



**In the Matter of:**

**BRIAN PETERSEN,**

**ARB CASE NO. 13-090**

**COMPLAINANT,**

**ALJ CASE NO. 2011-FRS-017**

**v.**

**DATE: November 20, 2014**

**UNION PACIFIC RAILROAD COMPANY,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Louis E. Jungbauer, Esq. and Christopher W. Bowman, Esq.; *Yaeger, Jungbauer & Barczak, PLC*, St. Paul, Minnesota**

***For the Respondent:***

**Steven W. Olsen, Esq. and Adam A. Hoelsing, Esq.; *Simmons Olson Law Firm, PC*, Scottsbluff, Nebraska**

**Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; Lisa Wilson Edwards, *Administrative Appeals Judge***

### **FINAL DECISION AND ORDER**

This case arises under the employee protection provisions of the Federal Railroad Safety Act of 1982 (FRSA).<sup>1</sup> On February 4, 2010, Petersen filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Union Pacific Railroad Company terminated his employment because he engaged in the protected activity of

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<sup>1</sup> 49 U.S.C.A. § 20109 (Thomson Reuters Supp. 2014) and as implemented by federal regulations at 29 C.F.R. Part 1982 (2013) and 29 C.F.R. Part 18, Subpart A (2013).

reporting a work-related. OSHA found a violation. Union Pacific requested a hearing and a Department of Labor (DOL) Administrative Law Judge (ALJ) also found that Union Pacific unlawfully discriminated against Petersen. The ALJ concluded that Petersen was entitled to (1) reinstatement, (2) back pay with interest extending from the time of termination until reinstatement, (3) compensatory damages in the amount of \$75,000, and (4) punitive damages in the amount of \$100,000.<sup>2</sup> Union Pacific appealed to the Administrative Review Board (ARB).<sup>3</sup> We summarily affirm.

## DISCUSSION

On September 9, 2009, Union Pacific notified Petersen, an apprentice machinist, that it was going to hold a hearing to investigate whether he violated any rules on August 28, 2009, when a car driven by another employee ran over Petersen's foot.<sup>4</sup> The Notice of Investigation provided that:

on Saturday, August 28, 2009 at approximately 23:45 while on-duty, you were allegedly checking messages on your cell phone in the GE Parking Lot and may have **failed to be alert and attentive** and may have **failed to take precaution to avoid having your feet run over** by Nathan Coco as he was attempting to park his automobile, resulting in you **sustaining a possible injury** to your feet and back.

Petersen was notified that, if sustained, the alleged rule violations would result in the assessment of level 5 discipline and permanent dismissal under Union Pacific Company Rules.<sup>5</sup>

Union Pacific offered Petersen the option of leniency, rather than undergoing an investigation and potential dismissal. Petersen and Union Pacific signed a leniency agreement on September 11, 2009.<sup>6</sup> Under the terms of the agreement, Petersen waived his right to an investigation and agreed to serve an unpaid suspension and then return to Union Pacific on a probationary basis during which any breach of workplace safety would be grounds for removal

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<sup>2</sup> *Petersen v. Union Pacific RR Co.*, ALJ No. 2011-FRS-017 (Aug. 7, 2013)(D. & O.).

<sup>3</sup> Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a).

<sup>4</sup> D. & O. at 6; ALJ 1.

<sup>5</sup> D. & O. at 7. The record indicates that Petersen had no prior disciplinary history as of September 28, 2009. R 6.

<sup>6</sup> D. & O. at 9.

from service without an investigation. Four days later, Petersen was observed purportedly working in an unsafe manner, which led to his being taken off duty and subsequently terminated.<sup>7</sup>

The ALJ thoroughly considered the evidence of record, assessed the credibility of witnesses, and addressed the parties' contentions regarding the essential elements of a FRSA claim: protected activity, adverse action, and a causal link. We adopt and affirm the ALJ's findings and add limited discussion.

We reject Union Pacific's multiple challenges to the ALJ's factual findings. Her findings of fact were well supported and based on substantial evidence including numerous credibility findings.

Union Pacific's principal legal argument that a complainant must demonstrate animus to prove causation under FRSA is without merit. We have repeatedly held that neither motive nor animus is required to prove causation under FRSA as long as protected activity contributed in any way to the adverse action.<sup>8</sup> As the ALJ noted, the Third Circuit explained in detail the rationale behind this holding in *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158-160 (3d Cir. 2013).

Union Pacific creates a straw man to bolster its only other substantive argument. According to Union Pacific, evidence showing a "sequential connection" or a "chain of events" cannot alone support a finding of causation because such a ruling would render "meaningless the carrier's ability to discipline its employees whenever it discovers a rule violation through an injury report."<sup>9</sup> However, even if Petersen meets his causation burden of proof, Union Pacific may avoid liability "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."<sup>10</sup>

The ARB has made clear that a "chain of events" can substantiate a finding of contributory factor.<sup>11</sup> But in this case, the ALJ additionally cited evidence of Union Pacific's

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<sup>7</sup> *Id.*; ALJ 1.

<sup>8</sup> *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip. op. at 6 (ARB Feb. 29, 2012); *Hutton v. Union Pacific R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-20, slip op. at 7 (ARB May 31, 2013).

<sup>9</sup> Respondent Union Pacific Railroad Company's Brief in Support of its Petition for Review at 11.

<sup>10</sup> *Hutton*, ARB No. 11-091, slip op. at 5 (citing 49 U.S.C.A. § 20109(d)(2)(A)(i), 49 U.S.C.A. § 42121(b)(2)(B)(iii)(iv)).

<sup>11</sup> *Hutton*, ARB No. 11-091, slip op. at 6-7, 9-11; *see also Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 8 (ARB June 20, 2012).

knowledge of protected activity, temporal proximity, disparate treatment, and evidence that the company's disciplinary rules effectively punish an employee for being injured.<sup>12</sup> Substantial evidence supports the ALJ's causation ruling, as well as her ruling that Union Pacific failed to prove its affirmative defense.<sup>13</sup> We affirm the ALJ's determination that Union Pacific discharged Petersen in violation of FRSA.

With respect to the ALJ's damages award, Union Pacific challenged only its liability for punitive damages and the ALJ's failure to deduct unemployment compensation from her 2010 back pay award. In its Petition for Review, Union Pacific objected to Petersen's entitlement to compensatory damages, punitive damages, and reinstatement.<sup>14</sup> Beyond this bare objection, however, Union Pacific offered no argument whatsoever regarding the ALJ's award of compensatory damages or reinstatement. We therefore consider those issues waived and affirm the ALJ's award of \$75,000 in compensatory damages and reinstatement.<sup>15</sup> Union Pacific failed to argue, much less contest, the ALJ's award of backpay for the years 2009, 2011, and 2012. We therefore affirm the ALJ's backpay awards for those years.

Union Pacific did challenge the ALJ's 2010 back pay award, arguing that the amount Petersen received in unemployment compensation in 2010 should offset his 2010 back pay award. However, the ARB has long held that unemployment compensation benefits received should not be deducted from back pay awards.<sup>16</sup> Union Pacific provides no reason for us to

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<sup>12</sup> D. & O. at 22-25.

<sup>13</sup> *Hutton*, ARB No. 11-091, slip op. at 6-13.

<sup>14</sup> Respondent, Union Pacific Railroad Company's Petition for Review at 9.

<sup>15</sup> See *Griebel v. Union Pacific R.R. Co.*, ARB No. 13-038, ALJ No. 2011-FRS-011, slip op. at 2, n.1. (ARB Mar. 18, 2014)(since the company failed to brief the liability determination, the issue is waived); *Adm'r, Wage & Hour Div. v. Global Horizons*, ARB No. 11-058, ALJ Nos. 2005-TAE-001, 2005-TLC-006, slip op. at 7 n.7 (ARB May 31, 2013) (citing *Dev. Res., Inc.*, ARB No. 02-046, slip op. at 4 (ARB Apr. 11, 2002) (quoting *Tolbert v. Queens Coll.*, 242 F.3d 58, 75-76 (2d Cir. 2001) (stating that it is a "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."))). See also *Entertainment Research v. Genesis Creative Grp.*, 122 F.3d 1211, 1217 (9th Cir. 1997)(appellate court declines to discuss issues for which petitioner failed to present specific, cogent argument for consideration).

<sup>16</sup> *Smith v. Specialized Transp. Servs.*, 1991-STA-022, slip op. at 3 (Office of Admin. App. Nov. 20, 1991); *Vandorn Keene v. Ebasco Constructors, Inc.*, ALJ No. 1995-ERA-004, ARB No. 97-089, slip op. at 1 (ALJ June 27, 1997). It has likewise been OSHA's longstanding policy not to deduct unemployment insurance from gross back pay. Occupational Safety and Health Administration, *Whistleblower Investigations Manual*, pg. 6-2 (2011).

reconsider this precedent, and we decline to do so. We affirm the ALJ's back pay award for 2010.

Union Pacific also challenges the ALJ's punitive damages award, and argues that the award is not supported by evidence of illegal motive.<sup>17</sup> FRSA does not, however, require "illegal motive" to sustain a punitive damage award. An award of punitive damages may be warranted where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law."<sup>18</sup> Possible relief under FRSA "may include punitive damages in an amount not to exceed \$250,000." 49 U.S.C.A. § 20109(e)(3). The size of the punitive award "is fundamentally a fact-based determination," and "[w]e are bound by the ALJ's [factual] findings if they are supported by substantial evidence."<sup>19</sup>

The ALJ's decision to award punitive damages is warranted here and in accordance with law. More specifically, the facts supporting the decision to award such relief are supported by substantial evidence, and the \$100,000 in punitive relief is within the amount allowable by law and in line with awards imposed in comparable cases.<sup>20</sup> Union Pacific failed to present persuasive reasons for overturning the ALJ's punitive damage award, and we affirm it.

### CONCLUSION

Accordingly, we **AFFIRM** the ALJ's finding that Union Pacific violated FRSA by terminating Petersen's employment after he reported a work-related injury. We also **AFFIRM** the ALJ's findings awarding Petersen reinstatement; back pay with interest; compensatory damages in the amount of \$75,000; punitive damages in the amount of \$100,000; and attorney's fees.

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<sup>17</sup> Respondent, Union Pacific Brief at 20.

<sup>18</sup> *Youngerman v. United Parcel Serv.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 6 (ARB Feb. 27, 2013)(quoting *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 8 (ARB Aug. 31, 2011)).

<sup>19</sup> *Youngerman*, ARB No. 11-056, slip op. at 10.

<sup>20</sup> D. & O. at 32-33.

Any petition for special damages that may include litigation costs, expert witness fees, and reasonable attorney's fees incurred in proceedings before the Board must be filed with the Board within 30 days from the date of this Final Decision and Order. See 49 U.S.C.A § 20109(e)(2)(C). Any opposition is due within 30 days after the petition is filed.

**SO ORDERED.**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**