



In the Matter of:

ROBERT POWERS,

ARB CASE NO. 13-034

COMPLAINANT,

ALJ CASE NO. 2010-FRS-030

v.

DATE: OCT 17 2014

UNION PACIFIC RAILROAD COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

James Ferguson, Esq.; *Law Office of H. Chris Christy*, North Little Rock, Arkansas

For the Respondents:

Tim D. Wackerbarth, Esq.; and Joseph P. Corr, Esq.; *Lane Powell PC*, Seattle, Washington

ORDER SETTING EN BANC REVIEW

By notice dated February 4, 2013, the Administrative Review Board accepted Complainant Robert Powers's petition for review of Administrative Law Judge (ALJ) Steven B. Berlin's Decision and Order Denying Claim issued January 15, 2013. The Board received a brief from Powers and a response brief from the Respondent Union Pacific Railroad Company, including supporting appendices respectively, as well as Complainant's Notice of Additional Authority and a corresponding response from Union Pacific. Subsequently, the Board issued its decision in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (Oct. 9, 2014), which addressed a fundamental issue pertaining to "contributory factor" causation that the parties have not had the opportunity to address, should it be relevant to the resolution of this appeal. (The Board's *Fordham* opinion is available at <http://www.dol.gov/arb/welcome.html>). Consequently, given the widespread impact of the causation issue *Fordham* addressed, the Chief Administrative Appeals Judge has determined that this appeal should be heard en banc.

Accordingly, it is **ORDERED** that:

This appeal will be reviewed en banc. The parties are requested to file supplemental briefs that should address the “contributory factor” analysis addressed in *Fordham*, to the extent the parties consider it relevant to the resolution of *Powers*. The majority in *Fordham* held that under statutory burdens of proof that are imposed upon the parties contained in the 49 U.S.C.A. § 42121(b), incorporated into the whistleblower protection provisions of the Sarbanes-Oxley Act (SOX)(18 U.S.C.A. § 1514A) and the FRSA (49 U.S.C.A. § 20109), “the determination of whether a complainant has met his or her initial burden of proving that protected activity was a contributing factor in the adverse personnel action at issue is required to be made based on the evidence submitted by the complainant, in disregard of any evidence submitted by the respondent in support of its affirmative defense that it would have taken the same personnel action for legitimate, non-retaliatory reasons only. Should the complainant meet his or her evidentiary burden of proving “contributing factor” causation, the respondent’s affirmative defense evidence is then to be taken into consideration, subject to the higher “clear and convincing” evidence burden of proof standard, in determining whether or not the respondent is liable for violation of SOX’s whistleblower protection provisions.” *Fordham*, slip op. at 3. The majority reversed the ALJ’s finding on causation because “[i]n concluding in this case that Fordham failed to prove by a preponderance of the evidence that protected activity was a contributing factor in the adverse personnel action at issue, the ALJ relied on the evidence Fannie Mae introduced supporting its contention of legitimate, non-retaliatory reasons for its action. In weighing Fannie Mae’s causation evidence against Fordham’s evidence of causation in disregard of the statutory differentiation in the respective burdens of proof required of the parties, the ALJ committed reversible error.” *Fordham*, slip op. at 34.

This appeal will be heard en banc on the basis of the original briefs, including the supporting appendices and other pleadings, and supplemental briefs filed in response to this order. The parties shall file simultaneous supplemental briefs, which are due on or before **December 17, 2014**. No extensions of time or additional briefing will be permitted. The parties shall file with the Board an original and five copies of the supplemental briefs, not to exceed thirty (30) double-spaced typed pages and shall simultaneously serve a copy of the supplemental brief upon the opposing party, and file a certification of such service with the Board.

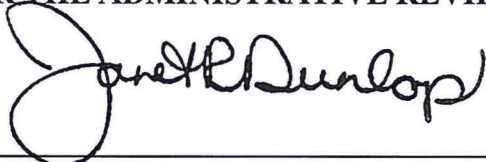
We invite the filing of simultaneous amicus briefs from any interested parties, including the Assistant Secretary, Occupational Safety and Health Administration, addressing the issue set forth above and any other relevant issues, which shall also be due on or before **December 17, 2014**, and comply with the requirements noted for the parties’ supplemental briefs.

The parties’ supplemental briefs and any amicus briefs should be prepared in typographic scalable 12 point, 10 character-per-inch type or larger, double-spaced with minimum one inch left and right margins and minimum 1.25 inch top and bottom margins, printed on 8½ by 11 inch paper. If a brief fails to comply with the requirements of this briefing order, the Board may refuse to accept the brief.

All supplemental briefs of the parties and any amicus briefs shall be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-5220, Washington, D.C., 20210.

If determined to be necessary, oral argument of no more than two (2) hours will be held on Wednesday, **January 14, 2014**. The Board will subsequently issue a further, more detailed order regarding the procedures for the oral argument.

FOR THE ADMINISTRATIVE REVIEW BOARD:



Janet R. Dunlop
General Counsel

**NOTE: Questions regarding any case pending before the Board should be directed to
the Board's Paralegal Specialists: Telephone: (202) 693-6200
Facsimile: (202) 693-6220**