



In the Matter of:

JOHN R. HUTTON,

ARB CASE NO. 11-091

COMPLAINANT,

ALJ CASE NO. 2010-FRS-020

v.

DATE: May 31, 2013

**UNION PACIFIC RAILROAD
COMPANY,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

R. Seth Crompton, Esq.; *Holland, Groves, Schneller & Stolze, LLC*; St. Louis, Missouri

For the Respondent:

Brian W. Plummer, Esq.; *Union Pacific Railroad Company*, Roseville, California

BEFORE: Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*. Judge Corchado, concurring.

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (FRSA).¹ On February 2, 2009, John Hutton filed a complaint with the Occupational Safety and Health Administration (OSHA) claiming that his employer, Union Pacific Railroad

¹ 49 U.S.C.A. § 20109 (Thomson Reuters Supp. 2012) and as implemented by federal regulations at 29 C.F.R. Part 1982 (2012) and 29 C.F.R. Part 18, Subpart A (2012).

Company (Union Pacific), discharged him in violation of the FRSA. A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed his complaint after a hearing. Hutton appealed to the Administrative Review Board (ARB). For the following reasons, we reverse the ALJ's Decision and Order² and remand this case for further proceedings.

BACKGROUND

The Complainant began working for Union Pacific on January 26, 2004, as a brakeman and switchman. D. & O. at 2. He reported a work-related injury on July 30, 2008, by filling out Respondent's Report of Personal Injury or occupational illness form. *Id.*, citing Joint Exhibit (JX) 1. He reported suffering from "cervical degenerative disc disease" and "spondylosis with left upper extremity radicular synopsis." D. & O. at 2, citing JX 1. After Hutton submitted the Report of Personal Injury form, he was instructed to contact John Tuttle, a Union Pacific claims representative. D. & O. at 2, citing Hearing Transcript (Tr.) at 197. Tuttle referred him to the company's Vocational Rehabilitation Program (VRP),³ and instructed Hutton to "comply with the instructions given in the program, and to aggressively seek employment, both within Union Pacific or outside." D. & O. at 2, citing Tr. at 200-201.

In August 2008, Hutton received correspondence from the company's Director of Disability Management offering assistance under the VRP. D. & O. at 2, citing JX 2 & 3; *see also* Tr. at 201-202. Following the instructions set out in the correspondence, Hutton called a phone number to accept the offer of assistance under the VRP, and Debby Duchan subsequently contacted him. D. & O. at 2, citing Tr. at 202. Hutton met with Duchan and signed a professional disclosure form. D. & O. at 2, citing JX 4. Hutton "could not return to work as a brakeman/switchman, was not offered any accommodation by Union Pacific to return to work as a conductor, and could not work for Union Pacific as an engineer because no jobs were available with his seniority." D. & O. at 2, citing Tr. at 205-206. Hutton applied for between five and ten jobs with Union Pacific and between ten and fifteen jobs with outside companies. D. & O. at 2. Through these job search efforts, Hutton eventually was hired as a dispatcher trainee for CSX in Stanton, Virginia. *Id.* at 4, citing JX 9 (letter stating that Hutton "accepted a position as a Dispatcher with CSX, Inc., and will begin employment on December 6, 2008.").

On September 10, 2008, Hutton underwent a Functional Capacity Evaluation, which indicated that he was not able to meet the physical demands of his present job as a trainman/conductor/train engineer; the evaluation established that "he was not able to lift/carry up to 83 lbs. and not able to hold a radio controlled device around his neck at a constant level." D. & O. at 2, citing JX 27. The Medical Department's findings were sent to the company's Operations Department. D. & O. at 2, citing JX 5. The correspondence stated that "if the

² *Hutton v. Union Pac. R.R. Co.*, ALJ No. 2010-FRS-020 (Sept. 14, 2011)(D. & O.).

³ The VRP brochure states that it is available to injured company employees "who need a more comprehensive level of assistance than can be provided by the Return to Work Managers." JX 3 at 3. The brochure states that "vocational rehabilitation counselor[s] follow[] the return-to-work hierarchy." JX 3 at 4.

department could accommodate the restrictions, the . . . supervisor and employee should meet for a job briefing and complete a Return-To-Work form.” D. & O. at 3, citing JX 5.

On November 12, 2008, Union Pacific notified Hutton that it could accommodate his medical restrictions with his return to work as an engineer. D. & O. at 3, citing JX 7. The letter instructed Hutton to contact Jeff Neal within five days to schedule a return to work conference, which would include filling out a Return to Work (RTW) form and reviewing the arrangements necessary to return to work as an engineer. *Id.* Hutton left a message with Neal on November 14, and they spoke on November 17 about the RTW program. Neal told Hutton that qualifying as an engineer required him to pass an air-brake test, a General Code of Operating Rules (GCOR) exam, a safety class, and time on the simulator. Hutton did not commit to a date to take the exams because, based on the RTW brochure, he understood the program to be voluntary.⁴ D. & O. at 3, citing Tr. at 213; *see also* JX 3. Further, Hutton was already involved in the Vocational Rehabilitation Program (VRP), and he knew he lacked the seniority necessary to obtain a job as an engineer. D. & O. at 3; Tr. at 212-213.

In a follow-up letter, Neal instructed Hutton to report for the exams on November 20, 2008. D. & O. at 3-4, citing Joint. Ex. 8. Hutton did not attend the Air Brake and GCOR examinations on November 20, as Neal instructed. That day, Neal sent a letter to Hutton stating that “[b]ecause of seniority rights, you are currently unable to hold a position as an Engineer. While you are unable to hold a position as an Engineer, at some future date, you should be able to work as an Engineer; therefore, we have begun the RTW process.” *Id.* at 4, citing JX 9. Neal directed Hutton to report for the examinations on November 25, 2008. *Id.* Recognizing that Hutton had accepted a position in Virginia, Neal stated that Hutton should resign his position with Union Pacific. *Id.*

Hutton received the letter on November 24, and responded to Neal by e-mail explaining that even if he took the Air Brake and GCOR examinations on November 25, he would not be available to attend the safety classes scheduled for December 15 to 19, because of his work obligations. *Id.* at 5-6. Hutton also complained to Neal that he had received notice of the exam only one day prior to the scheduled date, which was not a reasonable amount of time to prepare for the tests. *Id.* at 6.

On December 4, 2008, Union Pacific sent Hutton a Notice of Investigation regarding his failure to attend the exam on November 25, 2008. *Id.* at 6; JX 10. The resulting hearing was scheduled for December 10, 2008. Herb Krohn, local chairman of the United Transportation Union Local 1348, responded to the notice on behalf of Hutton, requesting the hearing be postponed until on or after January 6, 2009, because Hutton was outside the state and would not return until after January 1. D. & O. at 6, citing JX 11. On December 23, Neal sent a letter rescheduling the hearing to December 30. *Id.* at 6, citing JX 12. Krohn responded by letter dated December 26, objecting to the hearing date and, relying on the terms of the Memorandum of Agreement between the Union Pacific Railroad and the United Transportation Union (the

⁴ The Return to Work (RTW) Program brochure states that the program is “voluntary on the part of the employee” and if an employee is unable to assume his/her regular duties, he/she will be referred to Union Pacific’s vocational rehabilitation program. JX 3 at 2.

CBA) dated May 1, 2005, he requested “a reasonable and just postponement until on or after January 6th to allow Hutton time to return to the state and prepare for the hearing.” JX 13.

On January 8, 2009, Union Pacific sent Hutton a Notification of Discipline Assessed, finding him in violation of Rule 1.13 for failing to comply with instructions to report for the air brake exam on November 25, 2008, and assessing a Level 3 violation.⁵ JX 17. Shortly thereafter, on January 19, 2009, Union Pacific sent Hutton a second Notification of Discipline Assessed, informing him that because of his failure to attend the investigation hearing on December 30, 2008, his employment was terminated pursuant to the CBA.⁶ D. & O. at 7, citing JX 19.

JURISDICTION AND STANDARD OF REVIEW

Congress authorized the Secretary of Labor to issue final agency decisions with respect to claims of discrimination and retaliation filed under the FRSA. The Secretary has delegated that authority to the Administrative Review Board.⁷ We review the ALJ’s factual findings to determine whether they are supported by substantial evidence.⁸ The ARB reviews the ALJ’s conclusions of law under the de novo standard.

DISCUSSION

1. FRSA Employee Protections For Reporting Workplace Injury

Hutton claims that Union Pacific discharged him from employment on January 19, 2009, in retaliation for notifying it of a work-related personal injury on July 30, 2008, in violation of the FRSA. FRSA Section 20109(a)(4) prohibits a railroad carrier from discriminating against an employee who engages in protected activity, such as reporting a work-related injury or illness:

(a) In General.—A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may

⁵ Rule 1.13 states: “Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.” JX 25.

⁶ The Memorandum of Agreement Section C. provides in pertinent part: “An employee failing to appear at a hearing, after having been properly notified in writing, and who makes no effort to secure a postponement, will automatically terminate his services and seniority rights.” JX 19.

⁷ Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a).

⁸ 29 C.F.R. § 1982.110(b).

not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done—

(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^[9]

FRSA Section 20109, entitled "Employee protections," provides that any whistleblower protection action brought under the FRSA is governed by the legal burdens of proof set forth under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, at 49 U.S.C.A. § 42121(b).¹⁰ To prevail, an FRSA complainant must establish by a preponderance of the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action.¹¹ 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 a complainant's protected behavior.¹²

As we explained in *Henderson* and *Santiago*, the FRSA's legislative history reflects a progressive expansion of anti-retaliation measures aimed at addressing continuing concerns about railroad safety and injury reporting.¹³ Prior to 2007, rail employees' whistleblower retaliation complaints were subject to mandatory dispute resolution under the Railway Labor Act.¹⁴ Recognizing that these anti-retaliation measures were insufficient, Congress significantly expanded protections for railroad whistleblowers in the 2007 FRSA amendments. Congress amended these provisions again in 2008, by inclusion of the "prompt medical attention"

⁹ 49 U.S.C.A. § 20109(a)(4); *see generally* *Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-011 (ARB July 25, 2012).

¹⁰ *See* 49 U.S.C.A. § 20109(d)(2)(A).

¹¹ 49 U.S.C.A. § 42121(b)(2)(B)(iii); *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012).

¹² 49 U.S.C.A. §§ 20109(d)(2)(A)(i), 42121(b)(2)(B)(iii)(iv). *See Santiago*, ARB No. 10-147, slip op. at 6.

¹³ *Santiago*, ARB No. 10-147, slip op. at 12-15; *Henderson*, ARB No. 11-013, slip op. at 6-7.

¹⁴ 75 Fed. Reg. 53523 (Aug. 31, 2010).

language. “Together, these amendments convey congressional intent to comprehensively address and prohibit harassment, in all its guises, of injured rail employees.”¹⁵

2. ALJ Decision

After a hearing on the merits, the ALJ determined, based on the parties’ stipulations and evidence, that Hutton engaged in protected activity under FRSA Section 20109(a)(4) when he notified the Respondent of a work-related injury on July 30, 2008. The ALJ also found that the Respondent was aware of Hutton’s protected activity, and that Hutton was subject to an unfavorable personnel action on January 18, 2009, when Union Pacific notified him of his termination. Given that no party challenges these findings, we accept them as final.¹⁶ The ALJ ultimately dismissed the case because he found that Hutton’s injury report was not a contributing factor in the Respondent’s decision to terminate his employment.

In support of this finding, the ALJ ruled that the Complainant’s “chain of events” argument could not sustain a finding of contributing factor under the FRSA. D. & O. at 12. The ALJ also observed that neither Neal nor any other of the Respondent’s witnesses expressed any animosity against Hutton for reporting his injury. *Id.* Explaining that the CBA provided that failure to attend an investigative hearing was grounds for termination; the ALJ determined that it was the Respondent’s prerogative, in the usual course of business, to terminate Hutton’s employment for this reason. *Id.* at 14. The ALJ concluded that the “Complainant was terminated for failure to attend the investigation” because he “chose not to take the required exams,” then “chose not to attend the investigative hearing,” even though he may have reasonably believed that he would not be subject to automatic termination as he attempted to have the investigation postponed. *Id.* at 13. We find, however, that the ALJ erred both legally and factually. The ALJ did not correctly apply the FRSA’s contributing factor standard, and substantial evidence does not support the ALJ’s material finding that Hutton’s termination comported with the collective bargaining agreement. *Id.* at 14.

3. The contributing factor standard under the FRSA

Although the ALJ stated that the “chain of events” leading to Hutton’s termination would likely never have occurred had he not reported his injury, the ALJ determined that this was *not* the test for contributory factor under the FRSA. D. & O. at 12. This was error. The ARB has repeatedly ruled that under certain circumstances a “chain of events” may substantiate a finding

¹⁵ *Santiago*, ARB No. 10-147, slip op. at 15 (“The 2007 FRSA amendments contained increased protections for railroad whistleblowers. These provisions were amended again in 2008, . . . [with language] suggesting that Congress viewed the provision as integral to the strengthened whistleblower provisions passed a year earlier.”); *Araujo v. New Jersey Transit Rail Operations*, 708 F.3d 152, 156-157 & n.3 (3d Cir. 2013).

¹⁶ 29 C.F.R. § 1982.110.

of contributory factor.¹⁷ Compounding his error, the ALJ determined that no witness demonstrated “animosity” against Hutton, suggesting that Hutton was required to prove retaliatory animus or motive. Neither motive nor animus is a requisite element of causation as long as protected activity contributed in any way – even as a necessary link in a chain of events leading to adverse activity.¹⁸

Causation or “contributing factor” in a FRSA whistleblower case is not a demanding standard.¹⁹ The FRSA expressly adopts the standard of proof applicable to AIR-21 whistleblower cases.²⁰ The “AIR-21 burden-shifting framework that is applicable to FRSA cases is much easier for a plaintiff to satisfy than the *McDonnell Douglas* standard.”²¹ As the Eleventh Circuit reasoned in the context of the nuclear whistleblower law upon which AIR-21 was based: “For employers, this is a tough standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending

¹⁷ In *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012), we held that, because complainant’s protected disclosures caused the company to conduct an investigation that led to complainant’s discharge, complainant established the “contributing factor” element of his claim arising under the whistleblower protection provision of the Energy Reorganization Act. We held that complainant’s disclosures were “inextricably intertwined” with the investigations that resulted in his discharge because the content of those disclosures gave the company the reasons for the adverse action taken against complainant. *Id.*, slip op. at 8. See also *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6-7 (ARB Feb. 29, 2012).

¹⁸ See, e.g., *Menendez v. Halliburton, Inc.*, ARB No. 12-026, ALJ No. 2007-SOX-005, slip op. at 13-14 (ARB Mar. 15, 2013) (reissued Mar. 20, 2013); see also *Araujo*, 708 F.3d at 158 (an employee need not provide evidence of motive or animus to demonstrate that protected activity was a “contributing factor” to adverse action); *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993)(“[A] whistleblower need not demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action to establish that his disclosure was a contributing factor to the personnel action: ‘Regardless of the official’s motives, personnel actions against employees should quite [simply] not be based on protected activities such as whistleblowing.’ S. Rep. No. 413, 100th Cong., 2d Sess. 16 (1988) (accompanying S. 508).”). The protection these whistleblower statutes afford shields employees from both intentional and unintentional adverse conduct due to retaliation for engaging in whistleblower protected activity since, in either case, such conduct creates a “chilling effect” potentially discouraging employees from protected disclosures.

¹⁹ See *Henderson*, ARB No. 11-013, slip op. at 14.

²⁰ See 49 U.S.C.A. § 20109(d)(2)(A)(i), incorporating the provisions of 49 U.S.C.A. § 42121(b)(2)(B). The AIR-21 burdens of proof are modeled after the burdens of proof provisions of the 1992 amendments to the Energy Reorganization Act, 42 U.S.C.A. § 5851 (ERA), which contains the burden on employers to prove by “clear and convincing evidence” that it would have done the same thing in the absence of protected activity. See *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 9 (ARB Jan. 30, 2004).

²¹ *Araujo*, 708 F.3d at 159.

themselves.”²² “The 2007 FRSA amendments [adopting AIR-21’s contributing factor standard] must be similarly construed, due to the history surrounding their enactment.”²³

The FRSA’s legislative history, as summarized above (*supra* at 5-6), reveals Congress’s intent to comprehensively address the problem of railway retaliation for occupational injury reporting.²⁴ Congress’s adoption in 2007 of the comparatively lower contributory factor standard reflects congressional intent to promote effective enforcement of the Act by making it easier for employees to prove causation. 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.”²⁵ The contributing factor standard was “intended to overrule existing case law, which required that a complainant prove that his protected activity was a ‘significant,’ ‘motivating,’ ‘substantial,’ or ‘predominant’ factor” in a personnel action.²⁶ Therefore, a complainant need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent’s “reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant’s protected” activity.²⁷ Indeed, the Third Circuit recently held that the 2007 FRSA amendments adopting the contributing factor standard for FRSA whistleblower complaints reflects Congress’s intent to be “protective of plaintiff-employees.”²⁸

4. Hutton’s injury report was a contributing factor in his termination

- a. *The chain of events in this case shows that Hutton’s 2008 injury report contributed to the adverse action that he suffered*

Hutton reported his work-related injury on July 30, 2008. On August 25, a disability management team at Union Pacific contacted him and offered him the opportunity to participate in a Vocational Rehabilitation Program and sent him brochures about the programs titled

²² *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997).

²³ *Araujo*, 708 F.3d at 159.

²⁴ *See Araujo*, 708 F.3d at 159-160 (citing Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America’s Railroads: Hearing Before the H. Comm. On Transp. and Infrastructure, 110th Cong. (Oct. 22, 2007)).

²⁵ *Williams v. Domino’s Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011).

²⁶ *Allen v. Stewart Enter., Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-060, -062; slip op. at 17 (ARB July 27, 2006).

²⁷ *Walker v. Am. Airlines, Inc.*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 18 (ARB Mar. 30, 2007).

²⁸ *See Araujo*, 708 F.3d at 159.

Vocational Rehabilitation Services and Return to Work Assistance. JX 3. In these programs, he was urged to aggressively seek alternate employment. In fact, he was able to obtain two part-time jobs while he was off-injured, and he eventually secured an interim position in Virginia. Meanwhile, following a functional capacity evaluation, Union Pacific notified Hutton that his medical restrictions could be accommodated by his returning to work as an engineer, and instructed Hutton to schedule a Return to Work conference within five days.²⁹

On November 17, Hutton spoke with Neal, who did not schedule a conference, but instructed Hutton to complete certain exams and training to work as an engineer, and in a follow-up letter advised him that he was scheduled for the first exam on November 20. When Hutton did not take the exam, Neal contacted him to inquire about his absence. Hutton informed him that he had questions regarding the necessity of the process, including conflicts with the Return to Work program he was already participating in, and could not commit to fulfilling the requirements until his questions were answered. He also told Neal that he had accepted a position with a railroad in Virginia and would be leaving Washington State on December 6. Despite his acknowledgement that Hutton then lacked the seniority to enable him to work as an engineer, Neal rescheduled Hutton's initial examination for November 25 by letter dated November 20, 2008. JX 9-1. Aware that Hutton had obtained interim employment in another state, Neal encouraged Hutton to resign his position with Union Pacific. He further informed Hutton that to maintain his working relationship with Union Pacific, Hutton must comply with the RTW prerequisites. Hutton received this notice on November 24 and responded by e-mail that day, noting that the exam scheduled for the next day was not reasonable and that he would not attend. When Hutton did not attend the examination on November 24, Union Pacific initiated a Notice of Investigation and scheduled a hearing pursuant to the General Code of Operating Rules for December 10. JX 10. Krohn, Hutton's Union representative, responded in writing to the Notice, explaining that Hutton would be out of the state until after January 1, and requested that the hearing be postponed until January 6. JX 11. On December 23, Neal sent a letter rescheduling the hearing until December 30. Krohn responded on December 23, again explaining that Hutton would be gone until the beginning of January, and requested a postponement until January 9. JX 13. The hearing was held on December 30, and Hutton was issued a Notice of Discipline for a Level 3 violation for failure to take the exam on November 25, and thereafter a Letter of Termination for failure to attend the investigative hearing on December 30. JXs 17, 19.

The ALJ erred in determining that this chain of events does not establish that Hutton's report of injury was a contributing factor to his discipline measures and ultimate termination.³⁰ If Hutton had not reported his injury, he would never have been urged and/or required to comply with the provisions of three separate "return to work" programs – programs specially created and offered by the employer to address work-place injury. Had he not run afoul of the confusing, if

²⁹ Prior to Hutton's injury, he had been employed as a brakeman and switchman, and did not have the requisite seniority to work as an engineer.

³⁰ See *DeFrancesco*, ARB No. 10-114, slip op. at 6-7; *Smith*, ARB No. 11-003, slip op. at 7-9.

not contradictory, dictates of the several programs, Union Pacific would not have disciplined him.

In addition, once an employer adopts an injury policy, the employer should adequately explain and fairly administer that policy. The employer may not mask retaliation against injured employees behind an ostensibly beneficial policy with rules that are, on their face, so vague and confusing. Undisputed evidence indicates that the Respondent had several “return to work” programs with overlapping purposes and procedures. JX 3. Two such programs were both referred to as “Return to Work” – but one was apparently voluntary and the other mandatory. D. & O. at 5.³¹ Under these circumstances, Hutton chose to pursue the path of one such program (VRP) to the exclusion of the mandatory requirements of another program (Return to Work), which incidentally had the exact same name as still another program (Return to Work) that was explicitly voluntary. *Id.* The ALJ ruled that Hutton unreasonably ignored Neal’s mandatory instructions concerning the Return to Work exam and training requirements. Nevertheless, there is no question that Union Pacific placed Hutton in the position of performing conflicting directives in the context of the several different return to work programs the company created.

Hutton was fired for failing to navigate the very programs set up to help injured employees like himself. Return to work programs and policies, ostensibly created to address the needs of ill and injured railroad employees, must be operated reasonably and in good faith to

³¹ The facts show that Hutton adhered to procedures to begin the VRP process, and complied with Neal’s initial instructions. See *supra* at 2-3. At the administrative hearing, the ALJ heard testimony about the different RTW programs offered by the company:

Mr. Neal explained the Return to Work program as follows, “The Temporary Productive Work, TPW, is voluntary. What’s loosely referred to as Return to Work is a voluntary program set up by, you know, that department. My specific area of responsibility was to ensure we have locomotive engineers to run trains Tr. 113. He stated that the Human Resources Return to Work Program, for which the Complainant received a pamphlet, is different than the Operating Department’s Return to Work Program. While the former is voluntary, the lat[t]er is not. Tr. at 115. Ms. Arnush also testified there is both a Return to Work Program and a separate return to work process. Tr. 38-39. The lat[t]er is a process that helps employees go back to work with restrictions with oversight by the associate medical director. Tr. at 58-61.

D. & O. at 5. Hutton testified consistently that his intent was to participate in the voluntary return to work process, although the record is unclear whether Hutton understood the nature of the voluntary and mandatory programs the company offered. D. & O. at 3; *see also* Tr. at 213. Hutton also testified that when he became injured, he did not have the seniority to qualify as an engineer and, based on that undisputed fact, he could not yet qualify as an engineer regardless of whether he passed the Air Brake and other tests in November 2008. D. & O. at 3; *see also* Tr. at 212-213.

avoid harming and thereby discriminating against the very employees they are designed to serve.³²

The circumstances presented here are analogous to the facts in *DeFrancesco v. Union RR Co.*, in which we considered the application of the FRSA to the discharge of an employee who reported a work-related injury.³³ In *DeFrancesco*, the employee reported his injury, which led to an investigation into his disciplinary history and prior injury reports, and the investigation resulted in the employee's suspension. The ALJ conducted a hearing and concluded that DeFrancesco engaged in protected activity, but his protected activity did not contribute to his suspension. On petition for review, we held that if DeFrancesco had not reported his injury, the company would not have conducted the investigation that resulted in the discipline. We concluded that DeFrancesco's injury report was a contributing factor in his suspension, and we remanded the case to the ALJ to determine whether the respondent could show by clear and convincing evidence that it would have suspended DeFrancesco in the absence of his protected activity.³⁴

b. *The burden of proof analysis under FRSA*

Despite correctly identifying evidence that supported a contributing factor finding³⁵ – the Respondent's knowledge of the protected activity, temporal proximity, and evidence of the Respondent's arbitrary personnel decisions – the ALJ ultimately ignored this evidence and ruled, in effect, that the Respondent need only articulate a legitimate business reason for its action to prevail. Without adequately considering the totality of the circumstances,³⁶ the ALJ determined that the Respondent had a legitimate business reason to terminate Hutton, which the ALJ declined to "second-guess." D. & O. at 12. In so doing, he short-circuited the statutory burden of proof by concluding that it was the Respondent's prerogative, "in the usual course of business," to terminate Hutton and leaving it at that. The ALJ appeared to base his dismissal solely on a finding that Hutton committed a dismissible offense (failure to attend investigative hearing), similar to the "legitimate business reason" burden of proof analysis that does *not* apply

³² Compare *Santiago*, ARB No. 10-147, slip op. at 16 (railroad not required to create occupational health services, but if it does, it must not interfere with independent medical treatment. If railroad inserts itself into medical treatment and interferes with treatment, causation is presumed).

³³ *DeFrancesco*, ARB No. 10-114.

³⁴ *Id.*, slip op. at 8.

³⁵ Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. *DeFrancesco*, ARB No. 10-114, slip op. at 7.

³⁶ See *Bobreski v. J. Givoo Consultants*, ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 24, 2011).

to FRSA whistleblower cases.³⁷ Under the FRSA whistleblower statute, the causation question is not whether a respondent had good reasons for its adverse action, but whether the prohibited discrimination was a contributing factor “which, alone or in connection with other factors, tends to affect in any way” the decision to take an adverse action.³⁸

Finally, the ALJ erred in finding that Union Pacific’s termination decision comported with the CBA. D. & O. at 14 (ALJ stating that Hutton’s termination was made in the “usual course of business . . . as per the collective bargaining agreement”). The Complainant argues that Union Pacific terminated his employment *in violation* of the union agreement. At a minimum, the company failed to follow its own termination procedure. The Respondent’s January 19, 2009 Notification terminating Hutton’s employment states that “despite being properly notified in writing of the time and date of this Investigation and Hearing, you failed to attend.” The Notification cites a CBA provision in support of the decision to immediately terminate Hutton. But the CBA provision the Respondent cited states as follows: “An employee failing to appear at a hearing, after having been properly notified in writing, *and who makes no effort to secure a postponement*, will automatically terminate his services and seniority rights.” *Id.*, citing JX 26 at 2 (emphasis added). Hutton’s Union Representative made formal, reasonable, and repeated efforts to secure a postponement. Contrary to the ALJ’s finding, the CBA provision does not support the Respondent’s decision to terminate Hutton’s employment. Based on this record evidence, Hutton’s termination constituted an “inconsistent application of an employer’s policies,” which may be considered circumstantial evidence of retaliation.³⁹ In any case, on remand the ALJ should address this discrepancy in the factual record.

It is not disputed that the chain of events leading to Hutton’s termination would not have commenced without Hutton’s filing of a report of injury. Additionally, the ALJ cited evidence of the Respondent’s knowledge of protected activity, temporal proximity, and the arbitrary nature of the Respondent’s personnel decision. Coupled with the record evidence of confusing and contradictory application of the company’s back-to-work policies and apparent failure to conform to its own disciplinary policy, we conclude that Hutton’s report of injury in 2008 was a contributing factor to his termination.

5. The Respondent’s affirmative defense

Because the ALJ concluded that Hutton failed to prove that his protected activity contributed to his termination, the ALJ did not consider whether Union Pacific proved by clear and convincing evidence that it would have terminated Hutton absent his protected activity. Union Pacific argues on appeal, however, that even if Hutton could establish that his protected activity of reporting the injury contributed to the adverse action, Union Pacific would have terminated him in the absence of such activity.

³⁷ See *Zinn v. American Commercial Lines Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 11 (ARB Mar. 28, 2012).

³⁸ *DeFrancesco*, ARB No. 10-114, slip op. at 6.

³⁹ *Id.* at 7.

A respondent's burden to prove the affirmative defense under FRSA is purposely a high one. As noted above, FRSA whistleblower cases are governed by the legal burdens set out in AIR 21, 49 U.S.C.A. § 42121(b). The AIR-21 burdens of proof were modeled after the burdens of proof provisions of the 1992 amendments to the Energy Reorganization Act, 42 U.S.C.A. § 5851.⁴⁰ Congress intentionally drafted the burdens of proof contained in the 1992 ERA amendments – the same as those now contained in FRSA – to provide complainants a lower hurdle to clear than the bar set by other employment statutes: “Congress desired to make it easier for whistleblowers to prevail in their discrimination suits”⁴¹ In addition to *lowering* a complainant's burden, Congress also *raised* the respondent's burden of proof – once an employee demonstrates that protected activity was a contributing factor, the burden is on the employer to prove by clear and convincing evidence that it would have taken the same action absent the employee's protected activity.⁴²

On remand, the ALJ must consider the evidence of record and determine whether it is sufficient to meet Union Pacific's burden of proof that it would have disciplined Hutton even if he had not reported his injury.

CONCLUSION

Accordingly, we **REVERSE** the Decision and Order, and **REMAND** this case for further proceedings consistent with this opinion.

SO ORDERED

JOANNE ROYCE
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

Judge Corchado, concurring:

I agree to remand the ALJ's decision but only because I view the ALJ's findings incomplete regarding his rejection of a causal link between protected activity and adverse

⁴⁰ *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 9 (ARB Jan. 30, 2004).

⁴¹ *Araujo*, 708 F.3d at 159; *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999).

⁴² *Stone & Webster Eng'g Corp.*, 115 F.3d at 1572.

employment action. Contrary to the majority, the record does not persuade me to make a causation finding without first seeking clarification from the ALJ.

The ALJ correctly notes that he must analyze the “chain of events” to determine whether Hutton proved that his “reporting of his injury” contributed to the termination of his employment.⁴³ D. & O. at 12. Logically, to determine whether Hutton’s protected role was a factor in his termination, the ALJ analyzed the legitimacy of the Respondent’s reasons for terminating Hutton’s employment after he failed to take the steps necessary to transfer to an engineer position and failed to appear for an investigation hearing. This analysis comprised a majority of the ALJ’s causation analysis. *Id.* at 11-14. The ALJ sufficiently explains why he concluded that Hutton’s choices contributed to the termination of his employment. *Id.* at 13. But concluding that Hutton’s choices were a contributing factor does not necessarily mean that protected activity was not.⁴⁴

For many of the reasons cited in the majority opinion and argued by Hutton, it is not clear to me whether the ALJ analyzed the “totality of circumstances” to determine whether protected activity was a factor in the termination of his employment.⁴⁵ For example, it is unclear whether the ALJ considered the seemingly aggressive manner in which the Respondent attempted to “accommodate” Hutton by pushing him toward a job he could not fill due to several return-to-work requirements.⁴⁶ To be qualified for the engineer position, it is undisputed that Hutton had to satisfy several conditional requirements that included two tests, not to mention needing sufficient seniority. If he did not transfer to an engineer position in 60 days and remained out of work, he would have to redo two of the tests. D. & O. at 5. The record suggests Hutton learned of a required air brake test only one day before the test date. *Id.* at 6. I agree with Hutton that

⁴³ I understand the ALJ’s statement differently from the majority and, therefore, do not find error in the ALJ’s statement. The majority seems to understand the ALJ to say that a “chain of events” cannot prove circumstantially that a FRSA violation occurred. But I understand the ALJ as saying that it is the “reporting of [complainant’s] injury” and not the injury itself that constitutes protected activity under FRSA.

⁴⁴ *Franchini v. Argonne National Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 12 (ARB Sept. 26, 2012)(a true reason does not necessarily rule out other reasons).

⁴⁵ *See, e.g., Bobreski v. J. Givoo Consultants*, ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 24, 2011).

⁴⁶ It is not the Board’s role to mandate that employers follow their employment procedures unrelated to whistleblower violations. But, in analyzing the causation element, the Board may review inferences drawn by the ALJ from the manner in which an employer implemented its policies. Even so, I disagree with the majority that the Respondent’s aggressive efforts to place Hutton into an engineering job resembles the respondent’s aggressive health care practices in *Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-011, slip op. at 16 (ARB July 25, 2012). *See*, Majority opinion, p. 11, n.32. In *Santiago*, the respondent controlled an occupational health care facility that interfered with employee’s medical treatment for a work injury and thereby violated FRSA. *Santiago*, ARB No. 10-147, slip op. at 16 (ARB July 25, 2012).

the ALJ should have expressly considered whether the seemingly unrelenting “sequence of the scheduling of the investigation” was circumstantial evidence that *perhaps* something other than employment “accommodation” was afoot.⁴⁷

In the ALJ’s final analysis, it seems to me that he may have intended to explain that there was a *complete* break in “chain of events” such that Hutton’s “reporting of his injury” dropped out of the causation line leading to his employment termination.⁴⁸ By a complete break, I mean that the ALJ must be convinced that, after some point in the chain of events, the Respondent focused only on accommodating Hutton’s return to work and was *not at all* influenced by Hutton’s reporting of his injury. To the extent that the majority opinion suggests that the reporting of an injury automatically and inextricably latches onto every personnel decision that “would never have happened” but for the reporting of the injury, I respectfully disagree. Respectfully, I also disagree with the majority that this case resembles other Board cases cited by the majority where the reporting of an injury was “inextricably intertwined” with the termination of employment. In *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 3 (ARB Feb. 29, 2012), a case cited by the majority, the employee’s suspension was directly intertwined with his protected activity because the employer investigated the reason for the reported injury and blamed the employee for the injury. In *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 4 (ARB June 20, 2012), the employee reported a rule violation and was fired for reporting the violation late. Similarly, in *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 4 (ARB Oct. 26, 2012), the employee was also fired for an allegedly late reporting of an injury as well as for causing the injury. In *DeFrancesco*, *Smith*, and *Henderson*, the protected activity and adverse action were inextricably intertwined because the basis for the adverse action could not be explained without discussing the protected activity. In this case, if the Respondent fired Hutton solely because he failed to comply with necessary steps to accommodate his return to work, it is not necessary to discuss that he reported his injury. Therefore, the reporting of the injury and the adverse action are not inextricably intertwined.⁴⁹

Lastly, I appreciate but disagree with the majority’s characterization of the burden of proof on remand, essentially repeating the standard stated in *DeFrancesco*.⁵⁰ The majority requires the Respondent to prove that it would have disciplined Hutton “even if he had not reported his injury.” The *DeFrancesco* standard may be an impossible standard in cases like this

⁴⁷ See Complainant’s Brief in Support of his Petition for Review, p. 9.

⁴⁸ Normally, I would hesitate to speculate about the ALJ’s intent if an issue was sent back on remand. But I find it permissible to speculate in this case because the majority has resolved the contributory factor question.

⁴⁹ I do not mean to suggest that a causal link exists between protected activity and adverse action *only if* they are *inextricably* intertwined. But when protected activity and adverse action are inextricably intertwined, the causal link is self-evident where “contributory factor” is the burden of proof.

⁵⁰ *DeFrancesco*, ARB No. 10-114, slip op. at 8.

one unless a respondent could travel back in time and change history. Moreover, without more careful analysis, it is not clear to me whether Congress intended the *DeFrancesco* standard in the FRSA whistleblower statute. While resembling other whistleblower statutes, FRSA has the unique aspect of protecting employees who report injuries but then the employees and employers necessarily interact often for days, months, or even years to work through medical care issues and work accommodations in addressing the injury. Nevertheless, I reserve further comment because this issue is not ripe. In my view, on remand, the ALJ and the parties may fully address the burden of proof required in FRSA cases like this one.⁵¹ If an appeal is filed, the Board can address this issue at that time.

LUIS A. CORCHADO
Administrative Appeals Judge

⁵¹ In my view, the issue was not ripe or settled in *DeFrancesco* and, therefore, remained open for further development in those proceedings.