U.S. DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD
WASHINGTON, D.C.

KENNETH G. DeFRANCESCO,	)	
	)	
Complainant,	)	
	)	ARB No. 13-057
v.	)	
	)	ALJ No.: 2009 FRS-9
UNION RAILROAD COMPANY,	)	
	)	
Respondent.	)	
	)	
	)	
	)	

BRIEF OF THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS *AMICUS CURIAE*

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

WILLIAM C. LESSER
Deputy Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

PAUL L. EDENFIELD
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2716
200 Constitution Avenue, NW
Washington, D.C. 20210
(202) 693-5652

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STATEMENT OF INTEREST

Pursuant to 29 C.F.R. § 1982.108(a)(1) and the Administrative Review Board's ("Board") order of December 4, 2013, the Assistant Secretary of Labor for Occupational Safety and Health submits this brief as *amicus curiae*.

The Occupational Safety and Health Administration ("OSHA") has a strong interest in ensuring that the Secretary's interpretation of the Federal Railroad Safety Act ("FRSA") whistleblower protection provision strikes the legally correct balance between protecting employees from retaliation for reporting workplace injuries and enabling railroad employers to promote workplace safety through appropriate and effective enforcement of workplace safety rules.

OSHA receives and investigates approximately 2,327 whistleblower complaints per year (average annual number for the time period from 2005 to 2013) under FRSA, Section 11(c) of the Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. § 660(c), and the other 20 whistleblower protection statutes for which it is assigned investigatory authority. Since 2007, when authority for the FRSA whistleblower protection provision was assigned to the Department of Labor, OSHA has received over 1,462 FRSA whistleblower complaints, 60 percent of which allege retaliation for reporting a workplace injury.

The right to report a workplace injury is a core protected right under both FRSA and Section 11(c) of the OSH Act. If employees do not feel free to report

injuries or illnesses without fear of incurring discipline, the employer's entire workforce is put at risk. Employers will not learn of and correct dangerous conditions that result in injuries. Additionally, injuries will not be reported to OSHA or the Federal Railroad Administration (FRA), as required under Federal law, and thus information invaluable for preventing future worker injuries and illnesses will be lost. *See* 49 C.F.R. § 225.1 *et seq*.; 29 C.F.R. Part 1904; Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearings Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (Oct. 22, 2007) (noting that the accuracy of rail safety databases had been criticized in a number of government reports and that railroads' underreporting of injuries had been identified as a primary reason for this inaccuracy). Finally, depending upon the cause of the injury, the public can be put at risk if workers fear retaliation for reporting an injury. Ensuring that railroad employees can report injuries or illnesses without fear of retaliation is therefore crucial to protecting the safety and health of both railroad workers and the public.

As part of its mission to ensure (to the extent practicable), safe and healthful working conditions, OSHA encourages employers to maintain and enforce legitimate workplace safety rules in order to eliminate or reduce workplace hazards and prevent injuries from occurring in the first place. At the same time, OSHA has a strong concern that workplace safety rules, particularly those that are vague, are

neither manipulated nor used as a pretext for retaliation against workers who report workplace injuries. OSHA has a correspondingly strong interest in ensuring that whistleblower cases involving an employer's investigation of a workplace injury for potential safety rule violations apply the proper burdens of proof and consider the correct factors in order to strike the legally appropriate balance between a worker's right and responsibility to report a workplace injury and the employer's ability to look into the circumstances surrounding a workplace injury with an eye toward creating a safer workplace. OSHA has instructed its field investigators on the standards to be employed in FRSA whistleblower cases to determine whether a worker's injury was a contributing factor in a railroad's discipline and whether the railroad has shown by clear and convincing evidence that it would have taken the same action in the absence of the injury report. *See* Memorandum from Richard E. Fairfax, Deputy Assistant Secretary, U.S. Dep't of Labor, for Regional Administrators, Whistleblower Program Managers, *Employer Safety Incentive and Disincentive Policies and Practices* (Mar. 12, 2012), available at https://www.osha.gov/as/opa/whistleblowermemo.html ("Fairfax memo"). Although OSHA does not disagree with the ALJ's conclusion that the Respondent violated the anti-retaliation provisions of FRSA in disciplining the Complainant, OSHA believes that the ALJ's analysis in this case deviates from these standards and that the application of these standards would be the legally correct approach in

this case. OSHA asks the Board to clarify the burdens of proof applicable in FRSA whistleblower cases accordingly.

STATEMENT OF THE ISSUES

1) In a FRSA whistleblower case where there was an investigation to determine whether an employee's conduct warranted bringing disciplinary charges, does a complainant make out a prima facie case by showing that his or her protected conduct was a contributing factor to the investigation?

2) In a case where knowledge of an employee's alleged misconduct arose from an investigation prompted by an injury report, must the employer prove that it actually would have received knowledge of the alleged misconduct through other channels to prevail in its affirmative defense?

STATEMENT OF THE CASE

A. Procedural History.

Kenneth G. DeFrancesco filed a complaint with OSHA on February 11, 2009, alleging that the Union Railroad Company ("Railroad") violated section 20109(a)(4) of FRSA, 49 U.S.C. § 20109(a)(4), by taking an adverse action against him in retaliation for his protected reporting of a workplace injury. The Secretary found reasonable cause to believe that the Railroad had violated FRSA. The Railroad then objected to this finding and requested a hearing before an administrative law judge. Administrative Law Judge ("ALJ") Thomas Burke held a hearing and issued a decision denying DeFrancesco's complaint on June 7, 2010. DeFrancesco timely petitioned the Board for review, and on February 29, 2012, the Board reversed the ALJ and remanded the case for further proceedings.

On April 3, 2013, the ALJ issued a decision and order on remand finding that DeFrancesco's complaint was meritorious and awarding relief. The Railroad timely petitioned the Board for review of the ALJ's decision and order on remand. The private parties have since filed briefs in the appeal, and the appeal is pending before the Board.

B. Brief Summary of the Facts.

DeFrancesco, a trainman for the Railroad for over 30 years, slipped and fell on a wintry surface while directing a rail car in December 2008, injuring his back.[1] ALJ D&O at 2. He had been wearing all appropriate gear and equipment for the weather conditions when he fell. *Id.* A supervisor who initially reviewed the incident believed that slippery conditions were the cause and that no investigation into the cause of the fall was needed. ARB D &O at 2. DeFrancesco filed an injury report and received a medical evaluation. A doctor diagnosed him with a strained lower back. ALJ D&O at 2.

Railroad officials reviewed an available video of DeFrancesco's fall, along with his disciplinary record. ALJ D&O at 3-4. The investigation was designed both to uncover the "root causes" of the accident and to elicit whether DeFrancesco should be disciplined. *Id.* at 3-4, 10. Company officials stated that they "watched

[1] These facts are essentially undisputed, and are largely set forth in the ALJ's initial Decision and Order and in the Board's Decision and Order of Remand.

the video that recorded the incident, along with Complainant's discipline history and injury history to determine whether there was a pattern of unsafe behavior and whether corrective action needed to be taken." *Id.* at 3. After reviewing the video, they claimed that DeFrancesco had failed to take short, deliberate steps at the time he was injured, and that this was part of a pattern of unsafe conduct. *Id.* at 3-4. The Railroad then initiated disciplinary proceedings against DeFrancesco citing his violation of two safety rules:

> **5.20 Weather Hazards**
>
> Employee[s] must take precautions to avoid slipping on snow, ice, wet spots or other hazards caused by inclement weather.
>
> - Employees must wear company issued non-slip footwear during inclement weather conditions.
>
> **5.20.1**: When hazardous underfoot conditions exist:
>
> - Keep hands free when walking, and keep them out of pockets for balance.
> - Take short, deliberate steps with toes pointed outward.
>
> . . . .
>
> **1.2 Rule B**
>
> - To enter or remain in the service, employees must be of good moral character and must control themselves at all times, whether on or off Company property, in such manner as not to bring discredit upon the Company.
>
> - Employees who are careless of the safety of themselves or others, insubordinate, disloyal, dishonest, immoral, quarrelsome or otherwise vicious, or who willfully neglect their duty or violate rules, endanger life or property, or who make false statements or conceal facts concerning matters under investigation, or who

> conduct themselves in a manner which may subject the railroad to criticism and loss of good will, will not be retained in the service.

Id. at 4. After consulting with his union, DeFrancesco agreed to a 15-day suspension in lieu of risking more severe discipline if he went forward with a disciplinary hearing. *Id.* at 5.

C. ALJ's Original Decision.

Stating that retaliatory animus was the "key inquiry" in determining whether a complainant established his initial case that protected conduct was a contributing factor to an adverse action, the ALJ concluded that DeFrancesco had not met his burden in the case of showing that the injury report contributed to the 15-day suspension. ALJ D&O at 12. Specifically, the ALJ relied heavily on credited testimony from Railroad officials that the injury report was not a factor in the disciplinary decision and that the Railroad bore no hostility toward injury reporting. *Id.* The ALJ also rejected DeFrancesco's claim that injury-reporting data at his employer showed a pattern of retaliation against employees making such reports. *Id.* at 13-16.

D. Board's Decision and Order of Remand.

The Board concluded that the ALJ erred by making animus a central element of the contributing factor analysis. ARB D&O at 6. Animus is unnecessary to the analysis, as "[t]he ARB has said often enough that a 'contributing factor' includes 'any factor which, alone or in connection with other factors, tends to affect in any

way the outcome of the decision.'" *Id.* at 6 (quoting *Williams v. Domino's Pizza*, ARB No. 09-092, 2011 WL 327980, at *5 (ARB Jan. 31, 2011)). It further concluded that DeFrancesco had established as a matter of law that the injury report was a contributing factor to the suspension. *Id.* at 7. Notably, it pointed to the Railroad's admission that the injury report "triggered" the investigation of the circumstances of the fall and DeFrancesco's disciplinary record, which in turn led to the discipline. *Id.* The Board instructed the ALJ, on remand, to consider the Railroad's affirmative defense. *Id.* at 8. Specifically, the Board told the ALJ to evaluate whether clear and convincing evidence established that the Railroad "would have disciplined DeFrancesco even if he had not reported his slip-and-fall." *Id.*

E. <u>ALJ's Decision on Remand.</u>

Accepting the Board's holding that the contributing factor test had been met, the ALJ turned to the Railroad's affirmative defense. ALJ Remand D&O at 4-5. He interpreted the Board's remand order as follows:

> The ARB's concern is not with Respondent's reasons for taking the unfavorable personnel [action], that is, Complainant's engaging in unsafe conduct, but with whether Respondent would have known about Complainant's unsafe conduct without Complainant reporting his injury. By the logic of the ARB, Respondent may avoid liability by showing, by clear and convincing evidence, that it received notice of the unsafe conduct by means other than Complainant's injury report, not by showing its motivation for assessing the suspension.

Id. at 5. The ALJ concluded that the Railroad was unable to rebut the proposition that the discipline "logically and literally would never have come about but for the protected activity," and that absent a showing that there was some other "avenue" by which it would have learned of the conduct, the affirmative defense necessarily failed. *Id.* Thus, the ALJ found that the Railroad did not meet its burden of showing by clear and convincing evidence that it would have taken the adverse employment action absent DeFrancesco's protected activity. *Id.* at 6. Accordingly, the ALJ ruled that the Railroad violated the FRSA anti-retaliation provisions in disciplining DeFrancesco.

ARGUMENT

I. The Board Correctly Determined in its Remand Decision that DeFrancesco Satisfied the Contributing Factor Standard

A. <u>Board properly reversed ALJ on contributing factor analysis because ALJ made animus his focus.</u>

A complainant's initial burden in FRSA whistleblower cases is to show that protected conduct was a contributing factor to the adverse action.[2] The Board

[2] FRSA protects against adverse action "due, in whole or in part, to" an employee's protected conduct, such as injury reporting. 49 U.S.C. § 20109(a). The burden-shifting analysis to determine whether an adverse action is "due to" an injury report is as follows: "the complainant makes a prima facie showing [by proving by preponderance of the evidence that the protected conduct] . . . was a contributing factor in the unfavorable personnel action alleged in the complaint. . . . [An employer establishes an affirmative defense] if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same

accurately stated that a contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." ARB D&O at 6; *see also Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993).[3] Proof of animus is not required. *See Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 161, 163 (3d Cir. 2013) ("[Complainant] has not articulated an overwhelming case of retaliation. He has not, for example, proffered any evidence that [his employer] dissuaded him from reporting his injury or *expressed animus at him for doing so*. … [But he] has shown enough to survive [employer's] motion for summary judgment.") (emphasis added); *Addis v. Dep't of Labor*, 575 F.3d 688, 691 (7th Cir. 2009) (explaining that "contributing factor" is at one end of a spectrum of standards, all of which describe the extent to which a factor motivated a decision); *Marano*, 2 F.3d at 1141.

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unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 20109(d)(2)(A)(i), incorporating 49 U.S.C. § 42121(b)(2)(B)(iii) and (iv) of the Wendall H. Ford Aviation Investment and Reform Act for the 21st Century; *see* 29 C.F.R. § 1982.109(a).

[3] *Marano* was a review of a Merit Systems Protection Board decision. Because such cases involve the interpretation of the "contributing factor" standard of causation in the analogous context of whistleblower protections for federal employees and typically involve similar policy questions, the reasoning in such cases should carry weight in cases under FRSA and other private sector whistleblower statutes. *See* Whistleblower Protection Act, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified at various sections of 5 U.S.C.).

Although animus may often lurk behind an employer's actions, actual proof of animus is not required to show that the protected conduct was a contributing factor. Congress was deeply concerned with imposing too steep an evidentiary burden on whistleblowers, who may have limited access to the kind of direct evidence that would normally be required to prove animus. *See Marano*, 2 F.3d at 1140 (noting congressional concern over "excessively heavy" burden for whistleblower complainants). And indeed, sometimes employers discourage reporting injuries and whistleblowing even though their motive may not be animus *per se*. *See Araujo*, 708 F.3d at 161 n.7 (noting animus could be sometimes be difficult to prove under FRSA because some supervisors in railroad industry were motivated by financial incentives to keep injury numbers down rather than by animus). Showing that protected conduct is a contributing factor can be accomplished through the kind of circumstantial evidence more readily available to a complainant. Thus the Board properly held that the ALJ committed legal error in concluding that animus was required as part of the contributing factor showing.

B. <u>The Board correctly held, as a matter of law, that DeFrancesco satisfied the contributing factor standard because DeFrancesco's injury report triggered the railroad's investigation into his conduct and record.</u>

Having rejected the ALJ's contributing factor analysis because he required proof of animus, the Board went on to hold as a matter of law that the contributing factor test was satisfied here. The Board focused on the relationship between

DeFrancesco's injury report and the Railroad's investigation of his conduct: "If DeFrancesco had not reported his injury as he was required to do, Kepic [the Railroad's transportation superintendent] would never have reviewed the video of DeFrancesco's fall or his employment records." ARB D&O at 7.

The Board indicated that the relevant question was whether the injury report contributed to an investigation into whether to discipline the employee, regardless of whether the investigation subsequently divulged some other seemingly legitimate basis on which to discipline DeFrancesco: "While DeFrancesco's records may indicate a history and pattern of safety violations, the fact remains that his report of the injury on December 6 triggered Kepic's review of his personnel records, which led to the 15-day suspension." ARB D&O at 7.

Because the evidence unequivocally showed that the injury report was a contributing factor to the investigation, the Board concluded, as a matter of law, that DeFrancesco had met the contributing-factor standard. As the Board pointed out, the Railroad *admitted* that the injury report motivated its investigation of the conduct surrounding DeFrancesco's fall, as Kepic testified that "such a review was routine after an employee reported an injury . . . ." ARB D&O at 7.

The Board's approach was consistent with its past approach and the approach of the Merit Systems Protection Board ("MSPB") in cases where an employer conducts an investigation to determine whether discipline is warranted.

In *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, 2012 WL 5391422, at *8-9 (ARB Oct. 6, 2012), the Board noted that, as in *DeFrancesco*, the adverse action and the protected activity appeared to be inextricably intertwined because the disciplinary investigation (into whether Henderson's injury was timely reported and whether he worked safely to avoid injury) arose directly from the protected conduct (Henderson's injury report), thus giving rise to a presumption that the protected activity was a contributing factor in the adverse action. *Id*. at *6-9, *8 n.49; *see Smith v. Duke Energy Carolinas, LLC.*, ARB No. 11-003, 2012 WL 2588595, at *7 (ARB June 20, 2012) ("Just as in *Marano*, Smith's disclosure was 'inextricably intertwined' with the investigation that led to his termination; thus the content of his disclosure 'gave [his managers] the reason for its personnel action'"); *Russell v. Dep't of Justice*, 76 M.S.P.R. 317, 324 (MSPB 1997). In such cases, "when the investigation was so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate against an employee for whistleblowing activity," one must look to whether the protected conduct was a contributing factor in the decision to investigate the employee. *Russell*, 76 M.S.P.R. at 323-24 (finding contributing factor standard met because the investigation into whistleblower's conduct was initiated because of allegations about the whistleblower made by one of the two subjects of his protected disclosure); *see also Simmons v. Dep't of Air Force*, 99 M.S.P.R. 28, 40 (MSPB

2005) (noting that where there is "[]sufficient nexus" between investigation and discipline, one should look to role protected conduct played in motivating investigation). These cases view an investigation "closely related" to the adverse action as a proxy for the discipline itself in the causation analysis, and thus the contributing-factor test is satisfied simply by showing that the protected conduct contributed to the investigation. *See Rhee v. Dep't of Treasury*, 117 M.S.P.R. 640, 656 (MSPB 2012) (investigation "not a personnel action per se," but may be deemed to "taint" subsequent adverse action); *Hutton v. Union Pac. R.R.*, ARB No. 11-091, 2013 WL 2450037, at *10 (ARB May 31, 2013) ("In *DeFrancesco* . . . the protected activity and adverse action were inextricably intertwined because the basis for the adverse action could not be explained without discussing the protected activity.") (Corchado, J., concurring).

The Railroad is correct that a contributing factor "must have *influenced* or *contributed to* that decision in some way." Railroad Br. at 10 (emphasis in original). But here, there is evidence to establish, as a matter of law, that the injury report did in fact contribute to the discipline. Even though the Railroad dubbed this a "root cause" investigation, the evidence plainly showed that the investigation was to both "determine the underlying, 'root cause' of the incident and assess whether corrective or disciplinary action needs to be taken." ALJ D&O at 10. Moreover, here the investigation was mounted despite the front-line supervisor's

determination that no investigation was necessary. *See* ARB D & O at 2. Where an investigation prompted by protected conduct is designed to elicit evidence of an employee's wrongdoing, it is so closely related to the adverse action that one can infer that whatever factors contributed to the decision to investigate also contributed to the ultimate discipline. *See Russell*, 76 M.S.P.R. at 323-24. Thus, the contributing factor standard is met by showing that the protected conduct contributed to (i.e. influenced) the decision to conduct an investigation that had employee discipline as one of its contemplated outcomes.

The Railroad also points out, correctly, that it is insufficient to show simply that the employee's notification of an injury was the sole means by which it became aware of an incident potentially warranting discipline. *See* Railroad Br. at 10-11. However, contrary to the Railroad's arguments and the ALJ's understanding of the Board's remand instructions, the Board's approach does not adopt a "pure but-for standard," whereby protected conduct is deemed a contributing factor whenever it is part of a chain of causally-related events leading to the adverse action. Railroad Br. at 8; ALJ Remand D&O at 4. Rather, this application of the contributing factor standard requires a showing that the protected activity contributed to – that is, was a factor in, as opposed to a mere fact leading to – a decision to investigate for the purpose of deciding whether to bring disciplinary charges.

By focusing in this case on the employer's investigation into whether to bring disciplinary charges (which occurred in spite of a supervisor's conclusion no investigation was needed), the Board acknowledges the risk that retaliation might be effectuated under the pretext of such an investigation. An employer that wishes to retaliate would naturally seek grounds to do so by conducting an investigation. Without such a protective rule, an employer would be permitted to conduct an investigation designed to unearth some basis for discipline, and then to avoid liability for its retaliatory conduct because the ultimate discipline was based upon some finding of the investigation ostensibly independent of the protected conduct. *See Russell*, 76 M.S.P.R. at 325. ("To here hold otherwise would sanction the use of a purely retaliatory tool, selective investigations."). The approach taken by the Board correctly recognizes that where a protected injury report becomes the basis for investigation into the worker's conduct of a type designed to lead to discipline, there is a heightened danger that the investigation will chill injury reporting by sending a message to other employees that injury reports are not welcome. As one ALJ explained, when an injury investigation is "coupled with disciplinary proceedings under a collective bargaining agreement, how is an employee to feel comforted by the opportunity to report retaliation through a separate channel and assurances that retaliation for reports of injuries won't be tolerated? To the employee, the safety investigation and the disciplinary 'formal investigation' are of

a piece." *See Anderson v. AMTRAK*, ALJ No. 2009-FRS-00003, slip op. at 27 (OALJ Aug. 26, 2010).

To the extent the Board's Decision and Order of Remand could be read to support a conclusion that the "contributing factor" standard requires simply that the protected activity be a factual part of the chain of causal events leading to an adverse action, the Board should clarify its holding now to make plain that the Board simply found that there was evidence establishing that the injury report, as a matter of law, influenced the decision to investigate DeFrancesco; in cases where the investigation is designed to determine whether to bring disciplinary charges, such a showing is all that is required for a complainant to make out his or her prima facie case.

II. The ALJ Misevaluated the Employer's Affirmative Defense

A. An employer need not show that it actually would have received information concerning the misconduct through other channels.

The Board directed the ALJ on remand to consider whether the Railroad made out its affirmative defense by proving by clear and convincing evidence that it "would have disciplined DeFrancesco even if he had not reported his slip and fall." ARB D&O at 8. Although OSHA does not disagree with the ALJ's conclusion that the Railroad failed to make out its affirmative defense – and indeed OSHA found reasonable cause to believe that the Railroad retaliated against DeFrancesco at the conclusion of the agency's investigation – OSHA believes that

the ALJ failed to undertake the proper analysis of the defense. Showing that an employer actually would have "received notice of the unsafe conduct by means other than Complainant's injury report," ALJ Remand D&O at 5, will be nearly impossible to prove in cases like this, particularly under the clear-and-convincing evidence standard, even though the basis for the discipline might be strong. Indeed, even where an employer routinely monitors workplace safety, occasionally the only means by which it will be alerted to possible safety rule violations and unsafe conditions will be an injury report.

Board precedent and other cases under the "contributing factor" standard make clear that to make out its affirmative defense, the Railroad need not literally show that it would have learned of DeFrancesco's slip and fall through means other than his injury report. *See, e.g.*, *Henderson*, 2012 WL 5391422, at *9; *Russell*, 76 M.S.P.R. at 324-26. Indeed, there may be instances in which, looking purely at the *facts* that led to the discipline, it is clear that the discipline would not have occurred but for the protected conduct. But, whether there were extrinsic *factors* that independently led to the employer's decision to discipline, such as the alleged misconduct, is a separate question. *See Benjamin v. Citationshares Mgmt., L.L.C.*, ARB No. 12-029, 2013 WL 6354828, at *4 (ARB Nov. 5, 2013) (leaving open the question of whether the statute permits CitationAir to meet its burden under AIR21 by showing clear and convincing evidence that it would have taken

the same action based solely on non-retaliatory legitimate reasons); *Menendez v. Halliburton, Inc.*, ARB No. 12-026, 2013 WL 1385561, at *9 (ARB Mar. 15, 2013) (relevant question in assessing affirmative defense is whether there is "a ground for [the adverse action] extrinsic to the whistleblowing activity itself"). Thus, the analysis of the employer's affirmative defense under FRSA should focus on evidence demonstrating whether the employer would have disciplined the employee had it learned of identical conduct where the employee was not hurt, but where the conduct was unsafe. Such an analysis elucidates the employer's motivation, which is the critical subject of inquiry in retaliation cases: Was the employer motivated by the protected conduct, or by the legitimate safety concerns raised by a workplace incident? This approach properly guards against selective enforcement of workplace safety rules against only those employees injured on the job and the resulting chilling effect on the reporting of workplace injuries, while ensuring that employers are free to make and enforce appropriate workplace safety rules.

B. <u>OSHA's administrative guidance.</u>

This approach –looking to whether DeFrancesco's conduct leading up to his slip-and-fall was a sufficient independent motive for the discipline – is fully consistent with OSHA directives that seek to balance whistleblower protections with an employer's right to enforce safety rules. As OSHA has explained to its

whistleblower investigators, in cases where an employer imposes discipline on the ground that the injury resulted from the violation of a safety rule, careful inquiry is needed. Some of the relevant questions are whether the employer monitors for compliance with the work rule in the absence of an injury and whether the employer consistently imposes equivalent discipline against employees who violate the work rule in the absence of an injury. *See* Fairfax memo.

The nature of the rule cited by the employer should also be considered. Vague rules, such as a requirement that employees "maintain situational awareness" or "work carefully" may be manipulated and used as a pretext for unlawful discrimination. *See* Fairfax memo. Therefore, where such general rules are involved, such as Rule B at issue in this case, which prohibited employees from generally being "careless of the safety of others and themselves," the fact-finder must include an especially careful examination of whether and how the employer applies the rule in situations that do not involve an employee injury. Enforcing a rule more stringently against injured employees than noninjured employees suggests that the rule has been used a pretext for discrimination against an injured employee in violation of FRSA. *See* Fairfax memo.

C. Proper evaluation of an employer's affirmative defense.

The Board stated in *Henderson*, a case like this one involving an investigation prompted by an injury, that the affirmative defense inquiry is directed

to whether a railroad employer has demonstrated by clear and convincing evidence that it would have taken the same disciplinary action if it learned of the misconduct but there had been no injury report, and not whether the railroad would have learned of the misconduct through an independent chain of events. In *Henderson*, the railroad alleged that it terminated the complainant not for reporting an injury, but because he allegedly violated five work rules. *Henderson*, 2012 WL 5391422, at *2. The Board evaluated whether the railroad was entitled to summary judgment on the affirmative defense that it would have taken the same action absent the protected conduct. It made clear that the focus of this analysis was whether, in the employer's "mindset," the alleged rules violation was a sufficient independent basis for the discipline. *Id.* at *9. The Board declined to find the railroad was entitled to summary judgment on its defense that it took action against Henderson because of his rule violations, noting "[e]ven 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." *Id*. The Board then made clear that on remand the ALJ, in considering the railroad's affirmative defense, should consider whether Henderson suffered disparate treatment as compared to non-injured employees, whether the rules cited to terminate him had been selectively enforced,

and other circumstantial evidence in the record (such as Henderson's past positive evaluations) that could shed light on whether the railroad would have taken the same action to address Henderson's purportedly unsafe conduct even in the absence of his injury report. *Id*. at *10-11.

The Board's approach to the railroad's affirmative defense in *Henderson* is consistent with the approach taken by the Third Circuit in *Araujo* and in numerous ALJ opinions under FRSA. It is also in accord with the approach that other courts and agencies take in cases involving retaliatory investigations under analogous statutes. These cases focus on whether any conduct apart from the protected activity would have independently motivated the railroad's decision, looking closely at factors that might cast doubt on the veracity of the employer's professed explanation. *See, e.g.*, *Araujo*, 708 F.3d at 163 (noting that whether or not Araujo violated the cited safety rule shed no light on whether railroad's decision to file disciplinary charges was retaliatory where Araujo argued rule had been selectively enforced against him); *Vernace v. Port Auth. Trans-Hudson Corp.,* ALJ No. 2010-FRS-00018, slip op. at 28 (OALJ Sept. 23, 2011), *aff'd,* ARB No. 12-003, 2012 WL 6849446 (ARB Dec. 21, 2012) (finding employer failed to make out affirmative defense based in part on complainant's having followed employees' typical practice); *Anderson v. AMTRAK*, slip op. at 8-9, 22-23 (finding that shoddy conduct of investigation suggested it was pretextual, thereby casting doubt on

whether employer's explanation for its adverse action would have genuinely motivated the employee's termination absent the injury report); *see also Russell*, 76 M.S.P.R. at 324-26 (noting in retaliatory investigation case that MSPB would examine the following factors to determine whether Agency made out its affirmative defense: "The strength of the agency's evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated").

The alternative approach of suggesting that even where an employee committed a serious offense warranting discipline that is discovered via a post-injury investigation, an employer may not impose discipline unless it can show that bona fide misconduct would have come to its attention through other channels has been properly rejected. *See Benjamin, 2013 WL 6354828, at *4.* For example, in *Kalil v. Dep't of Agriculture*, 479 F.3d 821 (Fed. Cir. 2007), a case arising under the federal employee Whistleblower Protection Act, the Federal Circuit upheld discipline based on the employer's motive, even though the employer would not have known of any misconduct or undertaken the disciplinary action in the absence of the protected conduct. In that case, a Department of Agriculture employee, who was himself an attorney, engaged in *ex parte* communication with the chambers of

a judge who was handling a case in which his agency was a party (but in which he personally was not involved) to accuse the agency of dishonesty. *Id.* at 824-25. The content of his disclosure to the court was itself arguably protected. *Id.* But the court rejected the argument that when the grounds for the adverse action arise from the protected disclosure, the employer cannot discipline the employee for reasons emanating from the disclosure itself. *Id.* at 825. It instead held that the "outrageous" "character of [the otherwise protected] disclosure [to the court] itself supplies clear and convincing evidence" to support discipline. *Id.* Had the *Kalil* court applied the ALJ's causation standard, the employee would have been immunized from discipline in spite of serious misconduct. Thus, even where the protected conduct is causally linked to potential legitimate bases for an investigation, one must consider whether those legitimate concerns would have independently motivated the discipline if they could be divorced from the protected conduct. *Accord Lee v. Parker-Hannifin Corp.*, ARB No. 10-021, 2012 WL 694496, at *8 (ARB Feb. 29, 2012) ("intemperate or insubordinate (unauthorized) behavior" in connection with making a whistleblower protest may justify discipline under some circumstances).

D. <u>Application of the correct affirmative defense analysis in this case.</u>

The cases cited herein demonstrate that one must focus on whether the employer had a sufficient basis for the discipline for reasons extrinsic to the

protected conduct. Applying this focus on the employer's reasons for the decision – rather than on the factual chain of events – to the instant case, one must ask whether the same discipline would have occurred were the employer aware of identical conduct (failure to take slow and deliberate steps) in the absence of a protected injury report. Such an inquiry gives the Railroad the opportunity to prove that DeFrancesco was not subjected to selective discipline because of his injury report. Factors relevant to this inquiry include how the company treats slip and falls that do not result in injuries, whether the company routinely monitors the manner in which employees walk on snow and ice, whether it disciplines employees who do not take short, deliberate steps regardless of whether they report injuries, and how Rule 5.20 and Rule B are routinely applied.[4] Also relevant is

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[4] This approach closely parallels the way that the agency and the courts evaluate an employer's defense that it should not be subject to an administrative penalty under the OSH Act for a violation of a safety or health standard because employee misconduct led to the violation. An employer prevails in this defense if it shows that it: (1) established a work rule to prevent the reckless behavior and/or unsafe condition from occurring; (2) adequately communicated the rule to its employees; (3) took steps to discover incidents of noncompliance; and (4) effectively enforced the rule whenever employees transgressed it. *P. Gioioso & Sons, Inc. v. OSHRC*, 675 F.3d 66, 71 (1st Cir. 2012). This approach ensures that an employer cannot rely on a safety program "which looked good on paper but was routinely disregarded in practice" as a means to avoid its obligation to maintain a safe workplace. *See Brock v. L.E. Myers Co.,* 818 F.2d 1270, 1275 (6th Cir. 1987). Holding employers to this kind of standard in assessing the affirmative defense in FRSA whistleblower cases makes sense because it brings appropriate scrutiny to an employer's explanation for disciplining an employee who reports an injury. Without such scrutiny, an employer's actions may chill future injury reporting,

whether other evidence suggests that, in mounting an investigation, the employer was genuinely concerned about rooting out safety problems and not simply the filing of an injury report, or whether the conduct of the investigation suggests that it was a pretext designed to unearth some plausible basis on which to punish the employee for the injury report. *See Russell*, 76 M.S.P.R. at 325. For example here, it is relevant that the investigation was conducted despite the fact that the front-line supervisor had said no investigation was necessary. *See* ARB D & O at 2.

Such an approach accommodates an employer's right to conduct and act upon legitimate investigations, which are a valuable tool in enhancing workplace safety. An employer is not required to prove it would have actually received knowledge of misconduct from channels apart from an investigation, but only that it would have imposed equivalent discipline under the same circumstances where no protected conduct was involved. And employees will not be deterred from filing injury reports, knowing that the employer reviews safety issues in a fair-minded way.[5] For these reasons, OSHA believes that the Board should consider

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which in turn leads to the concealment of safety hazards and undermines FRSA's core purposes of "promot[ing] safety in every area of railroad operations and reduc[ing] railroad-related accidents and incidents." *See* 49 U.S.C.A. § 20101).

[5] DeFrancesco argues that employees will be deterred from filing injury reports if they believe that they committed misconduct which the employer would only learn of through their injury report. DeFrancesco Br. at 11. But FRSA is not designed

whether the facts related to the employer's affirmative defense were adequately explored by the ALJ. The Board may then affirm the ALJ's finding of retaliation if it concludes that the Railroad failed to present clear and convincing evidence that it possessed reasons extrinsic to the injury report that provided independent grounds for the disciplinary action.

CONCLUSION

OSHA urges the Board to reaffirm and clarify its holding that the prima facie case is successfully made out because the protected conduct was a contributing factor to an investigation of the employee that was closely related to the ultimate discipline. OSHA further recommends that the Board clarify that an employer makes out an affirmative defense by showing by clear and convincing

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to shield employees who actually engaged in misconduct. *See Araujo*, 708 F.3d at 163 (whistleblower may be disciplined for violation of bona fide work rule that is routinely enforced); *Marano*, 2 F.3d at 1142 n.5; 135 Cong. Rec. 5033 (1989) ("[The WPA] will not shield employees who engage in wrongful conduct merely because they have at some point 'blown the whistle'....") (Explanatory Statement on S. 20). Rather, FRSA protects employees who might be fearful that the mere filing of an injury report will provide their employer the pretext to punish them.

evidence that it possessed reasons extrinsic to the protected conduct that were an independent basis for the adverse action, and that the Board consider whether, based on the facts already found by the ALJ in this case, the Board may affirm the ALJ's finding of retaliation.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

WILLIAM C. LESSER
Deputy Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

____
PAUL L. EDENFIELD
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2716
200 Constitution Avenue, NW
Washington, D.C. 20210
(202) 693-5652

Attorneys for the Assistant Secretary of Labor for
Occupational Safety and Health

CERTIFICATE OF SERVICE

I certify that copies of this BRIEF OF THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE have been served via first class mail on the following individuals this 13th day of January, 2014:

Michael P. Duff
United States Steel Corporation
Law Department
600 Grant St., Room 1500
Pittsburgh, PA 15219-2800

D. Aaron Rihn
Robert Pierce & Associates
2500 Gulf Tower
707 Grant St.
Pittsburgh, PA 15219-1918

____
PAUL L. EDENFIELD
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2716
200 Constitution Avenue, NW
Washington, D.C. 20210
(202) 693-5652