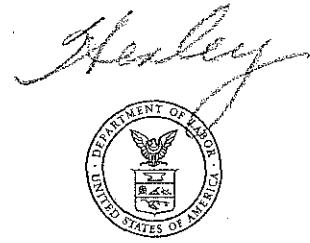


U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210



In the Matter of:

KENNETH PALMER,

ARB CASE NO. 16-035

COMPLAINANT,

ALJ CASE NO. 2014-FRS-154

v.

DATE: JUN 17 2016

CANADIAN NATIONAL RAILWAY/
ILLINOIS CENTRAL
RAILROAD COMPANY,

RESPONDENT.

2016 JUN 29 AM 8:38
US DEPT OF LABOR
ADMIN LAW JUDGES
WASHINGTON, DC

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

F. Tucker Burge, Esq.; *Burge & Burge, P.C.*; Birmingham, Alabama

For the Respondent:

George H. Ritter, Esq.; *Wise Carter Child & Caraway, P.A.*; Jackson, Mississippi

ORDER SETTING EN BANC REVIEW

By notice dated March 9, 2016, the Administrative Review Board accepted Respondent's petition for review of Administrative Law Judge (ALJ) Clement J. Kennington's Decision and Order issued January 19, 2016. Respondent has filed opening and reply briefs, and Complainant has filed a response brief. The Chair and Chief Administrative Appeals Judge Paul M. Igasaki has determined that this appeal should be decided en banc with supplemental briefing.

Therefore, it is **ORDERED** that

This appeal will be reviewed en banc. The parties are requested to file supplemental briefs that should address the questions set forth below that were previously considered before a panel of the Board in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014) and before the Board en banc in *Powers v. Union Pacific Railroad, Co.*, ARB No.

13-034, ALJ No. 2010-FRS-030 (ARB Apr. 21, 2015, reissued with full dissent), which the Board vacated on May 23, 2016:

- 1) In deciding, after an evidentiary hearing, if a complainant has proven by a preponderance of the evidence that his protected activity was a "contributing factor" in the adverse action taken against him, is the Administrative Law Judge (ALJ) required to disregard the evidence, if any, the respondent offers to show that the protected activity did not contribute to the adverse action?
- 2) If the ALJ is not required to disregard all such evidence, are there any limitations on the types of evidence that the ALJ may consider?

This appeal will be reviewed en banc on the basis of the briefs filed by Complainant and Respondent, including the supporting appendices and other pleadings, and supplemental briefs addressing the issue set forth above. The Complainant and Respondent shall file simultaneous supplemental briefs which are due on or before **August 3, 2016**. No further briefing by the parties will be entertained and **no enlargement of time will be granted**.

All supplemental briefs of the parties and any amicus briefs should be prepared in typographic scalable 12 point, 10 character-per-inch type or larger, double-spaced with minimum one inch left and right margins and minimum 1.25 inch top and bottom margins, printed on 8½ by 11 inch paper. If a party or other interested party files a brief that fails to comply with the requirements of this briefing order, the Board may refuse to accept the brief.

We invite the filing of simultaneous amicus briefs from any interested parties, addressing the issue set forth above, which shall also be due on or before **August 3, 2016**, and comply with the requirements noted for the supplemental briefs of the parties.

The parties shall file with the Board an original and four copies of the supplemental briefs, not to exceed thirty (30) double-spaced typed pages and shall simultaneously serve a copy of the supplemental brief upon the opposing party, and file a certification of such service with the Board. Failure to provide the supplemental briefs within the specified period may result in sanctions as the Board deems warranted.

All supplemental briefs of the parties and any amicus briefs shall be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-5220, Washington, D.C., 20210.

The Board also offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. If a party files a document through the EFSR portal, no paper copies need be filed with the Board; however, parties are still required to serve paper copies of all documents on opposing parties and their counsel.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner.

e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents. Information regarding registration for access to the EFSR system, as well as a step-by-step user guide and FAQs can be found at <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact Boards-EFSR-Help@dol.gov

If, upon consideration of the briefs filed, the Board decides that oral argument would be helpful to its disposition of the case, the Board will hold oral argument, of no more than two (2) hours, on **August 24, 2016**, at the U.S. Department of Labor, 200 Constitution Avenue, N.W.; Washington, D.C., 20210. If oral argument is necessary, the Board will issue a more detailed order regarding the procedures for such argument.

FOR THE ADMINISTRATIVE REVIEW BOARD:



Janet R. Dunlop
General Counsel

**NOTE: Questions regarding any case pending before the Board should be directed to
the Board's Paralegal Specialists: Telephone: (202) 693-6200
Facsimile: (202) 693-6220**