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00012, slip. op. at 3, 23 (ALJ Dec. 31, 2012) (ALJD). Bailey filed a complaint with the Occupational Safety and Health Administration (OSHA) on March 21, 2011. *Id.* at 3. On December 5, 2011, OSHA issued findings that Bailey's complaint was without merit. *Id.* Bailey filed a Notice of Objections/Request for Hearing on December 29, 2011. *Id.* at 3-4. On December 31, 2012, following a hearing, an Administrative Law Judge (ALJ) found that Conrail had retaliated against Bailey in violation of FRSA and ordered reinstatement and other remedies. *Id.* at 35-36. On January 15, 2013, Conrail petitioned the ARB for review of the ALJ's decision and filed a Motion for Stay of Reinstatement Pending Review, to which the Board invited the Assistant Secretary to respond.

FACTUAL BACKGROUND¹

Conrail employed Bailey as a conductor beginning on December 21, 1998. ALJD at 2. Among Bailey's responsibilities was ensuring that his train operated safely and efficiently. *Id.*

From June 29, 2010, to February 8, 2011, Bailey filed about thirty-five safety reports with Conrail. *Id.* at 3, 23 (citing Tr. 238). According to Conrail's practice, Kenneth McIntyre, the area superintendent, added descriptions of how the issues

¹ The Factual Background is based on the findings of fact stated in the ALJ's December 31, 2012, Decision and Order.

were resolved and then returned such reports to the employees who filed them. *Id.* at 4 (citing Tr. 233). On some of the reports that were returned to Bailey, Patrick Unger, Bailey's supervisor, wrote, "please notify me in the future if this happens again." *Id.* (citing Tr. 238; RX 14 at 20-21). In December 2010, according to Bailey, McIntyre told him to "quit sending in the goddamn safety reports." *Id.* at 27 (citing Tr. 160). McIntyre denied using those words but "did admit that some version of the exchange occurred." *Id.* (citing Tr. 105). In January 2011, Bailey requested a meeting with his supervisors, including Robert Conley, Jr., his immediate supervisor, to discuss a safety issue. *Id.* at 6 (citing Tr. 163). When Bailey raised his safety concern, Conley asked him, "if you're so upset why are you here?" *Id.* at 27 (citing Tr. 488).² On that occasion and on several others, Bailey told Conley and other management officials that he did not want to speak with them except regarding work-related issues. *Id.* at 6 (citing Tr. 199, 200, 232-33). When Bailey said this to his managers, they left him alone and no problems ensued. *Id.* at 29 (citing Tr. 410).

² This was the version of the comment that Conley himself recalled making. See ALJD at 27. According to Bailey's testimony, Conley said "if I didn't like my job I should just quit[]." *Id.* at 6 (alteration in original) (citing Tr. 154, 163).

On the morning of February 11, 2011, in the lunchroom of the yard office building, Conley said "good morning" to Bailey. *Id.* at 3, 5, 29 (citing Tr. 183-84). When Bailey did not respond and instead walked away, Conley added "or not." *Id.* at 29 (citing Tr. 49, 184). Bailey turned around and told Conley not to talk to him except about work; Conley responded that he could talk to anyone he wanted. *Id.* at 5, 29 (citing Tr. 184-85). Both men's voices were raised. *Id.* at 29 (citing Tr. 50). Conley did not tell Bailey that he wanted to discuss a work-related matter with him. *Id.* at 29-30 (citing Tr. 316, 495). Bailey left the room, but Conley continued to talk to him. *Id.* at 5 (citing Tr. 185-87). When Bailey returned to the lunchroom, Conley was still talking to him. *Id.* (citing Tr. 187). Bailey said, "Bob, do you want to tangle with me?" *Id.* (citing Tr. 187). He asked this once. *Id.* at 29-30 (citing Tr. 419-21). Bailey then walked toward the doors to Conley's left, not in Conley's direction, and Conley left the lunchroom by another set of doors. *Id.* at 14, 30 (citing Tr. 424-26).

Conley testified that he felt threatened; he feared for his safety. *Id.* at 14 (citing Tr. 423-25, 427). At the hearing, Conley recalled that Bailey was twenty feet away from him when Bailey allegedly threatened him and that, throughout the incident, the two men were at least ten feet apart. *Id.* at 28 (citing Tr. 421-22). Conley estimated that the entire encounter

lasted no more than twenty seconds. *Id.* (citing Tr. 468). According to bystanders, Bailey's words were not threatening, and he made no physical gestures toward Conley, *id.* (citing Tr. 47, 51, 67); the encounter was not a serious or heated confrontation, *id.* (citing Tr. 520-23); and nothing unusual occurred in the lunchroom that morning, *id.* & n.17.

After leaving the lunchroom, Conley called McIntyre, who told him to bring Bailey to McIntyre's office upstairs. *Id.* at 5-6, 15, 28-29 (citing Tr. 190-91, 439-41). Bailey acquiesced; he made no threatening statements or gestures. *Id.* at 15 (citing Tr. 440). At Bailey's request, coworker Brian McBain accompanied the two men to McIntyre's office to serve as a witness. *Id.* at 5 (citing Tr. 191). Conley went up the stairs first, with Bailey behind him. *Id.* at 29 (citing Tr. 192, 440-41). During the meeting in McIntyre's office, McIntyre told Bailey that he was making it "very hostile around here." *Id.* at 6 (citing Tr. 192). Bailey apologized to Conley, but Conley did not accept his apology. *Id.* at 6, 10, 15 (citing Tr. 192, 450, 620). McIntyre instructed Bailey and McBain to return downstairs. *Id.* at 6 (citing Tr. 192). After forty-five minutes, Conley came down to take them back upstairs. *Id.* (citing Tr. 193). McIntyre told Bailey there would be an investigation of that morning's incident, during which period he would be removed from service. *Id.* (citing Tr. 194). McIntyre

then "flicked" or "tossed" two or three of Bailey's safety reports across the desk and, according to McBain, said, "here, I know you keep these." *Id.* at 27 (citing Tr. 55, 194, 272). Conley took Bailey back downstairs. *Id.* at 6 (citing Tr. 194). Bailey gave Conley his radio and switch key; he then left without escort. *Id.* at 6, 29 (citing Tr. 196, 453). Throughout the encounter and meetings, no police or security personnel were called or were present. *Id.* at 8, 10, 15, 28-29 (citing Tr. 55, 124-25, 414-15, 417, 439, 672-73).

On February 29, 2012, following an investigatory hearing on the charges proposed by McIntyre that had been postponed several times at Bailey's request, Conrail terminated Bailey's employment. *Id.* at 21. The termination notice specified that Bailey was dismissed for "conduct unbecoming" and violation of Conrail's policy against workplace threats. *Id.* (citing RX 21). Joseph Price, who was manager of field operations and McIntyre's subordinate and officemate, made the final decision to terminate Bailey after reading the transcript of the investigative hearing, which he received from McIntyre. *Id.* at 18 (citing Tr. 595-96, 598, 603).

Since 2005, Conrail has had in place a "Threats or Acts of Violence in the Workplace" policy. *Id.* at 20 (citing JX 7). The policy provides that threats "will not be tolerated" and that violations will lead to disciplinary action up to and

including termination. *Id.* (citing JX 7). If a workplace matter involves "a threat of imminent harm or violence," the policy requires that the police be contacted. *Id.* (citing JX 7).

Beginning in January 2011 and continuing until September 2011, Bailey sought counseling from a social worker to address work-related anxiety and anger. *Id.* at 7 (citing Tr. 201, 203, 258). His counseling included anger-management techniques. *Id.* (citing Tr. 257, 264). The social worker referred Bailey to a psychiatrist, who began treating Bailey in March 2011 and was still treating him as of the date of the psychiatrist's deposition. *Id.* at 19 (citing RX 22 at 6, 8, 11). The psychiatrist's treatment focused on Bailey's "anxiety, depression, difficulty sleeping, stress related to work issues, and tightness in his chest and arms"; it did not include anger management. *Id.* (citing RX 22 at 9, 15-16, 18-19, 21).

ARGUMENT

Respondent's motion to stay reinstatement should be denied because Respondent has failed to show that "exceptional circumstances" justify a stay of the reinstatement order pending review. See 29 C.F.R. § 1982.110(b). Reinstatement is the presumptive remedy for a retaliatory termination under FRSA. See 49 U.S.C. § 20109(e)(2)(A). As under other whistleblower statutes enforced by OSHA, reinstatement is essential to

enforcement of the FRSA whistleblower protections "not only because it vindicates the rights of the complainant who engaged in protected activity, but also because the return of a discharged employee to the jobsite provides concrete evidence to other employees that the legal protections of the whistleblower statutes are real and effective." *Hobby v. Ga. Power Co.*, Nos. 98-166, 98-169, 2001 WL 168898, at *6 (ARB Feb. 9, 2001), *aff'd sub nom. Ga. Power Co. v. U.S. Dep't of Labor*, 52 F. App'x 490 (11th Cir. 2002) (table) (analyzing the importance of reinstatement to the whistleblower protections in the Energy Reorganization Act).

Congress enacted the whistleblower provisions of FRSA to protect railroad carrier employees who engage in whistleblowing related to railroad safety or security or who request medical treatment. See 49 U.S.C. §§ 20101, 20109; U.S. Dep't of Labor, Occupational Safety & Health Admin., *Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act: Interim Final Rule*, 75 Fed. Reg. 53,522, 53,527 (Aug. 31, 2010). In accordance with Congress's aim of providing a robust remedy for whistleblowers, FRSA provides that relief ordered by OSHA and the ALJ "shall include - (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination." 49 U.S.C. § 20109(e)(2) (emphasis added); 29

C.F.R. §§ 1982.105(a)(1), 1982.109(d)(1).³ Consistent with this statutory mandate, the regulations provide that an ALJ's reinstatement order, which follows a hearing on the record, is effective while the ARB conducts its review unless exceptional circumstances justify a stay. 29 C.F.R. § 1982.110(b).

Thus, the ARB may stay a reinstatement order only "in the exceptional case . . . where the respondent can establish the necessary criteria for equitable injunctive relief." 75 Fed. Reg. at 53,526 (preamble to 29 C.F.R. § 1982.110). To obtain a stay, the moving party must show that (1) it is likely to prevail on the merits on appeal; (2) it is likely to be irreparably harmed absent a stay; (3) others are unlikely to be harmed if a stay is granted; and (4) the public interest favors granting a stay. *Tipton v. Ind. Mich. Power Co.*, No. 04-147, 2007 WL 1935548, at *3-5 (ARB June 27, 2007) (citing *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987)); see also 75 Fed. Reg. at 53,526. An employer seeking to stay reinstatement must meet an extremely high burden to overcome the presumption that immediate reinstatement is appropriate. See 49 U.S.C. § 20109(e)(2)(A); 75 Fed. Reg. at 53,523. Here, Respondent has failed to show that a stay of

³ FRSA incorporates by reference the procedures and burdens of the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century at 49 U.S.C. § 42121(b). See 49 U.S.C. § 20109(d)(2)(A).

reinstatement is warranted because it has not shown a likelihood of success on the merits of its appeal and because the balance of hardships, as well as the public interest, supports Bailey's immediate reinstatement.

I. RESPONDENT HAS NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS

Conrail is unlikely to succeed on the merits on appeal. In a FRSA whistleblower case, the complaining employee must show by a preponderance of the evidence that he engaged in a protected activity, that the employer took an adverse employment action against him, and that his protected activity was a contributing factor in the employer's adverse action. 49 U.S.C. §§ 20109, 42121(b)(2)(B)(iii); 29 C.F.R. § 1982.109(a). A contributing factor is any factor that "alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Sievers v. Alaska Airlines, Inc.*, No. 05-109, 2008 WL 316012, at *3 (ARB Jan. 30, 2008) (quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (internal quotation mark omitted)). Where, as here, there is no direct evidence that the protected activity was a contributing factor, ALJD at 24, the employee must show that the employer had knowledge of his protected activity and may offer circumstantial evidence such as temporal proximity between the protected activity and the adverse action. See *DeFrancesco v. Union R.R.*, No. 10-114,

2012 WL 694502, at *3 (ARB Feb. 29, 2012); *Kester v. Carolina Power & Light Co.*, No. 02-007, 2003 WL 25423611, at *5 (ARB Sept. 30, 2003). Once the employee has made that showing, the employer can avoid liability if it shows by clear and convincing evidence that it would have taken the same adverse action even absent the protected activity. 49 U.S.C. §§ 20109(d)(2), 42121(b)(2)(B)(iv); 29 C.F.R. § 1982.109(b).

The ALJ applied these standards and burdens of proof correctly. Relying on extensive testimony from both Complainant's and Respondent's witnesses and considering the totality of the circumstances, the ALJ found that "Complainant has proven by a preponderance of the evidence that his protected activity, specifically his filing of numerous safety reports, contributed to his suspension and ultimate dismissal" and that "Respondent has failed to establish by clear and convincing evidence that it would have taken the same action absent the Complainant's protected activity." ALJD at 30, 32. The ALJ found that Bailey's protected activities were a contributing factor in Conrail's decision to terminate his employment because decision makers at Conrail knew about Bailey's protected activities, Conrail managers demonstrated animosity toward his filing of safety complaints, and Conrail's reliance on the February 11 encounter was pretextual. *Id.* at 24-30.

Contrary to Respondent's argument, the ALJ did not effectively require it to meet "the beyond a reasonable doubt standard applicable to criminal cases" or to "conclusively demonstrate" that it would have taken the same actions absent Bailey's protected activity. Respondent's Memorandum of Law in Support of Respondent's Motion for Stay of Reinstatement Pending Review (Resp. Mem.) 8. Rather, the ALJ correctly cited Board precedent in using the words "conclusively demonstrate" in her definition of the clear-and-convincing-evidence standard. See ALJD at 31. For example, in *DeFrancesco v. Union Railroad*, the ARB explained that "[c]lear and convincing evidence denotes a *conclusive demonstration*, i.e., that the thing to be proved is highly probable or reasonably certain." 2012 WL 694502, at *4 (emphasis added). The ALJ committed no error in defining or applying the clear-and-convincing-evidence standard.

Substantial evidence likely supports the ALJ's findings that Bailey's safety reports were a contributing factor in his termination and that Conrail would not have terminated him absent those reports. See 29 C.F.R. § 1982.110(b)(providing that the ARB reviews an ALJ's factual findings for substantial evidence). Substantial evidence is "more than a mere scintilla," meaning "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Robinson v. Morgan Stanley*, No. 07-070, 2010 WL 2148577, at *6 (ARB Jan. 10,

2010) (internal quotation marks omitted) (quoting *Clean Harbors Env'tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998)). The Board "must uphold an ALJ's factual finding that is supported by substantial evidence even if there is also substantial evidence for the other party, and even if we 'would justifiably have made a different choice had the matter been before us de novo.'" *Robinson*, 2010 WL 2148577, at *6 (quoting *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 488 (1951)). The ALJ's specific factual findings are based on ample evidence in the record as a whole, including carefully considered credibility determinations, making it very unlikely that Respondent will succeed on the merits of its appeal.

Notwithstanding the ALJ's ample analysis and citation to record evidence, Respondent argues that the ALJ erred in finding employer knowledge "because there was no evidence presented at the hearing that the decision maker, Manager, Field Operations Price, had any knowledge of Bailey's protected activity prior to reviewing the investigation transcript." Resp. Mem. 9. This argument fails for two reasons. First, the ALJ discredited Price's testimony that he did not know about Bailey's having filed safety reports. ALJD at 24. Price had read the hearing transcript from the CBA grievance process, which referred to safety reports that Bailey had filed. *Id.* (citing RX 8 at 284-85, 302-03). Moreover, Price had worked with McIntyre, Bailey's

direct supervisor; the two had shared an office for a year before Price made the decision to terminate Bailey. *Id.* at 24-25 (citing Tr. 603). Second, the ALJ noted that McIntyre – whose knowledge of Bailey’s protected activities is undisputed – had “substantial input in the decision to suspend and terminate” Bailey. *Id.* at 25; see *Kester*, 2003 WL 25423611, at *5; cf. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194 (2011) (holding that an employer may be liable for discrimination if a supervisor’s discriminatorily motivated action is a proximate cause of the employer’s ultimate adverse action). Based on Price’s own testimony, the ALJ concluded that “Mr. Price simply ratified the charges already put into motion by Mr. McIntyre.” ALJD at 25 (citing Tr. 605-07, 614-15). Substantial evidence likely supports the ALJ’s finding that Conrail’s decision makers knew of Bailey’s protected activities.

Respondent further argues that the ALJ erred in finding that its managers demonstrated animosity toward Bailey’s filing of safety complaints. Specifically, Respondent argues that “[a]ny ‘annoyance’ or ‘irritation’ had nothing to do with Bailey’s safety complaints but stemmed from his refusal to give local management a chance to address safety concerns in the ordinary course of business before Bailey would send a hotline fax to corporate offices.” Resp. Mem. 9. However, Respondent makes no argument that Bailey defied any order to follow a

particular protocol for reporting safety complaints.⁴ Indeed, Respondent conceded that Bailey's filing of safety reports – in the manner in which he filed them – constitutes protected activity. ALJD at 4 (citing Resp. Br. 30 n.23); see 49 U.S.C. § 20109(a)(1), (b)(1)(A).

Further, the ALJ found that hearing testimony from both parties' witnesses established that "management was irritated with the Complainant for his frequent filing of safety reports." ALJD at 27. This evidence included testimony that McIntyre asked Bailey, two months before Bailey was suspended, why he would not informally raise safety concerns, "rather than making out paper" (during an exchange in which Bailey recalled being told to "quit sending in the goddamn safety reports"); that Conley told Bailey that he should quit his job if he did not like it, during a meeting about a safety concern Bailey raised about a month before he was suspended; and that McIntyre tossed safety reports across his desk to Bailey, just after telling Bailey that he would be removed from service. *Id.* (citing Tr. 55, 103, 105, 160, 163, 194, 233, 272, 487-88, 629-30, 658). Based on the consideration of this testimony, substantial

⁴ Even if Bailey had defied such an order, the ARB has refused to hold "that an employee's conduct in contravention of a supervisor's order, without more, necessarily removes that conduct from whistleblower protection." *Lee v. Parker-Hannifin Corp.*, No. 10-021, 2012 WL 694496, at *8 n.20 (ARB Feb. 29, 2012).

evidence likely supports the ALJ's finding that Conrail demonstrated animosity toward Bailey's protected activity.

Respondent's stated reason for terminating Bailey was his alleged threat to Conley in violation of the company policy against workplace threats. *Id.* at 21. Respondent argues that the ALJ erred in finding that this proffered reason was pretextual. Resp. Mem. 9. Respondent mischaracterizes the ALJ's decision on this point in two respects.

First, Respondent argues that the ALJ concluded that "Conley provoked Bailey" merely by saying "good morning," a conclusion it terms "outrageous." Resp. Mem. 9. The ALJ, however, found that it was Conley's decision to *pursue* the interaction that "instigated the confrontation" and "escalate[d] the exchange." ALJD at 29. The ALJ noted that Conley added "or not" when Bailey did not respond to his greeting and that Conley "pressed on" after Bailey told him he did not want to talk unless it was related to work. *Id.* (citing Tr. 49, 184-85). The ALJ highlighted Conley's own acknowledgement "that other managers would leave the Complainant alone when he told them not to speak with him about non-work-related matters and there would be no problem." *Id.* (citing Tr. 410). Notably, the ALJ discredited Bailey's testimony that his behavior that morning was polite, finding instead that his refusal to acknowledge Conley's greeting "contributed to the exchange," but she

concluded that "the Railroad had accepted the Complainant's occasional refusal to speak about topics other than work." *Id.* at 29 n.19.

Second, the Respondent mischaracterizes the ALJ's finding of pretext as based only or primarily on her conclusion that Conley provoked Bailey; the ALJ's finding also relied on her conclusion that Conley did not reasonably believe he was threatened during the February 11 encounter. *See id.* at 28-30. No observer of the lunchroom incident supported Conley's account that Bailey threatened him: McBain testified that Bailey's words were not threatening and that he made no physical gestures toward Conley, *id.* at 28 (citing Tr. 47, 51, 67); yardmaster Alvin Coles testified that the encounter was not a serious or heated confrontation, *id.* (citing Tr. 520-23); and fifteen Maintenance of Way employees submitted a statement that they saw nothing unusual in the lunchroom that morning, *id.* & n.17.

The ALJ also found that Conley's behavior throughout the morning, including his instigation of the confrontation, was inconsistent with his stated fear of Bailey. *Id.* at 28-30. Conley did not call the police and was never accompanied by security guards; he walked upstairs to McIntyre's office with his back to Bailey; and he took Bailey back downstairs after the suspension decision was communicated to Bailey. *Id.* at 28-29 (citing Tr. 192, 196, 440-41, 453). Further, the ALJ found that

Conley's contemporaneous account of the lunchroom incident was exaggerated compared to the testimony he and others gave at the hearing. *Id.* at 29-30 (citing Tr. 419-22, 425-26, 316, 495). Similarly, the ALJ found that McIntyre's handling of the incident was inconsistent with a perception of Bailey as a threat: McIntyre told Conley to bring Bailey up to his office, with no backup, immediately after the allegedly threatening incident; he allowed Bailey to sit downstairs without supervision while waiting for a decision; and he did not arrange for Bailey to be escorted off the property. *Id.* at 29 n.18 (citing Tr. 122-24). Substantial evidence likely supports the ALJ's finding that Conrail's managers did not perceive Bailey's words as a threat, and thus Conrail's proffered reason for taking adverse action against Bailey was pretextual.

Taken together, these facts provide substantial evidence supporting the ALJ's finding that Bailey's safety reports were a contributing factor in Conrail's decision to terminate him.⁵

The ALJ also relied on ample evidence to support her conclusion that Conrail failed to show by clear and convincing evidence that it would have taken the same action absent

⁵ The ALJ also noted the close temporal proximity between Bailey's filing of a safety report on February 8, 2011, and his suspension on February 11, 2011. ALJD at 26. The ALJ concluded, however, that this evidence did not strengthen Complainant's case because the intervening incident on the morning of February 11 could have independently caused the adverse action. *Id.*

Bailey's safety reports. 49 U.S.C. §§ 20109(d)(2), 42121(b)(2)(B)(iv); 29 C.F.R. § 1982.109(b). In addition to the evidence indicating that Conley did not reasonably fear for his safety, that Conrail managers did not perceive Bailey's words as a threat, and that decision makers knew about Bailey's protected activity, ALJD at 24-25, 28-32, the ALJ further found that Conrail did not apply its policy against workplace threats and violence consistently, a finding that Respondent argues is error. Respondent insists that the ALJ "disregarded" witnesses' testimony "that it was unheard of for an agreement employee (*i.e.* a rank-and-file union member) to threaten a supervisor." Resp. Mem. 10. But the ALJ specifically acknowledged this testimony by McIntyre and McBain. ALJD at 31 (citing Tr. 67, 620-21). She pointed out, however, that McBain also testified that he did not believe that Bailey threatened Conley, and she noted that employee-supervisor status was irrelevant to Conrail's policy against threats and violence. *Id.*

The ALJ further highlighted that Respondent offered no evidence that any other employee had ever received any level of discipline for violating the policy against threats, despite that Bailey and other witnesses testified that Bailey had both threatened and been threatened by other employees on other occasions. *Id.* at 31-32 & 32 nn.22-23 (citing Tr. 90, 92, 96, 144-45, 546). Indeed, the ALJ found that the record as a whole

established "that profane language and heated conversations among employees and between employees and supervisors were tolerated as part and parcel of the nature of the work environment and a common occurrence at the Railroad." *Id.* at 30 (citing Tr. 63-64, 322-23, 332, 443-44, 520).

Respondent also offered no evidence explaining why Bailey, for making an alleged threat, received the harshest level of discipline possible under the policy. *Id.* at 31-32. By contrast, two employees who engaged in a physical altercation received ten-day suspensions. *Id.* at 32 n.21 (citing Tr. 66).

Conrail's inconsistent application of its workplace threats and violence policy supports the inference that Bailey's alleged violation of the policy was an insufficient reason for Conrail to terminate Bailey's employment. *Cf. DeFrancesco*, 2012 WL 694502, at *3 (listing "inconsistent application of an employer's policies" as circumstantial evidence tending to show that protected activity was a contributing factor). Substantial evidence thus likely supports the ALJ's finding that Conrail would not have terminated Bailey absent his filing of safety reports, and Conrail is unlikely to succeed in its appeal.⁶

⁶ Respondent also argues that the ALJ erred as a matter of law in rejecting its "election of remedies" defense. Resp. Mem. 8 n.2. Respondent argues that 49 U.S.C. § 20109(f) bars Complainant from simultaneously pursuing his FRSA whistleblower claim and his Railway Labor Act arbitration claim. *Id.* However, as Respondent acknowledges, the ARB has held that

II. THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST WEIGH
IN FAVOR OF BAILEY'S IMMEDIATE REINSTATEMENT

The Supreme Court has held that a stay pending appeal is a question of judicial discretion and "is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. v. United States*, 272 U.S. 658, 672 (1926)). Further, the moving party must "demonstrate that irreparable injury is *likely* in the absence of an injunction," not merely possible. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). The ARB has specified that "any alleged irreparable harm 'must be actual and not theoretical' and must be 'certain to occur.'" *Welch v. Cardinal Bankshares Corp.*, No. 06-062, 2006 WL 3246906, at *4 (ARB June 9, 2006) (quoting *Wis. Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

Respondent claims that it would suffer irreparable harm by reinstating Bailey because of "his admitted misconduct and problems with anger management." Resp. Mem. 12. However, the ARB has consistently held that "reinstatement should not be denied merely because friction may continue to exist between the complainant and the company or its employees." *Dale v. Step 1 Stairworks, Inc.*, No. 04-003, 2005 WL 767133, at *3 (ARB Mar.

FRSA's election of remedies provision does not bar employees from pursuing both types of claims. *Mercier v. Union Pac. R.R.*, Nos. 09-101, 09-121, 2011 WL 4915758, at *4-7 (ARB Sept. 29, 2011). Thus, this defense is unlikely to succeed.

31, 2005) (finding that the ALJ erred by not ordering reinstatement even where the complainant did not seek it and the employer's stated reasons for terminating him were his "negative attitude, bad language, and an unexcused absence," *id.* at *2); *cf. Sec'y of Labor v. Reading Anthracite Co.*, 23 FMSHRC 924, 934-35 (FMSHRC 2001) (reviewing decisions under the National Labor Relations Act regarding alleged threats in which circuit courts and the National Labor Relations Board found reinstatement inappropriate only where employees unambiguously threatened bodily harm). As discussed above, substantial evidence supports the ALJ's findings that Conrail managers did not perceive Bailey's words as a threat but, rather, relied on the February 11 incident as a pretext for terminating his employment in retaliation for his repeated safety complaints. These facts belie Respondent's claim that reinstating Bailey is tantamount to expecting Conrail "to wait for a fatality in a lunch room before it takes steps to remove a dangerous employee from the workplace." Resp. Mem. 12. Thus, Respondent has not shown that it will suffer "actual and not theoretical" irreparable harm if Bailey is reinstated.

OSHA agrees with the ALJ that Conrail "has a legitimate concern for violence in the workplace." ALJD at 30. But, in this case, the established facts show that Conrail did not terminate Bailey out of any legitimate concern for potential

workplace violence. Rather, Conrail used unfounded allegations that Bailey threatened Conley as a pretext to retaliate against Bailey for raising safety concerns. A rail employee's right to raise safety concerns without fear of being brought up on pretextual charges and terminated is precisely the right FRSA's whistleblower provision seeks to protect. This right would be irreparably diminished if an employer could escape the requirement to reinstate by simply raising an unsupported or disingenuous allegation that a worker is a safety risk.

OSHA agrees with Respondent that "there is a strong public interest in preventing violence in the workplace." Resp. Mem. 13 (citing the general duty clause of the Occupational Safety and Health Act, 29 U.S.C. § 654, and U.S. Dep't of Labor, Occupational Safety & Health Admin., Instruction, *Enforcement Procedures for Investigating or Inspecting Workplace Violence Incidents*, Directive No. CPL 02-01-052 (Sept. 8, 2011), available at http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-01-052.pdf). However, here the ALJ found that Conrail managers did not perceive Bailey's words as a threat, that Conrail would not have terminated Bailey if he had not engaged in FRSA-protected activity, and that Conrail was inconsistent in its application of its workplace violence policy. Conrail also has offered no evidence that Bailey is a current danger to anyone. An employer's pretextual reliance on an inconsistently applied

policy against workplace threats and violence does not promote the public interest in preventing violence in the workplace.

Under these circumstances, Bailey's and the public's interest in prompt enforcement of FRSA's whistleblower protections trumps any interest Conrail may have in keeping Bailey away from its facilities. Analyzing the enforceability of a preliminary reinstatement order under the closely analogous reinstatement provision in the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105(b)(3)(A)(ii), the Supreme Court noted:

Congress . . . recognized that the employee's protection against having to choose between operating an unsafe vehicle and losing his job would lack practical effectiveness if the employee could not be reinstated pending complete review. The longer a discharged employee remains unemployed, the more devastating are the consequences to his personal financial condition and prospects for reemployment. Ensuring the eventual recovery of backpay may not alone provide sufficient protection to encourage reports of safety violations.

Brock v. Roadway Express, Inc., 481 U.S. 252, 258-259 (1987).

The same concerns weigh in favor of immediate reinstatement of an employee following a finding of retaliation by an ALJ under FRSA. As with STAA, Congress expressly provided in the FRSA procedures that "[t]he filing of . . . objections shall not operate to stay any reinstatement remedy contained in the preliminary order." 49 U.S.C. § 42121(b)(2)(A). The statute reflects a clear congressional determination that reinstatement

pending review is necessary to encourage reports of violations of the law. See *Roadway Express*, 481 U.S. at 258-59. Thus, Bailey's immediate reinstatement is necessary not only to protect him from the devastating economic and professional consequences of retaliatory termination but also to vindicate the public interests underlying FRSA: "promot[ing] safety in every area of railroad operations and reduc[ing] railroad-related accidents and incidents." 49 U.S.C. § 20101.

CONCLUSION

For the foregoing reasons, the Assistant Secretary respectfully requests that the Board deny Respondent's Motion for Stay of Reinstatement Pending Review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of this Response of the Assistant Secretary of Labor for Occupational Safety and Health in Opposition to Respondent's Motion for Stay of Reinstatement Pending Review have been served via first class mail on the following individuals this 8th day of March, 2013:

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