Case No. 19-2780

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARK MLSNA,

Plaintiff-Appellant,

v.

UNION PACIFIC RAILROAD CO.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin,
Case No. 18-cv-37 – The Honorable William M. Conley

APPELLANT'S BRIEF

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2780

Short Caption: *Mlsna v. Union Pacific Railroad Co.*

(1) The full name of every party that the attorney represents in the case: Mark Mlsna, an individual.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: Apollo Law LLC, The Moody Law Firm, Inc., and Hunegs, LeNeave & Kvas, P.A.

(3) If the party or amicus is a corporation:

(i) Identify all its parent corporations, if any; and
(ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Not applicable for both i and ii.

Attorney's Signature: s/Adam W. Hansen **Date:** January 7, 2020

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Seventh Circuit Rule 34(f), Appellant respectfully requests oral argument in this case, which presents an important question concerning the intersection of the Americans with Disabilities Act's requirement that employers provide reasonable accommodations to hearing-impaired employees and the Federal Railroad Administration's regulations governing hearing protection and hearing testing for railroad employees. Appellant believes oral argument will be of significant benefit to the Court.

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STATEMENT OF JURISDICTION

The district court had federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this case arose under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. Docket Entry ("D.E.") 3 at 5.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The district court entered final judgment on May 16, 2019. Short Appendix ("S.A.") 35; D.E. 98. Plaintiff timely filed a motion to alter or amend the judgment on June 10, 2019. D.E. 102. The district court entered an order denying that motion on August 23, 2019. S.A. 36; D.E. 115. Appellant filed a notice of appeal on September 12, 2019. D.E. 116. This appeal is from a final judgment that disposes of all parties' claims.

STATEMENT OF THE ISSUES

1. Did the district court err when it concluded that wearing hearing protection in all circumstances required by Union Pacific's policies and passing the Federal Railroad Administration's hearing exam while wearing hearing protection were essential functions of Mlsna's job?

2. Did the district court err when it concluded that Union Pacific did not fail to reasonably accommodate Mlsna's disability?

INTRODUCTION

This case concerns, first, an employer's misplaced decision to terminate a hearing-impaired employee based on the false premise that the employee failed a federally mandated hearing exam; and second, that same employer's refusal to consider common-sense, reasonable accommodations that would have easily satisfied even the employer's incorrect heightened standards.

This dispute arises under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, which prohibits employers from "discriminat[ing] against a qualified individual on the basis of disability," 42 U.S.C. § 12112(a), and requires employers to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability…." 42 U.S.C. § 12112(b)(5)(A).

In this case, Appellant Mark Mlsna worked as a train conductor for Appellee Union Pacific Railroad Company ("Union Pacific") for nearly a decade. Mlsna suffers from hearing loss and wears hearing aids. Union Pacific hired and employed Mlsna with full knowledge of his hearing

impairment; and there is no evidence that Mlsna's hearing worsened during his tenure with Union Pacific.

Union Pacific shrouds itself in a simple argument: that it had no choice but to terminate Mlsna because he failed a federally mandated hearing exam. And because he failed, Mlsna could not perform the essential functions of his job.

Buried in that claim are a number of premises that do not withstand scrutiny.

First, Union Pacific interpreted the governing Federal Railroad Administration ("FRA") regulations to require Mlsna to pass a hearing exam *without his hearing aids* but *with hearing protection*. Moreover, Union Pacific applies this unique requirement solely on hearing-impaired employees—non-hearing-impaired employees need not pass the test with hearing protection. Union Pacific's policy represents a fundamental misreading of the governing regulations, which make no mention of hearing protection and allow conductors to take the hearing test "with or without the use of a hearing aid." 49 C.F.R. § 242.117(i). Mlsna took the test with his hearing aids and passed. No more is required to make him qualified.

Second, Union Pacific's position is based on the flawed premise that the FRA regulations required Mlsna to wear hearing protection in the first instance. The regulations mandate hearing protection "when [employees are] exposed to sound levels equivalent to an 8-hour [time weighted average] of 90 dB(A) or greater." 49 C.F.R. § 227.115(d). There is no evidence that Mlsna or any other Union Pacific thru-freight conductors were exposed to such sound levels within the last 19 years. Wearing hearing protection above and beyond what the FRA requires is a non-essential function subject to the ADA's reasonable accommodations requirement.

Third, even accepting Union Pacific's policies at face value, it failed to accommodate Mlsna as required by the ADA. Mlsna proposed a device that would simultaneously attenuate loud noise while enhancing quieter sounds. Mlsna's expert witnesses identified similar devices. Union Pacific rejected Mlsna's proposal because it claimed the device lacked an indicator called the Noise Reduction Rating. But the governing FRA regulations require no such rating—indeed, they explicitly rejected calls to require it. The district court compounded these errors by holding that Union Pacific's rejection of Mlsna's proposal was legally justified because

it was not pretextual. But pretext plays no role in reasonable accommodation cases. Finally, Union Pacific failed to engage in the interactive process required by the ADA. It made no effort to locate devices that might satisfy its own policies.

For these reasons, the district court's summary judgment order must be reversed.

STATEMENT OF THE CASE

I. FACTS.

A. The Parties.

Appellee Union Pacific is a railroad operating in 23 states across the western two-thirds of the United States. D.E. 3 at 2.

Appellant Mark Mlsna was employed by Union Pacific as a train conductor. D.E. 27 at 5. Mlsna has lived on his family's farm in Wisconsin his entire life. D.E. 27 at 3–4. He has a high school education. D.E. 27 at 3–4.

Mlsna suffers from "moderate to severe hearing loss." D.E. 53-1 at 7; 27 at 7. He has worn hearing aids for "twenty years or more." D.E. 27 at 7.

B. Mlsna's Employment History.

Union Pacific hired Mlsna as a thru-freight train conductor in 2006. D.E. 27 at 5. Mlsna has worked in the railroad industry as a conductor since the late 1990s. D.E. 27 at 4.

Union Pacific was fully aware of Mlsna's hearing impairment when he was hired. D.E. 27 at 18. Indeed, "he was hired…with the same hearing loss" that he had throughout his employment with Union Pacific. D.E. 66 at 20.

C. Union Pacific's Train Crew Job Description.

Union Pacific's "generic" job description for train crew members, which covers conductors, explains that the "basic purpose" of the position is to "[e]nsure safe, on-time/on-plan train operation and movement in compliance with company and Federal rules and instructions." D.E. 51-2 at 1. The job description lists one-and-a-half pages of "accountabilities," or tasks a train crew member must perform on the job. D.E. 51-2 at 1–2. These tasks include, for example, operating locomotive equipment through the use of remote control devices, coupling air hoses, uncoupling cars, "preparing written documentation," "working and interacting with others," and "[m]onitoring the situation, environment, and gauges to

gather information and take appropriate action." D.E. 51-2 at 1–2. The job description states that "[t]he statements in this section are essential job functions that an employee must be able to perform with or without reasonable accommodation in order to achieve the objectives of the job." D.E. 51-2 at 1–2.

In a separate section several pages later, the job description states that a train crew member must "wear personal protective equipment such as…hearing protection where the company requires." D.E. 51-2 at 4.

D. The FRA Maintains Regulations Governing Occupational Noise Standards and Conductor Certification.

At the direction of Congress, the FRA comprehensively regulates matters of health and safety in the railroad industry. Two FRA regulations play a starring role in this case. The first establishes occupational noise standards for railroads, including the use of hearing protection. The second requires railroads to certify conductors as fit for duty. That certification requirement, in turn, requires conductors to pass a hearing exam. Because the remaining facts and legal analysis require familiarity with these regulations, they are set forth in some detail here.

(1) The FRA's occupational noise standards.

The FRA has regulated locomotive noise levels since 1980. Occupational Noise Exposure for Railroad Operating Employees, 71 Fed. Reg. 63,066, 63,068 (Oct. 27. 2006).

The FRA's first such regulation provided that "the permissible exposure to a continuous noise in a locomotive cab shall not exceed an eight-hour time-weighted average of 90 dB(A), with a doubling rate of 5 dB(A)." 49 C.F.R. § 229.121(a) (1980). The same regulation provided that "[e]xposure to continuous noise shall not exceed 115dB(A)." *Id.* § 229.121(c) (1980).

Some of these terms require further explanation. "dB(A)" means "the sound pressure level in decibels measured on the A-weighted scale." 49 C.F.R. § 227.5. For the sake of simplicity, this brief will use the term "decibels" to mean "dB(A)." Because the human ear can perceive a tremendous range of sounds, decibels are measured logarithmically; every increase of 10 decibels represents a *doubling* of volume. *Id.* The

concepts of "time-weighted average" (abbreviated as "TWA")[1] and "doubling rate" (called the "exchange rate" under the current regulations) work in tandem: every time the doubling rate amount is added to the baseline decibels average, the allowable time exposure is cut in half. *Id.* To illustrate, under the 1980 regulation, a train conductor could permissibly be exposed to *eight hours* of sound averaging *90 decibels*, *four hours* of sounds averaging *95 decibels*, *two hours* of sound averaging *100 decibels*, and so forth. 49 C.F.R. § 229.121(c) (1980); 49 C.F.R. § 227.5; 49 C.F.R. Pt. 227, App. A.

The FRA revised and expanded its occupational noise standards in 2006, drawing heavily from regulations issued by the Occupational Safety and Health Administration ("OSHA"). 71 Fed. Reg. 63,066, 63,067. Aside from minor subsequent amendments not relevant here, these revised regulations remain in effect today. *Id.* The 2006 regulations contain a set of mutually reinforcing requirements—all aimed at reducing employees' exposure to harmful levels of noise. *Id.* The new

[1] This brief will do all it can to minimize the use of uncommon acronyms. Acronyms that are used in the regulations themselves or in the record evidence, however, will be noted for reference and used in direct quotations.

regulations set forth "minimum Federal health and safety noise standards for locomotive cab occupants" but do "not restrict a railroad…from adopting and enforcing additional or more stringent requirements." 49 C.F.R. § 227.1(b).

(a) Locomotive design and maintenance standards.

The centerpiece of the revised regulations is a requirement that new locomotives be designed, built, and maintained to meet strict new noise standards. That regulation requires that "all locomotives of each design or model that are manufactured after October 29, 2007, shall average less than or equal to 85 dB(A) …." 49 C.F.R. § 229.121(a)(1). The regulations also prohibit railroads from "mak[ing] any alterations" to locomotives to increase their average sound levels above established benchmarks and require railroads to "maintain all pre-existing locomotives so that they do not reach excessive noise levels." *Id.* § 229.121(a)(2); 71 Fed. Reg. 63,076. As the FRA explained, "since the early 1990s, the industry has taken delivery of thousands of newer locomotives engineered to reduce noise levels." 71 Fed. Reg. 63,072. "The cabs of most of these locomotives provide an environment where, for the

great majority of operating circumstances, employees will not experience 8 hour TWA exposures approaching 90 dB(A)…." *Id.*

(b) Operational controls.

Building on these design and maintenance standards, the revised regulations "encourage[] [railroads] to use noise operational controls" to reduce employees' exposure to excessive noise. 49 C.F.R. § 227.113. "Operational controls refer to efforts to limit workers' noise exposure by modifying workers' schedules or locations or by modifying the operating schedule of noisy machinery." 71 Fed. Reg. 63,101. The FRA lists several non-exhaustive examples of operational controls, including "placement of a newer (i.e., quieter) locomotive in the lead" of a train; "rotation of employees in and out of noisy locomotives;" and "variation of [an] employee's routes." Operational controls are beneficial, according to the FRA, "because they help reduce the total daily noise exposure of employees" and "take the burden off the employee to protect himself or herself" with hearing protection. *Id.*

(c) Noise monitoring and hearing conservation programs.

The 2006 regulations for the first time required railroads to establish noise monitoring and hearing conservation programs. 49 C.F.R. § 227.103.

The regulations governing noise monitoring require railroads to "take noise measurements under typical operating conditions" using a sound level meter or noise dosimeter. *Id.* § 227.103(c); 71 Fed. Reg. 63,088. In making those measurements, the regulations require railroads to "use a sampling strategy that is designed to identify employees for inclusion in the hearing conservation program and to enable the proper selection of hearing protection." 49 C.F.R. § 227.103(b)(1). Where factors such as "high worker mobility, significant variations in sound level, or a significant component of impulse noise make area monitoring generally inappropriate," the regulations generally require railroads to "use representative personal sampling to comply with the monitoring requirements of this section." *Id.* § 227.103(b)(2). "Representative personal sampling means measurement of an employee's noise exposure that is representative of the exposures of other employees who operate similar equipment under similar conditions." *Id.* § 227.5. Although the

FRA adopted a representative sampling standard, the agency made clear that railroads remain "free to employ continuous monitoring," where each discrete workspace is monitored on an ongoing basis. 71 Fed. Reg. 63,087.

The regulations require railroads to administer a hearing conservation program for all employees exposed to noise at or above "an eight-hour time-weighted-average sound level (TWA) of 85 dB(A)." 49 C.F.R. §§ 227.107, 227.5. Railroads must provide these employees with free "audiometric testing"—hearing exams—at least once every three years. *Id.* § 227.109(b), (f). The results of the first exam serve as a "baseline audiogram"—essentially a snapshot in time of an employee's hearing ability against which future tests can be compared. *Id.* § 227.109(e).

(d) Hearing protection.

Finally, the 2006 regulations established a number of new requirements governing the use of hearing protectors (amazingly, sometimes abbreviated as "HP").

The regulations require railroads to "provide hearing protectors to employees" covered by the railroad's hearing conservation program "at

no cost to [] employee[s].” *Id.* § 227.115(a)(1) and (b). Railroads must also “provide training in the use and care of all hearing protectors provided to employees,” “ensure proper initial fitting,” “supervise the correct use of all hearing protectors,” and “replace hearing protectors as necessary.” *Id.* § 227.115(a)(2), (5)–(6).

The regulations “require the use of hearing protectors” when certain thresholds are met. *Id.* § 227.115(a). Employees who have not yet established a baseline audiogram or whose hearing has significantly worsened must wear hearing protection if they are exposed to sound levels equivalent to an 8-hour Time Weighted Average of 85 dB(A) or greater. *Id.* §§ 227.115(c), 227.5 (defining “Standard threshold shift,” the metric for determining an actionable deterioration in hearing acuity). All other employees must “use…hearing protectors when [they are] exposed to sound levels equivalent to an 8-hour TWA of 90 dB(A) or greater.” *Id.* § 227.115(d).

Railroads must “give employees the opportunity to select their hearing protectors from a variety of suitable hearing protectors” including “devices with a range of attenuation levels.” *Id.* § 227.115(a)(4). This provision “underscore[s] the importance of railroads offering

employees with sufficient options." 71 Fed. Reg. 63,103. "When offering hearing protectors, employers should offer employees several different types, whether ear plugs, ear muffs, and/or electronic headsets. Within any given type, the employer should offer several different designs and models." *Id.* at 63,104. The regulations require a "range of attenuation levels" because railroads must "evaluate hearing protector attenuation for the specific noise environments in which the protector will be used." 49 C.F.R. § 227.117(a). Hearing protectors need only return the employee to noise exposures below the triggering threshold, "attenuat[ing] employee exposure to an 8-hour TWA of 90 decibels [or 85 decibels in the special cases described in the previous paragraph]." *Id.* § 227.117(b).

The FRA makes railroads responsible for evaluating hearing protector attenuation—in other words, determining how much sound a given pair of hearing protectors blocks—but gives them a wide range of options to make that determination. *See id.* § 227.117(a); 71 Fed. Reg. 63,072. As a starting point, the FRA defines "hearing protector" broadly, as "any device or material, which is capable of being worn on the head, covering the ear canal or inserted in the ear canal; is designed wholly or in part to reduce the level of sound entering the ear; and has a

scientifically accepted indicator of its noise reduction value." 49 C.F.R. § 227.5. That last clause—"scientifically accepted indicator of its noise reduction value"—is important. During the rulemaking, several stakeholders urged the FRA to mandate the "use [of] a specific indicator, the Noise Reduction Rating ([abbreviated as] NRR)." 71 Fed. Reg. 63,083. The FRA rejected using the Noise Reduction Rating as the sole permissible indicator. *Id.* The FRA expressed concern that limiting the definition to a single standard "would prevent the industry from availing themselves of advances in science and technology." *Id.* The FRA also found it inappropriate to adopt the Noise Reduction Rating standard because "there are several possible indicators that FRA could use and…there is not widespread public support for any particular one." *Id.* The Association of American Railroads—Union Pacific's industry group—also opposed using the Noise Reduction Rating as the solely accepted benchmark:

> The [Association of American Railroads] wrote that railroads should not be limited to the [Noise Reduction Rating] for evaluating [hearing protectors] attenuation, because it does not provide the flexibility to employ current science. The [Association of American Railroads] explained that there is current technology, such as in-the-ear microphones, which measure actual attenuation, and that technology would not be

> available if railroads were limited only to the [Noise Reduction Rating].

Id. The FRA's regulation on evaluating hearing protector attenuation is also framed broadly. That regulation "directs that a railroad shall use one of" three evaluation methods: "derating by type, Method B from ANSI [American National Standards Institute] S12.6-1997…, [or] objective measurement." *Id.* at 63,104; 49 C.F.R. § 227.117(a); *id.* Pt. 227, App. B. The FRA had originally proposed adopting the methods used in OSHA's regulations: the Noise Reduction Rating (NRR) and the National Institute for Occupational Safety and Health (NIOSH) methods #1, #2, and #3. 71 Fed. Reg. 63,104. The FRA rejected these metrics and adopted the three it did as better suited to the railroad industry. *Id.* at 63,104–05. Only the first listed method—derating by type—even mentions the Noise Reduction Rating. 49 C.F.R. Pt. 227, App. B. Of the three available methods, objective measurement—where the evaluator "[u]ses actual measurements of the level of noise exposure…inside the hearing protector when the employee wears the hearing protector in the actual work environment"—is the most accurate. 71 Fed. Reg. 63,105.

The regulations and FRA guidance broadly discourage railroads from mandating the use of hearing protection any more than necessary.

Section 227.103(e) provides that, "in administering the monitoring program, a railroad shall take into consideration the identification of work environments where the use of hearing protectors may be omitted." 49 C.F.R. § 227.103(e). "The purpose of this provision is to ensure that railroads do not excessively rely on reflexive use of hearing protectors when structuring their hearing conservation programs." 71 Fed. Reg. 63,088. Section 227.103(e) requires railroads to use the information gleaned from their noise monitoring programs to "determine general categories of work assignments that require hearing protectors and those that do not." *Id.* "Examples of situations where hearing protection may be omitted include…'[g]round' assignments where employees…have limited exposure to loud and persistent noise sources such as locomotives" and "[c]abs designed for sound reduction." *Id.* As the FRA recognized in 2006, "over the past decade and a half, the locomotive fleet has come to be dominated by cabs that are sufficiently quieter such that hearing protection is not required under most conditions of operation." *Id.* at 63,076.

The FRA has repeatedly emphasized that "several benefits…accrue when employees refrain from over-using hearing protectors." *Id.* Working

without hearing protection "maximiz[es] the availability of auditory cues…which results in improved personal safety." *Id.* In addition, "[o]verprotection can erode compliance." *Id.* When employees are "instructed to wear HP at all times and in all circumstances, it creates the impression for the employee that the HP requirement is just a pro forma requirement, not part of a larger program designed to protect their hearing. With that mindset, the employee is less likely to wear HP." *Id.*

Other regulatory provisions reinforce these same goals. Section 227.115(a)(4) requires railroads to "give employees the opportunity to select their hearing protectors from a variety of suitable hearing protectors" including "devices with a range of attenuation levels." 49 C.F.R. § 227.115(a)(4). Section 227.115(a)(3) provides that "[w]hen offering hearing protectors, a railroad shall consider an employee's ability to understand and respond to voice radio communications and audible warnings." *Id.* § 227.115(a)(3). These requirements address the "FRA's concern that the overuse of hearing protection may be counter-productive, especially for employees with existing hearing loss." 71 Fed. Reg. 63,102. "In addition to offering devices with high attenuation, railroads should offer devices with low or moderate attenuation." *Id.* at

63,104. "[A]n employer should provide HP types with ranges that are sufficient to protect the employee from the level of noise expected but still permit the employee to communicate effectively for the job." *Id.* For example, an employee "who is exposed to a TWA of 85 or 86 dB(A),"—the minimum possible threshold for required hearing protection—"should not wear HP that provides 30 dB in noise reduction, because that will reduce the employee's hearing ability and thus the employee's ability to listen and communicate in the cab." *Id.* at 63,102.

(2) The FRA's conductor certification rules.

At Congress' direction, the FRA issued new regulations, effective in 2012, requiring railroads to implement a program for certifying conductors. Conductor Certification, 76 Fed. Reg. 69,802 (Nov. 9, 2011).

The new rule "prescribes minimum Federal safety standards for the eligibility, training, testing, certification and monitoring of all [covered] conductors." 49 C.F.R. § 242.1(b). Its purpose is "to ensure that only those persons who meet minimum Federal safety standards serve as conductors." *Id.* § 242.1(a).

Most relevant here, the new regulations require that a person must pass a hearing exam to be certified as a conductor. The rule governing hearing exams provides that:

> [E]ach person shall have a hearing test or audiogram that shows the person's hearing acuity meets or exceeds the following thresholds: The person does not have an average hearing loss in the better ear greater than 40 decibels *with or without the use of a hearing aid*, at 500 Hz, 1,000 Hz, and 2,000 Hz.

Id. § 242.117(i) (emphasis added). A person who fails this hearing test may still be certified as a conductor, however, with or without "special restrictions," "[i]f, after consultation with a railroad officer, the medical examiner concludes that…the person has the ability to safely perform as a conductor." *Id.* § 242.117(j); *see also id.* § 242.117(c)(2).

Nothing in the conductor certification regulations or the FRA's implementing guidance suggests that conductors who may be required to wear hearing protection must meet the hearing acuity thresholds set forth in Section 242.117(i) *while wearing hearing protection*. *See generally* 49 C.F.R. Pt. 242; 76 Fed. Reg. 69,802, 69,802–66. The hearing acuity regulation simply requires meeting the stated thresholds "with or without the use of a hearing aid." 49 C.F.R. § 242.117(i).

The FRA's conductor certification regulations require railroads to put any adverse certification decisions in writing and set forth "the basis for [the] denial decision." *Id.* § 242.401(c). The aggrieved employee "may petition the [FRA] to review the railroad's decision." *Id.* § 242.501(a). The FRA then "determine[s] whether the denial or revocation of certification or recertification was improper under this regulation…and grant[s] or den[ies] the petition accordingly." *Id.* § 242.505(k).

E. Union Pacific Adopts a Hearing Protection Policy that Is More Stringent than Required by the FRA Regulations.

Union Pacific has adopted a hearing protection policy that is far more stringent than—and in some cases directly contradicts—the FRA's standards.

Despite the FRA's admonition that railroads should not "excessively rely on reflexive use of hearing protectors when structuring their hearing conservation programs," 71 Fed. Reg. 63,088, Union Pacific formally requires all conductors to wear hearing protection. D.E. 51-5 at 3; 51-9 at 3. Union Pacific also requires all employees, including conductors, "to wear approved hearing protection in identified hearing protection areas" demarcated by signs and whenever they are within 150

feet of a locomotive, unless they are inside the cab with the doors and windows closed. D.E. 51-6 at 1, 3, 6. Mlsna agreed that there were times during the day when he would be within 150 feet of a locomotive. D.E. 27 at 7.

Union Pacific told the district court that it engaged in "representative sampling designed to measure a conductor's noise exposure" as "required by the FRA," and learned that 13 percent (22 of 172) of "thru-freight" conductors (which was Mlsna's position) and 7 percent (6 of 91) of "local" conductors (which was *not* Mlsna's position) were exposed to an 8-hour Time Weighted Average of over 90 decibels. D.E. 51 at 7.

The evidence actually submitted by Union Pacific consists of records of average noise exposure from five different railroads during a period spanning from 1980 to 2017. D.E. 53-5 at 1; 53-6 at 1 (the "Lavg" column contains the relevant Time Weighted Average figures). The inclusion of old data is particularly problematic because, as previously discussed, the FRA mandated the use of quieter locomotives beginning in 2007 and railroads voluntarily began "tak[ing] delivery of thousands of newer locomotives engineered to reduce noise levels" in the 1990s. 49

C.F.R. § 229.121(a)(1); 71 Fed. Reg. 63,072. For example, Union Pacific highlighted the fact that one conductor in the sample was exposed to an 8-hour Time Weighted Average of 97 decibels—the highest measured noise dose in the sample. D.E. 51 at 7. But this measurement was taken in 1991. D.E. 53-5 at 1. Conversely, inclusion of data from other railroads is hardly relevant and contravenes the FRA's requirement that railroads do their own sampling. 49 C.F.R. § 227.103(b)(2).

The *relevant* data collected by Union Pacific tells a dramatically different story. Looking exclusively at measurements taken on or after February 26, 2007 (the date the FRA regulations mandating sampling took effect) by Union Pacific (not other railroads), *zero percent* (0 of 64) of "thru-freight" conductors (again, which was Mlsna's position) were exposed to an 8-hour Time Weighted Average of 90 decibels or greater. D.E. 53-5 at 1. In fact, all but one of the measurements exceeding the 90-decibel threshold were taken in the 1980s and 90s. D.E. 53-5 at 1. The single most recent measurement meeting or exceeding the 90-decibel threshold was taken in 2001. D.E. 53-5 at 1. Conversely, only 3.5 percent (2 of 56) of local conductors (which, again, was not Mlsna's position) employed by Union Pacific were exposed to an 8-hour Time Weighted

Average of 90 decibels or greater. D.E. 53-6 at 1. The complete absence of evidence supporting Union Pacific's claim that its thru-freight conductors are currently exposed to noise exceeding the legal threshold aligns perfectly with the FRA's observation in 2006 that "the locomotive fleet has come to be dominated by cabs that are sufficiently quieter such that hearing protection is not required under most conditions of operation." 71 Fed. Reg. 63,076.

Despite Union Pacific's formal policy broadly requiring hearing protection, the practice among employees on the ground is another matter. Over nearly a decade of work at Union Pacific, Mlsna wore his hearing aids without earmuffs or other hearing protection while performing his duties. D.E. 27 at 19.[2] Mlsna's experience was not unusual. During his entire tenure at Union Pacific, he "never saw anybody wear muffs." D.E. 27 at 18. Union Pacific's managers were aware that Mlsna wore his hearing aids without hearing protection. D.E. 27 at 19. As Mlsna explained, "I never had any [hearing protection] on.

[2] This fact is disputed. Mlsna's former supervisor testified that Mlsna "always wore hearing protection when and where required."

And nobody ever said anything to me. Nobody ever made a comment…." D.E. 27 at 18.

F. Union Pacific Adopts a Hearing Testing Policy that Is Inconsistent with the FRA Regulations.

After the FRA's new conductor certification regulation took effect in 2012, Union Pacific implemented a new hearing exam policy.

Union Pacific requires all conductors (including those with hearing impairments) to take a hearing test *without hearing aids*. D.E. 58-2 at 3. If the test subject satisfies the FRA's threshold—that is, "[t]he person does not have an average hearing loss in the better ear greater than 40 decibels…at 500 Hz, 1,000 Hz, and 2,000 Hz"—he passes. *Id.* No further testing is required. *Id.*

Union Pacific enforces a different requirement on hearing-impaired employees. Per Union Pacific's policy, a conductor who satisfies the FRA's hearing acuity threshold while wearing hearing aids *does not pass the exam* and cannot be certified as a conductor. D.E. 51-5 at 4; 58-2 at 3. In order to pass, Union Pacific requires hearing-impaired employees to satisfy the FRA's hearing acuity threshold *while wearing hearing protection and without hearing aids*. D.E. 51-5 at 4; 58-2 at 3. Union Pacific mandates the use of a single hearing protection device for all

hearing-impaired conductors: the "Pro Ears – Gold" device. D.E. 51-5 at 4. The Pro Ears – Gold device is an Amplified Hearing Protection Device (or "AHPD"), an electronic ear-muff style hearing protector with an external microphone and internal speaker designed to "amplif[y] ambient sound but block[] noise over 85 decibels." D.E. 53-1 at 3. The device is marketed to hunters and "makes no mention of its appropriateness for use by individuals with [a] hearing impairment." D.E. 48 at 4. Union Pacific's policies prohibit wearing hearing aids underneath either amplified hearing protection devices or standard earmuff style hearing protectors. D.E. 51-5 at 5. Thus, under Union Pacific's policies, a hearing-impaired employee is deemed to have passed his hearing exam, and is therefore eligible for certification as a conductor, *only* if he satisfies the FRA's hearing acuity threshold while wearing the Pro Ears – Gold device. D.E. 53-1 at 4; 58-2 at 3. Cumulatively, these policies produce a startling result: Union Pacific flatly prohibits conductors from wearing hearing aids on the job.

Union Pacific's hearing exam policy for hearing-impaired employees contravenes the FRA regulations in several important respects. It wrongly assumes that hearing-impaired employees cannot

pass the FRA-mandated hearing exam while wearing hearing aids but not hearing protection. *See* 49 C.F.R. § 242.117(i). It prohibits hearing-impaired employees from wearing standard earmuff style hearing protectors over hearing aids, which the regulations permit. *Id.* § 227.115(a)(4). Union Pacific's requirement that all hearing-impaired employees use a single pre-approved device runs afoul of its obligation to "give employees the opportunity to select their hearing protectors from a variety of suitable hearing protectors." *Id.* Indeed, railroads should "offer employees several different types, whether ear plugs, ear muffs, and/or *electronic headsets*. *Within any given type*, the employer should offer several different designs and models." 71 Fed. Reg. 63,104 (emphasis added). Union Pacific's policy also fails to provide hearing-impaired employees with a "range of attenuation levels" to best accommodate "the specific noise environments in which the protector will be used." 49 C.F.R. § 227.117(a). Union Pacific's Pro Ears – Gold device has an attenuation rating of 30 decibels—on the very high end of the attenuation scale. D.E. 51-5 at 4. But as the FRA has cautioned, attenuation overkill is bad: an employee whose work environment is right at the threshold for

requiring hearing protection should not wear high-attenuation hearing protectors. 71 Fed. Reg. 63,102; 49 C.F.R. § 227.117(a).

Union Pacific's testing regime also flatly discriminates against hearing-impaired employees. *Only* hearing-impaired employees are required to meet the FRA's hearing acuity threshold while wearing hearing protection. D.E. 58-2 at 3. An employee who passes the exam *without hearing aids*—even barely—is not then required to meet the FRA's hearing acuity threshold while wearing hearing protection. D.E. 58-2 at 3. Under Union Pacific's policies, only hearing-impaired employees must do so. D.E. 58-2 at 3. Union Pacific's testing policy is not a neutral, uniform protocol that disparately impacts hearing-impaired employees (although such a policy would still be problematic); Union Pacific's testing policy *facially discriminates* against hearing-impaired employees.

G. Mlsna Undergoes Testing Under Union Pacific's Hearing Testing Policy.

On December 18, 2014, Mlsna sat for his required hearing exam. (The FRA's new conductor certification regulations gave railroads a 36-month grandfathering period before requiring existing conductors to be certified. 49 C.F.R. § 242.105(c).)

Mlsna was first tested without his hearing aids and without hearing protection. D.E. 53-3 at 1. As expected, Mlsna did not meet the FRA's hearing acuity threshold. D.E. 53-3 at 1. The test showed that Mlsna "had an average hearing loss of 65 decibels" in his better ear. D.E. 58-2 at 1. That result, however, revealed no deterioration in Mlsna's hearing ability when compared to his prior exam results. D.E. 53-3 at 1. The FRA's hearing protection regulations attach significance to this fact. Recall that employees whose hearing has significantly worsened (as defined in the regulations) must wear hearing protection if they are exposed to sound levels equivalent to an 8-hour Time Weighted Average of 85 dB(A) or greater. *Id.* §§ 227.115(c), 227.5. All other employees must "use…hearing protectors when [they are] exposed to sound levels equivalent to an 8-hour TWA of 90 dB(A) or greater." *Id.* § 227.115(d). Mlsna's test results placed him firmly in the second category.

Mlsna was then tested *with* his hearing aids but without hearing protection. Under that scenario, Mlsna passed the test, meeting the FRA's hearing acuity threshold. D.E. 53-3 at 1.

Mlsna was then tested under two additional scenarios: (1) without hearing aids but wearing an amplified hearing protection device (but not

the Pro Ears – Gold device) with the volume turned off, and (2) without hearing aids but wearing the same amplified hearing protection device with the volume turned all the way up. D.E. 53-3 at 1. Mlsna failed to meet the FRA's hearing acuity threshold under either scenario. D.E. 53-3 at 1.

Immediately after these tests, Union Pacific removed Mlsna from service and "initiated a fitness-for-duty determination." D.E. 58-2 at 1; 66 at 5.

At Union Pacific's direction, Mlsna visited an audiologist on January 8, 2015. D.E. 58-2 at 1. The audiologist tested Mlsna under the same four scenarios as the prior test: (1) without his hearing aids and without hearing protection, (2) with his hearing aids but without hearing protection, (3) without hearing aids and wearing an amplified hearing protection device with the volume turned off, and (4) without hearing aids and wearing the amplified hearing protection device with the volume turned all the way up. D.E. 58-2 at 1. The only difference: in this round of testing, Mlsna wore the Pro Ears – Gold device as the amplified hearing protection device. D.E. 58-2 at 1.

Mlsna's results were the same. He met the FRA's hearing acuity threshold while wearing his hearing aids, but failed to meet the FRA's hearing acuity threshold under the other three testing scenarios. D.E. 58-2 at 2.

Based on these test results, Union Pacific concluded that Mlsna could not be certified as a conductor. D.E. 106 at 1.

H. Mlsna Asks for a Reasonable Accommodation.

After the denial of his conductor certification, Mlsna appealed to the FRA. D.E. 27 at 9; 106 at 1. He also contacted Union Pacific's director of disability management to explore possible reasonable accommodations. D.E. 27 at 9-10; 39 at 16.

Union Pacific's representative explained to Mlsna that "once we get through the medical aspects of this…and they can identify proper hearing protection, then we'll see if we can accommodate by utilizing what works for you, otherwise we would be looking at alternative employment." D.E. 39 at 16.

With the assistance of his local union chairman, Mlsna wrote to Union Pacific in March 2015 and asked the company to assist him in finding a reasonable accommodation. D.E. 73-3 at 2.

Mlsna had looked for a hearing protection device that would enable him to meet Union Pacific's requirements. D.E. 27 at 10. A custom-made device offered by E.A.R., Inc. was recommended to him. D.E. 27 at 10–11. In his letter, Mlsna asked Union Pacific to look into whether the device would work. D.E. 27 at 10–11; 73-3 at 2. Because it was a custom device, he requested that Union Pacific purchase it so that it could be built and then tested. D.E. 27 at 16; 73-3 at 2. Mlsna's request, however, was not limited explicitly to a single device. Rather, he was "trying to find some sort of device that would…work as a hearing aid and a hearing protection device." D.E. 27 at 10.

I. After a Perfunctory Review, Union Pacific Rejects Mlsna's Proposed Accommodation.

Union Pacific rejected Mlsna's proposed device. D.E. 39 at 22. This decision was made by Dr. John Holland, Union Pacific's chief medical officer, Vincent "Blake" Knight of the industrial hygiene department, and the legal department. D.E. 39 at 22; 60 at 3.

Union Pacific's reasons for rejecting Mlsna's proposed accommodation were inconsistent and shifting. Terry Owens, Union Pacific's director of disability management, was told that Mlsna's proposed device was too costly and that the "particular product didn't

meet our safety standards." D.E. 39 at 22, 35. She acknowledged telling Mlsna that one of the reasons for the denial was cost. D.E. 27 at 12; 39 at 35.

Mlsna was similarly informed that Union Pacific "didn't feel they had to pay for it…that it was not their responsibility to furnish this to employees" and "that it was too expensive." D.E. 27 at 11. He was not initially told that anything else was wrong with the device. D.E. 27 at 11.

Union Pacific later walked back its claim that cost was a factor. After speaking with Union Pacific's law department, Owens sent an email to Dr. Holland which stated, "I probably jumped the gun on this case." D.E. 39 at 34. She later explained, "I didn't have a right to tell Mr. Mlsna that cost was any factor." D.E. 39 at 35. "As it boiled down," according to Owens, cost "was not" a reason for denying the accommodation, because there was no reason to reach a cost determination after it was determined that the product would not satisfy Union Pacific's safety policy. D.E. 39 at 56.

Knight, a senior manager of industrial hygiene, evaluated the E.A.R. Primo device. D.E. 60 at 3. In his opinion, the problems with the device were that it was a custom earplug and that the manufacturer did

not publish a noise reduction rating (or "NRR"). D.E. 60 at 3–4; 64 at 20. He explained that Union Pacific prohibits custom earplugs "because the quality of the custom mold can be highly variable," and that "without a noise reduction rating Union Pacific cannot determine the level of protection, which it considers a safety hazard for employees." D.E. 60 at 3–4.

When Knight was asked at his deposition how he evaluated the use of the device, he stated, "[w]e got the manufacturer's literature [and] reviewed it." D.E. 64 at 20. What he looked for in the literature was "[t]he noise reduction rating," that is, "the ability of the device to attenuate noise." D.E. 64 at 20. Knight did not take any other steps, such as calling the company, to determine if there was a noise reduction rating. D.E. 64 at 23. When asked why he did not do so, he replied, "[t]hey provide the literature on the Internet." D.E. 64 at 23. He also did not look into whether there were any other devices that would meet Union Pacific's requirements. D.E. 64 at 23.

J. Mlsna Continues to Seek Reasonable Accommodations.

Mlsna remained in communication with Union Pacific, sending a letter to Owens and often speaking with a nurse. D.E. 39 at 29–30. It was

"a very slow process." D.E. 39 at 30. He was also informed that, "[s]hould [he] find a muff-type apparatus, Union Pacific's industrial health [department] will be happy to research it and consider it in light of the hearing policy." D.E. 27 at 12.

Mlsna tried finding alternative devices that would satisfy Union Pacific's myriad policies. D.E. 27 at 12. Mlsna described his difficulty communicating with companies about this issue, explaining, "whenever I get a chance or an opportunity, I…I check it out, and…I ask [th]em if it[']s…it can't be an amplified hearing, it has to be hearing protection, and it seems like I don't get very far when you say the word 'hearing protection.'" D.E. 27 at 30. Other than the E.A.R. Primo, Mlsna did not present any other specific devices to Union Pacific. D.E. 27 at 30.

K. Union Pacific Takes No Further Steps to Identify an Accommodation for Mlsna.

After Union Pacific rejected Mlsna's proposal, no one at Union Pacific took any additional steps to explore possible reasonable accommodations. Everyone claimed doing so was somebody else's responsibility.

Owens, the director of disability management, said she "did ask Mr. Mlsna to look and also Dr. Holland and Ms. Gengler's group would be

looking there because that's what they managed." D.E. 39 at 22. Holland, for his part, did not look at any other devices, instead pointing the finger back at Owens, stating, "I know part of the process for Terry Owens…was to try to determine if there were other adaptive devices, and I wasn't directly part of that. … I didn't do the search for the other devices." D.E. 66 at 28–29.

Knight, the senior manager of industrial hygiene, maintained that he had no responsibility to look for other devices. When asked why he did not do so, he replied, "Wasn't asked to." D.E. 64 at 23. When asked about what more he would have done had he known Mlsna would lose his job if a device could not be found, he stuck to this sentiment and gave replies including, "I was not asked to look at another device." D.E. 64 at 24.

As it turned out, *no one* at Union Pacific took even the smallest step to identify another device for Mlsna. As Owens explained, "none of us were going out and looking for something else for him. We were just asking him if you talked to your audiologist and you've come up with something else…but for us to actually go out and open up the website and look at all the markets, no." D.E. 39 at 27.

Despite Union Pacific's total failure to look for any devices that might accommodate Mlsna, Union Pacific falsely told Mlsna that it had engaged in an exhaustive search. In a letter to Mlsna, Dr. Holland stated that "[a]fter an extensive search, [Union Pacific] has found no adaptive devices" that would allow Mlsna to hear adequately while providing proper hearing protection. D.E. 27 at 16. No such search, extensive or otherwise, ever occurred.

L. Mlsna's Experts Confirm the Availability of Reasonable Accommodations.

Expert testimony gathered during this litigation confirmed that numerous devices exist that would satisfy Union Pacific's requirements.

Audiologist Dr. Douglas Kloss examined Mlsna and explained that despite Mlsna's hearing deficits, "with the proper hearing device, which provides both amplification of sound and protection by dampening excessive noise, Mr. Mlsna could be safely accommodated with current available technology such that he would comply with the FRA regulations and work as a railroad conductor." D.E. 76 at 1.

Specifically, Kloss recommended several available devices, including the "Impact Pro Industrial" electronic earmuff manufactured by Howard Leight Co., Inc. and several models of electronic earplugs

made by Electronic Shooters Protection Company. D.E. 76 at 1. Kloss also tested Mlsna while wearing the E.A.R. Primo device proposed by Mlsna. Wearing the new device with the amplification turned to "full-on" allowed Mlsna to meet the FRA's acuity threshold while wearing the device. D.E. 86-1 at 2.

Dr. Kevin Trangle, a board-certified occupational medicine specialist, also reviewed products offered by several companies and identified the Impact Pro Industrial earmuffs as a reasonable accommodation. D.E. 49 at 1; 78 at 1. Howard Light Impact Pro Industrial earmuffs are "electronic earmuffs that protect a worker's hearing while allowing them to have environmental awareness." D.E. 81 at 3. The device has an amplification that goes up to 82 decibels "with a variable volume depending on the needs of the user." D.E. 49 at 1. It has a noise reduction rating of 30 decibels. D.E. 76-1 at 2; 81 at 3. The device cuts out noise above 104 decibels and reduces it to 82 decibels. D.E. 49 at 1. The cost is approximately $50.00 and it is "easily available on the market." D.E. 49 at 1.

Union Pacific's expert witness took a different view. He claimed that the necessary technology—namely, an amplified hearing protection

device with enough amplification to compensate for Mlsna's hearing loss—simply did not exist. D.E. 48 at 5. His expert report does not reference any research about devices other than the ProEars Gold, which he apparently assumed was representative of all amplified hearing protection devices. D.E. 48 at 5.

Trangle, one of Mlsna's expert witnesses, also explained the importance of mitigating the need to use hearing protection through engineering controls, measuring noise levels in the actual work environment to determine the amount of attenuation required, and objectively testing hearing protection devices to ascertain their attenuation levels. D.E. 77 at 1; 78 at 2. He described these processes as "industry standard." D.E. 78 at 3.

II. PROCEDURAL HISTORY.

Mlsna's amended complaint, filed February 2, 2018, alleges discrimination under the ADA. D.E. 3 at 3–5. It claims that Union Pacific violated the ADA by "discriminating against a qualified individual on the basis of disability" as defined in Section 12112(a). D.E. 3 at 5. It also alleges that Union Pacific failed to make reasonable accommodations as required by Section 12112(b)(5)(A). D.E. 3 at 5. It further claims that

Union Pacific's testing procedures and policies were discriminatory and that Mlsna did not pose a direct threat to workplace safety. D.E. 3 at 2–4.

Union Pacific filed a motion for summary judgment. D.E. 50. Its supporting brief argued that Mlsna was not a qualified employee under the ADA because Mlsna did not pass the FRA's mandatory hearing exam while wearing hearing protection and that Union Pacific did not fail to provide reasonable accommodations. D.E. 51 at 21–30.[3]

The district court granted Union Pacific's summary judgment motion. S.A. 11; D.E. 97. The district court accepted Union Pacific's claims that following Union Pacific's hearing protection policies and passing the FRA-mandated hearing exam while wearing hearing protection were essential functions of the conductor position. S.A. 29, 34; D.E. 97 at 19, 24. It also held that Union Pacific did not fail to make a reasonable accommodation to Mlsna. S.A. 29–33; D.E. 97 at 19–23.

[3] Union Pacific raised additional arguments which were not addressed by the district court. To the extent that Union Pacific relies on these additional arguments as alternative grounds for affirmance, they will be addressed in Mlsna's reply brief.

Shortly after the district court granted summary judgment, the FRA reversed Union Pacific's decision to revoke Mlsna's conductor certification. D.E. 106. The FRA's opinion explains that Union Pacific's decision was based on "flagrant misrepresentations" of the FRA's hearing test requirements. D.E. 106 at 4.

Mlsna filed a motion to reconsider in the district court. D.E. 102. The district court denied the motion to reconsider, explaining that the court disagreed with the FRA's conclusions and believed Union Pacific's policies were aligned with the FRA's regulatory requirements. S.A. 40; D.E. 102 at 5.

This appeal followed.

SUMMARY OF THE ARGUMENT

The district court erred when it concluded that Union Pacific's hearing protection requirements were essential functions even to the extent they exceeded the minimum requirements set forth in the FRA regulations. Neither Union Pacific's job description nor the actual practice in the workplace support that conclusion. The job description mentions wearing hearing protection separately from the list of essential functions. And in practice, Mlsna, like other conductors, worked without

wearing hearing protection. Moreover, there is no evidence that Mlsna was ever "exposed to sound levels equivalent to an 8-hour TWA of 90db(A) or greater"—the threshold for mandatory hearing protection under the FRA regulations. *See* 49 C.F.R. § 227.115(d). Union Pacific's own data shows that no thru-freight Union Pacific conductors have been exposed to such noise levels since 2001—well before the FRA mandated strict engineering controls to mitigate harmful noise starting in 2007.

The district court erred a second time when it agreed that meeting the FRA's hearing acuity threshold *while wearing hearing protection* was required by the FRA regulations and therefore an essential function of the job for hearing-impaired employees. That holding contravenes the plain text of the governing regulation, which states, without qualification, that "[t]he person [must] not have an average hearing loss in the better ear greater than 40 decibels *with or without the use of a hearing aid*, at 500 Hz, 1,000 Hz, and 2,000 Hz." *Id.* § 242.117(i) (emphasis added). There are additional compelling reasons to take the regulatory text at face value. The FRA promulgated its conductor certification regulations *after* it created its hearing protection regime. If the FRA wanted to require conductors to pass a hearing exam while

wearing hearing protection, it could have easily said so. It did not, and therefore the FRA's hearing acuity threshold is best understood as calibrated to reflect the FRA's belief that a person who passes the hearing exam *without hearing protection* can hear well enough to perform the job *with hearing protection*. The hearing acuity threshold itself, which allows only mild hearing loss, supports that conclusion as well. The FRA, of course, agrees with Mlsna's interpretation, and the agency's construction of its own regulations is entitled to deference from this Court. Finally, the discriminatory nature of Union Pacific's policy defeats any argument that meeting the FRA's hearing acuity threshold while wearing hearing protection is an essential job function. Union Pacific *does not require* non-hearing-impaired conductors to meet the FRA's hearing acuity threshold while wearing hearing protection. Only hearing-impaired employees must do so. Union Pacific can hardly claim that a policy it enforces only against a small minority of its workforce is an essential function of the conductor position.

Even taking Union Pacific's hearing protection and hearing exam policies at face value, Union Pacific still failed to reasonably accommodate Mlsna, and the district court erred in concluding otherwise.

A reasonable factfinder could conclude that several devices—including the specific device proposed by Mlsna—would have satisfied Union Pacific's policies and thus served as a reasonable accommodation to Mlsna's disability. Union Pacific's objection to Mlsna's proposed device—the device's lack of a Noise Reduction Rating—was itself unreasonable. The FRA specifically rejected calls to require the use of the Noise Reduction Rating in evaluating hearing protection. By contrast, the technique proposed by Mlsna—objective measurement of noise attenuation—is specifically contemplated by the FRA regulations. The district court erred by holding that Union Pacific's reason for rejecting Mlsna's proposed accommodation was not a pretext for discriminatory animus and therefore lawful. That holding represents a fundamental misreading of the ADA. An employer's failure to provide a reasonable accommodation is defined as a type of discrimination. An employee need not prove that the failure to provide an accommodation was motivated by animus towards the disabled. Pretext plays no role in the reasonable accommodations analysis. Finally, contrary to the district court's conclusion, a reasonable factfinder could find that Union Pacific inhibited the identification of a reasonable accommodation by failing to engage

Mlsna in the interactive process. Aside from rejecting Mlsna's proposed device for legally unsupported reasons, no one at Union Pacific ever explored other devices that would have allowed Mlsna to meet Union Pacific's policies. That head-in-the-sand approach violated Union Pacific's obligations under the FRA regulations and the ADA alike.

For these reasons, the district court's judgment must be reversed, and the case remanded for further proceedings and trial.

STANDARD OF REVIEW

The Court reviews a district court's grant of summary judgment de novo. *White v. City of Chicago* 829 F.3d 837, 841 (7th Cir. 2016). It views the evidence in the light reasonably most favorable to the non-moving party and affirms if no reasonable trier of fact could find in favor of the non-moving party. *Id.* Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

ARGUMENT

I. MLSNA CAN PERFORM THE ESSENTIAL FUNCTIONS OF HIS JOB WITH OR WITHOUT A REASONABLE ACCOMMODATION.

All of Mlsna's claims require a showing that he could perform the essential functions of his position. The district court first erred when it concluded that wearing hearing protection in all circumstances required by Union Pacific's policies was an essential function of Mlsna's job. Although Mlsna agrees that wearing hearing protection *when required by the FRA regulations* is an essential function, there is no evidence that the regulations imposed that requirement on Mlsna. And Union Pacific's more stringent hearing protection standards were non-essential functions. The district court erred a second time when it held that passing the FRA's hearing exam *while wearing hearing protection* was an essential job function. That conclusion rests upon a gross misreading of the FRA regulations, which do not require meeting the FRA's acuity threshold while wearing hearing protection.

A. The ADA Prohibits Discrimination Against Qualified Individuals With Disabilities.

The ADA "was passed by large majorities in both Houses of Congress after decades of deliberation and investigation into the need for

comprehensive legislation to address discrimination against persons with disabilities." *Tennessee v. Lane*, 541 U.S. 509, 516 (2004). As Congress found, "overprotective rules and policies" and "exclusionary qualification standards and criteria," unfairly discriminate against disabled Americans and deprive these individuals of "equality of opportunity, full participation, independent living, and economic self-sufficiency." 42 U.S.C. § 12101(a)(5), (7).

The ADA prohibits employers from "discriminat[ing] against a qualified individual on the basis of disability." *Id.* § 12112(a). Discrimination by employers includes: (1) not making reasonable accommodations to the known limitations of an otherwise qualified individual with a disability; (2) taking any adverse employment action because of an individual's disability; and (3) using qualification standards or employment tests that screen out, or tend to screen out, an individual with a disability. *See id.* § 12112(b)(1),(5), and (6).

B. Essential Functions.

A "qualified individual" is someone "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position…." *Id.* § 12111(8).

Generally, the "essential functions" of a job are the functions that are "fundamental," as opposed to marginal, such that a job would be "fundamentally altered" if such a function was removed. *EEOC v. Ford Motor Co.*, 782 F.3d 753, 762 (6th Cir. 2015) (en banc).

In determining which functions qualify as essential, an employer's judgment and the employee's job description prior to litigation are both relevant considerations. *Dunderdale v. United Airlines, Inc.*, 807 F.3d 849, 853–53 (7th Cir. 2015); 42 U.S.C. § 12111(8). However, "written job descriptions are…not dispositive." *Rorrer v. City of Stow*, 743 F.3d 1025, 1040 (6th Cir. 2014). Similarly, "courts are not 'required to give deference to [the employer's] judgment regarding what the essential functions of the position [are]' when the record suggests that there" is evidence to the contrary. *Id.* at 1040, 1042 (quoting *Keith v. Cty. of Oakland*, 703 F.3d 918, 925–26 (6th Cir. 2013)). Such countervailing evidence may include "[t]he amount of time spent on the job performing the function[,]" "[t]he consequences of not…perform[ing] the function[,]" or the "work experience" of past incumbents in the same job and current employees in similar jobs. 29 C.F.R. § 1630.2(n); 42 U.S.C. § 12116; *Dunderdale*, 807 F.3d at 853.

At bottom, a job's essential job functions "should reflect the actual functioning and circumstances of the particular enterprise involved." *Faulkner v. Douglas Cty. Nebraska*, 906 F.3d 728, 733 (8th Cir. 2018). Courts must "look to evidence of the employer's actual practices in the workplace." *Stern v. St. Anthony's Health Ctr.*, 788 F.3d 276, 285–86 (7th Cir. 2015) (quoting *Miller v. Ill. Dep't of Transp.*, 643 F.3d 190, 198 (7th Cir. 2011)).

"The essential function inquiry is a factual question, *not* a question of law." *Brown v. Smith*, 827 F.3d 609, 613 (7th Cir. 2016). Therefore, the question of whether an employee can perform her essential functions is "typically…not suitable for resolution through a motion for judgment as a matter of law…." *Henschel v. Clare Cty. Road Comm'n*, 737 F.3d 1017, 1022 (6th Cir. 2013) (citing *Brickers v. Cleveland Bd. of Educ.*, 145 F.3d 846, 849 (6th Cir. 1998)).

C. Wearing Hearing Protection Is Not An Essential Function of Mlsna's Job.

Wearing hearing protection in every circumstance covered by Union Pacific's policies is a non-essential function. While Union Pacific is certainly free to adopt those policies, their non-essential character makes them subject to reasonable accommodations to disabled employees like

Mlsna. Mlsna's position is simple: wearing hearing protection is an essential function *only when required by the FRA's regulations*. And there is no evidentiary basis to conclude—as a matter of law or otherwise—that the FRA regulations required Mlsna to use hearing protection.

A number of factors support the conclusion that Union Pacific's more stringent hearing protection standards are non-essential functions. Union Pacific can hardly claim that the conductor position would be "fundamentally altered" if such a function was removed. *Ford Motor Co.*, 782 F.3d at 762. Indeed, a reasonable observer watching a conductor do his job would likely perceive no difference. Mlsna's job description supports the same conclusion. The job description lists one-and-a-half pages of tasks that are explicitly labeled as "essential job functions." D.E. 51-2 at 1–2. The job description's requirement that conductors "wear personal protective equipment such as…hearing protection where the company requires" appears several pages later and without any such label. D.E. 51-2 at 4. "[E]vidence of the employer's actual practices in the workplace" further supports the same point. *See Stern*, 788 F.3d at 285–86. During his nearly a decade of work at Union Pacific, Mlsna worked with his hearing aids and without hearing protection. D.E. 27 at 19. He

testified that other employees did not wear hearing protection either. D.E. 27 at 18. Finally, the FRA's regulations themselves amount to powerful evidence that they represent the essential requirements of wearing hearing protection. The agency's expertise in railroad safety and careful science-based approach in rulemaking illustrate that employees may safely perform their jobs without hearing protection when not required. This regulatory judgment strongly suggests that any additional requirements imposed by railroads are non-essential functions under the ADA.

Because the FRA's hearing protection standards—and not Union Pacific's more stringent policies—capture the essential functions of the job, it follows that wearing hearing protection was not an essential function of Mlsna's job because there is no evidence that he was exposed to levels of noise sufficient to trigger the FRA's hearing protection requirement.

Mlsna's argument is grounded in the FRA standards, which require hearing protection only "when an employee is exposed to sound levels equivalent to an 8-hour TWA of 90db(A) or greater." 49 C.F.R. § 227.115(d). There is no evidence that Mlsna was ever exposed to such

sound levels. Union Pacific never measured Mlsna's actual noise exposure even though such testing is neither difficult nor expensive. D.E. 78 at 2; 79 at 9. While the FRA regulations mandate sampling, railroads remain "free to employ continuous monitoring," where each discrete workspace is monitored on an ongoing basis. 71 Fed. Reg. 63,087. One of Mlsna's expert witnesses emphasized the importance of mitigating the need to use hearing protection through measuring noise levels in the actual work environment. D.E. 77 at 1; 78 at 2.

The lynchpin of Union Pacific's argument is the sampling data which it claims shows that conductors are sometimes exposed to noise levels meeting or exceeding an 8-hour Time Weighted Average of 90db(A). But Union Pacific's own evidence utterly fails to substantiate its claim. Samples of Union Pacific thru-freight conductors taken between 2007 and 2017 show that *zero percent* (0 of 64) of thru-freight conductors were exposed to an 8-hour Time Weighted Average of 90 decibels or greater. D.E. 53-5 at 1. The single most recent measurement meeting or exceeding the 90-decibel threshold was taken in 2001—the rest were taken in the 1980s and 90s. D.E. 53-5 at 1. These stark differences between the older and newer samples make perfect sense in light of the

FRA's mandated use of quieter locomotives beginning in 2007 and railroads' voluntary purchase "of thousands of newer locomotives engineered to reduce noise levels" starting in the 1990s. 49 C.F.R. § 229.121(a)(1); 71 Fed. Reg. 63,072.

The complete absence of evidence supporting the claim that Mlsna was exposed to noise levels meeting or exceeding an 8-hour TWA of 90db(A) arguably entitles *Mlsna* to judgment as a matter of law. At a minimum, a reasonable factfinder could easily find that Mlsna was never exposed to such noise levels. Because Union Pacific's hearing protection policies are non-essential functions to the extent they exceed the FRA standards, and because a reasonable factfinder could conclude that the FRA regulations did not require Mlsna to wear hearing protection, the district court erred in concluding that Union Pacific's hearing protection standards were essential job functions.

One word about the effects of the holding Mlsna's asks for here. Concluding that Union Pacific's hearing protection policies are non-essential to the extent they exceed the FRA standards *would not* prohibit Union Pacific from enforcing its policies in the vast run of cases. The only real-world consequence would be Union Pacific being required to modify

that policy for genuinely disabled employees on a case-by-case basis through the careful procedural mechanisms outlined in the ADA.

D. Meeting the FRA's Hearing Acuity Standards While Wearing Hearing Protection Is Not An Essential Function of Mlsna's Job.

The district court's error in holding that Union Pacific's hearing protection policies were essential functions was compounded by a second, more grievous error: the court's conclusion that meeting the FRA's hearing acuity standards *while wearing hearing protection* was an essential function of the job. D.E. 97 at 19; 115 at 5. No such requirement exists.

Mlsna wholeheartedly agrees with Union Pacific that meeting the FRA's hearing acuity standards (or securing an exemption under Section 242.117(j)) is an essential job function. The ADA does not require employers to break the law in providing reasonable accommodations. Union Pacific, for its part, relies solely on the FRA regulations to support its position. Union Pacific does *not argue*, as it does with respect to hearing protection, that it is applying a more restrictive company policy. Rather, Union Pacific has "consistently articulated that it could not certify Mlsna because he did not meet FRA minimum standards when

wearing mandatory, approved hearing protection." D.E. 51 at 36. Thus, the essential functions inquiry effectively collapses into a single question for this Court: do the FRA's regulations require hearing-impaired employees to satisfy the hearing acuity standards found in Section 242.117(i) while wearing hearing protection?

The answer to that question is a resounding no.

Most obviously, the plain text of the governing regulation makes no mention of wearing hearing protection. The hearing test must show, without qualification, that "[t]he person does not have an average hearing loss in the better ear greater than 40 decibels *with or without the use of a hearing aid*, at 500 Hz, 1,000 Hz, and 2,000 Hz." 49 C.F.R. § 242.117(i) (emphasis added). Had the FRA wished to require testing with hearing protectors, it certainly would have said so directly.

Other indicia of the FRA's intent support the same result. The FRA's conductor certification regulation was adopted in 2011—five years after the FRA issued its comprehensive occupational noise standards for railroads, including the use of hearing protection. The FRA knew in 2011 that some railroad employees may be required to wear hearing protection. Yet it adopted a hearing test regime that makes no mention

of hearing protection. *See generally* 49 C.F.R. Pt. 242; 76 Fed. Reg. 69,802, 69,802–66.

Union Pacific's contrary claim is principally based on a practical argument: if an employee is required to both pass a hearing exam and wear hearing protection (which Mlsna disputes, but here is assumed), then of course he must pass the hearing exam while wearing hearing protection. If he can't meet the acuity thresholds under all possible circumstances then he can't hear well enough to do the job. But this argument contains a flawed premise: the assumption that the FRA's hearing acuity standards represent the actual physical minimum requirement for hearing under any circumstances in the conductor position. The opposite premise is stronger: that the FRA's hearing acuity threshold represents an ability level that would permit someone to work as a conductor under a variety of circumstances—including with or without hearing protection. Consider this analogy: a firefighter might be required to run a 7-minute mile. She also must work inside burning buildings. But that does not mean she is unqualified if she cannot run a 7-minute mile *inside a burning building*. The 7-minute mile requirement is not a feat that must be possible in all circumstances but rather a

benchmark indicative of the overall physical stamina necessary to do the job.

The FRA regulations provide sound reasons to believe the same holds true here: that the potential use of hearing protection is fully baked into the FRA's hearing acuity testing standard. The FRA standard requires hearing loss of no greater than 40 decibels in the better ear. 49 C.F.R. § 242.117(i). A hearing loss of 40 decibels is considered "mild." *See* JG Clark, *Uses and Abuses of Hearing Loss Classification*, 493–500 (1981). As hearing deteriorates further, it is classified progressively as "moderate," "moderate severe," "severe," and "profound." *Id.* It is not unreasonable to assume that someone with normal hearing or mild hearing loss could safely attenuate his hearing a little further with hearing protectors and still safely perform as a conductor.

The FRA, of course, fully agreed with Mlsna's interpretation when it reversed Union Pacific's certification decision. D.E. 106 at 4. ("FRA permits the hearing standard set forth in 49 C.F.R. § 242.117(i) to be met 'with or without use of a hearing aid.' The parties agree that Petitioner met the standard with the use of a hearing aid…."). This Court owes

deference to the FRA's judgment. *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2418 (2019); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

One last point puts the nail in the coffin of Union Pacific's argument. Union Pacific's claimed requirement that hearing-impaired employees must meet the FRA's hearing acuity standards *while wearing hearing protection* cannot be an essential function because Union Pacific does not impose the same requirement on non-hearing-impaired employees. D.E. 58-2 at 3. Union Pacific cannot credibly claim that a requirement it does not impose on the vast majority of its workforce is in fact essential to the conductor position. *See Stern*, 788 F.3d at 285–86 (courts must "look to evidence of the employer's actual practices in the workplace.") Allowing an employer to claim a facially discriminatory practice as an essential job function would be equal parts ironic and cruel: essentially permitting a discriminatory policy to disqualify disabled employees at the threshold from challenging that very discriminatory policy. The ADA should not be read to tolerate such Orwellian results.

E. If This Court Agrees That the District Court Erred in Its Essential Functions Analysis, It Should Remand for Further Proceedings.

If this Court agrees with one or both of Mlsna's arguments regarding essential job functions, it should remand the case without any further analysis. The district court's discussion of reasonable accommodations was informed by its prior holdings; in light of those holdings, it limited its analysis to the narrow question of whether Union Pacific failed to reasonably accommodate Mlsna by providing him with a hearing protection device that would have allowed him to meet the FRA's hearing acuity standards while wearing the device. Without the faulty premises, that analysis would have proceeded differently. The reasonable accommodations analysis would, for example, need to consider the possibility of Mlsna working without hearing protection or with standard earmuff-style hearing protectors. *See Mobley v. Allstate Ins. Co.*, 531 F.3d 539, 545 (7th Cir. 2008) (elements of a failure-to-accommodate claim). In considering Mlsna's disparate treatment claim, the court would need to evaluate Union Pacific's argument that he was not terminated "because of his disability." *See Hooper v. Proctor Health Care Inc.*, 804 F.3d 846, 853 (7th Cir. 2015). Mlsna's qualification standards claim and Union

Pacific's direct threat defense would need to be separately analyzed as well. *See* 42 U.S.C. §§ 12112(b)(6), 12113(b).

The parties briefed some of these issues at summary judgment. The district court addressed none of them. If this Court agrees that the district court erred in its essential functions analysis, the Court should leave all other remaining issues for the district court.

II. UNION PACIFIC FAILED TO PROVIDE MLSNA WITH A REASONABLE ACCOMMODATION.

Even assuming the district court correctly decided the essential functions questions, the district court erred in concluding that Union Pacific fulfilled its obligations to provide Mlsna with a reasonable accommodation.

A. Reasonable Accommodations.

A failure to make reasonable accommodations for a known disability constitutes unlawful discrimination. 42 U.S.C. § 12112(b)(5)(A). In order to make out a prima facie case on this claim, Mlsna must put forth evidence that (1) he is a qualified individual with a disability; (2) the employer was aware of his disability; and (3) the employer failed to reasonably accommodate the disability. *Mobley*, 531 F.3d at 545 (citing *EEOC v. Sears, Roebuck Co.*, 417 F.3d 789, 797 (7th

Cir. 2005)). Whether an accommodation is reasonable is a question of fact. *Haschmann v. Time Warner Entm't Co.*, 151 F.3d 591, 601 (7th Cir. 1998).

B. Employers Must Engage in The Interactive Process.

When an employee asks for an accommodation because of a disability, the employer "must engage with the employee in an interactive process to determine the appropriate accommodation under the circumstances." *Stern*, 788 F.3d at 292 (quoting *Kauffman v. Peterson Health Care VII, LLC*, 769 F.3d 958, 963 (7th Cir. 2014)). The employer must "meet the employee half way" in this "flexible" process, *Reeves v. Jewel Food Stores, Inc.*, 759 F.3d 698, 701 (7th Cir. 2014), and take "an active, good-faith role." *Sears, Roebuck & Co.*, 417 F.3d at 806. All an employee must do to invoke this process is say, "I want to keep working for you—do you have any suggestions?" *Miller*, 107 F.3d at 487. Once an employee has proposed a reasonable accommodation, "the employer has a duty to…identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." *Melange v. City of Ctr. Line*, 482 F. App'x 81, 84 (6th Cir. 2012) (internal citation omitted).

Though not an independent cause of action, an employer's failure to engage in the interactive process is actionable when it prevents the identification of an appropriate accommodation for a qualified individual. *Stern*, 788 F.3d at 292 (citing *Spurling v. C&M Fine Pack, Inc.*, 739 F.3d 1055, 1059 n.1 (7th Cir. 2014)).

There is no "hard and fast rule" to determine how to assign responsibility when the interactive process fails. *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996). Factfinders should "look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary." *Id.* A party that "obstructs or delays" the interactive process or "fails to communicate" may be acting in bad faith. *Id.* Factfinders "should attempt to isolate the cause of the breakdown and then assign responsibility." *Id.* Determining "[i]f and when the interactive process broke down is a question of fact for the jury." *Hill v. City of Phoenix*, No. CV-13-02315, 2016 WL 3457895, at *3 (D. Ariz. June 24, 2016) (citing cases).

C. Union Pacific Failed to Reasonably Accommodate Mlsna.

A reasonable factfinder could conclude that several devices would have satisfied Union Pacific's policies and thus served as a reasonable accommodation to Mlsna's disability.

Mlsna's experts testified that Mlsna could easily have been accommodated in the conductor position and that the necessary technology to do so exists and is readily available. D.E. 77 at 1; 76 at 1. Mlsna's experts were readily able to identify electronic earmuffs appropriate for hearing-impaired workers that met every single one of Union Pacific's requirements. D.E. 76 at 1. For example, the Howard Light Impact Pro Industrial earmuff met all of Union Pacific's specifications and is "easily available on the market" for a cost of only about $50.00. D.E. 49 at 1.

Similarly, a reasonable jury could have found that Mlsna could have been accommodated with the E.A.R. Primo, the device Mlsna initially proposed to Union Pacific. As discussed in the next section, Union Pacific's objections to this proposed accommodation were themselves unreasonable.

D. A Reasonable Factfinder Could Have Concluded that Union Pacific's Cited Reasons for Rejecting Mlsna's Proposed Accommodation Were Unreasonable.

The district court erred in accepting Union Pacific's reasons for rejecting Mlsna's proposed accommodation.

Union Pacific initially rejected Mlsna's proposed accommodation based on cost. That rationale was plainly erroneous: FRA regulations require railroads to "provide hearing protectors to employees" covered by the railroad's hearing conservation program "at no cost to [] employee[s]." 49 C.F.R. § 227.115(a)(1) and (b). Union Pacific wisely abandoned this justification.

Union Pacific principally maintained that it "considers customized earplugs to be unsafe in the railroad environment since they have no factory-issued or laboratory-tested NRR." D.E. 51 at 30.

The lack of a Noise Reduction Rating should not have been accepted as a basis to reject Mlsna's proposed device. The FRA explicitly rejected the Noise Reduction Rating as the sole metric by which hearing protection devices should be evaluated. *See* 49 C.F.R. § 227.117(a); 71 Fed. Reg. 63,072. The Association of American Railroads—Union

Pacific's industry group—even opposed using the Noise Reduction Rating as the solely accepted benchmark:

> The [Association of American Railroads] wrote that railroads should not be limited to the [Noise Reduction Rating] for evaluating [hearing protectors] attenuation, because it does not provide the flexibility to employ current science. The [Association of American Railroads] explained that there is current technology, such as in-the-ear microphones, which measure actual attenuation, and that technology would not be available if railroads were limited only to the [Noise Reduction Rating].

Id. The FRA's regulation on evaluating hearing protector attenuation also rejected the Noise Reduction Rating—a metric the agency had initially proposed—as a method for measuring attenuation. *Id.* at 63,104; 49 C.F.R. § 227.117(a); *id.* Pt. 227, App. B. Of the three available methods, objective measurement—where the evaluator "[u]ses actual measurements of the level of noise exposure…inside the hearing protector when the employee wears the hearing protector in the actual work environment"—is the most accurate. 71 Fed. Reg. 63,105. This is the exact procedure Mlsna proposed to evaluate the E.A.R. Primo device.

In short, Mlsna proposed evaluating his proposed device using one of the three methods allowed by the FRA regulations. Union Pacific maintained that it could not determine the safety of a device unless it

used an evaluation method that was *considered and rejected* by the FRA—at Union Pacific's urging, no less. The district court erred in crediting Union Pacific's reason for rejecting Mlsna's proposed device as a matter of law.

E. The District Court Erred in Injecting Pretext into the Reasonable Accommodations Analysis.

The district court also erred by injecting the concept of pretext into its reasonable accommodations analysis.

The district court reasoned that "[Mlsna]'s contention about the availability of other methods of determining the level of hearing protection provided by a device is not enough to create a material dispute of fact, however, because [Mlsna] failed to produce any evidence from which a reasonable jury could conclude that Union Pacific's stated reason—the lack of a discernable NRR—was a pretext for discrimination." S.A. 31; D.E. 97 at 21.

The district court's analysis is legally unsound. This Court has said that the issue of pretext, which is pertinent to claims of disparate treatment, is "unnecessary and inappropriate" in evaluating reasonable accommodation claims. *Lenker v. Methodist Hosp.*, 210 F.3d 792, 799 (7th Cir. 2000). This makes sense: pretext is a tool for fleshing out

discriminatory animus where the employer proffers a neutral reason it took an adverse action (think race versus absenteeism or sex versus poor performance). But an employer's failure to provide a reasonable accommodation need not be motivated by discriminatory animus to be actionable. The ADA defines "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" as "discriminat[ion]…on the basis of disability." 42 U.S.C. § 12112(b)(5)(A). All that matters in a reasonable accommodation case is that the employer failed to provide a reasonable accommodation—pretext or discriminatory animus need not motivate that failure, and the district court seriously erred in concluding otherwise.

F. Union Pacific Failed to Engage in the Interactive Process.

Mlsna made a good faith, consistent effort to communicate with Union Pacific and identify a device that would meet Union Pacific's specifications and, thus, allow him to keep his job. He communicated with Union Pacific during the "very slow" accommodations process, speaking to a nurse "quite often," writing letters, and speaking with Terry Owens, Union Pacific's director of disability management. D.E. 39 at 16, 29–30;

27 at 10–11. Mlsna worked with his local union chairman to find a hearing protection device that would meet Union Pacific's requirements, and learned that the custom-made E.A.R. Primo model was a possible solution. D.E. 27 at 10–11. He asked Union Pacific to look into the device and, because it was a custom device, requested that Union Pacific purchase it so that it could be built and then tested. D.E. 27 at 10–11, 16.

Union Pacific, in contrast, demonstrated a complete lack of flexibility and failed to make reasonable efforts to find a proper accommodation for Mlsna. Mlsna's first suggestion—at the very least, a reasonable starting place—was rejected by Union Pacific for highly technical and legally indefensible reasons. Yet, Union Pacific did not make any suggestions of its own. Despite the involvement of several Union Pacific staff members, no one did so much as make a phone call or look at websites for other possible accommodations. D.E. 39 at 2; 64 at 23; 66 at 28–29. In fact, the only step actually taken was the cursory review of the device Mlsna himself suggested by Blake Knight. D.E. 64 at 20. Union Pacific also demonstrated a lack of good faith by informing Mlsna, falsely, that Union Pacific was in fact looking for an appropriate

device (and later, that it had undertaken such a search) when no such search ever occurred. D.E. 39 at 22; 27 at 16.

Here, the party in the best position to identify an appropriate device was Union Pacific. Mlsna has a high school level education. D.E. 27 at 3–4. He does not appear to have clearly understood Union Pacific's technical specifications, given his difficultly communicating with the companies he contacted about what he was looking for. D.E. 27 at 30. In contrast, Union Pacific employed numerous professionals whose roles, purportedly, encompassed selecting hearing protection for hearing-impaired employees. D.E. 64 at 6–8.

In this case, Union Pacific's failure to engage in the interactive process aligns with numerous FRA regulations that Union Pacific ignored. FRA regulations require railroads to "give employees the opportunity to select their hearing protectors from a variety of suitable hearing protectors" including "devices with a range of attenuation levels." *Id.* § 227.115(a)(4). This provision "underscore[s] the importance of railroads offering employees with sufficient options." 71 Fed. Reg. 63,103. "When offering hearing protectors, employers should offer employees several different types, whether ear plugs, ear muffs, and/or electronic

headsets. Within any given type, the employer should offer several different designs and models." *Id.* at 63,104. Union Pacific utterly failed to honor these regulatory requirements. Union Pacific offered Mlsna a single device. When Mlsna proposed a second possible device, Union Pacific rejected it and then made no effort to search for other devices. Union Pacific's manifest failure to search for—let alone offer—a "variety of suitable hearing protectors" underscores its failure to engage in the interactive process as required by the ADA.

In short, a reasonable jury could have found that Union Pacific's failure to engage in the interactive process is what prevented the selection of an appropriate accommodation for Mlsna. *See Stern*, 788 F.3d at 292.

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed and the case remanded for further proceedings and trial.

Date: January 7, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c) because this brief contains 13,432 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

Date: January 7, 2020

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CIRCUIT RULE 30(d) STATEMENT

I hereby certify, pursuant to Circuit Rule 30(d), that all material required under Circuit Rule 30(a) and (b) is included in the Short Appendix submitted with this brief.

Date: January 7, 2020

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SHORT APPENDIX

SHORT APPENDIX:
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APPEAL,CLOSED,PROTECTIVE_ORDER

U.S. District Court
Western District of Wisconsin (Madison)
CIVIL DOCKET FOR CASE #: 3:18−cv−00037−wmc

Mlsna, Mark v. Union Pacific Railroad
Assigned to: District Judge William M. Conley
Referred to: Magistrate Judge Stephen L. Crocker
Case in other court: 7th Circuit, 19−02102
Seventh Circuit, 19−02780
Cause: 42:12101 Americans with Disabilities Act

Date Filed: 01/17/2018
Date Terminated: 05/16/2019
Jury Demand: Plaintiff
Nature of Suit: 445 Civil Rights: Americans with Disabilities − Employment
Jurisdiction: Diversity

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Date Filed	#	Docket Text
01/18/2018	1	COMPLAINT against Union Pacific Railroad (Filing fee $400, receipt number 0758−2175978) filed by Mark Mlsna. (Attachments:

		# 1 Summons, # 2 JS−44 Civil Cover Sheet) (Thompson, Nicholas) (Entered: 01/18/2018)
01/19/2018		Case randomly assigned to District Judge William M. Conley and Magistrate Judge Stephen L. Crocker. (arw) (Entered: 01/19/2018)
01/19/2018		Standard attachments for District Judge William M. Conley required to be served on all parties with summons or waiver of service: NORTC, Corporate Disclosure Statement. (arw) (Entered: 01/19/2018)
01/19/2018	2	Summons Issued as to Union Pacific Railroad. (arw) (Entered: 01/19/2018)
02/12/2018	3	AMENDED COMPLAINT against Union Pacific Railroad, filed by Mark Mlsna. (Thompson, Nicholas) (Entered: 02/12/2018)
02/13/2018	4	Request for Issuance of Summons by Plaintiff Mark Mlsna. (Thompson, Nicholas) (Entered: 02/13/2018)
02/14/2018	5	Summons Reissued as to Union Pacific Railroad. (arw) (Entered: 02/14/2018)
02/15/2018	6	**TEXT ONLY ORDER** Judge Conley recently modified his attachments to the Preliminary Pretrial Conference Order, which you may access via this hyperlink: Attachments to Preliminary Pretrial Conference Order. Please note that occasionally Judge Conley makes changes to these attachments. As such, unless you do not have access to the attachments electronically (e.g., you are a pro se litigant), you should review the most recent version of the appropriate attachment to assure compliance when preparing summary judgment or other pre−trial submissions. (lak) (Entered: 02/15/2018)
03/12/2018	7	Notice of Appearance filed by Scott P Moore for Defendant Union Pacific Railroad. (Moore, Scott) (Entered: 03/12/2018)
03/12/2018	8	Unopposed Motion for Extension of Time to File Answer by Defendant Union Pacific Railroad. Motions referred to Magistrate Judge Stephen L. Crocker. (Moore, Scott) (Entered: 03/12/2018)
03/12/2018	9	Notice of Appearance filed by David P Kennison for Defendant Union Pacific Railroad. (Kennison, David) (Entered: 03/12/2018)
03/12/2018	10	** TEXT ONLY ORDER ** ORDER granting 8 Motion for Extension of Time to Answer 3 Amended Complaint. Union Pacific Railroad answer due 4/12/2018. Signed by Magistrate Judge Stephen L. Crocker on 3/12/2018. (jls) (Entered: 03/12/2018)
04/11/2018	11	*Affirmative Defenses and* ANSWER to Amended Complaint by Defendant Union Pacific Railroad. (Moore, Scott) Modified on 4/11/2018. (lak) (Entered: 04/11/2018)
04/12/2018		Set Pretrial Conference: Telephone Pretrial Conference set for 5/15/2018 at 1:00 PM before Magistrate Judge Stephen L. Crocker. Counsel for Plaintiff responsible for setting up the call to chambers at (608) 264−5153. Standing Order Governing Preliminary Pretrial Conference attached. (arw) (Entered: 04/12/2018)
04/18/2018	12	Report of Rule 26(f) Planning Meeting (Moore, Scott) (Entered: 04/18/2018)
05/07/2018	13	Certificate of Service by Defendant Union Pacific Railroad. (Kennison, David) Modified on 5/7/2018. (lak) (Entered: 05/07/2018)
05/09/2018	14	Certificate of Service by Defendant Union Pacific Railroad. (Moore, Scott) (Entered: 05/09/2018)
05/10/2018	15	Rule 26 Initial Disclosure Report by Plaintiff Mark Mlsna. (Thompson, Nicholas) (Entered: 05/10/2018)
05/15/2018		Minute Entry for proceedings held before Magistrate Judge Stephen L. Crocker: Telephone Preliminary Pretrial Conference held on 5/15/2018 [:15] (cak) (Entered: 05/15/2018)
06/01/2018	16	Pretrial Conference Order − Preliminary Pretrial Packet in cases assigned to District Judge William M. Conley attached. Amendments to Pleadings due 6/1/2018. Dispositive Motions due 1/7/2019. Settlement Letters due 5/10/2019. Motions in

		Limine due 5/17/2019. Response to Motion due 5/31/2019. Final Pretrial Conference set for 6/11/2019 at 04:00 PM. Jury Selection and Trial set for 6/24/2019 at 09:00 AM. Signed by Magistrate Judge Stephen L. Crocker on 5/22/18. (jat) (Entered: 06/01/2018)
08/29/2018	17	Joint Motion for Protective Order *and Fed. R. Evid. 502(d) Order* by Defendant Union Pacific Railroad, (Attachments: # 1 Text of Proposed Order − Joint Stipulated Fed. R. Evid. 502(d) Order Governing the Disclosure of Privileged Information, # 2 Text of Proposed Order − Protective Order) (Kennison, David) Modified on 8/30/2018. (lak) (Entered: 08/29/2018)
08/31/2018	18	ORDER granting 17 Joint Motion for Protective Order. Signed by Magistrate Judge Stephen L. Crocker on 8/31/2018. (arw) (Entered: 08/31/2018)
08/31/2018	19	ORDER Governing the Disclosure of Privileged Information. Signed by Magistrate Judge Stephen L. Crocker on 8/31/2018. (arw) (Entered: 08/31/2018)
10/15/2018	20	Notice by Defendant Union Pacific Railroad to Take Deposition of Plaintiff Mark Mlsna. (Moore, Scott) Modified on 10/16/2018. (lak) (Entered: 10/15/2018)
11/29/2018	21	Joint Motion for Extension of Time *of Discovery Deadlines in Preliminary Pretrial Conference Order* by Defendant Union Pacific Railroad. Motions referred to Magistrate Judge Stephen L. Crocker. (Moore, Scott) (Entered: 11/29/2018)
12/03/2018	22	** TEXT ONLY ORDER ** On November 29, 2018, the parties jointly moved to extend all remaining dates in the schedule "in order to have sufficient time to explore settlement and potentially engage in mediation." *See* dkt. 21 at 1. The parties are free to explore settlement or to mediate at any time during this lawsuit, but the June 24, 2019 trial date, set last May, is not moving. If the parties haven't settled by then, a jury will decide the prevailing party. With a firm trial date, the court can only afford to move the summary judgment motion deadline to February 1, 2019, so that is the new deadline, with 21/10 response/reply briefing. This pulls all of the slack out of the schedule, so the parties should not expect any further extensions. The parties are free to set whatever new discovery cutoff they choose in light of this slightly modified schedule. Signed by Magistrate Judge Stephen L. Crocker on 12/3/2018. (arw) (Entered: 12/03/2018)
01/09/2019	23	Notice by Defendant Union Pacific Railroad *to Take Deposition of Dr. Kevin Trangle*. (Moore, Scott) Modified on 1/10/2019. (lak) (Entered: 01/09/2019)
01/09/2019	24	Notice by Defendant Union Pacific Railroad *to Take Deposition of Dr. Douglas Kloss*. (Moore, Scott) Modified on 1/10/2019. (lak) (Entered: 01/09/2019)
01/09/2019	25	Motion to Strike *Plaintiff's Expert Witness Disclosure and Bar Plaintiff from Offering Testimony* by Defendant Union Pacific Railroad. Brief in Opposition due 1/23/2019. Brief in Reply due 1/30/2019. (Moore, Scott) (Entered: 01/09/2019)
01/09/2019	26	Declaration of Scott P. Moore filed by Defendant Union Pacific Railroad re: 25 Motion to Strike, (Attachments: # 1 Exhibit A − Email from Plaintiff's Counsel with the Attached "Plaintiff's Rule 26(a)(2)(C) Disclosures", # 2 Exhibit B − Excerpts of Deposition of Plaintiff Mark Mlsna (See 27 for complete deposition.), # 3 Exhibit C − Email String Between Plaintiff's and Union Pacific's Counsel Regarding Plaintiff's Rule 26(a)(2)(C) Disclosures, # 4 Exhibit D − January 4, 2019 Letter Sent to Plaintiff's Counsel from Union Pacific's Counsel Regarding Plaintiff's Rule 26(a)(2)(C) Disclosures) (Moore, Scott) Modified on 1/10/2019. (lak) (Entered: 01/09/2019)
01/10/2019	27	Deposition of Mark Mlsna taken on October 30, 2018. (Moore, Scott) Modified on 1/10/2019. (lak) (Entered: 01/10/2019)
01/16/2019	28	Motion to Expedite *Hearing* by Defendant Union Pacific Railroad. Motions referred to Magistrate Judge Stephen L. Crocker. Response due 1/23/2019. (Moore, Scott) (Entered: 01/16/2019)

01/16/2019	29	** TEXT ONLY ORDER ** The court is in receipt of defendant's motion for expedited hearing on its motion to strike plaintiff's experts disclosed under Fed. R. Civ. P. 26(a)(2)(C) (dkt. #28). That motion is GRANTED as follows. Plaintiff's new deadline for opposing defendant's motion to strike (dkt. #25) is noon on January 22, 2019. There will be no reply. Instead, the court will hold a telephonic motion hearing on January 24, at 3:00 p.m. Defense counsel will be responsible for setting up the call to chambers. Signed by District Judge William M. Conley on 1/16/2019. (DPM) (Entered: 01/16/2019)
01/17/2019		Set Deadlines and Hearings re: 25 Motion to Strike Plaintiff's Expert Witness Disclosure and Bar Plaintiff from Offering Testimony. Telephone Motion Hearing set for 1/24/2019 at 3:00 PM before District Judge William M. Conley. Counsel for Defendant responsible for setting up the call to chambers at (608) 264−5087. (arw) (Entered: 01/17/2019)
01/18/2019	30	Disregard. See 34 . Modified on 1/23/2019. (lak) (Entered: 01/18/2019)
01/18/2019	31	Declaration of Nicholas D. Thompson re: 25 Motion to Strike. (Thompson, Nicholas) Modified on 1/22/2019: Linked to the pending motion. (lak) (Entered: 01/18/2019)
01/18/2019	32	Disregard. See 35 . Modified on 1/23/2019. (lak) (Entered: 01/18/2019)
01/18/2019	33	Declaration of Nicholas D. Thompson re: 35 Motion to Strike. (Thompson, Nicholas) Modified on 1/23/2019. (lak) (Entered: 01/18/2019)
01/22/2019	34	Brief in Opposition by Plaintiff Mark Mlsna re: 25 Motion to Strike filed by Union Pacific Railroad, (Attachments: # 1 Exhibit − Deposition Transcript of John Holland, MD) (Thompson, Nicholas) Modified on 1/23/2019: Second e−mail to counsel. (lak) (Entered: 01/22/2019)
01/22/2019	35	Motion to Strike *Defendant's Expert Witness Disclosure and Bar Defendant from Offering Testimony* by Plaintiff Mark Mlsna. Brief in Opposition due 2/5/2019. Brief in Reply due 2/12/2019. (Attachments: # 1 Exhibit A − Notice of Taking Deposition of Rule 30(b)(6) Corporate Designee and for Documents Pursuant to Rule 30(b)(2) and Rule 34(b)(2), # 2 Exhibit B − E−mail dated August 17, 2018 from Casey Ochs to Nicholas D. Thompson and Tom Fuller regarding production of documents bearing Bates UP_MLSNA_000001−002030, # 3 Exhibit C − Email Chain Between Nicholas D. Thompson and David Kennison Regarding Document Production, # 4 Exhibit D − Email Chain Between Nicholas D. Thompson and Scott Moore Regarding Extending the Expert Disclosure Deadline, # 5 Exhibit E − Email Chain Between Scott Moore and Nicholas D. Thompson Regarding Expert Disclosure Date for Extension, # 6 Exhibit F − Defendant, UP's Expert Report of John Holland, M.D. (With Attachments), # 7 Exhibit G − Defendant, UP's Expert Report of Sigfrid Soli, Ph.D. (With Attachments), # 8 Exhibit H − Plaintiff, Mlsn's Expert Report of Kevin Trangle, M.D., # 9 Exhibit I − Plaintiff, Mlsna's Expert Report of Dr. Douglas Kloss) (Thompson, Nicholas) Modified on 1/23/2019: Expert reports not filed separately. (lak) (Entered: 01/22/2019)
01/22/2019	36	** TEXT ONLY ORDER ** The court is in receipt of plaintiff's motion to strike (dkt. 35), which will also be addressed at Thursday's telephonic motion hearing (*see* dkt. 29). Accordingly, defendant may have until noon on Thursday January 24 to file its response. There will be no reply. Signed by District Judge William M. Conley on 1/22/2019. (arw) (Entered: 01/22/2019)
01/23/2019	37	Motion for Leave to Clarify Factual Record by Defendant Union Pacific Railroad. Response due 1/30/2019. (Attachments: # 1 Exhibit − Excerpts of Deposition of Terry Owens (Not in condensed format.) (Moore, Scott) Modified on 1/24/2019. (lak) (Entered: 01/23/2019)
01/23/2019	38	Disregard. See 40 . Modified on 1/23/2019. (lak) (Entered: 01/23/2019)

01/23/2019	39	Deposition of Terry Owens taken on 9/10/18. (Moore, Scott) Modified on 1/23/2019: Not in condensed format. E−mail previously sent to counsel. (lak) (Entered: 01/23/2019)
01/23/2019	40	Declaration of Scott Parrish Moore filed by Defendant Union Pacific Railroad re: 37 Motion for Miscellaneous Relief (Attachments: # 1 Exhibit A − Email from Terry Owens to Dr. John Holland, # 2 Exhibit C − Letter from Dr. John Holland to Plaintiff, # 3 Exhibit D − Memorandum from Blake Knight to Dr. John Holland, # 4 Exhibit E − Union Pacific's Response to Complainant's Request for Production of Documents) (Moore, Scott) (Entered: 01/23/2019)
01/24/2019	41	Deposition of Sigfrid D. Soli, MD taken on 1/15/2019. (Kennison, David) Modified on 1/24/2019: Not in condensed format. (lak) (Entered: 01/24/2019)
01/24/2019	42	Brief in Opposition by Defendant Union Pacific Railroad re: 35 Motion to Strike, filed by Mark Mlsna. (Kennison, David) (Entered: 01/24/2019)
01/24/2019	43	Disregard. See 44 . Modified on 1/24/2019. (lak) (Entered: 01/24/2019)
01/24/2019		Action Requested: Counsel for all parties are asked to review this court's Electronic Filing Procedures, in particular, the rules for exhibits and deposition transcripts. (arw) (Entered: 01/24/2019)
01/24/2019	44	Declaration of David P. Kennison filed by Defendant Union Pacific Railroad re: 35 Motion to Strike, (Attachments: # 1 Exhibit 1A − Expert Report of Dr. John Holland, # 2 Exhibit 1B − Expert Report of Dr. Sigfrid Soli) (Kennison, David) Modified on 1/24/2019: Each exhibit/expert report has an exhibit or attachment to it. (lak) (Entered: 01/24/2019)
01/24/2019	45	ORDER denying 25 Motion to Strike; denying 35 Motion to Strike; granting 37 Motion for Leave to Clarify the Factual Record. Dispositive Motions due 2/18/2019. Responses due 3/6/2019. Replies due 3/13/2019. Signed by District Judge William M. Conley on 1/24/2019. (DPM) Modified on 1/25/2019. (arw) (Entered: 01/24/2019)
01/25/2019		Reset Deadlines and Hearings: Dispositive Motions due 2/18/2019. Responses due 3/6/2019. Replies due 3/13/2019. (arw) (Entered: 01/25/2019)
02/15/2019	46	Deposition of Dr. Kevin Trangle taken on January 14, 2019. (Kennison, David) (Entered: 02/15/2019)
02/15/2019	47	Deposition of Dr. Douglas A. Kloss taken on January 16, 2019. (Kennison, David) (Entered: 02/15/2019)
02/18/2019	48	Disregard. See 55 . Modified on 2/19/2019. (lak) (Entered: 02/18/2019)
02/18/2019	49	Disregard. See 56 . Modified on 2/19/2019. (lak) (Entered: 02/18/2019)
02/18/2019	50	**MOTION FOR SUMMARY JUDGMENT** by Defendant Union Pacific Railroad. Brief in Opposition due 3/11/2019. Brief in Reply due 3/21/2019. (Kennison, David) (Entered: 02/18/2019)
02/18/2019	51	Brief in Support of 50 Motion for Summary Judgment by Defendant Union Pacific Railroad (Attachments: # 1 Exhibit 1 − See 57 ., # 2 Exhibit 1A − See 57 ., # 3 Exhibit 1C − See 57 ., # 4 Exhibit 1E − See 57 ., # 5 Exhibit 2 − See 58 ., # 6 Exhibit 2A − See 58 ., # 7 Exhibit 2C − See 58 ., # 8 Exhibit 3 − See 59 ., # 9 Exhibit 4 − See 60 ., # 10 Exhibit 4C − See 60 ., # 11 Exhibit 5 − See 61 .) (Moore, Scott) Modified on 2/19/2019. (lak) (Entered: 02/18/2019)

02/18/2019	52	Motion to Seal Document by Defendant Union Pacific Railroad. Motions referred to Magistrate Judge Stephen L. Crocker. (Moore, Scott) (Entered: 02/18/2019)
02/18/2019	53	Index of Evidence filed by Union Pacific Railroad in Support re: 50 Motion for Summary Judgment, (Sealed Document) (Attachments: # 1 Exhibit 1B − Plaintiff's Records from Gundersen Clinic, # 2 Exhibit 1D − Plaintiff's Application for RRB Benefits, # 3 Exhibit 2B − Letter dated January 15, 2015, # 4 Exhibit 2D − Letter dated January 16, 2016, # 5 Exhibit 4A − Thru−freight Conductor Dosimetry Data, # 6 Exhibit 4B − Local Conductor Dosimetry Data) (Moore, Scott) Modified on 2/19/2019. (lak) (Entered: 02/18/2019)
02/18/2019	54	Redaction to 53 Index of Evidence, by Defendant Union Pacific Railroad (Attachments: # 1 Exhibit 1B − Plaintiff's Records from Gundersen Clinic, # 2 Exhibit 1D − Plaintiff's Application for RRB Benefits, # 3 Exhibit 2B − Letter dated January 15, 2015, # 4 Exhibit 2D − Letter dated January 16, 2016, # 5 Exhibit 4A − Thru−freight Conductor Dosimetry Data, # 6 Exhibit 4B − Local Conductor Dosimetry Data) (Moore, Scott) Modified on 2/19/2019. (lak) (Entered: 02/18/2019)
02/19/2019	55	Expert Report of Sigfrid D. Soli, Ph.D., F.A.S.A., by Defendant Union Pacific Railroad, (Attachments: # 1 CV) (lak) (Entered: 02/19/2019)
02/19/2019	56	Supplemental Expert Report of Kevin L. Trangle, MD, MBA, by Defendant Union Pacific Railroad, (Attachments: # 1 Honeywell Howard Leight Earmuff Amplified Hearing Protection Device 1/29/2019, Hearing Impact Pro & Impact Sport 1030943−RWS−01902 − RWS−05126 sound amplification Info, How the Impact Sport works) (lak) (Entered: 02/19/2019)
02/19/2019	57	Declaration of Scott P. Moore filed by Defendant Union Pacific Railroad re: 50 Motion for Summary Judgment, (Attachments: # 1 Exhibit 1A − Train Crew Job Description, # 2 Exhibit 1C − 1/30/15 Letter Status Update, # 3 Exhibit 1E − Plaintiff's Answers to Defendant's First Set of Interrogatories to Plaintiff) (lak) (Entered: 02/19/2019)
02/19/2019	58	Declaration of Dr. John P. Holland filed by Defendant Union Pacific Railroad re: 50 Motion for Summary Judgment, (Attachments: # 1 Exhibit 2A − UP Hearing Conversation Policy & Program, # 2 Exhibit 2C − 6/9/17 Holland Letter to Mlsna) (lak) (Entered: 02/19/2019)
02/19/2019	59	Declaration of Lucas Jennings filed by Defendant Union Pacific Railroad re: 50 Motion for Summary Judgment. (lak) (Entered: 02/19/2019)
02/19/2019	60	Declaration of Vincent Knight filed by Defendant Union Pacific Railroad re: 50 Motion for Summary Judgment, (Attachments: # 1 Exhibit 4C − Memorandum) (lak) (Entered: 02/19/2019)
02/19/2019	61	Declaration of Lou Mason filed by Defendant Union Pacific Railroad re: 50 Motion for Summary Judgment. (lak) (Entered: 02/19/2019)
02/19/2019	62	** TEXT ONLY ORDER ** ORDER granting 52 Motion to Seal by Defendant Union Pacific Railroad. Signed by Magistrate Judge Stephen L. Crocker on 2/19/2019. (arw) (Entered: 02/19/2019)
02/22/2019		Reset Briefing Deadlines re: 50 Motion for Summary Judgment. Brief in Opposition due 3/6/2019. Brief in Reply due 3/13/2019. (arw) (Entered: 02/22/2019)
02/26/2019	63	Notice of Appearance filed by Thomas William Fuller for Plaintiff Mark Mlsna. (Fuller, Thomas) (Entered: 02/26/2019)
03/06/2019	64	Disregard. To be refiled in condensed format. Modified on 3/6/2019. (lak) (Entered: 03/06/2019)

03/06/2019	65	Disregard. See 70 . Modified on 3/7/2019. (lak) (Entered: 03/06/2019)
03/06/2019	66	Disregard. To be refiled in condensed format. Modified on 3/6/2019. (lak) (Entered: 03/06/2019)
03/06/2019	67	Disregard. To be refiled in condensed format. Modified on 3/6/2019. (lak) (Entered: 03/06/2019)
03/06/2019	68	Disregard. See 80 . Modified on 3/8/2019. (lak) (Entered: 03/06/2019)
03/06/2019	69	Disregard. See 79 . Modified on 3/8/2019. (lak) (Entered: 03/06/2019)
03/06/2019	70	Deposition of Garry George Gordon taken on February 1, 2019. (Thompson, Nicholas) (Entered: 03/06/2019)
03/06/2019	71	Disregard. See 80 . Modified on 3/8/2019. (lak) (Entered: 03/06/2019)
03/06/2019	72	Brief in Opposition by Plaintiff Mark Mlsna re: 50 Motion for Summary Judgment filed by Union Pacific Railroad. (Thompson, Nicholas) (Entered: 03/06/2019)
03/06/2019	73	Exhibits to 72 Brief in Opposition re: 50 Motion for Summary Judgment, filed by Mark Mlsna, (Attachments: # 1 Exhibit A − See 74 ., # 2 Exhibit B − See 75 ., # 3 Exhibit C − E−mail from Bernbeck Griffke−Pribyl, Holland, Knight and Owens, # 4 Exhibit D − See 76 ., # 5 Exhibit E − See 77 ., # 6 Exhibit F − Probable Cause Finding from Department of Workforce Development, # 7 Exhibit G − See 78 .) (Thompson, Nicholas) Modified on 3/7/2019. (lak) (Entered: 03/06/2019)
03/07/2019	74	Supplemental Expert Report of Dr. Douglas Kloss by Plaintiff Mark Mlsna. (lak) (Entered: 03/07/2019)
03/07/2019	75	Supplemental Expert Report of Dr. Kevin L. Trangle by Plaintiff Mark Mlsna, (Attachments: # 1 Exhibit − Invoice) (lak) (Entered: 03/07/2019)
03/07/2019	76	Expert Report of Dr. Douglas Kloss by Plaintiff Mark Mlsna, (Attachments: # 1 Exhibit − Howard Leight Impact Pro Industrial Product Information) (lak) (Entered: 03/07/2019)
03/07/2019	77	Expert Report of Dr. Kevin L. Trangle by Plaintiff Mark Mlsna, (Attachments: # 1 Exhibit − Invoice) (lak) (Entered: 03/07/2019)
03/07/2019	78	Declaration of Kevin L. Trangle, MD, MBA, filed by Plaintiff Mark Mlsna re: 50 Motion for Summary Judgment. (lak) (Entered: 03/07/2019)
03/07/2019	79	Deposition of Vincent Blake Knight taken on January 30, 2019. (Thompson, Nicholas) (Entered: 03/07/2019)
03/07/2019	80	Deposition of John Holland, MD taken on January 30, 2019. (Thompson, Nicholas) (Entered: 03/07/2019)
03/07/2019	81	Supplemental Expert Report of Kevin L. Trangle, MD, MBA by Plaintiff Mark Mlsna. (Thompson, Nicholas) (Entered: 03/07/2019)
03/13/2019	82	Motion to Strike 73 Exhibit, 78 Declaration *of Dr. Trangle* by Defendant Union Pacific Railroad. Brief in Opposition due 3/27/2019. Brief in Reply due 4/3/2019. (Moore, Scott) (Entered: 03/13/2019)
03/13/2019	83	Brief in Support of 82 Motion to Strike *Declaration of Dr. Trangle* by Defendant Union Pacific Railroad. (Moore, Scott) (Entered: 03/13/2019)
03/13/2019	84	Disregard. See 85 . Modified on 3/14/2019. (lak) (Entered: 03/13/2019)
03/13/2019	85	Brief in Reply by Defendant Union Pacific Railroad in Support of 50 Motion for Summary Judgment. (Moore, Scott) (Entered: 03/13/2019)
03/14/2019	86	Motion for Leave to Supplement the Record, by Plaintiff Mark Mlsna, (Attachments: # 1 Exhibit A − Second Supplemental Report of Dr. Kloss) (Thompson, Nicholas)

		Modified on 3/15/2019. (lak) (Entered: 03/14/2019)
03/19/2019	87	Brief in Opposition by Defendant Union Pacific Railroad re: 86 Motion for Leave to File filed by Mark Mlsna. (Attachments: # 1 Exhibit − See 88 .) (Moore, Scott) Modified on 3/19/2019. (lak) (Entered: 03/19/2019)
03/19/2019	88	Declaration of Scott P. Moore filed by Defendant Union Pacific Railroad re: 86 Motion for Leave to File. (lak) (Entered: 03/19/2019)
03/20/2019	89	Brief in Opposition by Plaintiff Mark Mlsna re: 82 Motion to Strike filed by Union Pacific Railroad, (Attachments: # 1 Exhibit A − Defendant's Expert Witness Disclosures) (Thompson, Nicholas) (Entered: 03/20/2019)
03/25/2019	90	Brief in Reply by Defendant Union Pacific Railroad in Support of 82 Motion to Strike *Declaration of Dr. Trangle*. (Moore, Scott) Modified on 3/25/2019. (lak) (Entered: 03/25/2019)
04/12/2019	91	** TEXT ONLY ORDER ** The parties are directed to ensure that all deposition transcripts they wish to rely upon at summary judgment are appropriately filed on the docket. For example, the October 19, 2018, Vincent Knight deposition transcript (previously at dkt. 64) has not been refiled. Signed by District Judge William M. Conley on 4/12/2019. (arw) (Entered: 04/12/2019)
04/12/2019	92	Deposition of Terry Owens taken on September 10, 2018. (Moore, Scott) (Entered: 04/12/2019)
04/12/2019	93	Deposition of Dr. Sigfrid D. Soli taken on January 15, 2019. (Moore, Scott) (Entered: 04/12/2019)
04/16/2019	94	Deposition of John Holland, M.D. taken on October 19, 2018. (Thompson, Nicholas) (Entered: 04/16/2019)
04/16/2019	95	Deposition of Vincent Blake Knight taken on October 19, 2018. (Thompson, Nicholas) (Entered: 04/16/2019)
04/16/2019	96	Deposition of Kristi Deardorff taken on January 30, 2019. (Thompson, Nicholas) (Entered: 04/16/2019)
05/15/2019	97	ORDER granting 50 Motion for Summary Judgment; denying as moot 82 Motion to Strike; denying 86 Motion for Leave to Supplement the Record. Signed by District Judge William M. Conley on 5/15/2019. (DPM) Modified on 5/16/2019. (arw) (Entered: 05/15/2019)
05/16/2019	98	JUDGMENT entered in favor of Defendant Union Pacific Railroad dismissing the case. (arw) (Entered: 05/16/2019)
05/30/2019	99	Bill of Costs by Defendant Union Pacific Railroad. Motions referred to Peter A. Oppeneer, Clerk of Court. Objection to Bill of Costs due 6/10/2019. Brief in Support to Bill of Costs due 6/19/2019. Brief in Reply in Opposition to Bill of Costs due 6/24/2019. (Moore, Scott) (Entered: 05/30/2019)
05/30/2019	100	Affidavit of Scott P. Moore filed by Defendant Union Pacific Railroad re: 99 Bill of Costs, (Attachments: # 1 Exhibit A − Mark Mlsna Deposition Invoice, # 2 Exhibit B − Dr. Kloss Deposition Invoice, # 3 Exhibit C − Dr. Trangle Deposition Invoice, # 4 Exhibit D − Dr. Holland Deposition Invoice, # 5 Exhibit E − Dr. Soli Deposition Invoice, # 6 Exhibit F − Terry Owens Deposition Invoice, # 7 Exhibit G − Vincent Blake Knight Deposition Invoice) (Moore, Scott) (Entered: 05/30/2019)
06/10/2019	101	NOTICE OF APPEAL by Plaintiff Mark Mlsna as to 97 Order, 98 Judgment. Filing fee of $ 505, receipt number 0758−2482085 paid. No Docketing Statement filed. (Attachments: # 1 Disregard. (Thompson, Nicholas) Modified on 6/10/2019. (lak) (Entered:

		06/10/2019)
06/10/2019	102	Motion for Reconsideration by Plaintiff Mark Mlsna. Response due 6/17/2019. (Attachments: # 1 Disregard.) (Thompson, Nicholas) Modified on 6/10/2019. (lak) (Entered: 06/10/2019)
06/10/2019	103	Appeal Information Packet. (lak) (Entered: 06/10/2019)
06/10/2019	104	Transmission of Notice of Appeal, Order, Judgment and Docket Sheet to Seventh Circuit Court of Appeals re: 101 Notice of Appeal, (Attachments: # 1 Order, # 2 Judgment, # 3 Docket Sheet) (lak) (Entered: 06/10/2019)
06/10/2019	105	Objection to Bill of Costs by Plaintiff Mark Mlsna re: 99 Bill of Costs filed by Union Pacific Railroad. (Fuller, Thomas) (Entered: 06/10/2019)
06/11/2019		Reset Deadlines as to 102 Motion for Reconsideration. Brief in Opposition due 6/25/2019. Brief in Reply due 7/2/2019. (jat) (Entered: 06/11/2019)
06/11/2019	106	Exhibit to 101 Notice of Appeal, filed by Mark Mlsna, 102 Motion for Reconsideration filed by Mark Mlsna. *FRA Decision.* (Thompson, Nicholas) (Entered: 06/11/2019)
06/11/2019		USCA Case Number 19−2102 for 101 Notice of Appeal filed by Mark Mlsna. (jat) (Entered: 06/11/2019)
06/12/2019	107	Notice of Withdrawal of Motion by Defendant Union Pacific Railroad re: 99 Bill of Costs filed by Union Pacific Railroad. (Kennison, David) (Entered: 06/12/2019)
06/12/2019	108	Bill of Costs by Defendant Union Pacific Railroad. Motions referred to Peter A. Oppeneer, Clerk of Court. Objection to Bill of Costs due 6/24/2019. Brief in Support to Bill of Costs due 7/2/2019. Brief in Reply in Opposition to Bill of Costs due 7/8/2019. (Kennison, David) Modified on 6/13/2019. (lak) (Entered: 06/12/2019)
06/12/2019	109	Affidavit of David P. Kennison filed by Defendant Union Pacific Railroad re: 108 Bill of Costs, (Attachments: # 1 Exhibit A − Mlsna Deposition Invoice, # 2 Exhibit B − Kloss Deposition Invoice, # 3 Exhibit C − Trangle Deposition Invoice, # 4 Exhibit D − Holland Deposition Invoice, # 5 Exhibit E − Soli Deposition Invoice, # 6 Exhibit F − Owen Deposition Invoice, # 7 Exhibit G − Knight Deposition Invoice) (Kennison, David) Modified on 6/13/2019: Changed from Declaration to Affidvit. (lak) (Entered: 06/12/2019)
06/24/2019	110	Objection to Bill of Costs by Plaintiff Mark Mlsna re: 108 Bill of Costs filed by Union Pacific Railroad. (Fuller, Thomas) Modified on 6/24/2019. (lak) (Entered: 06/24/2019)
06/25/2019	111	Brief in Support of Bill of Costs by Defendant Union Pacific Railroad re: 108 Bill of Costs filed by Union Pacific Railroad. (Kennison, David) (Entered: 06/25/2019)
06/25/2019	112	Brief in Opposition by Defendant Union Pacific Railroad re: 102 Motion for Reconsideration filed by Mark Mlsna. (Moore, Scott) (Entered: 06/25/2019)
07/01/2019	113	Brief in Reply by Plaintiff Mark Mlsna in Support of 102 Motion for Reconsideration. (Thompson, Nicholas) (Entered: 07/01/2019)
07/22/2019	114	USCA ORDER Dismissing Appeal re: 101 Notice of Appeal by Mark Mlsna. No record to be returned. (Attachments: # 1 Mandate) (arw) (Entered: 07/22/2019)
08/23/2019	115	OPINION AND ORDER denying 102 Motion for Reconsideration. Signed by District Judge William M. Conley on 8/23/19. (jat) (Entered: 08/23/2019)
09/12/2019	116	NOTICE OF APPEAL by Plaintiff Mark Mlsna re: 97 Order, 98 Judgment, 115 Order on Motion for Reconsideration. Filing fee of $505, receipt number 0758−2539086 paid. Docketing Statement filed. (Attachments:

		# 1 Docketing Statement) (Thompson, Nicholas) Modified on 9/16/2019. (arw) (Entered: 09/12/2019)
09/16/2019	117	Transmission of Notice of Appeal, Docketing Statement, Order, Judgment and Docket Sheet to Seventh Circuit Court of Appeals re: 116 Notice of Appeal by Plaintiff Mark Mlsna. (Attachments: # 1 Docketing Statement, # 2 Order granting Summary Judgment, # 3 Judgment, # 4 Order denying Reconsideration, # 5 Docket Sheet) (arw) (Entered: 09/16/2019)
09/17/2019	118	Appeal Information Packet. (lak) (Entered: 09/17/2019)
09/17/2019		USCA Case Number 19−2780 for 116 Notice of Appeal by Mark Mlsna. (arw) (Entered: 09/17/2019)
09/20/2019	119	ORDER on Bill of Costs: Costs Taxed in favor of Defendant in the amount of $2,005.30. Signed by Peter A. Oppeneer, Clerk of Court on 9/20/19. (jat) (Entered: 09/20/2019)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARK MLSNA,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

OPINION AND ORDER

18-cv-37-wmc

Plaintiff Mark Mlsna claims that defendant Union Pacific Railroad Company violated the Americans with Disabilities Act in declining to recertify him as a train conductor because of his hearing impairment. Defendant has moved for summary judgment (dkt. #50), arguing generally that Mlsna was not a "qualified individual" because he could not simultaneously meet Federal Railroad Administration hearing acuity standards while wearing required hearing protection. Because plaintiff failed to marshal enough evidence for a reasonable jury to conclude that he could fulfill the essential functions of the train conductor position with a reasonable accommodation, defendant is entitled to summary judgment.[1] Also before the court are defendant's motion to strike an expert declaration (dkt. #82) and plaintiff's motion for leave to supplement the record to provide a late expert report (dkt. #86). Both of these motions will be denied, albeit for different reasons as set forth below.

[1] Because defendant is entitled to summary judgment based on plaintiff's inability to make his *prima facie* case, the court need not address the parties' arguments about direct threat or judicial estoppel.

UNDISPUTED FACTS[2]

A. Background

Mlsna has a hearing impairment and has worn hearing aids for over 20 years. He began working for Union Pacific as a thru-freight train conductor in 2007. The written job description for this position identified the following essential functions and qualifications: (1) "[f]ollowing safety precautions"; (2) "[m]onitoring, observing, interpreting, and relaying signals and placards to gather and communicate information"; (3) being "abl[e] to recognize sounds and changes in sounds"; (4) "[c]ommunicating clearly with co-workers and train dispatchers via radio"; (5) "[a]ttending to and understanding key pieces of spoken information"; and (6) "Safety Orientation: [t]he willingness to practice safe work habits." (Train Crew Job Description (dkt. #57-1) 2-3.) In describing work conditions, the job description also notes that a conductor "[m]ust wear personal protective equipment such as safety glasses, safety boots, hard hats, and hearing protection where the company requires," as well as "[e]nsure compliance with all railroad rules and

[2] Viewing the facts in the light most favorable to plaintiff as the non-moving party, the following facts are material and undisputed for purposes of summary judgment except where noted. At the outset, the court notes that the parties appear confused by the court's standard summary judgment procedures, particularly regarding proposed findings of fact. The party moving for summary judgment is supposed to file "[i]n a separate document, a statement of proposed findings of fact or a stipulation of fact between or among the parties to the action, or both," while the nonmoving party is supposed to respond to the moving party's proposed facts and "may propose its own findings of fact . . . to SUPPLEMENT the moving party's proposed findings of fact." (Prelim. Pretrial Packet (available at dkt. #16) 3, 4.) Additionally, the procedures explain that in responding to the moving party's proposed findings of fact, the nonmoving party is to "[a]nswer *each* numbered fact proposed by the moving party in separate paragraphs, using the same number." (*Id.* at 5 (emphasis added).) Here, not only did the parties include their proposed findings of fact *in* their briefs, but they failed to respond to all proposed facts. Obviously, facts that were not addressed will be deemed undisputed, but the court prefers to have facts laid out as described in its standard procedures.

regulations for safety, operations and Federal Railroad Administration (FRA)." (Train Crew Job Description (dkt. #57-1) 5.) As reflected by this job description, conductors rely heavily on communications from other crew members and dispatchers, including warning sounds and alerts conveying potential hazards. (Jennings Decl. (dkt. #59) ¶ 3.) Moreover, Mlsna agrees that the train conductor position is "safety-sensitive," such that an individual's inability to meet the position requirements could pose a threat to people's safety. (Mlsna Dep. (dkt. #27) 17:23-18:12.)

B. Hearing Acuity Standards & Hearing Conservation Policy

In January 2012, the FRA promulgated new regulations, which require railroads, including Union Pacific, to certify that its conductors met specific, minimum hearing acuity standards. In particular, the regulations required conductors to pass a hearing test demonstrating that they "do[] not have an average hearing loss in the better ear greater than 40 decibels with or without the use of a hearing aid." 49 C.F.R. §§ 242.117(i), 242.109(a)(2). FRA regulations also require railroad employees to wear hearing protections in two situations: (1) when exposed to sound levels equivalent to an 8-hour time-weighted average ("TWA") of 90 decibels or greater; or (2) when exposed to sound levels of 85 decibels or greater if the employee has not yet had a baseline audiogram or experiences a worsening change in hearing sensitivity. 49 C.F.R. § 227.115(c)-(d). Under FRA regulation, hearing protectors must generally attenuate employee exposure to an 8-hour TWA of 90 decibels or lower, but for employees who have experienced worsening hearing sensitivity, the hearing protection must attenuate exposure to at most an 8-hour TWA of 85 decibels.

As required by the FRA, Union Pacific created a Hearing Conservation and Policy Program, which covers employees who "may be subjected to noise exposures equal to or exceeding an 8-hour [TWA] sound level of 85 decibels." (Hearing Conservation Policy (dkt. #58-1) 1.) Likewise, Union Pacific performs noise monitoring to determine which employees are covered by the policy, including representative sampling.[3] Over a period of approximately 30 years, Union Pacific tested the sound exposure levels for 172 "thru-freight" conductors and 91 "local" conductors, using a noise dosimeter to create a snapshot of exposure levels at different locations.

This testing revealed that 62 of 172 "thru-freight" conductors were exposed to an 8-hour TWA of 85 decibels or greater, while 22 of 172 were exposed to an 8-hour TWA of over 90 decibels. As to "local" conductors, 29 of 91 were exposed to an 8-hour TWA of 85 decibels or greater, while six were exposed to an 8-hour TWA of over 90 decibels.

Based on this dosimetry testing, Union Pacific considered all conductors to fall under the Hearing Conservation Policy. (Knight Decl. (dkt. #60) ¶ 8.) Plaintiff notes that Union Pacific did not verify whether *his* individual essential job functions *actually* exposed him to an 8-hour TWA of 90 decibels. (Opp'n (dkt. #72) 4-5.)

Union Pacific's hearing conservation policy also "requires all employees to wear

[3] FRA regulation directs railroads to "use a sampling strategy that is designed to identify employees for inclusion in the hearing conservation program and to enable the proper selection of hearing protection." 49 C.F.R. § 227.103(b)(1). Further, if circumstances "make area monitoring generally inappropriate, the railroad shall use representative personal sampling to comply with the monitoring requirements, . . . unless the railroad can show that area sampling produces equivalent results." 49 C.F.R. § 227.103(b)(2). "Representative personal sampling means measurement of an employee's noise exposure that is representative of the exposures of other employees who operate similar equipment under similar conditions." 49 C.F.R. § 227.5.

approved hearing protection in identified hearing protection areas," which are demarcated by signs. (Hearing Conservation Policy (dkt. #58-1) 1, 3.) This policy directs all employees to wear hearing protection when they are within a 150-foot radius of a locomotive, unless inside the cab with the doors and windows closed. (*Id.* at 6.) Union Pacific contends that working within 150 feet of a locomotive was central to the position of train conductor, and Mlsna admitted that he worked within a 150-foot radius of a locomotive. (Mlsna Dep. (dkt. #27) 20:8-11, 21:25-22:3.) These additional rules are mandatory for all employees, including those whose regular potential noise exposure is less than the 8-hour TWA of 85 decibels. Indeed, plaintiff alleges in both his complaint and amended complaint that "Train Crewm[e]n work in a noisy environment and are therefore required to wear hearing protection." (Compl. (dkt. #1) ¶ 14; Amend. Compl. (dkt. #3) ¶ 14.)[4]

There is no dispute that Union Pacific provides its employees with hearing protection under its Hearing Conservation Policy. (Hearing Conservation Policy (dkt. #58-1) 1.) This policy noted that Union Pacific declined to authorize custom molded ear plugs, but instead relied on personal protective equipment approved by the Safety

[4] While there is no dispute that this policy applied universally, Mlsna muddled the record somewhat by testifying at his deposition that he and his colleagues never wore hearing protection. (Mlsna Dep. (dkt. #27) 67:10-68:8.) Despite that testimony, he did not really dispute the need for hearing protection even in his deposition. (*Id.* 57:12-18 (acknowledging importance of Union Pacific protecting its employees' hearing and conductors' wearing "appropriate hearing protection devices to protect their hearing"); *see also* Decl. of Lucas Mason (dkt. #61) ¶ 4 ("To the best of my recollection and knowledge, Mark Mlsna wore hearing protection when and where required.").) Regardless, at this late date, plaintiff is bound by his affirmative pleading for purposes of this case, as discussed below.

Department.[5] The Safety Department further authorized use of an amplified hearing protection device ("AHPD"), which is an ear-muff style protector with an external microphone and internal speaker that amplifies noise and permits the person to hear sounds, while also blocking harmful levels of sound. In particular, the Safety Department approved the Pro Ears -- Gold device, which prevents sounds greater than 85 decibels from reaching the external ear canal and ear drum. Union Pacific selected this product because of its certified NRR of 30 decibels.[6] (Holland Decl. (dkt. #58) ¶ 11.)

However, the policy expressly states that "[h]earing aids are not approved UPRR Hearing Protection Devices (HPDs) and are not effective for this purpose." (Hearing Conservation Policy (dkt. #58-1) 1.) Likewise, Union Pacific does not permit employees to wear hearing aids under hearing protectors or AHPDs because the combination: (1) is not tested or approved; (2) lacks a laboratory-determined NRR; and (3) may result in harmful noise exposure from excessive environmental noise. (Holland Decl. (dkt. #58) ¶ 17; Jan. 16, 2015 Letter (dkt. #53-4) 1.)

[5] Union Pacific's policy does not permit custom molded ear plugs because of concerns that their quality is highly variable. (Knight Decl. (dkt. #60) ¶ 15.) Mlsna disputes the soundness of that concern, contending that custom earplugs are no more likely than other devices to lose their seal. (Trangle Suppl. Rpt. (dkt. #81) 2 ("Despite Dr. Holland's assertion that he had heard and believed that molded plugs deform over time, if true, this would equally apply to molded-earplugs considered acceptable to [Union Pacific.]").) Mlsna notes that Union Pacific previously had approved in-the-ear amplification devices, but Union Pacific explains that those devices were not custom devices and had noise reduction ratings ("NRRs"). (*See* Knight Dep. (dkt. #79) 62:24-64:21 (discussing "expandable products").)

[6] The parties dispute whether an NRR is necessary to determine the noise attenuation provided by a hearing protection device (Opp'n (dkt. #72) 9-10), but as discussed below that dispute is immaterial.

C. Mlsna's Failed Hearing Certification & Proposed Accommodations

The 2012 FRA regulations "grandfathered in" then-current conductors for thirty-six months, so Mlsna did not have to complete his hearing certification until February 2015. He first underwent the required testing on December 18, 2014, during which his hearing was tested under four circumstances: (1) unaided; (2) with hearing aids; (3) with an AHPD, but with the amplification turned off; and (4) with an AHPD and the amplification turned all the way up. (*See* Hearing Test Results (dkt. #53-3) 1.) Mlsna only met the minimum FRA hearing criteria when tested with his hearing aids and no AHPD. Comparing these results to Mlsna's baseline audiogram revealed no change in hearing sensitivity.

After receiving these results, Union Pacific arranged for additional testing by an audiologist with Mlsna wearing the Union Pacific-approved APHD. This second round of testing occurred on January 8, 2015. Again, Mlsna's hearing was tested under the same circumstances. (*See* Jan. 8, 2015 Audiology Notes (dkt. #53-1) 7.) This testing also found that Mlsna only met FRA standards when he was wearing hearing aids without protection. Union Pacific did not know that Mlsna failed to meet minimum hearing criteria until this second round of certification testing. Following that testing, Union Pacific concluded that it could no longer certify Mlsna as a conductor because he could not meet the FRA-imposed hearing requirements while wearing a required AHPD.

Union Pacific's Health and Medical Services department then (1) informed Mlsna's supervisor that the railroad could not certify Mlsna and (2) asked what reasonable accommodations would permit Mlsna to continue working. Unfortunately, Mlsna's

supervisor could not identify a reasonable accommodation permitting Mlsna to continue to safely work as a conductor.

In March 2015, Mlsna suggested he be allowed to use E.A.R., Inc.'s "Primo" device, a custom-made earplug, as a possible way for him to satisfy the FRA acuity standards, while providing an adequate level of hearing protection. Despite the Hearing Conservation Policy's prohibition on custom molded ear plugs, Union Pacific reviewed the literature regarding the E.A.R. Primo, ultimately rejecting it because the literature did not specify an NRR. (Knight Dep. (dkt. #95) 22:21-23:11.) In response, Mlsna contends that an NRR *could* apply to a custom device. (Opp'n (dkt. #72) 11-12 (citing Gordon Dep. (dkt. #70) 29:9-31:2.)

The Industrial Hygiene Department at Union Pacific is responsible for evaluating workplace conditions, developing safety and regulatory compliance programs, providing health and safety training, evaluating employee noise exposure, and identifying appropriate hearing protection devices. In evaluating hearing protection devices, the department does not test the devices and instead relies on their manufacturer-provided NRRs. Without a manufacturer-provided NRR, the department would not approve a device because the department could not be sure of the level of protection.

Blake Knight, a Union Pacific Industrial Hygiene Manager, reviewed the E.A.R. Primo to confirm that it did not have a manufacturer-provided NRR, and accordingly, that the Industrial Hygiene Department could not determine one.[7] (Knight Decl. (dkt. #60)

[7] Dr. Holland relied on the Industrial Hygiene Department to determine the appropriateness of hearing protection.

¶ 15.) Prior to filing suit, Mlsna never contradicted Union Pacific's conclusion that the E.A.R. Primo lacked an NRR, nor did he undergo audiological testing while using the device to determine whether he met the FRA hearing acuity requirements. Regardless, Mlsna does not dispute that the lack of a manufacturer-provided NRR was the reason that Union Pacific rejected the E.A.R. Primo; rather, he disputes the accuracy of that determination and the reasonableness of the effort undertaken to reach it.[8] (Trangle Suppl. Rpt. (dkt. #81) 4 ("The NRR for the E.A.R. earplug is 31-32 dB and the E.A.R. Sensear earmuffs is NRR of 27 dB per the device representative.");[9] Knight Dep. (dkt. #95) 22:21-23:15 (testifying that the proposed accommodation was rejected because no NRR was available, but that he only reviewed the provided literature).)

In rejecting Mlsna's proposed E.A.R. Primo as an accommodation, Union Pacific also advised Mlsna that he could submit other proposed devices for evaluation. However, Mlsna did not propose other accommodations until after litigation was already underway, meaning Union Pacific could only have investigated Mlsna's proposed device.

In response, Mlsna now points to his experts' opinions that *other* AHPDs and

[8] Mlsna acknowledged that Union Pacific "always" communicated its concern about custom devices not having NRRs, but contends that his proposed accommodation was initially rejected because of cost. (Mlsna Dep. (dkt. #27) 38:12-39:2, 44:5-8; *see also* Owens Dep. (dkt. #39) 34:22-36:11 (testifying she inappropriately cited cost in rejecting Mlsna's proposed accommodation but that "[a]s it boiled down, [cost] was not [a reason for denying the accommodation]").)

[9] Defendant objects to this opinion of Dr. Kevin Trangle because the opinion is based on information in "a recent brochure from 2015" that he has in his possession but could not identify the E.A.R. representative with whom he spoke to obtain it. (Trangle Dep. (dkt. #46) 85:8-16, 86:18-20.) Further, as defendant points out, this opinion is contradicted by that of an E.A.R., Inc. employee: Garry Gordon testified that the E.A.R. Primo lacked a manufacturer-provided NRR, but would be expected to have an NRR "in the neighborhood of 24 to 26 maybe 27" (Gordon Dep. (dkt. #70) 29:12-30:10), well below the 30 decibel certified standard met by the device Union Pacific adopted for its employees (Holland Decl. (dkt. #58) ¶ 11).

custom devices could be used to accommodate him, but there is *no* evidence that Union Pacific was aware of any device in 2015 that would provide sufficient noise amplification and protection to permit Mlsna to meet the FRA requirements. (*See* Kloss Rpt. (dkt. #76) 1 (opining that "Mr. Mlsna could be safely accommodated with current available technology such that he would comply with the FRA regulations and work as a railroad Conductor," identifying five models of earplugs or earmuffs that provide sufficient sound amplification and protection); Kloss Suppl. Rpt. (dkt. #74) ¶ 2 ("There are custom digital hearing protection devices that can provide the 25dB of amplification" including products by Electronic Shooters Protection, which "are custom made hearing protection devices that are similar to hearing aids but can be manufactured with . . . a 25dB . . . that would presumably allow Mr. Mlsna to meet the FRA requirement."); Trangle Rpt. (dkt. #77) 1 (opining that "Mlsna could easily have been accommodated in his position as a conductor for the railroad" through use of AHPDs); Trangle Suppl. Rpt. (dkt. #81) 2-4 (opining that "[u]se of custom-molded protection for him, like what Mr. Mlsna provided that had been tailored for his use, could have worked" and discussing suitability of the Howard Leight Impact Pro Industrial earmuff and E.A.R. earplug and earmuffs); Trangle 2d Suppl. Rpt. (dkt. #56) 1 (opining that Honeywell's Howard Leight AHPD product "would provide Mr. Mlsna with hearing protection and necessary amplification"); Holland Decl. (dkt. #58) ¶ 21.)

After Union Pacific declined to recertify Mlsna as a conductor and Mlsna's department was "unable to identify a reasonable accommodation" permitting him to return to work safely, Union Pacific referred him to its Disability Management Department for

assistance. (Jan. 30, 2015 Letter (dkt. #57-2) 1.) Specifically, Union Pacific wrote a letter on January 30, 2015, that offered "experienced[,] certified vocational rehabilitation professionals" to "sit down with [him] and help [him] plan [his] next steps." (*Id.*) The letter further advised that if Mlsna did not contact the Disability Management Department within 30 days, then Union Pacific would assume that he did not require assistance. (*Id.*) The letter also enclosed a document titled, "What are my options now that I am unable to return to my Railroad job?" (*Id.* at 3-4.) That document explained:

> Assistance is available to help you look at your job options both inside the Union Pacific Railroad and outside of the railroad in your local community. . . . Following your call, a member of UPRR[']s Disability Prevention and Management Team (DP&M) will be assigned to assist you for up to 60 days.
>
> * * *
>
> No one at UPRR can create a job specifically for you. However, the DP & M staff can
>
> A. Teach you how to access information about vacancies within the Union Pacific Railroad and help you match your current skills/level of function with available job openings within UPRR;
> B. Assist you with the application process for any UPRR jobs that you are interested [in] & qualified for;
> C. Assist you with resume preparation and interview skills;
> D. Help you to identify sources of assistance for job leads within your local community; and
> E. Identify resources within your community that can assist you with retraining and/or longer term services.

(*Id.* at 3.) The attachment also provided information about the railroad retirement board and other disability benefits. (*Id.* at 3-4.)

Mlsna contends that Union Pacific would not have been able to accommodate his disability with another position. (*See* Deardorff Dep. (dkt. #96) 8:7-10 (testifying that he did not know of any positions Mlsna "could have bumped to that did not require him to

wear hearing protection").) However, Mlsna does not *remember* contacting the disability prevention and management team at Union Pacific, and he acknowledges never asking Union Pacific for assistance, as well as denying interest in changing jobs within the railroad. (Mlsna Dep. (dkt. #27) 34:3-35:9, 74:20-75:4.) Instead, Mlsna applied for disability benefits from the railroad retirement board ("RRB"). On his application, he represented that his medical conditions prevent him from working. (RRB App. (dkt. #53-2) 10.) Upon learning that he could obtain retirement benefits, Mlsna abandoned his disability benefits application altogether.

Still, Mlsna did ask Union Pacific to reconsider its decision not to recertify him. In response, Holland explained that: (1) safety required all train crew members "to be able to accurately hear spoken and radio communications"; (2) Mlsna had been "removed from service as a Trainman" following the December 18, 2014 audiogram showing "significant hearing loss in both ears"; (3) Union Pacific "requires all Trainmen to have a minimum hearing threshold in the better ear of 40 decibels or less . . . either with unaided hearing or when using a UPRR-approved AHPD"; (4) Mlsna's tests "indicate[d] that [he] ha[d] substantial bilateral hearing loss that poses a significant, imminent and unacceptable safety risk . . . if [he] were to work as a Trainman for UPRR"; (5) he "d[id] not have the hearing ability to safely perform [his] essential job duties as a Trainman even when . . . using a UPRR approved AHPD"; (6) Union Pacific could not locate "any adaptive device that would allow [Mlsna] to hear adequately for safe work as a Trainman and still provide adequate hearing protection in areas where this is required." (June 9, 2017 Letter (dkt. #58-2) 1-3.)

OPINION

Summary judgment is appropriate if the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). At this stage, all reasonable inferences must be drawn in favor of plaintiff as the nonmoving party. *Ozlowski v. Henderson*, 237 F.3d 837, 839 (7th Cir. 2001) (citing *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 692 (7th Cir. 1998)). To avoid summary judgment, plaintiff must marshal enough evidence -- not merely a scintilla -- to permit a jury to rule in his favor. *Nowak v. St. Rita High School*, 142 F.3d 999, 1002 (7th Cir. 1998) (internal citations omitted).

Defendant seeks summary judgment contending that plaintiff simply "cannot show that Union Pacific discriminated against him because of his hearing impairment." More specifically, even though Mlsna is "disabled" under the ADA, he cannot establish that: (1) he is a "qualified individual"; and (2) he suffered an adverse employment action because of his disability.[10] (Opening Br. (dkt. #51) 20-21 & n.4.) Plaintiff responds that "the real issue is whether [his] job . . . exposed him to dangerous noise levels that could not be mitigated through a device that also allowed [him] to pass the FRA's hearing test." (Opp'n (dkt. #72) 23-24.) Plaintiff misconstrues the issue at summary judgment. Confronted with defendant's motion, *plaintiff* must point to enough admissible evidence

[10] Defendant contends that plaintiff failed to make his case through either direct or indirect methods of proof, including that he failed to identify any comparators -- non-disabled, similarly-situated employees who were treated more favorably. Plaintiff does not address that argument and the court will focus its analysis on the direct method of proof. *See Hooper v. Proctor Health Care Inc.*, 804 F.3d 846, 853 (7th Cir. 2015) ("Lack of evidence [of similarly situated individuals] is sufficient to end the inquiry under the indirect method, as it is [plaintiff's] responsibility to identify and present evidence of a comparator at the summary judgment stage." (internal citations omitted)).

that a reasonable jury could conclude that he has met his *prima facie* case. Plaintiff has not met his burden.

"The ADA and Rehabilitation Act prohibit an employer from discriminating against a qualified individual with a disability because of the disability." *Jackson v. City of Chic.*, 414 F.3d 806, 810 (7th Cir. 2005) (quoting *Silk v. City of Chic.*, 194 F.3d 788, 798 (7th Cir. 1999)). Regardless of whether plaintiff's claim is viewed as outright discrimination or a failure-to-accommodate claim, he must establish that he is "disabled" under the ADA and that with or without accommodation he could perform the job's essential functions. *See Hooper*, 804 F.3d at 853 (citing *Bunn v. Khoury Enters., Inc.*, 753 F.3d 676, 683 (7th Cir. 2014)) (identifying elements of discrimination claim as: being disabled under the ADA, qualified to perform job's essential functions, and termination because of the disability); *E.E.O.C. v. Sears, Roebuck & Co.*, 417 F.3d 789, 797 (7th Cir. 2005) (citing *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 572 (7th Cir. 2001)) (identifying elements of failure-to-accommodate claim as: being "a qualified individual with a disability"; employer knowledge of disability; and the employer's failure to accommodate the disability).

In order to be a "qualified individual" an employee must "satisf[y] the prerequisites for the position" and be able to "perform the essential functions of the position . . . with or without reasonable accommodation" at the time he was fired. *Stern v. St. Anthony's Health Ctr.*, 788 F.3d 276, 285, 287 (7th Cir. 2015); *see also Whitaker v. Wis. Dept. of Health Servs.*, 849 F.3d 681, 684 (7th Cir. 2017) (explaining that an "otherwise qualified" employee is one who "is capable of performing the 'essential functions' of the job with or without a reasonable accommodation"); *Nowak*, 142 F.3d at 1003 (explaining that the

qualified individual determination "must be made as of the time of the employment decision" (internal citation omitted)). Plaintiff bears the burden of establishing that he was a qualified employee. *Nowak*, 142 F.3d 1003.

There is no dispute that plaintiff had the requisite background, experience, and knowledge to serve as a train conductor, as he had been employed by Union Pacific in that role since 2007. The relevant dispute is over plaintiff's ability to perform the position's essential functions with or without accommodation. Since there can be no dispute that federal regulation requires a person not to "have an average hearing loss in the better ear greater than 40 decibels with or without use of a hearing aid, at 500 Hz, 1,000 Hz, and 2,000 Hz," 49 C.F.R. § 242.117(i), the parties' dispute centers on whether hearing protection is an essential function of the position.

A. Essential Functions

"[T]o determine whether a particular duty is an essential function," the court considers factors like "the employee's job description, the employer's opinion, the amount of time spent performing the function, the consequences for not requiring the individual to perform the duty, and past and current work experiences." *Stern*, 788 F.3d at 285 (quoting *Gratzl v. Office of the Chief Judges of the 12th, 18th, 19th & 22nd Judicial Circuits*, 601 F.3d 674, 679 (7th Cir. 2010)); *see also* 29 C.F.R. § 1630(n)(2) (listing potential reasons that "[a] job function may be considered essential"). While the employer's judgment is important, it is not controlling; workplace practices are also considered. *Stern*, 788 F.3d at 285-86 (quoting *Miller v. Ill. Dep't of Transp.*, 643 F.3d 190, 198 (7th Cir. 2011)).

Defendant contends that wearing hearing protection is an essential function of the

train conductor position because: (1) FRA regulations require railroad employees to use hearing protection when exposed to an eight-hour TWA of 90 decibels or more (Opening Br. (dkt. #51) 22 (citing 49 C.F.R. § 227.115(d));[11] (2) Union Pacific performed representative sampling to measure noise exposure, consistent with FRA regulations (*id.* (citing 49 C.F.R. §§ 227.103(b)(2), 227.5));[12] (3) the representative sampling revealed a "reasonable likelihood that Union Pacific conductors will be exposed to excessive noise" (*id.*); and (4) Union Pacific, therefore, required all conductors to wear hearing protection under the Hearing Conservation Policy (*id.*).[13] The policy covered all employees who "may be subjected to noise exposures equal to or exceeding an 8-hour [TWA] sound level of 85 decibels," as well as all employees "in identified hearing protection areas" and within 150-feet of a locomotive. (Hearing Conservation Policy (dkt. #58-1) 1, 3, 6.) Union Pacific's policy is more conservative than FRA regulations, but the standards set by the FRA present the floor, not the ceiling, for safety procedures. 49 C.F.R. § 227.1 ("This part prescribes *minimum* Federal health and safety noise standards for locomotive cab occupants. This part does *not* restrict a railroad . . . from adopting and enforcing additional or more stringent

[11] As noted previously, the FRA also requires hearing protection for employees exposed to sound levels of 85 decibels or greater if the employee has not yet had a baseline audiogram or experiences a worsening change in hearing sensitivity. 49 C.F.R. § 227.115(c).

[12] Representative personal sampling measures representative noise "exposures of other employees who operate similar equipment under similar conditions." 49 C.F.R. § 227.5.

[13] Relatedly, defendant moved to strike the March 6, 2019, declaration of Dr. Kevin Trangle, opining about industry standards governing hearing conservation programs. (*See* Mot. Strike (dkt. #82) 1; Trangle Decl. (dkt. #78) ¶¶ 5, 6, 10.) Defendant argued that the declaration: (1) was a belated expert disclosure served after the close of discovery; (2) fails to disclose the bases for new opinions; and (3) imposes undue prejudice on defendant because Union Pacific lacks an opportunity to respond. (Mot. Strike (dkt. #82) 1.) As the court did not rely on the declaration, this motion is DENIED AS MOOT.

requirements." (emphasis added)).

Accordingly, plaintiff's argument that he may not have been personally exposed to excessive noise is not determinative. First, train conductors' work environments vary making personal noise exposure level monitoring a difficult, if not pointless, exercise. As defendant points out, "dosimetry data measures historically where he has *been*, not where he *will be* on a given day." (Reply (dkt. #85) 23.) Second, as plaintiff himself acknowledged in his complaint, "Train Crewm[e]n work in a noisy environment and are therefore required to wear hearing protection." (Amend. Compl. (dkt. #3) ¶ 14.) Accordingly, the court is inclined to credit Union Pacific's assertion that requiring *some* conductors but not others to wear protective gear "would produce administrative and legal chaos," as well as "invite FELA liability." (Reply (dkt. #85) 23.)

Plaintiff also argues that since the train conductor job does not *exist* "to wear hearing protection, wearing hearing protection has nothing to do with the number of thru-freight conductors Union Pacific employs, and Mlsna wasn't hired for his ability to wear hearing protection." (Opp'n (dkt. #72) 26.) Whether a position exists to perform a function, the number of employees who perform a function, and whether an employee was hired for the ability to perform that function are all factors a court may consider when evaluating whether that function is essential. But Union Pacific is also required to provide a safe work environment for its employees. Moreover, Union Pacific may do so by requiring the use of protective gear, even when doing so is above-and-beyond the federal requirements. Indeed, keeping train conductors safe is such a priority that Union Pacific noted in the train crew job description that it required train conductors to "[f]ollow[] safety

precautions," be "willing[] to practice safe work habits," "wear personal protective equipment such as . . . hearing protection where the company requires," and "[e]nsure compliance with all railroad rules and regulations for safety." (Train Crew Job Description (dkt. #57-1) 2-4.)

Accordingly, no jury could conclude that Union Pacific acted unreasonably in making the wearing of hearing protective devices an essential function of the train conductor position. An arguably closer question is whether Union Pacific did *in fact* make wearing headgear an essential function of plaintiff's train conductor position, but only because plaintiff testified at his deposition that he and his colleagues never wore hearing protection. However, plaintiff is bound by his affirmative pleading that "Train Crewm[e]n work in a noisy environment and are therefore required to wear hearing protection" because they "work in a noisy environment." (Amend. Compl. (dkt. #3) ¶ 14.) *Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 872 (7th Cir. 2010) ("A judicial admission is a statement, normally in a pleading, that negates a factual claim that the party making the statement might have made or considered making.");[14] *Keller v. United States*, 58 F.3d 1194, 1199 n.8 (7th Cir. 1995) ("Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them. They may not be controverted at trial or on appeal.").[15] Moreover, plaintiff also acknowledged

[14] The Seventh Circuit in *Robinson* rejected plaintiff's argument that defense counsel's closing argument constituted a judicial admission as "in order to qualify as judicial admissions, an attorney's statements must be deliberate, clear and unambiguous." 615 F.3d at 872 (quoting *MacDonald v. General Motors Corp.*, 110 F.3d 337, 340 (6th Cir. 1997)).

[15] The Seventh Circuit rejected Keller's argument for judicial admissions finding the statements were "not admissions at all" and were "misstated or misconstrued." 58 F.3d at 1199.

in his deposition the importance of Union Pacific protecting its employees' hearing and for the conductors to wear appropriate hearing protection. (Mlsna Dep. (dkt. #27) 57:12-18.)

B. Reasonable Accommodation

This brings the court to whether a reasonable accommodation would have permitted plaintiff to meet the FRA hearing acuity standards *while* wearing hearing protective devices. "[A]n accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." *Bunn*, 753 F.3d at 682 (quoting 29 C.F.R. pt. 1630 app. § 1630.2(o)). Where a disabled employee establishes that he did not receive a reasonable accommodation, his "employer will be liable only if it bears responsibility for the breakdown of the interactive process." *Sears, Roebuck*, 417 F.3d at 797 (citing *Beck v. Univ. of Wisc. Bd. of Regents*, 75 F.3d 1130, 1137 (7th Cir. 1996)).[16]

Here, there is no dispute that plaintiff could *only* meet the FRA hearing acuity

[16] To be clear, an employer does not have to provide any particular accommodation requested by an employee, rather the employer may choose any reasonable accommodation "that effectively accommodates the disabled employee's limitations." *Sears, Roebuck*, 417 F.3d at 802 (internal citations omitted). However,

> if the employee has requested an appropriate accommodation, the employer may not simply reject it without offering other suggestions or at least expressing a willingness to continue discussing possible accommodations. . . . An employer cannot sit behind a closed door and reject the employee's requests for accommodation without explaining why the requests have been rejected or offering alternatives.

Id. at 806.

standard with assistance from his hearing aids. However, as noted above, Union Pacific's Hearing Conservation Policy does not permit conductors to wear hearing aids under their hearing protection. Moreover, plaintiff's experts also do not recommend wearing hearing aids under hearing protection. (Trangle Dep. (dkt. #46) 58:13-59:19; Kloss Dep. (dkt. #47) 55:1-10.)

Plaintiff *only* offered the E.A.R. Primo as a proposed reasonable accommodation during the interactive process.[17] Despite its policy of not authorizing the use of "custom molded ear plugs" (Hearing Conservation Policy (dkt. #58-1) 1), Union Pacific considered plaintiff's proposal, rejecting it because it lacked an NRR. (*See* Mlsna Dep. (dkt. #27) 38:12-39:2, 44:5-8.) While plaintiff contends that an NRR could be ascertained for a custom device, his evidence actually shows conflicting NRRs for his proposed accommodation. (*Compare* Trangle Suppl. Rpt. (dkt. #81) 4 (opining that the "E.A.R. earplug" has an NRR of 31-32 dB "per the device representative")[18] *with* Gordon Dep. (dkt. #70) 29:12-30:10 (testifying that the E.A.R. Primo lacked a manufacturer-issued NRR and opining that "the average NRR to be expected" on such products "will be in the neighborhood of 24 to 26 maybe 27").

Further, the evidence shows an inability to accurately measure an NRR because of

[17] The court need not consider accommodations proposed after the start of litigation because plaintiff did not propose them during the interactive process back in 2015. Union Pacific cannot be faulted for failing to consider proposed accommodations plaintiff did not suggest at the time of the employment decision, especially in light of its offers to consider other suggestions or to provide assistance in finding alternative employment.

[18] However, as noted above, the basis for this opinion is murky, if not inadmissible hearsay. (*See* Trangle Dep. (dkt. #46) 85:8-16, 86:18-20.)

the device's electronics. (Gordon Dep. (dkt. #70) 55:13-56:16 (explaining that noise reduction testing is performed with the device in the "off" position because testing cannot be done "while it's turned on"); Soli Dep. (dkt. #41) 41:19-21, 62:1-6, 73:15-74:13 (testifying that NRR is "calculated based on the passive characteristics of the device" and that custom devices do not have NRRs).) Plaintiff's contention about the availability of other methods of determining the level of hearing protection provided by a device is not enough to create a material dispute of fact, however, because plaintiff failed to produce any evidence from which a reasonable jury could conclude that Union Pacific's stated reason -- the lack of a discernable NRR -- was a pretext for discrimination. *See Nolan v. Arkema, Inc.*, 809 F. Supp. 2d 356, 365 (E.D. Penn. 2011) (explaining that "a plaintiff may defeat a motion for summary judgment" by showing "some evidence . . . from which a factfinder would reasonably either: (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action" that required plaintiff to show "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence" (internal citations omitted));[19] *Mont-Ros v. City of W. Miami*, 111 F. Supp. 2d 1338, 1358 (S.D. Fla. 2000) (finding plaintiff had failed to

[19] The *Nolan* court found that the plaintiff *had* provided enough evidence that could show his employer terminated him because of its misconceptions about his abilities. However, in *Nolan*, the plaintiff marshalled evidence that: (1) despite constant communication during his absence, no one told him that his job had been filled until after he tried to return to work with restrictions; (2) the person who filled his job was not formally appointed until after plaintiff's termination; and (3) despite defendant's representatives promising to keep plaintiff in mind for future positions, plaintiff was not contacted about open positions. 809 F. Supp. 2d at 365-66.

show defendant's reasons were pretext for discrimination because he failed to marshal evidence "sufficient to permit a reasonable fact finder to conclude the reasons given by the employer were not the real reasons for the adverse employment decision" (citation omitted)). Union Pacific reasonably rejected the E.A.R. Primo as a proposed accommodation because it lacked a manufacturer-provided NRR and that decision is entitled to deference absent evidence that this reason masks discrimination.[20]

Even if Union Pacific's reason was a pretext for discrimination, plaintiff has another problem with his proposed accommodation: there is no evidence in the record to permit a reasonable jury to find that the E.A.R. Primo would actually permit him to fulfill the essential functions of a train conductor. (*See* Kloss Dep. (dkt. #47) 55:17-56:16 (testifying that he would need to test a product to determine if it would permit Mlsna to meet the FRA requirements).) Plaintiff's belated motion for leave to supplement the record with Kloss's most recent report is both too little and too late. (*See* Mot. Leave Suppl. (dkt. #86) 1.)

As to being too late, plaintiff knew from the outset that central factual issues in this suit were (1) his failure to meet FRA hearing acuity standards without assistance and (2) the lack of a manufacturer-provided NRR on his proposed accommodation. Indeed, Union Pacific ostensibly rejected the E.A.R. Primo *because* it did not have an NRR, and plaintiff had plenty of time to build a record on this question well *before* summary judgment was fully briefed. At the *very* latest, plaintiff should have provided this supplemental report

[20] As noted previously, when plaintiff first proposed the E.A.R. Primo, a Union Pacific employee cited cost as a reason for rejection. However, there is no evidence that would permit a reasonable jury to infer that the lack of a reliable NRR is being used as a pretext for cost or discrimination.

with his brief in opposition, which was filed March 6, 2019 -- one day *after* the date of the report. Regardless, there is no justification for plaintiff instead waiting to file the report one day *after* defendant filed its summary judgment reply.[21] This is the type of sandbagging that the rules governing expert disclosure seek to prevent.

As for too little, the supplementation does not solve plaintiff's evidentiary problems. The report describes the tested devices as having been "ordered through E.A.R., Inc[. and] manufactured by Persona Medical," but fails to identify them as the accommodation actually proposed by plaintiff in 2015. Likewise, the report only concludes that "with the volume turned to FULL-ON," Mlsna "DOES MEET FRA minimal hearing criteria." (Kloss. 2d Suppl. Rpt. (dkt. #86-1) 1.) Accordingly, this opinion adds practically nothing, since there is no dispute that with hearing aids plaintiff met this standard back in 2015. Assuming that meeting FRA hearing acuity standards is only one of the essential functions at issue here, Kloss's opinion is silent about the level of *hearing protection* offered by the tested device.

For all these reasons, Union Pacific's rejection of the E.A.R. Primo was reasonable, and Union Pacific cannot be held responsible for the breakdown of the interactive process, having met its burden by evaluating plaintiff's proposed accommodation and offering to review others. Indeed, the undisputed evidence is that plaintiff did not propose additional accommodations in 2015, and he declined defendant's offer for assistance in seeking

[21] Assuming that the court granted the motion for leave to supplement the record and that the report was sufficient to warrant a jury trial, defendant would not have the opportunity to re-depose Kloss or obtain its own rebuttal expert opinion in advance of trial. Accordingly, fairness concerns also militate in favor of exclusion.

alternate employment. Further, because plaintiff cannot meet FRA requirements while wearing appropriate hearing protection, he is not a "qualified individual." Accordingly, defendant is entitled to judgment.

ORDER

IT IS ORDERED that:

1) Defendant's motion for summary judgment (dkt. #50) is GRANTED.

2) Defendant's motion to strike (dkt. #82) is DENIED AS MOOT.

3) Plaintiff's motion for leave to supplement the record (dkt. #86) is DENIED.

4) The clerk's office is directed to ENTER judgment for defendant and CLOSE this case.

Entered this 15th day of May, 2019.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARK MLSNA,

Plaintiff,

v. Case No. 18-cv-37-wmc

UNION PACIFIC RAILROAD COMPANY,

Defendant.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendant Union Pacific Railroad Company against plaintiff Mark Mlsna dismissing this case.

s/ A. Wiseman, Deputy Clerk
Peter Oppeneer, Clerk of Court

May 16, 2019
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARK MLSNA,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

OPINION AND ORDER

18-cv-37-wmc

Plaintiff Mark Mlsna filed suit against his former employer, Union Pacific Railroad Company, alleging that its refusal to recertify him as a train conductor violated the Americans with Disabilities Act (the "ADA"). (*See* Am. Compl. (dkt. #3).) In May, the court granted defendant's motion for summary judgment, concluding that a reasonable jury could not find that plaintiff was capable of fulfilling the essential functions of his position, even with a reasonable accommodation. (*See* Summ. J. Op. (dkt. #97) 1.) Presently before the court is plaintiff's motion for reconsideration under Fed. R. Civ. P. 59(e), filed after the Federal Railroad Association (the "FRA") concluded that Union Pacific should not have revoked his conductor certification. (Mot. Recons. (dkt. #102) 1.) For the reasons set forth below, plaintiff's motion must be denied.

OPINION

Before the court can consider whether the FRA's decision warrants reconsidering, the court must initially address defendant's jurisdictional challenge. (Opp'n (dkt. #112) 3-4.) Specifically, defendant contends that the plaintiff's "filing of a notice of an appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control

over those aspects of the case involved in the appeal." (*Id.* at 3 (quoting *United States v. Ali*, 619 F.3d 713, 722 (7th Cir. 2010).) However, plaintiff's Rule 59(e) is an exception to this general rule. *See Myles v. Gupta*, No. 14-cv-661-bbc, 2016 WL 2859092, at *1 (W.D. Wis. May 16, 2016) (explaining that a Rule 59(e) motion "'suspends' the appeal and deprives the court of appeals of jurisdiction until the district court enters an order disposing of the motion" (internal citations omitted)); *see also Siddique v. Laliberte*, 15-CV-1-JPS, 2019 WL 3225746, at *1 n.1 (E.D. Wis. July 16, 2019) (explaining that a district court could address plaintiff's motion for reconsideration because it "retains jurisdiction to take additional action in aid of the appeal");[1] *Dye v. Bartow*, No. 13-cv-284-bbc, 2013 WL 5295690, at *1 (W.D. Wis. Sept. 19, 2013) ("Ordinarily, the filing of a notice of appeal divests the district court of its control over those aspects of the case involved in the appeal. However, where a party files a timely notice of appeal and a timely Rule 59(e) motion, the notice becomes effective only after the court has disposed of the Rule 59(e) motion." (internal citations and quotation marks omitted)).[2] Confident in its jurisdiction, the court will proceed, therefore, to address plaintiff's request for reconsideration on its merits.

Deciding "a motion for reconsideration is left to the discretion of the district court." *Caisse Nationale de Credit Agricole v. CBI Inds., Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996) (citing *Billups v. Methodist Hosp.*, 922 F.2d 1300, 1305 (7th Cir. 1991)). "Reconsideration

[1] In *Sidduque*, the Eastern District of Wisconsin also noted that the Seventh Circuit requested status updates on the plaintiff's motion for reconsideration, further suggesting that the district court retained jurisdiction. 2019 WL 3225746, at *1 n.1.

[2] Even if this court were not convinced of its jurisdiction, or the motion, plaintiff's recent voluntarily dismissal of his appeal has essentially mooted the issue. (Appeal Order (dkt. #114) 1.)

is not an appropriate forum for rehashing previously rejected arguments or arguing matters that could have been heard during the pendency of the previous motion." *Id.* (citations omitted). Instead, "[m]otions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Id.* at 1269 (quoting *Keene Corp. v. Int'l Fidelity Ins. Co.*, 561 F. Supp. 656, 665 (N.D. Ill. 1982), *aff'd*, 736 F.2d 388 (7th Cir. 1984)). "A 'manifest error' is not demonstrated by the disappointment of the losing party. It is the 'wholesale disregard, misapplication, or failure to recognize controlling precedent.'" *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (quoting *Sedrak v. Callahan*, 987 F. Supp. 1063, 1069 (N.D. Ill. 1997)).

Plaintiff argues that "the FRA's findings warrant the Court not only reconsidering its order on Union Pacific's motion for summary judgment [as a manifest error] but also . . . *sua sponte* granting summary judgment to Mlsna" since Union Pacific should be precluded from making the very arguments that this court found persuasive. Alternatively, plaintiff argues that the FRA's findings constitute "new evidence that could cause a reasonable person to find that Mlsna is not a direct threat." (Mot. Recons. (dkt. #102) 5-7.) Plaintiff's arguments reflect a misunderstanding as to the issue before this court and the import of the FRA's decision.

As an initial matter, plaintiff's motion for reconsideration is not a vehicle for the court to grant a motion for summary judgment he never pursued. Rather, it is simply a request for the court to reconsider its original decision in light of the FRA's June 4, 2019, decision. As explained at summary judgment, the question for this court was whether plaintiff had produced enough evidence for a reasonable jury to conclude that he had made

his prima facie case under the ADA. (Summ. J. Op. & Order (dkt. #97) 13-14.) Because the court found that he had failed to make this showing, it never addressed plaintiff's contention that he was not a direct threat. (*Id.* at 1 n.1.) Accordingly, plaintiff's motion for reconsideration based on an argument that the plaintiff is not a direct threat misses the point.

While the FRA's decision is critical of Union Pacific for "grossly" misrepresenting "the undisputed facts and FRA's hearing acuity requirements," that decision has no bearing on the award of summary judgment as to whether Union Pacific violated the ADA, unless Union Pacific were shown to have done the same in presenting material facts or FRA regulations to this court. Instead, the FRA's review was limited to whether Union Pacific acted in accordance with 49 C.F.R. § 242. (FRA Decision (dkt. #106) 1.) Accordingly, different standards applied.

Ultimately, the FRA concluded that Union Pacific's failure to recertify plaintiff was "improper for several reasons": (1) Dr. Holland in his communications with Mlsna -- and Union Pacific in its communications with the FRA -- "misrepresented a more stringent company policy as FRA's hearing acuity standards"; (2) Holland's misrepresentation of that policy "as a medical opinion suggests that the more stringent policy . . . may be inconsistent with the regulation"; and (3) Union Pacific failed to present Mlsna with a document stating that he met the FRA requirements with his hearing aids following his first hearing test on January 8, 2015. (*Id.* at 4.) In contrast, at summary judgment, there was no dispute that plaintiff met the FRA requirements with his hearing aids. (*See* Summ. J. Op. & Order (dkt. #97) 7 ("Mlsna only met the minimum FRA hearing criteria when

tested with his hearing aids and no AHPD."); *id.* at 19-20 (same).) Rather, the dispute before this court focused on "whether hearing protection is an essential function of [plaintiff's] position." (*Id.* at 15.) The court concluded that it was (or at least that Union Pacific had a reasonable basis to require the use of hearing protection), and that plaintiff had failed to identify a reasonable accommodation that would allow him to meet the FRA requirements while wearing hearing protection. (*Id.* at 18, 22-23.)

Additionally, the court is simply not convinced by the FRA's findings as to Dr. Holland's "misrepresentations." The January 16, 2015 letter from Holland stated accurately that Mlsna's "[fitness for duty] evaluation was initiated because a recent hearing test showed [his] *unaided hearing* did not meet Federal Railroad Administration (FRA) minimum hearing standards for conductors."[3] (Jan. 16, 2015 Letter (dkt. #53-4) 1 (emphasis added).) It likewise noted accurately that Mlsna could not "meet the FRA minimum hearing standard . . . with the use of UPRR approved Amplified Hearing Protection Devices." (*Id.*) That same letter separately explains that the "FRA minimum hearing standard requires a Conductor to have an average hearing threshold (at 500, 1000 and 2000 hertz) of no greater than 40 decibels in the better ear either with unaided hearing or when using a hearing amplification device," which tracks the regulatory requirements.[4]

[3] While the FRA initially refers to the January 30, 2015 letter, it actually is concerned about the January 16, 2015 letter, which was enclosed in the January 30 letter. (*Cf.* Jan. 30, 2015 Letter (dkt. #57-2); Jan. 16, 2015 Letter (dkt. #53-4).)

[4] The regulation requires conductors to

> have a hearing test or audiogram that shows the person's hearing acuity meets or exceeds the following thresholds: The person does not have an average hearing loss in the better ear greater than 40 decibels with or without use of a hearing aid, at 500 Hz, 1,000 Hz,

(*Id.*) Ultimately, Union Pacific's letter contains a separate section explaining Union Pacific's hearing policy, and its reliance on noise reduction ratings (*id.* at 2), concluding with an explanation as to how the FRA requirements interact with Union Pacific's stronger hearing policy. Union Pacific's failure to provide plaintiff with a certificate is irrelevant to his ADA claim. Whether or not these representations were in any way misleading for the FRA's purposes -- and it is hard to see how they were -- Union Pacific did not mislead this court on summary judgment, either in terms of the facts or the law.

Finally, whether or not the FRA's apparent ruling under its own regulations could bind this court under other circumstances, plaintiff's argument for issue preclusion is fundamentally flawed because this court's decision *predates* the FRA's determination. *See Northern States Power v. Bugher*, 189 Wis.2d 541, 550, 525 N.W.2d 723, 727 (1995), ("Issue preclusion refers to the effect of a judgment in foreclosing relitigation *in a subsequent action* of an issue of law or fact that has already been litigated and decided in a prior action." (internal citation omitted) (emphasis added)). The doctrine of issue preclusion does not apply a later decision to an earlier proceeding. Accordingly, defendant cannot be retroactively precluded from making its previously successful summary judgment argument. Nor is a later, administrative ruling -- even if arguably inconsistent with this court's opinion -- "new evidence" at least requiring reconsideration in this case. [5]

and 2,000 Hz.

49 C.F.R. § 242.117(i).

[5] Similarly, nothing in this decision or the court's earlier grant of summary judgment precludes the FRA from reinstating plaintiff's conductor certification if found to be appropriate under its own regulations and case law.

ORDER

IT IS ORDERED that: plaintiff's motion for reconsideration (dkt. #102) is DENIED.

Entered this 23rd day of August, 2019.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 2020, I electronically filed the foregoing brief and short appendix with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: January 7, 2020

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