U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

BRAD RIDDELL, **ARB CASE NO. 2019-0016**

COMPLAINANT, **ALJ CASE NO. 2014-FRS-00054**

v. **DATE: May 19, 2020**

CSX TRANSPORTATION, INC.,

RESPONDENT.

Appearances:

***For the Complainant*:**
Jerry Easley, Esq.; *Rome, Arata & Baxley, L.L.C.*; Pearland, Texas

***For the Respondent*:**
Doris A. Beutel-Guthrie, Esq. and Ryan D. Wilkins, Esq.; *Union Pacific Railroad*; Houston, Texas

Before: James A. Haynes, Heather C. Leslie, and James D. McGinley, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the Federal Railroad Safety Act of 1982 (FRSA).[1] Complainant Brad Riddell filed a complaint alleging that Respondent CSX

[1] 49 U.S.C. § 20109 (2008), as implemented by federal regulations at 29 C.F.R. Part 1982 (2019) and 29 C.F.R. Part 18, Subpart A (2019).

Transportation, Inc. retaliated against him in violation of FRSA's whistleblower protection provisions for reporting that he saw his co-workers engaging in illegal drug (marijuana) use while operating heavy machines on the rails. Respondent appeals from a Decision and Order (D. & O.) issued by a Department of Labor Administrative Law Judge (ALJ) on December 12, 2017, finding in favor of Riddell and awarding damages. We affirm.

BACKGROUND

Complainant works for Respondent as an assistant operator. D. & O. at 21. He began working for Respondent on June 8, 2008, but in January 2013, bid onto an S-1 production gang on a 2X machine. *Id.* Dennis Rhodes managed the S-1 production gang. *Id.* Rhodes reported to James Hinnant, the Director of Program Construction, Hinnant reported to Samuel Kelly Piccirillo, the Assistant Chief Engineer, and Piccirillo reported to John West, the Vice President of Engineering for Respondent. *Id.* at 14, 16, 17, 18, 21.

Complainant worked on a 2X with the senior 2X operator, Bobby Hatmaker, and the 2X mechanic, Chuck Domiano. *Id.* at 8, 9, 21. A 2X is a large device or machine that runs on the rails and is roughly 70 feet long and 60 tons. *Id.* at 21 (citing Tr. at 39-40, 44; JX 25). The other machines on S-1 followed behind the 2X at varying distances, which ranged from hundreds of feet to multiple miles. *Id.* (citing CX 3 at 34; CX 40 at 47). The 2X could reach speeds of up to 50 miles per hour. *Id.* (citing Tr. at 44).

Soon after he started working with the S-1 gang, Complainant noticed Hatmaker and on a separate occasion, Domiano, smoking marijuana on the 2X. *Id.* at 22. Thereafter, he noticed a number of employees smoking marijuana on the machines, in the mechanic's truck, or in the hotels where the men stayed after work. *Id.* Hatmaker and Domiano were known friends of the S-1 gang manager, Rhodes. Rhodes was aware of the drug use but Hatmaker and Domiano did not do it in front of him and they used a spray product and cigarette smoke to disguise the marijuana smell on the 2X cab. *Id.*

Complainant informed another member of the S-1 gang and a union president, Geoffrey Preece, about the drug use he saw; he also told two other co-workers about it. *Id.* at 4, 22. In these conversations, he was advised to "leave it be" or he could end up with a bad reputation, so Complainant decided not to report the drug use to Respondent at that time. *Id.* at 22, and 22 n.8.

Complainant and Rhodes did not have a good relationship; it deteriorated over the time Complainant worked on the S-1 gang. *Id.* Rhodes gave Complainant a citation for an efficiency test failure that Complainant thought was unfair and reprimanded Complainant for cursing after the assistant foreman moved the 2X before Complainant was clear of the machine. *Id.* Complainant admitted calling Rhodes a "worthless piece of shit" after the reprimand. *Id.* Complainant made disparaging comments about Rhodes on an ongoing basis but he never threatened Rhodes. *Id.* at 31.

In March 2013, Complainant was riding on the 2X when Hatmaker went through a railroad crossing at thirty-five miles per hour and almost hit a vehicle and its passengers (a mother and her children). *Id.* at 22; Tr. 51. According to company rules, such crossings were to be made at five miles per hour. *Id.* Upset by the event, Complainant went to Preece to ask for advice on how to respond. On March 18, 2013, Preece called the railroad police and reported the alleged drug use. *Id.* The police transferred Preece to Respondent's ethics hotline. *Id.* Preece reported anonymously to the hotline that Hatmaker was using and could be selling marijuana while working, but that he did not want to go to the gang leader, Rhodes, about it because he was friends with Hatmaker. *Id.* at 9, 22. The Ethics Hotline summary report lists the information provided as:

> Bobby and another employee, name unknown, are smoking marijuana while operating the machine. This is believed to happen on a daily basis and is very dangerous. They are currently working under the influence. Bobby has a gallon-sized Ziploc bag full of marijuana, so it's highly probable he is selling it. The witness (name withheld) does not want to go to the gang leader, Dennis Rhodes, about this, because he is friends with Bobby.

The report lists Bobby Hatmaker, the anonymous reporter, and Dennis Rhodes, as implicated parties. CX 10. After reporting, Preece told Complainant that he made the ethics call. *Id.* at 22.

On March 19, 2013, two managers for Respondent (Gerth and Love) conducted a surprise audit of the S-1 gang. *Id.* at 23. While en route to the worksite, Gerth called Rhodes to inform him that they were going to inspect for marijuana. *Id.* Rhodes then called Hatmaker to warn him of the audit and to advise Hatmaker to get any marijuana off the 2X. *Id.* Complainant asserted that he heard Rhodes mention that Piccirillo had tipped him off. *Id.* Hatmaker hid and temporarily

disposed of the marijuana. *Id.* The auditing managers reported that the 2X machine smelled faintly of cigarette smoke, but they did not find any drugs. *Id.*

On March 23, 2013, Complainant called the ethics hotline alleging that the drug activity was ongoing and that Rhodes had been tipped off about the audit by Piccirillo. *Id.* There are two incident reports on this day. One incident summary states:

> On Monday, March 18th, a report was filed about the fact that Bobby (last name unknown) and another employee (name unknown) often use marijuana while operating their machine. Employees on this crew do not feel they can report this issue to Mr. Rhodes, because he and Bobby are friends. This is why the decision was made to file a report with this hotline.
>
> Somehow, the manager who supervises the system production gangs, Kelly Picarilla, found out about this previous report and he called Mr. Rhodes about the issue. Mr. Rhodes then went and warned Bobby and this co-worker that an anonymous report had been made about them and that there was going to be an investigation. He suggested they get rid of any marijuana in their possession. The reporter requests that this matter be investigated by someone other than Mr. Rhodes and that Mr. Rhodes not be made aware of any plans to investigate the issue, since he will most likely just warn Bobby again.

The report also lists as implicated parties Bobby Hatmaker, Kelly Piccirillo, the anonymous reporter, and Dennis Rhodes. CX 12.

The second incident summary states:

> A report was made to the ethics line on March 18, 2013 regarding drug use by members of this gang including Mr. Domiano, Mr. Hatmaker, Mr. Laws, Mr. Powell, and Mr. Phelps. Mr. Rhodes may also be involved in the drug use.
>
> On March 20, 2013 Mr. Rhodes called Mr. Hatmaker and then spoke in person to Mr. Domiano; Mr. Rhodes stated he had received a call from Mr. Pickerillo who indicated someone called the Ethics Line to report "dope being smoked on the machine during work hours." Mr. Rhodes said that the drugs should be removed from the machine because an

> investigation was going to start. This tip-off by Mr. Pickerillo to Mr. Rhodes will hinder an objective investigation.
>
> There will be a drug test for the entire gang on Monday; however Mr. Rhodes will not be there. Of additional concern is that Mr. Brinkman is good friends with some of the crew. Also, Mr. Hennet may or may not protect this issue and Mr. Pickerillo's involvement; therefore he should be limited from receiving this report.

CX 13. This report lists as implicated parties Chris Brinkman, Mechanic Supervisor, Charles Domiano, Diesel Mechanic/Machinist, Bobby Hatmaker, Machine Operator, James Hinnant, Director Program Construction, Douglas Phelps, Machinst, Kelly Piccirillo, Assistant Chief Engineer, Laws, Assistant Foreman, Craig Powell, Machine Operator, Anonymous Reporter, and Dennis Rhodes. *Id.*

Deborah Wainwright, Respondent's Manager of Employee Relations, wrote in a March 25 email regarding the March 18 ethics call, and the audit conducted in response to it:

> On 3/22/2013, Kelly Piccirillo, Assistant Chief Engineer – Jacksonville, FL state that he would contact Mike Hinnant who is Dennis Rhodes' boss and have him schedule a surprise audit and inspect all the equipment. I reiterated the need for Confidentiality, but as you can see by the additional reports . . . not very much of a *surprise*.
>
> Would it be possible to enlist the aid of your drug dogs? Seems my attempt to work through management have failed.
>
> D. & O. at 20; CX 11 at 5 (emphasis in original).

In response to Wainwright's email, Christopher Whelma replied via confidential email with the subject "Ethics reports with allegations of Substance Abuse while on duty and under pay" on March 28, 2013:

> Spoke with Lavon and Frank Kirbyson about these three allegations of drug use and they stated that all who could be involved are aware that a complaint was filed so at this point, other than informing their agents that cover the territory that this gang would travel and conduct

> a random search (which they will do), there is nothing more that can be done with these specific cases.
>
> As a side note, Frank informed me that these cases should have been assigned to them initially and the general rule (I) should keep in mind is 'if you can go to jail for it, send the case to the police dept.'
>
> CX 16.

On March 26, 2013, there was another audit of the S-1 gang, by auditors Gerth, Gray and McDaniel. D. & O. at 23. Though instructed not to let anyone know about the audit beforehand, Gray informed Rhodes of the audit days prior. *Id.*

On March 30, 2013, Complainant made another call to the ethics hotline and explained that the 2X had not been checked thoroughly. He explained that Gray was friends with Hatmaker and Domiano and that they had reminisced together during the audit. *Id.* There were significant rumors that Complainant was responsible for the call to ethics about drug use on the gang. D. & O. at 5. Moreover, Complainant likely informed Mr. Hatmaker, Mr. Domiano, and Mr. Preece separately that he had called ethics, without telling the entire gang. *Id.*

On April 1, Hinnant wrote via email with the subject line "SI-1Audit" to Piccarillo, "No his name is Brad," in response to Picarrillo's email of March 31, 2013, stating, "I thought that was the employees name on the ethics complaint." CX 17; D. & O. at 17, 18, 42.

On April 7 or 8, Complainant called Albers, a union representative, to explain the situation and express his frustrations. D. & O. at 23. Albers called West and informed him of the drug use allegations. *Id.* West called Piccarillo and Hinnant and ordered them to have an audit performed the following week. *Id.* By this time, more rumors were circulating that Complainant had called the ethics hotline. *Id.*

On Wednesday April 10, and Thursday, April 11, 2013, Stephen Barfield, the S-1 foreman, went around to various members of the gang to solicit statements regarding allegations that Complainant threatened Rhodes. *Id.* at 5, 23, 32. John Christopher Brigman, supervisor of the system production gang's mechanics, was behind the action to acquire statements against Complainant and instructed Barfield to do so. *Id.* at 32. After collecting the statements, Barfield provided the statements to Brigman, who forwarded them to ethics and reported them to the supervisors above him. *Id.* at 15, 23, 32.

On Apr 12, 2013, at 5:13 PM, Piccirillo wrote via email "As information I have instructed Mike to have Mr. Riddle removed from service," to which John West responded later that evening, "Pls let Dennis Albers know since I believe he may have been the one calling him." CX 19.

Thereafter, Brigman informed the S-1 gang (except for Complainant) that Complainant would be taken out of service the following Monday. D. & O. at 23. Preece told Complainant that Brigman was going to take him out of service on Monday (in Montgomery, Alabama) after Complainant returned to work from home for the weekend (in Indiana). *Id.*; Tr. 76-77, 281, 327.

On Monday, April 15, 2013, Complainant returned to the hotel where his gang was staying before reporting to begin work. As he was getting ready for work, a CSX police officer arrived to take Complainant out of service. *Id.* at 23-24. Complainant told the officer about the ongoing issues regarding his reports of drug use. *Id.* at 24. Complainant was forced to return his company equipment in front of the entire gang. *Id.* During this process, Complainant became upset and yelled at Brigman before returning the requested items to the officer. *Id.* Complainant returned home while the remaining S-1 gang continued to work.[2] *Id.*

Later that day, another audit was conducted of the S-1 gang which did not find any evidence of drug use. *Id.*

Also on April 15, 2013, the officer's report about taking Complainant out of service was emailed to CSX personnel. CX 22. In the report, the officer wrote: "Riddle stated that he called into the ethics hotline about the drug use on March 18, 2013 and that nothing was done about it. Riddle stated that he feels he is being retaliated against because of the drug use complaints that he has called in." *Id.*

On May 22, 2013, Respondent held an investigative hearing on the alleged threats. *Id.* at 24. After the hearing, the hearing officer recommended "that B.D. Riddell be relieved in every capacity from the employment of CSX due to him making threats of bodily harm while working on the S1 Surfacing team." CX 33. The findings listed the charges against Complainant as, "[i]nsubordination, conduct unbecoming a CSX employee, uttering threats." *Id.*

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[2] Ten days later, Complainant filed the complaint in this case. D. & O. at 24.

Some days after the hearing concluded, Complainant called Preece to ask what hotel the S-1 gang was staying in, and Preece told him. *Id.* at 24. Shortly after the call, the police rushed to the hotel and one of the members of the gang was discovered to be in possession of marijuana and related paraphernalia. *Id.*

On June 26, 2013, Respondent informed Complainant that it had withdrawn its charges regarding the alleged threats of violence. *Id.* Respondent paid Complainant for his time out of work, and Complainant returned to work for Respondent in a different position. *Id.* On February 7, 2014, OSHA issued its findings, to which Complainant objected. *Id.* Complainant requested a hearing before the Offices of Administrative Law Judges. *Id.*

The ALJ held a hearing from January 24, 2017, to January 26, 2017. *Id.* On December 12, 2018, the ALJ issued a Decision and Order Awarding Damages. *Riddell v. CSX Transp. Inc.*, ALJ No. 2014-FRS-00054 (ALJ Dec. 12, 2018). While the parties had stipulated that Complainant engaged in protected activity by making an Ethics Helpline complaint on March 23, 2013, the ALJ found that all of Complainant's reports of unsafe behavior (marijuana use) (whether to Preece, the ethics hotline, or the CSX police) were protected activity under the FRSA. *Id.* at 25. The ALJ also found that Respondent took adverse action against Complainant 1) when it removed him from service in front of all of his coworkers, who were informed that he would be removed beforehand and gathered at the place of removal, 2) when it suspended Complainant (Complainant did not receive pay while he was out of work and his insurance ceased), and 3) when it charged him with serious infractions which threatened significant discipline including termination. *Id.* at 27.

Regarding contributing factor causation, the ALJ analyzed all of the evidence of record, direct and indirect, and his credibility determinations, to conclude that Complainant's protected activity was a contributing factor to the unfavorable personnel actions Respondent took against Complainant. *Id.* at 28-30. Direct evidence of retaliation included the testimony of Preece, who testified at deposition that he overheard Respondent's manager, Brigman, say that he would remove Complainant because of the problems that Complainant's ethics call had started. *Id.* at 28. The ALJ had found Preece's testimony credible and Brigman's not credible. Further, other witness testimony supported that Brigman had knowledge about Complainant's ethics call. *Id.* Thus, the ALJ credited the direct evidence that Respondent's manager, Brigman, gathered and brought charges against Complainant due to the ethics call. *Id.* at 29.

As to indirect evidence, the ALJ first considered that there was temporal proximity between Complainant's ethics calls and his subsequent removal from service (a week to a few weeks from the different reports to removal). *Id.* The ALJ next considered whether the threats, if assumed to be true, provided an intervening event breaking causation and found that they did not. *Id.* The ALJ explained that viewing all of the evidence, the alleged threats began a month or more before the statements were solicited, and were not seen as a pressing matter until after Complainant's ethics phone calls. *Id.* The ALJ found that the decision to discipline Complainant for the "threats" was instead predicated on the ethics calls. *Id.* The ALJ found this to be supported by the credible witness testimony of the S-1 gang members, who all stated that Barfield approached them seeking statements against Complainant only after Complainant made the calls to ethics. *Id.* at 30. The ALJ found that any assertion that the removal was based on Complainant's alleged threats was pretext. *Id.*

Finally, other evidence consisting of email communications between Hinnant and Piccarillo support causation in this matter. *Id.* at 30. The ALJ explained that emails between these two managers on March 30, 2013, showed that management was considering separating Rhodes and Complainant due to the ethics complaint. *Id.* No threats of violence are mentioned in the email chain and the alleged threats were not reported until April 2013. *Id.* Rather, the email was sent as a "follow up to the ethics call." The ALJ found that this email exchange demonstrated that upper management was aware of Complainant's ethics complaint and was a factor in their discussion of separating Rhodes and Complainant. The ALJ also found that it undermined Respondent's assertion that Complainant's removal was predicated on unrelated activity that occurred later. *Id.*

Considering all of the evidence of record, the ALJ concluded that Complainant proved that his protected activity was a contributing factor to Respondent's adverse actions against him. *Id.* Indeed, the ALJ found that Brigman intended to make an example of Complainant by working to remove Complainant from service and bring charges against him because Complainant made the ethics calls. *Id.* The ALJ also found that the decision-makers (regarding Complainant's adverse actions) relied on Brigman's action to "unwittingly or otherwise, authorize[] removal based on those false threats." *Id.* at 30, 31.

Having found that Complainant proved the elements of his claim, the ALJ next considered whether Respondent proved by clear and convincing evidence that it would have taken the same actions absent any protected activity. *Id.* at 31-34. The ALJ held that Respondent did not make this showing, finding instead, that

management helped to fabricate the false charges against Complainant. *Id.* at 32. The ALJ noted that upper level management (Hinnant and Piccarillo) knew that Complainant was the ethics caller, wanted Complainant removed from Rhodes because of it, and knew that the S-1 team had been warned prior to the drug audits. *Id.* Further, Piccarillo acknowledged that the number of reports from employees gave him the impression that the statements may have been part of an effort to get rid of Complainant. *Id.* at 32-33. He testified at the hearing that "when you have that many employees criticizing one employee, then it's like, is this something where they're not happy with that employee and they're trying to get him off the team[?]" *Id.* at 33. Again, Picarillo had the thought that the gang may have been trying to get rid of Complainant, knowing that Complainant had recently made the ethics call about drug use by some of his gang.

The ALJ also discounted Respondent's argument that Preece was a comparator because while Preece made an ethics complaint and was not disciplined, there was no evidence that anyone learned that Preece called the ethics hotline. *Id.* The ALJ noted that later on, Preece told Complainant what hotel the S-1 gang was staying at which apparently led to the police finding marijuana and ticketing one of the S-1 gang members. *Id.* In this situation, when the S-1 gang learned that Preece gave Complainant the gang's location, the gang (including Rhodes) became angry with him and there was so much tension that he left the gang. *Id.* The ALJ found that this response to Preece's release of information did not support Respondent's argument about Preece's ethics call and Respondent's response to it.

Finally, with respect to the affirmative defense, the ALJ noted that Respondent's arguments that it would have taken the same action absent protected activity were largely based on witness testimony that he found not credible or only partially credible. *Id.* The ALJ specifically found that Hinnant and Piccarillo misrepresented their knowledge regarding who made the ethics complaint making their testimony regarding this issue suspicious. *Id.* at 33-34. Having found that Complainant prevailed, the ALJ awarded damages including $13,506.53 in lost pay and benefits, $3,500.00 in emotional distress damages, and $150,000.00 in punitive damages, and granted Complainant time to provide an attorneys fee application.

Respondent appealed to the Administrative Review Board (ARB or Board) regarding whether there was an unfavorable personnel action taken against Complainant, contributing factor causation, the same action defense, and punitive damages. Respondent also makes the alternative argument on appeal that if it loses on the merits, it is entitled to a new hearing before a different ALJ citing *Lucia v. S.E.C.*, 138 S.Ct 2044, 2055 (2018).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board authority to issue agency decisions under the FRSA. Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020); see 29 C.F.R. § 1982.110(a). The Board reviews the ALJ's factual determinations under the substantial evidence standard. 29 C.F.R. § 1982.110(b). The Board reviews an ALJ's conclusions of law de novo. *Hamilton v. CSX Transp., Inc.,* ARB No. 2012-0022, ALJ No. 2010-FRS-00025, slip op. at 2 (ARB Apr. 30, 2013) (citations omitted).

DISCUSSION

FRSA complaints are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). 49 U.S.C. § 20109; *see* 49 U.S.C. § 42121(b) (2000). To prevail on a FRSA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity which was a contributing factor in an unfavorable personnel action taken against him. 49 U.S.C. § 42121(b)(2)(B)(iii).

The parties stipulated to one instance of protected activity on March 23, 2013, and the ALJ found additional protected activity—the ALJ found that all of Complainant's reports about drug use were protected by FRSA. Respondent has not challenged the ALJ's findings on this element of Complainant's case.

1. Adverse action

Having considered the evidence of unfavorable personnel action as a whole and collectively weighing all of the evidence of record, the ALJ found that Complainant proved that Respondent took an unfavorable personnel action against him in this matter. *Id.* at 27. As described above, the ALJ found that Respondent took adverse action against Complainant 1) when it removed him from service in front of all of his coworkers, who were informed that he would be removed beforehand and gathered at the place of removal, 2) when it suspended Complainant for months, even if he was later reimbursed (partially) for that time (Complainant did not receive pay while he was out of work and his insurance

ceased), and 3) when it charged him with serious infractions which threatened significant discipline including termination. *Id.*

Under FRSA, an employer "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee" because that employee engaged in activity protected by the Act. 49 U.S.C. § 20109(a). The regulations further explain that under FRSA at 29 C.F.R. § 1982.102(b)(1) and (2)(i), an employer may/shall "not discharge, demote, suspend, reprimand, or in any other way retaliate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining" an employee because they engage in FRSA protected activity.

Given this expansive statutory and regulatory language with respect to unfavorable personnel actions, the Board explained in *Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 2014-0047, ALJ No. 2013-FRS-00035, slip op. at 7 (ARB Nov. 24, 2015) (directly quoting *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 7 (ARB Dec. 29, 2010)), that adverse actions under FRSA refer "to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged."

We agree with the ALJ that the actions Respondent took against Complainant were unfavorable personnel actions under FRSA. Complainant was removed from service in a humiliating way in front of all of his peers after he had just returned to work from the weekend only to be accosted by a police officer, stripped of his work effects, and sent on his way. He was suspended, charged with serious misconduct, and subject to an investigation during which time he was not paid and did not have insurance benefits. He was threatened with discipline up to and including termination. We affirm the ALJ's findings and conclusions with respect to adverse action as supported by substantial evidence in the record and in accordance with applicable law.

2. Contributing factor causation

After analyzing all of the evidence in the record as a whole, the ALJ found that Complainant proved that Respondent took adverse actions against him because he engaged in protected activity. We affirm this finding as supported by substantial evidence and in accordance with the law.

The ALJ's contributing factor causation analysis was based in part on his credibility determinations.[3] The Board "gives considerable deference to an ALJ's credibility determinations and defers to such determinations unless they are inherently incredible or patently unreasonable." *Hunter v. CSX Transp. Inc.*, ARB Nos. 2018-0044, -0045, ALJ No. 2017-FRS-00007 (ARB Apr. 25, 2019) (citation omitted).

Regarding credibility, the ALJ found Complainant, who he observed at the hearing, to have a credible demeanor and to be highly credible for detail, for acknowledging unflattering information and lack of knowledge on certain issues, and for consistency. D. & O. at 2. The ALJ also found that the record supported Complainant's contested assertions on key issues including that there was drug use that Rhodes tipped off the drug users so that they would not be caught in an audit, and that Complainant did not make threatening statements against Rhodes among others. *Id.* We defer to these credibility findings, but also note that they are well-reasoned, thoroughly explained, and supported by substantial evidence in the record.

The ALJ also found Geoffrey Preece to be a credible witness, although he did not observe him at the hearing. *Id.* at 4. The ALJ noted that Preece's testimony from the investigative hearing, to the internal audit, to his deposition, were "remarkably consistent over time." *Id.* We defer to the ALJ's credibility finding as the trier of fact, and note that it is well-reasoned and supported by substantial evidence in the record.

The ALJ also found Danny Cox, Craig Powell, Willie Williams, Raymon Wilson, David Deerfield, James Hunt, Robert McDuffie, John West, Adam Gerth, Stephen Love, Bill McDaniel, Mike Price Donnie Wiggins, Robert Wolfe, Scott Thompkins, David Morris, and Deborah Wainwright to be credible witnesses

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[3] Respondent has taken issue with the fact that some of the credibility determinations the ALJ made were made based on written statements. Many witnesses testified at the hearing, including Complainant, Brad Riddell, Barfield, Brigman, Hinnant, Piccirillo, Wainwright, and Robert Miller, CSX's System Vice President of Labor Relations. Further, it is the ALJ's task to review the totality of the record and it is not necessary that the ALJ hear live testimony from every person in a case. Written statements increase the ALJ's access for probative evidence, not limit it. We find Respondent's objections regarding written statements unpersuasive.

because their accounts or statements were consistent internally and with the evidence of record. *Id.* at 10-21. We defer to the ALJ's credibility findings.

On the other hand, the ALJ found several witnesses not credible because of inconsistencies in their accounts and between their accounts and the evidence of record. *Id.* at 5-16. These include Barfield, Domiano, Hatmaker, Dale Lewis (one of Complainant's co-workers), Rhodes, and Brigman. Again, we defer to the ALJ's credibility finding as the trier of fact, and note that it is well-reasoned and supported by substantial evidence in the record.

Finally, the ALJ found several witnesses to be partially credible. D. & O. at 16-19. First, the ALJ found Hinnant to be partially credible because the record was largely in agreement with his testimony but contradicted Hinnant with respect to when he learned that Complainant made the ethics call. *Id.* at 17. The record showed that Hinnant knew made the ethics call as of April 1, 2013 (email between Hinnant and Piccarillo), but he stated as part of CSX's internal audit on May 10, 2013, that he did not know who made the ethics call. *Id.*

Second, the ALJ found Piccarillo to be a partially credible witness because his recollection of events was largely accurate, but like with Hinnant, the record showed (and he admitted when confronted with the April 1 emails) that he knew that Complainant was the ethics caller. However, on May 2, 2013, he stated that he did not know that Complainant was the ethics caller. *Id.* at 18 (citing CX 37 at 32 (in a memorandum regarding an internal interview about Complainant's retaliation claims). Additionally, Piccarillo contradicted himself with regard to allegations that Complainant threatened Rhodes. On direct examination Piccarillo stated that it never crossed his mind that the statements against Complainant may have been false, but on cross examination, he admitted that he had suspicions of misconduct when he received the written statements. *Id.* Further, he admitted that there were credibility issues with the statements against Complainant, but also believed that written statements are equivalent to being under oath and relied on the questionable statements to make his recommendation to terminate Complainant's employment. *Id.* at 17-18.

Thirdly, the ALJ found Colin Gray to be a partially credible witness because his account of the audit he performed on March 26, 2013, differed from that of the other two auditors in some respects. *Id.* at 19. Specifically, Gray reported that he called Rhodes thirty minutes to an hour before the audit to determine where the gang was on the tracks to perform the audit, while McDaniel stated that Gray had told Rhodes about the audit four days earlier and Rhodes had called McDaniel to

fish for information about the audit. *Id.* Additionally, Gray stated that the gang appeared surprised by the audit while the other two auditors agreed with each other that the gang did not seem surprised by the audit. *Id.* We defer to the ALJ's credibility findings regarding Hinnant, Piccarillo, and Gray as the trier of fact, and note that they are particularly well-reasoned and supported by substantial evidence in the record.

As described above, the ALJ analyzed all of the evidence of record, direct and indirect, and his credibility determinations, to conclude that Complainant's protected activity was a contributing factor to the unfavorable personnel actions Respondent took against Complainant. *Id.* at 28-30. Direct evidence of retaliation included Preece's credible deposition testimony that he overheard Brigman say that he would remove Complainant because of the problems that Complainant's ethics call had started. *Id.* at 28. Again, the ALJ had found Preece's testimony credible and Brigman's not credible. Further, other witness testimony supported that Brigman had knowledge about the ethics call and that Complainant had made it. *Id.* Thus, the ALJ credited the direct evidence that gathered and brought charges against Complainant due to the ethics call. *Id.* at 29.

Turning to indirect evidence, the ALJ noted the temporal proximity between Complainant's ethics calls and his subsequent removal from service (a week to a few weeks from the different reports to removal). *Id.* The ALJ considered whether the threats, if assumed to be true, provided an intervening event breaking causation and found that they did not. *Id.* The ALJ explained that viewing all of the evidence, the alleged threats began a month or more before the statements were solicited, and were not seen as a pressing matter until *after* Complainant's ethics phone calls. *Id.* The ALJ found that the decision to discipline Complainant for the "threats" was instead predicated on the ethics calls. *Id.* The ALJ found this to be supported by the credible witness testimony of the S-1 gang members, who all stated that Barfield approached them seeking statements against Complainant only after Complainant made the calls to ethics. *Id.* at 30. The ALJ found that any assertion that the removal was based on Complainant's alleged threats was pretext. *Id.*

Further, the ALJ explained that other evidence consisting of email communications between Hinnant and Piccarillo support causation in this matter. *Id.* at 30. The emails between these two managers on March 30, 2013, show that management was considering separating Rhodes and Complainant due to the ethics complaint. *Id.* No threats of violence are mentioned in the email chain and the alleged threats were not reported until April 11, 2013. *Id.* Rather, the email was sent as a "follow up to the ethics call." The ALJ found that this email exchange

demonstratee that upper management was aware of Complainant's ethics complaint and was a factor in their discussion of separating Rhodes and Complainant. The ALJ also found that it undermined Respondent's assertion that Complainant's removal was predicated on unrelated activity that occurred later. *Id.*

Finally, the March 31, 2013-April 1, 2013 emails between Hinnant and Piccarillo provide support for the ALJ's causation finding. These emails show that both knew that Complainant made the ethics call. Also providing support are the emails between West and Piccarillo on April 12, in which Piccarrillo told West, "I have instructed Mike to have Mr. Riddle removed from service," to which John West responded later that evening, "Pls let Dennis Albers know since I believe he may have been the one calling him." CX 19. The record shows and the ALJ found that Complainant called Albers, the union representative, on April 7 or 8, to express his frustrations and explain the drug use that was going on. D. & O. at 23. Albers called West to inform him of same. *Id.*

Considering all of the evidence of record, the ALJ concluded that Complainant proved that his protected activity was a contributing factor to Respondent's adverse actions against him. *Id.* at 30. Indeed, the ALJ found that CSX manager Brigman intended to make an example of Complainant by working to remove Complainant from service and bring charges against him because Complainant made the ethics calls and that the decision-makers relied on this action to "unwittingly or otherwise, authorize[] removal based on those false threats." *Id.* at 30, 31. Thus, the ALJ found causation by "cat's paw." D. & O. at 28-29.

Respondent objects to the ALJ's finding of causation for several reasons. First, Respondent takes issue with the ALJ's focus on whether Complainant actually made threats and whether the drug allegations were true. Resp. Br. at 11-12. Respondent argues that these are irrelevant considerations because the question is not whether these were true but what the employer believed that is at issue. *Id.* While Respondent is correct, that what matters to the causation analysis is what the employer believed rather than the truth of the underlying facts, it does not help Respondent here because the ALJ thoroughly explained that he was analyzing the underlying facts as a part of his credibility determinations. D. & O. at 3 ("the record supports Complainant's allegations of drug use, which bolsters Complainant's credibility) and D. & O. at 4 ("the record supports Complainant's assertion that he did not make threatening statements . . . this supports Complainant's credibility."). This fits squarely within the ALJ's responsibilities as the fact finder.

Additionally, the ALJ found that what the Respondent [Brigman] "believed" was that Complainant engaged in protected activity and intentionally retaliated against him for it, drumming up false allegations in order to punish Complainant for that protected activity, which was then acted upon by upper level management "unwittingly or otherwise" to remove him from service, suspend him, and bring charges against him, subjecting him to a disciplinary hearing which could result in termination. The ALJ's findings are supported by substantial evidence in the record.

Respondent also objects to the ALJ's reference to a cat's paw theory of causation. The record shows that management up and down the line was aware (1) Complainant had made the ethics calls,[4] (2) that charges were being made against Complainant after those calls,[5] and (3) that Complainant was claiming that he was being targeted (removed from service, etc.) because he made the ethics calls regarding drug use.[6] Additionally, the record shows that upper level management were considering removing Complainant from Rhodes due to the ethics calls prior to any allegations that Complainant had threatened Rhodes.[7] This evidence supports

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[4] CX 17 (Hinnant and Piccarillo knew the ethics caller was "Brad"); CX 19 (West believed that Complainant was the one who had called Albers); D. & O. at 16 (citing Tr. 368-69; CX 22, 37, and 40) (Brigman knew that Complainant made the ethics complaints about drugs); D. & O. at 5 (citing CX 40 at 62- 63) (the ALJ references Preece's credible deposition testimony that Domiano, Hatmaker, and Barfield told the gang that Complainant admitted he had called the ethics hotline).

[5] D. & O. at 23 (Brigman); CX 22 (April 15, 2013 police report which was sent to CSX on the same date regarding taking Complainant out of service states that Complainant felt he was being retaliated against for the drug use complaints he had called in); CX 19 (April 12, 2013 communication between Piccarillo and West about Piccarillo's instruction that Complainant be removed from service and West's acknowledgment of that with direction to let Albers know since Complainant had called him).

[6] See previous note, CX 22 (April 15, 2013 police report sent to CSX).

[7] D. & O. at 30 (March 30, 2013 "email communications between Mr. Hinnant and Mr. Piccirillo show that management was considering separating Mr. Rhodes and Complainant due to the ethics complaint.").

the ALJ's theory of cat's paw for causation at the very least (and possibly direct causation up the line).[8]

Respondent's next objection to the ALJ's causation determination are in regard to his statements about temporal proximity. Resp. Br. at 15. The ALJ found temporal proximity to be "[t]he major and most compelling, indirect evidence that Complainant's ethics call was a contributing factor in the adverse personnel action. . ." and called the short time "determinative." D. & O. at 29. Respondent asserts that "[t]emporal proximity alone cannot prove that the protected activity was a contributing factor in these circumstances." Resp. Br. at 15. We agree that close temporal proximity alone does not compel a finding of contributing factor causation.[9] However, despite the ALJ's language that temporal proximity was "determinative," it is clear that the ALJ relied on a large variety of both direct and indirect evidence in making his causation determination and did not rely on temporal proximity alone.

Finally, Respondent objects to what it refers to as the ALJ's unsupported credibility determinations. Resp. Br. at 15-19. As stated above, the Board "gives considerable deference to an ALJ's credibility determinations and defers to such determinations unless they are inherently incredible or patently unreasonable." *Hunter v. CSX Transp. Inc.*, ARB Nos. 2018-0044, -0045, ALJ No. 2017-FRS-00007 (ARB Apr. 25, 2019) (citation omitted). We view the ALJ' credibility determinations in this matter as particularly thorough and discerning, firmly based on the evidence of record and his own reasoned analysis. We defer to them and perceive that they could have been used to make even stronger findings against Respondent and about its decision-makers in this matter.

We affirm the ALJ's findings and conclusions that there was contributing factor causation in this case between Complainant's protected activity and the adverse action Respondent took against him as supported by substantial evidence in the record and in accordance with law.

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[8] D. & O. at 28-29 (in which the ALJ found cat's paw causation because "those advising the decision-maker" [Brigman] raised and investigated the false allegations which led the decision-makers to take the adverse actions against Complainant in this case, "unwittingly or otherwise." *Id.* at 28-29, 32.

[9] *Acosta v. Union Pac. R.R. Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082 (ARB Jan. 22, 2020) (in which the Board stated that "[t]he mere circumstance that protected activity precedes an adverse personnel action is not proof of a causal connection between the two." *Acosta*, slip op. at 8 (citations omitted)).

3. Affirmative defense/same action defense

The ALJ found that Respondent failed to prove by clear and convincing evidence that it would have taken the same adverse actions against Riddell absent his protected activity. D. & O. at 31-33. The ALJ found Respondent's asserted defense, that it would have removed Complainant from service because of the alleged threats Complainant made, unconvincing. *Id.* The ALJ explained that the statements about the threat were not produced sua sponte, but were solicited by management (Brigman), and that the only men who said that did approach Barfield on their own, were the ones that Complainant accused of using drugs. *Id.* at 32. The ALJ found that Hinnant, Piccirillo, and West, "unwittingly or otherwise, authorized removal" based on Brigman's actions in soliciting the false the threats, obtaining them, and passing them along up the line. *Id.* Additionally, the ALJ found that any assertion that the removal was based on Complainant's alleged threats was pretext. *Id.* at 30.

Based on the ALJ's findings and record evidence of Hinnant, Piccirillo, and West's knowledge (as to protected activity) of Complainant's protected activity and that the gang that was now speaking out against him also knew about Complainant's ethics calls, we agree with the ALJ that Respondent's evidence on this issue is neither clear nor convincing. Indeed, Piccirillo admitted at the hearing (while also contradicting himself to state that he never doubted the gang's statements about Complainant's threats), that he considered the number of statements against Complainant unique and possibly indicative of an attempt by the gang to get rid of Complainant. *Id.* at 32-33.

In rejecting Respondent's attempt to show that Preece raised a drug-related safety complaint and was not discriminated against, the ALJ pointed out that the premise was logically flawed because there was no evidence that anyone learned that Preece had called the ethics hotline and there were no rumors that he had made such a call. *Id.* at 33. "Logically, there would be no way to test whether Mr. Preece would have been retaliated against for his call, due to its undiscovered nature." *Id.* The ALJ commented on a later reaction which did not Respondent's case, to a known report by Preece of information about the location of the gang to Complainant after he had been removed from service. *Id.* This report led to the police ticketing a member of the gang for marijuana possession and to the gang's anger at Preece to the extent that he decided to bid off of the gang due to the tension he felt from them. *Id.* The ALJ additionally noted that the other comparator evidence offered was not similar, because they involved threats made specifically to

a person, not alleged threats made outside of the target individual's presence. *Id.*

Finally, the ALJ noted that Respondent's affirmative defense argument relied in great part on the testimony of individuals he had found to be not credible. *Id.* Hinnant and Piccirillo he had found to be only partially credible because they specifically misrepresented their knowledge regarding who made the ethics complaint. *Id.* at 34. Thus, viewing all of the evidence of record and giving the evidence the weight he considered appropriate, the ALJ found that Respondent failed to show that it met the clear and convincing standard of proof that it would have removed Complainant from service regardless of his protected activity. *Id.*

On appeal, Respondent asserts that it provided ample proof that it has responded in the same way to similar allegations against other employees absent protected activity,[10] that CSX's written policies prohibit threats and CSX takes threats seriously, that Riddell had hostility for Rhodes lending credence to the allegation of threats, all showing that it proved its affirmative defense by clear and convincing evidence. It also argues that the ALJ applied a "but-for causation" standard that was inappropriate.

We are not persuaded by Respondent's arguments challenging the ALJ's rejection of its affirmative defense. As previously noted, once a complainant demonstrates that protected activity was a contributing factor in the unfavorable employment action, to avoid liability, the employer must prove by clear and convincing evidence that it would have taken the same action absent the employee's protected activity, a very high burden of proof.[11]

In finding that Respondent failed to meet this evidentiary burden, the ALJ thoroughly examined Respondent's evidence in support of its argument that it would have brought charges against Complainant for alleged threats in statements

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[10] Respondent asserts that Preece identified himself openly when making his ethics helpline calls but the ALJ found that Preece did not identify himself, which finding is supported by substantial evidence. D. & O. at 22, 33. Thus, as the ALJ found, Preece was not comparable to Complainant. D. & O. at 33.

[11] *Raye v. Pan Am Railways, Inc.*, ARB No. 2014-0074, ALJ No. 2013-FRS-00084, slip op. at 5 (ARB Sept. 8, 2016) (citing *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6, 9 n.6 (ARB Jan. 31, 2011) (quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (citation omitted) (Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.")).

that Respondent solicited. That evidence does not clearly and convincingly establish that Respondent met its burden of proof. While Respondent cites policies and past practices against threats in the workplace that it argues mandated its actions against Complainant for his "threats," the ALJ found that Complainant did not make any threats and that a CSX manager (Brigman) solicited false threats to target him for engaging in protected activity. The ALJ also found that upper level management were aware of Complainant's protected activities when they made the decision to remove him from service for the alleged threats. While we acknowledge an employer's responsibility to create a safe work environment and we do not sit as a super-personnel board, we agree with the ALJ that Respondent failed to prove by clear and convincing that it would have charged and suspended Complainant in this case absent his protected activity.[12] We are bound by the ALJ's findings of fact as supported by substantial evidence in the record.

Further, contrary to what Respondent appears to posit, this is not a case in which the activity Complainant engaged in gave rise to both the protected activity and the employer's reason for taking action[13]—here, Complainant's reports of drug use (protected activity) are clearly separable from Respondent's asserted reason for taking action (the alleged threats).

Neither do we find persuasive Respondent's assertion that the ALJ utilized an incorrect standard to make his conclusion. While all of his language may not have been precise, in the end, the ALJ found that Respondent simply did not carry its high burden of proof for the several reasons set forth above. The ALJ considered

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[12] See *Wright v. R.R. Comm'n of Texas*, ARB No. 2019-0011, ALJ No. 2015-SDW-00001, slip op. at 4, n.9 (ARB May 22, 2019) ("We note that it is the role of neither the ALJ nor the Board to act as a super-personnel 'department that reexamines an entity's business decisions.") (quoting *Jones v. U.S. Enrichment Corp.*, ARB Nos. 02-093, 03-010, ALJ No. 2001-ERA-021, slip op. at 17 (ARB Apr. 30, 2004) (citations omitted)).

[13] Resp. Br. at 25-26. Respondent gives the example of a complainant reporting drug use and then being caught as a drug user in the ensuing audit and employer being prevented from taking action against the complainant because he had engaged in protected activity. As we explained in *Thorstenson v. BNSF Ry. Co.*, ARB Nos. 2018-0059, -0060, ALJ No. 2015-FRS-00052, slip op. at 10-11 (ARB Nov. 25, 2019), even in situations in which both protected activity and the employer's non-protected reason for an unfavorable personnel decision arise from the same act (are "inextricably intertwined"), the ALJ, as the fact-finder, must make the causation finding and may conclude that one, both, or neither contributed (which must be supported by substantial evidence). Thus, Respondent's example is unfounded. Additionally, it is not applicable here, when the two reasons for adverse action asserted by the parties are entirely separate.

Respondent's asserted reason for action, and found that based on all the evidence of record, Respondent failed to prove its defense. We affirm that finding as supported by substantial evidence and in accordance with law.

In summary, as to the merits of this complaint, the ALJ concluded that Complainant proved by a preponderance of the evidence that he engaged in protected activity, and that Respondent took unfavorable employment action against him because of that activity. The ALJ also found that Respondent failed to prove by clear and convincing evidence that it would have taken the same actions absent any protected activity. Substantial evidence supports the ALJ's findings of fact and his conclusions are in accordance with law; therefore, we **AFFIRM**.

4. Punitive damages[14]

The ALJ ordered Respondent to pay $150,000 in punitive damages. On appeal, Respondent challenges the award of punitive damages as ignoring that punitive damages are appropriate only when there has been reckless or callous disregard for complainant's rights as well as intentional violations of the law and that CSX's procedures significantly mitigated damage to Complainant. Resp. Br. at 26. Respondent also asserts that even if punitive damages were warranted, the amount the ALJ awarded was excessive as out of line with other cases, given that while Riddell was investigated, he received no discipline as a result of the investigation and he was compensated for his time out of work. Resp. Br. at 28-29.

Relief under FRSA "may include punitive damages in an amount not to exceed $250,000." 49 U.S.C. §20101(e)(3). The Board reviews whether a punitive damages award is warranted for whether substantial evidence supports the ALJ finding that the employer acted with the requisite intent. *Raye*, ARB No. 2014-0074, slip op. at 8. The ARB reviews an ALJ's determination of the amount of a punitive damages award for an abuse of discretion. *Id.* at 2.

A. Whether punitive damages were warranted

In determining whether punitive damages are warranted, the ARB has followed the standard set forth by the Supreme Court in *Smith v. Wade*, 461 U.S. 30, 51 (1983)—where there has been "reckless or callous disregard for the plaintiff s rights, as well intentional violations of federal law." *Raye*, ARB No. 2014-0074, slip

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[14] Respondent does not challenge any other aspect of the ALJ's damages award—thus, these aspects of the ALJ's award remain undisturbed on appeal.

op. at 8 (citations omitted). The inquiry into whether punitive damages are justified or appropriate focuses on the employer's state of mind, and thus does not require that the employer's misconduct be egregious. *Id.* As the Supreme Court has stated, "[e]gregious misconduct is often associated with the award of punitive damages, but the reprehensible character of the conduct is not generally considered apart from the requisite state of mind." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 538 (1999). Nevertheless, egregious or outrageous conduct may serve as evidence supporting an inference of the requisite state of mind. *Id.*

In this case the ALJ found that Respondent's managers engaged in a "deliberate effort to retaliate against Complainant in violation of the Act." D. & O. at 42. The ALJ found that upon learning that Complainant had engaged in protected activity by reporting drug use in an ethics call, Brigman and Rhodes endeavored to find information to use against Complainant and solicited statements against him from other employees. *Id.* at 42-43. The ALJ found that this demonstrated "attempts by Respondent's management to punish and discourage reporting of dangerous workplace conditions." *Id.* at 43.

Further, the ALJ found that Respondent had a culture in which reporting unsafe practices was discouraged. *Id.* The ALJ stated that this culture, along with Respondent's manager's actions "created an environment on the system gangs where it was more dangerous to one's employment to report a violation of company policy and federal law than it was to actually perform the forbidden activity." *Id.*

The ALJ found troubling Respondent's ethics helpline and audit systems, which allowed for upper level supervisors to be notified of ethics calls and promptly warn those implicated of impending audits. *Id.* at 42. Wainwright, Respondent's Manager of Employee Relations, was frustrated in her attempts to have a surprise drug audit performed, going through Piccirillo and Hinnant regarding Rhodes, and stated in an email at the time that her "attempt to work through management ha[s] failed." CX 11 at 5. Although aware of the problem, no system existed to protect Complainant for his safety reports. Viewing the evidence of record, the ALJ concluded that the behavior of Respondent's managers amounted to a reckless disregard for Complainant's rights and intentional violations of federal law, and that as such, Complainant was entitled to an award of punitive damages. *Id.* at 43.

Respondent argues that punitive damages are not warranted because (1) the harm to Complainant was largely mitigated by the internal hearing process, (2) the ALJ's finding that Brigman solicited statements to use against Complainant because he engaged in protected activity was simply a "manager informing a

complaining employee that no action would be taken against Riddell without formal written complaints," (3) its investigation was conducted in line with the collective bargaining agreement and IDPAP, (4) investigating threats is consistent with Respondent's duty to provide a safe workplace, and (5) its multi-layered review process and its anti-retaliations policy that it has maintained and disseminated are good faith efforts to comply with the law that provide a defense to punitive damages.

None of Respondent's arguments succeed to detract from the ALJ's finding, which is supported by substantial evidence in the record, that Respondent's managers engaged in "reckless or callous disregard" for Complainant's rights, "as well intentional violations of federal law." D. & O. at 43. Again, the inquiry focuses on the employer's state of mind and does not require that the employer's misconduct be egregious. Respondent's argument that Brigman was only informing Barfield that written statements would be needed to take formal action against Complainant for the alleged threats goes the closest to an argument that the employer's state of mind was not reckless, callous, or intentional, but the ALJ's fact findings squarely quash it.

The ALJ found that Brigman intentionally (and Rhodes as well) set out to target and punish Complainant because he engaged in FRSA-protected activity that they did not like. Respondent's argument that this was not the case goes against the facts as found by the ALJ (which are supported by the record) and thus, fail. Respondent's argument regarding the CBA also fails because a CBA process cannot serve to shield intentional retaliation against a FRSA-whistleblower for engaging in protected activity. Respondent has pointed to nothing in the CBA which would have prevented it from investigating Complainant's allegations that he was being targeted through the investigation process because of the drug allegations he made, rather than removing him from service and bringing charges against him. The substantial evidence of record supports the ALJ's finding that Respondent evinced a callous or reckless disregard of Complainant's rights, and engaged in intentional violations of federal law warranting the award of punitive damages.

B. The amount of the punitive damages award

An ALJ's task after determining that an award of punitive damages is appropriate is to determine the amount necessary for punishment and deterrence—"a discretionary moral judgment." *Raye*, ARB No. 2014-0074, slip op. at 10 (quoting *Smith v. Wade*, 461 U.S. at 52). We note that a "statutory limit on punitive damages awards [like the one in the FRSA] strongly undermines the concerns that underlie

the reluctance to award punitive damages where minimal or no compensatory damages have been awarded."[15]

The ALJ analyzed the question of the amount of punitive damages to award using guideposts that the Supreme Court has recognized ("*State Farm* guideposts") for determining whether a punitive damages award meets procedural and substantive constitutional limitations of fairness and due process which include: (1) the degree of the reprehensibility or culpability of respondent's misconduct, (2) the relationship between the penalty and the harm to the complainant caused by the respondent's actions, and (3) the penalties imposed in other cases for comparable misconduct. D. & O. at 43 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 418-19 (2003)).[16]

Concerning the degree of reprehensibility or culpability of Respondent's conduct, the ALJ found that: (1) the behavior of come of Respondent's managers showed a significant degree of reprehensibility, (2) Respondent managers framed Complainant for misconduct to discredit, retaliate and silence his complaints, (3) Respondent's managers undermined capability to uncover illicit drug use, and (4) the threat posed by an intoxicated individual operating rail equipment was troubling. D. & O. at 44.

With regard to the second *State Farm* guidepost, the ALJ found that the harm to Complainant was largely mitigated because charges were ultimately dropped after the internal hearing process. While the ALJ found that the harm to Complainant was somewhat limited, he made clear that Complainant was certainly harmed. In his discussion of the unfavorable personnel action, the ALJ explained that Complainant's removal from service was detrimental, caused significant embarrassment, and due to the significance of the alleged infractions, caused further strain. D. & O. at 27. He also suffered suspension for months with the correlated loss of pay and insurance for the duration. *Id.* In his discussion related to

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[15] *Raye*, ARB No. 2014-0074, slip op. at 10 (citing *Youngermann*, ARB No. 11-056, slip op. at 11).

[16] See *Raye*, ARB No. 2014-0074, slip op. at 9-10 (for applicability of the State Farm guideposts); *aff'd Pan Am Rys. Inc., v. U.S. Dep't of Labor*, 855 F.3d 29, 32 (1st Cir. 2017). We note that the Tenth Circuit in *BNSF Ry. Co. v. U.S. Dep't of Labor*, 816 F.3d 628, 643 (10th Cir. 2016), held that "the Board must use the *State Farm* guideposts to evaluate the constitutionality of punitive damages awarded under 49 U.S.C. § 20109(e)(3)." We disagree for reasons states in *Raye*, but follow *Cain* on this issue in the Tenth Circuit, and apply the *State Farm* factors in this case on appeal, as the ALJ applied them below.

emotional distress the ALJ stated:

> Nevertheless, the record demonstrates that Complainant was placed in emotionally distressing situations. Complainant was paraded in front of his coworkers and removed in a highly public and humiliating manner. Tr. at 78-80; CX 40 at 77-80. He was not informed that his health insurance had been stopped, causing him embarrassment when he attempted to take his daughter to receive treatment at the hospital. Tr. at 98-100. Complainant was (and still is) subjected to name calling. See *id.* at 103-106; CX 40 at 63, 74-75. Complainant was also forced to get a psychological evaluation due to the false allegations of threatening statements, and he was forced to get a drug test. Tr. at 88-90, 545-47.
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> D. & O. at 41-42.

Finally, the ALJ analyzed the third factor of sanctions imposed for comparable misconduct. The ALJ found the task difficult, noting the uniqueness of the circumstances, but he looked at prior ARB cases approving ALJ awards of punitive damages for their provision of a scale of ratios. Considering the facts of the case and case precedent, the ALJ decided that a 9 to 1 ratio was appropriate in this matter. The ALJ decided that the case was not egregious enough to warrant damages above a 10 to 1 ratio.

Thus, the ALJ analyzed the case through the lens of the three guideposts, considering it significant that Respondent engaged in egregious conduct, noting however, that the harm was somewhat limited, and viewing it in light of comparable decisions, to conclude that the punitive damages must be significant to have any deterrent effect. The ALJ awarded punitive damages in the amount of $150,000 as necessary to deter future misconduct.

On appeal, Respondent argues that the CSX employee (presumably Barfield) that solicited the statements was not a manager, so it was not reprehensible for Respondent to investigate the statements. Further, Respondent notes that the ALJ acknowledged that the harm was "relatively minor" and not suggestive of a large punitive damages award. It argues that because it did not ultimately discipline Complainant after the hearing process, paid him for his time out of work, and allowed him to go back to work, the ALJ's damages award was too high. Finally, Respondent argues that the award is "far out of line" with punitive damages awards in more egregious cases.

As previously stated, the Board reviews the amount an ALJ awards in punitive damages for an abuse of discretion. We find that the ALJ did not abuse his discretion in determining that $150,000.00 in punitive damages was necessary in this case to punish and deter future misconduct. Again, Respondent's argument that a non-manager solicited the statements goes against the ALJ's fact-findings (which are supported by substantial evidence in the record) and are therefore, not persuasive. While the ALJ acknowledged that the harm was relatively minor because his employment was not ultimately terminated, the ALJ also found the harm significant (charges, targeted retaliation, drug testing, psychological testing, removal from service, disciplinary hearing, and the threat of termination). Further, the ALJ found that Respondent's actions against Complainant resulted in strain, embarrassment, humiliation, and situations of emotional distress. Finally, we have upheld substantial (and larger) punitive damages awards in cases in which the complainant was not ultimately fired.[17] This is so, in part, because our standard of review is for an abuse of discretion—it is for the ALJ who heard and decided the case to determine an amount in his or her discretion once the determination that an award is warranted has been made.

To conclude, the ALJ finding of intentional retaliation supports a significant punitive damages award and the ALJ's award is in line with other ARB cases affirming ALJ awards, even though Respondent did not formally discipline Complainant as a result of the investigative hearing. Respondent's arguments to the contrary are unpersuasive. We **AFFIRM** the ALJ's punitive damages award.

5. Alternative challenge citing the Supreme Court's *Lucia* decision

Respondent alternatively argues that it is entitled to a new hearing before a different ALJ under *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), because the ALJ was not properly appointed under the Appointments Clause of the U.S. Constitution. Art. II,

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[17] In *Raye*, ARB No. 2014-0074, slip op. at 3, 10, the Board affirmed an ALJ award of the statutory maximum of $250,000.00, in a case similar to this one in that complainant was not ultimately fired (the adverse actions consisted of charging complainant with rule violations and subjecting him to a disciplinary hearing). Affirming, the First Circuit concluded "that the ALJ's decision to award punitive damages of $250,000, to punish and deter what he perceived to be a culture of intimidating employees and discouraging them from engaging in protected activity, was within the realm of his discretion." *Pan Am Rys. Inc., v. U.S. Dep't of Labor*, 855 F.3d 29, 32 (1st Cir. 2017).

§ 2, cl. 2.[18] Respondent asserts that it did not waive the challenge and that its challenge was timely under *Lucia* as promptly filed once the Supreme Court's decision issued. Resp. Reply at 10. In the event it loses on the merits, Respondent requests the matter be vacated and remanded for new proceedings before a different ALJ.

Riddell and the Solicitor of Labor, as amicus, argue Respondent waived its right to make an Appointments challenge. Ordinary principles of forfeiture and waiver apply to Appointments challenges. *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018).

While the ARB has the discretion to consider non-jurisdictional constitutional claims such as Respondent's Appointments Clause challenge, such discretion is exercised in only rare or exceptional circumstances which we do not see here. Respondent raised the Appointments Clause challenge for the first time on appeal in two-sentences at the end of its petition for review. Respondent did not raise the challenge at any point during the proceedings with the ALJ although it had notice of the issue and the opportunity to do so.[19] The ARB typically does not entertain arguments that are first raised on appeal and we shall not do so now. *E.g., Gattegno v. Prospect Energy Corp., et al.*, ARB No. 2006-0118, ALJ No. 2006-SOX-00008, slip op. at 22 (ARB May 29, 2008). Thus, we hold that Respondent has waived any

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[18] Which provides that only the President, "Courts of Law," or "Heads of Departments" can appoint "Officers."

[19] In 2016, the courts of Appeals issued conflicting decisions on Appointments Clause challenges to ALJs and in February 2017, the D.C. Circuit granted rehearing en banc of its 2016 *Lucia* decision. See Solicitor's Brief at 9. If the burgeoning conflict in the courts of Appeals did not, the Secretary's ratification of the ALJ's appointments in December 2017 put Respondent on notice of an Appointments issue. Finally, when *Lucia* was decided by the Supreme Court on June 21, 2018, CSX should have promptly made its constitutional challenge. The ALJ did not decide this matter until almost six months later on December 12, 2018, giving Respondent a considerable amount of time to raise a challenge. Its failure to do so in a timely fashion is fatal to its argument.

Appointments challenge.[20, 21]

CONCLUSION

Substantial evidence supports the ALJ's factual determinations. We **AFFIRM** the ALJ's conclusions that Respondent violated the FRSA, and did not prove by clear and convincing evidence that it would have taken the same actions absent any protected activity. We also **AFFIRM** the ALJ's awards of damages. We hold that Respondent waived the issue of whether the ALJ in this matter was properly appointed under the Appointments Clause by not raising it before the ALJ.

SO ORDERED.

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[20] Further bolstering our decision is the fact that Respondent only asks that the Board hold that the ALJ in this matter was not properly appointed *if* it loses on the merits—thus, the implication that if it were to win on the merits, it would consider the ALJ's appointment a non-issue.

[21] We note that our sister Board has issued cases consistent with our decision that Respondent's Appointments challenge has been waived in *Kiyuna v. Matson Terminals, Inc.*, BRB No. 19-0103, 2019 WL 2865994 (BRB June 25, 2019) and *Daugherty v. Consolidated Coal Co.*, BRB No. 18-0341, 2019 WL 3775979 (BRB July 19, 2019).