

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 November 2017

Case No.: **2016-FRS-00038**

In the Matter of:

JOHN E. SPARRE,
Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

Appearances:

Courtney E. Endwright, Kevin W. Betz and Sandra L. Belvins, *Esq.*
Betz + Blevins, Indianapolis, Indiana
For Complainant

John C. Duffey and Barry L. Loftus, *Esq.*
Stuart & Branigin LLP, Lafayette, Indiana
For Respondent

Before: Morris D. Davis, Administrative Law Judge

ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY DECISION

This proceeding arose under the employee protection provisions of the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 (Aug. 3, 2007), and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432 (Oct. 16, 2008), and the FRSA regulations found at 29 C.F.R. Part 1982. Section 20109 protects railroad carrier employees from discrimination based on their prior protected activity pertaining to railroad safety or security. Here, John E. Sparre (“Complainant”) alleges that Norfolk Southern Railway Company (“Respondent”) terminated his employment in retaliation for him reporting a safety issue.

I. Procedural Background

Complainant filed a complaint with the Secretary of Labor on December 10, 2014, alleging that he suffered an adverse personnel action in reprisal for making a formal complaint to

the Federal Railroad Administration in March 2010 that resulted in the assessment of civil penalties against Respondent. On February 26, 2016, the Secretary issued findings and dismissed the complaint. On March 22, 2016, Complainant requested a hearing before an administrative law judge (“ALJ”). On April 25, 2016, I issued a Notice of Hearing and Prehearing Order scheduling this case for hearing on October 26, 2016, in South Bend, Indiana. The hearing was continued until February 2, 2017, then to March 21, 2017, and finally to September 19, 2017, to permit the parties to attempt to resolve the complaint through mediation. On May 22, 2017, the Chief Administrative Law Judge issued an order concluding mediation after the parties were unable to resolve the matter.

Respondent filed a Motion for Summary Decision on December 19, 2016. I suspended taking action on the motion while mediation efforts were ongoing. Due to the passage of time, Respondent requested, and I approved, submission of a supplement to its motion for summary decision, which was submitted on May 31, 2017. On May 17, 2017, Complainant submitted a motion to compel depositions and for an enlargement of time to respond to the motion for summary decision. I held a conference call with counsel for both parties on June 5, 2017 to discuss the deposition issue and on June 8, 2017, I issued an order granting the motion to compel, denying a motion for a protective order and extending the deadline for Complainant to respond to the motion for summary decision to July 14, 2017. On July 14, 2017, Complainant submitted a second motion for an extension of time to respond to the motion for summary decision. Complainant requested an extension until August 11, 2017. I held a conference call with the parties on July 27, 2017 to discuss the pending issues and by order dated August 3, 2017, I granted Complainant’s motion to extend the deadline for his response to the motion for summary decision until September 29, 2017, ordered Respondent to submit any reply by October 2, 2017, and continued the hearing until January 24, 2018. Since then, I have issued two more orders – one dated September 13, 2017 and the other dated October 30, 2017 – addressing discovery disputes. I received Complainant’s response in opposition to the motion for summary decision on October 2, 2017 and Respondent’s reply on October 20, 2017.¹

II. Factual Background²

Complainant began his railroad career with Conrail in 1997 and then transferred to work for Respondent as a locomotive engineer beginning in June 1999. (CX 1).

On March 7, 2010, Chief Dispatcher Vicky Gay directed Complainant not to do a daily inspection on a locomotive as required by 49 C.F.R. § 229.21(a). Complainant reported the incident to the Federal Railroad Administration (“FRA”). In August 2010, Respondent was

¹ Respondent submitted a Motion to Strike on October 20, 2017, seeking to strike from the evidentiary record two FRA reports (CX 28 and 51) that were not alleged as protected activity in the whistleblower complaint filed with the Secretary of Labor on December 10, 2014 (RX 2 and 3); a declaration by Jim Scott (CX 88) Respondent contends seeks to re-litigate the facts of the incident that led to Complainant’s termination; and various statements allegedly made by other employees that Respondent contends are hearsay statements. For purposes of my consideration of whether summary decision is warranted, the Motion to Strike is **DENIED**.

² The parties submitted multiple volumes of exhibits in connection with the motion and, for the most part, both parties’ exhibits included the same documents. For convenience, the statement of facts cites Claimant’s exhibits except as noted. Complainant’s Exhibits are designated “CX,” Respondent’s Exhibits submitted with its initial motion are designated “RX” and exhibits submitted with its reply are designated “RXR.”

assessed a civil penalty of \$8,000.00 for the infraction by the FRA and two employees that were involved – G.P. Peters and R.E. Saxton – were counseled. (CX 30).

Complainant alleges that he was disciplined on three occasions after his FRSA protected complaint in March 2010. (Response at 4-5).

According to a summary of Complainant's personnel record, he was disciplined for the first time in June 2011 when he was suspended for 30 days for failure to comply with restricted speed when he failed to stop short and was involved in a collision with another train. (CX 1). Complainant waived his right to a hearing, accepted responsibility for the infraction, and accepted the 30 day suspension from work. (CX 3).

Complainant was disciplined a second time in October 2012 when he was suspended for intentionally delaying his assignment. (CX 1). The incident was investigated by Terry Chapman, the Terminal Superintendent at Elkhart, Indiana, at a hearing held on November 19, 2012. (CX 92). At the hearing, Road Foreman of Engines Matt Shepherd testified that on October 26, 2012, he responded to the train that Complainant was operating, which had stopped while it was in route. Bells had gone off on the second and third locomotives because they had not been properly shut down. Complainant and Mr. Shepherd reset some circuits and fixed the problem. Mr. Shepherd asked Complainant why he had been unable to maintain track speed and why he had shut down the second and third locomotives. Complainant told Mr. Shepherd that he shut down the second and third locomotives to conserve fuel. The information from the locomotive data recorder showed that Complainant was in a 50 mile per hour zone from 5:31:39 to 7:54:01 and proceeded along at speeds significantly less than 50 miles per hour. (RX N).³ Complainant testified at the hearing. Mr. Chapman asked him if there was any reason why he operated the train at a maximum speed of 44 miles per hour when the speed limit on the route was 50 miles per hour. Complainant responded, "No, I don't have any reason why. I just felt that was a safe, comfortable speed." (*Id.* at 43). He explained later that, "Well, my mental condition and lack of sleep, I thought that going a little bit slower was safer." (*Id.* at 49). Mr. Shepherd was recalled as a witness and asked whether Complainant appeared to be tired or said that he was tired on the day of the incident. Mr. Shepherd answered no to both questions. (*Id.* at 51). Mr. Chapman found that Complainant intentionally delayed his assignment. (RX O). Complainant was suspended from October 26 to November 28, 2012. (CX 1).

The third incident, and the one that ultimately led to Complainant's termination, was on October 20, 2014. The incident was investigated by Brian Stanley, Superintendent of Terminals, who held a hearing on November 10, 2014. (CX 39). Complainant and conductor Brandon Hughes were alleged to have excessively exceeded the speed limit. (CX 45).

Mr. Hughes was asked to describe what happened the morning of October 20, 2014. He said that he was focused on his CORA⁴ book and "I might have overlooked one thing pay[ing] attention to another thing, but it was probably the most honest, innocent mistake I probably could

³ The data recorder information is in RX N in what is marked "Carrier EX #5," which is a 274-page document. The data showing speeds while Complainant was in the 50 mile per hour zone begins at page 30 and ends at page 220.

⁴ CORA is the acronym for Chicago Operating Rules Association.

make once again, so – ” (CX 39 at 29). When Mr. Stanley asked him to clarify what he meant by “mistake,” Mr. Hughes said:

The mistake was not catching that train going over 10 miles per hour, not catching it, because we, of course we didn’t start up going 10, but when I kind of, you know, I start noticing we picking up speed, I should’ve just automatically said something instead of paying attention to that CORA book, so –
(*Id.*).

Mr. Hughes acknowledged that he had a copy of the Belt Railroad in Chicago (“BRC”) Daily Operating Bulletin and he was aware of the 10 mile per hour slow order. He testified:

Yeah, I started realizing we went too fast probably halfway in there, you know, that we was probably going too fast, so, and me and John kind of, you know, by his reaction, it was like, okay. He said we reached, well, he said we reached, what, 20, about, yeah, about 1000 feet I’m thinking so – I really wasn’t sure how far we got in though, because I, you know, I didn’t have a way of measuring it. That’s one thing I was kind of, like, you know, but he said we got about 20 about 1,000 feet in, so –
(*Id.*).

When asked specifically if he complied with the BRC Daily Operating Bulletin that imposed a 10 mile per hour slow order between milepost 0.1 and milepost 0.4, Mr. Hughes said “No, I did not comply with that.” (*Id.* at 30).

Complainant’s testimony was similar to the testimony of Mr. Hughes. He acknowledged that he had a copy of the BRC Daily Operating Bulletin and was aware of the speed restriction. (*Id.*) When Mr. Stanley asked him to describe what happened, Complainant said, “I blew it, I accept responsibility, I mean, as, I forgot about the 10 mile an hour and I wasn’t sure what speed was actually going, when the CP Dispatcher said called the North Dispatcher, right away I knew, you know, there was a problem.”⁵ (*Id.* at 31). Complainant said he was focused on what was ahead and “I made a big mistake and totally forgot about the 10 mile an hour behind me.” When asked if he complied with the speed restriction, he said “No. Initially yes, and when departing, no, I totally forgot about it.” (*Id.*) He continued, “I did hit 20 mile an hour, but it wasn’t until my counter had cleared, so I was on the CP rail itself, so what exactly the speed of the end of the train was, I wasn’t sure, with the length, because I had forgot about it and didn’t set the counter at Milepost 0.1.” Complainant concluded his testimony by saying that he violated the speed restriction and, based on the documentation he had reviewed, it appeared that he had “hit 20 mile an hour for 20 seconds or so.” (*Id.*)

⁵ A transcript of the voice communications between the BRC Dispatcher, Mr. Hughes and Complainant is included in RX U and is marked “Carrier EX #16” in the upper right corner. The Dispatcher asked Complainant if he had seen the 10 mile per hour speed restriction in the Daily Operating Bulletin and Complainant said yes, he had seen it. The Dispatcher gave Complainant a “heads up” that a trainmaster had taken an exception and advised that someone may contact him shortly. Complainant responded, “Ok, yeah, I, uh, we’re short on time, uh, yeah, I totally forgot.”

The data recorder from locomotive 9717 showed that it was operating at 20 miles per hour from 10:27:51 to 10:28:12, which is 21 seconds. (RX U).⁶

Mr. Stanley found that Complainant had excessively exceeded the speed limit and terminated him from employment with Respondent. (CX 45). Complainant appealed the decision to Division Superintendent Mike Grace. Mr. Grace denied the appeal by letter dated January 22, 2015. (CX 46). Complainant then appealed the decision to Assistant Director of Labor Relations John Muskovac. Mr. Muskovac, in a letter dated March 30, 2015, said there was substantial evidence establishing that Complainant committed the offense and that the discipline imposed was fully warranted. (CX 47). Complainant appealed the decision to the Public Law Board. In a two to one decision, the Public Law Board found that there was substantial evidence supporting the charge of excessive speeding and no reason to disturb the decision to terminate Complainant's employment. (CX 48).

Complainant filed his FRSA whistleblower complaint on December 10, 2014. The Regional Whistleblower Investigator conducted an investigation and found that there was no nexus between Complainant's protected activity in March 2010 and his termination in November 2014; therefore, the Investigator recommended that the case be dismissed. Regional Supervisory Investigator Tim Crouse concurred. (RX Y, Tab 3). Complainant was notified of the decision by letter dated February 26, 2016. (RX Y, Tab 2).

Complainant was deposed on October 18, 2016. (CX 84). He testified that in March 2010, the dispatcher relayed that Chief Dispatcher Vicky Gay had ordered him not to inspect the engines. When asked if Ms. Gay was involved in his termination four years later, Complainant said that if she was, he was unaware of it and added, "I don't know what became of her." (*Id.* at 35). He also said he had no knowledge that his supervisor from March 2010, Aaron Sherman, had anything to do with his termination in 2014. (*Id.*). Complainant said he was not disciplined for the March 2010 report and when asked "Did anybody [from the Company] criticize you in any way for making this report to the FRA?" Complainant said, "Not that I recall at the present moment." (*Id.* at 36).

Road Foreman of Engines David Wilkerson investigated the October 2014 speeding incident. He was deposed on December 21, 2016. (RX 87). He testified that he was unaware of Complainant's 2010 protected activity until after Complainant filed his whistleblower complaint in December 2014 and that he had never discussed Complainant's protected activity with anyone involved in the 2010 or 2014 incidents. (*Id.* at 203-06).

Brian Stanley was the hearing officer for the 2014 speeding incident. He was the Assistant Division Superintendent for the Dearborn Division at the time he conducted the hearing and recommended Complainant's termination. (RX 85). He was deposed on April 25, 2017. (RX 86). Mr. Stanley testified that he was unaware of Complainant's 2010 protected activity at the time he recommended termination in November 2014 and he said that he had not discussed Complainant's protected activity with anyone who worked for Respondent. (*Id.* at 47).

⁶ The data recorder information is in RX U in what is marked "Carrier EX #10," which is a 21-page document. The data showing the 20 mile per hour speed is at page 14 of 21.

Dearborn Division Superintendent Michael Grace was deposed on July 20, 2017. (CX 79). Mr. Grace testified that he reviewed Mr. Stanley's recommendation and approved Complainant's termination in November 2014. He said he was unaware of Complainant's 2010 protected activity until after Complainant filed his whistleblower complaint in December 2014 and that he had never discussed Complainant's protected activity with anyone involved in the 2010 or 2014 incidents. (*Id.* at 105; RXR F).

Jacob Elium was a Labor Relations Officer when Complainant was terminated in November 2014 and he currently serves as Manager of Recruiting. (RXR E). He provided a declaration dated May 24, 2017 (*Id.*) and was deposed on August 3, 2017. (CX 77). As a Labor Relations Officer, Mr. Elium reviewed disciplinary decisions at times. He reviewed the decision to terminate Complainant and he agreed with Mr. Stanley's decision. He said he was unaware of Complainant's 2010 protected activity until after Complainant filed his whistleblower complaint in December 2014 and that he had never discussed Complainant's protected activity with anyone involved in the 2010 or 2014 incidents. (RXR E; CX 77 at 66-67).

I granted Complainant's motion to depose the personnel involved in validating the speed measuring equipment associated with the train he operated on October 20, 2014. Robert Charbonneau, Kenneth Fuiten, Marshall Houele, Elizabeth Johnson, Charlie Lee and Roger Lilley were all deposed and all denied having any knowledge of Complainant's 2010 protected activity. (CX 76 at 41-42; CX 78 at 15; CX 80 at 17; CX 81 at 9; CX 82 at 29; CX 83 at 40-41).

III. Legal Standards

Summary Decision Standards

In cases before the Office of Administrative Law Judges, the standard for summary decision is analogous to the standard developed under Rule 56 of the Federal Rules of Civil Procedure. *Frederickson v. The Home Depot U.S.A., Inc.*, ARB No. 07-100, slip op. at 5 (ARB May 27, 2010). An administrative law judge may enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact and that the party is therefore entitled to summary decision as a matter of law. 29 C.F.R. § 18.72(a); *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-00018, slip op. at 5 (ARB Jun. 28, 2011). "A genuine issue of material fact is one, the resolution of which could establish an element of a claim or defense and, therefore, affect the outcome of the litigation." *Frederickson*, ARB No. 07-100, at 5-6 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). The primary purpose of summary decision is to isolate and promptly dispose of unsupported claims or defenses. *Catrett*, 477 U.S. at 323-24.

If the party moving for summary decision demonstrates an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to prove the existence of a genuine issue of material fact that might affect the outcome of the case and that is supported by sufficient evidence. *Miller v. Glenn Miller Prods.*, 454 F.3d 975, 987 (9th Cir. 2006). The non-moving party may not rest upon the mere allegations of his or her pleadings, but must instead set forth "specific facts" showing that there is a genuine issue of fact for hearing.

29 C.F.R. § 18.40(c); *Mara*, ARB No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6. Where the non-moving party “fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial,” there is no genuine issue of material fact, and the moving party is entitled to summary decision. *Catrett*, 477 U.S. at 322-23. In assessing a motion for summary decision, an administrative law judge must consider the record in the light most favorable to the non-moving party and draw all inferences in favor of the non-moving party. *Mara*, ARB No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6. The administrative law judge is not to weigh conflicting evidence or make credibility determinations. *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 1999-STA-00021, Dec. & Ord. of Remand, slip. op. at 6 (ARB Nov. 30, 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985)).

Standards Applicable to FRSA Claims

The FRSA, under which Complainant brings this complaint, generally provides that a rail carrier may not retaliate against an employee for engaging in certain protected activity, including reporting, in good faith, a hazardous safety or security condition. *See* 49 U.S.C. § 20109.

FRSA investigatory proceedings are governed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR 21”). 49 U.S.C. § 20109(d)(2). AIR 21 prescribes different burdens of proof at different stages of the administrative process. Under AIR 21, a complainant must establish by a preponderance of the evidence that he engaged in a protected activity that was a “contributing factor” motivating the respondent to take an adverse employment action against him. Thereafter, a respondent can only rebut a complainant’s case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of the complainant’s protected action. *See Menefee v. Tandem Transportation Corp.*, ARB No. 09-046, ALJ No. 2008-STA-00055, slip op. at 6 (ARB Apr. 30, 2010) (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, slip op. at 13 (ARB Jan. 31, 2006)); *see also Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-00032 (ALJ Dec. 11, 2007) (Complainant must prove by a preponderance of evidence that he engaged in protected activity, Respondent knew of the protected activity, Complainant suffered an unfavorable personnel action,⁷ and the protected activity was a contributing factor in the unfavorable action, provided that the Complainant is not entitled to relief if Respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event).

The Administrative Review Board articulated the applicable standards for a complaint under the whistleblower protection provisions of the Federal Rail Safety Act in *Palmer v. Canadian National Railway*, ARB Case No. 16-035, ALJ No. 2014-FRS-00154, slip op. at 31 (ARB Sep. 30, 2016) (reissued with full dissent Jan. 4, 2017).

⁷ An adverse employment action must actually affect the terms and conditions of a complainant’s employment. *Johnson v. Nat’l R.R. Passenger Corp. (AMTRAK)*, ARB No. 09-142, ALJ No. 2009-FRS-00006, slip op. at 3-4 (ARB Oct. 16, 2009). *See also Simpson United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-00031 (ARB Mar. 14, 2008); *Agee v. ABF Freight Sys., Inc.*, ARB No. 04-155, ALJ No. 2004-STA-00034, slip op. at 4 (ARB Nov. 30, 2005).

The AIR-21 burden-of-proof provision requires the factfinder – here, the ALJ – to make two determinations. The first involves answering a question about what happened: did the employee’s protected activity play a role, any role, in the adverse action? On that question, the complainant has the burden of proof, and the standard of proof is by a preponderance. For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee’s protected activity was a contributing factor in the employer’s adverse action.

The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.

Consequently, in order to meet his burden of proving a claim under the FRSA, Complainant must prove by a preponderance of the evidence that: (1) he engaged in protected activity, (2) Respondent knew of the protected activity, (3) he suffered an unfavorable personnel action, and (4) such protected activity was a contributing factor in the unfavorable personnel action.⁸ *Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-00032 (ALJ Dec. 11, 2007). 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.” *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, at 6 (ARB Feb. 29, 2012).⁹ As the Board said in *Palmer*, “The protected activity need only play some role, and even an ‘[in]significant’ or ‘[in]substantial’ role suffices.” Slip op. at 53.

⁸ Although I list the knowledge requirement as a separate element, I note that the ARB has said repeatedly that there are only three essential elements to an FRSA whistleblower case – protected activity, adverse action and causation, and that the final decision-maker’s “knowledge” and “animus” are only factors to consider in the causation analysis. See *Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-00025 (ARB Apr. 30, 2013). See also *Coates v. Grand Trunk Western R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-00003 (ARB July 17, 2015) (knowledge is not a separate element but instead forms part of the causation analysis).

⁹ In *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013), the court held that the employee “need only show that his protected activity was a ‘contributing factor’ in the retaliatory discharge or discrimination, not the sole or even predominant cause.” In addition, an employee “need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action.” *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993) (emphasis in original) (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)) (emphasis added by Federal Circuit). See also *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002,-003; ALJ No. 2007-SOX-00005 (ARB Sept. 13, 2011), at 31-32 ; see also *Kudak v. BNSF Railway Co.*, 768 F.3d 786, 791(8th Cir. 2014) (“[A] prima facie case does not require that the employee conclusively demonstrate the employer’s retaliatory motive. But the contributing factor the employee must prove is intentional retaliation prompted by the employee engaging in protected activity”).

IV. Discussion

Here, the parties do not dispute that Complainant submitted a safety-related complaint to the FRA in March 2010, that Respondent was assessed a fine for the infraction and was obviously aware of Complainant's protected activity at the time, and that Respondent terminated Complainant's employment in November 2014. Therefore, the only issue that is in dispute under the first determination required by *Palmer* is whether Complainant's protected activity played a role, any role at all, in his termination.

Whether Protected Activity Contributed to Complainant's Termination

A complainant must establish by a preponderance of the evidence that the protected activity was a contributing factor to the retaliatory action, not the sole or even predominant cause. *Rudolph v. National Railroad Passenger Corp. (Amtrak)*, ARB No. 11-037, ALJ No. 2009-FRS-00015 (ARB Mar. 29, 2013); *see also Araujo v. New Jersey Transit Rail*, 708 F.3d 152 (3d Cir. 2013). The Administrative Review Board has explained that a contributing factor includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the [adverse employment] decision." *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-00009, slip op. at 3 (ARB Feb. 29, 2012); *see e.g., Id.*, slip op. at 4 (credible evidence that the employee's report of a slip and fall injury led Respondent to investigate for safety violations and was a contributing factor); *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ Case No. 2010-FRS-00012, slip op. at 7 (credible evidence that the employee's report of back pain led Respondent to investigate for its timely filing and was a contributing factor); *Clark v. Airborne, Inc.*, ARB No. 08-133, 2005-AIR-00027 (employee memos discussing safety concerns during company downsizing was not a contributing factor). Further, "the causation question is not whether a respondent had good reasons for its adverse action, but whether the prohibited discrimination was a contributing factor." *Henderson*, slip op. at 6.

The contributing factor element "may be established by direct evidence or indirectly by circumstantial evidence." *DeFrancesco*, slip op. at 3. 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.

Id. "Standing alone, temporal proximity, pretext, or shifting defenses may be insufficient to establish by a preponderance of the evidence that a complainant's protected activity contributed to his Respondent's adverse action." *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-00011, slip op. at 6 (ARB May 26, 2010). However, the totality of the evidence may nonetheless support a finding of causation. *Id.* Furthermore, failure to consider the totality of the circumstantial evidence of the causal relationship between protected activities and adverse actions is reversible error. *Rudolph, supra.*

When a complainant makes an inferential case of discrimination by means of circumstantial evidence, “[t]he ALJ (and ARB) may then examine the legitimacy of the Respondent’s articulated reasons for the adverse personnel action in the course of concluding whether a complaint has proved by a preponderance of the evidence that the protected activity contributed to his Respondent’s adverse actions.” *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-00055 (ARB Apr. 30, 2010). Thus, the nondiscriminatory reasons are evaluated contemporaneously with a determination of whether the protected activity contributed to the adverse action. “Thereafter, and only if, the complainant has proven discrimination by a preponderance of the evidence, does the Respondent face a burden of proof.” *Id.*; see also *Brune v. Horizon Air Indus., Inc.*, ARB 04-037, slip op. at 14, ALJ No. 2002-AIR-00008 (ARB Jan. 31, 2006) (explaining that Respondent’s burden of proof arises after, and only if, complainant establishes discrimination by preponderance of the evidence).

Complainant has not alleged any direct evidence establishing that his protected activity was a contributing factor in Respondent’s termination of his employment and none is suggested from my review of the record; therefore, the question is whether the circumstantial evidence establishes the existence of this essential element upon which Complainant carries the burden of proof.

Temporal Proximity

Determining what is temporally proximate “is not a simple and exact science but requires ‘fact-intensive’ analysis.” See *Franchini v. Argonne Nat’l. Lab.*, ARB No. 11-006, 2009-ERA-00014, slip op. at 10 (Sept. 26, 2012) (citing *Hicks v. Forest Preserve Dist. of Cook County*, 677 F.3d 781, 789 (7th Cir. 2012) for the proposition that there are no “bright line rules to apply when considering temporal proximity of adverse actions to protected activities”). On the other hand, an administrative law judge may consider case law to develop some general parameters of strong and weak temporal relationships, but the context surrounding the present claim plays a significant role. *Id.*, slip op. at 10. The closer the temporal proximity between the protected activity and the adverse action, the greater the causal connection there is to the alleged retaliation. *Smith v. Duke Energy Carolinas, LLC*, ARB Case No. 11-003, ALJ Case No. 2009-ERA-00007, slip op. at 6 (ARB June 20, 2012). A range of five months has been suggested as sufficient to support an inference of unlawful discrimination. *Barker v. UBS AG*, 888 F. Supp. 2d 291, 301 (D. Conn. 2012) (SOX case).

Here, when viewing the facts in light most favorable to Complainant, the significant gap in temporal proximity does not support an inference that he was terminated in retaliation for his protected activity. The safety issue was reported in March 2010 and the FRA fined Respondent for the infraction in August 2010. The speeding incident was in October 2014 and Complainant was terminated in November 2014, more than four years after his protected activity. In between, Complainant was disciplined for the June 2011 collision with another train and delaying his assignment in October 2012. He acknowledged the June 2011 violation and accepted the discipline imposed and, at the hearing on the October 2012 incident, he did not dispute that he shut down two of the three locomotives and operated his train at speeds significantly below the 50 mile per hour limit for the duration of the journey. Therefore, whether I assess the 2010 protected activity and 2014 termination alone or factor in the 2011 and 2012 events as well, there

is nothing from a temporal proximity perspective that suggests Complainant's protected activity was a contributing factor in the adverse action.

Indications of Pretext

Complainant submitted a 35-page Response to the Motion for Summary Decision. In it, Conductor Brandon Hughes is mentioned briefly in a single paragraph and there is no mention at all of the fact that Mr. Hughes was also terminated as a result of the same speeding incident as Complainant. (Response at 28-29). If Respondent used the speeding incident as a pretext to retaliate against Respondent then it would have been used either as a pretext to terminate Mr. Hughes as well or Mr. Hughes was simply collateral damage in the scheme to retaliate against Complainant. While neither theory is impossible, they are both highly improbable. Complainant's protected activity resulted in Respondent paying a fine of \$8,000.00. In some contexts – for instance, if the employer was a small business struggling to stay afloat – an \$8,000.00 penalty could create serious waves and have major repercussions, but for Respondent, at most, it caused a ripple with negligible impact from an operational or fiscal perspective. There is nothing from the circumstances of the reporting of the safety issue in March 2010 or the imposition of an \$8,000.00 civil penalty in August 2010 that might indicate the events in October and November 2014 were a pretext for Respondent to retaliate against Complainant.

The four people involved in the decision to terminate Complainant and the six people involved in taking measurements and conducting objective testing to validate the speed measuring equipment were all deposed and all testified under oath that they were unaware of Complainant's 2010 protected activity at the time they had roles in his case in October and November 2014. Black's Law Dictionary (10th ed. 2014) defines "pretext" as "[a] false or weak reason or motive advanced to hide the actual or strong reason or motive." Complainant argues that requiring evidence a decision-maker had actual knowledge is too high a burden because decision-makers can disclaim awareness of protected activity and thereby avoid liability. (Response at 19). Complainant's argument, however, would totally negate the need for the first *Palmer* inquiry where a complainant has the burden to establish by a preponderance of evidence that protected activity played a role, any role, in the adverse action. Under Complainant's theory, once he established that he engaged in protected activity the burden instantly shifted to Respondent to establish it would have taken the same action in the absence of the protected activity. If that is what the Board intended in *Palmer*, it would not have articulated the two-part test it set forth.

Based upon the cases cited and the arguments advanced in Complainant's brief, it appears he has conflated (1) knowledge and (2) motive. Instead, they are separate and distinct, and he cannot prove (2) in the absence of (1). Black's Law Dictionary defines "motive" as "something, especially a willful desire, that leads one to act." The only way anyone could have had a willful desire to take adverse action against Complainant because of his protected activity is if one or more of the individuals involved in the chain of events had knowledge of the protected activity. There is no direct proof anyone involved had knowledge and the only way knowledge could be presumed is to first infer that one or more of the ten people deposed under oath committed perjury. In the context of this case, I am unable to draw the latter inference in order to reach the former one. *See Teruggi v. CIT Group/Capital Finance, Inc.*, 709 F.3d 654, 661 (7th Cir. 2013)

(To raise an inference of discrimination, comments must be: (1) made by the decision maker, (2) around the time of the decision, and (3) in reference to the adverse employment action.).

I am aware of the difficulties whistleblowers face when they challenge companies that have far greater resources and much more influence, and I am aware of the requirement to view the facts in the light most favorable to the non-moving party and to draw all reasonable inferences in his favor, but in this case there is absolutely no evidence or inference that any of the relevant actors were aware of Complainant's 2010 protected activity until after he filed his whistleblower complaint in December 2014 alleging his protected activity was why he was terminated. Protected activity could not have played a role, any role, in the adverse action when no one involved in the adverse action knew about the much earlier protected activity.¹⁰

Inconsistent Application of Policies

The Administrative Review Board declined to establish a bright-line rule for comparing the handling of different cases and instead affords an administrative law judge some flexibility in assessing the similarity or dissimilarity of comparators. *Echols v. Grant Trunk Western Railway Co.*, ARB Case No. 16-022, ALJ Case No. 2014-FRS-00049 (ARB Oct. 5, 2017).

Complainant contends that Respondent presented no evidence of comparators who were terminated for speeding for .3 miles or less at 10 miles per hour over the speed limit or less with a record that was not substantially worse than Complainant's record. (Response at 10-11). Respondent contends that excessive speeding is a START Major violation that subjects employees to immediate discipline without regard to how long the excessive speeding occurred. (Reply at 17). It contends that the comparator cases show it routinely terminated employees under similar circumstances. (*Id.*)

No two of the comparator cases are exactly alike nor do any of them match precisely with the facts of Complainant's case.¹¹ They do show, however, that Respondent terminated employees who sped for a shorter distance than Complainant (CX 96, Comparator # 6), for speeding less than 10 miles per hour over the speed limit (*Id.*, Comparator # 2, 7, 16 and 21), and

¹⁰ Complainant submitted a declaration in which he named over 100 of Respondent's employees with whom he discussed safety complaints and he named five employees he says warned him that he "had a target on my back" after he made the protected complaint in March 2010. (CX 90). Accepting Complainant's assertions as true, there is no evidence that any of these employees played a role, any role, in the October 2014 speeding incident or the November 2014 decision to terminate Complainant's employment. Complainant also states in his declaration that in addition to the March 2010 report to the FRA, he submitted reports to the FRA in November 2009, December 2010 and February 2012. (*Id.* at ¶ 4). Again, accepting Complainant's assertion as true, there is no evidence or inference that anyone who played in role in his termination in 2014 knew about these reports and they were not alleged in his complaint to the Secretary.

¹¹ Complainant divided the comparator evidence into an exhibit for those who were suspended or reinstated (CX 95) and an exhibit for those who were dismissed from employment (CX 96). Respondent put all comparator data into a single exhibit. (Reply, EX C). As a result, the way Complainant and Respondent numbered the comparators do not match. The exhibits are generally consistent, but the parties did not include all of the same data points in their exhibits. For instance, Complainant's exhibits show the distance and amount of time the comparator was speeding, where that information was available, while Respondent's exhibit does not. Respondent's exhibit shows the date on which comparators committed prior violations and the outcome, if any, of appeals to Labor Relations or the Public Law Board while Respondent does not.

where there had been no prior dismissal from employment (*Id.*, Comparator # 8, 9, 11, 12, 14, 15, 16 and 18).

Complainant argues that 25 comparators were reinstated to employment after being dismissed for excessive speeding, but he was not offered the opportunity for reinstatement. (Response at 10-11). In eight of the cases cited reinstatement was the result of the employees' successful appeals to the Public Law Board. (Reply, EX C, Comparator # 9, 12, 18, 19, 20, 29, 30 and 31). The Public Law Board reviewed Complainant's case and affirmed the findings and the discipline that was imposed. (CX 48). In seven cases, Respondent elected to reinstate employees dismissed for speeding where the employees had otherwise clean records with no prior disciplinary actions. (CX 95, Comparator # 2, 11, 12, 14, 16, 22 and 24). Complainant had two START Major violations within three and a half years of the speeding incident.

Complainant contends that three employees – Mr. Kelly, Mr. Middleton and Mr. Wilkerson – had records that were much worse than his own, yet they were reinstated. (Response at 32-33). Mr. Kelly was dismissed for a speeding incident in July 2015 and reinstated by the Public Law Board in July 2016. (CX 75). Mr. Middleton was dismissed for a speeding incident in April 2014 and reinstated by the Public Law Board in April 2015. (CX 74; Reply, EX C, Comparator # 9). Mr. Wilkerson was dismissed in 1999 for failing to stop short of a signal and was reinstated 15 days later. (CX 91). These cases do not show that Respondent was inconsistent in the application of its policies. Respondent dismissed Mr. Kelly and Mr. Middleton for speeding and both were subsequently reinstated by the Public Law Board. Respondent dismissed Complainant for speeding and the Public Law Board did not reinstate him. Respondent dismissed Mr. Wilkerson for failing to stop short of a signal and later chose to reinstate him. There is no evidence that provides any context surrounding the circumstances of this incident or the decision to reinstate Mr. Wilkerson. I note that the incident occurred in 1999, some 15 years prior to Complainant's speeding incident.

It would not serve any useful purpose to describe each of the roughly 40 other comparator cases and compare and contrast each of them with the facts of Complainant's case. I have looked at each one and, bearing in mind the admonition to view the facts in the light most favorable to the non-moving party and to draw all inferences in his favor, they show that the way Respondent applied its policies to Complainant was within the parameters of how it applied its policies to other employees involved in speeding incidents. In short, there is nothing here from which I could infer that the termination decision in November 2014 might have any connection to the protected activity more than four years earlier.

Shifting Explanations for Respondent's Actions

Complainant has not alleged that Respondent has varied in its explanation for its actions and none is suggested by the evidence of record.

Hostility Toward Complainant's Protected Activity and Change in Attitude Toward Complainant After His Protected Activity

Complainant alleges that on August 1, 2012, Elkhart Trainmaster Tom Barr told him, "You work for NS; not [the] FRA." (CX 90, ¶ 3). Sometime between Complainant's protected activity on March 10, 2010 and the train delay incident on October 26, 2012, Complainant said his supervisor at the time, Aaron Sherman, told him, "You know what I think, John? I think you're crawling around on the ground trying to find anything you can wrong with the locomotives so you can delay the train and make more money." (CX 84 at 45). This is alleged to have taken place while they were discussing a problem with the computerized system for reporting locomotive inspections. (*Id.* at 40-41). During the November 19, 2012 hearing on the train delay incident, Complainant alleges that the hearing officer, Terry Chapman, said "I don't like you and I told you to become invisible," and then when Mr. Chapman noticed Complainant's union representative was recording the hearing he said "I like you." (*Id.* at 55-56). Complainant contends it can be inferred that Mr. Chapman's comment was related to his protected activity and evidences a change in attitude toward him because of his protected activity. (Response at 30-31). He states that after his protected activity he was told by other employees that he had "a target on my back," and those employees included Tony Danniffell, Shawn DeBell, Drew Alsop, Steve Land and Jon Reed. (CX 90, ¶ 10). Claimant testified during his deposition that he could not recall anyone from the company ever criticizing him for the complaint he filed with the FRA in 2010, but "my whole relationship with the company and the supervisor seemed to change quite a bit after that moment I made the report." (CX 84 at 36).

Aaron Sherman provided a declaration dated December 10, 2016. He states that he recalled discussing the issue about reporting locomotive inspections with Complainant, but he said he did not harass or intimidate Complainant then or at any other time. He said he never spoke with Complainant about the March 2010 complaint to the FRA and that he had no role in Complainant's termination. Mr. Sherman said that when the speeding incident occurred and Complainant was terminated, he had moved on to a different position in Birmingham, Alabama. (RX 5).

A transcript of the hearing Mr. Chapman conducted on November 19, 2012 is included in the evidentiary record. (CX 92). The transcript does not include the "I don't like you and I told you to become invisible" statement Complainant alleges Mr. Chapman made during the hearing. At the conclusion of the hearing Mr. Chapman asked Complainant and his union representative if the hearing had been conducted fairly and impartially and neither of them mentioned the alleged "I don't like you" statement. (*Id.* at 54-57).

Considering the facts in the light most favorable to the non-moving party and drawing all reasonable inferences in his favor, and not weighing conflicting evidence or assessing credibility, these statements could suggest some animus toward Complainant that might be related to his protected activity. That connection is not clearly established by the evidence of record, but for purposes of assessing whether summary decision is appropriate this element does not weigh against Complainant.

Falsity of Respondent's Explanation

Complainant relies on a declaration by Jim Scott that is dated September 29, 2017 as the basis for his argument that the decision to terminate his employment was false.¹² (Response at 24-34). Mr. Scott is a retired former railroad employee who has been an expert in over 100 cases, including railroad crossing accidents, speeding incidents and other railroad operations matters. (CX 88 at 2-3 and Ex. A). There is no evidence that Mr. Scott has ever been an expert witness in a FRSA whistleblower case. Mr. Scott contends that Mr. Wilkerson's investigation of the speeding incident was so fundamentally flawed that his findings do not support a conclusion that Complainant was speeding. Complainant argues that this is "significant evidence suggesting that [Respondent's] stated reason for dismissing [him] was untrue." (Response at 29). Complainant also argues that: "Those involved in the dismissal decision therefore displayed bias and passed on information that contaminated any appeal to the Public Law Board because the Public Law Board assumed [Complainant] had excessively sped and had a record deserving of dismissal without reinstatement." (*Id.* at 34).

In *Teruggi*, the Seventh Circuit said, "[a]n unwise employment decision does not automatically rise to the level of pretext; rather, a party establishes pretext with evidence that the employer's stated reason or the employment decision 'was a lie – not just an error, oddity, or oversight.'" (quoting *Van Antwerp v. City of Peoria, Ill.*, 627 F.3d 295, 298 (7th Cir. 2010). *Supra* at 661. Similarly, in *Zayas v. Rockford Memorial Hospital*, 740 F.3d 1154, 1159 (7th Cir. 2014), the court affirmed the district court's decision to grant summary judgment for the employer, saying that it was irrelevant whether the plaintiff's conduct had been egregious enough to justify her termination so long as her supervisor believed that it was and noting that the plaintiff offered no proof that her supervisor was lying.

Even if Mr. Scott's assertions are true that Mr. Wilkerson's investigation was so flawed that the results were unreliable and meaningless, that does not lead to an inference that Respondent's explanation for terminating Complainant was false. The day of the incident, when the Dispatcher radioed Complainant to give him a heads up that a trainmaster had taken exception to his speed and that someone would probably be talking with him about it later, he responded, "Ok, yeah, I, uh, we're short on time, uh, yeah, I totally forgot." (*Supra*, note 5). At the hearing, Conductor Hughes said he realized they were going too fast and that Complainant told him "we got about 20 about 1,000 feet in." (CX 39 at 29). Complainant testified that he "blew it" and forgot about the 10 mile per hour speed restriction. (*Id.* at 30). He said "I did hit 20 mile and hour." (*Id.* at 31). In his closing statement at the hearing, Complainant's union representative argued, "He's had a long career and I would hate to see one error in judgment define his career with a dismissal. . . . He's owned what he's done and he's willing to take responsibility, and I feel he should be put back to work after 30 days." (*Id.* at 34).

Mr. Scott's expert opinion comes about three years too late to provide any potential benefit to Complainant. The facts of what happened on October 20, 2014 were litigated in the

¹² While I denied Respondent's Motion to Strike Mr. Scott's declaration and consider it for purposes of assessing whether summary decision is warranted, I do not give any weight to the parts of the declaration where Mr. Scott expresses legal opinions and conclusions. For instance, he states that Complainant's dismissal was "so baseless that it was fraudulent." (CX 88, ¶ 78). Such opinions are beyond the scope of the declarant's experience and expertise.

hearing conducted pursuant to the terms of the collective bargaining agreement and the three layers of post-hearing review that took place culminating in the Public Law Board upholding the findings and the discipline imposed. There is no evidence suggesting that anywhere in the process Complainant or Mr. Hughes ever contested whether or not they were speeding; in fact, as noted above, each one said it was a brief mistake and asked for leniency. At this stage the issue is whether Complainant's protected activity in 2010 had a role, any role, in his termination in 2014, not whether the train in fact reached a speed of exactly 20 miles per hour on October 20, 2014. While Mr. Scott's analysis may lead him to believe that every person and every process described in his report were fundamentally flawed, Complainant's comment to the dispatcher made contemporaneous with the incident, "I totally forgot," belies the notion that Respondent fabricated an explanation as a pretext for adverse action. (*Supra*, note 5).

V. Conclusion

In an October 2017 opinion, the Seventh Circuit affirmed a district court's decision granting summary judgment in a case involving claims of retaliation for complaining about sexual harassment and for taking leave under the Family and Medical Leave Act. *King v. Ford Motor Co.*, 872 F.3d 833 (7th Cir. 2017). The court noted that the plaintiff's bare assertions unsupported by evidence establishing specific concrete facts were insufficient to demonstrate that there was a triable issue. The court said:

At the outset, though, our concern is not whether Ford's decision to fire King was correct, but whether it was retaliatory. Even assuming that the 5-Day Quit notice was not the real reason for King's firing, King would still need to offer some reason to infer that retaliation was the reason. However, she offers no suspicious timing, no comparator evidence, and ... no comments by decisionmakers in reference to any of King's or anyone else's protected activities that could suggest a retaliatory animus. Thus, even if King could show that the 5-Day Quit process was a pretext, there is no evidence from which a jury could find that it was a pretext for retaliation for King's taking of FMLA leave or complaints of sexual harassment a year earlier. That missing link is fatal to King's claims.

(*Id.* at 842).

The same is true here; the missing link is the absence of evidence showing that Complainant's 2010 protected activity played a role, any role, in his 2014 termination. While various types of circumstantial evidence that might, alone or together, establish the contributing factor element are discussed above, the two that are substantially related and most persuasive are temporal proximity and the absence of indications of pretext. In *Clark County School District v. Breeden*, 532 U.S. 268, 274 (2001), the Supreme Court discussed temporal proximity and said, "[a]ction taken ... 20 months later suggests, by itself, no causality at all." Here, more than four and a half years elapsed between Complainant's protected activity in March 2010 and his termination in November 2014. Even if the other two disciplinary actions stemming from the train collision in June 2011 and the train delay in October 2012 are factored in, there are gaps of more than a year between each event. The passage of so much time is a principal reason no one involved in investigating the speeding incident or the decision to terminate Complainant's

employment knew about his protected activity, and if no one knew about it, there is no possibility it played any role at all in the actions they took or the decisions they made.

VI. Order

For the reasons stated above, I find that Respondent Norfolk Southern Railway Company is entitled to a decision in its favor as a matter of law on the allegation that Complainant's protected activity contributed to his termination. Respondent's motion for summary decision is **GRANTED** and the complaint is **DISMISSED**.

SO ORDERED.

MORRIS D. DAVIS
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).