UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

JOHN MOORE, Complainant, v. NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK), Respondent.	ARB Case No. 15-041 ALJ Case No. 2014-FRS-073

RESPONSE OF THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH IN OPPOSITION TO RESPONDENT'S MOTIONS FOR STAY OF REINSTATEMENT PENDING REVIEW AND FOR REMAND TO THE ALJ TO REOPEN THE RECORD

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INTRODUCTION

Pursuant to 29 C.F.R. §§ 18.6(b) and 1982.108(a), the Assistant Secretary of Labor for Occupational Safety and Health files the instant opposition to Respondent's Motions for Stay of Reinstatement Pending Review and for Remand in this matter arising under the whistleblower provisions of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20109. On March 24, 2015, following a hearing, an Administrative Law Judge ("ALJ") found that Amtrak had retaliated against Moore in violation of FRSA and ordered reinstatement and other remedies. *Moore v. Nat'l R.R. Passenger Corp. (Amtrak)*, No. 2014-FRS-00073, slip op. at 24 (ALJ Mar. 24, 2015) ("ALJD"). On April 6, 2015,

Amtrak petitioned the Board for review of the ALJ's decision and, on April 9, filed a Motion for Stay of Reinstatement Pending Review. On April 30, 2015, Amtrak filed a Motion to Remand and Reopen the Record based on New Evidence. The Assistant Secretary hereby responds to Amtrak's Motions for Stay Reinstatement and for Remand pursuant to his authority under 29 C.F.R. § 1982.108(a)(1).

FACTUAL BACKGROUND[1]

Moore was hired at Amtrak as a lineman trainee in the Electric Traction ("ET") department on February 9, 2011. ALJD at 3; Tr. 31-32. His job duties included "moving heavy objects . . . running cable, putting tension on cable" and "blueprint reading." ALJD at 3; Tr. 34. The training consisted of a two-year program, the first six months of which were probationary. ALJD at 3; Tr. 160-61. The first five or six weeks are referred to as basic training. ALJD at 3; Tr. 160-61. During the first six months of the training, trainees went through a number of classroom and field segments, were tested on their skills frequently, and were exposed to different linemen, foremen, and tasks. ALJD at 4; Tr. 39-42, 164. Amtrak ended Moore's employment on August 1, 2011, shortly before the end of Moore's probationary period. ALJD at 9; Tr. 91.

[1] The Factual Background is based on the findings of fact stated in the ALJ's March 24, 2015, Decision and Order.

Moore testified that his basic training instructors, Mark Wojcik and Timothy McNulty, told him and the rest of his class during basic training, "when you hurt yourself as a trainee, you will be automatically terminated." ALJD at 4; Tr. 40. Moore's testimony was supported by Elijah Barclay, a former Amtrak employee, who testified that during his basic training in 2009, a supervisor told him and his classmates they would be fired if they reported an injury during their probationary period. ALJD at 4; Tr. 278, 288. Similarly, Gregory Garmon, Sr., an Amtrak employee who worked with Moore in the field, testified that Amtrak would tell trainees they would be terminated if they had an injury. ALJD at 4; Tr. 334-35.

The instructors in Moore's training class, Wojcik and McNulty, and the other trainees in Moore's training class—Jared Sheldon, Dan Meehan, and Daniel Rockett—testified that trainees were not told they would be terminated for reporting injuries. ALJD at 4-5. Michael Poole, Amtrak's assistant division engineer for the ET department, ALJD at 2, also testified that Amtrak's policy prohibited supervisors from retaliating against workers for reporting injuries, Tr. 158-59. All of Respondent's witnesses were current Amtrak employees. ALJD at 20.

Moore testified that, on May 27, 2011, he injured his shoulder while working for Amtrak. ALJD at 6; Tr. 51, 54. It was the first time Moore had worked in that region of the

railroad, and he had not yet completed a course called "characteristics," where trainees are taught the distinguishing features of each section of the railroad. ALJD at 6; Tr. 49-51. Moore reported the injury to his supervisors verbally on the date of the injury and, on or about June 5, 2011, he filed an accident report. ALJD at 6-7; Tr. 55-56, 63-64, 157.

Following Moore's injury, Poole and another Amtrak supervisor, Steve Nazarenus, called Moore for a meeting to discuss the injury. ALJD at 7; Tr. 62-63, 182. During the meeting, Moore "placed himself at three different locations" at the time of the injury. ALJD at 7; Tr. 182, 184. There was no discussion of job performance at the meeting. ALJD at 7; Tr. 64. Amtrak treated the injury as work-related. Tr. 139.

Poole's responsibilities included overseeing the recruitment and retention of new employees and recommending which trainees to retain or terminate at the end of the probationary period. ALJD at 8; Tr. 187; Resp't Exh. 6. Poole would submit his recommendation to George Fitter, the division engineer, who made the final decision whether to terminate an employee. ALJD at 9; Tr. 187-88. Poole was not required to cut anyone from the training class, however. ALJD at 8; Tr. 220. To inform Poole's recommendation, supervisors completed evaluations of the trainees in June and July, 2011, which Poole turned into a numerical value of each trainee's performance.

ALJD at 8; Tr. 164-67, 214-15. Poole testified that he used 50% as a threshold to determine who would make the cut, and that Moore's training class was the first time this system was used. ALJD at 8; Tr. 168, 218. He also stated that he did not treat the evaluations as "gospel"; rather, he would follow up with supervisors to ensure the evaluations were accurate. Tr. 193.

Poole received five evaluations for Moore dated June 6, June 7, and July 28, 2011. Resp't Exh. 14. The evaluations noted Moore's lack of interest and poor communication skills. *See id.* They also consistently rated Moore's attendance as "satisfactory," but Poole did not compare the reviews against Moore's attendance records. ALJD at 23 n.4; Tr. 198. Poole also testified that, in early July, he witnessed Moore using an iPod in class. ALJD at 7-8. While he never raised this incident with Moore, ALJD at 8; Tr. 81-82, this incident suggested to Poole that Moore was disengaged with the program, Tr. 177-78.

Poole recommended that Moore, whose score of 48.85% was the lowest in the class, should be terminated. *See* ALJD at 9-10; Resp't Exh. 14. Based on Poole's recommendation, Moore was terminated on August 1, 2011. ALJD at 9; Tr. 91. Moore was the only trainee terminated. *See* ALJD at 10; Tr. 84. Daniel Rockett, the trainee with the second lowest score of 55.67%, was warned that his performance needed to improve, but he was not terminated. *See* ALJD at 10; Tr. 168-69; Resp't Exh. 14.

Moore testified that he received no negative feedback on his job performance between February and July 2011. ALJD at 8; Tr. 77-78. Moreover, he received high scores on tests during training, and he always arrived to work early. Tr. 39-40, 51. Moore also stated that he was allowed to use his iPod on the date referenced by Poole. ALJD at 7-8; Tr. 82. He claimed that there was another trainee whose frequent use of electronics was known to Amtrak and that trainee was not fired. Tr. 82-84.

ALJ's DECISION AND ORDER

Following a two-day trial, the ALJ found that Moore established a claim for retaliation under FRSA. Specifically, the ALJ found that Moore engaged in protected activity when he reported his work-related injury to Amtrak. ALJD at 15. Relying on the record evidence and his credibility determination of the witnesses before him, he also found that Moore's protected activity was a contributing factor in Amtrak's decision to issue him negative performance evaluations and terminate him. *Id.* at 3. The ALJ credited Moore's corroborated testimony that his training instructors told his class they would be fired if they reported an injury. *Id.* at 19. The ALJ rejected Amtrak's argument that there was no retaliation because Moore failed to establish Amtrak knew of the injury report, as it was undisputed that Poole made the recommendation to terminate Moore and he had knowledge of the injury report. *Id.*

at 17-18. The ALJ also noted that circumstantial evidence supported Moore's claim and suggested that Amtrak's stated reasons for the dismissal were pretextual. *Id.* at 20.

Lastly, the ALJ found that Respondent failed to establish by clear and convincing evidence that it would have terminated Moore absent his protected activity. *Id.* at 24. Accordingly, the ALJ ordered Amtrak to reinstate Moore to the same position he held with the same terms of employment. *Id.* at 25. The ALJ also awarded back wages from the date of his termination to the present. *Id.* at 26. Moore testified that he had not found regular employment since his termination and presented evidence of is attempts to mitigate his damages. *Id.* at 27. Since Amtrak did not argue that Moore failed to mitigate his damages, no amount was deducted from the calculation of back wages. *Id.* The ALJ also awarded punitive and compensatory damages. *Id.* at 34.

SUMMARY OF THE ARGUMENT

Respondent's motion to stay reinstatement should be denied because Respondent has failed to show that "exceptional circumstances" justify a stay of the reinstatement order pending review. *See* 29 C.F.R. § 1982.110(b). Reinstatement is the default remedy under the FRSA, and Complainant has not waived the remedy because he continues to seek reinstatement and Respondent has failed to make a bona fide offer of reinstatement. Furthermore, a stay is not warranted because

Respondent has not established the elements required for a preliminary injunction. First, Respondent has not shown that it is likely to succeed on the merits of its appeal. The ALJ's factual findings are supported by substantial evidence and his credibility determinations are reasonable. Second, Respondent has not shown that it will suffer irreparable harm by Moore's immediate reinstatement to the same position or a position equivalent to the position Moore held prior to his termination. Respondent argues that Moore would be unsafe if reinstated and that he may not be medically qualified for his former position. However, not only did Respondent fail to raise these concerns to the ALJ, but its concerns are speculative and Respondent has not shown that these concerns cannot be mitigated through means other than a stay of reinstatement. Third, the balance of hardships and the public interest strongly favor upholding the presumptive remedy of immediate reinstatement so that Respondent's workforce will be reassured that workers cannot suffer retaliation for reporting workplace injuries and so that Moore will be relieved of the severe economic consequences of the retaliation that the ALJ found occurred in this case.

Finally, the merits of this case are not sufficiently undermined by Respondent's offering of "newly discovered" evidence that Moore earned some income in 2014 to stay reinstatement and remand the case for the ALJ. The tax return

that Respondent seeks to submit as new evidence reflects nothing more than financial information that Respondent could have sought during pre-hearing discovery and presented at trial.

ARGUMENT

I. REINSTATEMENT IS THE PRESUMPTIVE REMEDY UNDER THE FRSA AND COMPLAINANT CANNOT WAIVE REINSTATEMENT ABSENT A BONA FIDE OFFER OF REINSTATEMENT.

Reinstatement is the presumptive remedy for a retaliatory termination under FRSA. *See* 49 U.S.C. § 20109(e)(2)(A). As under other whistleblower statutes enforced by OSHA, reinstatement is essential to enforcement of the FRSA whistleblower protections "not only because it vindicates the rights of the complainant who engaged in protected activity, but also because the return of a discharged employee to the jobsite provides concrete evidence to other employees that the legal protections of the whistleblower statutes are real and effective." *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, 98-169, 2001 WL 168898, at *6 (ARB Feb. 9, 2001), *aff'd sub nom. Ga. Power Co. v. U.S. Dep't of Labor*, 52 F. App'x 490 (11th Cir. 2002) (table) (analyzing the importance of reinstatement to the whistleblower protections in the Energy Reorganization Act).

Congress enacted the whistleblower provisions of the FRSA to protect railroad carrier employees who engage in whistleblowing related to railroad safety or security. *See* 49 U.S.C. §§ 20101, 20109; U.S. Dep't of Labor, Occupational Safety

& Health Admin., *Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act: Interim Final Rule*, 75 Fed. Reg. 53,522, 53,527 (Aug. 31, 2010). Consistent with Congress's aim of providing a robust remedy for whistleblowers, the FRSA provides that relief ordered by OSHA and the ALJ "shall include reinstatement with the same seniority status that the employee would have had, but for the discrimination." 49 U.S.C. § 20109(e)(2)(A); 29 C.F.R. §§ 1982.105(a)(1), 1982.109(d)(1).[2] The regulations further provide that an ALJ's reinstatement order, which follows a hearing on the record, is effective while the Board conducts its review unless exceptional circumstances justify a stay. 29 C.F.R. § 1982.110(b).

Respondent argues that the Board should stay Moore's reinstatement order because Moore does not seek reinstatement. *See* Resp't Mot. for Stay 3. This argument fails for two reasons. First, Moore has not waived reinstatement. Moore testified that he wanted "a job back at Amtrak, not in the ET department, if it's possible," Tr. 116, and thus unambiguously expressed his desire to be reinstated, even if he also expressed a preference as to the nature of the reinstatement. Second,

[2] The FRSA incorporates by reference the procedures and burdens of the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century at 49 U.S.C. § 42121(b). *See* 49 U.S.C. § 20109(d)(2)(A).

even if Moore's statement suggested he does not want to be reinstated, Respondent's argument fails because an employee cannot waive reinstatement until the employer has made a bona fide offer to reinstate. *See Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, 2005 WL 767133, slip op. at 3 (ARB Mar. 31, 2005). Remarks indicating disinterest in reinstatement are "of little value" when made before such an offer. See *Heinrich Motors, Inc. v. NLRB*, 403 F.2d 145, 150 (2d Cir. 1968). As Amtrak has made no offer of reinstatement, Moore cannot be deemed to have waived reinstatement.

II. RESPONDENT FAILS TO ESTABLISH EXCEPTIONAL CIRCUMSTANCES TO WARRANT A STAY OF REINSTATEMENT.

The Board may stay a reinstatement order only "in the exceptional case . . . where the respondent can establish the necessary criteria for equitable injunctive relief." 75 Fed. Reg. at 53,526 (preamble to 29 C.F.R. § 1982.110). To obtain a stay, the moving party must show that (1) it is likely to prevail on the merits on appeal; (2) it is likely to be irreparably harmed absent a stay; (3) others are unlikely to be harmed if a stay is granted; and (4) the public interest favors granting a stay. *See Bailey v. Consol. Rail Corp.*, ARB Nos. 13-030, 13-033, 2013 WL 1385563, at *2 (ARB Mar. 27, 2013); *Tipton v. Ind. Mich. Power Co.*, ARB No. 04-147, 2007 WL 1935548, at *3-5 (ARB June 27, 2007) (citing *Ohio ex rel. Celebrezze v. Nuclear*

Regulatory Comm'n, 812 F.2d 288, 290 (6th Cir. 1987)); *see also* 75 Fed. Reg. at 53,526. To overcome the presumption in favor of immediate reinstatement, an employer must meet an extremely high burden. *See* 49 U.S.C. § 20109(e)(2)(A); 75 Fed. Reg. at 53,523. Here, Respondent has failed to show that a stay of reinstatement is warranted because it has not shown a likelihood of success on the merits on appeal and the balance of hardships, as well as the public interest, supports Moore's immediate reinstatement.

a. RESPONDENT HAS NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS.

In a FRSA whistleblower case, the complaining employee must show by a preponderance of the evidence that he engaged in a protected activity, that the employer took an adverse employment action against him, and that his protected activity was a contributing factor in the employer's adverse action. 49 U.S.C. §§ 20109, 42121(b)(2)(B)(iii); 29 C.F.R. § 1982.109(a). A contributing factor is any factor that "alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013) (quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). Where, as here, there is no direct evidence that the protected activity was a contributing factor, ALJD at 18-20, the employee must show that the employer had knowledge of his protected activity and may

offer circumstantial evidence such as temporal proximity between the protected activity and the adverse action, *see Ray v. Union Pac. RR. Co.*, 971 F. Supp. 2d 869, 884-85 (S.D. Iowa 2013) (citing *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, 2012 WL 694502, at *3 (ARB Feb. 29, 2012)); *Bobreski v. J. Givoo Consultants*, ARB No. 13-001, 2014 WL 4660840, at *10 (ARB Aug. 29, 2014); *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, 2011 WL 4915751, at *8 (ARB Sept. 30, 2011), *aff'd Bechtel v. Admin. Rev. Bd.*, 710 F.3d 443 (2d Cir. 2013). Once the employee has made that showing, the employer can avoid liability if it shows by clear and convincing evidence that it would have taken the same adverse action absent the protected activity. 49 U.S.C. §§ 20109(d)(2), 42121(b)(2)(B)(iv); 29 C.F.R. § 1982.109(b).

The Board reviews the ALJ's factual findings for substantial evidence. *See* 29 C.F.R. § 1982.110(b). Substantial evidence is "more than a mere scintilla," meaning "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Robinson v. Morgan Stanley*, ARB No. 07-070, 2010 WL 2148577, at *6 (ARB Jan. 10, 2010) (internal quotation marks omitted) (quoting *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998)). The Board "must uphold an ALJ's factual finding that is supported by substantial evidence even if there is also substantial evidence for the other party, and even if we 'would justifiably have made

a different choice had the matter been before us de novo.'" *Robinson*, slip op. at *6 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

The ALJ's factual findings are based on ample evidence in the record as a whole, including testimony from the parties' witnesses and the ALJ's carefully considered credibility determinations, making it unlikely that Respondent will succeed on the merits on appeal. The ALJ found that Moore engaged in protected activity by reporting his work-related injury, suffered an adverse action when he received negative performance reviews and was terminated from Amtrak, and that Moore proved that his injury report contributed to his termination. ALJD at 15, 16, 21. Lastly, the ALJ found that "Amtrak failed to prove that it would have taken the same adverse action in the absence of the protected activity." *Id.* at 3, 22-24.

Respondent argues that it is likely to succeed on the merits because, generally, "there are numerous grounds for reversal of the ALJ's decision that the Respondent terminated the Complainant because he reported an on-duty injury." Resp't Mot. for Stay 1. Specifically, Respondent first argues that "[t]here was no credible evidence to support that claim." *Id.* Contrary to Respondent's argument, the ALJ based his findings on substantial evidence and witnesses' credibility determinations.

The Board defers to the ALJ's credibility findings unless

they are "inherently incredible or patently unreasonable." *See Jeter v. Avior Techs. Operations*, ARB No. 06-035, 2008 WL 592805, slip op. at 12 (ARB Feb. 29, 2008); *Pollock v. Cont'l Express*, ARB Nos. 07-073, 08-051, 2010 WL 1776974, slip op. at 5 (ARB Apr. 7, 2010). In making credibility determinations, ALJs must consider "all relevant factors," including the witnesses' relationship to the parties, motivations, bias, and discrepancies in their testimony. *See Edgewood Nursing Ctr. v. NLRB*, 581 F.2d 363, 365 (3d Cir. 1978); *Bobreski*, slip op. at 16 n.84, 85; *Pollock*, slip op. at 5.

The ALJ considered all relevant factors and concluded that Moore's testimony was credible. ALJD at 14-15, 19. Thus, he placed great weight on Moore's testimony that his work-related injury contributed to his termination. *Id.* at 15. The ALJ considered alleged inconsistencies in Moore's testimony and concluded that those did not detract from his credibility.[3] *Id.* at 14-15. First, Moore's estimate of how quickly he was driving when he suffered an off-duty car accident prior to his work-related injury, which varied between 2 mph and 5-10 mph, was not significant enough to undermine Moore's credibility. *Id.* at 14. Further, Moore's explanation for his confusion about the

[3] While Respondent alleges that "[t]he hearing before the ALJ was riddled with contradictory trial testimony by the Complainant," Respondent fails to identify specific inconsistencies. *See* Resp't Mot. for Stay 2. Absent a showing that the ALJ failed to consider other inconsistencies, Respondent's argument fails.

location of his on-duty injury was reasonable, *id.* at 14-15, and explained by Gregory Garmon, Sr., a lineman with Amtrak for sixteen years, who testified that "[i]t takes years to . . . know exactly where you are" on the railroad, Tr. 321-22. Further, Poole recognized that learning the physical characteristics is "a long process," which trainees are not tested on until the end of the two-year program. Tr. 182.

The ALJ also found Moore was credible when he testified that his training instructors, Wojcik and McNulty, told his class that probationary employees would get fired if they reported an injury. *See* ALJD at 19. Moore's claims were corroborated by the testimony of Garmon, Sr. and Elijah Barclay. *See id.* at 2, 15, 19.

The ALJ's findings are also consistent with the reasoned determination that the other trainees in Moore's training class—Sheldon, Meehan, and Rockett—and the instructors were not credible, taking into account their relationship to the parties and motivations. *See id.* at 2, 19-20. The ALJ noted that as "they are all still employed by Amtrak[, they] may fear retaliation if they speak up." ALJD at 20. Thus, the ALJ adequately explained his determination of the witnesses' credibility. Consequently, Respondent's first argument fails.

Respondent asserts that exceptional circumstances exist because "Moore is also pursuing a Title 7 claim in federal court

for race discrimination arising out of the [termination]." Resp't Mot. for Stay 2. This argument is also flawed. It is unclear why Moore's exercise of his rights under a separate federal statute justifies a stay. The Board lacks jurisdiction to hear matters arising out of the Civil Rights Act. *See generally* 42 U.S.C. § 2000e-2 (granting jurisdiction over Title VII claims to the Equal Employment Opportunity Commission). Courts have recognized complainants' entitlement to seek relief under alternative theories of relief, including in the discriminatory dismissal area. *See, e.g.*, *Houchen v. Dall. Morning News*, 2010 WL 1267221, *3 (N.D. Tex. 2010).

Respondent also is not likely to succeed on the merits on the basis of grounds not articulated in its Motion for Stay. In its Petition for Review, Respondent argues that Moore did not prove he engaged in protected activity. *See* Resp't Pet. for Review 7. However, as the ALJ noted, the parties stipulated at trial that Moore engaged in protected activity. ALJD at 2; Tr. 26-27 (counsel for Respondent's statement that "[w]e consider the fact that he reported an injury to Amtrak as protected activity."); *see also* 49 U.S.C. § 20109(a)(4). Nevertheless, as the ALJ noted, even if there was no stipulation, Respondent's witnesses acknowledged that Moore reported his injury. *See* ALJD at 12-15; Tr. 182, 216. Further, Moore is not required to demonstrate that the injury was actually work-related: he need

only show that he genuinely believed his injury was work-related. *See* ALJD at 14; 49 U.S.C. § 20109(a)(4) (protecting employees from retaliation for "good faith act[s] done"); *Ray*, 971 F. Supp. 2d at 884 ("[T]he relevant inquiry remains whether, *at the time he reported his injury* [], [the employee] genuinely believed the injury he was reporting was work-related.").

Respondent also argues that Moore did not establish that Respondent had knowledge of the protected activity because (1) George Fitter, the ultimate decision-maker, had no knowledge of Moore's injury report; and (2) Poole had reason to believe the injury was not work related. Resp't Pet. for Review 4. This argument is not likely to prevail. First, Fitter's apparent lack of knowledge is not dispositive. *See* ALJD at 17-18. The Complainant may establish knowledge based on evidence about "the acts or knowledge of a combination of individuals involved in the decision-making." *Id.* (quoting *Rudolph v. Nat'l R.R. Passenger Corp.*, ARB No. 11-037, 2013 WL 1385560 (ARB Mar. 29, 2013)). Here, it is undisputed that Poole was aware of Moore's injury report and that Poole was involved in the decision to retain all trainees but Moore. *See* Tr. 187-88. Second, even if Poole did have doubts about the cause of Moore's injury, Respondent's argument is unavailing because the FRSA requires that the employee—not the employer—genuinely believe the injury is work-related. ALJD at 17; Tr. 184; *Davis v. Union Pac. R.R.*

Co., 2014 WL 3499228, *8 (W.D. La. 2014) ("Whether the employer believed the employee was acting in bad faith is irrelevant.").

Respondent's next argument that the ALJ's finding of causation is not supported by substantial evidence, Resp't Pet. for Review 8, is similarly defective. The ALJ's finding of causation rests, in part, on his carefully considered credibility determinations. *See supra* pp. 15-17. In addition, circumstantial evidence, such as temporal proximity between the protected activity and adverse action, support the ALJ's finding that Respondent's reasons for the dismissal are pretextual. *See* ALJD at 20-21. The individuals who reviewed Moore's performance were aware of Moore's report before completing the evaluations, Tr. 216, 218, and Moore's alleged poor performance only began to be documented after his injury report, *see* ALJD at 20; Resp't Exh. 14. Poole also testified that he did not discuss Moore's performance issues with him before his dismissal. Tr. 221-22; *see also* Tr. 77-78 (Moore's testimony that he received no negative feedback before his termination). Further, Poole was not required to cut down the class and he did not ensure that the ratings on Moore's evaluations were an accurate reflection of his performance. *See* ALJD at 20-21; Tr. 198, 220.

Lastly, ample evidence supports the ALJ's finding that Respondent did not establish by clear and convincing evidence that it would have taken the same adverse action absent the

protected activity. *See* ALJD at 22. The ALJ considered that the evaluations on which the termination allegedly rested were not reliable, but rather "indicative of pretext." *Id.* at 23. In addition to the reasons discussed above, the ALJ noted that the ratings on Moore's performance evaluations were not accurate in at least one category. *Id.* at 23 n.4. Specifically, the evidence demonstrated that Moore was usually early to his shift, but he was nevertheless rated "satisfactory" in the "Attendance" category. *Id.*; Resp't Exh 14. Poole testified that, if an employee was regularly early, he should be rated higher in "Attendance." Tr. 199. Thus, if Poole had compared Moore's evaluations to his attendance records—in accordance with his normal practice—or if Moore had been accurately rated on attendance, his overall score might have exceeded the 50% cut-off. ALJD at 23 n.4; Tr. 193, 198.

The ALJ also rejected Respondent's argument that it treated trainees with performance similar to Moore's similarly. ALJD at 24. The ALJ's finding is supported by testimony showing that Respondent warned some employees that they needed to improve their performance or face termination but did not warn Moore. Tr. 168-69, 194. For example, Rockett, another Amtrak trainee, received poor performance evaluations similar to Moore's, but unlike Moore, he received a warning that he needed to improve and was not terminated. ALJD at 24; Tr. 168-69. In addition,

while Poole testified he witnessed Moore using his iPod during class—a sign of poor performance to Poole—Poole never raised this issue to Moore or anyone else. ALJD at 21; Tr. 177-78, 221-22. Nevertheless, Moore testified that another trainee frequently used electronics in class, but that trainee was only warned for his behavior. Tr. 82-84.

b. THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST WEIGH IN FAVOR OF IMMEDIATE REINSTATEMENT.

The Supreme Court has held that a stay pending appeal is a question of judicial discretion and "is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. v. United States*, 272 U.S. 658, 672 (1926)). Further, the moving party must "demonstrate that irreparable injury is *likely* in the absence of an injunction," not merely that it is possible. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). The Board has specified that "any alleged irreparable harm 'must be actual and not theoretical' and must be 'certain to occur.'" *Welch v. Cardinal Bankshares Corp.*, ARB No. 06-062, 2006 WL 3246906, at *4 (ARB June 9, 2006)(quoting *Wis. Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985)). Thus, "generalized and unsubstantiated concerns of irreparable harm" are insufficient to support a motion for stay of reinstatement. *See Blackie v. D. Pierce Transp., Inc.*, ARB No.

13-065, 2013 WL 4928257, slip op. at 2 (ARB July 24, 2013).

Respondent argues that "there are overarching safety concerns for not reinstating Complainant." Resp't Mot. for Stay 2. Namely, it argues that the lineman trainee position is a "highly safety sensitive position," *id.* at 1, and Moore did not pay attention during training, *id.* at 2. Respondent also argues Moore "suffers from chronic back pain and shoulder pain, which most likely disqualifies him from safely" performing the job duties. *Id.* at 3 (emphasis added). However, Respondent's concerns are speculative as it has not shown what harms would follow from reinstating Moore and has not shown that its concerns cannot be addressed through means short of a stay. The ALJ rejected Respondent's argument that it terminated Moore for poor performance and lack of interest in the program, and found that these reasons were pretextual. ALJD at 20-21. Moreover, even if the performance evaluations are accurate, Respondent retained another employee whose safety scores were similar to Moore's. Resp't Exh. 14; Tr. 168-69. Respondent did not point to any specific evidence that Moore was unsafe or that Moore would not perform the job safely upon reinstatement.

Contrary to Amtrak's argument, Moore's physical condition does not warrant a stay of reinstatement. While Moore admitted to suffering shoulder and back pain, Tr. 113, he testified that his shoulder condition would not affect his ability to work and

that he has no physical restrictions, Tr. 105. Respondent submitted no evidence to contradict Moore's testimony or to support its argument that Moore's condition would "most likely" make it unsafe for him to work. *See* Resp't Mot. for Stay 3. Such a general, speculative statement is insufficient to establish that irreparable harm is certain to occur. *See Wis. Gas Co.*, 758 F.2d at 674. Further, to the extent Respondent is arguing reinstatement is impossible due to Moore's physical condition, the argument fails because it was not raised before the ALJ. *See Cefalu v. Roadway Express, Inc.*, ARB No. 08-110, 2008 WL 5454142, slip op. at 2 (ARB Dec. 10, 2008) (the employer bears the burden to show that reinstatement is not possible).

Reinstatement may not be denied—and certainly not stayed once it is ordered—because the employer may find it inconvenient to reinstate the employee. *See Dale*, slip op. at 3. For example, in *Hobby*, an employer argued reinstatement should be denied where the discharged employee previously held a senior management position and lacked the skills needed to perform the job after a ten-year gap between the discharge and reinstatement. *See Hobby*, slip op. at 6. Since the employee's long absence from the job was due to unlawful discrimination, the Board held that "[i]t would be manifestly unjust to penalize" the employee by denying him reinstatement. *Id.* at 7. In so holding, the Board "recognize[d] that in most cases a

company will experience some measure of inconvenience when it reinstates an employee who previously was terminated." *Id.*

Even if Amtrak's concerns were valid, there are more appropriate means in place to address them than a stay of reinstatement. First, Moore's right to reinstatement is a right to "reinstatement with the same seniority status that the employee would have had, but for the discrimination." 49 U.S.C. § 20109(e)(2)(A). Amtrak may fulfill its obligation by reinstating Moore to the same position he occupied prior to the termination or to an equivalent position that Amtrak believes he can safely perform. *See Johnson v. U.S. Bancorp*, ARB Case No. 13-014, 2013 WL 2902820, at *3 (ARB May 21, 2013) (declining to stay reinstatement and noting reinstatement was not impossible because reinstatement could be to an equivalent position).

Also, in regards to the safety sensitive job requirements, the lineman trainee position is, by its nature, part of a training program with constant supervision by Amtrak. *See* Tr. 41-42, 45, 164. Such close supervision helps ensure trainees' safety and provides substantial oversight. Insofar as Amtrak has concerns about how Moore will perform if reinstated to his former position, the close supervision of the training position would alleviate them. Third, to the extent Moore has not maintained the level of skill needed for the program, courts have recognized that employers may offer refresher training to

reinstated employees where the circumstances so require it. *See, e.g.*, *Air Line Pilots Ass'n v. United Air Lines*, 480 F. Supp. 1107, 1114 (E.D.N.Y. 1979) (recognizing that wrongfully terminated flight attendants "may need refresher or additional training" to work on new aircraft or to perform job responsibilities which have been altered since their dismissal).

Lastly, in regards to Moore's physical condition, courts have recognized that employers may require a return-to-work physical where appropriate under applicable rules. *See Clarke v. Frank*, 960 F.2d 1146, 1151 (2d Cir. 1992) (the U.S. Postal Service could impose its "standard prerequisites," which included a physical examination, on a reinstated employee); *Kosmicki v. Burlington N. Santa Fe Ry. Co.*, 2008 WL 507995, *3 (D. Neb. 2008) (a reinstated engineer could undergo a physical examination when applicable federal regulations required it). Thus, Amtrak's speculation that Moore is no longer qualified or medically able to do the lineman trainee job is best addressed through means other than a stay of reinstatement and does not impose the type of undue hardship on Amtrak to justify a stay.

The balance of interests also weighs in Complainant's favor, as does the public interest. Moore suffered financial hardship, strained personal relationships, depression, and anxiety as a result of his termination. *See* ALJD at 28-29. Immediate reinstatement also promotes the public interest.

Reinstatement "provides concrete evidence to other employees, through the return of the discharged employee to the jobsite, that the legal protections of the whistleblower statutes are real and effective." *Dale*, slip op. at 2 (citing *Hobby*, slip op. at 8). The requirement in many statutes mandating reinstatement where an employer improperly discharged an employee "has the dual purpose of protecting the discharged employee and demonstrating the [employer's] good faith to its other employees." *Heinrich Motors*, 403 F.2d at 150.

Under these circumstances, Moore's and the public interest in prompt enforcement of the FRSA's whistleblower protections trumps any interest Amtrak may have in keeping Moore from working. Analyzing the enforceability of a preliminary reinstatement order under the closely analogous reinstatement provision in the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105(b)(3)(A)(ii), the Supreme Court noted:

> Congress . . . recognized that the employee's protection against having to choose between operating an unsafe vehicle and losing his job would lack practical effectiveness if the employee could not be reinstated pending complete review. The longer a discharged employee remains unemployed, the more devastating are the consequences to his personal financial condition and prospects for reemployment.

Brock v. Roadway Express, Inc., 481 U.S. 252, 258-259 (1987). The same concerns weigh in favor of immediate reinstatement of an employee following a finding of retaliation by an ALJ under

the FRSA. Congress expressly provided in the FRSA procedures that "[t]he filing of . . . objections shall not operate to stay any reinstatement remedy contained in the preliminary order." 49 U.S.C. § 42121(b)(2)(A). The statute reflects a clear congressional determination that reinstatement pending review is necessary to avoid chilling the reporting of workplace injuries that FRSA protects. *See Roadway Express*, 481 U.S. at 258-59. Thus, Moore's immediate reinstatement is necessary not only to protect him from the severe economic and professional consequences of retaliatory termination but also to vindicate the public interests underlying the FRSA: "promot[ing] safety in every area of railroad operations and reduc[ing] railroad-related accidents and incidents." 49 U.S.C. § 20101.

III. RESPONDENT'S MOTION TO REMAND AND REOPEN THE RECORD DOES NOT WARRANT A STAY OF REINSTATEMENT.

Respondent requests that the Board remand the case to the ALJ for consideration of newly-discovered evidence that Moore had income in 2014 and misrepresented his earnings in the ALJ hearing. Resp't Mot. to Remand & Reopen the R. 1 ("Mot. to Remand"). Respondent contends that this newly-discovered evidence, Moore's 2014 tax return, requires that the ALJ recalculate back wages and re-evaluate his determination that Moore's testimony was credible. *Id.* at 2. To succeed on such a motion, the moving party must make "a showing that new and

material evidence has become available which was not readily available prior to the closing of the record." *See* 29 C.F.R. § 18.54(c). As Respondent concedes, a motion under section 18.54(c) is analogous to a motion for a new trial under Federal Rule of Civil Procedure 59 or a motion for relief from final judgment under Federal Rule of Civil Procedure 60. *See* Mot. to Remand 4. Success under these rules "requires more than merely casting doubt on the correctness of the underlying judgment"; rather, such relief is "extraordinary in nature" and the movant must show that "exceptional circumstances exist." *Fisher v. Kadant, Inc.*, 589 F.3d 505, 512 (1st Cir. 2009). Rule 60 motions, therefore, "should only be granted sparingly." *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 19 (1st Cir. 2002).

To obtain this "extraordinary" relief, Respondent "must, at the very least, offer a convincing explanation as to why he could not have proffered the crucial evidence at an earlier stage of the proceedings." *Id.* at 19-20; *see also Parrilla-Lopez v. United States*, 841 F.2d 16, 19-20 (1st Cir. 1988) (finding that deposition testimony was not new evidence where the movant had made the strategic choice not to depose a witness due to expense).[4] Respondent's failure to diligently seek and

[4] Similarly, to prevail under Rule 60(b)(3), the movant must show clear and convincing evidence of fraud, misrepresentation, or misconduct that prevented the movant from fully or fairly presenting his evidence. *Karak*, 288 F.3d at 20-21.

present evidence does not warrant the "extraordinary" relief it seeks. Specifically, although Moore's 2014 tax return was prepared following the close of the hearing, Respondent had ample opportunity to conduct pre-hearing discovery about Moore's earnings and to cross-examine Moore at trial about his financial situation. For instance, Respondent could have obtained Moore's bank records, W-2s or paystubs to ascertain his damages and used that information at trial. However, Respondent either did not conduct discovery into Moore's finances, or chose not to present any such evidence during the trial. For example, there is no evidence in the record regarding Moore's tax returns in 2012 or 2013, although those documents would have been available at the time of the hearing. Nor did Amtrak inquire into the specific amounts Moore may have earned since his termination in 2011 even though Moore did not testify that he had been completely unemployed. *See* Tr. 146-47, 152-53.[5]

Respondent has therefore failed to show that it could not have discovered Moore's earnings through the exercise of due

[5] Moore testified that he had "not had a job since [he] left Amtrak," but that he had performed some temporary and volunteer work with the union that produced "no legit [sic] reliable income." Tr. 109, 146. Amtrak did not follow up on this testimony to ask if he had found any irregular work for which he had been paid. *See* Tr. 146-47, 152-53. Moore's trial testimony is not necessarily inconsistent with the 2014 tax return, which does not indicate when in 2014 Moore earned income, shows that the majority of his earnings came from sources other than wages, and shows that his wages were less than half the income he would have earned at Amtrak. *See* Mot. to Remand 3; ALJD at 25-26.

diligence. *See U.S. Steel v. M. DeMatteo Construction Co.*, 315 F.3d 43, 52 (1st Cir. 2002); *see also Dalton v. Copart, Inc.*, ARB No. 04-027, 2005 WL 1542549, slip op. at 5 (ARB June 30, 2005) (evidence pertaining to pain and suffering was not newly discovered where such evidence was available before the closing of the record). Thus, the ALJ's order of reinstatement should remain in effect and should be given effect.

CONCLUSION

For the foregoing reasons, the Assistant Secretary respectfully requests that the Board deny Respondent's Motions for Stay of Reinstatement and for Remand to Reopen the Record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of this Response of the Assistant Secretary of Labor for Occupational Safety and Health in Opposition to Respondent's Motions for Stay of Reinstatement Pending Review and for Remand to the ALJ to Reopen the Record have been served via United States Postal Service on the following individuals this 8th day of May, 2015:

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