No. 15-3369

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MICHAEL MERCIER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
ADMINISTRATIVE REVIEW BOARD,

Respondent,

UNION PACIFIC RAILROAD COMPANY,

Intervenor.

On Petition for Review of the Final Decision and Order of the
United States Department of Labor's Administrative Review Board

BRIEF FOR RESPONDENT THE SECRETARY OF LABOR

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

WILLIAM C. LESSER
Deputy Associate Solicitor

RACHEL GOLDBERG
Acting Counsel for Whistleblower
Protection Programs

DAVID L. EDELI
Attorney
U.S. Department of Labor
200 Constitution Ave. NW, N-2716
Washington, DC 20210
Telephone: (202) 693-5518
Fax: (202) 693-5689
E-mail: edeli.david.l@dol.gov

SUMMARY OF THE CASE

Union Pacific Railroad Co. ("UP") discharged Petitioner Michael Mercier after his coworker reported him for sexual harassment; he went to her home, uninvited, to take photos; and he continued to act inappropriately even after UP gave him a second chance. Mercier then filed a Federal Railroad Safety Act complaint, alleging UP fired him in retaliation for making safety reports. The complaint was rejected by the Occupational Safety and Health Administration, by a Department of Labor Administrative Law Judge ("ALJ"), and finally by the Department's Administrative Review Board ("ARB"). Mercier petitioned this Court for review; Respondent Secretary of Labor now defends the ARB decision.

In the case below, the ALJ denied relief after a three-day hearing, and on the basis of witness testimony—including from UP's Equal Employment Opportunity Director, who "clearly" and "vividly" described her decision to fire Mercier after his coworker expressed concerns for her safety and threatened to sue UP. The ALJ found Mercier did not meet his burden of showing that his safety reports were a contributing factor in his termination, and the ARB affirmed. This Court should deny relief because the ALJ applied the correct legal standard, considered all relevant evidence, and made findings of fact supported by substantial evidence.

Although the Secretary will gladly participate in oral argument, he does not believe that it is necessary because the issues may be resolved based on the briefs.

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STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Administrative Law Judge's ("ALJ") decision, which the Administrative Review Board affirmed, that Mercier failed to meet his burden to show that his protected activities were a contributing factor in Union Pacific Railroad Co.'s decision to discharge him.

Cha v. Henderson,
258 F.3d 802 (8th Cir. 2001)

Kuduk v. BNSF Ry. Co.,
768 F.3d 786 (8th Cir. 2014)

Maverick Transp., LLC v. U.S. Dep't of Labor,
739 F.3d 1149 (8th Cir. 2014)

Wiest v. Tyco Elecs. Corp.,
812 F.3d 319 (3d Cir. 2016)

2. Whether the ALJ properly applied the statute of limitations and considered all relevant background evidence, and, if not, whether the error was harmless.

Consolidation Coal Co. v. Smith,
837 F.2d 321 (8th Cir. 1988)

Erickson v. U.S. Envtl. Prot. Agency,
ARB Nos. 03-002 to -004, 03-064, 2006 WL 1516646 (ARB May 31, 2006)

Henderson v. Ford Motor Co.,
403 F.3d 1026 (8th Cir. 2005)

National R.R. Passenger Corp. v. Morgan,
536 U.S. 101 (2002)

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

The Federal Rail Safety Act ("FRSA" or "the Act") protects railroad employees from discharge or other discrimination in retaliation for, among other things, engaging in safety-related protected activities. See 49 U.S.C. 20109(a), (b); see also Kuduk v. BNSF Ry. Co., 768 F.3d 786, 787 (8th Cir. 2014); Cain v. BNSF Ry. Co., ARB No. 13-006, 2014 WL 4966163, at *2 (ARB Sept. 18, 2014), aff'd in relevant part, --- F.3d ---, No. 14-9602, 2016 WL 861101, at *6 (10th Cir. Mar. 7, 2016). The Act charges the Secretary of Labor ("the Secretary") with investigating and determining the validity of any complaints of retaliation. See 49 U.S.C. 20109(d)(1), (d)(2). The Secretary's implementing regulations direct individuals to file complaints with the Occupational Safety and Health Administration ("OSHA"). See 29 C.F.R. 1982.103.

On March 22, 2008, Michael Mercier filed a complaint with OSHA, alleging that his employer Union Pacific Railroad Co. ("UP") fired him in retaliation for making safety complaints, in violation of the FRSA's whistleblower protection provision. JA 2.[1] After an investigation, OSHA found no reasonable cause to believe that UP had violated the FRSA. JA 2–5, 64. Mercier timely objected to

[1] References to the Joint Appendix are indicated by the abbreviation "JA."

OSHA's findings and requested a hearing before an Administrative Law Judge ("ALJ") pursuant to 29 C.F.R. 1982.106.

Following a three-day evidentiary hearing, the ALJ issued a Decision and Order ("D&O") on February 28, 2013, finding that Mercier failed to meet his burden under the FRSA to show by a preponderance of the evidence that his protected activities were a contributing factor in his discharge. JA 36–63. Mercier petitioned for review by the Administrative Review Board ("ARB" or "Board"). On August 26, 2015, the Board affirmed the ALJ's decision in a Final Decision and Order; Deputy Chief Administrative Appeals Judge E. Cooper Brown filed a concurring opinion. JA 64–67. Mercier filed a timely Petition for Review with this Court.

B. Statement of Facts

Mercier worked for UP as a locomotive engineer for nine years before the company terminated his employment. JA 37 (D&O 2). UP dismissed Mercier for violating a waiver agreement related to an internal complaint filed by Mercier's coworker Deana Symons in which Symons alleged that Mercier had sexually harassed her in violation of UP's Equal Employment Opportunity ("EEO") policy. Id.

1. Protected Activities and Adverse Actions Prior to the EEO Complaint

Mercier made several complaints to UP management in 2006 about safety and other issues. In March and April of 2006, he reported that an engineer had been improperly told that he did not need a track warrant to do a power swap on the main line. JA 38 (D&O 3).[2] In July, he made several complaints—about yard masters improperly throwing switches, a crew alerter defect, and a transport driver talking on his cell phone and speeding. Id. In September, he passed complaints along to Lance Hardisty, the Superintendent of Mercier's UP service unit, about the improper releasing of track warrants. Id. And in October, he reported several other concerns about crew transportation, including the use of vehicles without proper luggage racks. Id.

In addition to making complaints and passing along reports, Mercier also acted during this time as a union officer of the Brotherhood of Locomotive Engineers and Trainmen (BLET). In September of 2006, he acted as a formal representative for another employee in an investigation about a workplace injury. JA 38 (D&O 3). On November 17, 2006, Mercier attempted to intercede when a union member was being held after his hours of service to be questioned about a crossing accident. JA 39 (D&O 4). Mercier subsequently reported the incident to

[2] The ALJ's decision, where cited here and throughout this Statement of Facts, contains rough descriptions of the technical terms necessary to understand Mercier's safety reports.

management and to Bruce MacArthur, the General Chairman of the BLET, who passed it along to the Federal Railroad Administration. Id.

On November 18, 2006, the morning after the hours-of-service incident, Mercier was instructed to take an SUV to the next worksite but refused to do so because the seatbelt did not fit over his body. JA 39 (D&O 4).[3] Shortly thereafter, Mercier's supervisor at the time, Andrew Tennessen, sought out Mercier to discuss the incident. Id. Tennessen found Mercier and a conductor asleep and assessed each a minor infraction for failing to follow the correct rest procedures. Id.; JA 196 (Hr'g Tr. 107: 13–14). Mercier did not file a grievance about this sleeping-policy infraction. JA 39 (D&O 4).

In a subsequent email exchange, Tennessen and Hardisty discussed the two incidents. An email that Hardisty forwarded to Tennessen about the incident contained a message from another UP employee, the "corridor manager," who stated: "Enginneer [sic] Mercier refusing to take a cab this am. Safety belt won't go around his big belly. I had him fired twice, should have never brought him back [. . .] :)." JA 40 (D&O 5). Tennessen responded to Hardisty:

> Went to speak to Mercier about seat belt issue and he and conductor were sleeping on power. He states he is using the empowerment

[3] In his brief, Mercier states the seatbelt was "defective," Pet'r's Br. 11, but this description is not supported by his citation to the record, id. (citing JA 194). The issue appears to have been that the belt did not fit over his body. JA 194 (Hr'g Tr. 105: 14–15).

> policy and will continue to use it to refuse limos due to unsafe conditions, including when seat belts do not fit. He also states that using the U-man and utility vehicle is not correct. I explained that was not true. I will get a seat belt extension for the Mankato utility vehicle but expect Mercier to continue this type of activity. Does he need a fitness for duty evaluation? He appears to be obese.

Id.[4]

Later in the morning of November 18, there was a backup of several trains at the Mankato station. JA 40 (D&O 5). In the aftermath, Mercier and a conductor were charged with using an improper airbrake test—a serious infraction. Id.; JA 626–31. At a hearing conducted about the incident, another employee testified that he "may have" told Mercier and the conductor that they did not need to use the proper test. JA 40 (D&O 5). Nonetheless, Hardisty assessed a "level four" violation. Id. Both Mercier and the conductor were suspended for thirty days. Id.; JA 1100–01, and Mercier's engineer's license was suspended for thirty days, JA 40 (D&O 5).

After the airbrake incident, Mercier made several other complaints and reports. Later in November 2006, he reported issues with walking conditions at one station. JA 40 (D&O 5). In January 2007, he reported that a supervisor was

[4] The discussion of "limos" refers to the vehicles of contracted transportation companies. UP contracted with taxi cab companies to provide transportation for employees between stations and train locations, and UP appears to use to the term "limo" to refer broadly to the contracted vehicles. JA 434–35; JA 438 (referring to UP's "Director of Limo Operations").

not performing certification rides correctly. JA 41 (D&O 6). In May 2007, he made a complaint about an open bottle of liquor in the door handle of a transport driver. Id. And on June 12, he reported excessive brush along a track. Id.

2. Deana Symons's EEO Complaint about Mercier

Deana Symons was hired by UP as a student conductor in March 2007. JA 41 (D&O 6). At the hearing before the ALJ, Symons testified that over the first three or four months of her work at UP, she heard from various coworkers that Mercier "had been speaking to them about her and commenting that she had been having sexual relations with multiple co-workers." Id.; JA 305 (Hr'g Tr. 329 1–4, Test. of Deana Symons) ("[One coworker] told me that Mercier had told him to get it while the getting is good, that I was giving it out to everybody I was riding with.").

In late June 2007, another coworker, Mike Thomas, told Symons that Mercier had sent him text messages in a similar vein. JA 42 (D&O 7). Symons testified that she saw the messages, which included an exchange in which Mercier had asked Thomas "[w]ho's doing the student Dana, I will send them some free holy rollie sex powder." Id. When Thomas advised Symons of a subsequent string of text messages from Mercier about her, Symons texted Mercier directly and told him she believed his actions amounted to harassment and that the issue needed to be addressed by management. JA 42 (D&O 8).

Symons reported the text-messaging incident to the UP EEO hotline on July 7, 2007. JA 42 (D&O 8). UP's EEO Director Melissa Schop received the report and initiated an investigation, which included calls to several of Mercier's supervisors. Id. After confirming the existence of the text messages, Schop instructed one of Mercier's supervisors that UP needed to charge Mercier with an EEO policy violation. Id. On July 9, UP removed Mercier from service. JA 43 (D&O 9). He received a letter dated July 13 that provisionally charged him with a "level 5" violation, which usually results in permanent dismissal, pending the results of a formal investigation. Id.

Two days after his removal, while awaiting a hearing on the violation, Mercier attempted to enter UP property to represent a union member at another disciplinary hearing. JA 44 (D&O 9). UP denied Mercier access. Id. Subsequently, however, UP rescheduled the union member's hearing to a site off of company property so that Mercier could participate as the member's chosen representative. Id.

3. Incident Where Mercier Went, Uninvited, to Symons's Home and Took Photos

On July 16, 2007, an incident involving Mercier occurred at Symons's home. JA 44 (D&O 9). That day, Thomas was visiting Symons at her home in an effort to help her prepare for the upcoming EEO hearing about Mercier's conduct, which was to be held on July 19. Id. During his visit, Thomas looked out of a

window and saw Mercier in his car, taking photos of Symons's house. Id. Symons's three-year old daughter was at home at the time. Id. Symons testified that she was frightened and unsure of how Mercier got her address and, feeling threatened, she called the EEO hotline again, then called the police. JA 44–45 (D&O 9–10). Mercier admitted during the ALJ hearing that he had indeed gone to Symons's house and taken photos. JA 45 (D&O 10).

4. Waiver Agreement and Return to Work

On July 17, 2007, two days before the scheduled July 19 EEO hearing, BLET Chairman MacArthur asked Hardisty if Mercier could be reinstated. JA 45 (D&O 10). MacArthur described Hardisty's response as "cordial and easily agreeable to return [Mercier] to service." Id. UP agreed to reinstate Mercier if he would sign an agreement ("the Waiver Agreement") that included several conditions. JA 45–46 (D&O 10–11). The Waiver Agreement, which Mercier eventually signed on July 27, was based on a UP template for EEO violations with conditions that included waiving a hearing on any subsequent violation, taking an EEO class, and refraining from discussing the complaint at work or retaliating against those who filed the initial complaint. JA 46–47 (D&O 11–12); JA 770–773 (Waiver Agreement). It also imposed a thirty-day suspension. JA 46–47 (D&O 11–12).

Soon after his return to work in August 2007, Mercier took actions that reflected poorly on his intent to abide by the Waiver Agreement. On August 8, 2007, Mercier presented Symons with an apology letter as required by the agreement. JA 47 (D&O 12). Symons testified that she was "offended" by the letter. Id. The letter, as she put it, "'wasn't an apology,' but was rather a statement that [Mercier] was sorry Thomas had shown Symons his text messages and was sorry if Thomas' actions had offended her." Id. (quoting Symons's testimony); JA 323–24 (Hr'g Tr. 347:11–349:19). Symons called the EEO Hotline to advise UP about the "apology." JA 325 (Hr'g Tr. 349: 9–15).

Then, on September 18, 2007, Mercier posted on the BLET union blog about an unrelated issue of being a victim of identity theft. JA 47 (D&O 12). In the post, though, he also "lamented how soon the identity theft had come after he had 'lost $10,000 in earnings because of a so-called friend,' referring, ostensibly, to Thomas." Id. (quoting the blog post).[5] Thomas later reported the blog post to Schop. JA 551–552.

In late September 2007, Mercier attended an EEO training in Omaha, Nebraska, as required by the Waiver Agreement. JA 48 (D&O 13). UP's Director of Diversity, Yvonne Method-Walker, subsequently communicated her concerns

[5] During September 2007, Mercier also made two more safety reports, reporting weeds, bad footing, and a defective switch; and reporting an issue with a crew alerter and speedometer on an engine. JA 47 (D&O 12).

about Mercier's participation to one of Mercier's supervisors and to EEO Director Schop. Id. Method-Walker said that Mercier was "very bitter" and that he was preoccupied with his perceived bad treatment by UP throughout the EEO process. Id. (quoting Method-Walker's email). She recommended that Mercier be "*strongly* counseled to avoid actions . . . that put him at risk for claims of retaliation." Id. (emphasis in original).[6]

5. Federal Railroad Administration Locomotive Engineer Board Reversal of Discipline for Airbrake Test Violation

Mercier had appealed the thirty-day suspension and license revocation that he received in November 2006 for improperly performing the airbrake test. JA 34. On October 27, 2009, the Federal Railroad Administration Locomotive Engineer Board, the entity to which he appealed the discipline, ruled in Mercier's favor, reversing his suspension and ordering backpay. Id. On October 29, 2007, the Locomotive Engineer Board ruled in Mercier's favor on his license revocation. Id.; JA 40 (D&O 5); JA 756–59.

6. Underwear Comment, Symon's Continued Complaints to EEO Director Schop about Mercier, and Mercier's Final Termination

On October 16, 2007, Mercier met with one of his supervisors, Eric Schwendeman, to discuss an unrelated issue. During the meeting, Mercier said to

[6] The emphasis appeared in Method-Walker's email, and was reproduced in the ALJ's decision.

Schwendeman that Thomas had showed him (Mercier) a pair of underwear that belonged to Symons. JA 50–51 (D&O 15–16). Mercier told Schwendeman: "Oh yeah, they were talking about this f . . . big (holding his hands about 18-22 inches apart) and red." JA 51 (D&O 16). Schwendeman called Thomas, who denied having done so. Id. Schwendeman discussed the incident with Symons on October 24, 2007. JA 59 (D&O 24). Schwendeman also relayed this information to EEO Director Schop. Id.; JA 51 (D&O 16). While Schop believed this constituted retaliation, she did not believe it was sufficient alone to show that Mercier had violated the Waiver Agreement. JA 51 (D&O 16).

Beginning on October 24, 2007, EEO Director Schop received "a series of phone calls and e-mails" from Symons, in which Symons said that she had been experiencing "many instances of retaliation." JA 51 (D&O 16). Symons complained about the underwear incident. JA 59 (D&O 24). Another incident about which she complained related to an alleged conversation that Mercier had with a new employee, Matthew Vossen, about Symons earlier in October. Symons told Schop that Vossen had told her (Symons) that Mercier "had talked about both Mike Thomas and myself to [Vossen] stating that we had lied and that I had gotten [Mercier] fired." JA 50 (D&O 15) (quoting Symons's testimony).[7]

[7] Schop testified that Vossen confirmed Symons's version of the events in a telephone conversation with Schop. JA 50 (D&O 15). But Vossen and another

Schop investigated Symons's complaints and later called UP's labor relations department and said she wanted to terminate Mercier. JA 51 (D&O 16). Schop "then called Hardisty and told him the same thing." Id. Schop testified that "the EEO Department is solely responsible for deciding what level of discipline to assess against an employee for an EEO violation." Id. Hardisty corroborated this in his testimony. Id. UP removed Mercier from service on October 31, 2007. UP dismissed Mercier on November 5, giving the reason that he had violated the terms of the Waiver Agreement by "creat[ing] a hostile work environment for Deana Symons by making inappropriate statements concerning her and . . . act[ing] in an intimidating and retaliatory manner towards both her and Mike Thomas." Id.

7. Arbitration Proceedings and Return to Work Again

Mercier contested his dismissal through the BLET collective bargaining agreement ("CBA") arbitration process. UP was represented by Katherine Novak, an attorney in its labor relations division. JA 51 (D&O 17). During preparation for the arbitration proceedings, Novak told BLET Chairman MacArthur that she was concerned about the case. JA 58 (D&O 23). She later testified that she was concerned because, among other reasons, "arbitrators are very reluctant to uphold a

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employee who was present during the conversation later disputed that Vossen said as much. Id. At the hearing in front of the ALJ, Vossen admitted that Mercier had told him "to be careful of what you say and how you treat other people," but Vossen "could not recall" if Mercier had mentioned Symons's name. Id.

dismissal of an employee near retirement," but that her research after the conversation with MacArthur convinced her that UP could win the case. Id.

On December 27, 2007, as UP continued to prepare for the arbitration proceeding, Symons sent Schop an email expressing concerns for her personal safety and exasperation with UP's handling of the matter. The email stated, in part:

> During the months of July through August I dreaded having to go to work, the thought of having to go into the yard office makes me sick with anxiety. . . .
>
> I want it known that I am very uncomfortable and worried about my personal safety in regards to Mike Mercier returning to work. I have stated this before in the EEO reports I made. I will be making an addition to the original EEO report if and when Mike Mercier returns to work. UP may not be considering his past history of actions but he has shown over and over that he cannot and will not stop harassing (sic) me. As in my conversations with you, Steve Forsman and the EEO report I am scared of the unpridictable (sic) actions of Mike Mercier. His coming to my home, joking about people following me while I am on duty at work, and his phone conversation with Mike Thomas in which he stated he didn't know why he does the things he does . . . **concern me a great deal**. I hope that in your meeting today some of this is taken into consideration, if not at least my concerns have been documented to you and UP.

JA 59–60 (D&O 24–25) (emphasis in original).[8]

UP decided not to back down in the face of Mercier's CBA arbitration claim. Novak testified to three reasons why UP continued to defend its decision to

[8] The emphasis appeared in Symons's email to Schop, and was reproduced in the ALJ's decision. JA 695–96.

discharge Mercier: (1) UP continued to believe that Mercier had engaged in retaliation in violation of policy; (2) UP wanted to support its female workers in the field by supporting the EEO policy; and (3) UP was concerned that Symons would file either a government charge or pursue litigation against the company. JA 58 (D&O 23). The ALJ specifically found Novak's testimony to be credible. Id.

Ultimately, the arbitrators ruled in favor of Mercier. Mercier returned to work on April 1, 2010. JA 51 (D&O 17).

C. Secretary's FRSA Findings and ALJ Pre-Hearing Orders

On March 22, 2008, Mercier filed his FRSA complaint with OSHA. JA 2. After an investigation, OSHA found no reasonable cause to believe that UP had violated the law. JA 2–5; 64. Mercier then requested a hearing before an ALJ.

During the ALJ proceedings, UP moved unsuccessfully for a summary decision and dismissal based on two arguments: (1) that the Secretary lacked jurisdiction because everything but the final termination had occurred prior to the August 3, 2007 effective date of the FRSA amendments that granted investigative authority to the Department of Labor ("Department"); and (2) that the election-of-remedies provision in the FRSA barred Mercier from pursuing both a FRSA complaint and the CBA arbitration. JA 6–10. On June 3, 2009, the ALJ denied UP's motion. Id.

In ruling on the jurisdictional issue, the ALJ concluded that because Mercier's initial suspension in November 2006 took place prior to the August 3, 2007 effective date of the FRSA amendments, it "falls outside the reach of the statute and is not actionable." JA 9. The ALJ went on to conclude, however, that:

> [Mercier's] second termination [on November 5, 2007] occurred after [the Department] had jurisdiction to adjudicate FRSA complaints, and, as a result, the court has jurisdiction. Even though only the second termination is actionable, the protected activity leading up to the first termination/suspension, and the termination/suspension itself, is relevant and therefore, admissible because it provides a complete picture of the relationship between [Mercier] and [UP] and whether [Mercier] was discriminated against because of his protected activity.

Id. On the election-of-remedies issue, the ALJ concluded that the FRSA's election-of-remedies provision did not bar Mercier from pursuing an FRSA complaint after already having pursued a CBA arbitration. JA 8. On interlocutory appeal, the ARB affirmed the election-of-remedies ruling. JA 20–29.

On May 30, 2012, the ALJ denied UP's motion for summary decision on the merits, ruling that there were material questions regarding causation. JA 33–35. Specifically, the ALJ noted that Mercier had reported several safety violations in 2006 including up to just before he was suspended for the airbrake test incident, and he had successfully appealed the suspension—resulting in rulings in his favor on October 27 and October 29, 2007, which was shortly before he was terminated for the EEO violation on November 5, 2007. JA 34–35. The ALJ ruled that the short time period between the resolution of Mercier's prior discipline and his

dismissal created a material issue of fact as to whether UP retaliated against him. Id.

D. The ALJ's Post-Hearing Decision and Order

The ALJ held a three-day hearing in June 2012, with testimony from various witnesses, including Mercier, Symons, Schop, and Hardisty. In post-trial briefing, the parties debated the proper inferences to be drawn from factual disputes in the record, and debated whether UP's concern that Symons might file suit against UP was a permissible reason to dismiss Mercier. CL 73–77.[9]

On February 28, 2013, the ALJ issued a Decision and Order that included extensive findings of fact about all of Mercier's safety reports and his disciplinary history. JA 36–63 (D&O 1–28). The ALJ found that Mercier had engaged in seventeen separate protected activities beginning in April 2006 through October 2007. JA 56 (D&O 21). The ALJ noted the FRSA's 180-day statute of limitations and that Mercier filed his FRSA complaint on March 27, 2008, and concluded that Mercier could not seek redress for any alleged retaliatory adverse actions that occurred before September 29, 2007 (i.e., 180 days before March 27, 2008). JA 56–57 (D&O 21–22). Thus, Mercier could seek redress only for the allegedly retaliatory November 5, 2007 termination. JA 57 (D&O 22).

[9] References to the documents in the certified list filed with this Court are indicated by the abbreviation "CL," followed by the document number.

The ALJ then devoted extensive analysis to the "contributing factor" causation element. Ultimately, the ALJ concluded that Mercier had failed to show by a preponderance of the evidence that his protected activities were a contributing factor in UP's decision to terminate his employment. JA 57–63 (D&O 22–28). The ALJ denied relief on this basis, without discussing UP's affirmative defense. Id.

E. The Board's Final Decision and Order

Mercier petitioned for review to the Board, arguing that he had not violated UP's EEO policy or the Waiver Agreement, and therefore that his firing was pretextual. JA 81–98. He also added a brief argument that the ALJ had misapplied the FRSA statute of limitations to limit consideration of UP's actions that fell outside of the limitations period, contrary to the background-evidence rule explained in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002). JA 98–99. In response, UP addressed the background-evidence rule argument by pointing to the ALJ's June 3, 2009 order, which showed that the ALJ had understood and correctly applied Morgan. JA 125. UP argued also that any error was harmless. JA 126–27. In his reply brief, Mercier did not explain how he was prejudiced by the error. JA 139–40.

On August 26, 2015, the Board issued a Final Decision and Order in which it affirmed the ALJ's Decision and Order denying Mercier's complaint. The Board

noted that the ALJ had found no contributing factor "[a]fter considering all the evidence as a whole." JA 65. The Board examined the record and considered "the parties' arguments on appeal" and affirmed the decision "[f]or the reasons cited by the ALJ" and "as supported by substantial evidence." Id.

This petition for review followed.

SUMMARY OF ARGUMENT

The Court should affirm the Board's decision in this FRSA whistleblower case. This Court should reject Mercier's argument that the ALJ did not apply the correct contributing factor causation standard. Mercier forfeited this argument by failing to argue it below. Moreover, the ALJ correctly identified and applied the governing contributing-factor causation standard.

Under the deferential substantial-evidence standard of the Administrative Procedure Act, the Court should affirm because substantial evidence supports the ALJ's conclusion, based on the ALJ's consideration of all the evidence in the record, that Mercier failed to meet his burden of showing that his protected activities were a contributing factor in his termination for sexual harassment.

Though this Court need only identify "substantial" evidence supporting the ALJ's decision, the evidence here is overwhelming. Mercier had every opportunity to present evidence to meet his burden: the parties pursued extensive discovery, the ALJ denied a summary-decision motion, and a three-day hearing

was held. The testimony, however, militated strongly against Mercier's case. The ALJ found that UP's EEO Director Schop "clearly" and "vividly" explained her decision to fire Mercier because she believed that Mercier had violated the Waiver Agreement, she wanted to support female workers in the field by supporting UP's EEO policy, and to protect Symons from Mercier's harassment and protect UP from potential liability for Mercier's sexual harassment.

The ALJ also gave particular weight to Symons's frantic calls and emails to UP—stating her fear of Mercier, requesting protection from him, and threatening legal action against UP—finding that these communications corroborated and supported Schop's testimony. Ultimately, the ALJ determined that Mercier had not shown the requisite causal connection between his safety reports and his firing. After considering this and all the evidence in the record, no factfinder would have found otherwise.

Lastly, the ALJ properly applied the background-evidence rule as set out in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002). The ALJ correctly applied the FRSA's statute of limitations to limit the allegations that would be actionable, but nonetheless considered all relevant evidence as required by Morgan. Moreover, any error was harmless, because Mercier was not prejudiced, and the result would be the same if the case were remanded for further proceedings.

The Board affirmed the ALJ's decision for the reasons cited by the ALJ and as supported by substantial evidence. For the same reasons, this Court should affirm the Board's decision and deny Mercier's petition.

ARGUMENT

I. STANDARD OF REVIEW

Judicial review of the ARB's decision is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2). See 49 U.S.C. 20109(d)(4) ("The review shall conform to chapter 7 of title 5."); Maverick Transp., LLC v. U.S. Dep't of Labor, 739 F.3d 1149, 1153 (8th Cir. 2014). Under this deferential standard, the Court must affirm the ARB's decision unless it is "unsupported by substantial evidence" or is "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." Maverick Transp., 739 F.3d at 1153, 1155 (citing 5 U.S.C. 706(2)(A)).

The substantial-evidence test is a narrow one, under which the reviewing court does not substitute its judgment for that of the agency. See Dawson Farms v. Risk Mgmt. Agency, 698 F.3d 1079, 1083 (8th Cir. 2012). "[S]ubstantial evidence" means "more than a scintilla but less than a preponderance." Midgett v. Wash. Grp. Int'l Long Term Disability Plan, 561 F.3d 887, 897 (8th Cir. 2009) (citation omitted). It is "relevant evidence that a reasonable mind would accept as adequate to support the [agency's] conclusion." Maverick Transp., 739 F.3d at

1153 (citation omitted). "Evidence may be substantial even when two inconsistent conclusions might have been drawn from it." Syverson v. U.S. Dep't of Agric., 601 F.3d 793, 800 (8th Cir. 2010). Thus, the question is "whether substantial evidence supports the Secretary's conclusion, not whether substantial evidence exists to support [an] alternative view." Carroll v. U.S. Dep't of Labor, 78 F.3d 352, 358 (8th Cir. 1996) (citing Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992)).

In considering whether the agency's decision is supported by substantial evidence, the Court considers the whole record before it. See Carroll, 78 F.3d at 358 (citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 487–88 (1951)). This "'includ[es] the ALJ's recommendation and any evidence that is contrary to the agency's determination.'" Id. at 357 (quoting Simon v. Simmons Foods, Inc., 49 F.3d 386, 389 (8th Cir. 1995)). Where the Secretary's opinion "is in agreement with and based in part on the ALJ's credibility determinations, it is entitled to 'great deference' by this Court." Id. (quoting Wilson Trophy Co. v. NLRB, 989 F.2d 1502, 1507 (8th Cir. 1993)); see also Lockheed Martin Corp. v. Admin. Review Bd., 717 F.3d 1121, 1129 (10th Cir. 2013) ("The Board's decision is entitled to a presumption of regularity, and the challenger bears the burden of persuasion." (internal quotation marks and citation omitted)).

Legal determinations by the Board or an ALJ are reviewed *de novo*, with appropriate deference to any interpretation of ambiguities in the statute. See

Pattison Sand Co. v. Fed. Mine Safety & Health Review Comm'n, 688 F.3d 507, 512 (8th Cir. 2012) (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)); see also Maverick Transp., 739 F.3d at 1153 (applying Chevron deference to the Board's application of the statute of limitations under the Surface Transportation Assistance Act).[10] Thus, "[a]s long as the ARB correctly applied the law and the ALJ's 'factual findings are supported by substantial evidence,'" this Court "will affirm the ARB's decision 'even though [the Court] might have reached a different decision[.]'" Maverick Transp., 739 F.3d at 1153 (quoting Wilson Trophy, 989 F.2d at 1507).

II. THE FRSA AND ITS APPLICABLE BURDENS

The Federal Rail Safety Act ("FRSA" or "the Act") protects railroad employees from discharge or other discrimination in retaliation for, in relevant part, reporting hazardous safety conditions or refusing to work when confronted by a hazardous safety condition. See 49 U.S.C. 20109(b)(1); see also Kuduk v. BNSF Ry. Co., 768 F.3d 786, 787 (8th Cir. 2014); Cain v. BNSF Ry. Co., ARB No. 13-006, 2014 WL 4966163, at *2 (ARB Sept. 18, 2014), aff'd in relevant part, --- F.3d ---, No. 14-9602, 2016 WL 861101, at *6 (10th Cir. Mar. 7, 2016).

[10] The Secretary's expertise in employee protection supports deference to his interpretation of whistleblower statutes. See Bechtel Constr. Co. v. Sec'y of Labor, 50 F.3d 926, 933 (11th Cir. 1995) (citing English v. Gen. Elec. Co., 496 U.S. 72, 83 (1990)).

The FRSA incorporates the rules and procedures, as well as the burdens of proof, set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121. See 49 U.S.C. 20109(d)(2)(A). Under these burdens, the trier of fact "may determine that a violation . . . has occurred only if" the employee demonstrates that protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. 42121(b)(2)(B)(iii) (emphasis added).

Thus, a FRSA whistleblower plaintiff must demonstrate, by a preponderance of the evidence, that (1) the plaintiff engaged in a protected activity; (2) the railroad employer knew or suspected that the plaintiff engaged in a protected activity; (3) the plaintiff suffered an adverse action; and (4) the protected activity was a contributing factor in the adverse action. See 29 C.F.R. 1982.104(e)(2); see, e.g., Kuduk, 768 F.3d at 789; Araujo v. N.J. Transit Rail Operations, Inc., 708 F.3d 152, 157–59 (3d Cir. 2013). If the plaintiff can make this showing, the burden shifts to the employer to show by clear and convincing evidence that the employer would have taken the same adverse action absent the protected activity. See Kuduk, 768 F.3d at 789.

III. THE ALJ PROPERLY IDENTIFIED AND APPLIED THE CONTRIBUTING FACTOR LEGAL STANDARD FOR CAUSATION, AND THE ALJ'S DETERMINATION THAT MERCIER HAD NOT MET HIS BURDEN OF SHOWING CAUSATION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

The ALJ in this case properly stated and applied the governing legal standard to determine that Mercier failed to meet his burden of showing that his protected activity was "a contributing factor" in UP's decision to terminate his employment. The ARB reviewed the decision and, citing the same contributing factor causation standard as used by the ALJ, determined that the ALJ's ultimate conclusion was supported by substantial evidence. Because the ALJ correctly applied the FRSA's legal standard and his ultimate conclusions are supported by substantial evidence, his decision should be affirmed. See Maverick Transp., 739 F.3d at 1153.

A. The ALJ Correctly Identified and Applied the Contributing Factor Legal Standard for Causation.

The ALJ correctly stated and applied the "contributing factor" standard of causation within the FRSA's burden-shifting framework. JA 53 (D&O 18). Under that framework, Mercier had the initial burden of demonstrating by a preponderance of the evidence that that his protected activities were "a contributing factor" in UP's decision to terminate his employment. Id. Because Mercier did not satisfy his burden, the ALJ never needed to reach UP's affirmative

defense that it would have made the same decision absent the protected activity. Id.

Mercier argues that the ALJ applied a more stringent standard than the FRSA's contributing factor standard. Pet'r's Br. 40. As a threshold matter, Mercier forfeited this argument because he failed to raise it in any substantial way in his briefing before the Board. His only reference to the ALJ's application of the causation standard was in a footnote, without any citation to the ALJ's decision or other developed argumentation. JA 82 n.1. Such a skeletal reference is not sufficient to raise an issue before the ARB. See Petersen v. Union Pac. R.R. Co., ARB No. 13-090, 2014 WL 6850019, at *2–3 & n.15 (ARB Nov. 20, 2014) ("[I]t is a 'settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'" (citation omitted)). Mercier therefore should not be allowed to do so now for the first time. See Maverick Transp., 739 F.3d at 1153 n.3 (refusing to consider issues not raised before the ARB).

Even if the Court were to consider Mercier's argument on this point, it fails on the merits. Mercier points to a statement in the ALJ's Decision and Order as allegedly showing that the ALJ applied the incorrect causation standard: "Complainant argues this termination was pretextual, that is, he was fired because of his protected activity not because he violated Respondent's EEO policy."

Pet'r's Br. 40 (quoting JA 57 (D&O 22)) (emphasis in Pet'r's Br.). But this quote is not the ALJ's statement of the legal standard; it is the ALJ's summary of *Mercier's* arguments in his post-trial brief.

Mercier also argues that the ALJ erred because he found "that Mercier had not established protected activity was the predominant cause of his termination." Pet'r's Br. 40. Mercier provides no citation to the ALJ's decision for this argument; nor could he because the ALJ made no such finding. The ALJ found that Mercier had not established that his protected activities were "a contributing factor." JA 63 (D&O 28). This accords with the contributing factor causation standard, under which 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." Kuduk, 768 F.3d at 791 (internal quotation marks omitted).

B. Substantial Evidence in the Record Supports the ALJ's Determination that Mercier's Protected Activities Were Not a Contributing Factor to His Employment Termination.

Mercier has fallen far short of showing that the ALJ's causation finding was not supported by substantial evidence. The ALJ rejected Mercier's core pretext argument on the basis of extensive factual findings about UP's decision-making process. These findings were based on credibility determinations about witness testimony, and they are therefore entitled to "great deference" by this Court. Carroll, 78 F.3d at 358 (quoting Wilson Trophy Co., 989 F.2d at 1507). The ALJ

also made factual findings about Mercier's disciplinary history that severely undercut Mercier's "pattern of retaliation" and disparate-treatment arguments. Together, this substantial evidence shows that EEO Director Schop made the decision to discharge Mercier—and his protected activity played no role and had no impact on her decision. Rather, Schop decided to discharge Mercier because she believed that he violated the Waiver Agreement, she was concerned that Symons would sue UP, and she wanted to show support for women working in the field by supporting UP's EEO policy.

1. *The ALJ's causation finding was based in significant part on his determination that EEO Director Schop's testimony was credible and persuasive.*

The ALJ found EEO Director Schop to be a particularly convincing witness, and he based his causation finding in large part on her testimony. JA 63 (D&O 28). Because Schop directed multiple investigations of Mercier's conduct and made the decision about whether to terminate him, the ALJ's credibility determination and the weight he gave to her testimony provides substantial evidence supporting the ALJ's ultimate causation finding—and undermines any inference about the relevance of Mercier's prior protected activities and/or his disciplinary history.

The ALJ's finding that Schop "was the ultimate decision maker" was based on her testimony, which the ALJ found persuasive. JA 60 (D&O 25). The ALJ found that EEO Director Schop testified "repeatedly and clearly" that she had made the decision to terminate Mercier based on Symons's EEO complaint and Mercier's subsequent conduct. Id. The ALJ specifically noted Schop's testimony that "she did not contact Hardisty to tell him about her recommendation that Complainant be terminated 'until the decision had been made.'" Id. (quoting Schop's testimony). Because these factual findings were supported by the ALJ's credibility determinations, they must be afforded great deference.[11]

Schop's concerns about Mercier's behavior were "revealed vividly in her testimony." JA 59 (D&O 24). In deciding to terminate Mercier, Schop was concerned first about "the work environment for Thomas and Symons." Id. Schop testified that she "'absolutely felt that he was retaliating against them, and he was creating a hostile work environment for them.'" Id. (quoting Schop's testimony). Schop was also concerned that Symons "'intended to get a lawyer, and that she

[11] Mercier conflates the ALJ's determination that Schop made the decision to terminate Mercier with a determination that Schop had no knowledge of Mercier's protected activity. Pet'r's Br. 54–55. While proving the employer's actual or constructive knowledge is necessary to make out a successful FRSA claim, see Kuduk, 768 F. 3d at 791, it is not alone sufficient to support one, as Mercier seems to suggest. In addition to showing knowledge, a complainant *also* must show causation. Id. Based on the facts presented, the ALJ reasonably found that Mercier could not show the latter. Regardless, Mercier points to no evidence in the record that Schop had actual knowledge of Mercier's protected activities.

was going to sue the company.'" Id. (quoting Schop's testimony). Schop testified that Symons was "'extremely angry with Union Pacific and with me that we weren't doing anything to protect her in her work environment.'" Id. (quoting Schop's testimony).

The ALJ's decision to credit Schop's testimony is additionally supported by the distressed communications from Symons to Schop, demonstrating Symons's fear of Mercier and her anger at UP. As she stated in an email to Schop:

> I want it known that I am very uncomfortable and worried about my personal safety in regards to Mike Mercier returning to work. . . . . I will be making an addition to the original EEO report if and when Mike Mercier returns to work. UP may not be considering his past history of actions but he has shown over and over that he cannot and will not stop harassing (sic) me. As in my conversations with you, Steve Forsman and the EEO report I am scared of the unpredictable (sic) actions of Mike Mercier. His coming to my home, joking about people following me while I am on duty at work, and his phone conversation with Mike Thomas in which he stated he didn't know why he does the things he does . . . **concern me a great deal**.

JA 59–60 (D&O 23–24) (emphasis in Symons's original email). There is no dispute that Schop knew that Symons was outraged at Mercier's conduct and frightened for her personal safety, and was beseeching UP to take action.

In making the ultimate determination about causation, the ALJ credited Schop's testimony that her reasons for discharging Mercier included:

> Symons' verbal statements and written emails; [Mercier's] red panty statement . . . ; Vossen's verbal statement about derogatory comments; Thomas' verbal statements about derogatory comments; [Mercier's] performance in the EEO training session; [Mercier's] insincere apology and

[Mercier's] blog post regarding Thomas.

JA 63 (D&O 28). The ALJ then specifically found that Schop's decisions to charge Mercier with an EEO violation and to terminate him for violating the Waiver Agreement were not in retaliation for his safety reports or related to any other of prior adverse employment actions. Id.[12] The evidence supporting the ALJ's decision is overwhelming, and it far exceeds that necessary to affirm a causation finding on the basis of substantial evidence.

2. *The ALJ correctly afforded EEO Director Schop the latitude to reasonably apply UP's EEO policy.*

This Court should reject Mercier's various arguments about whether he actually violated UP's EEO policy, whether his conduct was offensive enough to merit discipline in response to Symons's EEO complaint, or whether he violated the Waiver Agreement warranting his termination. Pet'r's Br. 45–52. Whether he

[12] Mercier argues that the joint decision about whether to continue defending the termination in Mercier's CBA arbitration shows that the EEO Department and the service unit worked together to terminate Mercier. Pet'r's Br. 56–57. But Hardisty's involvement in this decision does not undermine the ALJ's conclusion that Schop made the initial termination decision. In any case, the Novak memorandum that Mercier mentions, Pet'r's Br. 56, reinforces the ALJ's conclusions (1) that Mercier's protected activity played no part in decisions to terminate him or to not reinstate him in the face of his CBA arbitration, and (2) that in addition to their continued belief that he violated the Waiver Agreement, UP also refused to back down in order to support female employees in the workplace and to head off a lawsuit against UP by Symons—neither of which indicate a violation of the FRSA. Novak Memorandum, JA 986–89; see also infra § III(C). Moreover, the ALJ specifically found Novak's testimony about why UP continued to defend the termination to be credible. JA 58 (D&O 23).

violated UP's EEO policy or his Waiver Agreement are not the issue. Rather, the issue is whether substantial evidence supports the ALJ's conclusion that EEO Director Schop had reason to believe that Mercier violated the EEO policy and his Waiver Agreement. As outlined above, substantial evidence supports the ALJ's conclusion that she did. This Court should not take on the role of a super-personnel department and second guess Schop's human resource decisions.

The Third Circuit's recent decision in Wiest v. Tyco Electronics Corp., 812 F.3d 319 (3d Cir. 2016), is instructive. In that case, Tyco made the decision to fire Wiest after investigating reports that he had made inappropriate sexual comments to coworkers. See id. at 324–25.[13] Wiest filed suit alleging a violation of the anti-relation provision of the Sarbanes-Oxley Act, 18 U.S.C. 1514A, which uses the same "contributing factor" causation standard and burden-shifting framework as the FRSA. See Wiest, 812 F.3d at 330. Despite finding that Wiest had engaged in protected activity, the court found that he had not sufficiently proved that his protected activity was a contributing factor in his termination because "legitimate intervening events"—including the EEO investigation by the human resources director—negated any possible inference of causation. Id. at 332.

[13] After Tyco's human resources director made the preliminary decision to fire Wiest, he went out on short-term disability leave and never returned to the company. Wiest v. Tyco Elecs. Corp., 812 F.3d 319, 325 (3d Cir. 2016). Wiest argued that the preliminary decision was an actionable adverse action, and he also argued that he had been constructively discharged. Id. at 331–32.

The Wiest court further agreed that even if Wiest could have met his initial burden, Tyco had "amply" demonstrated its affirmative defense that it would have fired Wiest regardless of any protected activity. Wiest, 812 F.3d at 333. The court noted:

> The record in this case demonstrates that Tyco initiated an investigation after it received multiple complaints that Wiest engaged in improper conduct. That investigation found ample support for those complaints, and Tyco did not violate the Sarbanes–Oxley Act when it took adverse employment actions against him without either warning him or imposing a probationary period.

Id. Critically, the court flatly rejected Wiest's arguments that his conduct was not offensive enough to merit termination, holding that it is not the court's role to "second-guess a human resources decision that followed a thorough investigation." Id. (citations omitted).

Here, for the same reasons as cited by the Wiest court, this Court should not second guess EEO Director Schop's determinations that Mercier violated UP's EEO policy and the Waiver Agreement and that the latter warranted his termination. Nor should it second guess UP's later decision not to back down in the face of Mercier's CBA arbitration. Mercier argues that he never violated UP's EEO policy in the first place because his text messages to Thomas were sent on private cell phones and not "while working[.]" Pet'r's Br. 45. Similarly, Mercier faults Schop for concluding that he had to be fired even though there was

conflicting testimony about what he had said to Vossen. Pet'r's Br. 34.[14] These arguments are off-base. It was well within Schop's authority as EEO Director to determine that Mercier's conduct violated UP's EEO policy and that Mercier had violated the Waiver Agreement based on Schop believing Symons (and Vossen's initial oral report) over Mercier (and Vossen's later changed story). See Waters v. Churchill, 511 U.S. 661, 676 (1994) (rejecting the argument that employers cannot rely on hearsay or make credibility determinations in making disciplinary decisions).

Moreover, as this Court has recognized, "federal courts do not sit as a super-personnel department that re-examines an employer's disciplinary decisions." Kuduk, 768 F.3d at 792 (internal quotation marks and citation omitted). Even if Schop had wrongly believed Symons, it would have been improper for the ALJ to second-guess Schop's decision as long as her testimony as to her belief was credible. "In the absence of evidence" connecting a complainant's protected activity to an adverse action, a complainant "is not entitled to FRSA anti-retaliation relief even if [the railroad] inaccurately concluded that he committed" a violation

[14] This characterization of Mercier's argument is generous. He repeatedly makes misleading arguments about this issue, including asserting that UP "admittedly did not have *any* evidence" that Mercier had violated the Waiver Agreement. Pet'r's Br. 26 (emphasis added). In fact, UP did have evidence, including Symons's testimony about Vossen and Schwendeman's testimony about the underwear incident—and it never admitted otherwise.

and disciplined him based on that inaccurate conclusion. Id.; see also Allen v. City of Pocahontas, 340 F.3d 551, 558 n.6 (8th Cir. 2003) ("[I]t is not unlawful for a company to make employment decisions based upon erroneous information and evaluations.").

3. Mercier's weak "pattern of retaliatory conduct" argument is undermined by Hardisty's agreement to give Mercier a second chance.

Mercier argues generally that UP engaged in a "pattern of retaliatory conduct culminating in Mercier's termination[.]" Pet'r's Br. 3, 40–44. He offers no credible proof, however, of any retaliatory conduct, much less a pattern.

First, Mercier argues that the sleeping-policy infraction was retaliatory. Pet'r's Br. 11, 43. But the ALJ noted that both Mercier *and the conductor* were questioned about sleeping. JA 39 (D&O 4). In fact, Mercier himself admits that *both* he and the conductor were issued infractions for the violation. Pet'r's Br. 11. The disciplining of another similarly situated employee who did not engage in a protected activity does not support an inference of retaliation—rather, it supports the opposite inference. See Chappell v. Bilco Co., 675 F.3d 1110, 1118 (8th Cir. 2012) (concluding termination for violating attendance policy was not retaliatory, when other employees were also disciplined for violating the policy). And while Mercier now claims that the sleeping-policy violation was "unsubstantiated,"

Pet'r's Br. 43, the ALJ specifically noted that Mercier did not file a grievance about the infraction at the time, JA 39 (D&O 4).

Second, Mercier asserts that his thirty-day suspension for the airbrake test violation was retaliation. Pet'r's Br. 5, 12, 33, 43. As with the sleeping-policy violation, the record shows unequivocally that both Mercier *and the conductor* were charged with the airbrake test violation. JA 1100–06 (Public Law Board Ivey Decision, R113, discussing the discipline of the conductor). Moreover, when the conductor appealed his discipline, the Public Law Board found that the train crew "especially the Engineer [i.e. Mercier], should have made a greater effort to ascertain" which test needed to be done and "should shoulder the primary blame." JA 1104–05. These facts in the record hardly suggest retaliation by UP.

Third, Mercier argues that he was restricted from conducting investigations on behalf of union members. Pet'r's Br. 5. He includes no citation, but perhaps is referring to UP's restriction on him entering company property to represent a fellow union member while he was suspended for Symons's initial EEO complaint. Such a restriction does not in any way indicate retaliation. See Hervey v. Cnty. of Koochiching, 527 F.3d 711, 725 (8th Cir. 2008) (finding no retaliation where employee was barred from gaining access to company property while suspended). In any case, the ALJ found UP had nonetheless provided Mercier with an

alternative way to represent his fellow member by holding the investigation off of company property. JA 44 (D&O 9).

Fourth, Mercier misleadingly argues that UP "labeled him a 'trouble-maker.' Pet'r's Br. 5, 14. The ALJ decision did not discuss this allegation, but for good reason. There is no evidence of the term "trouble-maker" in the record. To support this statement, Mercier cites only to his own email, in which he alleged that another union member told him that he heard Tennessen on the phone telling some unknown person "I just wrote him up for sleeping. yeah, he's nothing but trouble." JA 621. At best, this statement is triple hearsay. Even if it were credited, Tennessen could have been talking about the conductor who had also been cited for sleeping. And, even if it were about Mercier, it provides only evidence of a nexus between Mercier's admitted violation of company policy and the "trouble" sentiment—not of any nexus between Mercier's *protected activities* and the sentiment. Given the various layers of hearsay involved and overall lack of reliability and probativeness, Mercier cannot seriously complain that he was prejudiced by the fact that the ALJ did not explicitly discuss this "trouble-maker" allegation.

In short, the ALJ specifically considered and made findings of fact about all of the minimally relevant "adverse actions" that Mercier alleges. They simply did not add up to a pattern of retaliatory conduct—and certainly not the sort of pattern

that would outweigh the overwhelming evidence stemming from Schop's testimony. A complainant's "burden to show a causal connection between a protected activity and the adverse action at issue does not disappear merely because the history between employer and employee is long and contentious." Henderson v. Ford Motor Co., 403 F.3d 1026, 1037 (8th Cir. 2005).

Moreover, even had the ALJ drawn the inferences Mercier wished to be drawn from his prior discipline, any attempt to connect that discipline to his termination would be significantly undercut by other evidence to the contrary. Mercier insinuates that Hardisty, specifically, was looking for a reason to fire him because of his protected activity. Pet'r's Br. 4. But the evidence points in the other direction. After Symons filed her EEO complaint, it was Hardisty who was willing to give Mercier a second chance by helping him to get reinstated. See Wiest, 812 F.3d at 332 n.8 (noting that "an employee's receipt of favorable treatment after engaging in protected activity . . . undermines a claim that there was a causal connection between the activity and the adverse employment action"). And, the ALJ specifically noted that BLET Chairman MacArthur described Hardisty as "cordial and easily agreeable to return [Mercier] to service." JA 45 (D&O 10). Moreover, even if Hardisty had harbored a grudge against Mercier, the ALJ made a specific finding—based on live witness testimony and credibility

determinations—that Hardisty "had no involvement" in the decision and "had no influence on the decision" to fire Mercier. JA 60–61 (D&O 25–26).

4. Mercier's disparate-treatment arguments ignore key evidence and common sense.

Finally, Mercier's half-hearted disparate-treatment arguments are wholly unsupported by the record. Mercier argues that he "was consistently disciplined for conduct for which others were not." Pet'r's Br. 57–58. His citations to the sleeping-policy infraction and the airbrake-test violation in support of this statement instead prove the opposite. As discussed above, Mercier was not treated differently in either instance—both times Mercier *and the conductor* were disciplined. JA 39 (D&O 4); JA 1100–06.

With regard to the EEO policy, Mercier's arguments are borderline offensive. Mercier argued to the ALJ that UP should have disciplined Thomas (in addition to Mercier) for showing Mercier's text message to Symons. The ALJ was unpersuaded, noting that Mercier "fails to recognize the difference between spreading rumors and alerting the target of them." JA 61 (D&O 26). Mercier now argues that the EEO policy made no such distinction, but that hardly merits a response. The EEO policy prohibits "harassment," and the distinction between Mercier's and Thomas's behavior was that making unwanted sexual comments about a coworker is harassing behavior, see Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 574 (8th Cir. 1997), whereas alerting someone to that behavior is not.

Mercier also argued that Schop should have disciplined Thomas after Mercier accused him of displaying Symons's underwear. But the ALJ credited Schop's testimony that she did not discipline Thomas because she did not believe Mercier. Again, Schop was well within her authority to make disciplinary decisions based on "past similar conduct" and "personal knowledge of people's credibility." Waters, 511 U.S. at 676. The ALJ's credibility determination regarding Schop's testimony is in turn due great deference and cannot, without more, be second guessed at this stage in the litigation. See Carroll, 78 F.3d at 358; Kuduk, 768 F.3d at 792.

C. The FRSA Does Not Bar UP from Discharging Mercier in Order to Support Women Employees by Supporting Its EEO Policy, Protect Symons from Mercier's Harassment, or Avoid Potential Liability for Mercier's Harassment.

Even if the Waiver-Agreement reason for discharging Mercier was pretextual, it would not mandate reversal. Mercier has repeatedly acknowledged that UP had other reasons for firing him—including "UP's desire to encourage employment of female workers in the field and its concern that Symons would pursue litigation against UP." Pet'r's Br. 51; id. at 6. He has consistently argued that these reasons are not "lawful" reasons for UP to have terminated him. See, e.g., Pet'r's Br. 42. But Mercier misunderstands the relevance of "pretext" evidence and wrongly conflates his legal rights under the FRSA with his contract rights under his CBA. These additional reasons do not violate the FRSA; instead

they provide additional substantial evidence supporting the ALJ's causation determination.

First, Mercier misstates the law of pretext evidence. Mercier argues that finding the waiver-agreement reasoning to be pretextual would "create[] the legal assumption that retaliation was a contributing factor in UP's decision as a matter of law." Pet'r's Br. 45. But under the contributing-factor standard, if a complainant proves pretext, the Board "*may* infer that the protected activity contributed to the termination, though [it is] not compelled to do so." Salata v. City Concrete, LLC, ARB Nos. 08-101, 09-104, 2011 WL 4690623, at *8 (ARB Sept. 15, 2011); see also Bobreski v. J. Givoo Consultants, Inc., ARB No. 09-057, 2011 WL 2614311, at *14 (ARB June 24, 2011) (noting that pretext evidence, if any, "should be weighed with all of the circumstantial evidence to determine the issue of causation after an evidentiary hearing").

Pretext evidence does not compel a causation finding for the simple reason that an employer may in some cases employ pretextual reasoning where the real reasons for the adverse action *still* would not violate the relevant anti-retaliation law. See Cha v. Henderson, 258 F.3d 802, 805 n.3 (8th Cir. 2001).

> For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and

> uncontroverted independent evidence that no discrimination had occurred.

Id. (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000)). While Cha and Reeves are Title VII cases, the principle is equally true under the contributing factor standard. See Clemmons v. Ameristar Airways, Inc., ARB Nos. 05-04805-096, 2007 WL 1935557, at *6 & n.25 (ARB June 29, 2007) (citing Reeves, 530 U.S. at 148); see also Zinn v. Univ. of Mo., Nos. 93-ERA-34, -36, 1996 WL 171417, at *4 (DOL Sec'y Jan. 18, 1996) ("Although found to be pretextual, an employer's stated reasons may nonetheless be found to be a pretext for action other than prohibited discrimination.").

This Court faced a similar fact pattern in Cha. In that case, the plaintiff brought a discrimination claim against the U.S. Postal Service after he was fired for sexually harassing a colleague. See 258 F.3d at 805. The district court acknowledged that the Postal Service relied on the plaintiff's harassing conduct outside of work, and that there was no authority to do so under Postal Service regulations. Id. Like Mercier, Cha argued that his evidence of pretext was therefore conclusive of unlawful discrimination. Id. This Court rejected that argument, holding that "[r]egardless of whether [the employer] should have relied on sexual conduct between co-workers outside the workplace, the district court's finding that he did so is certainly an explanation for the firing other than race or national origin discrimination." Id. at 805–06 (citing Reeves, 530 U.S. at 148).

On these ground, the Court affirmed the decision to deny relief to the plaintiff, noting in particular the post-trial posture of the case and the necessary deference to the determination by the trier of fact. Id. at 806.

The FRSA, like other retaliation statutes, bars an employer from retaliating against an employee because of that employee's protected conduct. See 49 U.S.C. 20109(b). Mercier does not allege that his harassment of Symons was "protected conduct" under the FRSA—nor could he. Accordingly, UP's termination of Mercier because of that behavior does not violate the FRSA—as long as his genuine protected activities were not also a contributing factor. The FRSA does not bar UP from discharging Mercier to protect Symons from Mercier's harassment, to avoid potential liability were Symons to file a sexual harassment lawsuit against UP, or to promote the EEO policy and women workers in the field. Mercier cannot successfully argue that UP failed to provide justification for his termination or that any related "legal assumption" is required. Pet'r's Br. 42, 45.[15]

To the contrary, the undisputed fact that UP relied on these reasons to fire Mercier is additional substantial evidence supporting the ALJ's causation finding.

[15] For the same reasons, the CBA arbitrator's conclusion that Mercier's conduct had not amounted to a violation of the Waiver Agreement does not warrant another outcome in this FRSA suit. Pet'r's Br. 60; JA 13–19. The CBA arbitration process does not consider, nor can it, whether Mercier's FRSA-protected activities were a contributing factor in UP's termination decision or whether UP had other reasons for discharging Mercier that were unrelated to his protected activities.

IV. THE ALJ PROPERLY APPLIED THE FRSA STATUTE OF LIMITATIONS AND CONSIDERED ALL RELEVANT EVIDENCE

A. The ALJ Applied the Statute of Limitations to Properly Bar Any Separate Claim Based on Adverse Actions Falling Outside the Limitations Period, While Still Considering All Relevant Prior Evidence as Required by *National Railroad Passenger Corp. v. Morgan*.

In an effort to avoid substantial evidence review, Mercier argues the ALJ misapplied clear Supreme Court precedent and therefore this Court must throw out the ALJ's exhaustive findings and send this case back for another round of proceedings. To accept Mercier's argument, however, would require that this Court twist the ALJ's words and disregard the ALJ's extensive treatment of the very evidence that Mercier claims was ignored.

The FRSA contains an express statute of limitations that requires any retaliation complaint to be "commenced not later than 180 days after the date on which the alleged violation . . . occurs." 49 U.S.C. 20109(a). OSHA has promulgated regulations that specify how to measure the date of filing and provide for equitable tolling. See 29 C.F.R. 1982.103(d). Mercier does not dispute that his claims are subject to this statute of limitations, nor that he is barred by the statute of limitiations from seeking redress for allegedly retaliatory adverse actions that occurred outside of the limitations period, i.e., before September 29, 2007.

Rather, Mercier argues that the ALJ failed to follow the Supreme Court's background-evidence rule because, according to Mercier, the ALJ failed to

consider evidence that occurred outside of the limitations period in determining whether Mercier's protected activities were a contributing factor to UP's decision to terminate his employment. Pet'r's Br. 30–36. There is no merit to Mercier's argument.

In National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002), the Supreme Court noted that "prior acts" that may not be actionable because they fall outside of a limitations period may still be used as "background evidence in support of a timely claim." The ARB has long-recognized that Morgan's "background-evidence rule" applies to whistleblower limitations periods for statutes under the ARB's jurisdiction, including the FRSA. See Williams v. Nat'l R.R. Passenger Corp., ARB No. 12-068, 2013 WL 6979714, at *4 (ARB Dec. 19, 2013) (applying Morgan to a FRSA complaint); see also Occhione v. PSA Airlines, Inc., ARB No. 13-061, 2014 WL 6850016, at *6 (ARB Nov. 26, 2014); Erickson v. U.S. Envtl. Prot. Agency, ARB Nos. 03-002 — 004, 03-064, 2006 WL 1516646, at *12 (ARB May 31, 2006).

Mercier argues that the ALJ improperly disregarded background evidence about his protected activities and adverse actions in 2006 and early 2007. Pet'r's Br. 32, 36. He specifically cites the ALJ's statement that "'[s]ince complainant's claim was filed, and his action thereby commenced on March 27, 2008, any alleged adverse employment actions occurring before September 29, 2007, are

barred by the statute of limitations.'" Pet'r's Br. 32 (quoting JA 56–57). And Mercier cites the statement that adverse actions, "'whether they have been proven or not, are time barred.'" Id. He suggests that this language means that the ALJ "refused to consider" evidence of UP's conduct in response to Mercier's protected activities. Id.

Mercier's argument is unavailing. The quoted language from the ALJ's Decision and Order has no bearing on whether the ALJ properly considered evidence outside of the limitations period. Instead, the quoted language discussing whether the actions were "barred" is directly solely at whether the adverse actions were "actionable." See Erickson, 2006 WL 1516646, at *12 (noting that prior acts that occur outstide the limitations period "are time barred, *that is*, *not actionable*" (emphasis added)). And, as noted above, Mercier does not dispute the ALJ's (correct) conclusion that he is time-barred from seeking redress for any adverse actions that occurred prior to September 29, 2007.

Mercier appears to purposely conflate the distinction between whether a specific adverse action is actionable under the applicable statute of limitations and whether the action may be considered as evidence. But, early in the case, the ALJ specifically recognized in its June 3, 2009 order that even if certain adverse actions are not actionable, they may nonetheless be considered as relevant evidence. JA 9. Specifically, the ALJ concluded that Mercier's initial suspension took place prior

to the date of the FRSA amendments and therefore "falls outside the reach of the statute and is not actionable." Id. The ALJ went on to conclude, however, that:

> [T]he protected activity leading up to the first termination/suspension [in July 2007], and the termination/suspension itself, is relevant and therefore, admissible because it provides a complete picture of the relationship between [Mercier] and [UP] and whether [Mercier] was discriminated against because of his protected activity.

Id. Thus, the ALJ explicitly recognized that the background-evidence rule would apply in this case.

Mercier has failed to grapple with the fact that the record as a whole shows that the ALJ properly considered all evidence that occurred outside of the limitations period and thus complied with the background-evidence rule. In the May 30, 2012 order, the ALJ expressly considered Mercier's safety reports between April 2006 and March 2007, and whether they could support a finding of causation. JA 34–35. The ALJ similarly considered UP's citation and discipline of Mercier for improperly performing the airbrake test, as well as his removal from service on July 9, 2007 in response to Symons's EEO complaint in concluding that summary decision for UP was not warranted. Id.

Moreover, given the extensive and detailed findings of fact in the ALJ's February 28, 2013 Decision and Order, JA 37–41 (D&O 2–6), Mercier can hardly claim that the ALJ was not aware of or somehow overlooked his allegations of protected activity and adverse actions that occurred outside of the limitations

period. The ALJ specifically found that Mercier had engaged in seventeen separate protected activities, nearly all of which occurred outside of the limitations period. JA 54–56 (D&O 19–21).[16] And, as discussed above, the ALJ made specific findings about Mercier's various alleged "adverse actions" that undermine any potential inference of retaliation, much less a pattern of retaliatory conduct. See supra, § III(B)(3).[17]

Thus, the May 30, 2012 pre-hearing order together with the ALJ's final Decision and Order show that the ALJ did not disregard evidence of either protected activity or adverse actions that occurred outside of the limitations period. Considered in this context, the ALJ's statute-of-limitations language has only the

[16] Thus, there is no merit to Mercier's argument that "the ALJ did not consider any of the protected activity in the record as he found it was barred under the statute of limitations." Pet'r's Br. 28; see also Pet'r's Br. 26, 39 (same). Furthermore, the ALJ referenced the effect of the statute of limitations on "adverse actions," JA 56–57 (D&O 21–22), not protected activity. There was no reference in the February 28, 2013 Decision and Order to the relationship between protected activity and the statute of limitations.

[17] Mercier argues that the ALJ should have made specific "findings" as to whether UP's early responses to Mercier's protected activity "constituted adverse employment actions." Pet'r's Br. 41–42. But such a specific mixed-law-and-fact finding of whether actions meet the standard for "adverse action" under the FRSA's burden-shifting test is relevant only to whether Mercier can bring an independent "claim" for damages as a result of those actions. See Brune v. Horizon Air Indus., Inc., ARB No. 04-037, 2006 WL 282113, at *4 n.9 (ARB Jan. 31, 2006). In any case, even if "specific findings" were required, Mercier forfeited this argument by failing to raise it at all in his briefing to the ARB. JA 70–99, 134–143; see Maverick Transp., 739 F.3d at 1153 n.3.

unremarkable meaning that the prior discrete acts by UP are "not actionable," Erickson, 2006 WL 1516646, at *12, and cannot be the basis for a separate claim or independently justify an award of damages.

B. Even if the ALJ Erred, Any Error Was Harmless.

For all of the reasons discussed in Section III above, even if the ALJ did not in fact consider Mercier's weak pattern-of-retaliation evidence, the only reasonable decision for the ALJ on remand would be to find that Mercier's protected activities were not a contributing factor in his termination. As a result, any legal mistake in applying the background-evidence rule would be harmless, and the ALJ's decision may therefore be affirmed regardless of any error.

Federal courts apply the rule of harmless error in reviewing agency actions. "The APA instructs courts reviewing agency action to take 'due account . . . of the rule of prejudicial error.'" United States v. Brewer, 766 F.3d 884, 890 (8th Cir. 2014) (quoting 5 U.S.C. 706); see also Shinseki v. Sanders, 556 U.S. 396, 407 (2009) (warning "against courts' determining whether an error is harmless through the use of mandatory presumptions and rigid rules rather than case-specific application of judgment, based upon examination of the record"); Hoffman v. Solis, 636 F.3d 262, 274 (6th Cir. 2011) (finding any error by the Board was harmless).

It is black letter law that the party that "seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." Shinseki, 556 U.S. at 409 (internal quotation marks and citation omitted); see also Powers v. Union Pac. R.R. Co., ARB No. 13-034, 2015 WL 1881001, at *35 (ARB Mar. 20, 2015) (Corchado, J., dissenting) ("To vacate or reverse for an evidentiary error, the Board must determine that the error was reversible error, that is, it could have affected the outcome of the case.").

Contrary to Mercier's arguments, the bare allegation of a misapplication of Morgan does not alone mandate a reversal on appeal. See Davis v. Con-Way Transp. Cent. Express, Inc., 368 F.3d 776, 786 n.4 (7th Cir. 2004) (finding the district court's failure properly apply Morgan and "to include acts outside the limitations period in evaluating [the plaintiff's] claims does not warrant reversal . . .").[18]

[18] It bears noting that while Mercier now claims he was "severely prejudiced" by the alleged error, Pet'r's Br. 41–42, he never made this argument before the Board. In his briefing before the Board, Mercier made a skeletal argument that the ALJ did not properly apply the background-evidence rule. JA 98–99. UP responded on the merits, and also argued harmless error. JA 125–27. UP specifically argued that the ALJ's conclusion that EEO Director Schop was the decision-maker in Mercier's termination rendered any alleged pattern of retaliatory conduct irrelevant to the material legal issue of whether Mercier's protected activity was a contributing factor in his termination. JA 126. Thus, UP argued, the decision would have been the same had the ALJ considered the prior "adverse actions" or not. Id. In reply, Mercier made only the naked assertion that "failure to consider the record as a whole is not harmless error." JA 139. He made no attempt to

Because Mercier cannot show that the Board or ALJ will rule any differently on remand, this Court should affirm even if it decides that the ALJ erred in its application of the background-evidence rule. See Consolidation Coal Co. v. Smith, 837 F.2d 321, 323 n.3 (8th Cir. 1988) (affirming agency decision where, "'it is clear that based on the valid findings the agency would have reached the same ultimate result[.]'") (quoting Salt River Project Agric. Improvement & Power Dist. v. United States, 762 F.2d 1053, 1060–61 n.8 (D.C. Cir. 1985)).

The evidence against Mercier in this case was overwhelming. The ALJ made extensive factual findings regarding the entire record—including Mercier's many instances of protected activity, his disciplinary history, and his various grievances with the company prior to the harassment incidents. Many criticial factual findings were based on credibility determinations—including that Schop made the termination decision and that Hardisy had no influence. And the various other essential facts are undisputed: that Mercier went uninvited to Symons's home to take photos; that Mercier told Schwendmann about Symons's underwear; that Symons was frightened of Mercier; that both Mercier and the conductor were disciplined for the sleeping-policy infraction and the airbrake test; and that UP

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explain exactly how he was prejudiced by any alleged exclusion of evidence. See Merix Pharm. Corp. v. Clinical Supplies Mgmt., Inc., 106 F. Supp. 3d 927, 942 (N.D. Ill. 2015) (noting party forfeited an argument by failing to respond, in a reply brief, to a point that had been raised in the response brief).

decided to terminate Mercier to support women workers in the field and avoid a lawsuit from Symons—in addition to its stated belief that he had violated the Waiver Agreement. Based on all of this evidence, the ALJ could only conclude that Mercier did not meet his burden of showing by a preponderance of the evidence that his protected activities were a contributing factor.

With this detailed record before it, the Court need not make any additional factual findings in order to determine that any background-evidence error was harmless. Rather, the Court may find as a legal matter that Mercier has not established that a preponderance of the evidence supports a finding of "contributing factor." As this Court has previously noted, "[e]ven though a court may use background information as evidence of discrimination to support a timely claim," a plaintiff cannot make out a prima facie case of retaliation where there is "no credible proof of a connection between past activities and [the] ultimate termination." Henderson, 403 F.3d at 1037 (citing Morgan, 536 U.S. at 113). As a result, even if this Court finds that the ALJ erred, it can affirm the decision below because the result would not be any different on remand. See Consolidation Coal Co., 837 F.2d at 323–24.

CONCLUSION

For the reasons set forth above, the Secretary requests that this Court affirm the Board's Final Decision and Order.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

WILLIAM C. LESSER
Deputy Associate Solicitor

RACHEL GOLDBERG
Acting Counsel for Whistleblower
Protection Programs

/s/ David L. Edeli
DAVID L. EDELI
Attorney
U.S. Department of Labor
200 Constitution Ave. NW, N-2716
Washington, DC 20210
Telephone: (202) 693-5518
Fax: (202) 693-5689
E-mail: edeli.david.l@dol.gov

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND EIGHTH CIRCUIT RULE 28A(h)

Pursuant to Fed. R. App. P. 32(a) the undersigned certifies that the foregoing brief of the Secretary of Labor:

(1) Complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,995 words, including footnotes but excluding the parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii);

(2) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word 2010 utilizing plain roman style, with exceptions for case names and emphasis, and using Times New Roman 14-point font, which is a proportionately spaced font, including serifs; and

(3) complies with the Eighth Cir. R. 28A(h) because the brief has been scanned for viruses and is virus-free.

Date: March 17, 2016

/s/ David L. Edeli
DAVID L. EDELI
Attorney
U.S. Department of Labor

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on March 17, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ David L. Edeli
DAVID L. EDELI
Attorney
U.S. Department of Labor