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 REPLY BRIEF

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INTRODUCTION

Union Pacific's response supplies all the reasons this Court needs to reverse the district court's judgment.

Union Pacific insists that courts owe blind deference to an employer's judgment about a job's essential functions. Br. at 36. That's wrong. "The essential function inquiry is a factual question" based on a host of relevant factors, and is "typically…not suitable for resolution through a motion for judgment as a matter of law…." *Brown v. Smith*, 827 F.3d 609, 613 (7th Cir. 2016); *Henschel v. Clare Cty. Road Comm'n*, 737 F.3d 1017, 1022 (6th Cir. 2013).

Union Pacific claims that evidence doesn't matter, dismissing its own data showing that thru-freight conductors have not been exposed to dangerous noise levels in almost 20 years. Wrong again. Workplace reality weighs heavily in the essential functions inquiry. *Stern v. St. Anthony's Health Ctr.*, 788 F.3d 276, 285–86 (7th Cir. 2015).

Union Pacific abandons the central argument it made below: that it fired Mlsna because he failed his FRA-mandated hearing exam. Now, Union Pacific claims it was just enforcing a stricter hearing exam

protocol. Br. at 46. That's not allowed. Appellate law 101 says Union Pacific cannot raise this novel argument for the first time here.

On the merits, things only get worse. Union Pacific tells this Court that its hearing exam protocol doesn't discriminate. Br. at 46. That's very wrong. Union Pacific concedes all of the facts necessary to show that it does. Under Union Pacific's policy, hearing-impaired employees must meet the FRA's hearing standard *while wearing hearing protection*. Non-hearing-impaired employees need only meet the FRA's hearing standard *without wearing hearing protection*. That is discriminatory. The ADA prohibits such discrimination. And it *certainly* forecloses any argument that such a discriminatory requirement is an essential job function.

Union Pacific insists that it satisfied the ADA's mandate to offer reasonable accommodations. Br. at 47. Wrong once again. The undisputed evidence shows that Union Pacific forced all hearing-impaired employees to use a single company-approved device that was doomed to fail. And it shifted the burden entirely to employees like Mlsna to locate a device that would satisfy Union Pacific's overbroad and unlawful standards. In Mlsna's case, Union Pacific lied about conducting "an extensive search" when no such search ever occurred. Union Pacific

has not played the "active, good-faith role" the ADA demands. *EEOC v. Sears, Roebuck Co.*, 417 F.3d 789, 806 (7th Cir. 2005).

Mlsna was qualified to continue working as a train conductor. He passed his hearing exam, as Union Pacific now effectively concedes. He can do the job without wearing hearing protection, as he did for nearly a decade. He can do the job while wearing standard hearing protectors. And he can do the job wearing any of the numerous AHPDs that he proposed to Union Pacific. Any of these modest accommodations is reasonable; and none would remove any essential functions from his role.

The ADA calls upon courts to root out "overprotective rules and policies" and "exclusionary qualification standards and criteria" that unfairly discriminate against disabled Americans and deprive them of "equality of opportunity, full participation, independent living, and economic self-sufficiency." 42 U.S.C. § 12101(a)(5), (7).

Union Pacific would have this Court turn its back on these principles. It would reduce ADA compliance to an exercise in business judgment. And it would recast this Court's role as little more than a rubber stamp on that judgment. The ADA demands better.

The district court's judgment should be reversed.

ARGUMENT

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

The district court erred in concluding that Union Pacific's hearing protection policy was an essential job function. It similarly erred in concluding that holding hearing-impaired employees to a stricter hearing exam protocol was essential. Union Pacific offers no persuasive defense of the district court's rulings.

A. Union Pacific Is Owed No "Deference" in Defining Essential Functions.

Union Pacific takes the position that the Court may not "second guess" Union Pacific's judgment regarding the essential functions of the job. Br. at 34.

But Union Pacific is owed no deference in the essential function inquiry. *Rorrer v. City of Stow*, 743 F.3d 1025, 1040 (6th Cir. 2014). "[C]ourts are not 'required to give deference to [the employer's] judgment regarding what the essential functions of the position [are.]'" *Rorrer*, 743 F.3d at 1042 (quoting *Keith v. Cty. of Oakland*, 703 F.3d 918, 925–26 (6th Cir. 2013)). An employer's judgment is just one factor among many that courts must consider. Others include written job descriptions, the

amount of time spent on the job performing the function, the consequences of not requiring the employee to perform the function, and the actual work experience of past and present employees in the position. *See* 29 C.F.R. § 1630.2(n)(3); *Dunderdale v. United Airlines, Inc.*, 807 F.3d 849, 853 (7th Cir. 2015). Courts must "look to evidence of the employer's actual practices in the workplace." *Stern*, 788 F.3d at 285–86 (quoting *Miller v. Ill. Dep't of Transp.*, 643 F.3d 190, 198 (7th Cir. 2011)). Indeed, courts have cautioned against giving too much weight to the employer's judgment. As the Sixth Circuit has observed, "If an employer's judgment about what qualifies as an essential task were conclusive, 'an employer that did not wish to be *inconvenienced* by making a reasonable accommodation could, simply by asserting that the function is essential, avoid that clear congressional mandate that employers mak[e] reasonable accommodations.'" *Rorrer*, 743 F.3d at 1040 (quoting *Holly v. Clairson Indus., LLC*, 492 F.3d 1247, 1258 (11th Cir. 2007)).

B. Wearing Hearing Protection Is Not an Essential Function of the Conductor Position When Not Required by the FRA Regulations.

Union Pacific argues that wearing hearing protection is an essential function of the conductor position—even when not required by

federal regulations. In doing so, Union Pacific misapplies the doctrine of judicial admissions, misrepresents its own job description, and misinterprets its own noise sampling data.

(1) Mlsna did not make a "judicial admission" by acknowledging that Union Pacific has a written policy requiring the use of hearing protection.

Union Pacific is incorrect in arguing that any "judicial admission" forecloses a finding that wearing hearing protection is not an essential function.

Mlsna offered his own testimony as evidence that Union Pacific did not actually require conductors to wear hearing protection. That testimony supports a finding that wearing hearing protection was not an essential function. *See* 29 C.F.R. Pt. 1630, App. § 1630.2(n).

Union Pacific argues that Mlsna is prevented from "contesting whether hearing protection is an essential function" because Mlsna "made a binding judicial admission" by stating in his Amended Complaint that "Train Crewmen work in a noisy environment and are therefore required to wear hearing protection." Br. at 33.

Mlsna's statement was not a judicial admission. "Judicial admissions are *formal* concessions in the pleadings…" *Keller v. United*

States, 58 F.3d 1194, 1199 n.8 (7th Cir. 1995) (emphasis added). Such admissions must be "deliberate, clear, and unequivocal." *Medcom Holding Co. v. Baxter Travenol Lab*, 106 F.3d 1388, 1404 (7th Cir. 1997). In his Amended Complaint, Mlsna merely acknowledged a fact that is not in dispute: Union Pacific has a written policy requiring hearing protection. By doing so, Mlsna was not "admitting" that the requirement was an essential function. *See id.* (explaining that a party "admitted only that to which it explicitly stipulated" and by stipulating to a fact, it "did not…make any binding admission as to how that fact should be interpreted.").

Union Pacific also suggests that Mlsna's supposed admission foreclosed his testimony that he did not, in fact, wear hearing protection or see any other employees doing so. Br. at 36. However, from the very beginning, Mlsna has been completely consistent on this point. In the very next line after his supposed "judicial admission," Mlsna's Amended Complaint states,

> From when he was hired until the dates at issue in this case, Mlsna has worn hearing aids without hearing protection while working as a Train Crewman. Mlsna has never had an issue performing a Train Crewman's essential functions while wearing hearing aids without hearing protection.…Union Pacific has always known that Mlsna wore hearing aids

> without hearing protection when he worked as a Train Crewman.

D.E. 3 at 3.

This is not the stuff of a formal, binding judicial admission. From the first, Mlsna has asserted that while Union Pacific formally *requires* hearing protection, conductors do not *actually wear* hearing protection on the job. There is no reason to disregard Mlsna's testimony.

(2) Mlsna's testimony demonstrates that wearing hearing protection is not an essential function.

Setting aside Union Pacific's mistaken judicial admission argument, Union Pacific still claims that Mlsna's testimony should be disregarded. That assertion is equally meritless.

The essential function inquiry is a question of fact for the jury, and an employer cannot elevate any job requirement to "essential function" status simply by putting it in a written job description or policy. *See Brown*, 827 F.3d at 613 (holding that the "essential function" issue was a factual question for the jury despite the employer's argument that the job description "establishe[d]" that the employer "consider[ed] the CDL requirement to be an essential job function"); *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1191 (10th Cir. 2003) ("[A]n employer may not turn

every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description.")

Union Pacific cites *Basith v. Cook County*, 241 F.3d 919 (7th Cir. 2001), claiming that this Court "reasoned that an employee's affidavit unsupported by the record could not overcome deference to the employer's judgment about essential functions." Br. at 36. But in *Basith*, the affidavits at issue did not provide any evidence *conflicting* with the employer's description of essential functions. *Basith*, 241 F.3d at 928. Here, in contrast, Mlsna's testimony about Union Pacific's actual practices *flatly contradicts* Union Pacific's description of essential functions.

Evidence regarding essential functions routinely comes from the plaintiff—particularly where, as here, the plaintiff is testifying to actual, on-the-ground working conditions. *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 604 (6th Cir. 2018) (fact question on the job's essential functions where the employee presented evidence that the job description was inaccurate). Testimony from the employee is not "somehow inherently less credible than testimony from an employer."

EEOC v. Ford Motor Co., 782 F.3d 753, 773 (6th Cir. 2015) (en banc) (Moore, J., dissenting). "Employers, just as much as employees, can give testimony about whether a particular function is essential that is 'self-serving' or not grounded in reality." *Id.* A court's "role is not to assess who is more credible." *Id. See also Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 704 (7th Cir. 2011) (stating that a court may not weigh conflicting evidence or make credibility determinations at the summary judgment stage); *Wright v. United Parcel Serv., Inc.*, 609 F. App'x 918, 920 (9th Cir. 2015) (holding plaintiff's testimony about her on-the-job experience established a dispute of material fact in the essential functions inquiry).

(3) Union Pacific's job description does not compel the conclusion that wearing hearing protection is an essential function.

Union Pacific argues it "manifested [its] judgment" that wearing hearing protection is an essential function by "includ[ing] the hearing protection mandate throughout the job description." Br. at 35. But Union Pacific's job description actually does just the opposite. While the "generic" job description covering conductors has a section specifically identifying the "essential job functions that an employee must be able to

perform with or without reasonable accommodation," wearing hearing protection is conspicuously absent from that list. D.E. 51-2 at 1–2. Union Pacific's hearing protection mandate resides several sections later under the heading of "work conditions." D.E. 51-2 at 4. The express identification of many functions as essential certainly supports the inference that functions not so labeled are not essential. *See Cremeens v. City of Montgomery*, 602 F.3d 1224, 1229 n.2 (11th Cir. 2010) (noting that "canon of *expressio unius est exclusion alterius* applies to exclusive lists); *Delta Min. Corp. v. Big Rivers Elec. Corp.*, 18 F.3d 1398, 1405 (7th Cir. 1994) (applying doctrine to interpretation of written contract).

(4) Wearing hearing protection is not a fundamental attribute of the job.

There are other reasons still to reject Union Pacific's argument. The ADA suggests that essential functions are "fundamental," as opposed to marginal, such that a job would be "fundamentally altered" if such a function was removed. *Ford Motor Co.*, 782 F.3d at 762. "A job function is essential when 'the reason the position exists is to perform that function.'" *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 579 (4th Cir. 2015) (quoting 29 C.F.R. § 1630.2(n)(1)). A job function may also be deemed essential because a "limited number of employees [are]

available among whom the performance of that job function can be distributed," or "[t]he function [is] highly specialized." *Shell v. Smith*, 789 F.3d 715, 717 (7th Cir. 2015) (citing 29 C.F.R. § 1630.2(n)(1)).

These provisions suggest that essential functions go to the fundamental attributes of the job. Qualification standards are addressed elsewhere in the ADA. 42 U.S.C. § 12112(b)(6). Those provisions supply rules for evaluating "safety-based qualification standards," such as considering "the magnitude of possible harm as well as the probability of occurrence." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 996 (9th Cir. 2007).

All of this demonstrates that Union Pacific's hearing protection requirement is not an essential function. No one would claim that "the reason the position exists is to" wear hearing protection. 42 U.S.C. § 12926(f). Nor is wearing hearing protection a "highly specialized" function or one that only a "limited number of employees" can perform. *Shell*, 789 F.3d at 717.

Mlsna's experience bears out the same point. He did the job for nearly ten years without wearing hearing protection. No one argues that Union Pacific's hearing protection policies are necessary to *do the job* or

even do the job safely. Employers are certainly free to adopt measures above and beyond what the law requires to protect the long-term health of their employees. But those measures do not fit comfortably within the concept of an *essential job function*. Instead, they must be evaluated under the ADA's core operative provisions. Does the policy discriminate? 42 U.S.C. § 12112(a). Can the policy be modified through reasonable accommodation? *Id.* § 12112(b)(5)(A). Would such an accommodation "impose an undue hardship" on the employer? *Id.* Is the policy a "qualification standard[]" that "tend[s] to screen out…individuals with disabilities"? *Id.* § 12112(b)(6). If so, is the policy "job-related" and "consistent with business necessity"? *Id.* Does the policy pose a "direct threat to the health or safety of other individuals in the workplace"? *Id.* § 12113(b).

These are the questions that Congress intended to guide the resolution of cases like this one. They demonstrate that Union Pacific's attempt to short-circuit the ADA by classifying every employment policy as an essential function committed to the employer's sole judgment should be rejected.

(5) Union Pacific's own noise sampling data shows that hearing protection is not an essential function.

Union Pacific tries to explain away its own sampling data showing that no thru-freight conductors have been exposed to harmful noise levels (as the FRA defines them) within nearly 20 years. This Court should not vindicate Union Pacific's excuses. The data shows what it shows. And it utterly fails to support Union Pacific's claim that wearing hearing protection is an essential job function.

Union Pacific first claims that Mlsna failed to mount an argument below based on the noise sampling data. Br. at 40. Not so. Mlsna's response to Union Pacific's summary judgment motion contains a lengthy criticism of Union Pacific's interpretation of the data. D.E. 72 at 5–6. It explained, in part:

> Union Pacific has relied on a study that includes nearly four decade old data on local conductors who wore dosimeters for less than an hour…[i]n the study on which Union Pacific has relied, only nineteen thru-freight conductors who worked for Union Pacific wore a dosimeter for eight or more hours within the last decade. Of those conductors, none were exposed to an eight hour TWA of ninety or greater decibels.

D.E. 72 at 5–6.

On the merits, Union Pacific accuses "Mlsna [of] speculat[ing] in assuming" that the reason for the nearly 20-year unbroken span of samples showing noise levels below the FRA threshold was caused by quieter locomotives and not simply statistical chance. Br. at 40. The data shows what it shows; Mlsna does not have to explain the *reason* why Union Pacific's studies have not turned up a single thru-freight conductor exposed to excessive noise levels since 2001. *See* D.E. 53-5 at 1. In any event, Mlsna isn't speculating. Federal regulations *require* that all locomotives manufactured after October 29, 2007 "average less than or equal to 85 db(A)…" and require railroads to "maintain all pre-existing locomotives so that they do not reach excessive noise levels." 49 C.F.R. § 229.121(a)(1).[1] It is not speculation to suggest that Union Pacific is following these regulations. And to the extent that there is any plausible dispute as to the correct interpretation of Union Pacific's data, Mlsna still

[1] Union Pacific argues that "supposedly 'outdated' samples show exposure as high as 93 decibels (D.E. 53-5 at 7/11/2001) on the same locomotive model, the SD40-2, which was still in use long after 2007 (*e.g.,* D.E. 53-5 at 8/4/2010)." Br. at 41. What Union Pacific fails to mention is that the time weighted average for that same model on August 4, 2010 was 81 decibels—less than one half the volume, as decibels are measured on a logarithmic scale. D.E. 53-5; 49 C.F.R. § 227.5. This would suggest that the model has been "maintained" to "not reach excessive noise levels," as the regulations require. *See* 49 C.F.R. § 229.121(a)(1).

prevails. Mlsna's suggestion that data showing quieter locomotives over the past 20 years is caused by quieter locomotives is exactly the sort of "reasonable inference" that must be made in Mlsna's favor at the summary judgment stage. *Daza v. Indiana*, 941 F.3d 303, 308 (7th Cir. 2019).

If the Court wants to see an *unreasonable* inference, it should look no further than Union Pacific's interpretation of its own data. Union Pacific argues that the difference between old and new samples is "just as likely to stem from new technology as pure coincidence." Br. at 40. In other words, Union Pacific suggests that there are still plenty of time-weighted averages over 90 decibels—but by complete chance, Union Pacific just happens to have not recorded any of them since 2001.

Union Pacific's willingness to label these two interpretations as "just as likely" is itself grounds for reversal. Where "two different and equally supportable inferences can be drawn from the evidence, …summary judgment [should] be denied." *Eatherly Constructors, Inc. v. Hillin-Simon Oil Co.*, No. 92–1303–PFK, 1993 WL 21066, at *2 (D. Kan. Jan. 8, 1993).

Of course, the two competing inferences are *not* equally likely—not remotely so. Union Pacific's thru-freight conductor data shows 82 readings taken since July 11, 2001—the last date with a TWA measured at or above 90. If time-weighted averages exceeding 90 decibels are, in fact, occurring 36 percent of the time as Union Pacific suggests, D.E. 51 at 7, the chance that one was never recorded *82 times in a row* is vanishingly small: approximately one in 7,820,637,100,000,000 (calculated as .64^82). Mlsna does not "claim that the dosimetry data is unreliable," as Union Pacific asserts. Br. at 38. To the contrary: Union Pacific attacks the reliability of its *own* data. Mlsna assumes the sampling data is reliable. And the data shows what it shows: no dangerous noise levels in almost 20 years.

Union Pacific goes on to suggest that Mlsna ignored relevant data, noting that the thru-freight conductor data that appears to be from "five different railroads" came from railroads that later merged with Union Pacific. Br. at 39. These claimed mergers are not in the record. But including this data only makes things worse for Union Pacific, not better. Examining the thru-freight conductor data for all railroads shows that out of 172 readings, 22 recorded an 8-hour TWA of 90 or greater. Twenty-

one of these samples were taken between 1988 and 1992. The one remaining sample was recorded in 2001. D.E. 53-5 at 1.

Union Pacific also suggests that data for local conductors should be extrapolated to Mlsna's position. It points to "recent readings above 90 (e.g., D.E.53-6 at 6/22/2016)" for local conductors. Br. at 40. Union Pacific's use of the plural "readings" is misleading: of the 91 samples taken for "local" conductors, only *one* measured sound exceeding 90 decibels. D.E. 53-6 at 1. There are no other readings over 90 in any year. D.E. 53-6 at 1. And as the name suggests, the samples gathered for local conductors are much shorter in duration. The example cited by Union Pacific involved a 78-minute trip (on an unknown route) that was unusually noisy. But recall that "TWA" is an 8-hour time-weighted *average* sound level, calculated by a complex formula factoring in both the noise "dose" and length of time. 49 C.F.R. 227 Appendix A. In an eight-hour day, an average sound level of 91 decibels is *permitted* under the regulations for a full seven hours. *See* 49 C.F.R. 227 Appendix A, Table A-2. Thus, this local conductor data says nothing about the time-weighted averages that Mlsna, a thru-freight conductor, would likely be exposed to.

Mlnsa was hired by Union Pacific in 2006. D.E. 27 at 5. At no time during his employment did the company record any thru-freight conductor as having been exposed to excessive noise. Yet—based on this data alone—Union Pacific asks this Court to conclude that Mlsna *was* "certain to encounter" excessive noise, Br. at 41, and that there is *not even a genuine issue of material fact* on that issue.

This request is extraordinary in its chutzpah. The Court would not find probable cause to search a house based on an affidavit that said no drug dealing activities had occurred there for the past 20 years. It would not order overtime compensation based on a time study showing that no overtime was worked for two decades. It would not shut down a city's water supply when years of testing revealed no contaminants. And it should not find that Mlsna's job required him to work in a dangerously noisy environment when years of testing revealed no excessive noise. If this data entitled anyone to summary judgment, it was Mlsna.

Union Pacific cites no authority for its claim that Mlsna's supposedly "novel theory" requires expert testimony. What Mlsna offers here are commonsense inferences drawn from the evidence, not a scientific theory. The Court is fully capable of reviewing an employer's

sound survey without the assistance of an expert—indeed, Union Pacific offered it without any. *See* Fed. R. Evid. 701 (requiring expert testimony for *opinions* where expert's specialized knowledge will help the trier of fact understand the evidence); *Clyma v. Sunonco, Inc.*, No. 03-CV-809-K, 2005 WL 8153788, at *4 (N.D. Okla. Jan. 21, 2005) (finding there was a question of fact about a plaintiff's noise exposure sufficient to defeat summary judgment on the essential functions question where the employer's sound survey did not show that a majority of the facility had unsafe noise levels).

Finally, Union Pacific claims that even if its sampling data shows no exposure to harmful noise, *it does not even matter* because "[t]he Seventh Circuit 'has long championed an employer's right to make its own business decisions, even if they are wrong or bad.'" Br. at 38–39 (quoting *Green v. Nat'l Steel Corp., Midwest Div.*, 197 F.3d 894, 899 (7th Cir. 1999)). Union Pacific is citing the so-called "honest belief" rule. That rule relates to the "pretext" analysis in discrimination claims. It holds that an employer can defeat a discrimination claim based on a non-discriminatory justification—even it that justification is later revealed to be mistaken. If, for example, an employer fired someone because she

believed in good faith the employee falsified timecards, and it eventually turned out the employer was mistaken, the falsification justification would still support a lawful termination. *See Green*, 197 F.3d at 900.

There is no "honest belief" or business judgment rule giving employers license to define a job's essential functions under the ADA. An employer's judgment is given due weight in the analysis. *Dunderdale*, 807 F.3d at 853. But other factors matter, too, including actual practice in the workplace. And where, as here, an employer's claimed judgment is fatally undermined by its own data, it provides ample reason for courts to reject that supposed judgment.

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

The district court also erred in concluding that meeting the FRA's hearing acuity standards while wearing hearing protection was an essential job function for hearing-impaired conductors. Union Pacific's defense of the district court's conclusion suffers from three flaws—each of which is sufficient to warrant reversal. First, Union Pacific abandons the sole argument it made below. It no longer claims that Mlsna failed the FRA-mandated hearing exam. Union Pacific now argues, for the first

time, that it was enforcing a more stringent standard. This argument is waived. Second, Union Pacific's hearing exam protocol discriminates against hearing impaired employees. At a minimum, essential job functions must be uniformly applied. And third, Union Pacific's ultra-stringent hearing exam protocol would not be essential even if it applied evenhandedly.

(1) Union Pacific waived any argument that it adopted more stringent hearing exam policies than those required under the FRA regulations.

Union Pacific's argument that it was simply enforcing a more stringent hearing exam protocol is waived.

In the district court, Union Pacific made one—and only one—argument with respect to the administration of hearing exams. It argued that, under the FRA regulations, passing the hearing exam while wearing hearing aids was insufficient to be certified as a conductor. Instead, "Union Pacific 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.

Union Pacific no longer attempts to defend its erroneous reading of the FRA regulations. Rather, now—for the first time—Union Pacific

argues that its hearing acuity requirements are more stringent than federal requirements and that meeting this heightened standard is an essential function. It explains, "[T]he district court rightly observed that 'the standards set by the FRA present the floor, not the ceiling, for safety procedures'…Union Pacific can require more stringent requirements both for acuity *and* hearing protection." Br. at 46. It further quotes the district court's statement that "Union Pacific's failure to provide plaintiff with a certificate is irrelevant to his ADA claim." Br. at 28. In other words, Union Pacific argues that *even if* Mlsna should have been certified under the FRA requirements, Union Pacific was *still* permitted to terminate his employment because it was free to enforce more stringent policies.

This argument was never raised below. It was made for the first time by the district court on behalf of Union Pacific in its order denying Mlsna's motion to reconsider. Union Pacific waived this argument by failing to raise it in the district court. *Varner v. Illinois State Univ.*, 226 F.3d 927, 936 (7th Cir. 2000); *Garlington v. O'Leary*, 879 F.2d 277, 282 (7th Cir. 1989).

(2) Union Pacific's hearing exam protocol discriminates against hearing impaired employees.

Union Pacific dresses up its discriminatory hearing exam policy in neutral-sounding language. But Union Pacific's description of that policy establishes its discriminatory nature beyond any doubt.

Union Pacific claims it holds all conductors to the same standard, requiring them "to meet the FRA acuity standard either with unaided hearing *or* when using an approved AHPD." Br. at 43. This description elides the central problem. Union Pacific's test gives hearing impaired employees a much more difficult task: meeting the acuity threshold while wearing hearing protection.

It is not difficult to come up with other examples of similar discrimination. Imagine an employer required all welders to pass a vision test. Any employee who can achieve 20/40 vision without glasses passes the test. But for employees who would need to wear their glasses to pass, the employer requires them to take the test while wearing welding goggles. The goggles provide some limited vision improvement, but those gains are more than wiped out by the light blocking character of the

goggles. The vision-impaired employees must pass a tougher test. The same is true of Union Pacific's hearing-impaired employees.

Indeed, Union Pacific's policy actually ensures that some employees who *pass* Union Pacific's test will have *greater hearing loss* on the job compared to the disabled employees who fail. Consider two hypothetical employees to drive the point home. Smith wears hearing aids. With his hearing aids in, he has no hearing loss. Without hearing aids, his "average hearing loss in the better ear" is 41 decibels—just shy of meeting the FRA acuity threshold. While wearing standard earmuffs and hearing aids, Smith's average hearing loss in the better ear is 30 decibels.[2] While wearing Union Pacific's approved Pro Ears Gold device, his average hearing loss in the better ear is 56 decibels. Union Pacific will not certify Smith. Now consider Jones. Jones does not wear hearing aids, but he does have some mild hearing loss: his "average hearing loss

[2] Union Pacific argues that "[e]ven Mlsna's own experts agree that conductors should not wear hearing aids beneath protective devices." Br. at 44. That statement is half true, half false. Mlsna's experts agreed that hearing-impaired employees should not wear hearing aids under *AHPDs*. That arrangement would involve two separate amplifying devices—the hearing aids and the AHPD—which could lead to unpredictable results. D.E. 46 at 16; D.E. 47 at 15. But Mlsna's experts expressed no discomfort with wearing hearing aids under standard hearing protectors. *Id.*

in the better ear" is 39 decibels—just good enough to meet the FRA acuity threshold. When Jones wears the same standard earmuffs as Smith, however, his hearing is attenuated an additional 30 decibels: his "average hearing loss in the better ear" is now *69 decibels*. Union Pacific *will* certify Jones—the employee whose hearing loss while wearing hearing protection is far worse than Smith's.

Mlsna does not "misunderstand the purpose of an AHPD" by referring to it as "hearing protection." *See* Br. at 43. Union Pacific goes so far as to describe the Pro Ears Gold as "functionally a hearing aid that happens to provide protection." Br. at 46. In fact, the opposite is true: the Pro Ears Gold is hearing protection that provides some, limited amplification. As Union Pacific's own expert acknowledged, it provides 30 decibels of noise reduction and a maximum of 15 decibels of amplification. D.E. 48 at 4. Indeed, Pro Ears "targets their AHPD products for hunters" and "makes no mention" of the device's "appropriateness for use by individuals with hearing impairment." D.E. 48 at 4. Because the Pro Ears Gold blocks more sound than it amplifies, anyone who fails Union Pacific's exam with unaided hearing is doomed to fail it again while wearing the Pro Ears Gold device. The fact that

Mlsna's hearing was *better with his unaided ears* than with this device, D.E. 53-1 at 10, was not Mlsna's personal failing. Rather, it was the direct result of Union Pacific's failure to provide an appropriate device for hearing-impaired employees.

Ultimately, only one fact matters: Union Pacific does not require all conductors to meet the FRA's acuity threshold while wearing hearing protection. Thus, Union Pacific plainly requires disabled employees to undergo more stringent testing than its non-disabled employees and, as a result, its testing policy is discriminatory on its face. *See Bates*, 511 F.3d at 988 (explaining that hearing standard was "a *facially discriminatory* qualification standard because it focuse[d] directly on an individual's disabling or potentially disabling condition") (emphasis in original).

Union Pacific tells this Court that "[p]assing the acuity test without hearing aids means that the individual can still meet the FRA threshold when wearing a protective device like earmuffs." Br. at 43. That claim is baseless. If a conductor's unaided hearing puts him just over the FRA threshold, and the conductor puts on hearing protection—which reduces the ability to hear—the conductor would not be able to reach that

threshold while wearing the device. The FRA standard requires that "[t]he person does not have an average hearing loss in the better ear greater than 40 decibels…." 49 C.F.R. § 242.117(i). A standard pair of hearing protectors with 30 decibels of attenuation would effectively cause an additional hearing loss of 30 decibels. Only test-takers with perfect or near-perfect hearing—0 to 10 decibels of hearing loss—could still pass the test while wearing hearing protection. The majority of test-takers would fail. Union Pacific essentially asks this Court to assume that, among the thousands of conductors who passed the test unaided, all have perfect or near perfect hearing. The competing inference is stronger: that these employees have varying hearing abilities.

If Union Pacific *in fact* believed it was essential for a conductor to meet the FRA standards while wearing hearing protection, Union Pacific would require all conductors to undergo auditory testing *with* hearing protection to ensure that they can do so. But it does not. Instead, Union Pacific assumes that nondisabled employees are good enough while setting up disabled employees to fail by forcing them to undergo testing *with a device that makes their hearing worse.* In light of its actual, discriminatory practices, Union Pacific's testing policies cannot be

considered essential functions. *See Stern*, 788 F.3d at 285–86 (explaining that courts "look to evidence of the employer's actual practices in the workplace" in determining whether a particular duty is an essential function); *Ford Motor Co.*, 782 F.3d at 766 (essential functions must be "uniformly-enforced").

Union Pacific criticizes Mlsna's observation that Union Pacific prohibits conductors from wearing hearing aids on the job. Br. at 15. It cites testimony asserting that "[a] conductor who does not meet the FRA minimum hearing standard with unaided hearing but does meet the standard with Hearing Aids, then the employee can wear hearing aid [sic] in areas where hearing protection is not required…[h]owever, in order to be allowed to work as a conductor, this person is also required to meet the FRA minimum hearing standard using an AHPD…." Br. at 15.

This situation could never occur under real-world conditions, however. Union Pacific restricts the use of hearing aids by ensuring that no one who actually *needs* them to pass its test can become a conductor in the first place. It is as if an employer said, "Disabled employees are free to use wheelchairs in flat areas. But to get the job, everyone is required to get to the second floor of the building by (1) walking up the

stairs or (2) wheeling up the stairs in a wheelchair." Permitting the hypothetical use of assistive devices but making it impossible for anyone who uses such devices to get the job is tantamount to banning them altogether.

(3) Meeting the FRA's hearing acuity threshold while wearing hearing protection is not an essential job function.

Even assuming Union Pacific enforced its hearing protocol evenhandedly, it would still not be an essential job function.

As Union Pacific now effectively concedes, the FRA regulations do not require employees to meet the acuity thresholds while wearing hearing protection. As explained in Mlsna's principal brief, that decision reflects the FRA's considered judgment that a conductor who can pass the hearing exam without hearing protection can hear well enough to do the job while wearing hearing protection. More stringent testing criteria—even if uniformly applied—would be non-essential job functions.

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

Even if Union Pacific's policies are treated as essential functions, the company still failed to reasonably accommodate Mlsna's disability.

A. Mlsna Could Have Been Accommodated With the E.A.R. Primo Device.

Union Pacific's rejection of the device Mlsna proposed, the E.A.R. Primo, demonstrates Union Pacific's misunderstanding of the available technology and misplaced reliance on the "noise reduction rating," or NRR, as a metric.

Though Union Pacific acknowledges that there are multiple ways to determine the amount of attenuation a device applies, it concludes—without providing any reasoning—that the "noise reduction rating" method is "the only one relevant here." Br. at 6. It then insists that "[w]ithout knowing the NRR, Union Pacific cannot determine the protection that the device offers." Br. at 52.

The NRR only factors into one possible method of measuring attenuation identified in the governing regulations. Union Pacific may have found that using the NRR was the "most convenient" way to determine the attenuation offered by a device. Br. at 7. But Union Pacific is not entitled to insist on an unwavering policy of maximum convenience when it conflicts with the need to accommodate a disabled employee.

Union Pacific also cherry-picks quotes from Mlsna's experts to make it sound as if they agreed that the noise reduction rating or

attenuation could not be determined for a custom "active" device like the E.A.R. Primo. Br. at 21–23. The owner of E.A.R., Inc., Barry Gordon, was asked this question repeatedly at his deposition and consistently maintained that while the NRR is determined *while* the device is in the "off" position rather than the "on" or "active" position, once the electronics are turned on, the NRR is "still there." D.E. 70 at 12. He was exceedingly clear that the amount of noise reduction does not change once the device is active. D.E. 70 at 12.

Additionally, Union Pacific observes that the district court rejected the testing done by Dr. Kloss of the Ear Primo because his report was "silent about the level of *hearing protection* offered by the tested device." Br. at 54. In fact, Kloss's testing was *not* silent about the hearing protection offered by the device. Kloss's report states that the custom earplugs "were manufactured with a maximum output limit set at 85db." D.E. 86-1 at 2–3. In other words, the device was manufactured so that no sound over 85 decibels could reach Mlsna's ears.

B. Mlsna Could Have Been Accommodated With Another Device.

Union Pacific also argues that the other devices proposed by Mlsna's expert should not be considered because he did not propose them

during the interactive process. Br. at 57–58. But this conclusion presupposes that Mlsna—not Union Pacific—was responsible for the breakdown in the interactive process.

And, in fact, Mlsna's experts were able to identify devices that met every one of Union Pacific's stated requirements. In particular, the "Impact Pro Industrial" earmuff had amplification that went up to 82 decibels and a noise reduction rating of 30 decibels. Unlike the Pro Ears Gold—a device with minimal amplification that was designed for hunters—the Impact Pro actually *was* "both a hearing amplification device for those with impaired hearing as well as a hearing protective device for those same individuals." D.E. 49 at 1. The Pro Ears Gold also had a noise reduction rating of 30 decibels. D.E. 48 at 4. Union Pacific's own expert explained that with that noise reduction rating, Mlsna would need about 25 decibels of amplification to pass Union Pacific's test. D.E. 48 at 4. Since the Impact Pro Industrial provided that much amplification and more, Union Pacific's claim that Mlsna did not put forward any evidence that an appropriate device existed is particularly difficult to understand.

C. Mlsna's Benefits Application Is Not Evidence He Was Not Qualified.

Union Pacific argues in a footnote that Mlsna is not qualified because of statements made in an application for disability benefits. Br. at 47 n.7. The district court did not address this issue in its opinion, and Union Pacific has waived this argument by raising it in a perfunctory manner here. *See G. Heilman Brewing Co. v. Joseph Oat Corp.*, 848 F.2d 1415, 1419 (7th Cir. 1988); *Hershinow v. Bonamarte*, 735 F.2d 264, 266 (7th Cir. 1984).

At any rate, Union Pacific appears to misunderstand the doctrine of judicial estoppel and, in fact, incorrectly cites *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 797 (1999), as "holding" that "an ADA plaintiff's sworn assertion in an application for disability benefits that she is unable to work appears to negate the essential element of her ADA claim that she can perform the essential functions of her job." Br. at 47 n.7. This is a quotation from the above case, but not a "holding." In fact, the Court *overturned* the decision of the Fifth Circuit, which had granted summary judgment on the basis of the plaintiff's claim that she was totally disabled for Social Security disability purposes. *Cleveland,* 526 U.S. at 807. The Court held that "pursuit, and receipt, of SSDI

benefits does not automatically estop a recipient from pursuing an ADA claim or erect a strong presumption against the recipient's ADA success." *Id.* at 795.

The doctrine of judicial estoppel does not apply here because Mlsna withdrew his application before receiving any benefits and, thus, did not convince the government to adopt his position. D.E. 72 at 19; *see 1st Source Bank v. Neto*, 861 F.3d 607, 612 (7th Cir. 2017).

And Mlsna's statements on the application were not actually inconsistent with his ADA claim. The benefits application, filed on January 22, 2016, lists January 9, 2015 as the date when his medical condition began to affect his ability to work and prevented him from working. D.E. 53-2 at 3, 10. But Union Pacific removed Mlsna from service because of his medical condition *before* that date. D.E. 51-7 at 1.

CONCLUSION

The district court's judgment should be reversed.

Date: April 8, 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 6,967 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.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 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.

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