

U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)



Issue Date: 30 April 2008

CASE No.: 2006-AIR-16

AVINASH YADAV
Complainant,

v.

L3 COMMUNICATIONS CORPORATION,
Respondent.

APPEARANCES:

Bradley K. Glazier, Esq.
Grand Rapids Michigan
For the Complainant

Mark R. Smith, Esq.
Grand Rapids Michigan
For the Respondent

Before: THOMAS F. PHALEN, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the provisions of the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21 Act” or “AIR21”), 49 U.S.C. Section 42121. The regulations that govern this matter appear at 29 C.F.R. Parts 18 and 1979.¹ These provisions protect employees from discrimination by air carriers, or their contractors or sub-contractors, for attempting to carry out the purposes of the AIR21 Act. Involved in the present matter is an aircraft part manufacturer subject to regulation under the

¹ Amendments to 29 C.F.R. Parts 18 and 24, adopted by congress since the hearing in the present matter, affect six ground transportation industry whistleblower provisions. Some relate to use of AIR21 (49 U.S.C.A. 42121) and the Federal Rail Safety Act, (49 U.S.C. § 20109) until new regulations are adopted for those covered, but do not substantively amend AIR21, its implementing regulations or the present decision and order. (See, The Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007))

Federal Aviation Administration (FAA), and the Occupational Health and Safety Administration (OSHA), or any other provision of Federal law relating to air safety, concerning which Complainant alleges discrimination because he has engaged in protected activity pertaining to a violation of an order or regulation under those provisions.²

On December 27, 2005, Complainant, Avinash Yadav, filed a discrimination complaint with the Occupational Safety and Health Administration (OSHA) under the AIR21 Act, 49 U.S.C. Section 42121, and 29 C.F.R.1979.³ The complaint was investigated, and, on May 15, 2006, was found by the Investigator to have not been supported by the persuasive evidence. On June 15, 2006, Complainant, through counsel, certified that he mailed his objections regarding the findings of the OSHA investigator, which had been postmarked on May 17, 2007, including a request for a *de novo* hearing. Pursuant to an order of the undersigned dated September 14, 2006, as amended on January 26, 2007, the hearing in this case was held on March 6 – 9, 2007 in Grand Rapids, Michigan. (ALJX 1-2)⁴ Both parties were represented by counsel, were given an opportunity to present evidence and arguments, and were allowed to submit briefs, which were timely filed by the parties. After considering all of the arguments, briefs, and all of the documentary and testimonial evidence, the following is my recommended decision and order. It includes the following issues, findings of fact and conclusions of law.

ISSUES

1. Whether the complaints of the Complainant were timely filed within the 90 day statute of limitations of the Act.
2. Whether Respondent committed adverse action against Complainant in response to protected activity under the AIR 21.
3. What damages and remedies, if any, the Complainant is entitled to as a result of the adverse actions taken by Respondent.

FINDINGS OF FACT

Stipulations:

The parties have stipulated and I find that:

² Respondent concedes that Complainant's complaints relate to software development standards which would fall within the jurisdiction of the FAA Software Assurance Standard, "Software Considerations in Airborne Systems and Equipment Certification," DO-178B, and that the allegation of Complainant of such a violation is protected by the Act, but "adamantly" denies any related violation of the AIR21 Act. (Fn.1, p.6 of its pre-hearing statement.)

³ Complainant's Statement of Complaint stated that it was filed on December 22, 2005. December 27, 2005 is the date of the OSHA time stamp, which is the actual filing date. (CX 2)

⁴References to the exhibits of the Administrative Law Judge, and the Joint, Complainant and Respondent exhibits, and to the official transcript will be designated, "ALJX", "JX", "CX", "RX" and "T" with the exhibit or page number following the designation.

1. The Office of Administrative Law Judges, U.S. Department of Labor has jurisdiction over the parties and the subject matter of this case.

2. Respondent, L3 Communications Corporation, is engaged in interstate commerce and is an employer subject to the provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act, (hereinafter, AIR21) (49 U.S.C. A. Section 42121), 49 U.S.C. A. § 40121 [corrected to 42121], 29 C.F.R. Part 1979 and the procedural regulations governing the hearing 29 C.F.R. Part 18.

3. Complainant, Avinash Yadav, is now, and all times material herein, [corrected to insert omission: “has been”] an “employee” as defined in 29 C.F.R. Part 1979, 49 U.S.C. Section 42121. The regulations that govern this matter appear at 29 C.F.R. Parts 18.

4. Complainant was an employee of Respondent during the applicable periods in that he was employed as a engineering manager – validation and verification of navigation software from October 18, 2004.

5. Pursuant to §42121 of the AIR21 Act, [corrected to insert: “Complainant] filed a complaint dated on December 27, 2005 with the Secretary of Labor alleging that Respondent discriminated against him in violation of Section 42121 of the AIR21 Act (49 U.S.C.A. § 42121).

6. The original complaint filed with the Secretary was timely.

7. Following an investigation, the Regional Administrator, Occupational Safety and Health Administration, issued findings on the complaint dated May 15, 2006, and postmarked on May 17, 2006.

8. Complainant mailed an appeal and request for hearing to the Chief Administrative Law Judge, U.S. Department of Labor, Washington, D.C. on June 14, 2006.

9. The appeal of the complainant satisfied the 30-day time constraints provided by 29 C.F.R. § 1976.106(a).

Background:

The L3’s “SmartDeck” Product Background:

Complainant, Avinash Yadav, testified that SmartDeck was known in the industry as “an integrated cockpit system” which was a “more modern computerized cockpit” system, while the “older generation cockpit” display was “cluttered with a number of electro-mechanical gauges.” He described the new SmartDeck system’s size and appearance as being “bigger than a bread box,” holding “a number of components,” which, themselves, “are computer boxes.” Several of these were integrated to “interact” or “talk” with each other, over an aircraft network similar to “an IT network” seen in our offices. The system would include a box containing the flight

display, with a “great deal of embedded software” such as the “primary flight display” which is “the pilot's primary instrument” for determining whether the plane was “pitching” up or down, or “turning or rolling;” another, known as the “multi function display,” typically used for transmitting “an assortment of other information” such as maps, charts and other such information, and other specific instruments such as the one showing the aircraft’s speed. It was also being designed to eliminate or reduce weight from the aircraft, now recognized as a major factor in an aircraft’s “improved reliability.”

Respondent Vice President, Wendy Ljungren, added that while the control aspects were through another company's equipment, the SmartDeck product was part of a system that navigated and provided displays for use in a four seat aircraft. In addition, L3 was pursuing a customer that would use it in a six passenger aircraft.

Complainant’s Background:

Avinash Yadav:

Complainant, Avinash Yadav, herein called “Mr. Yadav ,” “Yadav ” or “Complainant,” was hired in September 2004, and started work at L3 on October 18, 2004, as Manager, Engineering – Validation & Verification by Respondent, L-3 Communications Avionics Systems (L-3 Avionics), a/k/a L-3 Communications Corporation, at the L3 Avionics division headquarters in Grand Rapids, Michigan, herein called, “ the Respondent,” “the Employer,” “L3 Avionics” or “L3.”⁵ He initially reported to Mark Mishler, Director of SmartDeck Engineering, which was engaged in the production of aircraft cockpit flight instrument panels. This production process was, and is, governed by numerous health and safety regulations including those of both the Federal Aviation Administration (FAA) and the Occupational Health and Safety Commission (OSHA).

Education: Mr. Yadav received a Bachelor degree in Electrical Engineering in 1984 and a Masters (MS) degree in Systems Science and Mathematics degree in 1989, both from Washington University; an MBA in Management from Southern Illinois and a Graduate Certificate, International Affairs from Washington University, the last two having been received in 1992.

Employment History: Mr. Yadav had previously been employed at three Fortune 500 aircraft manufacturing companies. Prior to accepting employment at L3, he was an Engineering Department Manager for four years at General Dynamics Corporation (GD) in Sterling Heights, Michigan. At GD, Yadav managed a staff of sixty systems engineers and analysts engaged in the development of software-intensive and defense applications, and participated in an expansion of the engineering department. Before this he spent four years, as a Senior Engineer/Project Manager, at the Boeing Company, in Long Beach, California. There he served in certain high level technical positions, such as chief engineer and project manager, in which he led teams involved in research and development of information systems, and software-intensive programs such as “fly-by–wire” flight control systems. He began his engineering career as an Operations

⁵ See, JX 3, the September 21, 2004 Offer of Employment, and, JX 4, the October 18, 2004 “Agreement” signed by Mr. Yadav, on his first day of work at L3.

Research/Systems Analyst, at a third well-known aircraft manufacturing company, McDonnell Douglas, Corp. There he served as an analyst on the F-15E military aircraft and the National Aero-Space Plane (NASP). He also developed and operated flight control systems, and received the Outstanding Technical Accomplishment Award for his work.

Witness Credibility: In general, from observation of Mr. Yadav's appearance, behavior and demeanor, both on and off the witness stand during the hearing and its breaks, I found his testimony to be "spontaneous" (notwithstanding obvious preparation), knowledgeable straightforward, consistent and respectful to both counsel and the undersigned – with one important reservation. This involved the "rectitude" with which Mr. Yadav perceived his professional knowledge and opinion of "reverse engineering" and the "misrepresentations" by L3 to the FAA that acted as a roadblock in his ability to provide the actual empirical data that might have substantiated his claim.

L3's Management Team's Background:

Charlie Schafer:

Charlie Schafer was the Chief Operating Officer of the parent company, L3 Communications, Incorporated, located in New York, N.Y., and the President of the Products Group which would be a group of avionics and mostly defense companies. While he played a significant role at various points in this matter, he did not testify in this hearing.

Adrienne Stevens:

Adrienne Louise Stevens was the President of L3 Avionics, located in Grand Rapids, Michigan. She was promoted to this position when L3 bought Avionics from BF Goodrich. She started in sales with BF Goodrich in 1993, and served as Manager of Business and General Aviation Sales, Manager of Regional Airline Sales, Vice President of Sales and Marketing, Business Unit Director, and Director of Sales and Marketing. When she was Business Unit Director, she had some oversight for engineering.

L3 (formerly known as Avionics Division), was first started in the 1960's as a division of Learjet. After going through some name changes L3 Communications purchased the Avionics Division in 2003. L3 manufactures electronics for the general aviation industry, the air transport market and the military market. It has about 550 employees with four facilities located in Grand Rapids, Columbus, Phoenix and Fort Lauderdale.

As L3 Avionics President, Ms. Stevens reported to Charlie Schafer at L3 Communications, in New York. She holds a Bachelor of Science in Engineering Technology from Western Michigan, but does not have a graduate degree. Ms. Stevens testified that she interacted with Mr. Schafer on the phone a couple times a week, and she saw him at least once a month. When at the New York office, they discussed all aspects of the business including the SmartDeck project.

Those directly reporting to Stevens between 2004-2005 and involved in this case were Wendy Ljungren-Vice President of Engineering, Doug Pell-Vice President of IT and Finance, and Kathleen Margo-Director of Human Relations. In September of 2006, Ms. Ljungren's title changed from Vice President of Engineering to Chief Technology Officer, and Ms. Stevens hired a new Vice President of Engineering, Terry Flaishans, which Ms. Stevens insisted was not a demotion for Ms. Ljungren.

The credibility of President Stevens was impressive and consistent until she began describing complainant's position regarding the mismanagement of the SmartDeck program. At that point she seemed ready to decide that Yadav should leave before anyone else reached that conclusion. Despite company policy Stevens assumed the "originator" role initiating an ethics investigation regarding Yadav's claim of misrepresentation of the Software Development Plan submitted to the FAA. Pursuant to regulations in the Ethics Guidelines, she rejected advice from Human Resource Director, Kathy Margo, for Yadav to be interviewed and be allowed to suggest witnesses as part of the ethics investigation.

Wendy Ljungren:

Vice President Wendy Ljungren began her employment on March 1st of 2004 which was about six months before Mr. Yadav was hired. She had undergraduate and masters degrees in Electrical Engineering. Reporting directly to Ms. Ljungren were several engineering managers and one engineering director, Mark Mishler, who was in charge of the SmartDeck product at that time. Mr. Yadav reported to Mishler until a reorganization at the end of 2004, when Yadav began reporting directly to Ms. Ljungren, and remained in that reporting position until his termination on September 30, 2005. Later, after L3 hired a new VP of Engineering into Ljungren's former position and changed her title, Ljungren left L3 for a better position at Smiths Aerospace, where she was employed as Director of Systems Integration and Platform through the date of the present hearing.

Ms. Ljungren's background in commercial avionics consisted of 20 years with Honeywell, working on business regional and general aviation aircraft (mostly of "Part 25," larger class aircraft) costing 5 to 30 million dollars, involving integrated "whole cockpit" systems, with "higher criticality" equipment. She was also both a DER (FAA Designated Engineering Representative)⁶ for Honeywell, and a consultant for systems safety and software at "Level A," the highest level that Honeywell had. Her Honeywell organization was considered "best of class" under related FAA Regulation in general process compliance, for which she performed over 40 sample audits, while maintaining excellent compliance within her group.

Ljungren did not remain a DER while at L3, and had actually resigned that position in Honeywell due to higher management duties which were not within her group. She considered performing DER duties within one's group as an inherent conflict of interest, since the DER is paid by the employer, but also represents and has such fiduciary responsibilities for the FAA.

⁶Yadav testified that a "DER" is someone that has been deputized by the FAA to act on its behalf in the development and certification process of a company; that he was not a DER at the time of his employment, and that he was not aware that Ljungren had served as a DER either at Honeywell, or at L3.

This is due to the fact that the FAA does not have time or staff to cover all of these facilities, so it delegates these responsibilities to the DERs of aircraft companies. It is the same for every DER, including L3's DER, Cheryl Dorsey.

Friction that existed between Ljungren and Yadav was manifested in Ljungren's testimony. Apparently, Ljungren was frustrated by her inability to achieve an effective approach to make the most of Yadav knowledge and experience to dissipate the logjam that plagued the SmartDeck project. Early differences with Yadav were patent and communicated verbally rather than in written directives. While her credibility was seldom in question, she was defensive that her management exchanges directing specific performance actions by Yadav were not executed and did not produce results she hoped for.

Kathleen Margo:

Edith Kathleen Margo is the Human Resource Director for L3 Avionics Systems in Grand Rapids, Michigan, reporting directly to Ms. Stevens. Her educational credentials include Bachelor of Arts degree in Group Social Science from Grand Valley State University in Grand Rapids, and a Masters in Management from Aquinas College.

Ms. Margo was the most direct of the primary witnesses. Whether she was testifying about Complainant, Ms Stevens or Ms Ljungren, she did so in an accurate and professional manner with a steady demeanor that never altered or faltered. She pointed out to President Stevens that Yadav should be involved in the Ethics investigation that Stevens decided be the "originator." Further evaluation of this matter is discussed in the Ethics investigation section of this decision.

Mark Mishler :

Mark Mishler began his employment at L3 in August, 2003 as Director of Engineering. His educational background included a Bachelor Degree in Electrical Engineering, as well as a Masters in Business Administration, with an emphasis on Finance, and "almost" a Bachelor Degree in Computer Science. Prior employment experience involved managing various types of product development programs which included software elements at BF Goodrich and other companies in the aviation defense area.

Beginning his employment as Director of Engineering at L3, he became involved with the SmartDeck product which at this point already had a prototype in place. Regarding this project, Mishler had two roles: (1) the programmatic role as far as writing the programs and schedule of SmartDeck, and (2) a supervisory role over the management team responsible for development of the project, which included Yadav.

Mr. Mishler's testimony was done via live video teleconference. I found Mishler to be a cautious witness and somewhat guarded in his testimony, particularly regarding his review of Yadav's three month evaluation. I attributed this to the fact that he was still an employee at L3. There were no contradictions by him of any material presented in his memoranda or emails.

Eddie Young:

Eddie Young started with L3 Avionics as a contractor. In February of 2005 he became a direct employee when he was hired as L3's Technical Director for the SmartDeck program at L3's Columbus location. He graduated from the University of Toledo in 1988 with a Bachelor of Science degree in Electrical Engineering, and he had completed course work for a Master of Science in Electrical Engineering degree, at Wright State University in Dayton, Ohio.

Young testified that he, Mishler and Yadav were all "peers." Young and Mishler were on the development side, with Mishler, primarily performing program management activities, and Young, charged with integrating the software into the product, which was more involved with development. Yadav was in charge of the validation and verification and all three of those reported to Ljungren.

Yadav's Employment at L3:

Ms. Ljungren confirmed that both she and Mr. Mishler interviewed Mr. Yadav and were involved in the decision to hire him. On September 20, 2004, L3 extended an oral offer of employment to Yadav, which was confirmed by letter on September 21, 2004. On October 18, 2004, Yadav signed the letter accepting L3's offer, and his employment with Respondent as "Manager, Engineering – Validation & Verification" (V&V) (JX 3), began on that day. His job responsibilities were to head up the V & V, with an expectation from his group that it was accountable for ensuring compliance with FAA requirements relative to certification of certain aircraft software products. In addition, he would also serve as Engineering Manager charged with the responsibility of managing all other employees in his department, something that was "typical in engineering," according to Ljungren. In that position, he was assigned to L3's SmartDeck program until he was terminated approximately one year later, on September 30, 2005, the date of the alleged retaliatory action which is at issue in this case.

After a lengthy set of questions concerning what credentials Mr. Yadav's resume did not contain, the answers did not seem to have driven L3's interviewers to either find out more about his credentials and determine whether he was really a "fit" for the V&V position that they wanted to fill, or to have deterred them from hiring him at all. Instead, after a brief set of questions on the type aircraft L3's SmartDeck system was being designed for,⁷ Respondent chose to confront Yadav's conclusions that there were some "big problems at L3" regarding "reverse engineering," and his V&V assignment by challenging his lack of "specifics" about them. (T 236)]

The Engineering Design Process:

⁷ Smaller, "general aviation" aircraft, starting with four person planes, but also working on a contract for a "bigger airplane as well".

The “Life Cycle” Stages or Phases:

In his testimony, Yadav described the stages of the engineering design process involving a “handful” of stages, typically consisting of: first, a “planning stage” to lay-out and map all stages in a cohesive fashion; second, a “requirements definition stage” to specify the requirements for the product; third, a “design” stage to conceptualize, design and architect the requirements of the new product; fourth, an “implementation” stage to implement the design principles, in hardware or software; and fifth, the “verification” stage to verify that the design meets the requirements that were initially specified for the product. Yadav maintained as an engineer that it was “a natural sequence of ... events” that was “intended to occur ...” from the requirements” stage, to the “final finished product” stage. The “requirements” stage creates the “expectation that those requirements will be implemented in the subsequent” stages “for making an assessment” in the verification stage set forth above, “as to whether they have been satisfied or not.” He emphasized that, “that order ... is important.”⁸ (T 62-63)

Ljungren enumerated a four “stage of involvements” process which was used by the FAA with the certification process as the fourth named stage of involvements. She called these stages the “formal” stages as defined by the FAA, with “gate checks” called the “stage of involvements.” Stage of involvement number one, the “planning activities” stage, was in virtual agreement with Yadav. Her stage of involvement number two, the “requirements and development” stage combined the two “requirements” and “development” stages, described in Yadav’s stages, with stage three being her “validation and verification” stage. The fourth stage which she defined as the “FAA certification package around it” stage, was the one in which the FAA gets involved. Regardless of the numbers or names of stages, the sequence of the Life Cycle is the same.⁹

Teri Litteral, a Dayton L3 Avionics Software Quality Assurance (SQA) Lead during Mr. Yadav’s tenure, until December of 2005, had a Master’s degree in Management, and defined SmartDeck Software Development (SDP) processes. In a deposition supporting Yadav’s positions regarding severe shortcomings in the SDP, she testified that SQA occurs throughout the engineering “life cycle,” including verification within both the validation and verification functions, to assure that they have performed all of the tasks outlined in the V&V plan, after following each of the other prior phases of the SDP, including “process,” “contractual” and “plan” changes. These, combined with audits of each phase, from the “Requirements” phase and the “Development” phase where actual artifacts are developed based upon the design of the

⁸ Mr. Yadav testified that he learned those steps in engineering school at Washington University in St. Louis, and has continued to develop his understanding of it throughout his career, as well as engineering institutions that have published those engineering standards. [This was not contradicted by Respondent.]

⁹ However, there is a contrast between their positions on the stages of the “Life Cycle” of engineering by Yadav, and Ljungren’s “stages of involvements”, which occurs later in the discussion of an August 26, 2005 memo of Yadav, in response to a meeting between Ljungren and Yadav on August 17, 2005. (JX 25) On memo page 1, Yadav quotes from p. 6, Section 6, of the L3 SmartDeck Development Plan (Rev C), called the “SDP” herein, which will be discussed, in relation to the “Life Cycle” actually being used in the L3 SmartDeck program. (@ p. 34, *infra.*)

“Design” phase; then a “Certification” phase. In the end the artifacts are integrated into a product with other artifacts, and tested, to insure they are being developed to plans that have been approved by the FAA. ¹⁰

Validation & Verification’s Relation to Requirement Stage:

Mr. Yadav testified that as Manager of Validation and Verification, (V&V) his department served as the “last stage” in the production process. It involved “verifying that the product as designed and built does, in fact, comply with the “requirements” that were “initially specified” for the product. While verification is not unique to the aerospace industry, he maintained that it does become more critical in industries where there's a “great deal of complexity” and “safety is a big concern.” ¹¹

Each “requirement”, he testified, has been “structured in a statement that says the system shall do X, whatever X is, or the system shall perform to a certain level.” It constitutes “a set of statements” setting forth the “types of things” necessary for “a system” that is as “complex” as that set forth above, detailed in a “specification” that is “about an inch or so thick.” (T 68-70)

Distinguishing the two “Validation” and “Verification” functions, Complainant testified that, “validation” refers to the process of “assuring” that the correct “requirements” have been established; and that “verification” involves “insuring” that those “requirements” have been “complied” with. Both are “centered” around the “requirements” which would have been adopted to provide “a set of statements” specifying the functions, features, performance capabilities, and safety capabilities of the system being developed.

In his hiring interviews, Complainant had told L3 that he “believed” he had V&V experience that was required for the job; that it was an important role in the development of a product; that without it the product could not receive FAA certification, and that V&V was an absolute and critical part of the FAA certification process. He testified that he would follow those rules and regulations in the performance of his job duties.

The “Metric,” The “Metrics process,” and the Monday Morning Marches:

Yadav explained that the term “Monday March” grew from a period of time where meetings occurred on Monday, to which each manager would report to Mark Mishler, and on occasions Wendy Ljungren would attend. Most were held by telephone, but sometimes they were face-to-face as well.

¹⁰ I have concluded that, while Ms. Litteral’s deposition testimony appears credible and tends to support Yadav on the severe problems being encountered by L3 under its SmartDeck SDP program, including issues that were being investigated under NSS investigations otherwise discussed herein, it adds little to the dispute over L3’s motivation for Yadav’s termination, despite Ms. Litteral’s speculation, without other supporting evidence, concerning alleged silencing or terminations of L3 employees, after having raised production and safety issues.

¹¹ Mr. Yadav then compared the aerospace industry, with, for instance, the food and drug and pharmaceutical industry, which the FDA regulates, and wherein, “verification” is also, “quite critical.”

The concept of “Metrics” and weekly reports that were made utilizing such a metrics concept, became important in those meetings. The reports were for identifying issues and roadblocks, and taking management actions to address them, for which an “action log,” was developed.¹²

A “metric”, according to Yadav, is “a measurement taken at various points in time to show in a measurable way the progress being made in ... any activity ...” Typically, L3 would establish a time period, then set forth, for that time period, (1) “the number of test cases needed to verify a certain set of requirements;” (2) a projection of “how many of those test cases were planned to be accomplished,” (3) and an accounting of “how many were actually prepared by that certain point in time,” including the “tracking” of them. (T 72)

Information gained by this is called “metrics progress analysis,” which could be summarized and graphically presented in report. For this, Yadav identified some PowerPoint slides dated February 11, 2005 that were prepared by his department on a weekly basis and then submitted to L3. (JX 5) (These were prepared around the transition time between reporting to Mishler and Ljungren, and showed his accomplishments, issues being faced, and what was being delivered to his group from other groups, for their “Monday March” meetings.) Other L3 report/graphs summarize week-long activity of several components of the SmartDeck system, including “high level software test case development and low level software case development.” (See pp. 764-765, JX 9); T 73)

For the August 1st SRS component, in the metric “progress flow” of the V&V function, fifteen test cases were prepared but none made it through the next stage (*i.e.*, “debugged”) nor, of course did any make it through the subsequent stages.¹³ (p. 765, JX 9; T 74) (Yadav testified that the reason why the SRS appears to be the farthest behind compared with the other two, is because it had been completely redesigned just about a month or so before the report. Still, one of the “late arrivals,” was becoming subject to V&V review.) (*Ibid.*)¹⁴

In the second a weekly metrics DCU report, (p. 766, JX 9) the component made it through more stages, in which 90 were being prepared, 70 of which had been debugged. Compared to the SRS report, they show:

¹² Yadav disagreed there were any particular concerns that his department was running unduly behind in its V&V efforts; admitted that there were times when his department was behind due to delayed arrival of requirements, and thought that such delays should not be used to characterize his department as being “unduly behind.”

¹³ A graphical representation of what should be the same information as that described above, appears on page 765 (JX 9) which has been copied in black and white rather than the original color. While difficult, its not impossible to read. Two graph lines end around the report’s August 1st date and represent the actual completion date relative to the plan. Others continue after August 1st, for test cases scheduled to be completed in November.

¹⁴ Preparation of the metrics was a collaborative effort involving his department which would provide the raw information, and another “group” under Michelle Woogerd charged with actually producing and publishing the metrics.

[T]he role of my department really could not begin until requirements were provided, which were being developed and prepared by another group. [I]t was those requirements that...[it] was my department's job to verify. Until we had the requirements we really couldn't begin the verification work, and the coming of those requirements from the other groups was consistently delayed and delayed ... which had a ripple effect in the performance of my department. (Emphasis added.)

He concluded that the L3 plan was to have certain test cases prepared by a certain amount of time, and that, therefore, “the actual preparation of test cases was significantly behind that plan because the requirements had not been provided” by other departments to his group for verification.

“Reverse Engineering”:

“Reverse engineering,” as stated in Mr. Yadav’s testimony summation, would be “having an existing product and then trying to “reverse engineer” or “back out” the design that must have resulted in the product;” that is, to “reverse engineer” the “requirement stage”, which must have been “specified” to create the product. (T 63)

As a simple example of the life cycle of engineering, beginning with a “normal” non-reverse engineering “life cycle,” Yadav testified on that a “requirement” would be thinking of an instrument that, while sitting in the cockpit of an airborne aircraft, would show the aircraft’s land speed, which, in turn, would require designing hardware and software to produce a product on which one could observe that land speed. Utilizing a similar, simple example of “reverse engineering,” it would entail sitting in that same cockpit; looking at the previous “normally” produced land speed indicator, and deciding what “requirement” (or “requirements”) in the V&V process, had been specified, that had ultimately resulted in such a product showing the airborne land speed. In other words, if the pilot wanted to have that instrument duplicated, or used to make another identical, or better instrument to do the same thing: it would have to be “reverse engineered” to reach that result.

Yadav confirmed that it was known throughout L3 that there was some “componentry” [his word] of the SmartDeck “prototype” product that was being “reverse engineered” to obtain that basic “requirement” and was then worked through the various stages to result in the final product.

Yadav acknowledged that there were acceptable uses of reverse engineering in the aerospace industry and that there were a couple of areas in the SmartDeck program he knew they were performing reverse engineering, but was not “overly alarmed” about it since it was “limited in scope.” These were “preexisting, off the shelf libraries of software code” that L3 had purchased from another company, and utilized in other “relatively stable” applications or products. At that point, he considered reverse engineering to be a preexisting application on such “a limited scale” that might involve “some risk,” but would be “limited and manageable;” and that “knowingly” doing so in that circumstance was “not a cause for alarm.”

However, Yadav became alarmed, and considered the risks “quite large,” upon learning that “virtually the entire SmartDeck project” was being reverse engineered, contrary to what had been told to the FAA. He said that what L3 had in use was a reverse engineered “prototype” product by L3’s subsidiary AYESES, in Ankara, Turkey,¹⁵ which was developed for risk mitigation purposes to quickly prove the project’s concept, but in Yadav’s opinion was developed without the rigor necessary to establish its continued airworthiness. Since the prototype was “never intended to be airworthy,” missing was the engineering rigor and documentation necessary for a continuing, marketable, airworthy product. This increased the risk inherent in the reverse engineered product to “a magnitude” that Yadav considered “quite alarming.” (T 65-66)¹⁶ He felt that this was “essentially misleading the FAA” and that the project was not being developed “with the rigor that would be expected for an airworthy, certifiable product.” (T 64-65)

Underlying his cause for concern was that the documentation would reflect the same flaw inherent in the product, and that later, when tested against the initial “requirements” they would not be revealed because “the criteria” used in establishing the elements of the “requirements” as adopted for the production of the prototype, “would match each other” and therefore not be discoverable. (T 66-67) [In other words, it is my conclusion that Yadav meant that, since the flaws had not been revealed, and were therefore, “masked” by completion of the prototype without correction, later, when the completed prototype was tested against those requirements, the flaws could not be discovered, thus presenting a potential safety risk of unknown proportions.]

When asked if he was able to point to any such flaws in the SmartDeck product that would be serious at a later time, knowing that a prototype version of the product had been installed in one of the company's test airplanes, Yadav responded that he had consistently received feedback from a supplier under his management in Turkey regarding the poor quality of these requirements. When questioned about his knowledge of the construction of the AYESES prototype by respondent’s counsel, Yadav answered only that he knew internal reports from AYESES identified deficiencies in the requirements as well as the prototype itself. (T 67) However, he did not specifically identify any flaws or explore the nature or extent of the “poor quality” issues that the AYESES report revealed.

Since Yadav reported that AYESES had discovered various deficiencies in the requirements against which they were doing their validation and verification, and since part of his validation and verification work was to monitor and administer the work being done by AYESES, it would have seemed appropriate for him to have requested the AYESES details,

¹⁵ “AYESES” was an acronym standing for Turkish words that Yadav did not recall. When Yadav assumed his SmartDeck duties, it was already providing services under contract to L-3 Avionics, including engineering development and verification work for SmartDeck’s flight display “moving map” function that would “move as the aircraft moves,” similar to GPS displays in automobiles. It’s work became significant in the area of verification for the entire flight display.

¹⁶ In response to a question by the undersigned as to whether his testimony meant that an engineer “may be buying somebody's mistake,” in such a reverse engineering process, he stated that, if that product had “safety related flaws” and was not “developed with rigor,” then following would result: “[T]hose flaws would be essentially replicated by the engineers doing the reverse engineering.”

analyzed them, raised his own objections, and presented those that were not satisfactory explanations, to his superiors in the organization. At the very least, he could have utilized the AYESES experience as a model to guide the U.S. L3 SmartDeck operation.

My evolving conclusion is that Yadav did not do enough detail probing to verify that the basic “requirements” and “specifications” were being complied with. His preoccupation with reverse engineering concerns impeded his ability to see the broader picture. I find it troubling that it was the mere fact of the scope of the reverse engineering that was bothering him, not any known flaw in the procedure or the detail of the production of the final prototype that could be identified. His job as manager was to bring documentation/hard data, not theories, to management so that changes or revisions could be evaluated and implemented in order for the product to meet FAA safety standards.

Ljungren confirmed that in her position as a DER she had become familiar with the concept of reverse engineering, but that it had been neither her group’s nor her own responsibility for it at Honeywell. As part of her FAA experience, she testified that she knew “of many groups” that had done reverse engineering, and was asked to bring them up to certification standard in its regard. Ljungren testified that she had developed or reviewed software Development Plan (SDP) language such as L3’s in its SmartDeck project.

Ljungren testified that this included her familiarity with the SDP language, and applying to the process of moving a product from requirements to certification, for which V&V plays an important role. She characterized it as possibly, “literally” being “the final bottleneck between development and certification,” which is subject to the inference that it was the final, most important step, in an aviation company’s FAA certification.

The First Few Months of Study and the “Self-Evaluation”:

The First Three Months

Yadav could not recall having been given “anything like” a job description when he started with the company.¹⁷ However, he was not overly alarmed at that, knowing that his V&V Manager position was newly created, that L3 did not have such “a more rigorous culture,” and that he was taking over certain tasks from Jerry Barofsky, who was previously performing some aspects of his role, without a V&V manager designation.¹⁸ He stated that within a month after his arrival in his company, he reorganized his department to flatten out the structure. He confirmed that the person closest to being characterized as an assistant manager was Barofsky, and that his technical leads had other folks in the technical area reporting to them. Ultimately he had the management responsibility over the technical leads and other engineers within the V&V department.

¹⁷ A review of the record documents confirms his statement. Ljungren stated that, at that time, she was not sure if Mr. Yadav was given a formal job description. She stated it was her understanding that Yadav was not reviewed formally during his employment with Avionic Systems.

¹⁸ Barofsky remained within the group after Yadav took over as Manager.

Yadav stated that he did, on occasion, discipline and counsel some of his employees regarding their performance or deficiencies in their performance. One of his direct reports, Laura Henning, was, on several occasions counseled not so much about performance, but on her behavior. She tended to be a very blunt individual and often times unnecessarily ruffled a number of people's feathers and he would have counseled toning down her demeanor. He said that while this did not rise to the level of doing it in writing, there were some that did.

Mr. Yadav's first few months revolved around studying documents, participating in meetings and having individual discussions with Ljungren, Mishler, Stevens and a number of managers, as well with most, if not all, of his reporting employees. All related to his exclusive V&V manager position and his group's participation in the SmartDeck program, the architecture and concept of the system that would be the subject of his involvement, including L3 plans and standards in place for that department, and reading and discussing general company documents regarding management policies, etc. Yadav's initial impression of management and the engineers at L3, was that the engineers and management had an expected mix of talent, with some more talented than others. He testified that he was told "again and again" that he "was brought in to help address a number of problems" that the company was facing, particularly with the SmartDeck program – the first time the company has undertaken something of that magnitude.

Yadav's feedback for the three month introduction was "[g]enerally positive," and primarily from Mishler, who typically answered questions for him from Columbus, Ohio, by telephone and in person. They communicated often by phone, supplemented by Mishler's frequent visits to Grand Rapids,¹⁹ in which he found Mishler to be very encouraging, positive and supportive. Mr. Yadav later testified that he had made up his mind to learn everything he could about the L3 SmartDeck business, but to not raise issues until he had been there at least six months.

I find this to have been a reasonable approach, to a point; but not necessarily controlling in a dire situation. The question may be, whether the problems encountered during that time period may have constituted such a "dire situation" that obligated him, as a "manager," to have stated more, sooner. (See Sun-N-Fun discussion, JX 8, 10 and 25, *infra*.)

Yadav's "Performance Evaluation":

In February, 2005, Yadav initiated a three month performance evaluation by utilizing a form available on the L3 web site. (JX 7) After completing this "self appraisal" form, he forwarded the evaluation to his supervisor, Mr. Mishler, who filled out his ratings, which Yadav testified, concurred with his own, and completed the process.²⁰ Mr. Yadav testified that he rated

¹⁹ The fact that Mishler stayed in hotels in Grand Rapids and the fact that Yadav's family had not yet moved there, for the first two or three months, contributed to Mishler's often taking Yadav to dinner, and they could discuss matters even more frequently than would be possible at later times.

²⁰ Yadav recalled seeing a later version of this document which contained his ratings, and also testified that a copy of that document was requested in the present litigation, but was not produced. [JX 7 appears to be a recreated Performance Evaluation form; one that was filled-out by Yadav on a blank copy of the form that appeared on L3's web page, to duplicate what he had entered on the original, and was submitted by him for the hearing. It was not a

himself an “E” (Exceeds Expectations) in most of the 3 or 4 page categories provided, and with an “M” (Meets Expectations) for at least two under which he wrote comments. First, under “productivity”, he wrote, “due to the learning curve involved in my first few months, productivity has not been ... as high as it can be. Should get better in the coming months.” Under “Functional Technical Knowledge,” he wrote that he was comfortable with the general engineering and management knowledge of the personnel, but that he was “still learning the specifics of SmartDeck and associated technologies.”

In Mishler’s televised testimony, he stated that, although he did not agree with Yadav, particularly in giving himself “E’s” for “exceeds expectations,” since he did not believe that any new employee of Yadav’s tenure deserved such “E’s.” However, since that evaluation was not a required one, he just placed it in his drawer, without, objection to Yadav’s insertions.

While Mr. Mishler’s criteria for rating new employees seems reasonable, I find him less than appropriate in his failure to express his reservations not only with Yadav but also to report any concerns regarding Yadav’s evaluation of his employment to his superiors. Therefore, I have concluded that Yadav’s testimony was in agreement with what he recalled about this evaluation and the manner in which he processed it. I note that Yadav did not receive any other performance evaluation comparable. to this one before he was terminated.

Ljungren confirmed in her testimony that the employee handbook listed some provisions regarding performance reviews, and that she did not perform any type of written review at three, six or nine months for Yadav, nor any other review. While she disagreed with the statement that nothing was documented regarding Yadav’s performance until after his August 17th [and 26th] memo was sent to her, she stated that if a performance problem was identified, then a more formal approach to performance should have been initiated. She also admitted that this process was not done with Yadav.

The Restructuring of the Engineering Department:

In November 2004, shortly after Mr. Yadav’s October arrival at L3 Avionics, its parent company L-3 Communications sent a “Red Team” to perform an assessment of the organization and structure of L3 Avionics. This resulted in a significant “restructuring,” effect on the SmartDeck management group. Mark Mishler became the SmartDeck Program Director and would no longer be the Engineering Director. A decision was made by management to divide the Engineering Department into two divisions: a Program Director and a Technical Director. Eddie Young was assigned the position of Technical Director. Yadav would now be the Program Director managing the software, but not the “systems” function, yet still involved with the verification of all SmartDeck requirements, both hardware and software. He was also assigned supervision of the AYESSES, division of the project since 80% of all its activities were V&V functions.

copy of the original, which was requested, but not produced, by the Respondent.]

Generally, Mr. Yadav perceived the reorganization as a positive development that would allow him to execute his own vision for the department. The change would eliminate the multiple layers of people reporting to him as the fourth layer in the chain on the organization chart. He wanted to “flatten the level of reporting relationships” to only two levels within his department, to himself from his technical leads, and from then the rest of the team to the technical leads.

Yadav continued to report to Mishler, but he was given an added “dotted line” relationship to Ljungren. Late in January or early February the dotted line of Yadav to Ljungren became a solid line, and the solid line to Mishler was severed. From Yadav’s perspective, he was then reporting directly to a “higher person in the company” than he had been prior to this reorganization.

Ljungren testified that the primary reason for the change was that Yadav was not responding properly to Mishler, and that the Directors perceived Yadav’s actions to be “finger pointing,” and, with Ljungren being in Grand Rapids, she would be “more” able to keep an eye on him. She admitted that this was not documented, but was all done verbally. I saw no evidence that this point was communicated to Yadav, at that time. Therefore, with regard to Yadav’s termination, I make no finding on Ljungren’s assertion.

The “Sun-N-Fun” Memo - Joint Exhibits 8 – April 18-20, 2005 :

Yadav had been at L3 for six month when he attended the “Sun-N-Fun” Aeronautics Trade Show in Tampa, Florida on April 18, 2005. Following the show, President Stevens sent an email asking the attendees, including Yadav, for an account of information obtained at the show concerning “competitive intelligence,” impressions concerning “other products” including “customers, market and technology;” and inviting comments on “whatever changes that we should make ... watch out for...” etc.

In Yadav’s April 20th email response to Stevens, he indicated that Ms. Ljungren, who did not attend the conference, had already begun the process of collecting inputs from the attendees; that she had called a meeting for that purpose, and that she was going to be compiling all of the inputs into a consolidated set of findings. Yadav then added these additional email comments by, citing a “big hole” at the show, resulting from the absence of their SmartDeck cockpit flight display. He noted that in earlier conversations, Stevens had expressed her eagerness to get the SmartDeck product into the marketplace and displayed at such industry events. Yadav had told Stevens that he believed that their product had the potential to be that good, and if it had been displayed at Sun-N-Fun, it probably would have “out shined” other similar products “out there.”

Yadav further wrote that the more time he spent “in this organization the more concerned” he had become about their “continued ability to get this product out there.” He then stated:

There are systemic enterprise-wide structural, organizational, leadership and cultural weaknesses of such a magnitude that I could not have imagined their full significance when I joined the organization.”

He notes that he had promised himself that he would focus on “learning and assimilating as much as possible about the state of our enterprise and underlying root causes” while doing the best job that he could within that environment, but on reaching his six months the previous Monday, he “could not stand to remain quiet” about the issues that he had encountered, any longer. With that, he requested a “confidential talk” over lunch sometime. (JX 8)

In his testimony about this email, he stated that his strongly worded critique was meant to alert Stevens about what he considered serious management issues. When he was first employed, Stevens made him aware of the weaknesses in the various management structural groups. Now that he had passed the six month time period in his employment, he felt he was ready to share his experiences and observations which he believed “echoed” her concerns.

Subsequently, Stevens met with Yadav to discuss the details of this email. Stevens agreed in her testimony that she affirmed Yadav’s conclusion about L3’s weaknesses. However, since Yadav was hired to help strengthen the infrastructure of the division and bring experience from a more mature organization like Boeing or a larger company, she felt that more was expected of him. Yadav acknowledged that he had some written notes about his observations and thoughts on the root causes and potential corrective actions, but according to Steven’s testimony he did not really express any specific suggestions on how to deal with L3’s weaknesses, and she did not get back to him as she said she would.

At a second meeting on May 3rd, Stevens spent most of the ninety minutes walking Yadav through their entire strategic plan, functional area by functional area, leading to a discussion of the state of the business and where they were on that day. In her testimony, she also remembered asking Yadav for his recommendations so that, while she was hosting an executive meeting offsite, she would be able to relate some feedback from a person they had just hired. She maintained that she received no written feedback which Yadav had agreed to do.

Later in Yadav’s termination letter, the Fun-n- Sun letter was mentioned as contributing factor in his termination memo. (JX 79) I find that while no satisfactory agreement was made on whose duty it was to provide the follow-up information for the meeting or his observation notes, he would have helped himself by responding. He certainly should have replied with the “requested feedback” information for Stevens offsite meeting of May 3rd.

The “Debacle” - Joint Exhibit 10 – April and May 2005:

A “Program Review” meeting of the SmartDeck project was held the on April 28, 2005 at the Dayton facility with L3’s corporate President, Charlie Schafer in attendance from New York. Characterized as a “debacle,” Yadav described the meeting “not going very well” as Schafer

expressed “quite a bit of unhappiness” with the presentations; then “abruptly” called the meeting to an end, and immediately left. Yadav was summarizing the issues they were raising, together at the time with asking when they were going to address the “fundamental root causes” of the issues that had demonstrated such a “lack of systems engineering and program management” once and for all, rather than continue to do so again and again as they occur and reoccur.

The next day Ljungren emailed to Yadav a list of ten items captioned “Agenda Topics” for a discussion meeting of the “debacle.” In Yadav email reply he proclaimed the list “fine,” and expressed his certainty that it would help “to address the immediate fallout from yesterday’s debacle.” (JX 10)

In Ljungren’s response to all of this, she had stated, “for the PM [Program Management] side, we will be beefing up the infrastructure to support the managers, but the expectation is the managers are managing the people to the schedules rather than a parallel PM organization. I might be too close to it, but I see it ... as more a cultural problem of ownership and accountability.” (JX 10)

Yadav was asked at the hearing whether PM was part of the engineering process. He responded, “Yes and no,” explaining that in some companies, the PM was implemented within the engineering organization, while in others it was “organizationally” implemented outside the engineering organization. As an example he cited how the PM was structured at the Rockwell Company where he was currently employed. There the PM was outside of engineering, although associated, but not necessarily “part and parcel,” with it.

Ljungren agreed that the systems design was not what it could be, but felt that they were “stuck with a fundamental issue for the initial certs.” [FAA certifications.] In terms of “being stuck with the system,” Yadav countered with the observation that this was a “stuck-with-the-system” theme that he heard from her throughout his employment, and believed that there were “several e-mails on different topics” expressing that theme from her.

Ethics Report of Laura Henning - Joint Exhibit12 – May 27, 2005 :

A May 27, 2005 e-mail from Yadav to Stevens, Doug Pell and Ljungren, entitled “Reporting,” forwarded another of the same date from Laura Henning, alerting him to a problem that she identified as the result of a recent ethics training program required by L-3 that included Sarbanes-Oxley training. (JX 12) She stated her “specific concern” to be “that the SRS development team was directed to charge to accounting codes that do not represent the work they were actually doing;” and “that there were charge numbers available for what they are doing but those numbers were running out of budgeted hours.” (p. 2, JX 12) Her e-mail warned that the failure to report suspected wrongdoing in something that she suspected or believed was wrong, was as equally wrong as actually “doing the wrongdoing” herself, and that it would subject her to being responsible for committing a violation of Sarbanes-Oxley Act.

Yadav surmised that the suspected issue about the misrepresentation of charging hours was happening in Matt Reiss' SRS department which was another component of the SmartDeck system. Even though Yadav was Ms. Henning's supervisor (see page 15), he made no attempt to investigate the matter, discuss it with Matt Reiss, or take any other corrective action. Instead Yadav forwarded it in an email to Ms. Stevens stating that he "felt obligated to do something with it," and so was forwarding Henning's concern to upper management.

In that same email to Stevens, Yadav expressed his impression that L-3's management control in such circumstances to be "dangerously weak if they exist at all." This gave rise to his concern that this was creating an atmosphere of "tremendous pressure," and expecting people "to meet objectives" which were "extremely unrealistic." (p. 1, JX 12) Yadav indicated that Henning's concern should not be taken lightly, and that the matter should be investigated. He added that, whether meritorious or not, the environment seemed ripe for the matter discussed in her message "to happen."

Stevens' response was that it would be followed up, and that Yadav's suggestions for improvement would be welcome. He testified that he did not have any further follow-up with her on that matter. He did, however, draft a response that was, as he stated in his testimony, too "overly strongly worded" so he did not send it - as was hand-written on the email chain by someone else, not him. (JX 12)²¹ However, he did later send this email draft that he had not sent Stevens to President Schafer prior to their September 20th meeting at corporate headquarters. Yadav testified that this e-mail was later listed as a performance issue in his termination memo. (JX 79).

Miscellaneous Evidence from April to August 2005 Joint Exhibits 5, 9, 11, 14, 15, & 19

Joint Exhibits 5, 9, 11, 14, 15, and 19 covered various documents regarding the Weekly Overview Reports, the statistical data involved in these weekly reports, various emails between Yadav and Ljungren as well as email correspondence with other managers in the SmartDeck program as it relates to V & V department. While both Yadav and L3 Management agreed the progress of the SmartDeck project was not meeting timeline objectives, their explanation for this deficiency was definitely different.

One relevant question in this hearing was whether or not Yadav as Manager of the V & V Department was impairing the ability of the other groups to complete their objectives. Ljungren testified that his lack of direction and tardiness in completing his reports were one of the major reasons for the bottleneck in the requirement reviews. Preparation for the Weekly Overview Meeting was often not adequate (JX 11). She said that his metrics were showing "non performance", that his reports and slides (such as JX 9) were not "up to date" and that he was not communicating with his managers and as a result they were unable to answer questions about requirements. In other words, information was not flowing between the teams.

²¹ He did not see it until it was produced for this litigation .

Yadav defended his group's overall progress by reviewing the number of late submission of other groups (August 1st report), which would as a consequence delay the metric figures of the V& V department. In fact, the examination of earlier Weekly Overviews (April 28th) records that none of the test case items for the SDS, DCU, and FD departments were completed and ready for V & V testing. A June 7th email asked Yadav when V & V would begin to show test case development. Yadav responded that it would be the end of the following week, and that reports were too "granular" and looked like there was no movement, (JX 15) with the implication that there was movement.

Ljungren and Yadav, Meeting and Memo (JX 25; JX26) - August 17 - 26, 2005:

On August 17, 2005, Yadav engaged in a conversation with Ljungren following one of their standard weekly meetings, which Respondent's counsel had characterized as a meeting to discuss his "performance deficiencies" in his opening statement. However, Yadav testified that Ljungren did not indicate to him at any point before or during the meeting that the "purpose of the meeting" was to discuss his performance deficiencies, nor did she present "any recitation of his alleged performance deficiencies." The conversation appeared to be just that: the kind of business meeting conversation that would be expected of such a meeting, rather than such a personal "review."

The discussion began about the action log which was developed as a result of these "Monday March" weekly meetings so that management could identify issues and address any roadblocks among the various SmartDeck groups. While Yadav disagreed that a particular log report listed concerns regarding his department was running "unduly behind" in its V& V efforts, he admitted that at times his department was "behind" due to the delayed arrival of requirements. etc.

Ljungren then made a reference to a third party criticism conveyed by Eddie Young, another manager scheduled to be a witness in this trial. Young complained to Ljungren that V & V metrics were not available on the network and therefore delaying progress in his department. Yadav proved this complaint was incorrect as he showed Ljungren the existence of the metrics on her computer network, and so Ljungren called Young telling him to work it out with Yadav. I find that Ljungren was not prepared to, and did not, counter Yadav's statement at that meeting, and she stepped away from that issue when Yadav showed her on the computer that he did have such metrics.

After reviewing the metrics which Young had claimed did not exist, Yadav and Ljungren discussed what the metrics were communicating. Yadav testified that he told Ljungren that the V&V test development work was being impacted by the lack of requirements being provided to Yadav's department. This resulted in Yadav's analysis concerning the state of those requirements, concluding that there was an issue as to why the company was having as many problems as it was in being able to produce those requirements, and that this was a widely known problem, often discussed within the company. They then discussed the "root causes," and what could be done to improve that situation.

This led to a discussion about the primary concern that Yadav had come prepared to raise, namely, the implementation of L3's Software Development Plan, (SDP), which formed the basis for his assertion that L3 was making "false representations to the FAA." He insisted that at this meeting these false statements, not the "reverse engineering," were his main concern. Bringing a copy of the SDP to show Ljungren, he pointed out the language that concerned him regarding misrepresentation to the FAA, as he tried to get her to read it and to "take on" that language. The general nature of her response was that, while she and Mishler acknowledged that they were not happy with the language either, that "she had resigned herself to its fact" and that she had used it and found it to be acceptable to the FAA certification authorities and to the L3 DER, Cheryl Dorsey, who had either designed or directed the drafting of the design for L3. Therefore, she did not concur with him that there was any misrepresentation in it. The discussion evolved into one of engineering philosophy and the use of the reverse engineering process, which is discussed in the memo that he sent to her on August 26th. (JX 25 & JX 26)

With regard to whether L3 was violating FAA rules before August 17th meeting, Yadav stated that he had "done his homework;" had talked with a number of people as discreetly as possible about it, and tried to avoid alarming their work force about ethics violations, and other related matters. After reading FAA documents and regulations, including FAR part 23, Subpart 1309, before that, as well as internal company documents to confirm to what degree reverse engineering was taking place, he talked with a number of people who confirmed his own beliefs about the extent of L3's use of reverse engineering in the EDP. No conclusions were reached by them at this meeting.

After leaving the August 17th meeting with Ms. Ljungren he was "quite concerned" about her failure to address his concerns "without much encouragement." Yadav maintain he consulted others (no specific names were mentioned) and decided to document his discussion with Ljungren. On August 26th, he specified his concerns to her in a memorandum, "SmartDeck Plans and Standards," attached to a same-date e-mail to her, with the subject line, "Urgent, Please Read!!" In it, he requested her review so that she could informed him if he had misstated any part of their August 17th conversation. (JX 25 - See also, JX 26, the same document received by her in a PDF form).

Yadav verified the various discussion points of their meeting and once again emphasized that the "Life Cycle" statements in the SDP were "highly misleading and served to misrepresent the truth to the certification authorities." (Att: Memo pp.1-2, JX 25). To explain his conclusion, he began by stating the "phases" or "stages" from Section 6 of the SmartDeck, Software Development Plan (Rev C):

- The software life cycles ...used for SmartDeck ... consists of two distinct phases, a prototype phase and a formal development phase,

- The formal development process consists of the following phases:
 1. Planning
 2. High-level software requirements specifications
 3. Low-level software design requirements
 4. Coding
 5. Integration and test(of components and subsystems)
 6. Software Verification

According to Yadav, L3's failure to "clearly document" the actual reverse engineering approach it had adopted in its SDP, and the fact it was proceeding in reverse order in contradiction to the order outlined in its documents to the FAA, substantiated his claim of misrepresentation. In other words the "SmartDeck program is first creating the software code" and then "it is reverse engineering the requirements from the code." Also, the stated order of the progression of the phases was not following the expected "standard, generally accepted waterfall fashion:" that is, following the numerical order in which the "phases" or "stages" were presented; which, not only was not being followed but which was being performed in the reverse order of the listing. (pp 2-3, Att Memo to JX 25 & 26). Here, Yadav raised issues that clearly were protected under FAR §523.1309. They documented issues that were raised in his conversation with Ljungren on August 17th.

However, he began documenting language that was "heavy" on the description of "misrepresentations" he perceived in the SDP document as it was applied; and did sweep it into the Ljungren approval of that engineering, with which he disagreed. His language refers to "fundamentally flawed" and "corrupt" language and approach of the SDP; readers of the SDP being "clearly misled;" "corrupt and unsound engineering practice" being followed by the SDP, which "is being covered up through misrepresentation and falsification;" having "no confidence left in the integrity" of the SDP product or "the corrupt development process" used; it all making it impossible" for him to do his job in maintaining the product's integrity;" and ending by stating: "[P]lease don't count on me to support your position." (p. 34, *Supra* ; p.3, JX 25)

Management Responds to Yadav's Misrepresentation Allegations – (JX 29 & 30):

When Ms. Ljungren made President Stevens aware of Yadav's August 26th email, Stevens fired back an email to Ljungren on September 14th with a number of comments and instructions, including matters such as: stating that his memo sounded as if he was "giving his resignation," and asked that Ljungren look into it and "think about the plan for Avinash's replacement"; that she did not see how he was "the person needed for leading such an important activity;" that the issue raised by Yadav was serious and queried whether "there is still a place for Avinash;" that she "expected Avinash's letter to become visible," and added that, therefore, she wanted Ljungren's response memo "proofed" by her; that she questioned Yadav's lack of follow-up on the Sun-N-Fun memo; that she was not satisfied how he handled the Laura Hennings ethics concern; that his letter had been prompted by retaliation; that the "formal approach" PDF style August 26th memo, she inferred was questionable, and that she consider his lateness for meetings, and other matters. (JX 28)

This began a series of email exchanges, first between Ljungren and Stevens and then bringing Kathleen Margo, the Human Resources Director, into the loop regarding how Ljungren should structure her response to Yadav's memo. (JX 29) Following a review by Stevens and Margo, Ljungren emailed her response on September 14th to Yadav's August 26th memo. (pp. 5-6, JX 30) She asked what he had learned from the FAA manager, the DER Cheryl Dorsey and SQA (Software Quality Assurance – Teri Litteral, whom he did talk to later on, confirming various safety problems with the SDP but adding little else. - CX 5) and expressed her disappointment that Yadav did not “discuss his concerns” in order to validate his conclusions with the other managers in the SmartDeck project before coming to her. She stated that she now expected Yadav to have these discussions with the SQA/FAA manager and the DER and report whether any of them considered an update necessary. If so, she had no problem doing this. (pp. 5-6, JX 30) She sent another to him on September 16th that expressed her surprise that he did not follow-up on the four she wanted contact with, and getting SDP changes to them to get to the FAA by the 20th. In it she listed a set of expectations and directions for the immediate future. (JX 32)

Ljungren restated her view that they were “in the formal development process,” of the SDP; that the SQA “#1” was done (which formally approved the SDP planning document), before the six formal steps stated in the SDP, and that, as addressed in his memo, they were done in reverse order. In defense of their SDP process, she stated that while “it was not an ideal process, the conversion of prototype code through the upgrades needed for the code to comply with the checklists (and then formal reviews) is an acceptable approach.” This process, she maintained, “had been done and accepted by multiple certification authorities on multiple projects in the past, and represented that managers and corporate officers were satisfied with the process and its protections”. Ljungren warned that if Yadav saw code development happening without requirements, he should “flag” it.

The following day, due to scheduling conflicts, Yadav and Ljungren were unable to meet as requested in her email. On September 16th, (p.4, JX 30) , Yadav responded to Ljungren's query about gathering “perspectives from Paul/Lena/Teri/Cheryl” (SmartDeck Managers). He did indicate that he had spoken to Lina Spross who provided him with “neither a solution nor a particularly enlightening perspective” and that, beyond what they had discussed, he repeated that he expected little else from the others. He further added, “I don't need any perspectives on this,” and if she (Ljungren) had “uncertainties” that required clarification, she could “consult with whomever” she liked and “follow her own tune,” but he could not accept her engineering approach. Yadav “could not and would not proceed with V & V effort unless he had some clear answers to address my concern.” (p.3, JX 30) Finally, he concluded his email by commenting that he could not both do his job and “make you happy” and had concluded that “unfortunately” he would “have to make a tough choice.” (p. 3, JX 30) This alone, I conclude, warrants the inference that if management did not comply with his course of action, he would not perform any more V & V functions, i.e. his job.

On September 19th, at 9:22 AM, shortly after Ljungren sent her final email of the chain to Yadav, at 8:19 AM, Doug Pell-Vice President of IT and Finance, who had a lengthy career in management and was often consulted by Margo on difficult matters, sent a stern letter “only” to Margo after reading Yadav's memo of August 26th. {He stated that it was “only” to her, as he

did not like to get involved in “other VP’s sensitive issues,” but that she could forward them to Stevens and Ljungren.} In it he observed that Yadav “was interjecting himself into a level of management that was well above his pay grade,” that “he is not qualified to be a V&V manager; (does not understand their process or agree with them.), and that he is “unwilling to perform his responsibility as V&V Manager,” (citing some of his August 26th quotes that I have addressed, such as that VP Ljungren should not “count on him to support” her “position on this issue” regarding L3’s SmartDeck SDP engineering Life Cycle. He called Yadav “insubordinate” and cited an overuse of a chain of “dramatic and offensive language,” and seemed “unable to separate his business processes from our business processes.” He stated that this language was either “highly offensive” or that “many people in this organization must be fired immediately.” His conclusion was that: “this guy needs to be spanked.” He even suggested that Margo ask him for a list of those that should be fired, including himself!

This letter was not given to Yadav until discovery in this case. In retrospect, I have decided that it should have been shown to him, for its accurate and honest appraisal of Yadav’s overall handling of his position, particularly after having read his documents to Mark Mishler and Charlie Schafer. It supports my conclusion that clear and convincing evidence has been presented regarding his documentary exchanges with Ljungren between August 26th and September that Yadav would have been terminated absent his protected activity.

On September 19th, Ljungren, after obviously consulting Stevens and Margo, emailed Yadav with her strongest response ever. She insisted on specific “words” from him that “need to be clear about their existing SmartDeck processes” which she did not know of his having submitted, and that were due on the next day, Tuesday, September 20th. She cited two other instances of Yadav’s failure to follow-up regarding “managers not endorsing/enforcing” their processes and “specific issues/recommendations to help improve the SmartDeck.” She then listed a collection of directives to improve their communications that she had expected Yadav to “follow-up.”) Her response ended with a well-crafted paragraph, that at least owed its existence to Steven’s suggestions in her advisory e-mails between August 26th to September 14th, (September 14th, JX 29) urging Ljungren to end on a more proper, positive note. It included such affirmations as Yadav being hired for his “significant level of experience” and his “holding an important management position.” To these, Ljungren expressed commitment to being “solution and results oriented,” thus encouraging his going “beyond offering complaints and concerns.”

Management Initiates Two Official Independent Investigations:

(1) Product Development Investigation – July/August 2005:

A report titled “NSS Review of the SmartDeck Requirement Developments” was done by the Nehemeh Systems Solution, Inc. (NSS), an independent consulting group, selected by L3 to review and investigate the status development of the SmartDeck program. On or about August 9, 2005, the findings of the report were presented to the Executive Management Group (including Mr. Schafer) by Mishler and distributed by email to some but not all of the managers involved in the SmartDeck program. The consultants concluded that the “problems found were not simply process difficulties” but “encompassed a broader set of issues” (JX 22). Since reverse

engineering and the role of V & V were also among the topics reviewed in the report, it certainly seemed a serious oversight by management that Yadav did not receive an email of this report. Later at the trial, Mishler testified that he had no explanation for this oversight but that it was not intentional.

(2) Ethics Investigation – Joint Exhibit 72 - September 20, 2005:

Kathy Margo in her capacity as L3's Ethics Officer filed a request for an Ethics Investigation on September 20, 2005. Once again, NSS was chosen and for this Ethics Investigation given the directive to perform an "independent review of the SmartDeck development process as requested by Adrienne Stevens to objectively respond to a concern raised by an Avionics system employee," Avinash Yadav. (JX 72) The issues to be determined by the review were: "(1) Is the language in Section 6 of the SmartDeck SDP misleading to the FAA? (2) Is our development approach leading to the certification of a product that will *not* be safe?"

In order to define the scope of the investigation, Stevens sought input from Ljungren and Margo as is evidenced in a number of emails preceding the investigation request. (JX 46 through JX 50) In one email, Margo was relaying information about the general format of an investigation described in the Ethics Policy handbook. The "originator" of the investigation (whom Margo initially assumed would be Yadav) should be interviewed by the investigators and questioned whether there was any reason why he or she was not satisfied with the selection of the investigator. (JX 48) Stevens testified Yadav was not included in the investigation process, since she decided to assume the role of the designated originator so that the safety and misrepresentation issues that Yadav raised could be resolved without delay.

The findings of the Ethics Investigation Report, completed by NSS investigators, Marty Maciejewski and Jody Nehmeh, and delivered to Ms. Stevens on September 28, 2005, stated:

Our conclusion is that the SDP is not misleading in any way. It does have minor shortcomings, but there is no deception in this document. The document is typical of documents submitted to the FAA by capable avionics equipment manufacturers. In addition, the processes adopted by the L3 to develop the SmartDeck system are well suited to produce safe avionics systems. (JX 71)

The following day, Margo met with Yadav and delivered the results of the Investigation Report. She stressed the review was conducted by well qualified investigators. Yadav expressed surprise at the results and requested a copy, but was told by Margo that the report had to first be sent to the corporate office. (JX 73) It appears that a copy of the report was not submitted to Yadav by management, until after his termination. Other than Yadav's present action, the record contains no other direct challenge to the procedure or outcome of either of these NSS investigations.

Yadav Meets with Charlie Schafer, - Joint Exhibits JX 39 & JX 52 - September 22, 2005:

On September 20th Yadav e-mailed L3 Communications CEO, Charlie Schafer, (JX 39) a memo with attachments and the subject heading, "Urgent, for your eyes only." In the memo outlining his concerns regarding misrepresentation to the FAA and the incompetent and corrupt leadership at L3 Avionics, he made the following statement about his current state of employment: "I need to decide whether I am going to make a commitment to stay with the L3 division or whether I should move on. I would much prefer the latter, but I honestly don't think I can continue to work under the questionable leadership of this leadership's team."

To this, he attached a May 4, 2005 letter to Schafer that he had previously written and decided not to send, (JX 12) since he felt it was too strong, and also attached Ljungren's September 19th reply (JX 30) to his August 26th memo, (JX's 25 & 26), recounting their August 17th meeting. The first attachment concerned ramifications from the April "debacle" meeting when Schafer had abruptly left it. Even then, Yadav was questioning his unsuccessful attempts to work with L3 Avionics' whether they deserved his "continuing loyalty."

The second concerned Yadav's differences with Ljungren over L3's implementation of the SmartDeck SDP plan, and their misrepresentations to the FAA about it. Ljungren's reply, he told Schafer, had "elevated his concern that his life was about to become harder," and had heightened his feelings of possible "retaliation" from Ljungren's reaction to his memo.

In reply, Schafer emailed Yadav: "I am not in the office but it sounds important so plan on coming to see me tomorrow or Thursday. Please let me know what time and when". This invitation by CEO Schafer, I conclude, confirmed authorization to travel for Yadav and negated any later objection for approval by L3 Avionics.

In the one to two hour meeting, discussing his "misrepresentation" and "reverse engineering" concerns with Schafer, Yadav called them "symptoms of underlying management issues" which were the "root causes" of L3's SmartDeck problems. While Schafer was receptive to some elements of their conversation, he did not concur with the ethics violations and misrepresentations that Yadav presented. However, Schafer did agree to review a proposal Yadav had developed outlining his solution at his next visit

Though nothing concrete was resolved, Yadav seemed to be encouraged that Schafer was willing to review Yadav's proposal.²² He forwarded two documents to Schafer under cover of a September 29, 2005 memo, "Subject: The Proposal I Promised." The first was a 48 page compilation of 48 Power Point slides, the first slide captioned: "Evolving Culture of Flawless Performance With Integrity"(JX 74) and the second, the 49 page text designed to accompany the slides, with the same title. (JX 75) In it, Yadav proposed drastic reorganization of L3 Avionics, designed to correct its deficiencies by the introduction of a Chief Operating Officer (COO), and a restructuring of that complete L3 Division. (JX 74 & JX 75).

²² I.e., that the nature of the problem was that there was a mismatch between what they were telling the FAA on the one hand and what they were doing internally on the other hand, and that the mismatch could be resolved in one of two ways: either they had to change what they told the FAA to be reflective of what they were actually doing, or they had to change their internal practice to be reflective of what they told the FAA."

At about slide 7 in the proposal, he depicts in the form of a “bulls-eye” circle graph called “The Concern”, the center representing, apparently “perfect performance,” with ascending, outer rings, from “Inefficient,” “Ineffective,” “Unethical” and “Illegal” performance, and placing L3 Avionics Systems Division (“L3 ASD”) in the outer “Illegal” ring. His proposals, centered on the “COO” position, then advanced through other proposed restructured positions, which were all designed to achieve the target’s “bulls eye” end of “perfect performance.” The presentation was extensive, and could only have been performed by Mr. Yadav’s having worked most of his waking hours to complete, for the better part of September. He stated in a September 21st email to Ljungren, that he had not recently done much work on his 48 slide Power Point presentation, but would do so for them at that time.

**Yadav’s Responses to Mishler and Shafer: What Yadav Did Not “Get,”
Understand or Appropriately Respond to - Joint Exhibits 74-75, 76 & 83: date?**

On September 21, 2005, Mark Mishler sent an email to Mr. Yadav, regarding “Specific Issues – V&V,” referring to a “previous” unspecified email, and telling him to “acknowledge areas of concern by the end of this week (September 23rd) to discuss “next Monday” (September 26th). The issues were summarized, first, by a compliment on his “careful coordination of the AYESES weekly program reviews as the catalyst driving the AYESES team” program, as an “efficient and effective communication vehicle for a large portion of the overall program.” He then discussed, “Concern Areas,” which, due to his “program management skills” he could “significantly improve” his group’s performance, and compel “leadership of the overall V&V effort to drive ownership, deliver results on time, and improve morale” within his teams. He expressed “concern” for other “areas” as their sensing Yadav’s lack of “urgency in meeting his staffing needs” while his “schedule performance” degraded; directing that he improve communications to “set a clear example of ownership, accountability, and resolution of issues,” by being prepared and well informed on the progress” of his group “in all areas”, and reminding him that they needed the benefit of his “insight and expertise by offering solutions and driving performance, instead of hiding behind the less than optimal performance of the groups feeding” his performance. (JX 76 and JX 83)

Just before Yadav’s termination meeting with Margo and Ljungren on September 30th , Yadav sent a ten-paragraph, single spaced two page email response, that Mishler had requested by September 23rd, for their September 26th Monday meeting. In this belated response, Yadav disavowed knowledge of the first paragraph of Mishler’s email in which he did specifically ask Yadav to “acknowledge these areas of concern by sending us your action plan by the end of the week,” which could only have been “sent” in writing, by “Friday” which was September 23rd, to be in time for study and then discussion at that Monday, September 26th meeting.

In his belated response, however, Yadav offered an apology for failing to do so, and addressed Mishler’s comments. After stating his appreciation for recognition that things were “going well with regard to AYESES,” Yadav stated that he had “invested a great deal of time focusing on this part” of their “work scope” and “now quite a large portion of SmartDeck,” and, in which, he was now “becoming more and more comfortable.”

Following that, Yadav acknowledged that, due to the AYESES effort, his “personal focus on the SRS and DC had naturally taken somewhat of a back seat.” He then stated that, “This was not accidental, but a conscious choice.” He then attributed this “back-seat” to “the complexities of the Flight Display as the heart” of their system, plus those of the “overseas supplier” naturally driving his attention from the SRS and DC, and offered that, what he did do, was to appoint Jerry Barofsky to act as his backup to cover those areas while he concentrated on AYESES/DC. He explained that, due to redesign, SRS and DC were not ready for V&V until recently, and while he did not see that as a “high risk” item, he recognized that the picture was changing, and resulting in a “need-shift” of their focus.

Yadav then discussed what he perceived as his “immediate plan over the next three weeks ... to conduct a red-team assessment of our V&V infrastructure” by “an outside, fresh-set of eyes”; a next week “internal assessment involving Perry Stufflebeam,” and committed to address his “staffing challenges” that were not being addressed; his accountability “to carry SmartDeck through the V&V hurdles” without being able to “work magic;” the importance that he set “clear examples of ownership, accountability and resolution of issues;” improvements on the “Monday program reviews” and communications needed between himself and his team; along with offering the benefit of his “insight and expertise” to “remove bottlenecks and mitigate risks.”

However, he could not end this somewhat late expression of his understanding of what needed to be done, without expressing that he was “outright offended” by Mishler’s rebuke regarding any suggestion that he might be “hiding behind the less than optimal performance of the groups feeding” requirements to the V&V effort.

To most of the items covered in his memo, Yadav requested “specific examples” of the shortcomings mentioned by Mishler that they should discuss and act upon.

What Mr. Yadav did not realize was that his September 30th response to Mr. Mishler, to Wendy Ljungren and to Eddie Young as well as to Adrienne Stevens, and then to Charlie Schafer, was that it was already too late. It is my conclusion that Mr. Yadav, simply, “did not get it;” and, “it” being that he had been “too late” for days; for even weeks, and, perhaps, for months, that L3’s management was “crying-out” for him to utilize his V&V experience; to be very specific with his V&V reviews; to identify what must be done at each level, in each group, as to what they were doing, and to bring that level’s production into line with the SDP plan to receive certification – even if he did not believe that the steps being followed in its utilization of the reverse engineering process were being successfully followed to produce a certified and marketable product. (See my comment on p.14 regarding Yadav’s involvement in the AYESES program and not learning the detail to apply to the prototype being produced at his location.)

Likewise I find these same performance issues confirmed in reviewing Yadav’s Power Point presentation to COO Schafer. Here again, Yadav was distracted by this endeavor from performing V & V tasks directed by management in Mishler’s email of September 21st. Instead, he was preparing a complete reorganization plan which he stated “would serve as a constructive solution to the corrupt management” at L3. (JX 39)

Yadav's Termination – Joint Exhibit 79 - September 30, 2005:

Ms. Ljungren was signatory to the memorandum document given to Yadav at the termination meeting attended by both Margo and her on September 30, 2005. (JX 79) This termination-day memorandum, which began as a “performance issue” memorandum that, Ljungren testified, was originally drafted by her without termination in mind, became the termination-day memorandum, as matters escalated in late September. Ljungren confirmed that Stevens created the first rough draft of the document with some input from Margo. (JX 70) Following the initial draft, Ljungren made a number of changes adding specific situations and names to the document. Stevens also reviewed the final draft.

After receiving his copy of the memorandum, the evidence establishes that Yadav was not given any opportunity to prepare any kind of written or verbal response, either to it or to the choices given to him, either of which would have resulted in his termination. When Ljungren had completed an account of the major areas of deficiencies to Yadav, as set forth in the termination-day memo, she concluded by saying it would be better if Yadav “left the company.” Margo explained his two options as being: voluntary resignation or involuntary termination (discharge for cause). He then left the building after returning company property. (JX 80)

The September 30th, termination-day “performance review” was a four page document listing some general statements of issues and some issues regarding so-called travel abuse which I have heretofore ruled as neither relevant nor a legitimate basis for his termination in this matter, and other specific matters that have been evaluated in the Findings of Fact.

However, those issues which dealt with Yadav's lack of response to management's requests for specific actions or reports, failure to maintain scheduling objectives for V & V, and refusal to identify or pinpoint specific wording he considered necessary to correct the SDP language, from the point in time of his August 26, 2005 memo to Ljungren summarizing his conversation of August 17th, are relevant as inferences to conclude that Complainant was refusing to carry-out specific statements of Ljungren, which, as his superior, I find amounted to “directives” to him to do so. She repeatedly stated to him that he should talk to those involved with the determinations concerning the Software Development Plan (SDP) and issues concerning misrepresentations, to sustain management's contention that Yadav was terminated for legitimate “performance” issues, as have been discussed herein. Since the major issues are discussed above, and recognizing that the original of the document was intended as an overall “Performance Review,” rather than a termination letter, I will not address every such issue here, and am assuming that the major issue concerning Mr. Yadav's termination involves his failure to perform the primary duties of his V&V Manager position, as identified by Vice President Ljungren in her September 14th and 16th emails.

Complainant's Damage Evidence:

Complainant has testified and submitted a set of documents that he prepared, as Complainant's Exhibit 1, entitled, Claimant's Damages Summary (Spreadsheet showing lost pay, fringe benefits, etc., and graph showing lost pay) which has been reviewed, but will not be considered or determined with the evidence submitted in support of the subject matter of his

case, since it is recommended in this decision and order that a finding of no violation of AIR21 be made, and that the complaint be dismissed. While admission of the document was reserved at the hearing, and I find it unnecessary to rule on the document here. However, I note that beyond related back pay, front pay and cost and damage issues that would arise in the determination of an award in such a whistleblower action as an AIR21 case, reference is made to a \$5,000.00 signing bonus that was allegedly not paid by the Respondent, along with possible travel expenses that were not reimbursed, (T 200) but which might also be considered as employment contract issues. Simply because they have been raised as possible claims in this proceeding does not mean that they expire when left untreated in this determination.

CONCLUSIONS OF LAW

A. The Statutory and Regulatory Requirements of AIR21:

1. In General:

As previously stated, this matter arises under the provisions of the employee protection provisions of AIR21, 49 U.S.C.A. § 42121, and its whistleblower regulatory provisions at 29 C.F.R. §1979.101 *et seq.* (Only numbered section and subsections will be referenced herein, such as §1979.102(b)(1)-(4), which covers the elements of air carrier obligations and prohibited acts.) It protects employees from being discharged by any air carrier or its contractors or subcontractor, or discriminated against in any other manner, for providing information regarding “violations or alleged violations” of an “order, regulation or standard” of the FAA or other Federal law relating to air carrier safety under AIR21. (See, Footnote Nos. 3 and 4, *supra.*)

In several cases since the passage of AIR21 and adoption of its regulations, the Administrative Review Board (ARB) has addressed, distinguished and elaborated upon the procedures necessary for the effective filing of an AIR21 complaint before OSHA at the investigation stage, and the specific obligations, inferences, and burdens placed upon the parties at the second or adjudicatory stage, for a hearing before an Administrative Law Judge, which then may be reviewed by ARB. In *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006), ARB restated the procedures and evidentiary burdens applicable to an AIR21 whistleblower complaint, which had been previously detailed in *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 6-18 (ARB Jan. 30, 2004).

(a) The Investigatory Stage:

To begin an investigation under §1979.103(a) – (d) an employee need only file a written complaint with OSHA containing a full statement of all the acts and omissions alleged to have happened to him or her in violation of AIR21 by the air carrier, subcontractor or subcontractor as the respondent or “named person” in the complaint. This must include the related dates believed to have constituted a violation of AIR21, and be filed within 90 days after an alleged violation occurred or was communicated to the employee by the respondent.

An OSHA investigator examines the complaint's content to determine whether an inference of unlawful discrimination has been properly alleged under AIR21. If so, allegations are investigated to determine whether Complainant has established a *prima facie* "showing" that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint under §1979.104(b). Sufficient evidence must show or infer that, (1) the employee [Complainant, herein] engaged in protected activity or conduct; (2) the named person [the Respondent, herein] knew or suspected, actually, or constructively, that the employee was engaged in protected activity; (3) the employee suffered an unfavorable personnel action; and (4) the evidence is sufficient to raise a reasonable inference, that an AIR21 violation, has occurred. (29 C.F.R. §1979.104(b)(1)(i)-(4); *Brune v. Horizon Air Industries, Inc.* (*Supra.*) and *Peck v. Safe Air Int'l, Inc* (*Supra.*))

If the complaint has not been dismissed for failure to allege or establish a *prima facie* showing, sufficient to raise an issue of a violation of AIR21 as set forth in § 1979.104(b)(2), the parties may submit direct or circumstantial evidence to support the burdens of their respective positions. If Complainant's evidence is sufficient to warrant an inference that a violation has been shown to prevail, Respondent must submit "clear and convincing evidence" that it would have taken the same unfavorable personnel action in the absence of Complainant's protected activity, in which case, regardless of the stage of the investigation, the complaint must be dismissed, notwithstanding complainant's *prima facie* showing of a violation.

The Director may then determine whether a violation of AIR21 has occurred and to either dismiss the complaint or issue the findings and preliminary orders appropriate to the findings under §1979.105(a)(b). If dismissed, or at the appropriate stage under that section, having made a determination that showing of a violation has been established, either of the parties may file a request a formal, *de novo* hearing before an administrative law judge, at the Office of Administrative Law Judges (OALJ) (§1979.105(a) (b), in Washington, D.C.

In the latter situation, absent dismissal, the Director must issue the findings and a preliminary order complaint, and, absent compliance by the Respondent transfer the case to the Department of Labor's Office of Administrative Law Judges for the *de novo* hearing on the matter. The Administrative Review Board of the Department of Labor then, upon petition of the parties, reviews recommended decisions and orders of the Administrative Law Judges since the enactment of AIR21 and, now its related regulations, and to refine the various steps, burdens and standards required of the parties in these hearings.

(b) The Adjudicatory or Hearing Stage:

In general, under 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a).and established case law, once having established the protected aircraft industry employer/employee status, at the *de novo* adjudicatory hearing stage, the complainant has the burden of proving by a preponderance of the evidence that the protected activity or conduct, contributed to the adverse personnel action. *Clemmons v. Ameristar, Inc.*, ARB Nos. 05-048. 05-096, ALJ No. 2008-AIR-11 (ARB June 29, 2007).

In addition, ARB stated in *Brune*, (*supra*), that the “familiar Title VII” “burden shifting” standards may be employed for “analyzing and discussing pretext framework where Complainant initially makes an inferential *prima facie* case of circumstantial evidence.” At that point, respondent produces its business explanation; complainant counters with credence and pretext proof by a preponderance of the evidence, and respondent must answer by proving by “clear and convincing evidence” that it would have taken the same unfavorable personnel action in the absence of protected activity – the same as in the final response of respondent under AIR21.

2. The Present Case:

In the present matter, the Assistant Secretary determined that there was no showing, (no reasonable inference) that a violation had been established to believe that the Respondent had discriminated against the Complainant in violation of AIR21, and the complaint was dismissed. Complainant filed objections and a timely request for a hearing postmarked on May 17, 2006, and a timely request for a formal hearing in this case was filed by the Complainant on June 14, 2006.

For this hearing, Respondent has stipulated and acknowledged that Mr. Yadav was an “employee” of the Respondent; that he has “engaged in protected behavior or conduct;” namely, the raising safety concerns regarding its SmartDeck Software Development Plan (SDP) under the provisions of FAA Regulations (FAR § 23.1307) and that Respondent had “knowledge” of that protected activity.

Respondent has also conceded that it must defend Complainant’s allegation regarding its motive, that his protected behavior or conduct was a contributing factor in the termination of his employment by Respondent, if such activity or conduct is determined to have contributed to this unfavorable personnel action by a preponderance of the evidence. This differs from Claimant’s burden of merely presenting a “showing” or “inference” that it was such a contributing factor to L3’s termination of Mr. Yadav at the investigatory level, which he did not do. Respondent’s position is that it has demonstrated by “clear and convincing” evidence (a higher burden of evidence than a preponderance of the evidence) that it would have taken the same unfavorable action in the termination of Mr. Yadav, in the absence of any protected activity, thereby fulfilling its obligation under the provisions of 29 C.F.R. §1979.109(a), and that Complainant’s complaint must, therefore, be dismissed.

Here, both Yadav and L3 have invoked certain Title VII standards and precedents in their discussion of the evidence. Complainant offers Joint Exhibit 79 and Terri Litteral’s testimony as direct evidence, and then as circumstantial evidence of L3’s motive that establishes that Yadav’s protected activity contributed to his termination. Respondent relies upon Joint Exhibit 79 as part of the production of its business reason for terminating Complainant. If I determine that Complainant’s case rests upon evidence that establishes a *prima facie* case under Title VII authority, then, under *Bruni* (*supra*, @ Sl. Op. 13) “the employer’s burden ... is one of *production*, not proof, under which Respondent need only ‘articulate some legitimate, nondiscriminatory reason’ for its actions.” At this point, L3’s burden would only be “to rebut the presumption of discrimination by producing evidence why it” terminated him – which it has

done: Mr. Yadav was terminated by L3 for not fulfilling the duties of his position as Validation and Verification Manager. “Its burden of *proof* arises if, and only if,” [Yadav] “has proven discrimination by a preponderance of the evidence.” (*Ibid.*)

a. Complainant’s AIR21 Burden of Proof:

I find that, Respondent, having stipulated to Complainant’s engagement in, and its knowledge of, his protected activity, admits that part of Mr. Yadav’s objection to Respondent’s adoption and use of its SmartDeck Software Development Plan (SDP) involves the raising of air safety issues under FAA Regulation §23.1309, as an element of his objection, related to the SDP’s expanded use, and its alleged misapplication and misuse, of reverse engineering on the SmartDeck prototype. To analyze Yadav’s allegation that the raising of this protected objection to the expanded use of his safety concern to Ljungren, (JX’s 25 & 26); as it contributed to his adverse personnel action of terminating him, I must first examine the legitimacy of the employer's articulated reasons for his termination in deciding that issue, and then determine whether it has been established by a preponderance of the evidence that the protected activity contributed to the adverse action.

Then, but only if the Complainant has proven discrimination and a violation of AIR21 under *Clemmons v. Ameristar*, (*supra*) by a preponderance of evidence; or, under Title VII, by first, showing or producing an inference of a *prima facie* case, as stated in *Peck (supra)* and affirmed in *Bruni (supra)*²³, and then defeating Respondent’s production of its business explanation by proving by a preponderance of the evidence that the business reason was either unbelievable or was advanced as a pretext for the employer’s business reason, does the employer face its burden of proof. It may only avoid liability under AIR21, if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in the absence of protected behavior. 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). *Cf. Dysert v. United States Sec’y of Labor*, 105 F.3d 607, 609-610 (11th Cir. 1997) (“demonstrate” means to prove by a preponderance of the evidence). §1979.109(a).

For the reasons set forth herein, I find that Mr. Yadav has produced an “inference” that the two – protected activity and adverse personnel action - are related, in that the timing or “temporal proximity” of certain actions, and other circumstances surrounding, his termination, do create an inference that his raising of the protected activity did contribute to his termination, and that under Title VII standards this does raise a *prima facie* showing of a violation of AIR21. However, Respondent states that Complainant was terminated, not for raising the safety issues that he did, but for not fulfilling the duties and obligations of his Validation and Verification Manager position. Respondent advances compelling business reasons as the real reasons for Yadav’s termination, including repeated failures to produce information for President Stevens for other deadlines that affected action and meetings; for Vice President Ljungren, regarding the Monday March meetings, and for not discussing matters regarding implementation of the SDP with group managers, and for not being correct in his assessment of the SmartDeck Software

²³ Brunni cites to Black’s Law Dictionary to adopt a common definition of “Preponderance of the evidence” to be “[t]he greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”

Development Plan implementation. Mr. Yadav responds by “showing” circumstances surrounding actions of L3 management, that are not without viability and consideration on their own merits. Some of these are so serious, as to rise to the level of establishing by a preponderance of the evidence that the protected activity did, indeed, challenge the credence of L3’s management’s reasons for terminating him, thereby contributing to the decision to terminate him.

Foremost among the reasons advanced for terminating him was a September 29th determination received by President Stevens from an “outside” investigation team, “NSS,” that was engaged by her to respond to an Ethics Investigation, that I have concluded - and find - was initiated by Mr. Yadav’s having raised the possibility of such an investigation by a higher level of L3 in an email to HR Director Margo, but which was “taken over” by Ms Stevens, and influenced by her; and that, contrary to the objections raised by Yadav, found that the use of the L3 SmartDeck Software Development Plan (SDP) was neither misleading nor unsafe. My finding contradicts the contention of Respondent that L3 President Stevens who claimed and maintained that it was she who was responsible for the investigation, and was, therefore, the “Originator” of it, within the meaning of the L3 Ethics Conduct Policy, (JX 85, herein called the “Ethics Policy.”) I find that this statement was incorrect; that it was needless, and that it had a significant effect on the nature of the investigation, if not its outcome.

I find that it was Mr. Yadav’s action in objecting to the adoption and use of the SmartDeck Software Development Plan (SDP) to Vice-President Ljungren in his meeting with her of August 17, 2005, and his follow-up email memorandum of August 26th discussed above, (*supra*, p.22; JX 25 & JX 26) recounting his raising of the defects and safety considerations of the misuse of the SDP, and alleged misrepresentations to FAA certification officials and potential customers about the SmartDeck SDP, that gave rise to the Ethics Investigation, under L3’s Ethics Policy, and is detailed in the Findings of Fact. Yadav’s objection had to do with his perception of how the SDP had been written, and implemented to its written form. At issue was Yadav’s alleged contrary application of its two-phased “Informal” and “Formal” engineering “Life Cycle,” “phases” or “stages” discussed above and then implementing a reverse order of its published “Formal” phase that was contained in six “sub-phases.”, (*supra*, p. 24) or “stages” to separate them from the “Informal” and “Formal” phases, which were being used in reverse order of how they were listed. This reverse procedure, Mr. Yadav charged, was being misrepresented to the FAA and potential customers on how the SDP was being applied to the SmartDeck “prototype,” or product that had been previously developed by a predecessor company to Respondent L3 Avionics, and was being “reverse engineered” to establish a “code” from which a later SmartDeck product was being engineered. While he did not object to its limited use, Mr. Yadav was philosophically opposed to widespread use of “reverse engineering,” which he felt was being employed at L3.

As previously discussed, (*supra*, p. 27) HR Director Margo attempted to point-out to President Stevens, that she, as the “Originator” of the investigation, was choosing NSS as the investigator, under the terms of L3’s Ethics Policy when Yadav was the “Originator” under the Ethics investigation. Stevens maintained that it was she that was initiating the special investigation based upon the two questions that had been raised by Yadav, and she wanted to get to get to the bottom of those questions without the involvement of any other of L3’s

Management – which I took to mean that she wanted answers separate from Ljungren or Yadav. She apparently considered Yadav’s own issues as something separated from this inquiry, but finally, and reluctantly, admitted to Margo that the two investigations had merged into one. However, due to possible delay, she did not change her mind about the obligations of the “Originator” that she kept for herself, refusing to acquiesce in Margo’s admonition that Yadav should be considered the “Originator,” and be consulted in the selection of the investigator, which employee the investigator should talk to, including Yadav, under the Ethics Policy’s directives. Stevens did neither.

On the day before Yadav’s termination, the NSS investigators issued its determination and ruled in favor of L3’s positions on the wording and application of Software Development Plan (SDP). (JX 71) It found that the SDP, while it did have “minor shortcomings” there was “no deception in this document;” and that it followed the guidelines recommended by FAA DO-178B. It concluded that, “the processes adopted by L-3 to develop SmartDeck system are well suited to produce safe avionics systems;” that, *inter alia*, “the current process has the checks and balances necessary to achieve the required quality and safety levels” (p. 1, JX 71) and that it had recently passed an audit of the FAA. (p. 2, JX 71) The problem is, that areas were discussed that Yadav had expressed his opinions upon. Yet both the investigations and the report, were devoid of what might have been the contrary input of Yadav to the value of the final report.

Despite President Steven’s possibly laudable goal in trying to determine for herself whether there was something wrong in the development or use of the SDP (which she did want after there had been a prior study by another contract investigator earlier in the year), what she did in administrating the September 2005 Ethics Investigation, just before Yadav’s termination was altogether inappropriate and jeopardized merits of the investigation. Her action was prejudicial to the independence of the investigators, and both could, and did affect her determination to continue consideration of Yadav’s termination. The timing of it was abysmal, and lent to the conclusion that the two – the outcome of the NSS investigation, and Yadav’s separation and lack of participation in it, were related. The fact is that Yadav did not get to state what he wanted to state when he sent his letter to Margo about convening such an investigation even if it was not at the L3 Communications level that he wanted. How could she possibly justify that, and utilize the report for the reasons intended to gainsay his charges that the SDP was being misused or misrepresented?

There could, therefore, be no other conclusion but that this chain of events, which involved protected activity by, and behalf of, Mr. Yadav, was at least “showing” that it had contributed to the unfavorable action of his termination by Respondent, and would seemingly invoke a conclusion that Yadav had established a *prima facie* case by a preponderance of the evidence.

However, two factors remain that have not been determined by this prior conclusion, both intimately related to his termination. One is that the conclusion of the above investigation did not relate directly to Mr. Yadav’s termination, from the standpoint of its result. That determination was not something akin to a personal grievance arbitration that was addressing his conduct, a personnel action or the reason for his termination. It was solely to determine who may have been “right” in a dispute between Mr. Yadav and L3’s management over the

application of certain engineering principles to the L3 SmartDeck SDP. It was more in the nature of a philosophical determination about issues concerning how the business was run, or would be run in the future that was at issue in this NSS investigation; in particular, addressing some of the limitations of professional opinions on the use of “reverse engineering” in the development of an aircraft part prototype that might affect the operation of an aircraft, and how such applications should be chosen, governed and administered within the FAA regulations that govern such matters.

In this regard, it is not for an Administrative Law Judge to make such a determination in this type of a case. *i.e.* to decide who is “right” or who is “wrong” in such an issue. Indeed, arbitrations, and even court decisions have been made in such circumstances, when such issues have been presented in a forum convened to resolve such disputes. Such is not the case, here. The obligation here is solely to determine whether an employee who raises a safety issue such as Mr. Yadav raised here, finds that his protected conduct has contributed to an unfavorable personnel action taken against him contributed to his unfavorable action, his termination, because of his raising of the protected issue.

The second factor remains, that this involved matters not directly related to the NSS investigation which was Yadav’s own failure to perform all of his duties as V&V Manager. This leads to an evaluation of Respondent’s evidence concerning Yadav’s performance of his duties as V&V Manager.

b. Respondent’s Burden of Proof:

For reasons that are set forth herein, I find that, by clear and convincing evidence, the reason for Mr. Yadav’s termination was not for his raising of the safety issue regarding of the use of the SmartDeck Software Development Plan (SDP), but for his failure to perform the duties and obligations of his Validation and Verification Manager position, as offered by Respondent as the reason for his termination, and this was Respondent’s primary defense. I find that he was hired to utilize his education, experience, knowledge and skills to assist management by every aspect of those qualifications, to find out why the SmartDeck project was not as successful as management would have wanted. As Mr. Yadav became conversant in the language of L3’s employees, he learned what every employee at every level of performance in that organization must have known, that the SmartDeck SDP “prototype” was not performing successfully. Being an important aircraft part, at every level, if marketed without a resolution of issues in the production of the product, its failure would invoked the possibility of a disastrous incident, with ‘safety’ at the heart of every engineering decision. That is why the cited FAA regulations were written.

In the final analysis Mr. Yadav has not met his burden of establishing a substantial, reasonable basis for his belief that his raising of safety considerations regarding the adoption and implementation of the Software Development Plan (SDP), in L3’s implementation of the reverse engineering into the “Life Cycle” of the engineering process, as above stated, was sufficient to overcome Respondent’s clear and convincing evidence that he would have been terminated, that it would have taken the same unfavorable personnel action in the absence of a any protected activity, because he refused to perform the duties of his Validation and Verification Manager

duties. This is cautioned by him in his August 26th memo to Ljungren, when he first tells her that what he has stated in the memo “makes it impossible for me to do my job in maintaining the integrity of the SmartDeck V&V effort,” and ends by stating: “[P]lease don’t count on me to support your position.” (p. 34, *Supra* ; p.3, JX 25)

On September 16th, Yadav replied to Ljungren’s response, repeating the above factual findings, with regard to her query about gathering “perspectives from SmartDeck Managers Paul Mianovich, Lena Spross, Teri Litteral and DER Cheryl Dorsey, he had spoken solely to Lina Spross and had gotten “neither a solution nor a particularly enlightening perspective” and otherwise he stated that he expected little else from the others. Most importantly, he added, “I don’t need any perspectives on this.” If Ljungren had “uncertainties” that required clarification, he said, she could “consult with whomever” she liked and “follow her own tune,” but that he could not accept her engineering approach. He indicated that he “could not and would not proceed with V & V effort unless he had some clear answers to address my concern.” (p.3, JX 30), and, commenting that he could not both do his job and “make you [Ljungren] happy” and he concluded that “unfortunately” he would “have to make a tough choice.” (p. 3, JX 30)

Following this, Ljungren addressed a stern letter to Yadav on September 19th, in which she repeated some of what she had said on the 14th, and gave him the several directives, with which he did not comply. He was a week late in complying with some detail for the next Monday’s March meeting. (See the discussion regarding Mishler’s letter of the 21st requesting specific information to be to Mishler, by Friday, September 23rd, so that Mishler could use it in the meeting on the 26th, which was not provided by Yadav until September 30th – his termination date, as discussed herein!)

As I have stated above, from the statement of Yadav to Vice President Ljungren, the overall tone of this reply warrants the inference that if management did not comply with his course of action, basically in destroying the SmartDeck prototype, or product, presently under production under that SDP, he left Ljungren with a justifiable impression, which I now consider to be a warranted inference, that he would either not perform any more V & V functions on the SmartDeck Software Development Plan; or he would resign, or L3 management could remove him from his job and/or terminate him.

Motivation and “temporal proximity” (Timing):

While “temporal proximity,” or the timing, between the whistleblowing activities and adverse actions taken against a complainant, is sufficient to establish a *prima facie* case in discrimination litigation, *Tyndall, supra*, citing *County v. Dole*, 886 F.2d 147 (8th Cir. 1989); *Bartlik v. United States Department of Labor*, 73 F.3d 100 (6th Cir. 1996) in *Hadley v. Quality Equipment Co.*, 91-TSC-5 (Sec’y Oct. 6, 1992), the Secretary indicated that although a sequence of events occurring in a short period of time may invoke an inference of causation, it is still necessary to examine the events as a whole in determining whether the ultimate question of whether a complainant has proved by a preponderance of the evidence that the retaliation was a motivating factor in the adverse action. In other words, an administrative law judge may decline to find retaliation, notwithstanding the short proximity of events, if other facts show that complainant would have

been fired had he not engaged in the protected activity. *Hadley, supra*, (employee engaged in a stream of obscene behavior immediately prior to adverse actions by employer); *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 (Sec’y Mar. 4, 1996) (complainant was fired for being out of his work area rather than his protected activity even though there was temporal proximity between the protected activity and discharge).

In the present case, motivation may be inferred from the timely sequence of events related to the raising of AIR21 regulatory safety issues involving issues reasonably raised by Yadav’s open criticism and raising of his perceived safety concerns regarding the SmartDeck SDP process, reverse engineering and reversal of the steps of the “Formal” Life Cycle to establish codes before the “requirements” in the production of the SmartDeck product, on or between August 17th and 26th, as confirmed on September 14th and September 19th, and September 30th, the date of his termination by Respondent. However, as stated above, and under *Hadley, (supra)* and *Jackson (supra)* it is my conclusion that it has been established by clear and convincing evidence, that not only did Yadav threaten to stop performing important aspects of his V&V Manager position if the SmartDeck project was not altered to meet his demands as expressed to Vice President Ljungren, but that he actually stopped performing his Validation and Verification Manager duties, as above described. Notwithstanding his visit to Charlie Schafer in New York, which I have found to be a right that he had at his level of management when his dispute was with the two persons between Mr. Schafer and him, and upon his call to Mr. Schafer in which Schafer did invite Yadav to meet with him in New York – which Yadav and Schafer did on September 21, 2005; but that otherwise, Mr. Yadav did not produce requested information that Mr. Mishler had requested for their Monday meeting of September 23rd, nor did he talk to any but one of the managers that Ms. Ljungren directed him to do, or find out the specific information necessary to support his non-support of the SmartDeck SDP process, and that this all provided clear and convincing evidence that temporal proximity or timing was not established as a factor necessary to defeat the clear and convincing evidence of the reasons for his termination.

Yadav’s September 30th Response to Mishler’s September 21st Letter, and Yadav’s September 29th Proposal That He Promised for Schafer:

These matters were reviewed in the Findings of Fact. (pp. 29-31, *supra*) On September 21, 2005, Mark Mishler sent an email to Mr. Yadav, regarding “Specific Issues – V&V,” referring to a “previous” unspecified email, and telling him to “acknowledge areas of concern by the end of this week (September 23rd) to discuss “next Monday” (September 26th). On September 30th, Yadav sent a ten-paragraph, single spaced two page email response, that Mishler had requested by September 23rd, for their September 26th Monday meeting. In this belated response, Yadav disavowed knowledge of the first paragraph of Mishler’s email in which he did specifically ask Yadav to “acknowledge these areas of concern by sending us your action plan by the end of the week,” which could only have been “sent” in writing, by “Friday” which was September 23rd, to be in time for study and then discussion at that Monday, September 26th meeting.

In his belated response, however, Yadav offered an apology for failing to do so, and addressed Mishler’s comments; stated that he had “invested a great deal of time focusing on this

part” of their “work scope” and “now quite a large portion of SmartDeck,” and, in which, he was now “becoming more and more comfortable,” and delivered a stunning response to Mishler’s request. Yadav laid out a set of plans for moving the V&V process forward , including as his “immediate plan over the next three weeks, to conduct a red-team assessment of their “V&V infrastructure” by “an outside, fresh-set of eyes”; a next week “internal assessment involving Perry Stufflebeam”; improvements on the “Monday program reviews”; addressing “staffing challenges” that were not being addressed; recognizing the importance that he set accountability standards and plans to “carry” SmartDeck through the V&V “hurdles;” improving communications between himself and his team; offering the benefit of his “insight and expertise” to “remove bottlenecks and mitigate risks,” and others.

Summarizing the facts discussed above concerning the proposal that Yadav made after his meeting in New York with L3 Communications COO Charlie Schafer, on September 29th, Yadav followed –up the meeting and forwarded the two documents that he promised to Schafer, with a cover letter, identifying them as, “The Proposal I Promised.” One included pictures of a 48 slide presentation, “Evolving Culture of Flawless Performance With Integrity,”(JX 74) and the second, a matching 49 page text “booklet” accompanying the slides, that he obviously did print and draft specifically for L3, for COO Schafer. (JX 75) In them, Yadav proposed a drastic reorganization of L3 Avionics, designed to correct its deficiencies by the introduction of a Chief Operating Officer (COO) for, and a restructuring of, that complete L3 Division. Slide 7, called “The Concern”, in the form of a “bulls-eye” depicts a “circle graph,” the center representing, “perfect performance,” with ascending outer rings, progressing outwards from “Inefficient,” to “Ineffective,” to “Unethical” and then to “Illegal” performance; and placing L3 Avionics Systems Division (“L3 ASD”) in the outermost “Illegal” ring! In other words, Mr. Yadav was presenting to his corporate Chief of Operations that L3 Avionics in Grand Rapids, Michigan, was operating illegally! His proposals, centered on the “COO” position, then advanced through other proposed restructured positions, which were all designed to achieve the target’s “bulls eye” end of “perfect performance.”

The presentation for Mr. Schafer was extensive, and could only have been performed by Mr. Yadav’s having worked most of his waking hours from September 22nd until September 29th to complete that presentation. He had stated in a September 21st email to Ljungren, that he had not recently done much work on his 48 slide Power Point presentation, but would do so for them at that time; and it was obvious that it had not been completed by the 22nd, or he would have given it to Schafer. Therefore, the inference is warranted that he must have spent a significant amount of time preparing that Power Point presentation for Mr. Schafer, utilizing time that he should have been working on his V&V obligations as spelled-out by Ljungren. This is confirmed by the fact that Yadav did not respond to Mishler’s September 21st letter until September 30th .

The following were inferences I drew from this presentation that provided additional credence to Respondent’s assertion that Yadav unfavorable personnel action was based on a reasonable business decision, and that it provided clear and convincing evidence that his termination, his unfavorable personnel action, was not related to his protected activity, and that it would have been the same absent any such activity: (1) The draft to restructure or reorganize L3’s Avionics division had little or nothing to do with V&V work or his position as V & V manager for which he was hired. Despite the size of these combined documents, there is only

one reference on one slide to “Validation and Verification” or his L3 V&V Manager experience base, with nothing regarding the use or improvement of his position or group. (2) The dedication of his time and resources for this presentation prevented his attention and completion of specific V & V tasks required but neglected during that time period, including the timely submission of his response to Mishler’s September 21st letter, requiring a response that was not submitted until the 30th, the day of his termination. (3) With less than a year’s experience at L3, he lacked the authority, credentials and experience for creating such a total restructuring or reorganization plan at L3. (4) His proposal contains no realistic plan describing what it would take, in terms of the logistics, time, or cost analysis to make such a conversion, and to keep the SmartDeck project functioning and progressing while the transition was being made.

Mr. Yadav had it within his capability to show management where, and why, their suggested SDP process-path was not working, as the Validation and Verification Manager. His problem lay, however, in not recognizing that this was the reason he was hired. Yadav continued to maintain in various exchanges of email and discussions with the management leadership team that it was not his job to go down onto the line, to find out what was being done there, and to ascertain how the respective groups were dealing with the issues. Instead of providing management with an analysis of specific corrections or improvements required for the SDP Life Cycle phases of planning, or pointing out V & V requirements that could be initiated or adopted to correct safety issues, he was persistent in his conviction that he could not perform V & V functions unless management first addressed his perceived safety concerns, which he refused to verify, other than by invoking philosophical engineering principles.

While there is no evidence that L3 management saw, or relied upon, the three documents that Mr. Yadav submitted on September 29th or 30th in L3’s determination to terminate him, I find that the inference to be drawn from those documents is that they confirm a legitimate expression of Mr. Yadav’s position relative to his obligations as V&V Manager, and that reasonable inferences may be drawn from the actions related to those letters concerning whether or not he would be retained as an employee in the position that he held, or would be terminated from that position. I find that they do constitute clear and convincing evidence to confirm that Mr. Yadav would have been terminated in the absence of protected activity, and notwithstanding any showing by a preponderance of the evidence, that his protected activity contributed to his termination as an unfavorable personnel action because of his independent action of failing and refusing to fulfill his duties and directives as Validation and Verification Manager.

Summary and Conclusion:

Here, I find that Mr. Yadav was an employee of an air carrier contractor, covered by the provisions of AIR21; that he was a member of the class employees protected by the “whistleblower” protective provisions of AIR21; that he was engaged in protected activity as the employee who raised safety implications concerning Respondent’s SmartDeck, Software Development Plan (SDP) engineering Life Cycle provisions, in that it was Complainant’s perception that L3 was not performing in accordance with the language of that SDP, and was, therefore, misrepresenting to the FAA what it was actually doing; that, to that point in the hearing, he had established under the Title VII shifting burdens of production of evidence, a

prima facie case that the protected activity contributed to the adverse action of his termination; that Respondent replied by producing evidence that it had terminated Mr. Yadav for failing and refusing to perform the obligations and duties of his position as V&V Manager, by not performing actions directed by VP Ljungren on Yadav's "enough perspectives" and refused to talk to other peers and managers as directed by VP Ljungren. Complainant was unable to counter this as either pretext or by challenges to the credibility Respondents witnesses, at which point Respondent did establish by clear and convincing evidence that Mr. Yadav would have been terminated for that deliberate action of not performing his V&V Manager obligations and duties, or taken the same adverse action of terminating him in the absence of any protected activity.

As part of that sequence, to the extent that Title VII principles were invoked in this analysis, I find that Respondent has demonstrated by clear and convincing evidence, that the business reasons advanced by Respondent for his unfavorable action, termination, do not constitute a pretext for the real reason that Mr. Yadav claimed he was terminated, his failure to perform adequately in his V&V Manager position. In short, Respondent has, demonstrated "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior" by Mr. Yadav.

Complainant has, therefore, openly provided "intervening" behavior, conduct and incidents that mitigate against any other evidence of any or omission that might have been sufficient to established by a preponderance of the evidence at an earlier point, that his prior protected activity contributed to any adverse action taken by the employer, with an intervening result that the protected activity constituted a violation of AIR21 by a preponderance of the evidence. His continuing refusal to perform specific duties that were directed to him, as demonstrated by this behavior and conduct paved the way for a certain determination that Respondent has submitted clear and convincing evidence that it would have taken the same personnel action in terminating Mr. Yadav in the absence of any protected behavior, within the considerations of the ARB decisions, whether viewed in the context of the acceptable shifting burdens of production of evidence under Title VII confirmed in *Bruni* and *Peck*, (*supra*) or the strict presentation of evidence requiring that Complainant prove by a preponderance of the evidence, as confirmed by ARB in *Clemmons*, (*supra*) that his protected activity contributed to his adverse personnel action, his termination; and that Respondent respond with clear and convincing evidence that the same adverse action would have been taken by it in the absence of any protected activity.

Therefore, it is recommended that the following order be entered on behalf of the Secretary of Labor, to be effective immediately if no petition for review is filed, or upon an applicable ruling by the Administrative Review Board if review is sought under the provisions of 29 C.F.R. §§ 1979.109.

IT IS ORDERED that the complaint of Avinash Yadav is DISMISSED, for the reasons set forth in this decision and order.

A

THOMAS F. PHALEN, JR.
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

If no Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).