UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

KENNETH PALMER,

Complainant,

v.

CANADIAN NATIONAL RAILWAY/
ILLINOIS CENTRAL
RAILROAD COMPANY,

Respondent.

ARB CASE NO. 16-035

ALJ CASE NO. 2014-FRS-154

BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, TEAMSTERS FOR A DEMOCRATIC UNION, TRUCKERS JUSTICE CENTER, AND GENERAL DRIVERS, WAREHOUSEMEN & HELPERS LOCAL NO. 89

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II. Interests of *Amici Curiae*

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country and is composed of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of more than 4,000 attorneys, who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit and in the U.S. Department of Labor, affording NELA a unique perspective on how the principles announced by the courts and administrative tribunals in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and it regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

Teamsters for a Democratic Union ("TDU") is a grassroots organization of thousands of members across North America, working together to rebuild Teamster power and promote workplace safety and health, including commercial vehicle safety. TDU members include truck drivers, dock workers, warehouse workers, airline pilots, and railroad workers. TDU is not part of the Teamsters Union, but it is a caucus of Teamster Union members and retirees. TDU chapters bring together Teamsters from local unions in their area to work together. TDU employs a staff of organizers who travel to meet with Teamsters at the local level, hold workshops, and support reform-organizing efforts.

Truckers Justice Center is a division of Taylor & Associates, Ltd., a law firm engaged in the business of protecting the legal rights of truckers and representing truck safety advocates.

General Drivers, Warehousemen & Helpers Local No. 89 (Affiliated with the International Brotherhood of Teamsters) is the 4th largest Teamster local union within the U.S., Canada and Puerto Rico with approximately 16,500 members. Local 89 is headquartered in Louisville, Kentucky with members employed in the construction, ship building, carhaul, warehouse, motion picture, distillery, food production, gaming, and freight industries throughout Kentucky and Southern Indiana. Within the freight division, local 89 represents approximately 8000 employees at UPS, including package handlers, package delivery drivers, and freight drivers.

III. Summary of the Argument

As a general rule, when determining whether an employee has met his burden to establish that his protected activity was a contributing factor in his employer's decision to take an adverse action against him, an ALJ should not consider the employer's evidence that the protected activity played no role in the decision. The employer can prevail with such evidence, but the employer bears the burden of establishing that assertion by clear and convincing evidence. In this regard, the Board's decisions in *Fordham* and *Powers* correctly interpret the law. *Powers v. Union Pac. R.R. Co.*, ARB Case No. 13-034, ALJ Case No. 2010-FRS-030 (Mar. 20, 2015) (reissued with full dissent Apr. 21, 2015); *Fordham v. Fannie Mae*, ARB Case No. 12-061ALJ No. 2010-SOX-051, 2014 WL 5511070 (Oct. 9, 2014).

Statutory interpretation begins with the text, which applies the contributing factor standard of causation. A "contributing factor" is a factor that had any tendency to affect the employer's decision to take an adverse action. It is an intentionally low bar that allows an employee to prevail even if his protected activity is only one of many factors the employer

considered. Because of this, an employee is not required to prove pretext or retaliatory motive to satisfy the contributing factor standard. However, consideration of an employer's causation evidence when determining the contributing factor issue would require an employee to do just that.

Further, consideration of an employer's causation evidence when determining the contributing factor issue would conflict with the plain meaning of the statute's text that provides an employer can escape liability if it demonstrates by clear and convincing evidence it would have taken the adverse action absent protected activity. If the employer can argue that its causation evidence shows an employee's protected activity had no role in the adverse action decision to defeat the employee's contributing factor showing, the employer can prevail by showing it would have taken the same action absent the protected activity under the preponderance of the evidence standard, not the statutorily-prescribed clear and convincing standard.

Additionally, consideration of an employer's causation evidence when determining the contributing factor issue would deprive the whistleblower provisions of the Federal Railroad Safety Act ("FRSA") of the consistent, employee-friendly regulatory scheme Congress intended. Congress amended the FRSA to strengthen the statute's whistleblower-protection provision because railroad safety posed a serious and persistent problem, and Congress viewed retaliation against employees who reported safety issues was a significant part of that problem. Accordingly, Congress incorporated employee-friendly standards of proof and causation to make it easier for employee's to get relief from retaliation. Specifically, Congress bifurcated the ultimate issue of causation into a two-part analysis. Consideration of an employer's causation

evidence when determining the contributing factor issue would render a provision of the statute superfluous and conflict with the calibration of evidentiary standards Congress intended and enacted.

Though this general rule will cause some evidence relevant to the contributing factor issue to not be considered, it is Congress' prerogative to make such a policy determination, and the Board should not upset Congress' judgment. Further, the general rule is not an absolute bar on the employer's evidence on contribution, but rather a necessary check to ensure that the regulatory scheme is applied as the text requires and as Congress intended.

IV. The Well-Established Meaning of "Contributing Factor" Precludes Consideration of an Employer's Evidence on Causation When Determining the Contributing Factor Issue

A. The Contributing Factor Standard is a Low Bar

Statutory interpretation necessarily starts with the text, *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). In relevant part, the statute provides, "The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(iii).

This means that an employee must establish by a preponderance of the evidence that his protected activity was a factor that, alone or in connection with other factors, tended to affect the employer's decision to take an adverse action in any way. *See Fordham,* 2014 WL 5511070, at *7 (citing *Sylvester v. Parexel Int'l*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 9 (ARB May 25, 2011); 29 C.F.R. § 1980.109(a)).

The term "demonstrates" means that the employee bears the burden of persuasion to prove the required elements by a preponderance of the evidence. *See Powers,* 2015 WL 1881001, at *38 n.1 (collecting cases). Preponderance of the evidence is the default when a statute does not specify the standard of proof. *See id.*; *see also, e.g.*, *Jones for Jones v. Chater*, 101 F.3d 509, 512 (7th Cir. 1996). The preponderance of the evidence standard requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before he can find in favor of the party who has the burden of persuasion. *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993).

A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Powers*, ARB Case No. 13-034, slip op. at 11; *Williams v. Domino's Pizza*, ARB Case No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (Jan. 31, 2011); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013); *Hutton*, ARB Case No. 11-091, slip op. at 8; *Sievers v. Alaska Airlines*, ARB Case No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4 (Jan. 30, 2008). The standard originated under the Whistleblower Protection Act ("WPA"), which prohibits retaliation against federal employees. *See* 5 U.S.C. § 1221(e). Before the WPA, a federal employee had to show that her protected disclosure "constituted a 'significant' or 'motivating' factor in the agency's decision to take the personnel action." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (citing *Clark v. Dep't of the Army*, 997 F.2d 1466, 1469–70 (Fed. Cir. 1993)). But by enacting the WPA, Congress "substantially reduc[ed]" a whistleblower's burden and sent "a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistleblowing." *Id.* (citing 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)).

Congress intended specifically to overrule case law that required a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action. *Id*. The contributing factor standard has the same meaning under AIR-21 and the FRSA. *Araujo*, 708 F.3d at 158 (quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)).

In light of the standard's meaning, "[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." *Powers*, ARB Case No. 13-034, slip op. at 11; *Hutton*, ARB Case No. 11-091, slip op. at 8 (quoting *Walker v. Am. Airlines, Inc.*, ARB Case No. 05-028, ALJ No. 2003-AIR-017, slip op. at 18 (Mar. 30, 2007)). And so an employee need not prove that an employer's proffered reasons for the adverse action are pretext. *See Blackie v. D. Pierce Transp., Inc.*, ARB Case No. 13-065, ALJ No. 2011-STA-055, 2014 WL 3385883, at *6 (June 17, 2014) (citing *Araujo*, 708 F.3d at 158); *Marano*, 2 F.3d at 1141 (AIR 21 complainant "need not demonstrate the existence of a retaliatory motive . . . [or] that the respondent's reason for the unfavorable personnel action was pretext"); *DeFrancesco v. Union R.R. Co.*, ARB Case No. 10-114, ALJ No. 2009-FRS-009, 2012 WL 694502, at *3 (Feb. 29, 2012) ("The ALJ concluded that DeFrancesco failed to show that his protected activity was a contributing factor because he did not prove that his employer was motivated by retaliatory animus. This is legal error."); *Zinn v. Am. Commercial Lines Inc.*, ARB Case No. 10-029, 2012 WL 1143309, at *7 (Mar. 28, 2012) ("The ALJ also erred to the extent he required that Zinn show 'pretext' to refute [respondent's] showing of nondiscriminatory reasons

for the actions taken against her."); *Warren v. Custom Organics*, ARB Case No. 10-092, ALJ No. 2009-STA-030, 2012 WL 759335, at *5 (Feb. 29, 2012) ("Under the 2007 amendment to the STAA burden of proof, an employee is not required to prove that his employer's reasons for an adverse action were pretext, e.g., that the employer had an alternate, albeit improper, motive for the adverse action, to prevail on a complaint."); *Klopfenstein v. PCC Flow Tech., Inc.*, ARB Case No. 04-149, ALJ No. 04-SOX-11, 2006 WL 3246904, at *13 (May 31, 2006) (citing *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)) ("[A] complainant is not *required* to prove pretext."). Likewise, an employee need not prove retaliatory motive to make his contributing factor showing. *See Powers*, ARB Case No. 13-034, slip op. at 19–20, 28. In *Powers*, the ALJ concluded that the employee failed to make his contributing factor showing. The ALJ committed reversible error in reaching this determination because he credited and relied on testimony from the employers' witnesses that they acted on non-retaliatory motives. *Id.* at 28.

B. Considering an Employer's Evidence When Determining the Contributing Factor Issue Contradicts the Statutory Text's Well-Established Meaning

When determining the contributing factor issue, an ALJ should not consider evidence that, according to the employer, shows protected activity had no role in the adverse action because doing so would require an employee to prove pretext and/or retaliatory motive. Because of the meaning of "contributing factor," an employer's causation evidence would be relevant to the issue only if the evidence tends to show that the employer took the challenged adverse action only because of unprotected factors. *See* 29 C.F.R. § 18.401. Were such evidence considered, an employee could establish the contributing factor element only by discrediting the employer's evidence or otherwise showing that the employer's proffered reasons are more than likely untrue. Such a result would be the definition of requiring an employee to prove pretext. *See, e.g.*, *Texas*

Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981) (defining "pretext" as a situation where "the proffered reason was not the true reason for the employment decision" and stating that pretext can be proved either directly, by showing a discriminatory reason "more likely motivated the employer," or indirectly, "by showing that the employer's proffered explanation is unworthy of credence"). Accordingly, such a result would contradict the well-established meaning of the contributing factor standard. The same goes for retaliatory motive. *See Powers*, ARB Case No. 13-034, slip op. at 19–20, 28.

V. Considering an Employer's Evidence that the Protected Activity Had No Role When Determining the Contributing Factor Issue Contradicts the Plain Meaning of 49 U.S.C. § 42121(b)(2)(B)(iv)

Considering an employer's evidence that protected activity had no role in an adverse action when determining the contributing factor issue would contradict the plain meaning of Section 42121(b)(2)(B)(iv). The provision states, "Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(B)(iv). When the statute's text is plain, a tribunal's sole function is to enforce it according to its terms, unless the disposition required by the text is absurd. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.,* 530 U.S. 1, 6 (2000) (internal quotation marks omitted) (quoting *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241 (1989), in turn quoting *Caminetti v. United States,* 242 U.S. 470, 485 (1917))).

The plain meaning of the clause "the employer would have taken the same unfavorable personnel action in the absence of that behavior" would necessarily include all situations where

the protected activity played no role in an adverse action. If protected activity was totally inconsequential to an adverse action that was in fact taken, it must follow that the employer would have taken the adverse action absent the protected activity. Therefore, it must follow that based on the text's plain meaning, the employer bears the burden of proving protected activity played no role in an adverse action by clear and convincing evidence.

Consideration of an employer's causation evidence when determining the contributing factor issue would permit an employer to prevail by showing it would have taken the same action absent protected activity without meeting the clear and convincing standard. If the employer's evidence showed a mere 50/50 likelihood that protected activity had no role, it would prevent the employee from making his contributing-factor showing by a preponderance of the evidence. *See United States v. Myers*, 772 F.3d 213, 220 (5th Cir. 2014) (citing *United States v. Juarez*, 626 F.3d 246, 251 (5th Cir. 2010); *see also United States v. Diaz*, 344 F. App'x 36, 43 (5th Cir. 2009) ("The court did not decline to reduce the sentence because there was not evidence by fifty-one percent, or to the extent of more likely than not, as the preponderance of the evidence standard requires." (internal quotation marks and citation omitted)); *United States v. Harper*, 360 F. Supp. 2d 833, 835 (E.D. Tex. 2005) ("under a preponderance of the evidence standard, that there was a 'better than fifty percent possibility'"); *Matkovich v. Sec'y of Dep't of Health & Human Servs.*, No. 90-1676V, 1994 WL 142294, at *4 (Fed. Cl. Apr. 7, 1994) ("preponderance of the evidence, or fifty percent and a feather"). Therefore, consideration of an employer's causation evidence when determining the contributing factor issue would contradict the statute's text that explicitly identifies the standard applicable to that evidence. Because considering an

employer's causation evidence when determining the contributing-factor issue would contradict the statute's plain meaning, the Board should reject such an interpretation.

VI. The Statute's Overall Regulatory Scheme Precludes Consideration of an Employer's Evidence on Causation When Determining the Contributing Factor Issue

Congress incorporated AIR 21's standards into the FRSA to strengthen the statute's whistleblower protections. Specifically, AIR 21's standards were meant to calibrate the relevant standards and burdens in favor of the employee and to erect a high burden for employers to avoid liability. As discussed above, AIR 21's standards have their origins in the WPA. In a seminal decision discussing those standards, the Federal Circuit noted that Congress intended specifically to hold agencies to a higher burden because whistleblowers are at a severe disadvantage in proving whistleblower retaliation:

> The laws protecting whistleblowers from retaliatory personnel actions provide important benefits to the public, yet whistleblowers are at a severe evidentiary disadvantage to succeed in their defenses. Thus, the tribunals hearing those defenses must remain vigilant to ensure that an agency taking adverse employment action against a whistleblower carries its statutory burden to prove—by clear and convincing evidence—that the same adverse action would have been taken absent the whistleblowing.

Whitmore v. Dep't of Labor, 680 F.3d 1353, 1377 (Fed. Cir. 2012).

Consideration of the employer's evidence on causation when determining the contributing factor stage would render a statutory provision superfluous and deprive the FRSA's

whistleblower protections of the consistent, employee-friendly regulatory scheme Congress intended and enacted.

A. In Enacting and Amending the FRSA, Congress Intended to Strengthen the Statute's Whistleblower-Protection Provisions

Congress enacted the FRSA "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. After the FRSA's passage, Congress became aware that railroad workers who complained about safety conditions experienced retaliation for their actions. *See Consol. Rail Corp. v. United Transp. Union*, 947 F. Supp. 168, 171 (E.D. Pa. 1996) (citation omitted). In 1980, Congress responded with amendments that prohibited rail carriers from retaliating and discriminating against employees who, *inter alia*, reported violations of federal railroad safety laws or refused to work under hazardous conditions. *See* Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, § 10, 94 Stat. 1811, 1815 (1980).

Following the 1980 amendments, employees who experienced such retaliation could seek relief through the arbitration procedures set forth in RLA § 3, 45 U.S.C. § 153. *See id*. at § 10, § 212(c)(1), 94 Stat. 1811, 1815. Those procedures require binding arbitration in one of several forums, including the National Railway Arbitration Board ("NRAB"). 45 U.S.C. § 153. However, the procedures also put an onerous administrative-exhaustion burden on employees, whereby they first had to attempt resolution of their complaints internally via their employers' grievance process. *E.g.*, *Thurston v. Burlington N. Santa Fe Ry. Co.*, Award No. 25942, Docket No. 45856, 03-1-02-1-B-2182 (N.R.A.B. 1st Div. Nov. 26, 2003). Relief was uncommon under the old regulatory regime and typically was reserved for direct evidence cases. *Cusack v. Econo-Rail Corp.*, Award No. 25000, Docket No. 44671, 99-1-97-1-E-1272 (N.R.A.B. 1st Division

June 2, 1999); *see also Burlington N. Santa Fe Ry. Co. v. Bhd. of Maint. of Way, Emps. Div. – IBT*, P.L.B. 7589, Case No. 28 (Oct. 31, 2014). Further, judicial review of NRAB decisions is among the "narrowest in the law." *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 91 (1978).

In 2007, Congress amended the FRSA to include additional categories of protected conduct. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1521, 121 Stat. 266, 444 (2007). The 2007 amendments also eliminated the requirement that FRSA complaints proceed through the RLA arbitration process, instead transferring authority to investigate and adjudicate such complaints to the Secretary of Labor. Pub. L. No. 110-53, § 1521(c), 121 Stat. 266, 446. Finally, Congress added two provisions to the FRSA that specify that nothing in Section 20109 preempts or diminishes other rights of employees and that the rights provided by the FRSA cannot be waived. 49 U.S.C. § 20109(g)–(h). These amendments were an attempt to "enhance[] administrative and civil remedies for employees" and "to ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers." H.R. REP. NO. 110-259, at 348 (2007) (Conf. Rep.).

B. Congress Intended for the AIR 21 Standards to Be a Unique, Employee-Friendly Regulatory Scheme

Congress acted on its intent to strengthen the FRSA's whistleblower protections by intentionally incorporating a specific and distinct regulatory scheme. AIR 21's standards are far more protective of employees and much easier for a complainant to satisfy than the Title VII standard. *See Beatty v. Inman Trucking Mgmt.*, ARB Case No. 13-039, ALJ No. 2008-STA-020, 2014 WL 2536888, at *5 (May 13, 2014) ("The ARB has recognized that a whistleblower protection statute 'should be liberally interpreted to protect victims of discrimination and to

further its underlying purpose of encouraging employees to report perceived . . . violations without fear of retaliation.'") (citations omitted); *Blackie*, 2014 WL 3385883 at *6 (June 17, 2014) (AIR 21 Burden-Shifting Framework is "much more protective of complainant-employees and much easier for a complainant to satisfy than the *McDonnell Douglas* standard"); *Araujo*, 708 F.3d at 159; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) ("For employers, this is a tough standard, and not by accident."); *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) ("[I]t is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws.").

Congress' incorporation of AIR 21's standards is significant because it signals an intentional choice to calibrate evidentiary standards in favor of the employee. The Title VII burden-shifting scheme established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies as the default analysis governing anti-retaliation statutes unless Congress specifically supplies an alternative burden-shifting framework. *See Araujo*, 708 F.3d at 157–58 (citations omitted). Under that framework, the ultimate burden always rests with the employee to show but-for causation by a preponderance of the evidence. *See Bd. of Trs. of Keene Coll. v. Sweeney*, 439 U.S. 24, 25 n.2 (1978).

But the FRSA explicitly incorporates AIR 21's standards, 49 U.S.C. § 20109(d), which constitute an "independent burden-shifting framework," distinct from the *McDonnell Douglas* pattern applicable to Title VII claims, *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008). Accordingly, applying Title VII's standards to statute's incorporating the AIR 21 framework is reversible error. *See, e.g.*, *Beatty*, 2014 WL 2536888 at *5 (May 13, 2014) (holding AIR 21, not Title VII, was appropriate framework for STAA retaliation claims); *Hutton*

v. Union Pac. R.R. Co., ARB Case No. 11-091, ALJ No. 2010-FRS-020, 2013 WL 2450037, at *5 (May 31, 2013) (holding AIR 21, not Title VII, was appropriate framework for FRSA retaliation claims); *Zinn v. Am. Commercial Lines Inc.*, ARB Case No. 10-029, ALJ No. 2009-SOX-025, 2012 WL 1102507, at *6 (Mar. 28, 2012) (holding AIR 21, not Title VII, was appropriate framework for SOX retaliation claims); *Luder v. Cont'l Airlines, Inc.*, ARB Case No. 10-026, ALJ No. 2008-AIR-009, 2012 WL 423490, *4–5 (Jan. 31, 2012) (holding Title VII burden shifting did not apply to AIR 21 claims); *Saporito v. Progress Energy Serv. Co.*, ARB No. 11-040, ALJ No. 2011-ERA-006, 2011 WL 6114496, at *3 (Nov. 17, 2011) (holding AIR 21, not Title VII, was appropriate framework for ERA retaliation claims).

In construing the differences between Title VII's and AIR 21's regulatory schemes, the Board and federal appellate courts have held that Congress bifurcated the ultimate question of causation into a two-part analysis. *E.g.*, *Fordham*, 2014 WL 5511070, at *16, 19; *see Araujo*, 708 F.3d at 157; *Bechtel v. Admin. Review Bd., U.S. Dep't of Labor*, 710 F.3d 443, 448–49 (2d Cir. 2013). And under this unique, bifurcated scheme, the burden of persuasion regarding the ultimate issue of causation is split between the parties.

C. Consideration of an Employer's Causation Evidence When Determining the Contributing Factor Issue Would Deprive the Statute of Its Intended Regulatory Scheme

Consideration of an employer's causation evidence when determining the contributing-factor issue would deprive the FRSA of the employee-friendly regulatory scheme Congress enacted. Such consideration would violate the imperative to interpret statutes such that its provisions work together. *E.g.*, *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) ("It is a 'fundamental canon of statutory construction that the

words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into a harmonious whole.'") (internal citations omitted). And when Congress has calibrated a statutory scheme based on policy determinations, a tribunal should not interpret a statute to upend that calibration. *See Abuelhawa v. United States*, 556 U.S. 816, 820 (2009).

Consideration of an employer's causation evidence when determining the contributing factor issue would deprive the FRSA's whistleblower protections of a coherent and harmonious regulatory scheme. Each word or phrase in the statute is meaningful and useful, and so an interpretation that would render a word or phrase redundant or meaningless should be rejected. *See, e.g.*, *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 577–78 (1995) (interpreting "communication" to include oral communications because limiting the term to written communications would leave the statute's inclusion of "notice, circular, advertisement, letter" with no independent purpose to serve). Considering an employer's causation evidence when determining the contributing factor issue would render Section 42121(b)(2)(B)(iv) redundant and meaningless. If an employer could prevail with much less persuasive causation evidence on the contributing factor issue, Section 42121(b)(2)(B)(iv) would never have any substantive purpose. If an employer's causation evidence is sufficient to prevent an employee from making his contributing-factor showing under the lower preponderance standard, the employer would never need to resort to Section 42121(b)(2)(B)(iv) and its higher clear and convincing standard. And if an employer's causation evidence could not defeat the employee under the relatively lower preponderance standard, it could not hope to meet

the more demanding clear and convincing standard. Section 42121(b)(2)(B)(iv) will be rendered entirely superfluous. The Board should not interpret the FRSA's whistleblower provisions so that a provision is rendered superfluous.

Additionally, consideration an employer's causation evidence when determining the contributing factor issue would contradict Congress' intent to calibrate the whistleblower protections' evidentiary standards. *See Abuelhawa*, 556 U.S. at 820. *Abuelhawa* is a rare case where the Supreme Court actually declined to give statutory text (i.e., the term "facilitate") its plain meaning. *Id.* The Court reasoned that where a statute treats one party to a bilateral transaction more leniently, adding to the penalty of that party for facilitating the other's action would upend the legislature's calibration of punishment. *Id.* at 820.

Similar to the *Abuelhawa* case, Congress has made a specific calibration of the burdens of proof under AIR 21. A "standard of proof represents an attempt to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship,* 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring). But because a factfinder cannot be absolutely sure of what happened, "the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions." *Id.* Because there is always a margin of error in litigation, the selection of a standard of proof is a choice about where to place the risk of that error. *Shepherd v. Am. Broad. Companies, Inc.*, 62 F.3d 1469, 1476 (D.C. Cir. 1995) (citing *Speiser v. Randall,* 357 U.S. 513, 525 (1958)). Justice Harland explained further:

> In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts

> warrant a judgment for the defendant…On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor… Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

In re Winship, 397 U.S. at 370-71.

For example, in a typical civil suit it is generally no more serious for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. *Id.* 371-72. In contrast, the standard of proof in criminal cases is based on a fundamental value determination that it is far worse to convict an innocent man than to let a guilty man go free. *Id.*

Here, Congress' calibration of the risk of an erroneous result is inherent in its application of the clear and convincing standard to the employer's same-decision showing. Congress would much prefer that an employer wrongfully be held liable than for an employee to suffer reprisal for blowing the whistle without recourse. This determination is based on Congress' determination that safety issues had proved a serious and persistent problem in the railroad industry, and retaliation for reporting safety issues contributed to that problem.

Congress has the constitutional authority to apply different burdens of proof to the parties' evidence on causation, and the Board should enforce the regulatory scheme Congress enacted. When Congress speaks to the standard of proof, courts must defer to "'the traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts.'"

Steadman v. S. E. C., 450 U.S. 91, 95–96 (1981) (citing *Vance v. Terrazas*, 444 U.S. 252, 265 (1980)). Such deference is required equally in administrative proceedings, *id.* at 96 n.9, because Congress' authority to prescribe standards of proof is rooted in its constitutional powers, *Vance*, 444 U.S. at 265–66. Further, restricting the consideration of relevant evidence is not unusual or unanticipated. Administrative law judges and courts alike have rules permitting the exclusion of relevant evidence for policy reasons. 29 C.F.R. § 18.403; FED. R. EVID. 403. Indeed, the Department of Labor's regulations explicitly contemplate a statute limiting the general admissibility of relevant evidence. 29 C.F.R. § 18.402 ("All relevant evidence is admissible, *except as otherwise provided…by Act of Congress*..." (emphasis supplied)).

VII. The General Rule Does Is Not an Absolute Bar on Considering an Employer's Causation Evidence When Determining the Contributing Factor Issue

The general rule prohibiting consideration of an employer's evidence that protected activity played no role in an adverse action when determining the contributing factor issue is not an absolute bar. The key legal and analytical distinctions are that (1) an employer's evidence should not create burdens on the employee's causation showing inconsistent with the contributing factor standard, and (2) an employer's evidence that it would have taken the same action absent the employee's protected activity should weighed under the clear and convincing standard. *Cf. Powers*, ARB Case No. 13-034, slip op. at 22–23. However, an employer's causation evidence may be considered when determining the credibility of an employee's contributing factor evidence. *Powers*, ARB Case No. 13-034, slip op. at 8, 46. Specifically, the *Fordham* majority opinion states:

> In the first stage, the question is whether protected activity (or whistleblowing) was *a factor* in the adverse action. Certainly at this

> stage an ALJ may consider an employer's evidence challenging whether the complainant's actions were protected or whether the employer's action constituted an adverse action, as well as the credibility of the complainant's causation evidence. However, the question of whether the employer has a legitimate, non-retaliatory reason for the personnel action and the question of whether the employer would have taken the same adverse action *in the absence of the protected activity* for that reason only require proving different ultimate facts than what is required to be proven under the "contributing factor" test. An employer's legitimate business reasons may neither factually nor legally negate an employee's proof that protected activity contributed to an adverse action. Rather, the respondent must prove the statutorily prescribed affirmative defense that it would have taken the same personnel action had the complainant not engaged in protected activity by the statutorily prescribed "clear and convincing" evidentiary burden of proof.

Fordham, 2014 WL 5511070, at *16 (italics in original, underscore supplied).

Because the facts and evidence of each case are unique, this is necessarily a case-specific analysis that is not amenable to a bright-line rule. *Powers*, ARB Case No. 13-034, slip op. at 22. For example, in *Powers* the Board held that the administrative law judge erred in considering the employer's evidence on motive because in that case the employee had established undisputed facts that sufficiently established the contributing factor element. *Id.*, slip op. at 29–32.

VIII. Conclusion

Generally, when the determining the contributing factor issue, an ALJ should not consider the employer's causation evidence because doing so would contradict the statutory text's plain meaning, result in a statutory provision with no purpose and a discordant regulatory scheme, and thwart Congress' intent in incorporating AIR 21's standards into the FRSA's whistleblower-protection provision. However, this general rule is not an absolute bar on considering an employer's evidence on causation when determining the contributing factor issue.

Rather, an ALJ must look on a case-by-case basis to ensure that an employer's evidence on contribution rebuts the employee's evidence on the issue, that evidence supporting the employer's same-decision defense is held to the clear and convincing standard, and that the employer's evidence on causation cannot be used to create additional implicit burdens on an employee's contributing factor showing. This is the calibration of proof Congress erected as part of the solution to a persistent and serious public safety problem. The Board should construe the law consistent with Congressional intent as reflected in the statute's plain meaning.

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