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Office of Administrative Law Judges
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Issue Date: 29 June 2009

Case No. 2007-AIR-9

In the Matter of:
RODERICK M. BLOUNT,
Complainant,

v.

NORTHWEST AIRLINES, INC.,
Respondent.

APPEARANCES:

Paul W. Iverson, Esq.
Angela M. Rouillard, Esq.
Roseville, MN
For the Complainant

James Kramer, Esq.
Minneapolis, MN
and
John M. Vande Walle, Esq.
Eagan, MN
For the Respondent

BEFORE: Thomas F. Phalen, Jr.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the provisions of the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21 Act" or AIR21"), 49 U.S.C. Section 42121. The regulations that govern this matter appear at 29 C.F.R. Parts 18 and 1979. These provisions protect employees from discrimination by air carriers, or their contractors or sub-contractors, for attempting to carry out the purposes of the AIR21 Act. Involved in the present matter is a Northwest Airlines, Inc., customer service agent (CSA), Roderick M. Blount, subject to regulation under the Federal Aviation Administration (FAA), the Occupational Safety and Health Administration (OSHA), and any other provision of Federal law relating to air safety. Complainant alleges discrimination because he has engaged in protected activity related to a violation of an order or regulation under those provisions.

On February 15, 2007, Complainant, Roderick M. Blount, filed a discrimination complaint with the Occupational Safety and Health Administration (OSHA) under the AIR21 Act, 49 U.S.C. Section 42121, and 29 C.F.R. 1979 due to his termination for his refusal to sign a completed flight crew list verification form. The complaint was investigated, and on June 15, 2007, it was found by the investigator to have not been supported by the persuasive evidence. On July 18, 2007, Complainant, through counsel, certified that he mailed his objections regarding the findings of the OSHA investigator, requesting a *de novo* hearing. Pursuant to an order of the undersigned dated September 5, 2007, as amended on April 16, 2008, the hearing in this case was held on May 13, 2008 in St. Paul, Minnesota. (ALJX 1(a) and 1(b)) Both parties were represented by counsel. They were given an opportunity to present evidence and arguments, and were allowed to submit briefs, which were timely filed.

On August 13, 2008, pursuant to discussion of the undersigned with the parties at the hearing in this matter, a Stipulated Index: Hearing Transcript Pages Containing Sensitive Security Information Under 49 C.F.R. § 1520 to be Filed Under Seal Pursuant to 29 C.F.R. § 18.46, was submitted and has been adopted as part of the record by the undersigned.

After considering all of the arguments, briefs and documentary and testimonial evidence, the following is my recommended decision and order. It includes the following issues, findings of fact and conclusions of law.

ISSUES

1. Whether Respondent committed a violation of the AIR 21 Act by taking an unfavorable personnel action in which Complainant has alleged that his protected conduct or behavior was a contributing factor; and if so, whether Respondent has demonstrated by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of any protected behavior or conduct, as alleged in the complaint.
2. What damages and remedies, if any, the Complainant is entitled to as a result of the adverse actions taken by Respondent.

STIPULATION OF FACTS

1. The Office of Administrative Law Judges, U.S. Department of Labor has jurisdiction over the parties and the subject matter of this case.
2. Respondent is engaged in interstate commerce and is an employer subject to the provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act (hereinafter AIR 21). (49 U.S.C.A. § 42121). 29 C.F.R. Part 1979 and the Procedural Regulations governing the hearing at 29 C.F.R. § 18.

3. Complainant was, and at all times material herein, an “employee” as defined in § 29 C.F.R. Part 1979, 49 U.S.C. § 40102 and the procedural regulations governing the hearing at 29 C.F.R. Part 18.
4. Roderick Blount was an employee of Northwest Airlines during the applicable periods in that he was employed as a probationary customer service agent of the Minneapolis Airport.
5. Pursuant to § 42121(b) of the Wendell H. Ford Aviation Investment and Reform Act Blount filed a complaint on February 15, 2007 with the Secretary of Labor alleging that Northwest Airlines discriminated against him in violation of Section 42121 of the Wendell H. Ford Aviation Investment and Reform Act (49 U.S.C. § 42121).
6. The original complaint filed with the Secretary was timely.
7. Following an investigation, the Regional Administrator, OSHA, issued his findings on the complaint on June 15, 2007.
8. Complainant received those findings by mail on June 19, 2007.
9. Complainant mailed an appeal and request for hearing to the Chief Administrative Law Judge, U.S. Department of Labor, Washington, D.C. on July 18, 2007.
10. The appeal of the complainant satisfied the 30-day time constraints provided by 29 C.F.R. § 1979.106.

FINDINGS OF FACT

Unless otherwise so indicated by the undersigned, the following descriptive summaries of testimony and relevant documents constitute my findings of fact, in addition to the above stipulations of fact which I now adopt as part of these findings of fact.

Blount's Employment at Northwest Airlines -

On December 4, 2006, Complainant, Roderick M. Blount (“Blount” herein), signed an application form and an employment contract with Respondent, Northwest Airlines, Inc., (“Northwest” herein) as a customer service agent (CSA), despite having no airline or customer service experience.¹ Subject to a probationary period of 180 days,² Blount was employed as a

¹ Blount confirmed that he had no prior customer service oriented employment experience, that he never worked for an airline company before joining Northwest, and that he did not have any knowledge or experience in working with airline security regulations and requirements prior to being employed by Northwest. He also acknowledged that dates he submitted on his application for his previous jobs were inaccurate. **[I have concluded that none of this affected Northwest's decision to hire him, particularly insofar as its knowledge of his lack of airline employment credentials was concerned.]**

² Blount testified that he signed the employment contract under “duress;” (T 50) that, while discussing his signing with a Northwest representative, Blount questioned a provision of the attached section 4B of the collective

part-time employee under the terms of a union collective bargaining agreement and was paid nine dollars per hour plus benefits that included employee travel benefits.³ His duties involved verification of crew members boarding a flight – first initialing a list of those members and then signing the completed list as the CSA assigned to the particular gate.⁴ (RX 1, 3) While in the final phase of his on-the-job training during his probationary period, Blount was assigned to a gate as the “lead” or “primary” gate CSA. While Blount maintains that he was terminated for refusing to falsify a document protected by FAA regulations, he was terminated for insubordination in his refusal to sign a completed crew verification list which showed the individual crew members as having been identified and initialed by other CSA’s when he was ordered by a supervisor to do so, because he felt it was a violation of Northwest policy protocol to sign without his own crew member verification.⁵

bargaining agreement, which conditioned his employment as probationary and “at-will” for the first 180 days of employment; that it was not attached as stated; that he had [previously] seen and read this provision when he raised his concern over signing the document; and that the Northwest representative informed him that if he did not sign it, he would not be employed and that he could be terminated at any time without cause. (T 168) Blount testified that he signed the agreement, thinking he had no other options. **[Assuming Blount’s credible testimony on this point, I find that he had read the 180-day probationary period provision as set forth in the collective bargaining agreement before signing his employment contract with Northwest; that the reference to the provision in the employment contract did constitute an “incorporation by reference” of a document known to him; and that having read the provision, Blount could establish neither harm, nor a violation of any statutory or regulatory provision governing the action of Respondent’s representative under the AIR 21 Act in its failure to have that document attached to the employment contract. This conclusion is reinforced by credible testimony that in their classroom training, new employee trainees were reminded that they were probationary employees and had to “pass that probationary period.” (Infra., p. 6)]**

³ Respondent has an acknowledged policy against utilizing employee travel benefits for personal business reasons, and introduced evidence regarding Blount’s alleged abuses of the policy. In addition to possibly being an additional reason for his termination, it challenged the truthfulness and credibility of Blount’s stated defense to the allegation. While Blount admitted taking advantage of Northwest’s free travel benefits twice a month to visit his family in Tennessee, he initially denied utilizing them to explore other business interests. However, Respondent introduced evidence that in his **March 2008** deposition, Blount acknowledged that he did utilize his travel benefits to “pursue” such business interests, but denied that he was “conducting” business matters on such travel, insofar as no such business was concluded.

⁴ Customer service supervisor (CSS), Lori Weber, testified that in addition to flight crew verification, a CSA’s duties include passenger contact such as checking-in ticket holders at the ticket counter and gate; issuing boarding passes; tagging and checking-in passenger’s bags; meeting all arrival flights and working the departures at the assigned gate; processing standby passengers; and printing and completing the flight paperwork needed for flight departure. Generally, one CSA works an assigned gate for the entire day. If that gate closes, the CSA moves to another gate. However, the assigned CSA is responsible for all flight activity occurring at that gate, with additional CSA assistance assigned as necessary.

⁵ A review of Complainant’s post-hearing briefs did not reveal that Blount had a big concern regarding air safety. It speaks more of “falsifying a document in violation of a government mandated security program.” (Complainant’s Post-hearing Brief, 21) There is a reference that after being told that he needed to do whatever his supervisor asked, Blount then asked what if there was a safety issue. He was told that the priority was to get flights out on time. *Id.* at 11. I note that Blount also stated that “whoever’s name is signed on that document could be personally held responsible as it relates to any potential accidents or anything of that nature...” (T 97) However, there are no specific details in the post-hearing briefs as to what is meant by “potential accidents.”

Blount's Classroom and Airport Training:

Blount and Webers' Testimony -

On January 2, 2007, Blount began his employment training with Northwest, in a classroom at its headquarters at the Minneapolis-St. Paul, Minnesota International Airport. He testified that the classroom training consisted of passing seven mandatory exams plus ten others⁶ following the training, one of which was "working the gates" (T 53), which specifically related to the crew verification procedures for which an employment manual was provided. He testified that he had read the manual procedures; that it had been explained to him in classroom training; that his interpretation was that a CSA was required to arrive at the gate approximately 30 minutes to an hour before departure to begin the departure process;⁷ and that prior to boarding, a CSA must verify a printed flight crew list which he understood as the correct procedure to "verify" the flight crew members boarding the flight.

A more comprehensive explanation of the classroom and on-the-job training was provided by then customer service supervisor (CSS), Lori Weber, who later became a customer service manager (CSM). She testified that she had been employed by Northwest for over twenty years performing all the functions of a customer service agent (CSA).⁸ For training she met with the new CSA's on their first day for the new-hire orientation⁹ and she was responsible for their periodic evaluations.¹⁰ As a CSS she was covered by the same union collective bargaining agreement as an hourly employee with the CSA's, and supervised a "unit," replacing CSA's and other employees at three to five gates or the ticket counter,¹¹ but did not have any other

⁶ Blount testified that he passed all mandatory tests the first time, with scores of "above average;" that he did not have to retake any of the tests to do so; and that he received certificates acknowledging passage of exams, which indicated that he had completed his training. (T 53 -54) **[I find that the certificates only applied to those portions of his training, not to evaluation of his on-the-job training.]**

⁷ The "departure process" included checking the departure signs, such as making sure the sign accurately reflected the correct departure place and time, printing upcoming flight information, and also checking to verify if a plane is set to arrive at that gate. (T 56)

⁸ Having started with Northwest in March 1987 as a part-time, then full-time, sales representative in Livonia, Michigan, Ms. Weber advanced through ticket sales and reservations and other positions in New York and Detroit. In 2004, Ms. Weber was promoted to supervisor and then manager in New York. In 2004, she was promoted to the Minneapolis-St. Paul International Airport; first, as a more general customer service manager, and then in January 2007, to a customer service manager position, responsible for managing the ticket counter and luggage operation.

⁹ Weber testified that the CSA new-hire training program began with the two-week program of eight-hour classes, thirty percent of which consisted of computer-based training. Two certified instructors, Jan Sheldon and Pat Hamilton, were responsible for overseeing new-hire training on the day shift, a portion of which included review of policies regarding operation of the airport computer system and related manual provisions.

¹⁰ The new hire evaluation process includes evaluations every thirty days until the CSA has completed 120 days of employment. The purpose of the evaluations is to monitor the new-hire's performance by ensuring that the new-hire is performing his expected duties and responsibilities and complying with Northwest policies, including attendance, safety, security, and appearance. (T 286)

¹¹ If assigned to a set of gates, Ms. Weber testified that the CSS is responsible for overseeing all the employees assigned to those particular gates, ensuring the CSA's presence at an assigned work area at the beginning of his or her shift and performing expected duties, such as seeing that flight departures leave the gate safely and on time.

management authority. In addition to his or her own work, the CSS made sure that the CSA's were performing their duties as expected in compliance with Northwest policies.¹²

On January 14th, 2007, the first day of the on-the-job training phase of Blount's training program, Ms. Weber confirmed that she first met his training class along with the other CSM's, Chuck Heinz and Maria Buyco, to explain what was expected of them as new-hires and to further reiterate what was required of them during their probationary period. She stated that the reason for the two-week classroom training was to address operating documents such as the manuals and associated paperwork governing "flight closeout" – the documents necessary for releasing the flight for take-off. They included the crew verification list as part of the primary responsibility of the CSA assigned to a gate, which was all part of a program in preparation for a nine week "on-the-job" training process that was followed by three weeks at the ticket counter with the remaining weeks spent operating a gate.

Weber testified that she told them that during probation they were not covered under the collective bargaining agreement until they passed it, and that Northwest then had the right to terminate them, with or without cause. (T 292) She told them to not worry; that new-hires would be assigned a mentor¹³ to help in situations where they might forget certain procedures or policies regarding check-ins; and that the mentor would support and provide answers to questions that might arise. In addition, at the end of the day they would also meet with Pat Hamilton to discuss any questions they might have regarding clarification of Northwest policy. By this training, she stated, they would pass probation by being able to "immediately step in and start checking passengers in at the ticket counter and performing the duties of a CSA." (T 292-293)

To verify that the process of a departing flight was complete, as part of what was known as the flight's "closeout," Weber testified that she explained to the trainees that, beside the passenger list, the primary CSA was required to check to see if all the flight crew members have been initialed and to put his or her electronic signature on the flight paperwork "at the bottom stating that its complete."¹⁴ (T 282) The CSA then prints it out, to be recorded and put on file. (T 282) While the lead CSA¹⁵ in charge of the gate is responsible for performing the completion

¹² Pursuant to the collective bargaining agreement, a customer service supervisor does not have the power to terminate employees, to evaluate the performance of employees, or to take disciplinary action against employees. (T 276, 277)

¹³ Upon cross-examination, Weber testified that to her knowledge there were no Northwest corporate documents that describe the role of a mentor and that there are no corporate documents that describe mentor training. (T 374)

¹⁴ Both CSA Dynelle O'Gara and CSM Roberta Minks provided testimony clearly supporting Weber in her description of the two-step signature procedure which governed crew member identification and clearance to board an aircraft at Northwest by a CSA's initialing the crew member's name on the list, and/or signing a completed list to verify that it had been completed, as follows: (1) A CSA initials the individual crew member's name on the list, as each arrives, shows his or her identification and boards the plane; and (2) the specifically assigned CSA, or "lead" CSA signs the completed list, with the initials of all of the crew members, to verify the list's completion. In addition, O'Gara noted that every CSA at a gate carries a generic set of keys to allow them to open a gate at the airport, thereby allowing a crew member to board a flight, strengthening Respondent's position on this point.

¹⁵ Upon cross-examination, Weber conceded that nowhere in any of the training manuals or in the collective bargaining agreement was there a reference to the position of a "lead CSA." (T 369). **[However, I find that this is not a significant difference in the overall testimony, and that over time, this "primary" gate assignee has been informally designated as the "lead" CSA. Neither is there any contradiction in the fact that he or she accrues**

of the paperwork process, she testified that the lead CSA is not the only person who contributes information to the preparation of the flight paperwork. (T 283)

Weber testified that CSM Maria Buyco then reviewed the security procedures¹⁶ regarding the gates with Blount and the other new-hires, that they were given instructions pertaining to gate security, and that this included emphasis on the responsibility of the lead CSA for monitoring the assigned gate to ensure that no one gets on the plane without authorized access. (T 298) She verified that the trainees, including Blount, were told in that session that the “lead” or “primary” CSA assigned to that specific gate was responsible for printing the crew verification list and that when a flight crew member arrived at the gate, the lead CSA was responsible for verifying the crew member’s identity and confirming that it was correct by signing (writing his or her initials)¹⁷ next to the crew member’s name. However, she testified that they were also told that day that the general overview of the policy was that “an agent” signs (places his initials) by each crewmember’s name, and then he signs the crew verification list, verifying that “every crewmember has been verified ... and is just making sure that the paperwork is complete.” (T 299)¹⁸ **[I find that all of Respondent’s witnesses, including Weber’s testimony, verified that the latter terminology, “an” agent or “a” CSA agent, are among the common universal terms used by those witnesses regarding the CSA’s individual identification, verification and initialing of flight crew members. By her appearance and demeanor, although somewhat nervous at the outset, I find that Weber’s testimony demonstrated both her knowledge and consistency, and by that, warranted a conclusion that it was credible and truthful. I credit her testimony.]**

authority to perform certain other duties such as reassigning other employees or CSA’s, but has no specific authority to discipline or discharge another employee. He or she is considered an hourly employee, part of the Northwest bargaining unit, and subject to terms and conditions of the union contract.]

¹⁶ Weber testified that all CSM’s are also ground security coordinators and have to review the Northwest Corporate Security Crew Verification Policy of June 1, 2005 (RX 13) in their ground security training (the one that was in place during Blount’s employment). They monitor the CSA’s to ensure their compliance with this procedure by checking their daily paperwork. (T 321)

¹⁷ During her own testimony, Weber did use this simple reference to a “lead” CSA related to the individual crew member verification process. However, I find that it was an unintended, over-broad statement that did represent that the “lead” CSA could ID and did initial the individual crew members, but did not reasonably mean that, as maintained under Blount’s definition, the policy must restrict or limit that task to the lead CSA, or that the final signature of the lead CSA also meant that the lead CSA was required to personally verify the identity of each flight crew member as a part of the lead CSA’s verification.

¹⁸ Actually, in that same training session, Weber did make the correct statement, when she stated that the initialed verification was performed by “an agent.” Otherwise, such a requirement that the “lead” CSA agent initial all of the crew members and sign the list as having been completed, would have constituted an unnecessary anomaly, nullifying the importance of the presence of the first CSA that had verified and initialed the crew member’s actual identity, by requiring a re-identification of each crew member by the lead CSA, as I have so found, and will be discussed further, herein!

Ms. Dynelle O’Gara’s Testimony -

Dynelle O’Gara testified that she had been working at Northwest since August 1982¹⁹ as a CSA, generally at the gates preparing for flights. This involved preparing paperwork for the pilots, printing crew lists and passenger lists, and checking-in standby passengers. She testified that she has worked on thousands of flight departures from the Minneapolis Airport; that there has always been one CSA assigned to a gate for a flight departure; and that additional CSA’s could be brought over to help, depending on the size of the aircraft and passenger list. Typically if one CSA from a neighboring gate notices that a departing flight consists of a lot of passengers, the neighboring CSA will usually come over to assist boarding the passengers. However, the assigned CSA to the gate has the responsibility of ensuring that the paperwork is complete and in order.²⁰ (T 397-402)

O’Gara testified that she has been a daily mentor in the program for about two years, reminding trainees of the various tasks that need to be performed as part of a normal flight boarding and departure, such as filling out the recap sheet and printing the crew list for the captain of the flight. Once crewmembers have been checked-in, the CSA signs the bottom of the paperwork to show completion. When she works with them as a daily mentor, it is the responsibility of the trainee to review and sign the crew list to become familiar with the tasks a CSA is expected to perform. She maintained that a new trainee would not learn the tasks of a CSA as quickly if they only watched her do the work.

O’Gara’s understanding of Northwest’s flight crew verification policy verified Weber’s testimony that a CSA prints the crew list, checks-in the crew members as they arrive by checking their ID, and then initials next to the name of the crewmember to allow them onto the aircraft. The initials next a crewmember’s name signifies that the CSA has checked them in and has let that particular crewmember board the plane. She testified that Northwest policy does not require the same CSA to check-in all crewmembers for a flight, since the assigned CSA might not be at the gate at the time a crewmember arrives and it would be inefficient and time consuming not to allow another CSA to verify that crewmember. She testified that, therefore, any CSA, supervisor or manager has the authority to verify a flight crewmember and to allow them to board the flight and that it is not required that a CSA needs to be assigned to a particular flight in order to verify and admit the crew for that flight. Furthermore, she testified that every CSA carries a generic set of keys for the gates. (T 406, 407) **[I find that this latter unopposed testimony regarding all CSA’s carrying keys for access to the gates verifies the authority of all the CSA’s in the area to verify a crew member’s identification for boarding the aircraft and supports that practice. On this and other matters, Ms. O’Gara’s testimony was straight forward and delivered meaningful details without unnecessary comment or contradiction. This was matched by her knowledge of the job and her relationship with Blount as his mentor and by her consistency and her demeanor while testifying. I credit her testimony.]**

¹⁹ Between 1984 and 1998, O’Gara worked at the Minneapolis-St. Paul Airport as a CSA for the majority of the time. She then worked as a CSS (customer service supervisor) for three years and then as a ticket sales agent in the Northwest Minneapolis office. Around 2003, she came back to the Minneapolis Airport to work at her present CSA position.

²⁰ To ensure the completion of the paperwork, the assigned CSA has to ensure that the recap sheet is filled out properly, that the pilot has signed the release sheet, and that the crewmembers have all been checked-in; then the CSA has to sign on the bottom of the paperwork. (T 402)

Ms. Roberta "Bobbie" Minks' testimony -

Ms. Roberta Minks testified that she had been employed at Northwest for the last twelve years.²¹ During Blount's brief employment at Northwest, she was a relief customer service manager (CSM) on the AM shift, which meant that she did not have a primary area assigned to her, but instead covered other managers' primary areas when they took time off from work.²² As a primary CSM, Minks' responsibilities consisted of ensuring that places were adequately staffed with CSA's in their correct areas, while addressing necessary performance issues requiring disciplinary action. She was also responsible for handling customer service issues escalating beyond the responsibility of a CSS, and she spent most of her time observing the operation of the CSA's and CSS at the gates, offering them support and guidance when necessary.

In line with Weber's and O'Gara's testimony, Minks testified that the flight crew verification policy began with the flight paperwork, which includes the flight crew list printed off by the CSA working the flight. Then, as the crewmembers approach the gate, a CSA verifies the crewmember(s)' ID, matches their name with the name on the crew list, and then initials next to the crewmembers' name to indicate the verification of the crewmember. Minks testified that it is not required that just one CSA check in all members of an individual flight crew, because it would be impractical for just one CSA to be assigned to that task when other tasks, such as helping customers and boarding passengers, also needs to be done. Minks testified that as a manager she had the responsibility to ensure compliance with the Northwest Corporate Security Crew Verification Policy document.²³ To ensure compliance, Minks testified that she would speak to the employees concerning the policy and oversee their work to ensure adequate compliance with security procedure.

Minks testified that once the flight crew verification and boarding has been completed, the CSA assigned to the gate reviewed the paperwork to ensure completion and then signed it to signify completion of the flight closeout process. She said that the CSA signature does not constitute some form of independent verification or personal vouching by the CSA, who signs the paperwork to signify its completion, and that under Northwest's policy, it is permissible for the CSA agent assigned to the gate to rely upon the initials of their colleagues to verify the flight crew. (T 464) **[After having listened to Ms. Minks' testimony and having observed her demeanor, I have concluded that it was knowledgeable, consistent and truthful. I credit her testimony.]**

Weber's Redirect Examination on the Crew List Verification -

After O'Gara and Minks had testified and Blount had completed his testimony on cross examination, Weber credibly testified without contradiction, on redirect near the end of the

²¹ Minks started at Northwest as a sales agent for the company, and she became a reservations supervisor in 2000. In October of 2002, she was the station manager at the Cedar Rapids, Iowa Airport, and then in September of 2005, she became a customer service manager at the Minneapolis Airport where she is currently employed.

²² Minks testified that "primary areas" usually refers to a concourse, which is a primary area. (T 458)

²³ Minks testified that she does not think Blount was given this document as part of his training as a CSA, even though he testified to the contrary. (T 462)

hearing as to her understanding of the crew check-in-policy and procedure at Northwest.²⁴ She stated that Northwest was obligated to adopt a policy for flight crew verification through a security directive of the FAA to come up with a policy on crew boarding. They then went through the process and had it approved as Northwest's policy, which she called the "general overview of the policy." (T 376 and T-378; RX 13) Second, she stated that in the process that was adopted, the lead CSA at the gate prints, as part of the preflight paperwork, the crew verification list of the flight crew's names and employee numbers scheduled to work that particular flight. As they arrive, the "lead" CSA²⁵ verifies that the crewmember's ID matches the crew verification list by looking at the crewmember's picture located on his ID badge, ensuring that the picture matches the crewmember. Then the CSA places his or her initials next to the crewmember's name and, after that, allows the crew member to board the plane. The lead CSA then completes the final paperwork for the flight by printing the final standby passenger processing list showing those cleared for boarding; reviews the crew verification list to ensure that it is complete; and signs it and then reviews the flight release form to ensure that the captain of the flight has signed that document. All of these documents then have to be turned in at the end of the day.²⁶ (T 320) **[I also credit Weber's truthful and uncontested summary of Northwest's implementation of its crew verification policy in relation to what is set forth in its June 1, 2005 NWA Corporation Security Document. (pp. 1-2, RX 13)]**

Blount's Interim Classroom/On-the-Job Training –

After completing his classroom training and receiving his certificate, Blount went to the airport for additional training. When Pat Hamilton conducted a tour of the airport for the trainees, Blount asked specific questions on safety procedures and he was told to whom he would

²⁴ Recognizing that Blount was maintaining that his termination was based on the fact that he had raised as "protected activity" an objection to Respondent's crew verification policy as a violation of an FAA rule, for which he was being subject to an "adverse action," I first overruled an objection to the cross-examination of Weber on there being a possible violation of FAA rules when Blount stated to her in their February 7th encounter that what they were doing (questioning and/or terminating him) was verification that his questioning of that process "was an FAA violation" in and of itself, for protected activity that was being violated by that, or any other adverse action, which she immediately denied. (T 380) When asked about that, Weber had quoted Blount as stating: "He stated this was an FAA violation" which she had already denied as being the case. Framing a follow-up question to imply that there was some obligation on Weber's part to process the accusation by Blount – to process that statement through Respondent's "HR" – she repeated her statement that there was no violation. *Id.* Respondent's attorney objected to it, as calling for "a legal conclusion" that "assumes facts not in evidence." (T 381) I acknowledged the "fine line" that was being presented, but allowed the line of questioning to be continued. Complainant's attorney then asked whether Weber "was aware that by reporting an FAA violation to you [Weber] that Mr. Blount was engaging in protected activity." This resulted in another objection based upon the first, which I then sustained as calling for (assuming) a legal conclusion that was one that I had to determine. Without further argument, the question was then withdrawn. (T 381)

²⁵ At first, Weber used the term "lead" for the CSA who may be checking the list for the initial verification, which she then corrected, throughout her testimony, that the CSA doing that verification could be either the "lead" or "primary" CSA or any other CSA assisting at that gate.

²⁶ Weber testified that the "general overview of the crew verification policy" was what was located in the customer service manual and the corporate security manual. However, emphasizing that the policy was merely a "general overview," Weber pointed out that the common practice of having the "lead" CSA sign the crew verification list and the significance behind that signature was also not mentioned in the documents. (T 378)

report safety incidents, without any objection being expressed to him.²⁷ Several days of additional classroom training were then followed by the non-mandatory tests, which covered general airport operations and safety issues beyond the flight crew verification issue which was not raised. Otherwise, Blount passed all the tests administered during that additional training period.

Blount's Credibility -

At the hearing, Blount affirmed that when asked if he recalled the specifics of what Shively or other instructors said to him during classroom training regarding gate security procedures, he stated that he did. However, at Blount's March deposition he testified that he did not remember what his instructor told him in the classroom training on security procedures; that he only remembered what was in the training book or manual and the crew list form received in training (T 165-166); and that this was the only documentation received for verification of flight crew policies, practices and procedures. The relationship of that questioning to that of his March deposition was otherwise confusing. It neither contradicted nor verified that of Respondent's witnesses set forth above, regarding the initialing of individually identified crew members on the verification list by any available CSA as they arrived, and the final verification that the flight crew list had been completed by the CSA assigned to the gate. **[The fact that Blount's deposition testimony neither completely contests nor confirms his hearing testimony (T 170-171),²⁸ provides ample justification for my acceptance of a favorable inference from the testimony of Respondent's witnesses regarding the elements of the crew verification procedure as above stated, over any such inference that might have been available from Blount.]**

Blount conceded that he did not recall being told during classroom training that the same customer service agent must check in all flight crewmembers and sign the completed flight crew list; that Northwest did not require that one CSA check in all members of a flight crew; that he understood being told that different customer service personnel could or could not check in different members of a flight crew; or that such procedures were or were not in conflict with

²⁷ Blount gave the specific example of a situation in which the "hood" of the tunnel might touch the airplane, which is not supposed to occur. He testified that he asked such specific questions because these hypothetical incidents were not covered in class. (T 64)

²⁸ I now conclude from Blount's testimony at the hearing that he did receive both the manual and the crew member verification list form in his classroom training. However, I have also concluded that in his March deposition, Blount utilized the phrase "not true" when he was uncertain about what to answer about what he was verbally instructed regarding use and completion of the crew list. In terms of my assessment of his credibility in the present hearing, I conclude that Blount was very confused about what he was told or instructed in his training regarding the actual crew verification procedure; that he did not describe or recount exactly what he was told about completing that form by his instructors; and that little was done at the hearing to clarify exactly what he even believed he was told in that training – except for one answer, that it was what was in the manual. In addition, as stated above about what anyone said, he testified that he did not recall "anything outside of the training." I find that Blount's statements regarding the two steps of the procedure were neither accurate, consistent nor credible; that his sole specific reference to the manual (p. 1, RX 13) was that which employed his own limited interpretation of the wording of the crew member verification provision, thus ignoring its long-term application in practice; that this was accompanied by a claimed inability to recall what he had been told about the applied crew verification practice which remained unchallenged by him until his February 7th refusal to sign the completed list, even when told about its application as credibly verified by Respondent's witnesses, which I have credited; and that, therefore, I have no choice but to credit Respondent's witnesses in their statements regarding the actual boarding procedure.

Northwest's policy regarding flight crew verification. However, he also answered "not true" when asked to confirm his March deposition testimony that he did not recall anything he was told in training regarding a CSA worker's obligation to review and sign the crew list, despite the fact that in that deposition, when asked what he was told during classroom training concerning a CSA's obligation to review and sign the flight crew list prior to flight departure, that he did not recall "anything outside of the training." (T 172-173) In March, Blount did confirm that the training manual described the purpose for the last signature by the CSA on the crew list, but that there was some discrepancy as to whether the training manual stated the purpose behind the CSA signing the crew list as the last step in the process. He continued to insist, however, that "its" [it "is" or "was"] addressed as "part of a step." (T 175)²⁹

In conclusion, while I found most of Blount's hearing testimony truthful, he was decidedly uncomfortable with crew member verification list questions comparing his present sworn testimony with that of his March 8, 2008 deposition. He had a visible change in his comfort and demeanor, *i.e.*, an increase in his hesitation, facial expressions and body movements, when answering similar crew list questions in his deposition. In his deposition, he was not remembering virtually anything that his instructors had said about their duties regarding the crew verification form. Instead, he responded with carefully constructed answers on matters that, where he did not know or was afraid to answer, he would simply state "not so" without clarification. I found that this was confusing and that it cast a shadow on his hearing testimony, even where parts of it made sense with a core of truth. As a result, I was unable to credit his testimony over that of Respondent's repeatedly consistent testimony regarding multiple CSA identification and initialing of individual crew members on the verification list, particularly in instances where his testimony was either contradicted or unsupported by other witnesses.

Findings of Fact Regarding the Initialing and Signing of the Crew List -

After listening to the description of the procedure that was followed on a daily basis for verifying the appearance of the members of the flight crew of a particular scheduled flight for boarding the flight as described in slightly differing sworn renditions in the testimony of Blount, Weber, O'Gara and Minks, which consisted of a "two-step" signature policy, I have made the following conclusions regarding that testimony. I find that first, after printing the crew member verification list, the "lead" or "primary" CSA, or any qualified CSA working in the area of the gate of the scheduled flight, must identify the crew member and his or her credentials together with his or her name on the crew verification list for that flight, and "sign" the list by writing his or her initials next to the crew member's name which allows the crew member to board the flight. Second, after all of the scheduled crew members have been identified for boarding the flight,³⁰ the "lead" or "primary" CSA assigned to that gate, "signs" (or "electronically" signs) the completed crew verification list, thus "verifying" by this second verification signature, that "every crewmember has been verified" and permitted to board the plane as evidenced by the

²⁹ I also conclude that this [Blount's interpretation of the final signing of the crew verification list by the CSA meaning that the person signing-off the completed list was also verifying that he or she had personally verified the identification of each member of the flight crew] was never specified in any particular, stated "step" in the manual, and that it contradicted what I have found to be Northwest's actual policy as stated therein.

³⁰ I can recall no specific reference in the record testimony concerning procedures for documenting a crew member that fails to appear for a legitimate reason or is replaced, so I make no finding on this matter.

initials next to the individual crew member's name; that the list has been completed; and that the list, along with other documents such as the passenger list are then delivered to the captain of the flight, verifying the flight is ready for departure.

Blount's On-The-Job Training: First Assignment – To the Ticket Counter -

Blount's first assignment after his training was at the ticket counter and then to "work the gates." The first of his two-gate assignment on February 3rd and 4th were for the Orlando and Las Vegas flights, both with mentors and another trainee. During the Orlando pre-flight,³¹ Blount verified the flight crew and, after verifying their identities, initialed the crew list document and allowed the flight crew to board the aircraft. He did not recall signing the document or testifying that during the Orlando flight crew verification process, he followed the procedure as it was specified in the manuals. Blount testified that neither of the mentors assigned to him on those two days asked him to sign a verification list in which he did not first verify the crew, nor did either ask him to sign or initial a blank verification form. (T 69)

Blount's Testimony On His Assignment to Gate F-12 -

On February 7th, Blount was assigned to work at gate F-12 with CSA O'Gara as his daily mentor. He testified that he arrived at 8:45 a.m. and was assigned by her to work at the customer service computer. At approximately 9:20 a.m., O'Gara told Blount that she was taking her lunch break, and she instructed him to print off the flight crew information while she was on break. Blount stated that he did not print the crew list and instead searched the computer to become more familiar with the system. He said that he felt that the flight crew information only took a "couple of seconds" to print and that, since the flight was scheduled for departure at 11:45 a.m., he had time to search the computer. He also took a bathroom break during this time. However, O'Gara returned from her lunch break around 10:30 a.m., first bringing with her two other employees (not introduced to Blount) and, later, Connie Menard to work with her.

O'Gara asked Blount if he printed the flight crew information; she "listened," as Blount said that he did not, and she told him that she was going to print it off "now." At that point, she finished printing it off herself. Boarding had not begun and, to Blount's knowledge, the crewmembers had not yet boarded the aircraft. From then (10:30 a.m.) until the flight departure at 11:45 a.m., Blount did not personally verify any of the flight crew members nor did he witness anybody verify the flight crewmembers.

By Blount's testimony, O'Gara brought Blount the flight crewmember list that she had printed-off, and she told Blount that he needed to initial it, testifying that she told him: "This is how it's done, initial here, this right here," while pointing at the paper. (T 79) He initially testified that he verified the document's printed material but no handwriting on the crew list when she told him to initial it. Blount testified that he told O'Gara that he "didn't see anyone, any of these individuals that came onboard and if they're onboard" and asked her if he could "go onboard to verify who they are," (T 82) which she denied.

³¹ Blount testified that he was unsure if it was the Orlando flight in which he had flight crew verification detail. (T 68)

Blount testified that five to ten minutes passed before O’Gara came back and told him that “You just need to sign the form as instructed. You’re a trainee.” Blount responded that he “would be happy to, if he could verify who they (referring to the crew members) are before he put his initials on it,” as also stated in his testimony. (T 83) According to Blount, O’Gara came back a third time with initials next to each crew members name, and she asked Blount to then sign the document. This time, Blount refused to sign the document because he did not actually see the crew members checked in, and a supervisor came over to the gate and told Blount that he needed to sign the document as he was told to do so.

It appeared that Blount had first maintained that when O’Gara came back a second time, there were initials “D-O-G” for Dynelle O’Gara, with a written name of O’Gara on it. At this point in the testimony, I was confused and asked, “when you were first asked to do anything to the form, were there any initials or signatures on it? – No handwriting, any handwriting, the first time?” - to which, he responded, “No handwriting.” (T 83) I repeated the question, asking on “the first time he was asked to look at the list, what was on it, and he responded, “First time to initial,” which he explained was the time at a point when he had not seen any crew members. (T 84) When I asked about the second time he saw the document when it had initials, he corrected me, referring to five or ten minutes later, as this being the “three [sic] or fourth time that the handwriting, initials appeared on it” with all the crew members on it, and that he was being asked to sign it, at which time he said “No,” because he didn’t see them (the crew members) which he also corrected to say “was about the fourth time.” – when it had both the initials and O’Gara’s signature on it, after three, which just had the initials on it. (T 84-85) (At this point, we were referring to the crew verification list shown in Respondent’s Exhibit 10 as the top [first] of two documents. (See T 79, RX 10.))

[I have now concluded that two time periods were involved regarding the discussions between Blount and O’Gara on the morning of February 7th about the crewmember verification list. The first was when O’Gara returned from her break and printed-off the list, after finding out that Blount had not done so, and was telling him about initialing the crew members as they arrived at the gate. This first list had no initials on it. The second was when she came back to him after the crew members had arrived and had boarded, which he apparently did not see, but was verified by O’Gara, who was also at the gate, and did so.³² He refused to sign the verification list since he did not see them arrive, and he got into his differences with O’Gara when he refused to sign the list as completed, after it had been initialed. The fourth time he saw it, O’Gara had signed the list to verify its completion.]

Blount testified that he refused to initial the document because he did not verify the flight crew members personally, which he told O’Gara when he refused to initial the document.³³ He also told O’Gara that his refusal to initial or sign was based upon his interpretation of Northwest protocol. Also, Blount refused to sign the document when Ms. Deb Livecche, his supervisor,

³² See O’Gara’s testimony, fn.37, p. 16, *infra*.

³³ Upon cross-examination, Blount was asked whether it was true that his refusal to initial the document was because he had not personally “checked in” the crew members, and therefore, he did not think it was appropriate for him to sign the crew list. He then responded that this was “not true,” indicating he had a different reason for his refusal. (T 202) **[The only difference that I could discern between his initial testimony on direct and his testimony on cross-examination at this point, was that instead of using a form of the word “verify” the term “checked in” was used. This has not been explained to the satisfaction of the undersigned.]**

came over and told him to do as he was told because he did not know who she was, and that he told her that it was not protocol for him to process that form as he was instructed to do. (T 92) Blount testified that Livecche responded by getting angry and saying such things, as “we’re not going to let new-hires tell us what to do.” (T 92)

When asked how the situation of February 7th was different from the other two times where Blount was told to sign a document by Northwest employees, he responded that based upon what he learned in training and also from professional experience accumulated as an auditor, he felt that he would be personally liable for any potential accidents that might occur with the plane. He also told O’Gara that he worked best in an “analytical mode” - slower than usual working mode, because he liked to know each step being taken and why it needed to be performed. Yet, when asked if he asked a lot of questions on his third day at the gate about how tasks were to be performed and why, Blount testified as to that not being the case, and that when asked to state whether it was true that he had a lot to learn at the gate that day but just did not feel that O’Gara was willing or able to teach him very well, Blount answered that this was “not true.” (T 188) The fourth time O’Gara told Blount that he needed to sign the document, O’Gara’s signature was then on it, and she again informed him that he needed to do as he was told,³⁴ which he refused to do.

When asked to affirm that he did not have knowledge as to whether O’Gara or CSA Connie Menard or any other CSA checked in the members of the Seattle flight crew³⁵ pursuant to Northwest policy on February 7, or that he observed O’Gara or Menard check in any members of the Seattle flight crew that day, Blount responded with “not true.” While he did confirm that on that day his tasks were to print the crew list and to assist customers, he indicated that he was

³⁴ During cross-examination, Blount testified that the first time O’Gara gave him the document to initial, there were no initials next to the names of the flight crew members. However, the third time Blount saw the document all the initials were on the document, and the last time he saw the flight crew verification document, O’Gara’s signature was then present. Blount refused to sign the document each time it was presented to him for initialing or signature. In response, Blount filed several different complaints with the EEOC (RX 18-5), OSHA (RX 18), TSA (RX 19), FAA (RX 18-5), and the Department of Labor (T 203-213) pertaining to termination of his employment, and nowhere in any of these complaints did Blount mention that O’Gara asked him to initial a blank crew list. (T 200) Also, Blount conceded that he understood from classroom training that the initials next to a crewmember’s name indicated that the crewmember had been verified and checked in by a CSA pursuant to company policy. (T 209) Upon cross-examination, Blount conceded that he was told by O’Gara, Minks and Livecche that by reviewing and signing the crew list as the lead CSA at the gate that day all he was doing was confirming that the document was in order and that the crewmembers were already checked in, which was reflected by the initials next to each crewmember’s name. (T 210) However, he still refused to sign the document, believing his act of signing the crew list to be illegal and that he felt he “knew better” than Minks, O’Gara, and Livecche and that he “rejected” what they told him. (T 210) When asked if he thought by signing it, he was verifying the document, Blount stated that by signing it, he was verifying that the document was accurate. (T 214) When asked if he would have signed the document if he, in fact, was able to personally verify each crew member’s identification, Blount answered that he still would not have signed the document because he felt he would have been responsible for a potential accident. (T 215) **[I find that the purpose and use of the flight crew verification by O’Gara as his mentor was completely and reasonably explained to Complainant as being solely the verification of the completed list; that his refusal to sign it as so, as the CSA assigned to the gate as the primary or “lead” CSA in training, followed a reasonable request and/or demand from his appointed mentor (and superiors) to do so; that his refusal to do so did not constitute “protected conduct or behavior,” and that it justified disciplinary action in his insubordinate refusal to do so.]**

³⁵ Referring to Flight 95 that was taking off at gate F-12 on February 7.

aware that a CSA checked in the flight crew members pursuant to policy, but that he did not “watch” to see whether O’Gara or Menard checked-in any flight crew members. (T 190-191)

In Blount’s March deposition, when asked if he had any reason to believe that a flight crew member obtained unauthorized access to the aircraft prior to departure, he responded, “I don’t know if they verified or not,” (T 192) stating that he “could not testify” as to whether a CSA checked in the flight crew members because he did not have knowledge as to who was authorized and who was not, and finally conceding, and therefore admitting, that it does not have to be just one single person who checks in every member of a flight crew for a flight because policy does not require it. (T 193; Blount’s Deposition p. 205) He finally admitted that the “initials” were on all of the crew list “forms” (that is, on the “form” shown to him by O’Gara, shown to him four or more times), that she was requesting him to initial or sign as the CSA responsible for the list, and the last time that he saw it, O’Gara had signed the list, except for the first time, when the list had no initials or signatures on it. (T 195-197)

Blount’s Testimony Concerning “Edna” -

After refusing to sign the document, Blount testified that Livecche told him to go on break. Instead, Blount told Livecche that he would have to report the incident; that he went to the office directly behind the ticket counter to check his schedule; and that he reported the incident to the person sitting behind the desk named “Edna.”³⁶ Blount testified that he “didn’t feel comfortable with” what they wanted him to do, and that he had to “report this to the FAA.” (T 106) Edna, he said, then told Blount that he would have to report it to Livecche’s manager first; that Livecche had a “bad experience;” that she should know better as a supervisor; and that she then asked Blount not to report this incident to the FAA. Blount testified that he responded that he had no choice but to report it. (T 107)³⁷

³⁶ Blount testified that this office was behind the security checkpoint and that it required a card and access number to enter; that Edna was the only person in the office at that time; that her last name was unknown to Blount; and that he had previously only seen her in passing. (T 101) There is a serious discrepancy as to whether an employee named “Edna” was working that day. (T 222) **[I have credited Respondent witness testimony that whether there might have been someone that Blount talked to or not, there has been no conclusive evidence presented by Blount that there was an “Edna” in such a position related to Respondent’s management as that described by him who could either verify or deny any such encounter. Therefore, I give Complainant’s testimony on this point no weight.]**

³⁷ During the conversation with Edna, Blount testified that he also told Edna of alleged racial remarks that Livecche said to him previously when she got angry with him over his refusal to sign, and that Livecche told him that “we normally get rid of blacks like you.” (T 108) Upon cross-examination, Blount confirmed that he testified in his March deposition that he did not recall the main portion of the conversation with Edna and that he only spoke with her for a few minutes. (T 224) **[Notwithstanding this portion of Blount’s account and conversation with Livecche as to whether an alleged, illegal racial statement may be conclusively attributed to her, it is not material regarding the present AIR21 allegations, particularly since other discrimination complaints have been filed regarding aspects of Blount’s termination, which will not be determined in the present proceeding. See *infra* p. 31. It is otherwise considered to be unverified testimony, and it is given no weight or consideration in this proceeding.]**

O’Gara’s Testimony Regarding Blount’s February 7th Gate 12 Assignment-

When O’Gara returned from her lunch break, she noticed that the tasks she assigned Blount to do were not started. O’Gara testified that she then helped him print off the flight paperwork. She then instructed Blount that after “all is done you want to make sure you have that signed,” referring to the paperwork. She also instructed him to ensure that he had the captain sign the release form. O’Gara testified that she observed Blount’s performance and noticed that when passengers approached him with questions, and/or seat change requests, he did not know how to proceed with those requests. O’Gara would then instruct him how to proceed in this type of situation, by walking him through a process like a seat change request. However, O’Gara testified that she did not believe Blount would be able to perform such a task on his own even after being shown how to do so. Additionally, O’Gara testified that she had to explain things to Blount more than once.

O’Gara testified that she checked in all but one³⁸ of the crewmembers for Flight 95 to Seattle and that her initials appeared next to the crewmembers she checked in. She testified that she fully complied with Northwest crew verification policy before admitting a crewmember on the flight, by checking their ID when they came to the gate, ensuring that their name appeared on the crew list, and then by initialing next to the crewmember’s name to verify that she let the correct crewmember board the aircraft. O’Gara testified that she did not direct Blount to initial and sign a blank crew list even though he did not check in any crewmembers for the flight that day. Furthermore, O’Gara testified that she has never instructed a trainee or another CSA to initial next to a crewmember’s name when that individual did not check in the crewmember. (T 424)

O’Gara testified that after the crewmembers were checked in and initials were next to each crewmembers name, she asked Blount to sign the document so he would get used to signing flight paperwork. O’Gara testified that Blount then told her that he would not sign the list since he did not personally check in the crewmembers. O’Gara testified that she then informed Blount that “It’s not necessary that you actually check the crew yourself ... you just want to make sure that once the crew has all been checked in that you sign, the paperwork is signed.” (T 424) Blount then informed her that he still would not sign. O’Gara testified that she does not recall Blount asking to go on board the aircraft to re-verify the crewmembers. However, O’Gara testified that it would not have been reasonable for Blount to board the aircraft if he was presented with the crew list with initials next to each name. (T 425) O’Gara testified that Blount did not tell her that he had reason to believe that the flight crew was checked in improperly; instead, he told O’Gara that since he did not personally check in the crewmembers, he would not sign the list.

O’Gara testified that Livecche, standing nearby, asked what was going on; that O’Gara related Blount’s refusal to sign the crew list because he did not personally check in any crewmembers; and that Livecche then informed Blount that “[t]he signature on there doesn’t

³⁸ O’Gara testified that she did not know who checked in the seventh crewmember because she did not recognize the initials next to that crewmember’s name. Upon cross-examination, O’Gara testified that other than looking at the flight crew list in preparation for trial, she did not have any recollection of checking in the crewmembers on February 7th. (T 433)

mean that you have checked each crew personally, it's just to finish, complete the paperwork.” (T 428) Even after Livecche explained its significance to him, Blount still refused to sign the list, so O’Gara signed it. She did not originally sign it since, consistent with her mentor duties, she wanted to give Blount, as a trainee, experience on when to sign a flight’s paperwork to get trainees in the routine of signing it. After Flight 95 departed, O’Gara did not have any further interaction with Blount. Later that day, O’Gara informed Minks of Blount’s refusal to sign the crew list and his reasons for it, based on his belief that he needed to personally check-in the crewmembers before signing the list. O’Gara testified that as a CSA, she had never witnessed a trainee refuse to sign a crew list for the reason given by Blount.

Upon questioning as to why O’Gara did not initially sign the crew member list, she said that the flight was such a large flight that there was an additional employee at the gate to help board passengers; that she did not ask Blount to check-in crewmembers since he was probably busy with the passengers when they arrived; and that she did it since the process was “pretty easy” and could be done without training, as long one knows to check each crewmembers’ ID. (T 436-438) More importantly, O’Gara testified that she would never initial next to a crewmember’s name if she had not in fact checked in that crewmember for the flight. (T 441) **[I credit O’Gara’s knowledgeable, direct and consistent responses to her questioning in her testimony, as well my observation of her general comfort and demeanor in delivering those responses.]**

Blount’s Termination –

Blount’s Testimony on His Meeting with Weber, Minks and Livecche -

When Blount returned to gate F-12, he was intercepted by Livecche and was told to report to the manager’s office on the second floor in a secured area of the airport. Ms. Minks, whom he had just met, brought him into the conference room, where she and Weber met with him. Minks asked Blount what happened at F-12. He responded that what “they wanted [him] to react to” was “a procedure that was not within protocol of the Northwest policy,” and that he “didn’t feel comfortable, with that process.” (T 117) Minks told him that he needed to follow “what [his] Northwest supervisor tells you to do,” to which Blount responded that he would “be happy to do anything according to what, [he thought was] reasonable and within policy and legal,” and that he “was trying to explain to her that there was a violation ... at the gate” that O’Gara “would not listen to.” (T 118) Blount then told Minks that what O’Gara wanted him to sign was a document that was not within the Northwest policy protocol, and that O’Gara would not listen to the alleged violation. He stated that Minks “indicated to me that I need to do as ... I was told” and that there was “a lot of responsibility on the CSA ... to get flights out on time,” to which Blount then “indicated to her” that his “first responsibility was safety”³⁹ and that “(s)he refuted that by saying “No, it’s getting the flights out in time.” (T 119) During that conference, similar statements were made by Weber who added that he needed to “follow ... whatever ... the Northwest staff tells you to do,” to which Blount repeated that he “cannot do anything illegal,” with Weber responding, “you just need to do as you’re told.” (T 119-120) Blount later testified that he also told both Minks and Weber that unless he had some personal involvement in

³⁹ See also discussions on this O’Gara exchange at pp. 13-17, *supra*.

checking in crewmembers for a flight, he would not perform his function of reviewing and signing a crew list at any gate. (T 227)

Finally, Blount testified that Minks “indicated” to him that he was being terminated, “Because you are not following – the um --[unintelligible] as directed from your – from the Northwest Staff, you are hereby terminated for insubordination.” (T 120) He testified that Minks “pulled a letter from the bottom of the pile and gave it to me.” (T 121) It was dated February 7, 2007, and it stated:

The purpose of the correspondence is to notify you that effective immediately you have been terminated from the position of Customer Service Agent here in Minneapolis/St. Paul. (RX 11)

This was followed by Blount’s testimony in response to a question as to the reason he was being terminated, to which he responded that “the reason was that I wouldn’t follow instructions, and that I was terminated for insubordination.” (*Ibid.*) He added that he did state to Minks that he “would have to report this to the FAA.” He then turned over his ID and his keys, and was escorted from the area by airport security to his vehicle in the parking lot. (T 122)⁴⁰

Weber’s Testimony Regarding Blount’s February 7th Meeting and Termination -

On February 7, 2007, the day of Blount’s assignment to Gate 12 and his termination, Weber testified that she was the ticket counter and luggage manager responsible for the area of Blount’s assignment; that Bobbie Minks was the concourse manager including gate F-12 (T 336); that Deb Livecche was the CSS assigned to the area; and that O’Gara⁴¹ was Blount’s daily mentor that day.⁴² Weber outlined her learning of the Blount situation from Minks, who was radioed by O’Gara to discuss it.⁴³ (T 338) After detailing the Blount situation,⁴⁴ Minks and

⁴⁰ Blount testified in his March deposition that he did not recall what was said and what occurred during his meeting with Weber and Minks. (T 225)

⁴¹ Weber testified that O’Gara has been a CSA for over twenty years and that she is an experienced, very knowledgeable, and dedicated employee. Weber also testified that Northwest receives “a lot of complimentary letters on her.” (T 337) Weber testified that she has never known O’Gara to engage in any conduct in violation of Northwest’s securities policies, and has never asked any trainees to engage in such conduct.

⁴² Weber testified that a supervisor assigns one CSA to a gate and if a flight is large enough, more CSA(s) are called in to help board the flight. Weber testified that Blount was assigned to gate F-12 that day, along with O’Gara who was his mentor. (T 373) Weber testified that Connie Menard was pulled over to the gate to help with boarding, but was not assigned to the gate in the beginning of her shift. However, it is unclear whether Menard remembered if she was assigned to gate F-12 or if she was asked to assist at the gate that day.

⁴³ Minks first requested feedback on Blount’s ticket counter performance and Hamilton’s concerns were expressed to Weber about it. Weber recounted Blount’s working the ticket counter for the first three weeks as a CSA when she was the CSM of the ticket counter; that CSA Hamilton approached her to discuss Blount’s ticket counter performance concerns and his unwillingness to perform certain gate duties. While Weber told Hamilton to have the mentors document the complaints to address them on Blount’s thirty-day evaluation, she did not receive anything in writing on those concerns or write them up since Blount was terminated before the end of his thirty-day evaluation period. (T 375) **[In this regard, I will not consider the details of undocumented complaints.]**

⁴⁴ Weber testified that Minks informed her that Blount refused to sign a completed crew verification list and that he was also unwilling to perform the task of printing it. (T 355) **[I note that on the record I mentioned that getting the list printed off at a later time than asked did not bother me too much at that time because Blount was still**

Weber discussed the importance of talking to Blount about the seriousness of insubordination by not signing the crew verification list when “asked” to do so by both his mentor and his supervisor. They then discussed Blount’s situation with Director, Rick Feltner,⁴⁵ after which Weber and Minks met with Blount.

Weber testified that the determination to terminate Blount’s employment with Northwest had not been made prior to meeting with him; that they wanted to give him the opportunity to explain what happened; and that they wanted to make sure Blount understood the policy regarding flight crew verification which they thought should involve additional training. (T 340)⁴⁶ When asked why she and Minks had a pre-prepared letter of termination at the meeting, Weber replied that it was standard procedure to take such a letter into a meeting with a new-hire because insubordination from a new-hire is a “strong offense and is immediate terms for termination.” (T 383)

Prior to meeting with Blount, however, Minks talked directly to O’Gara and Livecche concerning his situation. When they met with Blount,⁴⁷ Minks took the lead on the discussion as manager of the concourse that day. Minks first asked Blount what happened at the gate. He said that he did not sign the crew verification list since he did not personally check in each member of the crew, (T 341) and since the initials on the crew list were not his, he could not do so. Minks then told Blount the policy regarding flight crew verification and also that the signature by the lead CSA signifies the completion of the document. Blount did not accept Mink’s explanation saying that “It was a violation of FAA law.”⁴⁸ (T 342) Weber repeated the policy to Blount that Minks just explained. Weber again informed Blount that the agent who checks-in the crewmember initials the document, and once the check-in process is complete, the lead CSA assigned to the gate will need to verify that the paperwork is complete by signing it. (T 342) Again, Blount refused to accept this explanation. When Weber told him that he needed to follow this policy since it was the practice at Northwest, Blount became very argumentative, stating that he would not do so, and that doing so “was an FAA violation.”⁴⁹ (T 342) They again tried to

in the training phase of his employment. I also mentioned that standing alone it would probably not have been grounds for the disciplinary action (termination) taken against Blount. (T 356)]

⁴⁵ Weber explained to Feltner that Blount was directed to print the crew verification list by O’Gara while O’Gara left on break, and that when she came back Blount did not have the crew verification list printed. She also informed Feltner that Blount was explained the crew verification policy and how it works during his training. Weber also testified that she told Feltner that Blount, at the time of his insubordination, was in the role of lead CSA and that O’Gara explained to him his role of signing the crew verification and what that signified. Weber then told Feltner that Blount refused to sign the paperwork and that after Livecche explained the same thing as O’Gara did to him, he still refused to sign. Then Weber told Feltner the concerns that Hamilton had received from mentors and also from some of Blount’s classmates regarding his performance. (T 340)

⁴⁶ Weber testified that she and Minks were the only ones present at the meeting with Blount. (T 341)

⁴⁷ Weber testified that Hamilton, Blount’s certified instructor that day, was not allowed to join the meeting because Weber and Minks were having a question and answer session with an employee and a trainer is not entitled to attend. (T 353)

⁴⁸ Weber testified that the chain of command, to whom she would have to report Blount’s accusation of an alleged FAA violation, was Blount’s mentor, O’Gara, and then Hamilton, who was his certified instructor that day, then Livecche, who was Blount’s supervisor that day, and then to Minks who was the concourse manager that day. (T 353, 354)

⁴⁹ Upon cross-examination, Weber conceded that she did not provide Blount with any forms to fill out to report an alleged FAA violation. (T 383) However, Blount did not ask for one. (T 384) Additionally, Weber testified that an employee would report an alleged FAA violation directly to the FAA. (T 396)

explain the policy, but he said that he was “going to report it, and that he would have my job and Bobbie’s job,” according to Weber. (T 343)

Minks then decided that Blount’s insubordination to two managers in refusing to accept both of their explanations and to follow Mink’s directive resulted in her decision to terminate Blount’s employment with Northwest immediately.⁵⁰

During the meeting, Blount did not tell Weber and Minks that he was told by O’Gara to sign a flight crew verification that had no initials on it. (T 345)⁵¹ Also, Blount did not mention that during their earlier meeting he had asked O’Gara if he could board the plane to verify the crewmembers identities. (T 346) Upon redirect, Weber testified that according to standard operating procedure, it was not reasonable for a lead CSA to board a flight to re-verify the crewmembers if the CSA was presented with a crew list which had initials next to each crewmember’s name. (T 393)⁵²

Minks’ Testimony Regarding Their Meeting and Blount’s Termination -

Minks testified that on February 7th, she was assigned to work the F concourse and that Livecche and O’Gara were assigned to the gate F-12 area, with Livecche as CSS and CSA O’Gara as Blount’s mentor, both of whom she had worked with for years and neither of whom she had experienced any problems. Minks responded to a call from Livecche informing Minks that CSA trainee Blount had refused to sign the crew verification list, after O’Gara had explained to the trainee why he needed to sign it; that supervisor had come over to the gate and told Blount to sign the list, but that he still refused to do so and that she was surprised to hear that a newly-hired employee would refuse to take direction from a supervisor. (T 468) Minks directed Livecche to tell Blount to see her after completing the flight process.⁵³

⁵⁰ Weber testified that she and Minks made the decision to terminate Blount’s employment since both of them are customer service managers who are able to issue formal discipline to a CSA. Weber testified that HR was not involved because Blount, as a probationary employee, is not protected under the collective bargaining agreement, and that during his probationary period the company has a right to terminate their employment with or without cause. (T 344) Furthermore, Weber testified that Blount did not ask for the involvement of someone from HR, or for a representative from the collective bargaining agreement. (T 345) When asked if Weber understood that if there is a clear FAA violation, and a protected action was taken by Blount, then the probationary employee-at-will provisions would not be relevant when discussing his termination, Weber testified that she was not aware of that until now. (T 358) However, Weber testified that she and Minks told Blount during the meeting that signing the crew verification list did not violate a FAA policy because the signature just signified that “[e]very crewmember has been verified,” evidenced by initials next to each name, and that by signing the list he would be verifying the paperwork is complete. (T 359)

⁵¹ Weber testified that if Blount had told them that O’Gara tried to make him sign a flight crew verification list that had no initials on it, she would have immediately called O’Gara up to the office and had a meeting between O’Gara and Blount. (T 345)

⁵² Weber stated in her March deposition, that if the CSA has a concern as to whether a flight crew member was checked in according to procedure, when the CSA did not check in the crewmembers personally, the CSA is told that he or she may verify the crewmember check-in with the CSA who initialed next to the crewmember’s name, or the CSA may board the aircraft and re-verify that particular crewmember. (T 390) Weber testified that she was not aware of whether Blount had offered to go onto the plane and verify the crew. (T 392)

⁵³ Minks testified that she had not met Blount or knew of him prior to meeting him on February 7th.

After a briefing with Weber about Blount,⁵⁴ Minks informed her of the Blount situation and they went to discuss it with Director, Rick Feltner. Feltner advised them to talk to Blount to understand his side of the situation. However, since he was a probationary employee at the time and had refused direction from both a manager and a supervisor, Feltner said they should also be prepared to terminate him, depending on the outcome of the conversation. (T 469) After that, Minks sought details from O’Gara who said that: first, Blount did not print off the flight paperwork as she asked him to do and that when she asked him why he did not print it off, he told her that he did not want to be rushed into doing anything; that O’Gara then walked Blount through the process of printing off the paperwork and getting it ready for the flight, but that she ended up doing most of the work herself; that, after the flight was boarded, she instructed Blount to review the crew list for completeness and then to sign off on it to signify completion, and that Blount refused to sign the list. That was when O’Gara summoned CSS Livecche to talk to Blount. O’Gara still had not informed Minks why Blount refused to sign the list.

While Minks testified that she had not made the decision to terminate his employment until she spoke to Blount, after speaking with O’Gara, Minks prepared a termination letter for Blount. She testified that in a disciplinary case, it is common for Respondent to print off a termination letter so that she can be prepared to issue it to the employee if she decides it is necessary. Minks testified that she and Weber then met with Blount to discuss the situation. Minks testified that Blount told her that he believed that it was “fraudulent for him to sign the document when he had not personally checked the ID of every crewmember who went onboard” the aircraft. (T 472, 473) Minks testified that she then informed Blount that “he was not vouching for the fact that each crewmember’s ID had been checked,” and that “he was vouching for the review and the completeness of the document itself,” which was the crew verification form. (T 473) Minks testified that Blount would not accept her explanation and told her that it was still “fraudulent” for him to sign.⁵⁵

Minks repeated Northwest policy to Blount, and why it was not necessary for him to check in every crewmember of a flight before signing off on the paperwork.⁵⁶ Minks testified

⁵⁴ Weber described meeting Blount during his first day new-hire orientation at the airport, as very disruptive and berating her with questions. Weber added that instructor Pat Hamilton, had concerns with his performance during the first few weeks of his employment while he was stationed at the ticket counter. See fn. 43, *supra*.

⁵⁵ Minks testified that Blount did not tell Minks or Weber during the meeting that he was allegedly told to sign by O’Gara a crew list that had no initials on it. (T 476) Minks testified that if he in fact did tell her that he was allegedly asked to sign a list without initials on it, she would then have to speak to O’Gara to understand what fully happened. Furthermore, Minks testified that Blount did not mention speaking to anyone he thought was a customer service supervisor or someone named “Edna” that day. (T 477)

⁵⁶ Minks testified that she does recall Blount stating that by signing the signature he would be engaging in a fraudulent activity which constituted an FAA violation. However, Minks conceded that she did not give Blount any forms to fill out in order for him to state his alleged complaint of a FAA violation. (T 481) Additionally, Minks did not tell any of her superiors of Blount’s belief regarding an alleged FAA violation. However, Minks testified that she has never had an employee before Blount approach her wanting to report an alleged FAA violation. (T 481) Minks testified that she personally has never had to report anything directly to the FAA and that the FAA does “occasional audits,” which in her opinion would reveal any potential violations. (T 483) Minks testified that during the meeting with Blount, she and Weber explained to Blount repeatedly that his actions of signing the crew verification list did not constitute a FAA violation and that this is explained to new CSA’s at on-the-job-training at the airport. (T 484)

that Blount then became “more agitated and more belligerent.”⁵⁷ Furthermore, Minks told Blount that if he, at any point, had a question as to whether a crewmember’s ID had not been properly checked, he could go on the aircraft and recheck the crewmember’s ID himself before he signed the list. (T 474) However, Blount did not tell Minks that he had suggested to O’Gara that he wanted to go on the aircraft to re-verify. Additionally, Minks testified that if Blount was presented with a completed crew list, which contained initials next to each crewmember’s name, then he would have had no reason to board the plane in order to re-verify.⁵⁸

After talking to Blount, Minks testified that she and Weber decided to terminate Blount based upon his insubordination. Minks testified that she did not first consult with Livecche or O’Gara before deciding to terminate him because they are under the same collective bargaining agreement as CSA’s, and are not allowed to discuss disciplinary matters concerning CSA’s.

On cross-examination, Minks testified that there was no mention in the Customer Service Training Manual that discusses more than one CSA verifying crewmembers. Additionally, Minks testified that there is also no mention that the purpose of the signature by the CSA was merely for review and to signify completion of the paperwork. (T 480) Also, Minks conceded that there is no mention that states that the purpose of the signature is for review and completeness in the crew verification corporate security process.

Mr. David M. Budge’s testimony

Mr. David Budge testified that he had been employed at Northwest for 24 years; that he was the manager of passenger and aircraft security for Northwest and Republic Airlines;⁵⁹ and that he has always been involved with training.⁶⁰ In 2004 he became a specialist in the security department, and then in 2005, was promoted to the manager position, which he currently holds.⁶¹ He stated that corporate security at Northwest is “broken down into two departments or two divisions,” – operations and compliance and safety and health. Operations and compliance, where Budge works, deals with the rules and regulations of Northwest. This includes its policies and procedures in regards to any security threat, or security incident response that might

⁵⁷ When Minks and Weber explained to him that they had an issue with Blount refusing to accept direction from his supervisor and that he could be considered insubordinate for doing so, Minks testified that Blount then became more agitated and told them that “I’m not going to do it, it’s fraudulent,” and refused to accept their explanations. (T 475) Additionally, Minks testified that at one point in the discussion with Blount, Blount told them that he was going to “have their jobs” because what he was asked to do was “fraudulent.”

⁵⁸ I have concluded that whether Blount asked and was refused a request that he board the flight to check crew members, as a trainee his supervisors were under no obligation to allow him to board the flight and check, delaying its departure. Since nothing else was discussed on this point, I do not give that part of the conversation any weight.

⁵⁹ As a manager of the passenger and aircraft security division, Budge has, and expects others in his division to have, knowledge and familiarity with government security regulations because their job is working with security issues to ensure that Northwest employees are in compliance with the policies and also to ensure that the passengers are safe

⁶⁰ Budge testified that as a corporate instructor he primarily trained new-hire equipment service employees, baggage handlers, and also did some training for “many aspects of ground operations.” Additionally, he developed and delivered different training programs. (T 488)

⁶¹ Budge started as a part-time equipment service employee with Republic Airlines in 1984. Upon completion of his college degree, he stayed at Northwest in that position full-time. He then worked in the training department as a mentor, became a corporate instructor in 1997, and ultimately ran Northwest’s training department for equipment service employees at the Minneapolis Northwest station from 2000 to 2004.

potentially arise.⁶² His department works closely with certain government agencies in addressing security issues, including but not limited to the Department of Homeland Security, and specifically, the Transportation Security Administration. (T 491) The role of the passenger and aircraft safety division at Northwest is that of a compliance group, ensuring that all government rules and regulations are followed through implementation of policies and procedures as developed by Northwest. The flight crew verification policy falls within the jurisdiction his safety division in which he is a safety specialist, developing policies and procedures from those that are issued by the TSA, and creating manuals that employees at Northwest can understand and then perform properly.⁶³

Budge wrote the crew verification policy for Northwest and stated that the policy was in effect during Blount's employment. In preparation for writing this policy, he read and reviewed the required TSA requirements, which included the regulations promulgated by the administration on February 22, 2002, as well as federal rules and regulations regarding development of a flight crew verification policy, and that federal rules⁶⁴ do not specify any particular procedure with regard to flight crew verification for admittance on the aircraft. Instead, it just specified that such a procedure needs to be completed by the airlines. (T 496) However, even though the regulations and the AOSSP do not require documentation of the crew verification process, he testified that he included it in Northwest's policy to ensure that the procedure had been performed by an employee(s).⁶⁵

Budge testified that when creating the crew verification policy, he considered the time constraint CSA's are under when working a gate and that to efficiently do their job, the flight crew verification process had to be manageable and practical. Therefore, the policy does not contain who has to actually perform the flight crew verification process because "there are many different things going on on a flight at departure time, that to designate one particular person to perform all of the functions was not very practical when we talked to the people who were in the field." (T 506) Furthermore, the policy does not require that a crewmember of a flight be verified and admitted to the aircraft by the same CSA, nor does it preclude an employee in the area, but not working that specific flight, from verifying and admitting crewmembers.⁶⁶

⁶² Budge also described a safety and health department, which is different than the passenger and aircraft security department where he works.

⁶³ Budge testified that his division researches federal and world regulations, attends conferences, and works closely with people in the TSA in order to stay up to date with security measures.

⁶⁴ Budge testified that the Aircraft Operator Standard Security Program (AOSSP), which is a TSA-created document, states the security regulations that airlines are to follow in order to operate in the United States. Budge testified that section 6.10 in the AOSSP states the crewmember authorization regulation, which states "Before any crewmember is authorized to board his or her assigned aircraft, a direct aircraft operator employee, or authorized representative, must verify the airport operator employee ID number, ID of each crewmember and his/her assignment on that flight." (T 499) Budge testified that his understanding of this regulation means that "before any of our working crewmembers ... board an aircraft for them to perform their functions for that flight, we are required to verify that they are, in fact, working, employed with Northwest Airlines, and they are assigned to actually work that flight." (T 500)

⁶⁵ Budge testified that the policy requires Northwest to keep the flight paperwork for 24 hours in order for it to be available to Northwest auditors, who look to see that the employees are following federal regulations. (T 503)

⁶⁶ Budge testified that the policy he wrote states, "The customer service agent will examine each crewmember's crew ID badge, verify the photo resemblance to the crewmember, and ensure that the crewmember is listed on the crew list. The agent then will place a checkmark or other indication next to the crewmember's name on the paperwork. The CSA will then sign the bottom of the crew list and retain the flight's other paperwork." (T 506)

Budge testified that the purpose behind the procedure section stated in the crew verification policy, which reads “Agent will check the crewmember’s ID and place a checkmark or other indication appropriate to crewmember’s name on paperwork, and the agent will sign the bottom of the paperwork with a full signature,” was not to be construed to require just one CSA to perform both tasks. (T 508) Budge testified that as the author of this policy, the purpose behind the signature requirement signifies that the process of checking the crewmembers’ IDs has been completed as reflected by the initials next to the names, but not necessarily by the agent reviewing and signing the list at the end of the flight process;⁶⁷ that Blount’s belief that the signature represents some form of independent confirmation or personal vouching of the individual crew check-in process for each crewmember is not correct (T 509); and that it would not be a violation⁶⁸ for a CSA who has not checked in any of the crewmembers to review and sign the crew list. Furthermore, Budge testified that in the years that this policy has been in effect, he has never heard of a CSA, other than Blount, raise the issue that Blount has now raised.

[Having closely observed Budge’s mannerisms, demeanor, intensity and eye contact while on the witness stand as the Respondent’s primary witness involved as the author in the adoption of the crew member verification policy as set forth on the NWA Security document (RX 13, *supra*), I found his testimony to be knowledgeable, comprehensive, consistent and truthful. Therefore, I credit his testimony, which truly verifies the testimony of all of Respondent’s witnesses.]⁶⁹

DISCUSSION AND CONCLUSIONS OF LAW

AIR 21 extends whistleblower protection to employees of air carriers, contractors and subcontractors of air carriers. 49 U.S.C. § 42121(a); 29 C.F.R. §§ 1979.100, 102 (a). The act extends whistleblower protection to employees in the air carrier industry who engage in certain activities that are related to air carrier safety. *Hirst v. Southeast Airlines, Inc.*, USDOL/OALJ Reporter (PDF), ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47 at 6 (ARB Jan. 31, 2007).

Budge testified that it was not his intention to require one particular CSA on a flight to be responsible for checking in each crewmember. Therefore, Budge testified that he would not read the policy to mean that the tasks had to be done sequentially by one CSA. (T 507)

⁶⁷ Upon cross-examination, Budge conceded that there is no mention in the corporate security document, stating that the purpose behind the signature requirement is simply to verify that the form has been completed. (T 515) Additionally, Budge conceded that there is also no mention in the corporate security document that states that the crew verification process may be completed by different CSA’s. However, Budge testified that the document does not mention that the process has to be completed by the same CSA. (T 515)

⁶⁸ Budge testified that there are TSA inspectors who work at the Minneapolis Airport and that their job is to oversee if the airlines’ employees are properly following federal regulation protocol. Additionally, Budge testified that the TSA inspectors have oversight of Northwest’s compliance with its crew verification policy and that they test Northwest’s security policies everyday by disguising themselves as normal passengers. (T 511) Budge testified that in the past three years there have been no violations submitted by the TSA inspectors in regards to Northwest’s crew verification process. (T 513) Upon cross-examination, Budge conceded that the airline does not have to submit their crew verification policy to TSA for approval. (T 517)

⁶⁹ Since Blount’s complaint has been dismissed in this matter, an evaluation of testimony presented regarding his possible remedies for any alleged violation of the AIR21 Act will not be made.

To establish a violation under AIR 21, a complainant must prove by a preponderance of the evidence:⁷⁰

- (1) that he engaged in protected activity;
- (2) that the employer subject to AIR21 was aware of the protected activity;
- (3) that he was subjected to an unfavorable personnel action (“adverse action”); and
- (4) that the protected activity was a “contributing factor” in the adverse action.

49 U.S.C. §§ 42121(a), (b)(2)(B)(iii); 29 C.F.R. § 1979.109(a);⁷¹ *see also Hirst*, ARB Nos. 04-116, 04-160 at 7; *Rooks v. Planet Airways, Inc.*, USDOL/OALJ Reporter (PDF), ARB No. 04-092, ALJ No. 2003-AIR-35 at 5 (ARB June 29, 2006); *Brune*, ARB No. 04-037 at 13; *Peck v. Safe Air Int’l, Inc.*, USDOL/OALJ Reporter (PDF), ARB No. 02-028, ALJ No. 2001-AIR-3 at 6-7, 9 (ARB Jan. 30, 2004). “Preponderance of the evidence is the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.” *Id.* at 13 (citing *Black’s Law Dict.* at 1201 (7th ed. 1999) (internal quotation marks omitted)). If Blount proves that Northwest violated AIR21, Northwest may still avoid liability if it can show by clear and convincing evidence that despite Blount’s protected activity, Northwest still would have taken the same unfavorable action. *Clemmons v. Ameristar Airways, Inc. and Ameristar Jet Charter, Inc.*, USDOL/OALJ Reporter (PDF), ARB Nos. 05-048 and 05-096, ALJ No. 2004-AIR-11 at 6 (ARB June 29, 2007).

Protected Activity

Under AIR 21, an employee of an air carrier has engaged in protected activity when he has:

- 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

⁷⁰ Because this case was tried on the merits, I need not determine whether Blount presented a *prima facie* case. *See Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004) (stating that the *prima facie* analysis is only conducted at the investigation level); *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006).

⁷¹ Section 1979.109 (a) provides in pertinent part that:

A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior.

violation of an 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 such a proceeding.

49 U.S.C. § 42121(a); 29 C.F.R. § 1979.102(b)(1)-(4).

An employee's complaints must "implicate safety definitely and specifically" to be protected activity. *American Nuclear Resources v. U.S. Dept. of Labor*, 143 F.3d 1292 (6th Cir. 1998) (citing *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995)). "[AIR21]...protects not only those who report air safety violations to the government, but also those who make such reports to their employers." *Vieques Air Link, Inc., v. United States DOL*, 437 F.3d 102, 107 (1st Cir. 2006) (citing 49 U.S.C. § 42121(a)). "[A] complainant need not prove an actual violation, but need only establish a reasonable belief that his ... safety concern was valid." *Rooks*, ARB No. 04-092 at 6 (citing *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-12, slip op. at 4-5 (ARB Apr. 8, 1997)). As such, a complainant must show that he "subjectively believed that his employer was engaged in unlawful practices and [his belief must be] objectively reasonable in light of the facts and record presented." *Walker v. American Airlines*, USDOL/OALJ Reporter (HTML), ARB Case No. 05-028, at 15 (ARB Mar. 30, 2007).

I conclude that Blount's basic contention regarding the February 7th meeting with Minks and Weber was that his protected activity, "protected behavior or conduct" under AIR 21, involved Respondent's alleged violation of FAA regulations regarding discipline for his failure to sign the completed crew verification list when he had not personally identified the crew members and had not verified their identification with his own initials. Weber denied such an FAA violation based upon her personal knowledge involving Respondent's crew verification procedure, with which Blount did not comply. Assuming that Blount's statement of his firmly held belief that Northwest's crew verification procedure was wrong and that however wrong he was in his perception, it still constituted protected behavior or conduct which prohibited any unfavorable personnel action, Weber's and Minks' responses were that their conduct in ordering him to sign the completed crew list verification form did not violate any FAA rules or the Act, and that actions taken pursuant to Respondent's flight boarding policies that had been submitted and approved by the FAA were correct and that Blount was insubordinate in refusing to obey a direct order to follow those procedures. Therefore, Respondent contends that it did not take or render any prohibited "unfavorable personnel action" under AIR 21 in his termination for insubordination for refusing to obey such a direct order.

I find that Northwest's business explanation for its flight crew verification process was based upon a rational process or policy recognized by its dominant authority, the FAA. In so acting under the rational exercise of its discretion under those policies, Respondent's witnesses acted in accordance with that policy at the time of the facts outlined by Blount, himself, as having occurred on February 7, 2007. Considering the repeated reference to "the CSA" or

“Agent” in Northwest’s Crew Verification – Procedure (RX 13-1) and the absence of a specific reference to a qualifying word such as “any” in referring to “the CSA” or “Agent,” as contended by Blount to require the same CSA or Agent originally designated as the “primary” or “lead” CSA or Agent in justifying his refusal to sign the completed list without his first having identified and initialed each and every crew member and thus limiting the initialing of boarding crew members to “him” as the “lead” or “primary” CSA or “Agent,” I find the Northwest practice of utilizing any qualified CSA or Agent in the area of the scheduled flight to ID and initial each crew member to be a valid, acceptable and justifiable interpretation of the policy, involving the rational and necessary implementation of that policy as so testified by Respondent’s witnesses. This is particularly the case when the boarding of crew members could extend over a number of hours, involving delays, changes of shifts or other circumstances mandated by the necessity to utilize additional CSA’s for early arrivals and “big” flights, etc. These circumstances are not at odds with my understanding of the practical implementation of that policy as stated by all of Respondent’s witnesses by the end of the hearing, all of which was repeatedly explained to Complainant Blount.

I note that until the point of O’Gara asking Blount to sign off on the crew verification list a second time,⁷² I was inclined to conclude that Blount might have been within his right to refuse to sign it on air safety grounds. However, while on the one hand, he was a “probationary” employee, subject to immediate discharge, for good, bad or no reason or even as a non-probationary employee, he might have been in a circumstance when the generally accepted principle of “work now – grieve later” or “obey now – grieve later” might have been applied, (*See* p. 713, *How Arbitration Works*, 4th Ed., Elkouri and Elkouri, BNA (1985)); on the other hand, these positions of Respondent could have been outweighed by an AIR 21 or FAA policy that might have recognized the possibility that a potentially “unidentified crew member” was on board if no one had correctly identified and verified the crew members, thus inferring a reasonable belief that an immediate health or safety condition existed, involving the health and safety of the flight’s crew, its passengers and the public - which by the way, Blount did not raise or specifically express!⁷³

More importantly, I have recognized that Blount has failed to establish a rational basis for his challenge to the flight crew member verification policy as actually formulated and utilized to establish that the crew members on this particular flight had been effectively identified and verified by the established process. Thus, his refusal to sign the completed crew member verification form in accordance with the procedures taught by trained Northwest personnel, as stated by his supervisor, would constitute clear and convincing evidence of an unjustified refusal to obey their orders to do so, particularly while he remained in a training status, and have justified his termination which, on consideration of all the facts presented in this record as a

⁷² Blount testified that his experience as a personal auditor had taught him that when looking at a document, a person’s signature means that that person has verified that document and validated any process that is mentioned in the document. (T 97) **I have now determined that after O’Gara’s third return with the initialed crew list (if not the second), Blount was acting outside of his authority by not following the direction of his superiors to merely verify that the initialed list was complete.**

⁷³ See the evaluation of his single reference to safety (T 199) p. 18 *supra*. This was not raised to O’Gara in their exchange at Gate 12.

whole, I so find.⁷⁴ As stated above, Blount testified that he felt he “knew better” than Minks, O’Gara, and Livecche and that he “rejected” what they told him. (T 210). This testimony of a trainee, who “knew better” than the numerous years of combined airline experience of his supervisors, reinforces that Blount was out of line and that his belief was not objectively reasonable.

Therefore, I find that Blount had a personal obligation to listen to the instructions that he was receiving in his training; to determine how those instructions were carried out in practice; and to make inquiries about any doubts that he may have had while acting at the gates in what was in fact his initiation to his performance as a new employee. Beyond that, I find that, as a trainee, he had to determine the basis for Respondent’s policy and that his failure to do so was simply not rational under the circumstances stated herein. This divested himself of any argument that he had been terminated for engaging in any protected conduct or behavior that supported his belief that Northwest was violating FAA regulations. No such violation was established. No safety issue was established as a matter of fact. In his meeting with Minks regarding “the responsibility of the CSA to get the flights out on time,” Blount testified that “I indicated to her that my first responsibility was safety,” which she “refuted by repeating the obligation to get my flight out on time.” (T 119) Otherwise, Blount did not relate this to the crew verification procedure. Mr. Blount’s complaint, therefore, must be dismissed.

Furthermore, I find that Blount has not met his burden by showing that he “subjectively believed that his employer was engaged in unlawful practices and [that his belief is] objectively reasonable in light of the facts presented.” *See Walker v. American Airlines*, ARB Case No. 05-028. Blount conceded that he did not recall being told during classroom training that the same CSA must check in all flight crew members and sign the completed flight crew list, and he conceded that Northwest did not require that one CSA check in all members of the flight crew. Furthermore, on February 7 he refused to sign the document even though his mentor, O’Gara, and his supervisor, Livecche, asked or directed him to sign it. In addition, Blount conceded that he was told by O’Gara, Minks and Livecche that by reviewing and signing the crew list as the lead CSA at that gate that day all he was doing was confirming that the document was in order, and that the crew members were already checked in, which was reflected by the initials next to each crew member’s name. Yet, he still refused to sign, stating it was illegal and because he felt he would have been responsible for any potential accident. Also, in his meeting with Minks and Weber after the incident, both women explained the policy again; however, Blount did not accept their explanations, stating that “it was a violation of FAA law.” Even though an argument can be made that the actual policy, as written, could be interpreted as Blount has interpreted it, in light of the facts presented as outlined above, Blount’s belief was not objectively reasonable.

Moreover, the alleged act must “implicate safety definitively and specifically.” Blount’s testimony that “they wanted [him] to react to ... a procedure that was not within protocol of the Northwest policy,” that he “didn’t feel comfortable with that process,” that he would “be happy

⁷⁴ Recognizing that his having failed to print off the crew manifest as directed would have also possibly been subject to other legitimate disciplinary issue considerations – *i.e.*, following legitimate employer policies, disobeying a direct order, etc. – also would have warranted his termination, particularly as a probational employee – his termination might also have been justified. That particular reason for terminating Blount, has not been pursued by Respondent in this case.

to do anything according to what [he thought was] reasonable and within policy and legal,” and that he “was trying to explain ... that there was violation ... at the gate” is lacking with regard to definite and specific safety implications.

In summary, the evidence establishes that Blount did not have an objective reasonable belief that Northwest was engaged in unlawful activity on the day in question. After careful consideration of the evidence, I find and conclude that Blount did not engage in protected activity actionable under AIR21.

Assuming *arguendo*, that the evidence supports Blount’s belief of conduct sufficient to constitute protected activity, I will proceed to analyze the remaining factors.

Knowledge of Protected Activity

After establishing that he engaged in protected activity, Blount must show that Northwest had knowledge of that protected activity. The ARB has stated that “knowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint. This element derives from the language of [AIR21] ... that no air carrier, contractor, or subcontractor may discriminate in employment ‘because’ the employee has engaged in protected activity.” *Peck*, ARB No. 02-028 at 14 (citing *Bartlik v. TVA*, 88-ERA-15, slip op. at 4 n. 1 (Sec’y Apr. 7, 1993), *aff’d*, 73 F.3d 100 (6th Cir. 1996)) and 49 U.S.C. § 42121(a).

Therefore, I find that Blount’s statements to his daily mentor, the customer service supervisor, and the concourse manager constitute actual knowledge within the purview of the Act.

Adverse Action

Blount’s employment with Northwest was terminated as of February 7, 2007. Termination of employment is adverse action under AIR21. 49 U.S.C. § 42121(a); 29 C.F.R. § 1979.102(b).

Protected Activity as a Contributing Factor to Adverse Action

The complainant must prove by a preponderance of the evidence that his protected activity was a “contributing factor” which motivated the employer to take the adverse employment action against him. 49 U.S.C. §§ 42121(a), (b)(2)(B)(iii); 29 C.F.R. § 1979.109(a); *see also Hirst*, ARB Nos. 04-116, 04-160 at 7; *Clark*, ARB NO. 04-150 at 11, 12; *Rooks*, ARB No. 04-092 at 5; *Brune*, ARB No. 04-037 at 13.

Assuming that Blount was able to establish that he engaged in protected activity and that he experienced an adverse employment action, he cannot establish that Northwest’s legitimate reasons for his termination, *i.e.*, his failure to follow instructions and insubordination, are a pretext for retaliation. In other words, Blount did not establish that Northwest terminated him

because of his complaints as opposed to his failure to follow instructions after repeated explanations regarding the flight crew list verification process.

Specifically, even if Blount had established his behavior was protected activity, such activity was not a “contributing factor” to his termination. Even though he was terminated on the same day as the alleged protected activity, where “...a temporal connection between protected activity and an adverse action may support an inference of retaliation, the inference is not necessarily dispositive. For example, if an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee’s burden of proof...” *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058 (ARB Dec. 31, 2007). Furthermore, even though she had not made a decision to terminate Blount, Minks did prepare a termination letter for Blount prior to their meeting and prior to her knowledge of an alleged FAA violation. More importantly, Blount testified that Minks indicated that he was being terminated for insubordination, which was clarified by Blount. In his testimony he specifically stated, “The reason was that I wouldn’t follow instructions and that I was terminated for insubordination.”

Furthermore, Complainant maintains that, once having established his “protected behavior or conduct” in raising a violation of FAA rules and regulations and that this had contributed to Respondent’s determination to terminate him as an “unfavorable personnel action,” Respondent is obligated to produce clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity.⁷⁵ Here, based upon the otherwise uncontested, and therefore clear and convincing evidence (outside of Blount’s own belief) that Respondent had developed a policy necessary to address the FAA’s requirement that there be a reasonable boarding policy, not only for passengers, but for the crew verification itself; that, in fact, Northwest had that policy approved by the FAA, regardless of what Blount thought, particularly as a probationary employee who was still attending his basic Northwest training on the subject; and that therefore, in refusing to sign a legitimate document after a direct order to do so, establishes clear and convincing evidence that he would have been terminated for refusing to follow the direct order to sign the completed crew verification form.

Moreover, Blount’s alleged travel benefit abuses and racial discrimination allegations must be addressed. In light of Respondent’s acknowledged prohibition against utilizing employment travel benefits for business reasons, Respondent might have concluded that “pursuing” such business interests, as opposed to “conducting” them, constituted a distinction without a difference, and might have justified his termination under that policy alone, as well as having created a credibility issue regarding his testimony on the matter. According to Respondent, this would have constituted a legitimate business reason for his termination. Complainant’s response might then have been that a termination for such an alleged travel abuse would be a pretext for the real reason for his termination, his alleged violation of FAA/AIR21 rules; or even might have advanced as a defense that he was being terminated for some other inappropriate reason, such as disliking a person’s motorcycle hobby, or an “illegal” reason

⁷⁵ If a complainant fails to show by a preponderance of the evidence that a protected activity was a contributing factor to an adverse action, it is unnecessary to consider the question of whether a defendant employer has shown by clear and convincing evidence that the same adverse action would have been taken even if there had been no protected activity. Hence, it is not necessary to resolve this issue in this proceeding.

involving a discrimination statute. While such issues may be considered when other protected reasons are advanced to establish a pretext for taking such an unfavorable personnel action (*i.e.*, EEOC protected racial discriminatory actions; particularly those discussed regarding Blount's racial discrimination allegations in his complaint to OSHA (RX 18) charging a conspiracy by five white women – I take judicial notice that he was an African-American man – who tried to get him to “falsify flight crew records” to support “the CSA claims,” (T 201-202)), these other causes of action will, similarly, not be determined in the present matter. Here, Complainant must allege and demonstrate by a preponderance of the evidence that his protected activity (“protected behavior or conduct”) under the “protected” FAA/AIR21 Act contributed to Respondent's decision to terminate him, and overcome Respondent's clear and convincing evidence that he would have been terminated in the absence of that protected behavior or conduct if he meets that initial burden.

In Blount's refusal to sign as “completed” the flight crew verification list, the listed members of which were initialed as “verified” by other CSA's and not personally identified or “verified” by himself, which he alleged as “fraud” under FAA/ AIR21 Act regulations and a violation (impliedly involving an unstated safety issue if the actions of an unidentified crew member resulted in an accident or other happening which he did not specifically allege), I have found no such FAA/AIR21 Act violation. As stated herein, Blount's conduct or behavior was neither protected, nor a valid response to Respondent's clear and convincing evidence regarding the reasons for his termination. I, therefore, find it unnecessary to make a final determination on this EEOC related issue or any other alleged discriminatory action covered by other statutes over which I have no jurisdiction (whether alleged as “pretext” or not) as well as any other issue concerning Respondent's alleged violation of his employment contract involving abuse of his travel benefits, or other provisions unrelated to AIR21 Act violations under the collective bargaining agreement.

Finally, Mr. Budge's testimony verified my conclusion that the CSA signing of the completed crew member verification form is merely performing that “completed” function alone, without constituting an individual verification of the crew members themselves, which could have been performed by any available qualified CSA. Blount's repeated refusal as a new employee to accept reasonable direction from several long-term, knowledgeable employees, ranking from CSA's to CSM's, to act within the scope of their employment and whose refusal to do so could have held-up the departure of a flight that had its crew and passengers properly boarded and ready to take-off, constituted an act of insubordination on Blount's part, thus warranting disciplinary action.

As such I find by clear and convincing evidence that Northwest would have taken the same adverse action regardless of the alleged protected activity.

Remedy

If a complainant fails to show by a preponderance of the evidence that a protected activity was a contributing factor to an adverse action, or is unable to counter Respondent's clear and convincing evidence that it would have taken the same unfavorable action in the absence of a protected activity ("behavior or conduct"), it is unnecessary to consider the question of whether the complainant is entitled to a remedy. Hence, it is not necessary to resolve this issue in this proceeding.

ORDER

For the reasons discussed, I find that the Complainant has failed to establish the essential elements of coverage under the Act. Accordingly, this matter is **DISMISSED**.

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THOMAS F. PHALEN, JR.
ADMINISTRATIVE LAW JUDGE

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

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

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