

In the Matter of:

MICHAEL J. BROUSIL,
COMPLAINANT,

v.

BNSF RAILWAY COMPANY,
RESPONDENT.

ARB CASE NOS. 16-025
16-031

ALJ CASE NO. 2014-FRS-163

DATE: July 9, 2018

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Kenneth E. Rudd, Esq.; Wildwood, Missouri

For the Respondent:

Paul S. Balanon, Esq. and Jacob S. Godard, Esq.; BNSF Railway Company; Fort Worth, Texas

Before: Joanne Royce, *Administrative Appeals Judge* and Leonard J. Howie III, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the Federal Rail Safety Act of 1982 (FRSA).¹ Complainant Michael J. Brousil filed a complaint with the Occupational Safety and Health Administration in January 2014 alleging that his employer, Respondent BNSF Railroad Company (BNSF), retaliated against him in violation of FRSA's whistleblower protection provisions. Exhibit A. OSHA dismissed the complaint in August 2014. *Id.* At Brousil's request, a Department of Labor Administrative Law Judge (ALJ) held a formal evidentiary hearing July 14-16, 2015. In his Decision and Order—

¹ 49 U.S.C.A. § 20109 (Thomson/West 2018) as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. 110-53, as implemented by federal regulations at 29 C.F.R. Part 1982 (2017) and 29 C.F.R. Part 18, Subpart A (2017).

Dismissal of the Complaint (Nov. 25, 2015)(D. & O.), the ALJ found that Brousil engaged in protected activity that contributed to the three instances of adverse action that BNSF took against him; three “Level S 30 Day Record Suspensions.” But the ALJ also found that BNSF met its burden to establish by clear and convincing evidence that it would have reprimanded Brousil, absent his protected activity. Accordingly, the ALJ concluded that BNSF established its affirmative defense to liability and thus denied the complaint. Brousil has appealed to the Administrative Review Board (ARB or Board).² We affirm, in part, and vacate, in part, the ALJ’s decision, and remand the case for further consideration consistent with this opinion.

BACKGROUND

BNSF hired Brousil in 1988. In March 2011, Brousil, a locomotive engineer, discussed with BNSF managers his concern about plugging into shore power at Chicago Union Station due to unsafe exposure to diesel emissions. Brousil raised concerns about unsafe diesel exhaust in confined spaces throughout much of 2013.³ As the ALJ stated, Brousil’s “whistleblowing began with the accusations about ambient air quality, which led to the discussions about ‘shore’ power, which led to discussions about where to stop a train in the terminal and how long the extension cables should have been.” D. & O. at 13.

On August 29, 2013, BNSF suspended Brousil for a February 5, 2013 incident in which he ran a passenger train at speeds over 60 miles-per-hour for more than 10 minutes with a passenger car door open. He was charged with initiating operation of the train without an indication that all doors were shut. Brousil denied the charges.

On October 11, 2013, BNSF suspended Brousil for a July 29, 2013 incident involving insubordination when he refused to follow his supervisor’s instructions to use an alternative method to assure rail car doors were closed when the door indicator light was not working.

On October 11, 2013, BNSF also suspended Brousil for an August 1, 2013 incident in which Brousil stopped his train 30 feet from the stopping point and refused to pull the train up as

² Brousil has filed two appeals. On December 9, Brousil appealed from the ALJ’s November 25, 2015 D. & O. dismissing the complaint. (ARB No. 16-025). Brousil claims, inter alia, that the ALJ issued his decision before the expiration of the time in which the parties could file post-hearing briefs and thus the ALJ did not consider Brousil’s post-hearing brief. On December 17, the ARB set the briefing schedule. On December 22, the ALJ issued a second decision considering post-hearing briefing, again dismissing the complaint. On January 7, 2016, Brousil filed an appeal of that decision (ARB No. 16-031). In a January 15, 2016, order, the ARB questioned whether the ALJ had retained jurisdiction to issue his December decision and indicated that since the ALJ did not change his decision on the merits of the case, it was unnecessary to decide the question. We decide this case based on the first D. & O. only.

³ The ALJ explicitly found that “[t]his issue [of plugging into shore power to avoid unsafe exhaust fumes] arose repeatedly and specifically again in January 2013.” D. & O. at 7.

instructed to be plugged into shore power. As a result, an individual with a disability was unable to board the train because there was no power to operate the mechanical lift.

On August 29, 2013, BNSF issued a Level S 30 Day Record Suspension on Brousil for the February 5 incident. On October 11, 2013, BNSF imposed on Brousil another Level S 30 Day Record Suspension and three-year review period for the July 29 incident and a third Level S 30 Day Record Suspension and three-year review period for the August 1 incident (to be served concurrently with the other disciplinary review period).

The ALJ found that “at all times during the[se] three incidents [Brousil] engaged in protected activity; (ii) BNSF knew or suspected, actually or constructively, that he engaged in the protected activity” D. & O. at 13. The ALJ also held that Brousil credibly testified “that he felt he had been harassed” *Id.*

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board authority to issue final agency decisions under the FRSA.⁴ The Board reviews the ALJ’s factual determinations under the substantial evidence standard.⁵ The Board reviews an ALJ’s conclusions of law de novo.⁶

DISCUSSION

The FRSA prohibits a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee’s protected activity.⁷ The FRSA is governed by the legal burdens of proof set forth under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, at 49 U.S.C.A. § 42121(b) (West 2007).⁸ To prevail, an FRSA complainant must establish by a preponderance of the evidence that protected activity “was a contributing factor in the unfavorable personnel action alleged in the complaint.”⁹

⁴ 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); see 29 C.F.R. § 1982.110(a).

⁵ 29 C.F.R. § 1982.110(b).

⁶ *Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, ALJ No. 2010-AIR-025, slip op. at 2 (ARB Apr. 30, 2013) (citations omitted).

⁷ 49 U.S.C.A. § 20109(a), (b), (c).

⁸ 49 U.S.C.A. § 20109(d)(2)(A)(i).

⁹ 49 U.S.C.A. § 42121(b)(2)(B)(iii).

If a complainant meets his burden of proof, the employer may avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected activity.¹⁰

The ALJ initially found that: (1) Brousil engaged in protected activity when he made allegations about "ambient air quality and safety within the confines of a terminal controlled by [BNSF]," and by alleging that BNSF "violated several Federal laws relating to railroad safety, or for 'reporting, in good faith, a hazardous safety or security condition.'" D. & O. at 9; (2) that BNSF knew about Brousil's protected activity; (3) that BNSF imposed three suspensions (with no loss of pay); (4) that the parties stipulated that the suspensions constituted adverse actions under the FRSA, and (5) that Brousil's protected activity was a contributing factor in these adverse actions.. BNSF has filed no cross-appeal pertaining to these issues. Therefore, we affirm the ALJ's findings as they have gone unchallenged on appeal.¹¹

Brousil contests the ALJ's conclusion that BNSF met its burden on affirmative defense. If the complainant proves that protected activity was a contributing factor in the personnel action, the respondent may nevertheless avoid liability if it proves by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected activity. "Clear" evidence means the employer has presented an unambiguous explanation for the adverse action in question. *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (ARB Apr. 25, 2014). "Convincing" evidence is that which demonstrates that a proposed fact is "highly probable." *Id.* Clear and convincing evidence "denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain." *Id.*; see also *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 9-10 (ARB Sept. 30, 2015) (*DeFrancesco II*).

In assessing Respondent's burden, the Board uses a case-by-case balancing of a variety of factors including: (1) how "clear and convincing" the independent significance is of the non-protected activity; (2) the evidence that proves or disproves whether the employer "would have" taken the same adverse actions; (3) the existence and strength of any motive to retaliate on the part of the agency officials involved in the decision; and (4) the facts that would change in the "absence of" the protected activity. See *Speegle*, ARB No. 13-074, slip op. at 12 (internal citations omitted); *Pattenaude v. Tri-Am Transp., LLC*, ARB No. 15-007, ALJ No. 2013-STA-37, slip op. at 16-17 (ARB Jan. 12, 2017).

In *DeFrancesco II*, the ARB further elaborated that:

[A]nalysis of the employer's affirmative defense should also carefully assess the employer's asserted lawful reasons for its action. Such an assessment requires not only a determination of whether

¹⁰ 49 U.S.C.A. § 42121(b)(2)(B)(iv).

¹¹ BNSF advises the ARB of the decision of the United States Court of Appeals for the Seventh Circuit in *Armstrong v. BNSF Ry. Co.*, 880 F.3d 377 (7th Cir. 2018)(contributing factor standard requires evidence of intentional retaliatory animus). BNSF asserts that the 2018 decision is controlling authority. We disagree since the causation issue is not before us.

there exists a rational basis for the employer's decision, such as the existence of employment rules or policies supporting the decision, but also a determination of whether the basis for the employer's decision is "so powerful and clear that [the personnel action] would have occurred apart from the protected activity."

ARB 13-057, slip op. at 10 (quoting *Henderson v. Wheeling & Lake Erie RR*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 14-15 (ARB Oct. 6, 2012)).

The ALJ concluded that BNSF proved by clear and convincing evidence that it would have reprimanded Brousil and applied his "lenient" discipline absent his protected activity and thus established its affirmative defense to liability. Specifically, the ALJ noted that BNSF held Brousil out of service from August 2, 2013, to October 25, 2013, but had subsequently paid him for that time and made him whole. The ALJ next noted BNSF's argument that under its Policy for Employee Accountability, an employee who commits a stand-alone dismissible offense or a serious rule violation while on probation for another serious rule violation is subject to dismissal and Brousil had both. Specifically, the ALJ quoted BNSF's arguments that failure to comply with instructions and failure to comply with rules regarding accommodating a disabled passenger are serious rule violations; that Brousil was already on probation for the February 5, 2013 incident; that Brousil was subject to dismissal for the July 29, 2013 incident; that for the August 1, 2013 incident, Brousil had two active Level S suspensions on his record; and BNSF had elected to exercise leniency and issued a third Level S 30-day Record Suspension, removing any notion of discriminatory animus. D. & O. at 14 (quoting from Respondent's Brief).

The ALJ next set forth BNSF's proof of other employees who violated the same rules and were more severely disciplined, being reprimanded which Brousil was, and being dismissed which Brousil never was. Rather, the ALJ noted that BNSF had showed leniency. D. & O. at 14-15. For all three incidents for which Brousil was reprimanded, the ALJ found that BNSF established that it would have taken the same adverse action in the absence of Brousil's protected activity: as to the first (February 5, 2013 open door incident) incident, the ALJ found that BNSF would have suspended Brousil for violating its rules even "if the prima facie case had not been made by Complainant." *Id.* at 15. As to the second (July 29, 2013 insubordination and refusal to comply with instructions and third (August 1, 2013 disabled passenger) incidents, the ALJ found that BNSF established that it could have terminated Brousil's employment under its progressive disciplinary policy, despite his (earlier established) "status" as a whistleblower. *Id.* at 13-15. The ALJ determined, "The burden under the clear and convincing standard is very strict, but I find that, in essence, the Respondent proved that although Complainant is a whistleblower, and there is an inference that a reaction to the whistleblowing caused an adverse personnel action, to a clear and convincing degree of proof, Complainant would have received the lenient discipline anyway." Thus the ALJ concluded, "As the Respondent/Employer BNSF has proven by clear and convincing evidence that it would have reprimanded Complainant absent any instances of protected activity, this claim for benefits must be denied." *Id.* at 16.

Upon review, we find that the ALJ failed to follow the applicable legal standard as set forth above and must apply the correct factors on remand. The ALJ found that there was "probable cause for Respondent to investigate the three stipulated incidents" that led to discipline. *Id.* at 14.

But “probable cause” is not the standard to be applied to determine whether the employer established by clear and convincing proof that it would have taken the same discipline in the absence of the protected activity. Simply put, a finding of “probable cause” is not sufficient to meet employer’s clear and convincing burden. In the same vein, the ALJ focused on the severity of discipline that “could” have been applied to Brousil given his alleged misconduct. But Respondent’s high affirmative defense standard requires proof of what the employer “would have done” not simply what it “could have” done.¹² As the ARB explained in the context of an analogous FRSA case:

Such an assessment requires not only a determination of whether there exists a rational basis for the employer’s decision, such as the existence of employment rules or policies supporting the decision, but also a determination of whether the basis for the employer’s decision is “so powerful and clear that [the personnel action] would have occurred apart from the protected activity.”^[13]

The Board further explained:

To meet the statutory affirmative defense in the this case, it is not enough for [the] Railroad to show that [the employee] violated its safety rules, that it had a legitimate motive (i.e. [the employee’s] rule violations) for imposing the disciplinary action, or that it imposes “appropriate discipline” against employees for safety violations and unsafe behavior regardless of whether they [engaged in protected activity].^[14]

Caution is required in cases, such as this, where the basis for the adverse action—in two of the three suspensions—is closely linked to protected activity Brousil engaged in. The ALJ vaguely acknowledged that Brousil “was a whistleblower when he protested in incidents 2 and 3” as additional evidence supporting his finding that Brousil’s protected activity contributed to the adverse actions taken against him. But, in our view, the ALJ did not recognize or adequately analyze the legal significance of the concept of “inextricably intertwined” on BNSF’s affirmative defense burden of proof. Here, the investigation and discipline regarding both the July 29, and the August 1, 2013 incidents were inextricably intertwined with Brousil’s protected activity. On July 29, 2013, Brousil refused to run his train because the door indicator light failed to illuminate.¹⁵ He

¹² *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (ARB Apr. 25, 2014).

¹³ *DeFrancesco II*, ARB No. 13-057, slip op. at 13.

¹⁴ *Id.* at 10.

¹⁵ We note the irony of BNSF punishing Brousil in Incident 1 for operating a train without an illuminated door light and punishing him in Incident 2 for *refusing* to operate a train without an illuminated door light.

was disciplined for the very conduct that the ALJ correctly described as “whistleblowing.” Likewise, in the August 1 incident, Brousil was disciplined for failing to pull the train close enough to be plugged into shore power—his refusal was based, as it had in the past, on his continuing concern about the hazards of train exhaust in confined spaces.

Technically, while the issue of whether the adverse action taken is “inexplicably intertwined” with a complainant’s protected activity is an issue germane to complainant’s burden to prove causation, the ALJ’s failure to properly address it has consequences for the analysis of employer’s burden in proving its affirmative defense. The Board has stated that in cases, such as this, where the protected activity is virtually inseparable from the basis for the imposition of discipline, the fact finder must be careful to assure that the employer has met the high clear and convincing affirmative defense standard.¹⁶ Since the protected activity here directly led to the discipline, it makes no sense to inquire whether discipline would have occurred in the absence of the protected activity. These cases therefore present a challenge for literal application of the affirmative defense.

When evaluated against the affirmative defense standard and factors identified above, particularly in light of the challenging presence of the inextricably intertwined concept, the ALJ’s affirmative defense finding does not withstand scrutiny. His analysis of BNSF’s affirmative defense relied too heavily on his finding that there was a rational basis for the employer’s decision. And he failed to explain how this finding clearly or convincingly extinguished his earlier finding that BNSF harassed Brousil because of his protected activity.

Accordingly, we vacate the ALJ’s conclusion that BNSF proved that it would have taken the same adverse actions against Brousil absent any protected activity by clear and convincing evidence. We thus vacate the ALJ’s dismissal of Brousil’s whistleblower complaint and remand the case for application of the correct legal standard to the pertinent facts of this case.

¹⁶ See *Abdur-Rahman v. DeKalb Cnty*, ARB Nos. 08-003, 10-074; ALJ Nos. 2006-WPC-002, -003 (ARB Feb. 16, 2011)(alleged insubordination included protected safety concerns); *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012)(protected disclosures exclusively led to disciplinary investigation); *Henderson Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012)(termination letter referenced protected activity); see also *Smith v. Duke*, ARB No. 14-027, ALJ No. 2009-ERA-007 (ARB Feb. 25, 2015)(Royce, J. dissenting); *Speegle v. Stone & Webster*, ARB No. 11-029-A, ALJ No. 2005-ERA-006, slip op. at 15, n.97 (ARB Jan. 31, 2013).

CONCLUSION

The ALJ's Decision and Order dismissing Brousil's complaint is **AFFIRMED, IN PART, VACATED, IN PART.** The case is **REMANDED** for further consideration consistent with this opinion.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge