



Issue Date: 27 December 2006

CASE NO.: 2004-AIR-00003

In the Matter of

JOHN NICK ROUGAS, JR.*
Complainant,

v.

SOUTHEAST AIRLINES, INC.,
Respondent.

DECISION AND ORDER ON REMAND

This matter involves a dispute concerning alleged violations by Respondent-employer, Southeast Airlines, of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 *et seq.* (AIR21) and the regulations promulgated thereunder at 29 C.F.R. Part 1979. By Decision and Order dated June 30, 2004, this Court dismissed the complaint finding that Complainant has not engaged in activity protected by AIR21. By Final Decision and Order dated July 31, 2006, the Administrative Review Board upheld the Court's findings that the two incidents that were the focus of the complaint, the investigation and the hearing were not protected activities. However, the Board remanded the case for the Court to determine whether various other activities listed in Complainant's post-hearing brief were protected activities. As this Court finds that none of the other activities listed in Complainant's post-hearing brief affected in any way the decisions to suspend and then fire Complainant, for purposes of this decision, the Court will assume the listed activities were protected activities.

Under 49 U.S.C. § 42121(b) and 29 C.F.R. § 1979.109, to establish that a respondent has committed a violation of the employee protection provisions of AIR21, a complainant must prove by a preponderance of the evidence that an activity protected under AIR21 was a contributing factor in the unfavorable personnel action alleged in the complaint. Courts have defined "contributing factor" as "any factor which, alone or in connection with other factors, tends to affect in any way" the decision concerning the adverse personnel action. Marano v. United States Dep't of Justice, 2 F.3d 1137 (Fed. Cir. 1993). The activities protected under 49 U.S.C. § 42121(a)(1) include reports of information to an employer or the Federal Government of a violation of a Federal law or FAA regulation, standard or order relating to air carrier safety. Based on these principles, to establish a violation of AIR21, a complainant must prove three

* Complainant's legal name. See ARB *Final Decision and Order* dated July 31, 2006.

elements: 1) protected activity; 2) unfavorable personnel action; 3) causation in terms of contributing factor.

In the event that a complainant proves the case in chief by a preponderance of the evidence, a respondent may still avoid liability for the discrimination through a statutory and regulatory affirmative defense. According to 49 U.S.C. §§ 42121 (b)(2)(B)(ii) and (iv) and 29 C.F.R. § 1979.109(a), a complainant may not obtain relief under AIR21 if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity. In asserting this affirmative defense, the burden of proof at the clear and convincing level rests with the respondent. Although there is no precise definition of “clear and convincing,” that evidentiary standard falls above preponderance of the evidence and below a reasonable doubt. See Yule v. Burns Int’l Security Serv., 93-ERA-12 (Sec’y May 24, 1995).

Credibility

The Court repeats the credibility finding expressed in the original Decision and Order. The credibility findings are based upon a review of the entire testimonial record and associated exhibits with regard for the reasonableness of the testimony in light of all record evidence and the demeanor of the witnesses. Probative weight has been giving to the testimony of all witnesses found to be credible. I found Terry Haglund, Amy Halisky, Jessica Bush, Jean Robbins, Vicky Vogel and Steven Malone to be very credible witnesses. **The Court was left with no doubt that Ms. Robbins testimony was truthful.** It must be noted that there are several discrepancies between the testimony of Ms. Bush, Ms. Robbins, Ms. Vogel and Captain Malone and Complainant’s own version of the events leading up to his termination. Although the Court did not observe Captain Lusk testify, the Court notes the discrepancy between Captain Lusk’s testimony and Complainant’s testimony concerning crew scheduling and Complainant’s personal schedule. Captain Lusk’s version is supported by Ms. Bush’s actions and the circumstances surrounding Complainant’s suspension and recall to duty.

In particular, **I note that Ms. Robbins’ and Ms. Vogel’s testimony regarding the events of February 13, 2003, is very different than the version given by Complainant.** Likewise, Ms. Bush’s account of the crew scheduling conversation on that day contradicts Complainant’s account. Finally, Captain Malone’s testimony regarding Complainant’s sick days in December 2002 exposes more inconsistencies in Complainant’s testimony. Since Ms. Robbins, Ms. Vogel, Ms. Bush and Captain Malone were each credible witnesses, Complainant’s general credibility as a witness has been called into question by the various inconsistencies between his testimony and the testimony of these four credible witnesses. Accordingly, I find that Complainant’s testimony is only partially credible and is entitled to less probative weight.

The report to Lusk about Malone’s purported disregard of the one-in-seven rule

The one-in-seven rule was never mentioned in the initial complaint filed with OSHA (RX. 1), the supplements to that complaint (RXs. 2, 3) or in the answers to interrogatories (RX. 6, Int. 5, 13). During his 125 page post-hearing deposition, Captain Lusk was never asked about the one-in-seven incident.

At the hearing, Complainant stated that Captain Malone told pilots that they had no days off and were always on call, which Complainant felt to be a violation of the one-in-seven rule. (Tr. 137). Complainant stated he made a complaint to Lusk about this issue but did not know whether Lusk ever investigated the situation. (Tr. 137-40). Other than Complainant's testimony, the only evidence of this communication with Lusk was in the body of an unsigned letter titled "Studying for a FAA Systems Oral Southeast Hanger." (CX. 21).

Lusk testified that he flew with Complainant on approximately ten occasions. (RX. 12, p. 8). He testified that whenever he had to work with Complainant, he knew that he would have to listen to Complainant's "barrage of complaints" about the corporate leadership, the lack of days off and the lack of firm scheduling, "which didn't make for a pleasant situation." (RX. 12, pp. 8-9). Lusk testified that Complainant never discussed safety issues or flight and duty time regulations; rather, he complained about his personal issues with the flight schedule. (RX. 12, p. 9, 25, 48).

Malone explained that under FAA guidelines, Respondent's pilots can work six days on and then have twenty-four hours duty-free. (Tr. 359). If a pilot has worked for less than six days and then has scheduled days off, he can still be called in as long as he is within the FAA time limit for days on. (Tr. 437). He denied ever telling Complainant or any other pilots that they had to work as many days as the company needed them without time off. (Tr. 359-60). Malone does not recall ever discussing the one-in-seven rule with Complainant. (Tr. 438).

As indicated in the Decision and Order, I did not find Complainant to be a very credible witness. Other than his testimony, the only evidence of the report is the unsigned letter that was not identified in discovery and was not shown to anyone until Complainant was testifying. (Tr. 138, CX. 21). I find more credible Lusk's testimony that Complainant never discussed safety issues or flight and duty time regulations; rather, he complained about his personal issues with the flight schedule. Even assuming Complainant made the report to Lusk, it is clear that in the intervening months that Lusk did not remember this incident. Accordingly, I find it had no effect on the decision to suspend or terminate Complainant.

The various communications with schedulers (the notifications that Rougas was too ill to fly, the request to be removed from the reserve list, and the refusal to fly the Baltimore-Aruba flights) and the reports to Lusk and O'Brien about Malone's threat

After reviewing the entire record, the Court is not convinced that Complainant was ever ill.

In the Decision and Order I found that Complainant did not engage in protected activity in December 2002. I found Captain Malone's testimony to be substantially more credible than that of Complainant concerning the events in December 2002. Although Complainant *said* he was sick, he was being very dodgy about it and would not give Captain Malone a definite answer as to whether he was too sick to fly. Captain Malone just needed a clear answer from Complainant on whether he was able to fly but Complainant persisted in being difficult. Captain Conover, who flew with Complainant on the flight in question, denied that Complainant appeared to be ill or claimed to be ill. While refusing to fly because of illness can be protected

activity, I found that Complainant never communicated to Respondent that he was too ill to fly. However, the Court finds Complainant did report the “threat” from Malone to both Lusk and O’Brien.

As noted by the Board, the series of events leading up to the conversation between Complainant and Malone started on December 13th when Complainant was on reserve. While Complainant says he called in sick, there is no evidence that he was actually called to cover a trip but *said* he was too sick to fly. While there is a doctor’s note dated December 13th which stated Complainant should not fly for the next two days, it is not clear when this note was obtained or when it was provided to Respondent.[†] Regardless of when the note was obtained, on December 14th Complainant indicated he was feeling “a little bit better” and told them “if you need something smaller I might be able to help you out, but I am still questionable.” (Tr. 147).

Complainant did not fly on December 13, 14 or 15. On December 16, Complainant took a shuttle to Miami where he was to do a test flight. When the plane was not ready Complainant was again in touch with crew scheduling and eventually had the phone confrontation with Malone. The Board upheld the Court’s finding that Complainant did not communicate to Malone on December 18th that he was too ill to fly. I find Complainant’s communications with the schedulers were similar to the communications he had with Malone. According to Malone, Complainant kept calling crew scheduling with “I need to get back, I don’t want to be here, you tricked me, I have a hockey game to referee.” (Tr. 412). Finally, crew scheduling contacted Malone to find out what Complainant was going to do. (Tr. 414).

Although Complainant did not fly the Baltimore-Aruba flights, it is not at all clear as to the reason he did not make the flights. While in his post-hearing brief Complainant states “On December 19, 2002, Rougas . . . refused to work the eleven (11) hour Baltimore-Aruba flights scheduled for December 21-22, 2002 based on his continuing sickness” the return to work doctor’s note indicates Complainant could return to flying on December 20th. As noted by the Board, Complainant also gave a different reason for his reluctance to accept the Baltimore-Aruba flights – his belief that the one-in-seven rule would be violated. He had this belief because he had “called in off sick leave Saturday the 14th and had been working six days in a row. (CX. 7).” So we have a pilot who (1) has a history of putting personal affairs (hockey) over his SEAL duties; (2) is being dodgy about whether he is too sick to fly; (3) does in fact fly; (4) claims to have refused the Baltimore-Aruba flights one day; and 5) has a return to work note stating he could have flown on the dates the refused flights were scheduled.

The multiple reports to the FAA about Malone prior to the suspension

Although Complainant referenced complaints to the FAA concerning Malone’s disregard of FAA regulations, including weights and duty time, these complaints appear to have been made by people other than Complainant and there is no evidence that Respondent ever knew or suspected that Complainant made such complaints to the FAA prior to his suspension.

[†] The note referenced by the Board that Complainant said was faxed to Robbins and scheduling was the return to duty note and not the December 13th note. Although the return to duty note was dated December 20th, it was not obtained until December 27th.

The above incidents were not contributing factors in the suspension

The Court finds the above incidents did not, alone or in connection with other factors, tend to affect in any way the decision to suspend Complainant. Lusk was ready to fire Complainant even before the December 2002 events. Complainant had continuing difficulties with crew scheduling because of conflicts with assigned flight duty and his hockey commitments. Complainant irritated colleagues, including Lusk, with incessant, non-safety related, complaints and annoyed them with unprofessional behavior.

Captain Malone testified about Complainant's conduct prior to the December 2002 events. Captain Malone flew with Complainant on many occasions. In his opinion, Complainant was an average pilot but was very immature. For example, Complainant would carry a flight bag with a dead chicken hanging out of it and wore bunny ears and reindeer antlers on his head during holiday seasons. (Tr. 355). He also programmed the number "666" into the transponder on the airplane even after one of the captains asked him to stop doing so. (Tr. 372-73). In addition, other employees felt that Complainant complained too much, which was disruptive. (Tr. 355-56). For example, Complainant would ask the flight attendants to make him iced tea and fill it up to a precise line in his mug, and he would return the mug if they failed to do so. (Tr. 356). In another incident in the fall of 2002, Complainant complained over the radio that Respondent had tricked him about something and that it "suck[ed]." (Tr. 361). Captain Malone testified that this type of language was improper by both company standards and by FAA standards. (Tr. 362).

Complainant also caused problems at a water survival training class when he and other pilots engaged in distracting behavior and Complainant referred to some flight attendants as fat pigs. (Tr. 365-67). Complainant also sold ties and shirts with the company logo on them even after he had been asked to stop producing and selling these items. (Tr. 370-31). Captain Malone agreed that Complainant had a problem with following instructions and was a complainer. (Tr. 371, 393). However, he never expressed a preference not to fly with Complainant and denied any personality conflict between himself and Complainant. (Tr. 411). In December 2002, Captain Malone began receiving reports from crew scheduling about Complainant's refusal to answer his phone on reserve days as well as his claims that he was too ill to fly. (Tr. 357-58).

Captain Lusk also testified about Complainant conduct prior to the December 2002 incident. Captain Lusk flew with Complainant on approximately ten occasions. (RX. 12, p. 8). He testified that whenever he had to work with Complainant, he knew that he would have to listen to Complainant's "barrage of complaints" about the corporate leadership, the lack of days off and the lack of firm scheduling, "which didn't make for a pleasant situation." (RX. 12, pp. 8-9). Complainant never discussed safety issues or flight and duty time regulations; rather, he complained about his personal issues with the flight schedule. (RX. 12, p. 9). Every time that Complainant's schedule got changed, he would say that he was being lied to, and on one occasion, he told a scheduler over the radio that something "really suck[ed]," which Captain Lusk felt was improper and unprofessional. (RX. 12, pp. 17, 22). The crew schedulers often complained about their dealings with Complainant. (RX. 12, pp. 23-24). Captain Lusk counseled Complainant on occasion about his difficulties with crew scheduling. (RX. 12, p. 118).

Captain Lusk testified that Complainant filed expense reports for lost income if he was called in to fly and missed refereeing a hockey game, even though he made more money if he was working as a pilot. (RX. 12, pp. 20-21). Captain Lusk also felt that Complainant showed poor judgment as a pilot. (RX. 12, p. 14). In one instance, when the crew was concerned with flight and duty time, Complainant suggested entering a holding pattern to see a space shuttle launch even though doing so would place the crew in danger of violating FAA regulations. (RX. 12, pp. 10-14). However, no pilots ever refused to fly with Complainant or related safety concerns about Complainant. (RX. 12, pp. 76-77).

It is with this background that the mid-December events unfolded. Often Respondent had been unable to contact Complainant. On days he was scheduled for reserve, he often failed to answer calls or claimed he was talking to a doctor when schedulers were trying to assign him to fly. The illness often became less debilitating if the scheduled flight would allow him to return “in time to referee a hockey game.” (Tr. 358).

This appears to be what happened in mid-December. Complainant called in sick on Friday but by Saturday he was able to fly and “if you need something smaller I might be able to help you out.” He was apparently able to fly by Monday and take a short assignment for a test flight. When this did not go off as planned and he had to extend his time away from home, Complainant again became ill – but not so ill that he can’t continue on the shorter flights. When told to get documentation for his illness, he provided a doctor’s note indicating he could have returned to flying on December 20th and made the Baltimore-Aruba flights.

The documentation provided by Complainant added further to the confusion. Although he had a doctor’s note dated December 13th saying he could not fly for two days, he told Lusk that he would violate the one-in-six rule if he took the Baltimore-Aruba flights as he had called in off sick leave the previous Saturday and had been on reserve.

Captain Lusk suspended Complainant because of his (1) failure to properly document a recent illness; (2) failure to cooperate with crew scheduling; (3) use of inappropriate language of SEAL’s radio; and (4) poor working attitude with other crew members. (RX. 7). The Court finds these were in fact the true reasons for the suspension.

The report to Lusk about Malone’s purported disregard of the one-in-seven rule, the various communications with schedulers (the notifications that Rougas was too ill to fly, the request to be removed from the reserve list, and the refusal to fly the Baltimore-Aruba flights), the reports to Lusk and O’Brien about Malone’s threat and any reports to the FAA about Malone were not factors in the decision to suspend Complainant.

The Court further finds that the credible testimony of Malone and Lusk demonstrates by clear and convincing evidence that Respondent would have suspended Complainant in the absence of any protected activity.

Events after the suspension

During the suspension Complainant contacted Bruce Haseltine at the FAA concerning the conduct of SEAL, including the threat made on December 18, 2002. Although the dates of this contact with the FAA and the dates Haseltine contacted Respondent concerning this contact were not exact, clearly some of the contact was prior to the February firing and Kolfenback, the President of SEAL, was aware of the contact. For purposes of this decision, the Court will assume this contact with FAA was protected and Kolfenback was aware of the activity. The Court further finds that Malone, Lusk and Burk were not aware of this contact with the FAA until after Complainant was terminated.

However, the Court finds this protected activity did not, alone or in connection with other factors, tend to affect in any way the decision to fire Complainant.

Captain Lusk met with Complainant on January 2, 2003, to discuss the suspension. He prepared a letter which stated the reasons for the suspension as well as the terms and conditions of it. One of the reasons for the suspension was Complainant's lack of proper documentation from a doctor for his illness. The other reasons cited for the suspension included lack of cooperation with crew scheduling, use of inappropriate language on the company radio in October 2002 and poor working attitude with other crew members. Complainant was suspended until March 2, 2003, at which time he would be returned under a six-month probation. (RX. 12, pp. 30-34).

After about a month, Respondent decided to bring Complainant back because he had been very quiet since his suspension and because more pilots were needed on the line. (RX. 12, pp. 35-36). When Complainant came back, he met with Captain Lusk to reiterate the issues which had led to his suspension. (RX. 12, pp. 36-37). Complainant appeared to understand and agree with Captain Lusk. (RX. 12, p. 37). Captain Lusk told Complainant to go to crew scheduling and get a schedule. Complainant told Captain Lusk that he already had scheduled hockey games to referee, and Captain Lusk told Complainant that if he wanted to come back, he needed to work within Respondent's schedule. Complainant agreed to do so. (RX. 12, p. 38). Captain Lusk denied that he gave Complainant permission to tell Ms. Bush to work around his hockey games. (RX. 12, p. 39). Nonetheless, Complainant told Ms. Bush that she needed to work around his prior commitments. (RX. 12, p. 40).

Captain Lusk's testimony is corroborated by Ms. Bush's testimony. When Complainant was brought back from his suspension, Captain Lusk asked Ms. Bush to come up with a schedule for him to start flying the DC-9. (Tr. 231). Captain Lusk did not mention any exceptions or special circumstances in the schedule. Ms. Bush prepared the schedule, which was to be effective immediately. (Tr. 234). When Complainant came to pick up the schedule, he told Ms. Bush that there were certain days that he could not work due to prior engagements. (Tr. 231-32, 234). Ms. Bush then told Captain Lusk that Complainant had told her that he was unable to work on certain days that he had been scheduled to fly. (Tr. 233). The Court finds this version of events more credible than Complainant's testimony that Lusk told him that the schedulers would work around his other commitments.

Complainant then went to human resources and made the negative comments about Captain Malone that were the focus of the previous Decision and Order.

Captain Lusk felt that based upon this incident and Complainant's prior difficulties, he should be terminated. (RX. 12, p. 42). Within a day or two, Captain Malone told Captain Lusk that the decision had been made to terminate Complainant because of the crew scheduling incident and the fact that Complainant had been bad-mouthing people, which were viewed as violations of his probation. (RX. 12, p. 43). There was never any discussion of Complainant having engaged in protected activity. (RX. 12, pp. 45-46). Captain Lusk was aware of the substance of Complainant's comments about Captain Malone, and he did not feel that these comments had anything to do with raising a safety issue. (RX. 12, pp. 46-47). He testified that he was unaware of Complainant ever raising a safety issue with the company and that Complainant's termination was not an act of retaliation against him for raising a safety issue. (RX. 12, pp. 47-48).

Captain Malone, Captain Lusk and Mr. Burk discussed the situation and determined that Complainant should be terminated. (Tr. 380, 386). Their concern was that Complainant had just agreed to follow procedures and stop being disruptive and had then gone back to his old ways. (Tr. 386). Captain Malone asked Ms. Robbins to write a letter about her conversation with Complainant, and the letter was passed up to Mr. Kolfenbach, who made the ultimate decision to discharge Complainant. (Tr. 380, 386, 446).

After hearing the witnesses testify and considering the entire record, the Court was left with no doubt that Respondent would have fired Complainant in the absence of any protected activity. Respondent counseled and suspended Complainant because of performance deficiencies. When he was brought back early from his suspension, he immediately reverted to his old ways – demanding scheduling concessions to accommodate personal commitments and bad-mouthing Malone. The Court finds Complainant's protected activity had absolutely no effect on his suspension and firing.

ORDER

The complaint of John Nick Rougas, Jr. is hereby **DISMISSED**.

So ORDERED.

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LARRY W. PRICE
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, Room S-4309, 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).