In the Matter of:

ROBERT POWERS,	**ARB CASE NO. 13-034**
COMPLAINANT,	**ALJ CASE NO. 2010-FRS-030**
v.	**DATE: March 20, 2015**
UNION PACIFIC RAILROAD COMPANY,	**REISSUED (with full dissent):April 21, 2015**
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
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***For the Respondents*:**
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***For the Assistant Secretary of Labor for Occupational Safety and Health*:**
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For Project on Governmental Oversight as Amicus Curiae
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For National Whistleblower Center, National Employment Lawyers Association, Trucker's Justice Center and Teamsters for a Democratic Union as Amicus Curiae

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For Edna Fordham as Amicus Curiae

Thad M. Guyer, Esq., T.M. Guyer and Ayers & Friends, PC, Medford, Oregon; Thomas Devine, Esq. (argued); *Government Accountability Project*, Washington, District of Columbia

For Association of American Railroads as Amicus Curiae

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For Chamber of Commerce of the United States of America, American Trucking Associations, Inc. as Amicus Curiae

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Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne *Royce, Administrative Appeals Judge*; *Luis* A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge. Chief Judge Igasaki and Judge Corchado dissent. A summary of the dissent is attached, the full dissenting opinion to follow.*

DECISION AND ORDER OF REMAND

This case arises under the whistleblower protection provisions of the Federal Rail Safety Act of 1982 (FRSA), 49 U.S.C.A. § 20109 (Thomson/West 2012), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53, and implemented by 29 C.F.R. Part 1982 (2014), and 29 C.F.R. Part 18, Subpart A (2014). Robert Powers filed a complaint with the Occupational Safety and Health Administration (OSHA) on November 5, 2008, alleging that his employer, Union Pacific Railroad Company (Union Pacific or Company), violated the FRSA by terminating his employment because he reported a work-related injury. After an investigation, OSHA issued a letter on July 22, 2010, finding reasonable cause for a violation. OSHA ordered relief that included reinstatement and backpay.

Union Pacific requested a hearing with the Office of Administrative Law Judges (OALJ). On March 1, 2011, Union Pacific moved the Administrative Law Judge (ALJ) for summary decision arguing that Powers abandoned his FRSA administrative complaint when he grieved the termination under a collective bargaining agreement. On May 17, 2011, the ALJ entered an Order Denying Summary Decision. The ALJ held an evidentiary hearing on the FRSA complaint on July 20-21, 2011. On January 15, 2013, the ALJ issued a Decision and Order Denying Claim and dismissing the complaint (D. & O.).

Powers petitioned the Administrative Review Board (ARB) for review. Following briefing on the petition, the ARB entered an Order setting the case for review en banc, and ordering additional briefing on the effect of the "'contributory factor' analysis addressed in *Fordham* [*v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (Oct. 9, 2014)], to the extent that the parties consider it relevant to the resolution of *Powers*." Order Setting En Banc Review at 2 (ARB Oct. 17, 2014). After supplemental briefing by the parties and amici, the ARB held oral argument on January 14, 2014.

BACKGROUND

A. Facts

The facts that led to the complaint in this case are set out fully in the ALJ's decision, and briefly set out below. See D. & O. at 2 (Findings of Fact).

1. Circumstances involving Powers' injury and treatment

Powers began working at Union Pacific in December 1996. On Friday May 18, 2007, he was operating a rail saw, made a cut, and had to loosen a tightening arm. After striking the tightening arm, he hurt his hand. Powers reported the injury to his supervisor, Leroy Sherrah. Sherrah suggested that Powers take care of his hand over the weekend, and that they would fill out an injury report if it still hurt on Monday. D. & O. at 2-3.

On Monday May 21, 2007, Powers reported to Sherrah that he nursed his hand throughout the weekend, but still felt pain. Powers filled out an accident report, and Sherrah told him to date the form for that day, Monday, May 21, 2007. Sherrah also told Powers to indicate on the form that the incident occurred at a milepost in the Eugene Yard, rather than in Springfield, Oregon, where the injury had actually occurred. Powers complied with Sherrah's requests. Sherrah drove Powers to a hospital for treatment and an x-ray on his hand. The next day, orthopedic specialist Dr. Thomas Wuest examined Powers. Powers reported tenderness and discomfort in part of his left hand, and that he could not extend his thumb. Powers' x-ray was negative for fracture or dislocation. Dr. Wuest diagnosed a severe contusion (bruise) and tenosynovitis in the right thumb, and immobilized the hand with a cast. Dr. Wuest wrote in his report: "Work restrictions are to avoid any lifting over five to ten pounds; keep the cast clean and dry; no heavy pulling, tugging, lifting, and etcetera." *Id*. at 3-4 (citing Employer's Exhibit

(E. Ex.) K at 293. Dr. Wuest signed a "Medical Status Report" the same day putting Powers on lifting restrictions of five pounds. *Id*. at 4. Union Pacific accommodated Powers' medical restrictions and put him on light duty that required him to prepare a truck in the morning, drive during the day, and occasionally lift objects under ten pounds. Further monthly medical examinations and work restrictions prescribed by Dr. Wuest followed. *Id*. at 5

Dr. Wuest again examined Powers on June 5, 2007. Powers reported some pain when extending his thumb. Powers' x-rays were normal, and showed no signs of arthritis or injury. Dr. Wuest added a diagnosis of mild posttraumatic intersection syndrome; he removed the cast and advised Powers to wear a splint as necessary and released him for driving duties. Powers continued his light duty assignments. On July 5, 2007, Powers complained to Dr. Wuest of residual inflammation at the wrist and mild swelling. Dr. Wuest prescribed an anti-inflammatory drug, and advised the same work restrictions and use of a splint; Dr. Wuest advised that Powers could continue to drive at work. *Id*.

Dr. Wuest examined Powers on July 19, 2007, and reported that the anti-inflammatory was helpful. Dr. Wuest renewed the prescription, provided Powers a new splint, ordered physical and occupational therapy, and imposed lift restrictions of ten to fifteen pounds. Powers continued his light duty driving at work. On August 23, 2007, Powers indicated to Dr. Wuest that he was still suffering some pain. Powers informed Dr. Wuest that he was undergoing physical and occupational therapy, and that the therapist recommended a steroid injection. Dr. Wuest changed the diagnosis to "recalcitrant tendinitis" and administered a steroid injection to Powers. On September 20, 2007, Dr. Wuest prepared a "Medical Status Report." The Report stated that Powers could continue to work with no pushing, pulling, or lifting over ten to fifteen pounds while wearing a splint as needed. *Id*. at 5-6.

On September 26, 2007, Dr. Wuest examined Powers and stated that he had "dramatically improved with [the steroid injection]." *Id*. at 6, quoting E. Ex. L at 17. Dr. Wuest observed that Powers had some tendinitis, "a little pain" over one joint of the thumb, and "every now and then" the thumb locked up on extension. *Id.* Dr. Wuest imposed a fifty pound lift restriction and "[l]imited repetitive movements or gripping with the left wrist and hand to occasionally or as tolerated." *Id.* Dr. Wuest advised that Powers "[a]void vibratory type or impact tools, and wear the splinter brace when working." *Id.* Dr. Wuest prepared a "Work Status Report" with the same restrictions, and requested a second orthopedic opinion. *Id.* (citing E. Ex. L at 18).

In October 2007, Powers was "force recalled" to a higher paying system welding job. The manager for the job accommodated Powers' medical restrictions, but after two weeks informed Powers that he could no longer accommodate the restrictions. *Id*. at 7. After his dismissal from the welding job, Powers wanted to return to the district driving job, but believed that in doing so he would lose his system welding seniority. Instead, Powers took an unpaid medical leave of absence and consulted with Company Claim Specialist William Loomis to ensure that he would continue to receive his proper benefits. Powers filed for disability benefits with the Company's private disability insurer and the Railroad Retirement Board. *Id*. at 7-8.

On November 15, 2007, Dr. Jason Tavakolian examined Powers for a second orthopedic opinion. Powers reported to Dr. Tavakolian that he had improved, but suffered significant pain if he hyperextended his thumb, which he said happened a few times a month. *Id*. at 8, citing E. Ex. L. at 19-20. Dr. Tavakolian concluded that there were no remaining signs of tenosynovitis following the steroid injection treatment and wrote in his Medical Report the following:

> I cannot obtain a more accurate anatomic diagnosis [beyond Dr. Wuest's diagnosis of "thumb pain"]. I suspect that many of Mr. Powers' symptoms will subside with time. I have no further treatment recommendations at this point other than continuing symptomatic treatment.

E. Ex. L. at 20.

On November 20, 2007, Dr. Wuest completed a Return to Work Status Report on Powers based on the September 26, 2007, examination, and kept Powers on the same work restrictions. D. & O. at 9 (citing E. Ex. L. at 22). On November 28, 2007, Dr. Wuest examined Powers; Powers reported wrist pain and some inflammation. Dr. Wuest informed Powers that the case was ready for closure and that Powers required a "functional capacity evaluation" and may require "some permanent partial restriction to avoid repetitive use of the wrist and/or hand." *Id*. (citing E. Ex. L at 23).

On November 30, 2007, occupational medicine specialist Dr. Richard Abraham performed a functional capacity evaluation, and ordered an "MRI . . . of his left wrist extending to his proximal thumb to rule out pathology." *Id*. (citing E. Ex. M at 4). Dr. Abraham adopted the recommendations set out in Dr. Wuest's Return to Work Status Report advising that Powers refrain from lifting over fifty pounds, and avoid repetitive wrist motion. *Id.* Dr. Abraham examined Powers on December 18, 2007, and reviewed the "MRI report of his left wrist." E. Ex. M at 10. Dr. Abraham determined the MRI findings were compatible with "mild" tenosynovitis but no tendon tear. D. & O. at 9 (citing E. Ex. M. at 10). The medical report indicated that Powers' pain was "worse with movement." E. Ex. M at 10.

After examining Powers on May 13, 2008, Dr. Abraham prepared an Occupational Health Injury Treatment report limiting Powers' lifting, pushing or pulling to fifty pounds or less. E. Ex. M at 30-32; E. Ex. O. The Injury Treatment report indicated no further limitation to Powers' work capabilities. Dr. Abraham's separate Chart Notes dated May 13, 2008, states: "RTW form completed releasing patient to work avoiding repetitive wrist motion. No lifting over 50 pounds." E. Ex. at 31; E. Ex. O at 2; *see also* D. & O. at 10 n.16. The Notes state: "[Powers] seems to be approaching the point of maximum improvement and medically stationary status." E. Ex. at 31; E. Ex. O at 2. The Chart Notes state that Dr. Abraham referred Powers to Dr. Wuest "for consideration of another cortisone injection to see if that alleviates his symptoms completely." *Id.*; *see also* D. & O. at 10 (citing E. Ex. L at 25).

On May 27, 2008, Dr. Abraham examined Powers. Powers reported that the steroid injection Dr. Wuest administered had reduced his pain. D. & O. at 12-13 (citing E. Ex. M at 33-34). Dr. Abraham advised on the Chart Notes that Powers continue on the same fifty pound lift restrictions and limited repetitive movement; Dr. Abraham failed to record the restriction on repetitive movement in the Status Report. On July 8, 2008, Dr. Abraham examined Powers, and Powers reported "minor pain" in the affected area. Dr. Abraham removed the repetitive motion restriction and determined that Powers was "OK for full duty using left thumb brace." E. Ex. M at 36-37; E. Ex. AA; *see also* D. & O. at 14.

2. Surveillance Video of Powers taken in March 2008

Around May 8, 2008, Company Claims Manager Loomis hired Investigator Jonathon Iguchi to secretly record Powers' activity at his home. Investigator Iguchi recorded Powers' activity on Saturday May 15, Sunday May 16, and Tuesday May 18, 2008. The parties summarized his three days of activity by the following stipulation:

> [Powers] was observed and recorded engaging in various activities, including wrapping a string line, repeatedly lifting 6x6 wood posts, using a shovel, pushing a wheelbarrow, using a hammer, repeatedly lifting a metal trailer ramp, operating a large power drill, pushing and pulling a soil compactor, swinging a sledge hammer and lifting boxes of ammunition.

ALJ Exhibit (ALJ Ex.) 1 at 4 (*see* D. & O. at 2, n.1); *see also* D. & O. at 11-12; Complainant's Exhibit (C. Ex.) 7 (surveillance report). On May 28, 2008, the Company's Director of Track Maintenance informed Powers that his fifty-pound lift restriction could not be accommodated. D. & O. at 13. On May 29, Company Manager Michael Gilliam telephoned Powers to determine the level of his work capability. *See Id*.; *see also* C. Ex. 4. On July 17, 2008, the Company informed Powers it could not accommodate the medical restriction that required use of a thumb brace when needed. E. Ex. V (letter of July 17, 2008).

On July 15, 2008, Claims Manager Loomis gave Company Manager Gilliam the May 2008 surveillance video taken of Powers. D. & O. at 15. After viewing the video, Gilliam determined that Powers had been dishonest about his home activities and failed to adhere to his work restrictions. *Id.*

3. Powers' termination from Union Pacific

On July 24, the Company issued Powers a Notice of Investigation informing him that the Company would conduct an in-house investigation and hearing to determine whether he violated the dishonesty provision of Rule 1.6 of the General Code of Operating Rules from May 15 to May 18, 2008, by "allegedly fail[ing] to stay within [his] medical restrictions." E. Ex. Y. Hearing Officer Gaylord Poff, who worked for the Company, oversaw a hearing on the allegations on July 31, 2008. Following the hearing, the case was transferred to Reviewing

Officer William Meriwether for review of the investigatory record and a determination whether to impose discipline. D. & O. at 17. On September 3, 2008, the Company issued a Notification of Discipline Assessed, notifying Powers that his actions violated Company Rule 1.6, assessing him a Level 5 discipline and terminating his employment. E. Ex. BB; *see also* D. & O. at 17-18.

4. Powers' Union Grievance to the Public Law Board

The Union grieved Powers' termination on October 22, 2008. D. & O. at 18. Following further proceedings, on August 25, 2009, Public Law Board No. 7258 of the National Mediation Board ruled in Powers' favor and ordered his reinstatement and other relief. *Id*. (citing E. Ex. PP).

The Public Law Board determined that the Company failed to prove that Powers engaged in conduct contrary to his medical restriction in violation of Company Rule 1.6 (dishonesty). E. Ex. PP at 4. The Public Law Board stated: "The first incident that Carrier finds fault with is Claimant wrapping a string onto a spool held with his left hand for a total of 27 repetitions during a twenty-second time period. We do not find this to be repetitive motion as intended by Claimant's work restrictions." *Id.* at 5. The Public Law Board further determined:

> Moreover although Claimant was surreptitiously observed hammering and drilling with his right hand, there was no proof that those activities were not within his restrictions. Likewise, Claimant was observed pushing an empty wheel barrow, shoveling, swinging a sledge and guiding a vibrating compactor for a matter of a minute or two or even seconds on each occasion, but Carrier failed to show how that activity constitutes working outside of his medical restrictions. While the Carrier's witness surmised that the activities listed above violated Claimant's repetitive motion restriction, we find it absurd to consider activity lasting less than a minute to fall into the category of repetitive motion as intended by Claimant's physician. While Carrier may disagree with that conclusion, it failed to consult with Claimant's physician to prove that those activities were in violation of the restrictions as intended. The burden here was on the Carrier to prove Claimant's activities violated his work restrictions, a burden it failed to meet.

Id. at 5-6. In addition, the Board determined that "concerning load of ammunition boxes, the Carriers' contract investigator testified that he bought and subsequently weighed the Claimant's heaviest ammunition box and found it to weigh 49.4 pounds, less than Claimant's lifting restriction." *Id.* at 6. "Thus Carrier has failed to prove with probative evidence that Claimant exceeded his medical limitations during the gun show." *Id*. The Board ordered that Powers be reinstated to his former position, compensated for all wages and benefits lost since his removal, and that his personnel record be expunged. *Id.* at 1, 6.

B. ALJ Decision and Order Denying Claim

On July 20 and 21, 2011, an evidentiary hearing was held before a Department of Labor Administrative Law Judge (ALJ) on Powers' FRSA whistleblower complaint. On January 15, 2013, the ALJ issued a Decision and Order Denying Claim.

The ALJ held that Powers engaged in protected activity when he reported a workplace injury in May 2007, and that Union Pacific discharged Powers on September 3, 2008. The ALJ held, however that "[w]here [Powers'] evidence falls short . . . is on the third element of the *prima facie* case: that the protected activity was a contributing factor in the discharge." D. & O. at 19. The ALJ observed that Powers offered no direct evidence of retaliation, and that the Company's "decision-makers each denied that [Powers'] reporting the May 2007 injury contributed to the discharge." *Id.* The ALJ stated: "I therefore turn to the circumstantial case." *Id.*

The ALJ determined that circumstantial evidence failed to satisfy Powers' burden of proving that protected activity contributed to the adverse action he suffered. D. & O. at 19-26. The ALJ, focusing on Company managers involved in Powers' disciplinary process (Meriwether, Taylor, Gilliam, Poff, and Loomis), determined that Powers' injury report neither personally disadvantaged these managers, nor did Powers' report give them a personal reason to retaliate against him. *Id.* at 21. The ALJ further found that "Loomis' motivation in giving Gilliam the video is irrelevant . . . because Loomis played no role in the decision to terminate and only gave Gilliam accurate information." *Id.* at 22.

The ALJ, however, "credit[ed] Gilliam's testimony that he concluded [Powers] had been less than honest when the two talked on the telephone on May 29, 2008." D. & O. at 23. The ALJ stated: "I do not suggest that [Powers] utterly misrepresented his activity level. . . . But he did say he would have to stay away from lifting or carrying joint bars because of pain in his thumb and wrist; that lifting or carrying a spoke driver might be too heavy and require a better grip than he had. . . . And of greatest significance to Gilliam, [Powers] said that he had been doing some gardening, but nothing major." *Id.*. The ALJ observed that unlike the "Public Law Board [which] asked whether [Powers] had in fact complied with his medical restrictions; the question I must decide is whether Gilliam recommended discipline, which Meriwether imposed, because he *believed* Complainant had been dishonest or whether he or Meriwether had some other motive, such as retaliation for Complainant's reporting the injury." *Id.* The ALJ determined that the activity showed on the video is "more extensive than [Powers] described when answering Gilliam's questions." *Id.* at 24. Based on the video, the ALJ determined that "Gilliam could . . . reasonably and fairly have concluded that [Powers] was exceeding his medical restrictions." *Id.*; *see also id.* at 25 (ALJ stating: "I find no reason to doubt that an ordinary manager in Gilliam's position . . . could well conclude that the person was engaged in repetitious movement of his wrist, especially given the other repetitive activities.").

The ALJ further stated, as to Powers lifting the ammunition boxes: "My task is not to determine whether, in fact, [Powers] actually exceeded his restrictions. Rather it is to determine

whether I find credible that the Company officials believed that he did and discharged him for that reason, as opposed to asserting as true a rationale they knew to be false because they wished to retaliate against him." D. & O. at 25. The ALJ concluded that, "even assuming that Company officials took the actual weight of the ammunition boxes into account, they reached their conclusions fairly, honestly, and reasonably. . . . [The video] shows [Powers] doing more than 'nothing major' and show him engaged in work requiring what a person could reasonably call repetitive wrist motion." *Id.*

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the FRSA. Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012). The ARB reviews the ALJ's factual findings for substantial evidence, and conclusions of law de novo. 29 C.F.R. § 1982.110(b); *Kruse v. Norfolk Southern Ry. Co.*, ARB No. 12-081, ALJ No. 2011-FRS-022, slip op. at 3 (ARB Jan. 28, 2014).

DISCUSSION

A. The Federal Rail Safety Act's Statutory and Regulatory Framework

The Federal Rail Safety Act was enacted to "promote safety in every area of railroad operations." 49 U.S.C.A. § 20101. The statute was amended in 2007 to expand anti-retaliation measures and provide enforcement of those measures within the Department of Labor. 49 U.S.C.A. § 20109. "Prior to the amendment of FRSA, whistleblower retaliation complaints by railroad carrier employees were subject to mandatory dispute resolution pursuant to the Railway Labor Act (45 U.S.C. 151 *et seq.*), which included whistleblower proceedings before the National Railroad Adjustment Board, as well as other dispute resolution procedures." 75 Fed. Reg. 53,522-53,523 (Aug. 31, 2010). The 2007 statutory amendment "change[d] the procedures for resolution of such complaints and transfer[ed] the authority to implement the whistleblower provisions for railroad carrier employees to the Secretary of Labor." *Id.*

Under the FRSA, a railroad carrier "may not discharge . . . or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act" involving one of various statutorily protected activities. 49 U.S.C.A. § 20109(a); 29 C.F.R. § 1982.102(b). The protected activities include "notify[ing], or attempt[ing] to notify, the railroad carrier . . . of a work-related personal injury or work-related illness of an employee." 49 U.S.C.A. § 20109(a)(4); *see also* 29 C.F.R. § 1982.102(b)(1)(iv). The FRSA further provides: "A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for . . . following orders or a treatment plan of a treating physician." 49 U.S.C.A. § 20109(c). For purposes of subsection (c), "[t]he term 'discipline' means to bring charges against a person in a disciplinary proceeding, suspend,

terminate, place on probation, or make note of reprimand on an employee's record." *Id.* "An employee who alleges discharge, discipline, or other discrimination in violation of [section 20109](a) or (c) . . . may seek relief . . . with any petition or other request for relief under this section to be initiated by filing a complaint with the Secretary of Labor." 49 U.S.C.A. § 20109(d)(1); 29 C.F.R. § 1982.103(a).

The FRSA incorporates by reference the legal burden of proof standards governing the employee protection provision of the Wendell H. Ford Investment and Reform Act for the 21st Century (AIR 21). *See* 49 U.S.C.A. § 20901(d)(2), referencing 49 U.S.C.A. 42121(b)(2)(B). Under that provision, "[t]he Secretary may determine that a violation . . . has occurred" where the "complainant demonstrates that any behavior" protected by the statute was a "contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C.A. § 42121(b)(2)(B). The complainant's showing must be "demonstrated by a "preponderance of the evidence." 29 C.F.R. § 1982.109(a). Where the complainant meets his or her burden of proof by a preponderance of the evidence, "[r]elief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C.A. § 42121(b)(2)(B)(iv); *see also* 29 C.F.R. § 1982.109(b).

B. The FRSA Burden of Proof

As the Third Circuit noted in *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013), the FRSA incorporates AIR 21's "two-part burden-shifting test." In order to prevail under AIR-21, and thus under the FRSA, a complainant must prove, by a preponderance of evidence,[1] three specific elements: (1) that complainant engaged in a protected activity, as

[1] In *Fordham v. Fannie Mae*, the majority took issue with the Eleventh Circuit's deference in *Dysert v. U.S. Sec'y of Labor*, 105 F.3d 607 (11th Cir. 1997), to the Secretary of Labor's interpretation of the statutory term "demonstrate" as requiring proof by a preponderance of the evidence of contributing factor causation. ARB No. 12-061, ALJ No. 2010-SOX-051, slip op. at 27 n.60 (ARB Oct. 9, 2014). While there is merit to the *Fordham* majority's concern about the Secretary's interpretive analysis in *Dysert*, nevertheless case authority is clear that in the absence of express congressional imposition of proof requirements, the "preponderance of evidence" standard is considered the default burden of proof standard in civil and administrative proceedings, as well as the one contemplated by the APA, 5 U.S.C. § 556(d). *Jones for Jones v. Chater*, 101 F.3d 509, 512 (7th Cir. 1996) (citing *Steadman v. SEC*, 450 U.S. 91, 101 n.21 (1981) and *Director, Office of Workers' Comp., Dep't of Labor v. Greenwich Colleries*, 512 U.S. 267, 277 (1994)). *See also Sea Island Broad. Corp. v. F.C.C.*, 627 F.2d 240, 243 (D.C. Cir. 1980), cert. denied 449 U.S. 834 (1980); *Collins Sec. Corp. v. SEC*, 562 F.2d 820, 823 (D.C. Cir. 1977); 9 J. Wigmore, Evidence § 2498 (3d ed. 1940). *Accord Desert Palace v. Costa*, 539 U.S. 90, 99 (2003) ("Title VII's silence with respect to the type of evidence required in mixed-motive cases also suggests that we should not depart from the '[c]onventional rul[e] of civil litigation [that] generally appl[ies] in Title VII cases.' That rule requires a plaintiff to prove his case 'by a preponderance of the evidence,' using 'direct or circumstantial evidence.'") (citations omitted).

statutorily defined; (2) that he suffered an unfavorable personnel action; and (3) that the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C.A. § 42121(b)(2)(B)(iii); *Hutton v. Union Pacific R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020, slip op. at 5 (ARB May 31, 2013).[2] Once the complainant makes that showing, "the burden shifts to the employer to demonstrate by 'clear and convincing evidence' that the employer would have taken the same unfavorable personnel action in the absence of [the complainant's protected acts]." *Araujo*, 708 F.3d at 157; *Cain v. BNSF Ry. Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019, slip op. at 3 (ARB Sept. 18, 2014). The Department promulgated regulations that adopt this burden shifting standard for FRSA complaints. *See* 29 C.F.R. § 1982.109(a) and (b) ("If the complainant has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected behavior.").

A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams v. Domino's Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011); *Araujo*, 708 F.3d at 158; *Hutton*, ARB No. 11-091, slip op. at 8; *Sievers v. Alaska Airlines*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4 (ARB Jan. 30, 2008). The "contributing factor" standard was employed to remove any requirement on a whistleblower to prove that protected activity was a "'significant', 'motivating', 'substantial', or 'predominant' factor in a personnel action in order to overturn that action." *Araujo*, 708 F.3d at 158 (quoting *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). Consequently, "[a] complainant need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected' activity." *Hutton*, ARB No. 11-091, slip op. at 8 (quoting *Walker v. Am. Airlines, Inc.*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 18 (ARB Mar. 30, 2007)).

The contributing factor element of a complaint may be proven "by direct evidence or indirectly by circumstantial evidence." *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6-7(ARB Feb. 29, 2012). It is well established, in the context of various whistleblower statutes, including the FRSA, that in proving contributing factor "an employee need not provide evidence of motive or animus" by the employer. *Araujo*, 508 F.3d at 158 (internal quotations omitted). *See also Peterson v. Union Pac. R.R. Co.*, ARB No. 13-090,

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[2] This test has at times been identified as one requiring proof by the complainant of four elements, *i.e.*, that (1) the complainant engaged in protected activity; (2) the employer knew that the complainant engaged in the protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *See, e.g., Bechtel v. Admin. Review Bd.*, 710 F.3d 443, 447 (2d Cir. 2013); *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475-476 (5th Cir. 2008); *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051, slip op. at 18 (ARB Oct. 9, 2014).

ALJ No. 2011-FRS-017, slip op. at 3 (ARB Nov. 20, 2014); *Hutton*, ARB No. 11-091, slip op. at 7; *Menendez v. Halliburton, Inc.*, ARB No. 12-026, ALJ No. 2007-SOX-005, slip op. at 13-14 (ARB Mar. 15, 2013) (reissued Mar. 20, 2013); *DeFrancesco*, ARB No. 10-114, slip op. at 6. "Regardless of the official's motives, personnel actions against employees should . . . not be based on protected activities such as whistleblowing." *Marano*, 2 F.3d at 1141 (quoting S. Rep. No. 413, 100th Cong., 2d Sess. 16 (1988)). Quite simply, "any weight given to the protected [activity], either alone or even in combination with other factors, can satisfy the 'contributing factor' test." *Marano*, 2 F.3d at 1140.

The court of appeals' opinion in *Araujo* is instructive in understanding the context for evaluating contributing factor in FRSA cases involving injury reporting. 508 F.3d 152. *Araujo* involved a complaint filed by a railroad employee alleging that his injury report contributed to the discipline he suffered in violation of 49 U.S.C.A. § 20109. The court of appeals, consistent with ARB precedent, expressly rejected Title VII's evidentiary burden procedure in FRSA cases. The court of appeals observed that under Title VII, where "the employer articulate[s] a legitimate, nondiscriminatory reason for its employment action . . . the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer's explanation is pretextual." *Araujo*, 708 F.3d at 158, n.5. This three-part evidentiary burden-shifting framework set out in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), for Title VII plaintiffs, however, was replaced under AIR 21 by the two-part burden-shifting test, *Araujo*, 708 F.3d at 158, n.5, as it has been under other statutes such as the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (Thomson Reuters 2012), that use a similar two-part burden-shifting framework. *See Stone & Webster Eng'g v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) ("Section 5851 is clear and supplies its own free-standing evidentiary framework."). The Third Circuit observed, consistent with *Stone & Webster*, 115 F.3d at 1572, and prior holdings by the ARB, that the AIR 21 burden shifting framework, applicable to the FRSA, is "much easier for a plaintiff to satisfy than [Title VII's] *McDonnell Douglas* standard." *Araujo*, 708 F.3d at 159.

The context for the burden of proof standard employed by FRSA is made clear by the Act's legislative history.[3] The court of appeals in *Stone & Webster* observed that the standard

[3] The 2007 amendment to the FRSA was enacted against a backdrop of findings by Congress of extensive retaliation against injured railway employees, and under-reporting of injuries by the nation's railroad companies, and these congressional findings have been fully noted in federal court and agency precedent. *See, e.g.*, *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 6, n.20; 7, n.21 (ARB Oct. 26, 2012) (citing Reauthorization of the Federal Rail Safety Program: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (Jan. 30, 2007); Fatigue in the Rail Industry: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (Feb. 13, 2007); Rail Safety Legislation: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (May 8, 2007); Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (Oct. 22, 2007)); *Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-011, slip op. at 8-10 (ARB July 25,

for employers is "'tough' because Congress intended for companies in the nuclear industry to face a difficult time defending themselves, due to a history of whistleblower harassment and retaliation in the industry." 115 F.3d at 1572. "The 2007 FRSA amendments must be similarly construed, due to the history surrounding their enactment." *Araujo*, 708 F.3d at 159. The court of appeals in *Araujo* noted the following legislative activity surrounding the FRSA:

> We note, for example, that the House Committee on Transportation and Infrastructure held a hearing to 'examine allegations . . . suggesting that railroad safety management programs sometimes either subtly or overtly intimidate employees from reporting 'on-the-job-injuries.' (Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearings Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (Oct. 22, 2007). As the Majority Staff of the Committee on Transportation and Infrastructure noted to members of the Committee:
>
> > The accuracy of rail safety databases has been heavily criticized in a number of government reports over the years. The primary issue identified in many previous government investigations is that the rail industry has a long history of underreporting incidents and accidents in compliance with Federal regulations. The underreporting of railroad employee injuries has long been a particular problem, and railroad labor organizations have frequently complained that harassment of employees who report injuries is a common railroad management practice.
>
> The report noted that one of the reasons that pressure is put on railroad employees not to report injuries is the compensation system; some railroads base supervisor compensation, in part, on the number of employees under their supervision that report injuries to the Federal Railroad Administration.

Araujo, 708 F.3d at 159 (internal footnotes omitted). The court of appeals "note[d] this history to emphasize that, as it did with other statutes that utilize the 'contributing factor' and 'clear and convincing evidence' burden shifting framework, Congress intended to be protective of plaintiff-employees." *Id.* at 160.

2012) (surveying legislative history of FRSA employee protection provision). *See also Cash v. Norfolk Southern Ry. Co.*, 2015 WL 178065, slip op. at 10 (W.D. Va. Jan. 14, 2015).

C. The ARB's Decision in Fordham v. Fannie Mae

In *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051, slip op. at 20 (ARB Oct. 9, 2014), the ARB addressed the question of what evidence

> is appropriately to be considered at the hearing stage in determining whether a complainant has met his or her burden of proving 'contributing factor' causation by a preponderance of the evidence test? More specifically: Whether the respondent's evidence of legitimate, non-retaliatory reasons for its action may be weighed against the complainant's causation evidence in determining whether the complainant has met his or her burden of proving by a preponderance of the evidence that protected activity was a contributing factor in the adverse personnel action at issue?

Following an extensive examination of pertinent federal court and agency precedent, the ARB in *Fordham* held that legitimate, non-retaliatory reasons for employer action (which must be proven by clear and convincing evidence) may not be weighed against a complainant's showing of contribution (which must be proven by a preponderance of the evidence). *Fordham*, ARB No. 12-061, slip op. at. 20-37. That holding as set forth in *Fordham* is fully adopted herein. Our decision in this case, considered en banc, reaffirms *Fordham's* holding upon revisiting the question of what specific evidence can be weighed by the trier of fact, *i.e.*, the ALJ, in determining whether a complainant has proven that protected activity was a contributing factor in the adverse personnel action at issue and, more pointedly, the extent to which the respondent can disprove a complainant's proof of causation by advancing specific evidence that could also support the respondent's statutorily-prescribed affirmative defense for the adverse action taken. Yet, while the decision in *Fordham* may seem to foreclose consideration of specific evidence that may otherwise support a respondent's affirmative defense, the *Fordham* decision should not be read so narrowly. This decision clarifies *Fordham* on that point. With that in mind, we review the relevant legislative history that supports *Fordham's* holding. In addition, provisions of the Office of Administrative Law Judges' Rules of Practice and Procedure set out the necessary framework in which evidence relevant to a complainant's proof of contributing factor may be analyzed in the administrative proceeding.

1. The legislative history supporting Congress's adoption of the contributing factor element of proof in whistleblower protection statutes, and the Labor Department's regulatory history, makes a clear evidentiary distinction between complainant's burden of proving causation and respondent's burden of proving the statutory affirmative defense

The FRSA's whistleblower protection provisions, 49 U.S.C.A. § 20109(d)(2)(A)(i), incorporate the AIR 21 legal burdens of proof, which in turn are modeled after the burden of proof provisions of the 1992 ERA amendments and the Whistleblower Protection Act (WPA) *as*

originally adopted in 1989.[4] The legislative history accompanying the 1992 ERA amendments explains that by adoption of the "contributing factor" and "clear and convincing evidence" burdens of proof, Congress sought to replace the burdens of proof enunciated in *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977).[5] This ERA expression of intent is identical to that found in the legislative history accompanying the 1989 adoption of the Whistleblower Protection Act, which similarly referred to the intended purpose of supplanting *Mt. Healthy's* burdens of proof requirements.[6]

Under *Mt. Healthy*, if the trier of fact concludes that the complainant has proven by a preponderance of the evidence that the protected conduct was a motivating factor in the employer's action (the "mixed motive" case), the employer, to avoid liability, has the burden of proving by a preponderance of the evidence that it would have reached the same decision or taken the same action in the absence of the protected activity. *Mt. Healthy*, 429 U.S. at 287; *Consolidated Edison Co. of N.Y. v. Donovan*, 673 F.2d 61, 63 (2d Cir. 1982). The Title VII/*Mt. Healthy* burden of proof requirements are applicable to whistleblower claims under the six environmental whistleblower statutes pursuant to 29 C.F.R. § 24.109(b)(2), which provides:

> In cases arising under the six environmental statutes listed in § 24.100(a), a determination that a violation has occurred may only be made if the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint. If the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint, relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity.

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[4] As the ARB has observed, the AIR 21 and ERA burden of proof provisions are ultimately modeled after the WPA's burden of proof provisions as originally adopted. *See Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 24, n.124 (ARB Sept. 30, 2011); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 7, n.15 (ARB Sept. 30, 2003).

[5] 138 Cong. Rec. H11,409; H11,444 (daily ed. Oct. 5, 1992).

[6] 135 Cong. Rec. S2784 (Mar. 16, 1989) ("With respect to the agency's affirmative defense, it is our intention to codify the test set out by the Supreme Court in the case of *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977). The only change made by this bill as to that defense is to increase the level of proof which an agency must offer from 'preponderance of the evidence' to 'clear and convincing evidence.'"); *see also* 234 Cong. Rec. H9321 (Oct. 3, 1988).

The Department of Labor's regulatory history accompanying the foregoing, found at 76 Fed. Reg. 2808, 2811-2812 (Jan. 18, 2011), explains that under the *McDonnell Douglas*[7]*-Mt. Healthy* Title VII standards embraced by section 24.109(b)(2), "a complainant may prove retaliation either by showing that the respondent took the adverse action because of ["but for"] the complainant's protected activity or by showing that retaliation was a motivating factor in the adverse action (i.e., a "mixed-motive analysis"). . . . If the complainant proves by a preponderance of the evidence that the respondent acted at least in part for prohibited reasons, the burden shifts to the respondent to prove by a preponderance of the evidence, that it would have reached the same decision even in the absence of protected activity." (internal citations omitted).

The differences (and similarities) between the *McDonnell Douglas-Mt. Healthy* Title VII burdens of proof requirements and the "contributing factor"/"clear and convincing evidence" proof requirements of the FRSA (as well as under AIR 21, the ERA, *etc*.) are readily apparent when comparing the provisions of 29 C.F.R. § 24.109(b)(2) with the FRSA regulatory provisions regarding burdens of proof found at 29 C.F.R .§ 1982.109(a), (b):

> (a) . . . A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.
>
> (b) If the complainant has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected behavior.

In explanation of the FRSA burdens of proof provision, the Department's regulatory history found at 75 Fed. Reg. 53,522; 53,524-25 (Aug. 31, 2010) states: "In proving that protected activity was a contributing factor in the adverse action, 'a complainant need not necessarily prove that the respondent's articulated reason was a pretext in order to prevail,' because *a complainant alternatively can prevail by showing that the respondent's 'reason, while true, is only one of the reasons for its conduct,' and that another reason was the complainant's protected activity.* . . . Once the complainant establishes that the protected activity was a contributing factor in the adverse action, the employer can escape liability only by proving by clear and convincing evidence that it would have reached the same decision even in the absence of the prohibited rationale." (internal citations omitted) (emphasis added).[8]

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[7] See *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

[8] The ERA legislative history also makes clear (contrary to the assertion of the dissent in *Fordham*, ARB No. 12-061, slip op. at 45) that a showing of "contributing factor" causation does not, in and of itself, automatically result in a finding of a violation of the whistleblower provisions. The legislative history accompanying the ERA's 1992 amendments explains Congress's choice of

The Whistleblower Protection Act's burden of proof provisions, as originally adopted in 1989, are strikingly similar to the AIR 21 burden of proof provisions and the foregoing FRSA regulation. The 1989 enactment read in pertinent part, at 5 U.S.C.A. § 1221(e):

> (1) [I]n any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee . . . has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against such employee. . . .
> (2) Corrective action under paragraph (1) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

The legislative history pertaining to the foregoing, which accompanied the 1994 amendments to the WPA,[9] explained Congress's intent in distinguishing a claimant's initial burden of proving "contributing factor" causation from a respondent's burden of proving any affirmative defense that it might have:

> [T]he Whistleblower Protection Act creates a *clear division* between a whistleblower's prima facie case, which must be proven by a preponderance of the evidence, and an agency's affirmative

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the word "may" within the statutory provision ,"[t]he Secretary may determine that a violation . . . has occurred" upon proof that protected activity was a "contributing factor" in the alleged unfavorable personnel action: "At the administrative law judge hearing . . . [o]nce the complainant makes a *prima facie* showing that protected activity contributed to the unfavorable personnel action alleged in the complaint, a violation is established *unless* the employer establishes by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." 138 Cong. Rec. H-11,409; H-11,444 (daily ed. Oct. 5, 1992) (emphasis added). This expression of Congressional intent is consistent with federal case law holding that choice of the statutory term "may" "has never been held to uniformly mean shall." *Solenoid Devices, Inc. v. Ledex, Inc.*, 375 F.2d 444 (9th Cir. 1967); *Sani-Top v. North Am. Aviation*, 261 F.2d 342 (9th Cir. 1958). "Where a provision contains both the word 'shall' and 'may,' it is presumed that the lawmaker intended to distinguish between them, 'shall' being construed as mandatory and 'may' as permissive." *Perez-Farias v. Global Horizons, Inc.*, 447 Fed. Appx. 843 (9th Cir. 2011).

[9] The 1994 amendment to the WPA merely *clarified* what Congress had intended with the 1989 Act. *Powers v. Navy*, 69 MSPR 150, 155 n.6 (1995) ("The legislative history behind the amended section 1221(e)(1)(A), (B) points out that the added provisions specifying the knowledge/timing test merely express what Congress had intended in enacting the pre-amendment section 1221(e)(1).").

> defense, which must be proven by clear and convincing evidence. . . . *Congress intends for a[n] agency's evidence of reasons why it may have acted (other than retaliation) to be presented as part of the affirmative defense and subject to the higher burden of proof.*

Senate Report No. 103-358, at 6-7 (1994) (emphasis added).[10]

Consistent with this legislative history, in *Kewley v. Dep't of Health & Human Servs.*, 153 F.3d 1357 (Fed. Cir. 1998),[11] a case arising under the WPA, the Federal Circuit held that the

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[10] The dissent in *Fordham*, ARB No. 12-061, slip op. at 46-47, questioned the relevance of the WPA's legislative history to the interpretation of whistleblower statutes over which the ARB has jurisdiction. However, in at least thirty decisions (in addition to *Fordham*) the ARB has embraced WPA's legislative history for interpretive guidance through the Board's citation to and reliance upon the Federal Circuit's interpretation in *Marano* of the WPA's "contributing factor" provision, at times quoting the WPA legislative history that *Marano* cites. *See, e.g.*, *Timmons v. CRST Dedicated Servs.*, ARB No. 14-051, ALJ No. 2014-STA-009 (ARB Sept. 29, 2014); *Blackie v. Pierce Transp.*, ARB No. 13-065, ALJ No. 2011-STA-055 (ARB June 17, 2014); *White v. Action Expediting*, ARB No. 13-015, ALJ No. 2011-STA-011 (ARB June 6, 2014); *Beatty*, ARB No. 13-039 (ARB May 13, 2014); *Speegle v. Stone & Webster*, ARB No. 13-074, ALJ No. 2005-ERA-006 (ARB Apr. 25, 2014); *Joyner v. Georgia-Pacific Gypsum*, ARB No. 12-028, ALJ No. 2010-SWD-001 (ARB Apr. 25, 2014); *Hoffman v. Nextera Energy*, ARB No. 12-062, ALJ No. 2010-ERA-011 (ARB Dec. 17, 2013); *Hutton*, ARB No. 11-091 (ARB May 31, 2013); *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024 (ARB Apr. 25, 2013); *Rudolph v. Nat'l R.R. Passenger Corp.*, ARB No. 11-037, ALJ No. 2009-FRS-015 (ARB Mar. 29, 2013); *Menendez v. Halliburton*, ARB No. 12-026, ALJ No. 2007-SOX-005 (ARB Mar. 20, 2013); *Speegle v. Stone & Webster Constr.*, ARB No. 11-029A, ALJ No. 2005-ERA-006 (ARB Jan. 31, 2013); *Smith v. Duke Energy Carolinas & Atl. Grp.*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012); *Zinn v. American Commercial Lines*, ARB No. 10-029, ALJ No. 2009-SOX-025 (ARB May 28, 2012); *Defrancesco*, ARB No. 10-114 (ARB Feb. 29, 2012); *Bechtel v. Competitive Techs.*, ARB No. 09-052, ALJ No. 2005-SOX-033 (ARB Sept. 30, 2011); *Menendez*, ARB No. 09-002 (ARB Sept. 13, 2011); *Furland v. American Airlines*, ARB No. 09-130, ALJ No. 2008-AIR-011 (ARB July 27, 2011); *Bobreski v. Givoo Consultants*, ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 24, 2011); *Hoffman v. Netjets Aviation*, ARB No. 09-021, ALJ No. 2007-AIR-007 (ARB Mar. 24, 2011); *Douglas v. Skywest*, ARB No. 08-070, ALJ No. 2006-AIR-014 (ARB Sept. 30, 2009); *Evans v. Miami Valley Hosp.*, ARB No. 07-118, ALJ No. 2006-AIR-022 (ARB June 30, 2009); *Rocha v. AHR Util. Corp.*, ARB No. 07-112, ALJ No. 2006-PSI-001 (ARB June 25, 2009); *Leak v. Dominion Res. Servs.*, ARB No. 07-043, ALJ No. 2006-SOX-012 (ARB May 29, 2009); *Florek v. Eastern Air Cent.*, ARB No. 07-113, ALJ No. 2006-AIR-009 (ARB May 21, 2009); *Clark v. Airborne*, ARB No. 06-082, ALJ No. 2005-AIR-027 (ARB Mar. 31, 2008); Sievers, ARB No. 05-109 (ARB Jan. 30, 2008); *Allen v. Steward Enters.*, ARB No. 06-081, ALJ No. 2004-SOX-060 (ARB July 27, 2006); *Henrich v. EcoLab*, ARB No. 05-030, ALJ No. 2004-SOX-051 (ARB June 28, 2006); *Klopfenstein v. PCC Flow Tech. Holdings*, ARB No. 04-149, ALJ No. 2004-SOX-011 (ARB May 31, 2006).

ALJ committed reversible error by relying upon the respondent's affirmative defense evidence of legitimate, non-retaliatory reasons for its action in concluding that the claimant failed to prove "contributing factor" causation by a preponderance of the evidence. *Id.* at 1362-1364. Citing WPA's legislative history, the court rejected the respondent's argument that its countervailing evidence of non-retaliatory reasons for why it acted as it did negated the complainant's showing at the "contributing factor" causation stage. The court of appeals held that it was error for the ALJ to weigh the respondent's evidence supporting a non-retaliatory basis for its action against the complainant's causation evidence in determining that the protected activity was not a contributing factor. "Evidence such as responsiveness to the suggestions in a protected disclosure or lack of animus against petitioner may form part of [the respondent's] rebuttal case. Such evidence is not, however, relevant to a [claimant's] prima facie case under section 1221(e)(1)(A) and (B)." *Id*. at 1363. "[B]ecause the agency's affirmative defense under section 1221(e)(2) requires a higher burden of proof, we hold that the AJ's causation finding that Ms. Kewley's protected disclosure was not 'a contributing factor' was legally erroneous as contrary to the statutory command as correctly construed." *Id*. at 1364.

The import that evidence relevant to contribution be analyzed in the context of complainant's proof of his/her case is illustrated in *Carey v. Dep't of Veterans Affairs*, 93 MSPR 676, 681 (2003), where the Merit Systems Protection Board states that once the complainant proves contribution through circumstantial evidence, "an ALJ must find that the [complainant] has shown that his whistleblowing was a contributing factor in the personnel action at issue, *even if after a complete analysis of all of the evidence a reasonable factfinder*" would determine that there was evidence that the employer had legitimate business reasons for the adverse action taken. *Id.* at 681-682 (emphasis added); *accord Armstrong v. Dep't of Justice,* 107 MSPR 375, 386 (2007); *Rubendall v. Health & Human Servs.,* 101 M.S.P.R. 599, ¶ 12 (2006); *Gebhardt v. Air Force,* 99 M.S.P.R. 49, 54 (2005).

2. The OALJ's Rules of Practice and Procedure set out the framework for complainant to prove to the trier-of-fact the elements of his or her claim

The Rules of Practice and Procedure for the Department of Labor's Office of Administrative Law Judges (OALJ Rules), 29 C.F.R. Part 18, set out the procedural and evidentiary rules for administering adjudicatory proceedings. Subpart A codifies the General Rules applicable to administrative adjudicatory proceedings held before Department of Labor ALJs, provided the OALJ rules are not inconsistent with "a rule of special application as provided by statute, executive order, or regulation," in which case the latter is controlling. 29 C.F.R. § 18.1(a). Where "any situation [is] not provided for or controlled by [the OALJ Rules], or by any statute, executive order or regulation . . . the Rules of Civil Procedure for the District Court of the United States shall be applied." *Id*. Subpart A further states that in any

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[11] ARB decisions (in addition to *Fordham*) citing *Kewley* for interpretive guidance have included *Tablas*, ARB No. 11-050 (ARB Apr. 25, 2013); *Speegle*, ARB No. 11-029A (ARB Jan. 31, 2013); and *Smith*, ARB No. 11-003 (ARB June 20, 2012).

administrative hearing, the ALJ has "all powers necessary to the conduct of fair and impartial hearings, including, but not limited to" specific powers set out in 29 C.F.R. § 18.29. Unless limited by the ALJ, the "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding . . . ." 29 C.F.R. § 18.14(a). This scope of discovery permits the taking of depositions (29 C.F.R. § 18.22) that can be used at the administrative hearing "by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness." 29 C.F.R. § 18.23(a).

Subpart B of the OALJ Rules prescribes the Rules of Evidence that govern formal adversarial adjudications of the United States Department of Labor conducted before a presiding officer that is required by, inter alia, the Administrative Procedure Act, 5 U.S.C.A. §§ 554, 556 and 557 (West 1996). *See* 29 C.F.R. Subpart B, § 18.101. The purpose of the OALJ Rules of Evidence is to "secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." 29 C.F.R. § 18.102. Under the OALJ Rules, "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 29 C.F.R. § 18.401. The Rules provide:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, pursuant to executive order, by these rules, or by other rules or regulations prescribed by the administrative agency pursuant to statutory authority. Evidence which is not relevant is not admissible.

29 C.F.R. § 18.402. Relevant evidence may be excluded if, inter alia, "its probative value is substantially outweighed by the danger of confusion of issues." 29 C.F.R. § 18.403. Evidence may be taken in administrative proceedings by competent witness testimony. 29 C.F.R. § 18.601. The ALJ Rules on Evidence authorize the ALJ to exercise reasonable control over the mode and order of interrogation and presentation of evidence, and that authority includes "[m]ak[ing] the interrogation and presentation effective for the ascertainment of the truth." 29 C.F.R. § 18.611(a)(1). The Rules permit cross-examination of witnesses that is "limited to the subject matter of the direct examination and matters affecting the credibility of the witness." 18 C.F.R. § 18.611(b).

As shown, the holding in *Fordham*, in which the ARB distinguished the evidence relevant to the determination of whether a complainant meets his/her burden of proving contributing factor causation from an employer's affirmative defense evidence is consistent with both the OALJ Rules requiring deference to rules "of special application as provided by statute, executive order, or regulation" (29 C.F.R. § 18.1(a)), and the relevance of admissible evidence as prescribed statute or "other rules or regulations prescribed . . . pursuant to statutory authority" (29 C.F.R. § 18.402).

3. Fordham, as fully adopted herein, properly requires that in an administrative hearing, an FRSA complainant has the burden of proving solely the elements of his or her claim, and the trier-of-fact bears the responsibility to ensure that specific evidence advanced at hearing to rebut an element of complainant's claim be relevant to that showing

A FRSA complainant may prove a violation of the Act by demonstrating by a "preponderance of the evidence" the statutorily prescribed elements of (1) protected activity, (2) adverse action, and (3) that the protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C.A. § 42121(b)(2)(B)(i); *see also* 29 C.F.R. § 1982.109(a). The parties, the Assistant Secretary, and amici appear to agree that all of the evidence admitted at the hearing is available to the ALJ in assessing whether the complainant meets his or her burden of proving the requisite elements that the FRSA requires. *See, e.g.*, Assistant Secretary's Brief at 18-19 and n.9 (citing Model Jury Instructions and stating that "when applying the preponderance of the evidence standard in civil cases, juries must consider all relevant evidence regardless of which party presented it."). This principle may also be drawn from a general reading of the Administrative Procedure Act, 5 U.S.C.A. § 556(e), which states: "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title . . . ." "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts" 5 U.S.C.A. § 556(d). The ALJ, however, has authority to exclude evidence that is "irrelevant, immaterial" (5 U.S.C.A. § 556(d)), and where "its probative value is substantially outweighed by the danger of confusion of issues." 29 C.F.R. § 18.403.

While the entire record, including witness testimony (direct and cross examination) and the admitted documentary evidence, constitutes the administrative record for purposes of decision (5 U.S.C.A. § 556(e)), it does not mean that just any item of evidence can be utilized for purposes of determining whether the complainant has met his or her burden of proof under the Act. For purposes of assessing whether the complainant has met his or her burden of proof, the evidence must be *relevant* to the element that is sought to be proven. *See, e.g.*, 5 Am. Jur. Trials 505 (Order of Proof at Trial Stage, Sec. 12. Plaintiff's case) ("In meeting this burden, the outline of the factual proof must necessarily be coordinated with the outline of the legal requirements . . . . [The legal factors] in the plaintiff's case must be proved by admissible evidence."). Under the OALJ Rules, "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 29 C.F.R. § 18.401. In the context of assessing whether a complainant has met his or her burden of proof, the trier of fact must assess the evidence in the context of the legal elements that complainant is required to prove, *e.g.*, protected activity, adverse action, and contribution. Conversely, where a respondent seeks to rebut the complainant's showing, any evidence advanced by respondent (on cross examination of witnesses or utilization of direct testimony and documentary evidence) must be relevant to the three elements that complainant is legally required to prove and, at the same time, subject to

proof by a preponderance of the evidence. This reasoning does not undermine the preponderance of evidence standard that ALJs employ for determining whether a complainant has met his or her showing. It does, however, put in context how items of evidence are to be used in assessing whether a complainant has proven his or her case to the trier of fact.

Contrary to the dissent's assertion in *Fordham* that the majority's holding in that case precluded consideration by an ALJ of all relevant evidence in deciding the question of contributing factor causation (see *Fordham*, slip op. at 37), the majority in *Fordham* only addressed the question of what evidence could properly be weighed under the "preponderance of the evidence" standard in analyzing complainant's proof of contributing factor causation. *Fordham* specifically addressed the question as to evidence that may be weighed to demonstrate the contributing factor element under the preponderance of evidence standard. The majority decision in *Fordham* stated that its ruling "does not preclude an ALJ's consideration, under the preponderance of the evidence test, of respondent's evidence directed at three of the four basic elements required to be proven by a whistleblower in order to prevail,"[12] explaining that "[i]t is only with regard to the fourth element, of whether the complainant's protected activity was a contributing factor in the unfavorable action, that the statutory distinction is drawn." *Fordham*, ARB No. 12-061, slip op. at 35, n.84. The distinction should not, however, be interpreted to foreclose the employer from advancing evidence that is relevant to the employee's showing of contribution. It merely recognizes that the relevancy of evidence to a complainant's proof of contribution is legally distinguishable from a respondent's evidence in support of the statutory defense that it would have taken the personnel action at issue absent the protected activity, which must be proven by clear and convincing evidence. Certainly, analyzing specific evidence in the context of the AIR 21 burden shifting framework "requires a 'fact-intensive' analysis." *Franchini v. Argonne Nat'l Lab*, ARB No. 11-006, ALJ No. 2009-ERA-014), slip op. at 10 (ARB Sept. 26, 2012).

While, as *Fordham* explains, the legal arguments advanced by a respondent in support of proving the statutory affirmative defense are different from defending against a complainant's proof of contributing factor causation, there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor causation *as long as the evidence is relevant to that element of proof*. 29 C.F.R. § 18.401. Thus, the *Fordham* majority properly acknowledged that "an ALJ may consider an employer's evidence challenging whether the complainant's actions were protected or whether the employer's action constituted an adverse action, as well the credibility of the complainant's causation evidence." *Fordham*, slip op at 23.

A number of ARB decisions have recognized this *relevancy* distinction without having expressly articulated its reasoning. To be sure, where there is little or no evidence that the protected activity has any connection to the adverse action, objective evidence of employer

[12] The three elements referred to in the cited passage from *Fordham* include: whether the complainant engaged in protected activity, whether the employer knew that complainant engaged in the protected activity, and whether the complainant suffered an unfavorable personnel action. *Fordham*, slip op. at 35, n.84.

conduct may be relevant for showing that protected activity played no role whatsoever in the adverse action. For example, in *Zurcher v. Southern Air, Inc.*, ARB No. 11-002, ALJ No. 2009-AIR-007 (ARB June 27, 2012), the ARB affirmed an ALJ's ruling that complainant failed to prove that protected activity contributed to his termination. In this case, complainant had engaged in several acts protected by AIR 21. The Company, however, "strictly prohibited" "[t]he use of profanity or abusive language." *Zurcher*, ARB No. 11-002, slip op. at 3 (quoting RX7 at 112-113). The Company Handbook stated that the "use of profanity and abusive language . . . [was] strictly prohibited and will subject the individual involved to immediate disciplinary action up to and including termination." *Id*. at 3, 5 (quoting RX 7 at 112-113). In *Zurcher*, complainant had frequently used profane language in the workplace and had been warned to modify his behavior but failed to do so. *Id*. at 2-3; see also *Zurcher*, ALJ No. 2009-AIR-007, slip op. at 15 (Sept. 29. 2010) (citing RX 22 at 163 ("Zurcher did not modify his behavior as he promised Cline; in fact his behavior became more offensive.")). Zurcher's employment was terminated after he used profanity directed at a secretary in a conversation that had no connection to his protected acts. *Zurcher*, ARB No. 11-002, slip op. at 3, 6. In this case, Zurcher's circumstantial evidence of contribution rested solely on the temporal proximity of his protected activity to the adverse action. There was no evidence that the individual responsible for terminating Zurcher's employment knew of the protected activity or that individuals in the Company aware of the protected activity influenced the termination decision. *Id*. at 6. Thus, while temporal proximity *alone* may at times be sufficient to satisfy the contributing factor element,[13] the ruling in *Zurcher* is consistent with ARB precedent that has declined to find "contributing factor" based on temporal proximity *alone* where relevant, objective evidence disproves that element of complainant's case.[14]

A more difficult case is where the adverse action is closely intertwined with the protected activity, where evidence advanced by the complainant to support the contributing factor element of his or her claim may prove more persuasive against rebuttal evidence advanced by respondent to disprove contribution. For example, *Tablas*, ARB No. 11-050 (ARB Apr. 25, 2013), involved a truck driver whose employment was terminated after he complained about faulty air lines on his vehicle and failed to complete a driving assignment because of inclement weather conditions. The ALJ determined that complainant failed to prove either protected activity under the Surface Transportation Assistance Act (STAA) of 1982, as amended, 42 U.S.C.A. § 31105 (Thomson/West Supp. 2012) , or that protected activity contributed to the adverse action he suffered. In determining that complainant failed to prove contributing factor causation, the ALJ stated: "[C]ompany officials who testified at the hearing 'uniformly stated that there were no adverse consequences to the Complainant's complaints on this issue; to the contrary, they stated,

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[13] *Lockheed Martin v. Admin. Review Bd.*, 717 F.3d 1121, 1136 (10th Cir. 2013); *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2009). *Accord Clemmons v. Ameristar Airways*, ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 6 (ARB May 26, 2010).

[14] *See, e.g., Spelson v. United Express*, ARB No. 09-063, ALJ No. 2008-STA-039, slip op. at 3, n.3 (ARB Feb. 23, 2011); *Robinson v. Northwest Airlines*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005).

they were appreciative of his actions . . . [but that] Tablas was "terminated from employment chiefly, if not solely, because he refused to complete the Bellingham run." *Tablas*, ARB No. 11-050, slip op. at 4; see also *Tablas*, ALJ No. 2010-STA-024, slip op. at 27.

On petition for review, the ARB reversed and remanded. The ARB determined that the ALJ erred in holding that the complainant's report to his Dispatcher that his truck's air lines were not operating properly was not protected activity under STAA. *Tablas*, ARB No. 11-050, slip op. at 6-8. Based on that error, the ARB held that the ALJ also erred in determining that the complainant failed to prove that protected activity contributed to his termination. *Id.* at 8-9. While the record in this case contained testimony by a Company manager that Tablas was fired because he refused to drive in bad weather (*id.* at 9), that witness testimony was insufficient to rebut evidence (witness testimony by Tablas and the Dispatcher, and documentary evidence of the Driver Vehicle Report) supporting complainant's proof of the elements of his STAA claim. The ARB stated that Tablas's refusal to drive, "which stemmed in part from his concerns about the weather, was also 'inextricably intertwined' with his [protected] activity (reporting the faulty air lines)." *Id*. Given that the employer's evidence for its action (employer witness testimony that Tablas "failed to complete the Bellingham run") was inextricably intertwined with the complainant's evidence of contribution, such that the competing evidence could not be separated, the ARB held that Tablas's protected activity was a contributing factor in the decision to terminate his employment. *Id*. *See also Marano*, 2 F.3d at 1143; *Pogue v. Dep't of Labor*, 940 F.2d 1287, 1291 (9th Cir. 1991); *Smith*, ARB No. 11-003 slip op. at 8 (ARB June 20, 2012); *Abdur-Rahman v. Dekalb Cnty.*, ARB No. 08-003; ALJ No. 2006-WPC-002, slip op. at 12, 15 (ARB May 18, 2010). Where the trier of fact determines that the protected acts are closely intertwined with the adverse action taken, the respondent "bears the risk that the influence of legal and illegal motives cannot be separated." *Abdur-Rahman*, ARB No. 08-003, slip op. at 12. *Accord Pogue*, 940 F.2d at 1291 ("It is well-settled that '[i]n dual motive cases, the employer bears the risk that the influence of legal and illegal motives cannot be separated.'").

The inherent tension of resolving the contributing factor element is clear in FRSA cases where a complainant alleges a violation based on reporting a work injury (49 U.S.C.A. § 20109(a)(4)), or "following orders or a treatment plan of a treating physician" (49 U.S.C.A. § 20109(c)). Certainly, in these cases, injured workers may be unable to return to work at full capacity for days, months, or in more extreme cases even years due to ongoing medical concerns that stem from the workplace injury. However, that tension is not for the administrative agency to resolve by departing from the elements of proof that Congress requires, and that the Department of Labor administers, under the FRSA employee protection statute. By adopting the AIR 21 standards in the FRSA, 49 U.S.C.A. § 20109(d)(2), Congress appropriated the well-established "contributing factor" standard that requires that railroad workers show no more than that the protected activity was "any factor, which alone or in combination with other factors, tends to affect in *any way* the outcome of the decision." *Araujo*, 708 F.3d at 158 (quoting *Allen*, 514 F.3d at 476, n.3 (emphasis added), and *Marano*, 2 F.3d at 1140)). *See also Cash*, 2015 WL 178065, slip op. at 10. The standard for FRSA complainants is underscored by congressional findings of worker abuse in the railroad industry, including "a history of retaliation against injured railway employees and the under-reporting of injuries by the nation's railroad

companies." *Cash*, 2015 WL 178065, slip op. at 9-10 (citing *Araujo*, 708 F.3d at 159). The FRSA legislative changes were intended to "enhance the oversight measures that improve transparency and accountability of the railroad carriers" with "[t]he intent of [the employment protection provision] being to ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers." H.R. Rep. No. 110-259 at 348 (2007), Conf. Rep., 2007 U.S.C.C.A.N. 119, 181; *see also Santiago v. Metro-North Commuter R.R. Co.*, ARB No. 10-147, ALJ No. 2009-FRS-011, slip op. at 12-14 (ARB July 25, 2012).

Finally, in assessing the persuasiveness of a complainant's evidentiary showing, it is clear that specific documentary and testimonial evidence can serve more than one purpose. For example, in *Speegle*, ARB No. 11-029A (ARB Jan. 31, 2013), testimony by complainant that he used profanity to complain about safety and directed that profanity at Company managers at a staff meeting was relevant evidence that substantiated complainant's proof of contribution. On remand, however, the same testimonial evidence (witness testimony at the hearing that complainant's profane language accompanied complainant's safety complaints), along with testimony by managers was advanced by respondent to prove an affirmative defense for the adverse action taken.

Speegle involved a complaint by a nuclear plant worker alleging that his termination violated the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (Thomson Reuters 2012). Complainant Speegle testified at the evidentiary hearing that he used profanity at a staff meeting in the context of complaining about safety. *Speegle*, ARB No. 11-029A, slip op. at 16 (quoting Hearing Transcript at 164-165 (testimony of James Speegle)). The ALJ determined that this evidence, and other witness testimony of Company managers, rebutted complainant's showing of contribution which was based on the temporal proximity of the protected acts (the staff meeting on May 22, 2008) and the adverse action (complainant's termination on May 24, 2008). *Id.* at 37-38 (ALJ holding that Speegle's "comment at the May 22 meeting was an intervening event of significant weight. Respondent reasonably could have terminated Speegle for the legitimate reason of insubordination arising out of this comment."). On further administrative review, the ARB reversed the ALJ's determination on contributing factor, and held that "there is no evidence of unprofessional conduct or insubordinate conduct by Speegle that is unrelated to his protected activity." *Speegle*, ARB No. 11-029-A, slip op. at 10-11. The ARB remanded the case to the ALJ to determine whether respondent could show by clear and convincing evidence that it would have taken the same adverse action absent complainant's protected acts. The ALJ subsequently determined, based in part on the same testimony proffered by Speegle at the hearing and additional testimony of company managers, that respondent proved by clear and convincing evidence that the same adverse action would have been taken absent any protected acts. *Speegle*, ALJ No. 2005-ERA-006, slip op. at 5-6 (July 9, 2014). The ARB affirmed that determination, stating: "Though not the strongest case for clear and convincing evidence, the ALJ provided sufficient rationale for dismissing this case after considering the three factors in determining whether S & W proved by 'clear and convincing evidence' that it 'would have' taken the same adverse action in the

absence of' Speegle's protected activity." *Speegle v. Stone & Webster Const., Inc.*, ARB No. 14-079, ALJ No. 2005-ERA-006, slip op. at 6 (Dec. 15, 2014).[15]

4. Since complainant's burden of proof does not require a showing of retaliatory motive by the employer, evidence that employer lacked a retaliatory motive for the adverse action taken does not rebut complainant's evidence supporting contributing factor

It is well established that to prove contributing factor under the FRSA and whistleblower statutes that adopt the AIR 21 standard of proof, "complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action." *Timmons*, ARB No. 14-051, slip op. at 6 (ARB Sept. 29, 2014) (citing *Araujo*, 708 F.3d at 158; *Marano*, 2 F.3d at 1141). *See also DeFrancesco*, ARB No. 10-114, slip op. at 6; *Hutton*, ARB No. 11-091, slip op. at 7, n.18. Congress has indeed made clear in the context of whistleblowing legislation that "*[r]egardless of the official's motives*, personnel actions against employees should . . . not be based on protected activities such as whistleblowing." *Marano*, 2 F.3d at 1141 (quoting S. Rep. No. 413, 100th Cong., 2d Sess. 16 (1988)). Since proof of contributing factor does not require evidence of retaliatory motive, long understood to be a very difficult element of proof for complainants generally,[16] it stands to

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[15] *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037 (ARB Oct. 17, 2012), is another example in which an employer's evidence may serve more than one purpose. Indeed, *Abbs* demonstrates how close the relationship can be as to evidence demonstrating the contributing factor element at the preponderance of evidence showing, and that can alternatively support an employer's affirmative defense at the clear and convincing evidentiary showing. In *Abbs*, the ALJ ruled on summary decision that complainant failed to prove the contributing factor element of his claim based on undisputed evidence that he falsified log books – a work task unrelated to his claim of protected activity – and undisputed evidence that he was terminated because he knowingly entered false information on his driving log and pay sheet. *Abbs*, ARB No. 12-016, slip op. at 4, 6. Complainant did not dispute that he falsified his log book and payroll record. *Id.* at 6. In *Abbs*, the intervening event upon which the employer relied in terminating the complainant's employment was held to be sufficiently compelling to break any inference of causation due to temporal proximity. At the same time, the ARB noted that the employer's evidence would also constitute "clear and convincing evidence that [the employer] would have taken the same adverse action in the absence of the protected activity." *Id.* at 6, n.5.

[16] *See generally* Kohn, "Proving Motive In Whistleblower Cases," 38-MAR JTLA TRIAL 18 (Mar. 2, 2002) ("Proof of intent is usually the most difficult aspect of a case. Testimony that contains a direct admission of retaliatory motive rarely exists. Lawyers who represent whistleblowers must carefully review both the direct and circumstantial factual evidence of motive."); Estlund, C., "Wrongful Discharge Protections In An At-Will World," 74 TEX. L. REV. 1655, 1670 (June 1996) ("Although the law protects imperfect as well as perfect employees from discrimination and retaliation, the burden of proving the bad motive may be overwhelming for the former. The problems of proof are further magnified to the extent that employers and their supervisors are reasonably well-educated about the employment laws, reasonably cautious in

reason that complainant has no obligation to *disprove* evidence of a subjective non-retaliatory motive in the context of advancing evidence supporting a showing of contributing factor. *See generally Kewley*, 153 F.3d at 1363 ("Evidence such as . . . lack of animus against petitioner may form part of such a rebuttal case. Such evidence is not, however, relevant to a petitioner's prima facie case."). For example, in *DeFrancesco*, ARB No. 10-114, slip op. at 6, n.17, the ALJ dismissed the FRSA complaint because there was "insufficient evidence to establish that the decision to commence disciplinary charges against Complainant was motivated by Complainant's reporting of his injury." The ARB reversed, and held:

> [Complainant] is not required to show retaliatory animus (or motivation or intent) to prove that his protected activity contributed to Union's adverse action. Rather, [complainant] must prove that the reporting of his injury was a *contributing factor* to the suspension. By focusing on the motivation of [Company managers], the ALJ imposed on [complainant] an incorrect burden of proof, thus requiring remand.

DeFrancesco, ARB No. 10-114, slip op. at 6.

The holding in *DeFrancesco*, drawing from precedent and the statutory text of AIR 21, makes clear that imposing on complainant a heightened obligation to proffer evidence that directly contradicts evidence of non-retaliatory motive can entail, for example, rebutting evidence of self-serving witness testimony at hearing by Company managers that they were not motivated by retaliation when they took the adverse action in dispute. *See, e.g.*, *Powers*, D. & O. at 23 (finding lack of contributing factor based on testimony by Company Managers of a subjective belief that Powers violated his medical restrictions). Just as a complainant's burden of proof does not require a showing of employer motivation, non-retaliatory motive cannot rebut complainant's evidence of contribution when that rebuttal evidence is comprised of the self-serving testimony of Company managers. Instead, this evidence is more properly evaluated when the burden shifts to the respondent to prove "by clear and convincing evidence that [it] would have taken the same unfavorable personnel action in the absence of [the protected acts]." 49 U.S.C.A. § 42121(b)(2)(B)(iv). This evidence is more relevant to respondent's affirmative defense to "show that the truth of its factual contentions is highly probable." *Timmons*, ARB No. 14-051, slip op. at 6 (quoting *Araujo*, 708 F.3d at 159 (internal quotations omitted)).

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avoiding statements evidencing bad motives, and reasonably diligent in documenting employee shortcomings."). *See also Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1072-1073 (9th Cir. 2003) ("[A]n employer's true motive in an employment decision is rarely easy to discern. As we have previously noted, '[w]ithout a searching inquiry into these motives, those [acting for impermissible motives] could easily mask their behavior behind a complex web of *post hoc* rationalizations. . . .'" (internal citation omitted); *Pickett v. Sheridan Health Care Ctr.*, 610 F.3d 434, 442 (7th Cir. 2010) ("Plaintiffs often have great difficulty in gathering information and can present only circumstantial evidence of discriminatory motives.").

D. Applying Fordham, the ALJ in Powers Erred in Determining that Complainant Failed to Prove that his Protected Activity Was a Contributing Factor in the Adverse Action he Suffered

Applying the principles enunciated in *Fordham*, as clarified herein, the ALJ erred in determining that complainant failed to prove the contributing factor element of his case.

1. The ALJ erred in ruling that Powers failed to prove contributing factor based on the testimony of Company Managers pertaining to their subjective nondiscriminatory motive for the adverse action taken

The two-stage analysis mandated by FRSA's incorporation of the AIR 21 employee protection statute distinguishes the elements of proof required of each party and their respective burdens of proof. *See Fordham*, ARB No. 12-061, slip op. at 9-10. Under the facts of this case, the ALJ erred in ruling that Powers failed to prove the contributing factor element of his claim, because that ruling is based on the subjective testimony of Company managers regarding their alleged legitimate business reasons for Powers' termination—evidence that is of highly questionable relevance to contribution. *See supra* at 25-26. For example, the ALJ stated: "I must determine whether it is more likely than not that Gilliam subjectively concluded that Complainant had been dishonest . . . ." D. & O. at 23; *see also id.* at 21 ("I therefore turn to the managers involved."); *id.* at 23 ("focus on the managers' thinking"); *id.* at 23 ("the question I must decide is whether Gilliam recommended discipline, which Meriwether imposed, because he *believed* Complainant had been dishonest."). In relying on that subjective testimony by Company managers to rebut Powers' evidence of contribution, the ALJ improperly applied the preponderance of evidence standard to evidence of non-retaliatory motive. Moreover, the relevancy of subjective witness statements for purposes of analyzing complainant's showing of contributing factor, as a general matter, is highly questionable because "subjective criteria can be a ready vehicle for [discrimination]." *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 769 (11th Cir. 2005); s*ee also Miles v. M.N.C. Corp.*, 750 F.2d 867, 871 (11th Cir. 1985) ("subjective evaluations . . . provide a ready mechanism for . . . discrimination."). Subjective standards are difficult for courts to evaluate and difficult for plaintiffs to rebut, and their use in employment decisions should be viewed with suspicion. *See Hill v. Seaboard Coast Line R. Co.*, 885 F.2d 804, 808-09 (11th Cir. 1989). To be sure, "[t]he Supreme Court has consistently recognized that disparate treatment potentially results from an employer's practice of committing employment decisions to the subjective discretion of its supervisors." *Anderson v. WBMG-42*, 253 F.3d 561, 564 n.1 (11th Cir. 2001) (citing *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 988 (1988) ("[W]e have consistently used conventional disparate treatment theory, in which proof of intent to discriminate is required, to review [employment] decision[s] that were based on the exercise of personal judgment or the application of inherently subjective criteria.")).

Since Powers "need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action" to prove contributing factor (*supra* at 19), he has no obligation under the Act to rebut evidence of nondiscriminatory motive by Company managers to satisfy his showing for proving an FRSA violation. *See supra* at 19-20;

see also 29 C.F.R. § 18.401. And certainly, even if such evidence were relevant, it should be excluded because "its probative value is substantially outweighed by the danger of confusion of the issues" since, again, subjective employer motivation is not a required subset of complainant's showing of contribution. 29 C.F.R. § 18.403.

2. The ALJ's ruling on contributing factor is not supported by substantial evidence

Next, even absent the ALJ's error in weighing the testimony of Company managers to rebut Powers' evidence of contribution under the preponderance of the evidence standard, the ALJ's ruling, for various reasons, is not supported by the substantial evidence.

First, the ALJ erred by basing the contributing factor determination on evidence that Company managers subjectively *believed* that Powers was dishonest in violation of Company Rule 1.6. E. Ex. BB (termination letter stating that Powers was in "violation of Rule 1.6 (Conduct)".). The undisputed evidence of the Public Law Board determination establishes that Powers, in fact, was complying with his doctor's treatment plan and that his actions were within his medical restrictrictions; that his conduct at home, which conformed to the "treatment plan of a treating physician" certainly is within the scope of acts protected by the FRSA. 49 U.S.C.A. § 20109(c). *See* E. Ex. PP, Public Law Board Decision (dated July 8, 2009). The Public Law Board determined that the surveillance video showed no act Powers engaged in that violated the medical restrictions in effect as of May 16, 2007, when the video was conducted. *Id.* The undisputed evidence further shows that Claims Manager Loomis made no effort to contact Dr. Abraham, Powers or Powers' attorneys to clarify the disparity between Dr. Abraham's May 13, 2008 Chart Notes (that imposed a repetitive motion restriction) and the Injury Report (that contained no such limitation). Hearing Transcript (Tr.) at 155-156, 161 (Loomis). Furthermore, Powers testified on direct examination that the surveillance tape of his activities in May 2008 shows that he complied with the medical restrictions Dr. Abraham imposed. Powers testified that Dr. Abraham

> wanted me to do things. His idea of repetition and the reason he put that on there was because I had told him that we do physical work all day long. And he didn't want to see me out there swinging a sledge hammer all day long or wasn't doing repetitive motions for hours on end. It wasn't meant to be a one or two-minute deal.

Tr. at 71.[17] Furthermore, Dr. Abraham testified that the repetitive motion limitation reflected on the May 13, 2008 Chart Notes permitted Powers to engage in movement that is "intermittent in

[17] Even in evaluating whether the surveillance tape rebuts Powers' evidence of contribution, Powers effectively testified on direct examination at the evidentiary hearing that his actions comported with his medical restrictions. Tr. at 68-69, 84. However, as we have determined on review, the ALJ's determination that complainant failed to prove contributing factor is not supported by substantial evidence and contrary to law.

nature." Tr. at 380. Dr. Abraham testified on cross-examination that "intermittent" means "less than, usually 33 percent of the time that you are doing an activity." Tr. at 385. Moreover, Dr. Abraham testified that he may not have been precise in describing to Powers at his appointment the scope of activity medically permitted. Dr. Abraham testified: "I don't think that I specifically went over those exact -- that exact criteria with Mr. Powers, either, to be honest with you." Tr. at 386. Dr. Abraham testified that he never directed Powers to cease all activity with the left hand, and that he encouraged Powers to use his hand and try to rehabilitate it. Tr. at 387. Powers testified that he used his right hand in the videotape, not the left hand that had suffered the workplace injury. *See* Tr. at 68-69.

For these reasons, the ALJ's determination that Powers failed to prove the contributory factor element of his claim is not supported by substantial evidence and contrary to law. Based on the record evidence, Powers proved that he engaged in protected activity when he reported a workplace injury in May 2007 (49 U.S.C.A. § 20109(a)(4)), prepared and subsequently filed a complaint under the Federal Employee Liability Act (FELA), 45 U.S.C.A. § 51 et seq. (*see, e.g.*, *Ledure v. BNSF Ry Co.*, ALJ No. 2012-FRS-020 (Feb. 21, 2013)), and properly followed Dr. Abraham's treatment plan (49 U.S.C.A. § 20109(c)). Powers suffered an adverse action when Respondent terminated his employment in September 2008 based on an erroneous belief by Company managers that he failed to adhere to Dr. Abraham's treatment plan after telling his manager that he was following his doctor's orders, in violation of Company Rule 1.6 (dishonesty). The record reflects that Powers' acts comported with Dr. Abraham's treatment plan, and that his termination violated the Act.

Second, absent the ALJ's erroneous determination, *supra* at 26-28, the ALJ's findings, which are based on undisputed evidence, show that Powers satisfied his burden of proving that his protected activity contributed to his termination. Specifically, undisputed evidence shows that Powers' May 2007 injury at the railroad tracks and his subsequent attempts to comply with his doctor's treatment plan contributed to the disciplinary proceeding and termination.

Powers was injured in May 2007 and filed a medical injury report days later after his supervisor, Leroy Sherrah, discouraged him from filing a report immediately. *See* D. & O. at 2-3. The record reflects that during that year, Sherrah was "under disciplinary scrutiny because too many employees who reported to him were getting injured." *Id.* at 3, n.4. The record reflects that during 2007, Sherrah was reprimanded, suspended with pay, put on a personal development review plan, and later discharged. *Id.* at 5, n.6. A reason for Sherrah's termination was "that there were four personal injuries on Sherrah's watch." *Id.*

Powers filed his medical injury report in May 2007, and the Company accommodated his injury by placing him on light (driving) duty that comported with his medical restrictions. D. & O. at 4. When the Company determined in October 2007 that Powers could no longer be accommodated, Powers stopped working based on his belief that he could not return to a position at the local level without losing his seniority. D. & O. at 6-8; Tr. at 59-60 (Powers). In November 2007, Powers began preparing to file a personal injury claim under the FELA. D. &

O. at 7-8. n.13.[18] Claims Manager Loomis testified that he was aware of Powers' intent to file a FELA claim, an act that has been found to be protected activity under AIR 21 (*see, e.g.*, *Ledure*, ALJ No. 2012-FRS-020, slip op. at 10), and arranged for Powers to be offered vocational rehabilitation through the Company's Director of Disability Management. D. & O. at 8; *see also* Tr. at 173. The ALJ stated, based on Claims Manager Loomis's testimony, that "the Company's exposure would be reduced if Complainant returned to work." D. & O. at 10 (citing Tr. at 180-81). Claims Manager Loomis remained concerned about the pace of Powers' recovery and on May 2, 2008, again offered him vocational rehabilitation. D. & O. at 11 (citing Tr. at 174-175; E. Ex. S). On May 6, Claims Manager Loomis directed Investigator Jonathan Iguchi to secretly videotape Powers. Iguchi videotaped Powers over a three-day period, during May 15, 16, and 18, 2008. D. & O. at 11 (citing C. Ex. 7; E. Ex. T (video recording)).

On May 27, 2008, Dr. Abraham ordered that Powers continue the fifty-pound lifting and repetitive movement restriction. D. & O. at 12-13 (citing Tr. at 347-348). On May 28, a system level manager informed Powers that the fifty-pound lift restriction could not be accommodated. E. Ex. U. On May 29, 2008, Company Manager Gilliam interviewed Powers about his work capabilities given his doctors' medical restrictions. D. & O. at 13; C. Ex. 4; *see also* Tr. at 327-333. During this interview, Powers answered various questions Gilliam asked about his physical ability to complete certain tasks. C. Ex. 4. Gilliam's questions included: "Have you been living up to your restrictions while you've been off?" C. Ex.4; *see also* D. & O. at 13. Powers responded: "Off 6 months. Have had pain. Have been within restrictions. Wearing brace a little bit; trying to wean off brace." *Id*. Claims Manager Loomis gave Company Manager Gilliam the surveillance video on July 15, 2015. Tr. at 341 (Gilliam). Loomis testified that he gave Gilliam the videotape to help get Powers back to work. D. & O. at 15 (citing Tr. at 157 (Loomis)). However, Gilliam reviewed the videotape and concluded that Powers was being dishonest in the interview about his home activities in violation of Company Policy 1.6. D. & O. at 15; *see also* Tr. at 313-315, 332, 356-357. Gilliam sought a disciplinary charge against Powers based on a belief that Powers was not adhering to Company policy. Tr. at 347-349. Hearing Officer Poff conducted a disciplinary hearing, and the record of the hearing constituted testimony of Powers, Gilliam, documentary exhibits (including the surveillance video), and argument by the parties. D. & O. at 16-17; *see also* Tr. at 218-219. Following the disciplinary hearing, Review Officer Meriwether "reviewed the disciplinary hearing transcript . . . [and] talked to Hearing Officer Poff and to Company Manager Gilliam both before and after the hearing." D. & O. at 17; Tr. at 251. Meriwether, however, did not confer with Powers, the union representative; nor review the surveillance video directly. Tr. at 250-252; *see also* D. & O. at 17. On this information, Reviewing Officer Meriwether opted to terminate Powers' employment. D. & O. at 17-18.

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[18] The administrative record reflects that Powers filed the FELA complaint in state court on March 11, in the year 2009 or 2010. *See* D. & O. at 7-8 ("Complainant also retained a law firm and ultimately brought the present case as well as a later claim under the Federal Employer's Liability Act, 45 U.S.C. §§ 51 *et seq*., apparently initiated on March 11, 2009. ALJ Ex. 1 at 8 (*see* fn. 1); *but see* E. Ex. QQ suggesting a possible 2010 filing date)." *See also* D. & O. at 8; nn.12,13.

Finally, Powers' activity documented in the surveillance videotape fails to objectively establish that Powers was dishonest. The record evidence establishes that the ammunitions boxes weighed less than fifty pounds, in accordance with Powers' lift restrictions at the time. There is also no objective evidence that Powers acted beyond the repetitive movement restrictions. *See supra* at 6-7 (citing E. Ex. PP).

Based on this undisputed evidence, it is clear that Powers' injury report, as well as evidence (based on testimony by Dr. Abraham and Powers) that Powers complied with his doctor's treatment plan, contributed to his termination. Given these undisputed facts, Powers has proven by a preponderance of evidence presented at the evidentiary hearing that protected activity contributed to his employment termination in violation of the FRSA.

E. The ALJ on Remand Must Determine Whether the Company Can Show by Clear and Convincing Evidence that it Would Have Taken the Same Action Absent Powers' Protected Acts

In light of this ruling on contributing factor (49 U.S.C.A. § 42121(b)(2)(B)(i)), we remand so that the ALJ can determine if Respondent can "demonstrate[], by clear and convincing evidence, that [it] would have taken the same unfavorable personnel action in the absence of that behavior" (49 U.S.C.A. § 42121(b)(2)(B)(ii). *See also* 29 C.F.R. § 1982.109(b). In *Speegle,* ARB No. 13-074, slip op. at 11-12, the ARB explained:

> this statutory mandate requires adjudicators of whistleblower cases to consider the combined effect of at least three factors applied flexibly on a case-by-case basis: (1) how "clear" and "convincing" the independent significance is of the non-protected activity; (2) the evidence that proves or disproves whether the employer "would have" taken the same adverse action; and (3) the facts that would change in the "absence of" the protected activity.

Should the ALJ determine on remand that Respondent failed to prove its affirmative defense by clear and convincing evidence, the ALJ should find Respondent liable under the Act and determine the appropriate relief. 49 U.S.C.A. § 20109(e); *see also* 49 U.S.C.A. § 42121(b)(2)(B)(iv).

CONCLUSION

The ALJ's Decision and Order Denying Claim is **REVERSED**, and the case is **REMANDED** for proceedings consistent with this Decision and Order of Remand.*

SO ORDERED

LISA WILSON EDWARDS
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

Judge Corchado dissenting, with Chief Judge Igasaki joining.

Before explaining the basis for my dissent, I note that the Board majority in this case makes two important rulings that have unanimous support. First, while it professes to "fully adopt" *Fordham* (a securities case) by reference in this decision (a railway injury case), the Board majority in fact rejects the clear-cut evidentiary rule created by the two-judge majority in that case. The *Fordham* majority asserts or implies more than two dozen times that an employer cannot use its reasons for its own employment action to dissuade the ALJ from finding contributory factor.[19] Contrary to *Fordham*, the majority in this case states that "there is no

[19] Eleven times, the *Fordham* majority stated one way or another that a respondent's evidence should not be "considered" in deciding "contributing factor." *See Fordham*, ARB No. 12-061, slip op. at 3, 22, 24, 26 (including n.52), 28-29, 30, 33, 35 at n.84, 37. Cementing this clear-cut rule, the *Fordham* majority also said that the contributing factor should be decided in "disregard" of a respondent's reasons for its actions (slip op. at 3). Then using the terms "disregard," "examined," "presented," "weigh," and other terms, the *Fordham* majority reaffirmed more than a dozen times that the respondent's reasons for its employment actions cannot dissuade the ALJ from finding that protected activity was a contributing factor in the employment action. Slip op. at 2, 3, 16, 17, 21, 22-23, 23, 24, 25, 26, 31, 31-32, 32 at n.74, 35, 35 at n.84. To the extent that *Fordham* has any relevance to the majority's narrow holding in subsection D of its Discussion, I rely on the Board's decision in *Bobreski v. Givoo Consultants*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op. at 13-14 (ARB Aug. 29, 2014) (*Bobreski II*) and the dissent in *Fordham*.

inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor *as long as the evidence is relevant to that element of proof.*"[20] *Supra* at 21 (italics in original). Further, as explained below, the majority cites several cases in which the employer's reasons were relevant in deciding the question of "contributing factor." In one of those cases, the Board affirmed *summary dismissal* of the complainant's claim where the protected activity, the employer's non-retaliatory reasons, and the unfavorable employment action all occurred over a three-day period.[21] The rejection of *Fordham's* clear-cut evidentiary rule has unanimous support.

Second, the Board majority reaffirms that 29 C.F.R. Part 18 grants ALJs the power to decide relevance questions. This ruling also has unanimous support. It is beyond question that that the Board must accept an ALJ's evidence rulings unless the ALJ abused his or her discretion.[22] The ALJ's broad discretion to decide relevance issues prohibits the Board from easily disregarding evidence the ALJ considered in its decision. In the end, while it is difficult to understand the majority's patchwork discussions of the two-judge majority decision in *Fordham* and this case, it is clear that the en banc decision here unifies the Board on the age-old rule that relevance governs the way that evidence is used on a case-by-case basis in FRSA and AIR 21 whistleblower cases, and ALJs have discretion to decide relevance.

I. Introduction

For many reasons, I respectfully dissent from the majority's reversal of the contributing factor issue, the only issue on appeal. Stated simply, I dissent because the majority usurps the ALJ's role in reversing his dismissal of this case. Despite the many pages of dicta, the majority's reversal and remand rest on the reasons provided in subsection D(1) and (2) in its "Discussion": (a) a narrow evidentiary holding "under the facts of this case" that Union Pacific's "subjective" explanations should be disregarded as "highly suspicious"[23] and (b) a

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[20] This sentence, among others, and the majority's reliance on evidence rules, reject the idea that the AIR 21 burdens of proof create a clear-cut division between "contributing factor" and "clear and convincing" evidence.

[21] *Abbs,* ARB No. 12-016, slip op. at 24, n.15.

[22] 29 C.F.R. § 1982.110(b). In the review of an ALJ's Decision and Order, the ARB is bound by the ALJ's factual findings if the findings are supported by substantial evidence of record. "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. Inc. v. Herman,* 146 F.3d 12, 21 (1st Cir. 1998)(quoting *Richardson v. Perales,* 402 U.S. 389, 401)(1971).

[23] In suggesting that "subjective" explanations should be rejected as "highly suspicious," the majority inexplicably ignores Board precedent where it recognized that an employer's subjective reasons can rebut a complainant's accusation of unlawful retaliation if the ALJ believes the employer's testimony. *See, e.g., Hamilton v. CSX Transp., Inc.,* ARB No. 12-022, ALJ No. 2010-FRS-025 (ARB Apr. 30, 2013)(unanimous three-judge panel that summarily affirmed the dismissal

causation finding of contributing factor based on the Public Law Board's irrelevant ruling and the Board's impermissible alternate view of the facts, among other reasons. But the majority fails to perform a proper substantial evidence review of the ALJ's contributing factor ruling[24] and/or a proper abuse-of-discretion review of evidentiary issues. Rather than review the record to see if it supports the ALJ's rejection of protected activity as a contributing factor, the majority searches the record for evidence to determine if it supports a finding of contributing factor. In so doing, the majority (1) disregards record evidence without finding an abuse of discretion or reversible evidentiary error, (2) reassesses the credibility and weight of witness testimony, (3) ignores substantial evidence in the record, (4) weighs the record evidence as if it were a trier of fact, and (5) finds that the ALJ erred in finding no causal link between Powers' protected activity and the termination of his employment. Rather than vacate and remand, the majority continues its improper fact-finding to conclude that Powers proved that protected activity contributed to Union Pacific's decision to terminate his employment.[25]

The Board cannot make factual findings. The ALJ is the trier of fact that must be persuaded by the competing evidence the parties present. Where a genuine dispute of material facts exists, the ALJ decides (not the Board) whether protected activity, non-retaliatory reasons, or a mixture of both contributed to an unfavorable employment action.[26] The Board can reject

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of complainant's complaint on the question of contributing factor where the ALJ believed the employer's subjective explanation). The Secretary's delegation of authority requires the Board "to adhere to the rules of decision and precedent . . . until and unless the Board or other authority explicitly reverses." Acting outside of delegated authority is a void act and, at minimum, voidable by the Secretary. *See supra* at 8 (delegation of authority).

[24] *See Bobreski II*, ARB No. 13-001, slip op. at 13-14.

[25] *See Stone & Webster Const., Inc. v. U.S. Dep't of Labor*, 684 F.3d 1127, 1133-1134 (11th Cir. 2012) ("[a]lthough the ARB acknowledged that it was bound by the substantial evidence standard, the ARB showed little deference to the ALJ's findings with which it disagreed, and it disregarded the ALJ's conclusions supported by substantial evidence in the record;" "[t]he question for the ARB, however, was not whether the ARB could support alternative factual findings with substantial evidence, but whether the ALJ could support its original findings with substantial evidence;" "[t]herefore, we conclude that the ARB erred . . . by refusing to accept the ALJ's findings which were based on substantial evidence); *Dalton v. U.S. Dept. of Labor*, 58 F. Appx. 442, 2003 WL 356780, slip op. at 9 (10th Cir. 2003) (unpub.) ("substantial evidence supported the ALJ's findings . . . [and] under its own regulations, the Board was required to adopt those findings . . . [so] its failure to do so was reversible error").

[26] *Cf. Marrone v. Miami Nat. Bank* (Fla. App. 3rd Dist. 1987)("In a non-jury case, it is the trial court's duty to reconcile conflicts in the testimony, to judge the credibility of witnesses, and to determine the weight of the evidence presented.").

the ALJ's fact findings only where the ALJ's findings are not supported by substantial evidence or the record overwhelms the ALJ's causation finding, as a matter of law.[27]

Contrary to the majority's decision, I find that a proper substantial evidence review requires us to affirm the ALJ's finding on causation: that protected activity did not contribute to Union Pacific's termination of Powers' employment. The ALJ sufficiently explained why he rejected protected activity as a contributing factor and also provided a useful recap of some of these reasons. D. & O. at 26. In addition, in deciding what did influence Union Pacific's actions, the ALJ properly considered Union Pacific's stated reasons for terminating Powers' employment, and the ALJ explained why he believed these reasons were the true reasons instead of protected activity, as Powers believes.

II. The ALJ's ultimate findings on contributing factor

To properly review the ALJ's dismissal of this case, the Board must address two ultimate findings the ALJ makes on the issue of contributing factor (causation). In one finding, the ALJ rules that protected activity did not contribute to Union Pacific firing him. More specifically, the ALJ concludes that (1) "Complainant has failed to carry his burden to show that his reporting the workplace injury in May 2007 contributed to Union Pacific's discharging him from employment in September 2008," D. & O. at 25-26, and (2) "there is no persuasive evidence to link the discharge decision to Complainant's filing of the injury report in May 2007," *Id.* at 27. The reasons he cites include, among other reasons: (1) Union Pacific accommodated Powers' injury and treatment needs for a year without taking any action that might adversely affect Powers; (2) the twelve to fourteen month temporal gap between the injury and the any potentially adverse actions was "counter-evidence" that protected activity contributed to unfavorable employment action against Powers; and (3) that central decision-makers were not in Powers' chain of command in May 2007. *Id*. at 26. This finding rests on record evidence apart from the employer's explanations for why it fired Powers, meaning that this finding may stand even if other evidence should not have factored into the ALJ's contributing factor analysis. At most, if evidentiary errors are found, the Board should vacate the ALJ's finding and remand for the ALJ to reconsider the causation question. More importantly, if the majority finds evidentiary error in the ALJ's finding that protected activity *did not* contribute, this does not automatically mean that protected activity *did* contribute. For example, if a Mr. Jones sees that someone hit his parked car, he might rule out his neighbor as a suspect because he wrongly assumes that his neighbor is on vacation. Correcting Mr. Jones' erroneous assumption does not mean that his neighbor hit his car. But Mr. Jones needs to reevaluate the evidence to determine who the real culprit is. Likewise, the Board should generally remand where it believes the ALJ committed a significant evidentiary error.

In another ultimate finding pertaining to causation, the ALJ concludes that Union Pacific terminated Powers' job because it believed that Powers was dishonest. The ALJ's reasons

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[27] *See Bobreski II*, ARB No. 13-001, slip op. at 15-30.

include, among others, that (1) managers heard that Powers was lifting heavy objects, (2) a phone conversation between Powers and Gilliam where it is undisputed that Powers said he was doing "gardening, nothing major," and (3) a video that the parties all agree shows Powers pulling, digging, carrying, drilling, hammering, lifting, repeatedly winding wire, among other physical activities. These ALJ findings all focus on independent evidence that led Gilliam to believe Powers was being dishonest, much more than bald assertions of unsupported subjective opinions. Again, the majority's logic fails when it concludes that disproving Powers' dishonesty means that unlawful retaliation must have been a contributing factor to the termination of his employment.

Another analogy might demonstrate the majority's faulty logic. If a Ms. Smith fires her Tahitian babysitter because she truly suspected the babysitter stole a necklace that went missing, that reason becomes an historical fact. The historical reason for the termination does not change simply because Ms. Smith later finds her necklace in an old purse and the necklace was never actually stolen. If the Tahitian babysitter sues Ms. Smith for national origin discrimination, proving that Ms. Smith was wrong about the theft does not prove that Ms. Smith unlawfully discriminated. It merely creates a difficult factual question for a judge or jury that has no personal knowledge of the true facts: did Ms. Smith fire the babysitter for a mistaken belief that theft occurred or because of national origin discrimination or both? The majority suggests that proving a mistaken belief automatically means that, among the countless reasons that influence people to act, discrimination must have been a reason. Such analysis is illogical.

As I understand the majority's decision, it appears to collapse the ALJ's two ultimate findings on causation into one inseparable finding. It first concludes erroneously that Union Pacific offered only subjective opinion of its belief of Powers' dishonesty. Then it assumes erroneously that discarding Union Pacific's subjective testimony of dishonesty *necessarily* affects the ALJ's rejection of protected activity as a contributing factor. To these errors, the majority adds its confusion over the significance of the Public Law Board's ruling and its improper substantial evidence review. With this backdrop, I discuss what the majority held.

III. The majority's ruling

Despite extensive editorial comments about *Fordham*, the majority's controlling ruling emanates from the ALJ's errors the majority expressly discusses as the basis for reversing the ALJ's decision and remanding this case to the ALJ.[28] The majority explains the ALJ's errors in the penultimate section of its "Discussion" ("Subsection D"). *Supra at* 26. Subsection D has two numbered subparts ("Subsection D1" and "Subsection D2"). In Subsection D1, the majority finds that "*under the facts of this case*" the ALJ erred when deciding the contributing factor question by relying on "subjective testimony" of the employer's explanations for why it

[28] *See Defining Dicta,* 57 STAN. L. REV. 953, 961 (Mar. 2005)("holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) are necessary to the judgment. If not a holding, a proposition stated in a case counts as dicta").

terminated Powers' employment. To the majority's credit, it expressly limits its holding to the specific facts in this case and thereby limits the precedential impact of the decision reached in this case. In Subsection D2, through improper substantial evidence review, the majority affirmatively finds that Powers proved there was a causal link between protected activity and the termination.[29] No other discussion in the majority opinion is controlling if such discussion contradicts or is unnecessary to the errors discussed in Subsection D. Below, I address each subsection separately and in numerical order (D1 and then D2).

A. Subsection D(1) of the Majority Decision

In Subsection D1, the majority identifies one error that it believes the ALJ makes and provides two reasons for its conclusion. More specifically, the majority rules that "under the facts of this case" the ALJ errs in rejecting "contributing factor" by relying on Union Pacific's "subjective testimony" proffered to explain why it fired Powers. *Supra at* 26-27.

1. "Highly suspicious relevance" means relevant but not persuasive

The first reason the majority rejects the value of employer's "subjective testimony," is because it is "of highly questionable relevance" and, per the majority, apparently generally unreliable. *Supra* at 26-27. To its credit, the majority did not say that Union Pacific's subjective explanations were irrelevant. This is consistent with its earlier statement that there is "no inherent" limitation on what evidence can be considered in deciding contributing factor.[30] *Supra at* 21. The majority cites approvingly to *Abbs* and *Zurcher* to demonstrate that, in deciding the question of contributing factor, an ALJ can choose to accept the employer's reasons for its employment action and reject the employee's assertion that protected activity contributed. Most notably in *Abbs*, the Board affirmed a summary dismissal where the ALJ believed the employer's competing reasons for a termination even though the protected activity and termination occurred only three days apart. The Board in *Abbs* expressly relied on the "contributing factor" standard and affirmed the ALJ's decision to discount the significance of a temporal proximity of three days.[31] Similarly, in *Zurcher*, the Board affirmed the ALJ's reliance on the employer's explanations of its employment action to rule that there was no "contributing factor." Again, temporal proximity was very close in the *Zurcher* case, where Zurcher's protected activity occurred in February 2008, and he was fired in March 2008. Like the *Powers* case, some of the employer's reasons involved subjective belief (Zurcher had been "rude"). Zurcher's employer based part of its subjective opinion on its observations of the reactions of a co-worker who was on the phone with Zurcher, not quite as vivid as watching a video of the

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[29] *See* n.25, *supra*.

[30] This general principle directly contradicts the clear-cut rule stated in *Fordham* that the ALJ cannot consider the employer's explanations. *See supra* at n.20.

[31] I do not understand how the ALJ could resolve the issue of contributing factor on summary decision in *Abbs*, but the decision stands as a contradiction to the clear-cut rule asserted in *Fordham*.

complainant's actions like Union Pacific did in this case. The Board affirmed the dismissal of these cases without requiring that the ALJ consider the employer's reasons under the "clear and convincing" standard.[32]

While implicitly acknowledging some potential relevance of the employer's testimony, the majority nevertheless questions the value of "subjective" testimony. It seems to suggest that the employer's explanation of the mental processes that led to its employment decisions should generally be disregarded because employers cannot be trusted to tell the truth. True, sometimes employers lie about the reasons for their actions, but sometimes they tell the truth. On the other hand, sometimes employees rightly suspect whistleblower retaliation, while other times they misperceive reality. Sometimes neither employers nor the employees accurately recall historical facts. So it is unclear why an employee's circumstantial evidence of the employer's mental processes is generally better than the employer's own explanation of its actions. In any event, there is no statute, regulation, or binding case law that requires ALJs to disregard an employer's subjective explanations of its mental processes.

To support its suggestion that subjective employer testimony should be disregarded, the majority grossly distorts the courts' rulings in the five cases it cited (Title VII cases where the standard of proof is different). In *Vessels.*, 408 F.3d at 769, in reviewing the *summary judgment* entered, the Eleventh Circuit Court of Appeals stated that the employer's "subjective evaluations" played no part in step one of the three-step *McDonnell Douglas* test, but it was relevant in step two and "evaluated as part of the court's pretext inquiry [step three]" of the *McDonnell Douglas* test. But all three steps of the *McDonnell Douglas* test precede any consideration of an affirmative defense. In *Miles*, 750 F.2d at 871-875, the Eleventh Circuit Court focused on the level of proof needed to prove the affirmative defense where the plaintiff's "evidence consisted of direct testimony that the defendant acted with a discriminatory motive, and it is accepted by the trier of fact, the ultimate issue of discrimination has been proved." In this context, the Eleventh Circuit Court stated that the employer's subjective evaluations may not be enough because "subjective evaluations involving white supervisors provide a ready mechanism for racial discrimination." *Miles*, 750 F.3d at 871 (citing *Parson v. Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374, 1385 (5th Cir.1978)). In *Hill*, 885 F.2d at 808-09, as the majority recognizes, the Eleventh Circuit Court stated that subjective components of promotional

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[32] Given these cases and the majority's reliance on the evidence rules, its attempt to incorporate *Fordham* into *Powers* and its discussion of the WPA to fundamentally change ARB law is confusing at best and even self-contradictory. *Abbs* and *Zurcher* are not the only recent ARB precedents where the Board rejected "contributing factor" due to the employer's explanations of its employment actions and without requiring application of the "clear and convincing" standard. *See Benninger v. Flight Safety Int'l*, ARB No. 11-064, ALJ No. 2009-AIR-022, slip op. at 2 n.3, 4 (ARB Feb. 27, 2013) (the Board unanimously affirmed an ALJ's rejection of causation based on the complainant's insufficient evidence and the employer's evidence of "serious violations" but the Board's unanimous panel expressly declined to review the ALJ's ruling on the "affirmative defense"); *Hamilton*, ARB No. 12-022 (*see* n.23, *supra*, regarding decision by unanimous three-judge panel). Three judges in this case cannot overrule the precedent in these cases, among others.

decisions "should be viewed with suspicion," but the court also ruled that "it was within the district court's role and capabilities to assess whether the subjective employment qualification was bona fide and whether an employer's testimony that the plaintiff did not possess the qualification was credible." Similarly, in the remaining two cases cited by the majority, the courts discussed the evidentiary complexities arising in Title VII cases where the employer relied on subjective criteria, but the courts do not say that subjective evidence should be completely disregarded.[33]

What the majority unknowingly questions is the weight of the employer's subjective testimony, a question reserved for the trier of fact, not appellate bodies. Phrases like "highly questionable relevance" and that the evidence "should be viewed with suspicion" pertain to the weight or persuasiveness of evidence.[34] Weighing does not mean that you simply count the number of witnesses or the number of times that witnesses repeated the same testimony.[35] But the Board does not have the de novo review authority over the ALJ's fact findings in whistleblower cases; it must perform a substantial evidence review. Therefore, as a matter of law, the ARB errs by questioning the persuasiveness of evidence.

2. The majority's discussion on the "confusion of issues"

The majority's second reason[36] for rejecting Union Pacific's explanations is that "subjective" employer testimony should be excluded to avoid "confusion of the issues" because "subjective employer motivation is not a required subset of complainant's showing of contribution." *Supra* at 27. Again, the majority cites no ARB decision or court decision that says an employer's subjective explanation for its employment action would confuse the issue of contributing factor (causation) in FRSA cases. To the contrary, the employer's reasons are ***the issue*** when deciding the question of "contributing factor" (causation).

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[33] Those remaining cases are *Anderson,* 253 F.3d at 564 n.1, which cites *Watson,* 487 U.S. at 988.

[34] *See, e.g.*, 3 Fed. Jury Prac. & Instr. § 101:43 (6th ed.)(listing factors that jury can consider in deciding what testimony to believe).

[35] *See id.* (weight of the evidence does not necessarily depend upon the number of witnesses who testify). *See also* Colorado Jury Instructions 3:12, 4th – Civil (Preponderance Not Determined by Number of Witnesses).

[36] In one unexplained sentence, the majority also says that "the ALJ improperly applied the preponderance of the evidence standard to evidence of non-retaliatory motive." *Supra* at 28. The sentence does not address the issue of relevance and provides no meaningful explanation or guidance.

In Section 20109(a) and (c)(2), the FRSA whistleblower statute prohibits railroad carriers from relying on protected activity as a reason for acting against an employee. These subsections provide as follows in relevant part:

> (a) In general.—*A railroad carrier* engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, *may not* discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done [as described in subsections (a)(1) through (7)].
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> * * *
>
> (c)(2) Discipline.—*A railroad carrier* or person covered under this section *may not* discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record

49 U.S.C.A. § 20109(a), (c)(2) (emphasis added). The focus of these substantive prohibitions is the railroad carrier's unfavorable employment action and why it took such action. The phrase "in whole or in part" is a somewhat unique causation standard,[37] but it mirrors the causation phrase used in the railroad negligence cases under FELA. For decades, the courts have understood that phrase "in whole or in part" to mean "any factor, even the slightest significance."[38] This also mirrors the plain meaning of "contributing factor" standard used in

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[37] Most of the whistleblower statutes under the ARB's jurisdiction use the word "because"—that an employer may not discriminate against an employee "because" of protected activity. *See, e.g.*, 15 U.S.C.A. § 2087(a)(2014)(consumer product safety); 18 U.S.C.A. § 1514A(a)(2014)(securities); 21 U.S.C.A. § 399d(a)(2014)(food, drug, cosmetic safety); 49 U.S.C.A. § 31105(a)(2014)(trucking transportation); 49 U.S.C.A. § 42121(a)(2014)(AIR 21). But these whistleblower statutes define level of causation as "contributing factor" in their statutory "procedures" by incorporating the AIR 21 procedures.

[38] *Rogers v. Missouri Pac. Railroad Co.*, 352 U.S. 500, 506 (1957).

FRSA's procedural provisions (Section 20109(d)). The words in the statute that Congress *actually passed* (and the President signed) make clear that Congress intended to ban even the slightest reliance on protected activity. According to these sections, if railroad carriers include protected activity (to any degree) in its reasons for an unfavorable employment action, they violate Sections 20109(a) and/or 20109(c)(2) as a matter of law. Yet, the majority attempts to water down this whistleblower protection.

Inexplicably, and for the first time in any ARB decisions, the majority suggests in a footnote that proving contributing factor does not necessarily prove a violation of the whistleblower anti-retaliation law.[39] *Supra* at 16, n.8. The majority's suggestion would trigger a perilous and never-ending breach in whistleblower protection by ignoring the substantive provisions and instead focusing only on the procedural provisions of the FRSA whistleblower law.[40] It suggests that the phrase "may determine a violation occurred" in the procedural provisions grants the Secretary of Labor some ambiguous power to decide when protected activity can contribute to employment actions and when it cannot. *Supra* at 16, n.8. By this same logic, and to be consistent, one would need to understand the substantive prohibition in Section 20109(a) as being equally permissive where it provides that a railroad carrier *may not* (or arguably sometimes may) discharge or demote an employee based, in part, on protected activity.

If contributing factor is not a violation, then what has the complainant accomplished upon proving it?[41] What is the justification for the heightened burden of proof (clear and convincing) on the affirmative defense if the employer has not violated the law? The majority's hyper-technical tinkering with the significance of the contributing factor necessarily tinkers with the very foundation of the clear and convincing affirmative defense.[42]

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[39] Similarly inexplicable, at the oral argument in this matter, an attorney advocate for whistleblowers agreed with this statement and also argued that proving "contributing factor" is "academic." Statements by National Whistleblower Center, January 14, 2015. I certainly disagree that it is academic.

[40] 49 U.S.C.A. § 42121(b)(2)(B) ("Procedures").

[41] After earlier suggesting that proving contributing factor does not necessarily prove a violation until the affirmative defense is decided, the majority seems to contradict itself in concluding that ". . . Powers has proven by a preponderance of evidence presented at the evidentiary hearing that protected activity contributed to his employment termination *in violation* of the FRSA." *Supra* at 32 (emphasis added).

[42] One possible reason the majority downplays the significance of the contributing factor proof is to avoid the obvious unfairness of declaring the employer a violator of the law without permitting the employer a full opportunity to explain its employment actions, even if its explanation is a subjective explanation.

To say there is no violation upon proving contributing factor contradicts the plain prohibition Congress expressed in the substantive provisions. According to the plain language in Sections 20109(a) and (c), once the employee proves protected activity was a contributing factor in a discharge or demotion decision, the employee proves a violation of the whistleblower protection law.[43] The perceived ambiguity arising from the majority's hyper-technical interpretation disappear in the face of the clear mandate in the substantive prohibition that flatly prohibits any reliance on protected activity.

3. Practical relevance of the employer's reasons as to causation.

To prove a FRSA whistleblower violation, FRSA's blanket prohibition against the slightest reliance on protected activity still requires proof that protected activity influenced to some degree *the employer's decision-making process*. The employer's reasons are not a "stage" in the litigation process; they are necessarily the central focus of the ultimate question of contributing factor. Contributing factor analysis requires a search of the employer's decision-making process to determine if one of the reasons for its decision is protected activity.

But the employer's decision-making is a metaphysical mental process; so, neither the complainant nor the employer can show the ALJ the actual mental processes that occurred. The invisible influences on the decision-maker's mental thoughts cannot be displayed on a movie screen or downloaded as computer data onto a computer monitor. Instead, at the evidentiary hearing, the ALJ faces a complainant trying to prove he was the victim of unlawful mental processes and the employer who denies that protected activity influenced any part of the mental process that led to the employment action in question. The complainant might rely on temporal proximity, inconsistent employer policies, disparate treatment, emails, and witness testimony, among other evidence, to prove circumstantially that protected activity contributed. The employer will do the same and most likely testify that protected activity did not contribute. It is this evidence battle that the ALJ must evaluate together to decide as best as possible what the truth is. But whether the causation evidence consists of memoranda, documents, depositions, hearing testimony, etc., all causation evidence presented to the ALJ will be about the influences that did or did not factor into *the employer's mental processes* that led to the ultimate decision against an employee. The ALJ must listen to all of the employee's evidence and all of the employer's rebuttal evidence and then decide whether protected activity contributed.

I agree with the majority that the employee need not prove that his employer had a motive *to retaliate* or that the employer's non-retaliatory reasons are pretext. But the majority mistakenly equates what the complainant *must prove* to succeed on a whistleblower claim with the ways in which the complainant *may prove* his or her claim. Evidence of retaliation and/or

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[43] Compare *Clemmons v. Ameristar Airways, Inc.*, ARB No. 12-105, ALJ No. 2004-AIR-011, slip op. at 7 (Nov. 25, 2013)(Board majority said that, after contributing factor has been proven, the question is no longer the merits of a complainant's claim but only whether the complainant is entitled to relief.).

pretext can serve as circumstantial evidence that bolsters the complainant's claim of contributing factor. Similarly, if the employer fails to provide any other reason for the employment action in question, the complainant can use this silence as circumstantial evidence that protected activity must have been a reason. For example, if little Leo runs to his teacher and says that Johnny elbowed him in the eye during recess because Leo is a school crossing guard, but nobody witnessed the incident, Leo can show the teacher his black eye, present evidence of temporal proximity and say no more. But, if Leo also says that Johnny called him a "rat" and then elbowed him, this evidence of motive bolsters Leo's testimony. If Johnny said nothing in response to Leo's accusation, the teacher could assume that he hit Leo as retaliation.[44] On the other hand, if Johnny denies retaliating against Leo and credibly tells the teacher that Johnny accidentally elbowed Leo during a basketball game, he and Leo have been close friends for years, and Johnny always protected Leo from getting beat up during lunch, the teacher may choose to believe Johnny that he accidentally elbowed Leo. After Johnny offers his rebuttal explanation, Leo can remain silent or he can try to show that Johnny is making things up to avoid getting in more trouble. In the end, the teacher chooses which story to believe to resolve Leo's complaint.

Similarly, until the ALJ decides the contributing factor issue, the causation question remains open and unproven. As the employee offers evidence, the ALJ will determine whether it has any tendency to show that protected activity contributed to the adverse action and, if so, will admit the evidence into the record without deciding the ultimate question of contributing factor until all the evidence has been submitted by both sides. Likewise, when the employer offers evidence to show that protected activity was not a contributing factor and that some other reasons were, the ALJ will again consider only whether the evidence may be admitted into the record as having "any tendency" of making "contributing factor" more or less probable. That is the definition of relevance.[45] Once evidence is admitted into the record, absent a limiting instruction, the parties and the trier of fact may refer to it freely to decide the ultimate questions of causation, affirmative defenses, and damages.[46] The complainant's retaliation evidence presses against the employer's denial and counter-evidence as the ALJ considers all of it to settle the question of contributing factor. To be clear, the complainant's burden of proving

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[44] In criminal cases, the prosecution cannot comment on the silence of the accused. *See United States v. Jackson*, 736 F.3d 953, 957 (10th Cir. 2013) cert. denied, 134 S. Ct. 1777, 188 L. Ed. 2d 606 (2014)("self-incrimination clause of the Fifth Amendment is violated when the prosecution comments on an accused's silence"). In contrast, sometimes courts allow a party to argue an adverse inference against an opposing party that invokes the Fifth Amendment to remain silent. *S.E.C. v. Caramadre*, 717 F. Supp. 2d 217, 222 (D.R.I. 2010).

[45] "Relevant evidence means evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 29 C.F.R. § 18.401(emphasis added).

[46] *See, e.g.*, Florida Standard Jury Instruction 301.1 and 301.2 (all admitted evidence available for witness testimony during trial and the jury upon deliberation).

"contributing factor" is slight, but his or her evidence (of contributing factor) must have enough substance to persuade the ALJ and withstand the employer's counter-evidence (of no contributing factor).

Evidence rules for hearings do not change when the causation standard drops from "but for" to "motivating factor" to "contributing factor." What changes is the level of causation that a complainant must prove. AIR 21 procedures changed the *Mt. Healthy*[47] standards of proof by lowering complainant's standard from "motivating factor" to "contributing factor" and raising the employer's affirmative defense standard from "preponderance" to "clear and convincing." But these changes do not make the employer's subjective testimony any more "suspicious" or make such testimony completely irrelevant. Under the extremely high "but for" causation standard, the complainant must prove that protected activity was an essential cause and the employer will have a relatively easy task to successfully rebut the plaintiff's claim even if unlawful discrimination was a substantial factor.[48] Under the "motivating factor" standard, unlawful retaliation must be a "substantial factor;"[49] the employer will have more difficulty completely rebutting the complainant's accusation because "substantial factor" allows for mixed motives. The "contributing factor" standard presents the same possibility as "motivating factor," that multiple factors caused the unfavorable employment action, except that "contributing factor" captures the slightest influence of protected activity. For this reason, while 29 C.F.R. § 24 requires the "contributing factor" standard for ERA cases and "motivating factor" for six other environmental statutes, the same rules of relevance apply to the ERA and the other six environmental laws. In the end, the majority misunderstands and muddies this broad definition of relevance, unnecessarily overcomplicating the administrative evidentiary hearings process.[50]

Even if "contributing factor" complainants had more favorable evidence rules than "motivating factor" complainants (under the six environmental statutes), the Board must review

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47 *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

48 *See, e.g., Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. __, 133 S. Ct. 2517, 2525 (2013).*

49 *See Onysko v. State of Utah, Dept. of Envtl. Quality*, ARB No. 11-023, ALJ No. 2009-SDW-004, slip op. at 10 (ARB Jan. 23, 2013)("A 'motivating factor' is 'conduct [that is] . . . a 'substantial factor' in causing an adverse action.")(citing *Mt. Healthy*, 429 U.S. at 287)).

50 The *Powers* majority suggests that we should follow the Merit Systems Protection Board's (MSPB) evidentiary rulings for its WPA cases given that the Board has cited MSPB's *Marano* decision thirty times for one finite point of law (i.e., the obvious point that "contributing factor" meant "contributed in any way"). *Supra* at 18, n.10. But the WPA case that attempts to substantively change how to judge the relevance of employer evidence in the record is *Kewley*, a case the Board has never cited for that purpose before the *Fordham* decision. Before *Fordham*, the Board cited *Kewley*, a mere three times (as alternate support for the obvious definition of contributory factor). *See Tablas*, ARB No. 11-050, slip op. at 8; *Speegle*, ARB No. 11-029-A, slip op. at 10, n.69 (Corchado, J., concurring); *Smith*, ARB No. 11-003, slip op. at 6-7.

evidentiary errors under an abuse of discretion standard. [51] ALJs have broad discretion when making evidentiary rulings. In this case, the majority generally discusses the evidentiary rule of relevance but never says that the ALJ violated that rule or any other evidence rule. It merely says ambiguously that subjective employer testimony is of "highly suspicious relevance." To vacate or reverse for an evidentiary error, the Board must determine that the error was reversible error, that is, it could have affected the outcome of the case.[52] The majority did not even mention the abuse of discretion standard, much less discuss it. Lastly, even if the majority concluded that the ALJ committed a reversible error, generally this would make the outcome unclear and would require a remand so the ALJ can reconsider this matter without considering the employer's explanation for doing what it did.

B. Subsection D(2) of Majority's Discussion

The entire subsection D2 is an improper substantial evidence review. While the majority recognizes that the AIR 21 burden shifting framework "requires a 'fact-intensive' analysis," it fails to apply the Board precedent in *Bobreski II* to determine whether substantial evidence supports the ALJ's ruling on contributing factor. In *Bobreski II*, the Board did not change the mandatory "substantial evidence review" standard, it merely fleshed out a standard that the law has required for years, which is to determine: (1) whether the ALJ and/or the parties have identified record evidence for each of the material fact-findings; (2) whether such record evidence logically supports the material fact-findings; and, if so (3) whether the record as a whole overwhelms that fact finding or contains factual disputes that expose that fact-finding as unresolved.[53] Instead of following the guidelines in *Bobreski II*, the majority engages in its own de novo review of the ALJ's findings of fact and the record evidence and makes at least two fundamental errors.

The majority makes its first misstep by failing to appreciate the material differences between the Public Law Board hearing and this case, making the Public Law Board's ruling irrelevant. The burdens of proof are opposite and the causation questions are different. In the Public Law Board appeal, Union Pacific had the burden of proving that Powers violated an employment law rule and that such violation justified termination. The Public Law Board determined Union Pacific did not meet its burden. In this case, Powers has the burden of proving whether Powers' protected activity influenced Union Pacific's decision to terminate his job. Consequently, the fact that the Public Law Board said Union Pacific incorrectly concluded that Powers was dishonest about his physical abilities does not change that Union Pacific relied on an

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[51] *See, e.g.*, *Bechtel*, ARB No. 09-052, slip op. at 19.

[52] 5 Am. Jur. 2d Appellate Review § 692 (errors are harmless if they could not have changed the result of the case).

[53] *Bobreski II*, ARB No. 13-001, slip op. at 13-14. The concurring judge in *Bobreski II* raised no objection to the three-step analysis.

errant reason for terminating Powers' employment.[54] Again, it is true that Powers does not have to prove that Union Pacific's reasons were pretext. But if Powers chooses not to challenge Union Pacific's reasons, he runs the risk of permitting the ALJ to accept Union Pacific's reasons as the sole cause to the exclusion of protected activity being a factor, a choice that the trier of fact may make.

In its second error in subsection D2, instead of analyzing whether the record supports the ALJ's ruling on contributing factor even without the employer's "subjective" explanations of its employment action, the majority and Powers act as the trier of fact and focus on whether there is "substantial evidence to support a prima facie case under the FRSA." Powers' Brief at 1.[55] The majority then lists the facts that favor Powers' claim and neutral facts. After listing these facts, the majority again acts as the trier of fact and concludes that substantial evidence proves that Powers' report of an injury and treatment were contributing factors in Union Pacific's termination of Powers' employment.

The majority ignores the facts that support the ALJ's finding that protected activity did not contribute to Union Pacific's termination of Powers' employment. Those facts include, among others: (1) the many months separating Powers' report of injury (May 2007) and his termination in late 2008, (2) the accommodations that Union Pacific provided, and (3) that central decision-makers were not in Powers' chain of command in May 2007. In generalizing the employer's explanations as "subjective," the majority ignores what the parties agreed the video showed and that the ALJ found the video showed Powers engaged in substantial physical activities over a three-day period. By stipulation, those activities included strenuous activity of pulling, pushing, drilling, hammering, lifting items that were almost fifty pounds (his restriction limit), and certainly more than "just gardening." The ALJ found Gilliam's mistake to be reasonable, a finding of fact that the Board cannot ignore by simply disagreeing with the ALJ. The majority ignores the fact that Powers' doctors had already released him from treatment when he was fired. The record contains substantial evidence supporting the ALJ's finding on causation (rejecting "contributing factor") and his finding that a reasonable mistake led to Union Pacific firing Powers. The ALJ's overall opinion suggests to me that the ALJ understood Union Pacific presented an either/or case (its reasons to the exclusion of protected activity), and Union Pacific persuaded the ALJ that a reasonable mistake about Powers' lack of integrity was the sole reason that it fired Powers.

As the Board explained and demonstrated in *Bobreski II*, to reverse the ALJ's factual findings, the Board must cautiously explain how the record fails to provide substantial evidence for the ALJ's relevant fact findings and the ultimate finding on causation or, alternatively, how the ALJ's findings and undisputed facts overwhelmingly disprove the ALJ's ultimate finding on causation. It cannot simply list the favorable facts and then reach an alternate conclusion, even if

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[54] Ironically, the majority accepts that Powers believed erroneously that he had to take medical leave to preserve his seniority status and that incorrect belief caused him to take medical leave. *Supra* at 4. The fact that he was wrong does not change the reason that he took medical leave.

[55] *See* n.4, *supra*.

it is a plausible conclusion. In *Bobreski II*, the Board painstakingly analyzed the various factual findings to see if they were supported by substantial record, and then reviewed whether the record overwhelmingly weighed against the ALJ's finding on causation.

In summary, the majority decision demonstrates there is consensus reached on two important points. First, there is no "inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor." Second, the ALJs must exercise their discretion to determine what evidence is relevant. The majority's ultimate narrow holdings found in subsection D of its "Discussion" are improper evidentiary determinations and an improper substantial evidence review filled with many errors of law and evidentiary principles.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge