



In the Matter of:

WAYNE LAIDLER,

ARB CASE NO. 15-087

COMPLAINANT,

ALJ CASE NO. 2014-FRS-099

v.

DATE: August 9, 2017

GRAND TRUNK WESTERN RAILROAD
COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Robert B. Thompson, Esq. and Robert E. Harrington, III, Esq.; *Harrington, Thompson, Acker & Harrington, Ltd.*, Chicago, Illinois

For the Respondent:

Andrew J. Rolfes, Esq.; *Buchanan Ingersoll & Rooney*, Philadelphia, Pennsylvania

For the Assistant Secretary of Labor for Occupational Safety and Health as Amicus Curiae:

M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Megan E. Guenther; Esq., and Joseph G. Gilliland, Esq.; *U.S. Department of Labor, Office of the Solicitor*, Washington, District of Columbia

Before: Leonard J. Howie III, *Administrative Appeals Judge*; Paul M. Igasaki, *Chief Administrative Appeals Judge*; and E. Cooper Brown, *Administrative Appeals Judge*.

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (FRSA).¹ Wayne G. Laidler filed a complaint with the United States Department of Labor’s Occupational Safety and Health Administration (OSHA) alleging that his employer, Grand Trunk Western Railroad Company (GTW), retaliated against him for refusing to work due to a hazardous safety condition, activity the FRSA protects. After a formal hearing, an Administrative Law Judge (ALJ) issued a Decision and Order in which the ALJ found that GTW unlawfully discriminated against Laidler in violation of the FRSA and awarded damages and other relief.² GTW appealed the ALJ’s decision to the Administrative Review Board (ARB). The Department of Labor’s (DOL) Solicitor of Labor has filed an amicus brief on behalf of the Assistant Secretary for the Occupational Safety and Health Administration (OSHA) in support of the ALJ’s decision. For the following reasons, the ALJ’s decision is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this Decision and Order of Remand.

FACTUAL AND PROCEDURAL BACKGROUND³

GTW is a railroad carrier within the meaning of the FRSA.⁴ Laidler started working for GTW on December 6, 2006.⁵ Canadian National Railroad (CN) is GTW’s parent company and GTW is the CN division that operates in the Michigan zone.⁶ CN has its own operating rules for its employees, including a “roll-by inspection” Rule 523, which requires: “When duties and terrain permit, at least two crew members of a standing train . . . must inspect passing trains on the ground on both sides of the track. At locations where trains will meet, the train to arrive second must notify the first train when they pass the approach to the siding, to allow crew members to be in position for inspection.”⁷

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).

² ALJ Decision and Order Awarding Benefits (D. & O.), ALJ No. 2014-FRS-099 (Aug. 13, 2015).

³ The facts for the Background section are taken from the parties’ stipulated facts, the ALJ’s findings of fact, and the undisputed facts.

⁴ See Stipulations, ALJ’s Decision and Order Awarding Benefits (D. & O.) at 3.

⁵ See Stipulations, D. & O. at 4.

⁶ D. & O. at 18, 36.

⁷ Respondent’s Exhibit (RX) 1; Joint Exhibit (JX) 2 at 60.

On December 15, 2012, Laidler, as the train's conductor, and Claude T. Freeman Jr., as the train's engineer, were transporting a GTW freight train when it was stopped in the GTW railyard located in Flint, Michigan.⁸ As Laidler's and Freeman's train was stopped, an oncoming GTW train approached their train. GTW Trainmaster Jacob Hommerding was aboard the oncoming train. The ALJ found that Laidler and Freeman had not been warned or notified that a moving train would be approaching and passing their train.⁹ This notice, as required under Rule 523, allows the crew of the stopped train to get into position on the ground, on both sides of the train track, to carry out the roll-by inspection. And although there was an evidentiary dispute as to the exact location of Laidler's train when the alleged violation occurred, the ALJ found that the train's head engine was stopped on the Schwartz Creek Bridge and, therefore, was in an unsafe location to perform a roll-by inspection from the ground.¹⁰

Laidler did not perform a roll-by inspection of Hommerding's oncoming train. Neither Laidler nor Freeman notified anyone at GTW that they could not perform a roll-by inspection of the oncoming train from the ground.¹¹ The following day, when Hommerding approached Laidler and asked him why he had not performed a roll-by inspection from the ground, Laidler replied that it was too hazardous to do so due to the location of his train on the bridge. Not until the hearing before the ALJ did Laidler ever indicate to anyone that he and Freeman had instead inspected the passing train from the cab of the head engine locomotive of their train.¹²

Subsequently, GTW brought disciplinary charges against Laidler, but not Freeman or Hommerding, for failing to perform a roll-by inspection of the passing train in violation of Rule 523.¹³ An investigation hearing was conducted as provided for in the collective bargaining agreement between GTW and Laidler's union.¹⁴ Phillip B. Tassin, Jr., general manager of CN Railroad's Michigan zone, was tasked with determining whether Laidler was guilty of not performing a roll-by inspection in accordance with Rule 523.¹⁵ Tassin reviewed the

⁸ D. & O. at 47-48.

⁹ D. & O. at 48, 56, 62. Laidler, Freeman, and Hommerding testified during Laidler's disciplinary hearing that Laidler's stopped train was not provided prior notice that Hommerding's train was approaching and would be passing Laidler's train.

¹⁰ *Id.* at 47-54.

¹¹ *Id.* at 48, 56; ALJ Hearing Transcript (HT) at 191-192.

¹² *See* D. & O. at 55, n. 17.

¹³ *Id.* at 63.

¹⁴ *Id.* at 62-64.

¹⁵ *Id.* at 18-19.

investigation hearing evidence. In addition, Tassin obtained additional information from other unidentified employees; he used Google Maps to stage a reenactment of the incident;¹⁶ and he considered the fact that Laidler had previously tested positive for cocaine use in assessing Laidler's credibility.¹⁷ Tassin concluded that Laidler was lying regarding the location of his train, and Tassin instead believed that Laidler's train was actually stopped in a location where it was safe to perform a roll-by inspection from the ground.¹⁸ Thus, Tassin concluded that Laidler's employment should be terminated for not performing a roll-by inspection in accordance with Rule 523.¹⁹ Tassin subsequently testified at the hearing before the ALJ that GTW disciplined Laidler for failing to perform a roll-by inspection "period," not for failing to perform a roll-by inspection from the ground.²⁰ In a letter dated February 26, 2013, signed by Tassin, GTW notified Laidler that his employment was terminated for not performing a roll-by inspection in accordance with Rule 523.²¹

On March 7, 2013, Laidler filed a complaint with OSHA alleging that GTW violated the FRSA, 49 U.S.C.A. § 20109(b)(1), by terminating his employment in retaliation for his refusal to perform an assigned duty, i.e., a roll-by inspection of an oncoming train from the ground, due to a hazardous safety condition. OSHA found that GTW violated the FRSA. GTW requested a hearing before an ALJ. After a formal hearing, the ALJ found that GTW unlawfully discriminated against Laidler in violation of the FRSA and awarded damages, including back pay with interest, punitive damages, and other relief.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to issue final agency decisions in FRSA cases.²² The ARB reviews the ALJ's factual findings

¹⁶ *Id.* at 62-64.

¹⁷ D. & O. at 20.

¹⁸ *Id.* The ALJ acknowledged that Tassin believed Laidler was lying. D. & O. at 63.

¹⁹ *Id.* at 57.

²⁰ HT at 442.

²¹ D. & O. at 33; JX 3.

²² Secretary's Order No. 02-2012 (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.

under the substantial evidence standard and the ALJ's conclusions of law de novo.²³ The standard for reviewing the amount of a punitive damages award is abuse of discretion.²⁴

DISCUSSION

A. Governing Law

The FRSA is intended “to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.”²⁵ Pertinent to the present case, the FRSA at 49 U.S.C.A. § 20109(b) prohibits a railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee for “refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee’s duties, if the conditions described in paragraph (2) exist.” 49 U.S.C.A. § 20109(b)(1)(B). Paragraph (2) provides that, a refusal is protected under paragraph (1)(B) and (C) if –

- (A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;
- (B) a reasonable individual in the circumstances then confronting the employee would conclude that
 - (i) the hazardous condition presents an imminent danger of death or serious injury; and
 - (ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and
- (C) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to

²³ 29 C.F.R. § 1982.110(b); *Winch v. CSX Transp., Inc.*, ARB No. 15-020, ALJ No. 2013-SOX-014, slip op. at 5 (ARB July 19, 2016).

²⁴ See *D’Hooge v. BNSF Rys.*, ARB Nos. 15-042, -066; ALJ No. 2014-FRS-002, slip op. at 5 (ARB Apr. 25, 2017); *Raye v. Pan Am Rys., Inc.*, ARB No. 14-074, ALJ No. 2013-FRS-084, slip op. at 2 (ARB Sept. 8, 2016), *aff’d sub nom. Pan Am Rys., 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)).

²⁵ 49 U.S.C.A. § 20101.

perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

49 U.S.C.A. § 20109(b) (in relevant part); *see also* 29 C.F.R. § 1982.102(b)(2).

The FRSA incorporates the procedures and burdens of proof set forth under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121(b) (West 2007). Under those procedures, the complainant bears the burden of proving a causal link between protected activity and an unfavorable employment action. More specifically, the 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 whole or in part, in the unfavorable personnel action. If a complainant meets his burden of proof, the employer may nevertheless 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.²⁶

B. ALJ's Decision and Order Awarding Benefits

Protected Activity

The ALJ found that Laidler's refusal to perform a roll-by inspection from the ground constituted a protected refusal to work under 49 U.S.C.A. § 20109(b)(1)(B).²⁷ Specifically, the ALJ found that Laidler's train's head engine was stopped on the Schwartz Creek Bridge and, therefore, was in an unsafe location to perform a roll-by inspection from the ground.²⁸ Thus, the ALJ found that Laidler's refusal to dismount from the train and perform a roll-by inspection from the ground was made in good faith.²⁹

The ALJ further found that Laidler was not provided with any reasonable alternative "sanctioned by and explained" by GTW to performing a roll-by inspection from the ground.³⁰

²⁶ *Winch*, ARB No. 05-127, slip op. at 7. *See* 49 U.S.C.A. § 42121(b)(2)(B)(iii).

²⁷ D. & O. at 57.

²⁸ *Id.* at 47-54. As GTW does not challenge the ALJ's finding on appeal and substantial evidence in the record supports the finding, it is affirmed. *Leiva v. Union Pacific R.R. Co., Inc.*, ARB Nos. 14-016, -017; ALJ No. 2013-FRS-019, slip op. at 8 (ARB May 29, 2015).

²⁹ D. & O. at 54-55. The ALJ's finding that Laidler's refusal was made in good faith is also affirmed as unchallenged on appeal. *Leiva*, ARB Nos. 14-016, -017; slip op. at 8.

³⁰ D. & O. at 55.

Specifically, while the ALJ noted that Laidler's union and Tassin indicated that a roll-by inspection could be done from a train's platform,³¹ the ALJ found that the union had no authority to change Rule 523 and GTW provided "no bulletin or written guidance" outlining any reasonable alternatives for conducting a roll-by inspection.³² Moreover, although Laidler testified that he did a roll-by inspection from the engine cab, the ALJ held that whether a roll-by inspection could be performed from an alternative location is "irrelevant" because Laidler was disciplined for failing to perform the inspection from the ground.³³

Finally, the ALJ found that Laidler received no warning of the approach of the oncoming train as Rule 523 required.³⁴ Because Laidler received no warning, the ALJ found that he "would not have had sufficient time to eliminate the danger without refus[ing] to perform the work" and, therefore, it was not possible for him to notify GTW "of the existence of the hazardous condition and his intention not to perform the work unless the condition was corrected immediately."³⁵

Adverse Action and Contributing Factor

The ALJ found that GTW terminated Laidler's employment. Because GTW dismissed Laidler for not performing a Rule 523 roll-by inspection from the ground, the ALJ found that Laidler's protected activity was a contributing factor to the adverse action.³⁶

Affirmative Defense Not Established by Clear and Convincing Evidence

Because GTW dismissed Laidler because he did not perform a Rule 523 roll-by inspection from the ground and Tassin testified that he would not have disciplined Laidler if he had believed that his head engine was at or near the bridge, the ALJ found that GTW is unable to establish that it would have dismissed Laidler in the absence of his protected activity.³⁷

³¹ See RX 26.

³² D. & O. at 55.

³³ *Id.* at 55 n.17.

³⁴ *Id.* at 56. Again, as the ALJ's finding is unchallenged on appeal and supported by substantial evidence in the record, it is affirmed. *Leiva*, ARB Nos. 14-016, -017, slip op. at 8.

³⁵ D. & O. at 56.

³⁶ *Id.* at 57.

³⁷ *Id.*

ALJ's Award of Remedies

Under the FRSA, a successful complainant is entitled to make-whole remedies including back pay, compensatory damages, and punitive damages up to \$250,000.³⁸ The ALJ held that Laidler is entitled to back pay, with both pre- and post-judgment interest, to make Laidler whole, and that “prejudgment interest on back pay” be awarded based on the interest rate set out in 26 U.S.C.A. § 6621(a)(2), compounded quarterly, in accordance with the Board’s holding in *Doyle v. Hydro Nuclear Servc.*, ARB Nos. 99-041, 99-042, 00-12; ALJ No. 1989-ERA-022, slip op at 18-19 (ARB May 17, 2000).³⁹ The ALJ also ordered that Laidler be reinstated to his position as a conductor, that GTW expunge from Laidler’s employment records any adverse or derogatory reference to his protected activities and his termination, and found that an award to Laidler of \$100,000 in punitive damages, as Laidler had requested, is appropriate in this case.”⁴⁰

C. Issues Raised on Appeal and Analysis

Respondent argues on appeal that Laidler’s refusal to perform the on-the-ground roll-by inspection as Rule 523 required did not constitute a protected refusal to work under 49 U.S.C.A. § 20109(b)(1)(B) because Laidler failed to prove that the conditions required under Section 20109(b)(2) for establishing a protected work refusal existed—in particular that he failed to prove that he had no reasonable alternative to the refusal and failed to establish that it was not possible to notify GTW of the existence of the hazardous condition and his intention not to perform the roll-by inspection.

No Reasonable Alternatives

GTW contends that, contrary to the ALJ’s finding, Laidler did have reasonable alternatives to performing a roll-by inspection from the ground, either doing so from the platform or the cab of the train, which both union and GTW officials indicated could be done in a union document and e-mail contained in the record.⁴¹ Moreover, GTW notes that both Laidler and Freeman testified at the hearing before the ALJ that they actually did perform such an alternative inspection of the passing train from the cab of their locomotive, although they did not inform or notify GTW of that fact.⁴² Finally, GTW argues that the ALJ’s holding that no reasonable alternative “sanctioned and explained” by GTW was available to Laidler is inconsistent with the language of the FRSA, which merely requires the complainant to establish that no “reasonable

³⁸ *D’Hooge*, ARB Nos. 15-042, -066; slip op. at 9.

³⁹ D. & O. at 58-59, 64-65.

⁴⁰ *Id.* at 58, 61-65.

⁴¹ *See* RX 26-27.

⁴² *See* HT at 52-53, 99-100, 147-150, 151-152, 179, 415.

alternative” was available, and instead improperly places the burden on the employer to establish that a “sanctioned and explained” reasonable alternative was available.

As the ALJ found, Rule 523 requires a roll-by inspection on the ground “when . . . terrain permit[s],”⁴³ but provides no other information, guidance or alternatives when the terrain does not permit a roll-by inspection to be performed from the ground. Although the record does contain a union document and e-mail pre-dating the facts in this case indicating that performing a roll-by inspection from the platform or the cab of a train are possible alternatives when the terrain does not permit performing a roll-by inspection from the ground, such alternatives are not incorporated into Rule 523 and, as the ALJ noted, Laidler testified that he was not made aware of the union document or e-mail until the investigation hearing.⁴⁴ So despite the fact that the union document and e-mail indicate that performing a roll-by inspection from the platform or the cab of a train are possible alternatives when the terrain does not permit performing a roll-by inspection from the ground, without any official sanction from GTW either incorporated into Rule 523 or guidance provided in a written GTW bulletin indicating that such alternatives were “reasonable” to comply with Rule 523, the only reasonable action or alternative available to Laidler to comply with the language as set forth in Rule 523 was to refuse to perform a roll-by inspection from the ground.

Moreover, while GTW contends that Tassin testified that Laidler was not disciplined for failing to perform a roll-by inspection “on the ground,” but for failing to do a roll-by inspection “period,”⁴⁵ Laidler’s dismissal letter states that he was dismissed for having “violated” “Rule 0523.”⁴⁶ Therefore, because Rule 523 provides for no other alternatives when the terrain does not permit a roll-by inspection to be performed from the ground and as Laidler was not given prior notice of the oncoming train as Rule 523 also requires, Laidler reasonably complied with Rule 523 to the letter in refusing to perform a roll-by inspection from the ground. Faced with the lack of prior notice of the oncoming train and the unsafe terrain, the only reasonable action or alternative available to Laidler to comply with the language as set forth in Rule 523 was to refuse to perform a roll-by inspection from the ground. Consequently, the ALJ’s finding that there was no reasonable alternative available to Laidler to refusing to perform a roll-by inspection from the ground to comply with Rule 523 is affirmed as supported by substantial evidence.

Whether Notice to GTW of the Hazardous Condition was Possible

49 U.S.C.A. § 20109(b)(2)(C) requires an employee to notify the railroad carrier “*where possible . . . of the existence of the hazardous condition*” and of the employee’s “intention not to

⁴³ RX 1; JX 2 at 60.

⁴⁴ D. & O. at 55 n.16; HT at 159.

⁴⁵ See HT at 413-414, 442.

⁴⁶ JX 3.

perform further work . . . unless the condition is corrected immediately.” (emphasis added). Based on evidence indicating that there was insufficient time to do so, the ALJ found that “it was not possible for Complainant to notify Respondent of the existence of the hazardous condition and his intention not to perform” a roll-by inspection from the ground in accordance with Rule 523. See D. & O. at 56. The ALJ reached this conclusion in apparent disregard of conflicting testimony by Laidler and Freeman suggesting that Laidler could have notified GTW that they were not conducting the roll-by inspection.⁴⁷

“Weighing conflicting evidence is the essence of an ALJ’s responsibility.” *Hall v. United States Army Dugway Proving Ground*, ARB Nos. 02-108, 03-013; ALJ No. 1997-SDW-005, slip op. at 30-31 (ARB Dec. 30, 2004)(citing *Brindisi v. Barnhart*, 315 F.3d 783, 786 (7th Cir. 2003) (reversing ALJ’s findings for lack of adequate discussion of conflicting evidence because “the ALJ’s opinion is important not in its own right but because it tells us whether the ALJ has considered all the evidence” as required by law)). As the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has stated, “to facilitate meaningful judicial review,” an ALJ needs to “actually evaluate the evidence . . . and give an explained conclusion,” otherwise “it is impossible to say that the ALJ’s decision . . . was supported by substantial evidence.” See *Reynolds v. Comm’r of Soc. Sec.*, 424 Fed. Appx. 411, 2011 WL 1228165, slip op. at 4 (6th Cir., Apr. 1, 2011)(unpub.)(citing *Burnett v. Comm’r of Soc. Sec.*, 220 F.3d 112, 120 (3d Cir. 2000) (“[b]ecause we have no way to review the ALJ’s . . . inadequate . . . ruling, we will vacate and remand the case for a discussion of the evidence and an explanation of reasoning” supporting the determination)). A reviewing appellate court is “unable to conduct . . . substantial evidence review if the ALJ fails to identify the evidence he or she rejects and the reason for its rejection.” *Walton v. Halter*, 243 F.3d 703, 710 (3d Cir. 2001) (citing *Burnett*, 220 F.3d at 119-120). “In the absence of such an indication, the reviewing court cannot tell if significant probative evidence was not credited or simply ignored.” *Burnett*, 220 F.3d at 121 (citing *Cotter v. Harris*, 642 F.2d 700, 705 (3d Cir.1981)).

⁴⁷ Laidler testified that he did not see the oncoming train until it was 500 to 1000 feet away, but that he could have radioed the yardmaster “at that time” that it was unsafe to do a roll-by inspection from the ground and that he was not doing such an inspection. HT at 191. The ALJ summarized Laidler’s testimony, acknowledging that Laidler testified that “[h]e could have used the radio to contact the yardmaster or crew of the passing train to let them know they were not going to do a roll-by because of unsafe conditions.” D. & O. at 12. But the ALJ did not address or apparently consider this testimony in making his finding pursuant to 49 U.S.C.A. § 20109(b)(2)(C). See D. & O. at 56.

Laidler further testified that “after the train passed,” he did not contact anyone at GTW to tell them that he had not done the inspection because it was not safe to do so. HT at 192. Similarly, Freeman testified that he could have radioed the yardmaster that it was unsafe to do a roll-by inspection from the ground. HT at 101.

The ALJ's failure here to reconcile Laidler's and Freeman's seemingly conflicting testimony⁴⁸ with the ALJ's finding that it was not possible for Laidler to notify GTW that he was not conducting the roll-by inspection raises serious evidentiary questions in need of reconciliation upon remand. *Cf. Nevarez v. Werner Enters.*, ARB No. 14-010, ALJ No. 2013-STA-012, slip op. at 15 (ARB Oct. 30, 2015) (ordering remand where ALJ failed to take into consideration and reconcile Respondent's witness's conflicting testimony in making credibility determination that, in turn, was weighed against opposing party's testimony). The ALJ may have considered the conflicting testimony, but any such consideration is not evident from the Decision and Order. Absent discussion in the decision of the evidence and an explanation by the ALJ for why he disregarded the testimony, this Board is unable to fulfill its appellate responsibility to determine whether substantial evidence of record supports the ALJ's factual finding that it was impossible for Laidler to notify GTW of the existence of the hazardous condition that prevented him from performing the on-the-ground roll-by inspection.

Because the Board is unable, for the foregoing reason, to determine whether substantial record evidence supports the ALJ's finding that it was not possible for Laidler to notify GTW of the existence of the hazardous condition and his intention to refuse to perform a roll-by inspection in accordance with Rule 523, the Board is currently unable to determine whether the ALJ's finding that Laidler engaged in FRSA-protected activity satisfies the requirements of 49 U.S.C.A. § 20109(b)(1)(B). The ALJ's D. & O. is thus vacated, and this case is remanded to the ALJ for reconsideration of whether or not it was possible for Laidler to notify GTW of his intention not to perform an on-the-ground roll-by inspection because of the hazardous terrain, after taking into consideration Laidler's and Freeman's testimony seemingly indicating that such notice was possible. The remand decision issued as a result necessarily must provide an explanation of the ALJ's reasoning supporting his determination, including an explanation as to what evidence was relied upon, and why, and as to what evidence was not relied upon, and why.

D. “Contributing Factor” Causation/“Clear and Convincing” Evidence of Affirmative Defense

GTW has not challenged the ALJ's further findings that Laidler's protected activity, if established, was a contributing factor to his termination and that GTW failed to prove by clear and convincing evidence that it would have dismissed Laidler in the absence of his protected activity. Thus, those findings are affirmed, and thus are not subject to reconsideration should the ALJ, upon remand, again find that Laidler engaged in FRSA-protected activity.⁴⁹

⁴⁸ We say “seemingly conflicting” because Laidler's testimony (at HT 191) and that of Freeman's (HT 101) is not at all clear, given the brevity of their respective answers in response to the cross-examination questions posed.

⁴⁹ See *Leiva*, ARB Nos. 14-016, -017, slip op. at 8.

E. Remedies

Because the ALJ's Decision and Order is vacated regarding the issue of protected activity, and the case remanded for further consideration of whether or not Laidler engaged in FRSA-protected activity, the Board necessarily does not address Respondent's challenge to the remedies ordered by the ALJ. Should the ALJ upon remand again issue a decision favorable to Complainant accompanied by an order awarding remedies, Respondent will be free to challenge any remedies ordered by the ALJ at that time. Nevertheless, in the interest of judicial economy, we address an issue GTW has raised on appeal regarding the proper method for the calculation of interest on a back pay award in a FRSA whistleblower case brought before the DOL, because its resolution does not affect the substantive rights of the parties in this case.

Calculation of Interest on Back Pay Award.

The ALJ awarded Laidler back pay, with both pre- and post-judgment interest and awarded "prejudgment interest on back pay" based on the interest rate set out in 26 U.S.C.A. § 6621(a)(2), compounded quarterly in accordance with the Board's holding in *Doyle*, ARB Nos. 99-041, 99-042, 00-12; slip op at 18-19.⁵⁰ Thus, the ALJ ordered GTW to "pay [Laidler] back pay, with both pre- and post-judgment interest," noting that "[t]he exact amount will be computed based on" the guidance the ALJ set forth.⁵¹

GTW notes that the FRSA now has a kick-out provision, implemented after the issuance of the Board's holding in *Doyle*, whereby FRSA whistleblower cases may now be brought, alternatively, in U.S. District Court⁵² and notes that interest on back pay awards in cases brought before the U.S. District Court are determined in accordance with 29 U.S.C.A. § 1961, which provides that interest be compounded annually. In contrast, as the ALJ held, in FRSA whistleblower cases brought before the DOL, interest is computed pursuant to 26 U.S.C.A. § 6621(a)(2), which is compounded quarterly in accordance with the Board's holding in *Doyle* and therefore, GTW argues, provides a windfall in comparison to FRSA cases brought in U.S. District Court. But because the FRSA states that a prevailing employee "in any action" is "entitled to all relief necessary to make the employee whole,"⁵³ GTW argues that "make whole" relief under the FRSA should not and cannot be different depending on whether the case is brought before the DOL or the U.S. District Court and urges that interest compounded annually in accordance with 29 U.S.C.A. § 1961 be applied in this case.

⁵⁰ D. & O. at 58-59, 64-65.

⁵¹ *Id.* at 64-65.

⁵² *See* 49 U.S.C.A. § 20109(d)(3).

⁵³ 49 U.S.C.A. § 20109(e)(1).

While differing interest rates could be applied in FRSA cases depending on whether the case is brought before the DOL or the U.S. District Court, this case arises before the DOL. As the Assistant Secretary for OSHA noted in an amicus brief filed in this case, OSHA issued new rules implementing the FRSA's employee protection provisions, effective November 9, 2015,⁵⁴ that provide that in cases brought initially before OSHA for a determination, appealed to a DOL ALJ for a hearing, or appealed for review by the Board, "[i]nterest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily." See 29 C.F.R. §§ 1982.105(a)(1), 1982.109(d)(1), 1982.110(d); 80 Fed. Reg. 69,115, 69,124 (Nov. 9, 2015).

In the comments to the new regulations regarding how interest on back pay is calculated in FRSA cases, the Secretary of Labor stated:

In ordering interest on back pay under FRSA . . . , the Secretary has determined that interest due will be computed by compounding daily the Internal Revenue Service (IRS) interest rate for the underpayment of taxes which, under 26 U.S.C. 6621, is generally the Federal short-term rate plus three percentage points.

In the Secretary's view, 26 U.S.C. 6621 provides the appropriate rate of interest to ensure that victims of unlawful retaliation under FRSA . . . are made whole. The Secretary has long applied the interest rate in 26 U.S.C. 6621 to calculate interest on back pay in whistleblower cases. *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012, . . . [slip op.] at 14-15, 17 Section 6621 provides the appropriate measure of compensation under . . . FRSA and other DOL-administered whistleblower statutes because it ensures the complainant will be placed in the same position he or she would have been in if no unlawful retaliation occurred. See *Ass't Sec'y v. Double R. Trucking, Inc.*, ARB Case No. 99-061, slip op. at 5 (ARB July 16, 1999) (interest awards pursuant to § 6621 are mandatory elements of complainant's make-whole remedy).

The Secretary also believes that daily compounding of interest achieves the make-whole purpose of a back pay award.

80 Fed. Reg. 69,124.

As "[r]etroactivity is not favored in the law," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1944), "administrative rules will not be construed to have retroactive effect unless their language requires this result," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). In

⁵⁴ 80 Fed. Reg. 69,115 (Nov. 9, 2015).

this regard, however, the Assistant Secretary of OSHA noted, in the comments to the new regulations regarding how interest on back pay is calculated in FRSA cases, that because the new rule “is procedural and interpretative rather than substantive,” the rule is “effective immediately so that parties may know what procedures are applicable to pending cases.”⁵⁵ “Relying upon *Landgraf* for the proposition that the retroactive application of a new rule . . . depends upon the procedural posture of a case,”⁵⁶ the focus “is upon whether a final decision had already been issued under the previous . . . rule prior to the new . . . rule’s enactment.”⁵⁷

Because no final order has been issued in this case,⁵⁸ application of the calculation of interest on any back pay award in this case in accordance with 29 C.F.R. § 1982.110(d) does not affect the substantive rights of the parties.⁵⁹ Therefore, applying 29 C.F.R. § 1982.110(d) to this case would not have a disfavored retroactive consequence.⁶⁰ Consequently, because the parties’ substantive rights remain unaffected, the calculation of interest on any back pay award in this case should be made in accordance with 29 C.F.R. § 1982.110(d), to be compounded daily.⁶¹

⁵⁵ 80 Fed. Reg. 69,115, 69,131.

⁵⁶ *Landgraf*, 511 U.S. at 275 n.29.

⁵⁷ *Abhyankar v. Countrywide Fin. Corp.*, ARB No. 11-043, ALJ No. 2007-SOX-083, slip op. at 9 (ARB Mar. 29, 2013) (and cases cited therein).

⁵⁸ See 29 C.F.R. § 1982.110(b), (d).

⁵⁹ *Abhyankar*, ARB No. 11-043, slip op. at 9.

⁶⁰ *Id.*

⁶¹ We note that the new regulations at 29 C.F.R. § 1982.114(b) provide that an “employee prevailing” in an FRSA case brought before the U.S. District Court “shall be entitled to all relief necessary to make the employee whole, including, where appropriate: . . . any back pay with interest,” but in contrast to 29 C.F.R. §§ 1982.105(a)(1), 1982.109(d)(1), 1982.110(d) for cases brought before the DOL, does not provide how interest in such cases should be calculated. Although interest on back pay awards in cases brought before the U.S. District Court might arguably be determined in accordance with 29 U.S.C.A. § 1961, as GTW asserts, that issue is not before us. Because this case has been brought before the DOL, the Board is compelled to follow the regulation implemented by the Secretary of Labor for the calculation of interest on a back pay award in FRSA cases set forth in 29 C.F.R. § 1982.110(d), in accordance with the Board’s delegation of authority to act for the Secretary of Labor in reviewing appeals of ALJ decisions pursuant to the FRSA. See Secretary’s Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the [ARB]), 77 Fed. Reg. 69,378.

In addition, while GTW argues that the procedure as described in *Doyle* for calculating the compounding of interest on a “quarterly” basis is erroneous, any possible error in that regard is harmless, as the regulation for the calculation of interest on a back pay award in FRSA cases before the Board set forth in 29 C.F.R. § 1982.110(d) requires that such interest be “compounded daily.”

CONCLUSION

For the above-stated reasons, the ALJ's Decision and Order Awarding Benefits is **AFFIRMED, IN PART**, to the extent that the ALJ's unchallenged findings that Laidler's protected activity, if established, was a contributing factor to his termination and that GTW failed to prove by clear and convincing evidence that it would have dismissed Laidler in the absence of his protected activity are **AFFIRMED**, and **VACATED, IN PART**, with regard to the ALJ's finding of protected activity. The ALJ's order of remedies is similarly **VACATED**. This case is **REMANDED** for further consideration of whether Laidler engaged in FRSA-protected activity, consistent with this opinion, and for reconsideration of the award of remedies should protected activity be found. It is further **ORDERED** that the calculation of interest on any back pay award in this case be made in accordance with 29 C.F.R. § 1982.110(d), to be compounded daily.

SO ORDERED.

LEONARD J. HOWIE III
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge