



In the Matter of:

CORBY ACOSTA,

ARB CASE NO. 2018-0020

COMPLAINANT,

ALJ CASE NO. 2016-FRS-00082

v.

DATE: JAN 22 2020

UNION PACIFIC RAILROAD  
COMPANY,

RESPONDENT.

**Appearances:**

*For the Complainant:*

Bristol Baxley, Esq.; *Rome, Arata & Baxley, LLC*; Pearland, Texas

*For the Respondent:*

Ryan D. Wilkins, Esq., and Fred S. Wilson, Esq.; *Union Pacific  
Railroad Company*; Houston, Texas

**Before:** Thomas H. Burrell, *Acting Chief Administrative Appeals Judge* and  
James A. Haynes and Heather C. Leslie, *Administrative Appeals Judges*

### DECISION AND ORDER OF REMAND

Corby Acosta, Jr., filed a complaint under the whistleblower protection provisions of the Federal Rail Safety Act (FRSA)<sup>1</sup> alleging that the Union Pacific Railroad Company (Union Pacific) fired him for reporting safety concerns. After a hearing, an Administrative Law Judge (ALJ) concluded that Union Pacific violated the FRSA and awarded back pay. Union Pacific appealed the ALJ's decision to the Administrative Review Board (ARB or Board). For the following reasons, the Board remands the ALJ's decision back to the ALJ for further proceedings.

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<sup>1</sup> 49 U.S.C. § 20109 (2008), as implemented by federal regulations at 29 C.F.R. Part 1982 (2017) and 29 C.F.R. Part 18, Subpart A (2017).

## BACKGROUND

The facts are taken from the ALJ's summary of the evidence and are not generally contested. Acosta was certified as a conductor but performed various work functions as a brakeman, switchman, foreman, and footboard yardmaster in the Westwego service yard at the Avondale, Louisiana, terminal. His immediate supervisor was Jimmy Cougett and the director of terminal operations was Tobe Allen.

On May 8, 2015, Acosta called Union Pacific's safety hotline to report overgrown grass and weeds in a right of way, which harbored snakes and created a hazardous condition around the tracks in the yard. Acosta was a union secretary and had previously made more than 150 calls to the hotline to report his and other employees' safety concerns. D. & O. at 11.

On May 13, 2015, Acosta was working as a footboard yardmaster with two other crewmembers ("first" and "second" crewmembers). On this day, the following two incidents took place:

### 1. May 13, 2015 single-car securement incident

The first incident involved the crew's failure to properly secure a car attached to two locomotives. The second crewmember pulled the pin after a shove movement to detach the car from the locomotive. D. & O. at 9, 16. A shove movement is the pushing or aligning of a rail car or series of cars into place. The second crewmember performed a securement test<sup>2</sup> but did not wait a minute to verify that the cars were holding after pulling the pin. D. & O. at 16. There was no movement, accidents, or damage resulting from the second crewmember's action. However, Allen identified it as an error in procedure. Allen also took issue with Acosta's failure to supervise the crew as the footboard yardmaster. D. & O. at 9.

### 2. May 13, 2015 sideswipe collision

Shortly after the single-car incident, the crewmembers were involved in another incident resulting in a collision. The crew's job was to move a cut of twenty-two rail cars into the Kinder Morgan plant to be unloaded. One crewmember was driving the two locomotives that were pushing the cars along track 55, Acosta was at the head of the line of cars acting as "point protector," and a second crewmember was the switchman. D. & O. at 6. A point-protector is on the leading edge of the movement, either in the leading car or walking alongside the cars. The point-

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<sup>2</sup> Securement tests identify the integrity of the brake hold. D. & O. at 13. If the cars begin to roll during the test, then another hand brake is needed.

protector has a vantage spot to observe the shoving movement. The engineer in the locomotive, however, cannot identify shoving movement because of the obstacles in front of him. D. & O. at 6. For this reason, the point-protector is in charge of the movement.

The crew initially moved the cars onto the Kinder Morgan track. After the first movement, but before the shove movement, the second crewmember purportedly set two hand brakes. The engineer began the shove movement. Acosta rode the shove in the leading car to the gate and exited the train. D. & O. at 21. After the shove movement and after Acosta had exited the train, the second crewmember pulled the pin to disconnect a locomotive from the line of cars. However, the second crewmember failed to perform a second securement test to ensure that the cars were stable. D. & O. at 7, 16. The cars began rolling back down the track and sideswiped one of the locomotives.

### **3. Union Pacific's investigation and discharge of Acosta**

Terminal director Allen investigated the incident and took personal statements from the crew. The crew was tested for drug use and Allen pulled video of the crew's work that day. Allen issued all three crewmembers notices of investigation which charged them with carelessness and failing to secure equipment properly. The failure to properly secure the cars in the single-car incident in conjunction with the sideswipe incident established a pattern of neglect. D. & O. at 28. Allen looked at Acosta's disciplinary history and pulled him out of service pending an investigation because he already had a level 4 charge on his record. D. & O. at 10-11.

At Union Pacific's investigation hearing on June 9, 2015, the second crewmember took full responsibility for the May 13 events, stating that he had not waited to ensure securement during the single car incident and later, in the twenty-two car collision, had set the two hand brakes on the lead tanker car but not tightly enough, which caused the cars to roll and sideswipe the locomotive. He added that Acosta was "being punished" for his actions, but that Acosta was not involved with securing the cars. Respondent's Exhibit (RX) J at 206-07. Acosta also denied wrongdoing at the hearing. The first crewmember admitted that he shared in the fault for the incident and accepted the level 4 discipline. The second crewmember was charged with a level 5 violation and fired. D. & O. at 14, 16.

On June 19, 2015, Union Pacific dismissed Acosta for switching and securement rules violations, resulting in uncontrolled movement of railroad cars. Complainant's Exhibit (CX) 5. Superintendent Jamal Chappell reviewed the transcript of the June 9 investigation hearing and concluded that the evidence "more than substantially supports the charges: "On 05-13-2015, at approximately 15:30 while employed as a Footboard Yardmaster, you failed to properly secure

equipment, resulting in uncontrolled movement colliding with own engine and allegedly failed to secure equipment.” He noted that under Union Pacific’s Upgrade Progressive Discipline Table, the violation was a level 4C which, coupled with Acosta’s current level 4 status, amounted to a level 5 violation. Under Union Pacific’s policy, that resulted in permanent dismissal effective immediately.

Acosta filed a timely complaint with DOL’s Occupational Safety and Health Administration (OSHA) on December 16, 2015, alleging that Union Pacific fired him in retaliation for reporting safety concerns. After an investigation, OSHA determined on August 11, 2016, that Union Pacific had not violated the FRSA. Acosta objected and timely requested a hearing, which was held in Covington, Louisiana on January 18, 2017. The ALJ concluded that Union Pacific had violated the FRSA and awarded Acosta \$156,100.00 in back pay and expungement of his termination record.<sup>3</sup>

#### 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. Secretary’s Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019); 29 C.F.R. § 1982.110. We review the ALJ’s factual findings to determine whether they are supported by substantial evidence. 29 C.F.R. § 1982.110. The ARB reviews the ALJ’s conclusions of law de novo. *Kruse v. Norfolk S. Ry. Co.*, ARB Nos. 12-081, -106, ALJ No. 2011-FRS-022, slip op. at 3 (ARB Jan. 28, 2014). We generally defer to an ALJ’s credibility findings unless they are “inherently incredible or patently unreasonable.” *Mizusawa v. United Parcel Serv.*, ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 3 (ARB June 15, 2012).

#### DISCUSSION

Under the FRSA, a 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. 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. 49 U.S.C. § 20109(d)(2)(A)(i); 49 U.S.C. § 42121(b)(2)(B)(i)(2000); *Thorstenson v. BNSF Ry. Co.*, ARB No. 18-059, -060, ALJ No. 2015-FRS-052 (ARB Nov. 25, 2019).

<sup>3</sup> The Public Law Board reinstated Acosta as of November 2, 2016. D. & O. at 20. Acosta went back to work on February 7, 2017. The ALJ awarded Acosta 635 days of back pay at \$260.00 a day minus the amount he earned at part-time jobs. D. & O. at 59–60.

## 1. Acosta engaged in protected activity and suffered an adverse action

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. § 20109(a).<sup>4</sup> We affirm as unchallenged on appeal the ALJ's conclusions and findings that Acosta engaged in protected activity when he complained of the overgrown grass and snakes in the right of way and suffered an adverse personnel action when he was fired. Union Pacific does not challenge the ALJ's credibility determinations on appeal.

## 2. The ALJ erred in his contributing factor analysis

To establish a violation under the FRSA, a complainant must show that the protected activity was a "contributing factor" in the adverse employment action. 49 U.S.C. § 20109(d)(2)(A), referring to 49 U.S.C. § 42121(b)(2)(B)(i). "A 'contributing factor' includes 'any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision.'" *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 461–62 (9th Cir. 2018), quoting *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969

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<sup>4</sup> Those provisions include the following:

(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—

(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. § 20109(a).

(8th Cir. 2017). “[T]he contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity.” *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014). In satisfying this statutory standard, a complainant need not prove a retaliatory motive beyond showing that the employee’s protected activity was a contributing factor in the adverse action. *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013). If an employer asserts a legitimate, nondiscriminatory reason for its actions, a complainant can point to specific facts or evidence that, if believed, could show that the employer’s reasons were pretext or show that the protected activity was also a contributing factor even if the employer’s reasons were nonretaliatory. Conversely, an employer’s reasons for imposing an adverse personnel action can be supported and documented to such a degree that a fact-finder finds no contributing factor causation.

#### A. The ALJ’s use of “prima facie case” language

Considering the temporal relationship between Acosta’s May 8 protected activity and Acosta’s termination, the ALJ “[found] there may be sufficient circumstantial evidence to prove, prima facie, that the protected activity was a contributing factor to the adverse action.” D. & O. at 47. Summarizing the section on contributing factor, the ALJ wrote, “I find there is sufficient circumstantial evidence to prove, prima facie, that the protected activity was a contributing factor to the adverse action.” D. & O. at 49.

Despite its commonplace occurrence in the post-hearing opinions of ALJs, a “prima facie case” is usually associated with an inference and the investigatory phase of a whistleblower complaint, not proof after hearing. *See, e.g., Zinn v. Am. Commercial Lines*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 10 (ARB Mar. 28, 2012) (explaining the different phases of investigation and proof by a preponderance after an evidentiary hearing); *Hoffman v. Nextera Energy*, ARB No. 12-062, ALJ No. 2010-ERA-011, slip op. at 12 (ARB Dec. 17, 2013) (*prima facie* showing irrelevant once case goes to hearing before ALJ). As the Eleventh Circuit has noted, incorporation of the term “prima facie case” into whistleblower adjudication has “bred some confusion, chiefly because the phrase evokes the sprawling body of general employment discrimination law.” *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (citations omitted). At the evidentiary stage after hearing, the complainant is required to prove the elements by a preponderance of the evidence, including proof that protected activity was a contributing factor in the adverse action, 29 C.F.R. § 1982.109(a), and not merely allege circumstances sufficient to establish the four elements, including circumstances sufficient to raise the inference that the protected activity was a contributing factor, 29 C.F.R. § 1982.104(e)(2)(iv). *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 1997-ERA-038, slip op. at 9 (ARB July 31, 2002) (“However, because this case has been fully tried on the merits, we move beyond the question of

whether Complainant has presented a *prima facie* case to analysis of the evidence on the ultimate question of liability.”); *Palmer v. Canadian Nat’l Ry, IL Cent. R.R. Co.*, ARB 16-035, ALJ No. 2014-FRS-154, slip op. at 20 n.87 (ARB Jan. 4, 2017) (reissued with dissent) (comparing and contrasting the investigation stage with the burden of proof after hearing); *Rookaird*, 908 F.3d 461–62 (same).

*B. The ALJ found that temporal proximity and knowledge prove a “prima facie” case of causation*

The ALJ’s use of “prima facie” proof seemingly contributed to his findings on pages 44–49 of his D. & O., that temporal proximity and knowledge<sup>5</sup> were sufficient to prove contributing factor causation.

In reference to the timing of Acosta’s termination, the ALJ found that there were only five days between Acosta’s May 8 protected activity and the May 13 accident resulting in Union Pacific’s charge against Acosta. D. & O. at 45–47. The termination decision followed shortly thereafter on June 19, 2015. The ALJ reasoned that temporal proximity and knowledge “will establish, prima facie,” contributing factor causation. D. & O. at 45; *see also id.* at 47 (temporal proximity is “sufficient circumstantial evidence to prove, prima facie, that protected activity was a contributing factor”). The ALJ found that “[g]iven the knowledge of the ultimate decision maker as well as the proximity between Claimant’s protected activity and the adverse action, I find there is sufficient circumstantial evidence to prove, prima facie, that the protected activity was a contributing factor to the adverse action.” D. & O. at 49. The ALJ added that this finding is reinforced when considered in conjunction with what the ALJ found to be a lack of evidence supporting the Respondent’s reasons, which the ALJ discussed in the subsequent section.

Union Pacific argued that the ALJ erred in drawing an inference from the temporal proximity between Acosta’s discipline and the May 8 complaint. Union Pacific noted that prior to that complaint, Acosta had made more than 150 safety

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<sup>5</sup> Union Pacific concedes but criticizes the ALJ’s finding that it had knowledge of Acosta’s May 8 hotline report on June 19 when it made the decision to terminate Acosta. Union Pacific Br. at 10. Union Pacific argues that as of the May 13 investigation into the accident no one involved with Acosta’s pending discipline knew of his May 8 hotline report. The ALJ agreed with Union Pacific that Allen had no knowledge of the specific May 8 complaint on May 13 when the accident took place and when Allen charged Acosta. D. & O. at 42, 47–48. The ALJ further reasoned that Allen’s knowledge was not essential as he was not the final decision-maker. The ALJ found that Chappell knew or had constructive knowledge of Acosta’s May 8 complaint on June 19, 2015, because he reviewed the transcript of the investigatory hearing that took place on June 9 concerning the events that had occurred on May 13, during which time Acosta referred to his protected complaint. D. & O. at 47–48.

complaints over a seven-year period with no repercussions. Union Pacific argues, among other things, that the ALJ's analysis gives no weight to intervening events and that Allen charged all three crew members with violations (Acosta less severely than others) before having knowledge of the May 8 safety complaint. For the following reasons, we agree with Union Pacific that the ALJ erred in his causation analysis.

Generally, temporal proximity is associated with an inference to avoid summary judgment and is not sufficient to prove contributing factor causation by a preponderance of the evidence. *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006); *Peck v. Safe Air Int'l*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 9 (ARB Jan. 30, 2004) (temporal proximity between protected activity and adverse personnel action "normally" will satisfy the complainant's burden of making a *prima facie* showing at the OSHA investigatory stage).

The mere circumstance that protected activity precedes an adverse personnel action is not proof of a causal connection between the two. *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1179 (7th Cir. 1998) ("Timing may be an important clue to causation, but does not eliminate the need to show causation -- and [the plaintiff] really has nothing but the post hoc ergo propter hoc 'argument' to stand on."); *Huss v. Gayden*, 571 F.3d 442, 459 (5th Cir. 2009) (noting "the post hoc ergo propter hoc fallacy assumes causality from temporal sequence"); *Huskey v. City of San Jose*, 204 F.3d 893, 899 (9th Cir. 2000) (same).

The limited causal value of temporal proximity is especially prominent in a whistleblower case where most of a complainant's job may consist of protected activity. Proof of retaliation for engaging in protected activity under the FRSA generally requires more than the mere temporal relationship that an adverse action followed an instance of protected activity. Temporal proximity may be supported by other forms of circumstantial evidence establishing the evidentiary link between the protected act and the adverse action such as inconsistent application of an employer's policies, pretext, shifting explanations by the employer, or antagonism. *Loos v. BNSF Ry. Co.*, 865 F.3d 1106, 1112-13 (8th Cir. 2017), *rev'd* on other grounds, 139 S. Ct. 893 (Mar. 4, 2019).

The insufficiency of temporal proximity as a basis for proving causation is even more apparent when the facts reveal an intervening event occurring between the protected activity and the adverse personnel action. *Feldman v. Law Enforcement Assoc. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014); *Robinson v. Nw. Airlines*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005) ("where the protected activity and the adverse action are separated by an intervening event that *independently* could have caused the adverse action, there is no longer a logical reason to infer a causal relationship between the activity and the



adverse action”); *Jones v. BNSF Ry. Co.*, No. 14-2616, 2016 WL 183514, at \*7 (D. Kan. Jan. 14, 2016) (citations omitted) (“While temporal proximity supports this element, more than a temporal connection is required to present a genuine factual issue on retaliation. This is especially true when the employer was ‘concerned about a problem before the employee engaged in the protected activity.’”); *King v. BP Prods. N. Am., Inc.*, ARB 05-149, ALJ No. 2005-CAA-005, slip op. at 13 (ARB July 22, 2008) (Beyer, J., dissenting) (temporal proximity insufficient for genuine issue of material fact when there is an intervening event).

*C. The ALJ erred in failing to evaluate the intervening events occurring on May 13 by the correct standard*

The ALJ’s problematic use of inferential, “prove a prima facie case” language and conclusions that temporal proximity and knowledge were sufficient for contributing factor causation are compounded by the ALJ’s errors in handling Union Pacific’s legitimate, nondiscriminatory reasons for terminating Acosta.<sup>6</sup> As discussed below, the ALJ erred in substituting his perception of the poor merits of Union Pacific’s employment decision as a means for finding that those reasons were not honestly held and thus were pretext for FRSA retaliation.

*i. Whether or not Acosta was actually a point-protector for the entire time on May 13, was a supervisor, foreman, or was vicariously liable for the acts of his crew is not the dispositive issue in an FRSA retaliation claim*

Union Pacific claimed that Acosta was a point-protector and footboard yardmaster on May 13 and was tasked with preventative and supervisory duties during a shove incident resulting in a collision in the sideswipe incident and failure to follow protocol in the single-car securement incident. Point-protectors serve a safety role during shove-procedures to prevent collisions or derailment. D. & O. at 6, 50–51. When investigating the May 13 incident, Allen charged Acosta with violating the rules because he was footboard yardmaster and the entire crew is responsible for the securement of the equipment. D. & O. at 9–13, 28–29, 32. Notwithstanding that one of Acosta’s crewmembers admitted that he alone failed to secure the cars,

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<sup>6</sup> The ALJ correctly set out the preponderance of the evidence burden of proof and the contributing factor standard in his introduction to the section. D. & O. at 40–44. The ALJ correctly noted that a complainant need not prove that the employer’s reasons were false to prevail under the contributing factor standard. D. & O. at 44. But the ALJ overextended that premise when he concluded that an employer’s legitimate, nondiscriminatory reason “is by itself insufficient to defeat an employee’s claim under the contributing factor analysis.” D. & O. at 44. A fact-finder is permitted to conclude that the employer’s justifications for its action were proven to such a degree that contributing factor played no part in the adverse action. That the two motives can coexist under the lighter, contributing-factor standard does not render the employer’s justifications irrelevant or impotent at the contributing factor stage. *Palmer*, ARB 16-035.

Union Pacific's position is that Acosta was the "footboard yardmaster" and "should have been watching and admonishing [his crewmember] for violating the rules." D. & O. at 28–29, 51. Union Pacific relied in part on a "pattern" of neglect because the crew under Acosta failed to secure the cars correctly during the single-car securement incident that occurred before the twenty-two car collision. Union Pacific claimed that it based its termination decision on Acosta's existing level 4 violation status and the events of May 13, which upgraded that status to level 5. *Id.* at 12–13, 28–29, 32–33.

Rejecting Union Pacific's reliance on this ground, the ALJ countered that "Allen never testified that Acosta was the point protector during the entirety of the events which took place on May 13, 2015. Rather, Allen specifically stated that he **'could not say who provided point protection for the initial shove movement.'**" D. & O. at 51 (emphasis in original). The ALJ also took issue with the fact that Union Pacific did not charge Acosta himself with violating the rules but rather held him responsible for the actions of his crew. D. & O. at 51. The ALJ emphasized "[m]oreover, my review of the record reveals Acosta was never found to have directly violated any rules. Rather, he was held accountable for his crew member's violations of those rules." D. & O. at 52. The ALJ rejected Union Pacific's assertion that Acosta was in a leadership position and was thus responsible for the actions of his crew. D. & O. at 52. "I find no testimony, by [crewmembers] or Acosta, that the footboard yardmaster position is a leadership or management position. My review of the record reveals that [crewmembers] and Acosta uniformly testified that a footboard yardmaster is in charge of the work to be done, but a footboard yardmaster is not in charge of or liable for the actions of the crew." D. & O. at 52–53. The ALJ examined the specific testimony of crewmembers as to whether it supported the assertion that the footboard yardmaster was similar to a foreman or liable for crew's actions. D. & O. at 52–54. The ALJ found that Union Pacific's "reasons for the adverse action" against Acosta were "not support[ed]" because Acosta was not liable as footboard yardmaster. D. & O. at 53. "I do not find [crewmembers'] testimony establishes that a footboard yardmaster is in charge of the crew, responsible for, or liable for the actions of the crew." D. & O. at 54. The ALJ did not find that Union Pacific had proven that a footboard yardmaster was equivalent to a foreman. D. & O. at 55. The ALJ wrote "[m]oreover, I am not convinced, by the evidence of record, that a footboard yardmaster is responsible for the actions of the other crew members. Nor do I believe the evidence supports a finding that that a footboard yardmaster is vicariously liable for the safety violations of his crew." D. & O. at 55. Continuing to vet the merits of vicarious liability, the ALJ found the following:

Respondent has wholly failed to convince me of the legitimacy of its reasons for its adverse actions against Complainant. Respondent failed to establish that a footboard yardmaster is a leadership position. Respondent also failed to establish that a footboard yardmaster is

responsible for or liable for any safety violations of his crew members – regardless of whether he witnesses such violations.

D. & O. at 56. Accordingly, the ALJ found that Union Pacific's reasons for disciplining Acosta because of his safety violations on May 13 were "illegitimate or pretextual." D. & O. at 50.

The ALJ erred in the above analysis by focusing on his perceptions of the merits of Union Pacific's justifications for terminating Acosta. The question is not whether Acosta violated Union Pacific's rules, whether he actually was or was not point protector for the entire time, or whether Union Pacific proved that he was not actually in charge of the team's work as opposed to being a leader of the team. *Jones v. U.S. Enrichment Corp.*, ARB Nos 02-093, 03-010, ALJ No. 2001-ERA-021 (ARB Apr. 30, 2004) ("It is not enough . . . to *disbelieve* the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.") (case citations omitted). The ARB has stated on many occasions that the ALJ should not sit as a super-personnel advocate when viewing the employer's decisions for an adverse action. *Clem v. Computer Sciences Corp.*, ARB No. 16-096, ALJ Nos 2015-ERA-003, -004 (ARB Sept. 17, 2019); *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 1997-ERA-038, slip op. at 13 (ARB July 31, 2002) ("Moreover, the thrust of Complainant's argument is that it was wrong, unfair, or unjust for Respondents not to weigh the grounds that they cited against Complainant's past performance and find in favor of retaining her, and that therefore Respondents' rationale was pretext. However, "[I]t is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible . . . [rather] he must show that the explanation is a 'phony reason.'" citing *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 278 (7th Cir. 1995)). The FRSA is not a wrongful termination statute. An employer's actions can be harsh, faulty, and unjustified, but this does not establish that the employer retaliated for FRSA whistleblowing activity.<sup>7</sup>

Rather, the issue to be decided by the ALJ when evaluating the employer's reasons for its action is first whether Union Pacific genuinely or honestly believed that Acosta was responsible in whole or in part for the pattern of safety violations or

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<sup>7</sup> *Swenson v. Schwan's Consumer Brands N. Am., Inc.*, 500 Fed. Appx. 343, 346 (5th Cir. 2012) ("Admittedly, the parties dispute whether and to what extent Swenson violated Schwan's vacation policy. Swenson argues that demonstrating that Schwan's was factually incorrect in its determination that Swenson violated company policy is sufficient to establish pretext. However, pretext is not established merely because the company was mistaken in its belief, if honestly held. Whether Schwan's conclusion was correct is irrelevant; if Schwan's belief that Swenson violated company policy motivated its discharge decision, then it was not a pretext, and Swenson cannot meet his evidentiary burden."); *Collins v. Am. Red Cross*, 715 F.3d 994, 999 (7th Cir. 2013) (the FRSA "does not forbid sloppy, mistaken, or unfair terminations; it forbids discriminatory or retaliatory terminations").

the twenty-two car collision. And if so, whether that belief and not protected activity accounted for its disciplinary actions. *Clem*, ARB No. 16-096; *Stone & Webster, Constr., Inc. v. U.S. Dept. of Labor*, 684 F.3d 1127, 1136 (11th Cir. 2012).

We do not say that the believability of the employer's reasons is not relevant to a whistleblower retaliation claim. If the employer's reasons were so unbelievable as to be unworthy of credence, this would be evidence in favor of Acosta, either at the contributing factor stage or preventing the employer from establishing its affirmative defense. The ALJ had traditional grounds for establishing pretext for FRSA retaliation such as disparate treatment with similarly situated comparators, a history of retaliation against persons who engage in protected activity, and so on. However, this is not the analysis that the ALJ performed.

*D. The ALJ's errors require remand to weigh the evidence by the preponderance of the evidence*

To prove a fact by a preponderance of the evidence "means to show that that fact is more likely than not; and to determine whether a party has proven a fact by a preponderance necessarily means to consider all the relevant, admissible evidence and, on that basis, determine whether the party with the burden has proven that the fact is more likely than not." *Palmer*, ARB 16-035, slip op at 18. As we have stated before, the employer's reasons for its actions are relevant at both the contributing factor stage, when applying the "preponderance of the evidence" standard, and at the affirmative defense stage, when analyzing the employer's burden by the "clear and convincing evidence" standard.

Reviewing the ALJ's opinion as a whole it is difficult to separate out the ALJ's use of inference standards (*prima facie*) from those showing a weighing by the preponderance of the evidence, especially in light of the weight that the ALJ gave to temporal proximity and knowledge--adorned in inference language. D. & O. at 47, 49. Our conclusion is corroborated by the fact that the ALJ appeared to compartmentalize the employer's reasons for its actions in a separate section on legitimate, nondiscriminatory reasons after concluding that temporal proximity and knowledge established "*prima facie*" that protected activity contributed to Acosta's termination. Even if the ALJ did weigh the evidence by a preponderance of the evidence in making his contributing factor findings (D. & O. at 56), he did not correctly weigh the employer's evidence by the correct standard and this requires remand.

### **3. The ALJ erred in his clear and convincing analysis**

In evaluating the employer's same-action defense, the fact-finder must assess whether the respondent has demonstrated by clear and convincing evidence that it would have taken the action even if the employee had not engaged in protected

activity. We have said that the employer satisfies this burden when it shows that it is “highly probable” that it would have taken the action in the absence of protected activity. *Palmer*, ARB 16-035, slip op. at 52. As we said in *Clem*, ARB No. 16-096, a fact-finder must holistically consider any and all relevant, admissible evidence when determining whether an employer would have taken the same adverse action against an employee in the absence of any protected activity.

The above-cited errors in the ALJ’s causation analysis, carried over to the ALJ’s analysis of Union Pacific’s affirmative defense as the ALJ again relied upon his perception of the merits of Union Pacific’s justifications and not Union Pacific’s honestly held basis for the June 19 termination following investigation of the May 13 events. The ALJ found that he was “unconvinced by the legitimacy of Respondent’s reasons” for the adverse action. D. & O. at 58. The ALJ wrote as follows:

For the same reasons I am unconvinced by the legitimacy of Respondent’s reasons for its adverse action, I am similarly unconvinced that Respondent would have taken the same action absent Complainant’s protected activity. Simply put, I am wholly unconvinced by Respondent’s reasons for its adverse actions against Complainant.

I believe – as Respondent asserts – Complainant would have been upgraded to a “level 5” and thus subject to the possibility of termination if he violated safety rules. However, as discussed above, Respondent was unable to convince me of the legitimacy of its reasons for charging Complainant with the safety rule violations and the ultimate adverse action taken against Complainant. Respondent failed to establish sufficient evidence of the actual responsibilities and duties of one of its own employee positions. As such, the undersigned found the validity of Respondent’s reasons for the adverse action taken against Complainant to be questionable. In this particular case, without convincing me of its reasons for the adverse action, Respondent cannot convince me that it would have taken the same action absent Complainant’s protected activity. Accordingly, I find Complainant has established that his protected activity was a contributing factor to the adverse action and Respondent failed to establish that it would have taken adverse action absent Complainant’s protected activity.

D. & O. at 58 (emphasis in original). The ALJ committed error by shifting the issue to be decided from retaliation for FRSA protected activity to the accuracy or merits of Union Pacific’s termination decision.

**CONCLUSION**

The ALJ erred in his contributing factor and same-action defense analyses. We **REMAND** for proceedings consistent with this opinion.

**SO ORDERED.**

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