In the Matter of:

KENNETH G. DeFRANCESCO,

COMPLAINANT,

v.

UNION RAILROAD COMPANY,

RESPONDENT.

ARB CASE NO. 13-057

ALJ CASE NO. 2009-FRS-009

DATE: September 30, 2015

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
D. Aaron Rihn, Esq., *Robert Peurce & Associates, PC*, Pittsburgh, Pennsylvania

***For the Respondent*:**
Michael P. Duff, Esq., Pittsburgh, Pennsylvania

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*; Judge Igasaki concurring.

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (FRSA).[1] Kenneth G. DeFrancesco complained that his employer, Union Railroad Company (Union Railroad), violated the FRSA when it suspended him for 15 days after he reported a work-place, slip-and-fall injury on December 6, 2008. A

[1] 49 U.S.C.A. § 20109 (Thomson/West 2012), as implemented by federal regulations at 29 C.F.R. Part 1982.

Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed DeFrancesco's complaint for failure to prove that his injury report was a contributing factor in the suspension.[2] DeFrancesco appealed to the Administrative Review Board (ARB or Board), which reversed the ALJ's dismissal based on DeFrancesco's failure to prove causation, and remanded the case for Union Railroad to prove by clear and convincing evidence that it would have suspended DeFrancesco absent his protected activity.[3]

On remand, the ALJ found that Union Railroad failed to establish its affirmative defense and awarded DeFrancesco damages.[4] Union Railroad appealed and the Solicitor of Labor submitted an amicus brief. We incorporate our previous decision and affirm the ALJ's decision on remand on other grounds as discussed below.

BACKGROUND

I. Factual background

The ALJ's findings of fact are largely undisputed and are laid out in the ALJ's initial and remand decisions.[5] DeFrancesco, a trainman for Union Railroad for more than 30 years, slipped and fell, injuring his back, on a wintry night in December 2008 as he was directing a rail car in the yard. At the time, he was wearing the required protective gear and equipment for the weather conditions, including "grippers" over his boots. DeFrancesco filed an injury report and a doctor diagnosed a strained lower back, for which he received medical treatment.

After reviewing the incident, DeFrancesco's supervisor concluded that slippery conditions caused his fall and reported that no further investigation was necessary. Union Railroad officials subsequently reviewed an available video of DeFrancesco's actions that night, along with his disciplinary record and injury history to determine both the "root causes" of the accident and whether DeFrancesco should be disciplined. The company officials stated that the purpose of their investigation was "to determine whether there was a pattern of unsafe behavior and whether corrective action needed to be taken."[6]

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[2] *DeFrancesco v. Union RR Co.*, ALJ No. 2009-FRS-009 (ALJ June 7, 2010) (D. & O.).

[3] *DeFrancesco v. Union RR Co.*, ARB No. 10-114, ALJ No. 2009-FRS-0009, slip op. at 2-4 (ARB Feb. 29, 2012).

[4] *DeFrancesco v. Union RR Co.*, ALJ No. 2009-FRS-009 (ALJ April 3, 2013) (D. & O. on Remand).

[5] D. & O., slip op. at 2-6; D. & O. on Remand, slip op. at 2-3.

[6] D. & O. at 3.

They did not inspect the accident scene or interview DeFrancesco, his supervisor, his co-workers, or two witnesses who were at the scene after the fall.

Based on the video and DeFrancesco's disciplinary record, the Union Railroad officials concluded that he failed to take short, deliberate steps at the time of the fall and that his injury history exhibited a pattern of unsafe behavior. Union Railroad initiated disciplinary proceedings charging DeFrancesco with violating company Safety Rules 5.20 and 5.20.1,[7] because of the manner in which he was walking, and General Rule 1.2 B because of his conduct at the time of the incident in light of his disciplinary and injury history.[8] After consulting with his union representative, DeFranceso accepted a 15-day suspension instead of risking more severe discipline if he insisted upon a disciplinary hearing.

II. **Prior proceedings**

In his June 7, 2010 Decision and Order, the ALJ found that DeFrancesco engaged in FRSA-protected activity by reporting his injury, that Union Railroad's disciplinary decision-makers were aware of his activity, and that the 15-day suspension imposed on DeFrancesco constituted adverse personnel action. The ALJ nevertheless held that DeFrancesco failed to establish that his protected activity contributed to his 15-day

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[7] The Union Railroad officials relied on the video in charging DeFrancesco with violating Safety Rules 5.20 and 5.20.1, which provide:

> 5.20 Weather Hazards Employee must take precautions to avoid slipping on snow, ice, wet spots or other hazards caused by inclement weather. Employees must wear company issued non-slip footwear during inclement weather conditions.
>
> 5.20.1: When hazardous underfoot conditions exist: Keep hands free when walking, and keep them out of pockets for balance. Take short, deliberate steps with toes pointed outward. When steeping over objects, such as rails, be sure your front foot is flat before moving your rear foot. Inspect equipment for icy conditions before mounting or dismounting. Complainant's exhibit (CX) 2.

[8] The Union Railroad officials relied upon DeFrancesco's conduct the evening of the accident, coupled with his disciplinary and injury history at work in charging him with violating General Rule B, which provides:

> 1.2 (Rule B): To enter or remain in the service, employees must be of good moral character and must control themselves at all times, whether on or off Company property, in such manner as not to bring discredit upon the Company. Employees who are careless of the safety of themselves or others, insubordinate, disloyal, dishonest, immoral, quarrelsome, or otherwise vicious, or who willfully neglect their duty or violate rules, endanger life or property, or who make false statements or conceal facts concerning matters under investigation, or who conduct themselves in a manner which may subject the railroad to criticism and loss of good will, will not be retained in the service. (CX 3).

suspension because he failed to prove that retaliatory animus motivated the Union Railroad officials who ordered the suspension. Based on the credible testimony of Union Railroad's officials, the ALJ found that DeFrancesco's injury report was not a contributing factor in the disciplinary decision and that Union Railroad had no hostility toward employees' injury reporting. The ALJ concluded that DeFrancesco failed to prove that reporting his injury contributed to the suspension.[9]

Upon consideration of DeFrancesco's appeal of the ALJ's initial Decision and Order, the ARB held that the ALJ committed reversible error by requiring DeFrancesco to prove that his employer's imposition of the suspension was motivated by retaliatory animus to establish "contributing factor" causation under the FRSA. Applying the correct legal standard, the ARB held that the evidence of record supported finding that DeFrancesco had proven as a matter of law that his injury report was a contributing factor to the suspension, noting Union Railroad's admission that the report triggered the investigation which led to Union Railroad's review of DeFrancesco's injury history and the subsequent suspension. The ARB remanded the case to the ALJ to determine whether, based on the evidence of record, Union Railroad could nevertheless prove by clear and convincing evidence that it would have disciplined DeFrancesco even if he had not reported his slip-and-fall injury.[10]

On remand the ALJ accepted the ARB's holding that DeFrancesco had established "contributing factor" causation and turned to the question of whether Union Railroad could prove the statutory defense that it would have disciplined DeFrancesco even if he had not reported his injury. The ALJ found that because Union Railroad would not have learned of DeFrancesco's unsafe conduct in the absence of DeFrancesco's report of his injury, Union Railroad failed to meet its burden of proving by clear and convincing evidence that it would have taken the adverse employment action of disciplining DeFrancesco absent his protected activity.

The ALJ determined that because Union Railroad could not show through clear and convincing evidence that it learned of the unsafe conduct "by means other than [DeFrancesco's] injury report," Union Railroad failed to establish that the suspension "logically and literally would never have come about but for the protected activity." Accordingly, the ALJ concluded that Union Railroad failed "on the facts of this case [to] meet its burden of rebuttal as articulated by the ARB," held Union Railroad liable for violating the FRSA, ordered equitable relief, and awarded damages and attorney's fees.[11]

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[9] D. & O. at 11-16.

[10] *DeFrancesco*, ARB No. 10-114, slip op. at 6-8.

[11] D. & O. on Remand at 5-6, 8-9.

JURISDICTION AND STANDARD OF REVIEW

The Secretary has delegated authority and assigned responsibility to the ARB to act for the Secretary of Labor in review of an appeal of an ALJ's decision under the FRSA.[12] The ARB reviews the ALJ's factual findings to determine whether they are supported by substantial evidence, and the ALJ's conclusions of law de novo.[13]

DISCUSSION

The FRSA prohibits a rail carrier engaged in interstate commerce from discharging, demoting, suspending, reprimanding, or in any other way retaliating against an employee who engages in certain protected activity, such as reporting a work-related injury or illness.[14] To prevail, a FRSA complainant must establish by a preponderance of the evidence that: (1) he engaged in a protected activity as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action.[15] If a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior.[16]

I. "Contributing factor" causation

Union Railroad initially challenges the Board's prior ruling that DeFrancesco's reporting of his injury was a contributing factor in his suspension. Union Railroad argues that other than triggering its investigation into the incident in which DeFrancesco was injured, his report of the injury neither influenced nor affected its decision to suspend him because neither the fact nor the content of the injury report was a factor in the decision to discipline him or in the severity of that discipline. Union Railroad charges that, by holding that DeFrancesco's protected conduct (filing his injury report) was a contributing factor in the 15-day work suspension despite the fact that the basis for the

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[12] Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 222 (Nov. 16, 2012); 29 C.F.R. § 24.110(a); 29 C.F.R. § 1982.110(a).

[13] 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).

[14] 49 U.S.C.A. § 20109(a)(4).

[15] *Powers v. Union Pacific RR Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 11-13 (ARB, Apr. 21, 2015).

[16] *Id.*

suspension was not the injury report but information independently discovered during the ensuing investigation, the Board has erroneously adopted a "pure but-for standard" whereby protected conduct is deemed a contributing factor whenever it is part of a chain of causally-related events leading to the adverse action.[17]

The Board's prior ruling that DeFrancesco met his evidentiary burden of establishing, as a matter of law, that protected activity contributed to Union Railroad's suspension decision is consistent with our decision in *Fordham v. Fannie Mae*,[18] as recently reaffirmed and clarified *en banc* in *Powers v. Union Pac. R.R.*[19] As these decisions explain in detail, an employer's affirmative defense evidence (supporting a legitimate, non-retaliatory reason for the adverse action in the absence of any protected activity) is, with rare exception, not to be considered at the initial causation stage, where the complainant is required to prove by a preponderance of the evidence that his or her protected activity was a contributing factor in the adverse personnel action at issue. The employer's affirmative defense evidence is instead reserved for proof by clear and convincing evidence should the complainant prevail in establishing contributing-factor causation. Under the "contributing factor" standard a complainant is not required to prove that his protected activity was the only or the most significant reason for any adverse action taken against him. Rather, the complainant need establish only that the protected activity affected *in any way* the adverse action taken, notwithstanding other factors an employer cites in defense of its action.

In its prior decision, the Board rejected the ALJ's previous ruling that required proof of retaliatory animus on the employer's part to establish contributing-factor causation.[20] The Board focused instead on whether DeFrancesco provided sufficient circumstantial evidence to establish causation, and concluded as a matter of law that DeFrancesco met his burden of proof through circumstantial evidence establishing that his injury report influenced Union Railroad's decision to investigate DeFrancesco to determine whether to discipline him. That investigation uncovered evidence upon which Union Railroad based its disciplinary action.

In *Henderson v. Wheeling & Lake Erie RR*,[21] the ARB held that because the adverse action and the protected activity were inextricably intertwined (due to the fact

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17 Respondent's Brief, at p. 8. *See also* D. & O. on Remand at 4, where the ALJ indicates a similar understanding of the ARB's reasoning.

18 ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014),

19 ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Apr. 21, 2015).

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

21 ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB, Oct. 6, 2012).

that the investigation resulting in disciplinary action arose directly from Henderson's injury report), his protected activity was a contributing factor in the adverse action against him, regardless of the employer's asserted rationale for its action. Contrary to Union Railroad's argument on appeal and the ALJ's understanding of the remand decision the Board has not adopted a "pure but-for" causation standard. Rather, we have held, consistent with our precedent,[22] that the protected activity was "a factor in," as opposed to a mere fact "leading to," a decision to investigate an employee's injury for the purpose of deciding whether to bring disciplinary charges.

As the DOL's Solicitor of Labor noted in an amicus brief filed in this case on behalf of the Occupational Safety and Health Administration (OSHA), the ARB's approach "correctly recognizes that where a protected injury report becomes the basis for investigation into the worker's conduct of a type designed to lead to discipline, there is a heightened danger that the investigation will chill injury reporting by sending a message to other employees that injury reports are not welcome."[23] As in this case, where a complainant's evidence establishes that his injury report influenced the employer's decision to investigate to determine whether to bring disciplinary charges, the complainant has met his burden of proving by circumstantial evidence that his protected activity was a contributing factor in the disciplinary action that resulted.

Finally, Union Railroad argues that the Board's interpretation of the contributing-factor requirement effectively nullifies its statutory affirmative defense under 49 U.S.C.A. § 20109(d)(2)(A)(i). As discussed below, Union Railroad's fear is for naught.

II. Clear-and-convincing proof of the statutory affirmative defense

The requirement that the employer prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity has two components. The first involves imposition of the clear-and-convincing burden-of-proof standard, a more rigorous burden than the preponderance-of-the-evidence standard. The second is the phrase "would have taken the same unfavorable personnel action in the absence of [the protected activity]," which we now address.

As the ARB said in *Speegle v. Stone & Webster Construction*, the plain meaning of the clear-and-convincing phrase requires that the evidence must be "clear" as well as "convincing."[24] "Clear" evidence means the employer has presented an unambiguous

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[22] *E.g., Henderson, supra; Smith v. Duke Energy Carolinas*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB, June 20, 2012); *Hutton v. Union Pac. R.R.*, ARB No. 11-091, 2010-FRS-020 (ARB, May 31, 2013) (Corchado, J., concurring).

[23] Amicus Brief at 16.

[24] *Speegle v. Stone & Webster Constr., Inc*., ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 6 (ARB Apr. 25, 2014).

explanation for the adverse action(s) in question. "Convincing" evidence has been defined as evidence demonstrating that a proposed fact is "highly probable."[25] Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain.[26]

The U.S. Supreme Court has observed that the clear-and-convincing standard is "reserved to protect particularly important interests in a limited number of civil cases."[27] Similarly, two circuit courts have commented, "For employers, this is a tough standard, and not by accident."[28] One of the important interests Congress sought to protect by the 2007 amendments to FRSA was the right of railroad employees to report injury without fear of retaliation for so doing. To that end, Congress incorporated into the FRSA the AIR 21 affirmative defense framework,[29] which was first adopted for employers in the nuclear industry (in the 1992 amendments to the Energy Reorganization Act, at 49 U.S.C.A. § 5851), making it difficult for employers to defend themselves due to their history of whistleblower harassment and retaliation in the industry.[30] Congress intended to be protective of employees. Consequently, AIR 21 contains the tougher "clear and convincing" standard. Similarly, the legislative history surrounding adoption of the same tough clear-and-convincing standard under the FRSA whistleblower protection provision reveals congressional concern about a history of retaliation against railway employees who report an injury.[31]

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[25] *Id.*

[26] *Williams*, ARB 09-092, slip op. at 5.

[27] *California ex rel. Cooper v. Mitchell Bros. Santa Ana Theater*, 454 U.S. 90, 93 (1981).

[28] *Araujo v, NJ Transit Rail*, 708 F.3d 152, 159 (3rd Cir. 2013), quoting *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1 572 (11th Cir. 1997):.

[29] Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121 (West 2008).

[30] *Araujo*, 708 F.3d at 159.

[31] *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) (Introductory Remarks of Rep. Oberstar) ("Reports have documented a long history of under-reporting of accidents, under-reporting incidents, of noncompliance with Federal regulations; and under-reporting of rail injuries is significant because employees frequently report that harassment of those who do report incidents, being hurt on the job, is a common practice in the rail sector."). *Araujo*, 708 F.3d at 159, n.6.

The ARB's prior decision remanded this case to the ALJ to determine whether the evidence Union Railroad submitted in defense of its suspension of DeFrancesco was sufficient to overcome his proof that his protected activity was a contributing factor in the discipline, thereby relieving Union Railroad of liability for violating the FRSA. The Board directed the ALJ to determine whether the evidence of record was "sufficient to meet Union's burden of proof that it would have disciplined DeFrancesco even if he had not reported his slip-and-fall."[32]

The ALJ interpreted the ARB's remand directive as eliminating any concern with Union Railroad's purported reasons for suspending DeFrancesco. The ALJ deduced that the focus was solely and exclusively on whether Union Railroad could prove by clear and convincing evidence that it "would have known about Complainant's unsafe conduct without Complainant reporting his injury."[33] "Under the ARB's reasoning," the ALJ opined, "Union Railroad's non-discriminatory motives are immaterial as long as the adverse employment action logically and literally would never have come about but for the protected activity."[34] Thus, the ALJ concluded, Union Railroad failed to meet its burden of rebuttal because it was unable to show, "by clear and convincing evidence, that it received notice of the unsafe conduct by means other than Complainant's injury report."[35]

Certainly, evidence that an employer would have learned of an employee's misconduct through channels other than the employee's protected activity is relevant to an employer's affirmative defense. However, ARB precedent makes clear that learning of the employee's conduct through other means is neither the sole nor necessarily a decisive basis by which an employer may establish its statutory affirmative defense.[36] Also relevant is the existence of extrinsic factors that the employer can clearly and convincingly prove would independently lead to the employer's decision to take the personnel action at issue.

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[32] D. & O. on Remand at 8.

[33] *Id*. at 5.

[34] *Id*.

[35] *Id*.

[36] *See e.g*., *Benjamin v. Citationshares Mgmt*., ARB No. 12-029, 2010-AIR-001 (ARB, Nov. 5, 2013); *Menendez v. Halliburton*, ARB No. 12-026, 2007-SOX-005 (ARB, Mar. 15, 2013); *Henderson*, ARB No. 11-013. *See also*, *Russell v. Dept. of Justice*, 76 MSPR 317, 324-26 (MSPB, Aug. 18, 1997) (interpreting similar "contributing factor" and "clear and convincing evidence" standards of the Whistleblower Protection Act, 5 U.S.C.A. § 1211, *et seq*.).

For example, in *Henderson v. Wheeling & Lake Erie RR*, the ARB held that analysis of the employer's affirmative defense should also carefully assess the employer's asserted lawful reasons for its action. Such an assessment requires not only a determination of whether there exists a rational basis for the employer's decision, such as the existence of employment rules or policies supporting the decision, but also a determination of whether the basis for the employer's decision is "so powerful and clear that [the personnel action] would have occurred apart from the protected activity."[37] Against an employer's showing of the existence of these or similar extrinsic factors justifying the disputed action, the ARB cautioned in *Henderson*, would be other factors weighing against the respondent meeting its statutory burden of proof such as evidence that the complainant suffered disparate treatment compared to other employees subject to the same company rules or policies cited in justification of the respondent's action, or evidence that those rules and policies were otherwise selectively enforced against the complaint.[38]

As in this case where the FRSA-protected activity involves the filing of an injury report ostensibly resulting from the employee's unsafe conduct, the focus in determining whether the respondent meets the required affirmative defense is on whether the employer has presented evidence that clearly and convincingly establishes that it would have taken the same personnel action against an uninjured employee engaged in identical unsafe conduct.

The Solicitor's amicus brief highlights OSHA's strong interest in assuring that interpretation of the FRSA whistleblower protection provision strikes the legally appropriate balance "between protecting employees from retaliation for reporting workplace injuries and enabling railroad employers to promote workplace safety through appropriate and effective enforcement of workplace safety rules" and "between a worker's right and responsibility to report a workplace injury and the employer's ability to look into the circumstances surrounding a workplace injury with an eye toward creating a safer workplace."[39]

An employee's right to report a workplace injury is, as the Solicitor noted, "a core protected right" under the FRSA that benefits not only the employee but also the railroad employer and the public. We agree with the Solicitor that if employees do not feel free to report injuries or illnesses without fear of incurring discipline, dangerous conditions will go unreported resulting in putting the employer's entire workforce as well as the general

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37 *Henderson*, ARB No. 11-013, slip op. at 14-15.

38 *Id*. at 16-17.

39 Amicus Brief, at 1-3.

public potentially at risk. At the same time, the railroad employer must be able to maintain and enforce legitimate workplace safety rules in order to eliminate or reduce workplace hazards and prevent injuries from occurring in the first place. Thus, assuring that employers are able to investigate reports of workplace injury for potential safety hazards must necessarily be balanced against the manipulation of such investigations as pretext for retaliation against employees who report workplace injuries.

Consistent with ARB case authority, OSHA has promulgated policy guidelines on the standards to be employed in FRSA whistleblower cases by its field investigators in order to ensure that the proper burdens of proof are applied and the correct factors considered. To guard against situations where an employer attempts to use an employee's violation of a workplace safety rule as pretext for discrimination against the employee for reporting an injury, OSHA's policy guidelines call for careful examination of whether the employer had a sufficient basis for the personnel action for reasons extrinsic to the protected conduct. The guidelines provide:

> Does the employer monitor for compliance with the work rule in the absence of an injury? Does the employer consistently impose equivalent discipline against employees who violate the work rule in the absence of an injury? The nature of the rule cited by the employer should also be considered. Vague rules, such as a requirement that employees "maintain situational awareness" or "work carefully" may be manipulated and used as a pretext for unlawful discrimination. Therefore, where such general rules are involved, the investigation must include an especially careful examination of whether and how the employer applies the rule in situations that do not involve an employee injury. Enforcing a rule more stringently against injured employees than non-injured employees may suggest that the rule is a pretext for discrimination against an injured employee in violation of [the] FRSA.[40]

Applying this focus to the present case, the question is whether the same discipline to which DeFrancesco was subjected would have occurred were Union Railroad aware of identical conduct (failure to take slow and deliberate steps) in the absence of an injury report. That focus requires careful examination, at a minimum, of the following factors:

> (1) Whether Union Railroad monitors for compliance with the work rules Francesco is charged with violating in the absence of an injury? Does

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[40] See Memorandum from Richard E. Fairfax, Deputy Assistant Secretary for OSHA, *Employer Safety Incentive and Disincentive Policies and Practices,* March 12, 2012, available at https://www.osha.gov/as/opa/whistleblowermemo.html ("Fairfax memo").

Union Railroad routinely monitor the manner in which employees walk on snow and ice?

(2) Whether Union Railroad consistently imposes equivalent discipline against employees who violate the work rules DeFrancesco was cited for violating but who are not injured as a result of the violation? Does Union Railroad discipline employees who do not take short, deliberate steps, regardless of whether they report injuries?

(3) Are the work rules DeFrancesco was charged with violating (Safety Rules 5.20 and 5.20.1, and General Rule B) routinely applied?

(4) Are the work rules DeFrancesco was charged with violating vague and thus subject to manipulation and use as pretext for unlawful discrimination? If they are general safety rules, how has Union Railroad applied the rules in situations that do not involve an employee injury?

(5) Does other evidence suggest that in conducting its investigation Union Railroad was genuinely concerned about rooting out safety problems? Or does the evidence suggest that its conduct of the investigation was pretext designed to unearth some plausible basis on which to punish DeFrancesco for the injury report?

The evidence on which Union Railroad relies in support of its defense that it would have taken the same action against DeFrancesco absent his protected activity does not sufficiently address these extrinsic factors. Instead, as the ALJ summarized, Union Railroad's affirmative defense consisted of "point[ing] to its record of disciplining employees for safety violations even when the employees did not report injuries; Mr. Kepic's testimony that he would have disciplined Complainant if he had witnessed the safety violation even if [he] had never reported his injury; and the evidence that Complainant was indeed violating Respondent's safety policy at the time of his injury."[41]

On appeal before the ARB, Union Railroad cites the following evidence in support of its defense that it would have disciplined DeFrancesco absent his injury report: DeFrancesco engaged in the conduct for which the disciplinary action was imposed; when employees commit safety violations, Union Railroad issues "appropriate discipline" when necessary "in light of [the] employee's action and record of safety violations and unsafe behavior, regardless of whether they reported an injury or not;" discipline is not imposed on all employees who report injuries, but only where safety violations are "committed in connection with such incidents;" the discipline imposed is not unique to DeFrancesco "or to those who reported injuries;" Union Railroad disciplines employees

[41] D. & O. on Remand at 5.

for safety violations regardless of whether they reported injuries;" "[v]irtually all of the employees who had been disciplined for safety violations in 2008 had not reported injuries or engaged in any other protected activities;" and even if DeFrancesco had not reported his injury, the same discipline would have been imposed had Union Railroad officials witnessed his conduct at the time of the incident.[42]

This evidence does not, however, address how Union Railroad treats employees who engage in conduct similar to DeFrancesco's that does not result in injury. No evidence was presented on whether Union Railroad disciplines employees who do not take short, deliberate steps, regardless of whether they report injuries. Nor does the evidence address whether or to what extent Union Railroad monitors employees for compliance with the work rules DeFrancesco was charged with violating in the absence of an injury. Moreover, there is no evidence of how Safety Rule 5.20 and General Rule B are routinely applied.

Given that his front-line supervisor and two witnesses had reported that no investigation into DeFrancesco's slip and fall was necessary, the absence of evidence in support of its contention that Union Railroad was genuinely concerned about rooting out safety problems suggests that the investigation it conducted was pretext designed to unearth some plausible basis on which to punish DeFrancesco. Union Railroad testified that after determining that DeFrancesco violated Safety Rule 5.20 (following its review of the initial incident report and video), it then reviewed DeFrancesco's personnel records to see if he had a pattern of rule violations and/or unsafe behavior to determine whether "corrective action" was necessary. However, Union Railroad submitted no evidence indicating that this procedure is routinely followed in similar situations, let alone evidence demonstrating that if investigations of similar incidents were initiated and resulted in finding a pattern of an employee's rule violations or unsafe behavior, that the discipline would be the same or similar to that imposed on DeFrancesco.[43]

To meet the statutory affirmative defense in the this case, it is not enough for Union Railroad to show that DeFrancesco violated its safety rules, that it had a legitimate motive (i.e. DeFrancesco's rule violations) for imposing the disciplinary action, or that it imposes "appropriate discipline" against employees for safety violations and unsafe behavior regardless of whether they reported an injury. Instead, Union Railroad was required to demonstrate through factors extrinsic to DeFrancesco's protected activity that the discipline to which DeFrancesco was subjected was applied consistently, within

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[42] Respondent's Brief, at pp. 22-24.

[43] Contributing to the pretextual nature of Union Railroad's stated reason for conducting the investigation is the vagueness of Rule B (prohibiting employees from generally being "careless of the safety of others and themselves") which suggests, as the Solicitor argues, its potential for manipulation and use as pretext.

clearly-established company policy, and in a non-disparate manner consistent with discipline taken against employees who committed the same or similar violations but were not injured. Union Railroad has failed to do so, and as a result has failed to establish by clear and convincing evidence that it would have taken the same disciplinary action against DeFrancesco in the absence of his protected activity.

REMEDIES

After finding that DeFrancesco established that Union Railroad retaliated against him in violation of the FRSA for reporting his injury, the ALJ ordered Union Railroad to expunge DeFrancesco's personnel file of any disciplinary record or negative references related to the charges arising from the December 6, 2008 incident, and to restore DeFrancesco to the same seniority status that he would have had but for the violation of the FRSA. Additionally, the ALJ ordered Union Railroad to pay DeFrancesco back wages with interest from January 24, 2009 through February 7, 2009, plus prejudgment interest for the period following DeFrancesco's suspension on January 24, 2009 until the date of the ALJ's initial Decision and Order, and post-judgment interest to be paid until the date payment of back pay is made. Finally, the ALJ ordered Union Railroad to pay DeFrancesco's reasonable attorney's fees and costs, and granted DeFrancesco's counsel twenty (20) days from the date of the ALJ's Decision and Order within which to file and serve a fully-supported application for fees, costs, and expenses.[44] On appeal Union Railroad has not challenged the ALJ's order on remedies.

CONCLUSION

For the reasons set forth, the Board finds that the ALJ's determination that Union Railroad failed to meet its burden of proving by clear and convincing evidence that it would have taken the disciplinary action against DeFrancesco absent his FRSA-protected activity is supported by the substantial evidence of record and in accordance with applicable law. Accordingly, the Board AFFIRMS the ALJ's determination that Union Railroad violated the anti-retaliation provisions of the FRSA in disciplining DeFrancesco. In the absence of any challenge, the ALJ's order awarding remedies is also AFFIRMED.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

[44] D. & O. on Remand at 6-9.

Paul M. Igasaki, Chief Administrative Appeals Judge, concurring:

I concur in the result of this case only.

PAUL M. IGASAKI
Chief Administrative Appeals Judge