**U.S. Department of Labor**

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

**In the Matter of:**

**SCOTTY LANCASTER,** **ARB CASE NO. 2019-0048**

**COMPLAINANT** **ALJ CASE NO. 2018-FRS-00032**

**v.** **DATE: February 25, 2021**

**NORFOLK SOUTHERN RAILWAY COMPANY,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***
**Brian Reddy, Esq.; *The Reddy Law Firm*; Maumee, Ohio**

***For the Respondent*:**
**Joseph C. Devine, Esq.; *Baker & Hostetler LLP*; Columbus, Ohio**

**Before: James D. McGinley, *Chief Administrative Appeals Judge*, James A. Haynes and Stephen M. Godek, *Administrative Appeals Judges***

## DECISION AND ORDER

This case arises under the employee protection provisions of the Federal Railroad Safety Act of 1982 (FRSA).[1] Scotty Lancaster (Complainant) filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Norfolk Southern Railway Company (Respondent) violated the FRSA by disciplining him in retaliation for acts protected by the FRSA. OSHA dismissed the complaint. Complainant objected and requested a hearing before an Administrative Law Judge (ALJ). The ALJ concluded

[1] 49 U.S.C. § 20109 (2008), as implemented by federal regulations at 29 C.F.R. Part 1982 (2020) and 29 C.F.R. Part 18, Subpart A (2020).

Respondent retaliated against Complainant in violation of the FRSA and awarded Complainant compensatory damages for back pay and emotional distress, and punitive damages. Respondent appealed to the Administrative Review Board (ARB or the Board). For the following reasons, we affirm the ALJ's order.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Board to issue agency decisions in this matter.[2] The ARB will affirm the ALJ's factual findings if supported by substantial evidence but reviews all conclusions of law de novo.[3] The Board defers to ALJ's credibility findings unless they are "inherently incredible or patently unreasonable."[4]

## DISCUSSION

Complainant is a locomotive engineer for Respondent. The Hours of Service Act is relevant to this case and provides, in part: "A railroad carrier and its officers and agents may not require a train employee to remain on duty for a period in excess of 12 consecutive hours."[5] The Hours of Service Act provides that an employee's time on duty begins when the employee reports for duty, and ends when the employee is released from duty. The Hours of Service Act also states that "time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in or connected with the movement of a train is time on duty."[6]

On November 26, 2015, Complainant and a colleague, Thomas Combs, were operating a train in Kentucky. Complainant's supervisor was Matthew Newcomb.[7] Newcomb visited the train's cab due to a delay and spoke with Complainant and

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[2] 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. 13186 (Mar. 6, 2020).

[3] 29 C.F.R. § 1982.110(b); *Brough v. BNSF Ry. Co.,* ARB No. 2016-0089, ALJ No. 2014-FRS-00103, slip op. at 8 (ARB June 12, 2019).

[4] *Brough,* ARB No. 2016-0089, slip op. at 5.

[5] 49 U.S.C. § 21103(a)(2).

[6] 49 U.S.C. § 21103(b)(1), (b)(3); ALJ Decision & Order ("D. & O.") at 7.

[7] D. & O. at 8.

Combs in an effort to end the delay. After consulting with his manager, Newcomb decided he needed to obtain a written statement from Complainant and Combs about the delay.

The next day Complainant and Combs worked together again, starting at 4:30 a.m. At 3:45 p.m., they learned that Newcomb was on his way to pick them up. Newcomb arrived sometime between 3:45 and 3:55 p.m., and drove both employees to his office about 15 minutes away. When they arrived at the office, Newcomb told both employees to write a statement about the delay. The time was around 4:15 p.m.[8]

Combs proceeded to provide the written statement and worked past 4:30 p.m. to complete his statement. Complainant did not immediately provide a statement. Complainant told Newcomb that he would be over his hours of service if he provided the statement and spoke with his union representative. After speaking with his representative, Complainant told Newcomb he would provide the statement. Rather than permitting him to provide the statement, Newcomb called his supervisor and then suspended Complainant without pay, pending disciplinary investigation.[9] On January 5, 2016, Respondent notified Complainant that he was assessed discipline of a 40-day suspension, without pay, starting November 27, 2015. After his suspension, he returned to duty.[10]

On June 8, 2016, Complainant submitted a complaint to OSHA, alleging whistleblower retaliation.[11] OSHA dismissed the complaint on November 6, 2017. Complainant appealed to the OALJ on February 16, 2018. Respondent moved to dismiss for untimeliness on March 21, 2018, which the ALJ denied on April 21, 2018. Respondent moved for reconsideration and certification for interlocutory appeal on April 23, 2018, which the ALJ denied the next day. A hearing was held December 3 and 4, 2018. The ALJ issued a Decision and Order finding that Respondent retaliated against Complainant and awarded $12,599.51 in back pay, $5,000 for emotional distress, and $25,000 in punitive damages, along with attorney's fees.

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[8] D. & O. at 12.

[9] *Id.* at 13-14.

[10] *Id.* at 2-3.

[11] *Id.* at 2.

Respondent timely appealed the ALJ's Decision and Order to the Board on April 8, 2019.

**1. Timeliness**

*A. OSHA Complaint*

Respondent argues for the first time before the Board that Complainant's complaint to OSHA was untimely. The statute has a 180-day deadline for filing a complaint.[12] Complainant engaged in protected activity on November 27, 2015. He was immediately removed from work pending an investigation and formally penalized on January 5, 2016. He filed his complaint with OSHA on June 8, 2016. He filed with OSHA fewer than 180 days after the suspension was imposed. We conclude that Complainant timely filed his complaint with OSHA.

*B. OALJ Appeal*

Respondent also argues that Complainant's appeal to the ALJ was untimely. At issue is whether OSHA is required to send its findings to the Complainant in addition to sending them to his counsel. OSHA's investigation was completed on November 6, 2017. It was received by Complainant's counsel on November 13, 2017. OSHA included a copy for Complainant in the same envelope, but there is no evidence in the record that Complainant was ever sent a copy of the findings directly.

An appeal to an ALJ is timely when filed within 30 days of receipt of OSHA's findings.[13] "The findings and, where appropriate, the preliminary order will be sent by certified mail, return receipt requested, to all parties of record (and each party's legal counsel if the party is represented by counsel)."[14] In this case, Complainant is the party of record, but OSHA sent its findings only to his attorney. The regulation includes each party's legal counsel via a parenthetical that starts with the word "and." The use of a parenthetical to include counsel indicates that OSHA's obligation to send its findings to the party of record is primary, but insufficient when a party is represented by counsel. In that case, both the party and counsel

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[12] 49 U.S.C. § 20109(d)(2)(A)(ii).

[13] 29 C.F.R. § 1982.106.

[14] 29 C.F.R. § 1982.105(b).

must be sent a copy. A plain reading of the language shows that Complainant as a party of record must be sent a copy of the findings. Here, OSHA sent two copies to Complainant's counsel but did not send one to Complainant.

For the clock to start running on Complainant's right to appeal, he must receive OSHA's findings, which is dictated by the language in the regulation governing appeals. There, the regulation indicates that *receipt* is a prerequisite for the clock to start ticking. "Any party who desires review, including judicial review, of the findings and preliminary order [...] must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to § 1982.105."[15]

We also agree with the ALJ's conclusion that Complainant's appeal to OALJ was filed timely because there is no evidence in the record showing that Complainant ever received the OSHA's findings.

## 2. FRSA Whistleblower Retaliation

The FRSA prohibits a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith protected activity.[16] To prevail, an FRSA complainant must establish, by a preponderance of the evidence, that: (1) he engaged in protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action.[17] If a complainant meets this burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action absent the complainant's protected activity.[18]

It is undisputed that Complainant suffered an unfavorable personnel action.

### *A. Protected Activity*

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[15] 29 C.F.R. § 1982.106.

[16] 49 U.S.C. §§ 20109(a) & (b).

[17] *Brough*, ARB No. 2016-0089, slip op. at 9.

[18] *Id.*

The FRSA states that an employee is protected when he or she provides information in good faith regarding any conduct that the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security.[19]

Respondent offers several arguments in support of its position that Complainant did not engage in protected activity. Respondent argues that Complainant had other concerns, was not engaged in a safety task at the time of his disclosure, and completing a written statement as requested would not have violated the Hours of Service Act.

The ALJ concluded that Complainant's disclosure and initial refusal to fill out a statement was protected activity because he made a lawful, good faith disclosure about violation of a federal law related to railroad safety, the Hours of Service Act. To support his conclusion, the ALJ found Complainant's testimony about telling Newcomb his hours of service were expiring to be credible. Key parts of Complainant's testimony were corroborated by Combs. The ALJ further found that Newcomb had actual knowledge that the Hours of Service Act would be violated if Complainant and Combs were on duty past 4:30 p.m. and, therefore, Newcomb had a duty to ensure that both employees were off duty by 4:30 p.m. He also found that Combs's statement took longer than fifteen minutes to write and that Complainant would have exceeded his hours of service if had he written a statement.

Respondent's arguments are without merit. A thorough review of the record shows that the ALJ's findings of fact are supported by substantial evidence. Complainant's disclosure fits squarely within the bounds of what the FRSA protects – Complainant objectively and reasonably believed there was an imminent violation of federal railroad safety law. The FRSA does not require that an employee is engaged in a "safety-related task" as Respondent asserts. The FRSA prohibits railroad employers from taking unfavorable personnel actions against employees for reporting safety issues that are illegal or dangerous.[20] This purpose applies equally

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[19] 49 U.S.C. § 20109(a).

[20] 49 U.S.C. § 20109(a)(2) and (b)(1)(A) and (B).

whether there is a regulatory violation or a hazardous safety condition that relates to the equipment, or the condition of a person who is working on the equipment.[21]

Therefore, the ALJ's conclusion that Lancaster engaged in protected activity is supported by substantial evidence in the record.

*B. Contributing Factor*

"A 'contributing factor' includes 'any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision."[22] "Contributing factor" causation may be proven indirectly by circumstantial evidence, such as temporal proximity; indications of pretext; inconsistent application of an employer's policies; an employer's shifting explanations for its actions; an employer's antagonism or hostility toward a complainant's alleged protected activity; the falsity of an employer's explanation for the adverse action taken; or a change in the employer's attitude toward the complainant after he or she had engaged in protected activity.[23]

The ALJ concluded that Complainant proved by a preponderance of the evidence that his "protected act of refusing to compose the written statement demanded by Newcomb on November 27, 2015 was at least a contributing factor in Respondent's decision to impose discipline on Complainant."[24] The ALJ then more broadly concluded Complainant satisfied his burden of proofing that Respondent had retaliated against Complainant in violation of the FRSA.[25]

On appeal to the Board, Respondent argues that Complainant's disclosure was not a contributing factor to his suspension. Respondent asserts that the ALJ concluded that Lancaster's supervisors "did not even consider Lancaster's protected conduct" when they removed him from service. Respondent also argues that Shannon Mason, Newcomb's supervisor, did not know about Lancaster's protected

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[21] *Cieslicki v. SOO Line R.R. Co.*, ARB No. 2019-0065, ALJ No. 2018-FRS-00039 (ARB June 4, 2020).

[22] *Acosta v. Union Pac. R.R. Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082, slip op. at 6 (ARB Jan. 22, 2020).

[23] *Id*. at 8.

[24] D. & O. at 25.

[25] *Id*.

activity when he instructed Newcomb to remove Lancaster from service. Respondent further argues that the deciding official, Richard Lloyd, did not know about the protected activity when he decided to impose a 40-day suspension on January 5, 2016.

These arguments are not persuasive. Respondent takes the ALJ's language out of context, fails to show why the ALJ's factual findings are not supported by the record, and fails to offer credible, non-retaliatory reasons for its conduct. Therefore, because the ALJ's findings are supported by substantial evidence in the record, we affirm them.

### *C. Clear and Convincing Evidence*

If the complainant proves that protected activity was a contributing factor in the personnel action, the respondent may nevertheless avoid liability if it proves by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected activity.[26] "Clear" evidence means the employer has presented an unambiguous explanation for the adverse action in question.[27] "Convincing" evidence is that which demonstrates a proposed fact is "highly probable."[28] Clear and convincing evidence "denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain."[29]

Circumstantial evidence can be used to prove what an employer "would have done" in its efforts to prove its affirmative defense. The circumstantial evidence it presents can include, among other things: (1) evidence of the temporal proximity between the non-protected conduct and the adverse actions; (2) the employee's work record; (3) statements contained in relevant office policies; (4) evidence of other

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[26] *Cole v. Norfolk S. Ry. Co.*, ARB No. 2019-0029, ALJ No. 2018-FRS-00023, slip op. at 5 (ARB July 14, 2020) (*citing* 49 U.S.C. § 20109(d)(2)(A)(i)); *D'Hooge v. BNSF Ry.*, ARB Nos. 2015-0042, -0066, ALJ No. 2014-FRS-00002, slip op. at 6 (ARB Apr. 25, 2017), *appeal dismissed*, *BNSF Ry. Co. v. U.S. Dep't of Labor*, No. 17-71854 (9th Cir. Sept. 5, 2017)).

[27] *Speegle v. Stone & Webster Constr. Inc.*, ARB No. 2013-0074, ALJ No. 2005-ERA-00006, slip op. at 11 (ARB Apr. 25, 2014).

[28] *Id.*

[29] *Id.; see also DeFrancesco v. Union R.R. Co.*, ARB No. 2013-0057, ALJ No. 2009-FRS-00009, slip op. at 9-10 (ARB Sept. 30, 2015) (*DeFrancesco II*).

similarly situated employees who suffered the same fate; and (5) the proportional relationship between the adverse actions and the bases for the actions.[30]

The ALJ concluded Respondent failed to prove by clear and convincing evidence that the unfavorable personnel action it imposed on Complainant was the result of events or decisions independent of Complainant's participation in protected activity.[31] The ALJ reasoned that Respondent "failed to come forward with any credible evidence showing that Complainant was given 40-day suspension for some reason other than Complainant's initial refusal to compose the written statement demanded by Newcomb."[32]

Respondent argues that the ALJ erred because it was never permitted meet its burden and show that Complainant would have been suspended anyway. However, Respondent needed to provide evidence that it would have suspended Complainant for a different reason than his initial refusal to complete the statement over hours of service concerns. Respondent never did that at the hearing, and does not do that in front of the Board either. Therefore, the ALJ correctly recognized that Respondent did not meet its burden.

### 3. Punitive Damages

Finally, Respondent argues that it was inappropriate for the ALJ to impose punitive damages.

Relief under FRSA "may include punitive damages in an amount not to exceed $250,000."[33] Reviewing the ALJ's punitive damages award requires the ARB to consider whether, as the ALJ did: (1) any punitive damages award was warranted, and (2) the amount awarded was appropriate.[34] The Supreme Court has held that punitive damages are appropriate where there has been "reckless or

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[30] *Echols v. Grand Trunk W. Ry., Co.*, ARB No. 2016-0022, ALJ No. 2014-FRS-00049 (ARB Oct. 5, 2017) (*citing Speegle,* ARB No. 2013-0074, slip op. at 11).

[31] D. & O. at 6, 26.

[32] *Id.* at 26.

[33] 29 C.F.R. § 1982.109(d)(1).

[34] *Youngerman v. United Parcel Serv., Inc.*, ARB No. 2011-0056, ALJ No. 2010-STA-00047 (ARB Feb. 27, 2013).

callous disregard for the plaintiff's rights, as well as intentional violations of federal law."[25]

Here, the ALJ followed the proper legal analysis by first determining whether punitive damages were warranted. He held they were based on record evidence and testimony showing that everyone involved was aware of the requirements of the Hours of Service Act. The ALJ also held that Newcomb was prioritizing his supervisors' priorities over compliance with the law. After determining that Respondent intentionally violated the Hours of Service Act and the FRSA, the ALJ then awarded punitive damages in the amount of $25,000 based on Respondent's repeated violations of the Hours of Service Act. Complainant and his supervisors testified at the hearing that it was commonplace for employees to be required to remain on duty for a period in excess of 12 consecutive hours.[35] The ALJ's process and findings are consistent with ARB precedent and supported by the record.

## CONCLUSION

Accordingly, we **AFFIRM** the ALJ's Decision and Order.

**SO ORDERED.**

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[35] D. & O. at 29-35.