

**U.S. Department of Labor**

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**Issue Date: 23 June 2006**

CASE NO.: 2005-AIR-00016

In the Matter of

**RONALD WALTERS**

Complainant

v.

**TRAVELSPAN, INC.**

Respondent

Appearances:

Kathleen Peratis, Esquire  
ReNika C. Moore, Esquire  
For Complainant

Jonathan W. Yarbrough, Esquire  
Kenneth P. Carlson, Esquire  
For Respondent

Before: Robert D. Kaplan  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 et seq., (“AIR 21”) and the regulations promulgated thereunder at 29 C.F.R. Part 1979. The provisions of the statute provide whistleblower protection for employees in the airline industry.

On or about February 10, 2005, Complainant Ronald Walters filed complaints with the Occupational Safety and Health Administration (“OSHA”) against Respondent Travelspan, Inc. as well as TransMeridian Airlines (“TMA”) (respectively, OSHA # 2-4173-05-020 and OSHA # 2-4173-05-018). After being referred to the Office of Administrative Law Judges, the case involving Respondent was assigned the case number in the above caption. The case involving TMA was assigned case number 2005-AIR-00029. On September 16, 2005, I issued an Order in which the two cases were consolidated and a hearing was scheduled for October 24, 2005. The hearing was postponed several times. Subsequently, in an Order dated October 24, 2005, I granted the motion of TMA to stay proceedings against it because TMA had filed for bankruptcy (liquidation) under Chapter 7 of the U.S. Bankruptcy Code. In the same Order, I rescheduled the hearing in Respondent’s case for February 6, 2006. On January 30, 2006, I issued an Order severing the two cases.

On January 30, 2006, I issued an Order postponing the hearing, pending ruling on Respondent's forthcoming motion for summary decision with respect to, inter alia, the issue of whether Respondent is liable as a covered employer under AIR 21. On March 3, 2006, I issued an Order in which Respondent's motion for summary decision was denied (both as to the liability issue and the question of whether Complainant had engaged in protected activity). In that Order I noted that Respondent conceded that it is an "indirect air carrier" and made no contention that it is not a covered "air carrier" under AIR 21. The Order rescheduled the hearing for April 11, 2006.

The hearing was held on April 11 and 12, 2006, in New York, New York. Complainant and Respondent filed briefs on June 2 and 5, 2006, respectively. On June 14, 2006, counsel for Complainant filed an application for attorney's fee and costs, which was opposed by Respondent on June 20, 2006. On June 15, 2006 Complainant filed additional argument, to which Respondent replied on June 21, 1996.

## I. THE ISSUES

In its post-hearing brief, Respondent states that it "is not a direct air carrier, but could be classified as an "indirect air carrier. See Arkin v. Trans. Intern Airlines, Inc., 568 F. Supp. 11 (E.D.N.Y. 1982)." (Respondent's Brief at 7) This was also propounded in the parties' Joint Notice of Dismissal and Request for Remand filed on July 25, 2005. Indeed, Respondent has never controverted Complainant's contention that Respondent is an "air carrier" under AIR 21 and 29 C.F.R. § 1979.101.<sup>1</sup>

The issues remaining for resolution are:

1. Whether Complainant engaged in protected activity as described in 49 U.S.C. § 42121;
2. Whether the subsequent action of TMA in suspending Complainant from flying out of his airport base in New York, New York constitutes an unfavorable personnel action;
3. Whether Complainant's protected activity was a contributing factor in the unfavorable action;
4. Whether Respondent has established by clear and convincing evidence that the same unfavorable personnel action would have been taken against Complainant in the absence of the protected activity.

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<sup>1</sup> In his letter to me dated April 29, 2005, Respondent's counsel conceded that Respondent is an "indirect air carrier" within the meaning of AIR 21," citing McLoughlin v. TWA Getaway Vacations, 979 F. Supp. 171, 175 (S.D.N.Y. 1997), as well as the Arkin case. The regulation at 29 C.F.R. § 1979.101 states: "*Air carrier* means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." Based on the facts of this case, I find that Respondent is an "air carrier" within the meaning of AIR 21.

5. Whether Respondent is liable for TMA's action against Complainant; and
6. If Complainant succeeds on the merits, what is the appropriate remedy.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Summary of the Evidence

Most of the facts are not in dispute. TMA was a charter airline that had a contract with Respondent under which TMA flew Respondent's customers between John F. Kennedy airport in New York ("JFK") and Port of Spain, Trinidad. Under the contract, TMA provided a Boeing 757 aircraft ("757"), the crew to fly the airplane and service the passengers in flight, maintenance for the airplane, and insurance. (RX 10, 11)<sup>2</sup> TMA obtained the customers or passengers and sold them tickets for the flights. The arrangement between Respondent and TMA lasted from at least September 2003 until TMA went into bankruptcy and ceased operating in September 2005. Complainant was employed as a 757 captain-pilot by TMA beginning in the fall of 2003, and was based at JFK. Almost all of Complainant's work for TMA consisted of flying charter flights for Respondent between JFK and Trinidad.

On November 30, 2004, at JFK Complainant was about to fly the airplane to Trinidad carrying 205 of Respondent's customers. (All dates hereinafter are in the year 2004, unless otherwise stated.) Before taking off, Complainant received several slips of paper from the baggage handlers with printouts showing the number of passengers on board the airplane, the number of their checked bags, the weight of the aircraft, and the total weight of the checked bags that were being placed in the 757's two luggage bins. (CX 30; RX 50R) One of the documents (CX 30) also showed that the average weight of the checked bags was 60.6 pounds. After examining these documents, Complainant decided not to use the 30-pound per bag assumed-weight method that is contained in TMA's Weight and Balance Manual (CX 56; RX 9),<sup>3</sup> but that

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<sup>2</sup> The following abbreviations are used herein: "RX" denotes Respondent's Exhibit; "CX" denotes Complainant's Exhibit; "T" denotes the transcript of the April 11-12, 2006, hearing.

<sup>3</sup> TMA's Weight and Balance Manual for the 757, page 3-4, approved by the Federal Aviation Administration, states –

In accordance with [TMA's] approved weight and balance program the following weights will be used:

- An average baggage weight of 30 pounds will be used for each checked bag.
- Actual weights will be used when manifested cargo, other than checked baggage, is loaded on [TMA's] aircraft. Weights will be determined using the weight listed on the certified shipper's manifest. If it becomes necessary to separate a manifested shipment, actual weights will be determined by physically weighing the separated items.

he should use the 60.6-pound average weight provided to him by the ground personnel. Previously, Complainant had been concerned about using the 30-pound assumption when he knew the actual average weight exceeded 30 pounds. Complainant's prior concern will be discussed below.

Using the 60.6-pound per bag weight on November 30, Complainant made a determination that the weight on the airplane exceeded the allowable "maximum zero fuel weight" ("MZFW").<sup>4</sup> Complainant therefore issued an order that about 150 bags had to be removed from the airplane. Lillian Jerez was the ground agent observing the activity on November 30. Using her cell phone, Jerez called the president and chief executive officer of Respondent, Nohar Singh, and advised Singh that a large number of the passengers' bags were being removed from the airplane. Singh asked Jerez if he could speak to Complainant. Jerez then handed the phone up to Complainant who was in the cockpit with his first officer (co-pilot) Michael Gallagher. Singh asked Complainant if he was certain that the airplane was overweight and stated that Complainant was removing a "huge amount of bags."<sup>5</sup> Complainant told Singh that he was certain that the airplane's MZFW had been exceeded and that it was necessary to remove the bags. Complainant took off from JFK and flew to Trinidad, leaving behind between 150 and 168 bags.

On November 30, after the 757 flew off, Singh telephoned Billy Smith, TMA's vice president/flight. Singh was upset and explained what had happened. On December 2, TMA's chief pilot at that time, Andrew Lotter, telephoned Complainant in his condominium in northern New Jersey. Lotter told Complainant that Lotter had spoken to Singh, and Singh was not happy. Lotter told Complainant that there was no need for Complainant to weigh the bags<sup>6</sup> and that he might have to pull Complainant out of JFK. Complainant told Lotter that Complainant had received the actual weight of the bags and if he had used the 30-pound assumed weight provided in TMA's Weight and Balance Manual rather than the actual average weight of the bags, the weight would have exceeded the MZFW because a greater number of bags would have been allowed on the airplane.<sup>7</sup> Complainant also told Lotter that if he was taken out of JFK he would

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<sup>4</sup> Complainant testified that the MZFW "is the weight that includes the airplane, the passengers and baggage . . . . [I]t's the maximum weight that the airplane can weigh" for takeoff. (T 25)

<sup>5</sup> Details about this conversation and other conversations about which the parties disagree will be filled in below.

<sup>6</sup> It is clear that throughout TMA's confrontations with Complainant about the flight of November 30, TMA executives mistakenly believed that Complainant rather than the JFK ground crew had performed the calculations that resulted in the 60.6-pound average bag weight.

<sup>7</sup> Respondent contends that in determining whether the airplane was overweight, Complainant should have used the 30-pound assumed weight for each bag and it was improper for Complainant to use 60.6 pounds as the average bag-weight. Complainant agrees that if he had used the 30-pound figure, the mathematical calculation would make it appear that the MZFW was not exceeded, but in actuality it would have been exceeded. This is the crux of the problem raised by Complainant.

file a whistleblower complaint because he was being retaliated against for leaving the bags behind. In addition, Complainant told Lotter that Singh had attempted to get Complainant to put 50 extra bags on the airplane. Lotter said he would get back to Complainant. On December 3 Lotter called Complainant at home. Lotter again stated that there was no need for Complainant to use the actual weight. Lotter also stated that if Complainant had “blown the whistle” it would not be good for Complainant or TMA. Lotter gave Singh’s telephone number to Complainant and asked Complainant to call Singh to arrange to meet with him. (T 73-78) Complainant’s testimony regarding his conversations with Lotter is uncontradicted, as Lotter did not testify, although Respondent listed him as a witness and he was present during the hearing’s first day. (T 613-14)

Complainant called Singh and arranged for a meeting at Singh’s office that took place on December 4. Singh testified that he wanted to find out about this “huge problem” with the bags and “what we are going to do to fix this. How is this going to be resolved?” Singh testified that he was concerned about “a bigger problem for the rest of the month [of December]” because “all the flights for the rest of December for Christmas were full . . . to max.” Singh testified that on December 4 Complainant told him that some of TMA’s pilots were using the 30-pound assumed average and that if Complainant had done this on November 30 the mathematical calculation would not have shown the airplane to be overweight. However, Singh testified that Complainant also told Singh that if Complainant had the actual weight – which on November 30 had been given to him by the ground crew – “I have to use that.” This put Singh “very much in a nervous state.” (T 536-37) Singh also appeared to be in a state of confusion, understandably, as he testified that Complainant was telling him that the 30-pound average could be used unless the actual weight was known. Singh further testified:

You’re talking about peoples’ lives and God forbid, . . . the fact is that if that airplane is overweight and [the weight is] not calculated properly, you’re going to crash that airplane, and I just couldn’t go on the premise that if you see it or don’t, you use it or don’t use it. That’s a bunch of nonsense . . . . From a practical standpoint that makes no sense to me.

(T 538-39: Corrections to the punctuation in the transcript are herewith made.) Singh added that he did not understand how his prior flights had flown overweight. (T 543)

Singh testified that prior to his meeting with Complainant on December 4, he had been informed by Smith or Lotter that TMA was going to summon Complainant to a meeting at TMA’s headquarters near Atlanta, Georgia, “to go over all the issues,” and TMA would get back to Singh. (T 544) On December 6 Lotter called Complainant, stated that Complainant’s meeting with Singh had not gone well, and ordered Complainant to go to TMA’s headquarters to discuss the weight and balance issue. (T 85) On December 8 Complainant went to TMA’s headquarters where an instructor discussed weight and balance procedure with him for thirty minutes to an hour. Complainant then attended a meeting there with Smith, Lotter and TMA’s president and chief executive officer John Affeltranger. Smith was a witness for Respondent at the hearing. Smith testified that he disagreed with Complainant’s use of the actual weight of the bags divided by the number of the bags (which resulted in the 60.6-pound average weight), “Because it was

not an approved method” under TMA’s Weight and Balance Manual and because the average bag weight Complainant arrived at “was higher than the standard 30 [pound average].” (T 318-19) Subsequently, Smith testified that there were only two approved and acceptable methods for calculating the weight of the bags that went into the airplane. One method was the assumed 30-pound average weight per bag. Smith described the other method as follows:

He could have used the average bag weights where he could have been sure of what went into each [of the two baggage] compartments. He would have to know the exact weight that went into each compartment.

(T 324) However, Smith agreed that Complainant did not have that information, and could not have obtained it on November 30. Consequently, Smith testified, the only method that Complainant could have properly used on November 30 was to assume that each bag weighed 30 pounds, under TMA’s Weight and Balance Manual that had been approved by the Federal Aviation Administration (“FAA”). (T 325) Smith was then asked why the FAA would be concerned “if someone used a method that put fewer bags on the flight, [to] make it even further below the maximum weight?” Smith replied, “Just because, they’re just regulatory based (sic).” (T 325)

TMA suspended Complainant from flying from December 10 through December 16, but paid him his standard salary for that period. Smith testified that he made the decision to suspend Complainant in order to prevent Complainant from flying Respondent’s flights. Smith stated that he had no communication with Singh about this decision. Smith testified, “The only communication I had with Mr. Singh was that he called me and advised me that we were having problems with . . . leaving bags behind. (T 323) Smith explained his action in his subsequent testimony, as follows:

Because it was a customer who called me and he was concerned and I just took him [Complainant] off because I wanted to keep the customer happy.

(T 343) Still later, Smith testified that he decided on December 2 to remove Complainant from flying for Respondent by removing Complainant from the New York base. Smith said that the decision was made after he had spoken with Singh about removing Complainant from the New York base. Smith testified that Singh was unhappy about the bags being left behind on November 30. However, that decision was deferred when Complainant threatened to file a whistleblower complaint. (T 395-400)

After December 16, Complainant resumed flying for TMA but had been removed from the JFK base. This resulted in his being taken off Respondent’s flights. Complainant called “crew scheduling” at TMA to ask why this had happened. He was told that he was not being scheduled on any of Respondent’s flights. Subsequently, he received a flight schedule from TMA, with the handwritten notation: “Do not put on [Respondent] flights. Use anywhere else.” (T 98-99; CX 2) Smith testified that this was the second decision affecting Complainant’s work for Respondent, and that it was made by Affeltranger. Smith stated that Affeltranger made this

decision because Singh “was upset over a comment that [Complainant] made and at that time Mr. Affeltranger removed him.” (T 343) Subsequently, Smith reiterated that Affeltranger was the person who decided to continue to ban Complainant from flying for Respondent after December 16. (T 430, 432)

Affeltranger was a witness for Respondent at the hearing. Affeltranger testified that he was given “a heads up” about the November 30 flight by Lotter. I conclude that he was informed about the situation on November 30 or shortly thereafter. Affeltranger testified that he decided that there were “two issues” involved:

a technical issue, i.e., the interpretation of [the Weight and Balance] Manual and how [Complainant] interpreted the manual, [and] a little bit of a personality conflict in that there were accusations that were made . . . that [Complainant] was under the impression that Mr. Singh was relatively aggressive in making sure that the aircraft flew all the bags that were there . . . and was challenging his authority as a captain as to putting all the bags on board the airplane. . . .

(T 468-69) Affeltranger testified that Smith made the initial decision to suspend Complainant in early December. However, Affeltranger said that he made the subsequent decision to remove Complainant from the JFK base and Respondent’s flights. (T 493-94)

During the meeting on December 8 Affeltranger telephoned Singh and advised Singh about what Complainant had told him and the others. Apparently, this included Complainant’s statement that Singh had asked Complainant to try to place an additional 50 bags on the November 30 flight. Affeltranger testified that Singh “grew very upset that his integrity had been challenged and . . . [Singh] was personally affronted.” (T 471-72) At the hearing, Affeltranger was asked whether Singh requested that TMA remove Complainant from Respondent’s flights and responded that, “it was really my decision to take [Complainant] off the flight[s].” (T 472) Affeltranger testified he was concerned about the technical side as well as the personality conflict. Affeltranger stated that he decided to bring in a person, Michael Lovett, to resolve the “personality conflict” between Complainant and Singh. (T 472) Affeltranger told Singh that he was not going to allow Complainant to fly on Respondent’s flights “until we resolved the personality conflict.” Affeltranger testified that Singh “was absolutely fine with that.” (T 473) When Complainant refused to cooperate with Lovett, Affeltranger testified that he decided it was best to continue barring Complainant from Respondent’s flights and

continue to fly him anywhere else in the system because we were unable to come to terms with the personality conflict [and] it was best that he not fly on [Respondent’s] system because it was a valued customer and I’ve got a great captain.

(T 476)

Singh's overall version of the relevant events follows. Singh testified that on November 30 he asked Complainant, "[H]ow is it possible that you're leaving so much [bags] now and you've never left, you know, no flight before has left anything like that before?" (T 576) Singh testified that at that time he "was pleading with [Complainant] on the situation itself, [asking] did you check the fuel, did you check the child rate, you know it's a huge situation." Singh also testified, "I sort of pleaded with [Complainant], please do your best." But Singh denied that he asked Complainant to take on 50 additional bags. (T 576)

Singh testified it was not until December 8 that he formed the opinion that Complainant should be barred from piloting Respondent's flights. Prior to December 8, Singh stated, although he was very concerned about the effect of Complainant's actions on Respondent's future business, Singh felt that Complainant was providing helpful suggestions to avoid the overweight problem, such as to weigh the passengers as well as the bags or convince the Boeing Company to recalculate upward the total weight capacity of TMA's 757s. Consequently, Singh did not request TMA to ban Complainant from Respondent's flights prior to December 8. (T 526-27) However, on December 8 Affeltranger called Singh and told him that Complainant had said that Singh "tried to force him to take the bags." Singh responded by telling Affeltranger, "I prefer not to work with him." (T 528) Subsequently, Singh testified that on December 8 Affeltranger told him, "Well, I got to tell you that we finished talking with [Complainant] and he's saying that you tried to force him to carry more bags." Singh testified, "I got very upset . . . I said to [Affeltranger], 'John, no way, no way. I would never do nothing like that (sic).'" Singh explained: "I've been chartering airplanes since I was 24 years old and . . . I would never tell a captain to do that because that's the safety of people (sic)." (T 549) Singh stated that Affeltranger said he would call Singh again, and reiterated that Complainant "is saying that you tried to force him, that day, to carry more bags." Singh testified that Affeltranger called him a second time on December 8, and the following conversation took place:

I said [to Affeltranger], "Well, John, this has never happened. What do I do here? How do I handle something like this? . . . He goes, "Well, you know, this is the situation, what is it you would like to do?"

I said, "What is it that can be done, John, because there's just no way I'm going to accept a guy saying I did something like this."

So I said, "John, what is it that could be done here?" John made a reference to the Kerry situation. They had a pilot there, something about they had him removed. I don't remember the Caracas incident, the Venezuela carrier that removed the flight crew and so he made reference to that, [saying] "this has happened before, and at the customer's request they have moved the flight crew."

So I said, "Are you going to move him [Complainant]?" And he [Affeltranger] goes, "Yes he keeps his job, he just flies somewhere else."

I said, "John, I would prefer that right now. I really don't want to work with anybody that could do this to me."

(T 550-52) Subsequently Singh testified, "I wanted to freeze our relationship; I didn't want to work with [Complainant]." (T 561)

In essence, Singh testified that his desire not to work with Complainant had nothing to do with the fact that Complainant left bags behind on November 30, but was caused by Complainant's false accusation that Singh attempted to force Complainant to take more bags on the aircraft on that date. (T 554) Singh further stated that he had no knowledge that Complainant's removal from the JFK base and from Respondent's flights could result in Complainant losing income. (T 554, 598-600)

B. Discussion

1. The Merits of the Complaint

The employee protection provisions of AIR 21 are set forth at 49 U.S.C. § 42121(a)(1)-(4). Subsection (a) proscribes discrimination against airline employees, as follows:

(a) No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges or employment because the employee (or any person acting pursuant to a request of the employee)-

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in a proceeding.

The proof requirements of the complaint procedures are contained in subsection (b)(2)(B). This provision requires the complainant to make “. . . a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.” In defense, an employer must demonstrate “. . . by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.” 49 U.S.C. § 42121(b)(2)(B). The standard for a determination by the Secretary is “that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.” 49 U.S.C. § 42121(b)(2)(B)(iii).

The “demonstrates” standard set forth in AIR 21 requires a complainant to prove by a preponderance of the evidence that protected activity was a contributing factor that motivated a respondent to take adverse action against him. 29 C.F.R. § 1979.109(a); Peck v. Safe Air International, Inc., ARB No. 02-028, slip op. at 6, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004).

#### Complainant’s Conduct on November 30, 2004, was Protected Activity

Protected activity is defined under 29 C.F.R. § 1979.102(b) to include filing, or assisting in, a proceeding relating to a violation of “any order, regulation, or standard of the [FAA] or any other provision of Federal Law relating to air carrier safety under subtitle VII of title 49 of the United States Code, or under any other law of the United States.” § 1970.102(b)(2). The precedents arising under the various federal whistleblower protection statutes make it clear that the critical question is whether the complaining employee “reasonably” believed that his conduct was related to a safety consideration. Id., slip. op. at 9.

Respondent argues that Complainant’s action is not protected because, “Under 14 C.F.R. § 121.153(b) a certificate holder like TMA may use an approved weight and balance control system based on average, assumed, or estimated weight to comply with applicable airworthiness requirements and operating limitations.” (Respondent’s Brief at 15) Respondent further contends that Complainant’s conduct is not protected because his belief “that there was some FAA violation . . . on November 30 is patently unreasonable” because he “failed to follow TMA’s FAA approved method for calculating weight and balance [and] created his own weight and balance system . . . .” (Respondent’s Brief at 16) Complainant cites Negrón v. Vieques Air Link, ARB Case No. 04-021, ALJ Case No. 2003-AIR-10 (ARB Dec. 30, 2004), aff’d. sub nom. Vieques Air Link v. U.S. Dept. of Labor, 437 F.3d 102 (1<sup>st</sup> Cir. Feb. 2, 2006), for the proposition that a pilot’s refusal to fly an airplane because he believes it to be overweight and in violation of FAA regulations constitutes protected activity. (Complainant’s Brief at 16-17)

As Respondent notes, there is no evidence that Complainant reported to the FAA any violation relating to the November 30 flight. In Vieques, the administrative law judge, the Administrative Review Board (“ARB”) and the First Circuit all found that the airline violated AIR 21 by retaliating against pilot Negrón because he had questioned the passenger weights

recorded for a flight and started using a scale to verify their weights. The First Circuit noted that AIR 21 prohibits an airline from discriminating against an employee because the employee provided either to the employer or the federal government information relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any law relating to air carrier safety.

I find that Complainant engaged in protected activity when he decided to leave bags behind on November 30, in the belief that had he allowed all the bags on the airplane by using the 30-pound per bag method to calculate the baggage weight, the November 30 flight would have exceeded the MZFW. Complainant's action was quickly made known to Respondent and TMA. Complainant had a reasonable concern about the safety problem created by calculating the weight of the bags to be loaded on the airplane by using 30 pounds per bag rather than the actual average weight of more than 60 pounds per bag. On December 2 Complainant informed Lotter, chief pilot for TMA, of the reasons he had directed that bags be kept off the plane. I find no merit in Respondent's argument that the FAA-approved 30-pound per bag assumption was the only permissible method of calculating the weight. Respondent's contention is an extension of Smith's testimony that putting fewer bags on the flight would be an FAA concern "Just because [the 30 pounds is] . . . regulatory based." I find that TMA's attempt to enforce the 30-pound per bag rule gave unreasonable blind obedience to the technical standard.<sup>8</sup>

In addition, I find that it is not certain that the Weight and Balance Manual required that the 30-pound rule had to be used on November 30. Respondent's witnesses Smith and Elbert Corbett (the chief pilot for TMA who preceded Lotter, and subsequently a ground instructor for TMA) testified that where the actual weight of the bags was known, a second method – but not the one Complainant used – could be utilized. (T 315-17, 324-25, 441-44, 452-53, 455-56) It appears, however, that Smith and Corbett were adjusting the rules "on the fly" as the Weight and Balance Manual allows a second method for calculating weight only for "manifested cargo, **other than checked baggage.**" (See fn. 3, above. Emphasis supplied.) In addition, despite this testimony by Smith and Corbett, no one has testified that the bags on the November 30 flight met that description. Consequently, it appears that TMA itself was not averse to casting aside the Weight and Balance Manual's approved 30-pound standard for baggage.

Further, Complainant testified that in the middle of November, several weeks prior to the November 30 event, he placed a call to Charles Boswell, an inspector for the FAA on TMA's 757 airplanes. Complainant called Boswell because Complainant was concerned about using the 30-pound per bag assumption and wanted information about using the total baggage weight to calculate how much the individual bags weighed. Complainant told Boswell that on JFK flights that were fully loaded the actual weights were 10,000 pounds above what the 30-pound per bag figure provided, and the MZFW was being exceeded. Complainant testified that Boswell said, "If you have these [actual] weights, you must use them." Complainant further testified that Boswell told him that if Complainant had the actual baggage weight, failed to use that weight,

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<sup>8</sup> It is clear that TMA's underlying motivation was not simply to adhere to the 30-pound rule because it was "regulatory based." Adherence to the rule met the needs of Respondent, an important TMA customer, by allowing Respondent's passengers to put double the number of bags on the airplane.

and consequently the MZFW was exceeded, it would be considered careless and reckless operation of the aircraft. (T 41-48, 50, 188) Boswell corroborated Complainant's testimony about their telephone conversation in mid-November, testifying at the hearing by telephone from his FAA office in Atlanta. Boswell stated that he is an FAA aviation safety inspector and in November 2004 was an FAA "safety inspector/assistant principal operating inspector" overseeing TMA. Boswell testified that Complainant called him at his FAA office in November and said he was concerned about the loading of cargo and bags at JFK. Complainant said he was confused because TMA had given him two different methods for computing weight and balance. Boswell testified that he told Complainant that, "[I]f he knew the actual weight that he could not exceed any limitation of the aircraft; it was his responsibility." (T 228-32) Boswell testified that Complainant told him that Complainant knew the total weight of all the bags checked for the JFK flights. (T 236) I find that Boswell's advice to Complainant to use the actual baggage weight reveals that the FAA-approved 30-pound per bag method was not written in stone and could (and should) be ignored if it resulted in a known overweight problem. Further, it is clear that in deciding to use the 60.6-pound per bag calculation, obtained by dividing the number of bags into the total baggage weight, Complainant was relying on the advice he received from Boswell of the FAA. This is additional reason to conclude that Complainant's conduct on November 30 was protected activity under AIR 21. Finally, the FAA regulations state, under the heading, "Responsibility and authority of the pilot in command,"

The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.

14 C.F.R. § 91.3(a).

In light of the foregoing, I find that Complainant had reasonable cause to believe that on November 30 he was applying the FAA's general safety rules, even if there was no specific rule that authorized his actions.

Suspending Complainant from Flying and Removing Complainant from the JFK Base  
Constitute Unfavorable Personnel Actions

It is uncontested that Complainant was suspended from flying from December 10 through December 16 and thereafter was barred from flying out of the JFK base that was close to his New Jersey residence. Apart from whether these actions resulted in Complainant losing any income, each of the actions constitutes an adverse personnel action because they caused Complainant inconvenience of the type that could reasonably discourage employees from whistleblowing activity. See Burlington Northern & Santa Fe Railway Co. v. White, U.S. , 2006 WL 1698953 (June 22, 2006), in which the Supreme Court noted that reassignment of duties and suspension from employment can constitute "materially adverse" action that constitutes unlawful retaliation under Title VII of the Civil Rights Act of 1964, even where there is no loss of pay.<sup>9</sup>

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<sup>9</sup> The proposition for which I have cited White is not a new one under employee-protection statutes. White is important for another reason. It extended Title VII's anti-retaliation provision

Complainant's Protected Activity Contributed to TMA's Decision  
To Impose Unfavorable Personnel Actions on Complainant  
and  
Respondent has Failed to Establish that Absent the Protected Activity  
The Same Unfavorable Personnel Action Would Have Been Imposed

I find that Complainant's protected activity on November 30 contributed to the decision by TMA to suspend him and, later, to bar him from flying out of the JFK base. The entire course of the conflict between TMA and Complainant began with his protected activity on November 30. This led to TMA's efforts to placate Respondent, TMA's most important customer, by suspending Complainant because Singh was upset about Complainant's removal of the bags on November 30. The events of November 30 subsequently resulted in TMA's decision to remove Complainant from the JFK base because Singh later told TMA he did not want Complainant to fly for Respondent any more.<sup>10</sup>

TMA's independent action to suspend Complainant from flying because Singh was upset is inextricably intertwined with the fact that Singh was upset over Complainant's protected activity on November 30. TMA's later submission to Singh's plea that he did not want to work with Complainant any longer – in actuality a demand that Complainant be barred from Respondent's flights – was also bound up with Singh's concern about Complainant's protected activity and his fear that Complainant would do it again. Consequently, I find that Respondent cannot establish that absent Complainant's protected activity the same unfavorable personnel action would have been taken against Complainant.

Respondent is Not Responsible for TMA's Suspension of Complainant,  
But is Liable for TMA's Removal of Complainant from the JFK Base

I find that Respondent is not responsible for TMA's suspension of Complainant from flying from December 10 through December 16. Simply stated, this was decided by TMA before the headquarters meeting of December 8 and there is no direct evidence that Singh applied pressure to TMA to take any kind of action against Complainant until Singh spoke with Affeltranger on December 8. At most, prior to December 8 Singh indicated to TMA that he was concerned and upset about the events of November 30 and how the weight and balance problem would be resolved. This is insufficient circumstantial evidence on which I can base an inference that Respondent did anything to cause the suspension. Finally, although it is understandable that TMA would believe that the suspension of Complainant would please Singh, this is inadequate for a finding that Respondent caused the suspension.

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to prohibit employers from "taking actions not directly related to [an employee's] employment or by causing harm *outside* the workplace." *Id.* slip op. at 7.

<sup>10</sup> As discussed below, I conclude that Respondent did not cause TMA's initial decision to suspend Complainant, but subsequently did cause TMA to bar Complainant from Respondent's flights.

On the other hand, it is clear that Singh's statements to Affeltranger on December 8 resulted in TMA prohibiting Complainant from flying out of JFK thereafter. Singh himself testified that he told Affeltranger that on December 8 he formed the opinion that Complainant should be barred from piloting Respondent's flights, and so informed Affeltranger. Based on Singh's testimony quoted at length above, it appears that TMA's Affeltranger was pointedly suggesting that Complainant would be barred if only Singh would request it. Singh did so, stating, inter alia, "there's just no way I'm going to accept [the] guy . . . ." I discredit Affeltranger's testimony to the contrary.

Respondent argues that it was not Complainant's employer, and therefore cannot be held liable for TMA's adverse personnel action against him. (Respondent's Brief at 11-14) Complainant argues that he is a covered "employee" under 29 C.F.R. § 1979.101, but concedes that TMA, not Respondent, was Complainant's employer. Complainant further argues that Respondent is liable for the adverse employment action against Complainant imposed by TMA, but does not explain the basis for Respondent's liability. (Complainant's Brief at 16) I agree with Respondent's contention that Complainant was employed by TMA and that Respondent was never Complainant's employer. I find that the record contains no evidence of any common law indicia of an employer-employee relationship between Respondent and Complainant.

So the question remains: If Respondent was not Complainant's employer, how can Respondent be liable for TMA's action against Complainant because of his protected activity – even though TMA's action was caused by Respondent? There is no clear answer. However, a pathway is suggested by the Administrative Review Board ("ARB") in a case cited by Complainant: Fullington v. AVSEC Services, L.L.C.; Southwest, Airlines Co.; et al., ARB Case No. 04-019, ALJ Case No. 2003-AIR-30 (ARB Oct. 26, 2005).

Loretta Jean Fullington ("Fullington") was employed as a duty manager by AVSEC Services ("AVSEC"), a company that provided janitorial and aircraft detailing services for Southwest Airlines Co. ("Southwest"). Fullington supervised and scheduled the cleaning crews. She also was responsible for performing cabin seat security checks. She complained to AVSEC, Southwest and the FAA about alleged violations of "standard security procedures and because she believed that it was improper for Southwest to assign security checks to a cleaning company." Ultimately AVSEC suspended Fullington from her job. She filed AIR 21 complaints against AVSEC and Southwest. Southwest filed a motion to dismiss. The ARB concluded that the evidence indicated that Fullington's employment had been adversely affected by AVSEC due to her protected activity, and Southwest had knowledge of the protected activity, but that Southwest did not take adverse action against her or cause AVSEC to do so. Fullington, slip op. at 5-6. The ARB therefore affirmed the determination of the administrative law judge that Southwest was not liable for AVSEC's adverse action against Fullington.

In what probably is *dicta*, the ARB stated that the "pivotal" issue was "whether Fullington was an employee and Southwest was an employer subject to liability under AIR 21," noting that "employer": is not defined in the statute or regulations, but that "employee" is defined as "an individual . . . working for an air carrier or contractor or subcontractor . . . or **an individual whose employment could be affected by an air carrier** or contractor or subcontractor of an air carrier. 49 U.S.C. § 42121(a). See also 29 C.F.R. § 1979.104(b)(1)(i)-

(iv).” (Emphasis supplied.) The ARB also stated: “Although the statute refers to ‘employer’ as the potentially liable party, the regulations speak in terms of ‘named person,’ 29 C.F.R. § 1979.104, which they define as ‘the person alleged to have violated the Act.’ 29 C.F.R..101.” Id. slip op. at 6. As noted, the ARB ultimately held that Southwest was not liable because it was not Fullington’s employer and did not cause AVSEC’s decision to take action against her. Id. slip op. at 7-8. The ARB’s opinion case did not address the liability of AVSEC.

The employment situation in the instant case is the obverse of that in Fullington. In Fullington, Southwest was not the employer and had not caused the adverse employment action. In the instant matter, TMA was an “air carrier” and Complainant’s employer, and took the adverse personnel action against him (but TMA is out of the case due to the bankruptcy stay), while Respondent also is an “air carrier,” although it was not Complainant’s employer, and Respondent caused TMA to take adverse action against Complainant.

Public policy strongly warrants protecting Complainant under AIR 21 despite the fact that Respondent was not his employer. The purpose of AIR 21 is to guard the safety of airplane flights by protecting whistleblowers who are employed by air carriers from adverse actions by their employers that are “affected by an air carrier or contractor or subcontractor of an air carrier.” 29 C.F.R. § 1979.101. Complainant was employed by an air carrier (TMA) and his employment was affected by an air carrier (Respondent). Thus, the relationships and interactions of Complainant, TMA and Respondent fit logically into the intent and scheme of AIR 21.

For the instant case, the most significant language in Fullington is:

We therefore conclude that there must be an employer-employee relationship between an air carrier, contractor, or subcontractor employer who violates [AIR 21] and the employee it subjects to discharge or discrimination, but that **the violator** need not be the employee’s immediate employer under the common law.

Fullington, slip op. at 6. (Emphasis supplied.) Indeed, here Respondent, although not Complainant’s employer, was a covered “violator” who caused TMA to take adverse personnel action against Complainant. Respondent cannot reasonably argue that it could not have foreseen that TMA would remove Complainant from JFK and Respondent’s flights. Respondent requested this action, which was all but solicited by TMA, and under the circumstances knew that its request would be heeded by TMA. In addition, I discredit Singh’s testimony that he had no reason to believe that Complainant could lose income as a result of being removed from Respondent’s flights. Even if TMA told Singh that Complainant would not lose any flying time, it was reasonably foreseeable by Singh that when Complainant was barred from piloting the flights of Respondent – a major customer of TMA – this could very well result in Complainant losing flying time.

Based on the foregoing, I find that Respondent is liable for the adverse action it caused TMA to take against Complainant.

## 2. The Remedy

Complainant does not seek reinstatement to his job with TMA. Indeed, it appears that TMA became defunct in September 2005. Further, Complainant testified that he resigned from TMA as of August 1, 2005 and obtained another job as a pilot at that time. (T 15, 109, 143)

Complainant seeks backpay of \$29,250 “because he could no longer fly out of JFK,” as well as “compensatory damages” of \$75,000 “for his pain and suffering, mental anguish, and humiliation.” (Complainant’s Brief at 18-20)

Despite suspending Complainant for seven days in December 2004 and removing him from JFK after December 16, except for one or two flights (T 135-36), TMA paid Complainant his regular salary of \$58,000.00 per annum through the year 2004 and \$68,000.00 per annum beginning on January 1, 2005. (T 104, 109) Complainant claims, however, that he was deprived of \$29,250.00 of “reserve” pay at \$500.00 per day for making himself available to fly beyond the standard 16 days per month for which he received his regular salary. The reserve pay was also known as “overtime.” Complainant arrived at the \$29,250.00 by calculating that he received an average of 9.5 days per month of overtime from June 2004 through November 2004, but had only a total of eight days of overtime for the period of December 2004 through July 2005. (CX 55; T 131-33) Complainant concedes, “He was not available for overtime during April [2005] due to the death of his father.” Consequently, he eliminated April from his calculations. (Complainant’s letter-brief dated June 15, 2006, page 1.) Therefore, Complainant posits that he should have received 66.5 days of overtime during seven months of the period in question, but he received a total of only eight overtime days. The net loss is 58.5 days at \$500 per day, or a total loss of \$29,250. (Complainant’s letter-brief dated June 15, 2006.)

Respondent argues that Complainant did not lose any overtime income due to being transferred out of the JFK base, pointing out that Smith testified that there was less overtime available during that time than earlier. Smith testified that TMA was short of pilots during the latter part of 2004 and hired more of them. Consequently, less overtime was available for each pilot. He also testified that the amount of overtime decreased in the December 2004 to July 2005 period. (T 430-31) Respondent also points out that Complainant testified that furlough of pilots occurred in 2005 because of TMA’s deteriorating financial condition. (T 144-45) I infer from the above that Respondent’s flights were being reduced in number in 2005 because of its financial problems. Complainant counters by arguing that “TMA provided no documents to substantiate” that there was less overtime available for pilots in 2005. (Complainant’s Brief at 13; Complainant’s letter-brief dated June 15, 2006, page 2) However, it is Complainant’s burden to establish that his overtime was reduced because he was transferred out of JFK; it is not Respondent’s burden to establish the contrary. Moreover, it appears that Complainant made no discovery attempt to obtain TMA’s records that would reveal how much overtime was available from December 2004 through July 2005. Complainant also argues that the availability of overtime was established by his testimony that other pilots were getting “significant amounts of overtime.” (T 240) Complainant also said he spoke to two pilots who told him they were getting overtime. (T 261) Finally, Complainant testified that another pilot thanked him, “kind of saying that he was getting overtime as a result of flying in the New York, covering my trips, on my line.” (T 261) I find that this testimony of Complainant is entitled to no weight because it is

anecdotal and general in nature. Further, Complainant did not identify the persons with whom he spoke. In addition, there is no evidence regarding how much overtime these pilots were being assigned or where or when they worked on overtime. In conclusion, I find that Complainant has failed to establish by a preponderance of the evidence that he lost overtime income as a result of his transfer away from the JFK base. Therefore, Complainant is not entitled to an award of backpay.

Complainant supports the requested compensatory damages of \$75,000.00 with the argument that after he was barred from flying out of JFK he suffered injury because:

- He was required to go to other cities to fly for TMA.
- He was required to be away from home at least half of each month.
- He suffered emotionally.
- He was forced to sell his condominium and his New Jersey car, lost significant overtime pay, and he accrued legal expenses.
- He suffered assault to his dignity, his self-esteem and his sense of professionalism and security.
- He became extremely apprehensive and anxious every working day after November 30 because he believed his every move was being watched.
- His lengthy and frequent absences from home to fly out of other cities interrupted the pattern of his personal life.
- He was forced to spend enormous amounts of time bringing and prosecuting the complaint.
- He lost significant social relationships and activities that previously brought him pleasure.

(Complainant's Brief at 13-15)

Despite the emotional trauma that Complainant alleges he suffered as a result of being removed from JFK, he did not seek treatment by any physician for his "mental anguish." Complainant attempts to blunt the force of this fact by the argument that he is "not comfortable with the idea of psychotherapy and had never sought it in his life." Complainant also states that he was afraid to report such medical care to the licensing authorities. He therefore decided to "tough it out." (T 104-108, 136-142, 246)

Any compensatory damages would be limited to the December 2004 – July 2005 period because Complainant obtained another job as a pilot in August 2005, and he does not seem to allege that he suffered injury after that period. At any rate, there is no clear allegation, testimony, or other evidence that he had compensatory damages after July 2005. In weighing the extent to which Complainant suffered mental or emotional injury due to being removed from the JFK base, I first note that Complainant continued to fly 757 aircraft for TMA throughout this period of time. At the hearing in this case Complainant showed that he is a dedicated pilot who is highly concerned about the safety of his flights. I therefore am certain that Complainant would not have continued to pilot 757s through July 2005 if he had any indication that his ability to fly safely was impaired for any reason. Further, Complainant did not suffer severely enough for him to seek treatment for mental or emotional problems from a physician. Complainant

explained that he preferred to “tough it out.” Since he was able to do so successfully without medical treatment, this is additional reason to conclude that his mental or emotional problems were not significant. Finally, although an award of damages for emotional trauma can be made in the absence of supporting evidence from a medical expert, Complainant’s failure to have offered such evidence at the hearing is another factor I have considered. In consequence, even if Complainant experienced some mental or emotional discomfort, I find that he has failed to establish by a preponderance of the evidence that he suffered severely enough to be compensated for it.

Complainant has shown, however, that he was inconvenienced by having to travel to cities other than New York to fly for TMA during the pertinent period of time. (TMA paid Complainant’s travel expenses.) On the other hand, there is no evidence that he was in any way debilitated by this because, as noted above, he was not prevented from piloting 757s during that period. For the inconvenience of having to travel to and from airports far from home and live away from home, I find that Complainant is entitled to damages of \$500.00 per month from December 2004 through July 2005. Excluding the month of April 2005, when Complainant did not make himself available to fly, he is entitled to damages for seven months at \$500.00 per month, for a total of \$3,500.00 in compensatory damages.

### 3. Attorney’s Fee and Costs

Complainant seeks attorneys’ fees totaling \$142,150.50 and costs in the amount of \$4,201.27 in an application filed on June 16, 2006. The fees are based on services provided primarily by Complainant’s lead attorney at the rates of \$500 per hour in 2005 and \$550 per hour in 2006, and the “second chair” attorney at the rates of \$180 per hour in 2005 and \$200 per hour in 2006, and somewhat lower rates for a few hours in 2004. Other attorneys at the firm are also listed as having performed work on the case.

Respondent, in its opposition to the requested fee, makes the following arguments: (1) the requested hourly rates are unsupported, and Complainant’s lead counsel’s fee should be set at \$300 per hour (citing precedents for fees of \$250 and \$350 per hour); (2) Respondent should not be charged for time solely attributable to TMA issues that putatively occurred on the following dates in 2005 – January 24, February 1 and 15, May 27, August 2 (actually August 3), and September 28; (3) Respondent should be responsible only for the fees of Complainant’s two main attorneys; (4) intra-office conferences and communications should be excluded; (5) vague time entries should be excluded; (6) there should be an “across the board reduction of 30%.”

The description of the services rendered by each attorney and paralegal, the hours expended for the services, and the hourly rates are set forth in a 27-page document. Unfortunately the total hours by each individual and by the law firm are not shown. I calculated Complainant’s lead counsel’s hours at 57 hours at the hourly rate of \$500 and 83 hours at the hourly rate of \$550, for a total requested fee of about \$74,000 for a total of 140 hours of work. I calculated the hours for the “second chair” attorney as 122 hours at the rate of \$180 and 183 hours at the rate of \$200, for a total fee of over \$58,500 for 305 hours of work. These two attorneys together expended a total of about 455 hours on the case. This leaves the remainder of

the total requested fee of \$142,150.50 – less than \$10,000 – spread among a number of lower paid attorneys and paralegals. I calculate this work as totaling about 50 hours of time.

I reject Respondent’s objection to time arguably spent on matters pertaining solely to TMA. First, these add up to only 1.40 hours. Second, it is almost impossible to identify what matters pertain solely to TMA and not at all to Respondent. I also reject the objection to intra-office communications. Finally, I reject the objection to “vague” entries, finding that the explanations of the reasons for the time spent are adequate. Respondent’s remaining objections will be considered below.

The guiding Supreme Court precedent for determining the appropriate attorney’s fee under a federal fee-shifting statute is Hensley v. Eckerhart, 461 U.S. 424 (1983), a case under the Civil Rights Attorney’s Fees Awards Act, 42 U.S.C. § 1988. Hensley stated that “the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours and hourly rates.” Id. at 437. The Court stated that a “prevailing party” in a fee-shifting case, such as Complainant herein, is entitled to an attorney’s fee, but held that the trial court still must “determine what fee is reasonable.” The method for the “reasonable fee” determination is to use “the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” Hensley also stated that the trial court “should exclude from this initial fee calculation hours that were not ‘reasonably expended,’” referring to legislative history. The Court further stated that, “Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary . . . .” Id. at 433-34. Referring to Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5<sup>th</sup> Cir. 1974), Hensley held that there are “twelve factors” to be considered,<sup>11</sup> one of which, “‘the amount involved and the results obtained,’ indicates that the level of a plaintiff’s success is relevant to the amount of fees to be awarded.” Hensley at 430-31. A general consideration is that the fee should be “adequate to attract competent counsel, but [should not] produce windfalls to attorneys.” Id. at fn. 4. Finally, in considering whether to “adjust the fee upward and downward,”<sup>12</sup> the Court stated that a consideration is “the important factor of the ‘results obtained,’” restated as: “did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?” Id. at 434. In this regard, Hensley noted that “many of the [twelve] factors are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate.” Id. at fn. 9.

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<sup>11</sup> The twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. The Court noted, “These factors derive directly from the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106.” Hensley at fn. 3.

<sup>12</sup> An “upward” adjustment is not a consideration under AIR 21, as that would constitute impermissible punitive damages.

I find that Complainant's counsel has established that the hourly rates requested are reasonable for the high-cost New York City venue in which the law firm is situated, considering the skills and experience of the attorneys who worked on the case, and the issues involved. I also find that the costs expended are reasonable and should be reimbursed by Respondent.

However, I find that counsel exceeded a reasonable number of hours in relation to the nature of the case, its potential outcome, and its actual outcome for Complainant. From the outset of counsel's representation of Complainant it should have been apparent to counsel that the remedy or damages available to Complainant were limited. Complainant did not seek reinstatement to his former position with TMA. Nor did Complainant seek front pay beyond July 2005. At all times, his remedy was limited to backpay and compensatory damages. Further, his loss of wages was limited in that TMA continued to pay Complainant his regular salary. At most, he would be entitled to \$29,250 in lost overtime pay, as claimed by Complainant. But Complainant himself knew that TMA was furloughing pilots because of its financial problems, and he himself requested a furlough in July 2005. In addition, it appears Complainant's counsel never engaged in discovery to obtain evidence that would reveal the amount of overtime that TMA assigned to pilots before and after December 2004, or any evidence that would show how much overtime was available and how many pilots were employed during the two periods in question. At best, counsel prosecuted the case through the hearing without any idea of what were Complainant's overtime losses that were attributable to his being removed from the JFK base. With regard to compensatory damages, counsel should have been aware that where Complainant "toughed it out" without seeking medical treatment and continued to fly 757 aircraft, he had a very steep uphill climb in order to establish that he had significant mental or emotional injury. In short, counsel should have reasonably anticipated that only a very modest remedy could be achieved in this case. Therefore, the hours expended by the law firm are not reasonable under Hensley.

Based on the foregoing and viewed in the context of my award to Complainant of only \$3,500 in damages, the hours and (and resulting fee) must be considerably reduced. To award a fee approaching the requested \$142,150.50 would result in an unwarranted windfall for Complainant's counsel. On the other hand, in determining the size of the proper fee, I have taken into consideration that Complainant's actions on November 30 were vindicated through this litigation. I have also taken into consideration that competent lawyers should be encouraged to represent employees who "blow the whistle." Based on all these considerations, I find that a reasonable expenditure of time for which counsel should receive compensation is 150 hours at a blended rate for the two primary attorneys of \$325.00 per hour,<sup>13</sup> or a total fee of \$48,750.00.

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<sup>13</sup> In arriving at a "blended" hourly rate of \$325 I have combined Complainant's lead attorney's \$500 and \$550 rates with the second attorney's \$180 and \$200 rates. I took into consideration the fact that the second attorney, with the lower rates, spent more than twice as much time on the case than did the lead attorney.

ORDER

It is ORDERED that:

Respondent Travelespan, Inc. is liable for and shall pay the following compensatory damages, attorney fee, and costs:

1. Complainant Ronald Walters' compensatory damages of \$3,500.00.
2. Complainant's attorney's fee of \$48,750.00 and costs of \$4,201.27.

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Robert D. Kaplan  
Administrative Law Judge

Cherry Hill, New Jersey

**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).