



**In the Matter of:**

**RAYMOND E. GRIEBEL,**

**ARB CASE NO. 13-038**

**COMPLAINANT,**

**ALJ CASE NO. 2011-FRS-011**

**v.**

**DATE: March 18, 2014**

**UNION PACIFIC RAILROAD COMPANY,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Joseph L. Bauer, Esq.; Baner & Baebler, P.C.; St. Louis, Missouri**

*For the Respondent:*

**Fred S. Wilson, Esq.; Union Pacific Railroad, Houston, Texas**

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

**FINAL DECISION AND ORDER**

This case arises under the Federal Rail Safety Act of 1982 (FRSA), 49 U.S.C.A. § 20109 (Thomson Reuters Supp. 2013), as implemented by 29 C.F.R. Part 1982 (2013) and 29 C.F.R. Part 18, Subpart A (2013). Raymond E. Griebel filed a complaint alleging that his employer, Union Pacific Railroad Co. (Union Pacific), violated the FRSA by terminating his employment after he reported a work-related injury. On January 31, 2013, following an evidentiary hearing, an

Administrative Law Judge (ALJ) determined that the employer's action violated the Act, and granted relief. Union Pacific petitions the Administrative Review Board (ARB) for review. We affirm.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the FRSA. 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). The ARB reviews the ALJ's factual findings for substantial evidence, and conclusions of law de novo. *Youngerman v. United Parcel Serv.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 2 (ARB Feb. 27, 2013) (citations omitted). The ALJ's evidentiary rulings are reviewed for abuse of discretion. *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 19 (ARB Sept. 30, 2011) (citation omitted).

### DISCUSSION

Union Pacific challenges the ALJ's punitive damages award, and argues (Resp. Br. at 3) that the award is not supported by the evidence.<sup>1</sup> The FRSA entitles a prevailing complainant to be made whole. 49 U.S.C.A. § 20109(e)(1). Possible relief under FRSA "may include punitive damages in an amount not to exceed \$250,000." 49 U.S.C.A. § 20109(e)(3). An award of punitive damages may be warranted where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law." *Youngerman*, ARB No. 11-056, slip op. at 6 (quoting *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 8 (ARB Aug. 31, 2011)). The size of the punitive award "is fundamentally a fact-based determination," and "[w]e are bound by the ALJ's [factual] findings if they are supported by substantial evidence." *Youngerman*, ARB No. 11-056, slip op. at 10. In analyzing the amount of damages awarded, the focus is on the employer's conduct and "whether it is of the sort that calls for deterrence and punishment." *Id.* at 10 (internal citation omitted).

The ALJ's decision to award punitive damages is warranted here and in accordance with law. More specifically, the facts supporting the decision to award such relief are supported by substantial evidence (see Decision and Order (D. & O.) at 34-35), and the \$100,000 amount in

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<sup>1</sup> Union Pacific's petition objected to the ALJ's liability determination (Petition at 2-3), but the company does not argue the issue in the brief supporting the petition. Since the company has not briefed the liability determination, that issue is waived. *Adm'r, Wage & Hour Div. v. Global Horizons*, ARB No. 11-058, ALJ Nos. 2005-TAE-001, 2005-TLC-006, slip op. at 7 n.7 (ARB May 31, 2013) (citing *Dev. Res., Inc.*, ARB No. 02-046, slip op. at 4 (ARB Apr. 11, 2002) (quoting *Tolbert v. Queens Coll.*, 242 F.3d 58, 75-76 (2d Cir. 2001) (stating that it is a "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."))).

punitive relief is within the amount allowable by law. D. & O. at 35-36 (ALJ stating: “I find an award of \$100,000, still less than half the allowable amount, is appropriate in this case.”); see also *Youngerman*, ARB No. 11-056, slip op. at 12 (ARB affirms award of \$100,000 in punitive damages in STAA whistleblower action) & n.48. Moreover, the employer failed to present persuasive reasons for overturning the amount of punitive damages the ALJ awarded.

Union Pacific next argues (Resp. Br. at 14) that the ALJ’s admission of Complainant Exhibit 12, a compilation of FRSA complaints filed against the company, was error and prejudicial. However, even if the ALJ erred in admitting this exhibit, its admission was not reversible error. Indeed, the ALJ expressly stated that he did not rely on the evidence for purposes of determining whether the company’s actions violated the Act, and that as to punitive damages the ALJ “[has] not placed any real weight on the number of FRSA complaints filed against the Respondent in the past without knowing more about the details and outcomes of the complaints.” D. & O. at 2-3. Instead, the ALJ’s award of punitive relief in the case “arises from its own facts and circumstances.” *Id.* at 3. Since the ALJ made clear that little to no weight was placed on the evidence, any error by the ALJ was harmless. See *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 765 (9th Cir. 1986) (agency may rely on harmless error rule when its mistake does not affect the result).

Finally, Union Pacific challenges (Resp. Br. at 14-15) the ALJ’s order denying the motion for summary disposition. See ALJ Order Denying Motion For Respondent’s Summary Disposition (issued July 11, 2011). The company contends that under 49 U.S.C.A. § 20109(f), Griebel was foreclosed from filing a whistleblower complaint with OSHA because he elected to grieve his termination under a collective bargaining agreement. This argument lacks merit. The FRSA election of remedies provision, 49 U.S.C.A. § 20109(f), permits a whistleblower claim to run concurrently with a collective bargaining grievance. *Mercier v. Union Pac. R.R. Co.*, ARB Nos. 09-101, -121, ALJ Nos. 2008-FRS-003, -004 (ARB Sept. 29, 2011); *Kruse v. Norfolk S. Ry. Co.*, ARB Nos. 12-081, 12-106, ALJ No. 2011-FRS-022 (ARB Jan. 28, 2014).<sup>2</sup>

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<sup>2</sup> Union Pacific argues that *Mercier* carries less precedential weight because it is an interlocutory decision. Resp. Br. at 15. *Mercier*, however, resolved a question of law that precluded dismissal of a complaint under 49 U.S.C.A. § 20109(f), and the ARB followed it in a later case. See *Kruse*, ARB Nos. 12-081, 12-106. The ARB’s interpretation of Section 20109(f) has been adopted in federal courts. See *Ray v. Union Pac. R.R. Co.*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 5297172, \*8 (S.D. Iowa 2013) (district court holding “that Plaintiff’s FRSA claims are not barred by the election of remedies provision in § 20109(f) merely because he elected to pursue an enforcement action under the RLA for rights that substantively arise under Defendant’s collective bargaining agreement . . . .”); *Ratledge v. Norfolk S. Ry. Co.*, 2013 WL 3872793, \*12-\*17 (E.D. Tenn. 2013). See also *Reed v. Norfolk S. Ry. Co.*, 740 F.3d 420 (7th Cir. 2014).

**CONCLUSION**

The ALJ's decision is **AFFIRMED**.

**SO ORDERED.**

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**