**In the Matter of:**

**MARK STALLARD,**

**COMPLAINANT,**

**v.**

**NORFOLK SOUTHERN RAILWAY COMPANY,**

**RESPONDENT.**

**ARB CASE NO. 16-028**

**ALJ CASE NO. 2014-FRS-149**

**DATE: September 29, 2017**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant*:**
**Willard J. Moody, Jr., *Esq.*; Michael R. Davis, *Esq.*; *Moody Law Firm*, Portsmouth, Virginia**

***For the Respondent*:**
**Agnis C. Chakravorty, *Esq.*; *Woods Rogers PLC*, Roanoke, Virginia**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Tanya Goldman, *Administrative Appeals Judge***

## DECISION AND ORDER OF REMAND

Complainant Mark Stallard filed a complaint under the Federal Rail Safety Act (FRSA)[1], claiming that his employer, Respondent Norfolk Southern Railway Company (Norfolk Southern), harassed him in violation of the FRSA's whistleblower provisions because he

[1] 49 U.S.C.A. § 20109 (Thomson Reuters 2016). The FRSA's implementing regulations are found at 29 C.F.R. Part 1982 (2016).

reported work-related injuries. A Department of Labor Administrative Law Judge (ALJ) granted Norfolk Southern's Motion for Summary Decision. For the following reasons, we vacate the ALJ's Order and remand for an evidentiary hearing, consistent with this order.

## BACKGROUND[2]

At the relevant time, Mark Stallard had worked for Norfolk Southern for twenty-three years. Stallard was injured on March 16, 2013, while he was at work. Just before he was injured, Stallard met briefly with Assistant Trainmaster Jackson in the crew room. After the meeting with Stallard, Jackson went to the Yardmaster's office for a job briefing. Shortly thereafter, Jackson witnessed Stallard enter the Yardmaster's office "holding the left side of his lower back and [] limping." Jackson FELA Dep., Exh. 3. Jackson directed Stallard to fill out a Form 22, Norfolk's standard injury report form. Respondent's Exhibit 2, at Joint Exhibit 45 (RX-2, at JX-45). Stallard indicated on the form that the injury occurred at work. Jackson asked Stallard if he needed medical attention, which he declined. About fifteen minutes after filling out the form, Stallard changed his mind and asked for medical treatment. Jackson drove Stallard to the hospital. After Stallard was treated, the doctor advised him to refrain from working for at least 2 days. Sometime later that same day, Norfolk Southern "performed a full investigation of the alleged accident in accordance with its rules and procedures." Jt. Stip. 11. Assistant Trainmaster Jackson led the investigation and issued an injury report in which he noted that Stallard sustained an injury on company property while on duty. Jackson FELA Dep., p. 32, Exh. 2.

Two days after his injury, on March 18, Dr. Mullins, Stallard's personal physician, examined him in a follow-up appointment. By deposition, Stallard testified that he had known Dr. Mullins for more than twenty years and was under his care for several conditions. Stallard FRSA Dep. at 35-36. Dr. Mullins' March 18 patient record indicates that Stallard complained of severe lower back pain starting 2 days earlier and notes a three-inch bruise on Stallard's back. RX-2, at JX-35; Jt. Stips. 12, 15. In the same record, Dr. Mullins accidentally checked a box stating that the March 16 injury occurred at home rather than on-duty. Jt. Stips. 23, 24. Stallard ultimately had back surgery and never returned to active employment. Jt. Stip. 13.

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[2] The parties submitted a Joint Stipulation of Agreed Facts dated November 13, 2015 (Jt. Stip.). The following material is taken from the ALJ's order and the pleadings and depositions associated with the parties' summary decision motions, including depositions taken in connection with an action Stallard filed under the Federal Employers' Liability Act (FELA). The parties agreed that the depositions in the FELA case could also be used in this FRSA case. The appendix filed with Respondent's Brief in Opposition to Complainant's Petition for Review contains these documents including the Joint Stipulation at Respondent's Exhibit 1 and the Joint Exhibits (before ALJ Rosen) at Respondent's Exhibit 2, which is denoted hereinafter as RX-_, at JX-_.

On May 1, Norfolk Southern's claim agent, Mike Maher, processed Stallard's benefits claim and discovered the discrepancy between the March 16 and March 18 reports concerning whether Stallard's injury occurred on-duty or at home. Maher stated that he had tried to contact Stallard for more information. Maher FRSA Dep. at 11-12, 38-40. Also on May 1, Maher notified Carl Wilson, Assistant Superintendent and one of Stallard's supervisors. RX-2, at JX-22. On May 3, Wilson forwarded Maher's e-mail to Gregory Comstock, then General Manager for the Eastern Region and Wilson's supervisor. That same day, Wilson by e-mail asked Dr. Prible of Norfolk Southern's medical department if he could ascertain which version of events was true. Dr. Prible, however, was on leave at the time. On May 23, Norfolk Southern obtained Norton County Hospital records. Nurse Janowiak, of Norfolk Southern's medical department, informed Wilson that Respondent had obtained Stallard's medical records, but Wilson was not permitted to access the documents. On May 24, Wilson contacted Dr. Prible again. Dr. Prible responded on May 24 that, reviewing the records, there was no way of knowing whether the injury occurred at work or at home. RX-2, at JX-22-23.

On May 23, Dr. Mullins faxed a correction of his March 18 report to the medical department, addressed to "Dr. Trible." The amendment stated that the March 16 injury had in fact occurred at work. With Memorial Day weekend, the amended medical record did not make it to all channels immediately. Janowiak testified that she did not know when she first read Dr. Mullins's amendment fax, but she had read it by May 29 when she forwarded notice of it (but neither the attachment itself nor a statement of its contents) to Wilson and Dr. Prible. Janowiak FRSA Dep. at 16-18, 21; *see also* RX-2, at JX-32. Janowiak did not forward the actual content because of privacy restrictions. Dr. Prible testified that he thought that Janowiak's May 29 e-mail was his first knowledge of Mullins's amendment. Prible FRSA Dep. at 18.

On May 30, Wilson sent Stallard a charge letter scheduling a hearing for June 6. The hearing was to determine whether Stallard provided false statements to Norfolk Southern. Jt. Stips. 33-35. Norfolk Southern states that it scheduled a meeting for June 6 to comply with the collective bargaining agreement that requires that hearings be scheduled within 10 days of learning of potentially false or misleading statements. *Id.* at Jt. Stip. 35. When they scheduled the hearing, Wilson and Comstock did not know of the contents of Dr. Mullins's amended report. Wilson FRSA Dep. at 64-65; Comstock FRSA Dep. at 11-15, 18.

During this time, Stallard was still out with a back injury. On June 1, two days after Wilson sent the charge letter to Stallard, Stallard's daughter was married. A Norfolk Southern employee sent Facebook images of Stallard dancing at the wedding to Norfolk Southern. Wilson FRSA Dep. at 38-42, 45-58, 68-69; Comstock FRSA Dep. at 20, 34. Wilson testified that he had heard a "rumor" that Stallard was working at a golf course in Florida while out with a back injury. Wilson FRSA Dep. at 40.

On or about June 2, the hearing was postponed to July 18 at Stallard's request.

On June 4, Dr. Mullins re-sent his amendment memo indicating that Stallard had been injured on duty. That same day, Wilson e-mailed Janowiak in reply to her May 29 e-mail to ask

whether the amendment had any information regarding the discrepancy. On June 4, Dr. Prible replied to Wilson, detailing the pertinent facts of Dr. Mullins's amendment. Prible FRSA Dep. at 22-24. June 4 was the first day Wilson and Comstock learned that Dr. Mullins had amended the note to say that the injury occurred at work. Jt. Stips. 38-40. On June 4, Wilson recommended to Comstock that the hearing be cancelled, but Comstock was on vacation.

Wilson and Comstock spoke on or about June 12 and decided to keep the hearing scheduled in the event that the rumors and suspicions about the severity of Stallard's injury could be confirmed. Wilson FRSA Dep. at 45-47; Comstock FRSA Dep. at 34; Jt. Stips. 44-45. Around this time, Wilson suggested that surveillance of Stallard would be appropriate.

Norfolk Southern did not cancel the hearing until July 11 when Stallard asked for an indefinite postponement due to his medical treatment for the injury. Stallard received back surgery in August 2013 and did not return to active employment at Norfolk Southern.

In October 2013, Stallard filed a complaint with the Occupational Safety and Health Administration (OSHA). Stallard contends that Norfolk Southern's scheduling of the hearing was harassment and intimidation and that he suffered emotional distress and is entitled to both compensatory and punitive damages. Norfolk Southern counters that Stallard did not suffer an adverse action because there are no pending disciplinary actions against Stallard; there is nothing in his record relating to the disciplinary hearing, and Norfolk Southern paid for all his medical expenses.

On June 2, 2014, OSHA dismissed the claim. Stallard filed objections and the case was assigned to an ALJ.

Norfolk Southern moved for summary decision before the ALJ, and, the ALJ granted that motion. The ALJ determined that there was no genuine issue of material fact regarding whether Stallard had suffered an adverse action. D. & O. at 7-8. The ALJ held that there was no evidence and thus no issue of material fact that either Wilson or Comstock knew of Dr. Mullins's amendment when they scheduled the hearing. D. & O. at 7. The ALJ also found that Norfolk Southern "has established" by "clear and convincing" evidence that Stallard's report of a work injury was not a contributing factor in the alleged adverse action. D. & O. at 7, 8-9. Stallard appealed the ALJ's findings to the Administrative Review Board (ARB or Board). We find that the ALJ failed to apply controlling law and that genuine issues of material fact exist with respect to adverse action, contributing factor, and Respondent's affirmative defense. Therefore, we remand for an evidentiary hearing.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to decide this matter to the Administrative Review Board.[3] The ARB reviews an ALJ's grant of summary decision de novo, applying the same standard that ALJ's employ under 29 C.F.R. Part 18.[4] Pursuant to 29 C.F.R. § 18.72, an ALJ may enter summary decision for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. In assessing this summary decision, we view the evidence, along with all reasonable inferences, in the light most favorable to Stallard, the non-moving party.[5]

## DISCUSSION

### 1. Legal Standards.

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 lawful, good faith protected activity.[6] 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, 49 U.S.C.A. § 42121(b) (Thomson Reuters 2016).

To prevail, an 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.[7]

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[3] 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).

[4] *Siemaszko v. FirstEnergy Nuclear Operating Co., Inc.*, ARB No. 09-123, ALJ No. 2003-ERA-013, slip op. at 3 (ARB Feb. 29, 2012).

[5] *Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, ALJ No. 2008-TSC-001, slip op. at 11 (ARB Dec. 28, 2012).

[6] *See* 49 U.S.C.A. § 20109(a), (b).

[7] *See* 49 U.S.C.A. § 42121(b)(2)(B)(iii); *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012).

Given the nature of Stallard's claim, it is worth recalling the legislative history surrounding the 2007 FRSA amendment to expand the categories of FRSA-protected conduct to explicitly include reporting a work-related injury. As we stated in *Henderson v. Wheeling & Lake Erie Railway*,[8] a series of hearings leading up to the amendment signaled increasing public and congressional concern with rail safety, including chronic under-reporting of rail injuries, widespread harassment of employees reporting work-related injuries, and interference with medical treatment of injured employees.[9] Testimony before Congress identified numerous management policies that deterred employees from reporting on-the-job injuries including subjecting employees who report injuries to increased monitoring and scrutiny from supervisors that could lead to discipline and termination; supervisors accompanying employees on their medical appointments and attempting to influence employee medical care; sending employees to company physicians instead of physicians of their own choosing; and light-duty work programs that require the injured employee to report to work, but perform no work, to avoid having to report the injury as a lost work day to the Federal Railroad Administration.[10]

The bill amending FRSA, signed into law on August 3, 2007, contained significant additional protections for rail employees including an expansion of protected activity to include explicit protection for employees who "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;" and transferred the enforcement authority of the whistleblower provisions to the Secretary of Labor. But Congress was not finished with amending the rail employee protection measures. On October 16, 2008, an amendment creating an affirmative duty on the part of railroads to refrain from interfering with the medical treatment of injured employees became law.[11]

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[8] ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012).

[9] *See, e.g.*, Reauthorization of the Federal Rail Safety Program: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (Jan. 30, 2007); Fatigue in the Rail Industry: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (Feb. 13, 2007); Rail Safety Legislation: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (May 8, 2007): Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (Oct. 22, 2007).

[10] *See generally* "Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads," Hearing before the House Committee on Transportation and Infrastructure, 110th Cong. (2007) (H. Hrg. 110-84) (Oct. 22, 2007).

[11] Rail Safety Improvement Act of 2008, PL 110-432 (Oct. 16, 2008).

We view this history as a progressive expansion of anti-retaliation measures in an effort to address continuing concerns about railroad safety and injury reporting. The 2007 FRSA amendments contained increased protections for railroad whistleblowers. These provisions were amended again in 2008, by inclusion of the "prompt medical attention" language. Together, these amendments convey congressional intent to comprehensively address and prohibit harassment, in all its guises, of injured rail employees.

**2. The ALJ erred in granting summary decision on the issue of adverse action**

In his decision, the ALJ used the adverse action standard from *Burlington Northern & Santa Fe Ry. Co. v. White*,[12] in determining that "it would not be 'reasonable' that an employee would be dissuaded from engaging in any protected activity because of the scheduling of a hearing, which was ultimately canceled . . . ." D. & O. at 8. He concluded that "[a]ccordingly, complainant has not suffered from an adverse action." This conclusion constitutes error for two principal reasons.

First, it is usually inappropriate for an ALJ to make factual findings at the summary decision stage. Here, the ALJ appeared to have weighed evidence and made factual inferences contrary to his duty to draw reasonable inferences in favor of Stallard, the nonmoving party.[13] The question at this summary decision stage is not whether an adverse action occurred but whether, given the evidence submitted by both parties, there is a reasonable question as to whether an adverse action occurred. Possibly, the ALJ meant only to state that Respondent prevailed on this element by pointing to an absence of evidence that the charge letter was adverse or that Stallard failed to present evidence to support his claim. As detailed below, however, Stallard presented sufficient evidence of the adverse nature of the charge letter to defeat a summary decision on the element of adverse action.

Stallard alleges that Norfolk Southern's scheduling of a disciplinary investigation constituted deliberate retaliation, intimidation, and harassment for reporting an on-duty injury. Stallard claims the charge affected his personnel record and he suffered anxiety and emotional distress because of the scheduled hearing and its implicit threat of termination. Norfolk Southern counters that Stallard suffered no consequences and nothing was placed on his permanent record. The parties also dispute whether the scheduled hearing was routine and required by the collective bargaining agreement or whether it was discretionary. Norfolk Southern alleges that dishonesty is a serious matter and that it routinely schedules hearings for employees who appear to have made false statements. Norfolk Southern Br. 10. Stallard, on the other hand, alleges the charge letter was discretionary and therefore open to manipulation and use as a pretext for retaliation. Viewing the evidence in the light most favorable to Stallard, we find that disputed issues of fact

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[12] 548 U.S. 53 (2006).

[13] *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 7, 12-13 (ARB Sept. 26, 2012).

exist as to whether a reasonable person could find the charge letter in this case to be materially adverse.

In addition, the ALJ's legal analysis of adverse action was flawed. While his reliance on *Burlington Northern* was not necessarily error, the ALJ failed to recognize or acknowledge controlling ARB precedent addressing *Burlington Northern* in the FRSA context. The test the ALJ applied is one of several tests used to determine what constitutes adverse action but it is not the exclusive test and is not determinative in this case.

In *Burlington Northern*, the Supreme Court broadened the existing Title VII adverse action test. The *Burlington Northern* standard provides:

> [the challenged action need only be] materially adverse to a reasonable employee or job applicant . . . [such] that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.[14]
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> …
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> We speak of material adversity because we believe it is important to separate significant from trivial harms.[15]

In *Williams v. American Airlines*, the ARB departed somewhat from *Burlington Northern* explaining that it was unnecessary to turn to Title VII cases like *Burlington Northern* to determine what qualifies as adverse action under AIR 21.[16] Instead, the Board must construe adverse action consistently with the language of the AIR 21 whistleblower statute and its implementing regulations. The relevant implementing regulations prohibit actions "to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee" because of protected activity. Given the breadth of this regulatory definition as well as the explicit mention of "threats," we observed in *Williams* that adverse action under AIR 21 should be construed more expansively than under Title VII. Accordingly, we held that a written warning or counseling session is presumptively adverse where: "(a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline."[17]

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14 *Burlington Northern*, 548 U.S. at 57.

15 *Id.* at 68.

16 *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010).

17 *Id.* at 11.

Noting also that AIR 21's statutory language contains no express limitation of adverse actions to those actions that might dissuade a reasonable employee, the Board ruled that an adverse action need only be "more than trivial, either as a single event or in combination with other deliberate employer actions alleged."[18]

In *Fricka v. National Railroad Passenger Corporation*,[19] the ARB applied the *Williams* standard to FRSA cases noting that Congress expressly added "threatening discipline" as prohibited discrimination in FRSA section 20109(c).[20] In *Zavaleta v. Alaska Airlines, Inc.*,[21] the ARB noted that the ALJ's reliance on *Burlington Northern* was not necessarily error as that standard and the ARB's *Williams* standard overlap. Both standards require some level of materiality that must be more than trivial harm. Nevertheless, as we noted in *Vernace v. Port Authority Trans-Hudson Corp.*,[22] "[w]here termination, discipline, and/or threatened discipline are involved, there is no need to consider the alternative question whether the employment action will dissuade other employees."

In this case, Norfolk Southern's investigation letter did not contain an explicit statement of potential discipline. The potential for discipline is implicit, however, in the May 30, 2013 letter notifying Stallard of a "formal investigation . . . [in connection with] providing false and/or conflicting statements." Jt. Stip. 32. The letter notifies Stallard of his right to representation, his right to hear testimony and to call and question witnesses. Jt. Stip. 33. These references to an established disciplinary process further support an inference that the letter contained the potential for discipline.[23] While each case is different, we see no material facts that would distinguish the charge letter in *Vernace* that we found to be adverse, from the charge letter in this case.[24] Nevertheless, we leave that ultimate factual determination to the ALJ on remand.

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[18] *Id.* at 15.

[19] ARB 14-047, ALJ No. 2013-FRS-035 (ARB Nov. 24, 2015).

[20] *Id.* at 8.

[21] ARB No. 15-080, ALJ No. 2015-AIR-016 (ARB May 8, 2017).

[22] ARB No. 12-003, ALJ No. 2010-FRS-018, slip op. at 2, n.4 (ARB Dec. 21, 2012).

[23] Norfolk Southern's own testimonial and documentary evidence demonstrates that it investigated and disciplined other employees for making false statements. Memorandum of Law in Support of Respondent's Motion for Summary Decision, p. 23, Exh. C. Because Stallard, had worked for Respondent for over 20 years, he was likely aware of this information and reasonably feared the potential discipline his charge letter entailed.

[24] *See Doucet v. Univ. of Cincinnati*, 2006 WL 2044955, *22, n.19 (S.D. Ohio, July 19, 2006) ("In its reply brief, UC contended that Korosick's disciplinary action against Doucet cannot be

### 3. Genuine issues of material fact remain on contributing factor

As the U.S. Court of Appeals for the Seventh Circuit has reasoned, summary decisions are difficult in "employment discrimination cases, where intent and credibility are crucial issues."[25] We have similarly explained that summary decisions on the issue of causation under whistleblower statutes like FRSA are even more difficult because Congress explicitly made it easier for whistleblowers to prevail in their discrimination cases by requiring only that a complainant prove that his protected activity was a "contributing factor" rather than a "substantial factor."[26] Thus, a successful complainant need only show that protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action. Nevertheless, even 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 absent a complainant's protected behavior.

The ALJ held: "This presiding judge finds that Respondent has established by clear and convincing evidence that the Complainant's report of a work-related injury was not a contributing factor in the alleged adverse actions." D. & O. at 8-9; *see also id.* at 7.

It is unclear whether the ALJ meant for this statement to apply to the contributing factor prong or the affirmative defense prong of a successful FRSA claim. If the ALJ meant for this statement to apply to the contributing factor prong, the ALJ erred as the contributing factor standard is weighed under a preponderance of the evidence standard and it is the Complainant's burden. If the ALJ meant for this statement to apply to Norfolk Southern's affirmative defense, we find the statement problematic in that it suggests the ALJ improperly weighed the evidence and made a factual finding when the pending matter was a motion for summary decision.[27]

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regarded as retaliatory because 'the initiation of an investigation that does not lead to discipline does not constitute adverse action' for Title VII purposes. (Doc. # 18 at 9 (citing *Johnston v. O'Neill,* 130 Fed. Appx. 1 (6th Cir. 2005).). The Supreme Court has since held that any employer action that is objectively harmful enough that it 'could well dissuade a reasonable worker from making or supporting a charge of discrimination' may constitute retaliatory action under Title VII. The initiation of a formal disciplinary investigation-even one that does not result in formal discipline-would satisfy this standard." (citing *Burlington Northern,* 126 S. Ct. at 2409, 2415)).

[25] *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1038 (7th Cir. 1993).

[26] *Franchini,* ARB No. 11-006, slip op. at 9.

[27] *See Henderson,* ARB No. 11-013, slip op. at 9.

Regardless of which error the ALJ committed in the holding, we find that genuine issues of material fact remain as to whether Stallard's injury report contributed to his scheduled hearing and whether Norfolk Southern can prevail in its affirmative defense.

First, the ALJ's one-sentence holding is conclusory and provides no analysis. This alone justifies a remand on this issue. Further, the record before us raises a presumptive inference of causation that prevents a summary decision on the issue of contributing factor. Stallard's protected activity—namely the injury report—was inextricably intertwined with the alleged adverse action since without the injury report there would have been no disciplinary hearing investigating false statements in connection with the injury report. The Board has repeatedly found that if, as here, the protected activity and the adverse action are "inextricably intertwined," there exists a presumptive inference of causation.[28]

In this case, Stallard's injury report led to a mistaken medical report indicating that his injury had occurred at home, rather than on-duty. The misinformation contained in the medical injury report, in turn, led Stallard's employer to question his veracity and issue the charge letter. Here, "the basis for the adverse action cannot be explained without discussing the protected activity."[29] This chain of events, where no hearing has yet occurred, raises an automatic presumptive inference of causation because the injury report and the adverse action are inextricably intertwined. Of course, Norfolk Southern may ultimately rebut the presumption and prove that issuing the charge letter was entirely legitimate. But on a motion for summary decision, it would be improper to ignore the evident connection between the protected activity and the adverse action and somehow conclude that they had nothing to do with each other.[30]

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[28] In *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 7 (ARB Feb. 29, 2012), the ARB found that, because the complainant's report of injury led to the employer's review of his disciplinary records, ultimately leading the employer to impose disciplinary action, the complainant's injury report was a contributing factor to his suspension. *See also Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012) (the complainant reported a rule violation and was fired for reporting it late; because his protected activity triggered the employer's investigation that led to the complainant's discharge, the protected disclosure was "inextricably intertwined" with his discharge and the complainant established the "contributing factor" element of his claim).

[29] *See Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020, slip op. at 15 (ARB May 31, 2013) (Corchado, J., concurring).

[30] The very wording of Stallard's charge letter raises issues of fact on the element of causation and literally demonstrates the inextricably intertwined concept. Norfolk Southern argues Stallard's injury report had nothing to do with the issuance of the charge letter scheduling a disciplinary hearing. But the first sentence of the charge letter states that the purpose of the "formal investigation" is to determine facts in connection with providing false or conflicting statement regarding the "on-duty injury that you reported" on March 16, 2013. Where, as here, the basis for

We recognize that this presumptive inference of causation may make it difficult for employers to prove the legitimacy of discipline imposed on injured employees. Nevertheless, the presumption is supported by sound policy reasons. The FRSA's legislative history, as outlined above, reveals a congressional intent to comprehensively address the problem of railway retaliation for occupational injury reporting. Effective enforcement of the Act requires presumptive causation under circumstances such as Stallard's, where viewing the alleged falsification of an injury report as an "independent" ground for scheduling a hearing could easily be used as a pretext for eviscerating protection for injured employees.[31]

In addition to the presumptive inference that precludes summary decision, this record presents conflicting facts on material issues in connection with causation. Norfolk Southern argues that even if there were an adverse action, there was no contributing factor causation because the doctor's note, erroneously misleading Norfolk Southern, was an intervening event between Stallard's injury report and Norfolk's scheduling a hearing. Norfolk Southern claimed that it would have scheduled a hearing even if there had not been an injury as Norfolk Southern takes false reports seriously. Comstock by affidavit testifies that Norfolk Southern regularly holds hearings when potential dishonesty is at issue, whether there was a report of an injury or not. In the three years before Stallard's injury, Norfolk Southern scheduled seven hearings investigating false allegations; only one of which also involved a reported injury. RX-13 at 2; *see also* Jt. Stip. 58; RX-12 at 18. The parties stipulated that no hearing was scheduled when Stallard filed the injury report on March 16th. Wilson and Comstock testified they did not know as of the date they issued the charge letter that Dr. Mullins had corrected his misstatement that Stallard was injured at home. Jt. Stip. 36. Nevertheless, even assuming Dr. Mullins's mistake was the catalyst for Norfolk Southern's questioning of Stallard's veracity, this conclusion does not rule out the possibility that other factors may also have contributed to the ultimate filing of the charge letter. We have repeatedly ruled that an intervening event that independently justifies an alleged adverse action does not automatically break a causal connection between protected activity and an adverse action.[32] A complainant can prevail by showing that the respondent's reason, although true, is only one of the reasons for its adverse action and that another reason was complainant's protected activity.[33]

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the adverse action cannot be explained without discussing the protected activity, the protected activity and adverse action are inextricably intertwined.

[31] *See Henderson*, ARB No. 11-013, slip op. at 14.

[32] *Franchini*, ARB No. 11-006, slip op. at 12.

[33] *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 19 (ARB May 31, 2006).

Stallard in opposition points out that neither Wilson nor Comstock attempted to contact Stallard before scheduling the hearing. Stallard alleges that Norfolk could easily have confirmed the on-duty status of his injury from Assistant Trainmaster Jackson, who was present shortly before and after Stallard was injured. Not only was Jackson present when Stallard formally reported his injury but, shortly thereafter, he drove Stallard to the emergency room. Jt. Stips. 3-9. Jackson also investigated the accident, in accordance with Norfolk Southern's procedures, and wrote a "reportable injury" report that included the statement that Stallard "has been marked off on-duty injury with a mark off restriction . . . ." Jackson FELA Dep., Exh. 3. But neither Wilson, Comstock, nor Maher asked Jackson about the location of the injury prior to scheduling the hearing. Jackson FRSA Dep. at 12, 13.

Stallard also argues that by failing to cancel the hearing as soon as it learned of Dr. Mullins's corrected filing on June 4, Norfolk Southern exacerbated the retaliation. Stallard alleged certain other facts that complainants have used successfully in other whistleblower cases to establish circumstantial evidence of discriminatory motive, including evidence of bias, past and current relationships of the involved parties, and inconsistencies in the employer's reasons for discipline.[34] For example, prior to his termination, Stallard was a twenty-three-year employee of Norfolk Southern "instrumental in the past as far as helping other conductors . . . ." Jackson FELA Dep., Exh. 3. Stallard also offered evidence that Wilson and Comstock sought to discipline him for reasons other than the one stated in his charge letter. Stallard presented evidence that Wilson was trawling for additional bases upon which to charge Stallard (Wilson FRSA Dep., p. 50-51) and even suggested that surveillance on Stallard be undertaken (Wilson FRSA Dep., p. 52, lines 3-11). These unresolved issues of material fact related to the issue of causation bolster our conclusion that summary decision was improper in this case.

**4. Genuine issues of material fact remain on Respondent's affirmative defense**

Because the ALJ's opinion suggests he addressed Respondent's affirmative defense, we now consider whether Norfolk Southern demonstrated that it was entitled to summary decision on its affirmative defense. Norfolk Southern carries the burden of proof on this affirmative defense and must prove "by clear and convincing evidence" that it would have charged Stallard and initiated a disciplinary hearing in the absence of his injury. "Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain."[35] As the employer, Norfolk Southern "faces a steep burden" under the statute—the burden is intentionally high, because "Congress intended to be protective of plaintiff-employees."[36] Because the burden is high, resolving the issue of Norfolk Southern's

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[34] *Bobreski v. J. Givoo Consultants, Inc*., ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011).

[35] *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015).

[36] *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 160 (3d Cir. 2013).

affirmative defense by summary decision is challenging. It is a fact-intensive assessment that requires a determination, on the record as a whole, how clear and convincing Norfolk Southern's lawful reasons were for scheduling and then cancelling a hearing into Stallard's injury. In analyzing the affirmative defense, it is not enough to confirm the rational basis of Norfolk Southern's employment policies and decisions. Instead, we must assess whether they are so powerful and clear that Norfolk Southern would have charged Stallard apart from the protected activity.

In *DeFrancesco II*, the Board discussed several factors, in addition to the validity of the discipline that should be considered in determining whether a respondent has sufficiently demonstrated its affirmative defense in the context of a reported injury.[37] Those factors include (1) whether the respondent railroad routinely enforces the work rule the complainant is charged with violating, in the absence of an injury; (2) whether the respondent enforces the rule more stringently against injured employees than non-injured employees; (3) whether the work rule at issue is vague and therefore subject to manipulation and use as pretext for retaliation; and (4) whether the evidence suggests that the respondent railroad was genuinely concerned about rooting out safety problems or whether, instead, the evidence suggests that its conduct was pretext designed to unearth a plausible basis on which to punish the complainant for filing an injury report.[38]

Norfolk Southern claims it has presented undisputed facts consistent with these factors including (1) that it initiated the charge letter solely in response to Dr. Mullins's misstatement; (2) dishonesty is a serious offence (Jt. Stip. 58); and (3) the railroad routinely disciplines employees for similar misconduct.[39] But as we observed in *Henderson*, "even where a respondent asserts legitimate, non-discriminatory reasons as part of its affirmative defense, a complainant can create a genuine issue of fact by pointing to specific facts or evidence that, if believed, could discredit the respondent's reasons, making them less convincing on summary decision."[40]

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[37] *DeFrancesco*, ARB No. 13-057, slip op. at 11-12.

[38] *Id.*

[39] Norfolk Southern introduced substantial evidence tending to show that it routinely enforced the rule proscribing dishonesty against uninjured employees. Stallard however argued that the offences of Respondent's comparators were very different than Stallard's and thus not comparable. Ordinarily, "the question whether two employees are similarly situated is a question of fact" and because the similarity of the comparators is disputed, summary decision on this issue is unavailable. *See Mandell v. County of Suffolk*, 316 F.3d 368, 379 (2d Cir. 2003).

[40] *Henderson,* ARB No. 11-013, slip op. at 15.

We find that the same disputed facts, outlined above, material to Norfolk Southern's purported motivation prevent summary decision on Respondent's affirmative defense. Stallard provided sufficient evidence to create an issue of fact that Norfolk Southern's conduct, before and after initiation of the charge letter, suggested "pretext designed to unearth some plausible basis on which to punish [Stallard] for the injury report."[41] As detailed above, Norfolk could easily have confirmed the on-duty status of Stallard's injury from Assistant Trainmaster Jackson, who was on-duty when Stallard was injured. At the time, Jackson urged Stallard to fill out an injury report then drove Stallard to the emergency room. Jt. Stips. 3-9. Jackson also drafted an investigation report that unambiguously stated Stallard was injured on-duty. Jackson FELA Dep., Exh. 3. Stallard also presented evidence that Wilson was trawling for additional bases upon which to charge Stallard (Wilson FRSA Dep., p. 50-51) and even suggested that surveillance on Stallard be undertaken (Wilson FRSA Dep., p. 52, lines 3-11).[42] Viewing the evidence in the light most favorable to Stallard, we are not convinced that Norfolk Southern has shown by clear and convincing evidence, as a matter of law, that it would have scheduled a hearing had Stallard never reported his occupational injury. Stallard has produced evidence that raises triable issues of fact material to Respondent's affirmative defense.

## CONCLUSION

The record raises sufficient questions of disputed fact on the issue of adverse action and causation to survive summary decision. In addition, Norfolk Southern did not produce sufficient undisputed facts to convince us by clear and convincing evidence that Norfolk Southern would have scheduled a hearing in the absence of Stallard's reports of work-related injury.

Accordingly, we **VACATE** the D. & O. and **REMAND** this case for further proceedings consistent with this opinion.

**SO ORDERED**.

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

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

**TANYA GOLDMAN**
**Administrative Appeals Judge**

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41 *DeFrancesco,* ARB No. 13-057, slip op. at 12.

42 Shifting explanations for discipline may be circumstantial evidence of pretext. *See Bobreski,* ARB No. 09-057, slip op. at 13.