

No. 13-3740

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition for Review of the Final Decision and Order of the
United States Department of Labor's Administrative Review Board

RESPONSE BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT REGARDING ORAL ARGUMENT

Although Respondent Secretary of Labor will gladly participate in any oral argument scheduled by this Court, he does not believe that oral argument is necessary in this case because the issues presented on appeal may be resolved based on the parties' briefs.

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STATEMENT OF JURISDICTION

This case arises under the employee protection provisions of the Federal Railroad Safety Act ("FRSA" or "Act"), 49 U.S.C. 20109, and its implementing regulations, 29 C.F.R. Part 1982. The Secretary of Labor ("Secretary") had subject matter jurisdiction over this case based on a complaint filed with the Occupational Safety and Health Administration ("OSHA") by Mark Bailey ("Bailey") against his employer, Consolidated Rail Corporation ("Conrail"), pursuant to 49 U.S.C. 20109(d)(1).

On April 22, 2013, the Department of Labor's Administrative Review Board ("ARB" or "Board") issued a Final Decision and

Order ("FDO") affirming the decision of the Administrative Law Judge ("ALJ") that Conrail suspended and terminated Bailey in violation of FRSA.¹ Conrail filed a timely Petition for Review in this Court on June 18, 2013. This Court has jurisdiction to review the ARB's decision because the alleged violation occurred in Michigan. See 49 U.S.C. 20109(d)(4) (review of Secretary's final order may be obtained in the court of appeals for the circuit in which the violation allegedly occurred); 49 U.S.C. 42121(b)(4) (same); see also 29 C.F.R. 1982.112(a).²

STATEMENT OF THE ISSUE

Whether substantial evidence supports the ALJ's conclusion, as affirmed by the ARB, that Bailey's protected activity was a contributing factor in Conrail's decisions to suspend and ultimately terminate Bailey.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The anti-retaliation provisions of FRSA protect railroad employees from discharge or other discrimination for engaging in

¹ The Secretary of Labor has delegated authority to the ARB to issue final agency decisions under the employee protection provisions of FRSA. See Sec'y of Labor's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378 (Nov. 16, 2012); see also 29 C.F.R. 1982.110(a).

² Proceedings under FRSA are governed by the rules and procedures, as well as the burdens of proof, set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. 42121(b). See 49 U.S.C. 20109(d)(2).

protected activity under the Act, including providing information "regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety" and "reporting, in good faith, a hazardous safety or security condition" to the employer. 49 U.S.C. 20109(a)(1)(C), (b)(1)(A).

An employee who believes that he or she has been retaliated against in violation of FRSA may file a complaint alleging such retaliation with the Secretary of Labor. See 49 U.S.C. 20109(d); 29 C.F.R. 1982.103. Following an investigation, OSHA issues a determination either dismissing the complaint or finding reasonable cause to believe that retaliation occurred and ordering appropriate relief. See 49 U.S.C. 20109(d)(2)(A); 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1982.105. Either the complainant or the respondent may file objections to OSHA's determination with an ALJ. See 49 U.S.C. 20109(d)(2)(A); 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1982.106. The ALJ's decision is subject to discretionary review by the Board, which issues the final order of the Secretary. See 29 C.F.R. 1982.110.

B. Statement of Facts³

Since 1998, Bailey was employed by Conrail as a conductor. See ALJD at 2. As a conductor, Bailey was responsible for ensuring that his train operated safely and efficiently. *Id.* Bailey's immediate supervisor was Robert Conley ("Conley"), who reported to Kenneth McIntyre ("McIntyre"), Conrail's area superintendent. *Id.* at 5, 13.

From June 29, 2010 through February 8, 2011, Bailey filed approximately thirty-five formal written safety complaints with Conrail. See ALJD at 3, 23. Pursuant to Conrail's standard practice, McIntyre would return such complaints either directly or through a trainmaster to the employee with an explanation as to how the issues were resolved. *Id.* at 4 (citing Appx. 91). On some of the reports that were returned to Bailey, trainmaster Patrick Unger requested that Bailey "please notify me in the future if this happens again." *Id.* (citing Appx. 92, 460-61). According to Bailey, in December 2010, McIntyre told him to "quit sending in the goddamn safety reports." Appx. 72; see ALJD at 27. Although McIntyre denied using those exact words, he "did admit that some version of the exchange occurred." ALJD at 27 (citing Appx. 59).

³ Unless otherwise indicated, this statement of facts is based on the facts as determined by the ALJ in her December 31, 2012 Decision and Order ("ALJD"). The ALJD is set forth in the Appellant's Appendix ("Appx.") at 493-531. The ARB's FDO affirming the ALJ's decision is located at Appx. 540-45.

In January 2011, Bailey requested a meeting with his supervisors, including Conley, to discuss a safety issue. See ALJD at 6 (citing Appx. 73). When Bailey raised his safety concern, Conley asked him, "if you're so upset why are you here?" *Id.* at 27 (citing Appx. 156).⁴ On that occasion and many times thereafter, Bailey told Conley and other management officials that he did not want to speak with them unless the conversation was related to work. *Id.* at 6 (citing Appx. 82, 90-91). When Bailey said this to his managers, they left him alone and no problems ensued. *Id.* at 29 (citing Appx. 137).

On February 11, 2011, Bailey encountered Conley in the lunchroom of the yard office building. See ALJD at 3, 5. Approximately fifteen workers from the Maintenance of Way Department were present at the time. *Id.* at 5 (citing Appx. 78). Conley said "good morning" to Bailey. *Id.* When Bailey did not respond and instead walked away, Conley added "or not." *Id.* at 5, 29 (citing Appx. 45, 78). Bailey turned around and told Conley not to talk to him except about work-related matters; Conley replied that he could talk to anyone he wanted. *Id.* (citing Appx. 78-79). Both men's voices were raised. *Id.* at 29 (citing Appx. 45). Conley did not tell Bailey that he

⁴ This was based on the version of the comment that Conley himself recalled making. See ALJD at 27. According to Bailey, Conley said "if I didn't like my job I should just quit[]." *Id.* at 6 (alteration in original) (citing Appx. 71, 73).

wanted to discuss a work-related matter with him. *Id.* at 29-30 (citing Appx. 113, 158). Bailey exited the lunchroom, but Conley continued to talk to him. *Id.* at 5 (citing Appx. 79). When Bailey returned to the lunchroom, Conley was still talking to him. *Id.* Bailey said, "Bob, do you want to tangle with me?" *Id.* He asked this once. *Id.* at 29-30 (citing Appx. 139). Bailey then walked toward the doors to Conley's left, not in Conley's direction, and Conley exited the lunchroom by another set of doors. *Id.* at 14, 30 (citing Appx. 140-41).

After leaving the lunchroom, Conley called McIntyre, who told him to bring Bailey upstairs to McIntyre's office. See ALJD at 5-6, 15, 28-29 (citing Appx. 80, 144). Bailey agreed to meet with McIntyre; he made no threatening statements or gestures. *Id.* at 15 (citing Appx. 144). At Bailey's request, co-worker Brian McBain ("McBain") accompanied the two men to McIntyre's office to serve as a witness. *Id.* at 5 (citing Appx. 80). Conley went up the stairs first and Bailey followed behind him to McIntyre's office. *Id.* at 29 (citing Appx. 80, 144). During the meeting in McIntyre's office, McIntyre stated that Bailey was making it "very hostile around here." *Id.* at 6 (citing Appx. 80). Bailey apologized to Conley, but Conley did not accept his apology. *Id.* at 6, 10, 15 (citing Appx. 80, 147, 197). McIntyre instructed Bailey and McBain to return downstairs. *Id.* at 6 (citing Appx. 80).

Approximately forty-five minutes later, Conley came down to take them back upstairs. See ALJD at 6 (citing Appx. 81). McIntyre told Bailey there would be an investigation of that morning's incident, during which period he would be removed from service. *Id.* McIntyre then "flicked" or "tossed" several of Bailey's safety reports across his desk and, according to McBain, said, "here, I know you keep these." *Id.* at 27 (citing Appx. 46, 81, 100). Conley took Bailey back downstairs. *Id.* at 6 (citing Appx. 81). Bailey gave Conley his radio and switch key; he then left without escort. *Id.* at 6, 29 (citing Appx. 81, 147). No police or security personnel were called or were present at any time throughout the incident or meetings. *Id.* at 8, 10, 15, 28-29 (citing Appx. 46, 63-64, 138, 144, 210).

McIntyre charged Bailey of "conduct unbecoming an employee of Conrail" and with a "violation of Conrail SA Order AD 0.06, Threats or Acts of Violence in the Workplace, part 4.2, when at approximately 7:15 a.m. on February 11, 2011 in the lunchroom at the Livernois Yard Office Building you threatened Trainmaster Robert Conley, Jr., by among other things, stating: 'Do you want to tangle with me?'" ALJD at 3; see Appx. 241. Conrail scheduled an investigatory hearing on these charges for February 25, 2011. *Id.* At the request of Bailey's union representative, the hearing was postponed several times to February 16, 2012. See ALJD at 3.

On February 29, 2012, following the internal investigative hearing, Conrail terminated Bailey's employment. See ALJD at 3, 21. The termination notice specified that Bailey was dismissed for violating Conrail's policy against workplace threats. *Id.* at 21 (citing Appx. 492). Joseph Price ("Price"), who was manager of field operations and McIntyre's subordinate and officemate, made the final decision to fire Bailey after reading the internal investigative hearing transcript, which he received from McIntyre. *Id.* at 18 (citing Appx. 190-92).

Bailey filed a whistleblower complaint with OSHA on March 21, 2011, alleging that Conrail retaliated against him in violation of FRSA for filing safety complaints. See Appx. 2-4.⁵

⁵ As permitted by his collective bargaining agreement ("CBA"), Bailey also filed a grievance regarding his termination under the dispute resolution procedures in the Railway Labor Act ("RLA"). The arbitration decision adjudicating Bailey's CBA grievance was issued on June 16, 2013, nearly two months after the ARB issued its final decision resolving the FRSA claim. Conrail asserts that this Court may take judicial notice of the arbitration opinion pursuant to *Don Lee Distrib., Inc. v. NLRB*, 145 F.3d 834, 841 n.5 (6th Cir. 1988). See Conrail Br. at 14 n.4, Attachment A.

In *Don Lee*, however, this Court expressly concluded that "it is appropriate to take judicial notice of 'adjudicative facts' such as agency and judicial decisions, even where those decisions contain disputed statements of fact, as long as we take judicial notice for some purpose other than to take a position on the disputed fact issue." 145 F.3d at 841 n.5 (emphasis added). This Court may therefore take judicial notice of the adjudicative fact that an arbitration panel issued an opinion resolving Bailey's CBA grievance on June 16, 2013. However, this Court must reject Conrail's repeated suggestions that it should defer to the arbitration decision's resolution of disputed facts, see Conrail Br. at 4, 13-15, 22 n.7, 30 n.8,

OSHA dismissed the complaint on December 5, 2011. *Id.* at 5-7. Bailey sought review of OSHA's findings before an ALJ on January 4, 2012. *See* ALJD at 1-2. The ALJ conducted a hearing from May 8 through May 10, 2012. *See* Appx. 32-237.

C. The ALJ's Decision and Order

After considering three days of testimony, the parties' briefs and joint stipulations, and numerous exhibits, the ALJ issued a thirty-seven page decision and order on December 31, 2012, concluding that Bailey had established by a preponderance of the evidence that his protected activity contributed to his suspension and ultimate dismissal. *See* ALJD at 30. The ALJ further determined that Conrail had failed to satisfy its burden of proving by clear and convincing evidence that it would have taken the same action absent the protected activity. *Id.* at 32.

In her decision, the ALJ thoroughly discussed and assessed the credibility of each witness's testimony. *See* ALJD at 4-20. She then reviewed the documentary evidence. *Id.* at 20-21. Based on this evidence, the ALJ concluded that Bailey had engaged in protected activity under FRSA, specifically by filing several safety reports from June 29, 2010 through February 8, 2011 and by filing an injury report on August 3, 2010. *Id.* at

because the opinion is not part of the administrative record and is wholly irrelevant for purposes of determining FRSA liability. *See Don Lee*, 145 F.3d at 841 n.5; *see also infra* pp. 42-43.

23. She also determined that it was undisputed that Conrail engaged in adverse actions by suspending Bailey on February 11, 2011 and by terminating him on February 29, 2012. *Id.* The ALJ's analysis thus focused on whether Bailey's protected conduct contributed to the adverse actions. *Id.* at 23-30.

In applying the contributing factor standard, the ALJ explained that, since there was no direct record evidence demonstrating that Bailey's protected activity contributed to the adverse actions, her analysis focused on the parties' circumstantial evidence. See ALJD at 24. The ALJ analyzed whether Conrail had knowledge of Bailey's protected activity. *Id.* at 24-25. Although she acknowledged that Price testified that he had no prior knowledge of Bailey or his protected activity at the time that Price decided to terminate Bailey, the ALJ concluded that it was "difficult to accept" Price's testimony on this point because the internal investigative hearing transcript upon which Price relied to make his decision expressly referenced Bailey's safety reports. *Id.* at 24.

Moreover, the judge found that Price's testimony that he did not have any information about Bailey prior to reading the transcript "strains credibility in light of the fact that he worked closely with Mr. McIntyre, his direct supervisor, and even shared an office with him for the year prior to his decision." ALJD at 24-25. The ALJ further determined that,

even if she were to credit Price's testimony, "McIntyre did have such knowledge and his decision to charge [Bailey] as well as his substantial input in the decision to suspend and terminate [Bailey] is sufficient to meet the knowledge requirement." *Id.* at 25. The judge explained that McIntyre was responsible for initiating the chain of disciplinary events, participated in the internal investigative hearing, testified against Bailey, handed the transcript to Price, and directly supervised Price. *Id.*

Based on the evidence, the ALJ thus concluded that Price "simply ratified" McIntyre's charges. ALJD at 25. The ALJ also observed that Price did not look at any of the exhibits from the internal investigative proceeding and testified that he was not even aware that there were exhibits despite numerous references to them in the transcript he received from McIntyre. *Id.* Further, Price could not recall basic facts about the hearing. *Id.* Indeed, the ALJ observed that Price admitted that he based his decision on the simple fact that the incident occurred. Price did not consider anything beyond this fact, such as how Bailey's words were perceived by Conley or the motivations of McIntyre and Conley, even though the workplace violence policy defined a threat as words or actions that "create[] a perception that there may be an intent to physically harm persons or property." *Id.* at 25, 28 (citing Appx. 244).

The ALJ then analyzed Conrail's hostility towards Bailey's protected activity. See ALJD at 26-28. The ALJ rejected two of Bailey's arguments in support of retaliatory animus, *id.* at 26-27, but concluded that circumstantial evidence supported an inference that Conrail's managers were "irritated" with Bailey for his frequent filing of safety complaints. *Id.* at 27. The ALJ credited Bailey's testimony that, two months prior to his suspension, McIntyre told him to "quit sending in the goddam safety reports." *Id.* The ALJ found that, in response to Bailey's raising of a safety concern approximately one month prior to his suspension, Conley told Bailey that he should quit if he did not like his job. *Id.*

The judge also explained that Bailey's written reports required Conrail managers to formally document every event, "which they admitted they did not want to do." ALJD at 28. Moreover, the ALJ noted that several witnesses testified that, when he suspended Bailey, McIntyre "flicked" or "tossed" safety reports at Bailey and said, "here, I know you keep these." *Id.* at 27. The judge thus concluded that the "evidence establishes that, at the very least, Conrail management was irritated by [Bailey's] written safety complaints and viewed [him] as a nuisance for frequently raising his safety concerns." *Id.* at 27-28.

The ALJ then determined that there was substantial evidence that Conrail's proffered reason for Bailey's termination was "unworthy of credence." ALJD at 28. The judge noted that under the terms of Conrail's policy the "relevant inquiry" in evaluating whether a workplace threat had occurred must focus on the victim's perception. *Id.* The judge further stated that based on the evidence, "it is difficult to find that Mr. Conley reasonably believed he was threatened" because he testified that he was standing approximately twenty feet away from Bailey during their alleged altercation and at no point were they closer than ten feet apart. *Id.* The judge also stated that McBain testified that he did not think Bailey's words were a threat and that Bailey did not make any physical gestures towards Conley, and that yardmaster Alvin Coles ("Coles") also testified that he did not think the encounter was serious. *Id.* Moreover, fifteen Maintenance of Way employees provided a statement that they did not notice anything unusual in the lunchroom that morning. *Id.*

The ALJ further reasoned that Conley's testimony that he feared for his physical safety during and after the incident was inconsistent with the evidence because Conley accompanied Bailey to McIntyre's office and walked up the stairs first, attended the meeting with Bailey, and did not contact security or the police. See ALJD at 28-29. The ALJ also determined that Conley

"instigated" the incident with Bailey. *Id.* at 29. Finally, the ALJ found that Conley's description of the incident "lacks credibility" and that he had "attempted to exaggerate the events that occurred." *Id.* The ALJ thus concluded that Conrail's stated reason for terminating Bailey—that he violated the rule against workplace threats—was not credible and that there was "an abundance of evidence" that contradicted Conrail's assertion that Bailey threatened Conley. *Id.* at 30. The judge determined that the February 11, 2011 incident was a pretextual "excuse to terminate [Bailey] for many reasons, including his protected activity." *Id.*

For many of the same reasons set forth above, the ALJ determined that Conrail failed to prove by clear and convincing evidence that it would have taken the same actions against Bailey absent his protected activity. *See* ALJD at 31-32. The judge emphasized again that it was the actions of McIntyre and Conley, who knew about Bailey's protected activity, that "ultimately led to" Bailey's termination and that there was not a "truly independent investigation apart from Mr. McIntyre's influence." *Id.* at 31.

With respect to Conrail's argument that it simply enforced its rule against workplace threats, the ALJ determined that there was "substantial evidence to the contrary." ALJD at 31. The judge emphasized that Conrail presented no evidence of prior

incidents in which an employee was disciplined, let alone terminated, due to a violation of the policy. *Id.* Moreover, the judge stated that Conrail failed to provide any evidence or explanation of why Price decided to impose the most severe level of discipline in this case or any evidence of "objective criteria used by the company for determining the level of discipline to impose for violations of the policy against workplace violence." *Id.* at 31-32. The ALJ also determined that there were past incidents involving workplace threats where Conrail did not take disciplinary action. *Id.* at 32. The ALJ thus found that Bailey's suspension and termination violated FRSA and that he was thus entitled to relief. *Id.* at 32-36.

D. The ARB's Final Decision and Order

On April 22, 2013, the ARB affirmed the ALJ's decision. See FDO at 3. The Board concluded that the ALJ's factual findings were supported by substantial record evidence, and that the judge's credibility determinations were entitled to deference. *Id.* at 2. The ARB also determined that the ALJ's legal conclusions were in accordance with the law and that Conrail's challenges were not meritorious. *Id.*

SUMMARY OF ARGUMENT

This Court should affirm the ARB's final decision and order, upholding the ALJ's decision. The ARB correctly concluded that substantial evidence supports the ALJ's

determination that Bailey established by a preponderance of the evidence that his protected activity was a contributing factor in Conrail's decisions to suspend and ultimately terminate him. Moreover, as affirmed by the Board, the ALJ correctly concluded that Conrail failed to establish by clear and convincing evidence that it would have taken these adverse actions absent Bailey's protected activity.

Specifically, the ALJ correctly determined that Conrail's decisionmakers had knowledge of his protected activity. It is undisputed that Conley and McIntyre, the Conrail managers responsible for suspending Bailey, knew that he had filed many safety reports. Moreover, the ALJ correctly found that the testimony of Price, the Conrail manager nominally responsible for terminating Bailey, disavowing such knowledge was not credible because Bailey's safety reports were referenced in the internal investigative hearing transcript that Price testified he had read. The ALJ also correctly made an alternative finding that, even if Price lacked personal knowledge of Bailey's protected activity, such knowledge may be imputed to Price because he merely ratified the charges that had already been set in motion by Conley and McIntyre and because Conley and McIntyre had significant influence upon the termination decision.

The ALJ also correctly concluded that Bailey was not required to produce direct evidence of retaliatory animus in

order to establish his prima facie case of discrimination under FRSA; rather, Bailey could rely upon circumstantial evidence to satisfy his burden. Substantial evidence supports the ALJ's finding that Conley and McIntyre displayed hostility towards Bailey's filing of written safety reports. Moreover, the ALJ properly applied a "cat's paw" theory to impute retaliatory animus to Price because the hostility towards Bailey's protected activity displayed by McIntyre and Conley "tainted" both the internal investigation and Price's review of such investigation.

Finally, the ALJ properly determined that Conrail's reliance on the February 11, 2011 incident as a basis for the adverse actions was pretextual because Conrail's managers did not reasonably believe that Bailey had threatened Conley and acted in a manner that was inconsistent with their assertion that Bailey threatened Conley. In addition, Conrail produced no evidence that it had ever applied its rule against workplace threats to terminate an employee even though it was aware that threats had occurred in the past, thus Conrail disparately disciplined Bailey.

Accordingly, the ALJ correctly concluded that Bailey established by a preponderance of the evidence that his protected activity contributed to his suspension and termination. Moreover, substantial evidence supports the ALJ's conclusion that Conrail failed to prove by clear and convincing

evidence that it would have taken the same actions absent Bailey's protected activity.

STANDARD OF REVIEW

Judicial review of the ARB's final decision is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2). See 49 U.S.C. 20109(d)(4); 49 U.S.C. 42121(b)(4)(A); *Durham v. Dep't of Labor*, 515 F. App'x 382, 383 (6th Cir. 2013). Under this standard, this Court must affirm the agency's decision if it is supported by substantial evidence and is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A),(E); see *Varnadore v. Sec'y of Labor*, 141 F.3d 625, 630 (6th Cir. 1998).

The ARB's factual findings "must be affirmed if they are supported by substantial evidence, which is more than a scintilla, but less than a preponderance, of the evidence." *Ind. Mich. Power Co. v. U.S. Dep't of Labor*, 278 F. App'x 597, 602 (6th Cir. 2008) (internal quotation marks omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Sasse v. U.S. Dep't of Labor*, 409 F.3d 773, 778 (6th Cir. 2005) (internal quotation marks omitted). A court's review of an agency decision under the substantial evidence standard is "highly deferential" and "requires this Court to defer to the inferences that the DOL derives from the evidence." *Ind. Mich.*

Power Co., 278 F. App'x at 602; see *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951); *Sasse*, 409 F.3d at 778-79. This Court "must uphold the Board's findings if supported by substantial evidence even if the court would justifiably have made a different choice had the matter been before it de novo." *Yadav v. L-3 Commc'ns Corp.*, 462 F. App'x 533, 536 (6th Cir. 2012) (internal quotation marks omitted).

Although the ARB's "purely legal conclusions" are generally reviewed de novo, this Court "defer[s] somewhat to the agency because it is charged with administering the statute." *Tenn. Valley Auth. v. Sec'y of Labor*, 59 F. App'x 732, 736 (6th Cir. 2003) (internal quotation marks omitted). The ARB's interpretation of FRSA's whistleblower provision is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and must be upheld as long as it is a "permissible construction of the statute." *Tenn. Valley*, 59 F. App'x at 736 (internal quotation marks omitted); see *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (explaining appropriateness of granting *Chevron* deference to agency's statutory interpretations made through formal adjudication); *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1131-32 (10th Cir. 2013) (according *Chevron* deference to the ARB's interpretation of the whistleblower provision of the Sarbanes-Oxley Act ("SOX")); *Tenn. Valley*, 59 F. App'x at

736 (applying *Chevron* deference to the ARB's reasonable interpretation of the Energy Reorganization Act whistleblower provision); *Ray v. Union Pac. R.R.*, No. 4:11-cv-334, 2013 WL 5297172, at *7-8 (S.D. Iowa Sept. 13, 2013) (granting *Chevron* deference to ARB's interpretation of FRSA's whistleblower provision); *Reed v. Norfolk S. Ry.*, No. 12-cv-873, 2013 WL 1791694, at *5 (N.D. Ill. Apr. 26, 2013) (same).

Finally, this Court accords "great weight and deference" to an ALJ's credibility determinations. *Schmiedebusch v. Comm'r of Soc. Sec. Admin.*, No. 12-4316, 2013 WL 5749156, at *12 (6th Cir. Oct. 24, 2013); see *Johnson v. U.S. Dep't of Labor*, 205 F. App'x 312, 314 (6th Cir. 2006). This Court's review of such findings is limited to whether they "are reasonable and supported by substantial evidence in the record." *Schmiedebusch*, 2013 WL 5749156, at *12 (internal quotation marks omitted).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S CONCLUSION, AS AFFIRMED BY THE BOARD, THAT CONRAIL RETALIATED AGAINST BAILEY IN VIOLATION OF FRSA

A. FRSA and the Applicable Burdens

Actions under the whistleblower provisions of FRSA are governed by the legal burdens set forth in 49 U.S.C. 42121(b)(2)(B) and the applicable regulations at 29 C.F.R. Part 1982. See 49 U.S.C. 20109(d)(2). To prevail on a FRSA claim, a complainant must prove by a preponderance of the evidence that

(1) he engaged in protected activity; (2) the employer knew of such activity; (3) he suffered an adverse employment action; and (4) his protected activity was a contributing factor in the adverse employment actions. See 49 U.S.C. 42121(b)(2)(B)(iii); 29 C.F.R. 1982.104(e); see also *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013).

If the complainant proves that his protected activity contributed to the employer's adverse action, the burden of proof shifts to the employer to prove "by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of [the protected conduct]." 49 U.S.C. 42121(b)(2)(B)(iv); 29 C.F.R. 1982.109(b).

Conrail concedes, and the evidence establishes, that Bailey engaged in protected activity by filing approximately thirty-five safety complaints with Conrail from June 29, 2010 to February 8, 2011. See ALJD at 23 (citing 49 U.S.C. 20109(a)(1), (b)(1)(A)). Conrail admits, and the evidence shows, that Bailey's supervisors, McIntyre and Conley, were aware of his protected activity.⁶ Conrail also acknowledges, and the record demonstrates, that Conrail took adverse employment actions against Bailey by removing him from service on February 11, 2011

⁶ Although Conley and McIntyre, the Conrail officials who were responsible for suspending Bailey, unquestionably knew of his protected activity, Conrail argues that Price, the manager who terminated Bailey, lacked such knowledge. See Conrail Br. at 26-29. This issue is addressed *infra* pp. 23-28.

and by terminating his employment on February 29, 2012. *Id.* The sole issue remaining on appeal is thus whether substantial evidence supports the ALJ's conclusions, affirmed by the ARB, that Bailey's protected activity was a contributing factor in Conrail's decisions to suspend and ultimately terminate Bailey and that Conrail failed to show by clear and convincing evidence that it would have taken those actions in the absence of Bailey's protected activity.

B. The Contributing Factor Test

The contributing factor element of a whistleblower's prima facie case is "broad and forgiving." *Lockheed Martin Corp.*, 717 F.3d at 1136. Under this standard, a complainant "need only show that his protected activity was a 'contributing factor' in the retaliatory discharge or discrimination, not the sole or even predominant cause." *Araujo*, 708 F.3d at 158 (citing 49 U.S.C. 42121(b)(2)(B)(ii)); see 49 U.S.C. 20109(a) (FRSA protects against adverse action "due, in whole or in part, to" an employee's protected conduct) (emphasis added). In other words, 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." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (internal quotation marks omitted and emphasis added); see *Araujo*, 708 F.3d at 158; *Lockheed Martin Corp.*, 717 F.3d at 1136.

The contributing factor test was "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." *Araujo*, 708 F.3d at 158 (quoting *Marano*, 2 F.3d at 1140). Where, as here, there is no direct evidence that the protected act was a contributing factor, see ALJD at 24, the employee may offer circumstantial evidence. See *Araujo*, 708 F.3d at 160-61; *Lockheed Martin Corp.*, 717 F.3d at 1136; *DeFrancesco v. Union R.R.*, No. 10-114, 2012 WL 759336, at *3 (ARB Feb. 29, 2012).

The ALJ applied this standard correctly and engaged in a detailed analysis and thorough discussion of the testimonial and documentary evidence, including making credibility findings. Based on this evidence, she concluded that Bailey proved by a preponderance of the credible evidence that his protected activity was a contributing factor in Conrail's decisions to suspend and terminate him. See ALJD at 30.

C. The ALJ Correctly Determined That Conrail's Decisionmakers Had Knowledge of Bailey's Protected Activity⁷

As the ALJ properly recognized, a complainant under FRSA must demonstrate that the employer had knowledge of his

⁷ Employer knowledge may be treated as a standalone element of the complainant's prima facie case but is also relevant with respect to the contributing factor analysis. See, e.g., *Scott v. Eastman Chem. Co.*, 275 F. App'x 466, 482 (6th Cir. 2008).

protected activity in order to prove his prima facie case of retaliation. See ALJD at 24. Moreover, as the ALJ correctly stated, it is generally insufficient "for a complainant to show that his employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the decision makers who subjected him to the alleged adverse actions were aware of his protected activity." *Id.* The ALJ's discussion of the employer knowledge requirement is consistent with this Court's admonition that a decisionmaker's "knowledge of the protected activity is an essential element of the prima facie case of unlawful retaliation." *Frazier v. USF Holland, Inc.*, 250 F. App'x 142, 148 (6th Cir. 2007) (citing *Mulhall v. Ashcroft*, 287 F.3d 543, 551 (6th Cir. 2002)).

As this Court has recognized, however, a "plaintiff is not required to have *direct* evidence that her employer knew of the plaintiff's protected activity." *Brown v. VHS of Mich., Inc.*, No. 13-1054, 2013 WL 5583818, at *5 (6th Cir. Oct. 10, 2013) (emphasis added); see *Mulhall*, 287 F.3d at 551-54; *Polk v. Yellow Freight Sys., Inc.*, 876 F.2d 527, 531 (6th Cir. 1989). Rather, a decisionmaker's knowledge can be inferred through circumstantial evidence. See *Vander Boegh v. EnergySolutions, Inc.*, No. 12-5643, 2013 WL 4105648, at *7 (6th Cir. Aug. 14, 2013); *Mulhall*, 287 F.3d at 552-53; *Scott*, 275 F. App'x at 482 ("Knowledge may be inferred from evidence in the record.").

This Court has also affirmed that a "decisionmaker's disavowal of knowledge may be rebutted with countervailing evidence." *Vander Boegh*, 2013 WL 4105648, at *7.

As a threshold matter, it is undisputed that McIntyre and Conley, the Conrail managers who were responsible for suspending Bailey on February 11, 2011 and charging him with a terminable offense, knew about Bailey's protected activity. See ALJD at 25, 31. With respect to Bailey's FRSA claim regarding his removal from service, the employer knowledge element has thus been established.

Substantial testimonial and documentary evidence also supports the ALJ's determination that Price, the official who made the decision to terminate Bailey, had knowledge of Bailey's protected activity. During the hearing before the ALJ, Price testified that he did not know anything about Bailey, including the fact that he filed numerous safety reports, at the time that he decided to discharge Bailey. See ALJD at 17-18. The ALJ properly determined that Price's testimony was not credible. *Id.* at 24-25, 31. At the ALJ hearing, Price testified that he had read the internal investigative hearing transcript; in fact, he emphasized that his decision to terminate Bailey was based solely and exclusively on his review of the transcript. *Id.* at 24. As found by the ALJ, however, such testimony directly undermines Price's disavowal of knowledge that Bailey had

previously filed safety reports because the internal investigative hearing transcript itself contains references to Bailey's safety reports. *Id.*; Appx. 288-90, 301-02, 319-20. That evidence alone is sufficient to support the ALJ's finding that Price knew Bailey engaged in FRSA-protected activity.

The ALJ further determined, however, that Price's testimony that he knew nothing about Bailey or his protected activity prior to reviewing the internal investigative hearing transcript in February 2012 was not credible in light of the fact that Price had worked and shared an office with McIntyre for almost the entire year preceding his decision to terminate Bailey. See ALJD at 24-25; Appx. 192.⁸ Moreover, McIntyre *directly supervised* Price at the time that he decided to fire Bailey, and Price himself directly supervised Conley. *Id.* In fact, when the time came for him to make a decision about Bailey's discipline, Price received the internal investigative hearing transcript directly from McIntyre himself. See ALJD at 25; Appx. 191, 194.

Based on this extensive record evidence, the ALJ correctly concluded that "Mr. Price's testimony that he did not have any

⁸ During this nearly year-long period in which Price and McIntyre shared an office prior to February 2012, several important events related to this case occurred: OSHA investigated Bailey's whistleblower complaint; Bailey filed objections to OSHA's findings and requested an ALJ hearing; and Conley and McIntyre testified at Bailey's internal investigative hearing. See ALJD at 1-4.

information regarding the Complainant prior to reading the transcript strains credibility" and that she thus found it "difficult to accept Mr. Price's testimony that he had no knowledge of the Complainant or of his prior protected activity" when he decided to terminate Bailey. ALJD at 24. This Court should accord significant deference to the ALJ's credibility determination. See *Schmiedebusch*, 2013 WL 5749156, at *12.

The ALJ also made an alternative finding that, even if she were to credit Price's testimony that he lacked knowledge of Bailey's protected activity, such knowledge could be imputed under a "cat's paw" theory because McIntyre and Conley, both of whom indisputably knew that Bailey had filed many safety reports, had "substantial input" in the decision to fire Bailey and proximately caused his termination. See ALJD at 25, 31.⁹ The ALJ's proper application of the "cat's paw" doctrine with

⁹ This Court recently assumed without deciding that the "cat's paw" theory may be used to impute employer knowledge (in addition to retaliatory animus) to a decisionmaker, but acknowledged that the availability of this theory with respect to employer knowledge "is less than clear under this court's precedent." *Vander Boegh*, 2013 WL 4105648, at *9. Other courts, however, have utilized the "cat's paw" theory in whistleblower cases subject to the contributing factor standard, such as the instant case, to impute knowledge to an indisputably unaware decisionmaker where another employee with significant influence upon the final decision knows of the complainant's protected activity. See, e.g., *Lockheed Martin Corp.*, 717 F.3d at 1137-38 (SOX Section 806); *Rudolph v. Nat'l R.R. Passenger Corp.*, No. 11-037, 2013 WL 1385560, at *12 (ARB Mar. 29, 2013) (FRSA). In any event, this Court need not resolve this issue because substantial evidence supports the ALJ's finding that Price did, in fact, know about Bailey's protected activity.

respect to discriminatory animus is discussed below. *See infra* pp. 34-41.

D. The ALJ Correctly Determined That Direct Proof of Retaliatory Animus is Not Required Under FRSA, But That the Conrail Managers Who Decided to Suspend Bailey and Charge Him With a Terminable Offense Displayed Hostility Towards His Protected Activity

On appeal, Conrail argues that the ALJ erred in concluding that Bailey could satisfy FRSA's contributing factor test without any direct showing of retaliatory animus or intent. *See* Conrail Br. at 33-36. Conrail asserts that Bailey's safety reports "did not set in motion a chain of events that led to his suspension" and that, because Bailey's protected activity was not the "but for" cause of his suspension, the ALJ erred by failing to require that Bailey prove by a preponderance of the evidence that retaliatory animus contributed to Conrail's disciplinary action. *Id.* at 35. This argument mischaracterizes the ALJ's decision and is not supported by the case law.

1. Direct proof of retaliatory animus is not required.

The ALJ correctly stated that a complainant is not required to show direct evidence of retaliatory animus under a contributing factor standard. *See* ALJD at 28; *see also* Araujo, 708 F.3d at 161; Marano, 2 F.3d at 1141. As discussed above, *see supra* pp. 22-23, a FRSA plaintiff's initial burden is merely to show that his protected conduct *contributed* to the adverse action. *See* 49 U.S.C. 20109(a). This standard "does not

require a plaintiff to prove the protected activity was the sole or predominant factor." *Kuduk v. BNSF Ry.*, No. 12-276, 2013 WL 5413448, at *7 (D. Minn. Sept. 26, 2013); see *Araujo*, 708 F.3d at 158 (same); *Addis v. Dep't of Labor*, 575 F.3d 688, 691 (7th Cir. 2009) (explaining that "contributing factor" is at one end of a spectrum of standards, all of which describe the extent to which a factor motivated a decision); *Marano*, 2 F.3d at 1141.

Numerous courts have therefore held that direct evidence of retaliatory animus is not required under FRSA; instead, a complainant may show that his protected activity contributed to the adverse action through circumstantial evidence. See *Araujo*, 708 F.3d at 161, 163; *Kuduk*, 2013 WL 5413448, at *7-8; *Ray*, 2013 WL 5297172, at *11-12; *DeFrancesco*, 2012 WL 759336, at *3.¹⁰ In *Araujo*, for example, the Third Circuit recently concluded that a FRSA whistleblower established a prima facie case of retaliation based on "entirely circumstantial" evidence and without providing "any evidence" of his employer's motive because "direct evidence is not required." 708 F.3d at 161 (emphasis added).

¹⁰ Conrail attempts to distinguish such cases holding that proof of retaliatory animus is not required to satisfy the contributing factor test by arguing that such a conclusion only applies where the complainant's protected activity sets in motion a chain of events that results in, or is the direct "but for" cause of, the adverse action. There is, quite simply, no legal support for this assertion. All FRSA whistleblower cases are subject to a contributing factor standard that may be satisfied entirely through circumstantial evidence.

Contrary to Conrail's argument that failing to require complainants to prove retaliatory animus "eviscerate[s] the FRSA's causation requirement," Conrail Br. at 36, a complainant still must prove by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action. The complainant can satisfy this burden, however, solely based on circumstantial evidence. See *Araujo*, 708 F.3d at 161. Such circumstantial evidence may include "temporal proximity, pretext, shifting explanations by the employer, antagonism or hostility toward the plaintiff's protected activity, the falsity of the employer's explanation or a change in the employer's attitude toward plaintiff after he/she engaged in protected activity." *Kuduk*, 2013 WL 5413448, at *7; see *Ray*, 2013 WL 5297172, at *11-12; *DeFrancesco*, 2012 WL 759336, at *3.

Strong legislative and public policy reasons support the conclusion that FRSA whistleblowers are not required to produce direct evidence of retaliatory animus. Requiring complainants to prove that their supervisors possessed discriminatory intent would be unduly burdensome, if not impossible, in many cases and would eviscerate the lenient causation standard that Congress expressly intended to apply to FRSA whistleblowers, whose access to the kind of direct evidence that would normally be required to prove animus may be limited. See *supra* pp. 22-23. Moreover,

actual proof of animus is not required to show that a complainant's protected act contributed to the adverse action.¹¹

2. The ALJ correctly concluded that Conrail's managers were hostile to Bailey's protected activity.

In any event, however, the ALJ *did*, in fact, determine that Conrail's managers displayed retaliatory animus towards Bailey's protected activity. Although the ALJ characterized such animus more precisely as "irritat[ion]" or "hostility," ALJD at 26-28, such terminology is a distinction without a difference in this context. *See, e.g., Loesel v. City of Frankenmuth*, 692 F.3d 452, 466 (6th Cir. 2012) ("Animus is defined as 'ill will, antagonism, or *hostility* usually controlled but deep-seated and sometimes virulent.'") (quoting Webster's Third New Int'l Dictionary, Unabridged (2002)) (emphasis added). Conrail thus incorrectly asserts that the ALJ allowed Bailey to satisfy FRSA's contributing factor element "through circumstantial evidence *completely unmoored from the core issue of retaliatory intent.*" Conrail Br. at 36 (emphasis added).

¹¹ Indeed, in enacting FRSA, Congress expressly intended to prohibit retaliation for whistleblowing even when an employer's motive was not animus *per se*. *See Araujo*, 708 F.3d at 161 n.7 (FRSA's legislative history "shows that Congress was concerned that some railroad supervisors intimidated employees from reporting injuries to the [Federal Railroad Administration (FRA)], in part, because their compensation depended on low numbers of FRA reportable injuries within their supervisory area") (citation omitted and emphasis added).

Substantial evidence supports the ALJ's determination that Conrail's managers displayed hostility towards Bailey's protected activity. First, the ALJ credited Bailey's testimony that, two months prior to his suspension, McIntyre told Bailey to "quit sending in the goddamn safety reports." ALJD at 27; Appx. 72. As the ALJ explained, although McIntyre denied uttering those precise words to Bailey, "he did admit that some version of the exchange occurred." ALJD at 27; Appx. 59. Specifically, McIntyre testified that he asked Bailey "why he wouldn't give us a chance to go out and fix the safety defect just by coming to us and asking us, rather than making out the paper." Appx. 59.

McIntyre also testified that very few workers submit formal safety complaints and that the forms were intended to be completed only if the safety hazard was not fixed upon receipt of a verbal complaint. See ALJD at 27; Appx. 199, 206.¹² Conley, Bailey's direct supervisor, also testified that, in the context of discussing a safety problem raised by Bailey, he

¹² Notably, Conrail has presented no evidence or argument that Bailey defied any order or company policy to follow a particular protocol for reporting safety concerns. Even if Bailey had disobeyed such an order, the ARB has declined 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). Indeed, Conrail has conceded that Bailey's filing of safety reports—in the manner in which he filed them—constitutes protected activity. See ALJD at 23; 49 U.S.C. 20109(a)(1), (b)(1)(A).

asked Bailey something like, "if you're so upset why are you here?" ALJD at 27; Appx. 156. Although he stated that he did not intend such a result, Conley acknowledged that his words "could probably discourage" a worker from submitting further safety reports. Appx. 156. Bailey similarly testified that, in response to his raising that safety complaint approximately one month before he was suspended, Conley told Bailey that he should quit his job if he did not like it. See ALJD at 27; Appx. 73.

The ALJ also credited Bailey's testimony that McIntyre "flicked" or "threw" Bailey's safety reports across his desk at Bailey after informing him that he was suspended. ALJD at 27; Appx. 81, 100. Such evidence was corroborated by the testimony of McBain, who stated that McIntyre "threw" or "tossed" several safety reports across the desk at Bailey and that McIntyre said "here, I know you keep these." ALJD at 27; Appx. 46. The ALJ thus properly concluded that, although it was the regular practice of Mr. McIntyre or trainmasters to return safety complaints to Bailey with an explanation of the resolution of the problem, "the timing and the way Mr. McIntyre returned the reports at the time the Complainant was taken out of service also supports a finding that he was annoyed with the Complainant's formal reporting of safety issues." ALJD at 27.

The ALJ further determined that when Bailey filed a written safety report, such an action required Conrail managers to

formally document every incident, "which they admitted they did not want to do." ALJD at 28. The ALJ thus properly determined that substantial evidence "establishes that, at the very least, Conrail management was irritated by the Complainant's written safety complaints and viewed the Complainant as a nuisance for frequently raising his safety concerns." *Id.* at 27-28.¹³

E. The ALJ Correctly Applied a "Cat's Paw" Theory to Impute Retaliatory Animus to the Conrail Manager That Decided to Terminate Bailey

Conrail further argues on appeal that the ALJ erred as a matter of law by misapplying the "cat's paw" theory to impute McIntyre's and Conley's retaliatory animus to Price, the official who at least nominally made the decision to terminate Bailey. See Conrail Br. at 19-25.¹⁴ Conrail asserts that "Price's independent review of the investigatory hearing transcript, coupled with the hearing itself and the *undisputed* nature of Bailey's misconduct, severed any possible causal

¹³ Although Conrail urges otherwise, the "*possibility* of drawing different inferences from the administrative record . . . is a grossly insufficient basis to disturb an agency's findings on appeal" under APA review. *Lockheed Martin Corp.*, 717 F.3d at 1138 (emphasis added); see *Yadav*, 462 F. App'x at 536.

¹⁴ Placing an employee on unpaid suspension is itself an adverse action. See *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 72-73 (2006) (stating that "an indefinite suspension without pay could well" be an adverse action "even if the suspended employee eventually received backpay"). Conrail may be deemed to have violated FRSA based on Bailey's suspension alone, even in the unlikely event that this Court rejects the ALJ's findings and credibility determinations with respect to Bailey's termination.

connection" between Price's decision to terminate Bailey and the alleged hostility displayed by McIntyre and Conley. *Id.* at 22-23. As explained below, however, this argument should be rejected because neither Conrail's internal investigation nor Price's review of the investigation were sanitized of the influence of McIntyre and Conley.

1. Legal standard for applying the "cat's paw" theory

The Supreme Court clarified the "cat's paw" theory of imputed liability in *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011). In *Staub*, the Court held that, in a discrimination suit arising under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), an employer is liable if (1) a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action and (2) if that act is a proximate cause of the ultimate adverse action. *Id.* at 1194. If the ultimate decisionmaker commences an investigation that results in an adverse action for reasons that are not related to the supervisor's initial biased action, the employer will avoid liability. See *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 351 (6th Cir. 2012) (citing *Staub*, 131 S. Ct. at 1193). The supervisor's discriminatory action, however, "may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, *apart from the supervisor's recommendation,*

entirely justified." *Staub*, 131 S. Ct. at 1193 (emphasis added).

The Supreme Court in *Staub* therefore "refused to completely absolve an employer based on its claim to have conducted an independent investigation." *Chattman*, 686 F.3d at 351; see *Staub*, 131 S. Ct. at 1193 ("We are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect."). Moreover, if "the independent investigation relies on facts provided by the biased supervisor," then the investigation was not, in actuality, independent and the employer is liable." *Chattman*, 686 F.3d at 352 (quoting *Staub*, 131 S. Ct. at 1193).

This Court has addressed the "cat's paw" doctrine of imputed bias in several cases arising under Title VII of the Civil Rights Act of 1964. See, e.g., *Reynolds v. Fed. Express Corp.*, No. 13-5010, 2013 WL 5539616, at *2-3 (6th Cir. Oct. 8, 2013); *Bishop v. Ohio Dep't of Rehab. & Corr.*, 529 F. App'x 685, 695-99 (6th Cir. 2013); *Chattman*, 686 F.3d at 350-53; *Davis v. Omni-Care, Inc.*, 482 F. App'x 102, 109-11 (6th Cir. 2012); *Romans v. Mich. Dep't of Human Servs.*, 668 F.3d 826, 836-37 (6th Cir. 2012).

As the Tenth Circuit has recognized, however, "an employee's required showing under a 'cat's paw' theory of liability will vary depending upon the stringency of the

ultimate causation element at issue." *Lockheed Martin Corp.*, 717 F.3d at 1137 n.10 (citing *Simmons v. Sykes Enters., Inc.*, 647 F.3d 943, 949 (10th Cir. 2011)). The anti-retaliation provision of Title VII imposes a "but-for" causation standard. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013); *Bishop*, 529 F. App'x at 695-96. The employee protection provision of FRSA, however, expressly sets forth a "contributing factor" standard for causation. See 49 U.S.C. 20109(d)(2), 42121(b)(2)(B)(iii).¹⁵

Consequently, the required showing to establish causation in this case "is less onerous than the showing required under Title VII, the ADEA, or USERRA." *Lockheed Martin Corp.*, 717 F.3d at 1137 (applying same analysis to SOX Section 806).¹⁶ The contributing factor test is "distinct from, and more lenient than, other causation standards." *Id.* (citation omitted). Accordingly, the Tenth Circuit has concluded that, in applying the "cat's paw" theory of subordinate bias in a SOX Section 806 whistleblower case, it only needed to determine whether the ALJ's finding that the complainant's supervisor "poisoned" the

¹⁵ Even before the Supreme Court's decision in *Nassar*, Title VII's "motivating factor" test was still more onerous than FRSA's "contributing factor" standard. See *Lockheed Martin Corp.*, 717 F.3d at 1137.

¹⁶ The same standards and burdens of proof, set forth in AIR 21's whistleblower provision at 49 U.S.C. 42121(b), apply to both FRSA and SOX Section 806 whistleblower claims. See 18 U.S.C. 1514A(b)(2) (SOX); 49 U.S.C. 20109(d)(2) (FRSA).

final decisionmakers' opinion of the complainant was supported by substantial evidence, "keeping in mind that [the complainant] satisfies the causation element of her Section 806 claim by demonstrating merely that her [protected activity] contributed to the adverse employment actions taken against her." *Id.*

2. The ALJ properly applied the "cat's paw" test.

Substantial evidence supports the ALJ's finding here, as affirmed by the Board, that McIntyre and Conley "tainted" Price's decision to terminate Bailey. See ALJD at 24-25, 31. On appeal, Conrail argues that it "went far beyond the minimum necessary for an independent investigation by conducting a full-blown evidentiary hearing, at which Bailey and his union were able to call witnesses of their own choosing, introduce evidence, and cross examine Conrail's witnesses," Conrail Br. at 25, and that Price's decision to terminate Bailey was based on this "independent investigation." Conrail's argument must be rejected, however, because neither its investigation nor Price's review of that proceeding was devoid of the influence of McIntyre and Conley. See *Staub*, 131 S. Ct. at 1193.

Substantial evidence supports the ALJ's determination that *the internal investigative proceeding itself* was not an "independent investigation" sufficient to avoid application of the "cat's paw" theory. As the evidence indisputably shows, McIntyre himself charged Bailey with the rule violation and

personally made the decision to remove him from service. McIntyre and Conley participated in the investigation and both testified against Bailey at the investigative hearing, claiming that Bailey had threatened Conley. Without the testimony of McIntyre and Conley, it is highly unlikely that Price could have concluded a rule violation had occurred in the first place.¹⁷ Indeed, approximately one-third of the internal investigative hearing transcript reflects their testimony. See Appx. 247-340.

Moreover, substantial evidence supports the ALJ's conclusion that *Price's* review of the internal investigative hearing transcript was not sufficiently independent to avoid liability under the "cat's paw" theory because it was not conducted free from the influence exerted by McIntyre and Conley. Price admitted at the hearing that, if McIntyre had decided not to bring disciplinary charges against Bailey in the first place, there would have been no investigation and Price would never have made the decision to discharge him. See ALJD

¹⁷ Conrail repeatedly insists that Price made the decision to terminate Bailey based solely on the undisputed fact that Bailey asked Conley, "do you want to tangle with me?" See, e.g., Conrail Br. at 15-16, 26. In order to find that Bailey violated Conrail's rule against workplace threats, however, Price had to determine that Bailey's undisputed words constituted a "threat" as defined by the policy, which depends upon the victim's perception. See ALJD at 28. McIntyre and Conley were the *only* witnesses who testified that Conley reasonably felt threatened by Bailey's statement and their testimony was thus critical to establishing that Bailey's words actually violated the company's rule, thereby justifying discharge.

at 25; Appx. 195. Moreover, at the time that Price decided to discharge Bailey, McIntyre was Price's *direct supervisor* and they shared an office.¹⁸ In fact, Price received the investigative hearing transcript directly from McIntyre. See Appx. 194. Price was also the direct supervisor of Conley. *Id.* at 192.

Despite Price's testimony that he had personally reviewed the internal investigative hearing transcript and relied exclusively upon such review in making his decision to terminate Bailey, Price was unable to answer basic factual questions about the transcript at the ALJ hearing. See ALJD at 25. For example, although Collop's name appears on approximately twenty-nine pages of the ninety-four page internal investigative hearing transcript, see Appx. 247-340, Price did not know that Collop represented Bailey at the hearing. See ALJD at 25; Appx. 193.

¹⁸ "Cat's paw" theories generally arise in the context of *subordinate bias*. See, e.g., *Davis*, 482 F. App'x at 109 (stating that the "cat's paw" doctrine applies to "circumstances where a seemingly unbiased decisionmaker makes an adverse employment decision that was in part motivated by a *biased subordinate*") (emphasis added); *Cobbins v. Tenn. Dep't of Transp.*, 566 F.3d 582, 586 n.5 (6th Cir. 2009) ("[T]he 'cat's paw' theory refers to a situation in which a *biased subordinate, who lacks decisionmaking power*, influences the unbiased decisionmaker . . .") (emphasis added). This case, however, involves the highly unusual situation in which the manager alleged to have possessed retaliatory animus is the *direct supervisor* of the ultimate decisionmaker. Such a fact lends significant weight to the ALJ's conclusion that Price did not conduct an independent review free from McIntyre's influence.

Price further testified that he had not reviewed any of the exhibits that were admitted during the internal investigative proceeding and, in fact, was unaware that any such exhibits even existed. See ALJD at 25; Appx. 193. Price also stated that he could not recall the date on which he made the decision to terminate Bailey. See Appx. 192. Price's own testimony bolsters the ALJ's conclusion that "Mr. Price simply ratified the charges already put into motion by Mr. McIntyre." ALJD at 25; see *id.* at 31.¹⁹

Substantial evidence thus supports the ALJ's findings that McIntyre and Conley "tainted" the internal investigation and heavily influenced Price's review, thereby eviscerating the independence of his final decision to terminate Bailey. See ALJD at 24-25, 31.

F. The ALJ Correctly Concluded That Conrail's Proffered Reason for Disciplining Bailey was Pretextual

The legitimacy of an employer's stated reason for taking adverse action is a relevant factor to consider in evaluating whether a complainant has established by a preponderance of the evidence that protected conduct contributed to the adverse action. See *Kuduk*, 2013 WL 5413448, at *7; *Ray*, 2013 WL

¹⁹ In fact, during his testimony before the ALJ, Price could not deny that Bailey's dismissal letter may have been prepared prior to the internal investigative hearing. See Appx. 194.

5297172, at *11-12; *DeFrancesco*, 2012 WL 759336, at *3.²⁰

Conrail's proffered reason for firing Bailey was his alleged threat to Conley in violation of its rule against workplace threats. See ALJD at 21. Substantial evidence supports the ALJ's conclusion that this explanation was pretextual.

1. The ALJ properly evaluated Conrail's proffered reason for suspending and later terminating Bailey in the context of Conrail's own workplace violence policy.

Conrail asserts in a footnote in its brief that the "ALJ exceeded her authority by purporting to apply the terms" of this company policy and by "interpreting the Policy differently not only from Conrail, but also differently from the neutral Arbitrator" Conrail Br. at 30 n.8. As explained above, see *supra* pp. 8-9 n.5, however, Conrail's suggestion that the ALJ should have followed or deferred to the RLA proceeding arbitration decision is disingenuous and legally unsound. The arbitration decision was not issued until June 16, 2013, nearly

²⁰ Close temporal proximity between protected conduct and an adverse action is also relevant in applying the contributing factor test. See *Taylor v. Geithner*, 703 F.3d 328, 339 (6th Cir. 2013). Although the ALJ did not accord significant weight to this factor, she correctly determined that there was "some evidence of temporal proximity" between Bailey's protected activity and his suspension. ALJD at 26. In the two-week period preceding his suspension, Bailey filed six safety reports with Conrail. See Appx. 441-46. His most recent safety report was submitted on February 8, 2011, only three days before he was suspended. See ALJD at 26; Appx. 441-42. The ALJ correctly recognized, however, that the February 11 lunchroom incident likely qualified as an intervening event that "undercut" the persuasiveness of the close temporal proximity. See ALJD at 26.

two months *after* the ARB issued its decision, and thus could not have been relied upon by the agency and is not part of the administrative record. Moreover, Conrail's request that this Court take judicial notice of the arbitration decision for the purpose of deciding disputed factual issues in this case directly contradicts the well-established rule barring the use of judicial notice for such purposes. See Fed. R. Evid. 201(b) (a court may not take judicial notice of a fact that is "subject to reasonable dispute"); *Don Lee*, 145 F.3d at 841 n.5; *Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001).²¹

In any event, contrary to Conrail's assertion, the ALJ did not attempt to *interpret* Conrail's disciplinary policies; she merely examined whether Bailey's conduct could in fact constitute a violation of the rule as written. Such an inquiry is highly relevant for purposes of evaluating the legitimacy of an employer's proffered explanation for discipline. See *Riddle v. First Tenn. Bank, Nat'l Ass'n*, 497 F. App'x 588, 597 (6th Cir. 2012) ("The ultimate inquiry during the pretext analysis is

²¹ Moreover, even if the arbitrator had issued an opinion prior to the ALJ's ruling, such an opinion is wholly irrelevant to this case. The focus of a CBA grievance proceeding is whether the worker's discharge violated the terms of his CBA, while the proper inquiry of a FRSA whistleblower proceeding is whether the worker's termination violated his federal statutory rights. See *generally Ratledge v. Norfolk S. Ry.*, No. 1:12-CV-402, 2013 WL 3872793 (E.D. Tenn. July 25, 2013).

did the employer fire the employee for the stated reason, or not?") (internal quotation marks omitted).

As the ALJ correctly observed, Conrail's rule against workplace threats, with which Bailey was charged, defines a threat as "words or actions that either create[] a perception that there may be an intent to physically harm persons or property, or that actually bring about such harm." ALJD at 28 (citing Appx. 244-46). Since it is undisputed that no actual physical harm occurred during the lunchroom incident on February 11, 2011, the relevant inquiry in determining whether this rule has been violated is the victim's perception. *Id.*; see Conrail Br. at 31 n.9 ("Conrail readily concedes that its Policy . . . also focuses on the impact of threats and violence on the victim of the misconduct as well as the actions of the perpetrator.")

Substantial evidence supports the ALJ's determination that Conley did not reasonably believe he was threatened during the February 11 encounter. See ALJD at 28-30. At the hearing, Conley himself testified that Bailey was twenty feet away from him when Bailey allegedly threatened him and that the men were never closer than ten feet apart throughout the incident. *Id.* at 28; Appx. 139-40, 151. Moreover, none of the observers of the lunchroom incident supported Conley's statement that Bailey had threatened him: McBain testified that Bailey's words were not threatening and that he made no physical gestures toward

Conley, see ALJD at 28 (citing Appx. 44, 45, 49); Coles testified that the encounter was not a serious or heated confrontation, *id.* (citing Appx. 167, 168); and fifteen other employees submitted a statement that they saw nothing out of the ordinary in the lunchroom that morning, *id.* & n.17; Appx. 372-73.

The ALJ also correctly found that Conley's behavior throughout the morning of February 11, 2011, including his instigation of the confrontation,²² was inconsistent with his purported fear of Bailey. See ALJD at 28-30. As the ALJ found, Conley did not call for security guards or contact the police after the incident, despite the fact that Conrail's rule against workplace threats requires the police to be contacted. *Id.* at 20 (citing Appx. 244-46). Conley returned to the lunchroom almost immediately after the incident to tell Bailey that he had

²² The ALJ stated that Conley's decision to pursue the interaction with Bailey "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 informed him that he did not want to talk unless it was work-related. *Id.* (citing Appx. 45, 78-79). The ALJ emphasized 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 Appx. 137). Notably, the ALJ discredited Bailey's testimony that his conduct that morning was polite, finding instead that his refusal to acknowledge Conley's greeting "contributed to the exchange," but she concluded that Conrail "had accepted the Complainant's occasional refusal to speak about topics other than work." *Id.* at 29 n.19.

to accompany him to McIntyre's office and he walked upstairs to McIntyre's office first, with his back to Bailey. *Id.* at 28-29 (citing Appx. 80, 144). Conley then remained in the office while Bailey was informed that he was being suspended, and he took Bailey back downstairs after Bailey had been told of the suspension. *Id.* at 29 (citing Appx. 81, 147).

Further, the ALJ determined that Conley's contemporaneous account of the lunchroom incident was exaggerated compared to the version of events to which he and others testified at the hearing. See ALJD at 29-30 (citing Appx. 113, 139-41, 158). Relatedly, the ALJ found that McIntyre's treatment of the incident was inconsistent with a perception of Bailey as a threat to physical safety or property. As the ALJ explained, McIntyre told Conley, the alleged victim, to bring Bailey up to his office, with no security or police backup, immediately after the allegedly threatening incident; he permitted Bailey to sit downstairs unsupervised while waiting for a disciplinary decision; and he did not arrange for Bailey to be escorted off the company's property. *Id.* at 29 n.18 (citing Appx. 63). Substantial evidence thus supports the ALJ's determination that Conley did not reasonably fear for his safety and that Conrail managers did not actually perceive Bailey's statement as a threat to their physical safety or property.

2. Even if Bailey's statement "do you want to tangle with me" did constitute misconduct, that fact would not foreclose the ALJ's finding of retaliation.

On appeal, Conrail argues that the ALJ's determination that Conrail's proffered reason for dismissing Bailey was pretextual is "fatally flawed" because it "ignores the undisputed fact that Bailey committed misconduct that is unacceptable in any workplace." Conrail Br. at 39. Conrail's argument, however, ignores the ALJ's further findings that Conrail did not apply its policy against workplace threats and violence consistently. See *Covucci v. Serv. Merch. Co.*, 115 F. App'x 797, 800 (6th Cir. 2004) (noting that whether an employer "applied its policy unfairly or inconsistently" is a factor to consider in analyzing pretext); *DeFrancesco*, 2012 WL 759336, at *3 (listing "inconsistent application of an employer's policies" as circumstantial evidence tending to show that protected activity was a contributing factor).

In other words, even if Bailey *did* engage in misconduct and such misconduct *did* violate the company's rule against workplace threats, the ALJ determined that Bailey was disparately punished for his acts. While the ALJ acknowledged that McIntyre and McBain testified that they had never heard of an employee threatening a supervisor, see ALJD at 31 (citing Appx. 49, 197), the ALJ also stated that McBain testified that he did not believe that Bailey threatened Conley, and she noted that

employee-supervisor status was irrelevant to Conrail's policy against workplace threats and violence. *Id.*

As further emphasized by the ALJ, Conrail has offered no evidence that any other employee has ever received any level of discipline—let alone suspension and termination—for violating the policy against threats, despite that Bailey and other witnesses testified that Bailey had previously threatened and been threatened by other employees on other occasions. See ALJD at 31-32 (citing Appx. 55-56, 68-69, 174). In fact, substantial evidence supports the ALJ's finding 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 Appx. 48, 115, 117, 145, 167).

Moreover, as correctly stated by the ALJ, Conrail has offered no evidence explaining why Bailey, for making an alleged verbal threat, received the most severe level of discipline possible under the policy. See ALJD at 31-32. In contrast, the record reflects that two Conrail employees who engaged in a physical altercation only received ten-day suspensions. *Id.* at 32 n.21 (citing Appx. 49). The record also demonstrates that, in 2001, a Conrail employee told Bailey, "I can't wait to get you," and that employee was not discharged, despite the fact

that the victim, Bailey, perceived such words to be a threat.
Id. at 32; Appx. 174.

Conrail's repeated emphasis that Bailey's termination was justified because of the sole fact that he uttered the words "do you want to tangle with me?" thus carries little weight.²³ Conrail's inconsistent application of its workplace threats policy supports the inference that Bailey's alleged violation of the policy was a pretextual reason for Conrail to discharge him.

For all of the reasons stated above, substantial evidence supports the ALJ's finding that Bailey's safety reports were a contributing factor in Conrail's decisions to suspend and terminate him and that Conrail would not have taken these adverse actions absent his protected activity.

²³ Even if Bailey's conduct *did* violate the rule against workplace threats, such a fact would only demonstrate that there were multiple reasons why Conrail disciplined Bailey. As correctly stated by the ALJ, Bailey need only demonstrate that one of the reasons he was terminated was his protected activity. See ALJD at 30. The ALJ correctly found, and Conrail does not dispute, that Conrail failed to prove by clear and convincing evidence that it would have fired Bailey absent such activity.

CONCLUSION

For the foregoing reasons, the Secretary requests that this Court affirm the Board's Final Decision and Order finding that Conrail violated FRSA and ordering appropriate relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(5) and (d), and 32(a)(7)(C), and Sixth Circuit Rule 32(a), the undersigned certifies that this brief complies with the applicable type volume limitation, typeface requirements, and type style requirements.

1. This brief complies with the type volume limitation because it contains 11,530 words, including footnotes but excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements because it has been prepared in monospace typeface, Courier New, in 12 point font in text and 12 point font in footnotes. This brief was prepared using Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of December, 2013, the Response Brief for the Secretary of Labor is being filed electronically and notice of such filing will be issued to all counsel of record through the Court's electronic filing system, including the following:

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