U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

ANTHONY INGANAMORTE,

COMPLAINANT,

v.

MTA LONG ISLAND RAILROAD,

RESPONDENT.

ARB CASE NO. 2025-0009

ALJ CASE NO. 2022-NTS-00002
ALJ SCOTT R. MORRIS

DATE: September 8, 2026

Appearances:

For the Complainant:
Samuel Seham, Esq., and Lee Seham, Esq.; *Seham, Seham, Meltz & Petersen, LLP*; White Plains, New York

For the Respondent:
Helene R. Hechtkopf, Esq., and Amory W. McAndrew, Esq.; *Hoguet Newman Regal & Kenney, LLP*; New York, New York

Before BURRELL and KIKO, Administrative Appeals Judges

DECISION AND ORDER AFFIRMING IN PART AND REVERSING IN PART

This case arises under the National Transit Systems Security Act of 2007 (NTSSA), and its implementing regulations.[1] Complainant Anthony Inganamorte alleges that his employer, Respondent MTA Long Island Railroad, retaliated against him in violation of the NTSSA. On October 31, 2024, a United States Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order Granting Relief (D. & O.), finding in Complainant's favor and awarding him monetary and non-monetary relief. In this appeal, Complainant asks the Administrative Review Board (ARB or Board) to grant him higher monetary

[1] 6 U.S.C. § 1142; 29 C.F.R. Part 1982 (2026).

damages. For the reasons that follow, we affirm the D. & O. in part and reverse the D. & O. in part.

BACKGROUND

1. Complainant's Employment with Respondent

Respondent is a railroad company that operates from Long Island to New York City.[2] Respondent employs Signal Inspectors to test the rail's signaling system to ensure it is operating properly.[3] Respondent organizes its Signal Inspectors into "Gangs" or "Subs," which are teams of two or more employees led by a Foreman.[4]

Complainant joined Respondent in 1995.[5] He began as an Assistant Signalman before qualifying as a Signal Inspector in 1997.[6] Complainant became an Assistant Foreman in 2003, and then became Foreman for Sub 12 in 2009.[7]

The ALJ described Sub 12 as a "unique work gang for Respondent."[8] Although Sub 12 had testing responsibilities similar to other Gangs, it had different work hours and sets of tests assigned.[9] Unlike most other Subs, Sub 12 worked ten-hour overnight shifts, four days a week.[10] Also, Sub 12 performed "interlocking tests," which were different than the tests performed by most other Subs.[11]

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2 D. & O. at 7.

3 *Id.* at 7-8.

4 *Id.* at 7. According to Complainant, there were 125 Subs in the signal maintenance department. *Id.* However, nearly all evidence and testimony in this case focused on Subs 1 through 6, 12, and 13. *See id.* at 7-9, 23; *see also* Complainant's Post-Hearing Brief (Comp. Post-Hearing Br.) at 6-7.

5 D. & O. at 5.

6 *Id.*

7 *Id.*

8 *Id.* at 8.

9 *Id.* at 7-9.

10 *Id.* at 7, 9.

11 *Id.* at 9. Among the other Subs, Sub 13 was most comparable to Sub 12—like Sub 12, Sub 13 also worked ten-hour overnight shifts, but on a slightly different schedule and in a different location. *Id.* at 7-9.

2. Complainant's First Whistleblower Claim

In 2015 and 2016, members of Sub 12 pressured Complainant to engage in a wage theft scheme.[12] Complainant refused to participate, prompting hostility from the members of the Sub.[13] Eventually, Respondent removed Complainant from his Foreman position and temporarily appointed one of the ringleaders of the hostility in his stead.[14] While demoted, Complainant also reported that the new Sub 12 Foreman was not completing required testing.[15] Respondent did not correct this issue.[16]

Respondent eventually notified Complainant that it was going to terminate his employment.[17] Ultimately, Complainant agreed to be disqualified from the Foreman position for a year in exchange for keeping his job.[18] Complainant later sought to be reinstated to Foreman, but was denied.[19]

Complainant filed whistleblower complaints against Respondent with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) on October 9, 2017, and November 19, 2018.[20] On January 8, 2020, the parties reached an in-court settlement, which was approved by the assigned ALJ.[21]

The crux of the settlement involved reinstating Complainant to the Foreman position.[22] To achieve that end while complying with the applicable collective bargaining agreement (CBA), the parties agreed to a convoluted process whereby: (1) Complainant would apply for an open Assistant Foreman position;

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12 *Id.* at 11.

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.* at 11-12.

17 *Id.* at 12.

18 *Id.*

19 *Id.* at 13.

20 *Id.*

21 *Id.*; *see also* January 8, 2020 Transcript (ALJ No. 2019-FRS-00014) (January 8 Tr.) at 55.

22 D. & O. at 13.

(2) Complainant would take a limited "re-qualification examination;"
(3) Respondent would subsequently abolish the Assistant Foreman position; and
(4) pursuant to the CBA, Complainant would be reinstated to a Foreman position.[23]

Over the ensuing months, though, disputes arose regarding implementing this process, ultimately prompting the parties to return to the ALJ.[24] On August 11, 2020, the ALJ issued an order implementing the parties' settlement agreement (August 11 Settlement Order).[25] In the August 11 Settlement Order, the ALJ stated that on August 4, he had ordered Respondent to implement the January 8 settlement agreement, that the parties had since agreed that Respondent could no longer fully comply with the agreement, and that, accordingly, he was ordering Complainant immediately restored to the Foreman position. The Order also provided that "[a]ll other provisions of the Agreement, as set forth on the record on January 8, 2020, shall remain in effect."[26]

3. Complainant's Reinstatement and Subsequent Adverse Action

Respondent reinstated Complainant as Foreman of Sub 12 pursuant to the settlement agreement in August 2020.[27] Almost immediately, Respondent began taking new adverse action against Complainant.

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[23] *Id.* at 13-14 & n.38.

[24] *Id.* at 14.

[25] *Id.*

[26] August 11 Settlement Order at 1-2. Complainant does not dispute the validity of the January 8 agreement, as modified and implemented by the August 11 Settlement Order. *See* Complainant's Opening Brief (Comp. Br.) at 17; Complainant's Reply Brief (Reply Br.) at 11. We take judicial notice of the January 8 Transcript and the August 11 Settlement Order which, in combination, constitute the settlement agreement of the prior case. *See Pappas v. Bank of Am. 401(K) Plan for Legacy Cos.*, 526 F. App'x 785, 790 (9th Cir. 2013) (taking judicial notice of settlement agreement from prior proceeding); *Brown v. McCallister*, 141 F.3d 1184 (Table), 1998 WL 123065, at *1 n.2 (10th Cir. 1998) (same); *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 289 n.2 (2d Cir. 1992) (same).

[27] D. & O. at 14.

First, in August and September 2020, Respondent audited the movement of Sub 12's trucks using GPS data.[28] The audit showed that Gang 12's trucks were located near headquarters for an extended time towards the end of shifts.[29] Respondent asserted that this was unusual because Sub 12 should have been out testing signals.[30] However, other evidence suggested that Sub 12 was performing tests at or directly adjacent to the headquarters at the time.[31]

Following the GPS audit, Complainant's fourth- and second-line supervisors, John Walker and John Reynolds, respectively, instructed Complainant's first-line supervisor, Peter Volz, to speak with Complainant and Sub 12 about spending too much time around headquarters and to communicate that management was dissatisfied with Sub 12's performance.[32] Volz then told Complainant that management had investigated him and was not happy about his performance, that they wanted an immediate change, that they thought he was having his subordinates spend too much time at headquarters, and that the Sub members should be "out the door after an hour and should be back to headquarters no sooner than an hour prior to their shift ending."[33] According to Complainant, this directive was contrary to historical practice, interfered with testing, and compromised Respondent's social distancing policy which was in effect due to the COVID-19 pandemic.[34] The directive also caused Sub 12 members to become angry with and hostile towards Complainant, blaming him for drawing the ire of management.[35]

In addition, Complainant complained that he was denied overtime opportunities after his reinstatement in 2020. According to Complainant, overtime was typically available when Subs fell behind on regular testing schedules or when testing was added that was not part of the schedule provided at the beginning of the

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28 *Id.* at 17. Respondent asserted that it first conducted a GPS audit of Sub 13 due to suspicious overtime requests and then elected to also audit Sub 12 to preempt a union complaint from Sub 13 members. *Id.* at 16-17. The ALJ determined that extending the audit to Sub 12 was retaliatory. *See id.* at 19, 36-37, 41-42.

29 *Id.* at 18.

30 *Id.*

31 *Id.* at 17.

32 *Id.* at 14-15, 18.

33 *Id.* at 18.

34 *Id.* at 21.

35 *Id.*

year.[36] Complainant asserted that Respondent had historically high overtime levels in 2020 and 2021 due to the pandemic and Respondent's receipt of billions of dollars in funding.[37] Yet, while other Subs allegedly reaped the benefits of the increase in overtime, Complainant asserted that he and Sub 12 were denied overtime opportunities.

In particular, Complainant testified regarding one type of testing—emergency backup interlocking circuit, or "EMCP," testing—for which Respondent denied him overtime in 2020 and 2022.[38] According to Complainant, EMCP testing was federally mandated and had to be completed every two years.[39] Sub 12 began EMCP testing in 2012 and it was historically performed on overtime.[40]

In or around October and November 2020, Complainant asked Mark Ellentuck, Respondent's Engineer Manager for FRA Testing and Inspection,[41] on at least two occasions about conducting EMCP testing.[42] Ellentuck responded that he "looked into it and they are not going to give you overtime" due to budgetary concerns.[43] Complainant testified that the testing was still federally mandated, that budget concerns had not been an impediment for past overtime requests, and that approval of overtime just prior to this time for similar type of work was common.[44] Even so, Respondent declined to authorize overtime for Sub 12 to perform EMCP testing.[45]

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36 *Id.* at 9; Hearing Transcript (Tr.) at 242, 265-66.

37 D. & O. at 22.

38 *Id.* at 22-23. For a description of EMCP testing, please see the D. & O. at 9-10.

39 *Id.* at 10, 42, 44 n.119.

40 *Id.* at 10, 38 n.106.

41 *Id.* at 8. Ellentuck was responsible for planning, managing, and coordinating all signal system testing. *Id.*

42 *Id.* at 22.

43 *Id.* at 22-23. Complainant understood "they" to mean Walker and, possibly, Reynolds. *Id.* at 23 n.83.

44 *Id.* at 23.

45 Complainant also testified that Respondent delayed reimbursing him for mileage and delayed giving him access to a cloud-based storage system. *Id.* at 24-26. The ALJ did not find either action constituted adverse action under the NTSSA. *See id.* at 36-39. Complainant did not raise them on appeal.

4. Complainant's Second Whistleblower Claim & ALJ Proceedings

Complainant filed another OSHA complaint on October 16, 2020, regarding the adverse action that occurred after his reinstatement. OSHA dismissed Complainant's complaint and Complainant requested a hearing with an ALJ. An ALJ conducted a hearing from March 6 to 10, 2023. On October 31, 2024, the ALJ issued the D. & O., ruling in Complainant's favor.

The parties stipulated that Complainant's first whistleblower claim and related litigation constituted protected activity under the NTSSA.[46] Respondent also conceded that its decisionmakers had knowledge of the prior litigation following Complainant's reinstatement.[47]

The ALJ also determined that Complainant suffered adverse action under the NTSSA when: (1) Sub 12 was subjected to the GPS audit; (2) Volz counseled Complainant and directed Sub 12 to remain away from headquarters; and (3) Respondent denied Sub 12 overtime to complete EMCP testing.[48] The ALJ also determined that Complainant's protected activity contributed to the Respondent's decision to take adverse action against him.[49] Finally, the ALJ determined that Respondent did not demonstrate by clear and convincing evidence that it would have taken the same adverse action against Complainant absent Complainant's protected activity.[50]

Having ruled for Complainant, the ALJ turned to relief and damages. As relevant to this appeal,[51] the ALJ ordered Respondent to pay Complainant: (1) $8,636, plus interest, for overtime for EMCP testing in 2020 and 2022;[52] and (2) $125,000 for non-economic compensatory damages for emotional distress.[53] The ALJ also determined that, if he had the power to do so, he would have ordered

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46 *Id.* at 34.

47 *Id.*

48 *Id.* at 36-38.

49 *Id.* at 40-43.

50 *Id.* at 44-45.

51 The ALJ awarded other relief that the parties did not raise on appeal.

52 *Id.* at 46-47, 50-51.

53 *Id.* at 47-49.

Respondent to pay Complainant $100,000 in punitive damages.[54] But, citing the Supreme Court's decision in *SEC v. Jarkesy*,[55] the ALJ determined that punitive damages were not permissible without a jury and were therefore not awardable in this proceeding.[56]

5. ARB Appeal

On November 14, 2024, Complainant petitioned the Board for review of aspects of the ALJ's damages award. First, Complainant challenges the ALJ's lost overtime award. Complainant requested $450,000 in lost overtime dating back to 2016 and contends that the ALJ erred in declining to award more than just $8,636 for EMCP testing. Second, Complainant challenges the ALJ's non-economic compensatory damages award, arguing that the evidence supports an award of more than $125,000. Finally, Complainant challenges the ALJ's application of *Jarkesy* to deny him punitive damages.[57]

JURISDICTION & STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue final agency decisions under the NTSSA.[58] In NTSSA cases, the Board reviews questions of law de novo, but is bound by the ALJ's factual findings if they are supported by substantial evidence.[59]

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54 *Id.* at 49-50.

55 603 U.S. 109 (2024).

56 D. & O. at 50.

57 Neither party appealed the ALJ's conclusion that Respondent violated the NTSSA by taking adverse action against Complainant in retaliation for Complainant engaging in protected activity. Therefore, we accept the ALJ's findings of fact and conclusions of law as to Respondent's liability.

58 *See* 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. § 1982.110(a).

59 29 C.F.R. § 1982.110(b); *Siddiqui v. Transit Admin. Ctr., Inc.*, ARB No. 2024-0012, ALJ No. 2021-NTS-00001, slip op. at 5 (ARB Jan. 14, 2025) (citations omitted).

DISCUSSION

1. Overtime

In an extremely abbreviated fashion, Complainant requested awards for two types of lost overtime opportunities in his Post-Hearing Brief filed with the ALJ.[60] First, he requested $450,000, calculated as $65,000 per year dating back to 2016 when he was first demoted as Foreman of Sub 12, for unspecified lost overtime opportunities that he says other Foremen received but that he was denied. Second, he requested an additional $8,636 specifically for overtime to perform EMCP testing in 2020 and 2022.

The ALJ ruled that Complainant's request for overtime prior to the parties' 2020 settlement agreement was barred. Regarding the post-2020 period, the ALJ only awarded Complainant $8,636 in lost overtime for the EMCP testing.[61]

On appeal, Complainant argues that the ALJ erred in not awarding $450,000 for other unspecified overtime opportunities.[62] We disagree.[63] As set forth more fully below, Complainant did not adequately support his request for overtime other than with respect to EMCP testing. Furthermore, the ALJ did not err in declining to award damages for lost overtime prior to 2020 based on the parties' settlement agreement.

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[60] Comp. Post-Hearing Br. at 34-35. It does not appear that Complainant testified to or identified the $450,000 (in total) or $65,000 (per year) figures during the hearing before the ALJ. He only proffered these figures to the ALJ in his Post-Hearing Brief.

[61] D. & O. at 47. Respondent did not appeal the ALJ's award of $8,636 for EMCP testing. Therefore, we do not consider whether substantial evidence supports that award.

[62] Comp. Br. at 12-15.

[63] As an initial matter, Complainant contends that the ALJ "determined that the 'credible testimonial evidence' supported a finding that . . . Complainant lost $65,000 per year in overtime payments." *Id.* at 12. Complainant misstates the ALJ's holding. The ALJ found only that there was "credible testimonial evidence that he would regularly take overtime opportunities that he denied due to Respondent's conduct. Further, he testified that he worked regular overtime before 2016, when he first experienced issues with Respondent." D. & O. at 47. Finding that Complainant regularly took overtime opportunities is a far cry from finding that those overtime opportunities amounted to $65,000 per year. For the reasons explained herein, the evidence cited by Complainant does not support that figure with reasonable certainty.

A. Complainant Did Not Show He Was Entitled to Additional Lost Overtime

Complainant bore the burden to establish his entitlement to back pay, including lost overtime.[64] Complainant did not have to establish his lost back pay with mathematical certainty, but he was required to present sufficient evidence to allow the ALJ to estimate the amount owed with reasonable certainty.[65] Complainant's request for $450,000, or roughly $65,000 per year, was perfunctory and the ALJ did not err in declining to award this significant sum.

Complainant's argument regarding his entitlement to an award for overtime in his Post-Hearing Brief, in its entirety, was:

> Mr. Inganamorte has demonstrated that prior to 2016 he would work all available overtime but that, since that time, due to the hostile work environment created by LIRR managers, he has been unable to work overtime equivalent to his peers. (CX-10; AI, 310-311). Complainant requests $450,000 in lost overtime wages between 2016 and the present based on average Foreman overtime earnings of $65,000 per year. (CX-20 and CX-51). In addition, lost overtime for EMCP testing (Section II.C) is $8,636 ($86.36 per hour x 10 hour shift x 10 days (five days of overtime lost in both 2020 and 2022).[66]

This is the only place in Complainant's Post-Hearing Brief where he discusses his request for $450,000 for unspecified overtime opportunities based on what other Foreman allegedly earned. Elsewhere in his Post-Hearing Brief where he discussed overtime as a form of adverse action, Complainant focused *exclusively* on overtime

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64 *See Pillow v. Bechtel Constr., Inc.*, No. 1987-ERA-00035, slip op. at 13 (Sec'y July 19, 1993); *see also Sir Speedy, Inc. v. L & P Graphics, Inc.*, 957 F.2d 1033, 1038 (2d Cir. 1992).

65 *See Sir Speedy, Inc.*, 957 F.2d at 1038; *see also Ferguson v. New Prime, Inc.*, ARB No. 2012-0053, ALJ No. 2009-STA-00047, slip op. at 4 (ARB Nov. 30, 2012) (stating a complainant need not prove back wages with "unrealistic exactitude," but must provide a "reasonable approximation" of his damages).

66 Comp. Post-Hearing Br. at 34-35.

denied for EMCP testing in 2020, without referencing or citing to evidence concerning any other specific lost overtime opportunities.[67]

Complainant argues that the ALJ did not adequately explain why he did not award the full $450,000 Complainant requested for other unspecified overtime opportunities.[68] An ALJ must adequately explain his decision to allow "a reviewing tribunal [to] be able to understand what the ALJ did and why [he] did it."[69] We are satisfied that the ALJ adequately explained why he awarded $8,636 for EMCP testing.[70] While the ALJ might have also more thoroughly explained why he did not award anything more, the ALJ's focus on EMCP testing and the brevity of his analysis was reasonable and expected given the short-shrift Complainant gave to his request for $450,000 in his Post-Hearing Brief, the paucity of the evidence cited by Complainant in support thereof, and the Complainant's own almost exclusive focus on EMCP testing.[71]

Moreover, we find any error in this regard harmless because the record adequately supports the ALJ's decision not to award additional lost overtime. Complainant did not explain how he calculated the "average" annual Foreman overtime payment of $65,000 per year and did not cite sufficient evidence to support that figure with reasonable certainty.

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67 *Id.* at 27-30.

68 Comp. Br. at 14 ("[T]he D&O contains no explanation for the omission of a full award of back pay damages for the post-release period.").

69 *Adm'r, Off. of Foreign Lab. Certification, Empl. & Training Adm'r, U.S. Dep't of Lab. v. C. Fla. Lab. Servs., LLC (Central Florida)*, ARB No. 2025-0026, ALJ Nos. 2023-PED-00011, -00012, -00013, -00015, slip op. at 11 (ARB Mar. 28, 2025) (citation omitted).

70 D. & O. at 10 (describing EMCP testing and when, how, and by whom it was typically performed), 22-23 (outlining the facts regarding Complainant's request for overtime for EMCP testing in 2020 and the denial thereof), 38 & n.106 (finding that Complainant requested overtime for EMCP testing, that the testing was still required by law, and that overtime was typically provided for EMCP testing but was denied to Complainant in 2020), 47 (awarding back pay for the EMCP testing in 2020 and 2022).

71 *See Huffman v. Swift Prepared Foods*, ARB No. 2025-0077, ALJ Nos. 2024-FDA-00013, 2025-FDA-00003, slip op. at 7 (ARB Dec. 18, 2025) ("[W]hile we are mindful of Complainant's pro se status, he must still make cognizable legal arguments and support them with citations to material from the record. Because he failed to do so, we must reject his arguments.") (citations omitted).

Complainant cited just two exhibits in support of his single-sentence averment that Foremen made, on average, $65,0000 per year in overtime. The first was CX 20, which Complainant testified shows overtime for Sub 12 from 2016 to 2019.[72] The second was CX 51, which Complainant testified shows an "overtime summary for each year," reflecting the total overtime hours worked by the entire Signal Department from 2019 to 2021.[73] Complainant did not explain in his Post-Hearing Brief, in his appellate briefs, or in his testimony at the hearing how either exhibit established how much overtime Foreman averaged per year. Neither document appears to break down overtime worked for any Sub other than Sub 12,[74] show overtime totals (in hours or dollars) for Foreman in any subdivision other than Sub 12, or otherwise help establish or calculate the overtime Foremen across the Signal Department did or could expect to earn with reasonable certainty.

For the first time in his Reply Brief on appeal to the Board, Complainant cited two additional exhibits, CX 69 and CX 77, in support of his claim that Foreman earned, on average, $65,000 or more per year in overtime.[75] Once again, though, Complainant failed to adequately explain how either exhibit supports his calculation with reasonable certainty.

CX 69 consists of more than 1,300 pages of "Overtime Approval Request Forms" for different Subs for part of 2020. Complainant cites a selection of pages of the exhibit which he says show that: (1) Andrew McCarthy, Sub 1 Foreman, earned $33,368 in overtime from April 1 to September 30, 2020, annualized to $66,736, and (2) Leroy Freckleton, Sub 2 Foreman, earned $39,087 in overtime from May 1 to October 31, 2020, annualized to $78,174.[76]

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[72] Tr. at 273.

[73] *Id.* at 238.

[74] CX 20 appears to reflect overtime hours worked by several people, including William Saar, who was the Foreman for Sub 12 immediately preceding Complainant's reinstatement in August 2020. D. & O. at 5. It is undisputed that, unlike Complainant, Saar was qualified as a pilot (a person qualified to control the movement of trains), which contributed to his ability to work overtime beyond that which otherwise might have been available. D. & O. at 23 n.87; *see also* Tr. at 326, 449-50. Complainant attempts to downplay this distinction between Saar and himself, *see* Reply Br. at 10, but he did not adequately develop the record to show how much (or how little) of the overtime Saar earned was attributable to his status as a pilot. Therefore, we cannot reasonably deduce what Complainant might have made by comparing him to Saar.

[75] *Id.* at 8, 10.

[76] *Id.* at 8 n.10.

Although the excepts appear to show the overtime hours worked by certain Subs during the referenced time frame, there are several problems with the excerpts that limit their evidentiary value. First, the documents reflect hours worked by position, but do not identify by name the individual(s) who worked the overtime.[77] Thus, it does not appear possible to validate Complainant's tallies of the hours worked by McCarthy, Freckleton, or any other specific Foreman based on the exhibit.[78] Indeed, it appears that at least some of the entries reflect that more than one Foreman worked within a single Sub on a given day, demonstrating that McCarthy and Freckleton may not have accounted for all of the Foreman overtime hours reflected in the excerpts.[79] Complainant does not explain this apparent discrepancy or explain precisely how he could tally the overtime hours for McCarthy and Freckleton, or any other Foreman, based on the limited information available in the exhibit.

Additionally, as Complainant acknowledges, the excerpts from CX 69 only cover a limited window of time from April to October 2020. Yet, Complainant requests overtime dating back approximately seven years, to 2016.[80] The excerpts

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[77] For example, the excerpts show that a "Foreman-Signal" worked four hours of overtime on August 12, 2020, but do not show who that Foreman was. CX 69 at 536.

[78] Complainant argues that, absent Respondent's "retaliatory reduction of his seniority," he should have been placed in Sub 1 or Sub 2 ahead of McCarthy and Freckleton and, thus, been able to secure more overtime than what was available in Sub 12. Reply Br. at 8. Although the evidence cited by Complainant shows that, as of 2018, he had higher seniority than McCarthy and Freckleton, he did not cite evidence showing that his higher seniority guaranteed that he would have been able to become Foreman of Subs 1 or 2 ahead of them absent the "retaliatory reduction of his seniority." Additionally, per the August 11 Settlement Order, Complainant's seniority rights were to be restored and he was permitted to exercise his seniority to displace any junior Foreman. August 11 Settlement Order at 2. Complainant has not explained how or why he did or could not reap the benefit of this agreement, if indeed he desired to take the position as a Foreman of a different Sub. Moreover, even if Complainant's argument about his seniority is true, he still failed to present sufficient evidence to establish the amount he would or should have earned as Foreman with reasonable certainty, for all the reasons set forth herein.

[79] For example, there are three partially overlapping entries for a Foreman for Sub 1 on April 4, 2020, suggesting that at least three different Foreman worked for the Sub that day. CX 69 at 821. There are many additional instances of more than one Foreman working for a Sub in a single day in the excerpts cited by Complainant. *Id.* at 623, 642, 841-44, 880, 882, 888, 1084.

[80] *See* Comp. Post-Hearing Br. at 34 (requesting $65,000 per year, for a total of $450,000, which works out to approximately seven years of overtime).

cited by Complainant also refer only to two Subs, but Complainant testified there were 125 Subs in the signal maintenance department and at least eight Subs of particular relevance to this case.[81] Even if we could decipher from the exhibit how much any specific Foreman worked during that limited period of time in late 2020, Complainant does not explain why it is fair or reasonable to extrapolate seven years' worth of overtime for all Foreman from that limited subset of data.

Complainant likewise fails to explain how CX 77 establishes the amount of overtime Foreman averaged. Complainant testified that he compiled CX 77 to show the amount of overtime hours worked by various Subs based on data included in CX 69. CX 77 does not show how much overtime was worked by any particular position (including Foreman), let alone by any particular individual; instead, it simply reflects subtotals of overtime worked for entire Subs on specific date ranges.

Moreover, even if any of the four exhibits cited by Complainant did reasonably establish that Foreman averaged $65,000 per year in overtime, Complainant did not explain or cite evidence to establish that he personally could or would have earned as much as his peers and predecessors. To the contrary, evidence in the record showed that even before his demotion in 2016, Complainant earned far less than $65,000 per year in overtime as Foreman of Sub 12.[82] Complainant also acknowledged that Sub 12 generally "doesn't get a lot of overtime" and that Sub 12 kept pace with its testing schedule in 2020, which limited its requests or need for overtime.[83] Complainant also acknowledged that he typically declined overtime opportunities that were available to work in other Subs and, by the time of the hearing before the ALJ, had even stopped taking the automatic one hour of overtime per week offered to every Foreman.[84] Thus, whatever the "average" Foreman may have earned, the evidence suggests Complainant would have likely earned far less.

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81 *Supra* note 4.

82 D. & O. at 27. The record reflects that Complainant earned overtime of $16,285 in 2012, $8,000 in 2013, and $11,000 in 2014. *Id.*

83 *See* Tr. at 902, 910; *see also* Comp. Post-Hearing Br. at 16 ("Mr. Inganamorte's Sub 12 is the only subdivision that completed all of its assignments without requesting OT . . . ."), 28 ("Because Sub 12 only infrequently receives overtime, its members look forward to EMCP testing because they usually receive five days of overtime pay for work they enjoy doing.").

84 D. & O. at 27; Tr. at 325-27; *see also* Tr. at 453.

In his briefing to the Board, Complainant also asserted that evidence offered at the hearing showed that other Subs worked historically high levels of overtime in 2020 and 2021, but the same opportunities were not given to him and Sub 12.[85] We are not swayed by this evidence, either. First, Sub 12 was not alone in receiving few overtime opportunities, even if overtime opportunities were on the rise for some other Subs. As the ALJ recognized, Sub 13, like Sub 12, also only had one overtime request approved during a four-month period from mid- to late-2020.[86]

Furthermore, Respondent offered compelling explanations, accepted by the ALJ, for why Subs 12 and Sub 13 received fewer overtime opportunities than other Subs. As the ALJ stated, Sub 12 was a "unique work gang for Respondent."[87] Subs 12 and 13 worked longer, 10-hour shifts than other Subs. Respondent explained that the 10-hour shifts limited the amount of overtime Subs 12 and 13 could work because of hours-of-service rules.[88] Additionally, Subs 12 and 13 performed different types of tests than other Subs. Although there may have been an influx of funds in 2020 and a corresponding increase in overtime, Respondent explained that it was for work performed by other signal Gangs and was not extended to Subs 12 and 13.[89]

Furthermore, and importantly, although Complainant testified generally that overtime opportunities increased for other Subs in and after 2020, he testified to only two specific overtime opportunities (one of which was EMCP testing) which he believed he and Sub 12 had been denied.[90] As stated above, Complainant also acknowledged that Sub 12 generally did not receive much overtime, Sub 12 stayed on schedule in 2020 and did not need much overtime to catch up, and Complainant denied overtime opportunities that were available to him. Thus, even if overtime was generally on the rise, the evidence does not adequately support Complainant's claim that he should have received more overtime.

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85 Reply Br. at 10.

86 D. & O. at 22 n.81.

87 *Id.* at 8.

88 *Id.* at 23.

89 *Id.*

90 *See* Tr. at 328-29. The other was overtime related to a training. *Id.* Complainant did not discuss the denial of overtime for the training in his briefs; therefore, we do not separately analyze that issue.

Based on this record and the evidence cited by Complainant, we conclude that the ALJ did not err and the evidence cited by Complainant does not establish, with reasonable certainty, that he was entitled to any additional lost overtime.[91]

B. The In-Court Settlement Agreement Bars Recovery Prior to 2020

Complainant and Respondent settled Complainant's prior OSHA claims at a hearing with an ALJ on January 8, 2020, and read the terms of the agreement into the record.[92] Although the parties subsequently faced issues implementing the agreement, the ALJ reaffirmed the settlement on August 11, 2020, with slight modifications regarding the mechanics of Complainant's reinstatement.[93]

The January 8 agreement, as modified by the August 11 Settlement Order, provided that Complainant would "release [ ] this action and another action pending in the Eastern District of New York . . . " in exchange for: (1) $250,000 in attorney's fees; (2) Respondent's concession of Complainant's union grievance; (3) restored seniority rights; and (4) reinstatement to the Foreman position.[94] The parties explicitly agreed that Complainant was not claiming or receiving backpay in the settlement.[95] The ALJ stated, and the parties agreed, that they were bound by these terms.[96]

The ALJ in the present case found that Complainant's claim for lost overtime prior to the date of the settlement was barred by the settlement agreement.[97] Complainant argues that the ALJ erred and that he did not release his claim for overtime.[98] We disagree with Complainant.

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91 In the next section, we conclude that the ALJ did not err in barring recovery for lost overtime prior to the parties' 2020 settlement agreement. However, even if the settlement agreement did not bar recovery, Complainant failed to adequately support his claim for additional overtime for the pre- and post-2020 periods for all the reasons stated above.

92 D. & O. at 13; *see also* January 8 Tr. at 55.

93 D. & O. at 13-14; *see also* August 11 Settlement Order at 1.

94 *Id.* at 56-60; August 11 Settlement Order at 1-2.

95 January 8 Tr. at 57 ("It was agreed by the parties that there has been no - - there is no claim for backpay in this particular matter . . . .").

96 *Id.* at 60.

97 D. & O. at 47.

98 Comp. Br. at 15-20.

Complainant primarily focuses on the fact that the ALJ, in deeming Complainant's pre-2020 claim for overtime barred, once referred to the "settlement agreement entered into on **May 6, 2020**."[99] It appears that in between the in-court agreement on January 8 and the August 11 Settlement Order, the parties attempted to commit the settlement to writing.[100] On May 6, 2020, Complainant signed a draft of that written agreement prepared by Respondent. Complainant's signature was the only signature provided for under the agreement.[101] Encountering continued difficulties, the parties returned to the ALJ, who issued the August 11 Settlement Order reaffirming and applying the original in-court January 8 agreement.[102] Complainant argues that the May 6 draft agreement was not part of the record, was not fully executed or effective, and cannot be used to bar his recovery of lost overtime.[103]

The ALJ's single reference to the May 6 agreement on page 47 of the D. & O. may have been a scrivener's error. Everywhere else in the D. & O., the ALJ referred to the settlement agreement accurately as agreed to on January 8 and modified on August 11.[104] The ALJ made no other reference to the May 6 written draft of the agreement and did not discuss any facts surrounding its drafting, negotiation, or execution. Clearly, the ALJ barred Complainant's claim for pre-2020 overtime based on the January 8 agreement, as modified by the August 11 Settlement Order, and not based on the May 6 draft agreement. Therefore, Complainant's arguments regarding the admissibility, applicability, or enforceability of the May 6 version of the agreement are irrelevant.

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99 *Id.* at 15; D. & O. at 47 (emphasis added).

100 *See* Comp. Br. at 18-19.

101 *Id.*; Reply Br. at 11.

102 D. & O. at 14.

103 Comp. Br. at 15-20.

104 D. & O. at 5 ("Judge Calianos issued an order of August 11, 2020, enforcing the January 8, 2020, settlement agreement."), 13 ("Complainant's prior whistleblower hearing began on January 7, 2020. . . . However, the following day the parties reached an in-court settlement."), 14 ("After hearing the parties' dispute over the settlement issue, ALJ Calianos ultimately ordered that the parties follow the settlement originally submitted. *See* August 11, 2020 Order Implement Settlement Agreement, 2019-FRS-00014."); *accord* Tr. at 206 ("The following facts are established by the pleadings. . . . Judge Calianos issued an Order of August 11th, 2020, entering the January 8th, 2020 Settlement Agreement.").

Complainant's sole argument on appeal concerning the January 8 agreement is that it did not include a "broad release of claims" covering lost overtime dating back to 2016.[105] Complainant does not explain why he believes the January 8 agreement did not release his overtime claims prior to that date. In the January 8 agreement, Complainant agreed to release Respondent from liability for his OSHA claims, which charged Respondent with, among other things, unlawfully demoting Complainant from the Foreman position in 2016. In the January 8 agreement, Complainant agreed to be reinstated to the Foreman position while waiving any claim to backpay for the time that he was demoted. Now, before a new ALJ, Complainant seeks recovery for lost overtime (i.e., a form of backpay) for the period of his demotion from 2016 to 2020. This is precisely what Complainant released in the January 8 agreement. Therefore, we affirm the ALJ that any claim for lost overtime prior to January 8, 2020, is barred.

2. Non-Economic Compensatory Damages

A. Complainant's Request for an Increase in the ALJ's Damage Award

The NTSSA provides that a prevailing complainant is entitled to "compensatory damages."[106] "Compensatory damages are designed to compensate discriminatees not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering."[107] Emotional distress is not presumed; it must be proven.[108] Complainant has the burden to prove by a preponderance of the evidence that he suffered mental pain or emotional anguish and that the discriminatory action was the cause of the harm.[109] Compensatory damages must be "proportionate to the harm inflicted," but there is no specific formula for determining the amount of compensatory damages a

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105 Comp. Br. at 17; *accord* Reply Br. at 11.

106 6 U.S.C. § 1142(d)(2)(C); 29 C.F.R. § 1982.110(d).

107 *Hobby v. Ga. Power Co.*, ARB No. 1998-0166, ALJ No. 1990-ERA-00030, slip op. at 31 (ARB Feb. 9, 2001) (citations omitted).

108 *Moder v. Village of Jackson*, ARB Nos. 2001-0095, 2002-0039, ALJ No. 2000-WPC-00005, slip op. at 10 (ARB June 30, 2003).

109 *Jones v. Exclusive Jets, LLC*, ARB No. 2022-0035, ALJ No. 2022-AIR-00003, slip op. at 27 (ARB Dec. 31, 2024) (citations omitted).

complainant is owed.[110] A key step in determining the amount of compensatory damages is a comparison with awards made in similar cases.[111]

The ALJ awarded Complainant $125,000 in compensatory damages for emotional pain and suffering.[112] The ALJ considered the testimony of Complainant and his wife that Complainant's demeanor and life satisfaction significantly changed as a result of Respondent's conduct, and Complainant's past use of medication.[113] The ALJ compared the facts here to other cases, determining that the circumstances justified damages "in excess of a typical claim."[114]

Despite receiving more than the "typical claim," Complainant asks the ARB to more than triple his award, to $445,000.[115] We find that the ALJ's award is fair and reasonable and supported by substantial evidence.

Complainant testified that Respondent's retaliation had a "tremendous impact on him," especially given how long it went on.[116] Complainant testified that he was hopeful that he had moved past it in 2020 when he was reinstated, but with the post-reinstatement retaliation he now believes it will never end.[117] He said the retaliation has impacted his sleep, caused him to get sick and feel run down often, and caused him to have stomach problems.[118] He said it has also affected his relationships with friends and family and "ruined [his] life."[119]

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110 *Id.* (citations omitted).

111 *Id.* at 28 (citation omitted).

112 D. & O. at 49. Respondent did not appeal the ALJ's award of $125,000.

113 *Id.* at 48-49.

114 *Id.* at 49.

115 Comp. Br. at 25-30. Complainant focused heavily on the impact the original demotion from Foreman and his prior OSHA case had on him. *Id.* at 22-24, 27-29. Complainant released his claims with respect to that prior action in the January 8 settlement agreement. Complainant also focused heavily on the egregiousness of Respondent's conduct and the lack of deterrent effect the $125,000 award would have on Respondent. *Id.* at 20-21, 30. These considerations, particularly deterrence, are more properly considered in assessing punitive damages rather than compensatory damages.

116 Tr. at 307.

117 *Id.*

118 *Id.* at 308.

119 *Id.*

Complainant saw his family doctor and a psychologist about these issues previously and was put on medication for anxiety and depression, but had not seen the psychologist since 2016 and apparently stopped using medication in 2019.[120] Complainant submitted into evidence a medical record showing his prescriptions from 2016 to 2019.[121] He did not offer any other medical evidence or testimony from treating doctors or other health professionals.

Complainant's wife testified that Complainant suffers from insomnia and depression, that "[h]is brain never shuts off," and that he "doesn't want to do anything" and is "very withdrawn."[122] She testified that he does not want to socialize and has "much shorter views now."[123] She also testified that the conduct "substantially" impacted their relationship and she feels "pretty much single at this point, I go everywhere alone."[124]

The evidence provided by Complainant is comparable to other cases where complainants received similar, or significantly smaller, awards for compensatory damages. For example, in *Leveille v. New York Air National Guard*,[125] the ARB affirmed an award of $45,000 ($89,335)[126] where the complainant had severe anxiety attacks, trouble concentrating, a loss of enjoyment of life, marital conflict, and psychological counseling.[127] In *Berkman v. U.S. Coast Guard Academy*,[128] the ARB affirmed an award of $70,000 ($137,657) where the complainant received a clinical diagnosis of major depression, suffered worsening depression requiring weekly psychotherapy and medication, changed from an affectionate person with

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120 *Id.* at 358-59; *see* CX 9.

121 CX 9.

122 Tr. at 22.

123 *Id.* at 22-23.

124 *Id.*

125 ARB No. 1998-0079, ALJ Nos. 1994-TSC-00003, -00004 (ARB Oct. 25, 1999).

126 Complainant emphasizes that the ARB should take care not to allow the level of compensatory damages to become frozen in time by ignoring factors like inflation. Comp. Br. at 25-26. For the cases cited herein, we include the present value of the awards based on the Bureau of Labor Statistic's inflation calculator, available at https://www.bls.gov/data/inflation_calculator.htm.

127 *Leveille*, ARB No. 1998-0079, slip op. at 5.

128 ARB No. 1998-0056, ALJ Nos. 1997-CAA-00002, -00009 (ARB Feb. 29, 2000).

energy and enthusiasm to an inactive person who did not enjoy work, and experienced fatigue and memory loss.[129] In *Van v. Portneuf Medical Center*,[130] the ARB affirmed an award of $100,000 ($145,005) where the complainant suffered personal humiliation, marital difficulties, difficulties in his relationship with his daughter, required professional help with anxiety, insomnia, and ruminating thoughts, and was given medication and counseling.[131] In *Rudolph v. National Railroad Passenger Corporation*,[132] the ARB affirmed an award of $25,000 ($34,890) where the complainant's personal and financial lives were turned "upside down," causing emotional distress, anxiety, disruption to sleeping and eating, and eventual divorce.[133] And finally, in *Burt v. National Railroad Passenger Corporation*,[134] the ARB affirmed an award of $20,000 ($25,007) where the complainant had physical manifestations of stress like diarrhea, headaches, heart palpitations, and high blood pressure, had to seek treatment from a doctor, was diagnosed with debilitating anxiety and severe symptomatic anxiety, was given medication and told to stay out of work, and had his finances negatively impacted.[135]

In contrast, the evidence of harm Complainant proffered is materially less than the harm suffered by complainants in other cases where they received awards greater than or comparable to (or in some cases even significantly less than) the amount awarded by the ALJ here. For example, in *Martin v. The Department of Army*,[136] the ARB affirmed an award of $75,000 ($150,233) where the complainant had ongoing psychological counseling, including four different in-patient stays at psychiatric facilities, had suicidal thoughts, was withdrawn from family and friends, lacked concentration which adversely affected his ability to work and function generally, and suffered fatigue, malaise, depression, difficulty sleeping,

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129 *Id.* at 29-31.

130 ARB Nos. 2011-0028, 2012-0043, ALJ No. 2007-AIR-00002 (ARB Jan. 31, 2013).

131 *Id.* at 9; *Van v. Portneuf Med. Ctr.*, ALJ No. 2007-AIR-00002, slip op. at 90 (ALJ Feb. 2, 2011).

132 ARB Nos. 2014-0053, -0056, ALJ No. 2009-FRS-00015 (ARB Apr. 5, 2016).

133 *Id.* at 14-15; *Rudolph v. Nat'l R.R. Passenger Corp.*, ALJ No. 2009-FRS-00015, slip op. at 38 (ALJ Apr. 24, 2014).

134 ARB No. 2020-0042, ALJ No. 2018-FRS-00015 (ARB Apr. 29, 2021).

135 *Id.* at 14; *Burt v. Nat'l R.R. Passenger Corp.*, ALJ No. 2018-FRS-00015, slip op. at 38-39 (ALJ May 11, 2020).

136 ARB No. 1996-0131, ALJ No. 1993-SDW-00001 (ARB July 30, 1999).

bronchial irritation, and low self-esteem.[137] In *Doyle v. Hydro Nuclear Services*,[138] the ARB awarded $80,000 ($155,763) in emotional distress damages where the complainant needed treatment from multiple doctors and specialists, was placed on several medications for depression and anxiety, underwent crisis intervention because of nightmares and suicidal thoughts, was diagnosed with permanent depression and PTSD, suffered worsening relationships with his wife and daughter and serious strain in his marriage, suffered professional harm and impact to reputation, could not afford to treat his Hepatitis C, amassed significant debt, and was on the verge of bankruptcy.[139] In *Hobby v. Georgia Power Company*,[140] the ARB affirmed an award of $250,000 ($474,854) where the complainant, who was previously on track to become a company executive and/or CEO, had his career and career prospects destroyed and was forced to take a clerk position, was under- and unemployed for over eight years, and repeatedly requested loans from friends and family.[141] Finally, in *Canter v. Maverick Transportation, LLC*,[142] the ARB affirmed an award of $75,000 ($109,133) where the complainant had suicidal thoughts, including one attempted suicide, loss of appetite, frequent stressful debt collection notices and calls from collection agencies, and checking accounts closed due to insufficient funds, and was forced to move across the country to move in with family.[143] Complainant did not present evidence of the same level of psychological

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137 *Id.* at 17.

138 ARB Nos. 1999-0041, -0042, 2000-0012, ALJ No. 1989-ERA-00022 (ARB May 17, 2000).

139 *Id.* at 13-14; *Doyle v. Hydro Nuclear Servs*., ALJ No. 1989-ERA-00022, slip op. at 20-22 (ALJ Nov. 7, 1995).

140 ARB Nos. 1998-0166, -0169.

141 *Id.* at 32-33; *Hobby v. Ga. Power Co.*, ALJ No. 1990-ERA-00030, slip op. at 67-69 (ALJ Sept. 17, 1998). *Hobby* is the only ARB case cited by Complainant to support his request for a higher compensatory damages award. Comp. Br. at 26. The utter career ruin faced by the complainant in *Hobby* materially distinguishes the circumstances there from those faced by Complainant here, who, though clearly negatively impacted, was ultimately returned to his position with the same seniority and has not demonstrated such significant and irreparable professional or financial damage.

142 ARB No. 2011-0012, ALJ No. 2009-STA-00054 (ARB June 27, 2012).

143 *Id.* at 6; *Canter v. Maverick Transp., LLC*, ALJ No. 2009-STA-00054, slip op. at 17-18 (ALJ Oct. 28, 2010).

trauma, need for professional help, or financial catastrophe as the complainants in these cases.[144]

Accordingly, we affirm the ALJ's award of $125,000 in compensatory damages.

B. Complainant's Request to Reopen the Record for New Evidence of Damages

In his Petition, Complainant also asks that "the matter of compensatory damages be remanded to the Tribunal to consider an additional $1 million in damages based on recently acquired evidence related to his diagnosis for rheumatoid arthritis arising from work-related stress. This evidence only became available on November 1, 2024, as a result of a diagnosis by the Complainant's physician on that date."[145] Complainant did not make the same argument in any of his other appellate briefs, did not cite legal authority in support of his request to reopen the record, and did not otherwise elaborate on his argument. Thus, we deem the argument forfeited.[146]

Furthermore, even if we considered Complainant's request, we would reject it. When determining whether to reopen the record and accept new evidence, the Board and the ALJ both apply the standard contained in the Rules of Practice and

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144 Complainant cites two federal cases affirming jury awards of $800,000 (*Fresquez v. BNSF Ry. Co.*, 52 F.4th 1280 (10th Cir. 2022)) and $500,000 (*Wooten v. BNSF Ry. Co.*, 387 F.Supp.3d 1078 (D. Mont. 2019), *aff'd* 819 F. App'x 483 (9th Cir. 2020)). Comp. Br. at 26. Neither case convinces us to increase the damages award here. They involved *jury* awards and were before the courts on requests for remittitur, which carry a lofty standard. As the courts explained, the jury awards were entitled to great deference and would only be overturned if the award was so excessive "as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or another improper cause invaded the trial." *Fresquez*, 52 F.4th at 1315 (citation omitted); *accord Wooten*, 387 F.Supp.3d at 1102 (stating the jury's verdict was entitled to "great deference" and would only be overturned if "grossly excessive, monstrous, clearly unsupported by the evidence, or based only on speculation or guesswork.") (citations omitted). That the courts found the awards in those cases not "shock[ing]" to the judicial conscience or the byproduct of "passion, prejudice, [or] corruption," does not compel us to find that this case demands a similar type of award.

145 Petition for Review at 8.

146 *See Cerny v. Triumph Aerostructures-Vought Aircraft Div.*, ARB No. 2019-0025, ALJ No. 2016-AIR-00003, slip op. at 7 n.2 (ARB Oct. 31, 2019) ("An appellant is required to develop argument with citation to law and authority to avoid waiver or forfeiture.") (citations omitted).

Procedure of the Office of Administrative Law Judges, which provides: "No additional evidence may be admitted unless the offering party shows that new and material evidence has become available that could not have been discovered with reasonable diligence before the record closed."[147] "For new evidence to be admitted under [the OALJ Rules], it is necessary that it was **in existence at the time of the hearing**."[148]

It appears that the rheumatoid arthritis for which Complainant seeks additional compensation is a new condition that did not arise until after the hearing.[149] Therefore, the cited evidence was not in existence at the time of the hearing. Alternatively, if it were a condition in existence at the time of the hearing, there is no reason Complainant could not have presented evidence on it previously. Either way, we deny Complainant's request to reopen the record.

3. Punitive Damages

The NTSSA expressly provides that a prevailing complainant may receive "punitive damages in an amount not to exceed $250,000."[150] Punitive damages may be appropriate where the employer acted with "callous disregard of [an employee's protected] rights."[151]

The ALJ determined that Respondent's conduct warranted punitive damages.[152] Among other things, the ALJ considered "the period of time Complainant was subjected to a hostile environment, even after being reinstated

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147 29 C.F.R. § 18.90(b)(1); *Smith v. Akal Express, Inc.*, ARB No. 2022-0041, ALJ No. 2021-STA-00028, slip op. at 5 (ARB Jan. 12, 2023) (Order Regarding Pending Motions).

148 *Shields v. James E. Owen Trucking, Inc.*, ARB No. 2008-0021, ALJ No. 2007-STA-00022, slip op. at 8 (ARB Nov. 30, 2009) (citation omitted) (emphasis added); *see also Ryan v. U.S. Lines Co.*, 303 F.2d 430, 434 (2d Cir. 1962) (applying comparable federal rule regarding ordering a new trial based on new evidence and stating it "permits reopening a judgment only on the discovery of evidence in existence and hidden at the time of the judgment").

149 Complainant states that he "recently acquired evidence" that "only became available on November 12" when he was apparently first diagnosed with the condition. Petition for Review at 8.

150 6 U.S.C. § 1142(d)(3); *accord* 29 C.F.R. § 1982.110(d).

151 *Graves v. MV Transp., Inc.*, ARB No. 2012-0066, ALJ No. 2011-NTS-00004, slip op. at 2 (ARB Aug. 30, 2013) (citations omitted).

152 D. & O. at 50.

consistent with a settlement agreement . . . ."[153] The ALJ stated "[t]his is conduct that calls for deterrence and punishment, especially in this case where, considering Complainant's original claims involve such intense harassment, to do otherwise might potentially dissuade others from availing themselves of a protected activity."[154] Thus, the ALJ stated that "if the Tribunal believed that it had the power to do so, it would grant Complainant's request for damages, and order Respondent to pay $100,000 in punitive damages."[155] However, citing the Supreme Court's decision in *SEC v. Jarkesy*,[156] the ALJ determined he could not award punitive damages.[157] He explained:

> In [*Jarkesy*], the court held that the SEC's imposition of punitive civil money penalties for Securities Fraud without a jury trial was a violation of the Seventh Amendment. 603 U.S. at 13, 19. As punitive damages seek to punish or deter conduct by Respondent, not solely return to [sic] Complainant to a status quo, this Tribunal finds that punitive damages in this case are not permissible without a jury and are therefore not awardable in this forum.[158]

The ALJ did not provide any other analysis of *Jarkesy* or explain why he believed it barred an award of punitive damages.

Complainant argues that the ALJ lacked "jurisdiction" to rule on the constitutionality of the NTSSA's punitive damages provision. We agree that the ALJ erred.[159]

The Board has consistently ruled that the Board and ALJs do not have the authority to rule on the constitutionality or legality of the statutes or regulations

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153 *Id.*

154 *Id.*

155 *Id.*

156 603 U.S. 109 (2024).

157 D. & O. at 50.

158 *Id.*

159 Despite Complainant's categorization, we do not see this as a "jurisdictional" issue.

that are delegated to us.[160] We have been delegated the authority to hear and decide appeals by the Secretary and must decide the appeals in accordance with the statutes and regulations as they are written.[161] Both the statute[162] and the regulation[163] provide for the award of punitive damages. Therefore, punitive damages can and should be awarded when called for by the facts of the case.

Respondent counters that the Board is bound by the holdings of the Supreme Court and that in *Jarkesy*, the Supreme Court held that "punitive damages are not available without a jury trial in a situation such as that before the Tribunal in this case."[164] The Board is of course bound by Supreme Court decisions when such decisions apply, but *Jarkesy* does not expressly preclude the imposition of punitive damages under the NTSSA. *Jarkesy* dealt with SEC proceedings under a different

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[160] *E.g., Wyderka v. Energy Transfer*, ARB No. 2025-0033, ALJ No. 2023-PSI-00001, slip op. at 3 (ARB Feb. 24, 2025) (declining to accept interlocutory appeal concerning Seventh Amendment and Article III challenge to PSIA; "Even if we ultimately agreed with Respondents . . . the Board would not appear to have the authority to provide a remedy for these challenges . . . Indeed, the Board has long held it does not have the power to pass on the constitutional validity of the statutes and regulations it administers.") (citations omitted); *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Ken Techs., Inc.*, ARB No. 2003-0140, ALJ No. 2003-LCA-00015, slip op. at 5 (ARB Sept. 30, 2004) ("Ken argues that the INA regulatory scheme violates the Fifth Amendment due process clause . . . . The ALJ lacks authority to decide this constitutional challenge to the agency's governing statute and regulations.") (citations omitted); *Jones v. EG&G Def. Materials, Inc.*, ARB No. 1997-0129, ALJ No. 1995-CAA-00003, slip op. at 8 (ARB Sept. 29, 1998) (rejecting Seventh Amendment challenge to CAA; "The Solicitor suggests that this Board is not authorized to rule on the constitutionality of the environmental acts pursuant to which Jones brings this case, and we agree. The Supreme Court consistently has reasoned that 'adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.' . . . Consequently, we decline to address EG&G's constitutional argument.") (citations omitted).

[161] *See* Secretary's Order No. 01-2020, 85 Fed. Reg. at 13187 ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions."); 29 C.F.R. §§ 18.10 ("To the extent that these rules may be inconsistent with a governing statute, regulation, or executive order, the latter controls."), 18.12(b) (directing ALJs to "[r]egulate the course of proceedings in accordance with applicable statute, regulation or executive order").

[162] 6 U.S.C. § 1142(d)(3) ("Relief in any action under subsection (c) may include punitive damages in an amount not to exceed $250,000.").

[163] 29 C.F.R. §§ 1982.109(d) ("The order may also require the respondent to pay punitive damages up to $250,000."), 1982.110(d) (same).

[164] Respondent's Response to Complainant's Opening Brief at 3.

statute and administrative scheme. Whether the reasoning of *Jarkesy* can or will be extended to NTSSA proceedings at the Department of Labor remains to be seen.[165] Indeed, the ALJ even acknowledged that there had not been a decision extending *Jarkesy* to whistleblower actions of this type and in this forum.[166] Until then, we must apply the statute and regulations as written and have not been foreclosed from doing so by the Supreme Court.

Accordingly, we reverse the ALJ's decision and award Complainant $100,000 in punitive damages.[167]

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[165] The effect of *Jarkesy* on administrative agencies' ability to impose punitive damages, civil money penalties, and other similar penalties or damages is an evolving area in the law. The Board had the opportunity to weigh in on the issue in *Gourneau v. BNSF Railway Company*, ARB No. 2023-0034, ALJ No. 2021-FRS-00018 (ARB June 24, 2025) (Notice of Referral to the Secretary), under the Federal Railroad Safety Act (FRSA), another whistleblower statute under the ARB's jurisdiction. There, we opined that the statutory adjudication provisions contained in the FRSA do not violate the Constitution because (1) they do not implicate the Seventh Amendment right to a jury trial; and (2) even if they did, they fall within the "public rights" exception, which exempt them from a right to a jury trial in an Article III court. *Id.* at 2-3. The Eighth Circuit reversed the ARB's *Gourneau* decision, concluding that the complainant was entitled to a jury trial under the Seventh Amendment, *BNSF Ry. Co. v. Sec'y, U.S. Dep't of Lab.*, No. 25-2436 (8th Cir. Sept. 3, 2026), and the issue remains in flux. The parties analyzed whether the Seventh Amendment is implicated and/or whether the public rights exception applies in their briefs. We need not reach or weigh in on the issue in this case because we are bound to apply the statute and regulations as they are written.

[166] D. & O. at 50 n.121 ("A decision directly extending *Jarkesy* to whistleblower actions of this type and forum has yet to be rendered by a Federal Court or the ARB.").

[167] As stated above, the ALJ stated that, if he had the power to do so, he would award $100,000 in punitive damages. Respondent did not challenge that assessment on appeal so we need not remand to the ALJ for further analysis or order on the subject. *See Zhong v. U.S. Dep't of Justice*, 461 F.3d 101, 113 (2d Cir. 2006) (stating that an agency error does not warrant remand when it is clear from the record "that the same decision is inevitable on remand, or, in short, whenever the reviewing panel is confident that the agency would reach the same result upon a reconsideration cleansed of errors") (citation omitted).

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ's award of $8,636 for lost overtime, **AFFIRM** the ALJ's award of $125,000 in compensatory damages, **REVERSE** the ALJ's decision not to award punitive damages, and **ORDER** Respondent to pay $100,000 in punitive damages.

SO ORDERED.

THOMAS H. BURRELL
Administrative Appeals Judge

PHILIP G. KIKO
Administrative Appeals Judge