U.S. Department of Labor

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

In the Matter of:

VINCENT MARCH,

COMPLAINANT,

v.

METRO-NORTH COMMUTER RAILROAD COMPANY,

RESPONDENT.

ARB CASE NO. 2021-0059

ALJ CASE NOS. 2019-FRS-00032
2019-FRS-00035

DATE: January 21, 2022

Appearances:

For the Complainant:
Vincent March; *pro se*; Ossining, New York

For the Respondent:
Helene R. Hechtkopf, Esq. and Miriam J. Manber, Esq.; *Hoguet Newman Regal & Kenney, LLP*; New York City, New York

For the Assistant Secretary of Labor for Occupational Safety and Health, Intervenor:
Seema Nanda, Esq.; Jennifer S. Brand, Esq.; Maria Van Buren, Esq.; Megan E. Guenther, Esq.; and Bradley G. Silverman, Esq.; *United States Department of Labor*; Washington, District of Columbia

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provisions of the Federal Railroad Safety Act of 1982 (FRSA or the Act).[1] Complainant Vincent March filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Metro-North Commuter Railroad Company (Metro-North) violated the FRSA when it suspended March and terminated his employment for engaging in conduct protected by the Act. After an evidentiary hearing, an Administrative Law Judge (ALJ) issued a Decision and Order Awarding Damages (D. & O.), determining that Metro-North violated the FRSA. We affirm the ALJ's decision for the reasons set forth below.

BACKGROUND

1. March's Employment with Metro-North

March began working for Metro-North as a machinist in September 2002.[2] Beginning in 2009, March worked in Metro-North's diesel shop in Croton Harmon, New York, where he most recently reported to Anthony Browne.[3] Browne, in turn, reported to Neil McCrory and Matt Dalbo.[4] Kirk Fleming and Vincent DiRenno were several steps further up this reporting chain, serving as March's fifth and sixth level supervisors, respectively.[5]

As a machinist in the diesel shop, March was responsible for performing air brake inspections on locomotives.[6] This included checking brakes and pneumatic apparatuses, such as windshield wipers, sanders, bells, and horns, for integrity.[7] A machinist is required to report and document any defects and safety issues discovered during the course of the inspection so appropriate repairs can be made

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1 49 U.S.C. § 20109 (2008), as implemented by 29 C.F.R. Part 1982 (2021) and 29 C.F.R. Part 18, Subpart A (2021).

2 D. & O. at 4.

3 *Id.* at 2, 4.

4 *Id.* at 4.

5 *Id.* at 2, 4.

6 *Id.* at 4.

7 *Id.*

before the locomotive is returned to service.[8] March's manager(s) prepared an inspection packet for machinists and other employees responsible for parts of a locomotive's inspection, to check during their inspection. The employee is required to document and sign for the components they completed in the locomotive's inspection packet.[9]

March performed hundreds of inspections over the course of his sixteen-year career as a machinist with Metro-North.[10] It is undisputed that prior to working in the diesel shop, March was never disciplined for failing to complete his work and always received positive back.[11] His job performance was considered good.[12] The record also showed March was generally highly regarded as an inspector. Although some managers noted March's slow pace and meticulous nature, they nevertheless described March as a skilled, responsible, and thorough inspector.[13]

2. March's 2015 FRSA Retaliation Complaint

During an inspection in August 2015, March reported that a locomotive had defective windshield wipers.[14] When March's supervisor instructed him to replace the wipers, March refused, allegedly due to safety concerns about using the ladder his supervisor provided for the task.[15] Fleming, allegedly acting with DiRenno's influence, imposed a forty-five day deferred suspension on March for insubordination.[16] March filed a complaint against Metro-North with OSHA on November 23, 2015, followed by a lawsuit in federal court in 2016, alleging that the

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8 *Id*. at 2, 4.

9 *Id.* at 2; Hearing Transcript (Tr.) at 343-46; Joint Exhibit 3.

10 D. & O. at 3.

11 *Id*. at 4.

12 *Id.*

13 *Id.* at 13.

14 *Id.* at 5; *March v. Metro-North R.R. Co.*, 369 F. Supp. 3d 525, 527 (S.D.N.Y. 2019).

15 *March*, 369 F. Supp. 3d at 528.

16 *Id.* at 530; D. & O. at 5.

company retaliated against him in violation of the FRSA.[17] That litigation remained active through the remainder of March's employment with Metro-North.[18]

3. March's Subsequent Suspensions and Termination of Employment

March asserts that as he pursued his FRSA claim against Metro-North regarding the windshield wipers incident in August 2015, his managers, in particular Fleming, began subjecting him to hostility and increased scrutiny.[19] According to March, this antagonism culminated in two suspensions and the termination of his employment.

A. March's First Suspension – July 28, 2017 Locomotive Inspection

Metro-North first suspended March in connection with an inspection he performed on July 28, 2017.[20] Although March testified it typically took him between six and seven hours to complete the type of inspection he was assigned that day, delays allegedly beyond his control left him with only about three hours to work on the inspection before his shift ended.[21] The record indicates March worked diligently for the remainder of his shift, but he only managed to complete three of the fifty-five items in the locomotive's inspection packet.[22] March did not update his supervisors about his progress at the end of his shift or let them know he had been delayed. However, March testified he told Browne before the end of his shift that he would not be able to finish his inspection.[23]

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17 D. & O. at 2, 5.

18 *See March*, 369 F. Supp. 3d at 537. The Southern District of New York eventually dismissed March's complaint on summary judgment on March 28, 2019, more than seven months after Metro-North terminated March's employment. *Id.*

19 D. & O. at 20-22.

20 *Id.* at 3, 7.

21 *Id.* at 5-6. March explained that he was delayed while others finished their work on the locomotive in another part of the shop, and while waiting for flashlights necessary for parts of his inspection. *Id.* In contrast, Metro-North's witnesses testified there were other components of the inspection that March could have performed while he was waiting. *Id.* at 6-7 & n.6.

22 *See id.* at 6; Tr. at 423-24, 518. Notably, there appears to have been no testimony at the hearing as to what three inspection items March completed, or how long they should take to complete. *See* Tr. at 572-73, 689-90, 758-59, 775.

23 D. & O. at 6; Tr. at 149-50, 777-78.

On August 17, 2017, Fleming brought disciplinary charges against March relating to the July 28, 2017 inspection, explaining that March should have completed more than three items in the inspection packet.[24] After a disciplinary hearing on December 12, 2017, at which March was not present, DiRenno suspended March for twenty days for "Conduct Unbecoming a Metro-North Employee" and "Failure to Perform Duties as Assigned."[25]

B. March's Second Suspension – November 8, 2017 Eye Injury Investigation

Metro-North suspended March for a second time in connection with his reporting of an eye injury he sustained at work on November 8, 2017.[26] March testified he was walking through a locomotive when something blew into his eye, possibly by an air compressor.[27] It is undisputed March immediately reported an injury to Browne.[28] It is also undisputed March provided a written statement explaining the circumstances of the injury to Dalbo, who initially investigated the injury, but Dalbo refused to read March's written statement.[29] Finally, it is undisputed March engaged in a reenactment of the injury, at the company's direction.[30]

Otherwise, the parties' versions of events diverged. March testified that he tried to explain what he could about the incident to Fleming, whom Dalbo asked to intervene, but that Fleming would not accept March's explanation.[31] March also asserted he asked to leave the worksite to receive medical treatment, but was not

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24 D. & O. at 6-7.

25 *Id.* at 7; Respondent's Exhibit (RX) 1; Complainant's Exhibit (CX) 2.

26 D. & O. at 3, 8.

27 *Id.* at 8; RX 17.

28 D. & O. at 8; Tr. at 168-69.

29 D. & O. at 8. The statement provided:

> On Wednesday 11/8/17 @ about 1300 hrs, while walking by the air compressor on Loc. # 215, on Track 31, inside the shop, I felt something hit me in my left eye while the air compressor blew down. I was wearing my safety glass.

RX 17.

30 D. & O. at 8-9.

31 *Id.*

allowed to do so.[32] In contrast, Metro-North's witnesses testified March resisted their efforts to understand the circumstances of the injury, including during the reenactment, and that March's written statement was not sufficient.[33] Metro-North's witnesses also testified they asked March if he needed medical assistance, but he either did not answer or answered "no comment."[34]

After the reenactment, Fleming ordered March to go to Metro-North's Occupational Health Services (OHS) unit for evaluation.[35] Here, again, the parties' versions of events diverged. Metro-North's witnesses testified that March refused to go, stating there was nothing OHS could do for him.[36] In contrast, March testified he asked to leave to visit a doctor instead.[37] Fleming then removed March from service, and March went to an emergency medical facility.[38] Medical records indicate that March was diagnosed with "abrasion of conjunctiva, left."[39]

Metro-North brought disciplinary charges against March on November 20, 2017, for his participation in this investigation.[40] After another disciplinary hearing on December 12, 2017, at which March was not present, DiRenno suspended March for sixty-one days for "Conduct Unbecoming a Metro-North Employee," "Insubordination," "Refusal to Cooperate with a Workplace Investigation," and "Violation of Metro-North General Safety Instructions."[41]

C. *Termination of March's Employment – February 21, 2018 Locomotive Inspection*

Metro-North ultimately terminated March's employment following his inspection of a locomotive on February 21, 2018. Although March testified it

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32 *Id.* at 8.

33 *Id.* at 8-9.

34 *Id.* at 9; Tr. at 432-33, 719.

35 D. & O. at 9.

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*; RX 1; CX 2.

typically took him four to six hours to complete the type of inspection he was assigned that day, March did not receive his assignment until 1:40 p.m., just over two hours before the end of his shift at 4:00 p.m.[42] Once an electrician finished working on the assigned locomotive, March began his inspection around 2:10 p.m.[43] Once again, the record indicates March worked diligently for the remainder of his shift.[44] Even so, March testified he was not able to complete any of the inspection components before his shift ended, so he left the inspection packet blank.[45] March left without updating his managers about his progress, but his managers acknowledged they knew he would not be able to complete his inspection that day.[46]

Fleming brought disciplinary charges against March on March 19, 2018, for this inspection, explaining March did not have a reasonable explanation for failing to complete any of the inspection components.[47] After a disciplinary hearing on July 20, 2018, DiRenno terminated March's employment on August 3, 2018, for "Failure to Perform Duties as Assigned."[48] DiRenno explained he based his decision on an accumulation of events indicating a lack of cooperation, including March's behavior during two injury investigations, and the two inspections where March did significantly less work than expected.[49] On December 21, 2020, in response to March's appeals, a panel of three arbitrators (one member from Metro-North management, one union member, and one neutral member) upheld March's suspensions and the termination of his employment in three separate written decisions.[50]

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42 D. & O. at 10.

43 *Id.*

44 *See id.* at 11; Tr. at 436-37, 518, 539.

45 D. & O. at 10-11. March stated that he was working on an air brake test that typically took him between thirty-five and forty-five minutes to finish. *Id.* The test initially failed, and March was performing a second test when his shift ended. *Id.* at 11.

46 *Id.*; Tr. at 482-83, 516-17, 662.

47 D. & O. at 12.

48 *Id.*; RX 5; CX 1.

49 D. & O. at 12. In addition to the eye injury, DiRenno referred to an earlier elbow injury. *Id.* Although DiRenno suggested March did not satisfactorily participate in the company's investigation of the elbow injury, Fleming believed March was cooperative, and Metro-North did not discipline March in connection with the incident. Tr. at 579-80, 731-32.

50 RX 19.

4. Procedural History and the ALJ's Decision

March filed complaints against Metro-North with OSHA on January 8, 2018, and August 29, 2018. The Secretary of Labor found no reasonable cause to believe Metro-North violated the FRSA based on the complaints. March requested a hearing with the Office of Administrative Law Judges. The ALJ assigned to the case conducted a de novo hearing on December 10th and 11th, 2019.

The ALJ issued the D. & O. on August 3, 2021, finding in March's favor. The ALJ determined that: 1) March engaged in protected activity when he filed and pursued his FRSA retaliation complaint against Metro-North in connection with the wiper incident;[51] 2) Metro-North subjected March to adverse action by suspending and discharging him; 3) March's protected activity contributed to the adverse action; and 4) Metro-North did not prove that it would have taken the same action even in the absence of March's protected activity. Accordingly, the ALJ ruled that Metro-North violated the FRSA, and awarded March relief, including reinstatement, back and front pay, compensatory damages, and punitive damages.

Metro-North appealed the D. & O. to the ARB on August 17, 2021. On November 12, 2021, the Assistant Secretary of Labor for OSHA intervened in the case and filed a brief in opposition to Metro-North's appeal.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB or the Board) to review appeals of ALJ decisions under the FRSA.[52] In an FRSA case, the ARB reviews questions of law de novo, but is bound by the

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[51] The ALJ also found that March engaged in protected activity when he: 1) filed the OSHA complaints initiating this action; 2) reported the eye injury; 3) was deposed in connection with his retaliation complaint; 4) reported wheel defects during the July 28, 2017 inspection; and 5) reported a critical brake defect on a class of locomotives. D. & O. at 16. However, the ALJ found that "the main driver in this case is the filing of the 2015 whistleblower complaint and the ensuing litigation, and these additional incidences of protected activity built upon the initial whistleblower complaint, acting to drive up the tension between March and upper management." *Id.* at 19 n.21. Neither party challenges the ALJ's focus on the 2015 retaliation complaint as the key protected activity in this case. Therefore, we focus on that complaint as well.

[52] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

ALJ's factual findings if they are supported by substantial evidence.[53] Substantial evidence "means—and means only—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[54] Under this standard, "we must uphold an ALJ's supported findings of fact even if substantial evidence [also] supports a contrary view, and even if we justifiably disagree with the finding."[55]

DISCUSSION

1. The ALJ Did Not Commit Reversible Legal Error, and his Factual Findings are Supported by Substantial Evidence

The FRSA prohibits a railroad carrier engaged in interstate commerce, or its officers or employees, from retaliating against an employee because the employee engaged in activity protected by the statute.[56] As relevant to this case, protected activity includes filing a complaint related to the enforcement of the FRSA.[57]

To prevail on an FRSA retaliation complaint, a complainant must prove by a preponderance of the evidence that: 1) he engaged in protected activity; 2) the railroad carrier took adverse action against him; and 3) the protected activity was a contributing factor in the adverse action.[58] If the complainant meets this burden, the railroad carrier may escape liability only by proving by clear and convincing evidence that it would have taken the same unfavorable action against the complainant even in the absence of his protected activity.[59]

Metro-North does not challenge the ALJ's conclusions that March engaged in protected activity and that the company took adverse action against him.[60]

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[53] *Laidler v. Grand Trunk W. R.R. Co.*, ARB No. 2021-0013, ALJ No. 2014-FRS-00099, slip op. at 4-5 (ARB Aug. 31, 2021) (citation omitted).

[54] *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (quotations and citation omitted).

[55] *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 2013-0001, ALJ No. 2008-ERA-00003, slip op. at 14 (ARB Aug. 29, 2014) (citation omitted).

[56] 49 U.S.C. § 20109(a).

[57] *Id.* § 20109(a)(3).

[58] *Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 2014-0047, ALJ No. 2013-FRS-00035, slip op. at 5 (ARB Nov. 24, 2015) (citing 49 U.S.C. § 42121(b)(2)(B)(iii)).

[59] *Id.* (citing 49 U.S.C. § 42121(b)(2)(B)(iv)).

[60] We note Metro-North also does not challenge the ALJ's determination that punitive damages are warranted in this case based on Metro-North's reckless disregard for March's

However, Metro-North argues that the ALJ erred in concluding that: 1) March's FRSA retaliation claim contributed to his suspensions and the termination of his employment, and 2) Metro-North failed to prove that it would have taken the same adverse action in the absence of March's protected activity. For the following reasons, we affirm the D. & O.

A. Contributing Factor

A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the [respondent's] decision."[61] This is not a demanding standard; a complainant need not prove that his protected activity was a "significant," "motivating," "substantial," or "predominant" factor for the adverse action.[62] "[A] complainant's protected activity need only be one, even insubstantial, factor in the employer's adverse action, and may still 'contribute' to the adverse action even if other factors also influenced the decision."[63] A complainant may rely on a wide array of circumstantial evidence to establish this part of his claim, including temporal proximity between the protected activity and the adverse action; animus, hostility, antagonism, or a change in attitude or behavior towards the complainant; inconsistent application of company policies or a material change in practices; shifting explanations for the company's actions; or pretext or the falsity of the company's explanations.[64]

The ALJ concluded that March's whistleblower complaint was at least one factor, potentially among others, that contributed to the company's decision to suspend him and terminate his employment. The ALJ relied on a variety of forms of circumstantial evidence, including: 1) the temporal proximity between March's protected activity and the adverse action; 2) a change in behavior and new hostility towards March following his whistleblower complaints; and 3) the inconsistent

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rights under the Act following his whistleblower complaint in 2015. D. & O. at 32-36. After analyzing the relevant statutory authority and case law, the ALJ found March was entitled to punitive damages to deter similar conduct by Metro-North in the future. *Id*. at 35.

61 *Hutton v. Union Pac. R.R. Co.*, ARB No. 2011-0091, ALJ No. 2010-FRS-00020, slip op. at 8 (ARB May 31, 2013) (quotations and citation omitted).

62 *Id.* at 7-8 (quotations and citation omitted).

63 *Klinger v. BNSF Ry. Co.*, ARB No. 2019-0013, ALJ No. 2016-FRS-00062, slip op. at 12 (ARB Mar. 18, 2021) (citation omitted).

64 *Lancaster v. Norfolk S. Ry. Co.*, ARB No. 2019-0048, ALJ No. 2018-FRS-00032, slip op. at 7 (ARB Feb. 25, 2021); *Bobreski*, ARB No. 2013-0001, slip op. at 17.

application of the company's policies as described by March's managers. The ALJ also considered, but did not give significant weight to, the fact that arbitrators upheld both of March's suspensions and the termination of his employment. The D. & O. contains a thorough explanation of the ALJ's analysis and rationale for his findings and conclusions, as well as extensive citations to the evidence in support thereof.

Metro-North argues that the ALJ incorrectly assessed whether March's protected activity was a contributing factor in its decision to discipline him. In support of its argument, Metro-North attacks the way the ALJ considered and weighed the circumstantial evidence in this case, focusing primarily on the ALJ's: 1) temporal proximity analysis, and 2) consideration of the arbitration decisions. Metro-North's arguments do not provide a reasonable basis that compels us to disturb the ALJ's findings and conclusions.

i. Temporal Proximity

Metro-North first challenges the ALJ's reliance on temporal proximity as one of the factors weighing in March's favor. Metro-North argues there is no temporal proximity in this case. Instead, Metro-North argues any hostility or differential treatment was due entirely to a change in March's attitude, degree of cooperation, and sufficiency of work product after the 2015 windshield wipers incident, and he became difficult for his supervisors to work with, which led to the insubordination charges in this case. Metro-North further argues that the twenty-month gap between March's FRSA retaliation complaint and the events giving rise to the adverse actions taken against him precludes any causal connection that could be drawn between these events.

The ALJ recognized this temporal gap and considered additional evidence in finding that March's protected activity was a contributing factor in Metro-North's decision to discipline him. For example, the ALJ determined that March's litigation against Metro-North, which remained active through the remainder of his employment with the company, had "ramifications [that were] ongoing" for March.[65] The ALJ's determination is consistent with the evidence in the record and not unreasonable under the particular circumstances of this case. Indeed, Fleming provided testimony that confirmed March's managers remained "nervous" and "apprehensive" about interacting with March in light of his lawsuit against the

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[65] D. & O. at 19.

company.[66] The ongoing apprehension resulted in Fleming, who had also accused March of wrongdoing in his FRSA litigation, getting involved in the handling of the events that resulted in the discipline at issue in this case.[67] Thus, there was a substantial basis for the ALJ to reasonably conclude March's ongoing litigation against the company: 1) remained a persistent presence in the minds of the actors in this case; 2) had ongoing ramifications for March; and 3) helped shape how events unfolded.

The ALJ's analysis is also consistent with Board precedent. In *Brucker v. BNSF Railway Company*, the Board vacated an ALJ's decision that a two and one-half year gap between the complainant's protected activity (an injury report) and the termination of his employment precluded any inference that the former contributed to the latter.[68] The Board found that the ALJ's assessment of temporal proximity was "far too narrow."[69] Although the complainant's injury report preceded the termination of his employment by more than two years, the Board noted that the "ramifications of that report were most certainly not resolved on the day that it was filed and in fact, were still ongoing when BNSF fired" the complainant.[70] Ongoing litigation kept the protected activity "fresh as the events in the case unfolded" and led to "continuing fallout" for the complainant.[71]

According to Metro-North, the Board's decision in *Brucker* runs counter to Second Circuit law, which it says requires temporal proximity to be rigidly considered and measured only from the date litigation is commenced.[72] In *Dotson v.*

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66 Tr. at 737, 755-56, 767.

67 *Id.* at 755-56, 767.

68 ARB No. 2014-0071, ALJ No. 2013-FRS-00070, slip op. at 5 (ARB July 29, 2016).

69 *Id.* at 12.

70 *Id.*

71 *Id.* (quoting *Carter v. BNSF Ry. Co.*, ARB Nos. 2014-0089, 2015-0016, -0022, ALJ No. 2013-FRS-00082, slip op. at 4 (ARB June 21, 2016)).

72 We note that the cases upon which Metro-North relies are unpublished and not precedential. *Dotson v. City of Syracuse*, 688 F. App'x 69 (2d Cir. 2017) (unpublished summary order); *Blakney v. City of Philadelphia*, 559 F. App'x 183 (3d Cir. 2014) (unpublished); *Peppers v. Traditions Golf Club*, 457 F. App'x 905 (11th Cir. 2012) (unpublished); *Kim v. Columbia Univ.*, 460 F. App'x 23 (2d Cir. 2012) (unpublished summary order); *Nicolia v. Gen. Motors, LLC*, No. 16-CV-6368 CJS, 2019 WL 4887845 (W.D.N.Y. Oct. 3, 2019) (unpublished); *Magnusson v. Cnty. of Suffolk*, No. 14-CV-3449 (SJF) (ARL), 2016 WL 2889002 (E.D.N.Y. May 17, 2016) (unpublished), *aff'd* 690 F. App'x

City of Syracuse, the case upon which Metro-North principally relies, the Second Circuit took care to distinguish the circumstances presented there, where eight years elapsed between the plaintiff's complaint and the adverse action and where the litigation had already concluded by the time the adverse action occurred, with circumstances similar to those presented here, where the gap between the complaint and the adverse action was significantly shorter and where the litigation was ongoing at the time of the adverse action.[73] The other cases Metro-North cites are also distinguishable because: 1) the temporal gap was significantly greater than the gap here; 2) the litigation had already concluded when the adverse action occurred; 3) the plaintiff lacked other evidence of discrimination or retaliation; or 4) some combination thereof.[74]

In addition, we emphasize that temporal proximity was only one of several factors the ALJ considered in reaching his conclusion that March's protected activity contributed to the adverse action taken against him. The ALJ correctly observed that temporal proximity on its own is typically insufficient to establish causation, and therefore the ALJ relied on other circumstantial evidence as well.[75] For the reasons set forth in Section I.A.iii. below, we find that other circumstantial evidence substantially supports the ALJ's findings and conclusions.[76]

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716 (2d Cir. 2017) (unpublished summary order); *see also* 2d Cir. R. 32.1.1(a) ("Rulings by summary order do not have precedential effect.").

[73] 688 F. App'x at 73; *cf. Singleton v. Mukasey*, No. 06 Civ. 6588 (GEL), 2008 WL 2512474, at *6 (S.D.N.Y. June 13, 2008) (unpublished), *aff'd sub nom. Singleton v. Holder*, 363 F. App'x 87 (2d Cir. 2010) (summary order) (affirming conclusion that adverse action "necessarily followed closely" on protected activity because "litigation against the [employer] was ongoing.").

[74] *Blakney*, 559 F. App'x at 186-87 (three year gap, and finding no other evidence to suggest retaliatory motive); *Peppers*, 457 F. App'x at 907-08 (temporal proximity alone insufficient where "no other evidence offered by [plaintiff] weighs in favor of pretext"); *Kim*, 460 F. App'x at 25 (no causation where defendant had knowledge of complaint for at least fifteen years before adverse action); *Nicolia*, 2019 WL 4887845 at *14 (no causation where there was a three year gap and no evidence of disparate treatment); *Magnusson*, 2016 WL 2889002 at *12 (no causation where plaintiff relied only on temporal proximity).

[75] D. & O. at 18-20 (citing *Acosta v. Union Pac. R.R. Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082 (ARB Jan. 22, 2020)).

[76] The ALJ also noted the close temporal proximity specifically between Fleming's bringing disciplinary charges against March in connection with his July 28, 2017 inspection, and the depositions of March and DiRenno in connection with March's lawsuit. Although there is no dispute that Fleming was aware of March's ongoing litigation generally, there is no evidence that Fleming was aware of the depositions when he brought

ii. Arbitration Decisions

Metro-North also argues the ALJ failed to properly consider and weigh the fact that three neutral arbitrators subsequently upheld the company's decisions to suspend March and terminate his employment. An arbitration decision upholding an employer's disciplinary decisions may help substantiate an employer's explanation for its conduct, and it also may also be one piece of evidence suggesting that an employer did not discriminate or retaliate against its employee.[77] However, arbitration decisions are not dispositive. Rather, the weight to be accorded to the arbitration decisions is left to the discretion of the tribunal, based on the particular facts and circumstances of the case.[78] Metro-North has not shown that the ALJ abused his discretion in considering and weighing the evidence concerning the arbitration decisions here, or that the arbitration decisions must be given more weight than the ALJ accorded them.

First, we disagree with Metro-North's assertion that the ALJ "simply disregard[ed]" the arbitration decisions.[79] To the contrary, the ALJ explicitly noted that the arbitration decisions "tend[ed] to weigh in favor of Metro-North."[80] Even so, the ALJ considered the circumstances surrounding the arbitration decisions, including March's absence from two of the three disciplinary proceedings, the incomplete and inaccurate records presented to the arbitrators, and the fact that at least one of the arbitration decisions contained an error of fact. The ALJ determined that the arbitration decisions were not so probative as to outweigh the other circumstantial evidence tending to establish that March's protected activity contributed, at least in part, to the adverse action taken against him. The ALJ has the discretion to weigh competing evidence and make this type of judgment.

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disciplinary charges against March. However, this does not alter our conclusion regarding the ALJ's assessment of the impact of the ongoing litigation.

77 *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 & n.21 (1974); *Tompkins v. Metro-North Commuter R.R. Co.*, 983 F.3d 74, 82-83 (2d Cir. 2020) (citation omitted).

78 *Alexander*, 415 U.S. at 46 n.6, 60 n.21; *Collins v. New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002) (citing *Alexander*, 415 U.S. at 60 n.21); *Roadway Express, Inc. v. Brock*, 830 F.2d 179, 182 (11th Cir. 1987); *Spinner v. Yellow Freight Sys., Inc.*, 1990-STA-00017, slip op. at 10-11 (Sec'y May 6, 1992).

79 Respondent's Opening Brief (Resp. Br.) at 25, 38.

80 D. & O. at 24.

Second, we also reject Metro-North's arguments that the ALJ abused his discretion or committed reversible error by considering what he reasonably determined to be deficiencies or shortcomings with the arbitration decisions when determining the weight he would give them. Although it is not clear why March was not at the disciplinary hearings, Metro-North does not challenge the ALJ's ultimate conclusion that March's absence impacted the records in those proceedings.[81] Similarly, Metro-North does not dispute that the records developed through the disciplinary proceedings were, in some ways, incomplete and inaccurate (whether because of March's absence or not).[82] Metro-North has not pointed to any precedent that bars the ALJ, in the exercise of his discretion and judgment, from considering the accused's absence from the disciplinary proceedings, the impact that absence had on the records, or evident flaws in the records and decisions themselves, when weighing the probative value of arbitration decisions.[83] We find no error in the ALJ's determination about the appropriate weight to give the arbitration decisions, and Metro-North has not provided any legal basis for us to do so.

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[81] The two hearings from which March was absent occurred on the same day. CX 2. Metro-North asserts that March had notice of the proceedings, that the proceedings had previously been postponed at March's request, and that there is no evidence March could not attend. It appears that the hearings may have been held during a period when March was not working.

[82] For example, regarding the July 28, 2017 inspection, the arbitrators stated that March received his assignment at 8:45 a.m., but it is undisputed that he did not receive his assignment until 10:01 a.m. RX 19 (Case No. 64) at 1; D. & O. at 5 & n.4. Regarding the February 21, 2018 inspection, the arbitrators stated that there was work March could have performed before the cab signal work was finished by others at 1:40 p.m. RX 19 (Case No. 67) at 2. However, Metro-North confirms on appeal that March did not receive his assignment until 1:40 p.m. Resp. Br. at 17 citing Tr. 435, 661 ("Due to a cab signal test that had taken longer than usual, Browne assigned March to begin his inspection about 1:40 p.m. . . ."); *cf.* Tr. at 539 (Browne testifying that March "was doing what he was supposed to be doing" on February 21, 2018).

[83] Metro-North appears to suggest that the ALJ should have given more weight to the arbitration decisions merely because a union representative appeared on March's behalf. Respondent's Reply to the Brief of the Assistant Secretary of Labor for Occupational Safety and Health as Intervenor at 3-4 (referring to March's absence as an "irrelevant detail" because his union representative appeared). Although *Tompkins*, the case upon which Metro-North relies, holds that representation may be one relevant consideration, we do not read that case to hold that union representation is the sole relevant consideration in assessing the fairness or probative value of arbitration decisions. *See Tompkins*, 983 F.3d at 82-83 (citing *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017) (identifying factors that were "highly relevant" for the particular circumstances of that case, but not indicating they would be appropriate or determinative in all cases)).

Ultimately, the ALJ was not required to find that the arbitration decisions outweighed the competing circumstantial evidence showing that March's protected activity contributed to the adverse action taken against him. Thus, we decline Metro-North's invitation to reassess the weight the ALJ accorded this factor.

iii. Other Evidence Supports the ALJ's Decision

For the foregoing reasons, the ALJ did not commit reversible error or abuse his discretion in the manner in which he considered and weighed temporal proximity and the arbitration decisions. However, even if there were shortcomings or errors in the ALJ's analyses of these particular factors, the other circumstantial evidence cited by the ALJ adequately supports his conclusion that March's protected activity contributed, at least in part, to his discipline and the termination of his employment. Although Metro-North may disagree with how the ALJ weighed this evidence or resolved factual disputes, we find no reversible error in the ALJ's determination and conclude his findings are supported by substantial evidence.

First, the ALJ relied on Fleming's admissions, referenced above, that March's managers began acting differently towards March because of his litigation against the company. Fleming's testimony confirmed that the lawsuit caused others to be nervous, apprehensive, and standoffish, and influenced the way March's managers thought about and interacted with March.[84] The lawsuit and this concomitant change in attitude towards March prompted Fleming to become "hyper-focused" on March, as the ALJ described it, despite being several levels up the reporting chain.[85] This change in behavior and attitude is also consistent with the observations of one of March's colleagues, who testified that managers tended to monitor whistleblowers more closely and that whistleblowers were not "taken kindly" at Metro-North.[86]

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[84] Tr. at 737, 755-56, 767.

[85] D. & O. at 20-21; *accord* Tr. at 755-56, 767. Metro-North tries to disconnect March's earlier lawsuit from the events in this case by asserting that most of the managers involved here were not involved in the earlier case, and that some were not even aware of March's complaint. However, Metro-North identified only one manager, McCrory, who testified that he was not aware of March's earlier litigation. Resp. Br. at 32; Tr. at 686. Fleming testified that managers were not only aware of March's litigation, but nervous because of it. Tr. at 755-56. It is also undisputed that Fleming, who brought the disciplinary charges here, and DiRenno, who imposed the discipline here, were aware of, and involved in, March's earlier lawsuit as well. *March*, 369 F. Supp. 3d at 530.

[86] Tr. at 317-18.

Second, the ALJ relied on evidence that Fleming began exhibiting hostility towards March after he filed his complaint. March testified that Fleming, who played a key role in the earlier lawsuit and who was also responsible for each of the disciplinary charges here, grew sour towards March after he filed his complaint.[87] Fleming also acknowledged that March's relationships with others deteriorated after he filed his complaint, and he conceded that no one wanted to be involved with March because of his complaint.[88]

Metro-North argues this change in attitude towards March was prompted by March's own change in behavior, not his litigation against the company. According to Metro-North, March began to act differently after he filed his lawsuit, becoming inconsistent with the duration of his inspections and growing uncooperative with management. Although at times during the hearing Fleming blamed March for the growing tension, at other times, Fleming specifically and directly linked management's change in attitude and behavior with March's litigation.[89] The ALJ also credited March's testimony that his behavior, particularly the way he performed his inspections, never changed, and that his managers' change in attitude coincided with the initiation of his lawsuit.[90] Metro-North also overstates the evidence allegedly supporting the notion that March's attitude and performance declined over time. Although some of March's managers testified March became more particular and slower with his inspections after he filed his complaint, they nevertheless stated that these changes did not cause any significant concern.[91]

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87 *Id.* at 66.

88 *Id.* at 737-40, 755-56.

89 *Compare* Tr. at 738-40 (testifying that March became "[c]ombative, argumentative, [and] uncooperative" after the 2015 wiper incident), *with id.* at 737 ("[E]veryone is kind of like, you know, standoffish from [March]. They know that he has cases against him. No one wants to get involved."), 755-56 (testifying that March's managers were "call[ing] [Fleming] all the time" after the 2015 wiper incident because they were "nervous"), 767 ("Well, people are apprehensive. You know, taking pictures of people's work packets, him suing the company, things like that.").

90 D. & O. at 21, 28-29.

91 Tr. at 525, 527-28, 535 (Browne testifying that March became more particular, documented everything, and began taking issue with things that were not critical, but that he could not recall having a problem with the way and time March took to do his inspections), 630-33 (Dalbo testifying that he had a concern with March's inability to finish tasks because he was "very, very, very, very, very thorough" and seemed to take longer as time progressed, but after speaking with March about it, decided it was not something for which March should be punished), 688-89 (McCrory testifying that March did not finish

Fleming was the only witness who categorically insisted that March became combative, uncooperative, and unacceptably inconsistent after he sued the company.

The ALJ also relied on evidence that Metro-North became critical of March's performance only after he filed his complaint against the company. March estimated that prior to his 2015 complaint, he did not complete his inspections by the end of his shift about twenty percent of the time, but he did not suffer any discipline for it.[92] March also testified that the manner in which he conducted his inspections never changed.[93] Only after March filed his complaint did Fleming begin to discipline him and criticize the speed with which he conducted his inspections.

Metro-North argues the difference warranting discipline with respect to the July 2017 and February 2018 inspections was that March completed none, or essentially none, of his inspections on those occasions, and left the worksite without reporting his progress to his supervisors as he was expected to do. However, March testified that there were previous occasions when he did not sign for any inspection items, without being disciplined.[94] The ALJ also found Metro-North did not satisfactorily explain why March's lack of progress or behavior on those occasions, even if unusual, was unreasonable, violated Metro-North's rules, or warranted the severity of the discipline imposed under the circumstances.[95] Instead, the ALJ credited March's testimony regarding the reasons for his delays and lack of progress, and he noted Browne's testimony that he believed March was actually working on the inspections in question. Based on his credibility determination, the ALJ found that management knew March would not be able to complete his inspections those days, among other things.[96]

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things that he should have, but it would "[a]bsolutely not" be punishable if March was taking more time to be safe).

92 *Id.* at 51, 53-54, 111, 789; *cf. id.* at 242-45.

93 *Id.* at 43.

94 *Id.* at 53-54, 233-34; *cf. id.* at 242-45.

95 D. & O. at 28.

96 The ALJ did not merely find Metro-North's decision to punish March under these circumstances was "unfair," as Metro-North contends. Resp. Br. at 26, 41. Rather, the ALJ found that Metro-North's failure to satisfactorily explain its decisions under the circumstances "cast[ed] suspicion on Metro-North's motives," and, when combined with the hostility, change in behavior, and other evidence, helped establish that March's protected activity contributed to the adverse action here. D. & O. at 25, 28.

Finally, the ALJ also relied on evidence that March's discipline and the termination of his employment conflicted with his managers' testimony regarding the circumstances that typically warrant discipline. DiRenno testified that an employee would not be disciplined the first or second time he failed to meet expectations regarding his inspections, and that managers must first have conversations with a struggling employee before filing disciplinary charges.[97] Yet, March testified that supervisors never had those conversations with him before his first suspension for the July 28, 2017, inspection.[98] Additionally, DiRenno acknowledged that the termination of March's employment may not have been warranted if March had been working diligently, even if he failed to complete the number of inspection items expected of him.[99] Browne testified that March was indeed working on the inspections at issue.[100]

Viewed in their entirety, the circumstantial evidence supports the ALJ's conclusion that March's ongoing litigation against the company was at least one factor, potentially among others, in Metro-North's decision to discipline him and terminate his employment. We conclude the ALJ's findings are supported by substantial evidence and, therefore, are affirmed.

B. Same Action Defense

If a complainant proves his protected activity contributed to the adverse action taken against him, the burden shifts to the respondent to prove by clear and convincing evidence it would have taken the same adverse action even in the absence of the complainant's protected activity.[101] This is a high burden.[102] "Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain."[103]

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97 Tr. at 589-90.

98 *Id.* at 111; *cf. id.* at 531.

99 *Id.* at 580-81.

100 D. & O. at 23; Tr. at 518, 539.

101 49 U.S.C. §§ 20109(d)(2), 42121(b)(2)(B)(iv).

102 *Blackie v. D. Pierce Transp., Inc.*, ARB No. 2013-0065, ALJ No. 2011-STA-00055, slip op. at 10 (ARB June 17, 2014) (citation omitted).

103 *Brousil v. BNSF Ry. Co.*, ARB Nos. 2016-0025, -0031, ALJ No. 2014-FRS-00163, slip op. at 4 (ARB July 9, 2018) (quotations and citation omitted).

The ALJ determined Metro-North failed to carry this heavy burden. The ALJ noted Metro-North did not offer evidence regarding similarly situated employees who were disciplined for the same reasons as March. The ALJ also observed that the rules Metro-North charged March with violating were vague and easily manipulated for retaliatory purposes, and that Metro-North failed to provide evidence defining its rules or establishing how they were enforced. The ALJ found it significant that, in the absence of such evidence, the record indicates that: 1) March's work performance during the two inspections showed that he appeared to have worked diligently once he was able to begin the inspections of the locomotives; and 2) he explained, during the injury investigation, to the best of his recollection the circumstances of the event, and engaged in a reenactment of how his eye was injured. The ALJ found that the record did not clearly align with the charges brought against him or the severity of the discipline imposed.

Although Metro-North argues there were no similarly situated employees to whom March could be compared, Metro-North has not offered any rebuttal evidence to the other considerations the ALJ discussed, which we conclude are substantially supported by the evidence in the record. In particular, we emphasize the lack of evidence regarding: 1) how Metro-North defined the vague rules that it charged March with violating; 2) what rules may have applied to March's inspections or his participation in injury investigations; 3) how Metro-North interpreted or applied its rules in any other circumstances (whether identical to the circumstances involving March or not); and 4) any guidance or standards for determining the severity of discipline applied to violations of the rules March was charged with violating. [104] In the absence of this type of, and other similar, probative evidence, we conclude the ALJ reasonably concluded Metro-North did not carry its heavy burden to establish that it would have disciplined March in the absence of March's protected activity.

2. The ALJ Did Not Engage in Misconduct or Evince Bias at the Hearing

Metro-North also accuses the ALJ of engaging in improper and partial questioning of witnesses and demonstrating bias in March's favor during the hearing. We have reviewed the transcript of the hearing and conclude that the ALJ's conduct during the hearing was proper at all times, and that the ALJ did not

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[104] *See DeFrancesco v. Union R.R. Co.*, ARB No. 2013-0057, ALJ No. 2009-FRS-00009, slip op. at 12 (ARB Sept. 30, 2015) (identifying "vague" rules that may be "subject to manipulation and use as pretext" as a relevant factor in assessing the same-action defense).

abuse his discretion or exceed the bounds of his authority by questioning witnesses on both sides of the matter.

The applicable regulations afford ALJs broad discretion in the manner in which administrative hearings are conducted.[105] This discretion includes the power and, where appropriate, even an obligation, to question witnesses in order develop a complete record to determine the relevant facts and identify the salient issues necessary to decide a case.[106] Accordingly, the Board and the Secretary of Labor have long approved of ALJs extensively questioning witnesses as part of their role as factfinders and decisionmakers.[107] Federal courts have similarly expressed that it is often appropriate for a judge, particularly in the analogous circumstance of a bench trial, to question witnesses, so long as the judge does not slip into the role of an advocate for either party.[108] Moreover, it may be essential for an ALJ to question witnesses and take steps to clarify the record in a case involving a pro se litigant.[109]

We do not agree with Metro-North that the ALJ was partial or otherwise acted beyond the scope of his authority by questioning witnesses. The record demonstrates the ALJ's questions were appropriately geared toward: 1) clarifying or

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105 *See* 29 C.F.R. § 18.12(b); *Franchini v. Argonne Nat'l Lab.*, ARB No. 2018-0009, ALJ No. 2009-ERA-00014, slip op. at 10 (ARB July 5, 2018).

106 *See* 29 C.F.R. §§ 18.12(b)(2) (authorizing ALJ to "examine witnesses"), .614(a)-(b) ("The judge may, on the judge's own motion or at the suggestion of a party, call witnesses . . . The judge may interrogate witnesses, whether called by the judge or by a party."); *see also Bosco v. U.S.*, 164 F. App'x 226, 231-32 (3d Cir. 2006) (unpublished) ("When . . . the judge is conducting a bench trial, it is routine—indeed, almost obligatory—for the judge to put questions clarifying pertinent matters that counsels' questions may not have fully illuminated.").

107 *Assistant Sec'y of Labor for Occupational Safety & Health v. T.O. Haas Tire Co.*, 1994-STA-00002, slip op. at 1 n.1 (Sec'y Aug. 3, 1994); *Young v. Schlumberger Oil Field Servs.*, ARB No. 2000-0075, ALJ No. 2000-STA-00028, slip op. at 10 (ARB Feb. 28, 2003).

108 *E.g., Bosco*, 164 F. App'x at 231 ("The propriety of a trial judge's asking questions of witnesses is beyond dispute."); *Logue v. Dore*, 103 F.3d 1040, 1045 (1st Cir. 1997) ("It is . . . beyond cavil that a trial judge in the federal system retains the common law power to question witnesses and to analyze, dissect, explain, summarize, and comment on the evidence."); *Sims v. ANR Freight Sys., Inc.*, 77 F.3d 846, 849 (5th Cir. 1996) ("[A]lthough a trial judge must be neutral, he should not be a passive spectator. When in his sound discretion he deems it advisable, a judge may comment on evidence, question witnesses, elicit facts not yet adduced, or clarify those previously presented.").

109 *Chapman v. J.B. Hunt Transp. Co.*, ARB No. 2005-0097, ALJ No. 2004-STA-00044, slip op. at 7 (ARB June 29, 2007); *Young,* ARB No. 2000-0075, slip op. at 10-11.

supplementing testimony; 2) resolving potential or apparent conflicts in the record; and 3) exploring the parties' claims and defenses. The ALJ's questions often probed Metro-North's witnesses' testimony, and sometimes elicited testimony that Metro-North may perceive as unfavorable to its position. However, we find the ALJ's questions were reasonable, balanced, and neutral in soliciting testimony.[110] Likewise, although the ALJ posed leading and "hypothetical" questions[111] and occasionally commented on the evidence, it was within his discretion and authority to do so in furtherance of his duty to search for the truth and resolve incomplete or inconsistent testimony relevant to the issues in the case before him.[112]

Finally, we reject Metro-North's assertion that the ALJ demonstrated any bias or prejudgment of witness credibility or the outcome of the case. Typically, the Board requires a party accusing an ALJ of bias to show some type of extra-judicial source to support such a conclusion, which Metro-North has not done here.[113] Furthermore, Metro-North has not pointed to any aspect of the ALJ's handling of these proceedings, other than his conduct during the hearing itself, that demonstrates the ALJ harbored any sort of bias. For the reasons already stated, we conclude the ALJ acted within his discretion and did not exceed his authority during the hearing. Therefore, there is no reasonable basis for us to conclude that the ALJ was biased or prejudicially favored March in these proceedings.[114]

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[110] *See Bosco*, 164 F. App'x at 232 ("Counsel for plaintiff or counsel for defendant—or, indeed, counsel for both—may find the judge's questions unwelcome when they probe weaknesses or test limits of contentions advanced by a litigant. But a probing question does not betoken unneutrality."); *U.S. v. Orr*, 68 F.3d 1247, 1251-52 (10th Cir. 1995) ("Taken together, the responses to the court's questioning may have negatively affected defendant's defense . . . . But the district court may ask questions in the search for the truth, and it is no ground of complaint that the facts so developed may hurt or help one side or the other." (internal quotations omitted)).

[111] The "hypotheticals" were based on, and asked in the context of, testimony that had already been elicited at the hearing. Based on our review, we consider them designed to elicit witnesses' input on or responses to a particular salient point, to have witnesses explain their position or the company's actions in light of other testimony, or to examine potentially inconsistent testimony. Tr. at 397-400, 567-68, 574, 578, 580-81, 590-92, 636, 641-42, 686-87, 691-93, 745, 746-47, 756-63.

[112] *See U.S. v. Scott*, 529 F.3d 1290, 1297 (10th Cir. 2007); *Logue*, 103 F.3d at 1045; *Sims*, 77 F.3d at 849; *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1154 (10th Cir. 1978).

[113] *Leon v. Securaplane Techs., Inc.*, ARB No. 2011-0069, ALJ No. 2008-AIR-00012, slip op. at 5-6 (ARB Apr. 15, 2013) (citation omitted).

[114] *See Liteky v. U.S.*, 510 U.S. 540, 555 (1994) (stating that "opinions formed by a judge on the basis of facts introduced or events occurring in the course of the" proceedings do not

CONCLUSION[115]

For the reasons stated above, we **AFFIRM** the D. & O.

SO ORDERED.

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demonstrate bias "unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible"); *T.O. Haas Tire Co.*, 1994-STA-00002, slip op. at 1 n.1 (rejecting "argument that the ALJ demonstrated bias at the hearing by cross-examining Respondent's witnesses 'to great lengths.'").

[115] In any appeal of this Decision and Order that may be filed with the Courts of Appeals, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board (ARB)).