NOT RECOMMENDED FOR PUBLICATION

No. 21-3857

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEROME YELDER, Petitioner, v. U.S. DEPARTMENT OF LABOR, ADMINISTRATIVE REVIEW BOARD, Respondent, and NORFOLK SOUTHERN RAILWAY COMPANY, Intervenor.	)	ON PETITION FOR REVIEW FROM THE UNITED STATES DEPARTMENT OF LABOR

O R D E R

Before: NORRIS, McKEAGUE, and MATHIS, Circuit Judges.

Jerome Yelder, proceeding pro se, petitions for review of an Administrative Review Board (ARB) order affirming an administrative law judge's (ALJ) findings that Yelder's protected activity was not a contributing factor in Norfolk Southern Railway Company's decision to terminate his employment. Yelder also moves to proceed in forma pauperis, to correct exhibit evidence, and to file a "chronology of occurrence." Norfolk Southern has filed a brief as an intervenor, opposing Yelder's petition. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). Because substantial evidence supports the ARB's decision, we deny the petition for review.

Factual and Procedural Background

Yelder began working for Norfolk Southern as a conductor in 2011. On April 21, 2017, Yelder and a co-worker, James Jackwak, had just completed an assignment and got into a Professional Transportation, Inc. (PTI) taxi contracted by Norfolk Southern to take them to their hotel. Shortly into the drive, Yelder, who was in the front passenger seat, believed that the PTI driver was driving in the wrong direction and became concerned when he asked three times if the driver was taking them to their hotel and the driver did not respond. Yelder and the driver then physically struggled with one another as Yelder attempted to grab the taxi's two-way radio and steering wheel and remove the key from the ignition. During the struggle, Yelder admittedly shoved the driver in the chest. The driver then stopped the taxi. Once stopped, Yelder reached over and turned the taxi's ignition off. Yelder and Jackwak then exited the taxi and were taken to their hotel by a new driver.

Yelder reported the incident to Jerry Simon, a Norfolk Southern trainmaster at the time, as well as to the local police. In June 2017, after an investigation and hearing, Norfolk Southern terminated Yelder's employment for violating Norfolk Southern Safety Rule 900, which prohibits employees from engaging in conduct that "would be considered offensive or inappropriate by co-workers, customers, or the public."[1]

Yelder then filed a complaint[2] with the Occupational Safety and Health Administration (OSHA) against Norfolk Southern under the whistleblower protection provision of the Federal Railroad Safety Act (FRSA), 49 U.S.C § 20109. He asserted that Norfolk Southern terminated his employment because he reported the PTI driver's conduct, which was a hazardous safety or security condition. He later asserted during the investigatory hearing that he was terminated because he had reported a psychological injury arising out of the incident. In response, Norfolk

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[1] Yelder was reinstated effective January 2, 2019, but he did not return to work.

[2] Yelder also filed a federal employment discrimination action, alleging racial discrimination and retaliatory termination. We affirmed the district court's grant of summary judgment to Norfolk Southern. *Yelder v. Norfolk S. Ry. Co.*, No. 21-1141, 2022 WL 18587845 (6th Cir. Aug. 12, 2022).

Southern claimed that it terminated Yelder's employment because he had violated Safety Rule 900 by striking the driver. After an investigation, OSHA found no reasonable cause to believe that Norfolk Southern violated the FRSA. A hearing was then held before the ALJ at Yelder's request. The ALJ found that Yelder did not give a good-faith notice or attempted notice of his psychological injury to Norfolk Southern, that Yelder did not show that his protected activity of reporting the driver's behavior was a contributing factor in his termination, and that Norfolk Southern would have terminated Yelder in the absence of his protected activity of reporting the driver's behavior. The ARB affirmed, concluding that substantial evidence supported the ALJ's findings that Yelder's report of his psychological injury was not protected activity and that his protected activity of reporting the driver's behavior was not a contributing factor in the termination of his employment.

Standard of Review and the FRSA

We may overturn a decision of the ARB only if it is unsupported by substantial evidence, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. *Sasse v. U.S. Dep't of Labor*, 409 F.3d 773, 778 (6th Cir. 2005). "[S]ubstantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *ITT Auto. v. NLRB*, 188 F.3d 375, 384 (6th Cir. 1999)). This is a highly deferential standard of review, and we must uphold the ARB's findings even if we would have reached a different conclusion on de novo review. *Yadav v. L-3 Commc'n Corp.*, 462 F. App'x 533, 536 (6th Cir. 2012) (citing *NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 255 (6th Cir. 2000)). We review the ARB's legal determinations de novo. *See Bureau of Alcohol, Tobacco & Firearms v. Fed. Lab. Rel. Auth.*, 464 U.S. 89, 97 n.7 (1983).

The FRSA prohibits a railroad from discharging or retaliating against an employee who has, in good faith, engaged in a protected activity. *See* 49 U.S.C. § 20109(a). An employee engages in a good-faith protected activity if he provides information that he "reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security" to a "person who has the authority to investigate, discover, or terminate the misconduct."

49 U.S.C. § 20109(a)(1)(C). To establish a retaliation claim under the FRSA, "an employee must show that (1) he engaged in protected activity; (2) the employer knew that he engaged in protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action." *Consol. Rail Corp. v. U.S. Dep't of Labor*, 567 F. App'x 334, 337 (6th Cir. 2014). Once the employee makes a prima facie case that the protected activity was a contributing factor to the unfavorable personnel action, the employer must prove "by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected behavior." *Id.* (quoting 29 C.F.R. § 1982.109(b)).

Analysis

Protected Activity – Alleged Psychological Injury

Yelder's claim that Norfolk Southern terminated him because he reported a psychological injury resulting from his encounter with the PTI driver fails to meet the first and second elements of a retaliation claim because he did not show that he engaged in a protected activity, which requires an employee to report a work-related injury in good faith. *See* 49 U.S.C. § 20109(a)(4); *Grimes v. BNSF Ry. Co.*, 746 F.3d 184, 186 (5th Cir. 2014) (per curiam). Yelder testified at his deposition that he "never reported any injury to Norfolk Southern" before his termination and testified before the ALJ that he did not inform Norfolk Southern "of his symptoms" (including PTSD, depression nightmares, loss of appetite, and panic and anxiety attacks) until his dismissal hearing because he had not "been officially diagnosed with those conditions until after the fact." This led the ALJ to find that Yelder "either did not know that his symptoms (inability to sleep and nightmares) were the result of an injury or that he did not consider himself injured at the time of [Norfolk Southern]'s investigatory hearing because he had not been diagnosed with an injury at that point in time," and without actual knowledge that he had suffered an injury during the relevant time, his alleged "report of injury was not made in good faith" and thus "was not protected activity under the FRSA." Yelder does not attempt to rebut these findings on appeal. Indeed, he concedes that he did "not inform[] Norfolk Southern that [he] had suffered an injury," claiming that "[s]evere PTSD cannot be diagnosed in the immediate" and that he "wasn't officially diagnosed until [his]

psychiatrist observed that [his] symptoms were lingering without any improvement *months later*." Substantial evidence therefore supports the ARB's conclusion that Yelder did not show that he reported his alleged psychological injury to Norfolk Southern so as to render that reporting a protected activity.

Contributing Factor – Reporting of PTI Driver's Behavior

Substantial evidence also supports the ARB's conclusion that Yelder did not show that his protected activity of reporting the PTI driver's behavior was a contributing factor in his termination. A "contributing factor" is one that "alone or in connection with other factors, tends to affect in *any* way the outcome of the decision." *Consol. Rail Corp. v. U.S. Dep't of Lab.*, 567 F. App'x 334, 338 (6th Cir. 2014) (emphasis added) (quoting *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013)). In other words, here, Yelder "cannot prevail if the railroad would have fired him anyway." *Lemon v. Norfolk S. Ry.*, 958 F.3d 417, 419 (6th Cir. 2020).

During the two-day hearing, the ALJ heard testimony from Yelder, Jackwak, and Simon, as well as from four Norfolk Southern agents, all of whom reviewed the relevant investigatory documents, including Yelder's and Jackwak's written statements and the accident reports. In particular, the ALJ heard from (1) Yelder's supervisor, who testified about his involvement in the investigation of the incident as Norfolk Southern's charging officer, including his interviews with Yelder and Simon; (2) a superintendent, who served as the hearing officer and who recommended that Yelder be terminated in accordance with Norfolk Southern's discipline policy because Yelder admittedly struck the driver and tried to take control of the taxi while it was in motion and thus the charge of violating Safety Rule 900 "was proven in [Yelder's] own words"; (3) the superintendent's supervisor, who agreed that Yelder should be terminated under the discipline policy because he admittedly and inexcusably struck someone, concluding that "all the facts" gathered during the investigation "supported . . . the charges"; and (4) the assistant director of labor relations, who determined that Norfolk Southern had proven its case, agreed with the decision to terminate Yelder because Yelder "went from no issue to essentially assaulting the driver of a

moving vehicle," and noted that the discipline was comparable to that imposed on past employees who had been charged with physical altercations. Both the superintendent and his supervisor testified that Norfolk Southern would have handled the incident in the same way—i.e., it would have terminated Yelder—had the incident been reported by PTI instead of Yelder. The ALJ found these witnesses credible, determined that Norfolk Southern's investigation was reasonable, and concluded that, based on all of the testimony and documentary evidence concerning the incident and investigation, "Yelder's protected activity played no part in [Norfolk Southern]'s decision to take adverse employment actions against him." The ARB agreed.

Yelder offers no meaningful argument to the contrary. He raises only a handful of assertions that arguably relate to the pertinent "contributing factor" analysis regarding his report of the taxi driver's behavior, and we reject them all.[3] First, Yelder argues that the PTI driver "struck [him] first, twice" and that he "never punched" the driver. But Yelder never previously alleged or testified that the driver struck him first, and the ALJ did not erroneously state that Yelder "punched" the driver; instead, the ALJ explained that Yelder admittedly initiated a "physical altercation" with the driver and thus "it is of no consequence whether Yelder 'struck' the driver."

Second, Yelder stresses that Simon urged him not to report the incident to police. But Yelder ultimately did so on his own accord, and his claim that he was "coerced" into making a police report is unconvincing. And Simon had no decision-making authority with respect to Yelder's discipline, so the fact that Simon may have discouraged Yelder from reporting the matter to police could not have affected Norfolk Southern's disciplinary decision.

Third, and relatedly, Yelder complains that he was unable to report the incident to Norfolk Southern police. The ALJ acknowledged this fact but determined that Norfolk Southern's "explanation for not involving its own police in the investigation"—i.e., that the local police were already involved—"is credible and does not make [Norfolk Southern]'s investigation

[3] Many of these arguments could be deemed forfeited because Yelder did not raise them in his petition for review to the ARB. *See Formella v. U.S. Dep't of Lab.*, 628 F.3d 381, 390 (7th Cir. 2010). We review them in any event, as we can readily dispose of them.

unreasonable." Inasmuch as another police investigation likely would have been largely duplicative, we agree.

Fourth, Yelder faults Norfolk Southern for neglecting to have a policy to address the situation that he faced and, consequently, argues that Norfolk Southern cannot "justify penalizing someone for not following instructions if [it] did not have them in place to begin with." Although Norfolk Southern does not have a policy in place for the specific and unusual situation Yelder faced, it does have a policy—Safety Rule 900—prohibiting employees from engaging in "offensive or inappropriate" conduct, which Yelder was found to have violated. It also has a disciplinary policy that provides for, among other things, removal from service for a "major offense," including a single altercation, and Norfolk Southern terminated Yelder pursuant to that policy. Although Yelder argues that, under those policies, he "was treated differently than other employees" that "were put in 911 circumstances", he offered no evidence in support. Norfolk Southern, though, offered contrary evidence: the assistant director of labor relations, following review of career service records, identified seven employees who were charged with physical altercations; Norfolk Southern dismissed six and suspended one of them.

Fifth, Yelder complains that the PTI driver did not testify. The record shows that the PTI driver quit immediately following the incident, did not want to be contacted about the incident, and did not return Norfolk Southern's voicemail. Yelder does not claim to have made any effort to locate or subpoena the PTI driver to testify. Nor does he show any error in the ALJ's conclusion that the inability to interview the PTI driver did not render Norfolk Southern's investigation unreasonable.

Finally, Yelder challenges the witnesses' credibility and argues that he was barred from presenting his own facts, evidence, and witnesses. But the ALJ's credibility determinations are afforded "considerable deference," *Howard v. Comm'r of Soc. Sec.*, 276 F.3d 235, 242 (6th Cir. 2002), which Yelder has not overcome. And Yelder has not offered anything of substance to rebut the ALJ's determination that "[a]ll parties were represented by counsel and afforded a full opportunity to present evidence and argument as provided in the" relevant rules. Yelder had

counsel and testified at the hearing, and he does not identify any facts, evidence, or witnesses he wished to present, much less show that they could have affected the outcome of his hearing.

In short, substantial evidence supports the ALJ's findings that Yelder's protected activity played "no part" in his termination and instead that Norfolk Southern terminated Yelder because he engaged in a physical altercation that violated company policies. And because Yelder did not make out a prima facie case of retaliation, we need not address whether Norfolk Southern proved by clear and convincing evidence that it would have terminated Yelder in the absence of his protected activity.

Miscellaneous Arguments on Appeal

Yelder raises a host of arguments that are immaterial to the ALJ's and ARB's findings and ultimate conclusion that his termination did not violate the FRSA. For example, he repeatedly argues that Norfolk Southern discriminated against him on the basis of his race and disability and that the ALJ wrongly presided over his case. But we cannot consider these arguments because Yelder did not raise them before the ALJ or the ARB, *see* 29 C.F.R. § 1982.110; *Joseph Forrester Trucking v. Dir., OWCP*, 987 F.3d 581, 587-90 (6th Cir. 2021), and because many of them are raised for the first time in his reply brief, *see Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010) ("We have consistently held . . . that arguments made to us for the first time in a reply brief are [forfeited]."). And again, they do not bear on the findings made by the ALJ, as affirmed by the ARB.

For all of the foregoing reasons, we **GRANT** the motion for leave to proceed in forma pauperis for purposes of this review only, **DENY** the motions to correct exhibit evidence and to file a chronology of occurrence, *see* Fed. R. App. P. 10(a), and **DENY** the petition for review.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 21-3857

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 20, 2023
DEBORAH S. HUNT, Clerk

JEROME YELDER,

Petitioner,

v.

U.S. DEPARTMENT OF LABOR,ADMINISTRATIVE REVIEW BOARD,

Respondent,

NORFOLK SOUTHERN RAILWAY COMPANY,

Intervenor.

ORDER

BEFORE: NORRIS, McKEAGUE, and MATHIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk