



THE FEDERAL RAILROAD SAFETY ACT — AN EMPLOYER'S NONRETALIATORY REASONS FOR DISCHARGING AN EMPLOYEE MUST BE CONSIDERED IN CONTEXT OF EMPLOYEE'S PRIMA FACIE CASE ON CAUSATION

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The Federal Railroad Safety Act (FRSA) prohibits a rail carrier from retaliating against an employee because the employee engaged in certain activities protected by the statute, including the reporting of a workplace injury. To state a prima facie retaliation case under the FRSA, the employee has the initial burden to prove by a preponderance of evidence that his or her "protected activity" was a "contributing factor" to the adverse employment action.

The evidence that a factfinder may consider in an FRSA case has been hotly contested. The pivotal question is whether the factfinder may look to the rail carrier's evidence in determining if the employee has stated a prima facie case, or instead, whether the factfinder's review is limited to the evidence presented by the employee. This question is hugely important for rail carriers because once the employee meets his or her prima facie burden, the burden then shifts to the carrier to prove, by clear and convincing evidence, that it would have taken the same adverse employment action in the absence of the protected activity.

The Administrative Review Board (ARB or Board) was recently presented with this question in *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034 (ARB Jan. 6, 2017). In a significant case where both sides drew support from several amici, the ARB emphasized that the factfinder must consider **all** evidence — including that from the rail carrier — in answering the "contributing factor" question. Applying that approach, the Board in a 2-1 decision ruled in favor of Union Pacific and determined that the employee did not meet his prima facie burden.

The Underlying Facts

Powers injured his hand after he struck it against a piece of maintenance equipment. He was diagnosed with a severe contusion (bruise) and tenosynovitis (inflammation of the lining of the sheath that surrounds a tendon). Union Pacific thereafter put him on restricted duty to accommodate his injury.

Over the following year, Powers complained of pain in his hand, was examined and had his work restrictions extended. In fact, twelve months after his injury, he was still to avoid repetitive wrist motion and lifting over 50 pounds.

However, Union Pacific began to question the seriousness of Powers' injury and hired an investigator, who obtained video of Powers repeatedly lifting 6x6 wood posts, using a shovel, repeatedly lifting a metal trailer ramp, operating a large power drill, pushing and pulling a soil compactor, swinging a sledge hammer and lifting boxes of ammunition. When asked about his activity level, Powers reported that he had been doing some "gardening, nothing major."

Sixteen months after his initial injury, and after a hearing and investigation, Union Pacific terminated Powers for violating company policy by being dishonest in describing his level of activity and in failing to stay within his medical restrictions (a fact Powers contested throughout the proceedings). After an Administrative Law Judge (ALJ) dismissed his claim for lack of evidence establishing the "contributing factor" element, Powers appealed to the ARB, arguing that Union Pacific violated the FRSA's whistleblower provisions by firing him for reporting a workplace injury.

The "Contributing Factor" Standard

The ARB used this case as an opportunity to clarify what evidence may be considered in determining whether an employee meets his or her "contributing factor" burden. There is, the Board emphasized, "no limitation" on the evidence that the factfinder may consider in making the "contributing factor" determination. Thus, where the employer argues that the protected activity played no role in the adverse employment action, the ALJ "must consider the employer's evidence of its nonretaliatory reasons" in addition to the employee's evidence. Where there is a factual dispute, as is often the case, the ALJ must review the conflicting evidence and make factual determinations. If, after weighing this evidence, the ALJ believes that the protected activity and the employer's nonretaliatory reasons both played a role, the "contributing factor" element is met and the burden shifts to the rail carrier to show that it would have taken the adverse employment action even in the absence of the protected activity.

The Board's "Contributing Factor" Analysis in Powers

In looking to Union Pacific's evidence, the Board determined that Powers failed to meet his prima facie case on the "contributing factor" question. Union Pacific's evidence fell into two categories: (1) evidence that undermined Powers' claim that his injury report contributed to his termination, such as the 16-month gap between Powers reporting his injury and his termination; and (2) evidence tending to show that Union Pacific's actual reason for firing Powers was something other than his injury report — namely, Union Pacific's good-faith belief that Powers had been dishonest about his physical capabilities. Importantly, the fact that the Union Pacific decisionmakers may

have been mistaken in their belief that Powers violated his medical restrictions did not warrant reversal because a good-faith belief, even if mistaken, is not evidence of retaliatory animus.

Moving forward, *Powers v. Union Pacific Railroad Company* will serve as an important precedent for rail carriers and other employers subject to retaliation claims. After *Powers*, it is clear that the factfinder may consider the employer's evidence as to why it discharged the plaintiff in determining whether an employee meets his or her prima facie burden, and that a good-faith belief, even if mistaken, does not show a retaliatory animus.

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