



In the Matter of:

JASON RAYE,

ARB CASE NO. 14-074

COMPLAINANT,

ALJ CASE NO. 2013-FRS-084

v.

DATE: September 8, 2016

PAN AM RAILWAYS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Stephen J. Fitzgerald, Esq.; Garrison Levin-Epstein Richardson Fitzgerald & Pirrotti, P.C.; New Haven, Connecticut

For the Respondent:

Andrew J. Rolfes, Esq.; Buchanan Ingersoll & Rooney; Philadelphia, Pennsylvania

Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Administrative Appeals Judge; and Luis A. Corchado, Administrative Appeals Judge; Judge Corchado, concurring.

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Federal Rail Safety Act

of 1982 (FRSA).¹ Complainant Jason Raye filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his employer, Pan Am Railways, Inc., violated the FRSA by retaliating against him because he reported a safety hazard and a workplace injury and because he filed an FRSA complaint. With respect to Raye's reports of a safety hazard and workplace injury, OSHA found no violation,² but OSHA found reasonable cause to find that Pan Am retaliated against Raye for filing his FRSA complaint. Pan Am requested a hearing before a Department of Labor (DOL) Administrative Law Judge (ALJ). After a formal hearing, the ALJ issued a Decision and Order (D. & O.) on June 25, 2014, finding that Pan Am violated the FRSA by unlawfully discriminating against Raye. The ALJ awarded Raye \$10,000 in compensatory damages for emotional distress, punitive damages in the amount of \$250,000, reasonable attorney's fees and costs, and ordered Pan Am to expunge Raye's personnel file of any reference to the December 23, 2011 charges Pan Am asserted against Raye or the January 4, 2012 disciplinary hearing. The Board affirms the ALJ's decision.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to issue final agency decisions in FRSA cases.³ The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations if they are

¹ 49 U.S.C.A. § 20109 (Thomson/West 2007 & Supp. 2015), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53, and as implemented by federal regulations at 29 C.F.R. Part 1982 (2015).

² Raye's December 6, 2011 complaint alleged that he engaged in protected activity when he reported an injury that occurred on October 24, 2011. The complaint originally alleged that after Raye reported the injury, Pan Am charged Raye with a violation, conducted an investigative hearing into the charge, and issued discipline in the form of a formal reprimand and that this was illegal discrimination because of the injury report. These allegations are not the subject of this matter because OSHA found no violations with respect to them, and Raye did not appeal OSHA's findings.

³ See Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a).

supported by substantial evidence.⁴ The standard for reviewing the amount of a punitive damages award is abuse of discretion.⁵

BACKGROUND

On October 24, 2011, while working as a conductor for Pan Am, Raye injured his left ankle after stepping off a boxcar onto some railroad ties.⁶ While Raye stumbled and hurt his ankle, he did not fall. Three weeks earlier, Raye had reported the same railroad ties that he stumbled upon to his manager, and Respondent had done nothing to remedy the hazard. After he was injured, Raye went to the hospital, where he was diagnosed with a left ankle sprain. Because of this incident, Pan Am charged Raye with a violation of a rule requiring employees to be assured of firm footing before they step down from a train. At the investigatory hearing regarding the charged violation, Raye testified about the injury, stating that he stumbled but did not fall. Pan Am disciplined Raye after the hearing with a reprimand.

After Pan Am reprimanded Raye, Raye filed a FRSA complaint alleging that Pan Am retaliated against him for reporting a safety hazard and an injury. The complaint, drafted by Raye's counsel, was entirely consistent with Raye's account of events except that it stated that Raye "fell heavily to the ground" when he was injured. Pan Am reviewed the complaint and concluded that the statement that Raye fell was a major discrepancy and charged Raye with rule violations on December 23, 2011, and subjected him to a disciplinary hearing held on January 4, 2012.⁷ The charges against Raye included violations of "providing false statements," and "act[s] of insubordination, hostility, or willful disregard of the Company's interests," and were termed "sufficient cause for dismissal."⁸ Upon receiving these charges, Raye amended his FRSA

⁴ 29 C.F.R. § 1982.110(b); *Kruse v. Norfolk S. Ry. Co.*, ARB No. 12-081, -106; ALJ No. 2011-FRS-022, slip op. at 3 (ARB Jan. 28, 2014).

⁵ Supreme Court and circuit court law points to an abuse of discretion standard for the amount awarded in punitive damages, absent a constitutional challenge. See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001) ("If no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's 'determination under an abuse-of-discretion standard'" regarding the amount of a punitive damages award (in a common-law claim of unfair competition)) (quoting *Browning-Ferris Indus. of Vt., Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989)); *Deters v. Equifax Credit Info. Servs. Inc.*, 202 F.3d 1262, 1273 (10th Cir. 2000) (in which the Tenth Circuit held that "the district court did not abuse its discretion in reducing the punitive award to conform with the" statutory maximum for punitive damages).

⁶ The citations in the background are to D. & O. at 3-8.

⁷ *Id.* at 8.

⁸ *Id.* at 5.

complaint to allege that Pan Am discriminated against him for filing his FRSA complaint. After the second Pan Am investigatory hearing, Pan Am did not take any disciplinary action against Raye because it found the charges against Raye were not sustained as he maintained that his attorney added the “fell hard to the ground” language to his FRSA complaint and the language was not approved by him, and was untrue.

DISCUSSION⁹

Before the ALJ, Pan Am stipulated that Raye engaged in protected activity under the FRSA when he filed his complaint with OSHA on December 6, 2011, and that Pan Am was aware of the protected activity.¹⁰ The ALJ found that Pan Am engaged in adverse action against Raye when it charged Raye with rule violations on December 23, 2011, and subjected him to a disciplinary hearing on January 4, 2012.¹¹ The ALJ additionally found that Raye’s protected activity contributed to this adverse action. In deciding the question of contributing factor, the ALJ found that “there is strong circumstantial evidence establishing that Pan Am’s reasons for taking adverse action are unworthy of credence, which further supports a finding that the protected activity contributed to the adverse action.”¹² Pan Am did not object to the findings that Pan Am engaged in adverse action against Raye or that Raye’s protected activity contributed to the adverse action on appeal. They thus remain undisturbed. The ALJ further found that Pan Am failed to establish an affirmative defense, and ordered Pan Am to abate the violation and pay damages and attorney’s fees. The only issues on appeal before the Board are: (1) whether substantial evidence supports the ALJ’s finding that Pan Am failed to prove its affirmative defense by clear and convincing evidence (that it would have taken the same action absent the protected activity), and (2) whether the ALJ’s determination that Raye is entitled to punitive damages in the amount of \$250,000.00 is consistent with applicable law, supported by substantial evidence of record, and does not constitute an abuse of discretion.¹³

⁹ In affirming the ALJ’s Decision and Order, we limit our comments to the most critical points.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 8.

¹² D. & O. at 11. The lack of credible explanations from the employer makes the ALJ’s finding of causation that much stronger and effectively eliminates the employer’s ability in this case to establish an affirmative defense. For an extensive discussion of the affirmative defense, see *Speegle v. Stone & Webster Constr. Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 9-14 (ARB Apr. 25, 2014).

¹³ Pan Am did not object to the ALJ’s other remedial orders, including expungement of any reference to the adverse actions from his personnel record, and award of emotional distress damages in the amount of \$10,000.00 and reasonable attorney’s fees.

1. Pan Am's Affirmative Defense

The ALJ found that Pan Am failed to prove by clear and convincing evidence that it would have taken the same adverse actions against Raye absent his protected activity. The ALJ found Pan Am's asserted defense, that there was a major discrepancy between Raye's testimony that he did not fall when he injured himself and the statement in his FRSA complaint that he fell, wholly incredible and unsupported by the evidence. Nor did the ALJ give any credence to Pan Am's asserted justification for the second disciplinary hearing initiated against Raye, citing the fact that the charging letter for the second proceeding made no mention of further fact finding or additional violations, and instead charged Raye with serious rule violations including insubordination, hostility, and dishonesty that could lead to termination.¹⁴

In rejecting Pan Am's attempt to show that it has charged other employees in the past for dishonesty comparable to that alleged against Raye, the ALJ noted Pan Am's lack of corroborating evidence which, the ALJ pointed out, rendered it impossible to meaningfully compare the false statements involved in the two offered examples with the statements made by Raye that Pan Am asserted were false.¹⁵ The ALJ additionally pointed out that with respect to the two employees Pan Am put forth for comparison, the employees' testimony was "completely contrary" to the evidence while, in contrast, Raye's statement was mostly consistent—the only conflicting statement attributed to Raye merely being the allegation in the FRSA complaint that Raye "fell hard to the ground."¹⁶ The ALJ found that the allegation, which Pan Am argued was a false statement in violation of company policy, was but a minor discrepancy that did not rise to the level of the false statements involved in the other two cases Pan Am cited that warranted personnel action, and was therefore not comparable. The ALJ also distinguished Pan Am's asserted comparable cases because the false statements were made in the process of Pan Am's internal disciplinary process while in the present case, Pan Am charged Raye with false statements made in a complaint filed with a federal agency that was, itself, FRSA-protected activity. After analyzing all relevant evidence, the ALJ concluded that "the only conceivable reason" for Pan Am bringing its internal charges against Raye for statements he made in a whistleblower complaint was "to intimidate the complainant and discourage him from engaging in protected activity."¹⁷ Thus, the ALJ found that Pan Am failed to prove by clear and

¹⁴ D. & O. at 13, 15.

¹⁵ *Id.* at 14, 15. The ALJ specifically cited Pan Am's failure to provide hearing transcripts or determination letters for the two examples offered.

¹⁶ *Id.* at 14.

¹⁷ *Id.* at 15.

convincing evidence that it would have taken the same adverse personnel action against Raye in the absence of his protected activity of filing the FRSA complaint.¹⁸

We are not persuaded by Pan Am's arguments challenging the ALJ's rejection of its affirmative defense.¹⁹ As previously noted, once a complainant demonstrates that protected activity was a contributing factor in the unfavorable employment action, to avoid liability, the employer must prove by clear and convincing evidence that it would have taken the same action absent the employee's protected activity, a very high burden of proof.²⁰ In finding that Pan Am failed to meet this evidentiary burden, the ALJ thoroughly examined Pan Am's evidence in support of its argument that it would have brought charges against Raye for alleging that "he fell hard to the ground" after earlier stating that he did not fall. That evidence does not clearly and convincingly establish that Pan Am met its burden of proof, particularly where the only discrepancy cited in Raye's FRSA complaint as justifying Pan Am's action was the allegation that Raye "fell hard to the ground" (with the remainder of the complaint entirely consistent with Raye's earlier testimony), and Pan Am failed to establish that whether or not Raye actually fell would have mattered to the issue of whether he violated the rule he was charged with violating (failing to assure firm footing when he stepped down). Significantly, the ALJ did not believe Pan Am's justification that the second disciplinary hearing was necessary to clarify how the injury occurred because the charging letter pertaining to the second hearing made no mention of this, and instead charged Raye with rule violations including insubordination, hostility and dishonesty, and subjected Raye to possible termination. The ALJ also found that the comparator evidence presented was either not comparable, or not admissible as prejudicial. We find the ALJ did not abuse his discretion with regard to his evidentiary rulings related to his examination of Pan Am's evidence in support of its asserted affirmative defense,²¹ and hold that the ALJ's determination that Pan Am failed to meet the FRSA statutory burden of proof for establishing an affirmative defense is supported by substantial evidence of record.

¹⁸ *Id.*

¹⁹ Challenging the ALJ on appeal, Pan Am argues that the ALJ's finding that Pan Am failed to prove that it would have taken the same action absent protected activity was premised on erroneous evidentiary rulings and factual determinations that were unsupported by substantial evidence. Pan Am found fault with the ALJ's fact findings, credibility judgments, and evidentiary determinations.

²⁰ Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6, 9 n.6 (ARB Jan. 31, 2011) (quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (citation omitted)).

²¹ *Griebel v. Union Pac. R.R. Co.*, ARB No. 13-038, ALJ No. 2011-FRS-011, slip op. at 2 (ARB Mar. 18, 2014) ("The ALJ's evidentiary rulings are reviewed for abuse of discretion.") (citation omitted).

2. Punitive Damages

Relief under FRSA “may include punitive damages in an amount not to exceed \$250,000.”²² The ALJ found that the maximum punitive damages award was warranted because he found Pan Am intentionally violated Raye’s rights under the FRSA, and it was necessary to deter similar conduct by Pan Am in the future.

The ALJ analyzed the punitive damages issue using guideposts that the Supreme Court has recognized (“*State Farm* guideposts”) for determining whether a punitive damages award meets procedural and substantive constitutional limitations of fairness and due process which include: (1) the degree of the reprehensibility or culpability of respondent’s misconduct, (2) the relationship between the penalty and the harm to the complainant caused by the respondent’s actions, and (3) “the sanctions imposed in other cases for comparable misconduct.”²³ The ALJ analyzed these factors at length in his D. & O. to determine the amount of punitive damages.

Concerning the degree of reprehensibility or culpability of Pan Am’s conduct, the ALJ found that: (1) Pan Am attacked Raye for filing an FRSA complaint, (2) Pan Am’s first reaction upon receiving notice of Raye’s FRSA complaint “was to charge Raye with serious and terminable offenses including, but not limited to, dishonesty, insubordination, and hostility,” (3) Pan Am used the charges and subsequent hearing “to intimidate and discourage protected activity, not only by Raye, but other employees of Pan Am as well,” (4) the charges of serious violations brought against Raye were sufficient to cause a serious chilling effect that would dissuade other Pan Am employees from asserting their rights under FRSA, (5) this experience made Raye reluctant to file any further OSHA complaints and made him question whether he should have ever filed this FRSA complaint, (6) the discrepancy Pan Am alleged was minor and would not have changed the outcome of the original investigation into Raye’s safety regarding his injury, (7) Pan Am had a workplace culture that discouraged employees from reporting workplace injuries and blamed employees for their injuries, and (8) Raye was punished for a safety rule violation regarding his original injury even though Pan Am failed to remove the railroad ties that Raye had reported as a safety hazard weeks prior.²⁴ The ALJ found that Pan Am consciously disregarded Raye’s FRSA-protected rights and intentionally interfered with Raye’s exercise of those rights. The ALJ concluded that Pan Am’s actions in bringing baseless

²² 49 U.S.C.A. § 20109(e)(3).

²³ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 418-19 (2003); *accord*, *Youngermann v. United Parcel Serv.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 9 (ARB Feb. 27, 2013). The ALJ cited these guideposts at D. & O. at 18 (quoting *Cooper Indus., Inc.*, 532 U.S. at 434-35).

²⁴ *See* D. & O. at 18-22.

and serious charges against Raye for filing a FRSA complaint were “an egregious, blatant, and willful act of retaliation,” and that it was necessary “to deter similar conduct in the future.”²⁵

With regard to the second *State Farm* “guidepost,” the ALJ found that the harm to Raye was somewhat limited, but that the degree of Pan Am’s culpability and its egregious conduct, coupled with the need for deterrence, overwhelmed the second factor’s limitations in this case.²⁶ Finally, the ALJ analyzed the third factor of sanctions imposed for comparable misconduct and concluded that this analysis pointed to a significant punitive damages award.²⁷

Finding Pan Am to have engaged in egregious and intentional conduct that violated the FRSA, and upon comparing the circumstances in this case to other FRSA cases in which significant punitive damages were awarded, the ALJ awarded Raye the statutory maximum of \$250,000.00 in punitive damages, notwithstanding that the harm Raye suffered was somewhat limited because he was not ultimately fired because of the statement in his FRSA complaint.

Pan Am objects on appeal to the ALJ’s award of punitive damages, arguing that the ALJ erred both in ruling that Raye was entitled to punitive damages and because the amount of the punitive damages award was excessive. Specifically, Pan Am objects to the ALJ’s award of the statutory maximum when no disciplinary action was ultimately taken against Raye, additionally arguing that the ALJ erred in considering Raye’s injury report because it was no longer a part of this case since OSHA had dismissed Raye’s complaint based on his injury report and Raye had not asserted OSHA’s dismissal before the ALJ. Pan Am also argues that the ALJ failed to take into account that Pan Am had valid reasons for believing Raye to have been untruthful. Finally, Pan Am argues that punitive damages are not mandatory under FRSA, that the ALJ failed to consider that the collective bargaining agreement between the parties required Pan Am to file a notice of investigation within ten days of first knowledge of a violation, and that nothing it did evidenced a callous disregard for Raye’s rights under FRSA.

Reviewing the ALJ’s punitive damages award requires the ARB to consider, as did the ALJ, (1) whether any punitive damages award was warranted, and (2) whether the amount awarded was appropriate.

²⁵ *Id.* at 19, 21-22. As a part of his reprehensibility analysis, the ALJ also considered, as context, additional claims of retaliation Raye had previously filed because of safety and injury reports, even though the ALJ acknowledged that those claims were not before him for adjudication. *Id.* at 19.

²⁶ *Id.* at 21.

²⁷ *Id.*

A. Whether punitive damages were warranted

In determining whether punitive damages are warranted, the ARB has followed the common law rule recognized by the Supreme Court in *Smith v. Wade*, 461 U.S. 30, 51 (1983), as sufficient to trigger a punitive damages award—where there has been “reckless or callous disregard for the plaintiff’s rights, as well intentional violations of federal law.”²⁸ The inquiry into whether punitive damages are warranted focuses on the employer’s state of mind, and thus does not require that the employer’s misconduct be egregious. As the Supreme Court has noted, “[e]gregious misconduct is often associated with the award of punitive damages, but the reprehensible character of the conduct is not generally considered apart from the requisite state of mind.”²⁹ Nevertheless, egregious or outrageous conduct may serve as evidence supporting an inference of the requisite state of mind.³⁰ As previously noted, in this case the ALJ found that Pan Am consciously disregarded Raye’s FRSA-protected rights and intentionally interfered with Raye’s exercise of those rights. The ALJ found that Pan Am’s actions were not only egregious, but that its bringing of baseless and serious charges against Raye for filing an FRSA complaint was a “willful act of retaliation.”³¹ The substantial evidence of record supports the ALJ’s findings of egregious and intentional conduct warranting the award of punitive damages.³²

B. The amount of the punitive damages award

The ALJ finding of intentional misconduct supports a significant punitive damages award even though Pan Am did not formally discipline Raye as a result of the investigative hearing and charges. Pan Am’s arguments to the contrary are unpersuasive.

²⁸ *Petersen v. Union Pac. R.R. Co.*, ARB No. 13-090, ALJ No. 2011-FRS-017, slip op. at 5 (ARB Nov. 20, 2014); *Cain v. BNSF Ry. Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019, slip op. at 10 (ARB Sept. 18, 2014); *Youngermann*, ARB No. 11-056, slip op. at 6; *Ferguson v. New Prime*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 8 (ARB Aug. 31, 2011). See *Worcester v. Springfield Terminal Ry. Co.*, No. 14-1965, 2016 WL 3546322, at *3 (1st Cir. 2016) (endorsing ARB’s adoption of the common law standard for awarding punitive damages established by the Supreme Court in *Smith v. Wade*).

²⁹ *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 538 (1999).

³⁰ *Id.*

³¹ D. & O. at 19.

³² Concerning the egregious nature of Pan Am’s conduct, it is significant to note that the ALJ found that Pan Am intentionally retaliated against Raye for engaging in quintessential protected activity under the FRSA. See 49 U.S.C.A. § 20109(a)(1), (3), (4).

The ALJ determined that a punitive damages award was warranted because Pan Am's conduct was "of the sort that calls for deterrence and punishment" and awarded punitive damages in the amount of \$250,000.00.³³ Punitive damages are not awarded as of right upon a finding of the requisite state of mind; rather, the question of whether to award punitive damages is in the ALJ's discretion.³⁴ An ALJ's task, after determining that the evidence is sufficient for a punitive damages award, is to consider the amount necessary for punishment and deterrence and then to either make an award or not, based on those considerations.³⁵ As previously stated, the Board reviews the amount an ALJ awards in punitive damages for an abuse of discretion.³⁶ We find that the ALJ did not abuse his discretion in determining that \$250,000.00 in punitive damages was necessary in this case in furtherance of the goal of punitive damages awards to punish and deter future misconduct.³⁷ This is so even though the ALJ considered, as a part of his analysis, Pan Am's actions relating to Raye's injury report when it was no longer a part of this case.³⁸ This consideration did not change the intentional and reprehensible nature of Pan Am's conduct in targeting Raye because he filed a FRSA complaint. Further, the ALJ did not rely on this evidence but only viewed it in context, so the error was harmless.

³³ *Cain*, ARB No. 13-006, slip op. at 10 (quoting *Youngermann*, ARB No. 11-056, slip op. at 10) (internal citation omitted).

³⁴ *Smith v. Wade*, 461 U.S. at 52, 54 (Punitive damages "are never awarded as of right, no matter how egregious the defendant's conduct," but "are awarded in the jury's discretion 'to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.'" (quoting Restatement (Second) of Torts § 908(1) (1977).)).

³⁵ *Id.* at 54 ("The focus is on the character of the tortfeasor's conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards."); see also *Youngermann*, ARB No. 11-056, slip op. at 10 (In analyzing the amount of the award, "the focus is on the employer's conduct and 'whether it is of the sort that calls for deterrence and punishment.'").

³⁶ See *Cooper Indus., Inc.*, 532 U.S. at 433.

³⁷ The standard of review would be different if Respondent had challenged the amount of the award as unconstitutionally violating due process, but Respondent did not do so on appeal; it simply argued that the amount was "excessive," which is subject to abuse of discretion review. Analysis of the guideposts for constitutionality is considered by a reviewing court de novo. *State Farm*, 538 U.S. at 418 (citing *Cooper Indus.*, at 424) ("A trial court's application of these guideposts is subject to *de novo* review.").

³⁸ D. & O. at 18-21. Raye failed to object to the OSHA finding that Pan Am did not violate the FRSA with respect to Raye's safety complaint or workplace injury. *Id.* at 2, n.1; see OSHA Findings at 4. We note that OSHA did find that Raye's injury report was a contributing factor in the adverse actions, but concluded that Pan Am demonstrated that it would have taken the same action absent protected activity by clear and convincing evidence. OSHA Findings at 4.

We note that while the ALJ's analysis of the *State Farm* guideposts as a part of his analysis to determine the amount to award in punitive damages was not reversible error, it was also not necessary. An ALJ's task after determining that an award of punitive damages would be appropriate is to determine the amount necessary for punishment and deterrence—"a discretionary moral judgment."³⁹ The ALJ did not abuse his discretion in awarding \$250,000.00 in punitive damages. We note that a "statutory limit on punitive damage awards strongly undermines the concerns that underlie the reluctance to award punitive damages where minimal or no compensatory damages have been awarded."⁴⁰

CONCLUSION

For the foregoing reasons, the Board **AFFIRMS** the ALJ's decision. As a prevailing complainant, Raye is additionally entitled to "compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney's fees."⁴¹ Accordingly, Raye shall have thirty (30) days from receipt of this Final Decision and Order in which to file a fully supported statement of costs with the ARB, with simultaneous service on opposing counsel. Thereafter, Pan Am Railways shall have thirty (30) days from its receipt of the costs statement to file a response.

SO ORDERED.

E. COOPER BROWN
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

Judge Corchado, concurring:

I concur in the result and specifically affirm the ALJ's review of the "record as a whole" and finding of a causal link between protected activity and the unfavorable employment

³⁹ *Smith v. Wade*, 461 U.S. at 52.

⁴⁰ *Youngermann*, ARB No. 11-056, slip op. at 11.

⁴¹ 29 C.F.R. § 1982.110(d).

actions.⁴² In deciding the question of contributing factor, the ALJ examined the respondent's asserted explanations for the unfavorable employment actions and disbelieved those reasons.

LUIS A. CORCHADO
Administrative Appeals Judge

⁴² D. & O. at 3.