U.S. Department of Labor Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

SHEIDA HUKMAN,

COMPLAINANT,

v.

AMERICAN AIRLINES, INC. F/K/A U.S. AIRWAYS, INC.,

RESPONDENT.

ARB CASE NOS. 2024-0016
2024-0020

ALJ CASE NO. 2015-AIR-00003
ALJ STEVEN B. BERLIN

DATE: July 17, 2026

Appearances:

For the Complainant:
Sheida Hukman; *Pro Se*; Las Vegas, Nevada

For the Respondent:
Douglas Trey Lynn, Esq. and Nonnie L. Shivers, Esq.; *Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*; Phoenix, Arizona

Before JOHNSON, Chief Administrative Appeals Judge, and KAPLAN and KIKO, Administrative Appeals Judges

DECISION AND ORDER

This case arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) and its implementing regulations.[1] Complainant Sheida Hukman filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Respondent American Airlines, Inc. unlawfully retaliated against her for engaging in protected activity. On January 12, 2024, a United States Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order

[1] 49 U.S.C. § 42121; 29 C.F.R. Part 1979 (2026).

(D. & O.), finding that Respondent violated AIR21 when it placed Complainant on unpaid medical leave pending the report of an independent mental examination (IME) by a psychiatrist and awarded damages. Both parties petitioned the Administrative Review Board (ARB or Board) for review of the ALJ's D. & O. For the following reasons, we affirm.

BACKGROUND

U.S. Airways, Inc., now American Airlines, hired Complainant as a customer service agent on May 22, 2007.[2] Her duties included boarding passengers, issuing boarding passes, checking baggage, and assisting with flight operations at departure gates.[3] Throughout her employment, Complainant was represented by the Communications Workers of America (CWA) and worked pursuant to a collective bargaining agreement (CBA).[4]

From 2010 to 2012, Complainant submitted written complaints and made verbal reports to supervisors and managers concerning what she believed were airline safety and Federal Aviation Administration (FAA) violations.[5] Her concerns focused primarily on aircraft weight-and-balance procedures and passenger manifest accuracy. Specifically, Complainant alleged that gate agents sometimes manipulated passenger counts on weight-restricted flights by counting adults as children or by excluding jump-seat riders for flight manifests in order to avoid passenger limitations imposed for safety reasons,[6] that certain airline employees had "smuggled" themselves onto flights without being on the manifest,[7] and that a passenger boarded an international flight to London without a valid passport or boarding pass.[8]

During this same period, however, Complainant also experienced numerous interpersonal conflicts with coworkers and supervisors. One such incident occurred

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2 D. & O. at 2.

3 *Id*.

4 *Id*.

5 *Id*. at 2-8, 13-17.

6 *Id*. at 2-3, 6-7.

7 *Id*. at 3-4.

8 *Id*. at 13-17.

on November 15, 2012, when Complainant became involved in a heated dispute with a Republic Airways captain regarding boarding priorities for non-revenue passengers.[9] Complainant believed that a Republic Airways flight attendant had been improperly boarded ahead of another passenger and, also asserted that, following the incident, the captain was too agitated to fly.[10] After conducting an internal investigation, Respondent issued Complainant Level 1 discipline for failing to follow company policy and for engaging in unprofessional behavior relating to the incident.[11]

In August 2012, management and human resources became increasingly concerned that Complainant may not have been fit for duty because of the nature and frequency of her complaints.[12] In some of these complaints, Complainant accused coworkers of monitoring her apartment, accessing her financial information, bugging airport areas, practicing witchcraft, spreading rumors that she was a terrorist, and conspiring against her.[13] Additionally, several coworkers complained about Complainant's behavior, characterizing her as confrontational, argumentative, and difficult to work with.[14] As a result, on December 10, 2012, a human resources manager decided to require Complainant to undergo an IME.[15] Respondent then placed Complainant on unpaid leave pending the results of the IME.[16]

Article 16 of the CBA provides that an employee may be required to submit to a paid medical examination when Respondent determines that the employee's physical or mental condition may impair the performance of her duties or pose a safety hazard to herself, other employees, or customers.[17] An employee removed from service as a result of a medical examination may, within fourteen days of removal, appeal the determination and employ a qualified medical examiner of her

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9 *Id*. at 13.

10 *Id*.

11 *Id*. at 13-17.

12 *Id*. at 18-19.

13 *Id*. at 9-12.

14 *Id*. at 10.

15 *Id*. at 19.

16 *Id*.

17 *Id*. at 20.

choice, at her own expense, to conduct a physical or mental examination addressing the problems or conditions identified by Respondent's medical examiner.[18] Further, Article 16(D) states:

> If, under the provisions of this Article, an employee's removal from service is ultimately found to be unwarranted, he will be paid retroactively for time lost in the amount that he would have earned in his regularly scheduled work shifts, except to the extent he has unreasonably delayed the medical examination process, and he will be reimbursed for the employee's expense of employing a neutral medical examiner.[19]

Examine Works, a third-party vendor, scheduled Complainant's IME with Dr. Karen Cruey.[20] Respondent prepared a seventy-four-page packet of materials for Dr. Cruey and the IME.[21] On January 18, 2013, Dr. Cruey conducted a psychiatric and medical interview with Complainant.[22] Dr. Cruey diagnosed Complainant with several psychiatric and personality disorders and recommended extensive psychological treatment and testing before Complainant could safely return to work.[23] Dr. Cruey's diagnosis and treatment plan was outlined in the IME report, which was provided to Respondent on February 12, 2013.[24] On February 20, 2013, Respondent sent Complainant a letter advising her that, under Dr. Cruey's recommendations, she was required to see a psychologist, submit to a battery of psychological tests, and attend psychotherapy with that psychologist twice per week for at least four to six weeks before she could return to work.[25] Although Complainant disputed the diagnosis and treatment plan, she did not seek a second medical opinion within fourteen days, a right clearly afforded to her under the CBA,

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18 *Id*. at 20.

19 *See id*.; Respondent's Exhibit (RX) 4.

20 D. & O. at 21.

21 *Id*. at 21-22.

22 *Id*. at 22.

23 *Id*. at 22-24.

24 *Id*. at 48; RX-56.

25 D. & O. at 24.

and instead declined to avail herself of that right.[26] Complainant also did not complete the recommended treatment plan.[27] As a result, Respondent kept Complainant on unpaid leave.[28] Approximately three years later, Respondent informed Complainant that she was deemed to have resigned because she had not complied with the treatment requirements.[29]

On February 20, 2013, Complainant filed a complaint with OSHA.[30] On October 6, 2014, OSHA issued Secretary's Findings, concluding that there was no reasonable cause to believe that Respondent had violated AIR21. Complainant filed objections to the Secretary's Findings and requested a hearing before the Office of Administrative Law Judges (OALJ).

On April 23, 2015, an ALJ issued a Decision and Order Denying Motion for Leave to File Amended Complaint and Granting Motion to Dismiss, concluding that Complainant failed to state a claim for which relief could be granted.[31] Complainant appealed, and the ARB vacated the ALJ's D. & O. Granting Motion to Dismiss and remanded for further proceedings.[32] On remand, the ALJ granted Respondent's motion for summary decision and again dismissed the complaint, concluding that Complainant failed to raise genuine issues of material fact as to multiple elements of her AIR21 claim.[33] Complainant again appealed, and the ARB vacated the ALJ's Order on Remand Granting Respondent's Motion for Summary Decision and

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[26] *Id*. at 25.

[27] *Id*.

[28] *Id*. at 26.

[29] *Id*.

[30] *Id*. at 25.

[31] Decision and Order of Remand (ARB July 13, 2017) at 1-2.

[32] The Board affirmed the ALJ's denial of Complainant's request to amend her complaint and dismissal of certain alleged protected activities, including allegations concerning an "airport rage" incident and a report regarding a nurse's expired license. *Id*. at 4-6, 9. However, the Board reversed as to Complainant's allegation that she reported coworkers for placing individuals on flights without accurate manifests, concluding that such allegations could reasonably relate to aircraft safety concerns and therefore could constitute protected activity under AIR21. *Id*. at 6-8. The Board also instructed the ALJ on remand to determine the filing date of the OSHA complaint for purposes of assessing timeliness. *Id*. at 8.

[33] Decision and Order of Remand (ARB Jan. 16, 2020) at 2-3, 21.

Denying Complainant's Motion for Summary Judgment and remanded for further proceedings.[34]

Consistent with the ARB's Decision and Order of Remand, the case was reassigned to a different ALJ.[35] The ALJ held a videoconference hearing from April 19 through 21, 2021.[36] On January 12, 2024, the ALJ issued a D. & O., concluding that: (1) Complainant engaged in protected activity;[37] (2) Respondent took adverse actions against Complainant;[38] (3) Complainant's protected activity was a contributing factor in Respondent's adverse actions;[39] (4) Respondent established by clear and convincing evidence that it would have taken some, but not all, of the same adverse actions absent the protected activity;[40] and (5) Respondent violated AIR21, although Complainant's relief was limited based on after-acquired evidence.[41] The ALJ awarded Complainant back pay, with interest, from December

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[34] The Board concluded that the ALJ applied an improper evidentiary burden at the summary-decision stage, failed to construe Complainant's pro se submissions liberally, improperly resolved factual disputes, and did not view the evidence in the light most favorable to Complainant. *Id.* at 4, 6-11, 20. The Board held that Complainant had sufficiently alleged and supported a prima facie AIR21 claim for purposes of surviving summary decision, including allegations of protected activity, unfavorable personnel actions including written discipline, an IME requirement, and suspensions, and sufficient evidence of contributing-factor causation. *Id.* at 4, 12-20. The Board therefore vacated the dismissal, including the ALJ's findings regarding timeliness and Respondent's affirmative defense. *Id.* at 19-21.

[35] *Id.* at 20.

[36] D. & O. at 2.

[37] *Id.* at 32-36.

[38] *Id.* at 37-39.

[39] *Id.* at 41-43.

[40] *Id.* at 44-48.

[41] *Id.* at 47-48.

2, 2012, through February 12, 2013,[42] $2,000 in compensatory damages based on Complainant's loss wages, and reasonable litigation costs.[43]

Both parties petitioned the ARB for review of the ALJ's D. & O.[44] The Board accepted the petitions for review and consolidated the cases for decisional purposes. For the reasons discussed below, we affirm the ALJ's D. & O.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of the Department of Labor has delegated authority to the Board to review appeals from ALJ decisions and to issue agency decisions in cases arising under AIR21.[45] In AIR21 cases, the Board reviews questions of law presented on appeal de novo, but is bound by ALJ factual findings that are supported by substantial evidence.[46] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[47] Under this standard, the "threshold for such evidentiary sufficiency is not high."[48] When reviewing decisions under a substantial evidence standard, the Board is

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[42] The Board notes a discrepancy in the D. & O. regarding the date on which Respondent received the IME report, the basis for the ALJ's after-acquired evidence determination. In the analysis section, the ALJ found that Respondent received the report on February 12, 2013, but in the conclusion section, the ALJ identified February 13, 2013, as the back pay end date. *Id*. at 48-49. The record supports that the report was received by Respondent on February 12, 2013, and the back pay calculation should reflect that date. RX-56.

[43] D. & O. at 49.

[44] On January 22, 2024, Complainant filed her Petition for Review, and the matter was administratively assigned ARB Case Number 2024-0016. On January 29, 2024, Respondent filed its Petition for Review with the Board, and the matter was administratively assigned ARB Case Number 2024-0020.

[45] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020); 29 C.F.R. § 1979.110(a).

[46] 29 C.F.R. § 1979.110(b); *see Mazenko v. Pegasus Aircraft Mgmt., LLC*, ARB No. 2021-0032, ALJ No. 2019-AIR-00001, slip op. at 10 (ARB June 18, 2024) (citations omitted).

[47] *Mazenko*, ARB No. 2021-0032, slip op. at 10 (citations omitted).

[48] *Neely v. The Boeing Co.*, ARB No. 2020-0071, ALJ No. 2018-AIR-00019, slip op. at 9 (ARB May 19, 2022) (citing *Biestek v. Berryhill*, 587 U.S. 97, 103 (2019)).

precluded from "deciding the facts anew, making credibility determinations, or re-weighing the evidence."[49]

DISCUSSION

1. Governing Law

AIR21 states a complainant engaged in protected activity if he or she:

> [P]rovided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be 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 aviation safety. . . .[50]

To prevail in a retaliation case under AIR21, a complainant must prove by a preponderance of the evidence that: (1) she engaged in activity that AIR21 protects; (2) her employer took adverse action against her; and (3) her protected activity was a contributing factor in the adverse action.[51] If a complainant meets this burden of proof, the respondent may avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity.[52] The Board has previously held an employer satisfies this burden when it shows that it is "highly probable" or "reasonably certain" it would have taken the action in the absence of protected activity.[53]

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49 *Id.* (citing *Stone & Webster Constr., Inc. v. U.S. Dep't of Lab.*, 684 F.3d 1127, 1133 (11th Cir. 2012)).

50 49 U.S.C. § 42121(a)(1).

51 *Id.* § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a); *Mazenko*, ARB No. 2021-0032, slip op. at 12 (citations omitted).

52 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a); *Mazenko*, ARB No. 2021-0032, slip op. at 12 (citations omitted).

53 *Petitt v. Delta Airlines, Inc.*, ARB No. 2021-0014, ALJ No. 2018-AIR-00041, slip op. at 19 (ARB Mar. 29, 2022) (citing *Clemmons v. Ameristar Airways, Inc.*, ARB No. 2008-0067, ALJ No. 2004-AIR-00011, slip op. at 11 (ARB May 26, 2010)).

2. Complainant's Appeal: Adverse Actions Taken Against Complainant and Respondent's Affirmative Defense

The ALJ concluded that the assessment of Level 1 discipline, requirement to undergo an IME, placement on unpaid medical leave pending the IME results, requirement to undergo testing and treatment, and termination all constituted adverse actions under AIR21,[54] and that Complainant's protected activity contributed to these adverse actions.[55] Although the ALJ found that Complainant proved by a preponderance of the evidence that her protected activity was a contributing factor to the adverse actions, the ALJ determined that Respondent proved by clear and convincing evidence that it would have taken the same action even absent protected activity, to some, but not all the adverse actions listed above.[56] Specifically, the ALJ concluded that Respondent would not have placed Complainant on unpaid medical leave prior to the IME absent her protected activity.[57]

On appeal, Complainant argues that[58] the Level 1 discipline, requirement that she undergo an IME, the requirement that she undergo testing and treatment, and her eventual separation from employment were not legitimate personnel actions, but instead were imposed in retaliation for her protected activity under AIR21.[59] Complainant claims that Respondent relied on inaccurate or improperly obtained employee statements, failed to provide her with the documentation it furnished to Dr. Cruey, and used the Level 1 disciplinary process as a pretext to place her on unpaid medical leave, require an IME, and ultimately terminate her employment.[60] She also avers that the IME was unnecessary, that she was not properly informed of the requirements associated with it, and that the asserted

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[54] D. & O. at 37-39.

[55] *Id*. at 41-43.

[56] *Id*. at 44-48.

[57] *Id*. at 46.

[58] The Board "'construes arguments for self-represented litigants liberally in deference to their lack of training in the law,' while 'also refrain[ing] from becoming an advocate for the pro se litigant.'" *Kossen v. Asia Pac. Airlines*, ARB No. 2023-0047, ALJ No. 2023-AIR-00001, slip op. at 7 n.32 (ARB May 30, 2025) (quoting *Williams v. QVC, Inc.*, ARB No. 2020-0019, ALJ No. 2018-SOX-00019, slip op. at 7 n.43 (ARB Jan 17, 2023)).

[59] *See* Complainant's Opening Brief (Comp. Br.) at 13-19, 22-25, 29-30.

[60] *See id*. at 3, 16-18, 23, 27-31.

mental-health basis for these actions was unsupported.[61] She further challenges the ALJ's reliance on Dr. Cruey's report, asserting that the report "is false" and that Dr. Cruey was unqualified to conduct the IME.[62] In response, Respondent contends that substantial evidence supports the ALJ's finding that it proved by clear and convincing evidence that it would have taken the same actions absent protected activity.[63]

A. Complainant's Grievances and Relation to AIR21

We agree with Respondent. As a preliminary matter, "AIR21 is not a general remedy for employment grievances unrelated to air safety[,]"[64] nor does it authorize the OALJ or the Board to serve as a "super-personnel department" reviewing whether Respondent made the correct employment decision.[65] An employer may discipline an employee for reasons that are mistaken, unreasonable, or unfair without violating a whistleblower statute.[66] Accordingly, our role is not to determine whether Complainant violated Respondent or Republic Airways' boarding policies, whether Level 1 discipline was an appropriate penalty under the circumstances, or whether management should have accepted Complainant's explanation of the altercation with the pilot. Rather, the dispositive question is whether Complainant's protected activity was a contributing factor in Respondent's decision to impose the discipline.[67] Here, the ALJ correctly focused on the proper inquiry and concluded that Complainant's protected activity contributed to Respondent's decision to assess the Level 1 discipline.[68] Because the ALJ found Complainant's protected activity contributed to the adverse actions above, our review now focuses on whether

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61 *Id*. at 3-4, 27-28, 31.

62 *Id*. at 25-27.

63 Respondent American Airlines, Inc. F/K/A US Airways, Inc.'s Response Brief (Resp. Res. Br.) at 6-17.

64 *Forrand v. FedEx Express*, ARB No. 2019-0041, ALJ No. 2017-AIR-00016, slip op. at 3 n.8 (ARB Jan. 4, 2021).

65 *Neely*, ARB No. 2020-0071, slip op. at 12 n.76 (citing *Wright v. R.R. Comm'n of Tex.*, ARB No. 2019-0011, ALJ No. 2015-SDW-00001, slip op. at 4 n.9 (ARB May 22, 2019)).

66 *E.g.*, *Acosta v. Union Pac. R.R. Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082, slip op. at 11-12, 12 n.7 (ARB Jan. 22, 2020) (citing *Collins v. Am. Red Cross*, 715 F.3d 994, 999 (7th Cir. 2013) ("the FRSA 'does not forbid sloppy, mistaken, or unfair terminations; it forbids discriminatory or retaliatory terminations.'")).

67 29 C.F.R. § 1979.109(a).

68 D. & O. at 41-43.

substantial evidence supports the finding that Respondent established its same-action defense.

B. Level 1 Discipline

Substantial evidence supports the ALJ's finding that Respondent would have assessed Complainant Level 1 discipline absent her protected activity. Respondent presented documentary evidence and testimony that it investigated the pilot altercation by interviewing the participants and witnesses, considered conflicting accounts, and reasonably concluded that Complainant misunderstood the boarding-priority policy, escalated the dispute instead of seeking supervisory assistance, and shared responsibility with the pilot for their unprofessional conduct in front of customers.[69] The ALJ permissibly relied on that evidence in finding that Respondent would have assessed Level 1 discipline absent protected activity, and his finding is supported by substantial evidence.

C. Requirement to Undergo an IME

Substantial evidence supports the ALJ's finding that Respondent would have required Complainant to undergo an IME absent her protected activity. The record includes documentary evidence and testimony that Complainant made a series of complaints alleging, among other things, that coworkers and others were stalking her, had tapped her family's telephones, knew details of conversations inside her apartment, monitored her finances, spread accusations that she delivered drugs, communicated in a "witch" or "reverse" language, bugged airport gate areas, and intended to murder her.[70] The ALJ found that these complaints were numerous, extraordinary, and of a kind that would cause serious concern to a human resources manager.[71] The ALJ also credited Respondent-witness testimony indicating that after it received these allegations, Respondent investigated them and consulted with its employee assistance program contact and legal department for guidance.[72] Additionally, the ALJ reasonably relied on the CBA, which authorized Respondent to require an IME when an employee's physical or mental condition "may impair the performance of his duties or poses a safety hazard to himself, other employees,

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69 *Id*. at 44.

70 *Id*. at 44-45.

71 *Id*. at 45.

72 *Id*.

or customers."[73] Thus, substantial evidence supports the ALJ's finding that Respondent proved it would have required the IME regardless of Complainant's protected activity.

D. Requirement to Comply with the IME Testing and Treatment Recommendations

Substantial evidence supports the ALJ's finding that, after receiving Dr. Cruey's report, Respondent proved it would have required Complainant to comply with the recommended testing and treatment before returning to work and would have placed her in unpaid status during that period, absent her protected activity. The record supports the ALJ's finding that Dr. Cruey was a qualified licensed psychiatrist and that her opinion was independent and impartial.[74] Respondent used a third-party vendor to schedule the IME, provided Dr. Cruey with documentation concerning Complainant's employment history and complaints, and did not participate in the examination.[75] Dr. Cruey evaluated Complainant, reviewed the materials provided, and recommended psychotherapy, psychological testing, blood testing, and ongoing treatment.[76] Although Complainant disputed the diagnosis and treatment plan, she did not avail herself of the rights provided in the CBA and did not seek a second medical opinion within fourteen days.[77] The ALJ reasonably determined that once Respondent received Dr. Cruey's report and recommendations, and absent a contrary second opinion, it had expert information

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[73] *Id*. at 45-46.

[74] *See id*. at 46-47. The Board affords an ALJ's credibility determinations "great deference" and will not disturb them unless they are "inherently incredible or patently unreasonable." *Neely*, ARB No. 2020-0071, slip op. at 22 (citation omitted). Nothing in the record supports the ARB disturbing the ALJ's credibility determination and factual finding that Dr. Cruey was a qualified licensed psychiatrist. By contrast, Complainant's expert, Dr. Brown, evaluated Complainant several years after Dr. Cruey's evaluation, limiting the probative value of his opinion regarding Complainant's condition during the period at issue. D. & O. at 26-27, 48-49. Moreover, Dr. Brown did not testify at the hearing and therefore was not subject do cross-examination, further diminishing the weight that can be afforded to his opinion. *See id*. at 2. Finally, the fact that Dr. Cruey received compensation for her services as an expert witness does not itself undermine her qualifications or the credibility of her testimony, as expert witnesses are routinely and properly compensated for their time and professional services in litigation.

[75] *Id*. at 46.

[76] *Id*. at 46-47.

[77] *Id*. at 25.

bearing directly on whether Complainant could safely perform her job and would have required compliance with those recommendations before restoring her to active duty.[78]

We also affirm the ALJ's analysis and conclusion that the IME report limited Complainant's entitlement to back pay as of the date Respondent received it under after-acquired evidence principles. The ALJ correctly recognized that under *McKennon v. Nashville Banner Publishing Co.*,[79] and Board precedent,[80] after-acquired evidence may limit relief where the respondent proves by clear and convincing evidence it would have taken the same action on legitimate, non-retaliatory grounds once the information became known.[81] Here, although the evidence at issue did not concern employee misconduct, the ALJ permissibly found that the IME report constituted subsequently acquired information establishing a legitimate safety-based basis for removing Complainant from active duty without pay until she underwent recommended testing and treatment.[82] Respondent would have taken the same action irrespective of any protected activity given its obligation to protect Complainant, coworkers, and customers from known safety risks.[83] Accordingly, we agree that any back pay ended on the date Respondent received the IME report.

E. Separation From Employment

Substantial evidence supports the ALJ's finding that Respondent would have separated Complainant from employment absent protected activity. The record includes documentary evidence and testimony showing that, on December 4, 2015, Respondent notified Complainant that she was approaching three years on medical leave and that, unless she submitted documentation by December 11, 2015, demonstrating that she had satisfied the return-to-work requirements set forth in

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78 *Id.* at 47. As noted above, Complaint had a right to obtain a second opinion under the CBA but failed to do so.

79 *McKennon v. Nash. Banner Publ'g Co.,* 513 U.S. 352 (1995).

80 *See Clemmons v. Ameristar Airways, Inc.*, ARB No. 2012-0105, ALJ No. 2004-AIR-00011 (ARB Nov. 25, 2013).

81 *See id.* at 5 (citing *McKennon*, 513 U.S. at 362).

82 D. & O. at 48.

83 *Id.*

the IME report, she would be deemed to have resigned effective that date.[84] While we need not decide whether the ALJ correctly found that no provision in the CBA or elsewhere established a three-year limit on medical leave, the ALJ reasonably found that the separation was simply a continuation of its earlier, legitimate requirement that Complainant complete the recommended testing and treatment before returning to work.[85] Complainant presented no evidence that she ever complied with Dr. Cruey's recommendations, or with any equivalent testing and treatment, despite the passage of many years.[86] Accordingly, substantial evidence supports the ALJ's finding that Respondent proved by clear and convincing evidence that it would have taken this action absent protected activity.

3. Respondent's Appeal: The Railway Labor Act and Unpaid Medical Leave Pending the IME Results

As discussed above, the ALJ found that Respondent did not prove by clear and convincing evidence that it would have placed Complainant on unpaid medical leave pending the IME absent her protected activity.[87] On appeal, Respondent argues that the ALJ erred in awarding back pay and other damages for that leave period.[88] Respondent contends that any entitlement to damages while Complainant awaited the IME is governed exclusively by the CBA, such that the issue constitutes a minor dispute under the Railway Labor Act (RLA).[89] Respondent also contends that, because the ALJ found that Respondent proved it would have required Complainant to undergo the IME even absent protected activity, the ALJ lacked a basis to find an AIR21 violation and award damages for the unpaid medical leave prior to the IME.[90]

In response, Complainant does not directly address Respondent's RLA preemption or damages arguments. Instead, her response largely addresses the

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84 *Id*.

85 *Id*.

86 *Id*.

87 *Id*. at 46.

88 Petitioner American Airlines, Inc. F/K/A US Airways, Inc.'s Opening Brief (Resp. Br.) at 1, 18-24.

89 *Id*. at 22-24.

90 *Id*. at 18-22.

merits of her underlying retaliation claim which we have addressed above.[91] Nevertheless, we disagree with Respondent's contention that the ALJ's award of back pay, compensatory damages, and reasonable litigation costs is preempted by the RLA.

The RLA, enacted in 1926, was intended to promote stability in labor-management relations by establishing a comprehensive framework for resolving labor disputes in the railroad industry.[92] The RLA distinguishes between "major" disputes, which concern the formation of collective bargaining agreements, and "minor" disputes, which concern the interpretation or application of existing agreements.[93] In 1936, Congress extended the RLA's coverage to the airline industry, thereby affording air carriers and their employees substantially the same rights, obligations, and dispute-resolution procedures appliable in the railroad context.[94]

The RLA, however, does not preclude all employment-related claims brought by airline employees covered by a collective bargaining agreement. The Board has recognized that "RLA preemption occurs when there is an active dispute over the meaning of contract terms."[95] By contrast, preemption does not arise merely because the collective bargaining agreement is consulted, referenced, or considered by a judge in resolving a statutory claim or invoked by a respondent as a defense.[96]

Applying these principles here, Respondent has not established that the ALJ's damages award is barred by the RLA. Respondent primarily relies on Article 16(D) of the CBA, which states:

> "If, under the provisions of this Article, an employee's removal from service is ultimately found to be

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91 *See* Complainant Response Brief in Opposition to the Petition Opening Brief (Comp. Res. Br.) at 6-27.

92 *See* 45 U.S.C. §§ 151-188; *Willbanks v. Atlas Air Worldwide Holdings, Inc.*, ARB No. 2014-0050, ALJ No. 2014-AIR-00010, slip op. at 7 (ARB Mar. 18, 2015) (citation omitted).

93 *Willbanks*, ARB No. 2014-0050, slip op. at 7 (citations omitted).

94 *See* 45 U.S.C. § 181; *Willbanks*, ARB No. 2014-0050, slip op. at 7 (citations omitted).

95 *Petitt*, ARB No. 2021-0014, slip op. at 11 (internal quotations and citations omitted).

96 *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 256-66 (1994) (discussing and holding that the RLA does not bar claims based on rights independent of a CBA).

> unwarranted, he will be paid retroactively for time lost in the amount that he would have earned in his regularly scheduled work shifts, except to the extent he has unreasonably delayed the medical examination process, and he will be reimbursed for the employee's expense of employing a neutral medical examiner."[97]

Respondent argues that this provision governs whether Complainant was entitled to pay while awaiting the IME, that the provision's plain language bars recovery, and the ALJ therefore could not award damages without interpreting the CBA.[98]

Even assuming, solely for the purposes of this appeal, that Respondent's interpretation of Article 16(D) is correct, that would not establish preemption. While we acknowledge that the ALJ's statement "nothing in the [CBA] to support a suspension (or leave) without pay before the examination has been conducted"[99] may be read as addressing the meaning of the CBA, we do not understand the ALJ to have resolved a disputed issue of contract interpretation. The ALJ did not award relief because he concluded that Article 16(D) entitled Complainant to paid leave. Rather, the ALJ awarded relief after finding that Respondent violated AIR21 and failed to prove by clear and convincing evidence that it would have placed on unpaid medical leave pending the IME absent her protected activity.[100]

This distinction is dispositive as AIR21 creates rights and remedies independent of the CBA.[101] The question here is not whether Complainant had a contractual entitlement to paid leave under Article 16(D), but whether Respondent's decision to place Complainant on unpaid medical leave pending the IME was retaliatory and, if so, whether back pay or other make-whole relief was warranted under AIR21.[102] In making that determination, the ALJ evaluated Respondent's evidence, including the CBA, to determine whether Respondent satisfied its burden

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97 Resp. Res. Br. at 21.

98 *Id*. at 21-22.

99 D. & O. at 38 n.41.

100 *Id*. at 46.

101 *See Lucia v. Am. Airlines, Inc.*, ARB Nos. 2010-0014, -0015, -0016, ALJ Nos. 2009-AIR-00015, -00016, -00017, slip op. at 7 (ARB Sept. 16, 2011).

102 *See, e.g.*, *id.* at 7-8 (discussing the separate nature of statutory and contractual rights even if they concern some or all the same facts).

to prove its affirmative defense under AIR21.[103] A respondent may rely on a collective bargaining agreement as evidence to support its legitimate, nonretaliatory explanation or its same-action defense under AIR21. But invoking the CBA in support of its defense, or relying on the CBA as context for the employment relationship does not transform an AIR21 claim into a minor dispute under the RLA. Accepting Respondent's position would substantially expand RLA preemption beyond its proper scope.

Additionally, an employer cannot shield itself against liability for unlawful retaliation simply by characterizing its conduct as authorized by a collective bargaining agreement or a company policy. The Board has consistently held that the affirmative defense standard requires proof of what the employer would have done, not simply what it could have done.[104] An employer cannot carry its burden by showing that it might have taken the same adverse action against an employee.[105] Substantial evidence supports the ALJ's finding that Respondent failed to prove by clear and convincing evidence that it would have placed Complainant on unpaid leave pending the IME. As the ALJ found, Respondent did not identify examples of other employees being placed on unpaid leave for a required medical examination and did not provide a persuasive explanation justifying the unpaid leave.[106] Instead, Respondent relied primarily on the CBA in support of its position.[107] The ALJ reasonably determined that this showing was insufficient to establish by clear and convincing evidence that Respondent would have placed Complainant on unpaid medical leave pending the IME absent her protected activity.

Moreover, we also reject Respondent's argument that the ALJ's finding concerning the requirement that Complainant undergo an IME precludes damages for the unpaid leave.[108] Although the ALJ separately found that Respondent proved that it would have required Complainant to undergo the IME absent her protected activity, that determination is distinct from whether Respondent also established it would have placed her on unpaid leave pending the examination. The fact that

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103 D. & O. at 46.

104 *Young v. CSX Transp., Inc.*, ARB Nos. 2023-0028, -0029, ALJ No. 2021-FRS-00001, slip op. at 9 (ARB Mar. 27, 2025) (citations omitted).

105 *Id.* at 9-10 (citations omitted).

106 D. & O. at 46.

107 *Id.*

108 Resp. Res. Br. at 20.

Respondent established its same-action defense as to the IME requirement does not necessarily establish a same-action defense as to the unpaid leave. Accordingly, the ALJ's award of back pay, compensatory damages, and reasonable litigation costs is affirmed.

CONCLUSION[109]

For the reasons stated above, we **AFFIRM** the ALJ's D. & O.[110]

SO ORDERED.

PHILIP G. KIKO
Administrative Appeals Judge

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

ELLIOT M. KAPLAN
Administrative Appeals Judge

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[109] The Board does not question the sincerity of Complainant's concerns regarding airline safety. Indeed, the record reflects that she raised serious safety issues. Nevertheless, the dispositive issue before the Board is whether Respondent proved by clear and convincing evidence that it would have taken the same personnel actions absent Complainant's protected activity. The ALJ found, and the record supports, that Respondent reasonably required Complainant to satisfy the recommendations and conditions of the IME, or invoke the CBA's procedures for challenging the IME, before she could resume her position. Complainant did neither. The Board recognizes that this outcome may appear harsh given the nature of Complainant's protected activity. However, had Complainant complied with the IME recommendations or pursued the procedures available under the CBA, the factual and legal posture of this case may have been materially different.

[110] Although we affirm the D. & O., we note the discrepancy as to the after-acquired evidence date used by the ALJ. *Supra* note 42. Accordingly, Respondent must pay Complainant back wages, together with interest, from December 2, 2012, the date Respondent removed Complainant from pay status, through February 12, 2013, when the after-acquired evidence terminated Complainant's entitlement to recover lost wages.