

No. 22-1235

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ROGER REED,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent;
and

AMERICAN AIRLINES, INC.,
Intervening-Respondent.

RESPONSE BRIEF FOR THE SECRETARY OF LABOR

On Petition for Review of the Final Decision and Order of the United States
Department of Labor's Administrative Review Board

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STATEMENT REGARDING ORAL ARGUMENT

Although the Secretary of Labor (“Secretary”) would gladly participate in any oral argument that the Court schedules in this matter, the Secretary does not believe that oral argument is warranted in this case because the issues are well-settled and can be decided on the briefs.

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STATEMENT OF JURISDICTION

This case arises under the employee protection (“whistleblower”) provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21” or “Act”), 49 U.S.C. 42121. The Secretary of Labor (“Secretary”) had subject matter jurisdiction based on a complaint filed with the Occupational Safety and Health Administration (“OSHA”) by Roger Reed against his employer, American Airlines, on July 27, 2018, pursuant to 49 U.S.C. 42121(b)(1).¹ On December 16, 2021, the Department of Labor’s Administrative Review Board (“ARB” or “Board”) issued a Final Decision and Order affirming the Administrative Law Judge’s (“ALJ”) Decision and Order holding that American Airlines had not retaliated against Reed in violation of AIR21. Reed filed a timely petition for review of the Board’s decision with this Court on February 14, 2022, pursuant to 49 U.S.C. 42121(b)(4)(A).

This Court has jurisdiction to review the Board’s final order because the alleged violation occurred in Illinois. 49 U.S.C. 42121(b)(4)(A) (providing that

¹ Congress granted the Secretary the authority to adjudicate AIR 21 whistleblower complaints. 49 U.S.C. 42121(b)(1). The Secretary has delegated responsibility for receiving and investigating AIR 21 whistleblower complaints to the Assistant Secretary for Occupational Safety and Health. Sec’y’s Order No. 8-2020 (May 15, 2020), 85 Fed. Reg. 58,393-01 (Sept. 18, 2020). The Secretary has delegated the authority to issue final agency decisions in cases arising under AIR 21 to the ARB. Sec’y’s Order No. 01-2020 (Feb. 21, 2020), 85 Fed. Reg. 13,186-01 (Mar. 6, 2020); *see also* 29 C.F.R. 1979.110(a).

review of the Secretary's final order may be obtained in the court of appeals for the circuit in which the violation allegedly occurred).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. Whether substantial evidence supports the Board's affirmance of the Administrative Law Judge's determination that although at least one of Reed's instances of protected activity contributed to American Airlines' decision to suspend Reed pending investigation, American Airlines proved by clear and convincing evidence that it would have taken the same action in the absence of the protected activity.

2. Whether substantial evidence supports the Board's affirmance of the Administrative Law Judge's determination that Reed failed to establish by a preponderance of the evidence that he was subjected to a hostile work environment and that American Airlines denied him overtime opportunities because of his protected activity under AIR21.

STATEMENT OF THE CASE

A. Nature of the Case

At the time of the events in this case, AIR21 provided, in relevant part, that "[n]o air carrier ... may discharge an employee or otherwise discriminate against an employee ... because the employee ... provided to the employer or Federal

Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety.” 49 U.S.C. § 42121(a)(1); *see also* 29 C.F.R. § 1979.102(a), (b)(1).²

Under AIR21, an employee who believes his employer has discriminated against him in violation of the Act may file a complaint with OSHA. 49 U.S.C. § 42121(b)(1); *see also* 29 C.F.R. § 1979.103. OSHA investigates the alleged violation and issues a determination ordering appropriate relief or dismissing the complaint. 49 U.S.C. § 42121(b)(2)(A); *see also* 29 C.F.R. §§ 1979.104, .105. Either the employee or the employer may file objections to OSHA’s determination and may request a *de novo* hearing before a Department of Labor Administrative Law Judge (“ALJ”). 49 U.S.C. § 42121(b)(2)(A); *see also* 29 C.F.R. §§ 1979.106, .107. The ALJ’s decision is subject to discretionary review by the Board. If the Board accepts a case for review, the Board’s decision constitutes the final decision of the Secretary, subject to discretionary review by the Secretary. 29 C.F.R. § 1979.110; Sec’y’s Order No. 01-2020 (Feb. 21, 2020), 85 Fed. Reg. 13,186-01 (Mar. 6, 2020) (providing for discretionary review of the Board’s decision by the Secretary).

² AIR21 was amended in 2020 to apply to additional respondents and to protect additional activities. The 2020 amendments did not change the applicable burdens of proof or statutory procedures. *See Consolidated Appropriations Act of 2021*, Pub. L. 116-260, Div. V, Title I, § 118 (Dec. 27, 2020).

The Act and applicable Department of Labor regulations set forth the legal burdens relevant to proving that an employer has violated the whistleblower protection provision. 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1979.104(b)-(d). To prevail, an employee must show by a preponderance of the evidence that: (1) they engaged in protected activity; (2) the employer was aware of such activity; (3) they suffered an adverse employment action; and (4) the protected activity was a contributing factor in the adverse action. 49 U.S.C. § 42121(b)(2)(B)(iii); see also 29 C.F.R. §§ 1979.104(b)(1), .109(a); *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009) (noting AIR21's burdens of proof); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, 2004 WL 230770, at *7 (ARB Jan. 30, 2004).

Even if the employee meets his burden of proof, “[r]elief may not be ordered ... if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity].” 49 U.S.C. § 42121(b)(2)(B)(iv); see also 29 C.F.R. §§ 1979.104(b)(1), .109(a); *Harp*, 558 F.3d at 723; *Peck*, 2004 WL 230770, at *7.

B. Statement of Facts

1. Employment and CBA Background

Roger Reed (“Reed”) is employed by American Airlines as an Airline Maintenance Technician (“AMT”) at Chicago O’Hare International Airport. Tab 2,

R.A. 026, ALJ Decision and Order.³ Reed has worked for American Airlines for about thirty years and performs line maintenance including general inspection and repairs of American Airlines' aircraft. Tab 2, R.A. 026, 030-31; Tab 4, R.A. 109, Hearing Transcript Excerpts.

American Airlines has a collective bargaining agreement (“CBA”) with the Transport Workers of America Union (“Union”), which covers its mechanics, including Reed. Tab 2, R.A. 028. Pursuant to a memorandum of understanding between American Airlines, the Union, and the FAA, American Airlines established a confidential, but not anonymous, program for employees to report safety issues—the Aviation Safety Action Program (“ASAP”). *Id.* at 029. ASAP reports go to a secure system where personal identifying information on a submission is redacted, but the person investigating the report is given the reporting employee's name and telephone number, so they know who to contact when conducting the investigation. *Id.* The purpose of the program is to encourage employees to report potential safety violations without fear of retaliation from American Airlines or the FAA. *Id.* at 030; Tab 8, R.A. 175, Hearing Transcript Excerpts.

2. Reed Observes and Reports Safety Issue with Aircraft 8AK

³ The citations to the administrative record in this brief are to the tabbed exhibits in Respondent's Appendix (“R.A.”).

On April 6, 2018, three mechanics, Anthony Callahan, Bob Maag, and Walter Lorenzo-Dani, were performing maintenance on aircraft 8AK in one of American Airlines' hangars. Tab 2, R.A. 032; Tab 7, R.A. 168-69, Hearing Transcript Excerpts. Reed was informed by another mechanic that the pressure relief door of aircraft 8AK was hanging down and not flush with the fuselage as required. Tab 4, R.A. 112; Tab 6, R.A. 163, Hearing Transcript Excerpts. The other mechanic told Reed that he did not inform the three mechanics assigned to the aircraft about the problem because he did not want to deal with them, so Reed volunteered to tell them himself. Tab 2, R.A. 033.

Reed walked to the aircraft and saw a gap in the pressure relief door and speed tape coming off the hump seal that should have been flush. *Id.* He then walked under the aircraft for a few seconds where the door is located and confirmed his coworker's observation that the pressure relief door was down. *Id.*; Tab 4, R.A. 117. While he was under the door for a few seconds, Reed reached up with one hand while his other hand was in his pocket. Tab 2, R.A. 034; Tab 6, R.A. 174, Hearing Transcript Excerpts. He then walked to the truck where the three mechanics were sitting to tell them what he saw. He informed them about the open pressure relief door and the loose windshield speed tape and said these problems needed to be addressed. Tab 2, R.A. 034; Tab 4, R.A. 113. According to Reed, the mechanics replied that they did not care and were only there for overtime pay. Tab

4, R.A. 113; Tab 5, R.A. 132, Hearing Transcript Excerpts. Reed walked away from the truck and returned to the mechanics' routing room where he told the mechanics what happened. Tab 4, R.A. 113-16. One of the mechanics in the room contacted a Union steward who advised him to have Reed file an ASAP report. Tab 6, R.A. 167. After Reed learned the aircraft had left the gate early without the mechanical irregularities being addressed, he filed an ASAP report that same day. Tab 4, R.A. 115.

Following the conversation with Reed, all three mechanics left the truck and walked over to the pressure door. Tab 2, R.A. 034-35. Callahan observed that the panel was almost flush but not completely flush. *Id.* Maag similarly reported that the door was "near flush and appeared to be within limits." *Id.* at 035. Callahan pushed the panel back up flush to the aircraft. *Id.* Callahan subsequently texted Edith Miller, a maintenance shift manager, and told her that she needed to watch surveillance video footage of Reed at the aircraft that day. *Id.* Callahan asked why Reed was there looking at an aircraft he wasn't assigned to but did not tell Miller that Reed had sabotaged or caused any damage to the aircraft or that he had attempted to delay the aircraft's departure. *Id.* Miller watched the video but did not see anything concerning. She then called Richard Williams, a senior manager, and informed him Reed was at the aircraft that day and there was "some type of hostility" between Callahan and him. Tab 5, R.A. 139, 143. Miller never used the

word “sabotage” during her phone call with Williams, and she did not report any safety concerns to Williams. *Id.* at 140.

3. Mechanics Report Reed for Allegedly Sabotaging Aircraft 8AK

On May 2, 2018, American Airlines compliance specialist Lars Romme received a signed written statement via email from the three mechanics—Callahan wrote the statement upon request from Romme. Tab 2, R.A. 037. In the statement the mechanics claimed that they saw Reed attempt to create a departure delay by “sabotaging” the pressure relief door and that they had pushed the door back into place. *Id.* Callahan also sent the statement to Williams, who first learned about allegations that Reed may have sabotaged the aircraft from reading the statement. *Id.*; Tab 5, R.A. 140. According to Williams, the use of the word “sabotage” in this statement made him realize that the incident was more serious than Miller had initially explained. *Id.* Williams then showed the statement to his director, David Orban. Orban instructed Williams to contact Human Resources about the matter, who recommended that Orban start an investigation. Tab 2, R.A. 038; Tab 9, R.A. 177-78, Hearing Transcript Excerpts.

4. American Airlines Initiates 29(f) Investigation into Sabotage

Allegations

Orban initiated a “Section 29(f)” pre-discipline, factfinding investigation under the CBA and assigned Williams to conduct it because he had oversight of

terminal operations.⁴ Tab 2, R.A. 038; Tab 9, R.A. 179-80. Williams directed Brian Ray, a shift manager, to conduct some of the investigative interviews. Tab 2., R.A. 038; Tab 5, R.A. 145. Ray had been Reed's supervisor for several years and had conducted numerous Section 29(f) investigations. Tab 2., R.A. 038.

Williams told Ray about allegations that Reed had attempted to delay the departure of aircraft 8AK by damaging the pressure relief door but did not provide Ray with a copy of the May 2, 2018, statement from the mechanics. *Id.* Williams also told Ray that American Airlines was going to withhold Reed from service, with pay, during the pendency of the investigation. *Id.*

On May 10, 2018, Reed was called into a conference room for a Section 29(f) hearing, in which Ray and two Union stewards were present. *Id.*; Tab 4, R.A. 118. Ray informed Reed that he was being accused of damaging an airplane and was being walked off the premises pending the results of an investigation. Tab 4, R.A. 119. During the hearing, Reed informed Ray that he had filed two ASAP reports related to the matter and asked him to review the video footage. Tab 4, R.A. 121. Ray was not aware of the reports before the meeting. American Airlines then suspended Reed with pay and removed his access to the maintenance facility,

⁴ In the instance of an investigation of a matter that may lead to discipline of a mechanic, Section 29(f)(2) of the CBA provides that American Airlines may hold a mechanic "out of service pending the investigation, provided that the employee will be paid for all regularly scheduled hours while held out of service." TR. 2, R.A. 028.

took his badge and walked him out of the building. Tab 2, R.A. 039; Tab 4, R.A. 120.

Sometime after the May 10 meeting, Williams obtained the video footage of the area where the aircraft was being prepared on April 6, 2018. Tab 2, R.A. 039; Tab 5, R.A. 141. When he saw the videos, Williams was no longer concerned with the allegations of sabotage against Reed. Tab 5, R.A. 142. However, after comparing the video footage showing Reed inspecting the pressure door with Ray's notes from the May 10 meeting, Williams was concerned with Reed's statement to Ray that he did not go underneath the aircraft. *Id.*

On May 19, 2018, Williams interviewed AMT Callahan. Tab 2, R.A. 040. Callahan stated that he saw no issue with the pressure panel during his initial inspection of aircraft 8AK on April 6, and that Reed had reached up and pulled on the panel while his crew was waiting in their truck. *Id.* Williams then interviewed Lorenzo-Dani and Maag, who had told him that Maag observed Reed "look[] around to see if anyone was around" and "reach up with his arm and pull down on the pressure relief door." *Id.* at 18.

On May 30, 2017, Williams met with Reed again, asked him questions about the incident, and showed him the security video footage of his actions around aircraft 8AK. *Id.* The video footage showed that Reed approached aircraft 8AK, looked underneath it for about three seconds, and walked away from the aircraft

towards a truck with the three mechanics assigned to the aircraft. Tab 2, R.A 041-42. The video confirmed Reed had one hand in his pocket while approaching the aircraft. *Id.* The video did not show Reed hanging on or pulling the pressurized door as the three mechanics had alleged. *Id.* On June 13, 2018, American Airlines reinstated Reed and closed its investigation, finding the allegations against him were unfounded. *Id.* at 19. American Airlines did not add discipline or documentation of the investigation to Reed's personnel file. *Id.*; Tab 5, R.A. 147. Upon his return from suspension, Reed asked Orban to hold a town hall and make a statement that he was cleared of all accusations made against him—American Airlines declined to issue a statement, noting that Reed's return to service was good enough to evince that he was cleared of misconduct. Tab 2, R.A. 043; Tab 4, R.A. 122; Tab 9, R.A. 181, 188.

5. Return from Suspension and Alleged Retaliation

Reed alleged that, following his return from suspension, American Airlines engaged in several adverse and/or hostile actions against him. First, he alleged they assigned him to service engine oil more often than normal for mechanics—a task known to be a tedious and undesirable part of the job. Tab 2, R.A. 042-043; Tab 4, R.A. 123-24; Tab 5, R.A. 133-34. Reed alleged that oil servicing is often used as a disciplinary action if a mechanic finds too many problems with an aircraft. Tab 4, R.A. 127. Reed stated he performed oil service most days since returning to work

from his suspension. Tab 4, R.A. 128. According to Clemens, a fellow mechanic, American Airlines would not allow Reed to perform pre-departure checks. Tab 6, R.A. 165-66. On July 7, 2018, Reed was called into Ray's office for a 29(f) meeting to ask him about his "over-servicing" of aircraft engines. Reed explained that one could not over-service an engine with oil and received no discipline but viewed the meeting as a disciplinary action. Tab 2, R.A. 043. According to Ray, the meeting was not a formal investigation, and 29(f) meetings were not disciplinary actions. *Id.*

Reed also alleged that management told his supervisors not to assign him overtime work, claiming that his overtime hours were down significantly in 2018 from 2017. Tab 4, R.A. 129-30. He alleged that overtime calls to his phone would only ring once or twice before hanging up, and that he was often told the spot was filled when he called back. *Id.*

C. Procedural History

1. OSHA Investigation

Reed filed an AIR 21 complaint with OSHA on July 27, 2018. Tab 2, R.A. 024. In a September 18, 2019, letter, OSHA determined that Reed's employer would have taken the same adverse action against Reed absent his protected activity. *Id.* Accordingly, OSHA dismissed the complaint. On October 12, 2019,

Reed objected to OSHA's findings and requested a formal hearing before an ALJ.
Id.

2. ALJ's Decision and Order

On November 17 to 20, 2020, and January 12 to 15, 2021, an ALJ held a hearing on the matter. Tab 2, R.A. 025. The ALJ issued a Decision and Order Denying Relief on June 4, 2021.

During the ALJ hearing, Reed alleged he engaged in five protected activities that motivated American Airlines to take various adverse actions against him: (1) reporting his concerns about the condition of a pressure relief door and windshield speed tape on aircraft 8AK to the mechanics assigned to perform maintenance on the aircraft on April 6, 2018, (2) filing an April 6, 2018, ASAP report on safety concerns related to his observations of aircraft 8AK, (3) reporting potential damage to aircraft 8AC's engine inlet to an FAA inspector on May 8, 2018, (4) voicing concerns about the maintenance being performed by third party vendors on American Airlines aircraft during a March 2018 town hall with American Airlines' Regional Director of Maintenance, and (5) filing an April 16, 2018, ASAP report raising concerns about the confidentiality of the ASAP reporting system after hearing that coworkers knew of his April 6, 2018, ASAP report. Tab 2, R.A. 051. The ALJ found that only three of these activities were protected under AIR21: (1) reporting his concern about the condition of the pressure relief door and windshield

speed tape on aircraft 8AK to the mechanics assigned to perform maintenance on the aircraft, (2) filing the April 6, 2018, ASAP report, and (3) reporting the potential damage to aircraft 8AC's engine inlet to an FAA inspector on May 8, 2018. *Id.* at 052-54. The ALJ found that Reed's March 2018 town hall comments and his April 16, 2018, ASAP report were not protected activities under AIR21. *Id.* at 051. Regarding the town hall comments, the ALJ observed that Reed's testimony regarding them was too vague and non-specific and that the ALJ could not determine what was conveyed by Reed during the town hall as needed to evaluate whether Reed raised protected air safety concerns. *Id.* at 052. The April 16, 2018, ASAP report, the ALJ concluded, was based on Reed's conjecture and, in any event, focused more on Reed's concern for his reputation than identifying a concrete safety concern. *Id.* at 053.

The ALJ then considered whether American Airlines took adverse action against Reed. The ALJ found that while a 29(f) meeting itself is not an adverse action, American Airlines suspending Reed during the pendency of its investigation, taking his badge, escorting him to his vehicle, and denying him access to his pay and benefit information on their computer database constituted an adverse action. *Id.* at 056-57.

The ALJ also found that there was no credible evidence to support Reed's contention that management took steps to prevent him from obtaining overtime

hours upon his return. Tab 2, R.A 057-58. In reaching this conclusion, the ALJ considered that the process for offering overtime hours is governed by the CBA. *Id.* Managers would notify administrative staff of the need for overtime work. Staff would print out a computer-generated list of the names of mechanics who signed up to be available for overtime and how many overtime hours they had already earned. *Id.* The list is ordered from the mechanic with the least number of hours to those with more hours. *Id.* Staff would call the mechanic and would leave a message if there were no answer, they would then call all the names down the list until the shift was covered. *Id.*

Two staff members involved with the assignment of overtime testified that staff would not intentionally skip a mechanic, that it would violate American Airlines policies to do so, and that they were never directed by management to bypass Reed for overtime. Tab 2, R.A. 043-44. Kimberly Pett was an administrative staff member who was responsible for calling mechanics for overtime hours from 2018 through 2020. *Id.* Pett testified that staff would not intentionally skip a mechanic and denied that management ever asked her to bypass Reed. Tab 6, R.A. 148-49. Margarita Marti, an executive assistant who handled requests for overtime, verified that American Airlines' policies prevented them from skipping over any mechanic to work overtime. Tab 2, R.A. 043-44.

Orban also testified that neither he nor anyone in management ever directed staff to restrict Reed's overtime. *Id.*

The ALJ also found that if Reed was assigned servicing of engine oils or other mechanical fluids more frequently following his return to work, under the circumstances that would not rise to the level of an adverse action. Tab 2, R.A. 057. The ALJ further found that Reed's July 7, 2018, informal 29(f) meeting with Ray was not an adverse action as the meeting did not result in any disciplinary conduct and was simply a fact-finding informal meeting with his supervisor. *Id.* Additionally, the ALJ found that Reed failed to provide sufficient evidence to establish he was subjected to severe and pervasive harassment sufficient to establish a hostile work environment perpetuated or tolerated by American Airlines. *Id.* 059-061. The ALJ noted that the most persuasive testimony to establish hostile work environment was the testimony of former supervisor, Shanon Flanary, who the ALJ found credible, and who testified that she was asked by a manager to keep a file on Reed and to email reports about him to management. Tab 2, R.A. 061; Tab 6, R.A. 152-54. But the ALJ did not find this testimony sufficient to establish the existence of a hostile work environment. Tab 2, R.A. 061

The ALJ concluded that one of Reed's protected activities—his report to the three mechanics that there were safety issues with aircraft 8AK—contributed to

American Airlines' adverse action of suspending Reed, taking his badge, escorting him out of the building, and restricting his access to JetNet. Tab 2, R.A. 061, 065. Reed's report was mentioned in the statement of the three mechanics that triggered the investigation into Reed's conduct, and thus Williams was aware of it when he made the decision to suspend Reed. *Id.* at 064-065. The ALJ concluded that the other two protected activities—Reed's filing of the April 6, 2018, ASAP report and reporting the potential damage to aircraft 8AC's engine inlet to an FAA inspector on May 8, 2018, did not play any role in the suspension decision. *Id.* at 063. The ALJ reasoned that Williams was not aware of the ASAP report until Reed disclosed it in his interview on May 10, 2018, and there was no credible evidence that Reed's disclosures to the FAA played any role in the suspension decision. *Id.*

Although Reed made out a prima facie case that his suspension was discriminatory in violation of AIR21, the ALJ found that American Airlines showed by clear and convincing evidence that it would have taken the same adverse action against Reed even absent his protected activity. *Id.* at 066-67. The ALJ observed that American Airlines "faced a most serious allegation that one of its employees intentionally damaged one of its aircraft" and that American Airlines "had ultimate responsibility for air safety on its aircraft." *Id.* at 066. The ALJ also recognized that Reed, an employee alleged to have intentionally harmed an aircraft, was not just any employee, but an employee with access to the tarmac and

the hangar, and direct contact with aircraft. *Id.* at 067. Thus, the ALJ observed that American Airlines proceeded with caution and needed to gather the facts before making a determination on Reed's culpability. *Id.* Under the circumstances, the ALJ found it was not unreasonable for American Airlines to limit Reed's access to its facilities and databases pending its investigation. *Id.*

3. The ARB's Final Decision and Order

Reed petitioned the Board for review of the ALJ's decision, and the Board issued a December 16, 2021, Final Decision and Order affirming the ALJ's Decision and Order. In his petition for review before the Board, Reed, who was at that time represented by counsel, alleged: (1) that the ALJ erred in failing to analyze whether American Airlines' stated reason for suspending him was pretext, (2) that the ALJ erred in finding that American Airlines did not prevent Reed from obtaining overtime and that with regard to the denial of overtime, the ALJ should have made an adverse inference based on the lack of cooperation of one of the witnesses, Margarita Marti; (3) that the ALJ erred in finding that Reed did not show that American Airlines improperly disclosed his ASAP reports or that there was a hostile work environment; and (4) that substantial evidence did not support the ALJ's conclusion that American Airlines proved by clear and convincing evidence that it would have taken the same action in the absence of Reed's

protected activity. Tab 3, R.A. 096-097, Pt's Opening ARB Brief. Following examination of the record before the ALJ, the Board affirmed the ALJ's decision.

The Board first held that the ALJ did not commit legal error by not discussing pretext separately from the analysis of "contributing factor" causation or American Airlines' affirmative defense. In so holding, the Board observed that the ALJ had considered whether American Airlines' stated reasons for the adverse action were pretext in the context of his analysis of American Airlines' affirmative defense. Tab 1, R.A. 017, 019, ARB Decision and Order. Furthermore, under the burdens of proof applicable in AIR21 cases, a separate analysis of pretext is not required. *Id.* at 018. Rather, evidence of pretext may serve as circumstantial evidence that protected activity was a contributing factor in the employer's adverse action or that the employer would not have taken the same action absent protected activity. *Id.* Thus, the Board found no legal error in the ALJ's pretext analysis.

The Board also affirmed the ALJ's determination that Reed was not prevented from obtaining overtime and held that the ALJ acted within his discretion by refusing to make an adverse inference regarding the testimony of Margarita Marti on that issue. Tab 1, R.A. 019-20. In affirming these determinations, the Board noted that Reed earned more overtime in the year after he engaged in protected activities that he had previously. *Id.* at 019. Additionally, Orban and Pett testified that no one ordered them to block Reed from working

overtime, and the evidence demonstrated that process for assigning overtime was regimented and left little room for preferential treatment. *Id.* With regard to the non-cooperation of Margarita Marti as a witness on the overtime issue, the Board noted that despite her initial recalcitrance, Marti did eventually testify. *Id.* at 019-20. The ALJ concluded that the information she provided was of little value, and her initial unavailability was not the fault of either party. *Id.* Thus, the Board concluded the ALJ did not abuse his discretion in refusing to draw an adverse inference that her testimony supported Reed's allegations. *Id.*

The Board also held that substantial evidence of record supported the ALJ's finding that Reed failed to establish that American Airlines management disclosed his ASAP reports to coworkers or that there was a hostile work environment. *Id.* at 020-21. In reaching this conclusion, the Board considered that two witnesses testified that their own ASAP reports had been leaked and that Reed had a conversation with a crew chief that Reed interpreted as revealing that his ASAP report had been disclosed. *Id.* at 020. The Board agreed with the ALJ this evidence was not sufficient to demonstrate that American Airlines disclosed his ASAP reports. *Id.* at 020-21. With regard to Reed's allegation of a hostile work environment, the Board agreed with the ALJ that Reed's evidence of a 29(f) interview to investigate possible over-servicing of aircraft, name-calling by coworkers, denial of access to American Airlines' databases during his suspension,

and assignments to frequent oil servicing and other work assignments that deviated from normal business practices did not demonstrate conditions that were “extremely severe or serious and pervasive” as needed to meet the high bar of proving a hostile work environment. *Id.* at 021.

Finally, the Board held that substantial evidence of record supported the ALJ’s finding that American Airlines showed by clear and convincing evidence it would have taken the same adverse action against Reed absent his protected activity. Tab 1, R.A. 021-23. In affirming this conclusion, the Board noted that Williams and Orban both testified that they were concerned about safety when they first learned of the seriousness of the allegation against Reed based on the mechanics’ May 2, 2018, statement. *Id.* at 022. Williams also testified that American Airlines regularly suspends employees with pay pending investigation. *Id.* The ARB also agreed with the ALJ that under the circumstances, it was not unreasonable to American Airlines to temporarily suspend an individual accused of sabotaging an aircraft, revoke use of an identification badge, monitor him while removing items from his locker, and escort him from the facility. *Id.* Additionally, the ARB noted that it was not its role to decide the correct personnel decision. *Id.*

SUMMARY OF ARGUMENT

The Board’s decision affirming the ALJ’s findings is supported by substantial evidence in the record of this case. The ALJ reasonably concluded that

American Airlines showed by clear and convincing evidence that it would have suspended Reed pending an investigation into the complaint by three other mechanics alleging that Reed intentionally sabotaged one of American Airlines' aircraft even in the absence of Reed's protected activity. In particular, the ALJ relied on testimony he found credible from American Airlines' managers who testified that they were motivated to pull Reed from service because of the seriousness of the sabotage allegation against him and that suspensions with pay were commonplace while such investigations were pending. The ALJ also reasonably considered that American Airlines' decision was a reasonable response to a serious safety allegation and that American Airlines returned Reed to service when the investigation concluded that he had not engaged in wrongdoing.

Similarly, substantial evidence in the record supports the ALJ's findings, affirmed by the Board, that Reed failed to provide enough evidence to establish a hostile work environment or to show that American Airlines denied or restricted his overtime opportunities. The ALJ carefully considered the testimony of multiple witnesses regarding the incidents that Reed alleged contributed to a hostile work environment, made determinations regarding each witness's credibility, and ultimately determined that the evidence did not establish American Airlines management created or tolerated a hostile work environment. The ALJ also weighed the testimony and documentary evidence regarding the system for

assigning overtime and the record of Reed’s overtime, including the facts that Reed worked more overtime in the year he engaged in protected activity than in prior years and that the system for assigning overtime was governed by the CBA, very regimented, and left little room for preferential treatment. The ALJ reasonably concluded that Reed was not denied overtime.

In his petition for review and brief, Reed seemingly argues that the ALJ should have weighed the evidence differently, should have credited witnesses’ testimony differently, and should have come to different conclusions based on the evidence. But Reed’s disagreement with the ALJ’s weighing of the evidence does not demonstrate that the ALJ’s decision is not supported by substantial evidence so long as there is adequate evidence in the record to support that the ALJ’s conclusions were rational. That standard was more than met in this case. Ultimately, the ALJ applied the correct legal standards and appropriately weighed the evidence, and thus, the decision is supported by substantial evidence in the record and should be affirmed.

STANDARD OF REVIEW

Under AIR21, this Court reviews the Secretary’s final order—which in this case is the Board’s Final Decision and Order—according to the standard of review established by the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2). 49 U.S.C. § 42121(b)(4)(A). The APA provides that a court may overturn the

agency's order only if its legal conclusions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or its factual findings are "unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (E); *Roadway Express, Inc. v. U.S. Dep't of Labor*, 612 F.3d 660, 664 (7th Cir. 2010) (citing 5 U.S.C. § 706(2)(A), (E)). Under these standards, "the scope of review is narrow, and a court must not substitute its judgment for that of the agency." *Abraham Lincoln Mem'l Hosp. v. Sebelius*, 698 F.3d 536, 547 (7th Cir. 2012) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Substantial evidence, although "more than a scintilla," means only "such relevant evidence as a rational mind might accept as adequate to support a conclusion," i.e., something "less than a preponderance of the evidence." *Freeman United Coal Mining Co. v. Stone*, 957 F.2d 360, 362 (7th Cir. 1992) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971); citing *Smith v. Director, OWCP*, 843 F.2d 1053, 1057 (7th Cir. 1988)) (internal quotation marks omitted). "The deferential substantial evidence standard is satisfied if the factfinder relied on such relevant evidence as a reasonable mind might accept as adequate to support the conclusion." *Brousil v. United States Dep't of Labor*, 43 F.4th 808, 811 (7th Cir. 2022) (citing *Roadway Express*, 612 F.3d at 664).

ARGUMENT

A. Substantial Evidence Supports the ALJ’s Decision as Affirmed by the Board that American Airlines Showed by Clear and Convincing Evidence that it Would Have Taken the Same Adverse Action in Suspending Reed Absent his Protected Report to the Three Mechanics.

The Board correctly determined that substantial evidence supports the ALJ’s conclusion that American Airlines showed by clear and convincing evidence that it would have taken the same adverse action of suspending Reed absent his protected activity. 29 C.F.R. 1979.110(b)(“The Board will review the factual determinations of the[ALJ] under the substantial evidence standard.”). The factual record supports the ALJ’s conclusion that American Airlines took the adverse action against Reed based on its reasonable safety concerns arising from the allegations of sabotage made against Reed. In reaching this conclusion, the Board and the ALJ properly recognized that it was not their role to determine whether American Airlines made the proper personnel decision in suspending Reed or whether American Airlines could have conducted its investigation differently. Tab 1, R.A. 023; *See, e.g. Brooks v. Avancez*, 39 F.4th 424, 436 (7th Cir. 2022) (citations omitted) (noting in the context of ADEA action that “courts are not super-personnel departments who sit in judgment of management decisions” and upholding the district court’s determination of no discrimination where the employer acted on its non-discriminatory reason for the termination, which was managers’ honest belief that the plaintiff made threats). Rather, the ALJ was charged with determining, based

on the record evidence, whether American Airlines would have taken the same action against Reed absent any awareness of Reed's protected activity. Tab 2, R.A. 066-67; Tab 1, R.A. 022-23. Based on the record evidence, the ALJ reasonably concluded that clear and convincing evidence showed that American Airlines would have suspended Reed pending investigation based on the allegation of sabotage even in the absence of Reed's protected activity, and the Board properly affirmed.

As the ALJ explained, at the time American Airlines took the adverse action of suspending Reed, it was responding to the serious allegations that one of its employees intentionally damaged its passenger aircraft. The ALJ reasoned that a mechanic is not just any employee, their decisions go to the heart of air safety, they have access to the tarmac and hanger, and they have direct contact with American Airlines aircraft. Tab 2, R.A. 067. Thus, as the ALJ and Board explained, it was entirely reasonable for American Airlines to suspend an alleged saboteur while it gathered all the facts, conducted an investigation, and figured out exactly what transpired with aircraft 8AK on April 6, 2018. Tab 2, R.A. 066-67; Tab 1, R.A. 022-23.

Additionally, the ALJ found credible several witnesses' testimony about the reasons that American Airlines took the action of suspending Reed. For instance, Williams and Orban both testified that they immediately became concerned about

safety upon reading the serious allegations made in the May 2, 2018, written statement of the reporting mechanics. Tab 1, R.A. 022.; Tab 5, R.A. 136-38; Tab 9, R.A. 177. Williams, who decided to withhold Reed from service, testified that he was specifically alarmed by the use of the word “sabotage” and that suspending an employee pending investigation was common practice. Tab 1, R.A. 022.; Tab 5, R.A. 136-38. He also testified that given the seriousness of the sabotage allegation, he believed the investigation was going to be broad and that he did not want Reed to have the opportunity to compromise the investigation. Tab 1, R.A. 022. The ALJ also appropriately considered that American Airlines conducted an extensive investigation, interviewed various mechanics, including those who made the report, inspected video footage, took Reed’s statement, and ultimately concluded that Reed had not sabotaged its aircraft as alleged. Reed was then promptly returned to service once the investigation was complete, and American Airlines was sure the sabotage allegations against him were unfounded. Tab 2, R.A. 042. Indeed, the thoroughness of the investigation, the conclusion that Reed committed no wrongdoing, and American Airlines’ return of Reed to service run counter to Reed’s allegation that American Airlines’ investigation was motivated by retaliatory intent.

As the ARB noted, Reed’s frustration is understandable given that the allegations of sabotage ultimately proved to be unsubstantiated. However, the ALJ

reasonably concluded that American Airlines based the decision to suspend Reed on its perception that it needed to remove his access to its aircraft while it was investigating the veracity of the allegations against him. And the ALJ and the Board reasonably credited American Airlines' witnesses' testimony that they felt that they had to act in the interim to meet their own obligations to ensure aircraft safety. Tab 2, R.A. 067.

Reed argues that the ALJ and the ARB failed to give proper weight to evidence that allegedly proves American Airlines' proffered reason for suspending him was pretextual. For example, he notes the physical unlikelihood that he could of pulled the pressure relief door down in seconds with one hand in his pocket, Flanary's testimony that management had it out for him, the lack of consideration of the motives of the mechanics to retaliate against him for raising concerns about their assigned aircraft, Miller's lack of concern after initially viewing the surveillance footage a month before Reed was suspended, and the alleged fact that American Airlines never punished the other mechanics for making unsubstantiated allegations of sabotage against Reed. Informal Brief for Petitioner ("Pet'r's Br.") 12-15.

As the ARB correctly explained, while some the evidence cited by Reed could be viewed as undermining American Airlines' explanation that it suspended him because of its concerns of sabotage, it does not definitively prove that

American Airlines did not have legitimate concerns about Reed sabotaging its aircraft when it initiated and conducted the investigation. Tab 1, R.A. 022. And the ALJ was entitled to draw the rational conclusion from the evidence on record that American Airlines pulled Reed from service due to the seriousness of the sabotage allegations against him. It was rational for the ALJ to draw different inferences from the cited evidence than Reed suggests. For instance, Miller not being concerned after initially watching the video at issue does not negate the inference that management became concerned later when they were presented with a written allegation from three other mechanics that they witnessed Reed intentionally destroying or sabotaging an aircraft. Indeed, American Airlines' management testified that they only became concerned about the incident after reading the May 2, 2018, statement accusing Reed of sabotaging an aircraft. Tab 1, R.A. 022.; Tab 5, R.A. 136-38; Tab 9, R.A. 177.

Reed also seemingly argues that the way American Airline conducted the investigation itself is evidence that it was motivated by retaliatory purposes and not legitimate concerns of sabotage. Appellant's Brief at 14. For example, he cites evidence that the investigation dragged on for more than a month and that his statement was not taken until near the very end of the investigation which was unusual for a 29(f) investigation per the testimony of James Weel, American Airlines' managing director of labor relations. Tab 2, R.A. 045. However, the ALJ

concluded that the length of time that it took American Airlines to conduct its investigation was commensurate with the seriousness of the allegations against Reed and that American Airlines could not be faulted for proceeding with extreme caution in conducting the investigation. *Id.* at 068. This conclusion was reasonable based on the record and the seriousness of the allegations against Reed.

Additionally, a thorough investigation which ultimately cleared Reed of any wrongdoing itself provides support to the inference that American Airlines was motivated by a legitimate desire to understand the facts of what truly transpired with aircraft 8AK and address its concerns about sabotage when it suspended Reed.

The question on appeal is whether the ALJ's finding, as affirmed by the Board, that American Airlines acted because of its concerns of sabotage was reasonable based on the evidence on record. The Court reviews the agency decision under a deferential substantial evidence standard of review—that is the Court does not set aside an inference because it might find the opposite conclusion more reasonable if it were deciding the matter in the first instance. *Roadway Express*, 612 F.3d at 664 (internal citation omitted). Rather, if a reasonable factfinder could reach the same conclusion as the ALJ based on the record evidence, that is sufficient, and the court must affirm the decision. *Brousil*, 43 F.4th at 811; *Stone*, 957 F.2d 360 at 362 (internal citations omitted)(noting that

substantial evidence means only such relevant evidence that a rational mind might accept it as adequate to support a conclusion). Here, it is unquestionably a rational conclusion supported by ample evidence in the record that American Airlines pulled Reed from service because it was concerned about safety in the wake of receiving a serious allegation by three mechanics that Reed sabotaged an aircraft, and that American Airlines would have made that same decision even in the absence of Reed's protected activity. Thus, substantial evidence supports the ALJ's findings, as affirmed by the Board, that American Airlines established by clear and convincing evidence that it would have taken the same action against Reed absent his protected activity.

B. Substantial Evidence on the Record Supports the ALJ's Determination that Reed Failed to Establish that he was Subjected to Severe and Pervasive Harassment Necessary for a Finding of a Hostile Work Environment

The Board correctly concluded that substantial record evidence supports the ALJ's finding that Reed failed to prove a hostile work environment as an adverse action. To prove a hostile work environment Reed was required to provide sufficient evidence to demonstrate that his workplace "was permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). The ALJ emphasized here that Reed failed to present sufficient evidence to show he

experienced severe and pervasive harassment necessary to establish a hostile work environment.

Reed argued that several pieces of evidence demonstrate that he was subject to a hostile work environment, including the 29(f) interview for over-servicing an aircraft, name-calling by co-workers, the frequent oil servicing assignments, and other work assignments that deviated from normal business practices. Tab 2, R.A. 060-61; Tab 3, R.A.102-03; Tab 4, R.A. 125-127; Tab 6, R.A. 158-162; Appellant's Petition for Review at 3-4, 6. Additionally, he cites the testimony of Ms. Flanary, who testified that she was asked by a manger to keep a file on Reed and email reports about him to management. Tab 6, R.A. 152-154.

The ALJ and the Board found there was little evidence on record showing that Reed was subject to severe and pervasive harassment by American Airlines. Tab 2, R.A. 060. Reed alleges that his coworkers called him snitch and made fun of him for being too thorough in his aircraft inspections, however the ALJ explained that Reed failed to provide any evidence sufficient to attribute those comments to management or to show that management tolerated and encouraged such behavior at all. *Id.* Additionally, the ALJ found that there was no evidence on record demonstrating that such name calling was pervasive or constant. *Id.* The ALJ also rejected Reed's argument that being called into his supervisor's office for a 29(f) meeting to discuss over-servicing of engines evinced a hostile work

environment. *Id.* The ALJ noted that the 29(f) meeting was a single occurrence, informal, meant to simply gather information, and resulted in no disciplinary action against Reed.

The ALJ also addressed the allegations that Reed was more frequently assigned unpleasant and undesirable oil work when he returned from suspension. Tab 2, R.A. 060-61. The ALJ recognized that Reed provided some evidence of the frequency of his assignment to oil work, but ultimately found that the evidence was not sufficient to show that the assignment of oil work contributed to a hostile work environment or was itself an adverse action. Tab 2, R.A. 061. The ALJ reasoned that it was undisputed that oil servicing was a part of a mechanic's job duties and there was repeated and credible testimony that the crew chief, not management, assigned tasks to the mechanics. *Id.* at 062.

The question before the Court is whether substantial evidence supported the ALJ's finding, as affirmed by the Board, that Reed failed to establish by a preponderance of the evidence that he was subjected to a hostile work environment. The ALJ identified multiple deficiencies in the record to support the finding that Reed failed to provide sufficient evidence to establish that he was subjected to severe and pervasive harassment by American Airlines. Occasional name calling by his co-workers, a single non-disciplinary meeting with a supervisor to discuss his work performance, and the assignment of more frequent

oil work, an undisputed part of his job duties, cumulatively and on their own did not rise to the level of severe and pervasive harassment. The ALJ's finding that Reed failed to establish that he was subjected to a hostile work environment was supported by substantial evidence on the record, and the ARB properly affirmed it.

C. Substantial Evidence on the Record Supports the ALJ's Finding that Reed Failed to Establish by a Preponderance of the Evidence that American Airlines Denied or Restricted his Overtime Opportunities

The Board correctly concluded that substantial evidence on the record supported the ALJ's finding that Reed failed to provide credible evidence that management took affirmative steps to prevent him from obtaining overtime work.

The ALJ and the Board found that there was no credible evidence to support Reed's contention that management took steps to actively prevent him from obtaining overtime work. The ALJ emphasized that the American Airlines overtime system was a regimented system governed strictly by the CBA and was highly monitored by the union and mechanics themselves. Tab 2, R.A. 057-58. The ALJ noted that Reed provided no substantive evidence that his overtime hours decreased after he engaged in protected activity or that his hours were out of sync with other mechanics. *Id.* Significantly, the evidence shows that Reed earned more overtime in the year after he engaged in protected activities than previous years. Tab 9, R.A. 181-186. In 2018, Reed worked 341 overtime hours, in 2019 he

worked 420 hours. *Id.* He worked 287 and 338 hours in 2016 and 2017, respectively. *Id.*

To support his claim of overtime restrictions, Reed points to evidence that AMTs like Callahan received more overtime than him, and to Flanary's testimony that other AMTs like Callahan received special treatment in several matters including overtime. Tab 1, R.A. 019; Appellant's Petition for Review at 9-10. However, the ARB correctly found that this evidence was not significantly probative of the issue. First, Flanary's testimony noted that American Airlines management did "[n]ot necessarily" ask her to provide "preferential treatment" to the other AMTs and that it was "[j]ust [her] opinion" that certain job assignments were given to other AMTs for the purpose of overtime. Tab 6, R.A. 155-157. Additionally, American Airlines maintained that Reed and Callahan worked on different shifts and crews, and that no evidence showed that Reed and Callahan signed up for overtime at similar rates. Tab 1, R.A. 019.

The fact that Reed's overtime hours increased in the year after he engaged in protected activity coupled with the fact that American Airlines' overtime system is highly regimented and closely monitored by the Union, was sufficient to support the ALJ's finding that Reed failed to establish that American Airlines intentionally denied him overtime. In sum, substantial evidence supports the ALJ's conclusion that Reed failed to provide sufficient evidence to show management actively

denied him overtime opportunities, and the Board properly affirmed the ALJ's finding on this issue.

CONCLUSION

For the foregoing reasons, substantial evidence supports the ALJ's decision, affirmed by the Board, and thus this Court should dismiss Reed's petition for review.

Dated: November 18, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLAINT

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,413 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that, on November 18, 2022, I electronically filed the foregoing Answering Brief of the Secretary of Labor via the Court's CM/ECF Electronic Filing System. All participants in the case are registered CM/ECF users and service on them will be accomplished by the appellate CM/ECF system.

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