ADMIN. REVIEW BOARD
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**UNITED STATES DEPARTMENT OF LABOR**
**ADMINISTRATIVE REVIEW BOARD**

**ROBERT POWERS,**

**Complainant,**

against,

**UNION PACIFIC RAILROAD COMPANY,**

**Respondent.**

**ARB CASE NO. 13-034**

**ALJ CASE NO. 2010-FRS-030**

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# BRIEF OF *AMICI CURIAE* NATIONAL WHISTLEBLOWER CENTER, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, TRUCKERS JUSTICE CENTER AND TEAMSTERS FOR A DEMOCRATIC UNION

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Jason Zuckerman, Esq.
Dallas Hammer, Esq.
Amy Biegelsen (law clerk)
Zuckerman Law
1629 K Street, NW
Suite 300
Washington, DC 20006
jzuckerman@zuckermanlaw.com
(202) 262-8959 (v)
(202) 888-7555 (f)

Counsel for *Amici Curiae*

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## I. INTERESTS OF *AMICI CURIAE*

Established in 1988, the National Whistleblower Center (NWC) is a non-profit, tax-exempt public interest organization. The NWC regularly assists employees who suffer from illegal retribution after lawfully disclosing violations of federal law by maintaining a nationwide attorney referral service for whistleblowers, and educating attorneys and other whistleblower advocates. The NWC has participated as amicus curiae in the following cases: *English v. General Electric*, 110 S. Ct. 2270 (1990), *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (1985); *EEOC v. Waffle House*, 534 U.S. 279 (2002); *Haddle v. Garrison*, 525 U.S. 121 (1998); *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000); *Lawson v. FMR, LLC,* __ U.S. __, 134 S. Ct. 1158 (2014); *Lane v. Franks,* __ U.S. __, 134 S. Ct. 2369 (2014); *Wiest v. Lynch,* 710 F.3d 121 (3d Cir. 2013); *Sylvester v. Parexel Int'l,* ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, 2011 WL 2165854 (May 25, 2011).

In 2002, the NWC worked closely with the Senate Judiciary Committee and strongly endorsed its efforts to "prevent recurrences of the Enron debacle and similar threats to the nation's financial markets." 148 Cong. Rec. S. 7420 (daily ed. July 26, 2002) (remarks of Senator Leahy, quoting from letter signed by the NWC). Senator Leahy recognized the role of the NWC in the enactment of SOX:

> This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied. . . .

> Unfortunately, as demonstrated in the tobacco industry litigation and the Enron case, efforts to quiet whistleblowers and retaliate against them for being "disloyal" or "litigation risks" transcend state lines. This corporate culture must change, and the law can lead the way. That is why S. 2010 is supported by public interest advocates, such as the National Whistleblower Center, the Government Accountability Project, and Taxpayers Against Fraud, who have called this bill "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets."

S. Rep. 107-146, at 10.

The NWC advocates on behalf of whistleblowers because these truth-tellers help rectify grave problems facing our democracy. Whistleblowers are a bulwark of accountability against those who would turn the immense power of government or corporations to improper or illegal ends. Conscientious employees who point out questionable practices should not be forced to choose between their jobs and their conscience. Whistleblowers risk their careers, financial stability, emotional well-being, and family relationships to take an ethical stand against wrongdoing. They are protecting vital fiscal resources, preserving our health and safety, and saving lives. Society should protect them.

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

NELA strives to protect the rights of its members' clients, and it regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

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

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

## II. SUMMARY OF THE ARGUMENT

The *Fordham* majority correctly articulated the standard for "contributing factor" causation. *Fordham v. Fannie Mae*, ARB Case No. 12-061, ALJ Case No. 2010-SOX-051, 2014 WL 5511070 (ARB Oct. 9, 2014). Although *Fordham* synthesizes important clarifications to the law, the decision did not break new ground. *Fordham* merely concludes that if Congress explicitly defines the standard of proof for an issue, the Board must apply that standard.

Here, Congress explicitly directs adjudicators to weigh evidence of an employer's retaliatory actions by the preponderance of the evidence standard, and hold evidence of the employer's purportedly lawful reasons for taking an adverse action to the clear and convincing standard. *Fordham*, merely clarified that to follow the framework Congress laid out, evidence of

the employer's lawful reasons for the adverse action must be excluded from the analysis of whether an employee has shown that her protected activity was a contributing factor in the adverse action. Otherwise, evidence of an employer's purportedly lawful reasons could allow employers to avoid liability under the lighter preponderance of the evidence standard.[1]

Importantly, *Fordham* does *not* bar the respondent from offering *any* evidence to rebut the complainant's initial case; *Fordham* merely underscores that the respondent's evidence must be limited to that which undercuts the complainant's contributing factor showing.

## III. ARGUMENT

The *Fordham* opinion continues to clarify that the burden-shifting scheme Congress prescribed in this case represents a dramatic break with the burden shifting analysis applied to Title VII and similar statutes. In recent years, the Board has acknowledged that it is reversible error to apply a Title VII analysis to SOX whistleblower claims, and recognized that the proper burden-shifting analysis imposes a lower burden on complainants. *Fordham* now clarifies – in keeping with the plain meaning of the statute, the applicable legislative history, and Board precedent – that evidence offered by either party relating to the employer's alleged retaliatory conduct must meet the preponderance of the evidence standard. However, evidence of the employer's purported legitimate reason for the adverse action must meet the clear and convincing standard.

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[1] Merely to illustrate this point, imagine that an employer has evidence that indicates by a probability of 50.1% that an adverse action would have been taken absent the protected conduct. If such evidence is allowed to rebut a complainant's case-in-chief, then the employer would prevail because proof of the lawful reason would (barely) prevent a plaintiff from establishing that her protected activity more likely than not played a role in her termination. However, a 50.1% probability would not constitute clear and convincing evidence. Accordingly, considering such evidence during a complainant's case-in-chief would circumvent the law's explicit requirements.

### A. <u>The AIR 21 Burden-Shifting Framework Applies to SOX</u>

It is almost axiomatic that Title VII's burden-shifting analysis does not apply to retaliation cases arising under the Sarbanes–Oxley Act of 2002 (SOX), 18 U.S.C. § 1514A. As the Third Circuit has observed, the Title VII burden-shifting scheme established in *McDonnell Douglas* applies as the default analysis governing anti-retaliation statutes unless Congress specifically supplies an alternative burden-shifting framework. *See Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 157-58 (3d Cir. 2013) (citations omitted). The statutory language of SOX incorporates the burdens of proof from the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century at 49 U.S.C. §42121 (2000) (AIR 21 Burden-Shifting Framework). *See* 18 U.S.C. § 1514A(b)(2)(C). The AIR 21 Burden-Shifting Framework is an "independent burden-shifting framework," distinct from the *McDonnell Douglas* pattern applicable to Title VII claims. *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008). Congress specifically eschewed the Title VII framework in favor of the AIR 21 Burden-Shifting Framework for several statutes that the Board adjudicates, including SOX; the Federal Rail Safety Act, (FRSA); the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (STAA); and the Energy Reorganization Act (ERA), 42 U.S.C. § 5851.

The Board has repeatedly recognized that it is error to apply the Title VII framework to cases arising under statutes that use the AIR 21 Burden-Shifting Framework. *See, e.g.*, *Beatty v. Inman Trucking Mgmt.*, ARB No. 13-039, ALJ No. 2008-STA-020, 2014 WL 2536888, at *5 (ARB May 13, 2014) (holding AIR 21, not Title VII, was appropriate framework for STAA retaliation claims); *Hutton v. Union Pacific R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020, 2013 WL 2450037, at *5 (ARB May 31, 2013) (holding AIR 21, not Title VII, was appropriate

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

It is simply legal error to apply Title VII standards to claims governed by the AIR 21 Burden-Shifting Framework.

### B. The AIR 21 Burden-Shifting Framework is Distinct from Title VII

After the Board definitively held that the AIR 21 Burden-Shifting Framework replaced Title VII burden-shifting, the Board has begun to clarify the obligations of each party under the AIR 21 framework.

To support a claim for AIR 21 retaliation, the complainant must make "a prima facie showing" that her protected conduct "was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(iii). However, "[r]elief may not be ordered" if the employer "demonstrates by clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of" the complainant's protected conduct. 49 U.S.C. § 42121(iv).

#### 1. AIR 21 Imposes a Lighter Burden on Complainants

The AIR 21 Burden-Shifting Framework is far more protective of complainant-employees and much easier for a complainant to satisfy than the Title VII standard. *See Beatty*,

2014 WL 2536888, at *5 ("The ARB has recognized that a whistleblower protection statute 'should be liberally interpreted to protect victims of discrimination and to further its underlying purpose of encouraging employees to report perceived . . . violations without fear of retaliation.'") (citations omitted); *Blackie v. D. Pierce Transp., Inc.*, ARB No. 13-065, ALJ No. 2011-STA-055, 2014 WL 3385883, at *6 (ARB June 17, 2014) (AIR 21 Burden-Shifting Framework is "much more protective of complainant-employees and much easier for a complainant to satisfy than the *McDonnell Douglas* standard"); *Araujo*, 708 F.3d at 159; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) ("[f]or employers, this is a tough standard, and not by accident."); *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) ("it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws").

In sum, it is well-established that the AIR 21 Burden-Shifting Framework lowers the bar for complainants to prove whistleblower retaliation. Therefore, the *Fordham* dissent's concern that it is "unfair" to subject the employer "to a high burden of proof" is misplaced and contrary to well-settled precedent. *Fordham*, 2014 WL 5511070 at *25. Indeed, it was Congress that chose to subject employers to a high burden of proof. Consistent with well-established precedent, the Board should adopt the *Fordham* majority's holding that the AIR 21 "standards [are] intended to make it easier for whistleblowers to prevail in court." *Id.* at 22.

### 2. AIR 21 Imposes No Obligation on the Complainant to Show Retaliatory Animus or Pretext

In contrast to Title VII, the AIR 21 Burden-Shifting Framework imposes no obligation on the complainant to prove animus or pretext. *See Blackie*, 2014 WL 3385883 at *6 (AIR 21 complainant "need not demonstrate the existence of a retaliatory motive . . . [or] that the

respondent's reason for the unfavorable personnel action was pretext") (citing *Araujo*, 708 F.3d at 158; *Marano*, 2 F.3d at 1141); *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ NO. 2009-FRS-009, 2012 WL 694502, at *3 (ARB Feb. 29, 2012) ("The ALJ concluded that DeFrancesco failed to show that his protected activity was a contributing factor because he did not prove that his employer was motivated by retaliatory animus. This is legal error."); *Zinn*, 2012 WL 1143309, *7 ("The ALJ also erred to the extent he required that Zinn show "pretext" to refute [respondent's] showing of nondiscriminatory reasons for the actions taken against her."); *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, 2012 WL 759335, *5 (ARB Feb. 29, 2012) ("Under the 2007 amendment to the STAA burden of proof, an employee is not required to prove that his employer's reasons for an adverse action were pretext, e.g., that the employer had an alternate, albeit improper, motive for the adverse action, to prevail on a complaint."); *Klopfenstein v. PCC Flow Tech., Inc.*, ARB No. 04-149, ALJ No. 04-SOX-11, 2006 WL 3246904, *13 (ARB May 31, 2006) ("a complainant is not *required* to prove pretext") (citing *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)).

The most recent federal appellate decision applying this burden-shifting framework describes the whistleblower's burden as follows:

> Under this framework, the presence of an employer's subjective retaliatory animus is irrelevant. All a plaintiff must show is that his "protected activity was a contributing factor in the adverse [employment] action." 29 C.F.R. § 24.104(f)(1). The relevant causal connection is not between retaliatory animus and personnel action, but rather between protected activity and personnel action.

*Tamosaitis* v. *URS Inc.*, 771 F.3d 539, 553 (9th Cir. 2014) (construing an ERA claim).

While not required to support the complainant's case, showing pretext can be used as circumstantial evidence. *See Blackie*, 2014 WL 3385883, at *11 (Corchado, J. concurring) ("it is

legal error to require an employee to prove pretext where the causation standard is a 'contributory factor' standard, but pretext can be used as circumstantial evidence of discrimination against whistleblowers."); *see also Zinn*, 2012 WL 1143309, *7 ("Rather than assess any such pretext evidence as rebuttal evidence to ACL's nondiscriminatory reasons for firing Zinn, the ALJ must "weigh the circumstantial evidence as a whole [which includes any 'pretext' evidence] to properly gauge the context of the adverse action in question."); *DeFrancesco*, 2012 WL 759336, at *5 ("proving an employer's explanation unworthy of credence… address[es] the weight of the circumstantial evidence, not the intent or motivation of the employer.").

Congress explicitly replaced Title VII burden-shifting with the AIR 21 Burden-Shifting Framework for SOX claims. Therefore SOX complainants bear a lighter burden than those brining claims under Title VII, and may use retaliatory animus and pretext as components of their contributing factor causation showing, but are not required to martial evidence supporting those facts for their claims to succeed.

### C. ***Fordham* Provides the Correct Analysis of the Law**

The foregoing discussion outlines clarifications that the Board has made to define the proper implementation of the evidentiary showings that AIR 21 demands of complainants. *Fordham* synthesized these holdings. Further, as a matter of first impression, Fordham asked the Board to define the proper role of the respondent's evidence during the *prima facie*/preponderance of the evidence phase, as opposed to the role of such evidence during the affirmative defense/clear and convincing phase. The *Fordham* decision clarifies the eminently practical point: if the clear and convincing burden applies to the respondent's affirmative

defense, only evidence directly countering the complainant's prima facie showing may be introduced during the preponderance of the evidence phase.

The *Fordham* majority's holding falls squarely within the statute's plain meaning, the relevant legislative history, and existing Board precedent.

### 1. *Fordham* Correctly Applies the Law's Plain Meaning

The AIR 21 Burden-Shifting Framework is easier for a complainant to satisfy than the Title VII standard. *See, e.g.*, *Araujo*, 708 F.3d at 158, *accord. Stone,* 115 F.3d at 1572 ("[f]or employers, this is a tough standard, and not by accident."). To support a claim for AIR 21 retaliation, the complainant must make "a prima facie showing" that her protected conduct "was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(iii). However, "[r]elief may not be ordered" if the employer "demonstrates by clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of" the complainant's protected conduct. 49 U.S.C. § 42121(iv). This framework offers employees a lower burden to establish that the employer violated the law by showing that her whistleblowing contributed to the employer's adverse actions. Even once the employee establishes the violation, however, an employer can avoid liability, but only if the employer can meet the higher "clear and convincing" burden of proof.

*Fordham* embraces the logical proposition that because the AIR 21 Burden-Shifting Framework specifically imposes a higher, clear and convincing evidentiary standard to test the respondent's affirmative defense, such evidence cannot be held to meet the lower preponderance of the evidence standard, and therefore cannot be introduced to rebut the complainant's *prima facie* case. Specifically, the *Fordham* majority opinion states:

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

*Fordham*, 2014 WL 5511070 at *16 (italics in original, underscore supplied). As the *Fordham* opinion observes, failing to make this distinction would render Congress's efforts to ensure that employers prove their affirmative defense by clear and convincing evidence "meaningless." *Id.* at *15.

The distinction that the *Fordham* majority draws here is far more modest than the dissent's characterization of it:

> As I understand the majority opinion, it requires the ALJ to ultimately decide whether protected activity contributed to Fannie Mae's decision to fire her without considering the reasons Fannie Mae provides for firing her. So, in adjudicating Fordham's accusation that Fannie Mae unlawfully retaliated, the majority prohibits Fordham [*sic*] from arguing that it relied on non-retaliatory reasons for its actions to rebut the accusation of whistleblowing retaliation.

*Id.* at 23 (underscore supplied). The dissent's concern should be allayed. Again, the majority specifically invites an ALJ to consider an employer's evidence challenging the elements of the complainant's contributing factor evidence establishing protected conduct, an adverse action, and the credibility of the complainant's causation evidence, but merely requires that evidence supporting the employer's affirmative defense be measured against the higher evidentiary standard (as required by the statute).

The *Fordham* opinion faithfully follows the plain language of the statute. The full Board should embrace the *Fordham* majority's decision.

#### 2. *Fordham* is Consistent with the AIR 21 Framework's Legislative History

The AIR 21 retaliation framework that Congress embedded in SOX has its roots in the WPA retaliation framework. Before Congress enacted the WPA, which only covers employees of the federal government, a whistleblower had to establish that her protected disclosure "constituted a 'significant' or 'motivating' factor in the agency's decision to take the personnel action." *Marano*, 2 F.3d at 1140 (citing *Clark v. Dep't of Army*, 997 F.2d 1466, 1469–70 (Fed. Cir. 1993)). When Congress enacted the WPA in 1989, it "substantially reduc[ed]" a whistleblower's burden to establish her case, and sent "a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistleblowing." *Id.* at 1140 (citing 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)). The WPA replaced the previous onerous requirements with the more manageable "contributing factor" burden. *Id.* Congress, in an oft-quoted explanatory statement, characterized a "contributing factor" as "*any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.* This test is specifically intended to overrule existing case law,

which requires a whistleblower to prove that his protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action." 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20) (emphasis added). Indeed, the legislative history of the WPA emphasizes that "any" weight given to the protected disclosure, either alone or even in combination with other factors, can satisfy the "contributing factor" test. *Marano*, 2 F.3d at 1140. As the Federal Circuit noted in a seminal decision discussing the WPA burden-shifting framework, Congress specifically intended to hold agencies to a higher burden because whistleblowers are at a severe disadvantage in proving whistleblower retaliation:

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

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

This approach has been followed by a number of federal courts (including the Third, Fifth, Ninth, Tenth, and Eleventh Circuits) in WPA, AIR 21 and SOX cases. *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1136 (10th Cir. 2013), citing *Allen*, 514 F.3d at 476 n. 3 ("contributing factor" test is "broad and forgiving" and is satisfied by "any factor, which alone, or in combination with other factors, tends to affect in any way the outcome of the

decision."); *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254,*263. *See also, Wiest v. Lynch,* 15 F. Supp. 3d 543, 561-565 (E.D. Pa. 2014).[2]

As the *Fordham* majority correctly notes, the AIR 21 Burden-Shifting Framework is ultimately modeled after the burden of proof provisions in the WPA, and the ARB therefore often relies on opinions construing the identical burden-shifting framework in the WPA. *Fordham*, at *19 (citing *Bechtel v. Competitive Tech., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, 2011 WL 4915751, at *18, n.124 (ARB Sept. 30, 2011) (noting that SOX incorporates AIR 21's burdens of proof which were ultimately "modeled after" the WPA); *Kester v. Carolina Power and Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, (ARB Sept. 30, 2003) 2003 WL 25423611, at *8, fn.15); *see also Powers v. Pinnacle Airlines, Inc.*, ALJ No. 2003-AIR-12, 2003 WL 25840846, at *12 (DOL Adm. Rev. Bd. Dec. 10, 2003) (observing that ERA and WPA jurisprudence is persuasive authority in AIR 21 cases). Despite the dissent's objections, this history makes clear that the *Fordham* majority appropriately relied on case law construing a WPA claim. *Kewley v. Dep't of Health & Human Servs.*, 153 F.3d 1357 (Fed. Cir. 1998).

This legislative history of AIR 21 underscores that Congress has gone to great lengths to ensure that the first phase of the AIR 21 Burden-Shifting Framework focuses solely on the isolated question of whether the complainant could credibly demonstrate whistleblower retaliation. This is particularly evident in the definition of "contributing factor" as "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the

[2] *Cf. Kuduk v. BNSF Ry. Co.,* 768 F.3d 786, 792 (8th Cir. 2014) (acknowledging "the more lenient 'contributing factor' causation standard," but finding under the circumstances of that case that evidence of "temporal proximity" alone was not sufficient because the employee "was on disciplinary probation" when he engaged in protected activity and also finding that employer had demonstrated by clear and convincing evidence that it would have discharged employee).

decision." 135 Cong. Rec. 5033 (1989). As the *Fordham* opinion correctly observes, if an employee must only connect her protected conduct with the outcome of the adverse decision during the *prima facie* phase, the employer's evidence of a legitimate reason outside the employee's contributing factor showing is inapposite at that point in the burden-shifting framework. The *Fordham* opinion is faithful to AIR 21's legislative history and Congressional intent behind the whistleblower protection laws to which it has extended the framework.

### 3. *Fordham* is Consistent with ARB Precedent Addressing the Proper Treatment of the Respondent's Evidence in the AIR 21 Burden-Shifting Framework

The *Fordham* majority is in line with Board precedent requiring an employer's evidence supporting its affirmative defense to meet the clear and convincing standard. The ARB's decision in *DeFrancesco* is instructive. In that case, a railroad terminated an employee after the employee, DeFrancesco, reported a work-cite injury. *DeFrancesco*, 2012 WL 694502 at *1. DeFrancesco's injury report prompted his supervisors to review his disciplinary and safety records, and they suspended him for 15 days without pay based on that review. *Id.* at *2. The ALJ held that DeFrancesco failed to meet his contributing factor showing because he had not adequately shown that his supervisors' alleged reasons for suspending him were pretextual. *Id.* The ARB correctly reversed the ALJ's finding and remanded the case with instructions for the ALJ to consider the railroad's affirmative defense that it would have terminated DeFrancesco anyway, and to weigh those contentions using the clear and convincing standard. *Id.* Although the *DeFrancesco* decision discusses the ALJ's error as one of imposing an undue burden on the complainant to show pretext, the ARB's corrective analysis is instructive because it enacts the

proper analysis prescribed by *Fordham* and carefully preserves the respondent's affirmative defense evidence for the clear and convincing phase.

The ARB observed that if DeFrancesco had not reported his injury, his supervisor would never have reviewed DeFrancesco's safety or his employment records and that the injury as the "root cause" of the review was sufficient to establish contributing factor causation. *Id.* at *4. The ARB reaches this conclusion without considering evidence the railroad offered to the ALJ showing that it concluded that DeFrancesco's conduct violated workplace safety and union rules. *Id.* at *1. The railroad argued on appeal that even if DeFrancesco could establish that his protected activity of reporting the injury contributed to the adverse action, Union would have suspended him in the absence of such activity. *Id.* at *4. The ARB declined to consider that argument, however, because the ALJ had not yet weighed that evidence by the "more rigorous" clear and convincing standard, and rightly remanded the case to the ALJ so that he could perform the proper analysis on evidence of the respondent's affirmative defense. *Id.* at *3.

With this analysis, the ARB models the appropriate contributing factor analysis: DeFrancesco successfully demonstrated that his protected conduct was a contributing factor in his termination, a conclusion the ARB reaches without regard for any explanation the railroad offered concerning its alleged legitimate, non-retaliatory reason for the adverse action. The analysis the ARB undertook in *DeFrancesco* is precisely the fair and proper one elucidated in *Fordham.*

The next year, the ARB explicitly applied this analysis in *Hutton*, 2013 WL 2450037, at *8. In *Hutton*, the railroad claimed it terminated an injured employee, Hutton, for allegedly failing to comply with the railroad's vocational rehabilitation program. *Id.* at *3. Like the

*DeFrancesco* decision, the ALJ held that Hutton successfully showed that reporting his injury was protected conduct that contributed to his termination. *Id.* at *8. However, the ALJ erroneously ruled that the railroad had articulated a legitimate business reason for its action and Hutton had therefore failed to make his *prima facie* showing. *Id.* at *8. This analysis "short-circuited" the AIR 21 burden allocation, because the ALJ did not assess whether the railroad proved its legitimate, non-retaliatory reasons by clear and convincing evidence. *Id.* at *9.

In *Hutton*, because the ALJ improperly considered evidence of the railroad's affirmative defense during the preponderance of the evidence phase, and held that such evidence defeated Hutton's contributing factor showing, the ALJ failed to perform the necessary clear and convincing analysis. *Id.* at *9. The ARB correctly remanded the case to the ALJ with instructions to perform the full analysis. *Id.* at *9. The next year, the concurrence to the *Bobreski v. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003, 2014 WL 4389968, at *21 (ARB Aug. 29, 2014) (Royce, ALJ concurring) decision, highlights the need for clarification on this issue. The concurrence summarizes the position that the *Fordham* opinion expounds, stating "The ALJ erred by weighing Givoo's rebuttal evidence, pertaining to its alleged legitimate business reasons, against Bobreski's causation evidence at the first 'contributing factor' stage of the ERA whistleblower framework." *Id.*

The *Fordham* majority, therefore, outlines an approach that is consistent not only with ARB precedent, but, as the *Fordham* majority notes, that is also in step with federal court jurisprudence on the proper burden-shifting analysis under related statutes. *See Fordham*, at *20 (citing *Kewley v. Dep't of Health & Human Servs.*, 153 F.3d 1357 (Fed. Cir. 1998)).

## D. <u>The Dissent's Analysis Relies in Part on Case Law that is Inapposite</u>

The dissent in *Fordham* argues that the ARB has never held that "the employer's reasons cannot or should not be considered in deciding whether protected activity contributed to an unfavorable employment action," *Fordham*, 2014 WL 5511070 at *23, fn.106. To support that point, however, the dissent cites to cases that require closer scrutiny: *Onysko v. Utah, Dep't of Envtl. Quality*, ARB No. 11-023, ALJ No. 2009-SDW-004, 2013 WL 499361 (ARB Jan. 23, 2013) and *Benninger v. Flight Safety Int'l*, ARB No. 11-064, ALJ No. 2009-AIR-022, 2013 WL 1182312 (ARB Feb. 27, 2013).

The *Onysko* case arises under the Safe Drinking Water Act (SDWA). To prevail on an SDWA claim, the complainant must show that the protected activity was a "motivating or substantial factor" in an unfavorable employment action based on the record as a whole. *Onysko*, 2013 WL 499361, at *1. As *Marano* instructs, a motivating factor showing is much higher than the contributing factor at issue in AIR 21 retaliation. *See Marano*, 2 F.3d at 1140. More pressing here, parties to SDWA cases are each only required to make their showings by a preponderance of the evidence. As the controlling regulation states:

> [A] determination that a violation has occurred may only be made if the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint. If the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint, <u>relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity</u>.

29 C.F.R. § 24.109 (underscore supplied). The *Onysko* decision, therefore, does not offer an analysis of the same issue presented in *Fordham*; it addresses a claim under a completely separate burden-shifting framework and it is not controlled by the contributing factor test.

The dissent also offers *Benninger* as an example of a case where the ARB affirmed an ALJ's rejection of the complainant's causation showing based on the employer's reasons for terminating the employee weighed under the preponderance of the evidence standard, rather than the clear and convincing standard. However, it is not clear that the ARB performed the analysis in the way the dissent suggests. In *Benninger*, a flight instructor complained that his employer had violated and important safety regulation in October 2007. *Benninger*, 2013 WL 1182312, at *2. The employer investigated, but found no evidence of the violation. *Id.* The next month, the employer terminated Benninger's employment for allegedly falsifying a training schedule document, events which unfolded during the period from November 26-29. *Id.* at *1, fn.2, *2. The employer offered the November incidents as its legitimate, non-retaliatory reason for terminating Benninger. *Id.* at *2. The ARB disapproved of the ALJ's characterization of the events of November 26 to 29, 2007 as "intervening events" that "sever[ed] the temporal connection between the protected activity and the termination." *Id.* at *2, fn.2. Even so, the ARB ultimately approved of the ALJ's conclusion that Benninger failed to adequately show causation between his protected conduct and termination because "the ALJ's opinion, as a whole, considered all of Benninger's evidence and concluded that there was no causal link between his protected activity and the adverse actions." *Id.* at *2. This would seem to comport with, rather than undercut, the *Fordham* opinion. The *Benninger* panel disapproved of the ALJ's consideration of the "intervening events" that constituted the employer's affirmative defense, but

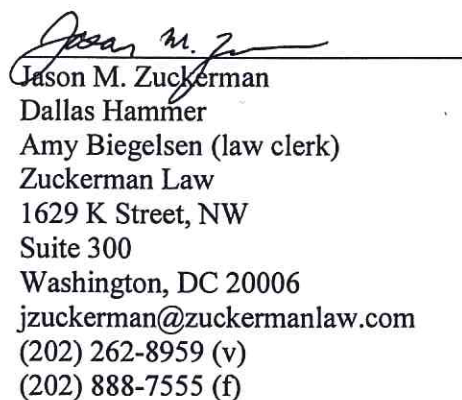
held that because the ALJ's decision was the same based on a complete review of only Benninger's evidence of causation, the error was harmless.

Although the dissent attempts to offer Board precedent showing that the Board allows employer's reasons to be considered in deciding whether protected activity contributed to an unfavorable employment action, the authority it offers does not, in fact, support that assertion.

## IV. CONCLUSION

The ARB has worked to clarify that AIR 21 imposes a rubric that is fundamentally distinct from Title VII's burden-shifting scheme. The *Fordham* decision synthesizes important clarifications, and correctly concludes that a respondent-employer's affirmative defense evidence may only be weighed by the clear and convincing standard, but evidence directly rebutting the complainant's contributing factor showing may be introduced during the *prima facie* phase and weighted under the preponderance of the evidence standard. This conclusion is faithful to the plain language of SOX, the legislative history behind it, and the Board's treatment of AIR 21 retaliation statutes. The full Board should uphold the *Fordham* majority.

Respectfully submitted by:



Jason M. Zuckerman
Dallas Hammer
Amy Biegelsen (law clerk)
Zuckerman Law
1629 K Street, NW
Suite 300
Washington, DC 20006
jzuckerman@zuckermanlaw.com
(202) 262-8959 (v)
(202) 888-7555 (f)

Counsel for *Amici Curiae*

**CERTIFICATE OF SERVICE**

I certify that a true copy of the foregoing Brief of *Amici Curiae* was served by regular mail on the following persons on this 17th day of December, 2014:

Robert Powers
5588 Andrea Avenue
Eugene, OR 97402

James R. Ferguson
Law Office of H. Chris Christy, PA
201 West Broadway, Ste. G12
North Little Rock, AR 72114

Union Pacific Railroad Co.
5424 SE McLoughlin Blvd
Portland, OR 97202

Joseph Corr, Esq.
Tim Wackerbarth, Esq.
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-2338

Rami Hanash, Esq.
Union Pacific Railroad Co.
Legal Department-MS 1580
1400 Douglas Street
Omaha, NE 68179-1580

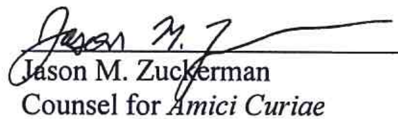
Bruce Brown
Associate Regional Solicitor
US DOL/Office of the Solicitor
300 5th Avenue, Suite 1120
Seattle, WA 98104-2397

Associate Solicitor
Division of Fair Labor Standards
Office of the Solicitor
U.S. Department of Labor
200 Constitution Avenue, N.W., Room N-2716
Washington, D.C. 20210

Director of Enforcement Programs
U.S .Department of Labor/OSHA
Room N-3112, FPB
200 Constitution Avenue, N.W.
Washington, DC 20210

Hon. Steven B. Berlin
Administrative Law Judge
Office of Administrative Law Judges
90 Seventh Street. Suite 4-800
San Francisco, CA 94103-1516

Hon. Stephen L. Purcell
Chief Administrative Law Judge
Office of Administrative Law Judges
800 K Street, N.W., Suite 400
Washington, DC 20001-8001



Jason M. Zuckerman
Counsel for *Amici Curiae*