ARB, however, found that in this particular case, the record demonstrated that both parties acknowledged the Complainant reported or attempted to report an injury from an air bag discharge, and from a back injury. These circumstances were sufficient for the ARB, for purposes of the appeal, to assume that this was protected activity. Moreover, the ARB presumed adverse action based on the Respondent termination of the Complainant's employment.

2. ALJ erred in apparently applying "legitimate business reason" analysis rather than "contributing cause" analysis

Second, the ALJ failed to analyze whether the alleged protected activity contributed to the termination of employment. The ALJ addressed the Complainant's pretext and disparate treatment claims; but these were not elements the Complainant needed to address to survive summary decision on the issue of causation. The ALJ appeared to base summary decision solely on a finding that the Complainant had committed a dismissible offense, similar to the "legitimate business reason" burden of proof analysis not applicable to FRSA complaints. Rather, the correct analysis in FRSA cases is "contributing factor" analysis. The ARB pointed to two exhibits submitted by the Respondent which themselves raised issues of material fact on the question of causation; to evidentiary proffers by the Complainant providing substantial evidence that protected activity may have contributed to the termination; and to inferences that could be drawn from temporal proximity and the inextricable intertwining of the protected activity and the adverse action.

-- presumption that protected activity contributed to adverse action

The ARB also noted similarities between this case and its recent decision in *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-9 (ARB Feb. 29, 2012). In the instant case, if the Complainant had not reported his back injury, he would not have been investigated and ultimately fired for failing to fill out a timely injury report. And if the Complainant had not claimed that the pain was work-related, he would not have been investigated and ultimately fired for failing to exercise occupational safety in connection with the injury. The ARB stated that in these circumstances the inference of causation may be presumed automatically, but as a presumptive inference. The presumption was sufficient to defeat the Respondent's summary decision motion.

3. Affirmative defense: ALJ apparently misplaced burden on Complainant to prove pretext

The ARB noted that the ALJ's opinion suggested that she considered the Respondent's affirmative defense when deciding the motion for summary decision. The ARB stated that it was not sufficient to confirm the rational basis of the Respondent's employment policies and decisions; rather, those reasons must be "so powerful and clear that termination would have occurred apart from the protected activity."

The ALJ erred in apparently imposing the burden on the Complainant of proving that he was not fired for the reason offered by the Respondent. Since the Complainant had established causation

sufficient to withstand summary decision, the burden shifted to the Respondent to establish its affirmative defense by clear and convincing evidence. The ARB wrote: "Even where a respondent asserts legitimate, non-discriminatory reasons as part of its affirmative defense, a complainant can create a genuine issue of fact by pointing to specific facts or evidence that, if believed, could discredit the respondent's reasons, making them less convincing on summary decision."

4. ALJ improperly decided questions of fact at summary decision stage, and failed to view evidence in the light most favorable to the Complainant

The ARB found that the ALJ improperly decided questions of fact at the summary decision stage, and failed to view evidence in the light most favorable to the Complainant. The ARB also found that the ALJ should have taken into consideration certain undisputed facts that have been used successfully in other whistleblower cases to establish circumstantial evidence of discriminatory motive, such as evidence that the Complainant had been considered a good worker, and such as selective enforcement.

XI. AFFIRMATIVE DEFENSE / CLEAR AND CONVINCING EVIDENCE STANDARD

U.S. Circuit Court of Appeals Decisions

AFFIRMATIVE DEFENSE; NINTH CIRCUIT FINDS NO LEGAL ERROR WHEN JURY INSTRUCTIONS PROPERLY FOCUSED ON DEFENDANT'S SINCERE BELIEF ABOUT MISCONDUCT

Elliott v. BNSF Railway Co., 714 Fed. Appx. 737 (9th Cir. Mar. 2, 2018) (unpublished) (Nos. 15-35785 and 15-25899) (Memorandum):

In a memorandum decision the Ninth Circuit affirmed a jury verdict in favor of the plaintiff under the FRSA. It rejected the contention that there was legal error in the "same-decision affirmative" defense because the jury instructions properly required only proof that the Defendant sincerely believed misconduct occurred, not that there had actually been misconduct. It further affirmed findings that BNSF did not sincerely and honestly believe that there was misconduct meriting dismissal because a reasonable jury could infer that BNSF manufactured an altercation with a manager as a pretext and that it had known about a prior felony conviction earlier and raised it after the protected activity as a pretext.

AFFIRMATIVE DEFENSE; EIGHTH CIRCUIT HOLDS THAT IT IS ERROR TO REJECT EMPLOYER’S AFFIRMATIVE DEFENSE ON THE GROUNDS THAT THE LEGITIMATE REASON FOR DISCIPLINE WOULD NOT HAVE BEEN DISCOVERED BUT-FOR THE PROTECTED ACTIVITY

BNSF Ry. Co. v. United States DOL Admin. Review Bd. [Carter], 867 F.3d 942, No. 16-3093, 2017 U.S. App. LEXIS 15020, 2017 WL 3469224 (8th Cir. 2017) (case below ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82).

The Complainant started working for BNSF in 2005. He injured his shoulder in 2007 and immediately reported it. He later filed a Federal Employer’s Liability Act (“FELA”), 45 U.S.C. § 51, *et seq.*, action based on that injury. During discovery in that case, BNSF deposed him. During trial preparation in 2012, a manager reviewed the deposition and noticed inconsistencies between information given in the deposition and that provided on the original employment application back in 2005. This led to a disciplinary investigation. A second investigation was launched regarding potential false statement in 2012 about getting to work on time. Both investigations produced findings that the Complainant had been dishonest, which under BNSF’s policy can result in a standalone dismissal. So they dismissed him twice in April 2012. Complainant filed a complaint under the whistleblower protection provisions of the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109, alleging that he was retaliated against for reporting his 2007 injury. An Administrative Law Judge (“ALJ”) found for Complainant and awarded \$50,000 in punitive damages as well as reinstatement and various other remedies. 867 F.3d at 944-45. The Administrative Review Board (“ARB”) affirmed. *See Carter v. BNSF Ry. Co.*, ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82 (ARB June 21, 2016).

The Eighth Circuit vacated and remanded. Among other issues, the Eighth Circuit held that it was legally improper to reject the affirmative defense on the grounds that but-for the protected activity, the employer would not have discovered the legitimate basis for the adverse action.

AFFIRMATIVE DEFENSE; FIRST CIRCUIT AFFIRMS FINDING THAT RAILROAD DIDN’T SUSTAIN AFFIRMATIVE DEFENSE WHERE COMPARATOR EVIDENCE DID NOT ADEQUATELY RELATE TO THE SITUATION AT ISSUE AND SUBSTANTIAL EVIDENCE SUPPORTED ALJ’S REJECTION OF RAILROAD’S CLAIMED MOTIVATION

Pan Am Railways., Inc. v. USDOL, 855 F.3d 29, No. 16-2271 (1st Cir. Apr. 20, 2017) (2017 U.S. App. LEXIS 7047; 2017 WL 1422369) (case below ARB No. 14-074; ALJ No. 2013-FRS-84)

Complainant in the case reported that a pile of railroad ties were a safety hazard. It was not abated. He later tripped on the pile and injured his ankle. He reported his injury and was taken to the hospital. A manager told him to expect a disciplinary hearing. He had two days off but took three days to recover, missing a day, which meant the railroad had to report the injury. A hearing was then initiated based on the alleged failure to make sure he had secure footing before

getting off a train. He was disciplined with a formal reprimand. Complainant then filed an OSHA complaint based on report the hazard and reporting the injury. It was drafted by a lawyer without review of the Complainant and contained a discrepancy with the testimony at the hearing injury as to whether after hurting his ankle he caught himself and say down or fell down. A manager deemed this major and the railroad decided to bring a second set of charges against plaintiff for filing the OSHA complaint containing a different account in one part. Complainant amended his OSHA complaint to include retaliation for bringing the initial OSHA complaint. At the second hearing, which threatened dismissal, Complainant explained that the lawyer had prepared the OSHA complaint and had gotten that one detail wrong. He also explained that no one at the railroad had asked him about the discrepancy before initiating the second round of discipline. The charge was not sustained.

OSHA found for Complainant on the second, but not first, complaint. The railroad sought a hearing. The ALJ found the manager not very credible and found for the Complainant, rejecting the affirmative defense because the comparator evidence did not match the situation. The ALJ awarded \$10K in emotional distress and the maximum amount, \$250K, in punitive damages. The ARB affirmed on the grounds that substantial evidence supported the findings and the punitive damage award was not an abuse of discretion. The railroad appealed to the First Circuit.

The First Circuit affirmed. First, the railroad argued that it had established its affirmative defense. It challenged the exclusion of certain comparator evidence, arguing that it was not hearsay under the business records exception. But they hadn't been excluded because they were hearsay. The ALJ excluded some of the comparator evidence because there weren't any witnesses who could provide context to them and so they didn't have probative value. This was not an abuse of discretion. Moreover, any error was harmless since they would have only shown that there was prior discipline for false statements, which would not make the circumstances similar to those in this case. This was the same deficiency the ALJ assigned to the evidence that did come in, which the First Circuit held was permissibly found insufficient. The railroad also argued based on its not-retaliatory motive in the discrepancy, but the First Circuit held that substantial evidence supported the ALJ's reasons for rejecting that explanation: adverse credibility findings as to the key manager. The First Circuit also flatly rejected the claim that the ALJ had improperly evaluated the evidence regarding the circumstances of the disciplinary hearing.

AFFIRMATIVE DEFENSE; TENTH CIRCUIT AFFIRMS FINDING THAT RAILROAD DID NOT ESTABLISH AFFIRMATIVE DEFENSE WHEN THERE WAS EVIDENCE OF HOSTILITY FROM THE SUPERVISORS, DISCOURAGEMENT OR PROTECT ACTIVITY, AND AN INDICATION THAT DESPITE PRIOR KNOWLEDGE THE INVESTIGATION ONLY STARTED AFTER THE PROTECTED ACTIVITY

BNSF Ry. Co. v. United States DOL, 816 F.3d 628, No. 14-9602, 2016 U.S. App. LEXIS 4234, 2016 WL 861101 (10th Cir. 2016) (case below ARB No. 13-006, ALJ No. 2012-FRS-19) (Christopher Cain, Intervenor/Complainant).

BNSF hired the Complainant as a sheet-metal worker in 2006. He worked at two rail yards and traveled between them in a company vehicle. In early January 2010, the Complainant developed chest pains and sought treatment in an emergency room. On January 27, 2010, the Complainant rear-ended a produce truck stopped at a red light while driving the BNSF vehicle between job sites. He reported that his brakes had malfunctioned. He was not issued a citation. Another employee picked him up and took him to one of the yards, where he filled out an injury report for his knuckle and knee. He did not get treatment for these injuries, but later claimed that he had no memory of filling out the report and had been in shock. He missed the next two days of work due to coughing fits. On February 17, 2010, he sought medical treatment and a nurse practitioner diagnosed a rib fracture, likely due to the seatbelt impact during the accident. The Complainant decided to determine what exactly was going on before reporting additional injuries. He sought additional days off work to have fluid drained from his lungs, but told supervisors that it was not due to the accident. When he returned to work, he was assigned to work in an undesirable location of the yard. *BNSF Ry. Co.*, 816 F.3d at 633-34.

On February 23, 2010, BNSF notified Complainant that it was investigating whether he had violated any safety rules in the accident. While the hearing was pending, Complainant saw a doctor on April 8, 2010, and was told that the work-related accident had caused his chest and lung injuries. He then updated the injury report, though two supervisors discouraged him from doing so. On April 30, 2010, BNSF notified Complainant that it was now also investigating its rules about timely reporting of injuries. The two hearings took place in May. On June 2, 2010, BNSF gave Complainant a 30 day suspension and 3 year probation, retroactive to the date of the accident, for safety violations that occurred in the accident. It warned him that any further violations during the probation could lead to termination. On June 8, 2010, BNSF terminated Complainant for not filing an injury report in a timely manner. The termination occurred because the violation had occurred during the retroactive probationary period. The Complainant unsuccessfully grieved the discipline and then filed a complaint under the whistleblower protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109.

The Occupational Safety and Health Administration dismissed the complaint, but an Administrative Law Judge (“ALJ”) found that BNSF had unlawfully retaliated against him and awarded back wages, nominal compensatory damages, and the statutory maximum of \$250,000.00 in punitive damages.² *Id.* at 635-36. BNSF appealed, but the Administrative Review Board (“ARB”) affirmed the liability finding. In analyzing the punitive damages award, the ARB determined that it did not need to consider the guideposts from *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) because Congress had removed the need for guideposts by setting a statutory cap. The ARB then halved the award to \$125,000.00. The ALJ's award had been based on a finding that managers engaged in a conspiracy against the Complainant and had assigned him to a very undesirable work location to punish him. The ARB noted that the second had not even been alleged as an adverse action and found it could not sustain a punitive damage award. So it cut the award in half. *BNSF Ry. Co.*, 816 F.3d at 636-37.

Turning to the contributing factor standard, the Tenth Circuit explained that

² Reinstatement was not ordered because the ALJ determined that Complainant was no longer able to perform railroad work. *See Cain v. BNSF Ry. Co.*, ARB No. 14-006, ALJ No. 2012-FRS-019, slip op. at 5 (ARB Sept. 18, 2014).

we must decide whether the agency abused its discretion in concluding that Cain's filing the April 8 Report was a factor that tended "to affect *in any way*" BNSF's decision to terminate him. Ordinarily, to meet this standard, an employee need only show "by preponderant evidence that the fact of, or the content of, the protected disclosure was one of the factors that tended to affect in any way the personnel action." In other words, even if the personnel action resulted not simply from the protected activity itself (filing a report), but also from the content declared in the protected activity, the two parts are "inextricably intertwined with the investigation," meaning the protected activity was a contributing factor to the personnel action. So if the employer would not have taken the adverse action without the protected activity, the employee's protected activity satisfies the contributing-factor standard.

Id. at 639 (quoting and citing *Lockheed Martin Corp. v. Admin Review Bd, U.S. Dep't of Labor*, 717 F.3d 1121, 1136 (10th Cir. 2013); *Marano v. Dep't of Justice*, 2 F.3d 1137, 1143 (Fed. Cir. 1993)) (internal citations omitted).

Yet the Tenth Circuit held that this case "marks an exception to this rule" because "employees cannot immunize themselves against wrongdoing by disclosing it in a protected-activity report." *Id.* "Accordingly, under these circumstances, we require Cain to show more than his updated Report's loosely leading to his firing. Because BNSF contends that it fired Cain for misconduct he revealed in his updated Report, Cain cannot satisfy the contributing-factor standard merely by arguing that BNSF would not have known of his delays in reporting his injuries absent his filing the updated Report." *Id.* The Complainant had met his burden nonetheless, due to the temporal proximity, the sequence of the investigations, and the finding that the supervisors had discouraged him from filing the report by hinting to adverse consequences if he did so. *Id.* at 639-640.

Next, the Tenth Circuit affirmed the ARB's determination that BNSF's had not shown by clear and convincing evidence it would have taken the same action absent the protected activity. The determination that the supervisors had encouraged the Complainant not to file the report, made implicit threats, and showed animus to the protected activity undermined any showing by BNSF on the issue. *Id.* at 640-41. Further, there were findings that BNSF had known earlier about the additional injuries but had not sought to discipline Complainant for not reporting them. BNSF had given inconsistent explanations about even who had fired the Complainant. And there was no evidence of actions taken against employees with similar violations. *Id.* at 641.

BNSF also appealed the punitive damage award. The Tenth Circuit began by affirming the finding that some punitive damages should be awarded. The comments from the supervisors discouraging the injury report supported the finding that BNSF had acted with a reckless or callous disregard for the Complainant's rights. *Id.* at 642. Turning to the amount of the punitive damages, the Tenth Circuit found that the ARB acted arbitrarily and capriciously when it halved the award because it found half the ALJ's analysis flawed. Appellate review is confined "to ascertaining 'whether the agency examined the relevant data and articulated a satisfactory explanation for its decision, including a rational connection between the facts found and the decision made.'" *Id.* (quoting *Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006)). The ARB's "half-for-half approach fails this standard. On remand, the Board must explain why the available facts support the amount of punitive damages it awards." *Id.* at 642-43.

Lastly, the Tenth Circuit held that it was error for the ARB to disregard the *State Farm* guideposts in assessing a punitive damages award. The *State Farm* guideposts are: 1) the degree of reprehensibility of culpability in the respondent's conduct; 2) the relationship between the punitive damages and the actual harm to the Complainant; and 3) punitive damages awarded for comparable misconduct. *Id.* at 636, 643. Though the presence of a statutory cap changed the “landscape” of the review, the guideposts still had to be used in a “less rigid review.” *Id.* at 643. In doing so, the ARB was directed to “set forth clear findings about the degree of BNSF's reprehensibility.” *Id.* at 644. And even though the statute set an upper limit, it was still necessary to look at the ration between punitive and other damages. *Id.* at 644-45. Comparable cases should be considered as well. *Id.* at 645. The Tenth Circuit then declined to evaluate the constitutionality of the punitive damages award, instead remanding so that the ARB could apply the guideposts in the first instance. *Id.*

On remand, the parties reached a settlement, which was approved by the ARB. *See Cain v. BNSF Ry. Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019 (ARB Sept. 15, 2016).

AFFIRMATIVE DEFENSE; SIXTH CIRCUIT AFFIRMS FINDING THAT RAILROAD DID NOT ESTABLISH AFFIRMATIVE DEFENSE WHERE WERE WIDELY DIVERGENT ACCOUNTS OF THE ALLEGED THREATENING INCIDENT AND OTHER INSTANCES WHERE THE RAILROAD HAD NOT DISCIPLINED THREATS IN THE MANNER IT HAD IN COMPLAINANT’S CASE

Conrail v. United States DOL, 567 Fed. Appx. 334 (6th Cir. May 28, 2014) (unpub.): Complainant was terminated for threatening a supervisor. He also made a high number of safety reports. When the supervisor allegedly perceived the threat, he escalated the issue to his supervisor, who suspended complainant indefinitely pending a hearing. There was evidence that the supervisors were unhappy with the safety complaints and when complainant was suspended the more senior supervisor tossed some of his safety complaints back at him. Complainant was terminated in a decision that was made by another subordinate supervisor under the command of the senior supervisor.

The case proceeded to a hearing before an ALJ. There was evidence adduced that there was no threat or altercation at all and that the first supervisor had unreasonably escalated the situation. That supervisor also gave conflicting accounts of events. There was further evidence that the official decision-maker was unaware of basic facts in the hearing transcript and hadn’t reviewed the evidence. There was further evidence that the railroad had not punished threats in this manner in the past. The ALJ concluded that complainant had established by a preponderance of the evidence that his protected activity contributed to the decision to terminate him and that the railroad had not shown it would have taken the same action absent the protected activity by clear and convincing evidence. She awarded reinstatement and compensatory damages. Both parties appealed to the ARB, which affirmed. The railroad appealed to the Sixth Circuit.

After reviewing the legal framework for an FRSA complaint, the panel explained that factual determinations made by the ALJ were reviewed on the substantial evidence standard, which is a deferential form of review. Legal conclusions were reviewed de novo. As to whether the

railroad established that it would have taken the same adverse action without the protected activity, the panel determined that the different accounts of the alleged threat meant that there was substantial evidence to support that ALJ's conclusion, especially where there were numerous other incidences of threats that did not result in termination.

**CLEAR AND CONVINCING EVIDENCE STANDARD UNDER FRSA
WHISTLEBLOWER FRAMEWORK; CLEAR AND CONVINCING EVIDENCE
REQUIRES EMPLOYER TO SHOW THAT THE TRUTH OF ITS FACTUAL
CONTENTIONS ARE HIGHLY PROBABLE**

In *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, No. 12-2148, 2013 WL 600208 (3rd Cir. Feb. 19, 2013), the Third Circuit Court of Appeals noted that since the FRSA was substantially amended in 2007 regarding anti-retaliation protections, including the AIR21 burden shifting test. The court stated:

Once the employee asserts a prima facie case, the burden shifts to the employer to demonstrate, "by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(B)(ii). The "clear and convincing evidence" standard is the intermediate burden of proof, in between "a preponderance of the evidence" and "proof beyond a reasonable doubt." See *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). To meet the burden, the employer must show that "the truth of its factual contentions are highly probable." *Colorado v. New Mexico*, 467 U.S. 310, 316, 104 S.Ct. 2433, 81 L.Ed.2d 247 (1984) (internal quotation omitted).

Araujo, supra, slip op. at 15-16.

U.S. District Court Decisions

**SUMMARY JUDGMENT; AFFIRMATIVE DEFENSE; WHERE NO COMPARATORS
ARE SIMILARLY SITUATED AND BOTH PARTIES PROFFER EXAMPLES TO
SUPPORT THEIR CASE, SUMMARY JUDGEMENT ON AFFIRMATIVE DEFENSE
INAPPROPRIATE**

Lemieux v. Soo Line R.R. Co., No. 16-cv-1794, 2018 U.S. Dist. LEXIS 207527 (D. Minn. Dec. 10, 2018): Plaintiff alleged that Defendant violated the FRSA by investigating him, suspending him, and then terminating him in retaliation for good faith reports of hazardous and unsafe brakes. The parties filed cross motions for summary decision. The District Court found genuine disputes of material fact and denied both motions.

Plaintiff “bad ordered” about 56 cars on a train for brake problems. Defendant pursued discipline for delaying operations after it determined that all but one were improper determinations and the brakes/brake pads were compliant. This resulted in an investigation, hearing, and five day suspension. While this was ongoing, Plaintiff reported brake defects as signaled by track detectors and a frozen slack adjuster. A supervisor went to observe and the parties disputed what exactly happened. But Defendant pursued discipline against Complainant for not immediately securing the train as ordered by dispatch and not conducting a proper roll-by inspection of a passing train. This led to termination.

The Court found that Defendant had not established its affirmative defense by showing by clear and convincing evidence that it would have taken the same adverse actions absent the protected activity. It found that this showing had not been made. Plaintiff had introduced evidence of many employees who were treated differently. Though these were different situated, so were the employees offered as comparators by Defendant. The fact that Defendant had terminated the other employee involved in the second incident was unavailing—that employee was differently situated in terms of the misconduct found and the initial recommendations for discipline had recognized that Plaintiff’s violation was less serious. Summary judgment was thus inappropriate.

SUMMARY JUDGMENT; AFFIRMATIVE DEFENSE; SUMMARY JUDGMENT DENIED WHEN THERE ARE NO ALTERNATIVE REASONS FOR THE DISCIPLINE AND EVIDENCE OF INCONSISTENT APPLICATION OF THE GENERAL RULE.

Wooten v. BNSF Railway Co., No. 16-cv-139 (D. Mont. Sept. 18, 2018) (2018 U.S. Dist. LEXIS 159199; 2018 WL 4462506) (case below 2016-FRS-00059) (Order [adopting Magistrate’s Findings and Recommendation and Order]), *adopting Wooten v. BNSF Railway Co.*, No. 16-cv-139 (D. Mont. May 29, 2018) (2018 U.S. Dist. LEXIS 89267; 2018 WL 2417858) (case below 2016-FRS-00059) (Findings and Recommendation and Order)

The Plaintiff reported a work-related wrist injury. After investigation a supervisor concluded that the injury had occurred prior to the work and that the Plaintiff had been dishonest in his reports. This led to termination. Plaintiff filed several actions, including an FRSA complaint.

Defendant sought summary judgment on the ground that it had established by clear and convincing evidence that it would have taken the same action absent the protected activity. But there was no evidence of another reason for the discipline. Insofar as Defendant’s argument was that it would have terminated the Plaintiff for any dishonesty, summary judgment was inappropriate because the plaintiff had produced evidence of discretion and inconsistency in punishing dishonesty.

SUMMARY JUDGEMENT, AFFIRMATIVE DEFENSE; SUMMARY JUDGMENT ON AFFIRMATIVE DEFENSE DENIED BECAUSE INJURY REPORT A BUT-FOR CAUSE OF THE ADVERSE ACTION AND COMPARATOR EVIDENCE WAS EITHER WEAK

OR CONTEXT-FREE; DECISION OF PUBLIC LAW BOARD DOES NOT SUPPORT SUMMARY JUDGMENT IN A *DE NOVO* PROCEEDING

Despain v. BNSF Railway Co., No. 15-cv-8294 (D. Az. Feb. 20, 2018) (2018 U.S. Dist. LEXIS 95518; 2018 WL 1894708) (Order [denying Defendant’s motion for summary judgment]):

The district court denied a motion for summary judgment by the Defendant in an FRSA action. The protected activity in the case involved making an injury report. The Defendant terminated the Plaintiff for dishonesty in making the report and in the investigation. The termination was later converted to a lengthy suspension. The alleged dishonesty concerned when the Plaintiff determined the injury was work-related, when during the shift the injury occurred, and the circumstance of a quip pro quo proposal to drop the injury report in exchange for a paid deadhead trip. The Plaintiff and manger had different accounts of who made that proposal.

Defendant sought summary judgment on its affirmative defense. The district court denied the motion on the grounds that the injury report was an obvious “but-for” cause of the termination and the comparator evidence either focused on instances where injury-reports were not punished (rather than where punishment occurred in similar circumstances without an injury-report) or was provided without the context needed to evaluate it. The district court also dismissed reliance on the Public Law Board finding in favor of the company, noting that the FRSA proceeding was *de novo*.

SUMMARY JUDGMENT; AFFIRMATIVE DEFENSE; DEFENDANT’S MOTION FOR SUMMARY JUDGMENT ON AFFIRMATIVE DEFENSE DENIED WHERE JURY COULD CONCLUDE THAT THE POLICY VIOLATION IN QUESTION WAS PROTECTED BY § 20109(C)(2)

Williams v. Illinois Central Railroad Co., No. 16-cv-838 (S.D. Miss. Feb. 5, 2018) (2018 U.S. Dist. LEXIS 18106; 2018 WL 716568) (Order [denying Defendant’s motion for summary judgment]):

The Plaintiff had a history of attendance violations. While at work he experienced symptoms of a heart attack. He was taken to the hospital. His symptoms were attributed to stress/anxiety and he was discharged with a note keeping him off of work for a few days, though it was not signed. He then told the Defendant railroad that he would not be working. The Defendant determined that it was an additional unexcused absence and under the terms of its policy terminated Plaintiff, though the public law board later converted this into a suspension without pay. He filed suit under the FRSA claiming he was retaliated against for reporting a work-related injury, protected by § 20109(a)(4), and following a treatment plan, protected by § 20109(c)(2). Defendant sought summary decision.

Defendant sought summary judgment on its affirmative defense. The district agreed that the policy in question was written and was followed, but found summary judgment inappropriate because a jury could find that the asserted policy violation—the absence from work—was itself protected by § 20109(c)(2) because it was in accordance with a treatment plan.

AFFIRMATIVE DEFENSE; DISTRICT COURT GRANTS SUMMARY JUDGMENT WHERE THE UNDISPUTED EVIDENCE ESTABLISHED, BY CLEAR AND CONVINCING EVIDENCE, THAT THE EMPLOYER WOULD HAVE REFUSED TO HIRE PLAINTIFFS FOR REASONS UNRELATED TO ANY RETALIATORY MOTIVE; PLAINTIFFS APPLIED FOR JOBS THAT REQUIRED WORK OUTSIDE, BUT BOTH PLAINTIFFS WERE RESTRICTED TO INDOOR EMPLOYMENT

In *Lincoln v. BNSF Railway Co.*, No. 15-cv-4936-DDC-KGS (D. Kan. April 24, 2017), the United States District Court for the District of Kansas granted summary judgment for Respondent, BNSF Railway Co. (“BNSF”), dismissing FRSA complaints of two Plaintiffs, Larry D. Lincoln and Brad C. Mosbrucker. *Lincoln*, slip op. at 1. Plaintiffs sent demand letters to BNSF describing an on-duty chemical spill that had taken place two and a half years earlier, their injuries, damages, and anticipated future damages. *Id.* at 3. Plaintiffs were subsequently placed on medical leave, which was extended, pending their submission of updated medical information addressing the safety concerns raised in the demand letters. *Id.* at 4-5. Plaintiffs applied to a number of different positions within BNSF, *Id.* at 15-17, pursuant BNSF’s craft transfer policy, which is triggered when a “physician does not release the employee to work” at his assigned job, *Id.* at 6-7. Plaintiffs were not selected for the positions they applied to and alleged that they were not selected because they informed BNSF in their demand letters that BNSF “negligently . . . handled the . . . chemical spill and, as a result, violated their rights under the Federal Employees Liability Act” *Id.* at 18, 54-55.

The court held that that Plaintiffs did not establish that the demand letters were a contributing factor in BNSF’s decision not to hire them. *Id.* at 59-60. It was uncontested that Plaintiffs sought positions that “required the worker to be able to work outside,” and that “both plaintiffs were restricted to indoor employment.” Accordingly, the court found that “no reasonable jury could find a retaliatory motive contributed to BNSF’s decision” not to hire either plaintiff. *Id.* at 60. The court emphasized that BNSF established “by undisputed evidence that it would have refused to hire plaintiffs for those positions for reasons unrelated to any retaliatory motive created by their demand letters.” *Id.* at 64.

SUMMARY JUDGMENT; AFFIRMATIVE DEFENSE; COURT GRANTS SUMMARY JUDGMENT TO RAILROAD WHERE THERE WERE ADMITTED VIOLATIONS OF RULES WITH TERMINATION AS A CONSEQUENCE AND THE EMPLOYEE NEGOTIATED AND AGREED TO A LESSER PUNISHMENT

Lee v. Norfolk Southern Railway Co., 187 F. Supp. 3d 623, No. 13-cv-4 (W.D. N.C. May 11, 2016) (2016 WL 2746626; 2016 U.S. Dist. LEXIS 62307) (case below 2013-FRS-4): Plaintiff alleged that he was wrongfully give a six month suspension in retaliation for giving too many cars “bad order” citations when he was working as a carman doing safety inspections. He had also filed a lawsuit contending that the suspension was race discrimination prohibited by 42 U.S.C. § 1981. That suit had been dismissed and the railroad argued that the FRSA’s election of remedies provision barred the FRSA action. The district court had agreed, but the Fourth Circuit reversed. On remand the district court considered the remaining arguments for summary decision.

It was undisputed that the Plaintiff had engaged in protected activity and had suffered an adverse action. Viewing the evidence in the light most in Plaintiff's favor and making inferences in his favor, Plaintiff also defeated summary judgment as to the knowledge of the decision makers. In order to show contribution, Plaintiff alleged inconsistent application of company policy, overzealous investigation, temporal proximity, hostility, and a later suspension showing continued retaliation. The court reviewed the evidence on each. Plaintiff had been suspended for drinking alcohol while on duty. Though he claimed others were treated less harshly, the others were in travel status, not on duty. The rule that Plaintiff violated called for termination, but he was only suspended. The uncontroverted evidence also showed that the investigation was not out of the ordinary and that any zealotry was the result of the Plaintiff's dishonesty in his initial denials. The protected activity was also too temporally remote to support an inference of retaliation. Evidence of hostility was really only evidence of hot-headedness and did not support an inference to contribution, especially when another manager conducted the hearing. The second suspension was another claim and wasn't proper to litigate within the one at issue. The court thus concluded that Plaintiff could not make out a showing on the contributing factor element.

In addition, the court found that even if a *prima facie* case of retaliation had been made, the railroad was entitled to summary judgment on the affirmative defense. The uncontroverted evidence showed that Plaintiff had violated rules that could have led to his termination and had instead agreed to a waiver process to limit his discipline to the suspension. The court observed that whistleblower statutes are not meant as a shield to be used to prevent consequences of misconduct and concluded that this is what Plaintiff was trying to do—he had admittedly violated several rules with harsh consequence and then agreed to lenient treatment, only then claiming for the first time that his discipline was the result of retaliation.

SUMMARY JUDGMENT; AFFIRMATIVE DEFENSE; SUMMARY JUDGMENT PROPER ON AFFIRMATIVE DEFENSE WHEN EVIDENCE PERTAINING TO ALL RELEVANT FACTORS FAVOR RAILROAD

Dafoe v. BNSF Railway Co., No. 14-439 (D. Minn. Feb. 26, 2016) (2016 WL 778367): Plaintiff was disciplined for three safety violations. The first involved not stopping his train when he was told over the radio that his “angle cock” appeared to be slightly turned. The second two grew out of a random safety inspection/audit in which Plaintiff was accused of improperly bottled air in the braking system when the train was stopped and walking between equipment without following safety procedures. He reached an agreement as to the first that included a probation. After he was found to have committed the second two he was terminated. He unsuccessfully grieved the dismissal and then filed a complaint with OSHA. He claimed that he was a known safety advocate and pointed to a series of protected safety complaints, both formal and informal. He also pointed to several injuries and injury reports in his long career. OSHA dismissed the complaint and Plaintiff asked for a hearing with an ALJ, but then removed the case to federal court.

The Railroad moved for summary judgment on the contributory factor element and on the affirmative defense. The discussion focused on the contributory factor element and granted Defendant summary judgment on that point. In addition, the court found that BNSF was entitled

to summary judgment on its affirmative defense. In evaluating whether a railroad has shown that it would have taken the same action absent the protected activity by clear and convincing evidence, courts look to 1) whether there are written policies addressing the alleged misconduct; 2) whether applicable investigatory procedures were followed; 3) whether the dismissals were approved by others in senior management; 4) whether the dismissal was upheld on appeal; 5) the temporal proximity between the non-protected activities and the adverse action; 6) whether the policies are consistently enforced; and 7) the independent significance of the non-protected activity. Looking at the evidence on offer, the court found that all factors favored BNSF and so summary judgment was proper.

SUMMARY JUDGMENT; AFFIRMATIVE DEFENSE; RAILROAD NOT ENTITLED TO SUMMARY JUDGMENT ON AFFIRMATIVE DEFENSE BASED ON THE COMMONALITY IN DELAYS IN RETURN TO WORK FOR WORK-RELATED AND NON-WORK-RELATED INJURIES WHERE CASE IN QUESTION DIDN'T INVOLVE A DELAY IN MEDICAL CLEARANCE

In *Rader v. Norfolk Southern Ry.*, No. 1:13-cv-298 (E.D. Tenn. Feb. 10, 2016) (2016 U.S. Dist. LEXIS 17913), the court denied Defendants' Norfolk Southern Railway Company's ("NSRC") and Norfolk Southern Corporation's ("NSC") Motion for Summary Judgment, finding that Plaintiff had presented sufficient evidence to meet the permissive threshold applicable at the summary judgment stage of proceedings.

The Plaintiff hurt his knee at work and reported the injury. He had surgery and was out for a time. He was then released to return to work, though his doctor also said he should use a Neoprene Sleeve on his knee. The medical department at the railroad cleared Claimant to return to work without restriction. This was transmitted to the relevant supervisors, along with mention of the sleeve. When Plaintiff returned to work he was told that he could not work and had to leave the property. The parties disputed the conversation, but use of the Sleeve was mentioned and emails indicated uncertainty over whether there was a work restriction. Eventually Plaintiff's doctor removed that restriction and after another physical and clearance by the medical department, Plaintiff returned to work. He filed a complaint under the FRSA alleging that his return had been delayed in retaliation for reporting a work-related injury.

The Railroad sought summary judgment. As to the contributing factor element, the court found that the Plaintiff had enough evidence to meet "this very permissive threshold." Given the evidence that the medical department had cleared him to return to work and instructed the supervisors that he should be allowed to work, as well as the evidence of the hostility Plaintiff encountered when he returned, a reasonable jury could find that the injury report contributed to the decision to delay the return.

As to the affirmative defense, the Railroad provided evidence that delays from the medical department are common for both work-related and non-work-related injuries. The court found that this was insufficient—the delay here resulted from the direct supervisor, not the medical department, which had cleared Plaintiff to return. That was conveyed to the supervisor who

made the decision, which undercut the argument that the delay would have occurred regardless of the protected activity.

The court also denied summary judgment as to the punitive claim on the grounds that there were material issues of facts in dispute and denied a motion to strike a notice of supplemental authority.

CLEAR AND CONVINCING EVIDENCE ON HIRING DECISION; OTHER APPLICANTS WERE MORE QUALIFIED

In *Jones v. BNSF Ry. Co.*, No. 14-2616 D. Kan. Jan. 14, 2016) (2016 U.S. Dist. LEXIS 4887; 2016 WL 183514) (case below 2014-FRS-53 (Jones) and -63 (Hodges)), Plaintiff Brian Jones alleged that Defendant BNSF retaliated against him for reporting an altercation with a fellow employee and for obtaining a restraining order against that employee. Plaintiff Nick Hodges alleged Defendant retaliated against him for reporting verbal threats made against Jones by another employee in the same altercation. The court granted Defendant's Motions for Summary Judgment on Plaintiffs' claims and dismissed Plaintiffs' Complaint.

Plaintiff Hodges claimed that he was "blackballed" from a machinist apprentice position at BNSF after he reported a verbal threat of violence against Jones. The court found that there was no serious dispute that Hodges had established a prima facie case, as 1) Hodges engaged in protected activity when he reported to BNSF what he heard the coworker say to Jones; 2) failure to promote Hodges was an adverse employment action; 3) Defendant knew about Hodges's protected activity; and 4) Hodges's reports and testimony were a contributing factor in BNSF's decision not to promote him, as supported by testimony.

The court found that even though Hodges had shown that his protected activity contributed in some way to BNSF's decision not to hire him for machinist apprentice positions, BNSF was entitled to summary judgment because it demonstrated by clear and convincing evidence that it would have made the same hiring decisions even if Hodges had not engaged in a protected activity. The evidence was uncontroverted that Hodges began applying for machinist apprentice positions well before the altercation between Jones and the coworker. In early 2012, he interviewed for an open position, but was not selected, in part because he did not have sufficient education and/or experience. In January 2013, before the altercation, Hodges again applied for an apprentice position and was not hired. It was undisputed that the applicants selected for the position had more experience, training, and education than Hodges. Likewise, it was undisputed that after Hodges's reports and testimony about the altercation, the applicants hired for the apprentice positions he applied for were more qualified, with technical degrees and years of experience and training that Hodges lacked working as heavy machinery mechanics. The court therefore found the record to show that Hodges was not promoted to a machinist apprentice position because the position was given to more qualified applicants. Thus, the undisputed evidence was clear and convincing that, even if BNSF was motivated in part by hostility to Hodges's protected activity, BNSF would not have promoted Hodges for the machinist apprentice positions because he was competing against more qualified candidates.

SUMMARY JUDGMENT; AFFIRMATIVE DEFENSE; WHERE MULTIPLE REASONS WERE GIVEN FOR THE ADVERSE ACTION AND THERE WAS DISPUTED EVIDENCE ABOUT COMPARATORS, SUMMARY JUDGEMENT DENIED FOR BOTH PARTIES ON THE RAILROAD'S AFFIRMATIVE DEFENSE

Rookaird v. BNSF Railway Co., No. 14-cv-176 (W.D. Wash. Oct. 29, 2015) (2015 U.S. Dist. LEXIS 147950; 2015 WL 6626069) (case below 2014-FRS-9): Plaintiff had been instructed to move roughly 42 cars. Before doing so he conducted air tests on the cars. He and a trainmaster communicated over the radio about whether the testing was necessary. When Plaintiff returned to the depot he was told by the superintendent to “tie up” and go home. He did so, but provided an end time 28 minutes later than the time he completed his tie up and did not sign his time sheet because he could not locate it. Plaintiff also had a confrontation in the break room with another employee, after which the superintendent told him to leave. Defendant investigated the events and terminated Plaintiff. Its stated reasons were failure to work efficiently, dishonest reporting of time, failure to sign the time sheet, and not complying with instructions to leave the property. Plaintiff filed suit under the FRSA on the grounds that his air testing and communications about it were protected activities and led to the termination. This order considered Plaintiff’s Motion for Partial Summary Judgment and Defendant’s Motion for Summary Judgment.

The court explained that the FRSA employs a “two-part burden-shifting test” and that in the first part the plaintiff must “show by a preponderance of the evidence that (1) he engaged in a protected activity; (2) the employer knew he engaged in the allegedly protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action.” “After the employee makes this showing, the burden shifts to the employer to demonstrate by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of the protected activity.” Here, Defendant conceded the second and third elements of the Complainant’s case.

The first issue for the court was which alleged protected activities were at issue. To be properly raised, Plaintiff needed to have exhausted his administrative remedies as to the issue. Relying on general principles of exhaustion, this meant that the action was limited to the administrative complaint, the investigation that followed, or the scope of an investigation that reasonably could have been expected to follow the complaint. Moreover, summary judgment is not a tool to flesh out inadequate pleadings, so protected activities and theories needed to be adequately plead prior to the summary judgment motion and opposition. Plaintiff’s administrative complaint *and* the operative complaint before the court limited the protected activity to refusing to violate federal safety rules or regulations related to air testing and his subsequent reports to the railroads hotline of the incident and subsequent harassment. Only those protected activities were properly before the court.

Both parties moved for summary judgment as to Defendant’s showing that it would have taken the same action absent the protected activity. Both motions were denied on this point. Defendant had given multiple reasons for terminating Plaintiff and Plaintiff pointed to comparative violations that had not been met with termination. Factual disputes remained in need of resolution after trail.

AFFIRMATIVE DEFENSES; SUMMARY JUDGMENT; CLEAR AND CONVINCING EVIDENCE STANDARD IS DIFFICULT TO MEET, SUMMARY JUDGMENT DENIED WHEN NO EVIDENCE THAT RAILROAD UNIFORMLY TERMINATED EMPLOYEES FOR SAME MISCONDUCT

Miller v. CSX Transp., Inc., No. 1:13-cv-734 (S.D. Ohio Aug. 25, 2015) (2015 U.S. Dist. LEXIS 112507; 2015 WL 5016507) (case below 2013-FRS-64): In August 2012 the Plaintiff reported that about a month earlier he had suffered a back injury when his foot slipped on loose ballast while stepping off of the train, resulting in a twist and popping sound. He had gone to an emergency room 5 days after the injury and more recently to an orthopedist. Defendant's rules require immediate reporting of on-duty injuries, so an investigation was initiated. Several days later Plaintiff gave a written statement retracting his injury report and stating that it had actually occurred at home while working on his car. Plaintiff claimed that through gestures and nodding, the managers had conveyed that if he retracted his report, he could go back to work with little or no penalty. After the investigation/hearing, Plaintiff was terminated. He pursued several actions, including an FRSA complaint.

Defendant moved for summary decision on its affirmative defense based on evidence of its termination of other employees for dishonesty and not terminating employees for injury reports. The court denied the motion. The clear and convincing evidence standard is difficult to meet and here the submission could not establish that every employee who was dishonest was discharged or that every employee who didn't report an injury on time was discharged. It added that the termination letter here did not even cite dishonesty.

AFFIRMATIVE DEFENSE AND SUMMARY JUDGMENT; DISTRICT COURT DENIES SUMMARY JUDGMENT FOR THE DEFENDANT WHERE THE DEFENDANT ARGUED THAT IT CONSISTENTLY DISCIPLINED EMPLOYEES FOR SIMILAR VIOLATIONS, BUT THE PLAINTIFF INTRODUCED EVIDENCE THAT THE DEFENDANT WAS INCONSISTENT IN APPLYING THAT DISCIPLINE

In *Mosby v. Kansas City Southern Railway Co.*, Case No. CIV-14-472-RAW (E.D. Okla. July 20, 2015), the U.S. District Court for the Eastern District of Oklahoma denied summary judgment under the FRSA. *Mosby*, slip op. at 14. The Defendant railroad argued that it had proven by clear and convincing evidence that it would have taken the same disciplinary action in the absence of any protected activity. *Id.* at 13. However, the court pointed to the Plaintiff's evidence that the Defendant "was not consistent in this discipline and that its employees are apprehensive about reporting injuries for fear of losing their jobs," and found that there was a genuine issue of material fact to be resolved at trial. *Id.* at 13-14.

AFFIRMATIVE DEFENSE; RESPONDENT FOUND TO HAVE ESTABLISHED AFFIRMATIVE DEFENSE WHERE RELEVANT DECISION MAKERS DID NOT HAVE KNOWLEDGE OF THE PROTECTED ACTIVITY, TEMPORAL PROXIMITY WAS INTERRUPTED BY INTERVENING EVENTS, AND A PROFFERED COMPARATOR WAS NOT SIMILARLY SITUATED

Hunter v. CSX Transportation, Inc., ARB Nos. 2018-0044, and -0045, ALJ No. 2017-FRS-00007 (ARB Apr. 25, 2019) (per curiam) (Final Decision and Order): FRSA case in which the ALJ found that Complainant had engaged in protected activity but not that the protected activity was a contributing factor in the decision to terminate him. The ALJ also found that the Respondent had established by clear and convincing evidence that it would have taken the same action absent the protected activity. Complainant appealed both causal findings. Respondent appealed the finding that Complainant engaged in protected activity.

Complainant reported that a wheel slip alarm was sounding. Respondent argued that this wasn't an actual hazardous safety condition and so couldn't be a report of such, or a good faith report of such. The ARB summarily rejected this, stating that they were the same arguments fully considered and properly rejected by the ALJ. Complainant's arguments turned on claims that certain testimony was credible, certain evidence was significant, and Respondent's explanations were "bunk." But ALJs receive deference in their credibility assessments unless they are inherently incredible or patently unreasonable. They were not in this case, so they received deference and the findings were affirmed. The ARB thus affirmed the ALJ's decision in full and "adopt it as our own and attach it."

ALJ Decision

Complaint had been terminated and the parties stipulated that was an adverse action. The case was about two accounts of the termination—Complainant said it was due, in part, to his report of the wheel slip alarm. Respondent said that happened all the time and wasn't a hazardous condition. It said Claimant was fired for leaving work without the permission of a supervisor and that the decision makers didn't even know about the alleged protected activity. Complainant asserted that other employees who left without permission weren't fired.

The ALJ had first denied the complaint on the contributing factor element. There was close temporal proximity, but the ALJ found that the relevant decision makers did not have knowledge of the protected activity--the trainmaster who reported that Complainant had left did have that knowledge, but he didn't report the protected activity to his hire ups and his role was only to receive guidance on what to do, i.e. initiate proceedings. The temporal proximity was also minimized because of intervening events (leaving work and the confusion at the end of the shift) and the commonality of the wheel slip events. Respondent had been consistent in its explanation of events and followed its disciplinary procedures. The ALJ also rejected reliance on a comparator who received less punishment since they weren't similarly situated. Further, the ALJ found that there was no good indication of evidence, which followed from the crediting of the

front line supervisor's explanations of his actions as well as listening to the tape of the report in question. The ALJ found that the supervisor had acted reasonably in the circumstances. Thus the ALJ concluded that Complainant had not established that the protected activity was a contributing factor in the termination decision.

For largely the same reasons, the ALJ found that the Respondent had made out its affirmative defense, that it would have taken the same action even absent the protected activity.

AFFIRMATIVE DEFENSE; APPLICATION OF CONCEPT OF “INEXTRICABLY INTERTWINED”; ARB HOLDS THAT WHERE PROTECTED ACTIVITY DIRECTLY LED TO THE DISCIPLINE, IT MAKES NO SENSE TO INQUIRE WHETHER DISCIPLINE WOULD HAVE OCCURRED IN THE ABSENCE OF THE PROTECTED ACTIVITY

In *Brousil v. BNSF Railway Co.*, ARB No. 16-025, -031, ALJ No. 2014-FRS-163 (ARB July 9, 2018), the ALJ found that the Complainant engaged in protected activity that contributed to three suspensions, but that the Respondent established by clear and convincing evidence that it would have reprimanded the Complainant absent his protected activity. The only issue on appeal was whether the Respondent met its burden on the affirmative defense. The ARB began by reciting its case-by-case balancing test, citing *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-6, slip op. at 12 (ARB Apr. 25, 2014), *Pattenaude v. Tri-Am Transp., LLC*, ARB No. 15-007, ALJ No. 2013-STA-37, slip op. at 16-17 (ARB Jan. 12, 2017), and *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 9-10 (ARB Sept. 30, 2015). In the instant case, the ARB found that the ALJ had applied the wrong standard. The ALJ found that there was “probable cause” for the Respondent to have investigated the incidents that lead to discipline; the ARB found, however, that “probable cause” is not an applicable standard. The ALJ also focused on the severity of discipline that was applied to the Complainant given his alleged misconduct, the ALJ finding that it was lenient. The ARB, however, noted that a respondent’s “high affirmative defense standard requires proof of what the employer ‘would have done’ not simply what it ‘could have’ done.” Slip op. at 6, citing *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-6, slip op. at 11 (ARB Apr. 25, 2014). The ARB found that the Respondent’s investigation and discipline on two of the incidents were “inextricably intertwined” with the Complainant’s protected activity. The third incident was similar, as the Complainant’s refusal to pull the train close enough to be plugged into shore power was based on his continuing concern about the hazards of train exhaust in confined spaces. The ARB wrote:

Technically, while the issue of whether the adverse action taken is “inexplicably intertwined” with a complainant’s protected activity is an issue germane to complainant’s burden to prove causation, the ALJ’s failure to properly address it has consequences for the analysis of employer’s burden in proving its affirmative

defense. The Board has stated that in cases, such as this, where the protected activity is virtually inseparable from the basis for the imposition of discipline, the fact finder must be careful to assure that the employer has met the high clear and convincing affirmative defense standard. Since the protected activity here directly led to the discipline, it makes no sense to inquire whether discipline would have occurred in the absence of the protected activity. These cases therefore present a challenge for literal application of the affirmative defense.

When evaluated against the affirmative defense standard and factors identified above, particularly in light of the challenging presence of the inextricably intertwined concept, the ALJ's affirmative defense finding does not withstand scrutiny. His analysis of BNSF's affirmative defense relied too heavily on his finding that there was a rational basis for the employer's decision. And he failed to explain how this finding clearly or convincingly extinguished his earlier finding that BNSF harassed Brousil because of his protected activity.

Slip op. at 7 (footnote omitted).

CLEAR AND CONVINCING EVIDENCE; ARB FINDS THAT WHERE ALJ FOUND THAT PROTECTED ACTIVITY WAS A CONTRIBUTING FACTOR IN THE ADVERSE PERSONNEL ACTION, AND BUT FOR THE COMPLAINANT'S REPORT THE RESPONDENT WOULD NOT HAVE ISSUED A LETTER DISQUALIFYING THE COMPLAINANT FROM EMPLOYEE-IN-CHARGE ASSIGNMENTS, THE ALJ'S ADDITIONAL FINDING THAT THE RESPONDENT MET ITS BURDEN OF PROOF THAT IT WOULD HAVE TAKEN THE SAME ACTION IN THE ABSENCE OF THE PROTECTED ACTIVITY IN LIGHT OF WHAT THE COMPLAINANT TOLD HIS DIRECT SUPERVISOR ABOUT HIS LACK OF COMFORT IN PERFORMING A PARTICULAR TASK WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

In [*Holmquist v. Wisconsin Central Ltd.*](#), ARB No. 16-006, ALJ No. 2014-FRS-57 (ARB Jan. 12, 2018), the Complainant had been ordered to act as an Employee-in-Charge (EIC) and pilot a rail grinding train on a portion of the railroad. The Complainant informed his direct supervisor that "he was uncomfortable and felt he was not qualified to function as an employee in charge of a rail grinding train." The Complainant relayed those same concerns to the Respondent's risk management (RM) specialist. The RM specialist told the Complainant that he would get someone else to act as EIC for the rail grinding train. The RM specialist then called the district Senior Manager and told him that the Complainant had been asked to act as EIC for the rail grinding train but told the RM specialist that "he didn't feel qualified or comfortable doing it." The RM specialist did not tell the Senior Manager that the Complainant said he could not act as an EIC in general. The Complainant's director supervisor also talked to the Senior Manager and recommended that the Complainant be disqualified from acting as an EIC. The Senior Manager then disqualified the Complainant from all positions requiring track authority, which precluded him from occupying all EIC positions. No one ever told the Senior Manager that the Complainant did not feel safe obtaining track authority for a specific piece of equipment.

The Complainant was transferred to a position that did not result in any loss of pay or reduction in benefits. The Respondent later removed the disqualification, and except for job assignments, the disqualification had no other impact on the Complainant's employment. The Complainant filed an FRSA complaint alleging that the disqualification was in retaliation for refusing to operate the rail grinding train. The ALJ concluded that the Complainant engaged in FRSA-protected activity that contributed to an adverse employment action, but that the Respondent proved that it would have taken the same action in the absence of the protected activity. The ALJ had concluded that the Respondent had provided by clear and convincing evidence that it was reasonable to remove the Complainant from all EIC positions in light of his communications with his direct supervisor. The ARB reversed the ALJ's conclusion that the Respondent met its burden in this way, stating:

But such a conclusion does not establish that [the Respondent] would have disqualified [the Complainant] if he had not engaged in those communications. The ALJ's conclusion contradicts his specific findings regarding the effect of [the Complainant]'s protected activities:

In other words, if [the Complainant] had not told Mr. Hardy on July 9, 2013 that he felt that it was not safe for him to pilot the rail grinding train and his refusal to do so the next day, Wisconsin Central management would not have initiated the subsequent informal investigation, and would not have disqualified Complainant from all EIC positions. In other words, I find the protected activity was a contributing factor in the adverse personnel action because, but for Complainant's report, Respondent would not have issued the disqualification letter . . . Complainant's raising legitimate concerns to his supervisor regarding his discomfort and inability to pilot the rail grinder was the only reason Bjork subsequently disqualified Complainant.

The Board therefore reverses the ALJ's legal conclusion that [the Respondent] met its burden of proof absolving it of liability because the foregoing findings of fact (which are supported by substantial evidence) establish, contrary to the ALJ's conclusion, that [the Respondent] would not have taken the same adverse action in the absence of [the Complainant]'s protected activity. Judgement for [the Complainant] is accordingly awarded.

Slip op. at 4-5 (quoting ALJ's decision) (footnote omitted).

CLEAR AND CONVINCING EVIDENCE; SUBSTANTIAL EVIDENCE SUPPORTED ALJ'S FINDINGS THAT THE COMPLAINANT VIOLATED THE RESPONDENT'S BLUE-FLAG RULES AND ITS ZERO-TOLERANCE POLICY AGAINST WORKPLACE VIOLENCE

CLEAR AND CONVINCING EVIDENCE; TEMPORAL PROXIMITY INFERENCE OF CAUSATION NEGATED BY LACK OF EVIDENCE OF DISPARATE TREATMENT WHERE THE COMPANY HAD ALSO FIRED A SIMILARLY SITUATED CO-

WORKER, HAD A ZERO-TOLERANCE POLICY ON WORKPLACE VIOLENCE, AND HAD A HISTORY OF DISMISSING EMPLOYEES WHO VIOLATED BLUE-FLAG RULES

In *Rathburn v. The Belt Railway Co. of Chicago*, ARB No. 16-036, ALJ No. 2014-FRS-35 (ARB Dec. 8, 2017), the Complainant filed a complaint alleging that the Respondent retaliated against him in violation of the FRSA whistleblower provision for reporting an injury and seeking medical treatment for the injury. The ALJ dismissed the complaint following a hearing on the merits, and the ARB affirmed the dismissal.

The Complainant and a coworker were conducting inspections on separate tracks of incoming trains. A dispute arose over whether the Complainant had properly released a blue-flag protection on the track for which the co-worker was doing inspections, leading to a physical altercation in which the Complainant was injured and sought medical treatment. Blue-flag protection rules block entry to a track on which an inspector is working. Both the Complainant and the co-worker were discharged for violating blue-flag protection rules, and rules of conduct relating to altercations and workplace violence.

The ARB found that the ALJ erred in applying the contributing factor causation element of a FRSA complaint because he took into account the lack of evidence that the adverse employment actions were motivated by retaliatory intent. The ARB noted that it “has repeatedly held, an employee need not prove retaliatory animus, or motivation or intent, to prove that his protected activity contributed to the adverse employment action at issue.” Slip op. at 8, citing among other decisions, *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-9, Slip op. at 6 (ARB Feb. 29, 2012).

The ARB nonetheless found that substantial evidence supported the ALJ’s conclusion that the Respondent demonstrated by clear and convincing evidence that it would have taken the same adverse action against the Complainant even had the Complainant not engaged in the protected activity of reporting the injury and seeking treatment for it. The ALJ had found that the Complainant violated the company’s blue-flag rule, and its zero-tolerance policy against workplace violation. The ARB noted that the ALJ had found the Complainant’s testimony unpersuasive and uncorroborated. The ALJ also found that, although there was temporal proximity between the protected activity and the adverse employment action, any inference of causation was negated by lack of evidence of disparate treatment (the company had also fired the co-worker, had a zero-tolerance policy on workplace violence, and had a history of dismissing employees who violated blue-flag rules). There had been hearing testimony indicating that the size of a bonus given to managers could be affected by the number of FRSA-reportable injuries, thereby giving a motive to discourage reporting. The ALJ, however, found no evidence that the Respondent had an attitude or workplace culture that discouraged reporting of injuries—in fact, all witnesses uniformly testified that the Respondent did not have such a policy or culture. The ALJ also found that all the witnesses testified that the Respondent’s blue-flag rules would not have allowed the Complainant to unlock the coworker’s track; that almost all witnesses testified that the Complainant did not have the authority to remove the coworker’s blue-flag on the day in question; and that the testimony of persons who witnessed the argument supported a finding that the Complainant had violated the zero-tolerance workplace violence policy.

AFFIRMATIVE DEFENSE; ARB CLARIFIES THAT CONDUCT FOR WHICH COMPARATOR EMPLOYEES WERE DISCIPLINED MUST BE FOR THE SAME OR SIMILAR VIOLATIONS BUT THAT A RESPONDENT DOES NOT NEED TO ESTABLISH THAT CONDUCT WAS IDENTICAL; ALJ SHOULD WEIGH SIGNIFICANCE OF COMPARATORS CASE-BY-CASE; COMPARATOR EMPLOYEES MUST HAVE ENOUGH IN COMMON TO ALLOW FOR A MEANINGFUL COMPARISON

In *Echols v. Grand Trunk Western Railway, Co.*, ARB No. 16-022, ALJ No. 2014-FRS-49 (ARB Oct. 5, 2017), the Complainant sustained a groin injury when he attempted to push a misaligned drawbar into place and could not do so, so he lifted the drawbar into place in violation of one of the Respondent's safety rules that prohibited lifting a drawbar. When the Complainant reported the injury, the Respondent began a disciplinary investigation process, but offered to waive the investigation and hearing if the Complainant admitted that his misconduct resulted in the injury. The Complainant signed the waiver and was suspended without pay. On appeal to the ARB, the only issue was whether the Respondent proved by clear and convincing evidence that it would have taken the adverse action absent any protected activity. The ALJ found that the Respondent met its burden by showing that it routinely monitored compliance with the rule in question, formally trained employees on compliance with the rule, and consistently imposed equivalent discipline on employees who violate the rule in the absence of an injury report. The ALJ also found that the rule was not vague or subject to manipulation and use as pretext for unlawful discrimination. The ALJ applied the factors discussed in *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-9, slip op. at 11-12 (ARB Sept. 30, 2015). The Complainant contended that the ALJ had wrongfully applied the *DeFrancesco* "similarly situated employee" factor, arguing that the Respondent had to prove that other employees engaged in identical conduct to that of the Complainant. The Respondent argued that it could use comparators who had violated the rule more generally. The rule included prohibitions on other actions in addition to the drawbar lift prohibition, and the ALJ agreed with the Respondent that there was no meaningful distinction in the various prohibitions covered in the rule.

The ARB acknowledged that the *DeFrancesco* decision contained equivocal language that supported both positions. It expressly disavowed, however, language that suggested that the relevant unsafe conduct must be *identical*, and instead stated that a respondent may use evidence that it has applied a clearly-established company policy in a non-disparate manner in regard to discipline against employees who committed the *same or similar violations*. The ARB declined to set a bright line rule on comparators, and instead allowed that ALJs "have the flexibility to weigh the significance of comparators case-by-case, depending on the level of similarity or lack of similarity among the comparators." USDOL/OALJ Reporter at 5, quoting *Speegle v. Stone and Webster Constr. Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-6, slip op. at 11 n.66 (ARB Apr. 25, 2014)). The ARB stated that "[i]n any event, 'similarly situated' comparator employees must have enough in common to allow for a meaningful comparison." *Id.* In the instant case, the ARB found that substantial evidence supported the ALJ's factual findings, and the ARB affirmed the ALJ's affirmative defense determination.

SUMMARY DECISION ON RESPONDENT’S AFFIRMATIVE DEFENSE, WHICH HAS TO BE ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE IS PARTICULARLY CHALLENGING; EVEN WHERE A RESPONDENT ASSERTS A LEGITIMATE, NON-DISCRIMINATORY REASON FOR THE ADVERSE ACTION, SUMMARY DECISION IS DEFEATED WHERE THE COMPLAINANT POINTS TO FACTS OR EVIDENCE THAT COULD DISCREDIT THAT REASON

In *Stallard v. Norfolk Southern Railway Co.*, ARB No. 16-028, ALJ No. 2014-FRS-149 (ARB Sept. 29, 2017), the Complainant reported a back injury at work and received medical care. The Complainant’s personal physician accidentally checked a box in a follow-up examination stating that the injury occurred at home rather than on-duty. A claim agent noticed the discrepancy about where the injury occurred. A company physician was consulted, and after reviewing hospital records, concluded that there was no way of knowing whether the injury occurred at home or at work. In the meantime, the Complainant’s personal physician faxed in a correction to state that the injury occurred at work. This correction was not immediately reported through channels, and a charge letter was sent scheduling a hearing to determine whether the Complainant provided false statements to the Respondent. The Complainant’s supervisor was provided Facebook photographs indicating that the Complainant apparently had been physically active at a social event, and learned of a rumor that the Complainant had been working at a golf course. The hearing was postponed at the Complainant’s request. The personal physician resent his correction memo. Upon learning of the correction, the Respondent’s officials debated whether to cancel the hearing, but decided to keep it scheduled in the event that the rumors and suspicions about the severity of the Complainant’s injury could be confirmed. The hearing was canceled about a month later when the Complainant requested an indefinite postponement due to his medical treatment for the injury. The Complainant ultimately had back surgery and never returned to work. The Complainant filed an FRSA retaliation complaint with OSHA. OSHA dismissed the complaint. The Complainant requested an ALJ hearing. The ALJ granted summary decision in favor of the Respondent finding that the Respondent had established by clear and convincing evidence that the Complainant’s report of a work injury was not a contributing factor in the alleged adverse action. The ARB vacated the ALJ’s decision and remanded.

The ARB noted that a respondent’s burden of proof on this affirmative defense is to prove “by clear and convincing evidence” that it would have taken the adverse action in the absence of the injury. The ARB stated that this is an intentionally high burden because “Congress intended to be protective of plaintiff-employees.” Thus, resolving the issue of the Respondent’s affirmative defense by summary decision is “challenging.” The ARB stated such “a fact-intensive assessment ... requires a determination, on the record as a whole, how clear and convincing [the Respondent]’s lawful reasons were for scheduling and then cancelling a hearing into [the Complainant]’s injury. In analyzing the affirmative defense, it is not enough to confirm the rational basis of [the Respondent]’s employment policies and decisions. Instead, we must assess whether they are so powerful and clear that [the Respondent] would have charged [the Complainant] apart from the protected activity.” USDOL/OALJ Reporter at 14.

In the instant case, the Respondent contended that it presented undisputed facts consistent with the factors discussed by the ARB in *DeFrancesco II*, ARB No. 13-057, slip op. at 11-12, for determining whether a respondent has sufficiently demonstrated its affirmative defense in the context of a reported injury. The ARB observed, however, that it has ruled that “even where a respondent asserts legitimate, non-discriminatory reasons as part of its affirmative defense, a complainant can create a genuine issue of fact by pointing to specific facts or evidence that, if believed, could discredit the respondent’s reasons, making them less convincing on summary decision.” USDOL/OALJ Reporter at 14, quoting *Henderson*, ARB No. 11-013, slip op. at 15. The ARB found that in the instant case there were disputed facts on motivation that prevented summary decision on the affirmative defense. For example, the Complainant provided sufficient evidence to create an issue of fact that the Respondent’s conduct surrounding the charge letter suggested pretext designed to unearth some plausible basis on which to punish the Complainant for the injury report.

CLEAR AND CONVINCING EVIDENCE STANDARD; ALJ PROPERLY FOCUSED ON IMPETUOUSNESS OF RESPONDENT’S RESPONSE TO PROTECTED ACTIVITY

In *D’Hooge v. BNSF Railways*, ARB Nos. 15-042, -066, ALJ No. 2014-FRS-2 (ARB Apr. 25, 2017), the Complainant was long-term engineer for BNSF, and had a desirable route because of its pay schedule, regular hours, and infrequent weekend work. The Complainant developed neck and back pain, and complained several times of “rough riding” locomotives and rough track conditions. The Respondent’s Yardmaster had become frustrated with performance of the crew the Complainant worked with, and warned several times that the route would be abolished (i.e., the route would be filed from a general board or pool) if performance did not improve. On April 5, 2012, the Complainant reported (or “bad-ordered”) all three cars in a consist (a train of joined cars) as too rough. Bad-ordering required the cars to be sent for inspection. The Trainmaster jumped to the conclusion that the crew had bad-ordered the cars in bad faith because the crew did not want to finish their work and because it was highly unusual to report an entire consist. The Trainmaster took into consideration previous instances with the crew not finishing their work late in the shift which the Trainmaster thought should have been completed. Later that evening, after discussing the matter with the Superintendent of Operations, the Trainmaster abolished the route and decided to fill the work from a rotating off-the-board crew. The Trainmaster later testified before the ALJ that the failure to complete the work and his perception that the bad-ordering had been in bad faith were the straw that broke the camel’s back. The Trainmaster acknowledged that he had not followed company procedure when suspecting a fraudulent report, stating he thought abolishing the route would address the performance problem without potential disciplinary action. The Complainant filed an FRSA complaint alleging that the favorable route had been abolished because he had bad-ordered three locomotives. Following a hearing, the ALJ found that FRSA protected activity contributed to the Trainmaster’s decision and that he would not have abolished the route at that time if the Complainant had not reported the locomotives. The ALJ awarded \$906 in back pay and \$25,000 in punitive damages. The Respondent appealed the ALJ’s finding of a violation of the FRSA and the decision to award punitive damages. The Complainant appealed the ALJ’s attorney fee award, the ALJ having denied some expenses and reduced the award for only partial success. The ARB consolidated the appeals and affirmed the ALJ’s decision.

Clear and convincing evidence defense; ALJ correctly focused on Respondent's impetuous response to perceived bad faith of protected activity on day it occurred, even though there might have been other reasons for adverse action during the season or a more considered assessment

The ARB also affirmed the ALJ's finding that the Respondent did not prove by clear and convincing evidence that it would have taken the same action absent the Complainant's report of the locomotive bad-ordering. The ARB found that the ALJ properly focused on action taken the day of the protected activity, even though the route might have been altered or suspended during the summer months due to heat. The ARB acknowledged that a different conclusion might have been reached by the ALJ had the Trainmaster not acted so impetuously based on erroneous assumptions about the reason for the bad-order report. The ARB agreed with the ALJ that the Respondent could not show that it would have abolished the route the day of the protected activity in the absence of the Complainant's bad-ordering of the locomotives.

CLEAR AND CONVINCING EVIDENCE; WHISTLEBLOWER WHO ARGUES DISPARATE TREATMENT TO SHOW THAT AN EMPLOYER'S REASON FOR TERMINATION WAS PRETEXT, AND THUS NOT CLEAR-AND-CONVINCING EVIDENCE, MUST PROVE THAT SIMILARLY-SITUATED EMPLOYEES WERE TREATED MORE FAVORABLY

In [Smith v. BNSF Railway Co.](#), ARB No. 15-055, ALJ No. 2013-FRS-71 (ARB Apr. 11, 2017), the Complainant, a train engineer, was discharged after his second serious safety violation within a year. The Complainant filed a FRSA complaint alleging that the severity of the discipline was in retaliation for his report during a period in which the Complainant had been reassigned as a conductor of sleep apnea and complaints during a disciplinary hearing that the Respondent was responsible for his sleep apnea due to its lack of fatigue management and policy on rest periods. Following a hearing, the ALJ found that there was overwhelming evidence that, under the Respondent's practice and its written Policy for Employee Performance Accountability, the discharge was merited due to the Complainant's second serious safety violation within the probationary period of a prior serious violation, even absent any protected activity. On appeal, the Complainant contended that the Respondent's policy gave it the flexibility to impose a lesser penalty and that another comparable employee was treated differently. The ARB wrote:

A whistleblower who argues disparate treatment to show that an employer's reason for termination was pretext, and thus not clear-and-convincing evidence, must prove that similarly-situated employees were treated more favorably. To meet this requirement, the whistleblower must establish that employees involved in or accused of the same or similar conduct were disciplined differently. The critical factors are the nature of the offense and the degree of punishment imposed.

Slip op. at 5 (footnote omitted).

The Complainant had pointed to a fellow engineer who had received a 30-day suspension rather than a dismissal for committing a second serious violation. The ARB found that substantial

evidence supported the ALJ's finding that the fellow engineer was not an appropriate comparator. The ALJ found, inter alia, that unlike the Complainant, the fellow engineer's second violation had not occurred during the 12-month probationary period following the first violation. Also the ALJ found that the fellow engineer had worked longer than the Complainant and had no suspensions since 1994, while the Complainant had served two suspensions, one in 2004 and one in 2005, and also received a formal reprimand in 2002. The ALJ also found that evidence of other comparators convincingly showed that the Respondent had treated the Complainant under a consistently-applied serious-violation policy. The ARB also noted that other evidence of record that the ALJ had not explicitly cited supported the Respondent's clear and convincing evidence defense—specifically the testimony of a labor relations department director who had reviewed 150 to 2007 cases of employee dismissals, including the Complainant's case, and had recommended dismissal—and the testimony of a superintendent that the Complainant had returned to duty as an engineer after being treated for his sleep apnea and cleared for duty, and how there were no extenuating circumstances supporting a lesser penalty than discharge.

FILING OF INTERNAL CHARGE OF DISHONESTY WHERE FRSA COMPLAINT CONTAINED A FACTUAL ALLEGATION INCONSISTENT WITH THE COMPLAINANT'S STATEMENTS DURING INTERNAL INVESTIGATION; RESPONDENT'S AFFIRMATIVE DEFENSE THAT IT WOULD HAVE TAKEN THE SAME ACTION ABSENT PROTECTED ACTIVITY; COMPARATOR EVIDENCE FOUND INSUFFICIENT

In [*Raye v. Pan Am Railways, Inc.*](#), ARB No. 14-074, ALJ No. 2013-FRS-84 (ARB Sept. 8, 2016), the Complainant stumbled, but did not fall, after stepping off a boxcar onto some railroad ties, and consequently injured his left ankle. Three weeks earlier, the Complainant had reported these railroad ties as a hazard to his manager. The Respondent charged the Complainant with violation of a rule requiring employees to be assured of firm footing before they step down from a train. At the Respondent's investigatory hearing, the Complainant stated that he stumbled but did not fall. The Complainant received a reprimand, upon which the Complainant filed a FRSA complaint, drafted entirely by the Complainant's counsel, which was consistent with the Complainant's account, except that it stated that the Complainant "fell heavily to the ground." The Respondent concluded that the statement about a fall was a major discrepancy and charged the Complainant with providing false statements and acts of insubordination, hostility, or willful disregard of the Company's interests, sufficient as cause for dismissal. The Complainant then amended his FRSA complaint to allege that the Respondent discriminated against him for filing his FRSA complaint. The Respondent conducted an investigatory hearing on this new charge, but did not take any disciplinary action against the Complainant because it found the attorney had added the language in the FRSA complaint about a fall without the Complainant's approval.

OSHA found no violation with respect to the Complainant's reports of a safety hazard and workplace injury, but found reasonable cause to find that the Respondent retaliated for the filing of the FRSA complaint. The Respondent requested an ALJ hearing. The ALJ found that the Respondent violated FRSA.

On appeal to the ARB, the Respondent challenged whether substantial evidence supported the ALJ's finding that the Respondent failed to prove its affirmative defense by clear and convincing evidence that it would have taken the same action absent the protected activity.

Comparator evidence insufficiently corroborated and distinguishable; lack of credibility of need for second disciplinary hearing

The Respondent had contended that it had charged other employees in the past for dishonesty comparable to that alleged against the Complainant. The ALJ rejected this contention, noting the lack of corroborating evidence for meaningfully comparing the false statements involved in the two offered examples with the statements made by the Complainant. The ALJ further noted that the testimony of the two comparator employees was completely at odds to the evidence in those cases, while the Complainant's statement was mostly consistent. The ALJ found that the allegation in the FRSA complaint that the Complainant had fallen was a discrepancy that did not rise to the level of the false statements involved in the other two cases. The ALJ also distinguished the comparator cases on the ground that the false statements there were made in the process of the Respondent's internal disciplinary process, while here, the Respondent charged the Complainant with false statements made in a complaint filed with a federal agency that was, itself, FRSA-protected activity. After analyzing all relevant evidence, the ALJ rejected the Respondent's affirmative defense, concluding that "the only conceivable reason" for the internal charges about the statements in the FRSA complaint was "to intimidate the complainant and discourage [the Complainant] from engaging in protected activity."

The ARB affirmed the ALJ's determination as supported by substantial evidence, citing the very high burden a respondent bears on the affirmative defense stage of a FRSA case, and the thoroughness of the ALJ's examination of the evidence. The ARB stated that it was significant that the ALJ did not believe the Respondent's justification that the second disciplinary hearing was necessary to clarify how the injury occurred, given that the charging letter made no mention of a need to clarify the injury but only charged the Complainant with rule violations and subjected the Complainant to possible termination.

SUMMARY DECISION; AFFIRMATIVE DEFENSE; COMPLAINANT'S OWN TESTIMONY FOUND SUFFICIENT TO RAISE GENUINE ISSUE OF MATERIAL FACT WHERE IT WAS BASED ON HIS PERSONAL KNOWLEDGE OF WHAT AN ASSISTANT SUPERINTENDENT HAD SAID, AND WAS NOT MERELY SPECULATIVE OR CONCLUSORY

In *Brucker v. BNSF Railway Co.*, ARB No. 14-071, 2013-FRS-70 (ARB July 29, 2016), when the Complainant applied for employment in 1993, he checked the box stating "no" in response to the question, "Other than traffic violations, have you ever been convicted of a crime?" The form required applicants to acknowledge that false information would be grounds for dismissal at any time, when it was discovered, and that the Respondent had policies against withholding information and dishonesty. Nineteen years later, the Respondent discovered that the Complainant had been convicted of misdemeanor assault in 1985 and incarcerated for two years. After investigating, the Respondent eventually fired the Complainant. About two and a half years

earlier, the Complainant's attorney had informed the Respondent that he had been retained to represent the Complainant in a claim for work related injuries. The Complainant shortly thereafter filed an injury report. The Complainant testified that after he filed his injury report, his supervisors intensified their scrutiny of his work. The ALJ granted summary decision on the question of contributing factor causation, and alternatively on the Respondent's affirmative defense. The ARB found several factors that raised a genuine issue of material fact regarding the contributory causation element. It also found that the Complainant had raised a genuine issue of material fact on the affirmative "clear and convincing evidence" defense.

The ARB found that while the ALJ had provided a strong explanation for what the Respondent "could" have done, the ARB did not find clear and convincing evidence of what the Respondent "would" have done. The ARB found that the ALJ erred when he found irrelevant the Complainant's testimony that an Assistant Superintendent instructed him not to check the box because the Respondent was only concerned about felonies. The ARB found that such testimony, if believed, could reasonably support an inference that, in practice, the Respondent would not ordinarily dismiss employees would had prior misdemeanor convictions, or care whether they failed to disclose them. The ARB found that the Complainant's testimony on this point "was not speculative or conclusory, but was, in fact, based on his personal knowledge of his conversation with [the Assistant Superintendent], and is thus sufficient to create a genuine issue of material fact." USDOL/OALJ Reporter at 16 (footnote omitted). The ARB noted that the ALJ had not pointed to any evidence that the Respondent routinely fired employees under similar circumstances.

CLEAR AND CONVINCING STANDARD; "CLEAR" EVIDENCE REQUIRES AN UNAMBIGUOUS EXPLANATION FOR THE ADVERSE ACTION IN QUESTION; "CONVINCING" REQUIRES EVIDENCE DEMONSTRATING THAT A PROPOSED FACT IS HIGHLY PROBABLE; "CLEAR AND CONVINCING" REQUIRES THAT THE THING TO BE PROVIDED IS HIGHLY PROBABLE OR REASONABLY CERTAIN

CLEAR AND CONVINCING EVIDENCE ANALYSIS IN CASES INVOLVING INJURY REPORTS AND RELATED INVESTIGATIONS; ARB REJECTS ARGUMENT THAT ITS PRECEDENT NULLIFIED THE STATUTORY AFFIRMATIVE DEFENSE; RATHER, THE AFFIRMATIVE DEFENSE CAN BE ESTABLISHED BY "EXTRINSIC FACTORS"

In [*DeFrancesco v. Union Railroad Co.*](#), ARB No. 13-057, ALJ No. 2009-FRS-9 (ARB Sept. 30, 2015), the Complainant alleged that his employer violated the FRSA when it suspended him for 15 days after he reported a workplace slip-and-fall injury. The Complainant's supervisor had concluded that slippery conditions caused the fall and that no further investigation was necessary. Other company officials, however, concluded that the Complainant "failed to take short, deliberate steps at the time of the fall and that his injury history exhibited a pattern of unsafe behavior." The Complainant accepted a 15 day suspension in lieu of risking more severe discipline if he sought a disciplinary hearing.

In an initial appeal, the ARB reversed the ALJ's finding that the Complainant had not established contributing factor, the ARB holding that the evidence of record supported a finding of contributory factor as a matter of law. The ARB remanded for the ALJ to consider whether the Respondent could prove by clear and convincing evidence that it would have suspended Complainant even if he had not made the report. On remand, the ALJ found in favor of the Complainant.

ARB rejects contention that its caselaw nullified statutory defense

The ARB then explained why it rejected the Respondent's contention that that the Board's interpretation of the contributing-factor requirement effectively nullifies its statutory affirmative defense under 49 U.S.C.A. § 20109(d)(2)(A)(i). The ARB indicated that in this discussion it would address the phrase from the clear and convincing standard: "would have taken the same unfavorable personnel action in the absence of [the protected activity]."

- clear and convincing standard is meant to be tough

The ARB first observed that federal caselaw authority acknowledges that the clear-and-convincing standard is a purposely tough standard, and that the FRSA legislative history shows that Congress purposely incorporated that standard in the FRSA due to railroad employers' history of harassment and retaliation against employees who report injuries. The ARB stated:

As the ARB said in *Speegle v. Stone & Webster Construction*, the plain meaning of the clear-and-convincing phrase requires that the evidence must be "clear" as well as "convincing." "Clear" evidence means the employer has presented an unambiguous explanation for the adverse action(s) in question. "Convincing" evidence has been defined as evidence demonstrating that a proposed fact is "highly probable." Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain.

USDOL/OALJ Reporter at 7-8 (footnotes omitted).

- An employer can show that it learned of sanctionable conduct through means other than protected reporting activity, and by other extrinsic factors

In *DeFrancesco* the ARB had remanded for the ALJ to consider whether the Respondent could prove by clear and convincing evidence that it would have suspended Complainant even if he had not made the report. On remand, the ALJ interpreted the ARB's remand directive as eliminating any concern with the Respondent's purported reasons for suspending the Complainant, and requiring that focus exclusively on whether the Respondent could prove by clear and convincing evidence that it "would have known about Complainant's unsafe conduct without Complainant reporting the injury." USDOL/OALJ at 9 (quoting ALJ's decision). The ALJ found that because the Respondent could not show through clear and convincing evidence that it would otherwise have learned of the Complainant's conduct, it could not meet its burden of proof. The ARB rejected the ALJ's interpretation of ARB precedent.

The ARB stated:

Certainly evidence that an employer would have learned of an employee's misconduct through channels other than the employee's protected activity is relevant to an employer's affirmative defense. However, ARB precedent makes clear that learning of the employee's conduct through other means is neither the sole nor necessarily a decisive basis by which an employer may establish its statutory affirmative defense. Also relevant is the existence of extrinsic factors that the employer can clearly and convincingly prove would independently lead to the employer's decision to take the personnel action at issue.

USDOL/OALJ Reporter at 9 (footnote omitted).

- Employer's reason must be powerful and clear

The ARB again cited *Henderson v. Wheeling & Lake Erie RR*. In that case, the ARB held that analysis of the employer's affirmative defense should carefully assess the employer's asserted lawful reasons for its action, and that "[s]uch an assessment requires not only a determination of whether there exists a rational basis for the employer's decision, such as the existence of employment rules or policies supporting the decision, but also a determination of whether the basis for the employer's decision is 'so powerful and clear that [the personnel action] would have occurred apart from the protected activity.'" USDOL/OALJ Reporter at 10 (quoting *Henderson*). The ARB, however, noted that *Henderson*, stated that there "would be other factors weighing against the respondent meeting its statutory burden of proof such as evidence that the complainant suffered disparate treatment compared to other employees subject to the same company rules or policies cited in justification of the respondent's action, or evidence that those rules and policies were otherwise selectively enforced against the complaint." *Id.* (quoting *Henderson*).

- Right to report a workplace injury is a core protected right under the FRSA; to guard against pretext, careful examination must be made of whether there was a sufficient basis for the personnel action for reasons extrinsic to protected conduct

The ARB then indicated its agreement with OSHA's amicus brief's highlighting of OSHA's "strong interest in assuring that interpretation of the FRSA whistleblower protection provision strikes the legally appropriate balance 'between protecting employees from retaliation for reporting workplace injuries and enabling railroad employers to promote workplace safety through appropriate and effective enforcement of workplace safety rules' and 'between a worker's right and responsibility to report a workplace injury and the employer's ability to look into the circumstances surrounding a workplace injury with an eye toward creating a safer workplace.'" USDOL/OALJ Reporter at 10 (quoting amicus brief). The ARB continued:

An employee's right to report a workplace injury is, as the Solicitor noted [in OSHA's amicus brief], "a core protected right" under the FRSA that benefits not only the employee but also the railroad employer and the public. We agree with the Solicitor that if employees do not feel free to report injuries or illnesses without fear of incurring discipline, dangerous conditions will go unreported resulting in putting the employer's entire workforce as well as the general public potentially at risk. At the same time, the railroad employer must be able to

maintain and enforce legitimate workplace safety rules in order to eliminate or reduce workplace hazards and prevent injuries from occurring in the first place. Thus, assuring that employers are able to investigate reports of workplace injury for potential safety hazards must necessarily be balanced against the manipulation of such investigations as pretext for retaliation against employees who report workplace injuries.

(USDOL/OALJ Reporter at 10-11). The ARB thus indicated its agreement with OSHA's policy guidance that, to guard against pretext, there must be a careful examination of whether the employer had a sufficient basis for the personnel action for reasons extrinsic to the protected conduct. The ARB enumerated the minimum factors to consider:

- the employer's monitoring of its work rules in the absence of injury;
- the employer's imposition of equivalent discipline in the absence of injury;
- whether the work rule being enforced is routinely applied;
- whether the work rule being enforced is vague, thus being subject to manipulation;
- whether the work rule being enforced is a general safety rule applied by the employer in non-injury situations;
- whether the employer in conducting an investigation showed genuine concern in identifying safety problems, or used the investigation as a means to unearth a plausible basis to publish the complaint for the safety report.

The ARB summarized that the Respondent "was required to demonstrate through factors extrinsic to [the Complainant's] protected activity that the discipline to which [the Complainant] was subjected was applied consistently, within clearly-established company policy, and in a non-disparate manner consistent with discipline taken against employees who committed the same or similar violations but were not injured." USDOL/OALJ Reporter at 13-14. The ARB found that the Respondent had failed to do so in this case.

[*Editor's note:* The two judge majority in *DeFrancesco* was Judge Brown and Judge Royce. Judge Igasaki concurred only in the result of the case without explanation or elaboration.]

CLEAR AND CONVINCING EVIDENCE; RESPONDENT MET ITS HEAVY BURDEN OF PROOF WHERE IT PRESENTED EVIDENCE THAT EMPLOYEES WHO ENGAGED IN SERIOUS SAFETY VIOLATIONS SIMILAR TO THAT OF THE COMPLAINANT, AND WHO HAD CHOSEN THE SAME DISCIPLINARY PROCEDURE AS HAD THE COMPLAINANT, WERE GIVEN THE SAME DISCIPLINE OF A SUSPENSION AND PROBATION

CLEAR AND CONVINCING EVIDENCE; WHERE RESPONDENT TERMINATED THE COMPLAINANT'S EMPLOYMENT FOR VIOLATION OF A PROBATIONARY

PERIOD, BUT THE "VIOLATION" WOULD NOT HAVE OCCURRED BUT FOR THE COMPLAINANT'S REPORTING OF AN INJURY, RESPONDENT FAILED TO MEET CLEAR AND CONVINCING EVIDENCE BURDEN OF PROOF

In *Cain v. BNSF Railway Co.*, ARB No. 13-006, ALJ No. 2012-FRS-19 (ARB Sept. 18, 2014), the Complainant was involved a truck accident and filled out a standard injury report for a skinned knuckle and a bruised knee. A few weeks later, the Complainant learned that the seatbelt had caused further, more serious injuries. That same day he filed an amended injury report, despite being discouraged to do so by the Respondent. Following an investigation of the accident by the Respondent, the Complainant was suspended and placed on probation for a violation of safety rules. Later, the Respondent concluded that the Complainant had violated a reporting rule by failing to report the extent of his injuries in a prompt manner, and notified the Complainant he was dismissed from employment. The Complainant then filed an FRSA complaint. The ALJ found that the Respondent violated the FRSA, and the Respondent appealed.

The Respondent had stipulated that the first injury report was protected activity but challenged the ALJ's finding that the amended reported was also protected. The ARB found, however, that substantial evidence supported the ALJ's finding that the reports and the investigations were intertwined, and the ALJ's rejection of the Respondent's contention that the second report was not made in good faith. The ARB also affirmed the ALJ's findings that protected activity contributed to both the investigation that led to suspension and imposition of probation, and the charge of failure to file a timely report which led to the Complainant's termination from employment.

In regard to the Respondent's clear and convincing evidence burden, the ARB noted that this is a high burden of proof, and that the Respondent is required to provide not what "could have" done, but rather what it "would have" done. The ARB stated

As we do not superimpose our opinion on the conclusions of a company's personnel office, our role is not to question whether the employer's decision to suspend Cain was wise or based on sufficient "cause" under BNSF personnel policies, but only whether all the evidence taken as a whole makes it "highly probable" that BNSF "would have" suspended Cain for 30 days absent the protected activity.

USDOL/OALJ Reporter at 7.

In regard to the suspension and probation, the ARB disagreed with the ALJ's conclusion that a list entered into evidence by the Respondent of employees who had been disciplined for safety violations only established that lesser suspensions or a waiver had been issued for the same or similar conduct. The ARB parsed the list and found that of the nine employees charged with a serious violation and who chose (as had the Complainant) not to pursue alternate handling, eight had been suspended and subjected to 1 to 3 year probations. Only one employee had been given a waiver. The ARB concluded that employees who chose the same disciplinary path as the Complainant, and who were also charged with a serious violation, received the same discipline as the Complainant. The ARB thus found that the Respondent met its burden of proof in regard to the suspension.

In regard to the termination, the ARB found that the evidence showed that the Respondent terminated the employment in part based on the Complainant's violation during a probationary period. The ARB found, however, that "this 'violation' would not have occurred in the absence of the April 8 report and BNSF does not offer an alternative reason that is not connected to the April 8 report for Cain's dismissal. As there is no allegation that BNSF would have terminated Cain's employment absent his filing the report on April 8, 2010, we affirm the ALJ's determination that Respondent failed to establish by clear and convincing evidence that the decision to terminate Cain's employment was not related to the protected activity." USDOL/OALJ Reporter at 9 (footnote omitted).

CONTRIBUTING FACTOR ANALYSIS; CHAIN OF EVENTS MAY SUBSTANTIATE CLEAR AND CONVINCING EVIDENCE ANALYSIS

In *Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, ALJ No. 2010-FRS-20 (ARB May 31, 2013), the Complainant worked for the Respondent as a brakeman and switchman. He reported a work-related injury, and was referred to the company's Vocational Rehabilitation Program (VRP). After the Complainant found a new job as a dispatcher trainee with a different railroad, but before he started work at that new job, the Respondent notified the Complainant that it could accommodate his medical restrictions on an engineer position. To qualify the Complainant was told that he needed to take some classes and pass a set of exams. The Complainant did not commit to the exams because he believed that the exams were voluntary under the company's return to work program, he was already involved in the VRP program, and he knew that he lacked the necessary seniority to obtain an engineer position. The Complainant was then directed to take the exams because he could work as an engineer at some future date. The Complainant was also told to resign because he had accepted another position. The Complainant emailed back that he would not be able to attend the classes because of his work obligations, and complained that he had only one day notice of an exam. The Respondent investigated the failure to take the exam, and the local union requested a postponement of the hearing because the Complainant was out of the state and would not return until the next month. The Respondent then sent a notice that it was disciplining the Complainant for missing the exam, followed by second notice that it was terminating his employment for failure to attend the investigation hearing.

The Complainant filed an FRSA complaint. After a hearing, the ALJ dismissed the case because he found that the Complainant's injury report was not a contributing factor in the Respondent's decision to terminate his employment. The ALJ ruled that the Complainant's "chain of events" argument could not sustain a finding of contributing factor under the FRSA. The ALJ observed the lack of animosity against the Complainant for reporting his injury, found that under the CBA failure to attend a hearing was grounds for termination, and that such a termination was the Respondent's prerogative.

Affirmative Defense - Clear and Convincing Evidence Standard

The ARB remanded for the ALJ to consider the affirmative defense of proving by clear and convincing evidence that it would have terminated the Complainant absent his protected activity. The ARB instructed:

A respondent's burden to prove the affirmative defense under FRSA is purposely a high one. ...FRSA whistleblower cases are governed by the legal burdens set out in AIR 21, 49 U.S.C.A. § 42121(b). The AIR-21 burdens of proof were modeled after the burdens of proof provisions of the 1992 amendments to the Energy Reorganization Act, 42 U.S.C.A. § 5851.40 Congress intentionally drafted the burdens of proof contained in the 1992 ERA amendments - the same as those now contained in FRSA - to provide complainants a lower hurdle to clear than the bar set by other employment statutes: "Congress desired to make it easier for whistleblowers to prevail in their discrimination suits" In addition to *lowering* a complainant's burden, Congress also *raised* the respondent's burden of proof - once an employee demonstrates that protected activity was a contributing factor, the burden is on the employer to prove by clear and convincing evidence that it would have taken the same action absent the employee's protected activity.

USDOL/OALJ Reporter at 13 (footnotes omitted).

Concurring Opinion

One member of the ARB agreed to the remand only because he believed that clarification from the ALJ was needed before a causation finding could be made by the ARB. The concurring member wrote:

Lastly, I appreciate but disagree with the majority's characterization of the burden of proof on remand, essentially repeating the standard stated in *DeFrancesco*. The majority requires the Respondent to prove that it would have disciplined Hutton "even if he had not reported his injury." The *DeFrancesco* standard may be an impossible standard in cases like this one unless a respondent could travel back in time and change history. Moreover, without more careful analysis, it is not clear to me whether Congress intended the *DeFrancesco* standard in the FRSA whistleblower statute. While resembling other whistleblower statutes, FRSA has the unique aspect of protecting employees who report injuries but then the employees and employers necessarily interact often for days, months, or even years to work through medical care issues and work accommodations in addressing the injury. Nevertheless, I reserve further comment because this issue is not ripe. In my view, on remand, the ALJ and the parties may fully address the burden of proof required in FRSA cases like this one. If an appeal is filed, the Board can address this issue at that time.

USDOL/OALJ Reporter at 15-16 (footnotes omitted).

CLEAR AND CONVINCING STANDARD OF PROOF IN FRSA SECTION 20109(c) REQUEST FOR MEDICAL CARE CASES; BECAUSE AIR21 CLEAR AND CONVINCING STANDARD CANNOT BE APPLIED LITERALLY, ARB CRAFTS INTERPRETATION REQUIRING SHOWING THAT THE RESULT WOULD HAVE BEEN THE SAME ABSENT THE RESPONDENT'S INTERFERENCE WITH THE CARE

In *Santiago v. Metro-North Commuter Railroad Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-11 (ARB July 25, 2012), the Complainant alleged that the Respondent violated the Federal Rail Safety Act of 1982 (FRSA), 49 U.S.C. § 20109, when it reclassified his back injury as non-occupational and ceased paying for medical treatment. Because the ARB remanded the case, it found it expedient to clarify the employer's "clear and convincing evidence" burden of proof, given the difficult analytical connection between the language of FRSA section 20109(c) cases and Congress' decision to link FRSA whistleblower cases to the AIR21 burdens of proof. Finding it impossible to literally apply AIR 21 burdens to an employer's interference with the request for care, the ARB found it necessary to craft a reasonable interpretation of congressional intent. The ARB thus held that the carrier is required to

...prove by clear and convincing evidence that the result would have been the same with or without the railroad carrier's interference (if the employee first proves that the railroad carrier or other covered person interfered). This does not require that the ALJ weigh medical evidence and actually decide the issue of medical causation or reasonableness one way or the other. Instead, as in other discrimination cases, the ALJ must look at all the direct and circumstantial evidence, as a whole, to determine whether the [r]espondent clearly and convincingly proved that the outcome would have been the same without [the respondent's] alleged interference.

USDOL/OALJ Reporter at 18-19.

CLEAR AND CONVINCING EVIDENCE STANDARD

In *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-9 (ARB Feb. 29, 2012), the ARB held that where the Respondent reviewed the complainant's discipline and injury history after the complainant reported a work-related personal injury, the report of injury was a contributing factor to the suspension as a matter of law. Because the ALJ had not reached the issue of whether the Respondent showed by clear and convincing evidence that it would have suspended the Complainant absent the protected activity, the ARB remanded the case. The ARB wrote:

The burden of proof under the clear-and-convincing standard is more rigorous than the preponderance-of-the-evidence standard. Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain. Clear and convincing evidence that an employer would have disciplined the employee in the absence of the protected activity

overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability.

DeFrancesco, ARB No. 10-114, USDOL/OALJ Reporter at 8 (footnotes omitted).

CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT WOULD HAVE ELIMINATED THE COMPLAINANT'S POSITION EVEN IN THE ABSENCE OF PROTECTED ACTIVITY; EVIDENCE OF COST-CUTTING PROGRAM

In *Wignall v. Union Pacific Railroad Co.*, ARB No. 10-103, ALJ No. 2009-FRS-5 (ARB Feb. 22, 2012), the ARB found that substantial evidence supported the ALJ's finding that the Respondent established by clear and convincing evidence that it would have abolished the Complainant's welder position even absent any protected activity where the Respondent had implemented a cost-cutting program called Project 75. In this regard, the Complainant's supervisor had consulted with the Director of Track Maintenance for the service unit and obtained permission to abolish a welder and add a welder helper to make the gang consistent with the rest of the two-man welding gangs on the maintenance side of the service unit. The supervisor had also consulted with the Director prior to abolishing various other operator positions, and had made other cost cutting measures during the same period of time. The supervisor estimated that the Respondent saved tens of thousands of dollars from these initiatives, including the elimination of the Complainant's job and the other section jobs.

The Superintendent of the service unit testified to an instance where an arc welder position in the service unit was abolished "only five days after it was filled, replacing the welder with a welder helper." The arc welder position was changed to a welder helper after the Superintendent reviewed all manning on welding gangs across the service unit and identified specific jobs for elimination for cost savings purposes. The Superintendent also learned that some three-man gangs had two welders and one welder helper, and requested that they be changed to one welder with two welder helpers for cost savings. The Superintendent testified that the cost-saving measure affected some management level employees, who either lost their jobs or were reassigned, and that there was a reduction pool made in an effort to give people whose jobs were being cut an opportunity to look for other employment with the Respondent. The Complainant appeared to agree that a welder on a two-person welder gang could be effectively replaced by a welder helper, and stated at the hearing that the welder helper could be paid approximately \$2.83 per hour less than a welder.

XII. 20109(c)(1) CASES: PROHIBITION OF INTERFERENCE WITH TREATMENT

Statute

49 U.S.C. § 20109

(c) Prompt medical attention.

(1) Prohibition. A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

Regulations

[The regulations at 29 C.F.R. § 1982.102(b) follow the language of the statute in this section.]

U.S. Circuit Court of Appeals Decisions

MEDICAL INTERFERENCE PROHIBITION; SECOND CIRCUIT FINDS CHALLENGE TO DEPARTMENT OF LABOR'S JURISDICTION OVER MEDICAL INTERFERENCE CLAIMS WAIVED WHEN RAISED FOR THE FIRST TIME ON APPEAL

MEDICAL INTERFERENCE PROHIBITION; SECOND CIRCUIT QUESTIONS ARB'S LEGAL ANALYSES OF SECTION 20109(C)(1) CLAIMS OF MEDICAL INTERFERENCE AND SUGGESTS ARB REVISIT ITS HOLDING, BUT FINDS IT DOES NOT NEED TO DECIDE THE PROPER ANALYSIS IN THE CASE PRESENTED

MEDICAL INTERFERENCE PROHIBITION; SECOND CIRCUIT VACATES FINDING OF MEDICAL INTERFERENCE WHEN FINDING THAT THE RAILROAD INSERTED ITSELF INTO THE MEDICAL TREATMENT AND INFLUENCED DECISIONS WAS NOT BASED ON AFFIRMATIVE EVIDENCE OF ACTUAL INTERFERENCE AND RESTED ONLY ON POTENTIAL WAYS THE RAILROAD COULD HAVE INTERFERED

Metro-North Commuter R.R. Co. v. USDOL [Santiago], 886 F.3d 97, No. 15-2551 (2d Cir. Mar. 23, 2018) (2018 U.S. App. LEXIS 7319; 2018 WL 1439593) (Opinion):

Complainant injured his back when he fell from a broken chair. Tit was determined to be occupational and treatment was provided. Several months later a physician's assistant at the Employer's Occupational Health Service, which was operated and staffed by a contractor, found

that the injury had resolved. Treatment was then ended. While the health service was operated by a contractor, the Employer retained significant control in that it could terminate the contract and exercise some control over staffing. Complainant filed a complaint under § 20109(c)(1) alleging that the Respondent had delayed, denied, or interfered with his treatment for a work-related injury because a manipulation under anesthesia was delayed. After a remand from the ARB, an ALJ found for Complainant. This was affirmed by the ARB and then appealed to the Second Circuit.

The panel started by commenting on the ARB's construction of the burdens of proof under § 20109(c)(1), which functions as a prohibition on denial, delay, or interference with treatment of a work-related injury. It is not a standard whistleblower provisions and so the ARB has adjusted the showings. The protected activity is the injury report and the adverse action is the denial, delay, or interference with treatment. To make out a *prima facie* case, a complainant must show that the railroad inserted itself into the medical treatment and that this in some way caused a denial, delay, or interference in care. The affirmative defense is a showing that the result would have been the same without the interference in that, here at least, any reasonable doctor would have made the same decision about coverage of the injury.

The panel observed that both the burden shifting scheme in the FRSA and the provision providing for an administrative cause of action in § 20109(d) were awkward as applied to § 20109(c)(1). But the panel then held that the jurisdictional challenge to DOL's authority to hear complaints under § 20109(c)(1) had been waived because it was raised for the first time on appeal. And the panel determined that it did not need to reach the propriety of the ARB's reconstruction of how the § 20109(c)(1) analysis was supposed to proceed. At the same time it suggested that the ARB reconsider its interpretation considering the structure and purpose of the relevant sections in ensuring prompt provision of medical care. It also pointed out that it was unexplained why the provision in question led to the conclusion that a railroad had to stay completely out of the way of medical treatment and might then refrain from having medical offices that might ensnare them in interference claims.

Rather, the Second Circuit held that even if the ARB interpretation was correct, the underlying decision was not supported by substantial evidence. The deficiency was in the conclusion that the decision of the medical doctor was not truly independent because the railroad had inserted itself into the process. The decision rested on a conclusion that the structure of the arrangement created indirect pressure on the providers, but there was no evidence that these factors affected the independent judgment of the medical staff in this case. There was no evidence that there had been any threats from the railroad to use its contractual powers, that it had interfered in staffing, or that it had set goals for occupational injury determinations. It had the potential to interfere, but that wasn't sufficient—there needed to be evidence that it did interfere. As to the other aspect of the underlying reasoning, the record provided evidence that the decision by the staff may have been incorrect, but this didn't license an inference that there was interference by the railroad—it could just have well been due to incompetence, laziness, or simple mistake. There was no affirmative evidence that undermined their claims of independence. The court thus granted the petition for review, vacated the decision, and remanded for further proceedings.

SECTION 20109(C)(1); SUMMARY JUDGMENT; SECTION 20109(C)(1) ONLY APPLIES WHERE THERE WAS AN INJURY SO COURT DENIES SUMMARY JUDGMENT WHERE FACT OF INJURY, AS WELL AS FACTS ABOUT THE REQUESTS FOR TREATMENT, REMAIN IN DISPUTE

Armstrong v. BNSF Ry. Co., 128 F.Supp. 3d 1079, No. 12-cv-7962 (N.D. Ill. Sept. 4, 2015) (2015 U.S. Dist. LEXIS 118224; 2015 WL 5180589): Plaintiff was called to the “glasshouse” area of a station where he and his supervisor had a dispute over his uniform. Plaintiff alleged that his supervisor assaulted him, injuring his left foot and left knee. He alleged FRSA violations for delays in providing medical care and retaliation, by termination, for filing an injury report. Both parties moved for summary decision and the court denied both motions.

The parties disputed what happened between Plaintiff and his supervisor and in particular whether the supervisor had slammed the door on the Plaintiff’s foot and knee. There was video with a partial view of the relevant area, but it did not capture the full sequence because the manager was out of view. Plaintiff had been taken for medical treatment after his request, but not immediately and not to the closest facility. After an investigation and hearing regarding the incident, the railroad had terminated Plaintiff for insubordination in not remaining in the “glasshouse” as instructed and for dishonesty in reporting the incident and in the injury report.

As to the inference with medical treatment claim under Section 20109(c)(1), the court denied Plaintiff’s motion for summary judgment. It first concluded that the claim had been adequately pled. Summary judgment couldn’t be granted because a prerequisite to the protections is an actual injury, and that was a question open for the jury. There were additional disputes about how and when Plaintiff requested treatment.

INTERFERENCE WITH TREATMENT PLAN CLAIM; SUMMARY JUDGMENT; COURT GRANTS SUMMARY JUDGMENT TO RAILROAD ON TREATMENT PLAN COMPLAINT WHERE THE RELEVANT TREATMENT PLAN POST-DATED THE ABSENCES IN QUESTION

Loos v. BNSF Ry. Co., No. 13-cv-03373, 2015 U.S. Dist. LEXIS 84663, 2015 WL 3970169 (D. Minn. June 30, 2015) (not reported): Defendant terminated the Plaintiff after 15 years of work as a conductor, brakeman, and switchman. During the employment, “his history with the company was marked by three relevant circumstances: his attendance record, his safety efforts, and his workplace injury.” Plaintiff filed suit under the whistleblower protection provisions of the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109. Slip op. at 1. The court observed that throughout his time with the company, the Plaintiff struggled to comply with BNSF’s attendance policy, which had resulted in reprimands, a suspension, and “alternative handling.” Plaintiff was counseled and told that continued persistent failure to work full-time hours would be a violation of the attendance policy. The problems continued, leading to further discipline involving alternative handling, counseling, reprimands, and suspensions. *Id.* at 2-4. The Plaintiff also engaged in efforts to

improve safety at BNSF, including an 8-12 month stint on the site safety committee in 2007-08. In addition, he testified on behalf of co-workers at an FRSA trial. *Id.* at 4-5. The Plaintiff reported a work-related injury in December 2010 after he twisted his right knee falling onto a drainage gate that had been covered with snow. He was off work through May 2011, when he was released without restrictions. *Id.* at 5.

Plaintiff was discharged after further attendance violations between May and July 2012. During that period, he had requested permission to code the absences as related to his 2010 injury on duty, which would have excused them, but this was denied because the only medical documentation offered was the May 2011 note releasing him to duty. *Id.* at 5-6. An investigation was noticed in August 2012 and conducted in November 2012. At the investigation, the Plaintiff produced a new note from earlier in November stating that due to his work-related injury he would have to periodically miss work, retroactive to the period in question. After the investigation, BNSF terminated Plaintiff for violations of the attendance policy while on probation. *Id.* at 6-7.

Plaintiff brought suit under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, alleging that BNSF was negligent in creating the conditions causing the December 2010 injury, and the FRSA, alleging that he had been disciplined for reporting a work-related injury, making safety complaints, serving on the safety committee, testifying in other FRSA proceedings, and following his doctor's treatment plans. BNSF moved for summary judgment on the FRSA claim and the FELA claim insofar as it arose after his discharge. *Id.* at 7.

The court found that the treatment plan claim had to fail because the doctor's note that authorized the absences post-dated those absences, so the Plaintiff could not have been following a treatment plan when he missed work in the summer of 2012. At that time, the contemporary treatment plan released him to work without restrictions. *Id.* at 13, *see also id.* at 11. The Plaintiff had "presented no evidence showing that his alleged protected activities were contributing factors in his discharge," so summary judgment was appropriate in favor of BNSF on that claim. *Id.* at 13-14.

DOL Administrative Review Board Decisions

DENIAL, DELAY, OR INTERFERENCE WITH MEDICAL TREATMENT

Santiago v. Metro-North Commuter Railroad Co., Inc., ARB No. 13-062, ALJ No. 2009-FRS-11 (ARB June 18, 2018): The ARB vacated its Final Decision and Order of June 12, 2015 and dismissed the Complainant's FRSA complaint based on the Second Circuit's decision in *Metro-North Commuter R.R. Co. v. United States Dep't of Labor*, 886 F.3d 97 (2d Cir. Mar. 23, 2018). In *Metro-North*, the ARB had affirmed the ALJ's determination that the Respondent denied, delayed, or interfered with the Complainant's medical treatment for a back injury. The Second

Circuit, however, concluded that the ALJ's determination was not supported by substantial evidence.

“CLEAR AND CONVINCING” IN MEDICAL INTERFERENCE CASE REQUIRES SHOWING THAT THE RESULT WOULD HAVE BEEN THE SAME WITHOUT THE RESPONDENT’S INTERFERENCE WITH THE MEDICAL TREATMENT

AFFIRMATIVE DEFENSE IN MEDICAL INTERFERENCE CASE REQUIRES RESPONDENT TO SHOW HIGH PROBABILITY THAT RESULT WOULD HAVE BEEN SAME BUT FOR RESPONDENT’S INTERFERENCE; OPINION OF ADDITIONAL MEDICAL AUTHORITY IS A FACTOR

INTERFERENCE WITH MEDICAL TREATMENT CASES DO NOT NECESSARILY REQUIRE RESPONDENT TO PAY FOR ALL TREATMENT PROVIDED BY MEDICAL PROVIDER

WHERE MEDICAL TREATMENT OPINIONS PROVIDED BY RESPONDENT CONTRACTOR ARE NOT ENTIRELY INDEPENDENT, BUT SUBJECT TO INFLUENCE BY RESPONDENT, INCLUDING ABILITY TO HIRE AND FIRE CONTRACTOR’S EMPLOYEES, RESPONDENT’S ARGUMENT AS TO LACK OF INTERFERENCE FAILS

FAILURE OF PHYSICIAN ASSISTANT, CONTRARY TO MEDICAL PROVIDER’S PROCEDURES, TO EVEN CONSULT WITH COMPLAINANT’S TREATING PHYSICIANS, IS EVIDENCE OF RESPONDENT’S INTERFERENCE WITH MEDICAL TREATMENT

In [*Santiago v. Metro-North Commuter Railroad Co., Inc.*](#), ARB No. 13-062, ALJ No. 2009-FRS-11 (ARB June 12, 2015), the Complainant filed a complaint alleging that the Respondent violated the FRSA when it reclassified his back injury as non-occupational and ceased paying for medical treatment. The ALJ dismissed the complaint, but the ARB remanded for further proceedings because the ALJ erroneously limited FRSA's protection under 49 U.S.C.A. § 20109(c)(1) to medical treatment immediately following a work injury rather than all medical treatment connected to a work injury. On remand, the ALJ was to determine whether the Respondent violated § 20109(c)(1) with respect to any medical treatment connected to the Complainant's work injury. On remand, the ALJ found that the reclassification interfered with the Complainant's medical treatment under § 20109(c)(1), and that the Respondent did not prove its affirmative defense that the reclassification would have been the same “without the railroad carrier's interference.” The ARB summarily affirmed the ALJ's decision on remand, except as to one evidentiary issue.

The ARB conceded that its remand order's condensed discussion of evidentiary issues that could arise under the affirmative defense misled to the ALJ into concluding that the ARB had predetermined as irrelevant any medical evidence related to the issue of medical reasonableness and consequently denying the Respondent's request to offer medical expert testimony on the question of medical reasonableness. The ARB also noted that the Respondent had misunderstood

the ARB to pronounce that the testimony of “any reasonable doctor” only meant that testimony from “another reasonable doctor” would constitute clear and convincing evidence of what would have occurred without the Respondent's interference.

The ARB stated that the most critical point of the remand order was that the ALJ must look at all the direct and circumstantial evidence, as a whole, to determine whether the Respondent met its burden to prove its affirmative defense. Specifically, the Respondent was required to prove by clear and convincing evidence that the result would have been the same without the Respondent's interference with the medical treatment. The ARB explained:

To determine what might have occurred, the ultimate question is whether Metro-North's evidence is so strong that it was highly probable that a reasonable doctor acting independently, without Metro-North's involvement, would have determined that the Manipulation Under Anesthesia (MUA) treatment (by Dr. Hildebrand) was medically unreasonable. The ultimate question is not whether the MUA was medically reasonable treatment; it is only a factor that could be considered. This is what the ARB stated it meant when it said the ALJ did not necessarily need to get bogged down in *specifically* deciding, like an insurance carrier or insurance review board, whether the treatment should have been provided and paid for.

Independent medical opinions about “reasonably necessary” treatment could provide circumstantial evidence of what would have occurred without Metro-North's involvement. Such testimony could bolster Dr. Hildebrand's decision and, depending on the evidence, possibly demonstrate why the same outcome was highly probable without Metro-North's involvement. The ARB did not intend to predetermine that additional medical testimony as to medical reasonableness was per se irrelevant, but only meant to emphasize that it was only a factor to consider in analyzing what the outcome might have been. It seems the ALJ excluded Metro-North's additional medical testimony because she understood the remand order to say it was per se irrelevant; that ruling was an abuse of discretion and therefore erroneous. But, rather, as discussed below, it was harmless error in this case.

Metro-North's offer of proof demonstrates that its proffered evidence would show only that the issue of medical reasonableness was debatable. Showing that “any” reasonable doctor out of a pool of doctors would have led to the same conclusion (the treatment was medically unreasonable) could have weighed heavily in Metro-North's favor. But Metro-North offered to show only that another doctor agreed with Metro-North and disagreed with Dr. Thomas Drag. What “another doctor” might testify is not the same as showing that “any doctor” would agree with Dr. Lynne Hildebrand. This does not mean that every reasonable doctor has to testify, but certainly stronger evidence is needed in this case beyond competing medical opinions.

In this case, the ALJ ruled that Dr. Hildebrand's opinion “flies in the face” of the medical evidence in the record and substantial evidence supports her findings. Plus, the medical treatment actually worked. Metro-North's proffered testimony,

if believed, may have generated a debatable point as to medical reasonableness, but it was not persuasive to the ARB that it had the potential of satisfying Metro-North's "clear and convincing" burden of proof. "Debatable" falls below the "clear and convincing" burden of proof.

USDOL/OALJ Reporter at 3-4.

The Respondent also argued that under the ARB's view of the section 20109(c), "a railroad would be required to pay for all treatment recommended by any health care provider for any procedure, thus creating potentially limitless liability for the railroad." The ARB found that "[t]his exaggerates and misstates the Board's ruling and ignores the ALJ's finding based on the specific facts in this case that Metro-North interfered with Santiago's medical treatment." Rather, the ARB found that the ALJ had carefully explained why she found that the Respondent's Occupational Health Services (OHS) department was not entirely independent, and that the Respondent influenced to some degree the medical decisions. The ALJ had found the Respondent's "power to end the contract with OHS and hire and fire medical personnel at will created a powerful influence over the medical facility." The ARB stated that had the Respondent sent injured employees to a health care service completely independently of its influence, then the Respondent would have had a basis to argue that it did not interfere with medical treatment. The ARB also stated that the Respondent had missed the significance of the phrase "contributing factor" in the FRSA. The ARB reiterated that Congress has made it clear that it wants railroad companies to completely stop interfering with the railroad worker's ability to seek proper medical treatment for work injuries.

FRSA SECTION 20109(c)(1) PROHIBITS A RAILROAD FROM DENYING, DELAYING, OR INTERFERING WITH AN EMPLOYEE'S MEDICAL TREATMENT THROUGHOUT THE PERIOD OF TREATMENT AND RECOVERY FROM A WORK INJURY

In *Santiago v. Metro-North Commuter Railroad Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-11 (ARB July 25, 2012), the Complainant alleged that the Respondent violated the Federal Rail Safety Act of 1982 (FRSA), 49 U.S.C. § 20109, when it reclassified his back injury as non-occupational and ceased paying for medical treatment. The ALJ concluded that FRSA § 20109(c)(1)'s prohibition on a railroad on delaying, or interfering with an employee's medical treatment applies only to the temporal period surrounding the injury, and therefore the Respondent in the instant case did not violate the FRSA because it had approved and paid for the prescribed treatment for eight weeks. On appeal the ARB acknowledged that the ALJ had made a thoughtful and comprehensive analysis of the difficult issues presented, but respectfully disagreed with her conclusion. Employing rules of statutory construction, the ARB held that "subsection 20109(c)(1) bars a railroad from denying, delaying, or interfering with an employee's medical treatment throughout the period of treatment and recovery from a work injury." Moreover, although the clear language of the statute made it unnecessary to refer to the legislative history, the ARB found that the history supported a broad interpretation of the law.

The ARB also addressed the meaning of "deny, delay or interfere," and found:

These are prohibitive words simply meaning to impede, slow down, or prevent medical treatment from moving forward or occurring. An act that causes medical treatment to be rescheduled necessarily means that the treatment was delayed. Any obstacle placed in the way of treatment necessarily results in interference. Denial means to refuse or reject a request for medical care. This subsection of the statute simply focuses on whether the railroad carrier interfered with medical treatment and thereby engaged in adverse action. ...[I]ssues pertaining to the reasonableness or necessity of the treating physician's treatment plan may be a factor in the railroad's attempt to establish an affirmative defense under section 20109(c), but not a factor in the employee's attempt to prove that the railroad interfered with medical treatment.

USDOL/OALJ Reporter at 16 (footnote omitted).

The ARB held that a railroad does not have an affirmative duty under the FRSA whistleblower statute to provide medical care, but only a duty to transport the employee to a hospital and not interfere with medical care or treatment. The ARB held, however, that where the railroad agrees to pay for medical treatment for work injuries, it cannot insert itself into the process and influence the level of care provided.

The ARB summarized: "[T]o prove that a railroad carrier violated subsection 20109(c)(1), an employee needs to prove that (1) the carrier inserted itself into the medical treatment and (2) such act caused a denial, delay, or interference with medical treatment." USDOL/OALJ Reporter at 17.

The ARB rejected the Respondent's argument on appeal that permitting subsection 20109(c)(1) to apply beyond the immediate period of injury would eviscerate the Federal Employers' Liability Act, finding that although there can be overlapping remedies, a railroad's defense against a FELA claim is separate from those addressed in a FRSA whistleblower claim.

CLEAR AND CONVINCING STANDARD OF PROOF IN FRSA SECTION 20109(c) REQUEST FOR MEDICAL CARE CASES; BECAUSE AIR21 CLEAR AND CONVINCING STANDARD CANNOT BE APPLIED LITERALLY, ARB CRAFTS INTERPRETATION REQUIRING SHOWING THAT THE RESULT WOULD HAVE BEEN THE SAME ABSENT THE RESPONDENT'S INTERFERENCE WITH THE CARE

In *Santiago v. Metro-North Commuter Railroad Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-11 (ARB July 25, 2012), the Complainant alleged that the Respondent violated the Federal Rail Safety Act of 1982 (FRSA), 49 U.S.C. § 20109, when it reclassified his back injury as non-occupational and ceased paying for medical treatment. Because the ARB remanded the case, it found it expedient to clarify the employer's "clear and convincing evidence" burden of proof, given the difficult analytical connection between the language of FRSA section 20109(c) cases and Congress' decision to link FRSA whistleblower cases to the AIR21 burdens of proof. Finding it impossible to literally apply AIR 21 burdens to an employer's interference with the

request for care, the ARB found it necessary to craft a reasonable interpretation of congressional intent. The ARB thus held that the carrier is required to

...prove by clear and convincing evidence that the result would have been the same with or without the railroad carrier's interference (if the employee first proves that the railroad carrier or other covered person interfered). This does not require that the ALJ weigh medical evidence and actually decide the issue of medical causation or reasonableness one way or the other. Instead, as in other discrimination cases, the ALJ must look at all the direct and circumstantial evidence, as a whole, to determine whether the [r]espondent clearly and convincingly proved that the outcome would have been the same without [the respondent's] alleged interference.

USDOL/OALJ Reporter at 18-19.

XIII. DAMAGES AND OTHER REMEDIES

Statute

49 U.S.C. § 20109

(e) Remedies.

(1) In general. An employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole.

(2) Damages. Relief in an action under subsection (d) (including an action described in subsection (d)(3)) shall include--

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) any backpay, with interest; and

(C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(3) Possible relief. Relief in any action under subsection (d) may include punitive damages in an amount not to exceed \$ 250,000.

Regulations

29 C.F.R. § 109: Decisions and orders of the administrative law judge

...

(d)(1) If the ALJ concludes that the respondent has violated the law, the ALJ will issue an order that will include, where appropriate: Affirmative action to abate the violation; reinstatement with the same seniority status that the employee would have had, but for the retaliation; any back pay with interest; and payment of compensatory damages, including compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The order will also require the respondent to submit documentation to the Social Security Administration or the Railroad Retirement Board, as appropriate, allocating any back pay award to the appropriate months or calendar quarters. The order may also require the respondent to pay punitive damages up to \$250,000.

29 C.F.R. § 110: Decision and orders of the Administrative Review Board

...

(d) If the ARB concludes that the respondent has violated the law, the ARB will issue a final order providing relief to the complainant. The final order will include, where appropriate: Affirmative action to abate the violation; reinstatement with the same seniority status that the employee would have had, but for the retaliation; any back pay with interest; and payment of compensatory damages, including compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The order will also require the respondent to submit documentation to the Social Security Administration or the Railroad Retirement Board, as appropriate, allocating any back pay award to the appropriate months or calendar quarters. The order may also require the respondent to pay punitive damages up to \$250,000.

- Reinstatement

ENFORCEMENT OF REINSTATEMENT ORDER STAYED PENDING APPEAL

Acosta v. BNSF Ry. Co., No. 15-9288 (D. Kan. Oct. 16, 2017) (2017 U.S. Dist. LEXIS 170991) (case below ARB Nos. 14-089, 15-016, 15-022; ALJ No. 2013-FRS-00082): The Department of Labor filed an action in district court seeking enforcement of the ALJ's FRSA reinstatement order, as affirmed by the ARB. The district court stayed the action while the Defendant appealed the ARB's decision to the 8th Circuit. In its decision, the 8th Circuit vacated the ARB's reinstatement order. Because of this ruling by the court of appeals, the district court found that there was no longer a case or controversy, and granted the Plaintiff's motion to dismiss the enforcement action.

**PRELIMINARY ORDER OF REINSTATEMENT BY OSHA UNDER THE FRSA;
JUDICIAL ENFORCEMENT IS NOT AVAILABLE**

In *Solis v. Union Pacific Railroad Co.*, No. 4:12-cv-00394 (D. Idaho Jan. 11, 2013) (related to 2012-FRS-15), the Secretary of Labor sought enforcement of a preliminary reinstatement order issued by OSHA under the whistleblower provision of the Federal Railroad Safety Act, 49 U.S.C. § 20109. The district court found it had jurisdiction to enforce final orders of the Secretary of Labor, but not a preliminary order of reinstatement issued by OSHA. The court noted a split in the few courts that had addressed the about the issue, that the Ninth Circuit had not yet addressed the issue, and that the only circuit authority on the issue was a split decision. *Bechtel v. Competitive Technologies, Inc.*, 448 F.3d 469 (2d Cir. 2006). The court found that "the fact that a preliminary order can prescribe the same relief as a final order does not mean Congress intended for federal courts to review preliminary orders." The court was not persuaded by the Secretary argument that because AIR21 (which is used for FRSA whistleblower procedure) provides that objecting to a preliminary order will not stay any reinstatement remedy in that order, and therefore there must be an enforcement mechanism. The court noted that a preliminary order issued by OSHA is based only on reasonable cause to believe a complaint has merit, which the court found was too tentative for present enforcement. The court was also not persuaded by the Secretary's alternative argument that the FRSA itself provides the necessary jurisdiction because the FRSA whistleblower provision specifically incorporates the procedures of AIR21 for preliminary orders, and because the appeals paragraph of the FRSA whistleblower provision also incorporates AIR21, which limits appeals to a final order of the Secretary.

STAY OF ALJ'S PRELIMINARY REINSTATEMENT ONLY GRANTED IN EXCEPTIONAL CIRCUMSTANCES

In *Bailey v Consolidated Rail Corp.*, ARB Nos. 13-030, 13-033, ALJ No. 2012-FRS-12 (ARB Mar. 27, 2013), the ARB denied the Respondent's motion for a stay of the ALJ's reinstatement order. The ARB noted the regulatory history to the FRSA whistleblower regulations make it clear the ARB may grant a motion to stay only in an exceptional case, and only if the moving party can establish the necessary criteria for equitable injunctive relief, i.e., irreparable injury, likelihood of success on the merits, a balancing of possible harms to the parties, and the public favors a stay. In the instant case, the Respondent argued that it was likely to succeed on the merits because the ALJ improperly required it to prove beyond any reasonable doubt that it would have discharged the Complainant even in the absence of protected activity. The ARB, however, found that the ALJ applied the correct "clear and convincing evidence" standard. The Respondent also argued that the ALJ's findings are not supported by substantial evidence. The ARB, however, found that although subject to further review and possible reversal, the ALJ's decision weighed disputed facts in light of the totality of circumstances after an apparently thorough evidentiary hearing, and that the Respondent failed to show in its motion a likelihood of success on the merits.

The Respondent also argued that reinstatement would present irreparable harm because of the Complainant presented a threat of workplace violence. The ARB rejected this argument noting that the ALJ had not found credible testimony at the hearing that the Complainant's supervisor felt threatened by the Complainant during the incident that lead to the Complainant's discharge. The ARB found, conversely, that the Complainant would be irreparably harmed if reinstatement was stayed because the record shows that he had suffered emotional and financial hardship as a result of his discharge.

- *Expungement / Sealing Records*

DOL Administrative Review Board Decisions

EXPUNGEMENT AS A REMEDY, WHEN AN ALJ FINDS THAT CERTAIN INFORMATION FROM A PERSONNEL RECORD SHOULD NOT BE USED AGAINST COMPLAINANT, "EXPUNGEMENT" MAY NOT BE A REALISTIC REMEDY FOR AN ALJ TO ORDER (OR TO APPROVE AS A TERM IN A SETTLEMENT AGREEMENT) AS BUSINESSES MAY NOT BE ABLE TO LEGALLY DESTROY SUCH RECORDS; INSTEAD ALJ COULD REQUIRE THAT INFORMATION BE

SEALED OR PLACED IN RESTRICTED ACCESS, AND TO ORDER RESTRICTIONS ON USE OF SUCH INFORMATION

In *Leiva v. Union Pacific Railroad Co.*, ARB No. 2018-0051, ALJ No. 2017-FRS-00036 (ARB May 17, 2019) (per curiam), Complainant and Respondent had settled a 2012 FRSA complaint. The settlement required Respondent to expunge certain information from Complainant's HR record, and ensure that the facts and circumstances relating to the discipline or exercise of Complainant's rights were not used against Complainant in any future disciplinary, employment, or promotional opportunities. In 2016, however, Respondent provided information that should have been expunged to the Public Law Board, resulting in the Board's upholding of Complainant's termination from employment. Complainant filed a new FRSA complaint in 2017. The ARB ruled that this new complaint could not be maintained, but that Complainant's remedies were to file a breach of contract claim in U.S. district court, or to return to arbitration before the Public Law Board. The ARB also noted that "expungement" is often not a realistic remedy for an ALJ to order. The ARB wrote:

We note that it may be futile to order an employer to "expunge" information which other laws may require the employer to maintain. Because businesses may not be able to legally destroy corporate records, ALJs should be cautious and specific when ordering an employer to "expunge" information from an employee's personnel record. Where an ALJ finds it necessary to order an employer to disregard certain information which had been placed in an employee's personnel record, it would be more realistic, for example, for the ALJ to require that the information be placed in a sealed and/or restricted folder or that the employer be specifically prohibited from relying on the information in future personnel actions or referencing it to prospective employers.

Slip op. at 6, n.11.

- *Back Pay*

U.S. District Court Decisions

BACK PAY; DISTRICT COURT DECLINES TO DISTURB JURY AWARD THAT AWARDED FRONT PAY BUT NO BACK PAY WHERE SAME AMOUNT CALCULATED AS BACK PAY WAS AWARDED IN FELA CLAIM

In *Wooten v. BNSF Railway Co.*, No. 16-cv-00139, 2019 U.S. Dist. LEXIS 68808, 2019 WL 1778017 (D. Mont. Apr. 23, 2019), the Plaintiff filed a complaint alleging that he was unlawfully

terminated by BNSF in retaliation for his report of an on-the-job injury. A jury found in his favor for Federal Employers' Liability Act ("FELA") and Federal Rail Safety Act ("FRSA") violations, but not on a count under the Locomotive Inspection Act ("LIA"). "On his FRSA claim, the jury awarded Wooten \$1,407,978 in lost wages and benefits in the future, reduced to present value, and \$500,000 for his mental and emotional humiliation or pain and anguish. . . . Additionally, after finding that BNSF's conduct was malicious or in reckless disregard for Wooten's rights, the jury awarded Wooten \$249,999 in punitive damages." Both the Plaintiff and Defendant filed post-trial motions.

Plaintiff's Post-Trial Motions

— Adjustments to Jury Award

The jury had only awarded front, and not back pay, on the FRSA claim, and the Plaintiff moved for the court to amend the jury award to include backpay with interest, prejudgment interest on the emotional distress damages award, and a tax "gross up." The court declined to disturb the jury's back pay determination, nothing that they had awarded the exact amount for backpay calculated by the Plaintiff's expert in relation to the FELA claims, and that the jury had been instructed not to award a category of damages under the FRSA that had been awarded under FELA.

SUMMARY JUDGMENT; DAMAGES; FAILURE TO MITIGATE; PLAINTIFF HAS DUTY TO MITIGATE BUT DEFENDANT HAS BURDEN TO SHOW FAILURE TO MITIGATE; WHERE QUESTION IS GEOGRAPHIC REASONABLENESS OF ALTERNATIVE JOBS, SUMMARY JUDGMENT INAPPROPRIATE.

Wooten v. BNSF Railway Co., No. 16-cv-139 (D. Mont. Sept. 18, 2018) (2018 U.S. Dist. LEXIS 159199; 2018 WL 4462506) (case below 2016-FRS-00059) (Order [adopting Magistrate's Findings and Recommendation and Order]), *adopting Wooten v. BNSF Railway Co.*, No. 16-cv-139 (D. Mont. May 29, 2018) (2018 U.S. Dist. LEXIS 89267; 2018 WL 2417858) (case below 2016-FRS-00059) (Findings and Recommendation and Order)

The Plaintiff reported a work-related wrist injury. After investigation a supervisor concluded that the injury had occurred prior to the work and that the Plaintiff had been dishonest in his reports. This led to termination. Plaintiff filed several actions, including an FRSA complaint.

Plaintiff sought summary judgment on the failure to mitigate defense. The court explained that while the plaintiff has the duty to mitigate, the defendant has the burden to show failure to mitigate, generally by showing the availability of substantially equivalent jobs and the failure of the plaintiff to use reasonable diligence in seeking alternative employment. The underlying issue here was whether the proposed alternate jobs were geographically reasonable. But this was a question of fact that would have to go to the jury.

SUMMARY JUDGMENT; BACKPAY AND DUTY TO MITIGATE; DEFENDANT HAS THE BURDEN TO ESTABLISH FAILURE TO MITIGATE BY SHOWING THE

AVAILABILITY OF SUBSTANTIALLY EQUIVALENT EMPLOYMENT AND FAILURE BY THE PLAINTIFF TO EXERCISE REASONABLE DILIGENCE IN SEEKING THAT EMPLOYMENT; SUMMARY JUDGMENT INAPPROPRIATE WHERE RECORD IS TOO INCOMPLETE AND MURKY ON THE AVAILABILITY OF OTHER JOBS

Despain v. BNSF Railway Co., No. 15-cv-8294 (D. Az. Feb. 20, 2018) (2018 U.S. Dist. LEXIS 95518; 2018 WL 1894708) (Order [denying Defendant’s motion for summary judgment]):

The district court denied a motion for summary judgment by the Defendant in an FRSA action. The protected activity in the case involved making an injury report. The Defendant terminated the Plaintiff for dishonesty in making the report and in the investigation. The termination was later converted to a lengthy suspension. The alleged dishonesty concerned when the Plaintiff determined the injury was work-related, when during the shift the injury occurred, and the circumstance of a quip pro quo proposal to drop the injury report in exchange for a paid deadhead trip. The Plaintiff and manger had different accounts of who made that proposal.

Defendant sought summary judgement on back pay for failure to mitigate damages in a case where the Plaintiff has not looked for work. It was denied. A defendant is required to prove a failure to mitigate by showing both the availability of substantially equivalent employment and failure by the plaintiff to use reasonable diligence to find employment. The record was “too incomplete and murky” to conclude that substantially equivalent employment was available, so the argument failed.

DOL Administrative Review Board Decisions

BACK PAY AWARD; COMPLAINANT WHO PROPERLY STOPPED WORKING WHEN HE BEGAN RECEIVING DISABILITY BENEFITS DID NOT FAIL TO MITIGATE DAMAGES AND IT WAS ERROR FOR THE ALJ TO DEDUCT DISABILITY PAYMENTS FROM BACK PAY AWARD

In *Rudolph v. National Railroad Passenger Corp. (AMTRAK)*, ARB Nos. 14-053, -056, ALJ No. 2009-FRS-15 (ARB Apr. 5, 2016), the ARB affirmed the ALJ’s decision and order finding that the Respondent violated the employee protection provision of the Federal Railroad Safety Act, when it determined that the Complainant was medically disqualified from working as a conductor. On appeal, the Complainant challenged the ALJ’s deduction of \$7,000 from the back pay award as an offset during the years that the Complainant was receiving disability benefits. The ARB found that the deduction was error. The Board noted that the Complainant properly stopped working when he began receiving disability benefits and he had no other earnings from that point forward. The ARB noted:

While a non-working employee has the duty to mitigate his damages by seeking suitable employment, it is well established that the employer has the burden of

establishing that the back-pay award should be reduced because the employee did not exercise diligence in seeking and obtaining other employment. Further, an employee cannot legally “double dip” by earning wages while receiving disability retirement or benefits.

USDOL/OALJ Reporter at 12-13 (footnotes omitted). The ARB found that the record contained no evidence that Amtrak even attempted to establish that comparable jobs were available and that Complainant did not seek them. Thus, the annual calculations until reinstatement should not include any \$7,000 offset.

BACK PAY; UNEMPLOYMENT COMPENSATION IS NOT DEDUCTED FROM BACK PAY AWARD

“[U]nemployment compensation benefits received should not be deducted from back pay awards.” *Petersen v. Union Pacific Railroad Co.*, ARB No. 13-090, ALJ No. 2011-FRS-17 (ARB Nov. 20, 2014), USDOL/OALJ Reporter at 4 (footnote omitted).

WHERE PARTIES STIPULATED TO AMOUNT OF LOST WAGES, THE ARB HELD THAT THEY WERE BOUND TO THAT BARGAIN EVEN THOUGH THE ALJ HAD DECLINED TO DEDUCT THE AMOUNT THE COMPLAINANT RECEIVED IN UNEMPLOYMENT BENEFITS

In *Cain v. BNSF Railway Co.*, ARB No. 13-006, ALJ No. 2012-FRS-19 (ARB Sept. 18, 2014), the parties stipulated to lost wages in the amount of \$5,780.52. The ALJ accepted the stipulated amount but declined to deduct the amount the Complainant received in unemployment benefits. The Board noted that unemployment compensation is not deductible from back pay awards in whistleblower cases, but found that there was no evidence that the stipulation to the amount of lost wages was so contrary to public policy as to warrant nonenforcement of the stipulation. Thus, the Board held that the parties were bound to the stipulated lost wages of \$5,780.52.

- *Front Pay*

U.S. District Court Decisions

FRONT PAY IS A PERMITTED REMEDY IN FRSA RETALIATION CASES; JURY RENDERS AN ADVISORY VERDICT ON FRONT PAY

FRONT PAY FOUND TO BE WARRANTED WHERE AN EXTENDED PERIOD HAD PASSED SINCE THE INCIDENT, AND THE PROTRACTED AND AGGRESSIVELY LITIGATED LAWSUIT DEMONSTRATED SIGNIFICANT HOSTILITY AND ANIMOSITY BETWEEN THE PLAINTIFF AND THE DEFENDANT

“GROSS UP” FOR TAX CONSEQUENCES OF LUMP SUM AWARD; COURT DENIED PLAINTIFF’S REQUEST FOR A “GROSS UP” IN THIS CASE, NOTING THAT HE WAS NOT CERTAIN THAT THE JURY HAD NOT ALREADY CONSIDERED TAX CONSEQUENCES; THAT PLAINTIFF HAD NOT CITED CONTROLLING AUTHORITY REQUIRING THE COURT TO EXERCISE EQUITABLE POWERS TO ORDER A GROSS UP, AND THAT THE BALANCE OF EQUITIES WERE NOT SHOWN TO FAVOR A GROSS UP

In *Wooten v. BNSF Railway Co.*, No. 16-cv-00139, 2019 U.S. Dist. LEXIS 68808, 2019 WL 1778017 (D. Mont. Apr. 23, 2019), the Plaintiff filed a complaint alleging that he was unlawfully terminated by BNSF in retaliation for his report of an on-the-job injury. A jury found in his favor for Federal Employers’ Liability Act (“FELA”) and Federal Rail Safety Act (“FRSA”) violations, but not on a count under the Locomotive Inspection Act (“LIA”). “On his FRSA claim, the jury awarded Wooten \$1,407,978 in lost wages and benefits in the future, reduced to present value, and \$500,000 for his mental and emotional humiliation or pain and anguish. . . . Additionally, after finding that BNSF’s conduct was malicious or in reckless disregard for Wooten’s rights, the jury awarded Wooten \$249,999 in punitive damages.” Both the Plaintiff and Defendant filed post-trial motions.

Defendant’s Post-Trial Motions

Remittitur

— Front Pay

The jury awarded the Plaintiff \$1,407,978 for lost wages and benefits in the future, reduced to present value. The first question was whether front pay could be substituted for reinstatement. The court found that “reinstatement has not been so distinctly provided for in the FRSA context that it should be considered to be a legal remedy rather than an equitable one.” *Id.* at 25. The next question was whether front pay was a proper question for the jury. The court first made a finding that reinstatement was not appropriate in this case because of the passage of time since the incident and because the “protracted and aggressively litigated lawsuit demonstrates significant hostility and animosity between BNSF and Wooten.” *Id.* at 28. The court then treated the jury’s front pay award as advisory. The court noted that the jury had received appropriate instructions and had heard extensive and detailed evidence and testimony on the question. The court accepted the advisory award for front pay as supported by the evidence, not grossly excessive, and consistent with the statutory mandate entitling the Plaintiff “to all relief necessary to make [him] whole.” *Id.* at 29 (quoting 49 U.S.C. § 20109(e)(1)).

Plaintiff’s Post-Trial Motions

— Adjustments to Jury Award

The jury had only awarded front, and not back pay, on the FRSA claim, and the Plaintiff moved for the court to amend the jury award to include backpay with interest, prejudgment interest on the emotional distress damages award, and a tax “gross up.” The court declined to disturb the jury’s back pay determination, nothing that they had awarded the exact amount for backpay calculated by the Plaintiff’s expert in relation to the FELA claims, and that the jury had been instructed not to award a category of damages under the FRSA that had been awarded under FELA.

The court noted that it had declined to give a jury instruction on a tax gross up and similarly declined to include a line of damages on the verdict form for such relief – but that the court had allowed the Plaintiff to present evidence and argument on such. The court denied a gross up, finding that he was not positive that the jury had not already taken tax consequences of a lump sum payment in account, that the Plaintiff had not cited controlling authority requiring the court to exercise equitable powers to order a gross up, and that the balance of equities were not shown to favor requiring the Defendant “to shoulder the tax consequences of a protracted front pay award intended to compensate Wooten for over 30 years of missed employment with BNSF.” *Id.* at 40 (footnote omitted).

- *Interest*

U.S. District Court Decisions

PREJUDGMENT INTEREST ON EMOTIONAL DISTRESS AWARD; PLAINTIFF IS ENTITLED TO PREJUDGMENT INTEREST, WHICH IN FEDERAL DISTRICT COURT IS CALCULATED BASED ON 28 U.S.C. § 1961 RATHER THAN DOL REGULATIONS

In *Wooten v. BNSF Railway Co.*, No. 16-cv-00139, 2019 U.S. Dist. LEXIS 68808, 2019 WL 1778017 (D. Mont. Apr. 23, 2019), the Plaintiff filed a complaint alleging that he was unlawfully terminated by BNSF in retaliation for his report of an on-the-job injury. A jury found in his favor for Federal Employers’ Liability Act (“FELA”) and Federal Rail Safety Act (“FRSA”) violations, but not on a count under the Locomotive Inspection Act (“LIA”). “On his FRSA claim, the jury awarded Wooten \$1,407,978 in lost wages and benefits in the future, reduced to present value, and \$500,000 for his mental and emotional humiliation or pain and anguish. . . . Additionally, after finding that BNSF’s conduct was malicious or in reckless disregard for Wooten’s rights, the jury awarded Wooten \$249,999 in punitive damages.” Both the Plaintiff and Defendant filed post-trial motions.

Plaintiff’s Post-Trial Motions — Adjustments to Jury Award

The court agreed that the Plaintiff should be awarded prejudgment interest on the emotional distress award in order to fully compensate him for his injury. The court was not, however, persuaded to use the DOL regulations rather than 28 U.S.C. § 1961 to calculate the rate.

DOL Administrative Review Board Decisions

CALCULATION OF INTEREST ON BACK PAY AWARDS IN FRSA CASES; ARB HOLDS THAT THE REGULATION PROMULGATED IN 2015 PROVIDING FOR DAILY COMPOUNDING APPLIES TO CASES IN WHICH NO FINAL ORDER HAD YET BEEN ISSUED; ARB NOTES ARGUMENT THAT FEDERAL COURTS CALCULATE INTEREST ANNUALLY BUT FINDS THAT IT IS REQUIRED TO APPLY THE SECRETARY’S REGULATIONS; NEW REGULATION ESSENTIALLY MOOTS APPLICATION OF ARB’S *DOYLE* DECISION WHICH PROVIDED FOR QUARTERLY COMPOUNDING

In *Laidler v. Grand Trunk Western Railroad Co.*, ARB No. 15-087, ALJ No. 2014-FRS-99 (ARB Aug. 3, 2017), The ALJ awarded back pay, with both pre- and post-judgment interest and awarded “prejudgment interest on back pay” based on the interest rate set out in 26 U.S.C.A. § 6621(a)(2), compounded quarterly in accordance with the Board’s holding in *Doyle v. Hydro Nuclear Serv.*, ARB Nos. 99-041, 99-042, 00-12; ALJ No. 1989-ERA-022, slip op at 18-19 (ARB May 17, 2000). On appeal, the Respondent noted that the FRSA has a kick-out provision that permit FRSA cases to be brought in district court, and that in district court interest on back pay awards is determined in accordance with 29 U.S.C.A. § 1961, which provides that interest be compounded annually. The Respondent argued that “‘make whole’ relief under the FRSA should not and cannot be different depending on whether the case is brought before the DOL or the U.S. District Court and urges that interest compounded annually in accordance with 29 U.S.C.A. § 1961....” *Id.* at 12. The ARB rejected this argument finding that in 2015 rulemaking, OSHA promulgated a regulation providing that “[i]nterest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.” *See* 29 C.F.R. §§ 1982.105(a)(1), 1982.109(d)(1), 1982.110(d); 80 Fed. Reg. 69,115, 69,124 (Nov. 9, 2015).” The ARB further found that because no final order had been issued in the case (the ARB’s having ordered a remand on the question of protected activity) § 1982.109(d) should be applied and interest on any back pay award should be compounded daily. The ARB noted that it is required to follow the Secretary’s regulations. The ARB found that any possible error in the *Doyle* procedure for calculation of interest on a quarterly basis was harmless given that DOL now has a governing regulation that provides for daily compounding.

- Compensatory Damages

U.S. Circuit Court of Appeals Decisions

DAMAGES FOR EMOTIONAL DISTRESS MUST BE SUPPORTED BY COMPETENT EVIDENCE OF GENUINE INJURY, WHICH HOWEVER, DOES NOT HAVE TO BE MEDICAL OR OTHER EXPERT EVIDENCE

Claims for damages for emotional distress in FRSA retaliation cases must be supported by competent evidence of genuine injury, but need not be supported by medical or other expert evidence. A plaintiff's own testimony under the circumstances of a particular case may be sufficient. *Blackorby v. BNSF Railway Co.*, No. 15-3192 (8th Cir. Feb. 27, 2017) (2017 U.S. App. LEXIS 3462; 2017 WL 744037) (case below W.D. Mo. 4:13-cv-908; ALJ 2013-FRS-68).

U.S. District Court Decisions

EMOTIONAL DISTRESS; 9TH CIRCUIT DOES NOT IMPOSE AN OBJECTIVE EVIDENCE REQUIREMENT ON EMOTIONAL DISTRESS AWARDS

EMOTIONAL DISTRESS; REMITTITUR; \$500,000 JURY AWARD NOT OVERTURNED WHERE PLAINTIFF'S TESTIMONY HAD BEEN COMPELLING; COURT TOOK INTO ACCOUNT THAT PLAINTIFF CAME FROM A "RAILROAD FAMILY" IN A SMALL "RAILROAD TOWN" AND HAD BEEN DECRIED BY THE RAILROAD AS A LIAR

In *Wooten v. BNSF Railway Co.*, No. 16-cv-00139, 2019 U.S. Dist. LEXIS 68808, 2019 WL 1778017 (D. Mont. Apr. 23, 2019), the Plaintiff filed a complaint alleging that he was unlawfully terminated by BNSF in retaliation for his report of an on-the-job injury. A jury found in his favor for Federal Employers' Liability Act ("FELA") and Federal Rail Safety Act ("FRSA") violations, but not on a count under the Locomotive Inspection Act ("LIA"). "On his FRSA claim, the jury awarded Wooten \$1,407,978 in lost wages and benefits in the future, reduced to present value, and \$500,000 for his mental and emotional humiliation or pain and anguish. . . . Additionally, after finding that BNSF's conduct was malicious or in reckless disregard for Wooten's rights, the jury awarded Wooten \$249,999 in punitive damages." Both the Plaintiff and Defendant filed post-trial motions.

Defendant's Post-Trial Motions: Remittitur—Emotional Distress

The jury awarded the Plaintiff \$500,000 for mental and emotional humiliation or pain and anguish. The Defendant argued that the Plaintiff failed to prove that he suffered emotional

distress, relying heavily on the contention that emotional distress damages must be supported by objective evidence. The court, however, noted that the Ninth Circuit does not impose an objective evidence requirement on emotional distress damage awards. The court noted that the Plaintiff's testimony had been compelling, "[p]articularly in light of the fact that Wooten came from a 'railroad family' in a small 'railroad town' and was wrongfully terminated and decried as a liar by the railroad." *Id.* at 30.

DAMAGES; EMOTIONAL DISTRESS; AN EMPLOYEES TESTIMONY REGARDING EMOTIONAL DISTRESS IS INDEPENDENTLY COMPETENT TO SUSTAIN AN AWARD OF EMOTIONAL DISTRESS DAMAGES

Blackorby v. BNSF Ry. Co., No. 4:13-cv-908 (W.D. Mo. Aug. 28, 2015) (2015 WL 5095989; 2015 U.S. Dist. LEXIS 114185) (case below 2013-FRS-68): Plaintiff alleged that he was retaliated against for filing an injury report. Motions for summary judgment were denied and a jury returned a verdict in favor of Plaintiff, awarding \$58,280 in damages but no punitive damages. Defendant's motion for judgment as a matter of law was denied. Pending before the court was a renewed motion for judgment as a matter of law, or, in the alternative, for a new trial. The motion was denied.

On a motion for judgment as a matter of law, a court must affirm the jury's verdict unless viewing the facts in the light most favorable to the prevailing party, the court determines that a reasonable jury could not have returned a verdict in favor of that party. A new trial is appropriate under Rule 59 where there has been a miscarriage of justice due to a verdict against the weight of evidence, an excessive damage award, or legal errors at trial.

BNSF challenged the award of emotional distress damages on the grounds that there was insufficient evidence to support the award. But the Plaintiff had testified about the distress he experience due to the disciplinary process and the one year review period. The court held that this was competent evidence of emotional distress and sufficient to support the award.

COMPENSATORY DAMAGES; SUMMARY JUDGMENT; SUMMARY JUDGMENT GRANTED ON EMOTIONAL DISTRESS DAMAGES WHEN NO REASONABLE JURY COULD FIND THAT THE ALLEGED RETALIATION WAS THE PROXIMATE CAUSE OF ANY DISTRESS

Fields v. Southeastern Pennsylvania Transportation Authority, No. 14-cv-2491 (E.D. Pa. July 31, 2015) (2015 U.S. Dist. LEXIS 100839, 2015 WL 4610876): Two joined FRSA complaints. Both plaintiffs were passengers in trucks used in work on the railway that were in a collision. One was injured and received a settlement for his injuries. No discipline was assessed. Roughly two months later they were involved in an accident using the same equipment on the same part of the track in the same conditions. They were disciplined for safety violations. One had no prior discipline and received a written warning that was expunged after the review period was ended. The other was at the termination stage of the progressive discipline policy, but a settlement was reached that preserved his job. After two years of no violations, his record was

cleared. They filed FRSA complaints, which were both kicked-out and then joined in the district court. After the close of discovery, Defendant moved for summary decision as to one employee for no protected activity and in part as to the other as to the absence of compensatory and punitive damages.

The first employee claimed that he had made a report of a violation of Federal law, rule, or regulation, and of an injury. But the court found that the record did not support the inference that this employee had reported anything to anyone. He was disciplined for operating a truck at an unsafe speed, but neither that nor being in an accident is protected activity. Defendant was thus summary judgment and the claim was dismissed.

As to the other plaintiff, he had produced no evidence to support the damages asserted in his complaint. The court concluded that the only support for emotional distress damages was the plaintiff's own self-serving argument about fear of termination. But this was not rational since the plaintiff wasn't ever in danger of termination given where he was in the progressive discipline policy. At the relevant time the plaintiff was going through a divorce and custody battle and received psychological treatment related to that, but none related to the alleged employment distress. He had also testified to distress from the injuries in the prior accident, which was already settled. The court concluded that no reasonable juror could award compensatory damages on the record because it would not be reasonable to find that the alleged retaliation was a proximate cause of any distress. It thus granted the motion for summary judgment as to compensatory damages.

DOL Administrative Review Board Decisions

\$25,000 IN COMPENSATORY DAMAGES FOUND APPROPRIATE FOR EMOTIONAL DISTRESS AWARD

In [*Rudolph v. National Railroad Passenger Corp. \(AMTRAK\)*](#), ARB Nos. 14-053, -056, ALJ No. 2009-FRS-15 (ARB Apr. 5, 2016), the ARB affirmed the ALJ's decision and order finding that the Respondent violated the employee protection provision of the Federal Railroad Safety Act, when it determined that the Complainant was medically disqualified from working as a conductor. On appeal, the Complainant argued that the ALJ should have awarded a minimum of \$250,000 in compensatory damages. The ARB agreed with the ALJ, however, that the Complainant's credible testimony at the hearing concerning his emotional distress, and especially his statements about his divorce, was sufficient to warrant a compensatory damages award of \$25,000. The ARB found, however, that nothing in the record supported the Complainant's assertion that he was entitled to more than this.

COMPENSATORY DAMAGES; BEING SENT HOME FOR EXPRESSING SAFETY AND HEALTH CONCERNS SUFFICIENT TO SUPPORT NOMINAL AWARD OF \$500 FOR EMOTIONAL DISTRESS

In *Jackson v. Union Pacific Railroad Co.*, ARB No. 13-042, ALJ No. 2012-FRS-17 (ARB Mar. 20, 2015), the Complainant engaged in protected activity when he reported a foul, smoky odor to the manager of yard operations (which had resulted from marsh fires outside New Orleans). Because of possible health concerns, the Complainant requested to be assigned to an area free from the smoke and smell. Unable to accommodate him, the Complainant's supervisor directed the Complainant to go home and to return to work only after obtaining a medical release. The ARB affirmed the ALJ's finding that sending the Complainant home without pay until he returned with medical clearance was an adverse action. The Complainant was later paid for three days of missed work. The ALJ, however, awarded a nominal compensatory damages award of \$500.00 for only minimal evidence showing that the Complainant suffered emotional distress due to the temporary suspension. On appeal the Respondent argued that the award was incongruous with the ALJ's finding of minimal evidence of emotional distress. The ARB, however, found that substantial evidence supported the nominal award based on the ALJ's finding that being sent home in the face of his peers for expressing health and safety concerns was stressful enough to support the \$500.00 award.

AN AWARD OF COMPENSATORY DAMAGES, EVEN A DE MINIMUS ONE, MUST BE SUPPORTED BY THE EVIDENCE

In *Cain v. BNSF Railway Co.*, ARB No. 13-006, ALJ No. 2012-FRS-19 (ARB Sept. 18, 2014), the ALJ awarded compensatory damages in the amount of \$1, even though the Complainant had not offered any evidence or testimony on such damages. On appeal, the ARB agreed with the Respondent that "Any award of compensatory damages, even a de minimus one, must be supported by the evidence." The Board therefore vacated the \$1 award.

DAMAGES FOR PAIN AND SUFFERING; ALJ'S DISCRETION TO LIMIT AWARD WHERE COMPLAINANT'S EMOTIONAL DISTRESS WAS NOT ENTIRELY ATTRIBUTABLE TO THE ADVERSE ACTION

In *Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, 13-033, ALJ No. 2012-FRS-12 (ARB Apr. 22, 2013), the Complainant petitioned for review of the ALJ's award of \$4,000 for pain and suffering, seeking an increase to \$100,000 in compensatory damages for pain and suffering, and \$250,000 in punitive damages. The ARB found that the \$4,000 award was well within the ALJ's discretion and supported by substantial evidence. The ALJ found that the Complainant's emotional distress was not entirely due to the Respondent's adverse action, and found that the Respondent had not acted with such callous disregard of the Complainant's rights that punitive damages were warranted. The ALJ rejected the Complainant's claims that company managers harbored antagonism or hostility against him and were conspiring to terminate his employment. Substantial evidence supported the ALJ's finding that the Complainant's protected activity was a

contributing factor in the adverse action, but that the evidence did not rise to the level of establishing grounds for awarding punitive damages.

- Punitive Damages

U.S. Circuit Court of Appeals Decisions

PUNITIVE DAMAGES; EIGHTH CIRCUIT HOLDS PUNITIVE DAMAGES UNAVAILABLE WHERE RAILROAD DEMONSTRATED THAT IT MADE GOOD FAITH COMPLIANCE EFFORTS, REJECTS RELIANCE ON PERCEIVED PROCEDURAL DEFICIENCIES AS GROUNDS FOR PUNITIVE DAMAGES

BNSF Ry. Co. v. United States DOL Admin. Review Bd. [Carter], 867 F.3d 942, No. 16-3093, 2017 U.S. App. LEXIS 15020, 2017 WL 3469224 (8th Cir. 2017) (case below ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82).

The Complainant started working for BNSF in 2005. He injured his shoulder in 2007 and immediately reported it. He later filed a Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, action based on that injury. During discovery in that case, BNSF deposed him. During trial preparation in 2012, a manager reviewed the deposition and noticed inconsistencies between information given in the deposition and that provided on the original employment application back in 2005. This led to a disciplinary investigation. A second investigation was launched regarding potential false statement in 2012 about getting to work on time. Both investigations produced findings that the Complainant had been dishonest, which under BNSF's policy can result in a standalone dismissal. So they dismissed him twice in April 2012. Complainant filed a complaint under the whistleblower protection provisions of the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109, alleging that he was retaliated against for reporting his 2007 injury. An Administrative Law Judge ("ALJ") found for Complainant and awarded \$50,000 in punitive damages as well as reinstatement and various other remedies. 867 F.3d at 944-45. The Administrative Review Board ("ARB") affirmed. *See Carter v. BNSF Ry. Co.*, ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82 (ARB June 21, 2016).

The Eighth Circuit vacated and remanded. Among other issues it addressed, it held that punitive damages were improper even if a violation was found on remand because BNSF had shown that it made good faith efforts to comply with the FRSA based on its corporate policy and review procedures. The award had been based on the fact that BNSF fired the Complainant twice and the procedural deficiencies of the hearings. That was error on the record in the case.

PUNITIVE DAMAGES; FRSA USES THE COMMON LAW RECKLESS DISREGARD TEST FOR PUNITIVE DAMAGES; PUNITIVE DAMAGES MAY BE AWARDED WHEN THE RAILROAD ACTED WITH “MALICE OR ILL WILL OR WITH KNOWLEDGE THAT ITS ACTIONS VIOLATED FEDERAL LAW OR WITH RECKLESS DISREGARD OR CALLOUS INDIFFERENCE TO THE RISK THAT ITS ACTIONS VIOLATED FEDERAL LAW”

PUNITIVE DAMAGES; STANDARD OF REVIEW; ABUSE OF DISCRETION REVIEW IS DEFERENTIAL TO THOSE BETTER POSITIONED TO MAKE DETERMINATIONS; MAXIMUM STATUTORY AMOUNT AFFIRMED WHERE ALJ PERMISSIBLY FOUND WILLFUL RETALIATION, INVOLVEMENT OF HIGHER MANAGEMENT, AND A CULTURE OF HOSTILITY TO INJURY REPORTS

Pan Am Railways, Inc. v. USDOL, 855 F.3d 29, No. 16-2271 (1st Cir. Apr. 20, 2017) (2017 U.S. App. LEXIS 7047; 2017 WL 1422369) (case below ARB No. 14-074; ALJ No. 2013-FRS-84)

Complainant in the case reported that a pile of railroad ties were a safety hazard. It was not abated. He later tripped on the pile and injured his ankle. He reported his injury and was taken to the hospital. A manager told him to expect a disciplinary hearing. He had two days off but took three days to recover, missing a day, which meant the railroad had to report the injury. A hearing was then initiated based on the alleged failure to make sure he had secure footing before getting off a train. He was disciplined with a formal reprimand. Complainant then filed an OSHA complaint based on report the hazard and reporting the injury. It was drafted by a lawyer without review of the Complainant and contained a discrepancy with the testimony at the hearing injury as to whether after hurting his ankle he caught himself and say down or fell down. A manager deemed this major and the railroad decided to bring a second set of charges against plaintiff for filing the OSHA complaint containing a different account in one part. Complainant amended his OSHA complaint to include retaliation for bringing the initial OSHA complaint. At the second hearing, which threatened dismissal, Complainant explained that the lawyer had prepared the OSHA complaint and had gotten that one detail wrong. He also explained that no one at the railroad had asked him about the discrepancy before initiating the second round of discipline. The charge was not sustained.

OSHA found for Complainant on the second, but not first, complaint. The railroad sought a hearing. The ALJ found the manager not very credible and found for the Complainant, rejecting the affirmative defense because the comparator evidence did not match the situation. The ALJ awarded \$10K in emotional distress and the maximum amount, \$250K, in punitive damages. The ARB affirmed on the grounds that substantial evidence supported the findings and the punitive damage award was not an abuse of discretion. The railroad appealed to the First Circuit.

The First Circuit affirmed. Part of the appeal challenged the punitive damages award. The First Circuit explained that the common law test of punitive damages applied to the FRSA. This test looks to reckless disregard or to whether the railroad acted with “malice or ill will or with knowledge that its actions violated federal law or with reckless disregard or callous indifference to the risk that its actions violated federal law.” Substantial evidence supported the finding that punitive damages were warranted due to the railroad’s reckless or callous disregard for the Complainant’s rights in that the ALJ permissibly found that the railroad had willfully retaliated for filing an OSHA complaint. As to the amount, the First Circuit reviewed for an abuse of

discretion and found that while it might have chosen a different amount, the ALJ's award was not clearly excessive. The ALJ had adduced additional reasons for the award, including management's exaggeration of the discrepancy and concerns about the culture at the railroad. The decision to pursue discipline for an OSHA complaint was made at high levels, not low level management, and showed a disregard for OSHA's fact-finding process. Evidence also showed that 99% of reportable injuries at the railroad led to discipline, though the record indicated that the railroad's attitude to safety was nonchalant. Affirming the amount, the First Circuit stressed deference in the abuse of discretion standard and the better placement of fact-finders in making determinations. On that standard, the award survived appeal.

PUNITIVE DAMAGES; FIRST CIRCUIT FINDS THAT “RECKLESS DISREGARD OR CALLOUS INDIFFERENCE” STANDARD APPLIES IN FRSA WHISTLEBLOWER CASES; ARB’S DECISION TO USE THAT COMMON LAW STANDARD FOUND TO BE PERSUASIVE

In *Worcester v. Springfield Terminal Ry. Co.*, No. 14-1965 (1st Cir. June 29, 2016) (2016 U.S. App. LEXIS 11941), the Defendant had appealed from a jury verdict awarding punitive damages to the Plaintiff under the FRSA whistleblower provision at 49 U.S.C. § 20109. The Defendant argued that the district court instructions to the jury gave the incorrect standard for awarding punitive damages. The First Circuit, however, found that the district court properly instructed the jury that it could award punitive damages if it found that the Defendant “acted, ‘[w]ith malice or ill will or with knowledge that its actions violated federal law or with reckless disregard or callous indifference to the risk that its actions violated federal law’.” Slip op. at 6. This standard, the court noted, came from the Supreme Court’s decision in *Smith v. Wade*, 461 U.S. 30, 56 (1983), and is the standard adopted by the USDOL Administrative Review Board in *Petersen v. Union Pac. R.R. Co.*, ARB Case No. 13-090, 2014 WL 6850019, at *3 (Nov. 20, 2014). The court indicated that even if the ARB’s interpretation of the FRSA is not entitled to *Chevron* deference, that interpretation was still persuasive (citing *Grosso v. Surface Transp. Bd.*, 804 F.3d 110, 117 (1st Cir. 2015), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)), given that the Supreme Court looked to the common law in determining both the standard that should govern the award of punitive damages in *Smith*, and the ARB had followed that same course.

PUNITIVE DAMAGES; TENTH CIRCUIT HOLDS THAT COMMENTS FROM SUPERVISORS WERE SUFFICIENT TO ESTABLISH RECKLESS AND CALLOUS DISREGARD FOR THE PLAINTIFF’S RIGHTS; VACATES ARB’S “HALVING” OF THE ALJ’S PUNITIVE DAMAGES WITHOUT EXPLAINING HOW IT JUSTIFIED THAT APPROACH; HOLDS THAT *STATE FARM* GUIDEPOSTS APPLY TO PUNITIVE DAMAGE AWARDS UNDER THE FRSA

BNSF Ry. Co. v. United States DOL, 816 F.3d 628, No. 14-9602, 2016 U.S. App. LEXIS 4234, 2016 WL 861101 (10th Cir. 2016) (case below ARB No. 13-006, ALJ No. 2012-FRS-19) (Christopher Cain, Intervenor/Complainant).

BNSF hired the Complainant as a sheet-metal worker in 2006. He worked at two rail yards and traveled between them in a company vehicle. In early January 2010, the Complainant developed chest pains and sought treatment in an emergency room. On January 27, 2010, the Complainant rear-ended a produce truck stopped at a red light while driving the BNSF vehicle between job sites. He reported that his brakes had malfunctioned. He was not issued a citation. Another employee picked him up and took him to one of the yards, where he filled out an injury report for his knuckle and knee. He did not get treatment for these injuries, but later claimed that he had no memory of filling out the report and had been in shock. He missed the next two days of work due to coughing fits. On February 17, 2010, he sought medical treatment and a nurse practitioner diagnosed a rib fracture, likely due to the seatbelt impact during the accident. The Complainant decided to determine what exactly was going on before reporting additional injuries. He sought additional days off work to have fluid drained from his lungs, but told supervisors that it was not due to the accident. When he returned to work, he was assigned to work in an undesirable location of the yard. *BNSF Ry. Co.*, 816 F.3d at 633-34.

On February 23, 2010, BNSF notified Complainant that it was investigating whether he had violated any safety rules in the accident. While the hearing was pending, Complainant saw a doctor on April 8, 2010, and was told that the work-related accident had caused his chest and lung injuries. He then updated the injury report, though two supervisors discouraged him from doing so. On April 30, 2010, BNSF notified Complainant that it was now also investigating its rules about timely reporting of injuries. The two hearings took place in May. On June 2, 2010, BNSF gave Complainant a 30 day suspension and 3 year probation, retroactive to the date of the accident, for safety violations that occurred in the accident. It warned him that any further violations during the probation could lead to termination. On June 8, 2010, BNSF terminated Complainant for not filing an injury report in a timely manner. The termination occurred because the violation had occurred during the retroactive probationary period. The Complainant unsuccessfully grieved the discipline and then filed a complaint under the whistleblower protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109.

The Occupational Safety and Health Administration dismissed the complaint, but an Administrative Law Judge (“ALJ”) found that BNSF had unlawfully retaliated against him and awarded back wages, nominal compensatory damages, and the statutory maximum of \$250,000.00 in punitive damages. *Id.* at 635-36. (Reinstatement was not ordered because the ALJ determined that Complainant was no longer able to perform railroad work. *See Cain v. BNSF Ry. Co.*, ARB No. 14-006, ALJ No. 2012-FRS-019, slip op. at 5 (ARB Sept. 18, 2014).) BNSF appealed, but the Administrative Review Board (“ARB”) affirmed the liability finding. In analyzing the punitive damages award, the ARB determined that it did not need to consider the guideposts from *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) because Congress had removed the need for guideposts by setting a statutory cap. The ARB then halved the award to \$125,000.00. The ALJ's award had been based on a finding that managers engaged in a conspiracy against the Complainant and had assigned him to a very undesirable work location to punish him. The ARB noted that the second had not even been alleged as an adverse action and found it could not sustain a punitive damage award. So it cut the award in half. *BNSF Ry. Co.*, 816 F.3d at 636-37.

Turning to the contributing factor standard, the Tenth Circuit explained that

we must decide whether the agency abused its discretion in concluding that Cain's filing the April 8 Report was a factor that tended "to affect *in any way*" BNSF's decision to terminate him. Ordinarily, to meet this standard, an employee need only show "by preponderant evidence that the fact of, or the content of, the protected disclosure was one of the factors that tended to affect in any way the personnel action." In other words, even if the personnel action resulted not simply from the protected activity itself (filing a report), but also from the content declared in the protected activity, the two parts are "inextricably intertwined with the investigation," meaning the protected activity was a contributing factor to the personnel action. So if the employer would not have taken the adverse action without the protected activity, the employee's protected activity satisfies the contributing-factor standard.

Id. at 639 (quoting and citing *Lockheed Martin Corp. v. Admin Review Bd, U.S. Dep't of Labor*, 717 F.3d 1121, 1136 (10th Cir. 2013); *Marano v. Dep't of Justice*, 2 F.3d 1137, 1143 (Fed. Cir. 1993)) (internal citations omitted).

Yet the Tenth Circuit held that this case "marks an exception to this rule" because "employees cannot immunize themselves against wrongdoing by disclosing it in a protected-activity report." *Id.* "Accordingly, under these circumstances, we require Cain to show more than his updated Report's loosely leading to his firing. Because BNSF contends that it fired Cain for misconduct he revealed in his updated Report, Cain cannot satisfy the contributing-factor standard merely by arguing that BNSF would not have known of his delays in reporting his injuries absent his filing the updated Report." *Id.* The Complainant had met his burden nonetheless, due to the temporal proximity, the sequence of the investigations, and the finding that the supervisors had discouraged him from filing the report by hinting to adverse consequences if he did so. *Id.* at 639-640.

Next, the Tenth Circuit affirmed the ARB's determination that BNSF's had not shown by clear and convincing evidence it would have taken the same action absent the protected activity. The determination that the supervisors had encouraged the Complainant not to file the report, made implicit threats, and showed animus to the protected activity undermined any showing by BNSF on the issue. *Id.* at 640-41. Further, there were findings that BNSF had known earlier about the additional injuries but had not sought to discipline Complainant for not reporting them. BNSF had given inconsistent explanations about even who had fired the Complainant. And there was no evidence of actions taken against employees with similar violations. *Id.* at 641.

BNSF also appealed the punitive damage award. The Tenth Circuit began by affirming the finding that some punitive damages should be awarded. The comments from the supervisors discouraging the injury report supported the finding that BNSF had acted with a reckless or callous disregard for the Complainant's rights. *Id.* at 642. Turning to the amount of the punitive damages, the Tenth Circuit found that the ARB acted arbitrarily and capriciously when it halved the award because it found half the ALJ's analysis flawed. Appellate review is confined "to ascertaining 'whether the agency examined the relevant data and articulated a satisfactory explanation for its decision, including a rational connection between the facts found and the decision made.'" *Id.* (quoting *Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006)). The ARB's "half-for-half

approach fails this standard. On remand, the Board must explain why the available facts support the amount of punitive damages it awards.” *Id.* at 642-43.

Lastly, the Tenth Circuit held that it was error for the ARB to disregard the *State Farm* guideposts in assessing a punitive damages award. The *State Farm* guideposts are: 1) the degree of reprehensibility of culpability in the respondent's conduct; 2) the relationship between the punitive damages and the actual harm to the Complainant; and 3) punitive damages awarded for comparable misconduct. *Id.* at 636, 643. Though the presence of a statutory cap changed the “landscape” of the review, the guideposts still had to be used in a “less rigid review.” *Id.* at 643. In doing so, the ARB was directed to “set forth clear findings about the degree of BNSF's reprehensibility.” *Id.* at 644. And even though the statute set an upper limit, it was still necessary to look at the ration between punitive and other damages. *Id.* at 644-45. Comparable cases should be considered as well. *Id.* at 645. The Tenth Circuit then declined to evaluate the constitutionality of the punitive damages award, instead remanding so that the ARB could apply the guideposts in the first instance. *Id.*

[Editorial Note: On remand, the parties reached a settlement, which was approved by the ARB. See *Cain v. BNSF Ry. Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019 (ARB Sept. 15, 2016).]

U.S. District Court Decisions

PUNITIVE DAMAGES; DISTRICT COURT DOES NOT DISTURB \$249,999 PUNITIVE DAMAGE AWARD WHERE SAFEGUARDS AGAINST RETALIATION WERE INEFFECTIVE

In *Wooten v. BNSF Railway Co.*, No. 16-cv-00139, 2019 U.S. Dist. LEXIS 68808, 2019 WL 1778017 (D. Mont. Apr. 23, 2019), the Plaintiff filed a complaint alleging that he was unlawfully terminated by BNSF in retaliation for his report of an on-the-job injury. A jury found in his favor for Federal Employers' Liability Act (“FELA”) and Federal Rail Safety Act (“FRSA”) violations, but not on a count under the Locomotive Inspection Act (“LIA”). “On his FRSA claim, the jury awarded Wooten \$1,407,978 in lost wages and benefits in the future, reduced to present value, and \$500,000 for his mental and emotional humiliation or pain and anguish. . . . Additionally, after finding that BNSF's conduct was malicious or in reckless disregard for Wooten's rights, the jury awarded Wooten \$249,999 in punitive damages.” Both the Plaintiff and Defendant filed post-trial motions.

Defendant's Post-Trial Motions: Remittitur — Punitive Damages

The jury awarded the Plaintiff \$249,999 in punitive damages. The Defendant challenged to the punitive damages award, which according to the court, was grounded in an attempt to apply *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999), a Title VII decision, to the FRSA. Under *Kolstad*, a defendant is allowed to escape punitive damage liability if it “undertook good

faith efforts by having policies in place to prevent retaliation.” The court noted that the Defendant was relying on the Eighth Circuit’s decision in *BNSF Railway Co. v. US. Department of Labor Administrative Review Board*, 867 F.3d 942 (8th Cir. 2017), as establishing *Kolstad* as the standard for awarding punitive damages under the FRSA, whereas the Plaintiff was relying on the First Circuit’s decision in *Worcester v. Springfield Terminal Railway Co.*, 827 F.3d 179 (1st Cir. 2016). The court found the First Circuit’s decision to be more convincing. The court proffered that *ineffective* safeguards against retaliation should not allow a defendant to escape punitive liability. The court rejected the Defendant’s contention that the Plaintiff’s burden on punitive damages was anything more than preponderance of the evidence.

SUMMARY JUDGMENT; PUNITIVE DAMAGES; WHERE EVIDENCE EXISTS THAT COULD SUPPORT AN INFERENCE OF DISCRIMINATORY ANIMUS.

Wooten v. BNSF Railway Co., No. 16-cv-139 (D. Mont. Sept. 18, 2018) (2018 U.S. Dist. LEXIS 159199; 2018 WL 4462506) (case below 2016-FRS-00059) (Order [adopting Magistrate’s Findings and Recommendation and Order]), *adopting Wooten v. BNSF Railway Co.*, No. 16-cv-139 (D. Mont. May 29, 2018) (2018 U.S. Dist. LEXIS 89267; 2018 WL 2417858) (case below 2016-FRS-00059) (Findings and Recommendation and Order)

The Plaintiff reported a work-related wrist injury. After investigation a supervisor concluded that the injury had occurred prior to the work and that the Plaintiff had been dishonest in his reports. This led to termination. Plaintiff filed several actions, including an FRSA complaint. Defendant sought summary judgment on the punitive damages request. This was inappropriate because evidence had been produced that could be found to establish discriminatory animus.

SUMMARY JUDGMENT; PUNITIVE DAMAGES; WHERE DEPENDING ON FACTUAL FINDINGS A JURY COULD INFER RECKLESS OR CALLOUS DISREGARD FOR A PLAINTIFF’S RIGHTS, SUMMARY JUDGMENT ON PUNITIVE DAMAGES INAPPROPRIATE

Despain v. BNSF Railway Co., No. 15-cv-8294 (D. Az. Feb. 20, 2018) (2018 U.S. Dist. LEXIS 95518; 2018 WL 1894708) (Order [denying Defendant’s motion for summary judgment]):

The district court denied a motion for summary judgment by the Defendant in an FRSA action. The protected activity in the case involved making an injury report. The Defendant terminated the Plaintiff for dishonesty in making the report and in the investigation. The termination was later converted to a lengthy suspension. The alleged dishonesty concerned when the Plaintiff determined the injury was work-related, when during the shift the injury occurred, and the circumstance of a quip pro quo proposal to drop the injury report in exchange for a paid deadhead trip. The Plaintiff and manger had different accounts of who made that proposal.

Defendant sought summary judgement on punitive damages. It was denied because the district court determined that a jury could infer reckless or callous disregard for the plaintiff’s rights, depending on how it resolved the factual disputes. Summary judgment barring punitive damages was thus improper.

SUMMARY JUDGMENT; PUNITIVE DAMAGES; WHERE MATERIAL DISPUTES OF FACT REMAINED ON THE SEQUENCE OF EVENTS AND THE BEHAVIOR OF SUPERVISORS, SUMMARY JUDGMENT ON PUNITIVE DAMAGES FOUND NOT APPROPRIATE

In *Rader v. Norfolk Southern Ry.*, No. 1:13-cv-298 (E.D. Tenn. Feb. 10, 2016) (2016 U.S. Dist. LEXIS 17913), the court denied Defendants' Norfolk Southern Railway Company's ("NSRC") and Norfolk Southern Corporation's ("NSC") Motion for Summary Judgment, finding that Plaintiff had presented sufficient evidence to meet the permissive threshold applicable at the summary judgment stage of proceedings.

The Plaintiff hurt his knee at work and reported the injury. He had surgery and was out for a time. He was then released to return to work, though his doctor also said he should use a Neoprene Sleeve on his knee. The medical department at the railroad cleared Claimant to return to work without restriction. This was transmitted to the relevant supervisors, along with mention of the sleeve. When Plaintiff returned to work he was told that he could not work and had to leave the property. The parties disputed the conversation, but use of the Sleeve was mentioned and emails indicated uncertainty over whether there was a work restriction. Eventually Plaintiff's doctor removed that restriction and after another physical and clearance by the medical department, Plaintiff returned to work. He filed a complaint under the FRSA alleging that his return had been delayed in retaliation for reporting a work-related injury.

The Railroad sought summary judgment. As to the contributing factor element, the court found that the Plaintiff had enough evidence to meet "this very permissive threshold." Given the evidence that the medical department had cleared him to return to work and instructed the supervisors that he should be allowed to work, as well as the evidence of the hostility Plaintiff encountered when he returned, a reasonable jury could find that the injury report contributed to the decision to delay the return.

As to the affirmative defense, the Railroad provided evidence that delays from the medical department are common for both work-related and non-work-related injuries. The court found that this was insufficient—the delay here resulted from the direct supervisor, not the medical department, which had cleared Plaintiff to return. That was conveyed to the supervisor who made the decision, which undercut the argument that the delay would have occurred regardless of the protected activity.

The court also denied summary judgment as to the punitive claim on the grounds that there were material issues of facts in dispute and denied a motion to strike a notice of supplemental authority.

PUNITIVE DAMAGES; SUMMARY JUDGMENT; SUMMARY JUDGMENT GRANTED ON PUNITIVE DAMAGES WHERE THERE WAS NO RECORD EVIDENCE OF RECKLESS OR CALLOUS DISREGARD OF PLAINTIFF'S RIGHTS OR INTENTIONAL VIOLATION OF FEDERAL LAW

Fields v. Southeastern Pennsylvania Transportation Authority, No. 14-cv-2491 (E.D. Pa. July 31, 2015) (2015 U.S. Dist. LEXIS 100839, 2015 WL 4610876): Two joined FRSA complaints. Both plaintiffs were passengers in trucks used in work on the railway that were in a collision. One was injured and received a settlement for his injuries. No discipline was assessed. Roughly two months later they were involved in an accident using the same equipment on the same part of the track in the same conditions. They were disciplined for safety violations. One had no prior discipline and received a written warning that was expunged after the review period was ended. The other was at the termination stage of the progressive discipline policy, but a settlement was reached that preserved his job. After two years of no violations, his record was cleared. They filed FRSA complaints, which were both kicked-out and then joined in the district court. After the close of discovery, Defendant moved for summary decision as to one employee for no protected activity and in part as to the other as to the absence of compensatory and punitive damages.

The first employee claimed that he had made a report of a violation of Federal law, rule, or regulation, and of an injury. But the court found that the record did not support the inference that this employee had reported anything to anyone. He was disciplined for operating a truck at an unsafe speed, but neither that nor being in an accident is protected activity. Defendant was thus summary judgment and the claim was dismissed.

As to the other plaintiff, the court granted summary judgment on the punitive damages claim. Punitive damages may be awarded where there was reckless or callous disregard for the plaintiff's rights or intentional violation of federal law. The court quickly concluded there was no evidence in the record that could possibly support such an award in the case.

DOL Administrative Review Board Decisions

PUNITIVE DAMAGES; STATE OF MIND OF MANAGER BASED ON MISTAKEN ASSUMPTION; LARGE RATIO BETWEEN BACK PAY AWARD AND PUNITIVE DAMAGE AWARD

In [*D'Hooge v. BNSF Railways*](#), ARB Nos. 15-042, -066, ALJ No. 2014-FRS-2 (ARB Apr. 25, 2017), the ALJ awarded \$906 in back pay and \$25,000 in punitive damages. The Respondent appealed the punitive damages award. The ARB explained FRSA punitive damages law:

Relief under FRSA “may include punitive damages in an amount not to exceed \$250,000.” Punitive damages require reckless disregard or willful violations of law. *Smith v. Wade*, 461 U.S. 30, 51 (1983). The fact-finder considers the actor's state of mind in relation to the law. Punitive damages are appropriate for intentional and egregious violations of the law. Gross or reckless indifference to the law can establish the intentional component needed for willfulness. *Kolstad v.*

Am. Dental, 527 U.S. 526, 535-36 (1999). An employer may avoid punitive damages when it has made a good-faith effort to comply with the law. *Youngermann v. United Parcel Serv.*, ARB No. 11-056, ALI No. 2010-STA-047 (ARB Feb. 27, 2013). The employer relying on the affirmative defense of good faith has the burden of proof.

Slip op. at 10 (footnote omitted).

State of mind; ALJ did not err in awarding punitive damages despite manager's mistaken assumption about whether protected activity was in bad faith where substantial evidence supported findings that the manager failed to adequately investigate before making a decision impacting a condition of employment

In the instant case, the ALJ found reckless disregard of law, and that the need for deterrence applied, because the Complainant's Trainmaster had abolished a fixed route with favorable working conditions that the Complainant had been assigned to, before investigating the Complainant's "bad-order" report of rough-riding locomotives, and had wrongly assumed that the report was made in bad faith. The Respondent argued that the ALJ erred because it did not have the requisite state of mind for reckless disregard, and it had operated in good faith. The Respondent argued that it adheres to anti-retaliation policies, and that a goal of deterrence would not be served because the Trainmaster who had made the decision to abolish the route had been under a mistaken belief about the crew's bad faith in bad-ordering the locomotives. The Respondent also noted that the Trainmaster was no longer employed by the Respondent. The ARB, however, found the ALJ's finding supported by substantial evidence. The Trainmaster had not followed protocol, had not investigated, and had merely assumed that the crew was trying to get out of work. The ARB noted that the ALJ stated that the need for punitive damages was directed to the Respondent's failure to train its managers appropriately, and to discourage managers from making decisions that impact a worker's condition of employment without the benefit of readily available information.

Large ratio between back pay award and punitive damage award found not excessive where the back pay was a low amount

The Respondent next argued that the ALJ's award was excessive because the ratio between the back pay award and the punitive damages was approximately 25:1. The ARB noted that it reviews non-constitutional claims of excessiveness for abuse of discretion, and constitutional claims de novo, but that in the instant case it was not necessary to differentiate. The ARB stated: "Under either the abuse of discretion standard or the constitutional due process standard, we find that the ALJ's award was not excessive. In another context, the ratio of 25:1 may present more concern, but here we focus on the low amount of back pay award to find that the ALJ's award of punitive damages at the ratio of 25:1 is not excessive." Slip op. at 12.

PUNITIVE DAMAGES; ALJ DID NOT ABUSE HIS DISCRETION IN AWARDING STATUTORY MAXIMUM PUNITIVE DAMAGES UNDER THE FRSA, EVEN THOUGH THE HARM TO THE COMPLAINANT HAD BEEN LIMITED, WHERE

THE ALJ DETERMINED THAT THE AMOUNT WAS NECESSARY TO PUNISH AND DETER FUTURE CONDUCT

In [Raye v. Pan Am Railways, Inc.](#), ARB No. 14-074, ALJ No. 2013-FRS-84 (ARB Sept. 8, 2016), the Complainant stumbled, but did not fall, after stepping off a boxcar onto some railroad ties, and consequently injured his left ankle. Three weeks earlier, the Complainant had reported these railroad ties as a hazard to his manager. The Respondent charged the Complainant with a violation of a rule requiring employees to be assured of firm footing before they step down from a train. At the investigatory hearing, the Complainant stated that he stumbled but did not fall. The Complainant received a reprimand, upon which the Complainant filed a FRSA complaint, drafted entirely by the Complainant's counsel, which was consistent with the Complainant's account except that it stated that the Complainant "fell heavily to the ground." The Respondent concluded that the statement about a fall was a major discrepancy and charged the Complainant with providing false statements and acts of insubordination, hostility, or willful disregard of the Company's interests, sufficient as cause for dismissal. The Complainant then amended his FRSA complaint to allege that the Respondent discriminated against him for filing his FRSA complaint. After the investigatory hearing on this new charge, the Respondent did not take any disciplinary action against the Complainant because it found the attorney had added the language in the FRSA complaint about a fall without the Complainant's approval.

OSHA found no violation with respect to the Complainant's reports of a safety hazard and workplace injury, but found reasonable cause to find that the Respondent retaliated for the filing of the FRSA complaint. The Respondent requested an ALJ hearing. The ALJ found that the Respondent violated FRSA, and, among other relief, awarded the statutory maximum in punitive damages of \$250,000. The ALJ, using the Supreme Court's "*State Farm* guideposts," awarded the maximum amount because he found that the Respondent intentionally violated the Complainant's rights under the FRSA, and the award was necessary to deter similar conduct by in the future, even though the harm suffered by the Complainant was limited because he was not formally disciplined after the second internal hearing.

In regard to whether punitive damages were appropriate, the ARB, noted that it follows the common law rule recognized by the Supreme Court in *Smith v. Wade*, 461 U.S. 30, 51 (1983), and found that substantial evidence of record supported the ALJ's findings of egregious and intentional conduct warranting the award of punitive damages. In a footnote, the ARB stated: "Concerning the egregious nature of Pan Am's conduct, it is significant to note that the ALJ found that Pan Am intentionally retaliated against Raye for engaging in *quintessential* protected activity under the FRSA. See 49 U.S.C.A. § 20109(a)(1), (3), (4)." Slip op. at 8, n.32 (emphasis added).

In regard to whether the amount awarded was appropriate, the ARB noted: "Punitive damages are not awarded as of right upon a finding of the requisite state of mind; rather, the question of whether to award punitive damages is in the ALJ's discretion. An ALJ's task, after determining that the evidence is sufficient for a punitive damages award, is to consider the amount necessary for punishment and deterrence and then to either make an award or not, based on those considerations." *Id.* at 9. The ARB stated that it "reviews the amount an ALJ awards in punitive damages for an abuse of discretion." *Id.* (noting, however, that the standard of review is different

for constitutional challenges). The ARB then determined that the ALJ's consideration of the Respondent's actions in response to the injury report, even though that aspect of the complaint was not appealed by the Complainant, was harmless error:

We find that the ALJ did not abuse his discretion in determining that \$250,000.00 in punitive damages was necessary in this case in furtherance of the goal of punitive damages awards to punish and deter future misconduct. This is so even though the ALJ considered, as a part of his analysis, Pan Am's actions relating to Raye's injury report when it was no longer a part of this case [the Complainant having not appealed OSHA's determination that the Respondent carried its affirmative defense burden in regard to this aspect of the case]. This consideration did not change the intentional and reprehensible nature of Pan Am's conduct in targeting Raye because he filed a FRSA complaint. Further, the ALJ did not rely on this evidence but only viewed it in context, so the error was harmless.

Id. (footnotes omitted).

The ARB also implied that the ALJ's use of the *State Farm* guideposts was not reversible error:

We note that while the ALJ's analysis of the *State Farm* guideposts as a part of his analysis to determine the amount to award in punitive damages was not reversible error, it was also not necessary. An ALJ's task after determining that an award of punitive damages would be appropriate is to determine the amount necessary for punishment and deterrence—"a discretionary moral judgment." The ALJ did not abuse his discretion in awarding \$250,000.00 in punitive damages. We note that a "statutory limit on punitive damage awards strongly undermines the concerns that underlie the reluctance to award punitive damages where minimal or no compensatory damages have been awarded."

Id. at 9-10 (footnotes omitted).

PUNITIVE DAMAGES; EIGHTH CIRCUIT REJECTS ARB'S RATIFICATION OF ALJ'S PUNITIVE DAMAGES AWARD; COURT APPLIES PRINCIPLE THAT A RESPONDENT MAY AVOID VICARIOUS PUNITIVE DAMAGES LIABILITY BY SHOWING THAT IT MADE GOOD FAITH EFFORTS TO COMPLY WITH THE FRSA, AND FINDS STRONG EVIDENCE OF RESPONDENT'S GOOD FAITH EFFORTS TO PREVENT RETALIATION BASED ON ITS CODE OF CONDUCT AND OTHER FACTORS

In *Carter v. BNSF Railway Co.*, ARB Nos. 14-089, 15-016, -022, ALJ No. 2013-FRS-82 (ARB June 21, 2016), the ARB affirmed the ALJ's award of \$50,000 in punitive damages. The ARB stated that "[i]f the ALJ finds that the employer had the requisite state of mind and that finding is supported by substantial evidence, on appeal, the ARB will uphold the ALJ's determination that punitive damages are warranted." USDOL/OALJ Reporter at 7 (footnote omitted). The respondent's conduct need not be egregious, but rather, the "determinative factual question an

ALJ must answer is whether the respondent acted with ‘reckless or callous disregard for the plaintiff’s rights’ or intentionally violated federal law.” *Id.* (footnote omitted). The ARB rejected the Respondent’s contention on appeal that it had not acted with reckless disregard for the Complainant’s rights under FRSA, the ARB citing several findings by the ALJ that were supported by substantial evidence. The ARB also rejected the Respondent’s argument that it had anti-retaliation policies showing “good faith” compliance with the FRSA and that the acting supervisors acted outside the scope of their employment when they engaged in misconduct. The ARB stated: “Written anti-retaliation policies, without more (as in efforts to implement and enforce these policies), do not insulate an employer from punitive damages liability.” *Id.* at 8 (footnote omitted). The ARB also cited the ALJ’s findings that the Respondent had ratified the supervisors’ actions, and endorsed them through conducting investigatory hearings with the supervisors acting as the Respondent’s agents.

[Editorial Note: On appeal the 8th Circuit Court of Appeals vacated the ARB’s decision sub nom. in *BNSF Ry. Co. v. United States DOL Admin. Review Bd.*, No. 16-3093 (8th Cir. Aug. 14, 2017) (2017 U.S. App. LEXIS 15020; 2017 WL 3469224). In regard to the punitive damages award, the court wrote:

Plaintiffs seeking punitive damages have a “formidable burden.” *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1035 (8th Cir. 2008) (applying malice or reckless indifference standard in *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 536 (1999), cited by the ARB in this case). Even if Carter can show unlawful retaliation, BNSF “may avoid vicarious punitive damages liability by showing that it made good faith efforts to comply with [the FRSA].” *Id.* Here, the ALJ acknowledged that BNSF “has a Code of Conduct that specifically prohibits retaliation, an Injury Reporting Policy prohibiting retaliation against employees who report injuries, a Mechanical Safety Rule expressly prohibiting retaliation, a hotline or website, and review of dismissals by its Labor Relations Department,” and that Heenan, “the person ultimately responsible for reviewing the file and making a recommendation, had never met Mr. Carter, and knew nothing about his injury or subsequent lawsuit.” This is strong evidence of BNSF’s good-faith efforts to prevent retaliation. *See Bennett v. Riceland Foods, Inc.*, 721 F.3d 546, 553 (8th Cir. 2013). As summarized by the ARB, the ALJ awarded punitive damages because BNSF fired Carter “not once, but twice,” and did not provide Carter with fair discovery and a continuance at his first on-property hearing. On this record, we would reverse the award of punitive damages.

Slip op. at 10.]

\$5,000 IN PUNITIVE DAMAGES APPROPRIATE SANCTION FOR RESPONDENT’S THREAT TO INITIATE DISCIPLINE IF COMPLAINANT CONTINUED TO ENGAGE IN PROTECTED ACTIVITY

In *Rudolph v. National Railroad Passenger Corp. (AMTRAK)*, ARB Nos. 14-053, -056, ALJ No. 2009-FRS-15 (ARB Apr. 5, 2016), the ARB affirmed the ALJ’s decision and order finding

that the Respondent violated the employee protection provision of the Federal Railroad Safety Act, when it determined that the Complainant was medically disqualified from working as a conductor. The ALJ awarded \$5,000.00 in punitive damages for the Complainant's supervisor's threat to initiate discipline if the Complainant continued to insist he was forced to work over his hours-of-service limit. On appeal, the Complainant argued that he was entitled to the maximum punitive damage award of \$250,000. The ARB found that substantial evidence supported the ALJ's award of \$5,000.00 in punitive damages, and the ALJ's reasoning that under the facts of the case, Amtrak's disciplinary charge and subsequent actions in referring the Complainant for a psychiatric evaluation and relying on the report from this evaluation did not constitute reckless indifference or callous disregard of the FRSA's protection provisions. The ARB found that the Complainant presented no persuasive evidence for increasing the award, and the damages were within the amount allowable by law. Six "aggravating factors" described in the Complainant's brief were merely allegations which the record evidence failed to prove.

FRSA PUNITIVE DAMAGE AWARD DOES NOT REQUIRE "ILLEGAL MOTIVE"; SIZE OF PUNITIVE DAMAGE AWARD IS A FACT BASED DETERMINATION

In *Leiva v. Union Pacific Railroad Co., Inc.*, ARB Nos. 14-016, -017, ALJ No. 2013-FRS-19 (ARB May 29, 2015), the ARB affirmed the ALJ's finding that the Respondent violated the FRSA employee protection provision, and remanded to the ALJ for consideration of the Complainant's claim for punitive damages, which the ALJ had not addressed in his decision and order. The ARB noted:

Under 49 U.S.C.A. § 20109(e)(3), "[r]elief in any action under subsection (d) may include punitive damages in an amount not to exceed \$250,000." FRSA does not require "illegal motive" to sustain a punitive damage award. An award of punitive damages may be merited where there has been "'reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law.'" The size of a punitive award "is fundamentally a fact-based determination." We remand to the ALJ to determine whether a punitive damages award is merited and if so, the size of the punitive damages award.

USDOL/OALJ Reporter at 8 (footnotes omitted).

PUNITIVE DAMAGES; ALJ'S AWARD OF \$1,000 IN PUNITIVE DAMAGES FOR SUPERVISOR'S EXAGGERATED RESPONSE TO COMPLAINANT'S RAISING OF CONCERNS ABOUT A SMOKY ODOR OF SENDING COMPLAINANT HOME WITHOUT PAY AND REQUIRING MEDICAL RELEASE FOR RETURN TO WORK REVERSED AND VACATED BY THE ARB WHERE COMPLAINANT DID NOT ESTABLISH THAT THE SUPERVISOR'S RESPONSE SHOWED A RECKLESS OR CALLOUS INDIFFERENCE

In *Jackson v. Union Pacific Railroad Co.*, ARB No. 13-042, ALJ No. 2012-FRS-17 (ARB Mar. 20, 2015), the Complainant engaged in protected activity when he reported a foul, smoky odor to

the manager of yard operations (which had resulted from marsh fires outside New Orleans). Because of possible health concerns, the Complainant requested to be assigned to an area free from the smoke and smell. Unable to accommodate him, the Complainant's supervisor sent the Complainant home without pay and directed him to return to work only after obtaining a medical release. The ALJ awarded \$1,000 in punitive damages for the "exaggerated" response to the Complainant's smoke concerns. The ARB found that substantial evidence did not support the punitive damages award, finding that the record did not indicate any reckless or callous indifference to the Complainant's legal rights. The ARB found that the Complainant's supervisor had consistently testified that the Complainant was reporting a personal health issue and that he wanted a doctor to determine why the Complainant had a problem while no one else at the yard did. The ARB acknowledged that the ALJ had implicitly disregarded this testimony in favor of the Complainant's testimony about his safety concerns, but nonetheless found that the Complainant had provided no evidence of how the supervisor's conduct showed reckless or callous indifference toward the Complainant. The ARB thus reversed and vacated the punitive damages award. One member of the Board dissented on this issue, finding that the majority had not discussed the ALJ's findings that the request for a medical clearance was a ruse.

**PUNITIVE DAMAGES; SHOWING OF ILLEGAL MOTIVE NOT REQUIRED;
\$100,000 AWARD FOUND WARRANTED WHERE RESPONDENT'S WORKPLACE
RULES EFFECTIVELY PUNISHED EMPLOYEE FOR BEING INJURED**

In *Petersen v. Union Pacific Railroad Co.*, ARB No. 13-090, ALJ No. 2011-FRS-17 (ARB Nov. 20, 2014), the ALJ awarded \$100,000 in punitive damages. The Complainant had been notified that the Respondent was going to conduct a hearing on whether the Complainant failed to be alert and attentive in violation of work rules while checking messages on his cell phone, and failed to take precaution to avoid having his feet run over by another employee attempting to park. The Complainant was informed that a finding of a rule violation would result in assessment of level 5 discipline and permanent dismissal, but that the Complainant could sign a leniency agreement waiving the right to an investigation, agreeing to an unpaid suspension and a return to work on a probationary basis during which any breach of workplace safety would be grounds for removal from service without an investigation. The Complainant signed the leniency agreement. Four days later he was observed purportedly working in an unsafe manner, which led to being taken off duty and subsequent termination from employment. The ALJ found that the company's disciplinary rules effectively punish an employee for being injured.

On appeal, the Respondent challenged the punitive damages award on the ground that it was not supported by evidence of illegal motive. The ARB rejected this argument writing:

FRSA does not, however, require "illegal motive" to sustain a punitive damage award. An award of punitive damages may be warranted where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law." Possible relief under FRSA "may include punitive damages in an amount not to exceed \$250,000." 49 U.S.C.A. § 20109(e)(3). The size of the punitive award "is fundamentally a fact-based determination," and

“[w]e are bound by the ALJ’s [factual] findings if they are supported by substantial evidence.”

USDOL/OALJ Reporter at 5 (footnotes omitted).

The ARB found that the ALJ’s punitive damages award was warranted, in accordance with law, and supported by the facts. The ARB found that the size of the award was within the amount allowable by law and in line with awards in comparable cases.

PUNITIVE DAMAGES REDUCED WHERE ALJ FOUND NOT TO HAVE ADEQUATELY EXPLAINED WHY HE AWARDED THE STATUTORY MAXIMUM

In *Cain v. BNSF Railway Co.*, ARB No. 13-006, ALJ No. 2012-FRS-19 (ARB Sept. 18, 2014), the ARB found that substantial evidence supported the ALJ’s determination that punitive damages were warranted, but reduced the amount awarded from \$250,000 to \$125,000 finding that the ALJ had not provided sufficient justification for the \$250,000 award. The ARB appears to have agreed with the ALJ that the amount of lost wages for which the Respondent was liable was insufficient to have a deterrent effect on the Respondent, and with the ALJ’s taking into consideration that several employees were involved in the decision to retaliate against the Complainant. The ARB found, however, that the ALJ erred by considering a reassignment of the Complainant, an action the ALJ considered to be “wanton and willful and an equivalent to an intentional tort.” The ARB noted that the Complainant had not raised the reassignment as an adverse employment action and that this issue had not therefore been adjudicated. The ARB’s explanation for its decision to half the punitive damages award was a bit ambiguous. The Board stated only: “The ALJ devoted half of his summary analysis to his determination that BNSF must pay \$250,000 in punitive damages. Therefore, we reduce his award by \$125,000.” USDOL/OALJ Reporter at 12.

ARB AFFIRMS \$100,000 PUNITIVE DAMAGES AWARD

In *Griebel v. Union Pacific Railroad Co.*, ARB No. 13-038, ALJ No. 2011-FRS-11 (ARB Mar. 18, 2014), the Respondent challenged the ALJ’s punitive damages award of \$100,000 under FRSA, 49 U.S.C.A. § 20109(e)(3). The ARB affirmed the award finding that the facts supporting the decision to award such relief were supported by substantial evidence, and that the Respondent failed to present persuasive reasons for overturning the amount of punitive damages.

PUNITIVE DAMAGES; CLAIM FOR PUNITIVE DAMAGES DOES NOT SURVIVE THE DEATH OF THE COMPLAINANT

In *Thompson v. Norfolk Southern Railway Co.*, 2011-FRS-15 (ALJ Jan. 8, 2013), the ALJ issued a decision in favor of the deceased Complainant, whose FRSA complaint was being pursued by his widow. The ALJ determined that punitive damages were not available, writing:

In this case, the matter of punitive damages is complicated by the death of Complainant. Whether a claim survives the death of the claimant is grounded in federal common law, absent contrary legislative intent, and turns on whether the action is penal or remedial in nature. *U.S. v. NEC Corp.*, 11 F.3d 137 (11th Cir. 1993). A penal action imposes damages for harm to the general public and does not survive the death of the claimant. *Schreiber v. Sharpless*, 110 U.S. 76, 80 (1884). A remedial action compensates an individual for a specific harm suffered and survives the death of the claimant. *Id.*

Whistleblower laws are generally considered remedial statutes, designed to make claimants whole. *Menendez v. Halliburton*, ARB Nos. 09-002 and 09-003, ALJ No. 2007-SOX-2005, at 15 (ARB Sept. 13, 2011); *Vernance v. PATH*, ALJ no. 2012-FRS-00018. Punitive damages, however, are penal in nature. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). Courts have addressed the survivability of federal remedial statutes that allow for punitive damages by allowing the compensatory aspect of the claims to continue while barring any punitive damage awards. *Smith v. Dept. of Human Services*, 876 F.2d 832, 837 (10th Cir.1989) (addressing survival of claim for punitive damages under the ADEA); *Caraballo v. South Stevedoring, Inc.*, 932 F.Supp. 1462, 1466 (S.D.Fl.1996) (addressing survival of claim for punitive damages under the ADA); *Green v. City of Welch*, 467 F.Supp.2d 625, 665-66 (S.D.W.Va. 2006). Accordingly, Complainant's claim for punitive damages does not survive his death.

PUNITIVE DAMAGES; ALTHOUGH PROTECTED ACTIVITY CONTRIBUTED TO ADVERSE ACTION, SUBSTANTIAL EVIDENCE SUPPORTED ALJ'S FINDING THAT RESPONDENT DID NOT ACT WITH SUCH CALLOUS DISREGARD FOR THE COMPLAINANT'S RIGHTS THAT PUNITIVE DAMAGES WERE WARRANTED

In *Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, 13-033, ALJ No. 2012-FRS-12 (ARB Apr. 22, 2013), the Complainant petitioned for review of the ALJ's award of \$4,000 for pain and suffering, seeking an increase to \$100,000 in compensatory damages for pain and suffering, and \$250,000 in punitive damages. The ARB found that the \$4,000 award was well within the ALJ's discretion and supported by substantial evidence. The ALJ found that the Complainant's emotional distress was not entirely due to the Respondent's adverse action, and found that the Respondent had not acted with such callous disregard of the Complainant's rights that punitive damages were warranted. The ALJ rejected the Complainant's claims that company managers harbored antagonism or hostility against him and were conspiring to terminate his employment. Substantial evidence supported the ALJ's finding that the Complainant's protected activity was a contributing factor in the adverse action, but that the evidence did not rise to the level of establishing grounds for awarding punitive damages.

- Attorneys' Fees and Costs

U.S. District Court Decisions

ATTORNEY'S FEES; COURT AGREED THAT PLAINTIFF HAD REASONABLY ENGAGED A LAW FIRM THAT SPECIALIZED IN FRSA RETALIATION LITIGATION, BUT REJECTED NOTION OF APPLYING A NATIONWIDE COMMUNITY OF LAWYERS WITH THAT EXPERTISE STANDARD FOR DETERMINING THE RELEVANT COMMUNITY; RATHER, THE COURT FOUND THAT THE PACIFIC NORTHWEST WAS THE RELEVANT COMMUNITY FOR A CASE HEARD IN MONTANA

ATTORNEY'S FEES'; WHERE DEFENDANT OBJECTED TO ALL BUT 33 HOURS OF NEARLY 755 HOURS CLAIMED, THE COURT GENERALLY FOUND THAT THE OBJECTIONS WERE UNREASONABLE AND NOTED THAT THE COURT'S ROLE WAS TO DO ROUGH JUSTICE AND NOT TO ACHIEVE AUDITING PERFECTION

LITIGATION COSTS; TAXABLE "OUT-OF-POCKET" EXPENSES INCLUDE POSTAGE CHARGES, TRAVEL CHARGES (BUT REDUCED IF FLYING FIRST CLASS), HOTEL EXPENSES WITH PER DIEM, VIDEOGRAPHY AND TRANSCRIPTION COSTS; EXPENSES FOR LEGAL RESEARCH DATABASES, HOWEVER, ARE PART OF THE ATTORNEYS' HOURLY RATE AND NOT SEPARATELY COMPENSABLE

BILL OF COSTS; TAXABLE AND NON-TAXABLE EXPENSES; PETITION FOR COSTS FOR EXPLICATION MUST COMPLY WITH LOCAL RULE

In *Wooten v. BNSF Railway Co.*, No. 16-cv-00139, 2019 U.S. Dist. LEXIS 68808, 2019 WL 1778017 (D. Mont. Apr. 23, 2019), the Plaintiff filed a complaint alleging that he was unlawfully terminated by BNSF in retaliation for his report of an on-the-job injury. A jury found in his favor for Federal Employers' Liability Act ("FELA") and Federal Rail Safety Act ("FRSA") violations, but not on a count under the Locomotive Inspection Act ("LIA"). "On his FRSA claim, the jury awarded Wooten \$1,407,978 in lost wages and benefits in the future, reduced to present value, and \$500,000 for his mental and emotional humiliation or pain and anguish. . . . Additionally, after finding that BNSF's conduct was malicious or in reckless disregard for Wooten's rights, the jury awarded Wooten \$249,999 in punitive damages." Both the Plaintiff and Defendant filed post-trial motions.

Plaintiff's Post-Trial Motions

— *Attorneys' Fees*

The case was tried in Montana. The Plaintiff contended that it was necessary to attain attorneys with nationwide expertise in railroad litigation and that the relevant community for a fees determination should be that community, whereas the Defendant contended that the reasonable fees should be the prevailing rates for counsel in Missoula, Montana. The court acknowledged the absence of Montana law firms that represent claimants in FRSA litigation “at this level,” but declined to apply the Plaintiff’s broad “nationwide experience” definition for the relevant community. Rather, the court looked to the Pacific Northwest, and in particular the Western District of Washington where the Plaintiff’s attorneys had recently had the reasonableness of their fee evaluated in two separate cases. After reviewing the matter, the court determined the prevailing market rate as between \$425 and \$275 an hour for various attorneys, and \$110 an hour for a paralegal. The court declined to consider time of a clerical nature spent by an administrative assistant, apparently on the ground that such is considered firm overhead. The court dismissed as unreasonable BNSF’s objections to all but 33 hours of the Plaintiff’s attorneys claimed hours, noting that the court’s role was to do rough justice and not to achieve auditing perfection. The court agreed to cut 10% of the claimed time because of the intermingling of the FRSA and FELA claims. The court noted that the case had been “fought tooth and nail” and indicated that it was not persuaded by BNSF’s claim that the hours claimed were so “stunning” as to result in “no award at all.” The court did make a few adjustments for certain hours, such as hours litigating a matter that concurring that resulted in the Plaintiff’s attorneys’ being sanctioned.

— *Taxable and Non-Taxable Litigation Costs*

The court noted that while the FRSA does not define “litigation costs,” the Ninth Circuit allows as compensation “out-of-pocket” expenses that would normally be charged to a fee-paying client. Thus, awards were made for postage charges, travel charges (with certain reductions, such as for flying first class), hotel expenses with per diem, and videography and transcription costs. The court found, however, that expenses for legal research databases were part of the attorneys’ hourly rate and not separately compensable.

— *Expert Witness Fees*

The court declined to get into requiring receipts for all charges based on BNSF’s “insinuation that Wooten has misrepresented what was actually charged on his invoices.” *Id.* at 63. The court reiterated that it “declines to become a ‘green-eyeshade accountant’ and will pursue ‘rough justice’ in relation to this fee award.” The court did reject a few unsupported invoices, but awarded \$233,993.70 in expert witness fees.

Bill of Costs

The Plaintiff submitted a bill of costs, which BNSF objected to in numerous aspects. The court noted that it may tax costs as provided in 28 U.S.C. § 1920. It found that BNSF properly objected to inclusion of pro hac vice fees, and limited recovery to the \$400 clerk of court filing fee. It allowed costs of service of summons and subpoenas, except for a \$75 service fee accrued without a waiver request. It allowed fees for printed or electronically recorded transcripts. It allowed witness fees, except it disallowed fees for deposition testimony that should not be paid under the local rule. It disallowed all fees for explication because the Plaintiff failed to conform

his request to the local rule. It disallowed fees for setting up video conferencing to allow to experts to testify remotely.

ATTORNEY’S FEES AND COSTS; LODESTAR USED TO DETERMINE REASONABLE FEE; PETITIONING PARTY HAS BURDEN TO ESTABLISH REASONABLE HOURLY RATES IN THE RELEVANT COMMUNITY; WHEN MULTIPLE CLAIMS ARE AT ISSUE, TIME SPENT SOLELY ON A CLAIM WITHOUT A FEE-SHIFTING PROVISION IS NON-COMPENSABLE; MULTIPLIER MAY BE APPROPRIATE IN CONTINGENT FEE CASES

O’Neal v. Norfolk S. R.R. Co., 16-cv-519 (M.D. Ga. Nov. 15, 2018) (2018 U.S. Dist. LEXIS 194771; 2018 WL 6005425) (Order [on costs and expenses]): Two joined FRSA actions proceeded to a jury trial, resulting in a verdict for the plaintiffs. Counsel for the plaintiffs sought an award of fees and costs. Defendant disputed the requested rate and the hours billed, as well as an application of a 1.33 multiplier.

The court explained that attorneys’ fees under the FRSA are determined using the lodestar: the reasonable hourly rate multiplied by the reasonable number of hours, with a “strong presumption” that the lodestar yields the proper award. Based on an affidavit of a local attorney about rates in the area, the court found that plaintiffs’ had established a rate of \$405.00/hour, but rejected the claim of \$450.00/hour that was based on an award in a different community.

The case involved a related FELA claim and FELA does not contain a fee-shifting provision. The court explained that the claims overlapped and hours that were necessary for the FRSA claim were billable, even if they also related to the FELA claim. But time spent solely on the FELA claim could not be billed to the Defendant. The court accordingly reduced FELA-only hours. The court also reduced clerical time, duplicate entries, and inaccurate entries.

Next, applying 11th Circuit law, the court awarded an enhancement to the lodestar with a 1.33 multiplier due to the risk of non-recovery. Lastly, the court rejected on objection to costs.

ATTORNEY FEE AWARD; LODESTAR METHOD APPLIES TO FRSA FEE REQUESTS; A SOPHISTICATED TIMEKEEPING SYSTEM IS NOT REQUIRED TO MEET CONTEMPORANEOUS RECORDS REQUIREMENT; WORK BEFORE OSHA IS COMPENSABLE; TRAVEL TIME REDUCED TO 50% OF HOURLY RATE; REDUCTION FOR REPLY FILING WHERE REPLY LARGELY ADDRESSED DEFICIENCIES IN ORIGINAL FILING; \$450 PER HOUR FOUND TO BE APPROPRIATE RATE FOR ATTORNEY IN SOUTHERN DISTRICT OF NEW YORK WITH 16 YEARS OF EXPERIENCE, 10 OF WHICH WERE DEVOTED TO REPRESENTATION OF RAILROAD WORKERS

In *Brig v. Port Authority Trans Hudson*, No. 12-cv-05371 (S.D.N.Y. Mar. 28, 2014) (2014 WL 1318345), the court found that the lodestar method is the correct analysis for calculation of reasonable attorney fees in an FRSA whistleblower case. Accordingly, the court stated that it would determine the amount of a reasonable fee by calculating the number of hours reasonably

expended on the litigation multiplied by a reasonable hourly rate, based on prevailing market rates in the district in which the case was brought. The court stated that “[i]n order to recover attorney fees in the Second Circuit, three conditions must be met with respect to the reasonableness of the time billed. First, the hours submitted must be documented with contemporaneous records. ... Second, the records must not be overly vague. Finally, the billed time must have been reasonably spent.” Slip op. at 4 (citations omitted).

The Defendant challenged the contemporaneousness of the Plaintiff's billing records based on a lack of indicia of use of a timekeeping system. The court rejected this challenge, finding that the lack of a sophisticated timekeeping system does not foreclose meeting the contemporaneous requirement, and that in the instant case the specificity of the records reflected that the time entries were made on the date the work was performed. The court found that the time records met the requirement that they specify the date, the hours expended, and the nature of work done, and thus were not overly vague or non-descriptive. In regard to reasonableness of the time billed, the court deducted 0.2 hours for an unnecessary correspondence, declined to deduct time billed for work before OSHA, reduced travel time charges to 50 percent of the attorney's hourly rate, and reduced hours spent on a reply declaration that was submitted in large part to address deficiencies in the original submission. The court reduced the requested hourly rate of \$600 to \$450 based on the Plaintiff's attorney's level of experience (16 years of practice, 10 of which were devoted exclusively to representation of railroad workers, and 22 cases tried to verdict with 19 verdicts against railroads), and based on the prevailing rates in the relevant community of the Southern District of New York.

DOL Administrative Review Board Decisions

ATTORNEY’S FEES AND EXPENSES; REDUCTION OF HOURLY RATE FOR INADEQUATELY DOCUMENTED TRAVEL TIME; REDUCTION FOR LIMITED SUCCESS; REQUEST FOR REMAND TO PROVIDE MISSING DOCUMENTATION OF EXPENSE; ATTORNEY’S FEES FOR APPEAL OF ATTORNEY’S FEE AWARD NOT AVAILABLE WHERE APPEAL IS NOT SUCCESSFUL

In *Aymond v. National Railroad Passenger Corp. (AMTRAK)*, ARB No. 16-029, ALJ Nos. 2014-FRS-20 and 21 (ARB Aug. 30, 2017), the ALJ found that the Complainants had been unlawfully discriminated against in violation of the FRSA and awarded each \$5,000 in back pay and \$1,000 in compensatory damages. The Respondent did not appeal. The ALJ subsequently issued a Supplemental Decision and Order awarding the Complainants’ counsel \$50,056.28 in attorney’s fees and costs. The Complainants’ counsel (“counsel”), who had requested an attorney’s fee of \$126,125, appealed.

Reduction of hourly rate for travel time documented only with vague and block billed entries

Counsel did not appeal the ALJ reduction of the hourly rate from \$500 to \$400. However, counsel appealed the ALJ's 50% reduction of the approved \$400 hourly rate for claimed travel time entries on the fee petition that did not itemize work tasks. The ALJ had noted that in the Fifth Circuit, where the case arose, U.S. district courts "compensate travel time entries at 50 percent of an attorney's hourly rate in the absence of documentation of any legal work accomplished during the travel time." USDOL/OALJ Reporter at 4 (footnote omitted). Counsel contended that the ALJ should have reduced the hourly rate to half of the requested \$500 rate, or a smaller percentage of the approved \$400 rate. The ARB found that the ALJ had not abused his discretion in reducing the hourly rate for travel time entries, citing its own decisions of *Smith v. Lake City Enters., Inc.*, ARB No. 11-087, ALJ No. 2006-STA-32, slip op. at 14 (ARB Nov. 20, 2012) and *Pollock v. Cont'l Express*, ARB Nos. 07-073, -051; ALJ No. 2006-STA-1, slip op. at 17 (ARB Apr. 7, 2010).

Reduction for limited success; burden is on counsel to establish that fees requested for related but unsuccessful claims were reasonable

Counsel also challenged the ALJ's reduction of the hours requested by 65% based on the fact that the Complainants had only succeeded on one of the four retaliatory adverse actions alleged in their complaint. The ALJ had based the reduction on a 25% success rate, plus 5% success for each of the two complainants in obtaining compensatory damages. Counsel contended that work on establishing all four retaliatory adverse actions was inextricably intertwined and, therefore, should not be reduced. The ARB cited its recent decision in *D'Hooge v. BNSF Rys*, ARB Nos. 15-042, 15-066; ALJ No. 2014-FRS-2, slip op. at 13 (ARB Apr. 25, 2017), and found that Counsel had not met his burden of showing that the fees he requested for the related but unsuccessful claims were reasonable.

ARB implicitly denies request for remand to provide documentation to ALJ on expenses not adequately described in the fee petition

The ALJ had declined to award any litigation expenses for legal research and writing performed by a hired outside attorney or travel expenses, because the requests were "wholly non-descriptive, unsupported, and vague." USDOL/OALJ Reporter at 7 (quoting ALJ's decision). On appeal, Counsel contended that he could document these expenses, and requested a remand to provide information to the ALJ. The ARB found that the ALJ had not abused his discretion in rejecting these expenses "[b]ased on the facts in this case and the vagueness of Counsel's requests," *id.*, thereby implicitly denying the remand request.

Attorney's fees for appeal of fee award are not available when the appeal is unsuccessful

Counsel had requested leave to file a fee petition with the ARB for his fees and costs in appealing the ALJ's supplemental decision on the fee petition. The ARB denied the request, writing "We note that in federal discrimination and retaliation claims, a plaintiff is entitled to a reasonable attorney's fee for services rendered in a successful appeal of the trial court's fee award. But an appellate court may not award attorney's fees for work done on an unsuccessful appeal of a trial court's award of attorney's fees to an employee who prevailed below on such claims." *Id.* at 8 (footnotes omitted). The ARB found that because the ARB affirmed the ALJ's supplemental decision, Counsel was not entitled to attorney's fees for his appeal to the Board.

ATTORNEY FEE; ALJ MAY REDUCE ATTORNEY'S FEES BOTH FOR PARTIALLY SUCCESSFUL INTERRELATED CLAIMS AND FOR UNSUCCESSFUL UNRELATED CLAIMS; ALJ HAS A LARGE DEGREE OF DISCRETION AS TO THE AMOUNT OF THE REDUCTION

In *D'Hooge v. BNSF Railways*, ARB Nos. 15-042, -066, ALJ No. 2014-FRS-2 (ARB Apr. 25, 2017), the Complainant appealed the ALJ's attorney fee award, the ALJ having denied some expenses, and having reduced the overall award by 50% because the Complainant had only been partially successful in his pursuit of various claims and damages. The ALJ cited *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

The Complainant argued on appeal that the ALJ erred in reducing the overall award by 50% and wrongly relied on *Avondale Indus. v. Davis*, 348 F.3d 487 (5th Cir. 2003). The Complainant argued that the ALJ's decision conflicted with cases decided subsequent to *Hensley*—specifically *Muniz v. United Parcel Serv.*, 738 F.3d 214 (9th Cir. 2013) and *Schwarz v. Sec'y Health & Human Servs.*, 73 F.3d 895 (9th Cir. 1995). The Complainant argued that *Hensley* is limited to denying fees for unrelated or alternate claims that were not successful, whereas in his case, he did not pursue unsuccessful unrelated claims. The Complainant argued that in *Avondale* the statute specifically requires a reduction of attorney's fees *pro rata* with the amount of the award, whereas the FRSA does not. The Complainant also made a policy argument that the ALJ's analysis might induce a lawyer to dissuade clients from pursuing anti-retaliation claims with less favorable odds. The Respondent argued that the case law supports a reduction for both partially successful interrelated claims as well as for unsuccessful unrelated claims, and highlighted that the Complainant had only been successful in winning 4.3% of the total amount he sought, and that the ALJ had rejected the Complainant's claims for front pay and emotional distress.

The ARB found that *Hensley* and the case law supported the Respondent's position. The ARB wrote:

Hensley states that fees for completely unrelated claims can be subtracted as Congress, in the analogous civil rights area, did not intend to award fees for unrelated and unsuccessful claims. Even for related claims, the measure of success can justify a reduction to be reasonable. Excellent results for interrelated claims may merit full rates and full hours. Limited or partial success may merit deductions, even large deductions to be reasonable. In *Hensley*, the Court explained the rationale for reducing an attorney's fee based on the degree of success:

If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

Slip op. at 12-13 (footnotes omitted). The ARB found that the cases cited by the Complainant “do not alter the *Hensley* position that trial judges may reduce attorney’s fees for limited success in related claims. As to the amount of the reduction, the case law is uniform: the trial judge has a large degree of discretion.” *Id.* at 13 (footnote omitted). The ARB found that the Complainant had not demonstrated that the ALJ abused his discretion in reducing the attorney’s fees by 50% for limited or partial success.

One member of the ARB filed a concurring opinion stating that the ALJ had not sufficiently explained *how* he arrived at a 50% reduction of the lodestar amount. This member noted that the Complainant had been completely successful on the merits, but had not been awarded anywhere near the amount of requested damages. The member wrote: “To arrive at a reasoned reduction of fees under the facts of this case, it makes sense to consider what percentage of the entire litigation efforts were attributable to [the Complainant’s] requests for damages. I reject the ALJ’s reduction of the fees by half because well over half of the litigation was directed to the merits on which [the Complainant] was successful—not damages. In my view, the ALJ abused his discretion by reducing the lodestar figure by half.” Slip op. at 15 (footnotes omitted).

LITIGATION EXPENSES; CALCULATION WHERE PARTIAL SUCCESS; DISCOUNT RATE BASED ON PERCENTAGE OF TOTAL POTENTIAL RECOVERY

In ruling on a fee and costs petition where the Complainant had been partially successfully, the ALJ in *Rudolph v. National Railroad Passenger Corp. (Amtrak)*, ARB No. 14-080, ALJ No. 2009-FRS-15 (ARB June 28, 2016), determined the value of the potential recovery and then discounted that amount based on a successful recovery rate of 83.5 percent. Included within the ALJ’s determination on the potential recovery was a finding of \$1.3 million in front pay in for reinstatement. The Respondent appealed the award, contending that the ALJ should have used a larger fee reduction because the value of reinstatement through retirement was conditioned on whether the Complainant would be found mentally fit for duty as a conductor. The Respondent also claimed that that the reinstatement value was actually zero, since the Complainant was reinstated in 2010.

The ARB first found that there was no evidence in the record before the ALJ of a reinstatement in 2010. The ARB also noted that that case had been previously appealed, and that the ALJ initially determined that reinstatement was inappropriate. Thus, the Complainant was not entitled to reinstatement until the ALJ ruled in his favor.

The ARB also found that the ALJ properly compared the actual potential value of full recovery with the actual result, noting that reinstatement was dependent on the Complainant’s mental ability to perform the duties of a conductor. The ARB further noted that while the Complainant “may not have received the full amount of the \$1.3 million in front pay for reinstatement, he is now entitled to reinstatement dependent on his mental status and his compensatory and punitive damages were increased by 500 percent. Thus, he has now achieved ‘essentially full relief.’” USDOL/OALJ Reporter at 4-5 (footnote omitted).

ATTORNEY FEES: PETITION WELL DOCUMENTED, REASONABLE, AND NOT EXCESSIVE FOR LITIGATION BEFORE BOARD

In *Leiva v. Union Pacific R.R. Co., Inc.*, ARB Nos. 14-016, 14-017, ALJ case. No. 2013-FRS-19 (ARB Sept. 4, 2015), the ARB awarded the Complainant's petition for fees requesting \$6,670 for litigation before ARB where the petition was not opposed, and was well documented, reasonable, and not excessive.

ATTORNEY'S FEES AND COSTS; ARB REVIEWS ALJ AWARD UNDER ABUSE OF DISCRETION STANDARD; NO ABUSE OF DISCRETION WHERE NUMBER OF ATTORNEY HOURS SIGNIFICANT BUT ALJ PROVIDED SUFFICIENT BASES FOR RATES APPLIED, HOURS APPROVED, AND TOTAL AMOUNT AWARDED

In *Coates v. Grand Trunk Western RR Co.*, ARB No. 14-067, ALJ No. 2013-FRS-3 (ARB Aug. 12, 2015), the Respondent appealed from the ALJ's award of attorney's fees and costs. Litigation of the case took two years and included filing a complaint; requesting a hearing before the OALJ; successfully opposing a summary decision; prevailing after a two-day evidentiary hearing; and submitting a post-hearing brief. The ALJ awarded total of \$190,272.50 in fees and \$5,840.93 in costs. The ARB stated that it reviews an ALJ's attorney's fees award under an abuse of discretion standard. The ARB found in the instant case that the ALJ had provided sufficient reasons and bases for the hourly rates he applied, the hours approved, and the total amount awarded in fees and costs, and while the number of hours awarded was significant, the ARB could not say that the ALJ abused his discretion in the fee award. The ARB also found that the Complainant was entitled to fees and costs associated with the appeal of the attorney fee award.

ATTORNEY FEE PETITION APPROVED WHERE SUPPORTED BY AFFIDAVITS AND WELL DOCUMENTED LIST OF TASKS

In *Bala v. Port Authority Trans-Hudson Corp.*, ARB No. 12-048, ALJ No. 2010-FRS-26 (ARB Mar. 5, 2014), the ARB approved an attorney's fee petition for legal work before the ARB at an hourly rate of \$525.00 where the hourly rate was supported by affidavits detailing the attorney's extensive federal trial and appellate litigation experience generally, and specifically as to handling employment matters in the railroad industry. The rate was also supported by documentation of the market rate in Connecticut and fee awards to the attorney in similar federal court and ALJ proceedings. The ARB also found that the number of hours sought was well documented with the "date, time, and duration necessary to accomplish each specific activity."

ATTORNEY'S FEE AWARD DETERMINATION RETURNED TO ALJ FOR FURTHER CONSIDERATION BECAUSE EARLIER REMAND ON MERITS OF THE CASE MIGHT INFLUENCE THE SIZE OF THAT AWARD

In *Rudolf v. National Railroad Passenger Corp. (AMTRAK)*, ARB No. 11-055, ALJ No. 2009-FRS-15 (ARB Apr. 25, 2013), the ARB had earlier affirmed in part, and reversed in part, the ALJ's decision on the merits, and remanded for further proceedings. The ALJ's attorney fee determination, which had been based on the ALJ's erroneous and/or unclear analysis of the merits of the claims was also thus remanded to the ALJ for further consideration once the remand decision on the merits was rendered. The ARB directed:

If, on remand, the ALJ concludes that Amtrak has violated the FRSA beyond his initial findings and, as a result, is presented with a motion seeking renewed consideration of Rudolph's attorney's fee request, the ALJ should put aside purely mathematical calculations and focus on the relief to which Rudolph would be entitled, including reinstatement, back pay, and compensatory damages in determining an appropriate award of an attorney's fee.

USDOL/OALJ Reporter at 2.

XIV. DISMISSALS, WITHDRAWALS, AND SETTLEMENTS

Regulations

29 C.F.R. § 111: Withdrawals of complaints, findings, objections, and petitions for review; settlement

(a) At any time prior to the filing of objections to the Assistant Secretary's findings and/or preliminary order, a complainant may withdraw his or her complaint by notifying OSHA, orally or in writing, of his or her withdrawal. OSHA then will confirm in writing the complainant's desire to withdraw and determine whether to approve the withdrawal. OSHA will notify the parties (or each party's legal counsel if the party is represented by counsel) of the approval of any withdrawal. If the complaint is withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section. A complainant may not withdraw his or her complaint after the filing of objections to the Assistant Secretary's findings and/or preliminary order.

(b) The Assistant Secretary may withdraw the findings and/or preliminary order at any time before the expiration of the 30-day objection period described in §1982.106, provided that no

objection has been filed yet, and substitute new findings and/or a new preliminary order. The date of the receipt of the substituted findings or order will begin a new 30-day objection period.

(c) At any time before the Assistant Secretary's findings and/or order become final, a party may withdraw its objections to the Assistant Secretary's findings and/or order by filing a written withdrawal with the ALJ. If the case is on review with the ARB, a party may withdraw its petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB. The ALJ or the ARB, as the case may be, will determine whether to approve the withdrawal of the objections or the petition for review. If the ALJ approves a request to withdraw objections to the Assistant Secretary's findings and/or order, and there are no other pending objections, the Assistant Secretary's findings and/or order will become the final order of the Secretary. If the ARB approves a request to withdraw a petition for review of an ALJ decision, and there are no other pending petitions for review of that decision, the ALJ's decision will become the final order of the Secretary. If objections or a petition for review are withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section.

(d)(1) *Investigative settlements.* At any time after the filing of a complaint, and before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if OSHA, the complainant, and the respondent agree to a settlement. OSHA's approval of a settlement reached by the respondent and the complainant demonstrates OSHA's consent and achieves the consent of all three parties.

(2) *Adjudicatory settlements.* At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ALJ if the case is before the ALJ, or by the ARB if the ARB has accepted the case for review. A copy of the settlement will be filed with the ALJ or the ARB, as the case may be.

(e) Any settlement approved by OSHA, the ALJ, or the ARB will constitute the final order of the Secretary and may be enforced in United States district court pursuant to §1982.113.

U.S. District Court Decisions

SETTLEMENT AGREEMENT

Williams v. Illinois Central Railroad Co., No. 16-cv-838 (S.D. Miss. Feb. 23, 2018) (Order of Dismissal): The district court dismissed the case with prejudice after the parties reached a settlement agreement and retained jurisdiction to enforce the settlement agreement.

ENFORCEMENT OF FRSA SETTLEMENT AGREEMENT; NO PRIVATE ENFORCEMENT CAUSE OF ACTION

In *Grigsby v. The Kansas City Southern Railway Co.*, No. 13-cv-418 (S.D. Tex. Mar. 3, 2014), the Plaintiff sought enforcement of an FRSA settlement of a whistleblower complaint before OSHA. The settlement had been approved by OSHA on behalf of the Secretary of Labor. Following the settlement, the Defendant reviewed credits it believed it was entitled to assess against the settlement fund, and informed the Plaintiff that it had already paid more than the settlement amount. The Plaintiff complained to OSHA and sought enforcement of the settlement as interpreted by him. OSHA, however, took no action. Thus, the Plaintiff filed a lawsuit to personally enforce the settlement agreement. The court dismissed the action on the ground that the FRSA does not provide for a private enforcement cause of action under the facts of the case. The court found that district courts have jurisdiction under § 20109(d) only in two limited circumstances: where the Secretary has not issued a final decision within 210 days of the filing of an administrative complaint, or where the Secretary brings an action in district court to require compliance with a final order. Neither of these circumstances were present.

RELEASE OF FELA CLAIM AS A BAR TO A FRSA WHISTLEBLOWER CLAIM; EXAMINATION OF INTENT OF PARTIES

In *Tagliatela v. Metro-North Commuter R. Co.*, 2012 WL 5493618 (D.Conn. Nov. 13, 2012) (case below ALJ No. 2009-FRS-13), the Plaintiff brought an action under the Federal Rail Safety Act (“FRSA”) in connection with the Defendant's discipline of the Plaintiff for allegedly violating the Defendant's policy requiring employees to immediately report a workplace injury and for failing to appear for a medical evaluation at the Defendant's Occupation Health Services facility. The Plaintiff had injured his knee, but did not report it immediately. The Defendant moved for summary judgment on the ground that a release signed by the Plaintiff in settlement of his FELA claim barred the FRSA claim.

Applying state contract law focusing on the intent of the parties, the court held that the release did not bar the Plaintiff's FRSA claim. The Plaintiff had released all claims that “arise from or out of injuries and damages known or unknown, permanent or otherwise, sustained or received” by the Plaintiff in regard to his knee injury. The court found that this language from the release could not be interpreted to mean that the Plaintiff's FRSA claim arose from the injury he sustained when he twisted his knee. Rather, his FRSA claim can be interpreted as having arisen from his protected activity of reporting a workplace injury and not the injury itself. The court also found that the Defendant was well aware of the FRSA claim at the time of the settlement of the FELA claim, and that had it wished to negotiate a global settlement it would have negotiated to explicitly include the known FRSA claim in that release. The court distinguished the ALJ's decision in *Davies v. Florida East Coast Railway, LLC*, 2010-FRS-7 (June 3, 2010), because in that case the release explicitly mentioned whistleblower claims. The court did not reach the issue of whether OSHA's approval of the release was required for it to be effective as a bar to the FRSA claim.

BREACH OF SETTLEMENT AGREEMENT; RELEASE OF INFORMATION TO THE PUBLIC LAW BOARD WHEN SUCH INFORMATION SHOULD HAVE BEEN EXPUNGED UNDER THE TERMS OF THE SETTLEMENT AGREEMENT; ARB RULES SUCH BREACH DID NOT CREATE A NEW FRSA CAUSE OF ACTION — RATHER COMPLAINANT’S RELIEF WAS TO FILE A CLAIM FOR BREACH OF CONTRACT OR TO RETURN TO ARBITRATION BEFORE THE PUBLIC LAW BOARD

In *Leiva v. Union Pacific Railroad Co.*, ARB No. 2018-0051, ALJ No. 2017-FRS-00036 (ARB May 17, 2019) (per curiam), Complainant had filed an FRSA complaint in 2012 based on the actions of Respondent in response to Complainant’s confrontation with a coworker. The ALJ found that Respondent violated the FRSA. The ARB affirmed the ALJ’s decision, but remanded for a determination on punitive damages. While on remand, the parties settled the case. The settlement agreement provided that Respondent would expunge from its HR record references to the discipline assessed against Complainant, and would ensure that the facts and circumstances relating to the discipline or exercise of Complainant’s rights were not used against Complainant in any future disciplinary, employment, or promotional opportunities with Respondent. The agreement provided that, subject to the ALJ’s approval of the settlement, it would constitute the final order under the FRSA and would be enforceable in U.S. District Court. The ALJ approved the settlement and dismissed the complaint.

In 2017, Complainant filed a new FRSA complaint alleging that Respondent engaged in adverse action when it fired him in 2014—and when it advised the Public Law Board in 2016 that Complainant engaged in workplace violence in 2012, which resulted in the Public Law Board’s upholding the 2014 termination. The ALJ found that there had been a continuing violation of the FRSA based on Respondent’s maintenance of records that Complainant engaged in workplace violence in 2012 and the consequent disciplinary history. The ALJ found that the submission of the information to the Public Law Board “was the same unlawful act from 2012” that continued to 2017, when the information was finally expunged.

The ARB reversed, finding that the ALJ erred by treating the case as a new, separate FRSA complaint rather than a continuation of the first FRSA complaint, as all the elements of entitlement were based on the original complaint. The ARB held that there were two other avenues of redress for Complainant.

First, Complainant could file a claim in U.S. District Court for breach of the settlement agreement based on Respondent’s maintaining information in Complainant’s personnel file relating to his disciplinary history and protected activity regarding the confrontation with his coworker.

Second, Complainant could object to the Public Law Board's reliance on the "workplace violence" notation by returning to arbitration. The ARB also noted that there is a statutory procedure for appealing Public Law Board decisions to U.S. District Court.

The ARB concluded by stating:

While the ALJ reasonably considered Respondent's failure to expunge the retaliatory information included in Complainant's personnel file, in violation of the terms of the settlement agreement, to be reprehensible and egregious conduct, the remedy is not the filing of a new FRSA complaint based on the same set of facts. Neither the ALJ nor this Board possess continuing jurisdiction to enforce settlement agreements that have become the final decision of the Secretary. Under such circumstances, Complainant must pursue any remedies in a proper forum in accordance with the terms of the settlement agreement to which he is a party.

Slip op. at 6 (footnotes omitted).

SETTLEMENT; ARB WILL NOT APPROVE A REDACTED SETTLEMENT AGREEMENT REACHED WHILE CASE IS ON APPEAL BECAUSE AMOUNT OF MONEY OR OTHER CONSIDERATION IS A MATTER OF PUBLIC CONCERN; IF UNREDACTED SETTLEMENT NOT SUBMITTED, ARB WILL REVIEW THE CASE ON THE MERITS

In *Boucher v. BNSF Railway Co.*, ARB No. 2016-0085, ALJ No. 2014-FRS-00072 (ARB Mar. 22, 2019) (per curiam), the Complainant filed a FRSA complaint and a Montana state court action. The DOL ALJ granted the Respondent's motion for summary decision on the ground that the Complainant could not seek relief for his discharge under both the FRSA and the Montana law. The ALJ also noted that it would be improper for Complainant to receive duplicate remedies for the Respondent's same alleged unlawful act. The Complainant appealed to the ARB, but later filed a motion to withdraw the petition for review based on a settlement of the Montana suit. The ARB directed the parties to submit a copy of the settlement agreement because the FRSA regulations require ARB approval where a withdrawal is based on a settlement agreement.

The Respondent filed a redacted copy of the settlement agreement. The ARB denied the motion to withdraw, stating that it would not approve a redacted settlement agreement because the amount of money or other consideration provided in the settlement was a matter of public concern. The ARB directed submission of an unredacted copy of the settlement within 30 days. The ARB stated that if such was not timely submitted, it would consider the case on its merits. In response, the Complainant conceded that the Respondent was entitled to summary decision because he had now elected his remedy—i.e., the settlement in the Montana action.

The ARB noted that the FRSA "election of remedies" provision at 49 U.S.C. § 20109(f) prohibits a complainant from bringing separate claims under two different provisions of law for the same allegedly unlawful act. The ARB wrote:

Montana law provides a cause of action to railway workers who suffer adverse actions because of a railroad's mismanagement, negligence, or wrongdoing. It is "another provision of law" and it provides "protection" because it provides a remedy for wrongful discharge. Because Complainant has elected to seek protection under "another provision of law" in addition to the FRSA, the "election of remedies" provision of the Act renders withdrawal and dismissal of the instant action appropriate.

Slip op. at 4 (footnote omitted). Accordingly, the ARB granted the Complainant's motion to withdraw his petition for review, and dismissed the complaint.

SETTLEMENT AGREEMENT; APPROVAL ON APPEAL

D'Hooge v. BNSF Railways, ARB Nos. 15-042, -066, ALJ No. 2014-FRS-2 (ARB Sept. 14, 2017): The ARB approved a settlement agreement reached by the parties while the case was pending on appeal before the Ninth Circuit. The court had ordered: "Pursuant to the terms of the parties' stipulation . . . , the appeal is dismissed without prejudice to reinstatement in the event the Administrative Review Board fails to approve the parties' settlement agreement." The parties jointly moved the ARB to approve the settlement agreement.

SETTLEMENT AGREEMENT; APPROVAL BY ARB

In *Cain v. BNSF Railway Co.*, ARB No. 13-006, ALJ No. 2012-FRS-19 (ARB Sept. 15, 2016) the ARB had issued an order of remand to the ALJ for fact-finding on the question of punitive damages pursuant to the 10th Circuit's decision in *BNSF Railway Co. v. ARB*, 816 F.3d 628 (10th Cir. 2016). The ARB's remand order, however, was issued prior to the 10th Circuit issuance of a mandate order. The parties filed a motion requesting that the Board re-issue the remand order after the mandate was issued on the ground that the earlier remand order had been issued prematurely. While that motion was pending, the parties submitted a motion to approve a settlement agreement. The ARB vacated its earlier order of remand, reviewed and approved the settlement agreement, and dismissed the complaint with prejudice.

SETTLEMENT AGREEMENT; RELEASE PROVISION INTERPRETED AS LIMITED TO RIGHT TO SUE IN THE FUTURE ON CLAIMS ARISING OUT OF FACTS OCCURRING BEFORE THE DATE OF THE AGREEMENT

In *Schow v. Union Pacific Railroad Co.*, ARB No. 15-048, ALJ No. 2013-FRS-43 (ARB May 29, 2015), the ARB construed a release provision of a settlement agreement as follows: “Waiver provisions such as this are limited to the right to sue in the future on claims or causes of action arising out of **facts** or any **set of facts** occurring **before** the date of the agreement; such waivers do not apply to actions taken by the employer subsequent to the agreement date.” USDOL/OALJ Reporter at 2 (footnote omitted) (emphasis as in original).

SETTLEMENT BEFORE THE ARB; ARB'S REVIEW OF SETTLEMENT AGREEMENT INCLUDED JOINT REQUEST FOR ATTORNEY'S FEES AND COSTS FOR PROCEEDINGS BEFORE BOTH THE ALJ AND THE ARB

In *Griebel v. Union Pacific Railroad Co.*, ARB No. 13-038, ALJ No. 2011-FRS-11 (ARB June 2, 2014), while the matter was pending on appeal before the 8th Circuit Court of Appeals, the parties notified the court that it had reached a settlement. The court remanded to the ARB for approval of the settlement and any outstanding issues. The parties jointly moved the ALJ for approval of fees and costs for proceedings before the ALJ, and the ARB for fees and costs for proceedings before it. The ALJ entered an order finding that the fees agreed upon appeared to be part of the settlement that was before the ARB for approval, and therefore jurisdiction to approve the fees part of the settlement rested with the ARB rather than the ALJ. On review, the ARB approved the settlement agreement, including the joint request for attorney's fees, costs, and expenses associated with proceedings before both the ALJ and the ARB.

JOINT MOTION TO DISMISS FRSA COMPLAINT; MOTION MUST INDICATE WHETHER REQUEST FOR DISMISSAL IS BASED ON SETTLEMENT; IF SETTLEMENT INVOLVED, COPY MUST BE SUBMITTED FOR ARB'S REVIEW

In *Carr v. BNSF Railway Co.*, ARB No. 13-052, ALJ No. 2012-FRS-14 (ARB June 26, 2013), an FRSA whistleblower appeal, the parties filed a joint motion to withdraw. The ARB noted that “[t]he regulation under which the parties have requested withdrawal provides, 'If objections or a petition for review are withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section.' 29 C.F.R. § 1982.111(c).” The ARB denied the motion because the parties had not specified the basis for their motion, and the ARB could not discern from the motion whether the parties had or intended to resolve the complaint by way of a settlement. The ARB's order permitted the parties to stipulate that they have not and do not intend to enter into a settlement to resolve the FRSA complaint, or to submit a copy of a settlement for the ARB's review.

XV. 20109(f): ELECTION OF REMEDIES

49 U.S.C. § 20109

(f) Election of remedies. An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.

(g) No preemption. Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.

(h) Rights retained by employee. Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.

U.S. Circuit Court of Appeals Decisions

FRSA ELECTION OF REMEDIES PROVISION DOES NOT BAR FRSA SUIT WHERE THE PLAINTIFF PREVIOUSLY FILED A RACE DISCRIMINATION SUIT

On September 17, 2015 the Fourth Circuit issued a published decision in *Lee v. Norfolk Southern Railway Co.*, 802 F.3d 626 (4th Cir. 2015), a Federal Railroad Safety (FRSA) case involving FRSA's election of remedies provision. FRSA's election of remedies provision, 49 U.S.C. § 20109(f), prohibits an employee from seeking protection under FRSA and "another provision of law for the same allegedly unlawful act of the railroad carrier."

The Secretary of Labor participated as amicus curiae. The Fourth Circuit agreed with the Secretary's position that the election of remedies provision does not bar an employee from seeking protection under FRSA in the circumstance where the plaintiff previously filed a lawsuit alleging that his employer discriminated against him on the basis of race.

The court concluded that the plain language of the statute indicated that an adverse action on the basis of race is not "the same allegedly unlawful act" as an adverse action in retaliation for FRSA whistleblowing. The court further reasoned that, even if it had found the statutory language ambiguous, the legislative history and statutory context show that the provision is narrow. It applies only to overlapping anti-retaliation or whistleblower statutes that provide protections similar to FRSA, such as section 11(c) of the OSH Act and similar state laws.

ELECTION OF REMEDIES; SIXTH CIRCUIT HOLDS THAT 49 U.S.C. § 20109(f) ELECTION OF REMEDIES PROVISION DOES NOT BAR AN EMPLOYEE FROM PURSUING ARBITRATION OF COLLECTIVE BARGAINING RIGHTS UNDER THE RAILWAY LABOR ACT AND A WHISTLEBLOWER COMPLAINT UNDER THE FEDERAL RAIL SAFETY ACT

Norfolk Southern Ry. Co. v. Perez, 778 F.3d 507, No. 14-3274 (6th Cir. Feb. 18, 2015) (case below ARB Nos. 12-081, -106, ALJ No. 2011-FRS-22) (2015 WL 670158; 2015 U.S. App. LEXIS 2460) [PDF](#): The FRSA’s election of remedies provision, 49 U.S.C. § 20109(f), provides that “[a]n employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.” This case involved an employee who pursued rights under the collective bargaining agreement and Railway Labor Act and then also pursued a complaint under the FRSA. In particular, he was injured at work and reported the injury; he was investigated and suspended; he grieved the discipline under the collective bargaining agreement and RLA, leading to a mitigated punishment; and he also filed a complaint under the FRSA at the Department of Labor alleging that that his discipline was retaliation for reporting a work-related injury. The railroad argued that the FRSA action was barred by the election of remedies provision. The ALJ and ARB rejected this argument and found for the employee. The railroad appealed.

The Sixth Circuit reviewed the history of congressional regulation of labor relations in the railroad industry, the result of which is that a railroad employee may only pursue grievances under a collective bargaining agreement under the scheme of the RLA, with narrow exceptions. Congress also passed laws addressing railroad safety, leading to the FRSA in 1970, with an anti-retaliation provision added in 1980. The election of remedies provision was part of the new anti-retaliation provision and was linked by Congress to worries that separate remedies might be pursued under both the OSH Act and the FRSA, leading to waste of resources and inconsistent results.

Originally the anti-retaliation provision proceeding into the same arbitration procedures of the RLA, but in 2007 it was amended and complaints now went to the Secretary of Labor, and eventually the federal courts, not the arbitration process. 20109(h) was also added, which provides that “[n]othing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.” The legislative history indicated that in the amendments, Congress sought to expand and enhance the rights of railroad workers and increase protections for whistleblowing. But the amendments left the election of remedies provision untouched

The Sixth Circuit agreed “with the Secretary that the plain language of § 20109(f) defeats Norfolk Southern’s position.” The railroad was right that the RLA was a provision of law and that the CBA was not. The question, however, is whether in pursuing arbitration of the grievance the employee was seeking protection of the RLA. The Secretary argued that the RLA created the procedural framework, not the protections, which were a product of the CBA. The Sixth Circuit agreed: “[a] railroad employee does not ‘seek protection’ under the RLA within the

plain meaning of § 20109(f) by invoking the RLA-mandated arbitration when pursuing a grievance under a collective bargaining agreement.”

Taking protection under a statute was using it as a shelter and as the source of the substantive remedy for the harm. It is the source of the rights at issue that matters, not the procedural mechanism for enforcing those rights. The RLA confers rights, like the right to arbitrate, and an employee seeking to vindicate those rights would be seeking protection under the RLA. But if an employee is seeking to vindicate rights from the CBA under the framework of the RLA, they are seeking protection under the CBA, not RLA. This reading was supported by prior decisions from other circuits and the presence of § 20109(h), which indicated that the FRSA was not attempting to limit rights.

The court countenanced that the employee had sought some protection under the RLA and these was a linguistic contradiction between sub-sections (f) and (h) insofar as one seemed to plainly limit rights while the other said that nothing in the section did so. But given the history, “we would have little trouble concluding that, where subsection (f) conflicts with subsection (h), the latter controls instead of the former.” So even if the plain-reading of subsection (f) did not defeat the railroad’s position, the presence of subsection (h) would lead to the same result.

ELECTION OF REMEDIES; FIFTH CIRCUIT HOLDS THAT ELECTION OF REMEDIES PROVISION DOES NOT BAR FRSA SUIT WHEN PLAINTIFF ARBITRATED CLAIMS UNDER THE CBA AND RLA

Grimes v. BNSF Ry. Co., 746 F.3d 184 (5th Cir. March 18, 2014) (Decision on Petition for Rehearing) [*Editor’s Note*: The original decision, which was replaced by this decision, can be found at 743 F.3d 114 (5th Cir. Feb. 17, 2014)]: Plaintiff was injured in an accident that occurred while working with two others on a nonmoving train, which was the result of one of the others operating one of the cars even though he was not certified to do so. He initially stated he could not recall what happened, but in question acknowledged that the other employee had operated the train. After an investigation and hearing, all three were terminated. Plaintiff pursued a collective-bargaining grievance. The Public Law Board upheld the discipline but mitigated the punishment, reinstating him without backpay. Plaintiff then filed a FRSA complaint, which ended up in district court. The district court gave preclusive effect to the arbitration finding that Plaintiff had been dishonest, and on that basis granted the defendant summary judgment.

In addition to addressing the issues of preclusion, the Fifth Circuit also held that the Election of Remedies provision in 20209(f) did not bar the suit. Plaintiff had pursued contractual claims in the arbitration and the Railway Labor Act had only provided for the procedures to enforce the rights under the contract. Agreeing with the Seventh Circuit in *Reed v. Norfolk So. Ry. Co.*, 740 F.3d 420 (7th Cir. 2014), the Fifth Circuit held that the plaintiff had not sought protection under another provision of law—he had sought protection under the contract. The Election of Remedies Provision was thus inapplicable.

FRSA ELECTION OF REMEDIES PROVISION DOES NOT PRECLUDE AN EMPLOYEE FROM PURSUING RELIEF BOTH UNDER GRIEVANCE ARBITRATION AND AN ADMINISTRATIVE CLAIM OR LAWSUIT UNDER THE FRSA

In *Reed v. Norfolk Southern Railway Co.*, 740 F.3d 420, No. 13-2307 (7th Cir. Jan. 14, 2014) (2014 WL 117479), the Plaintiff was fired for purportedly violating an internal rule requiring same-day reporting of on-site injuries. The Plaintiff and his union believed that his firing was in violation of a collective bargaining agreement, and he appealed the dismissal to an arbitral board. While the arbitration proceedings were pending, the Plaintiff filed a FRSA discrimination complaint with OSHA. Later, the discrimination complaint was filed in federal district court. After the arbitral board ruled in the railroad's favor, it moved for summary judgment in the district court action maintaining that the FRSA's election-of-remedies provision closed the courtroom door to the FRSA claim. The district court denied the motion. On appeal, the Seventh Circuit, although analyzing the issue differently than the district court and the Secretary of Labor, held that "FRSA's election-of-remedies provision is concerned with provisions of law that grant workers substantive protections, not with federal or state law writ large. The Railway Labor Act is not such a provision, and so we AFFIRM the district court's order denying summary judgment." Slip op. at 12.

U.S. District Court Decisions

ELECTION OF REMEDIES; WHERE PLAINTIFF HAD PREVIOUSLY PURSUED FRSA COMPLAINT AT OSHA, FRSA ELECTION OF REMEDIES PROVISION BARS STATE LAW ACTIONS ON THE SAME ALLEGATIONS

Welch v. Union Pac. R.R. Co., No. 16-cv-00431 (W.D. Mo. Aug. 4, 2016) (2016 U.S. Dist. LEXIS 102193; 2016 WL 4154760): Plaintiff filed an FRSA complaint with OSHA. After investigation, the complaint was dismissed. Plaintiff did not request a hearing, so the OSHA findings became final. Later Plaintiff filed a variety of state law claims in state court based in wrongful termination/public policy claims. The railroad removed the case to federal court and moved for dismissal based on res judicata and collateral estoppel.

The district court granted the motion after taking judicial notice of DOL's decisions, which were part of the public record. The FRSA contains an election of remedies provision at 49 U.S.C. § 20109(f) that provides that "[a]n employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier." In this case the new actions were based on the same allegedly unlawful act of the railroad and the Plaintiff had elected his remedy by filing a complaint with OSHA and exhausting his remedy by letting the adverse determination become final. That barred the state law actions.

Further, even absent the election of remedies, res judicata and collateral estoppel precluded the suit. These doctrines extend to determinations made by administrative agencies acting in a judicial capacity. That was the case here, despite no hearing before an ALJ, because the plaintiff had foregone his rights to a de novo hearing and appeals by not asking for a hearing. The Plaintiff had a full opportunity to litigate his claims before DOL, so the final decision barred the latter action based on the same allegations.

ELECTION OF REMEDIES; DISTRICT COURT HOLDS THAT FRSA’S ELECTION OF REMEDIES PROVISION DOES NOT BAR AN FRSA ACTION WHEN THE PLAINTIFF ALSO PURSUED AN ADA ACTION THAT INVOLVED THE SAME ADVERSE ACTION

Lillian v. National Railroad Passenger Corp. (AMTRAK), No. 14-cv-02605 (N.D. Ill. Mar. 30, 2016) (2016 U.S. Dist. LEXIS 41940): Plaintiff alleged that he discovered bed bugs while stripping sheets in a railcar and reported them to his supervisors as a safety hazard. The railroad did not investigate; instead it told him to return to work in the car. Plaintiff refused to do so and was taken out of service and then terminated. He filed an FRSA complaint. He also filed an ADA complaint for disability discrimination and retaliation.

The railroad moved for judgment on the pleadings on the FRSA count on the grounds that the FRSA’s election of remedies provision worked to bar the complaint because the Plaintiff had pursued the ADA complaint as well. That provision, 49 U.S.C. § 20109(f), provides that “An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.”

The district court denied the motion. It found the Fourth Circuit’s discussion in *Lee v. Norfolk S. Ry.*, 802 F.3d 626 (4th Cir. 2015) persuasive. The same act served as the adverse action complained of both actions, they involved different unlawful acts and different operative facts—the same termination was involved, but it was unlawful for entirely different reasons based on a different set of background events. The court also noted that two additions to the FRSA underscored that the FRSA was not meant to diminish the rights of an employee. Forcing Plaintiff to choose the ADA and FRSA would do so because the violations in non-overlapping statutes. It rejected the claim that because both involved retaliation in some manner, they were overlapping. Rather they were distinct because they involved different sort of rights.

ELECTION OF REMEDIES; COURT HOLDS THAT ELECTION OF REMEDIES PROVISION NOT IMPLICATED WHEN PLAINTIFF ALSO FILED COMPLAINTS WITH EEOC RELATED TO TITLE VII AND THE ADA.

Miller v. CSX Transp., Inc., No. 1:13-cv-734 (S.D. Ohio Aug. 25, 2015) (2015 U.S. Dist. LEXIS 112507; 2015 WL 5016507) (case below 2013-FRS-64): In August 2012 the Plaintiff reported that about a month earlier he had suffered a back injury when his foot slipped on loose ballast while stepping off of the training, resulting in a twist and popping sound. He had gone to an emergency room 5 days after the injury and more recently to an orthopedist. Defendant’s

rules require immediate reporting of on-duty injuries, so an investigation was initiated. Several days later Plaintiff gave a written statement retracting his injury report and stating that it had actually occurred at home while working on his car. Plaintiff claimed that through gestures and nodding, the managers had conveyed that if he retracted his report, he could go back to work with little or no penalty. After the investigation/hearing, Plaintiff was terminated. He pursued several actions, including an FRSA complaint.

The Defendant argued that the election of remedies provision, § 20209(f) precluded the FRSA action because Plaintiff had also pursued Title VII and ADA claims at the EEOC that related to the same adverse action. Relying on *Norfolk So. Ry. Co. v. Perez*, 778 F.3d 507, 513 (6th Cir. 2015), the court concluded the subsection was not meant to limit employee's rights in this way. It did not reach the question of whether the Plaintiff could have also pursued Title VII and ADA actions in litigation.

ELECTION OF REMEDIES; DISTRICT COURT FINDS THAT THE ELECTION OF REMEDIES PROVISION OF THE FRSA IS NOT IMPLICATED WHEN AN EMPLOYEE FILES A GRIEVANCE APPEAL UNDER THE RAILROAD LABOR ACT PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT

In *Bjornson v. Soo Line Railroad Co.*, Civil No. 14-4596 (JRT/SER) (D. Minn. Aug. 24, 2015), the U.S. District Court for the District of Minnesota overruled the Defendant's objections to a Magistrate's Report and Recommendation. The Defendant objected to a portion of the Report and Recommendation striking one of its affirmative defenses that the Railroad Labor Act (RLA) or a collective bargaining agreement (CBA) "trigger the election of remedies provision of the [FRSA]." *Bjornson*, slip op. at 2.

Lonnie Bjornson ("Plaintiff") fell in a bathtub while traveling on a work assignment for the Defendant. *Id.* 2. Plaintiff alleged that he was injured as a result, and that he required medical treatment for two years. *Id.* at 3. Plaintiff sought to request time off for a doctor's appointment related to his injuries, but was denied leave. Plaintiff ultimately took a sick day in order to attend the appointment. The Defendant subsequently initiated an investigation and "placed a reporting violation on [Plaintiff's] record and gave him a five-day suspension." *Id.* at 3. The Plaintiff filed a grievance under the CBA, which was unsuccessful. *Id.* at 3. He then appealed the CBA to the National Railroad Adjustment Board pursuant to the RLA. That appeal was denied. *Id.* at 4. The Plaintiff also filed an action pursuant to the FRSA alleging that the Defendant disciplined him for taking time off work for medical treatment of on-duty injuries. *Id.* at 4.

The court rejected the Defendant's contention that the election of remedies provision of the FRSA, 49 U.S.C. § 20109(f), prevents the Plaintiff from bringing a cause of action under that the FRSA because he filed a grievance appeal under the RLA. *Id.* at 6-12. The court reasoned that, in order to be "another provision of law" under the FRSA's election of remedies provision, a statute must be the source of the substantive remedy sought. *Id.* at 10. The court found that "the RLA offers no independent substantive protections for railroad employees" because "[i]t merely establishes the procedures by which those employees may attempt to enforce their collective bargaining agreement rights." *Id.* at 10. Therefore, employee CBAs provide the substantive

protection, rather than the RLA, but a CBA is “not a law or rule or regulation.” *Id.* at 11. The court concluded that a CBA “cannot satisfy the election of remedies provision of the FRSA” either, and struck the Defendant’s affirmative defense. *Id.*

ELECTION OF REMEDIES; COURT STRIKES ELECTION OF REMEDIES AFFIRMATIVE DEFENSE, CONCLUDING PURSUING COLLECTIVE BARGAINING RIGHTS DOES NOT BAR FRSA CLAIM

Bjornson v. Soo Lin R.R. Co., No. 14-cv-4596, 2015 U.S. Dist. LEXIS 112307 (D. Minn. June 15, 2015) (Report and Recommendation) (case below 2014-FRS-127) [PDF](#): Case involving a Federal Employer’s Liability Act, 45 U.S.C. § 51, *et seq.*, negligence claim and a retaliation complaint under whistleblower protection provisions of the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109, alleging that the railroad refused a request for a personal day to attend a doctor’s appointment for a work-related injury and then initiated an investigation for “failure to protect services” and “laying off under false pretenses.” He also challenged the inclusion of the investigation on his personal record. Slip op. at 2. This order contains a report and recommendation by a magistrate judge concerning the Plaintiff’s motion to strike three of the railroad’s 25 affirmative defenses under Fed. R. Civ. P. 12(f). *Id.* at 1, 3-4. An affirmative defense will not be stricken if it is a sufficient as a matter of law or presents a question of law or fact that the court should hear, but will be stricken if it is legally insufficient, or foreclosed by prior decisions. *Id.* at 5.

Plaintiff sought to strike an affirmative defense premised on the election of remedies provision in 49 U.S.C. § 20109(f), which prohibits seeking protection under the FRSA “and another provision of law for the same allegedly unlawful act of the railroad carrier.” The affirmative defense relied on the Plaintiff’s pursuit of a grievance under the collective bargaining agreement (“CBA”). Plaintiff argued that the CBA was not “another provision of law,” that pursuing the CBA rights in the manner prescribed by the Railway Labor Act (“RLA”), 45 U.S.C. § 151, *et seq.*, did not qualify because the RLA didn’t create any rights, and that even so, the CBA grievance did not concern the same unlawful acts as the FRSA complaint. *Id.* at 8-9. The railroad argued that the scope and reach of the election of remedies provision, and whether it forced choice between CBA grievances that feel under the RLA or an FRSA complaint was an open question in the 8th Circuit and so the defense should not be stricken. *Id.* at 9-11. Though the court acknowledged there was no on point 8th Circuit case, it found that the affirmative defense was foreclosed by the statute itself and so should be stricken. Though the RLA was another provision of law, the plaintiff had not sought protection under it. He had sought protection under the CBA, which was a contract, not a provision of law. The RLA only specified the forum for some of the CBA disputes; it never provided the substantive rights that would be protected. As such, the statutory provision plainly did not provide to this circumstance and the affirmative defense failed as a matter of law. *Id.* at 11-16.

SECTION 20109(f) “ELECTION OF REMEDIES” PROVISION DOES NOT BAR FRSA RETALIATION SUIT BASED ON COMPLAINANT'S APPEAL OF HIS DISMISSAL UNDER THE RAILWAY LABOR ACT

In *Koger v. Norfolk Southern Railway Co.*, No. 13-cv-12030 (S.D. W.Va. June 19, 2014) (2014 WL 2778793) (case below ARB No. 09-101, ALJ No. 2008-FRS-3), the Plaintiff filed an FRSA Section 20109 retaliation complaint in the Southern District of West Virginia. The Defendant filed a motion to dismiss for lack of subject matter jurisdiction on the ground that the Section 20109(f) FRSA "election of remedies" provision barred the FRSA complaint because the Plaintiff had already challenged his termination under the Railway Labor Act (RLA). The court first converted the FRCP 12(b)(1) motion into a FRCP 12(b)(6) motion for summary judgment, citing *Ratledge v. Norfolk Southern Railway Co.*, No. 1:12-cv-402, 2013 WL 3872793 (E.D. Tenn. July 25, 2013). The court denied the motion, citing the ARB decision in *Mercier v. Union Pacific Railroad*, ARB Nos. 09-121, -101, 2011 WL 4915758 (ARB Sept. 21, 2011) and several federal court decisions. In particular, the court found persuasive the 7th Circuit's decision in *Reed v. Norfolk Southern Railway Co.*, 740 F.3d 420, 425 (7th Cir. 2014) (appealing grievance to special adjustment board is seeking protection under collective bargaining agreement rather than seeking protection under the RLA).

SECTION 20109(f) “ELECTION OF REMEDIES” PROVISION DOES NOT BAR FRSA RETALIATION SUIT BASED ON UNION'S APPEAL OF COMPLAINANT'S SUSPENSION TO THE PUBLIC REVIEW BOARD

In *Pfeifer v. Union Pacific Railroad Co.*, No. 12-cv-2485 (D. Kan. June 9, 2014) (case below ARB No. 12-087, ALJ No. 2011-FRS-38), the Defendant moved for summary judgment on the Plaintiff's whistleblower retaliation action under the FRSA on the grounds that the action was barred by the doctrine of res judicata and by Section 20109(f).

Election of remedies

The Defendant also challenged the court's jurisdiction under the FRSA election of remedies provision, arguing that the FRSA action was barred because the Complainant sought protection by appealing his suspension to the Public Review Board. The court rejected this contention, first because it was the union and not the Complainant who sought this protection, and second because the protection sought was not under the Railway Labor Act, but rather under the collective bargaining agreement.

ELECTION OF REMEDIES; SUMMARY JUDGMENT; COURT HOLDS THAT § 20101(f) BARS FRSA SUIT WHERE PLAINTIFF PREVIOUSLY LITIGATED RACE DISCRIMINATION SUIT RELATING TO SAME ADVERSE ACTION

Lee v. Norfolk Southern Railway Co., No. 13-cv-00004 (W.D. N.C. May 20, 2014) [PDF](#): Plaintiff alleged that he was retaliated against in violation of the FRSA by Defendant for tagging too many cars with “bad order” citations. He has been suspended for 6 months. Previously he

had pursued an employment discrimination claim against Defendant alleging racial discrimination in reference to the same suspension. Here he alleged that supervisors had bad order quotas and there was pressure not to exceed those marks. He claimed that he did not succumb to the pressure and properly had ordered unsafe cars, resulting in the retaliation. The railroad's stated reason for the suspension was the consumption of alcohol (one beer) while on the clock. The railroad sought summary judgment under the election of remedies provision. The court granted the motion.

The court began by reviewing the structure of the Railway Labor Act and the FRSA, as well as the history of the FRSA's election of remedies provision and the 2007 amendments that took the FRSA out of the RLA arbitration process and gave the Secretary of Labor responsibility under the FRSA. In this case, it was undisputed that the Plaintiff had sought protection in the discrimination lawsuit and the FRSA suit. The court also found it undisputed that the same allegedly unlawful act was at issue in both suits—the six month suspension. This left the question as whether the first lawsuit was an action brought pursuant to another provision of law.

Plaintiff attempted to forestall this question by arguing that the railroad was estopped from arguing otherwise because of an agreement reached in the first discovery process. The court found this unavailing since the election of remedies provision limited what actions could even be brought. And the court thought that the Plaintiff had plainly brought suits under different provisions of law. The court saw the FRSA's framework as intended to provide an expedited framework to address complaints and the election of remedies provision as a way of ensuring that the FRSA process did not get bogged down while other suits were pursued.

In initiating the first action the Plaintiff had triggered § 20109(f) and the bar on the second action. It did not matter that in the first action the court had concluded that the forecast of evidence showed that he had been suspended for drinking alcohol on the job and this was a minor grievance subject to the RLA, depriving the court of jurisdiction. But at the same time, the court did have jurisdiction over the § 1981 claim and disposed of it in summary decision. The court acknowledged that if Plaintiff had sought redress under the CBA and RLA, the suit under the FRSA would not be barred because he would have been enforcing collective bargaining rights. But that was not the history in this case; he had not brought a CBA/RLA grievance at all; he brought a race discrimination claim and then an FRSA complaint.

Plaintiff argued that since § 1981 and the FRSA served different purposes, combating race discrimination and retaliation, respectively, and thus the election of remedies provision did not apply. But the court thought that this would prevent the election of remedies provision from serving its purpose since every lawsuit could be directed at a different wrong. As the court saw it, the overlap was in whether the suits concerned the same act, which it saw as the suspension.

Finally, the court rejected reliance on subsections (g) and (h) and the point that the FRSA was not meant to limit rights of employees. It stated that it had not done so because Plaintiff had been permitted to pursue his race discrimination claim to conclusion. As the court saw matters, 20109(f) requires that if an FRSA action is brought, it must be brought first. It did not prevent subsequent claims or side-by-side claims. But it barred subsequent FRSA complaints. If the later subsections were read to allow the action here, the court thought that subsection (f) would be eviscerated. It thus granted summary decision.

[*Editorial Note:* Decision reversed on appeal in *Lee v. Norfolk Southern Railway Co.*, 802 F.3d 656 (4th Cir. 2015)]

FRSA ELECTION OF REMEDIES PROVISION DOES NOT PRECLUDE AN EMPLOYEE FROM SIMULTANEOUSLY PURSUING ARBITRATION PURSUANT TO RIGHTS UNDER A COLLECTIVE BARGAINING AGREEMENT

In *Ratledge v. Norfolk Southern Railway Co.*, No. 12-CV-402 (E.D. Tenn. July 25, 2013) (2013 WL 3872793) (case below 2012-FRS-00064), the Plaintiff filed an FRSA employee protection complaint with OSHA after he was charged with falsely reporting an injury. Following an investigation, the Defendant fired the Plaintiff. The Plaintiff's union representative filed an appeal with the Director of Labor Relations, who denied the appeal. The Plaintiff then sought relief from the Public Law Board, which concurred with the guilty decision but which ordered reinstatement with seniority intact but without compensation for lost time. OSHA found that the Defendant violated the FRSA employee protection provision, the Defendant requested an ALJ hearing, and the Plaintiff then filed suit in U.S. district court. The Defendant filed a motion to dismiss the 49 U.S.C. § 20109(a) retaliation count of the complaint for lack of subject matter jurisdiction based on the election remedies provision at § 20109(f).

The Defendant argued that the Plaintiff's claim must be dismissed because that section's election-of-remedies provision precludes a rail carrier employee from simultaneously pursuing arbitration of his rights under a collective bargaining agreement and seeking whistleblower protection under the FRSA. The Plaintiff argued that the election-of-remedies provision does not apply to statutorily mandated arbitration. The Court agreed with the Plaintiff. The district court first found that the Defendant's motion was properly treated as a FRCP 12(b)(6) motion, rather than a FRCP 12(b)(1) motion. The court then analyzed the purposes of the Railway Labor Act (to govern disputes between management and labor in the railroad industry) and the Federal Rail Safety Act (to promote safety in railroad operations and reduce railroad-related accidents and injuries), and the relevant legislative history; the positions of the parties and the Department of Labor; and the recent decision in *Reed v. Norfolk Southern Railway Co.*, 12-cv-873 (N.D. Ill. Apr. 26, 2013).

The court found that the clause in the statutory language that bars an employee from seeking protection under the FRSA employee protection provision and "another provision of law" was not ambiguous, and that RLA arbitration does not constitute "another provision of law." Consequently, it was not necessary to reach the question of whether to accord *Chevron* deference to the DOL's interpretation, as the court had done in *Reed*. The court found that § 20109 distinguishes between legal remedies and CBA remedies, and rejected the Defendant's argument that the RLA-arbitration process was a statutory remedy. The court stated that "the provisions [of the RLA] at issue - the provisions that create rights and pursuant to which Plaintiff in this case sought relief - are not provisions of *law*. They are contractual rights governed by the framework of the RLA, as opposed to contract law. And it is those rights, not the RLA, under which Plaintiff sought protection." Slip op. at 23. The court observed that Congress would have understood when amending the FRSA in 2007 that many, if not the majority, of those seeking whistleblower protection would also have claims related to RLA-governed CBAs. The court stated that if Congress had expected the amendments to require employees to pick between enforcing the

CBA through arbitration or seek recompense for unlawful retaliation, the court would expect such a change to be more clearly stated.

FRSA ELECTION OF REMEDIES PROVISION; PLAINTIFF'S INITIATION OF ARBITRATION UNDER THE COLLECTIVE BARGAINING AGREEMENT WAS NOT AN ELECTION OF REMEDIES WITHIN THE MEANING OF THE FRSA; COURT GIVES DEFERENCE TO ARB'S DECISION IN MERCIER

In *Reed v. Norfolk Southern Railway Co.*, No. 12-cv-873, 2013 WL 1791694 (N.D.Ill. Apr. 26, 2013), the Plaintiff alleged that the Defendant violated the Federal Rail Safety Act, 49 U.S.C. § 20101 et seq. ("FRSA"), by discharging him in retaliation for reporting a workplace injury. The Defendant moved for summary judgment, arguing that due to the FRSA's Election of Remedies provision, 49 U.S.C. § 20109(f), the Plaintiff was barred from seeking relief under the FRSA because he already elected to pursue a remedy under the Railway Labor Act, 45 U.S.C. § 151 et seq. ("RLA"). The question before the court was whether the Plaintiff's initiation of arbitration under the CBA was an election of remedy under the meaning of Section 20109(f). The court looked to the statutory background to the RLA and the FRSA; to the text of the elections of remedy provision at Section 20109(f), which provides that "[a]n employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier"; and to Supreme Court decisional law, and found that the arbitration proceeding was not an "election" of a remedy because the tribunals and National Railroad Adjustment Boards are mandatory, and those tribunals may only hear disputes arising out the interpretation of the CBA.

The court acknowledged that the FRSA's election of remedies provision could tolerate a contrary reading, but found that this ambiguity permitted it to give deference to the Department of Labor's interpretation of the law. The court wrote:

Here, the Department of Labor has consistently taken the position that § 20109(f) is not triggered by an employee, such as Reed, pursuing arbitration under a collective bargaining agreement because a collective bargaining agreement is a private contract and not another provision of law. *See Mercier v. Norfolk Southern Corp., et al.*, Administrative Review Board Case No. 09-121; *see also* Brief Amicus Curiae of Assistant Secretary of Labor in *Mercier*, Dkt 32-1. Additionally, the Department of Labor interpretation avoids the potential conflict between § 20109(f) and § 20109(h), which Norfolk's assertions could create.

Reed, supra, slip op. at 8.

The court noted that the district court's decision in *Norfolk S. Ry. Co. v. Solis*, CIV.A. 12-0306 BJR, 2013 WL 39226 (D.D.C. Jan. 3, 2013) (an appeal of the ARB's *Mercier* decision), supported deference to the Department of Labor's interpretation:

The court in *Solis*, for purposes of determining subject-matter jurisdiction only, found that that the Administrative Review Board reading was "colorable under the statute, and not in violation of a clear, mandatory directive within the statute.

Thus, [] the *Leedom* doctrine does not apply." *Solis*, 2013 WL 39226, *19. Because the district court did not have subject-matter jurisdiction, the case was dismissed. This Court notes that the ruling in *Solis* did not reach a decision on the merits because it lacked subject matter jurisdiction. The *Solis* ruling, however, does lend support to the conclusion that the statute is ambiguous and the Department of Labor's interpretation is reasonable.

Reed, supra, slip op. at 9. Accordingly, the court denied the Defendant's motion for summary judgment.

DISTRICT COURT REVIEW NOT AVAILABLE CONCERNING NON-FINAL ORDER OF ADMINISTRATIVE REVIEW BOARD RULING THAT § 20109(f) OF THE FRSA DOES NOT PRECLUDE AN EMPLOYEE WHO CHALLENGED HIS TERMINATION IN AN RLA § 3 ARBITRATION FROM FILING A FRSA WHISTLEBLOWER CLAIM

In *Norfolk Southern Railway Co. v. Solis*, No. 12-00306 (D.D.C. Jan. 3, 2013) (case below ARB No. 09-101, ALJ No. 2008-FRS-3), Larry L. Koger filed a FRSA employee protection complaint. The ALJ held that 49 U.S.C. § 20109(f) barred the complaint because the Complainant elected to challenge his dismissal by pursuing the grievance and arbitration procedures under RLA § 3, 45 U.S.C. § 153. *Koger v. Norfolk Southern Ry.*, ALJ No. 2008-FRS-3 (May 29, 2009). On administrative appeal, the ARB consolidated Koger's appeal with an appeal in another case, *Mercier v. Union Pacific R.R.*, ALJ No. 2008-FRS-4 (June 3, 2009), where a different ALJ determined that § 20109(f) did not preclude an employee who had challenged his termination in RLA § 3 arbitration from filing a whistleblower claim under FRSA. The ARB agreed with the decision of the ALJ in *Mercier*, and ruled that, as a matter of law, an employee's pursuit of RLA arbitration does not constitute an election of remedies under 49 U.S.C. § 20109(f). The ARB remanded both *Mercier* and *Koger* for further proceedings.

The Respondent in Koger's administrative proceeding, Norfolk Southern Railway Co. (the "Plaintiff"), filed an action in federal district court claiming that the district court could review the ARB's non-final decision under the doctrine of *Leedom v. Kyne*, 358 U.S. 184 (1958), arguing that the decision was in excess of the Secretary's delegated powers, and that the Plaintiff would have no other meaningful and adequate means to vindicate its statutory right. The Secretary moved to dismiss arguing that the district court lacked subject-matter jurisdiction because 49 U.S.C. § 20109(d)(4) places review of final decisions by the ARB in the appellate court.

The district court noted that the exception under the *Leedom* doctrine is extremely narrow - essentially a "Hail Mary" pass. The doctrine has two predicates: (1) the party must demonstrate that the agency disobeyed a statutory provision that is 'clear and mandatory'; (2) the party must show that, without the district court's exercise of jurisdiction, it lacks any meaningful and adequate means of vindicating its statutory rights. In regard to the first predicate, the court reviewed the Plaintiff's arguments as to why the ARB's decision was allegedly in error, and found that the Plaintiff's argument was flawed in several respects, whereas the ARB's reading was supported by statutory history. The court found that it was not necessary to determine, for

the purposes of the jurisdictional question, whether the ARB's ruling was correct, but only that it was colorable under the statute and not in violation of a clear, mandatory directive within the statute. Accordingly, the court found that the *Leedom* doctrine did not apply. In regard to the second predicate, the district determined that it could not be said that the practical effect of making the Plaintiff go through with the FRSA investigation would somehow foreclose all access to the courts.

DOL Administrative Review Board Decisions

FRSA ELECTION OF REMEDIES PROVISION; WHERE COMPLAINANT AVERRED THAT HE WAS SATISFIED WITH A SETTLEMENT IN STATE COURT AND THERE “ELECTED HIS REMEDY,” THE ARB AGREED TO PERMIT THE COMPLAINANT TO WITHDRAW HIS PETITION FOR ARB REVIEW WITHOUT SUBMISSION OF UNREDACTED SETTLEMENT AGREEMENT FROM STATE ACTION

In *Boucher v. BNSF Railway Co.*, ARB No. 2016-0085, ALJ No. 2014-FRS-00072 (ARB Mar. 22, 2019) (per curiam), the Complainant filed a FRSA complaint and a Montana state court action. The DOL ALJ granted the Respondent’s motion for summary decision on the ground that the Complainant could not seek relief for his discharge under both the FRSA and the Montana law. The ALJ also noted that it would be improper for Complainant to receive duplicate remedies for the Respondent’s same alleged unlawful act. The Complainant appealed to the ARB, but later filed a motion to withdraw the petition for review based on a settlement of the Montana suit. The ARB directed the parties to submit a copy of the settlement agreement because the FRSA regulations require ARB approval where a withdrawal is based on a settlement agreement.

The Respondent filed a redacted copy of the settlement agreement. The ARB denied the motion to withdraw, stating that it would not approve a redacted settlement agreement because the amount of money or other consideration provided in the settlement was a matter of public concern. The ARB directed submission of an unredacted copy of the settlement within 30 days. The ARB stated that if such was not timely submitted, it would consider the case on its merits. In response, the Complainant conceded that the Respondent was entitled to summary decision because he had now elected his remedy—i.e., the settlement in the Montana action.

The ARB noted that the FRSA “election of remedies” provision at 49 U.S.C. § 20109(f) prohibits a complainant from bringing separate claims under two different provisions of law for the same allegedly unlawful act. The ARB wrote:

Montana law provides a cause of action to railway workers who suffer adverse actions because of a railroad’s mismanagement, negligence, or wrongdoing. It is “another provision of law” and it provides “protection” because it provides a remedy for wrongful discharge. Because Complainant has elected to seek protection under “another provision of law” in addition to the FRSA, the “election

of remedies” provision of the Act renders withdrawal and dismissal of the instant action appropriate.

Slip op. at 4 (footnote omitted). Accordingly, the ARB granted the Complainant’s motion to withdraw his petition for review, and dismissed the complaint.

FRSA ELECTION OF REMEDIES PROVISION DOES NOT BAR AN EMPLOYEE FROM CHALLENGING DISCIPLINE UNDER BOTH ARBITRATION AND FRSA RETALIATION PROCEEDINGS

In *Kruse v. Norfolk Southern Railway Co.*, ARB Nos. 12-081, -106, ALJ No. 2011-FRS-22 (ARB Jan. 28, 2014), the Complainant alleged that the Respondent violated the FRSA when it suspended him in retaliation for an injury he reported to a supervisor. The Respondent appealed the ALJ's Decision and Order in favor of the Complainant, arguing that the Federal Rail Safety Act's "election of remedies" provision, 49 U.S.C. § 20109(f) barred the Complainant, who had challenged his discipline in Railway Labor Act arbitration, from challenging the same discipline in a FRSA retaliation proceeding. The ARB rejected the Respondent's argument, finding that the ARB's interpretation of Section 20109(f) in *Mercier v. Union Pacific R.R. Co.*, ARB Nos. 09-101 and 121, ALJ Nos. 2008-FRS-3 and 4 (ARB Sept. 29, 2011), that Section 20109(f) does not encompass grievances filed pursuant to a CBA, had been agreed with by other courts, such as the 7th Circuit in *Reed v. Norfolk Southern Ry. Co.*, ___ F.3d ___, 2014 WL 117479 at * 4 (7th Cir. 2014), and several district courts. *See Ray v. Union Pacific Ry. Co.*, ___ F. Supp. 2d ___, 2013 WL 529172, *8 (S.D. Iowa 2013); *Ratledge v. Norfolk Southern Ry. Co.*, 2013 WL 3872793, *12-*17 (E.D. Tenn. 2013); *Battenfield v. BNSF Ry. Co.*, 2013 WL 1309439 (N.D. Okla. 2013).

FRSA ELECTION OF REMEDIES PROVISION DOES NOT BAR AN FRSA WHISTLEBLOWER COMPLAINT

In *Mercier v. Union Pacific R.R. Co.*, ARB Nos. 09-101, -121, ALJ Nos. 2008-FRS-3, 4 (ARB Sept. 29, 2011), the ARB held that the FRSA's election of remedies provision at 49 U.S.C.A. § 20109(f) does not bar an FRSA whistleblower complaint even though the complainant previously pursued a grievance and arbitration procedure provided in his union's collective bargaining agreement with his employer. The ARB reasoned that "the plain meaning of 'another provision of law' does not encompass grievances filed pursuant to a 'collective bargaining agreement,' which is not 'another provision of law' but is instead a contractual agreement." *Mercier*, ARB No. 09-121, USDOL/OALJ Reporter at 6. The ARB thus determined that the election of remedies provision does not bar a FRSA whistleblower claim because of a previously filed or pending collective bargaining grievance.

The ARB clarified, however, that its ruling does not permit a double recovery:

While subsection (f) cannot be read to bar concurrent whistleblower and collective bargaining claims, we *do* understand the necessity for barring duplicative *recovery* under those claims. The FRSA provides that an employee prevailing in a whistleblower complaint "shall be entitled to all relief necessary to make the employee whole." 49 U.S.C.A. 20109(e)(1). Damages may include reinstatement, backpay, compensatory damages, and punitive damages not to exceed \$250,000. 49 U.S.C.A. §§ 20109(e)(2), (3). In this case, Mercier appears to pursue compensatory damages for pain and suffering stemming from mental hardship, stress, and treatment for depression. *See* Mercier Complaint at 9. These are damages distinct to his complaint under 49 U.S.C.A. §§ 20109 that may not be available to him under the collective bargaining agreement. In any event, it is well-established that any relief to which Mercier is entitled would be that which would make him "whole" and would not include double recovery. *See generally* *Sears Roebuck & Co. v. Metropolitan Engravers, Ltd.*, 245 F.2d 67, 69-70 (9th Cir. 1956) ("a plaintiff may pursue an action against an identical defendant in several courts at the same time, even though inconsistent remedies are sought. But . . . there can be only one recovery."); *Taylor v. Burlington Northern R.R. Co.*, 787 F.2d 1309, 1317 (9th Cir. 1986) (same).

USDOL/OALJ Reporter at 8.

XVI. BANKRUPTCY

U.S. District Court Decisions

BANKRUPTCY; STANDING OF COMPLAINANT TO PURSUE FRSA WHILE IN CHAPTER 13 BANKRUPTCY; CAN PURSUE ON BEHALF OF ESTATE, BUT BANKRUPTCY MUST BE REOPENED AND DISCLOSURE MADE

King v. Ind. Harbor Belt R.R., No. 15-cv-245 (N.D. Ind. Mar. 30, 2018) (Memorandum Opinion and Order): Plaintiff filed for bankruptcy under Chapter 13. He listed one whistleblower claim in his schedule but later denied having any such claims at a creditors' meeting. He received a discharge several years later. During the pendency of the bankruptcy he brought an FRSA suit asserting three sets of claims—one that he may have disclosed in the bankruptcy and two that had accrued later, but still during the bankruptcy. The schedules were never amended. The Defendant sought summary judgment on the grounds of judicial estoppel and lack of standing.

The court explained that when a bankruptcy petition is filed, all property, including legal claims, becomes property of the bankruptcy estate. And property that is acquired during the bankruptcy also belongs to the estate. Here the claims were neither abandoned nor administered by the estate. The Plaintiff might be able to pursue the action in his own name, but for the benefit of the estate, but not unless they are disclosed to the estate. This was particularly true as here, when the bankruptcy was closed. To be able to pursue the claims the bankruptcy would have to be re-opened so that the trustee could determine whether to administer or abandon the interest in the claims. It was not clear if the bankruptcy could be re-opened, so the case was stayed so that Plaintiff could attempt to re-open it.

If this was not done, the court stated it would dismiss the two newer claims for lack of standing, and may do so with the older claim if it determined that there was not disclosure. In a note the court added that if the trustee elected to abandon the claims, the Plaintiff would be judicially estopped from pursuing them because he failed to disclose them properly.

BANKRUPTCY; SUBSTITUTION OF PARTY; FRSA COMPLAINT IS A CLAIM SUBJECT TO BANKRUPTCY AND WHERE A PLAINTIFF HAS FILED FOR BANKRUPTCY THE REAL PARTY IN INTEREST IS THE BANKRUPTCY ESTATE; SUBSTITUTION OF THE REAL PARTY IN INTEREST CAN BE MADE IF THERE WAS EXCUSABLE MISTAKE AND THE PLAINTIFF ACTED IN GOOD FAITH IN BRING THE ACTION IN THEIR OWN NAME

BANKRUPTCY; JUDICIAL ESTOPPEL; WHERE A PLAINTIFF FAILS TO DISCLOSE A CLAIM IN A BANKRUPTCY PROCEEDING JUDICIAL ESTOPPEL MAY APPLY TO PROTECT THE INTEGRITY OF THE BANKRUPTCY PROCEEDING AND BAR THE COMPLAINT FROM PROCEEDING

Clift v. BNSF Ry. Co., No. 14-cv-152, 2015 U.S. Dist. LEXIS 103424, 2015 WL 4656151 (E.D. Wash. Aug. 5, 2015): The case involved a complaint under the whistleblower protection provisions of the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109, by the Plaintiff against BNSF. In the course of the litigation, BNSF discovered that the Plaintiff had filed for bankruptcy 11 weeks after filing the claim against BNSF with OSHA, but had not disclosed the claim against BNSF in the bankruptcy proceeding. BNSF filed a motion to dismiss, which was denied. Presently before the court was a motion for reconsideration of that order as well as Plaintiff’s motion to join the bankruptcy trustee. Slip op. at 1.

Filing bankruptcy creates a bankruptcy estate and any causes of action that have accrued to the debtor become the property of the estate. Here there was no dispute that the cause of action against BNSF had accrued prior to the Plaintiff’s bankruptcy. Thus, it was the property of the bankruptcy estate. The prior motion to dismiss had been premised on the concept of prudential standing, but the court indicated that it was better to analyze the issue in terms of the real party in interest. *Id.* at 2-3. The real party in interest was the bankruptcy estate, not Plaintiff. Thus, under Fed. R. Civ. P. 17, the action had to be prosecuted in the name of the estate. Rule 17 allows for the substitution of the real party in interest, which is what Plaintiff sought to do, but not when “the determination of the right party to bring the action was not difficult and when no excusable mistake was made.” *Id.* at 3.

The order proceeds through the factual background and the possibility of an excusable mistake. *Id.* at 4-8. Plaintiff's contention was that he had viewed the FRSA matter as a "complaint" rather than "claim" and so not something that had to be disclosed in the bankruptcy. The court stated the issue as follows: "It is necessary for this Court to determine whether or not Plaintiff was acting in good faith when he filed this action in his own name. If Plaintiff did not make an honest and understandable mistake when he filed this action in his own name, this Court will not allow substitution of the real party in interest." *Id.* at 9. In answering that inquiry, the timing was important—it showed a request for damages in the FRSA complaint, a settlement offer to BNSF for a sum certain, and an interview with an investigator who called the complaint a "case" all immediately before the bankruptcy filing. The Plaintiff's level of involvement and legal representation made it "remarkable" that he now asserted an understandable mistake in the bankruptcy. It was also notable that a prior attorney had told Plaintiff to "fix" the bankruptcy, but he had done nothing. *Id.* The court found no understandable mistake so the case had to be dismissed and substitution of the real party in interest could not be permitted. The court also summarily dismissed the possibility of a post-bankruptcy retaliation claim (it hadn't been made properly yet and couldn't satisfy the procedural requirements). *Id.* at 10-11.

Moreover, "[e]ven if this Court allowed substitution of the trustee in for the Plaintiff, it would have to invoke judicial estoppel to protect the integrity of the bankruptcy process." *Id.* at 11. Bankruptcy disrupts the "flow of commerce" and creates a duty to disclose all assets to the trustee, since creditors must rely on that information. *Id.* at 11-12. Here, the court was persuaded that not disclosing the FRSA complaint violated the integrity of the bankruptcy for the same basic reasons it found substitution of the trustee could not be permitted—the Plaintiff had been represented by several attorneys and was fully aware of the financial aspect of the FRSA complaint. He was told to fix the nondisclosure and did not. Further, in the colloquy with the trustee, he affirmatively asserted that he had no claim against a third party. *Id.* at 12-14.

Because depositions had been conducted to assist in the determination of whether there was an understandable mistake, the court converted BNSF's motion to dismiss into a motion for summary judgment and then granted summary judgment to BNSF. The motion to substitute the trustee was denied and the case file was closed. *Id.* at 14.

DOL Administrative Review Board Decisions

JUDICIAL ESTOPPEL; COMPLAINANT'S FAILURE TO DISCLOSE FRSA CLAIM TO BANKRUPTCY COURT; MOTIVE TO MISLEAD BANKRUPTCY COURT CANNOT BE INFERRED FROM MERE FAILURE TO DISCLOSE; INTENT IS A QUESTION OF FACT ORDINARILY PRECLUDING GRANT OF SUMMARY DECISION

In *Nelson v. Norfolk Southern Railway Co.*, ARB No. 12-045, ALJ No. 2011-FRS-35 (ARB Sept. 25, 2013), the ALJ dismissed the Complainant's FRSA whistleblower complaint on

summary decision on the grounds that the Complainant was judicially estopped from pursuing his FRSA claim because he had not disclosed it to a bankruptcy court adjudicating the Complainant's Chapter 13 bankruptcy filing. The ALJ cited the ARB's decision in *White v. Gresh Transp., Inc.*, ARB No. 07-035, ALJ No. 2006-STA-048 (ARB Nov. 20, 2008). The ARB found that it was correct to apply a de novo standard of review, rather than an abuse of discretion standard as urged by one concurring member of the Board, on the question of a grant of summary decision on judicial estoppel grounds. The Complainant did not dispute that he was aware of his FRSA claim; that it arose subsequent to the filing of his bankruptcy petition; that he was obligated to disclose it to the bankruptcy court; and that he failed to do so. The ARB, looking to Fourth Circuit caselaw, thus found that the determinative factor in whether to apply judicial estoppel was whether the Complainant's failure to disclose his FRSA claim was motivated by an attempt to gain some advantage before the bankruptcy court.

The ALJ had focused on a filing made by the Complainant before the bankruptcy court to hold that the Complainant knew he was obligated to disclose the claim and had a theoretical motive for concealment. The ARB, however, viewing the evidence in the light most favorable to the Complainant, found that the filing relied upon by the ALJ merely indicated that the Complainant was aware of an ongoing duty to disclose any claims arising prior to the filing of the bankruptcy petition, which supported the Complainant's contention that at a minimum, an issue of material fact exists as to whether he knew that he was required to disclose his FRSA claim. The ARB cited 3rd Circuit caselaw rejecting a theoretical motivation construct as applied by the ALJ. The ARB stated that the ALJ's conclusion regarding the Complainant's motive was in conflict with well-established caselaw holding that intent is a question of fact ordinarily precluding a grant of summary judgment, and that summary judgment is particularly unsuitable for divining a complainant's motive when determining whether to apply judicial estoppel. The ARB remanded for further proceedings.

The concurring member would have applied an abuse of discretion standard of review, and found that the ALJ abused that discretion because, as the majority found, "the requisite intent for judicial estoppel should not be inferred from the mere fact of nondisclosure."