



In the Matter of:

GERALD E. D'HOOGHE,

COMPLAINANT,

v.

BNSF RAILWAYS,

RESPONDENT.

ARB CASE NOS. 15-042
15-066

ALJ CASE NO. 2014-FRS-002

DATE: APR 25 2017

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

John A. Kutzman, Esq.; Paoli Kutzman, P.C.; Missoula, Montana

For the Respondent:

Michelle T. Friend, Esq.; Hedger Friend, P.L.L.C.; Billings, Montana and Jennifer L. Willingham, Esq., and Noah K. Garcia, Esq.; BNSF Railways, Co.; Fort Worth, Texas

Before: Paul M. Igasaki, Chief Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; and Leonard J. Howie III, Administrative Appeals Judge. Joanne Royce, concurring.

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Federal Railroad Safety Act of 1982 as amended (FRSA).¹ Complainant Gerald D'Hooche filed a complaint with the

¹ 49 U.S.C.A. § 20109 (Thomson Reuters 2016), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53, and as implemented by federal regulations at 29 C.F.R. Part 1982 (2016).

Occupational Safety and Health Administration (OSHA) alleging that his employer, BNSF Railways, violated the FRSA by retaliating against him because he reported a safety hazard. D'Hooge later amended his complaint to add additional protected activities of reporting a second safety hazard and a workplace injury.

OSHA investigated and concluded that BNSF did not violate the FRSA. D'Hooge requested a hearing before a Department of Labor (DOL) Administrative Law Judge (ALJ). After a formal hearing, the ALJ issued a Decision and Order (D. & O.) on March 25, 2015, finding that BNSF violated the FRSA by unlawfully discriminating against D'Hooge when it abolished the fixed route that he operated. The ALJ awarded D'Hooge \$906 in back pay, \$25,000 in punitive damages, and \$25,040.50 in reasonable attorney's fees and costs. BNSF appealed the merits of the ALJ's decision, and D'Hooge appealed the ALJ's award of attorney's fees. The Administrative Review Board (ARB or Board) consolidates the two appeals and affirms the ALJ's decision.

BACKGROUND

Gerald D'Hooge began working for BNSF, then Burlington Northern, in 1974. Based upon his seniority, D'Hooge became an engineer on the Lost Local route in 2004. This route was a desirable job assignment because of its pay schedule, regular hours, and the infrequency of weekend work. During the relevant time period, the Lost Local crew included D'Hooge, as engineer; a conductor; and a brakeman. Connan Moler was Trainmaster and D'Hooge's supervisor. Grace Grabofsky, Superintendent of Operations, supervised Moler.

For most of the year, BNSF's Lost Local route ran from 7 a.m. to 7 p.m., Monday through Friday, and covered the route from Great Falls, Montana, to Moore, Montana. The Lost Local route was located in Montana (Mountain Time); BNSF division headquarters was located in Fort Worth, Texas (Central Time). During the summer months—when the route moved to an early morning or evening start time to avoid problems related to increased summer temperatures—D'Hooge typically bid on other jobs. D. & O. at 14, 62.

In the fall of 2011, D'Hooge developed neck and back pain. D'Hooge complained of “rough riding” locomotives and rough track conditions. “Rough riding” is a condition caused by a locomotive's lateral movement from side to side due to worn shocks or bad springs. Some lateral movement is acceptable, but the condition can be dangerous at higher levels.

Early in 2012, Dave Cotton, BNSF Yardmaster, became increasingly frustrated with the Lost Local crew's performance and warned the crew several times that the route would be abolished if their performance failed to improve. *Id.* at 45. Sometime during the spring of 2012, Moler spoke with Cotton about abolishing the Lost Local route for performance reasons. *Id.* at 42. Abolishing the route would mean that the work orders would be filled from a general board or pool. The Lost Local crew would have to bid competitively based on seniority or bid for another job.

On March 28, 2012, the Lost Local crew reported that locomotive #2723 was rough riding at Dutton, Montana and should not be used as a lead locomotive. *Id.* at 26, 46. Later the same day, D'Hooge informed Moler that he had sustained a work injury to his neck and back due to rough-riding conditions. Moler suggested that D'Hooge formally report the condition as cumulative so that D'Hooge would not be late reporting the injury as BNSF requires that workplace injuries be reported promptly. *Id.* at 46.

On April 5, 2012, BNSF assigned D'Hooge and the two other crew members (a conductor and a brakeman) to a trip on the Lost Local route from Great Falls, Montana, to deliver and pick up cars in Moore, Montana. BNSF policy requires that the crew members ride in the lead locomotive. D'Hooge and the conductor rode in the lead locomotive. Because the cabins were small, the brakeman rode in the middle locomotive on April 5. *Id.* at 47. It is undisputed that on the first southbound leg of the April 5 trip, locomotive #2901 was the lead locomotive. Locomotive #2723 was the middle car and #2982 was the tail car. For the northbound return trip, unit #2982 was the lead locomotive.

D'Hooge had previously reported at least two of the cars in the consist for rough riding and had experienced rough riding in the same consist for at least three days over the prior week. Hearing Transcript (Tr.) at 157, 264; D. & O. at 12, 47. The "consist" is an entire train of joined cars, in this case the three cars.

D'Hooge testified that the crew spent roughly thirty minutes in Moore before returning northbound. Tr. at 238. According to D'Hooge's testimony and the ALJ's finding, the Lost Local crew left Moore, heading north, at around 11:00 a.m. (Mountain Time). The ALJ found that the crew's ride was even rougher going north than it had been on the southbound route. The brakeman reported that he could no longer ride in the middle locomotive, #2723, because it was too rough. Tr. at 162; D. & O. at 47. At that time, roughly 11:14-11:21, D'Hooge reported ("bad-ordered") all three cars as too rough. Tr. at 162-63; D. & O. at 47. The ALJ found that the report was made in Mountain Time. D. & O. at 37 & n.11, 47; RX-19. When the consist passed through Hobson Switch going northbound, D'Hooge reported a rough track switch. Complainant's Exhibit (CX-16); D. & O. at 47.

At 5.49 p.m. (Mountain Time) (6:49 p.m. Central Time), the dispatcher sent an e-mail informing Great Falls management, including Moler, that the Lost Local crew had "bad-ordered" all three locomotives in the consist and that they must be sent to Havre for inspection. D. & O. at 48. Moler mistakenly assumed that the report had been made late in the day, around the same time he received the e-mail from dispatch. Assuming the crew reported the locomotives just before the end of their shift, Moler suspected that they did not want to finish their work that day. He therefore believed the report was made in bad faith. D. & O. at 21. Moler testified that he thought that the bad-order was not in "good faith" because you do not bad-order an entire consist. That only happened one time in Moler's nine years. Tr. at 387. Other BNSF employees also testified that it was very rare to report an entire consist. Moler's conclusion that D'Hooge reported in bad faith was supported by his previous experiences with the crew not finishing work late in their shift that Moler thought they could have completed. In other words, Moler thought that D'Hooge's report was another instance of the crew's failure to complete their work.

Later in the evening of April 5, after discussing the matter with Grabofsky, Moler abolished the Lost Local job and decided to fill the work from a rotating crew working “off the board.” CX-9; D. & O. at 22.

Moler testified that he abolished the route after learning of the April 5th bad-order and that he would not have abolished it on the evening of April 5 but for the bad-order of the entire consist. Tr. at 347-48. According to Moler, the failure to complete the work and the perceived bad-faith report was the straw that broke the camel’s back. Tr. at 385.

Moler acknowledged that company policy dictated specific procedures to follow when management believed a report is fraudulent and that he did not initiate such a procedure on April 5. Tr. at 351. One of the steps in that process is to have the locomotives inspected. Tr. at 376. If no defects are found, Moler testified that supervisors have a choice between counseling and investigation notices. Tr. at 376. To avoid the investigation in the first place, Moler thought that abolishing the route would be a compromise that addressed the performance problem without potential disciplinary action.

Upon receiving D’Hooge’s report, the dispatcher took the consist out of service and directed the locomotives to Havre for maintenance. D. & O. at 48. On April 9, Havre Maintenance inspected #2723’s springs, wheels, bolster pads, and side-bearing clearance. The equipment was found to have no defects. *Id.* at 49. Locomotive #2982 was also found to have no defects. On April 10, maintenance inspected locomotive #2901’s wheels, springs, shocks, bolster pads, and side-bearing clearance. The ALJ reported that the maintenance official did not annotate its conclusions for #2901. RX-19; D. & O. at 49.

D’Hooge continued to work for BNSF after Moler abolished the Lost Local route on April 5. D’Hooge joined the Laurel pool with six other engineers and was on telephone standby, alternating with others and working on every sixth train south to Laurel. D’Hooge claimed that the track conditions on the Laurel line were horrendous and that he aggravated his injury. D’Hooge next switched to the Shelby pool, but continued to suffer from rough-riding locomotives. D. & O. at 13. By the end of April 2012, D’Hooge decided he could no longer work due to his neck, shoulder, and back pain.

Around the same time in late April 2012, filling the Lost Local job with general employees from a pool became problematic. Moler reinstated the Lost Local route with a set crew on or about May 8 with a 4 a.m. start time. D. & O. at 32, 50. In a typical year, the Lost Local route was cancelled or altered during the summer months because the route could not operate in the heat of the day. The day route, 7 a.m. to 7 p.m., would then resume in the fall. At or around this time, however, D’Hooge elected to go on the retention board (nonwork status), then took personal leave, and soon thereafter entered into disability leave of absence. *Id.* at 50, 61.

D’Hooge filed his complaint with OSHA on September 12, 2012. D’Hooge alleged that BNSF abolished his route because he bad-ordered three locomotives, which he claimed was FRSA-protected activity. RX-11; D. & O. at 3. In November 2012, D’Hooge amended his complaint to include his report of rough track conditions and a March 28 workplace injury as

additional FRSA-protected activities. OSHA dismissed D’Hooge’s complaint on September 30, 2013. D’Hooge filed objections, and the case was assigned to an ALJ for hearing.

After holding a hearing, the ALJ found that Moler abolished the Lost Local route when Moler learned of the crew’s reports of bad locomotives, which Moler believed to have been submitted in bad faith, based in part on incorrect assumptions. D. & O. at 60. The ALJ noted that at the time that D’Hooge reported the consist, one of the locomotives had already been bad-ordered and was still pending maintenance inspection. *Id.* at 55. The ALJ concluded that FRSA protected activity contributed to Moler’s decision and that he would not have abolished the route at that time if D’Hooge had not reported the locomotives.

The ALJ awarded D’Hooge \$906 in back pay and \$25,000 in punitive damages. The ALJ also awarded \$20,196 in attorney’s fees and \$4,844.50 in costs. BNSF appealed the merits of the ALJ’s decision to the ARB (ARB 15-042), and D’Hooge appealed the ALJ’s award of attorney’s fees (ARB 15-066); the ARB consolidated the two appeals.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to issue final agency decisions in FRSA cases.² 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.³ The standard for reviewing the amount of a punitive damages award is abuse of discretion.⁴

DISCUSSION

In 2007, Congress amended the FRSA by incorporating the procedures found in the whistleblower protection section of the Wendell H. Ford Aviation Investment and Reform Act

² See 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).

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

⁴ See *Raye v. Pan Am Railways, Inc.*, ARB No. 14-074, ALJ No. 2013-FRS-084 (ARB Sept. 8, 2016), *aff’d sub nom. Pan Am Railways, Inc. v. United States Dep’t. of Labor*, 2017 WL 1422369 (1st Cir. 2017); *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433 (2001) (“If no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court’s ‘determination under an abuse-of-discretion standard’” regarding the amount of a punitive damages award (in a common-law claim of unfair competition)).

for the 21st Century, commonly known as “AIR-21.”⁵ The FRSA, as amended, prohibits a railroad company, a contractor, officer, or employee of a railroad company, from retaliating against an employee because the employee engaged in activity protected under the FRSA. A successful FRSA complainant must prove: (1) that he or she engaged in protected activity; (2) that the employee suffered an adverse action; and (3) that the protected activity was a contributing factor in the unfavorable employment action. If the employee prevails on the elements of his or her claim, he or she may be entitled to remedies. To avoid liability for remedies, the employer must prove by clear and convincing evidence its affirmative defense that it would have taken the same action absent the employee’s protected activity.⁶

1. Protected Activity

The FRSA protects an employee from retaliation if the retaliation is “in whole or in part” due to the employee’s “lawful, good faith” effort:

(a)(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety

. . . .

(a)(4) 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.^[7]

The FRSA also prohibits a railroad company, contractor, officer or employee of such railroad company from retaliating or discriminating against the employee for reporting, in good faith, a hazardous safety or security condition.⁸

The ALJ found three protected activities: (1) D’Hooge’s March 28 report of an injured neck due to cumulative neck stress; (2) D’Hooge’s April 5 report of a rough track; and (3) the

⁵ 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].”).

⁶ Clear and convincing evidence is “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.” *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6, 9 n.6 (ARB Jan. 31, 2011) (quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (citation omitted)).

⁷ 49 U.S.C.A. § 20109(a).

⁸ 49 U.S.C.A. § 20109(b)(1)(A) (reporting, in good faith, a hazardous safety or security condition).

April 5 report of rough riding or unsafe locomotives.⁹ The parties do not dispute that the March 28 report of an injured neck and the April 5 report of rough track were activities protected under the FRSA. There is also no dispute that a report of a rough-riding locomotive is FRSA-protected activity. D. & O. at 52. The issue on appeal is whether D'Hooge made the April 5 rough riding report in good faith.

The ALJ found that the FRSA requires only that a complainant subjectively believe his reporting and does not require that a complainant prove that his safety complaint was objectively held in good faith, that is that a reasonable person would also feel that the circumstance created a safety hazard.

While noting that the record contained contrary evidence, the ALJ found that D'Hooge's testimony satisfied his subjective belief that the locomotives were unsafe. D. & O. at 54. The ALJ discredited Moler's argument that BNSF acted on the belief that D'Hooge reported in bad faith because Moler made an erroneous assumption that the bad-order took place at the end of the Lost Local shift rather than the middle of the shift. *Id.*

BNSF argues on appeal that the ALJ erred in finding that D'Hooge's report was made in good faith. Specifically, BNSF argues that the FRSA's good-faith standard requires that a complainant prove both an objective and subjective component. That is, the FRSA employee must show not only that he or she subjectively believed in the safety condition but also that the condition was objectively reasonable. BNSF also argues that the record shows that the Lost Local crew had a history of poor performance. BNSF Brief (Br.) at 5. Moler believed that the April 5 report was a continuation of the Lost Local crew's bad conduct. According to BNSF, reporting all three locomotives at once was very uncommon. *Id.* at 7-8. Further, BNSF argues that it would be impossible for D'Hooge to be in Moore at 11 a.m. MT based on D'Hooge's testimony. According to BNSF's chronology, there is no way that D'Hooge could have completed the trip to Moore and begun the return trip to Great Falls in #2982 and made the complaint at the time he did. BNSF argues that D'Hooge did not report rough riding of the entire consist in good faith because he had not yet ridden in #2982 while heading south. *Id.* at 3-4. The crew should not have been riding in the middle or the tail locomotive, only the lead locomotive. BNSF argues that D'Hooge had no personal knowledge of the condition of one locomotive and fabricated the charge with respect to another locomotive. *Id.* at 9-10. For that reason, argues BNSF, the FRSA did not protect his report..

Substantial evidence supports the ALJ's finding that D'Hooge's actions were protected under either the subjective or objective standard of good faith. The ALJ found that the Lost

⁹ D'Hooge amended his complaint on November 5, 2012, to include two separate categories of protected activities: reporting the March 28 injury and the April 5 report of rough track (separate from the April 5 report of bad-ordering the three locomotives). The ALJ found that D'Hooge's amendments related back to his timely complaint of rough riding and thus considered all of the alleged protected activities. BNSF argues that the ALJ erred in ruling that D'Hooge's amendments to his complaint were timely. We agree with the ALJ that D'Hooge's amendments relate back to the original complaint arising out of the same fact pattern. 29 C.F.R. § 18.36 (2016); Fed R. Civ. P. 15(c). BNSF suffered no prejudice by the amendment to include additional protected activities.

Local crew had actually reported the rough riding consist about half way through their route; not at the end of their shift, as Moler had mistakenly believed due to an unexplained delay in his learning of the report. *Id.* at 54. Further, as the ALJ found, D’Hooge knew of the condition of at least two trains. He had tried to report the rough ride of the lead engine #2901 on his southbound trip and after leaving Moore headed north, he experienced an even rougher ride in lead engine #2982. Regarding the condition of the middle train, #2723, the ALJ found that soon after leaving Moore, the brakeman informed D’Hooge that he could no longer ride in the middle train because of its rough ride. Even if D’Hooge had not yet ridden in the third train on April 5, his report of its rough riding was reasonable given that the Lost Local crew had reported rough riding in the middle train on March 28 and the reported defect had not yet been resolved. *Id.* at 54, n.30.

2. Adverse Action

Shortly after learning of the bad-order, Moler abolished the Lost Local route with approval from his supervisor, Grabofsky. *Id.* at 59. BNSF argues that the ALJ erred in concluding that the conversion of Lost Local to a general bid job was an adverse action. We disagree and affirm the ALJ’s finding that D’Hooge suffered an adverse action when BNSF abolished the Lost Local route. Substantial evidence supports the ALJ’s finding. D’Hooge suffered a small loss in pay, as well as the loss of regular hours and free weekends. The Lost Local had the most favorable working conditions in the division, *Id.* at 57, and, after Moler abolished the Lost Local route, D’Hooge had to rebid on other jobs with worse conditions. *Id.*

3. Causation

Neither party sought review of the ALJ’s finding that two of the three protected activities, the March 28 injury and the April 5 track report, were not contributing factors to the abolition of the Lost Local route. The ALJ did, however, conclude that the April 5 report of the rough riding locomotives was a contributing factor to Moler’s decision to terminate the Lost Local job. In support, the ALJ cited Moler’s testimony that D’Hooge’s report was the “straw that broke the camel’s back.” Tr. at 384-85. Further, the ALJ found that BNSF could not establish its affirmative defense with respect to the abolishment because all the evidence points to the fact that BNSF terminated the Lost Local job because of D’Hooge’s report.

We find that substantial evidence supports the ALJ’s finding that the April 5 bad-order contributed to BNSF’s abolishment of the Lost Local route. BNSF does not dispute that D’Hooge’s bad-ordering was the last straw and was the reason Moler ended the Lost Local job.

On appeal, BNSF argues that Moler and Grabofsky abolished the Lost Local, not for D’Hooge’s safety complaints, but because of the crew’s continued nonperformance. We do not find this persuasive. As the ALJ found, Moler’s own testimony provided direct evidence of causation: “ Mr. Moler [] truthfully acknowledged that if he [had] not received the April 5 e-mail informing him of Mr. D’Hooge’s hazardous safety condition report, he would not have terminated th[e] Lost Local job that evening. His credible testimony is direct evidence that Mr. D’Hooge’s protected activity of reporting three rough-riding locomotives for an extremely rough

ride was a contributing factor in the abolishment of the Lost Local job on the same day.” D. & O. at 60.

BNSF also argues that the route change was considered a lenient alternative to a disciplinary investigation and that the ALJ erred in concluding that neither animus nor motive are required to prove causation. We reject these challenges to the ALJ’s order. Moler’s benevolent state of mind is not a defense to whistleblower retaliation when the statute’s causation language is satisfied.¹⁰ Here, Moler acknowledged that he abolished the route because D’Hooze bad-ordered the consist. Accordingly, the ALJ’s conclusion that the April 5 bad-order report contributed to abolishment is supported by substantial evidence.

4. Affirmative Defense

As part of its affirmative defense to avoid remedies, BNSF must prove by clear and convincing evidence that it would have taken the same action absent D’Hooze’s report of the April 5 bad-order. The ALJ held that BNSF could not show that Moler would have abolished the route without D’Hooze’s safety report. In its Petition for Review, BNSF claims that the ALJ erred by finding that BNSF could not establish its affirmative defense by clear and convincing evidence. However, BNSF provides no reasons supporting this claimed error. We conclude that the ALJ’s decision is supported by substantial evidence. Moler stated that the report was the last straw and the trigger for the abolishment of the Local Lost job. Although the timing of the route may well have been altered or suspended during the summer months because of the heat, the ALJ correctly focused on *when* the adverse action occurred, determining that BNSF failed to establish that it would have abolished the Lost Local *on April 5* in the absence of D’Hooze’s report of the bad locomotives. D. & O. at 60-61. Further, as the ALJ noted, Moler impetuously imposed the adverse action based on erroneous assumptions. Had Moler waited and based his decision more fully on work not being done with specified examples that did not principally rely on the April 5 bad-order, the ALJ may have reached a different conclusion. We affirm the ALJ’s ruling that BNSF failed to carry its affirmative defense.

5. Remedies

Under the FRSA, a successful complainant is entitled to make-whole remedies including back pay, compensatory damages, punitive damages up to \$250,000, and reasonable attorney fees.¹¹

¹⁰ *Petersen v. Union Pac. R.R. Co.*, ARB No.13-090, ALJ No. 2011-FRS-017, slip op. at 3 (ARB Nov. 20, 2014) (“[N]either motive nor animus is required to prove causation under [FRSA] as long as protected activity contributed in any way to the adverse action.”); *see also Williams*, ARB No. 09-092, slip op. at 6, 9 n.6; *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, -003; ALJ No. 2007-SOX-005 (ARB Sept. 31, 2011).

¹¹ 49 U.S.C.A. § 20109(e) Remedies.—

(1)In general.—

An employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole.

(A) Back pay and compensatory damages

D’Hooge asked for emotional damages and front pay in the amount of \$350,000 because he was no longer able to work due to the neck injury. The ALJ denied front pay, noting that D’Hooge was not terminated from BNSF when the Lost Local job was cut. D. & O. at 61-62. D’Hooge had the option to bid on subsequent jobs, some of which paid the same monthly pay. The Lost Local job came back online in May 2012, and D’Hooge could have rebid on the Lost Local route. Instead, D’Hooge elected to go on the work retention board, took personal leave, and then went on disability leave of absence. Furthermore, the Lost Local job was intermittent as the hours changed with the season. Even if Moler had not cut the job when he did, the Lost Local would not run year round and typically ended in June. Thus, the ALJ determined that it would be inappropriate to award front pay as if D’Hooge would have been employed on the route year round. The ALJ also dismissed D’Hooge’s claim that the abolishment of Lost Local aggravated D’Hooge’s injury because he had to bid on other work with rougher conditions. The ALJ noted that D’Hooge’s injury predated the abolishment of Lost Local—as early as October 2011. The ALJ found that the end of the Lost Local job reduced D’Hooge’s income for the last month that he worked from \$8,195 to \$7,289. The ALJ awarded \$906 plus pre-judgment interest. *Id.* at 63. The ALJ denied D’Hooge’s claim for emotional distress. Neither BNSF nor D’Hooge appealed the ALJ’s award of back pay or denial of front pay and emotional distress damages.

(B) Punitive damages

Relief under FRSA “may include punitive damages in an amount not to exceed \$250,000.”¹² Punitive damages require reckless disregard or willful violations of law. *Smith v. Wade*, 461 U.S. 30, 51 (1983). The fact-finder considers the actor’s state of mind in relation to the law. Punitive damages are appropriate for intentional and egregious violations of the law. Gross or reckless indifference to the law can establish the intentional component needed for willfulness. *Kolstad v. Am. Dental*, 527 U.S. 526, 535-36 (1999). An employer may avoid punitive damages when it has made a good-faith effort to comply with the law. *Youngermann v. United Parcel Serv.*, ARB No. 11-056, ALJ No. 2010-STA-047 (ARB Feb. 27, 2013). The employer relying on the affirmative defense of good faith has the burden of proof.

(2) Damages.—Relief in an action under subsection (d) (including an action described in subsection (d)(3)) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) any backpay, with interest; and

(C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(3) Possible relief.—

Relief in any action under subsection (d) may include punitive damages in an amount not to exceed \$250,000.

¹²

49 U.S.C.A. § 20109(e)(3).

(i) *BNSF had the requisite state of mind*

The ALJ relied on the fact that Moler did not investigate the bad-ordering and did not interview the parties before abolishing the route to find that punitive damages were warranted. The ALJ acknowledged BNSF's points about Moler's incorrect assumptions but ruled nonetheless that punitive damages were appropriate. D. & O. at 65. The ALJ determined that reckless disregard of the law had been met and deterrence was necessary and awarded \$25,000 in punitive damages.

BNSF argues on appeal that even if the ALJ's finding of an FRSA violation is affirmed, the ALJ erred in awarding punitive damages because BNSF did not have the requisite state of mind for reckless disregard because it operated in good faith. BNSF Br. at 15-16. BNSF argues that it adheres to anti-retaliation principles and that Moler was under a mistaken belief when he abolished the route. Because Moler was under a mistaken belief, punitives would not serve any goal of deterrence or ensure future compliance, which is not called into question. BNSF points out that deterrence and punitives would not be appropriate, not only because Moler's act was unintentional, but also because Moler is no longer employed at BNSF. *Id.* at 19.

We review the ALJ's finding of the requisite state of mind for substantial evidence. *Raye*, ARB No. 14-074. We find that the ALJ's finding is supported by substantial evidence. Moler did not follow protocol and did not investigate but assumed that the crew was attempting to get out of work. Moler testified that he was informed of the report just prior to the end of the route. The ALJ found it problematic that it took six hours for the rough riding report to make it from the dispatcher (at 11a.m.) to Moler later in the day. Moler did not provide an explanation as to why the report—which would necessitate the immediate cessation of the route—did not make it to him sooner. The ALJ's stated need for punitive damages is directed to the railroad's failure to train its managers appropriately. It is also meant to discourage managers from making decisions that negatively impact a worker's condition of employment without the benefit of information that is readily available.

(ii) *The ALJ's Award was not excessive*

In cases where the fact finder finds the requisite state of mind, the next inquiry is whether the award of punitive damages is necessary for deterrence. *Youngermann*, ARB No. 11-056. The ALJ awarded \$25,000 in punitive damages but only \$906 in back pay. This is a ratio of approximately 25:1.

BNSF argues that the ALJ's award of 25:1 was excessive. We analyze non-constitutional claims of excessiveness for abuse of discretion. We review constitutional claims of excessiveness *de novo*.¹³ In this appeal, we do not differentiate between the two standards.

¹³ *Carter v. BNSF Ry., Co.*, ARB Nos. 14-089, 15-016, -022; ALJ No. 2013-FRS-082 (ARB June 21, 2016); *Raye*, ARB No. 14-074. In resolving the question of excessive punitive damages, the ARB is guided by *State Farm Mut. Auto. Ins. Co. v. Campbell*, in which the Supreme Court considered whether a punitive damages award meets procedural and substantive limitations of fairness and due process which include: (1) the degree of the reprehensibility or culpability of respondent's misconduct, (2) the relationship between the penalty and the harm to the complainant

Under either the abuse of discretion standard or the constitutional due process standard, we find that the ALJ's award was not excessive. In another context, the ratio of 25:1 may present more concern, but here we focus on the low amount of back pay award to find that the ALJ's award of punitive damages at the ratio of 25:1 is not excessive.

(C) Attorney's fees and litigation costs (15-066)

The FRSA permits the complainant as prevailing party to request reasonable attorney's fees. 49 U.S.C.A. § 20109(e)(2)(C). Counsel for D'Hooge, Mr. Kutzman, asked for 175.1 hours at the rate of \$255, for a total of \$44,650.50 (\$255 x 175.1). The ALJ approved Kutzman's rate but reduced the hours by 16.7 hours. Supplemental D. & O. at 5. Thereafter, the ALJ reduced the overall award of \$40,392.00 (\$255 x 158.4) by 50% to \$20,196 because D'Hooge was only partially successful in his pursuit of various claims and damages, citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

D'Hooge also petitioned for \$5,308.56 in litigation expenses. The ALJ denied some miscellaneous office expenses in the amount of \$464.06. The ALJ awarded \$4,844.50 in litigation expenses.

On appeal, D'Hooge claims that the ALJ erred in reducing the overall award by 50% and wrongly relied on *Avondale Indus. v. Davis*, 348 F.3d 487 (5th Cir. 2003) in so doing. D'Hooge states that the ALJ's decision conflicts with cases subsequent to *Hensley*, namely *Muniz v. United Parcel Serv.*, 738 F.3d 214 (9th Cir. 2013) and *Schwarz v. Sec'y Health & Human Servs.*, 73 F.3d 895 (9th Cir. 1995). D'Hooge argues that *Hensley* is limited to denying fees for unrelated or alternate claims that were not successful. D'Hooge asserts that *Hensley* does not apply to this case because he did not pursue unsuccessful unrelated claims. Further, the ALJ's reliance on *Avondale* was inappropriate because the statute in that case, unlike the FRSA, specifically requires a reduction of attorney's fees *pro rata* with the amount of the award. D'Hooge also makes a policy argument that the ALJ's analysis conflicts with the purpose of fee-shifting statutes, and this might induce a lawyer to dissuade clients from pursuing anti-retaliation claims with less favorable odds.

BNSF counters that degree of success has always been a factor in determining "reasonable" fee awards, even in civil rights cases. BNSF disputes D'Hooge's recitation of the law and argues that the case law supports a reduction for both partially successful interrelated claims as well as for unsuccessful unrelated claims. BNSF highlights that D'Hooge was only successful in winning 4.3% of the total amount he sought. The ALJ rejected D'Hooge's claims for front pay and emotional distress.

We find that *Hensley* and the case law D'Hooge cites supports BNSF's position. *Hensley* states that fees for completely unrelated claims can be subtracted as Congress, in the analogous civil rights area, did not intend to award fees for unrelated and unsuccessful claims. Even for

caused by the respondent's actions, and (3) "the sanctions imposed in other cases for comparable misconduct." 538 U.S. 408 (2003). The ARB reviews non-constitutional challenges of excessiveness under similar criteria.

related claims, the measure of success can justify a reduction to be reasonable. Excellent results for interrelated claims may merit full rates and full hours. Limited or partial success may merit deductions, even large deductions to be reasonable.¹⁴ In *Hensley*, the Court explained the rationale for reducing an attorney's fee based on the degree of success:

If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.^[15]

The cases that D'Hooge cites for the contrary position do not alter the *Hensley* position that trial judges may reduce attorney's fees for limited success in related claims. As to the amount of the reduction, the case law is uniform: the trial judge has a large degree of discretion.¹⁶ D'Hooge has not demonstrated that the ALJ abused his discretion in reducing the attorney's fees by fifty percent for limited or partial success.

¹⁴ *Hensley* refers to the twelve *Johnson* factors, which are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

¹⁵ *Hensley*, 461 U.S. at 436.

¹⁶ *Id.* at 436-37.


CONCLUSION

We **AFFIRM** the ALJ's finding that BNSF violated the FRSA when it abolished the Lost Local route. We further **AFFIRM** the ALJ's award of back pay and punitive damages. Finally, we **AFFIRM** the ALJ's order of attorney's fees.

SO ORDERED.



PAUL M. IGASAKI
Chief Administrative Appeals Judge



LEONARD J. HOWIE III
Administrative Appeals Judge


Judge Royce, concurring:

I agree with the majority opinion affirming the ALJ's March 25, 2015 "Partial Approval of Complaint." However, I would modify the ALJ's June 1, 2015 "Supplemental Decision and Order—Partial Award of Attorney Fee & Litigation Costs" because I do not believe the ALJ appropriately applied the Supreme Court's holding in *Hensley* that a fee should reflect the level of a complainant's success. The ALJ based a 50% fee reduction of the fee award on his finding that "[a] comparison of the stark difference between the claimed and recovered amount demonstrates that a significant reduction of the lodestar attorney fee of \$40,392.00" is warranted.¹⁷ However, this statement does not sufficiently explain *how* the ALJ arrived at a 50% reduction of the lodestar amount. According to *Hensley* "[a] reduced fee award is appropriate if the relief [] is limited in comparison to the scope of the litigation as a whole."¹⁸ While this wording is vague—perhaps intentionally vague to allow for the exercise of discretion—I interpret the language, as applied in this case, to entail a reasoned assessment of what proportion of the entire litigation efforts are attributable to the success obtained to arrive at a "reasonable" attorney's fee award.

¹⁷ June 1, 2015 Supplemental Decision and Order—Partial Award of Attorney Fee & Litigation Costs at 5.

¹⁸ *Hensley*, 461 U.S. at 440.

D'Hooge prevailed on the merits of his complaint, namely that BNSF violated the Federal Railroad Safety Act, 49 U.S.C.A. § 20109(b)(1)(A), when it abolished his job on the Local Lost route because he engaged in protected activity. Although D'Hooge was awarded back pay and punitive damages, the ALJ declined to award as much as D'Hooge requested and awarded no compensatory damages or front pay whatsoever. Thus, although D'Hooge was completely successful on the merits of his claim, he was not awarded anywhere near the amount of damages that he requested in connection with his claim. To arrive at a reasoned reduction of fees under the facts of this case, it makes sense to consider what percentage of the entire litigation efforts were attributable to D'Hooge's requests for damages.¹⁹ I reject the ALJ's reduction of the fees by half because well over half of the litigation was directed to the merits—on which D'Hooge was successful—not damages. In my view, the ALJ abused his discretion by reducing the lodestar figure by half.²⁰


JOANNE ROYCE
 Administrative Appeals Judge

¹⁹ See *Rudolph v. Amtrak*, ARB No. 14-080, ALJ No. 2009-FRS-015 (ARB June 28, 2016) (Corchado concurring, “the basis for the ALJ’s reduction of Rudolph’s fee request is not entirely convincing to me. Rudolph succeeded in proving his overall claim: he lost his position as a result of unlawful whistleblower retaliation”).

²⁰ See *Hoffman v. Boss Insulation & Roofing, Inc.*, ARB No. 96-091, ALJ No. 1994-CAA-004 (ARB Jan. 22, 1997) (“The ALJ proposes a standard that would chill attorneys from taking moderately complicated cases where the complainant earned modest wages and hence the back pay sought would be small in relation to the attorney time expended. Moreover, in discrimination cases, the Supreme Court has rejected any requirement of proportionality between the damages and the attorney’s fees awarded. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1222 (3d Cir. 1995). In *Pogue v. U.S. Dept. of Navy*, No. 1987-ERA-021 (Sec’y Apr. 14, 1994), the Secretary wrote:

[T]he Supreme Court has cautioned that if “the claimed rate and the number of hours are reasonable, the resulting product is presumed to be the reasonable fee” *Blum v. Stenson*, 465 U.S. at 897. In addition, the Court has directed that “the fee awarded should not be reduced simply because the plaintiff failed to prevail on every contention in the lawsuit.” *Hensley v. Eckerhart*, 461 U.S. at 435; *Cf. Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1052-53 (9th Cir. 1991) (time spent on losing stage of litigation compensable if it contributes to ultimate success).

Cf. Clay v. Castle Coal & Oil Co., No. 1990-STA-037 (Sec’y June 3, 1994) (“Accordingly, I find it appropriate to reduce the number of hours billed by ten percent. I reject the ALJ’s recommended reduction of 30 percent as excessive and his further reduction, for punitive purposes, of an additional ten percent as unwarranted.”).