



In the Matter of:

LAWRENCE J. RUDOLPH,

ARB CASE NO. 11-037

COMPLAINANT,

ALJ CASE NO. 2009-FRS-015

v.

DATE: March 29, 2013

**NATIONAL RAILROAD PASSENGER
CORPORATION (AMTRAK),**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

James C. Zalewski, Esq.; DeMars, Gordon, Olson, Zalewski, Wynner & Tollefsen; Lincoln, Nebraska

For the Respondent:

Chad P. Richter, Esq.; Jackson Lewis LLP; Omaha, Nebraska

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

DECISION AND ORDER OF REMAND

This case arises under the whistleblower protection provisions of the Federal Rail Safety Act of 1982 (FRSA).¹ Lawrence J. Rudolph (Complainant) complained that his

¹ 49 U.S.C.A. § 20109 (Thomson/West 2012), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53, and as implemented by federal regulations at 29 C.F.R. Part 1982 (2012) and 29 C.F.R. Part 18, Subpart A (2012).

employer, National Railroad Passenger Corporation (Amtrak) violated the FRSA when, among other claims, it medically disqualified him from working as a conductor. A Department of Labor (DOL) Administrative Law Judge (ALJ) concluded that Amtrak had violated the FRSA on one of his whistleblower retaliation claims and awarded Rudolph \$5,000.00 in punitive damages. The ALJ concluded that reinstatement and the award of back pay were inappropriate. Rudolph appealed to the Administrative Review Board (ARB). We affirm the ALJ's decision in part and reverse in part, and remand the case for further proceedings.

BACKGROUND²

Complainant Rudolph's employment with Amtrak began in 1989.³ In 1999 he became an assistant conductor with Amtrak. During the period leading up to the events relevant to this case, Rudolph experienced several occasions of work-related stress that resulted in his taking brief periods of time off from work. The last such episode prior to Rudolph's engagement in activities, for which he seeks whistleblower protection, occurred in early 2008. As a result of several altercations with a supervisor because of what Rudolph perceived to be violations of company policy, he took sick leave from work upon the advice of his treating physician, who diagnosed Rudolph as suffering from increased anxiety due to the workplace incidents.

Prior to his return to work in June, Rudolph filed a complaint with Amtrak's Office of the Inspector General in which he requested that a compliance review be conducted of workplace violence incidents and harassment, highlighting the recent episodes that had resulted in his taking sick leave. Rudolph also applied to Amtrak for reasonable accommodations under the Americans with Disability Act (ADA).⁴

In consideration of his diagnosed anxiety disorder, Rudolph requested that Amtrak not assign him to work certain routes as the sole qualified conductor on board, that it pre-approve him to take leave from work in the event that an unanticipated health episode prevented him from fulfilling his on-board duties safely, and that it afford him a reasonable extension of time to perform pre-trip duties. Amtrak subsequently denied these requests. Amtrak's ADA panel denied his request on the grounds that his medical information was inadequate and the requested accommodations were incompatible with

² We summarize the ALJ's findings of fact, which are generally undisputed. See ALJ Decision and Order (D. & O.) at 53-71. In addition to the D. & O., we cite to record exhibits on which the ALJ relied.

³ Rudolph began his railroad career in 1979, but later worked as a commercial pilot for four years before joining Amtrak.

⁴ 42 U.S.C.A. § 12101, *et seq.* (Thomson West 2005).

his duties as a conductor. Subsequently, the ADA panel denied Rudolph's appeal of the denial, which he accompanied with additional medical evidence.⁵

Upon the approval of his treating physician, Dr. Michael J. Sedlacek, Rudolph returned to work as a conductor on June 6, 2008.

Amtrak assigned Rudolph to the 500-mile route of its California *Zephyr* passenger train between Omaha and Chicago. He made the trip twice a week, leaving Omaha about 5:00 a.m. and arriving in Chicago mid-afternoon. On July 19, 2008, Rudolph learned that his usual 5:00 a.m. start time had been pushed back to 1:00 p.m. because the *Zephyr* had been delayed from the west coast. He reported to work at 1:00 p.m. as the assistant conductor on the train to Chicago, with Mary Cannon as the conductor. Around 10:00 p.m. he asked Cannon if she had advised the Amtrak crew dispatcher that he would not have enough hours of service to reach Chicago and would need a relief. Cannon replied affirmatively. About an hour later, the train engineer advised the dispatcher that he and Rudolph would be out of hours at 1:00 a.m. Cannon went off-duty at 11:45 p.m., leaving Rudolph as the sole conductor in charge.

Shortly after midnight Rudolph informed his supervisor, Jack Krueger, that he would exceed his hours of service limit at Naperville, about an hour out of Chicago, at 1:00 a.m. Federal law and Amtrak's operating rules require that railroad employees work no more than twelve consecutive hours in a shift. About the same time, the train engineer advised the dispatcher that he and Rudolph were both about to exceed their respective hours of service. The engineer was informed that a relief engineer would replace him at Naperville. At 12:57 a.m., Krueger advised Rudolph that no relief conductor was available. Rudolph replied that if he continued past Naperville, he would be past his twelve-hour limit, and then Krueger would have to order him to violate his hours of service. Krueger replied that he would not issue such an order.

A few minutes past 1:00 a.m., Rudolph advised the relief engineer to pull the train out of Naperville. Upon being informed by Krueger that he would be in violation of his hours of service before the train arrived in Chicago, Krueger had contacted Gary Israelson, the assistant superintendent. Shortly after 1:00 p.m., Israelson advised Krueger that arrangements had been made for a Chicago yard crew to relieve Rudolph before the train arrived at Union Station. Krueger, in turn, called and advised Rudolph of the relief that Israelson indicated had been arranged. However, when the train stopped to pick up the relief conductor, none was there.

⁵ On July 22, 2008, Dr. Michael J. Sedlacek sent a letter to the Amtrak ADA panel indicating that Rudolph had received medical treatment for his mental condition since April 2006, that his diagnosed anxiety became "quite severe" at times and might "interfere with his ability to handle excessive, unexpected stress," and that Rudolph had requested accommodations because of his condition. Dr. Sedlacek stated that he doubted that such episodes would occur, but having the ability to leave would greatly reduce Rudolph's anxiety. Complainant's Exhibit (CX) 5, 10. See CX 11, Respondent's Exhibit (RX) 86, 89.

From Naperville to the train's final destination in Chicago, Rudolph continued to serve on board as the train's conductor notwithstanding that he had exceeded his hours of service. The train arrived at Chicago's Union Station sometime between 1:30 a.m. and 1:43 a.m. on July 20, whereupon Rudolph completed a train-delay report, which he faxed to Krueger and Amtrak, noting that his shift ended at 1:48 a.m. and that he was "forced to violate FRA Hour [sic] of Service Law."⁶

Notwithstanding that Rudolph continued to serve on board as conductor until the train arrived in Chicago late, at 1:03 a.m. Krueger had e-mailed Israelson that Rudolph's hours-of-service report showed that he had worked from 1:00 p.m. on July 19 to 1:00 a.m. on July 20, 2008.

Mid-morning on July 20, Rudolph advised Krueger that he was going to take sick leave due to the stress associated with the hours-of-service violation. An Amtrak road foreman met with Rudolph, who completed an injury report claiming that he suffered from anxiety and stress due to the previous night's events. The foreman then escorted Rudolph to a hospital as Israelson had instructed. There, a doctor diagnosed Rudolph with acute anxiety and found him unable to return to work until evaluated by a primary care physician.

On July 21, Rudolph encountered Israelson while waiting at Union Station to dead-head back to Omaha. They discussed Rudolph's reported injury/illness, during which Israelson told Rudolph it would not look good if Rudolph reported an on-duty injury every time he felt stressed.⁷

Rudolph subsequently filed a report with Krueger, in which he detailed the events of July 19 and 20, claimed that the anxiety/distress that he experienced as a result of the July 19-20 incident exacerbated an existing medical condition, and asserted that Amtrak caused him to violate his hours of service limitation the morning of July 20 by forcing him to choose between insubordination and violation of the hours-of-service rule.⁸

⁶ This report was submitted on a Personal Time Ticket (PTT), on which the employee records his hours of service (beginning and ending times). The PTT Rudolph submitted included in the remarks section, "7/20/2008, Forced to violate FRA Hour [sic] of Service Law." D. & O. at 36; CX 43, RX 43.

⁷ CX 24 at 6. The ALJ found that Rudolph and Israelson discussed Rudolph's injury report but not the hours-of-service violation. D. & O. at 63.

⁸ D. & O. at 32-33, 64; CX 24, 26. On July 30, 2008, Amtrak charged the crew caller who had failed to provide Rudolph a relief conductor with a rule violation and issued a written reprimand. RX 59.

The first of August, in preparing his monthly hours-of-service violation report, Krueger asked Israelson, his supervisor, whether to record the July 19-20 incident with Rudolph as an hours-of-service violation. Israelson indicated that if Rudolph was claiming he violated his hours of service, Amtrak needed to charge him with a violation because, Israelson asserted, no one had ordered Rudolph to do so.

Krueger asked Israelson whether Rudolph could be charged with a violation, given that Amtrak's collective bargaining agreement with the union required that an employee be charged within ten days of the company's first knowledge that the employee claimed that he exceeded his hours of service, and Krueger was aware that Rudolph had claimed on his July 20 PTT that he had been forced to violate the hours-of-service limit. When Israelson asked what Rudolph had indicated on his PTT, Krueger responded by e-mail with an attachment.⁹ When Israelson subsequently asked for clarification, Krueger informed Israelson that the PTT showed that Rudolph was performing services, and not merely riding the train beyond his hours-of-service limit.¹⁰

Israelson directed Krueger to contact Rudolph and clarify whether Rudolph was performing service into Chicago after 1:00 a.m. on July 20. Krueger telephoned Rudolph on August 7, 2008, and they engaged in a lengthy (and at times heated) discussion about the July 19-20 events. Krueger told Rudolph that he had been instructed to charge him with violating his hours of service if Rudolph continued to insist that he performed services after the train left Naperville at 1:00 a.m. on July 20. The two men disputed whether Krueger had ordered Rudolph to continue to perform services after 1:00 a.m. into Chicago. After the phone call, Krueger advised Israelson of the conversation, and Israelson told Krueger to prepare disciplinary charges against Rudolph.¹¹ The same day after talking with Krueger, Rudolph filed a complaint with the Federal Railroad Administration (FRA) claiming that he was forced to violate his hours of service on July 20.¹²

On August 8, 2008, Amtrak issued a Notice of Investigation charging Rudolph with violating the hours-of-service rule on July 20 without proper authority, and advising him that an investigation would be conducted.¹³

⁹ Presumably the attachment was the July 20 PTT that Israelson had inquired about, although the ALJ noted that the copy of Krueger's transmittal e-mail in the record did not include a copy of the attachment. D. & O. at 43.

¹⁰ D. & O. at 43.

¹¹ In response to Israelson's instructions, Krueger stated, "I have already made the request." D. & O. at 43, 65.

¹² Rudolph sent a copy of his complaint to the Amtrak dispute resolution office.

¹³ Amtrak did not investigate the charge further due to Rudolph's continued sick leave and eventual disability.

Rudolph presented to Dr. Sedlacek for examination on August 11, 2008. Prior to seeing Dr. Sedlacek, Rudolph had applied for sick benefits due to absence from work since July 20. Based on the August 11 visitation, Dr. Sedlacek completed a statement of disability dated August 13, 2008, indicating that Rudolph was totally temporarily disabled from July 20 to September 2, 2008, due to severe anxiety. The doctor stated that Rudolph was “very overwhelmed, anxious, fearful” with “low stress tolerance” exacerbated by the recent conflict at work over violation of the hours-of-service rule. Dr. Sedlacek opined that Rudolph’s mental limitation would interfere with his work because he was currently “too anxious and overwhelmed to focus and concentrate sufficiently.”

On August 25, Dr. Sedlacek revised his previous disability statement to indicate that Rudolph had stabilized as of August 21 and no longer had any mental limitation that would interfere with his returning to work; Rudolph was capable of performing his job with the previously listed restrictions.¹⁴ Rudolph immediately informed the Railroad Retirement Board (RRB) of his change in status and release to return to work. The RRB stopped further payment of sick benefits.

On August 29, 2008, Rudolph filed a complaint with Amtrak’s Dispute Resolution Office in which he charged, in part, that Krueger had harassed him during the August 7 phone call because Rudolph had reported an FRA violation and an on-duty injury.

Notwithstanding Dr. Sedlacek’s medical release advising that Rudolph could return to work, Amtrak refused to permit Rudolph to return. Rudolph called Amtrak’s health services unit three times between August 29 and September 18 about Dr. Sedlacek’s recommendation of return to work. Amtrak’s legal counsel advised the health services and Dr. Timothy Pinsky, Amtrak’s medical director, that if Rudolph wanted to return to work without restrictions, he would need a psychiatric evaluation to determine if he was mentally fit. On the other hand, counsel advised, if Rudolph wanted to return to work with restrictions, he was medically disqualified because the ADA panel had previously decided, based on conversations with his supervisors, that Rudolph’s initial requests for accommodations were not compatible with his job duties.

Dr. Pinsky called Dr. Sedlacek on September 18 to discuss Rudolph’s request to return to work. Dr. Sedlacek told Dr. Pinsky that Rudolph was cleared to return to his regular duties without restrictions except for activities that would violate federal regulations, and that Rudolph could work alone if required (although Dr. Sedlacek

¹⁴ Subsequently, on September 9, 2008, Dr. Sedlacek clarified his August 25 release to indicate that as of August 21 Rudolph was released to full-time duties “restricted to train operations that do not violate FRA regulations or compromise safety.” D. & O. at 67; CX 7-10.

indicated that Rudolph had informed him that a second conductor was required by law).¹⁵ Based on this information, Dr. Pinsky again consulted Amtrak legal counsel, who again advised that a return-to-work psychiatric evaluation was necessary. Counsel cited Rudolph's supervisors' concerns, including his "marking off" on July 20 and Israelson's discomfort about returning Rudolph to work without a medical assessment. Counsel also advised Dr. Pinsky to not respond any further to Rudolph's inquiries. Accordingly, Dr. Pinsky directed that arrangements be made for a psychiatric evaluation.¹⁶

On October 2, 2008, Amtrak advised Rudolph that he must undergo a return to work psychiatric evaluation. The same day, the FRA issued its determination in response to Rudolph's complaint. The FRA found that Amtrak had caused Rudolph to violate his hours of service by not providing a relief crew on July 19.

Several days later, Dr. Pinsky received a letter from Rudolph that he had sent prior to October 2, in which Rudolph inquired why Amtrak was preventing him from returning to work and noted that the RRB had stopped his sick benefits as of August 29. Rudolph asked for a statement that he could present to the RRB indicating that he was being prevented from returning to work. On the advice of Amtrak's counsel, Dr. Pinsky did not respond to Rudolph's letter.

On October 27, 2008, Dr. Dennis R. Wilson, chairman of the psychiatry department at Creighton University, submitted his return-to-work psychiatric assessment of Rudolph to Dr. Pinsky, noting that he had no reservations about communicating his findings to relevant parties including Rudolph.¹⁷ Dr. Wilson diagnosed generalized anxiety disorder and panic disorder. Dr. Wilson explained that Rudolph suffered from work-place stress but that his symptoms were fairly well controlled. However, he was "caught between a wish to resume work [and] a fear of what such a return would entail."

Dr. Wilson indicated that Rudolph would have "quite sensitized reactions to any perceived threat, retaliation, or hostility at work" and indicated that administrative clarification and correction of his concerns regarding work was "an essential step toward his fuller recovery and return to work." Dr. Wilson concluded that Rudolph's "condition is under satisfactory control but for unresolved fears engendered by the work place. Until

¹⁵ CX 9. Dr. Pinsky's progress notes state that in a conversation with Dr. Sedlacek on September 18, Dr. Sedlacek volunteered that he had been writing what Rudolph requested he write in his correspondence to Amtrak. D. & O. at 39.

¹⁶ Dr. Pinsky cited as the basis for his decision (1) Rudolph's medical documentation, (2) supervisor concerns that Rudolph might not be able to perform his job fully and safely, and (3) Dr. Sedlacek's "conflicting" notes. D. & O. at 68.

¹⁷ CX 10, 12; RX 80.

these issues are resolved, he is not able to perform his duties on a full-time basis without restriction or limitation.”¹⁸

Dr. Pinsky asked Dr. Wilson to clarify his opinion on Rudolph’s ability to return to work from a medical perspective. Dr. Wilson responded that Rudolph was not capable of functioning in the workplace even if his perceived hostilities and job demand issues were resolved. Based on Dr. Wilson’s clarification, Dr. Pinsky concluded that Rudolph was medically unfit for duty and should be medically disqualified. He directed Amtrak’s health services unit to notify Rudolph of his decision.

On November 5, 2008, the health unit sent Rudolph notice that Dr. Pinsky had medically disqualified him from his job as a conductor, based on Dr. Wilson’s return-to-work evaluation. The notice, which Rudolph received on November 8, offered four options (1) If Rudolph wished to return to his position as an assistant conductor, he could submit medical documentation establishing that his condition had improved sufficiently to permit him to perform his duties safely; (2) he could apply for permanent disability; (3) he could seek ADA accommodations; or (4) he could seek an alternative position with Amtrak.¹⁹

Rudolph wished to return to work in his former position, and went to Dr. Sedlacek for further examination. On November 20, 2008, Dr. Sedlacek advised Dr. Pinsky that he found “no contra-indications” preventing Rudolph from returning to work as an assistant conductor. Dr. Sedlacek maintained that Rudolph was capable of returning to his full-time duties, and opined that if Rudolph was “allowed to work within the confines of his assigned hours, he would be able to do his job without difficulty.” Expressing his willingness to discuss the case further with Dr. Pinsky, Dr. Sedlacek requested a copy of Dr. Wilson’s psychiatric evaluation and recommendations to understand better the doctor’s conclusions. Based on advice from Amtrak’s legal department, Dr. Pinsky declined to provide Dr. Wilson’s evaluation to either Dr. Sedlacek or Rudolph.²⁰

In mid-November, Rudolph began receiving sick benefits from the RRB because Dr. Pinsky notified it that Rudolph had been found medically unable to return to work, and his absence from work since August 11, 2008, was due to the need to clarify his medical condition. For 79 days from mid-August through mid-November,²¹ Rudolph had not received sick benefits because Amtrak’s health unit and Dr. Pinsky had refused to provide documentation regarding his employment status, despite repeated requests from

¹⁸ D. & O. at 69; CX 10, 12; RX 10, 12, 80.

¹⁹ CX 36.

²⁰ D. & O. at 35; CX 39.

²¹ The exact period is somewhat unclear, but appears to be from approximately August 25/29 to November 12/16, 2008. See D. & O. at 8, 80, 85.

Rudolph and the RRB for such information. Eventually, Rudolph was paid sick benefits of about \$600.00 every two weeks covering 79 days from the first of August. Through December 29, 2008, Rudolph received a total of \$6,039.00 in railroad sick and unemployment benefits.²²

Rudolph responded to Amtrak's November 5 notice of medical disqualification, objecting to the option requiring that he provide medical documentation to support a return to work in his former position. Rudolph noted that Dr. Sedlacek had submitted the requested additional medical documentation showing that he could perform his duties. He also requested certification that the workplace issues about which he complained had been resolved.²³

Absent any further response from Amtrak regarding his request to return to work, Rudolph filed a complaint with DOL's Occupational Safety and Health Administration (OSHA) on January 12, 2009, alleging that his disqualification as an assistant conductor and his termination from employment with Amtrak constituted retaliation in violation of the FRSA.

While his complaint was pending before OSHA, Dr. Sedlacek advised Amtrak in April that, contrary to his November 20 assessment, Rudolph was no longer able to return to work due to the elapsed time and fear of retaliation for his whistleblower activities. Due to Rudolph's excessive emotional stress, the doctor stated that a return to work was unrealistic.²⁴ Subsequently, Rudolph applied for occupational disability benefits with the RRB. In June the RRB concluded that Rudolph qualified for an occupational disability annuity as of May 1, 2009.²⁵

After an investigation, OSHA dismissed Rudolph's complaint against Amtrak on July 27, 2009.²⁶ Following OSHA's rejection of his claim, Rudolph timely requested a hearing before a Department of Labor Administrative Law Judge (ALJ). Following an evidentiary hearing held on April 6-7, 2010, the ALJ issued a decision on March 14,

²² CX 54.

²³ CX 40.

²⁴ By September 2009 Dr. Sedlacek opined that Rudolph was capable of returning to work, although the doctor felt that a return was not in Rudolph's best interests due to possible exacerbation of his condition. In December 2009, Dr. Sedlacek again opined that Rudolph was willing and able to return to work. In January 2010, Rudolph again asked Amtrak that he be permitted to come back to work. CX 68.

²⁵ Consequently, since May of 2009, Rudolph has received \$2,900.00 a month in disability benefits from the RRB rather than sick benefits.

²⁶ Exhibit 1 to Amtrak's motion for summary judgment.

2011, in which the ALJ concluded that Amtrak had violated the FRSA in part. The ALJ denied Rudolph's request for reinstatement and the award of back pay, while awarding \$5,000.00 in punitive damages. Rudolph timely appealed the ALJ's decision to the Administrative Review Board (ARB).

JURISDICTION AND STANDARD OF REVIEW

The Secretary has delegated authority and assigned responsibility to the ARB to act for the Secretary of Labor in review of an appeal of an ALJ's decision pursuant to the FRSA.²⁷ We review the ALJ's factual findings to determine whether they are supported by substantial evidence.²⁸ The ARB reviews the ALJ's conclusions of law de novo.²⁹

DISCUSSION

I. The FRSA's whistleblower protection provisions

The Federal Rail Safety Act (FRSA) prohibits a railroad carrier engaged in interstate commerce or its officers or employees from discharging, demoting, suspending, reprimanding, or in any other way retaliating against an employee because the employee engages in any of the protected activities identified under 49 U.S.C.A. § 20109(a), including *inter alia*:

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by—

(A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978; . . .

(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct; . . .

²⁷ Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 222 (Nov. 16, 2012); 29 C.F.R. § 24.110(a).

²⁸ 29 C.F.R. § 1982.110 .

(3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or to testify in that proceeding;

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

(5) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; . . .

(7) to accurately report hours on duty pursuant to chapter 211.

49 U.S.C.A. § 20109(a).

Section 20109 incorporates the procedures enacted by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), which contains whistleblower protections for employees in the aviation industry.³⁰ To prevail, an FRSA complainant must establish by a preponderance of the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action.³¹ If a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity.³²

II. The ALJ's Decision and Order

The ALJ's findings of protected activity

The ALJ found that Rudolph engaged in protected activity under various subsections of section 20109 on several occasions. The ALJ found that Rudolph engaged in protected activity under subsection (a)(1) (the reporting of violation of federal law) on

³⁰ 49 U.S.C.A. § 42121(b), see 49 U.S.C.A. § 20109(d)(2)(A).

³¹ 49 U.S.C.A. § 42121(b)(2)(B)(iii); *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012); see *Brune v. Horizon Air Industr., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006) (defining preponderance of the evidence as superior evidentiary weight).

³² 49 U.S.C.A. §§ 20109(d)(2)(A)(i), 42121(b)(2)(B)(iii)(iv). *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB Apr. 30, 2010), (citing *Brune*, ARB No. 04-037, slip op. at 13).

July 20, 2008, when Rudolph reported and/or complained to Amtrak officials Krueger and Anderson that he was forced to violate the federal hours of service limitation and that his work-related stress was a reaction to being forced to violate his hours of service; on August 1, 2008, when Rudolph sent Krueger a complaint dated July 31, 2008, alleging that Amtrak forced him to violate his hours of service, together with a copy of his July 22 statement (initially submitted to Dr. Sedlacek) reporting exacerbation of his anxiety condition; on August 7 when Rudolph submitted his complaint regarding hours of service to the FRA; and on August 29 and September 12 when Rudolph sent his complaint to Amtrak's Dispute Resolution Office.³³

The ALJ found that Rudolph engaged in FRSA-protected activities under subsection (a)(7) (accurately reporting hours of service) on July 20, 2008, when Rudolph recorded his hours of service on his Personal Time Ticket (PTT); under subsection (a)(4) (reporting/notice of work-related injury) on July 20 when Rudolph "marked off" from work and presented his claim to Anderson of a stress-related illness due to being forced to violate his hours of service; under subsection (a)(5) (cooperating with a federal investigation) on August 7, 2008, when Rudolph filed a complaint with the FRA alleging a forced hours-of-service violation; and under (c)(2) (attempting to return to work based on treating physician's recommendation) when Rudolph sought to return to work on August 25, September 4, and September 18 based on Dr. Sedlacek's August 25 statement of disability advising that Rudolph was capable of a "restricted return to work" as of August 21, followed by Sedlacek's September 9 release of Rudolph to full-time duty restricted only to train operations that did not violate FRS regulations or compromise safety.³⁴

The ALJ's findings of adverse action

In considering whether the multiple personnel actions that Rudolph cited constitute adverse action, the ALJ applied the Supreme Court's "materially adverse" standard for adverse action under Title VII³⁵ that the ARB has adopted in determining what constitutes adverse action under employee whistleblower protection laws over which the ARB has jurisdiction.³⁶ The ALJ found that Krueger's warning to Rudolph on

³³ D. & O. at 76.

³⁴ *Id.* at 77. While the ALJ found protected activities under subsections (a)(1), (a)(4), (a)(5), (a)(7) and (c)(2), he failed to address whether Rudolph's August 7, 2008 complaint to the FRA constituted protected activity under subsection (a)(3) (filing of complaint or the initiation of proceedings related to enforcement of 49 U.S.C.A. §§ 20101-21311).

³⁵ *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57-67 (2006) (defining "materially adverse" as action sufficiently harmful to dissuade a reasonable employee from making or supporting a charge of discrimination).

³⁶ E.g., *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002 (ARB Sept. 2008).

August 7, 2008, that he would have to charge Rudolph if he persisted in accurately reporting his hours was an adverse action.

In addition, the ALJ found that the following constituted adverse employment action: Amtrak's formal disciplinary charge (per Notice of Investigation) on August 8, 2008, that Rudolph exceeded his hours of service on July 20 without proper authority; Rudolph's temporary loss of sick leave benefits from mid-August to mid-November due to failure of Amtrak's health services unit and Dr. Pinsky to provide documentation regarding his employment status to the RRB; Amtrak's requirement that Rudolph undergo an independent psychiatric evaluation as pre-condition to his return to work; Dr. Pinsky's medical disqualification of Rudolph on November 5, 2008, from returning to his position as an assistant conduction; and Amtrak's refusal to permit Rudolph to return to work.³⁷

The ALJ's findings of proof of causation

In considering whether any of Rudolph's protected activities was a contributing factor to any of the adverse employment actions Rudolph experienced, the ALJ analyzed each protected activity and adverse action to determine if the specific activity contributed to any subsequent adverse action. The ALJ based his resolution of this question primarily on the determination of whether the Amtrak decision-maker for each adverse employment action had direct personal knowledge of Rudolph's protected activities. "Preliminarily, an implicit component of this element, contributing factor, is knowledge of the protected activity. Generally, demonstrating that an employer, as an entity, was aware of the protected activity is insufficient. Instead, the complainant must establish that the decision-makers who subjected him to the alleged adverse action were aware of the protected activity."³⁸

Based on this analysis, the ALJ found that Rudolph's accurate reporting of his hours on July 20 and his formal complaint to Amtrak were contributing factors to Krueger's August 7 warning of the consequences of Rudolph's violation of the hours-of-service rule because Krueger was aware of both instances of protected activity.³⁹ However, the ALJ concluded that none of Rudolph's other protected activities was a contributing factor in any of the other adverse actions taken against Rudolph. As the ALJ explained, because of the lack of personal knowledge on the part of the decision-maker in each instance of adverse action and despite the inference of causation raised by temporal proximity and other circumstantial evidence, Rudolph's protected activities did not "influence" (1) Amtrak's formal disciplinary charge on August 9 that he violated

³⁷ D. & O. at 80-81.

³⁸ *Id.* at 81.

³⁹ *Id.* at 83-84.

operating rules, (2) Rudolph's temporary loss of sick benefits, (3) Amtrak's requirement that Rudolph undergo a psychiatric evaluation, (4) Dr. Pinsky's medical disqualification of Rudolph on November 5, and (5) Amtrak's ultimate decision refusing to allow Rudolph to return to work in any capacity.⁴⁰

The ALJ's conclusion:

Having found that Rudolph's reporting that he was forced to violate his hours of service and that his accurate reporting of his hours of duty on July 20, 2008, were contributing factors to Krueger's August 7 threat of disciplinary action, the ALJ held that Amtrak failed to prove by clear and convincing evidence that Krueger would have made his threat absent Rudolph's protected activity.⁴¹ This, then, was the only basis upon which the ALJ assessed Amtrak's liability for damages.

In considering damages, the ALJ noted that none of Rudolph's employment and financial losses resulted from adverse employment actions for which any of Rudolph's protected activities were a contributing factor. Consequently, the ALJ concluded that Rudolph "failed to prove the portions of his FRS complaint that would lead to reinstatement, recoupment of lost wages, and recovery of compensatory damages" to which Rudolph would be entitled under 49 U.S.C.A. § 20109(e)(2). Nevertheless, the ALJ awarded \$5,000.00 in punitive damages based upon Krueger's disciplinary warning, which the ALJ found to have been made in deliberate and reckless disregard of Rudolph's rights under the FRSA.⁴²

III. Analysis of the ALJ's Decision and Order

The parties do not dispute the ALJ's findings that Rudolph engaged in the following protected activities under the FRSA: notifying his supervisors, Amtrak, and the FRA that he had been forced to violate the hours of service (protected under 49 U.S.C.A. § 20109(a)(1)); reporting a work-related injury (protected under § 20109(a)(4)); cooperating with the FRA (§ 20109(a)(5)); accurately reporting his hours of duty (§ 20109(a)(7)); and requesting that he be allowed to return to work (§ 20109(c)(2)). Nor do the parties dispute the ALJ's determination that Rudolph was subjected to the following adverse personnel actions: threat of discipline, disciplinary charge, unpaid sickness benefits, psychiatric evaluation referral, medical disqualification, and refusal to

⁴⁰ *Id.* at 85-93.

⁴¹ On appeal, Amtrak does not contest the ALJ's conclusion that it failed to prove by clear and convincing evidence that Krueger would have made the threat absent Rudolph's protected activity.

⁴² D. & O. at 94-95.

approve return to work. Accordingly, the ALJ's findings of protected activity and adverse action are treated as final for purposes of this appeal.⁴³

The parties also do not dispute the ALJ's determinations that Rudolph's reporting that he had been forced to violate the hours of service and accurately reporting his hours of duty on July 20, 2008, were contributing factors to the threat of disciplinary action that he received on August 7, and that Amtrak failed to establish by clear and convincing evidence that the threat would have been made absent the protected activity; thereby establishing liability on the part of Amtrak for the threat of disciplinary action. Consequently, we treat as final the ALJ's finding of liability on the part of Amtrak for the threat made against Rudolph on August 7, 2008.

The only issues before the ARB are whether the ALJ properly found that Rudolph failed to prove by a preponderance of the evidence that his other protected activities were contributing factors in the remaining adverse actions taken against him by Amtrak (i.e. the disciplinary charge, unpaid sickness benefits, psychiatric evaluation referral, medical disqualification, and refusal to approve return to work), and whether the ALJ's dismissal of the remaining portions of Rudolph's FRSA complaint related to those adverse personnel actions is in accordance with applicable law.

We hold that the ALJ committed reversible error by failing, among other things, to consider the totality of the circumstantial evidence of the causal relationship of Rudolph's protected activities to Amtrak's adverse actions,⁴⁴ including especially the question of "whether knowledge should be imputed to a decision-maker based on knowledge held by other relevant persons."⁴⁵

A. The ALJ failed to analyze contributory causation correctly

The FRSA identifies specific activities that are protected, including reporting a violation of a safety rule, refusing to violate a safety rule, filing a complaint regarding

⁴³ In treating the ALJ's findings of protected activity and adverse personnel action as final for purposes of the instant appeal, we are not making any pronouncement as to the propriety of any of the ALJ's findings. We merely acknowledge that neither party challenged the ALJ's protected activity or adverse action determinations, and accordingly we express no opinion on how the Board might have ruled on the ALJ's findings had they been challenged on appeal. *See generally Int'l Assn. of Machinists and Aerospace Workers*, ARB No. 11-073 (ARB Jan. 25, 2012); *Hutchins v. TNT Logistics*, ARB No. 05-065, ALJ NO. 2004-STA-009 (ARB Jan. 31, 2008).

⁴⁴ *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 24, 2011).

⁴⁵ *Klopfenstein v. PCC Flow Techs.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006).

enforcement, notifying an employer of a work-related injury or illness, cooperating with an investigation, furnishing accident information, reporting hours of service accurately, requesting medical or first aid treatment, and following a treating physician's orders or treatment plan.⁴⁶ Any activity falling within any of these categories triggers the whistleblower protection of the statute. The question that must be answered to find an employer liable under the FRSA is whether the protected activity contributed in any way to the adverse action the employer takes against an employee who engages in such activity.

Proof of causation or "contributing factor" is not a demanding standard. To establish that his protected activity was a "contributing factor" to the adverse action at issue, the complainant need not prove that his or her protected activity was the only or the most significant reason for the unfavorable personnel action. The complainant need only establish by a preponderance of the evidence that the protected activity, "alone or in combination with other factors," tends to affect in any way the employer's decision or the adverse action taken.⁴⁷ Thus, for example, a complainant may prevail by proving that the respondent's reason, "while true, is only one of the reasons for its conduct, and [that] another factor is the complainant's protected activity."⁴⁸

As previously noted, the ALJ's conclusion that Rudolph failed to establish that his protected activity contributed to each adverse action Amtrak took him was based primarily on the ALJ's finding that the Amtrak decision-maker for each adverse action was unaware of Rudolph's protected activities. The ALJ's exclusive focus on the knowledge possessed by the final responsible decision-maker constitutes error as a matter of law. As the ARB explained in *Bobreski*, proof that an employee's protected activity contributed to the adverse action does not necessarily rest on the decision-maker's knowledge alone. It may be established through a wide range of circumstantial evidence, including the acts or knowledge of a combination of individuals involved in the decision-making process.⁴⁹ Proof of a contributing factor may be established by evidence demonstrating "that at least one individual among multiple decision-makers influenced

⁴⁶ 49 U.S.C.A. § 20109(a)(1)-(7), (c)(2).

⁴⁷ *Klopfenstein*, ARB No. 04-149, slip op. at 18, quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (interpreting the Whistleblower Protection Act, 5 U.S.C.A. § 1221(e)(1)). The "contributing factor" standard was "intended to overrule existing case law, which required that a complainant prove that his protected activity was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action." *Bechtel v. Competitive Techs.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 12 (ARB Sept. 30, 2011).

⁴⁸ *Hoffman v. NetJets Aviation, Inc.*, ARB No. 09-021, ALJ No. 2007-AIR-007, slip op. at 7 (ARB Mar. 24, 2011).

⁴⁹ *Bobreski*, ARB No. 09-057, slip op. at 13.

the final decision and acted at least partly because of the employee's protected activity.”⁵⁰

As the Board discussed in *Bobreski*, the “cat’s paw” legal concept of liability recognized in *Staub v. Proctor Hosp.*,⁵¹ demonstrates how knowledge of protected activity and actions by others occurring early in the decision-making chain can influence the final decision-maker and result in a finding of liability. In *Staub*, the Supreme Court addressed the circumstances under which an employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision.⁵² The Court rejected the argument that an employer can shield itself from liability by isolating the personnel official responsible for the adverse employment action, who acted without discriminatory animus, from the animus of lower-level supervisors on whose advice and recommendations the company official relied in taking the personnel action. Under the “cat’s paw” theory, the Court held that if a supervisor performs an act motivated by discriminatory animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action taken, then the employer will be held liable.⁵³

Where motivation is, as in *Staub*, a prerequisite to establishing liability, the complainant must prove that the company official responsible for the adverse employment decision, although himself harboring no discriminatory intent, acted on the advice or actions of others motivated by animus intended to cause an adverse employment action. Where, however, the complainant need establish that his protected activity was only a contributing factor in the adverse action, proof of motivation is not

⁵⁰ *Id.* at 14. *Accord Klopfenstein*, ARB No. 04-149, slip op. at 18 (requiring ALJ upon remand to determine “whether knowledge held by other company employees should be imputed to the decision-maker); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, 2000-ERA-031, slip op. at 9 (ARB Sept. 30, 2003) (imputing to company official responsible for employment decision knowledge of protected activity of employees having substantial input into the personnel action). *See also Bartlik v. T.V.A.*, No. 1988-ERA-015, at n.1 (Sec’y, Apr. 7, 1993) (“[W]here managerial or supervisory authority is delegated, the official with ultimate responsibility who merely ratifies his subordinates’ decisions cannot insulate a respondent from liability by claiming ‘bureaucratic ignorance’.”).

⁵¹ 131 S. Ct. 1186 (2011).

⁵² *Staub* arose under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C.A. § 4311.

⁵³ 131 S. Ct. at 1194. *See generally Chen v. Dana Farber Cancer Inst.*, ARB No. 09-058, ALJ No. 2006-ERA-009 (ARB Mar. 31, 2011) (Royce, J. dissenting).

required.⁵⁴ Moreover, in such cases the complainant need not prove that the decision-maker responsible for the adverse action knew of the protected activity if it can be established that those advising the decision-maker knew, regardless of their motives. Consequently, Rudolph will have met his burden of proof under the FRSA if the circumstantial evidence of record, including the knowledge of those advising the ultimate decision-makers regardless of their motivation, establishes that his protected activity (any or all) was a contributing factor in the adverse personnel actions Amtrak took against him.

With respect to all five of the adverse personnel actions that the ALJ found that Amtrak took against Rudolph, the ALJ initially rejected any finding that Rudolph's protected activity was a contributing factor because of the lack of knowledge of the protected activity by the company official responsible for the adverse action. Additionally, for the four adverse personnel actions where the ALJ found that the Amtrak official primarily responsible for the adverse action was aware of one or more of Rudolph's protected activities,⁵⁵ the ALJ held that intervening events disrupted the contributing factor causal connection. The ALJ's exclusive focus on the responsible official's knowledge ignored the fact that in each instance one or more company officials who were aware of Rudolph's protected activity advised the decision-maker or were otherwise involved in the decision-making process.

Moreover, where the ALJ found knowledge on the part of the decision-maker of Rudolph's protected activity to exist, the intervening events cited by the ALJ do not automatically negate a finding that the protected activity was a contributing factor in the adverse action.

(1) The August 8, 2008 disciplinary charge

The ALJ found that because Israelson's focus was on Rudolph's performance of duties past his hours of service without proper authority "rather than Mr. Rudolph's protected activities themselves," the protected activities were not a contributing factor in Israelson's action.⁵⁶ However, the ALJ found that Krueger, who was involved in the preparation of the disciplinary charge,

⁵⁴ *Klopfenstein*, ARB No. 04-149, at 18-20; *Bechtel*, ARB No. 09-052, slip op. at 12; *Allen v. Stewart Enter.*, ARB No. 06-081, ALJ No. 2004-SOX-060, slip op. at 17 (ARB July 27, 2006). *Accord Staub*, 131 S. Ct. at 1192 ("When a decision to fire is made with no unlawful animus on the part of the firing agent, but partly on the basis of a report prompted (unbeknownst to that agent) by discrimination, discrimination might perhaps be called a 'factor' or a 'causal factor' in the decision. . . .").

⁵⁵ *I.e.*, Rudolph's temporary loss of sick leave benefits, Dr. Pinsky's referral of Rudolph for a psychiatric evaluation, Rudolph's medical disqualification as a conductor, and Amtrak's refusal to allow Rudolph to return to work.

⁵⁶ D. & O. at 85.

was aware of the four following protected activities: (a) Mr. Rudolph accurately reported his hours on July 20, 2008 on his PTT, showing 48 minutes on duty beyond the expiration of his hours of service, (b) he also annotated on the PTT that he was forced to violate his hours of service, (c) Mr. Rudolph marked off ill mid-morning on July 20, 2008, and (d) Mr. Rudolph submitted a written complaint on July 31, 2008 that he had been forced to violate his hours of service.”^[57]

By ignoring the fact that Krueger was aware of Rudolph’s protected activity, the ALJ committed reversible error in finding no contributing factor with respect to the April 8 disciplinary charge.

(2) Rudolph’s temporary loss of sick leave benefits

On August 25, 2008, Dr. Sedlacek released Rudolph to return to full-time duties as a conductor subject only to the restriction that “train operations . . . not violate FRA regulations or compromise safety.”⁵⁸ Rudolph informed the RRB that he had been released to return to work, and his sick benefits ceased. At the same time, Amtrak refused to allow Rudolph to return to work. The ALJ found that Rudolph’s resulting 79-day loss of sick benefits was due to the refusal of Dr. Pinsky and Amtrak’s health unit to provide requested information to the RRB about Rudolph’s employment status.

Prior to and during the September-to-early-November period during which Dr. Pinsky refused to provide the requested information, Rudolph engaged in all five of his protected activities. The ALJ found that Rudolph’s protected activities were nevertheless not a contributing factor in the resulting temporary loss of sick benefits.

To begin with, the ALJ found that Dr. Pinsky, who was primarily responsible for Amtrak’s actions that temporarily prevented payment of the sick benefits and prevented Rudolph from returning to work, was not aware of the three protected activities associated with Rudolph’s hours of service. However, the ALJ also found that Dr. Pinsky’s decisions and actions were based on the advice of attorneys within Amtrak’s

⁵⁷ *Id.* at 83.

⁵⁸ Dr. Sedlacek’s August 25 medical release indicated that Rudolph “appears to have stabilized sufficiently to return to work,” and that he was capable of performing his job “with previously listed restrictions.” On September 9 Dr. Sedlacek clarified his August 25 opinion to indicate that Rudolph was released effective August 21, 2008, to “full-time” duties “restricted to train operations that do not violate FRA regulations or compromised safety.” D. & O. at 26, 66-67; CX 7-10.

legal department,⁵⁹ who surely were aware of Rudolph's hours-of-service protected activities. Under the "cat's paw" theory of liability, this knowledge is imputed to Dr. Pinsky. Consequently, Dr. Pinsky's lack of personal knowledge of Rudolph's hours-of-service protected activities does not dictate a finding of no contributory causal relationship between the protected activity and Rudolph's temporary loss of sick benefits.

The ALJ did find that Dr. Pinsky "was well aware of [Rudolph's] protected activity of reporting a work-related injury ["marking off"] on July 20, 2008." Even so, the ALJ held that Rudolph's "marking off" was not a contributing factor in Dr. Pinsky's refusal to provide information to the RRB because of certain intervening events. These included "documentation Mr. Rudolph submitted in the late summer, after July 22, 2008, as medical justification for his previously denied requested ADA accommodations [which] suggested that as a result of his condition he might be unable at times to perform his work as conductor safely and properly," and Dr. Sedlacek's "conflicting notes and statements regarding Mr. Rudolph's condition."⁶⁰ Coupled with Rudolph's prior medical and work history, the ALJ concluded that the intervening medical information provided "sufficient evidence to outweigh the circumstantial evidence of contributing factor based on temporal proximity and subject matter."⁶¹

This, however, is *not* the proper test at the "contributing factor" stage of analysis. As the ARB recently pointed out, "an 'intervening event' does not necessarily break a causal connection between protected activity and adverse action simply because the intervening event occurred after the protected activity."⁶² The complainant's burden of proving contributory causation will be met upon this minimal showing even if the employer also had a legitimate reason for the unfavorable employment action against the employee.⁶³ Again, proof of causation or "contributing factor" is not a demanding standard. The complainant need not prove that his or her protected activity was the only or the most significant reason for the unfavorable personnel action. It is enough that a

⁵⁹ D. & O. at 67-68, 87-88.

⁶⁰ *Id.* at 88.

⁶¹ *Id.* at 90. By this same reasoning, if the intervening events cited by the ALJ negate any contributing-factor causal connection between Rudolph's "marking off" ill or his attempt to return to work and the adverse personnel actions, as the ALJ held, then of course the intervening events would negate any similar causal nexus to Rudolph's hours-of-service protected activities notwithstanding the "cat's paw" imputation of Amtrak's attorneys' knowledge to Dr. Pinsky.

⁶² *Benninger v. Flight Safety Int'l*, ARB No. 11-064, ALJ No. 2009-AIR-022, slip op. at 2, n.2 (ARB Feb. 27, 2013).

⁶³ *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 9, 11 (ARB Sept. 26, 2012).

complainant establish that the protected activity in combination with other factors affected in any way the adverse action at issue.

It may be that Amtrak can establish that the cited intervening events were the real reason why Rudolph was temporarily denied the sick benefits and not allowed to return to work beginning in August. To do so, however, Amtrak must prove by “clear and convincing evidence” that it would have taken these actions because of the intervening events even if Rudolph had not engaged in the protected activities. However, that question is not before us. The only question is whether the intervening events cited by the ALJ negate a finding that Rudolph’s protected activity was a contributing factor in Amtrak’s adverse action that resulted in Amtrak’s temporary denial of sick benefits and refusal to permit his return to work in August. We hold that they do not.

The final question regarding the temporary loss of sick benefits focuses upon the ALJ’s conclusion that, “the denial of information and related subsequently reimbursed loss of sickness benefits are not encompassed within the types of discipline specifically prohibited under § 20109(c)(2) in relation to Mr. Rudolph’s protected activity of attempting to return to work based on a physician’s treatment plan.”⁶⁴ It may be that the temporary denial of sick benefits does not constitute “discipline” within the meaning of section 20109(c)(2). However, the ALJ found that the denial of sick benefits constituted adverse action.⁶⁵

Consequently, to address the question of whether Rudolph’s protected activity contributed to that adverse action by holding that the adverse action does not meet the FRSA’s definition of “discipline” not only conflates distinguishable legal concepts but also fails to address the question of causation. The issue is not whether the denial of sick leave benefits constitutes “discipline” within the meaning of section 20109(c)(2) but whether, as with Rudolph’s other protected activity, his protected activity of seeking to return to work based on the recommendation of his treating physician was a contributing factor to his temporary loss of sick leave benefits.

- (3) Referral of Rudolph for psychiatric evaluation; and
- (4) Rudolph’s medical disqualification as a conductor

Regarding Dr. Pinsky’s referral of Rudolph for a psychiatric evaluation and Rudolph’s medical disqualification as a conductor, both of which the ALJ held constituted adverse personnel actions, the ALJ again found that the principal decision-maker, Dr. Pinsky, was not aware of Rudolph’s hours-of-service protected activities. Similarly, to the extent the ALJ found that Dr. Pinsky was aware of Rudolph’s other

⁶⁴ D. & O. at 85.

⁶⁵ See D. & O. at 80 (“[E]ven though Dr. Pinsky later provided the requested information that led to Mr. Rudolph being compensated, his initial loss of sickness benefits for 79 days represents an adverse personnel action.”).

protected activities, the ALJ held that intervening events justified a finding of no contributing factor.

We reject the ALJ's findings that Rudolph's protected activity was not a contributing factor to these two adverse actions for the same reasons as explained above. The ALJ's exclusive focus on what Dr. Pinsky knew ignores the fact that those advising him on each of the adverse actions, especially attorneys in Amtrak's legal department, knew of Rudolph's protected activity. For those protected activities of which the ALJ found Dr. Pinsky to be aware, the intervening events the ALJ cited do not, as the ALJ held, necessarily negate a contributing-factor relationship between the protected activities and the adverse actions.⁶⁶ The intervening events may be a basis for Amtrak's ultimate rebuttal of Rudolph's proof of a contributing-factor connection, but they do not, in and of themselves, negate a finding of contributory causation.⁶⁷

Finally, the ALJ rejected any contributory causal relationship between Rudolph's protected activity of attempting in August to return to work and Dr. Pinsky's referral of Rudolph for psychiatric evaluation. The ALJ based his conclusion on his finding that Dr. Pinsky's psychiatric referral does not fall within the definition of discipline in section 20109(c)(2)."⁶⁸ It may be, as with the temporary denial of sick benefits, that referral of Rudolph for a psychiatric evaluation does not constitute discipline within the meaning of section 20109(c)(2). However, answering that question does not address the question of contributory causation presently before us. Again, the question is not whether the psychiatric evaluation is discipline but whether Rudolph's protected activity of returning to work based on the recommendation of his treating physician (or any other protected

⁶⁶ The ALJ relied on Rudolph's submission of the medical documentation justifying his request for ADA accommodations and Dr. Sedlacek's "conflicting notes and statements regarding Mr. Rudolph's condition." D. & O. at 88. The ALJ also cited Dr. Wilson's October 27, 2008 psychiatric evaluation as an intervening event supporting his conclusion that the protected activities of which Dr. Pinsky was aware did not contribute to the doctor's decision to disqualify Rudolph for work (or in Amtrak's subsequent refusal to allow Rudolph to return to work in November). D. & O. at 91-92.

⁶⁷ Nor can it be argued that the ALJ effectively held Amtrak to its rebuttal burden of proof despite the ALJ's failure to articulate a proper application of the "clear and convincing" burden-of-proof standard. For example, it may be that Dr. Pinsky relied solely on Dr. Wilson's independent medical evaluation in reaching his decision to disqualify Rudolph. However, the fact that the ALJ found Dr. Wilson's independent medical assessment to be medically more credible than that of Dr. Sedlacek's thereby justifying Dr. Pinsky's reliance upon Dr. Wilson's opinion as "reasonable," D. & O. at 92, does not address the question of whether Amtrak established by "clear and convincing evidence" that Dr. Pinsky would have based his decision on Dr. Wilson's opinion even if Rudolph had not engaged in any protected activity.

⁶⁸ D. & O. at 86.

activity) was a contributing factor in Dr. Pinsky's decision to refer Rudolph for the psychiatric evaluation.

(5) Refusal to allow Rudolph to return to work

The ALJ divided into two periods Amtrak's refusal to approve Rudolph's return to work based on his treating physician's recommendation. The first was from August 21, 2008, when Dr. Sedlacek determined that Rudolph was capable of returning to work, to November 5, 2008, when Dr. Pinsky medically disqualified Rudolph from returning to work as a conductor. Notwithstanding Dr. Sedlacek's release of Rudolph to return to full-time duty subject only to the restriction that "train operations . . . not violate FRA regulations or compromise safety,"⁶⁹ Amtrak refused to allow Rudolph to return to work. Over the ensuing period until November and Dr. Wilson's IME report, Amtrak and Dr. Pinsky refused to respond to Rudolph's repeated requests that he be allowed to return to work. The second period the ALJ focused on was from November 5, 2008, to January 12, 2009, the date when Rudolph filed his FRSA whistleblower complaint.

The ALJ noted that by this time Rudolph had engaged in all of his protected activities and that Dr. Pinsky was aware in both instances of one or more of Rudolph's protected activities. The ALJ found, for example, that Dr. Pinsky "was well aware of [Rudolph's] protected activity of reporting a work-related injury ["marking off"] on July 20, 2008."⁷⁰ Obviously, Dr. Pinsky was also aware of Rudolph's attempt on both occasions to return to work based on his treating physician's medical release.⁷¹ Nevertheless, the ALJ held that the same intervening events that negated any causal relationship between Rudolph's protected activities and Dr. Pinsky's decision to medically disqualify Rudolph negated any contributory causal relationship of the protective activity to both refusals to return Rudolph to work.⁷²

For the same reasons that we rejected the ALJ's finding that Rudolph's protected activity was not a contributing factor in Rudolph's medical disqualification as a conductor, we reject the ALJ's determination that Rudolph's protected activity was not a contributing factor in either of Dr. Pinsky's decisions refusing to permit Rudolph's return to work.

⁶⁹ D. & O. at 67; CX 7-10.

⁷⁰ D. & O. at 88.

⁷¹ In addition, under the "cat's paw" theory of liability, the knowledge of those who advised Dr. Pinsky regarding his refusal to allow Rudolph to return to work, such as those in Amtrak's legal department, is imputed to Dr. Pinsky.

⁷² D. & O. at 92-93.

Finally, we consider the intervening event of Dr. Wilson's evaluation, which the ALJ cited as an additional basis for negating any causal relationship between Rudolph's protected activity and Dr. Pinsky's refusal to return Rudolph to his former position. Amtrak's November 5 notice of medical disqualification ostensibly offered Rudolph four options, including the option of returning to his former position as a conductor.⁷³ To meet this option's requirement that he provide medical documentation demonstrating that his condition had improved, Rudolph submitted a November 20 medical opinion from Dr. Sedlacek in which he disagreed with Dr. Wilson's conclusion.⁷⁴ The ALJ rejected the treating physician's opinion because Dr. Sedlacek provided no additional new medical evidence to indicate that Rudolph had improved since Dr. Wilson's October examination; instead Dr. Sedlacek merely disagreed with Dr. Wilson's opinion. Thus, according to the ALJ, Dr. Pinsky's reliance on Dr. Wilson's opinion was "neither unreasonable nor influenced by the protected activities."⁷⁵

To conclude as the ALJ did, that Dr. Pinsky's reliance on Dr. Wilson's opinion was "neither unreasonable nor influenced by the protected activities," does not address whether Rudolph's protected activity was a contributing factor in Amtrak's refusal to return Rudolph to employment. Nor, for that matter, does it meet the heightened burden of proof required of Amtrak to prove by clear and convincing evidence that it would have refused to permit Rudolph's return to work had he not engaged in any protected activity. Thus, the ALJ must consider, along with the other determinations of contributing causation, the question of whether, based upon all of the evidence of record, Rudolph's protected activities (any or all) were a contributing factor in Amtrak's refusal in November or thereafter to return Rudolph to his former position as an assistant conductor.⁷⁶

⁷³ The four options in the November 5, 2008 notice included: (1) apply for permanent disability; (2) apply again for ADA accommodations; (3) seek an alternate AMTRAK position; and (4) return to service as a conductor predicated upon providing medical documentation that his condition had sufficiently improved to permit him to perform his job as a conductor. D. & O. at 92-93.

⁷⁴ Dr. Sedlacek's opinion essentially reiterated his opinion of August 25, 2008 indicating that Rudolph "was not disabled and remained capable as of August 21, 2008 to return to his full-time duties provided his work was confined within his assigned hours." D. & O. at 93.

⁷⁵ *Id.* at 93.

⁷⁶ Given the nature of Amtrak's refusal to return Rudolph to his former position, based on the requirement that he establish medically his ability to return safely, Amtrak's refusal has all the trappings of an ongoing and continuing refusal, particularly given Rudolph's subsequent and repeated efforts to return (including his request to Amtrak in January 2010 that he be permitted to come back to work). Consequently, in examining all of the evidence of record, the ALJ should consider all of Dr. Sedlacek's post-November 5, 2008 medical

In doing so, we express a serious concern with the ALJ's analysis on this last point, which we believe requires closer examination by the ALJ on remand. Dr. Sedlacek requested a copy of Dr. Wilson's psychiatric evaluation and recommendations to better understand Dr. Wilson's conclusions and to provide medical documentation to support Rudolph's choice to return to work, as provided in Amtrak's November 5 notice.⁷⁷ Dr. Sedlacek indicated that "it would be very beneficial for me to review Dr. Wilson's psychiatric evaluation and recommendations to better understand" Dr. Wilson's conclusions, and observed that "in all fairness to Mr. Rudolph, he has a right to know what's on his medical record."⁷⁸

Notwithstanding, Dr. Pinsky refused to release Dr. Wilson's evaluation to Dr. Sedlacek on the advice of Amtrak's legal department,⁷⁹ thereby making it impossible for Dr. Sedlacek to respond specifically to the Dr. Wilson's findings and demonstrate medically that his condition had sufficiently improved to permit him to return to his former position. Consequently, before finding it reasonable for Dr. Pinsky to rely on Dr. Wilson's opinion because Dr. Sedlacek provided no new medical evidence, the ALJ must address the question of whether Amtrak, by making it virtually impossible for Dr. Sedlacek to provide a meaningful medical rebuttal to Dr. Wilson's evaluation, effectively denied Rudolph a meaningful opportunity to return to work in his former capacity as an assistant conductor.

B. Defenses to the charge of unlawful discipline under section 20109(c)(2)

The ARB's holding in this case focuses on the failure of the ALJ to employ the proper test for determining contributory causation, and requires remand to the ALJ for reconsideration of whether Rudolph has met his burden of proof. Should the ALJ find that Rudolph's protected activity was a contributing factor in any of the adverse actions taken against him, the question then arises whether Amtrak can nevertheless meet its rebuttal burden of proof under the FRSA and thus avoid liability. Before considering whether Amtrak can prove by clear and convincing evidence that it would have taken the same adverse actions absent Rudolph's protected activities, the ALJ must determine

opinions pertaining to Rudolph's mental health, including his medical report submitted to OSHA in April of 2009 and his medical opinions of September and December 2009.

⁷⁷ D. & O. at 70.

⁷⁸ *Id.* at 35.

⁷⁹ The ALJ found that, "On November 17, 2008, a human resources specialist indicated that based on the advice of the Law Department, AMTRAK would not provide [Dr. Sedlacek] a copy of Dr. Wilson's evaluation," D. & O. at 35, and that "Dr. Pinsky's subsequent refusal on November 20, 2008 to release Dr. Wilson's evaluation to Dr. Sedlacek appears to be based on legal advice." D. & O. at 87.

whether Amtrak’s refusal to permit Rudolph to return to work based on his treating physician’s certification that he was able to do so constitutes“ discipline under section 20109(c)(2).⁸⁰

We note that the ALJ recognized that section 20109(c)(2) provides that “a railroad carrier’s refusal to permit an employee to return to work following medical treatment is not considered a violation of the section if the refusal is pursuant to FRA’s medical standards for fitness for duty or if there are no pertinent FRA standards, the railroad carrier’s medical standards for fitness for duty.”⁸¹ Notwithstanding that neither the FRA nor Amtrak’s medical standards for fitness for duty were offered into evidence, the ALJ concluded that Amtrak did not violate section 20109(c)(2). The ALJ opined that Rudolph’s “testimony about his job responsibilities, the position description for an AMTRAK train conductor, as well as the analyses of Dr. Walters and Dr. Wilson about Mr. Rudolph’s ability to handle the stress associated with his work as a train conductor” provided “sufficient evidence of the medical standards for a train conductor’s fitness for duty.”⁸²

We agree with the ALJ that where an employee seeks to return to work based on his or her treating physician’s recommendation a covered employer’s refusal to allow the employee to return to work does not constitute discipline in violation of section 20109(c)(2) if the employer’s refusal is based on FRA medical standards for fitness for duty or, secondarily, the railroad carrier’s medical standards for fitness for duty. We do

⁸⁰ Section 20109(c)(2) provides:

DISCIPLINE.—A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier’s refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier’s medical standards for fitness for duty. For purposes of this paragraph, the term ‘discipline’ means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee’s record.

⁸¹ D. & O. at 93.

⁸² *Id.*

not, however, construe section 20109(c)(2) as affording an employer defenses to a charge of unlawful discipline beyond those the section expressly identifies.⁸³

Moreover, we view the defenses afforded an employer under section 20109(c)(2) within the context of the FRSA's rebuttal burden-of-proof standard required of an employer where the complainant has met his initial burden of establishing that his protected activity (i.e., the employee's return to work based on his treating physician's medical release) was a contributing factor in the employer's refusal to permit the employee's return.⁸⁴ The employer must establish by clear and convincing evidence that its refusal to permit the return to work was based on FRA medical standards for fitness of duty or, absent those, on the employer's fitness-for-duty standards.

CONCLUSION

The ALJ sustained Rudolph's claim of retaliation in violation of the FRSA only as to the August 7, 2008 threat of disciplinary action, for which Rudolph was awarded \$5,000 in punitive damages. Not challenged on appeal, that determination and award are affirmed. By focusing exclusively on the personal knowledge of Amtrak's decision-makers responsible for each adverse action against Rudolph, the ALJ failed to consider fully all of the evidence relevant to whether Rudolph's protected activity was a contributing factor in the adverse action taken, including especially the knowledge of other Amtrak personnel who advised the responsible decision-maker or who otherwise

⁸³ See *U.S. v. Barlow*, 576 F. Supp. 2d 1375, 1381 (S. D. Fla. 2008) ("When a federal statute enumerates defenses to liability, without specifying that other unenumerated defenses are available, the enumerated statutory defenses are generally deemed to be the exclusive defenses available under the statute."). See *Hall Street Assocs., L.L.C., v. Mattel, Inc.*, 552 U.S. 576, 584 (2008) (finding that the enumerated statutory grounds for vacatur and modification under the Federal Arbitration Act were exclusive); *U.S. v. 175 Inwood Assocs. LLP*, 330 F. Supp. 2d 213, 226 (E.D.N.Y. 2004) (stating that the Comprehensive Environmental Response, Compensation, and Liability Act's enumerated defenses against liability are the exclusive defenses available); *Nicor Int'l Corp. v. El Paso Corp.*, 292 F. Supp. 2d 1357, 1373 (S.D. Fla. 2003) (stating that enumerated defenses in the Inter-American Convention on International Commercial Arbitration are the exclusive defenses available against foreign enforcement of a foreign arbitral award); *In re Kmart Corp.*, 04 C 4978 (St. Eve, J.), 2004 WL 2222265, at *2 (N.D. Ill. 2004) (stating that the defenses set forth in Section 547(c) of the Bankruptcy Code are the exclusive defenses to the trustee's power to avoid certain transfers."). See also, *Four Seasons Hotel v. Consorcio Barr*, 377 F.3d 1164, 1170 (11th Cir. 2004); *Industrial Risk Insurers v. MAN GHH*, 141 F.3d 1434, 1443 (11th Cir. 1998); *California Dept. of Toxicology v. Neville Chem.*, 358 F.3d 661, 672 (9th Cir. 2004); *U.S. v. Smuggler-Durant*, 823 F. Supp. 2d 873, 876 (D. Colo. 1993).

⁸⁴ 49 U.S.C.A. § 20109(d)(1), (2) imposes upon the parties in an action based on an alleged violation of section 20109(c)(2) the same burdens of proof as are required under the other whistleblower protection provisions of the FRSA.

were involved in the decision-making process.⁸⁵ Additionally, the ALJ's focus on intervening events as a basis for negating knowledge of Rudolph's protected activity in other instances failed to recognize that Rudolph's protected activity could prove a contributing factor in the adverse personnel action notwithstanding the intervening events, which are instead an element of Amtrak's rebuttal burden of proof by clear and convincing evidence.

For these reasons, we remand this case to the ALJ for reconsideration of whether Rudolph has met his initial burden of proving that his protected activity was a contributing factor in any or all of the adverse personnel actions that the ALJ found that Amtrak took against him.⁸⁶ If the ALJ determines that Rudolph has met his burden of proof, then the question is whether Amtrak can nevertheless avoid liability by proving by clear and convincing evidence that it would have taken any or all of the adverse actions absent any protected activity by Rudolph and thereby avoid liability.

⁸⁵ Nevertheless, knowledge alone on the part of those advising the decision-maker or otherwise involved in the decision-making process may or may not be sufficient to find contributory causation. An intermediary's knowledge of the complainant's protected activity must be considered within the context of all of the circumstantial evidence. As the ARB noted in *Bobreski*, in assessing whether a complainant has met his or her burden of proof under the "contributing factor" standard, where the complainant's claim is based on indirect or circumstantial evidence, as in this case,

. . . each piece of evidence should be examined with all the other evidence to determine if it supports or detracts from the employee's claim that his protected activity was a contributing factor. Circumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence. Logically . . . the ALJ may examine each piece of circumstantial evidence to determine how substantial it is. Then the ALJ must weigh the circumstantial evidence as a whole to properly gauge the context of the adverse action in question. Taken as a whole, the evidence may demonstrate that at least one individual among multiple decision-makers influenced the final decision and acted at least partly because of the employee's protected activity.

Bobreski, ARB No. 09-057, slip op. at 13-14.

⁸⁶ We remand this case to the ALJ for re-examination of the evidence relevant to whether Rudolph has met his burden of proving contributory causation because that determination rests on findings of fact based in large part on indirect and circumstantial evidence that exceeds the ARB's jurisdiction to assess.

Finally, the ALJ must consider whether Amtrak's refusal to allow Rudolph to return to work constituted discipline in violation of section 20109(c)(2) and whether Amtrak can prove by clear and convincing evidence that it would have refused Rudolph's request to return to work even if he had not engaged in protected activity.

For the foregoing reasons, we affirm the ALJ's finding of liability for the August 7, 2008 threat of disciplinary action and award of \$5,000 in punitive damages. In all other respects, we reverse the decision and remand this case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

Judge Corchado, concurring and dissenting:

I agree with the decision to remand the ALJ's causation finding as to the notice of disciplinary charge (Charge) that Respondent Amtrak issued to Lawrence Rudolph. The ALJ required Rudolph to prove "that the decision-makers who subjected him to the alleged adverse action were aware of the protected activity." D. & O. at 81. If the ALJ meant that only Gary Israelson's knowledge was relevant because he was the ultimate decision-maker, then this was error. As the majority discusses, the ultimate decision-maker's knowledge is relevant but not dispositive on the issue of causation. On appeal, Rudolph persuasively demonstrated that the ALJ should have considered the significance of his immediate supervisor's (Jack Krueger) knowledge and entanglement with the issuance of the Charge, especially where the ALJ found that the immediate supervisor threatened Rudolph in violation of the FRSA's whistleblower statute, 49 U.S.C.A. § 20109. D. & O. at 83-85. I disagree with the majority's decision to remand the ALJ's rulings as to the medically-related "employment actions"⁸⁷ (i.e., the temporary loss of sickness benefits, the independent medical examination or IME, and the medical disqualification).⁸⁸ I also disagree with the majority opinion's interpretation of FRSA

⁸⁷ I use quotations because, as I indicate later in my discussion, the record is undisputed that Rudolph caused the August 2008 *termination* of his sickness benefits without any prompting by an Amtrak employee.

⁸⁸ I appreciate the reasons that the majority cited for remanding the ALJ's findings on causation. The ALJ had a challenging task of analyzing whether one or more multiple

Subsection 20109(c)(2). Given that this matter is being remanded, I will summarily note the core basis for my disagreement.

Medically-related Employment Decisions

Contrary to the majority opinion, I do not believe Rudolph demonstrated that the ALJ committed reversible error in finding no link between Rudolph's protected activity and Amtrak's medically-related employment decisions. For brevity's sake, I will cite only some reasons for my position. First, the ALJ correctly defined the term "contributory factor" and recognized that it eliminated the requirement that a complainant present evidence of pretext. D. & O. at 81-82. Second, the ALJ recognized the variety of circumstantial evidence that could prove contributory factor, such as temporal proximity, extraordinary harshness of discipline, and disparate treatment, among others. Third, he intermittently used words that indicated he rejected protected activity as a contributory factor. For example, the ALJ expressly concluded that, "rather than" Rudolph's marking off, "two intervening events" caused Dr. Pinsky to require Rudolph to submit to an IME. D. & O. at 88. He reaffirmed this finding when he ruled that Rudolph's marking off was "not a contributory factor in Dr. Pinsky's IME referral decision." D. & O. at 90-91.

Significantly, the ALJ's fact findings and the record support his ultimate conclusion that Rudolph's choices and events other than protected activity caused the medically-related employment decisions. It is undisputed that Rudolph voluntarily took sick leave on July 20, 2008, and chose Dr. Sedlacek as his treating physician. It is undisputed that Rudolph was receiving sickness benefits until he called the Railroad Retirement Board in August 2008 to advise it that he was capable of performing his job. D. & O. at 66. It is undisputed that, when Rudolph made his phone call to the Retirement Board, he did not have an unconditional medical release. The written medical releases speak for themselves and demonstrate that Rudolph's treating doctor (Dr. Sedlacek) wrote very different and unclear "releases" within a thirty-day period that progressed from "totally, but temporarily disabled" (8/11/08) to "capable" of working "with previously listed restrictions" (8/22/08) to a release to work "train operations that do not violate FRA regulations or compromise safety" (9/10/08). CX7, 8 and 9. There is no evidence in the record showing that anyone at Amtrak had anything to do with Rudolph's

protected activities occurring over several months caused any of the multiple adverse actions also occurring over several months. The causation issue was further complicated by the fact that, long before any of the relevant events occurred in this case, Rudolph was diagnosed with a "generalized anxiety disorder" that was exacerbated on July 19, 2008. Rudolph's generalized anxiety disorder (or anxiety disorder) was indisputably connected to his voluntary sick leave that started July 20, 2008, to the IME, and the medical disqualification from his job as an assistant conductor. The ALJ's efforts to explain his reasons and bases may have unintentionally created the impression that he improperly fragmented the circumstantial evidence. *See Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 24, 2011)(The main error in that case was the improper fragmentation of the circumstantial evidence).

call to the Retirement Board or with Dr. Sedlacek's medical releases. The ALJ found that Rudolph's illness, the confusion over his medical releases, and the non-availability of the IME doctor contributed to the delay in reinstating Rudolph's sickness benefits. D. & O. at 85-86. These fact findings are supported by substantial evidence.

Rudolph disputes the ALJ's fact findings but, in my view, fails to point to sufficient evidence to counter the ALJ's findings. For example, he advances his own versions of inhouse attorney Karen Rabin's motives, Dr. Pinsky's medical opinion in September 2008, and what Dr. Wilson intended in his September 2008 medical releases. Brief of Complainant at 6. Rudolph repeatedly asserted that the law department knew of Rudolph's hours-of-service protected activity and was directing Dr. Pinsky. *Id.* at 12. But neither Dr. Timothy Pinsky, nor Dr. Wilson nor anyone from Amtrak's law department testified. Dr. Glen Green's interpretation of Dr. Pinsky's notes was compelled conjecture at the hearing and not based on Dr. Green's personal knowledge. *Id.* at 11. Rudolph misstates the evidence to say that Dr. Pinsky agreed that Rudolph was capable of working in September 2008. *Id.* at 6. The fact that a decision-maker "knows" about protected activity permits an inference that unlawful discrimination occurred but *does not require* such an inference. In this case, the ALJ ultimately concluded that it did not. Rudolph's bald assertion that a law department's only interest is to protect the company was merely an opinion without any demonstrated personal knowledge and arguably an over-generalization about the objectives of corporate law departments. Looking at the record as a whole, including the ALJ's undisputed fact findings, Rudolph did not persuade me that the ALJ erred.

Fitness for Duty Exception

Finally, while I agree that the ALJ wrongly applied Subsection 20109(c)(2),⁸⁹ I cannot agree with the majority's interpretation of an important issue in that subsection. I believe much more analysis is needed before the Board decides this issue, and I hope such analysis will occur after the remand. Subsection 20109(c)(2) provides as follows:

(C) PROMPT MEDICAL ATTENTION.—

(2) DISCIPLINE.—A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, *except that* a railroad carrier's refusal to permit an employee to return to work following medical treatment *shall not be considered a violation* of this section if the refusal is pursuant to Federal Railroad Administration

⁸⁹ The majority noted that there were no "fitness for duty" medical standards in evidence as expressly required in Subsection 20109(c)(2) for the exception to apply.

medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

49 U.S.C.A. § 20109(c)(emphasis added). The majority opinion interprets the exception (the "Fitness for Duty Exception") in this subsection as an exclusive affirmative defense. But it is debatable whether the Fitness for Duty Exception is an affirmative defense at all, not to mention an exclusive defense.

First, Subsection 20109(c)(2) literally creates an "exception" to (c)(2) through the Fitness for Duty Exception which *shall not be considered a violation*. Medical disqualifications pursuant to the Fitness for Duty Exception are carved out from Subsection 20109(c)(2)'s coverage. Nowhere does Subsection 20109(c)(2) refer to an affirmative defense. On its face, then, Subsection 20109(c)(2) prohibits a complainant from asserting a FRSA whistleblower complaint based on the fact that established "fitness for duty" medical standards precluded such employee from returning to work.

Second, the majority's interpretation directly contradicts the mandate in Subsection 20109(d). That subsection unambiguously provides that FRSA whistleblower complaints filed with the Secretary under Subsections 20109(a), (b) and (c) "*shall be governed under the rules and procedures set forth in section 42121(b) [of Title 49].*" The "rules and procedures in Section 42121" (AIR 21 standards) provide that, after an employee has proven that protected activity contributed to an unfavorable employment action, the respondent may escape liability by proving only through clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior. If Congress intended to exempt Subsection 20109(c)(2) from the AIR 21 rules, then Congress could have easily stated that AIR 21 applies only to Subsections 20109(a), (b) and (c)(1) (rather than listing subsection (c)). 49 U.S.C.A. §§ 20109(d)(2)(A)(i), 42121(b)(2)(B)(iii)(iv). Subsection 20109(d) expressly identifies only one "Exception" to the application of the AIR 21 standards. See § 20109(d)(2)(B) (the "notification" rules).

Third, the majority opinion fails to consider the legislative history of the FRSA whistleblower statute. I need not repeat the legislative history the Board noted in *Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-11, slip op. at 12 -14 (July 25, 2012). For now, it is sufficient to note that everything but the Fitness for Duty Exception existed in the original bill that introduced Subsection 20109(c)(2), a bill that went through three versions before final passage.⁹⁰ The Fitness

⁹⁰ As we discussed in *Santiago*, the three stages of the bill are: (1) Federal Railroad Safety Improvement Act of 2007 (H.R. 2095) introduced on May 1, 2007; (2) the Senate

for Duty Exception was introduced through the amendment process only as an exception to the list of protected activity in Subsection 20109(a) and preserved in the final stage by inserting it awkwardly into Subsection 20109(c)(2). In that same amendment process, the legislature preserved the requirement that AIR 21 govern whistleblower actions filed under Subsections 20109(a), (b) and (c). It seems illogical to assume that, in the same pen strokes, Congress required the application of Subsection 42121(b) to Subsection 20109(c) but somehow failed to specify that it only meant Subsection 20109(c)(1) and not (c)(2).

Lastly, the majority's string of cases cited to support its interpretation further demonstrates the weakness in the majority's interpretation of Subsection 20109(c)(2). The majority cites these cases to support the idea that an "enumerated list" of defenses necessarily excludes other defenses. Yet, in stark contrast to the "exception" inserted in Subsection 20109(c)(2) in this case, the cases the majority cited, in fact, involved a "list" of defenses that a party could affirmatively use to "establish" or "prove" as a "defense" to liability or "vacate" a judgment.⁹¹

In the end, the Board has remanded this matter on the issue of causation, affirming only the ALJ's causation finding as to Krueger's threat. Consequently, Rudolph still has the burden of establishing causation beyond the threat. As to Subsection 20109(c)(2), in my view, Amtrak directly argued that no violation occurred and, therefore, preserved its right to fully challenge any finding of violation under that subsection.

LUIS A. CORCHADO
Administrative Appeals Judge

passed an Engrossed Amendment on August 1, 2008; and (3) the final version that was passed on October 1, 2008.

⁹¹ For example, the cases listed by the majority with explanatory parentheticals were: *U.S. v. Barlow*, 576 F. Supp. 2d 1375, 1381 (S.D. Fla. 2008)(relevant statute had a subsection entitled "Defenses" that enumerated three defenses to "establish" for defeating liability); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) (enumerated four statutory grounds for vacatur and three for modification of an arbitration award); *U.S. v. 175 Inwood Assocs. LLP*, 330 F. Supp. 2d 213, 226 (E.D.N.Y. 2004) (relevant statute contained a subsection entitled "Defenses" with four enumerated four defenses); *Nicor Int'l Corp. v. El Paso Corp.*, 292 F. Supp. 2d 1357, 1373 (S.D. Fla.2003) (statute enumerated seven defenses against foreign enforcement of a foreign arbitral award); *In re Kmart Corp.*, 04 C 4978 (St. Eve, J.), 2004 WL 2222265, at *2 (N.D. Ill. 2004) (enumerated nine defenses against a Bankruptcy trustee's power to avoid certain transfers).").