



In the Matter of:

MARK RILEY,

COMPLAINANT,

v.

**DAKOTA, MINNESOTA & EASTERN
RAILROAD CORPORATION
d/b/a CANADIAN PACIFIC,**

RESPONDENT.

**ARB CASE NOS. 16-010
16-052**

ALJ CASE NO. 2014-FRS-044

DATE: July 6, 2018

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Jerry Easley, Esq.; Rome, Arata & Baxley, L.L.C; Pearland, Texas

For the Respondent:

**Tracey Holmes Donesky, Esq. and Matthew C. Tews, Esq.; Stinson Leonard Street
LLP; Minneapolis, Minnesota**

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

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provisions of the Federal Rail Safety Act of 1982 (FRSA).¹ Complainant Riley filed a complaint alleging that Respondent Canadian Pacific (CP) violated the FRSA by suspending him without pay for forty-seven days due to his filing of a late injury/safety report. On October 20, 2015, an Administrative Law Judge (ALJ) granted relief including back pay plus interest. In a Supplemental Decision and Order issued on March 21, 2016, the ALJ awarded Riley's attorney's fee in the amount of \$32,939.10. CP petitioned the Administrative Review Board (ARB or Board) for review of the decision on the merits (ARB No. 16-010), and the decision awarding an attorney's fee to be paid by CP (ARB No. 16-052). For the following reasons, the Board affirms the ALJ's decisions.

FACTUAL BACKGROUND²

On July 4, 2012, Riley was working as a locomotive engineer on a loaded ethanol train traveling from Dubuque, Iowa to Chicago, Illinois. He was assigned to work with assistant locomotive engineer Jonathan Bollman. The train arrived in Chicago at 2:00 a.m. on July 5, 2012. Riley testified that upon the train's arrival in Chicago, Bollman got angry in response to a work-related task request Riley asked him to perform. Bollman entered the car where Riley was seated, struck him with a railroad lantern, punched him in the face, and knocked him to the ground. After the attack, the two men proceeded to bring the train into the yard, and thus remained in close proximity as they completed the job. Riley and Bollman shared a taxicab when traveling from the yard to their hotel. At the hotel, the two men clocked out of their on-duty time on designated computers in the hotel lobby. Riley estimated they clocked out at 4:25 a.m., and proceeded to their respective hotel rooms. Riley testified that he tried to call his immediate supervisors (Brandon Pregler or Jeremiah Christensen) to report the incident. Riley testified that the calls went unanswered, so he sent a text message to a "fellow railroader" that Bollman had assaulted him, and then proceeded to fall asleep.

Sometime between 10:00 a.m. and 11:00 a.m. on July 5, Riley was able to get in touch with Jeremiah Christensen, a manager over conductors and engineers, and let him know about the attack and informed him he did not want to work with Bollman on the return trip to Dubuque. Christensen encouraged Riley to file an injury report. Christensen called his supervisor, Steve Cork, to inform him of the situation. After receiving encouragement from co-workers, Riley called Christensen to file a formal complaint about the assault. Christensen sent an email to Cork detailing Riley's report at 4:44 p.m. on July 5th.

¹ 49 U.S.C.A. § 20109 (Thomson/West 2007), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53, and as implemented by federal regulations at 29 C.F.R. Part 1982 (2017) and 29 C.F.R. Part 18, Subpart A (2017).

² The facts for the Factual Background section are taken from the factual dispute resolutions, credibility determinations, and the undisputed evidence of record.

After collecting Riley's report as well as a conflicting report from Bollman, CP pulled both men out of service pending the results of a formal investigation of the altercation. The investigation took 47 days to complete. CP's investigation concluded that Riley should have reported the incident immediately, and the failure to do so was a violation of CP policy. Riley's punishment for this late reporting was forfeiture of pay for the 47 days that he had spent out of service during the investigation. Following the investigation, CP also disciplined Bollman. Riley filed a FRSA complaint with OSHA on September 5, 2012.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to act for the Secretary in review of an appeal of an ALJ's decision pursuant to the FRSA.³ We review the ALJ's factual findings to determine whether they are supported by substantial evidence.⁴ The ARB reviews the ALJ's conclusions of law *de novo*.⁵ We uphold an ALJ's credibility findings unless they are "inherently incredible or patently unreasonable."⁶

DISCUSSION

The FRSA prohibits a railroad carrier engaged in interstate commerce or its officers or employees from discharging, demoting, suspending, reprimanding, or in any other way retaliating against an employee because the employee engages in any of the protected activities identified under 49 U.S.C.A. § 20109(a), including *inter alia*:

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by—

³ Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 24.110(a)(2015).

⁴ 29 C.F.R. § 1982.110.

⁵ *Kruse v. Norfolk S. Ry. Co.*, ARB No. 12-081, ALJ No. 2011-FRS-022, slip op. at 3 (ARB Jan. 28, 2014).

⁶ *Mizusawa v. United Parcel Serv.*, ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 2 (ARB June 15, 2012) (quoting *Jeter v. Avior Tech. Ops., Inc.*, ARB No. 06-035, ALJ No. 2004-AIR-030, slip op. at 13 (ARB Feb. 29, 2008)).

(A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978;

(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

(5) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;

(7) to accurately report hours on duty pursuant to chapter 211.

49 U.S.C.A. § 20109(a).

Section 20109 incorporates the procedures enacted by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), which contains whistleblower protections for employees in the aviation industry.⁷ To prevail, an FRSA complainant must establish by a preponderance of the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; (3) and the protected activity was a contributing factor in the unfavorable personnel action.⁸ If a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity.⁹

Initially, we affirm the ALJ's finding that Riley engaged in protected activity under Section 20109(a)(1), which states that an employee is protected when he or she provides information in good faith regarding any conduct that the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security. In this instance, the ALJ found that Riley reported a physical assault that occurred on July 5, 2012. Although Riley did not mention the "small bruise" he received as a result of the assault, the ALJ found that this omission did not change the nature of the report since the record showed that Riley reported the bruise soon after it was discovered. Moreover, the ALJ found that the report of the assault qualified as

⁷ 49 U.S.C.A. § 42121(b)(2)(B)(iii); *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012); see *Brune v. Horizon Air Industr., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006) (defining preponderance of the evidence as superior evidentiary weight).

⁸ 49 U.S.C.A. §§ 20109(d)(2)(A)(i), 42121(b)(2)(B)(iii)(iv); *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB Apr. 30, 2010) (citing *Brune*, ARB No. 04-037, slip op. at 13).

⁹ 49 U.S.C.A. § 42121(b)(2)(B)(iv).

protected activity under Section 20109(b)(1)(A) as Riley informed his managers of a hostile violent co-worker and workplace violence has been found to be a safety issue. *Leiva v. Union Pac. R.R. Co., Inc.*, ARB No. 14-016; ALJ No. 2013-FRS-0019 (ARB May 29, 2015). The ALJ rejected CP's contention that Riley's failure to report the bruise showed bad faith, and credited Riley's contention that he remained in fear of Bollman until he returned to the hotel at 4:25 a.m., that he tried and failed to report the incident immediately, and did report it as soon as he woke up the next morning. The ALJ's findings are affirmed as they are reasonable and supported by the evidence.¹⁰

CP does not dispute that the suspension for 47 days without pay is an adverse employment action. Therefore, we will review the ALJ's findings regarding whether the reports were contributing factors to the unpaid suspension. While CP conducted an investigative hearing into the altercation on July 5, the letter from CP informing Riley of discipline dated August 21, 2012, states only that a review of the transcript establishes his failure to promptly report the incident to his supervisor and does not state that he was found to have violated any other work rule or regulation. Because it is impossible to separate the cause of Riley's discipline—for filing his injury report late—from his protected activity of filing the injury report, the two are inextricably intertwined and causation is presumptively established as a matter of law. But as the ALJ explained: “[t]his court is not suggesting that a complainant automatically establishes a causal nexus by simply demonstrating an employer took any unfavorable personnel action after a report of injury. Rather, a case is established here because the basis for Complainant's suspension cannot be discussed without reference to the protected activity. Simply put, Complainant's reporting of his injury set in motion the chain of events eventually resulting in the investigation and is inextricably intertwined with the eventual adverse employment action.”¹¹ In *Henderson v. Wheeling & Lake Erie Railway*, a FRSA case materially similar to the one before us, the Board explained in detail why disciplinary action taken against an employee for late injury reporting establishes presumptive causation as a matter of law:

The FRSA's legislative history, as outlined above, reveals a Congressional intent to comprehensively address the problem of railway retaliation for occupational injury reporting. Effective enforcement of the Act requires presumptive causation under circumstances such as Henderson's, where viewing the “untimely filing of medical injury” as an “independent” ground for termination

¹⁰ Moreover, we reject CP's contention that the claim is barred because Riley filed a claim under the Collective Bargaining Agreement. The Board has consistently held that the FRSA election of remedies provision, 49 U.S.C.A. § 20109(f), permits a whistleblower claim to run concurrently with a collective bargaining grievance. *Mercier v. Union Pac. R.R. Co.*, ARB Nos. 09-101, -121; ALJ Nos. 2008-FRS-003, -004 (ARB Sept. 29, 2011); *Kruse v. Norfolk S. Ry. Co.*, ARB Nos. 12-081, 12-106; ALJ No. 2011-FRS-022 (ARB Jan. 28, 2014). We also reject CP's contention that this is a minor dispute and thus the Department of Labor does not have jurisdiction. This contention is inconsistent with CP's assertion that the safety violation was severe and should have been reported at the earliest possible moment and any injury report or safety concern is not considered “minor” under the Act.

¹¹ D. & O. at 15 (citations omitted).

could easily be used as a pretext for eviscerating protection for injured employees.^[12]

In this case, CP did not successfully rebut the causation presumption, and we affirm the ALJ's causation finding as supported by substantial evidence.

Respondent relies on the United States Court of Appeals for the Eighth Circuit's decision in *Kuduk v. BNSF Railway, Co.*, 768 F.3d 786, 792 (8th Cir. 2014), and the circuit cases that follow *Kuduk*, to argue that more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation. *Id.* at 792. Respondent notes that *Kuduk* requires a complainant to prove intentional retaliation.

We hold that *Kuduk* however, is not analogous. In that case, the plaintiff's protected activity, while close in time, "was completely unrelated to the fouling-the-tracks incident that led to his discharge." *Id.* Further, as the ALJ correctly noted, the employee need not conclusively demonstrate the employer's retaliatory motive.¹³ Riley's injury and safety reports were both close

¹² *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 14 (ARB Oct. 26, 2012).

¹³ *See Kuduk*, 768 F.3d at 791. Although *Kuduk* passingly acknowledges established law—namely that a complainant need not prove retaliatory motive—we question its ultimate holding that a complainant must nevertheless prove "intentional retaliation." *Kuduk* and its progeny hold that "the contributory factor that an employee must prove is *intentional retaliation* prompted by the employee engaging in protected activity." *Id.* (emphasis added). But this pronouncement is both conclusory and contrary to the weight of precedent interpreting the "contributing factor" element of the statutory protections of most whistleblower laws. *See, e.g., Halliburton v. ARB*, 771 F.3d 254, 262-263 (5th Cir. 2014); *Araujo v. N.J. Transit Rail Ops., Inc.*, 708 F.3d 152, 158 (3d Cir. 2013); *Addis v. Dep't of Labor*, 575 F.3d 688, 691 (7th Cir. 2009); *Allen v. ARB*, 514 F.3d 468, 476 n.3 (5th Cir. 2008); *Kewley v. U.S. Dep't of Health & Human Svcs.*, 153 F.3d 1357, 1362 (Fed. Cir. 1998). In *Kuduk*, the Eighth Circuit supported this unprecedented "intentional retaliation" requirement by relying on the language and reasoning of the U.S. Supreme Court's causation findings in *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011). But the *Staub* "cat's paw" theory of causation, on which *Kuduk* relies, was created in the context of an action under the Uniformed Services Employment and Reemployment Rights Act (USERRA). *Staub v. Proctor Hosp.*, 562 U.S. 411, 416-417 (2011). USERRA, however, like Title VII, contains an explicitly different statutory causation standard than that found in the FRSA and similar whistleblower statutes. *Kuduk* adopted the *Staub* causation standard without properly accounting for the differences between the "motivating factor" causation standard under USERRA and the "contributing factor" standard under FRSA. We have long held that "retaliatory motive" is not required to show causation under the whistleblower statutes, like FRSA, containing the "contributing factor" standard. And we have explained in depth the reasoning behind the interpretive distinctions between these two causation standards. *See, e.g., Beatty v. Inman Trucking Mgm't, Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-020, -02; slip op. at 8 (ARB May 13, 2014). As we stated with respect to the SOX whistleblower provision, which contains the same causation standard as FRSA: "Nothing in Section 806 requires a showing of retaliatory intent. The statute is designed to address (and remedy) the effect of retaliation against whistleblowers, not the motivation of the employer. Proof of

in time to his discipline and inextricably intertwined therewith.¹⁴ We also affirm the ALJ’s finding that CP’s evidence fell short of proving its affirmative defense. The ALJ rejected the comparator evidence CP introduced to show that Riley was not selectively disciplined as a result of his injury report. Instead, the ALJ found that CP’s discipline for late injury reporting was inconsistent and thus incapable of clearly establishing that Riley would have been disciplined absent his injury report. Substantial evidence supports these findings. Additionally, we agree with the ALJ’s finding that, while Riley’s suspension may have been lenient in light of his past disciplinary record, there were insufficient facts to find that CP proved by clear and convincing evidence that Riley would have been suspended had he never reported the injury. As the ALJ observed, CP introduced no evidence to show either that CP regularly monitored for compliance with the prompt reporting rule or that a 47-day suspension was a reasonable discipline for violation of the rule. Furthermore, it is unclear who made the decision to suspend Riley and why. Michael Morris (CP investigation hearing officer) testified that he forwarded his recommendation to terminate Riley’s employment to Steve Cork (Riley’s supervisor), Jerry Peck (CP General Manager), and Jennifer Manz (a labor relations manager). But CP no longer employed any of these individuals at the time of the ALJ’s hearing and CP presented no evidence to clarify this issue. The record shows that an unknown manager made the decision to disregard the recommendation to terminate Riley’s employment in favor of a 47-day suspension. Moreover, the discipline letter was sent under Morris’s name with someone else signing his signature. Thus, we affirm the ALJ’s finding that CP did not meet its burden of persuasion, and we affirm the ALJ’s finding that CP is liable for retaliation against Riley pursuant to the FRSA.

‘retaliatory motive’ is not necessary to a determination of causation.” *Menendez v. Halliburton, Inc.* ARB Nos. 09-002, -003; ALJ No. 2007-SOX-005, slip op. at 31 (ARB Sept. 13, 2011) *aff’d*, *Halliburton v. ARB*, 771 F.3d 254, 262-263 (5th Cir. 2014). Although *Kuduk* acknowledged that the “contributing factor” under FRSA does not require a complainant to “demonstrate the employer’s retaliatory motive,” the court failed to explain why, instead, “intentional retaliation” was required or how “intentional retaliation” differs from “retaliatory motive.”

Another curious pronouncement in *Kuduk* states that “we reject the notion—suggested in some ARB decisions—that temporal proximity, without more, is sufficient to establish a prima facie case.” *Kuduk*, 768 F.3d at 792. But this “notion” which *Kuduk* rejects is contained in the regulations implementing the FRSA. 29 C.F.R. § 1982.104(e)(3) states a complainant’s burden under FRSA to warrant an OSHA investigation. A complainant’s burden at the summary decision stage is the same: “The burden may be satisfied, for example, if the complaint shows that the adverse action took place shortly after the protected activity, or at the first opportunity available to the respondent, giving rise to the inference that it was a contributing factor in the adverse action.” *See also Lockheed Martin Corp. v. ARB*, 717 F.3d 1121, 1136 (10th Cir. 2013)(“Temporal proximity between the protected activity and adverse employment action may alone be sufficient to satisfy the contributing factor test.”).

¹⁴ Respondent’s attempt to challenge the ALJ’s contributing factor analysis as contrary to Eighth Circuit law is unavailing legally as well as factually.

Damages—backpay

The ALJ found that Riley lost \$11,000 in earnings during his 47-day suspension¹⁵ as well as \$786 for missing three days of work to attend his deposition and the hearing in this case. CP did not address the amount of back pay claimed before the ALJ. But after the ALJ's decision was filed, and at the same time as this appeal was filed, CP filed a Motion to Alter & Clarify Judgment Or Alternatively, To Relieve Judgment before the ALJ contending that the back pay award was improperly calculated and that CP had already paid \$6,118.69 in back wages pursuant to a decision by the Public Law Board on appeal of the grievance Riley filed. In this appeal, and that motion, CP contends that the ALJ is bound by the back pay calculation dictated by the Collective Bargaining Agreement.

The Board has held that although the calculation of back pay must be reasonable and based on the evidence, the determination of back wages does not require “unrealistic exactitude,”¹⁶ and any uncertainty concerning the amount of back pay is resolved against the discriminating party.¹⁷ The ALJ relied on Riley's testimony, which he found to be credible, to find that he was entitled to back pay in the amount of \$11,000, plus payment for the days he missed for the deposition and hearing.¹⁸ Contrary to Respondent's contention, the CBA is a contract that controls the employer/employee relationship, but does not control review of a case under federal law. Thus, we hold that the ALJ's back pay finding is reasonable and supported by the evidence, and we reject CP's contention that the ALJ is bound by the CBA.¹⁹

CP also argues that the Public Law Board awarded Riley the amount of \$6,118.69 that CP paid and thus requests the Board to take judicial notice of this award and reduce Riley's award under the FRS accordingly. But CP had evidence of this award for 10 months before the ALJ issued his final Decision and Order and did not raise it. Although the record was closed, CP could have filed a motion requesting the ALJ to consider the evidence. But CP waited until two weeks

¹⁵ This finding appears to be based on Riley's testimony that he earned \$3500 for a two-week pay period or “half” and that he missed just over 3 halves or \$11,000. See Hearing Transcript (H.T.) at 27.

¹⁶ *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-055, ALJ No. 1995-STA-043, slip op. at 11-12, n.12 (ARB May 30, 1997).

¹⁷ *Clay v. Castle Coal & Oil Co.*, No. 1990-STA-037 (Sec'y June 3, 1994); *Kovas v. Morin Transp., Inc.*, No. 1992-STA-041 (Sec'y Oct. 1, 1993).

¹⁸ See H.T. at 30.

¹⁹ The OALJ Rules at 29 C.F.R. Part 18 set out the procedural and evidentiary rules for administering adjudicatory proceedings. Subpart B of the OALJ Rules prescribes the Rules of Evidence that govern formal adversarial adjudications of the United States Department of Labor conducted before a presiding officer that is required by, inter alia, the Administrative Procedure Act, 5 U.S.C.A. §§ 554, 556 and 557 (West 1996). See 29 C.F.R. Subpart B, § 18.101.

after the Decision and Order was issued to submit a motion that the OALJ did not act upon. We reject CP's attempt to reduce the award now with evidence not considered by the ALJ. If a dispute remains regarding the calculation of the award, CP may wish to address this issue with the district court that is responsible for enforcement.

Attorney's fee

Riley's counsel filed an Application for Attorney Fees and Litigation Costs before the ALJ, seeking fees of \$28,130.00. This fee represents 97 hours of legal services at the hourly rate of \$290 and litigation costs of \$5,001.10. The ALJ found that Riley was unable to secure local counsel in Iowa and thus approved the fee for counsel based on the Houston, Texas market rate. He also found that the hourly rate of \$290 was reasonable and supported by the evidence submitted by counsel. The ALJ recognized that Riley did not prevail in his request for compensatory and punitive damages, but rejected CP's contention that the fee should be reduced to account for limited success as Riley prevailed on his claim of retaliation and was awarded back pay and noted that all relief sought by Riley rested on common factual grounds. Further, with the exception of .75 hours spent filing the draft, the ALJ found that the services provided were well-documented and reasonable to establish the claim under the Act. Therefore, the ALJ awarded counsel a fee in the amount of \$27,985.00 and \$4,954.10 in costs.

On appeal of the Supplemental Decision and Order Awarding Attorney's Fees and Costs in Part, Respondent raises a number of contentions. Specifically, CP contends that the ALJ failed to adjust the attorney's fee award to account for Riley's limited success and that the ALJ erred in awarding the hourly rate for work performed in Houston, Texas, when this case was litigated in Iowa and that Riley did not establish that he sought and could not find local counsel. CP also contends that the ALJ erred in awarding \$4,954.10 in litigation costs that included \$3,176.55 in counsel's out-of-town travel costs. Lastly, Respondent contends that the ALJ erred in awarding any fees for work performed before the case was transferred to OALJ, which includes 5.25 hours of time billed during the investigation stage before OSHA. The ALJ considered and rejected CP's contentions and CP does not raise any error on appeal that requires reversing the ALJ's opinion. Thus, we affirm the ALJ's finding that CP must pay Riley's counsel a fee in the amount of \$27,985.00 and \$4,954.10 in costs.

CONCLUSION

Based on the foregoing, the Board **AFFIRMS** the ALJ's Decision and Order Granting Relief as well as his award of an attorney's fee and costs. Accordingly, the ALJ's August 13, 2015 Decision and Order and the Supplemental Decision and Order Awarding Attorney's Fees and Costs, in part are **AFFIRMED**.

Riley's attorney has 30 days in which to submit a petition for attorney's fees and other litigation expenses for work done before the ARB. He is to serve any such petition on CP, which will have 30 days in which to file objections to the petition.

SO ORDERED.

LEONARD J. HOWIE
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge