



**In the Matter of:**

**DANIEL LEIVA,**

**COMPLAINANT,**

**v.**

**UNION PACIFIC RAILROAD  
COMPANY, INC.,**

**RESPONDENT.**

**ARB CASE NOS. 14-016  
14-017**

**ALJ CASE NO. 2013-FRS-019**

**DATE: May 29, 2015**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Jerry Easley, Esq.; Rome, Arata & Baxley, L.L.C.; Pearland, Texas**

***For the Respondent:***

**Fred S. Wilson, Esq.; Union Pacific Railroad Company; Houston, Texas**

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

**DECISION AND ORDER OF REMAND**

Daniel Leiva filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA), alleging that his employer, Union Pacific Railroad Company, Inc., suspended him from service without pay, terminated his employment, and then reinstated him as a probationary employee subject to certain conditions, in

violation of the employee protection provisions of the Federal Railroad Safety Act of 1982 (FRSA).<sup>1</sup>

Leiva filed his initial complaint of unlawful retaliation with OSHA on September 19, 2012. OSHA dismissed Leiva's claim. Leiva then requested a hearing before the Office of Administrative Law Judges (OALJ). An Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) on December 2, 2013, finding Union Pacific liable for violating the FRSA and ordering it to pay Leiva back pay, expenses, and other damages and to expunge all disciplinary references relating to Leiva's suspension and waiver from Leiva's personnel record. Union Pacific filed a petition for review with the Administrative Review Board (ARB or the Board). Leiva also filed a petition for review requesting the Board to award punitive damages or remand to the ALJ for the ALJ to make an award of punitive damages. We affirm the ALJ's D. & O. and remand for the ALJ to consider awarding Leiva punitive damages.

## BACKGROUND<sup>2</sup>

Leiva began working for Union Pacific as a brakeman, switchman, and conductor in 2004, and in 2011, became a locomotive engineer.<sup>3</sup> On July 14, 2012, Leiva reported to Union Pacific's Bloomington, Texas facility where Union Pacific assigned him to work with a conductor (Mr. F.) on a train destined for Refugio, Texas.<sup>4</sup> After the train arrived in Refugio, Leiva attempted to explain some information to Mr. F., and Mr. F. "became belligerent yelling at and pointing his fingers almost in Complainant's face."<sup>5</sup> Leiva asked Mr. F. to step away and Mr. F. did so.<sup>6</sup> After Leiva and Mr. F. secured the train, Leiva told Mr. F. that it was not necessary for Mr. F. to have reacted the way he had.<sup>7</sup> Mr. F. again pointed his fingers at Leiva's face.<sup>8</sup> Leiva felt intimidated because Mr. F. approached him, pointed his fingers in Leiva's face,

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<sup>1</sup> 49 U.S.C.A. § 20109 (Thomson/West Supp. 2014). *See also* 29 C.F.R. Part 1982 (2014).

<sup>2</sup> We infer from the ALJ findings and conclusions that the ALJ credited Leiva's testimony set forth at D. & O. at 4-7, as well as accepted Leiva's arguments at D. & O. at 10-11. Further, Leiva's testimony is supported by the testimony of several Union Pacific managers and is undisputed on all matters set forth here.

<sup>3</sup> D. & O. at 3, 4.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

used profanity and repeatedly told Leiva that he did not know who he was messing with.<sup>9</sup> Leiva left the engine compartment, secured himself in a locked room, and started making a series of phone calls to report Mr. F.'s actions and to ask to be relieved from continuing the trip to Kingsville, Texas, because he did not feel safe working with Mr. F.<sup>10</sup> When Leiva reached Jeremy Lorange, Union Pacific's manager of operating practices in Bloomington, by phone, Lorange asked Leiva, "Why don't you guys work it out and go back to work?"<sup>11</sup> Lorange called Jimmy Carter, Union Pacific's Senior Manager of Operating Practices, and told him what had occurred, and Carter responded that if the men came back to Bloomington, Lorange should pull them both out of service.<sup>12</sup> Lorange called Leiva back and told him what Carter had said.<sup>13</sup> Leiva told Lorange that he did not believe that he could work things out with the conductor and that he insisted on going back to Bloomington so he could fill out a report, and Lorange could talk to Mr. F.<sup>14</sup> Lorange told Leiva that if he came back to Bloomington to fill out a report, that both he and Mr. F. would be pulled out of service.<sup>15</sup>

Leiva still wanted to fill out a report because he did not feel safe with Mr. F., so Union Pacific sent a vehicle to Refugio to pick the two men up and bring them back to Bloomington.<sup>16</sup> Leiva believed that Mr. F.'s actions that day violated several of Union Pacific's rules of conduct.<sup>17</sup> Jason Jenkins, Union Pacific's Director of Operations (safety director) for the Houston Service Unit, testified that he taught both engineers and conductors about safety and told them that if they complied with Union Pacific's rules they would be in compliance with the C.F.R. because Union Pacific's rules are more stringent than the regulations.<sup>18</sup>

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<sup>9</sup> *Id.* at 7.

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.* Lorange admitted that Leiva called and told Lorange that Mr. F. had threatened Leiva. D. & O. at 7.

<sup>12</sup> *Id.* at 7-8.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 4-5.

<sup>17</sup> *Id.* at 5, 6.

<sup>18</sup> *Id.* at 9.

In Bloomington, both men filled out reports on the incident, were pulled out of service without pay, and were charged with workplace violence.<sup>19</sup> Lorance admitted that if both men had simply returned to work then Leiva would not have been pulled out of service.<sup>20</sup> Lorance considered the information that Leiva provided him about Mr. F.'s conduct to be a safety issue.<sup>21</sup>

That same day, Jenkins talked to Lorance about the incident between Leiva and Mr. F.<sup>22</sup> Lorance reported to Jenkins that Leiva told Lorance that Leiva felt that Mr. F. had threatened Leiva.<sup>23</sup> Lorance indicated to Jenkins that he did not have any reason to doubt that Leiva reported the incident in good faith.<sup>24</sup> Jenkins testified that if the men had gone back to work, it would have resolved the situation, and the men would not have been pulled from service—as it was, Leiva was pulled out of service after he filled out his 705 complaint form.<sup>25</sup>

On July 24, 2012, Lorance sent both Leiva and Mr. F. letters informing them to report to Union Pacific's Bloomington office for a formal investigation and hearing on August 1, 2012, to develop facts and determine responsibility. The proposed discipline for the two men was a level five offense (termination) and each man would be suspended pending the result of the investigation.<sup>26</sup> The presiding officials at the hearing would be Union Pacific officials.<sup>27</sup>

Union Pacific then contacted both Leiva and Mr. F. and told them to report to Spring, Texas, on July 27, 2012.<sup>28</sup> At this time, Leiva and Mr. F. met with Jenkins and a union official, Charles Piland.<sup>29</sup> Union Pacific proposed that the two men sign a hearing waiver agreeing to (1) termination of employment followed by immediate reinstatement as a probationary employee,

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<sup>19</sup> *Id.* at 5, 8.

<sup>20</sup> *Id.* at 8.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 9.

<sup>26</sup> *Id.* at 6.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

(2) no pay for time lost, (3) dismissal of Leiva's claims, (4) refrain from similar conduct in the future or be subject to disciplinary action, and (5) attend safety intervention and workplace violence training or face a formal hearing subject to termination.<sup>30</sup> Leiva signed the waiver because he had already lost pay from July 15 to July 27, 2012, and he needed income to support his family.<sup>31</sup> Union Pacific later informed Leiva that the waiver and his participation in workplace violence would be part of his personnel records.<sup>32</sup> In an effort to clear his name, Leiva turned to several Union Pacific managers, none of whom assisted him.<sup>33</sup> Leiva filed this complaint on September 19, 2012.

Leiva testified that the level of communication between an engineer and conductor is very important and essential to the safe operation of a train.<sup>34</sup> In this case, Leiva did not feel that he could adequately communicate with Mr. F. for the safe operation of the train.<sup>35</sup>

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to this Board to issue final agency decisions in FRSA cases.<sup>36</sup> The ARB reviews the ALJ's factual determinations under the substantial evidence standard, but reviews questions of law presented on appeal de novo.<sup>37</sup>

### DISCUSSION

In his D. & O., the ALJ considered whether Leiva had met his burden to prove by a preponderance of the evidence that (1) he engaged in protected activity as defined by the FRSA, (2) he suffered an adverse action or unfavorable personnel action, and (3) the protected activity

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 6-7.

<sup>32</sup> *Id.* at 7.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 6.

<sup>35</sup> *Id.*

<sup>36</sup> Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379 (Nov. 16, 2012).

<sup>37</sup> 29 C.F.R. § 1982.110(b); *Rosadillo v. Union Pacific R.R., Co.*, ARB No. 10-085, ALJ No. 2009-FRS-008, slip op. at 3 (ARB Oct. 31, 2011).

was a contributing factor in whole or part for the adverse or unfavorable personnel action.<sup>38</sup> The ALJ found that Leiva met this burden, and thus considered whether Union Pacific could show by clear and convincing evidence that it would have taken the same adverse or unfavorable personnel action in the absence of Leiva's protected activity.<sup>39</sup> He concluded that Union Pacific did not meet this burden.<sup>40</sup> We affirm the ALJ's decision.

## 1. The Merits

Substantial evidence supports the ALJ's conclusion that Leiva proved his case by a preponderance of the evidence. First, Leiva proved by a preponderance of the evidence that he engaged in protected activity under 49 U.S.C.A. § 20109(a)(1), which states that an employee is protected when he or she provides information in good faith regarding any conduct that the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security. Union Pacific argues that Leiva never presented any evidence that he reasonably believed that he was reporting a violation of federal law.<sup>41</sup> However, Jenkins testified that he taught engineers, of which Leiva was one, about safety, and taught them specifically that if they complied with Union Pacific's rules then they would be in compliance with the federal regulations because Union Pacific's rules were more stringent than the regulations.<sup>42</sup> Further, and consistent with this testimony, Leiva testified that Union Pacific taught him that to comply with federal regulations, he had to follow Union Pacific rules.<sup>43</sup> He believed that several Union Pacific rules of conduct were violated and implicated safety.<sup>44</sup> Substantial evidence supports the ALJ's finding that Leiva reasonably believed that he was reporting a violation of a federal regulation as provided in section (a)(1). Union Pacific also argues that Leiva testified that he was not aware of any federal laws or regulations when he reported the fight to his supervisors.<sup>45</sup> This argument fails because the statute does not require that an employee know the specific rules that he reasonably believes are being violated when he makes his report—the statute only requires that an employee have a reasonable belief in a

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<sup>38</sup> D. & O. at 10-12.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 11, 12.

<sup>41</sup> Respondent's Brief (Resp. Br.) at 5.

<sup>42</sup> D. & O. at 9; see also Hearing Transcript (Tr.) at 127.

<sup>43</sup> D. & O. at 10; see also Tr. at 10.

<sup>44</sup> *Id.* at 5-6.

<sup>45</sup> Resp. Br. at 5.

violation of a Federal law, rule, or regulation related to railroad safety or security. Leiva proved that he had such a reasonable belief by a preponderance of the evidence.

Leiva also proved that he engaged in protected activity by a preponderance of the evidence under 49 U.S.C.A. § (b)(1)(A), which states that an employee is protected if he reports a hazardous safety or security condition in good faith. Union Pacific argues that Leiva presented no evidence that his report had anything to do with a “hazardous” condition.<sup>46</sup> However, several witnesses including Leiva, Lorange, and Jenkins, testified that Leiva felt threatened by Mr. F. during and after the altercation.<sup>47</sup> Further, Leiva testified that communication between an engineer and a conductor is essential to the safe operation of a train.<sup>48</sup> More importantly, Leiva did not feel that he could adequately communicate with Mr. F. for the safe operation of the train.<sup>49</sup> Thus, the discordant and potentially violent situation between the engineer and the conductor of the train itself had the tendency to create a hazardous safety or security condition. Bolstering this conclusion, Lorange testified that he considered Mr. F.’s conduct to be a safety issue.<sup>50</sup> Finally, Jenkins testified that he had no reason to doubt Leiva’s good faith in reporting the incident.<sup>51</sup> Thus, there is substantial evidence in the record to support that Leiva reasonably believed that he was reporting in good faith a hazardous safety or security condition in violation of section (b)(1)(A).

Union Pacific also argues that the ALJ reversed the burdens of proof and required Union Pacific to establish that Leiva had not engaged in protected activity.<sup>52</sup> We disagree. While the ALJ used negative language to describe his findings in relation to the parties (“Having considered both positions I find no credible testimony to support Respondent’s position . . .” D. & O. at 12 ), the ALJ implicitly found that Leiva’s position was credible. We affirm the ALJ’s implied findings that: 1) Leiva did not try to reengage Mr. F. in a work place argument, 2) Leiva was not equally responsible for the dispute, and so Mr. F. was more responsible for the dispute, and 3) Leiva had an objective and reasonable belief that he was reporting a hazardous safety or security condition. While the ALJ’s language could have been more explicit, we find no reversible error and conclude that the ALJ applied the proper burdens of proof, as he outlined them at D. & O. at 10.

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<sup>46</sup> *Id.* at 14-16.

<sup>47</sup> D. & O. at 7, 8; see also Tr. at 14, 84-85, 110.

<sup>48</sup> D. & O. at 6.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 8 (citing Tr. at 89).

<sup>51</sup> *Id.* (citing Tr. at 110).

<sup>52</sup> Resp. Br. at 12.

Union Pacific did not challenge the ALJ findings that (1) it took adverse action against Leiva, (2) Leiva’s reporting about the safety issue with Mr. F. was a contributing factor in the adverse action taken against him, and (3) Union Pacific did not prove by clear and convincing evidence that it would have taken the same adverse action absent protected activity. We affirm these ALJ findings as supported by substantial evidence in the record and as unchallenged.

## 2. Punitive Damages

Leiva requests that the Board award punitive damages in this case or remand the case to the ALJ for consideration of punitive damages. Leiva requested punitive damages from the ALJ, but the ALJ did not address punitive damages in his order.<sup>53</sup> Union Pacific did not object to Leiva’s request for punitive damages in its brief.

Under 49 U.S.C.A. § 20109(e)(3), “[r]elief in any action under subsection (d) may include punitive damages in an amount not to exceed \$250,000.” FRSA does not require “illegal motive” to sustain a punitive damage award.<sup>54</sup> An award of punitive damages may be merited where there has been “reckless or callous disregard for the plaintiff’s rights, as well as intentional violations of federal law.”<sup>55</sup> The size of a punitive award “is fundamentally a fact-based determination.”<sup>56</sup> We remand to the ALJ to determine whether a punitive damages award is merited and if so, the size of the punitive damages award.

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<sup>53</sup> D. & O. at 2, 13.

<sup>54</sup> *Petersen v. Union Pac. R.R. Co.*, ARB No. 13-090, ALJ No. 2011-FRS-017, slip op. at 5 (ARB Nov. 20, 2014).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (quoting *Youngerman v. United Parcel Serv.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 10 (ARB Feb. 27, 2013)).



## CONCLUSION

The ALJ's Decision and Order is **AFFIRMED** and remanded for proceedings consistent with this decision. As the prevailing party, Leiva is also entitled to costs, including reasonable attorney's fees, incurred before the Board.<sup>57</sup> Leiva's attorney shall have 30 days from receipt of this Final Decision and Order in which to file a fully supported attorney's fee petition with the Board, with simultaneous service on opposing counsel. Thereafter, counsel for Union Pacific shall have 30 days from its receipt of the fee petition to file a response.

**SO ORDERED.**

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

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

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