U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

MICHAEL YOUNG,

COMPLAINANT,

v.

CSX TRANSPORTATION, INC.,

RESPONDENT.

ARB CASE NOS. 2023-0028
2023-0029

ALJ CASE NO. 2021-FRS-00001
ALJ HEATHER C. LESLIE

DATE: March 27, 2025

Appearances:

For the Complainant:
Jefferson C. Callier, Esq.; *The Callier Firm*; Columbus, Georgia

For the Respondent:
Jacqueline M. Holmes, Esq. and Thomas R. Chiavetta, Esq.; *Jones Day*; Washington, District of Columbia

Before THOMPSON and ROLFE, Administrative Appeals Judges

DECISION AND ORDER

THOMPSON, Administrative Appeals Judge:

This case arises under the whistleblower protection provisions of the Federal Railroad Safety Act of 1982 (FRSA).[1] Complainant Michael Young filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Respondent CSX Transportation, Inc. retaliated against him in violation of the FRSA's whistleblower protection provisions. Following a hearing, a United States Department of Labor

[1] 49 U.S.C. § 20109; 29 C.F.R. Part 1982 (2024).

Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) on March 28, 2023, in Respondent's favor. Both Complainant and Respondent appealed to the Administrative Review Board (ARB or Board). For the reasons explained below, we affirm.

BACKGROUND AND PROCEDURAL HISTORY

Complainant worked for Respondent for approximately thirteen years at its Fitzgerald and Waycross, Georgia, locations, in a position which encompassed working a variety of jobs, including transporting trains.[2] While employed, Complainant was covered under a collective bargaining agreement (CBA) which outlined discipline and related investigatory procedures.[3]

Respondent's Employee Operating Manual lists various operating rules, including Rule 104.2, which prohibits employees from being dishonest.[4] Respondent's Individual Development and Personal Accountability Policy (IDPA) differentiates between rule violations as "major" or "non-major."[5] The IDPA explains major offenses "warrant removal from service pending a formal hearing and possible dismissal from service for a single occurrence if proven responsible."[6] Dishonesty is categorized as a major offense.[7]

1. Complainant's Injury Report

On March 7, 2018, Complainant worked as a conductor alongside Engineer William Cook and Trainmaster Rob Behrens.[8] As part of their workday, they picked up and dropped off cars at the Shapiro Metals plant (a scrap metal plant).[9] To enter the Shapiro plant, a gate across the tracks had to be opened.[10] On the way into the plant, Complainant opened the gate without incident.[11] Upon leaving the plant however, the gate fell and started swinging from a top hinge.[12] Complainant

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2 D. & O. at 3; Hearing Transcript (Tr.) at 15, 56.

3 D. & O. at 4.

4 *Id.*; Joint Exhibit (JX) 4 at 3.

5 D. & O. at 4.

6 *Id.*; JX 1 at 1.

7 D. & O. at 4; JX 1 at 1.

8 D. & O at 4; Tr. at 15-16, 19.

9 D. & O. at 5, 5 n.23.

10 *Id.* at 5.

11 *Id.*

12 *Id.*; Tr. at 25.

attempted to fix and close the gate, but the gate came completely off the hinges and fell entirely to the ground.[13] Complainant testified that he felt the gate strike the right side of the outside edge of his right knee.[14] After several attempts, Complainant ultimately secured the gate and walked away.[15] Complainant notified Cook on the radio that the gate fell off the hinges and hit him.[16] Complainant continued to work the rest of his shift and he returned to the yard office around 7 p.m.[17] At that time, Complainant called Behrens and told him about the incident.[18]

Later that day, Behrens brought Complainant Respondent's Form PI-1A, Employee's Injury and/or Illness Report (PI Form) for Complainant to complete.[19] Complainant began filling out the PI form, stating that "[w]hile pulling the gate to shut it the top of the gate came off its hing [sic] I went to get out of the way and the gate side landed on the side of my right knee causing pain on the back[,] front and side of knee."[20] The PI Form contained a section for indicating whether medical attention had been provided, and if so, for indicating what type of medical attention was provided.[21] Complainant sought guidance from Behrens on how to answer the question since he had not received any medical attention, but thought he may seek medical attention at a later time.[22] Behrens explained to Complainant that he must complete the entire form.[23] Complainant advised he could not complete the form because he did not know how to answer that question.[24] Behrens advised he could take Complainant to the emergency room (ER) if needed.[25] Behrens eventually drove Complainant to the ER although Complainant's desire at the time was to go home.[26]

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13 D. & O. at 5; Tr. at 24-25.

14 D. & O. at 5; Tr. at 25, 59-60.

15 D. & O. at 9.

16 *Id.* at 5; Tr. at 26.

17 D. & O. at 5-6.

18 *Id.* at 6.

19 *Id.*

20 JX 15 at 1; *see* D. & O. at 6.

21 D. & O. at 6; JX 15 at 1.

22 D. & O. at 6; Tr. at 54.

23 D. & O. at 6.

24 Tr. at 28.

25 *Id.* at 28-29.

26 D. & O. at 6-7; Tr. at 29-31.

At the ER, Complainant advised the ER staff that a metal gate had struck his right knee on the lateral side.[27] Complainant underwent x-rays and was given a leg brace and medication.[28] The ER doctor noted there was tenderness on the lateral side of the right knee and diagnosed Complainant as having a "contusion [on his] right knee."[29] Complainant was told to follow up with his primary care physician and stay out of work through March 16, 2018.[30] Behrens stayed with Complainant for the duration of his ER visit.[31] After his visit, Complainant completed the PI form.[32]

Later, Complainant followed up with his primary care physician who referred him to Georgia Sports Medicine,[33] where he was diagnosed with a "[s]prain of unspecified site" and referred to physical therapy.[34] Beginning on April 23, 2018, Complainant attended physical therapy with Southern Physical and Occupational Therapy Services.[35] Although he had previously asserted that the gate had struck his knee, at Southern Physical and Occupational Therapy Services, Complainant said only that he had been injured when he "[t]wisted knee [in the] beginning of March."[36] Complainant was released to full duty sometime in July or August.[37]

2. Respondent's Investigation

Following the incident, Behrens and Trainmaster Noah Asher (Asher) began investigating Complainant's accident.[38] On March 8, 2018, Behrens forwarded the PI Form and Complainant's medical report from the ER to the Superintendent for the Georgia Carolina zones, Ray Canady.[39] Behrens and Asher later inspected the gate at Shapiro.[40] They found that the top hinge of the right gate was broken off

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27 D. & O. at 7; JX 5 at 4-5.

28 D. & O. at 7.

29 *Id.*; JX 5 at 4.

30 D. & O. at 7; JX 5 at 4.

31 D. & O. at 7.

32 *Id.*

33 *Id.*

34 *Id.*; Tr. at 34; JX 28 at 2.

35 D. & O. at 7.

36 *Id.*; JX 28 at 2.

37 D. & O. at 7.

38 *Id.* at 9.

39 *Id.* at 9-10; JX 5; Tr. at 123.

40 D. & O. at 9.

which corroborated Complainant's statement.[41] Behrens obtained video from surveillance cameras at Shapiro.[42] Behrens viewed the video with Asher and then later with Canady.[43] Behrens felt there was an inconsistency between Complainant's statements (Complainant's statements to Behrens and the statement he wrote on the PI form) and the video surveillance; specifically, Behrens did not see the gate hitting Complainant's right knee.[44]

Behrens presented the results of the investigation to Canady who had the "final say" in determining whether Complainant had been dishonest.[45] After reviewing the video surveillance multiple times along with the results of Behrens' investigation, Canady concluded Complainant's statement that the gate hit him was untrue.[46] Consequently, Canady instructed Behrens to charge Complainant with dishonesty.[47]

On March 13, 2018, Respondent prepared an assessment form charging Complainant with violating Rule 104.2, which was emailed to Behrens, Canady, and Asher.[48] On March 15, 2018, Respondent sent a letter to Complainant informing him that a formal investigation would be held and that he would be out of service pending the investigation.[49]

On August 20, 2018, a Conducting Officer held a hearing about the charge against Complainant.[50] Behrens, Asher, Cook, and Complainant each gave testimony.[51] During the hearing, Asher watched the video surveillance and remarked that before the gate fell, Complainant had been limping with his right leg

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41 *Id.*

42 *Id.* at 9-10.

43 *Id.* at 10.

44 *Id.*

45 *Id.* at 10 n.73.

46 *Id.* at 10.

47 *Id.*

48 *Id.* at 11; JX 7 ("While working in the vicinity of Shapiro Metals you were dishonest in your reporting of an alleged incident that occurred.").

49 D. & O. at 11; JX 8.

50 *Id.*; JX 2 at 5; JX 12 at 1. The words "hearing" and "investigation" appear to be used interchangeably for the August 20, 2018 proceeding.

51 D. & O. at 11.

and only used his left leg to climb up the side of the rail car.[52] Asher remarked that although the video showed the gate falling towards the left side of Complainant's body, it did not show the gate striking Complainant on the right side of his knee or Complainant making any movements that would indicate the gate struck him.[53] After watching the video surveillance at the hearing, Complainant testified that he believed the gate hit him at 5:56:22 per the video time stamp, that at that moment, it felt like the gate hit him, and that he told Behrens on the drive to the hospital that while he was not 100% sure the gate hit his knee, he did have a pain in his knee.[54]

On August 20, 2018, the Hearing Officer issued Findings concluding that Complainant was dishonest in his reporting of the incident.[55] The Hearing Officer explained that both the PI Form and Complainant's statements at the hearing indicated the gate fell on his right knee, but the video surveillance showed that the gate fell to the left and could not have hit his right knee.[56] Respondent's Manager of the Discipline and Arbitration Group, Suzie Hutto, reviewed the investigation and the Hearing Officer's Findings.[57] Hutto did not watch the video surveillance.[58] Hutto recommended dismissal because it seemed to her that Complainant had backtracked his version of events after reviewing the video surveillance during the hearing.[59] Hutto made her recommendation to the Superintendent of the Florida Zone, Christopher Guenther.[60] Guenther was responsible for issuing discipline.[61] After reviewing the materials, including the video surveillance, Guenther determined that Complainant was guilty of dishonesty.[62] On September 17, 2018, Respondent dismissed Complainant by letter.[63]

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52 *Id.* at 11-12; JX 12 at 8, 10. Complainant remarked that he did not have any problems with his right leg prior to coming into work that day and the video accurately depicted how he normally mounts and dismounts rail cars. D. & O. at 13; JX 12 at 25.

53 D. & O. at 12; JX 12 at 10-11.

54 D. & O. at 13; JX 12 at 23-24, 27.

55 D. & O. at 13; JX 13.

56 JX 13 at 1.

57 D. & O. at 14.

58 *Id.* at 14 n.111 (citing Tr. at 155).

59 *Id.* at 14.

60 *Id.*

61 *Id.* Canady removed himself from the decision-making process regarding discipline because he was involved in the investigation process. *Id.*

62 *Id.* at 14-15.

63 *Id.* at 15.

3. Post-Termination

Shortly after Complainant's termination, Complainant filed a complaint with OSHA, in which he alleged Respondent violated the FRSA by terminating his employment after he submitted an injury report.[64] On September 14, 2020, OSHA issued its findings determining there was reasonable cause to believe Respondent violated the FRSA.[65] On October 15, 2020, Respondent filed a timely appeal with the Office of Administrative Law Judges, and an ALJ held an evidentiary hearing via video on December 15, 2021.[66]

On March 28, 2023, ALJ found for Respondent, concluding that although she found Complainant proved that protected activity was a contributing factor Complainant's termination, Respondent demonstrated by clear and convincing evidence that it would have fired Complainant absent his protected activity.[67] The ALJ viewed the video surveillance and found "no indication that he was hit, as he did not stop, reach down to his right knee, jerk in any way as if he was hit, and in fact seemed to be walking a normal gait immediately thereafter with no hint that he was struck by a falling metal gate" and that "having an altered gait before the injury, as compared to after the injury was supposed to have taken place, it is a valid reason for the Respondent to question the veracity of Complainant."[68] Both Complainant and Respondent filed petitions for review of the ALJ's decision with the Board on April 11, 2023.

On appeal, Complainant challenges the ALJ's finding that Respondent established an affirmative defense, and Respondent raises a number of issues challenging aspects of the ALJ's decision, including that: (i) Complainant did not engage in protected activity because he did make his injury report in "good faith;" (ii) Complainant's protected activity was not a contributing factor to his termination because he did not establish retaliatory intent; and (iii) the ALJ made a legal error by applying an inextricably intertwined standard in the contributing factor analysis.

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64 *Id.* at 2.

65 *Id.*

66 *Id.*

67 *Id.* at 26.

68 *Id.* at 23.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to review ALJ decisions under the FRSA.[69] The ARB will affirm the ALJ's factual findings if they are supported by substantial evidence, but reviews conclusions of law de novo.[70] The Board generally defers to an ALJ's credibility findings "unless they are 'inherently incredible or patently unreasonable.'"[71]

DISCUSSION

1. FRSA Legal Standards

The FRSA prohibits a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith protected activity.[72] To prevail, an FRSA complainant must establish by a preponderance of the evidence that: (1) they engaged in a protected activity; (2) they suffered an adverse action; and (3) the protected activity was a contributing factor in the adverse action.[73] If a complainant meets this burden of proof, the employer may avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action absent the complainant's protected activity.[74]

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[69] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (Mar. 6, 2020); *see* 29 C.F.R. § 1982.110(a).

[70] 29 C.F.R. § 1982.110(b) ("The ARB will review the factual determinations of the ALJ under the substantial evidence standard."); *Yowell v. Fort Worth & W. R.R.*, ARB No. 2019-0039, ALJ No. 2018-FRS-00009, slip op. at 4 (ARB Feb. 5, 2020) (citations omitted), *aff'd* 993 F.3d 418 (5th Cir. 2021).

[71] *Mizusawa v. United Parcel Serv.*, ARB No. 2011-0009, ALJ No. 2010-AIR-00011, slip op. at 3 (ARB June 15, 2012) (citation omitted).

[72] 49 U.S.C. § 20109(a), (b), (d)(2)(A)(i) (incorporating legal burdens of proof set forth in 49 U.S.C. § 42121(b)); *see* 49 U.S.C. § 42121(b)(2)(B)(iii).

[73] 29 C.F.R. § 1982.109(a).

[74] 29 C.F.R. § 1982.109(b).

2. Respondent's Affirmative Defense[75]

Under Board precedent, it is not enough for an employer to show that it *could* have taken the same adverse action; it must show that it *would* have done so even in the absence of protected activity.[76] Similarly, an employer cannot carry its

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[75] Respondent on appeal challenges the ALJ's protected activity and contributing factor causation findings. We need not reach 'Respondent's other objections because we affirm the ALJ's finding that Respondent proved the same-action defense by clear and convincing evidence. However, upon review of the ALJ's contributing factor causation analysis, the ALJ made a legal error in not making a determinative contributing factor finding (the ALJ stated that Complainant's protected activity could "be said to have contributed to adverse action") and in stating that Respondent's witness testimony did "not come into consideration at [the contributing factor] stage." *See* D. & O. at 21 n.160 (citing *DeFrancesco v. Union R.R. Co.*, ARB No. 2013-0057, ALJ No. 2009-FRS-00009 (ARB Sept. 30, 2015) (citing *Fordham v. Fannie Mae*, ARB No. 2012-0061, ALJ No. 2010-SOX-00051 (ARB Oct. 9, 2014) and *Powers v. Union Pac. R.R.*, ARB No. 2013-0034, ALJ No. 2010-FRS-00030 (ARB Apr. 21, 2015) (which holdings about what evidence could and should be considered in the contributing factor analysis were both overruled by *Palmer v. Canadian Nat'l Ry.*, ARB No. 2016-0035, ALJ No. 2014-FRS-00154 (ARB Sept. 30, 2016) (reissued with full dissent, Jan. 4, 2017)). In *Palmer*, the Board explained that factfinders must consider all relevant, admissible evidence, including the employer's non-retaliatory reasons for its adverse actions, in a contributing factor causation analysis and that there is no "limitation on the factfinder's consideration of relevant, admissible evidence at" this stage. *Palmer*, ARB No. 2016-0035, slip op. at 21, 23, 29, 35, 53, 56, 57. The Board has consistently explained that *Palmer* is controlling precedent and factfinders must consider all relevant, admissible evidence in a contributing factor causation analysis. *See e.g., Dick v. USAA*, ARB No. 2022-0063, ALJ No. 2018-STA-00054, slip op. at 14-16 (ARB Apr. 16, 2024); *May v. AGL Servs. Co.*, ARB No. 2022-0015, ALJ No. 2020-PSI-00001, slip op. at 7-8, 12 (ARB Sept. 14, 2023); *Neely v. The Boeing Co.*, ARB No. 2020-0071, ALJ No. 2018-AIR-00019, slip op. at 16 n.96 (ARB May 19, 2022). However, we find that the ALJ's error is harmless because it does not affect her affirmative defense analysis, and we affirm the ALJ's order on that basis. *See McLean v. Am. Eagle Airlines, Inc.*, ARB No. 2012-0005, ALJ No. 2010-AIR-00016, slip op. at 6 n.1 (ARB Sept. 30, 2014) (finding harmless error where the ALJ failed to apply the proper burden of proof because the error did not affect the result).

[76] *Palmer*, ARB No. 2016-0035, slip op. at 57; *Powers v. Union Pac. R.R. Co.*, ARB No. 2013-0034, ALJ No. 2010-FRS-00030, slip op. at 12 (ARB Jan. 6, 2017); *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 2013-0074, ALJ No. 2005-ERA-00006, slip op. at 11 (ARB Apr. 25, 2014). Complainant argues on appeal that because the ALJ found it impossible to determine from the video surveillance whether the gate hit his knee, D. & O. at 23, that likewise it is not possible for Respondent to meet its burden to prove by clear and convincing evidence that Respondent fired him because he was dishonest about the injury. Complainant (Comp.) Opening Br. at 1. This argument, however, is legally incorrect and unpersuasive. As described above, the correct affirmative defense analysis is whether an employer established, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. The ALJ found that Respondent

burden by showing that it might have taken the same adverse action against an employee.[77] After all, "the clear and convincing standard is truly a high standard."[78] This higher burden is justified because it is imposed only after it has been established "that protected activity actually contributed to an unfavorable employment action."[79]

The plain meaning of the clear-and-convincing phrase requires that the evidence must be "clear" as well as "convincing."[80] "Clear" evidence means the employer has presented an unambiguous explanation for the adverse action in question.[81] "Convincing" evidence has been defined as evidence demonstrating that a proposed fact is "highly probable."[82] Thus, to prove something by clear and convincing evidence requires "a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain."[83]

The ALJ found Respondent proved by clear and convincing evidence that it would have terminated Complainant's employment in the absence of his protected activity because it believed Complainant was dishonest regarding the March 7, 2018 incident.[84] In making this finding, the ALJ considered the following evidence in the record:

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would have taken the same action in the absence of the protected activity because it sincerely believed Complainant was dishonest. D. & O. at 26. A finding that Complainant *was actually* dishonest is not necessary to a finding that Respondent subjectively believed Complainant was dishonest (or otherwise a bad actor) and fired him for that reason. *See Austin v. BNSF Ry. Co.*, ARB No. 2017-0024, ALJ No. 2016-FRS-00013 (ARB Mar. 11, 2019) (ARB affirmed the ALJ finding that Respondent fired Complainant based on its "belief that Complainant was stealing in making [the] decision to terminate her employment" in finding no FRSA violation).

77 *See Douglas v. Skywest Airlines, Inc.*, ARB Nos. 2008-0070, -0074, ALJ No. 2006-AIR00014, slip op. at 17 n.108 (ARB Sept. 30, 2009) (an employer's "burden is to prove by clear and convincing evidence that it "would have," not "might have" or "could have" terminated" an employee's employment).

78 *Palmer*, ARB No. 2016-0035, slip op. at 66 n.265 (Corchado, J., concurring); *see also Smith v. Duke Energy Carolinas, LLC*, ARB No. 2014-0027, ALJ No. 2009-ERA-00007, slip op. at 12 (ARB Feb. 25, 2015) ("The 'clear and convincing'" phrase is not quite as clear but it obviously suggests a high standard[.]").

79 *Smith*, ARB No. 2014-0027, slip op. at 12 (Corchado, J. concurring).

80 *Speegle*, ARB No. 2013-0074, slip op. at 11.

81 *Id.*

82 *Id.*

83 *Id.* (citing *Williams v. Domino's Pizza*, ARB No. 2009-0092, ALJ No. 2008-STA-00052, slip op. at 5 (ARB Jan. 31, 2011)).

84 D. & O. at 26.

1) The ALJ's own findings that the video surveillance a) did not show Complainant was hit by the gate or any other indication of an injury, [85] b) showed that prior to the alleged incident, Complainant only used his left leg going up a ladder on the train,[86] and c) showed that minutes prior to the alleged incident, Complainant already seemed to be walking with a limp, but after the gate allegedly hit him, he did not have any difficulty walking.[87]
2) Complainant, when attending physical therapy, described twisting his knee as the cause of his injury, and not a gate falling on him.[88]
3) Respondent classifies dishonesty as a major offense warranting dismissal.[89]
4) Respondent investigated and followed procedures outlined in its company policy and the CBA covering Complainant.[90]
5) All of Respondent's witnesses testified "that it was Complainant's dishonesty in how he described the injury, and not the injury itself, which caused his termination."[91] The ALJ credited this testimony.[92]
6) Respondent's comparator evidence.[93] Respondent entered into evidence a list of other employees who reported work-related injuries whose reports did not result in discipline, termination or otherwise.[94] Respondent also submitted into evidence a list of employees Respondent found violated its dishonesty rule, among other rules, and who were subsequently terminated.[95]

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85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.* at 24.

89 *Id.* Canady and Hutto both testified to the importance of honesty in the railroad industry. Tr. at 135, 153.

90 D. & O. at 25.

91 *Id.* at 24.

92 *Id.*

93 *Id.*

94 JX 18A.

95 JX 18B.

It is the ALJ's function to weigh the evidence and determine witness credibility.[96] Based on the specific facts here, we find substantial evidence supports the ALJ's finding that Respondent proved, by clear and convincing evidence, that it would have fired Complainant for dishonesty absent his protected activity.[97] Even though we may have ruled for Complainant if the matter been before us de novo,[98] we note that the ALJ did not simply rely on Respondent's policy regarding dishonesty in making her finding that Respondent established its affirmative defense.[99] Rather, the ALJ further relied on her credibility finding that Respondent believed that Complainant was dishonest, and not the fact Complainant reported a medical injury, for the reason for his termination. The Board affords great deference to an ALJ's credibility findings,[100] and it would exceed our scope of review to disturb them

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[96] *See DeBuse v. Corr Flights S.*, ARB No. 2023-0036, ALJ No. 2020-AIR-00015, slip op. at 15 (ARB Dec. 6, 2024) (citation omitted).

[97] *See Chambers v. BNSF Ry. Co.*, ARB No. 2019-0074, ALJ No. 2018-FRS-00086, slip op. at 6 (ARB Mar. 5, 2021) (affirming the ALJ's finding that the employer established its affirmative defense because the employer's decisionmakers honestly believed the employee was dishonest, and BNSF demonstrated its policies prohibiting dishonesty and that it consistently dismissed employees it found to be dishonest); *see also Blackorby v. BNSF Ry. Co.*, 936 F.3d 733, 737 n.5 (8th Cir. 2019) ("[T]here is [not] anything inherently impermissible about using an 'honestly held belief' instruction in the context of an FRSA retaliation claim. Any such instruction, however, must be articulated in a manner that preserves the clear-and-convincing-evidence standard . . . . ").

[98] The Board "must uphold an ALJ's factual finding that is supported by substantial evidence even if there is also substantial evidence for the other party, and even if we 'would justifiably have made a different choice had the matter been before us de novo.'" *Sharpe v. Supreme Auto Transp.*, ARB No. 2017-0077, ALJ No. 2016-STA-00073, slip op. at 5 (ARB Dec. 23, 2019) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)); *see also Biestek v. Berryhill*, 587 U.S. 97, 103 (2019) ("[T]he threshold for [[substantial evidence] is not high . . . It means—and means only—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.") (internal citations and quotations omitted); *Bonet ex rel. T.B. v. Colvin*, 523 F. App'x 58, 59 (2d Cir. 2013) ("It may well be that reasonable minds would disagree as to [the finding], but it is clear from the record that the ALJ . . . simply reached a conclusion, supported by substantial evidence . . . .").

[99] *See Brucker v. BNSF Ry. Co.*, ARB No. 2014-0071, ALJ No. 2013-FRS-00070, slip op. at 14 (ARB July 29, 2016) ("To prove what BNSF **would** have done, it is not sufficient for it establish that it had an honesty policy in place under which it **could** have terminated Brucker's employment. *Instead it must convincingly demonstrate that it was highly probable that it* ***would*** *have terminated Brucker's employment* . . . .") (emphasis of italics added)).

[100] The Board affords great deference to an ALJ's credibility determinations and will only overturn such findings if they "conflict with a clear preponderance of the evidence" or "are inherently incredible or patently unreasonable." *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 2009-0057, ALJ No. 2008-ERA-00003, slip op. at 9 (ARB June 24, 2011) (citation

here. Far from being inherently incredible, the ALJ's crediting of this testimony is eminently reasonable. Because substantial evidence thus supports the ALJ's finding that Respondent established its affirmative defense, we must affirm.

CONCLUSION

The Board finds that substantial evidence supports the ALJ's affirmative defense finding based on the specific facts of this case. Thus, we **AFFIRM** the ALJ's D. & O.

SO ORDERED.

ANGELA W. THOMPSON
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

omitted); *see also Folger v. SimplexGrinnell, LLC*, ARB No. 2015-0021, ALJ No. 2013-SOX-00042, slip op. 4 n.8 (ARB Feb. 18, 2016).