In the Matter of:

ROBERT POWERS, **ARB CASE NO. 13-034**

COMPLAINANT, **ALJ CASE NO. 2010-FRS-030**

v. **DATE: January 6, 2017**

UNION PACIFIC RAILROAD COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
James Ferguson, Esq. (argued); *Law Office of H. Chris Christy,* North Little Rock, Arkansas; Stephen M. Kohn, Esq. (argued); *Kohn, Kohn & Colapinto, LLP*; Washington, District of Columbia

***For the Respondents*:**
Tim D. Wackerbarth, Esq. and Joseph P. Corr, Esq.; *Lane Powell PC,* Seattle, Washington; Clifford A. Godiner, Esq. (argued); *Thompson Coburn LLP,* St. Louis, Missouri

***For the Assistant Secretary of Labor for Occupational Safety and Health*:**
M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Megan E. Guenther; Esq., and Mary E. McDonald, Esq. (argued); *U.S. Department of Labor, Office of the Solicitor,* Washington, District of Columbia

For Project on Governmental Oversight as Amicus Curiae:
Scott Amey, Esq.; Project on Governmental Oversight, Washington, District of Columbia

For National Whistleblower Center, National Employment Lawyers Association, Truckers Justice Center and Teamsters for a Democratic Union as Amicus Curiae:
Jason Zuckerman, Esq. (argued) and Dallas Hammer, Esq.; *Zuckerman Law,* Washington, District of Columbia

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:

Louis Warchot, Esq. and Daniel Saphire, Esq.; *Association of American Railroads*, Washington, District of Columbia; Ronald M. Johnson, Esq. (argued) and Mikki L. McArthur, Esq.; *Jones Day*, Washington, District of Columbia

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

James E. Gauch, Esq.; *Jones Day*, Washington, District of Columbia; Steven P. Lehotsky, Esq. and Warren Postman, Esq.; *U.S. Chamber Litigation Center*, Washington, District of Columbia; Prasad Sharma, Esq. and Richard Pianka, Esq.; *ATA Litigation Center*, Arlington, Virginia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Anuj C. Desai, *Administrative Appeals Judge;* sitting en banc.[1] Judge Royce, dissenting.

FINAL DECISION AND ORDER

Robert Powers filed a complaint under the whistleblower protection provisions of the Federal Rail Safety Act of 1982[2] 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. OSHA investigated and then 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 and 21, 2011. On January 15, 2013, the ALJ issued a Decision and Order Denying Claim and dismissing the complaint (D. & O.).

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[1] Judge E. Cooper Brown took no part in the consideration or decision of this case.

[2] 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 (FRSA). FRSA's implementing regulations are found at 29 C.F.R. Part 1982 (2016) and 29 C.F.R. Part 18, Subpart A (2016).

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*."[3] Following supplemental briefing by the parties and amici, the ARB held oral argument on January 14, 2014.

After reviewing the case en banc, the Board issued a Decision and Order of Remand (with full dissent) on April 21, 2015. But subsequently, on March 11, 2016, the Board issued an order holding the case, which was pending before the Office of Administrative Law Judges, in abeyance. Ultimately, because one of its members who participated in the Board's en banc review of this case acknowledged that his impartiality in this case might reasonably be questioned, the Board issued an order on May 23, 2016, disqualifying that judge[4] from this case. Furthermore, given that judge's disqualification and to remedy any appearance of partiality, the Board vacated the Board's April 21, 2015 Decision and Order of Remand (with full dissent) in which the disqualified judge participated. Now, having completed our review of this case, we affirm the ALJ's determination that Powers failed to prove that his protected activity was a contributing factor in the adverse action he suffered as supported by substantial evidence and, therefore, affirm the ALJ's Decision and Order Denying Claim, dismissing the complaint.

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 Sharrah. Sharrah 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 Sharrah that he nursed his hand throughout the weekend, but still felt pain. Powers filled out an accident report, and Sharrah told him to date the form for that day, Monday, May 21, 2007. Sharrah 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 Sharrah's

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[3] Order Setting En Banc Review at 2 (ARB Oct. 17, 2014).

[4] After being disqualified, that judge, Judge E. Cooper Brown, took no part in the consideration or decision of this case. *See supra* note 1.

requests. Sharrah 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 (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 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 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 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.

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 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 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 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." EX M at 10. Dr. Abraham determined that the MRI findings were compatible with "mild" tenosynovitis but no tendon tear. D. & O. at 9 (citing EX M at 10). The medical report indicated that Powers' pain was "worse with movement." EX M at 10.

From December 2007 through March 2008, Dr. Abraham continued seeing Powers "on a regular basis with no new complaints, no additional treatment, no change in work restrictions, and no more than repeating reports of slow improvement." D. & O. at 9. Dr. Abraham's reports during this period contained various "discrepanc[ies]." *Id.* at 10.

On March 18, 2008, "Dr. Abraham estimated a return to work in four weeks." *Id.* On April 15, 2008, when Dr. Abraham had predicted Powers would be ready to return to work, Dr. Abraham still maintained Powers on the same restrictions and wrote in his report that Powers was still "approaching maximum improvement." *Id.*

On May 13, 2008, after examining Powers again, Dr. Abraham prepared an Occupational Health Injury Treatment report limiting Powers' lifting, pushing or pulling to fifty pounds or less. EX M at 30-32; 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." EX M at 31; EX O at 2; *see also* D. & O. at 10 n.16. The Chart Notes state: "[Powers] seems to be approaching the point of maximum improvement and medically stationary status." EX M at 31; 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 EX L at 25).

On May 27, 2008, Dr. Abraham examined Powers again. Powers reported that the steroid injection Dr. Wuest administered had reduced his pain. D. & O. at 12-13 (citing 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." EX M at 36-37; EX AA; *see also* D. & O. at 14.

2. Surveillance video of Powers taken in May 2008

Company Claims Manager Loomis had been receiving medical updates this whole time. D. & O. at 10 & n.17. By May 2008—now a year after the initial injury—"Loomis had what he believed was reason to question whether [Powers] was as disabled as his doctor was reporting him to be." D. & O. at 22. For one, Loomis had apparently learned that Powers "was moving heavy items," *id.*, and that Powers "might have been involved in some activities that . . . might show him as capable of work." *Id.* at 10. Moreover, Powers had had "no pre-existing medical problems with his thumb or wrist, laboratory testing was largely negative, [steroids addressed any problem shown by imaging], and a year had passed since the incident." *Id.* at 22. And, when Loomis then contacted Union Pacific's medical consultant, the consultant "advised that there was no reasonable explanation for [Powers'] lack of improvement." *Id.* By this point, Powers had also apparently retained an attorney for a potential claim against Union Pacific under the Federal Employers Liability Act (FELA), and so Loomis believed that he could not call either Powers or his treating physician to discuss Powers' slow progress. *Id.* at 10.

So, on or around May 8, 2008, Loomis hired an Investigator, Jonathon Iguchi, to secretly record Powers' activity at his home. Loomis sought evidence "to discredit the extent of [Powers'] work restrictions—or at least to show that [Powers] could do more than the restrictions would suggest." *Id.* at 22. Although Loomis also sought to "strengthen the Company's defenses" against a potential FELA claim, *id.*, there is no evidence that Loomis hired the Investigator for any reason connected to Powers' May 2007 report of the initial injury.

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 (ALJX) 1 at 4 (*see* D. & O. at 2, n.1); *see also* D. & O. at 11-12; Complainant's Exhibit (CX) 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* CX 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. 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." 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. 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 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). 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 Carrier's 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 the Company reinstate Powers to his former position, compensate him for all wages and benefits lost since his removal, and expunge his personnel record. *Id.* at 1, 6.

B. Relevant statutory and regulatory background

The FRSA has a whistleblower protection provision that prohibits railroad carriers from, among other things, "discharg[ing]" an employee if the discharge is "due, in whole or in part, to" the employee "notify[ing] . . . the railroad carrier . . . of a work-related personal injury."[5] In 2007, Congress established the Department of Labor procedures under which this case was brought, incorporating the procedures found in the whistleblower protection section of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, commonly known as "AIR-21."[6] The 2007 FRSA amendment incorporated AIR-21's burden-of-proof provision, stating "any action [under the substantive subsections of the FRSA whistleblower protection

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[5] 49 U.S.C.A. § 20109(a)(4); *see also* 29 C.F.R. § 1982.102(b)(1)(iv).

[6] *See* 49 U.S.C.A. § 20109(d)(2)(A)("Any [enforcement] action [under the substantive prohibitions on retaliation for whistleblowing] shall be governed under the rules and procedures set forth in [the AIR-21 whistleblower protection provision]"), referencing 49 U.S.C.A. § 42121(b)(2)(B).

provision] shall be governed by *the legal burdens of proof set forth in* [the AIR-21 whistleblower protection provision]."[7]

The AIR-21 legal burdens of proof are codified at 49 U.S.C.A. § 42121(b)(2)(B).[8] The clauses at 49 U.S.C.A. § 42121(b)(2)(B)(iii) and (iv), applicable in hearings before ALJs at issue in this case, establish a two-step test.

The first step of the AIR-21 whistleblower protection provision's burden-of-proof framework at 49 U.S.C.A. § 42121(b)(2)(B)(iii) requires the complainant to prove, by a preponderance of the evidence, that protected activity was a contributing factor in the unfavorable personnel action.[9] Thus, this first "step" also requires the complainant to prove by a preponderance of the evidence that (1) he engaged in protected activity and (2) his employer took some adverse personnel action.[10]

In this regard, the Board has recently overturned its decision in *Fordham* and its "contributory factor" analysis, and has held that in determining "whether the employee has *proven*, by a preponderance of the evidence, that the protected activity was a contributing factor in the adverse action (the "contributing factor" step)," the AIR-21 whistleblower protection provision contains "no limitations on the evidence the factfinder may consider" in making this "contributory factor" determination. *See Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 16, 37 (ARB Sept. 30, 2016; reissued Jan. 4. 2017). Specifically, "nothing in the statute precludes the factfinder from considering evidence of an employer's nonretaliatory reasons for its adverse action in determining the contributing-factor question." *Id*. at 16.

Thus, "[w]here the employer's theory of the case is that protected activity played no role whatsoever in the adverse action, the ALJ must consider the employer's evidence of its

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7 *Id.* at § 20109(d)(2)(A)(i) (emphasis added).

8 The first two clauses at 49 U.S.C.A. § 42121(b)(2)(B)(i) and (ii), apply to the investigation stage of the Department of Labor's procedures, when the Assistant Secretary for OSHA is considering the employee's complaint; the next two clauses at 49 U.S.C.A. § 42121(b)(2)(B)(iii) and (iv), apply in hearings before ALJs, as is at issue in this case. *See* 29 C.F.R. §§ 1979.104(b), (c), (d), 1979.109(a) (setting forth the procedures for complaints brought under the AIR-21 whistleblower protection provision); *see also* 29 C.F.R. §§ 1982.104(e)(1), (4); 1982.109(a), (b) (same for FRSA).

9 Specifically, 49 U.S.C.A. § 42121(b)(2)(B)(iii) (emphasis added) provides "[t]he Secretary may determine that a violation . . . has occurred only if the complainant demonstrates that [the protected activity] was a contributing factor in the unfavorable personnel action. . . ." The complainant's showing must be "demonstrated by a preponderance of the evidence." 29 C.F.R. § 1982.109(a).

10 *See, e.g., Folger v. SimplexGrinnell, LLC*, ARB No. 15-021, ALJ No. 2013-SOX-042, slip op. at 2 & n.3 (ARB Feb. 18, 2016).

nonretaliatory reasons" along with the employee's evidence to determine whether protected activity was a contributing factor in the adverse action. *Id*. at 16, 58-59. Because the protected activity need only be a "contributing factor" in the adverse action, an ALJ "should not engage in any comparison of the relative importance of the protected activity and the employer's nonretaliatory reasons." *Id.* "Since in most cases the employer's theory of the facts will be that the protected activity played no role in the adverse action, the ALJ must consider the employer's nonretaliatory reasons, but only to determine whether the protected activity played any role at all." *Id*. at 16.[11]

When determining whether protected activity was a contributing factor in an adverse personnel action, the ALJ should be aware that, "in general, employees are likely to be at a severe disadvantage in access to relevant evidence." *Id.* at 59.[12] Thus, an employee "*may*" meet his burden with circumstantial evidence." *Id.*[13] So

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[11] So "the employee does not need to disprove the employer's stated reasons or show that those reasons were pretext." *Palmer*, ARB No. 16-035, slip op. at 57. *See Zinn v. American Commercial Lines, Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 12 (ARB Mar. 28, 2012). ("The ALJ also erred to the extent he required that [the employee] show "pretext" to refute [the employer's] showing of nondiscriminatory reasons for the actions taken against her."); *Klopfenstein v. PCC Flow Techs. Holding, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 19 (ARB May 31, 2006) ("Because, in examining causation, the 'ultimate question' is whether the complainant has proven that protected activity was a contributing factor in his termination, a complainant need not necessarily prove that the respondent's articulated reason was a pretext in order to prevail. Of course, most complainants will likely attempt to prove pretext, because successfully doing so provides a highly useful piece of circumstantial evidence. But a complainant is not required to prove pretext, because a complainant alternatively can prevail by showing that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic" (citations, internal quotation marks, and footnotes omitted)).

Because "unlawful retaliatory reasons [can] co-exist with lawful reasons," *Bobreski v. J. Givoo Consultants, Inc*. (*Bobreski II*), ARB No. 13-001, ALJ No. 2008-ERA-003, slip op. at 17 (ARB Aug. 29, 2014); *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 12 (ARB Sept. 26, 2012) (noting that "even if [the employer's nonretaliatory reason] was a true reason, this conclusion does not rule out protected activity as a contributing factor in the termination of his employment"), and because, in such cases, "protected activity would be deemed a contributing factor, consideration of evidence of the employer's nonretaliatory reasons when determining the contributing factor issue does *not* require the employee to disprove the employer's reasons." *Palmer*, ARB No. 16-035, slip op. at 58.

[12] *See Bechtel*, ARB No. 09-052, slip op. at 13 n.68.

[13] *See, e.g.*, *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 11-029, ALJ No. 2005-ERA-006, slip op. at 10 (ARB Jan. 31, 2013); *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Feb. 29, 2012); *cf. Bobreski II*, ARB No. 13-001, slip op. at 17 (noting that "[c]ircumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence").

> an ALJ *could* believe, based on evidence that the relevant decisionmaker knew of the protected activity and that the timing was sufficiently proximate to the adverse action, that the protected activity was a contributing factor in the adverse personnel action. The ALJ is thus *permitted to* infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity. But, . . . the ALJ must *believe* that it is more likely than not that protected activity was a contributing factor in the adverse personnel action and must make that determination after having considered all the relevant, admissible evidence.

Id.

This first step of the AIR-21 burden-of-proof framework requires the factfinder or ALJ to answer a question "about what happened: did the employee's protected activity play a role, any role, in the adverse action?" *Id*. at 55. "For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action." *Id*. at 55-56. "If there is a factual dispute on this question, as is usually the case, the ALJ must sift through the evidence and make a factual determination. This requires the ALJ to articulate clearly what facts he or she found and the specific evidence in the record that persuaded the ALJ of those facts." *Id*. at 60.

"A contributing factor is '*any* factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.'"[14] "[I]t just needs to be a factor;" the "protected activity need only play some role, and even an '[in]significant' or '[in]substantial' role suffices." *Id.* at 56. "[I]f the ALJ believes that the protected activity and the employer's nonretaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question." *Id.*[15]

If the employee prevails at the first step, the second step of the AIR-21 burden-of-proof framework requires the factfinder to then determine whether the employer has proven, by clear and convincing evidence, that, "in the absence of" the protected activity, it would have taken the

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[14] *See, e.g.*, *Coates v. Grand Trunk W. R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 3 (ARB July 17, 2015) (quotation marks and citations omitted).

[15] *See Bechtel*, ARB No. 09-052, slip op. at 12 (noting that "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" (citation and internal quotations marks omitted) (alteration in original)).

same adverse action (the "same-action" defense)."[16] *Id*. at 37, 60. Again, the statute "does not contain . . . any limitation on the factfinder's consideration of relevant, admissible evidence" at the second step of the analysis. *Id*. at 37.[17] "It is not enough for the employer to show that it *could* have taken the same action; it must show that it *would* have." *Id.* at 60.[18]

The "clear and convincing" standard of proof that the ALJ must use "is usually thought of as the intermediate standard between "a preponderance" and "beyond a reasonable doubt." *Id.*[19] "[I]t requires that the ALJ believe that it is 'highly probable' that the employer would have taken the same adverse action in the absence of the protected activity."[20] "Quantified, the probabilities might be in the order of above 70% . . . ."[21]

The second step of the AIR-21 burden-of-proof framework requires the factfinder or ALJ to answer whether "in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway?" *Id*. at 56. The ALJ "must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity." *Id*. "[A]gain, it is crucial that the ALJ find facts and clearly articulate those facts and the specific evidence in the record that persuaded the ALJ of those facts." *Id*. at 60-61.[22]

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[16] Specifically, 49 U.S.C.A. § 42121(b)(2)(B)(iv) provides that "[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." *See also* 29 C.F.R. § 1982.109(b); *see generally Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 10-14 (ARB Apr. 25, 2014).

[17] *See Speegle* ARB No. 13-074, slip op. at 11 ("The circumstantial evidence can include, among other things: (1) evidence of the temporal proximity between the non-protected conduct and the adverse actions; (2) the employee's work record; (3) statements contained in relevant office policies; (4) evidence of other similarly situated employees who suffered the same fate; and (5) the proportional relationship between the adverse actions and the bases for the actions.").

[18] *Speegle,* ARB No. 13-074, slip op. at 11.

[19] *See Addington v. Texas*, 441 U.S. 418, 423-24 (1979).

[20] *See generally Speegle,* ARB No. 13-074, slip op. at 11-12; *see also Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

[21] *United States v. Fatico*, 458 F. Supp. 388, 405 (E.D.N.Y. 1978) (Weinstein, J.), *aff'd*, 603 F.2d 1053 (2d Cir.1979).

[22] The statute delegates that determination to the Secretary, § 42121(b)(2)(B) ("*The Secretary* may determine that a violation has occurred . . ." (emphasis added)), and through duly promulgated regulations, the Secretary has in turn delegated it to ALJs. *See* 29 C.F.R. § 1982.109; 29 C.F.R. § 1979.109.

C. The ALJ's Decision and Order Denying Claim

The ALJ found that it was undisputed 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. D. & O. at 19. 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." *Id.* 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*.

Ultimately, the ALJ concluded that Powers 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 because: 1) the twelve to fourteen month temporal gap between Powers' protected activity in reporting his injury in May 2007 and the adverse action of his discharge in late 2008 "was too great to establish retaliation, and if anything, weighs against" finding that protected activity contributed to any unfavorable employment action taken against Powers; 2) Union Pacific accommodated Powers' injury and work restrictions for a year after the injury without taking any action that might adversely affect Powers, "again suggesting the absence of any retaliatory purpose;" and (3) the two central Union Pacific managers and decisionmakers involved in Powers' discharge were not in Powers' chain of command "at the time he reported the injury in May 2007." *Id*. at 26.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has authority to hear appeals from ALJ decisions and issue final agency decisions on behalf of the Secretary of Labor in cases arising out of the FRSA whistleblower protection provision.[23] The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations if they are supported by substantial evidence.[24]

DISCUSSION

To prevail, Powers must demonstrate by a preponderance of the evidence that (1) he engaged in activity protected by the FRSA; (2) Union Pacific took some adverse personnel action against him; and (3) his protected activity was a contributing factor in that adverse personnel action.[25] The ALJ found that it was undisputed that (1) Powers engaged in protected activity when he reported a workplace injury in May 2007[26] and (2) Union Pacific took adverse

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[23] See Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378, 69,378 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a).

[24] 29 C.F.R. § 1982.110(b); *Kruse v. Norfolk S. Ry. Co.*, ARB Nos. 12-081, 12-106; ALJ No. 2011-FRS-022, slip op. at 3 (ARB Jan. 28, 2014).

[25] *Palmer*, ARB No. 16-035, slip op. at 17, n.74.

[26] At no point does Powers claim that he engaged in any protected activity other than the May 2007 injury report. In particular, he does not claim—indeed, he specifically disavows—that anything related to his FELA claim was protected activity. *See Brief of Complainant Robert Powers* at 19 ("a[] FELA claim cannot be the basis for [an] FLSA claim"). Nor does his Petition for Review to

action against him when it discharged him in September 2008. D. & O. at 19. But the ALJ concluded that (3) "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. This conclusion was based on the ALJ's determination that "there is no persuasive evidence to link the discharge decision to Complainant's filing of the injury report in May 2007," *id*. at 27; and the fact that Union Pacific decisionmakers "reasonably concluded that [Powers] was dishonest when he said he was doing some 'gardening, nothing major' and when he said he was complying with his medical restrictions," *id.* at 26-27. In other words, the ALJ concluded that the *sole* reason for the discharge was nonretaliatory—namely, Union Pacific's belief that Powers had been dishonest.

On appeal, Powers contends that the ALJ got the facts wrong. He argues that, despite the lapse in time between the filing of his injury report and his termination, Union Pacific took other acts during that period, acts that establish that his injury report was a contributing factor in his termination.[27] The crux of Powers' argument, then, is that the ALJ got the facts wrong by failing to view his evidence as sufficient to meet his burden to prove his injury report played a role in his discharge.

As an appellate body, we need not resolve this factual dispute: rather, because the ALJ found as a fact that the injury report was not a contributing factor in Powers' termination, we

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this Board claim that the ALJ erred on the question of what constituted Powers' protected activity. His Petition for Review seeks review only of facts related to the ALJ's causation determination; in the Petition for Review, he refers only to the May 2007 injury report as the protected activity, and he does this three separate times. *See* Powers v. Union Pacific Railroad Co., Petition for Review (noting that Powers "specifically appeals from the following findings: 1. That complainant's *report of personal injury* did not play any part in Respondent's decision to dismiss Complainant from service; . . . 3. That Complainant 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; . . . 6. That there is no persuasive evidence to link the discharge decision to *Complainant's filing of the injury report in May 2007*" (emphases added)).

[27] Powers asserts that the following facts are sufficient to show his injury report was a contributing factor in his termination: 1) His supervisor's attempt to initially dissuade Powers from immediately filing an injury report and Powers asserting that the supervisor only accommodated Powers to avoid having another lost time injury on the supervisor's record, 2) Union Pacific stated that the injury was Powers' own fault and documented that on Powers' disciplinary record, 3) Union Pacific failed to inform Powers that he could have "bid back" to his lower-level job that would accommodate his restrictions after his transfer to a system welding job where his restrictions could not be accommodated, 4) Union Pacific believed that Powers was planning on filing a claim under the Federal Employer's Liability Act, 45 U.S.C. § 51 et seq. (FELA), which Powers asserts prompted the surveillance video and Union Pacific officials questioning Powers about his restrictions, 5) Union Pacific officials were not even sure what restrictions Powers was under when he was videotaped, 6) the surveillance video was not shown to any Union Pacific official until Powers' restrictions were lifted so that he would be able to return to work, and 7) Gilliam stated that he could accommodate Powers even after viewing the surveillance video. *Brief of Complainant Robert Powers* at 15-21.

review the ALJ's "determination under the substantial evidence standard."[28] When supported by substantial evidence, we uphold an ALJ's factual findings "even if there is also substantial evidence for the other party, and even if we would justifiably have made a different choice had the matter been before us de novo."[29]

Under that standard, we affirm because the record contains substantial evidence supporting the ALJ's factual determination on causation. In particular, substantial evidence supports the ALJ's determination of the ultimate fact that Powers' protected activity did not contribute in any way to Union Pacific's termination of his employment.

The evidence supporting the ALJ's finding that Powers' May 2007 injury report (his protected activity) was not a contributing factor in his termination 16 months later (the adverse personnel action), falls into two categories: (1) evidence directly tending to undermine Powers' claim that the May 2007 injury report played a role in his termination; and (2) evidence tending to show that Union Pacific's actual reason for the termination was something other than the injury report—namely, the Union Pacific decisionmakers' reasonable belief that Powers had been dishonest about both his statement that he was just doing some "gardening, nothing major" and that he was complying with his medical restrictions. Despite the argument Powers and the numerous amici supporting him make to the contrary, the ALJ properly considered both categories of evidence.[30]

The first category of evidence on which the ALJ relied directly undermined Powers' claim that the injury report contributed in any way to Powers' termination. That evidence was all uncontroverted, and it led the ALJ to find the following undisputed, intermediate facts: (1) Powers continued to work for Union Pacific for 16 months before Union Pacific fired him; (2) Union Pacific was affirmatively helpful to Powers in the interim, providing him accommodations for his injury, work restrictions, and treatment needs, and it took no adverse action against him until his September 2008 termination; and (3) none of the decisionmakers involved in Powers' termination was in his chain of command in May 2007 (thus making it less likely that they were retaliating against him for the May 2007 injury report). *Id*. at 26.

The second category of evidence on which the ALJ relied tended to show that the only reason Union Pacific fired Powers was its officials' reasonable belief that Powers had been dishonest. That evidence convinced the ALJ to find the following intermediate facts: (1) Union Pacific official Loomis had "learned that Mr. Powers may be engaged in activities" showing him

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[28] 29 C.F.R. § 1982.110(b); *Kruse*, ARB Nos. 12-081, 12-106; slip op. at 3.

[29] *Henrich v. Ecolab, Inc*., ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 8 (ARB June 29, 2006) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

[30] *Palmer*, ARB No. 16-035, slip op. at 16, 37. In *Palmer*, this Board, sitting en banc, overruled the "contributing factor" analysis in *Fordham* and held that "nothing in the statute precludes the factfinder from considering evidence of an employer's nonretaliatory reasons for its adverse action in determining the contributing-factor question." *Id*. at 16.

as capable of work (a fact supported by testimonial evidence);[31] (2) Powers told Gilliam that he was just doing "gardening, nothing major" during a telephone conversation (an undisputed fact, also supported by testimonial evidence);[32] and (3) Powers had engaged in various strenuous physical activities over a three-day period, including pulling, pushing, digging, carrying, repeatedly winding wire, drilling, hammering, lifting items that were almost fifty pounds (his restriction limit), and certainly more than "gardening, nothing major" (another undisputed fact, based in part on the uncontroverted videotape of Powers).[33] D. & O. at 23-25.

The fact that Gilliam and Meriwether may have been wrong in their belief that Powers violated his medical restrictions does not warrant reversal. First, Gilliam reasonably believed that Powers was dishonest not only for allegedly violating his medical restrictions but also for saying that he was just doing "gardening, nothing major" during the May 29, 2008 telephone conversation. While not unrelated to each other, those are two distinct instances of alleged dishonesty on Powers' part. And, the ALJ specifically "credit[ed] Gilliam's testimony" that Gilliam believed Powers to have been "less than honest" during the May 29, 2008 telephone conversation.[34] Thus, Powers' alleged violation of his medical restrictions during the May 16-18, 2008 weekend was not the only thing Gilliam thought Powers had been dishonest about. So, even though Gilliam and Meriwether apparently turned out to be wrong in their belief that Powers had been dishonest about his medical restrictions, the ALJ thought they were correct in believing that Powers was dishonest during the May 29, 2008 telephone conversation.

Second, and more important, the ALJ was entitled to believe that the only reason for the discharge was Gilliam and Meriwether's reasonable belief that Powers had been dishonest about his medical restrictions, *even if that belief was incorrect*. Certainly, the fact that Gilliam and Meriwether were wrong about Powers' medical restrictions is relevant; indeed, the fact that they were wrong could be reason enough for a factfinder to be suspicious of their claim that dishonesty was the real reason for the discharge. On the basis of their having been wrong, therefore, a factfinder *could* conclude that their claimed reason of dishonesty was a pretext, or, at the very least, was not the whole story.

But the burden to show contributing-factor causation is the employee's. Thus, it is incorrect to say, as the dissent puts it, that "[t]he relevant causal connection is between a legitimate business reason and an adverse action—*not* between a Respondent's *belief* regarding its business reason and an adverse action."[35] An employer doesn't need to have *any* reason to fire an employee, let alone a "legitimate business reason." Unless the employer posits a

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31 Hearing Transcript (HT) at 147; *see* D. & O. at 10, 22.

32 HT at 313-315, 3332, 357-358; CX 4; *see* D. & O. at 14-15, 23-24, 27.

33 ALJX 1 at 4; CX 7; D. & O. at 2, n.1; D. & O. at 12.

34 D. & O. at 23.

35 Dissent at text following footnote 43 (emphasis in original).

nonretaliatory reason, however, a factfinder is very likely to conclude that retaliation was the real reason for, or at least a contributing factor in, the discharge. That is why the employer's belief not only is relevant but also is crucial to determining whether protected activity was a contributing factor in the adverse action.

The "relevant causal connection" is thus not between "a legitimate business reason and an adverse action."[36] Rather, the "relevant causal connection" is between *the protected activity* and an adverse action. When the ALJ concludes that the only reason for the discharge was something other than protected activity, the ALJ has concluded as a fact that the protected activity did not contribute in any way to the discharge. The ALJ has thus concluded that the employee has failed to meet his burden to show contributing-factor causation. Indeed, whether the employer's reason is "illegitimate" is not the question[37]—the legitimacy of the reason may certainly be relevant, and the factfinder should consider that in determining whether protected activity played a role in the adverse action. But, the ALJ clearly did that here, and it is well within the ALJ's purview to conclude, as he did, that an employee has failed to meet his burden to show that protected activity was a factor in his termination when the ALJ believes that the employer's claimed reason was in fact the only reason.

In sum, the independent and substantial evidence supports the ALJ's finding that Union Pacific officials reasonably believed that Powers was being dishonest about both his medical restrictions and when he said he was just doing "gardening, nothing major"; and, on the basis of that evidence and the lack of any "persuasive evidence" linking Powers' injury and his termination, the ALJ concluded that Union Pacific's reasonable belief about Powers' dishonesty was the sole reason that Union Pacific fired him.

Thus, the ALJ's determination that Powers failed to prove that his protected activity was a contributing factor in his termination is supported by substantial evidence. Consequently, the ALJ's D. & O. dismissing the complaint must be affirmed.

CONCLUSION

Substantial evidence supports the ALJ's factual finding that Powers' protected activity was not a contributing factor in Union Pacific's termination of his employment. In making that determination, the ALJ properly considered Union Pacific's evidence supporting its claims about why it fired Powers. In particular, the ALJ properly considered the evidence supporting Union Pacific's nonretaliatory reason for its action, that the only reason it fired Powers was its officials'

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[36] *Id.*

[37] For example, if an employer fires an employee because of the employee's race, that would be an "illegitimate" reason—indeed, one that violates federal law, *see* 42 U.S.C. § 2000e-2(a)(1)—but that would not mean that protected activity under the FRSA's whistleblower provision was a contributing factor in the termination.

reasonable belief that Powers had been dishonest. We therefore **AFFIRM** the ALJ's Decision and Order Denying Claim, and affirm the dismissal of Powers' complaint.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

ANUJ C. DESAI
Administrative Appeals Judge

Judge Royce, dissenting.

I dissent from the majority's decision affirming the dismissal of Powers' complaint. The ALJ erred by too narrowly defining Powers' protected activity and this, in turn, led him to err in his analysis of temporal proximity. In addition, the ALJ made contradictory findings on which officials were responsible for the adverse action. Given the critical importance of knowledge and temporal proximity to most whistleblower cases, I would reverse and remand the case to allow the ALJ to reconsider his findings on protected activity and causation.

The ALJ found that Union Pacific's Senior Claim Specialist, William Loomis, who managed injured workers' claims, initiated surveillance of Powers to strengthen Union Pacific's defenses against Powers' FELA claim:

> It is a reasonable inference that Loomis concluded by May 2008 that he should begin marshaling the Company's defenses against a potential FELA claim. Complainant had hired an attorney, and given that Complainant was receiving about half the wages on disability that he received by working, his filing an FELA would be an expected result. . . . . Loomis moved to strengthen the Company's defenses by . . . hiring an investigator in an attempt to discredit the extent of the work restrictions—or at least to show that Complainant could do more than the restrictions would suggest.[38]

The ALJ failed however to recognize that Powers' FELA claim was FRSA-protected activity. Prior to the ALJ's D. & O. in this case, the ARB had not addressed this question. Recently however, the ARB held that "because the filing and pursuit of a FELA claim effectively

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[38] D. & O. at 22. *See also* D. & O. at 11 ("And third, on or about May 8, 2008, Loomis hired investigator Jonathon Iguchi to see if he could confirm reports that Complainant was moving equipment from a warehouse, a step that also would be useful in the defense of an FELA claim.").

provides notification of a work-related injury, often in greater detail than an initial oral or written notice to an employee's supervisor at the time of injury, a FELA claim constitutes protected activity under the FRSA's whistleblower protection provisions."[39]

Although Powers did not formally file his FELA claim until after his termination, the FRSA protects an employee's act "done, or perceived by the employer to have been done *or about to be done* . . . to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee." 49 U.S.C.A. § 20109(a)(4)(italics added). The ALJ explicitly found that Union Pacific was marshalling its defenses against "a potential FELA claim"—in other words, Union Pacific expected that Powers was *about to* file a FELA claim. And as soon as Union Pacific learned of Powers' potential FELA claim, it had the effect of keeping his "protected report of injury fresh as the events in the case unfolded."[40]

Because the ALJ too narrowly defined Powers' protected activity—as the May 21, 2007 report of injury only—he incorrectly calculated the temporal proximity as too great to evidence causation. The ALJ compounded his mistake by noting that Powers' September 2008 discharge—fifteen months after his May 21, 2007 report of injury—constituted "*counter-evidence* of causal connection."[41] In reality, as the ARB explained in an analogous case, the ALJ's own fact findings demonstrate that Powers' protected activity continued well after the initial report of his injury and even beyond his termination:

> as a matter of law, the ALJ's findings establish that [the employee's] protected activity stemming from [his protected activity seven years earlier] engulfed the adverse action in question in this case . . . . Accordingly, the skewed view of temporal proximity in this case is so fundamental to the ALJ's decision that, regardless of any other errors, it requires us to remand this case for reconsideration by the ALJ.[42]

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[39] *Carter v. BNSF Ry. Co.,* ARB Nos. 14-089, 15-016, 15-022; ALJ No. 2013-FRS-082, slip op. at 4, n.18 (ARB June 21, 2016); *see also Ledure v. BNSF Ry. Co.,* ARB No. 13-044, ALJ No. 2012-FRS-020, slip op. at 5 (ARB June 2, 2015) ("[W]e see no reason why the 2008 [report of work-related injury] would lose its protected status when it is also discussed in a FELA case. Retaliation for later notifications of the same injury is just as unlawful as retaliation for the initial notice.").

[40] *Carter,* ARB Nos. 14-089, 15-016, 15-022; slip op. at 4. Powers similarly argued that filing a FELA complaint "can help to show that the Company's actions following its awareness of the claim were in retaliation for the action that the claim stems from." *Brief of Complainant Robert Powers* at 15.

[41] D. & O. at 20 (emphasis added).

[42] *Bobreski v. J. Givoo Consultants, Inc.,* ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 12-13 (ARB June 24, 2011).

In the case before us, the ALJ erred as a matter of law by failing to consider whether Union Pacific's knowledge that Powers was about to file a FELA complaint constituted protected activity.

Along with close temporal proximity, knowledge of the protected activity by the decision-makers, who carried out the adverse action, is often key to a whistleblower's ability to prove that the protected activity contributed to the adverse action. Because the ALJ erred in regard to protected activity, his findings on the decision-makers' knowledge of the protected activity must likewise be reconsidered. Furthermore, the ALJ made ambiguous, if not contradictory, findings regarding the decision-makers. Initially, the ALJ recognizes that both Loomis and Gilliam were involved in Powers' termination: "I therefore turn to the managers who were involved, directly or indirectly, in the discipline (Meriwether, Taylor, Gilliam, Poof, and Loomis)."[43] But later the ALJ appears to contradict himself, stating that "Loomis played no role in the decision to terminate" and that "if Loomis were aimed at discipline, the route to that end would not have been through Gilliam" because "Gilliam was not and never had been Complainant's manager." D. & O. at 22. Implicitly contradicting his own inference that Gilliam had no authority over Powers, the ALJ goes on to state that the disciplinary process was "a process that Gilliam started in motion and supported." D. & O. at 23. If either Loomis or Gilliam played *any* role—direct or indirect—in Powers' discipline, then the question is whether Powers' protected activity (including being about to file a FELA complaint) was a factor in that discipline. I would remand for the ALJ to reconsider his findings with respect to protected activity and causation.

Finally, it appears that the ALJ improperly analyzed and credited Union Pacific's evidence that company officials subjectively *believed* that Powers had been dishonest. In the context of his analysis of contributing factor, the ALJ stated: "I must determine whether it is more likely than not that Gilliam subjectively concluded that Complainant had been dishonest in the phone call."[44] First of all, whether an employer *believes* an employee acted in bad faith (warranting discipline) is irrelevant.[45] The relevant causal connection is between a legitimate business reason and an adverse action—*not* between a respondent's *belief* regarding its business reason and an adverse action. Thus, the strength of Union Pacific's evidence of Powers' alleged dishonesty—or proof that Powers *was* dishonest—is relevant to a determination of causation but proof that Union Pacific *believed* him to be dishonest is not. Furthermore, the ALJ seems to be requiring that Powers prove pretext in order to prevail:

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[43] D. & O. at 21.

[44] *Id.* at 23.

[45] *See Davis v. Union Pacific R.R. Co.*, No. 5:12-CV-2738, 2014 WL 3499228, at 7-8 (W.D. La. July 14, 2014)("The statute would be far less protective if an employer could avoid liability simply by arguing it thought the plaintiff was acting in bad faith, rather than by actually showing the plaintiff was acting in bad faith. Whether the employer believed the employee was acting in good faith is irrelevant.").

> But my task is not to determine whether, in fact, Complainant actually exceeded his restrictions. Rather, it is to determine whether I find credible that the involved 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 for reporting an injury more than a year earlier after the Company had instead accommodated him for months.[46]

The ALJ sets up a false dichotomy; in effect requiring that Powers prove pretext in order to prevail. But as we have repeatedly ruled, in a mixed-motive scenario even if a respondent proves a legitimate business reason, a complainant may still prevail by showing that, while respondent's reason may be true, it is only one of the reasons for the adverse action.[47] A complainant need not prove pretext in order to prevail under the FRSA whistleblower provisions.

For all these reasons, I would reverse the dismissal and remand for reconsideration consistent with this dissent.

JOANNE ROYCE
Administrative Appeals Judge

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46 D. & O. at 25.

47 *See Klopfenstein*, ARB No. 04-149, slip op. at 19.