

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 November 2009

CASE NO. 2008-AIR-00009

IN THE MATTER OF

**ROGER LUDER,
Complainant**

v.

**CONTINENTAL AIRLINES,
Respondent**

APPEARANCES:

**Howard T. Dulmage, Esq.
On behalf of Complainant**

**Louis J. Obdyke, Esq.,
On behalf of Respondent**

BEFORE:

**Clement J. Kennington
Administrative Law Judge**

RECOMMENDED DECISION AND ORDER

This proceeding involves a complaint filed by Captain Roger Luder (Complainant or Captain Luder), against Continental Airlines (Respondent), under the employee protection provisions of Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or the Act), 49 U.S.C. § 42121 et. seq., alleging that Respondent discriminated and/or retaliated against him by suspending him from a twenty-one (21) hour scheduled trip and placing him on an eighteen (18) month termination warning. According to Complainant, this warning was due to an incident on September 15, 2007, where Complainant, against Respondent's desire, wrote up aircraft # 304 as having flown through severe turbulence, and thereby, under FAA safety regulations, delayed the flight for re-inspection for potential structural damages.

Respondent denied the allegation, claiming it disciplined Complainant for failing to follow company operations policies and procedures, and engaging in unprofessional and disrespectful conduct when he wrote up and temporarily grounded the airplane in question. Complainant has also alleged that Respondent has subjected him to unscheduled and unnecessary simulator and line testing, and investigating him for pension or QDRO (Qualified Domestic Relations Order) fraud because of his actions on September 15, 2007.

Complainant timely filed a complaint over this matter with the United States Department of Labor's OSHA office, which investigated and dismissed it as non-meritorious on April 18, 2008. (JTX-20). Thereafter, Complainant filed the instant complaint with the Office of Administrative Law Judges, resulting in a hearing in Houston, Texas, on April 13-15, 2009, and August 12-13, 2009.¹ (JTX-18).

I. STIPULATIONS

Prior to the commencement of the hearing, the parties entered into the following stipulations:

1. Respondent is an air carrier as determined by AIR 21, operating under Federal Aviation Regulations (FAR) Parts 91 and 121, and under the provisions of an operating certificate issued by the Federal Aviation Administration (FAA) and FARS. As such, Respondent is responsible for compliance with the employee protection provisions of AIR 21.
2. Complainant is an employee and captain for Respondent, qualified to fly the 737 aircraft. As an employee of Respondent, Complainant enjoys the protections of AIR 21.
3. On September 15, 2007, Respondent paired Complainant and First Officer John Wofford (F.O. Wofford), to fly together and operate Respondent's flight 391 from Miami, Florida (MIA), to Houston, Texas (JAH). The flight, which was flown in a Continental Boeing 737-300 (aircraft # 304), was the same aircraft that Captain John LeMaire (Captain LeMaire or LeMaire), and First Officer Thomas (Mack) Solsberry (F.O. Solsberry or Solsberry), had flown earlier that day from McAllen, Texas, to Houston, and then to Miami. (JTX-7; 8).
4. Upon arrival in Houston from McAllen, neither Captain LeMaire nor F.O. Solsberry made any log book entry. Upon leaving the plane in Miami, F.O. Solsberry told F.O. Wofford that he had flown through pink, and nearly got the wings ripped off. F.O. Solsberry further stated that a flight attendant had been sent to the clinic, but the plane was a 300 and was "good".²

¹ References to the record are as follows: Trial Transcript, Tr.- ; Joint Exhibit, JTX - , p.____; Complainant's exhibit, CX - , p.____.

² A pink or magenta cell on a plane's radar indicates the presence of severe turbulence and requires, under FAA regulations and Respondent's flight operations manual, that a mechanical inspection take place after the aircraft lands and before it is flown again. If a captain believes his aircraft has been exposed to severe turbulence, he is required to make an entry in the maintenance logbook. (JTX-22, p. 282, TR. 1183). Severe turbulence is identified as turbulence which causes large, abrupt changes in altitude and/or attitude. With severe turbulence the aircraft can be out of control for short periods with large variations in airspeed, violent movements of passengers and crew, and movement of loose objects around the aircraft (JTX-13, p 76). A captain is expected to

- 5 F.O. Wofford found the story compelling and relayed it to Complainant after which Complainant made a maintenance logbook entry indicating the aircraft had experienced severe turbulence requiring a maintenance inspection, which delayed the flight thirty-seven (37) minutes. (JTX-11, p. 1108; JTX-12, p. 74).³

II. STATEMENT OF THE CASE

Although the parties agree on many of the underlying facts as narrated below which are based upon credible witness testimony and record exhibits, they disagree on Respondent's motivation for its discipline, pilot training, and pension investigation of Complainant, with Complainant contending protected activity as motivating factor, as opposed to Respondent which asserted legitimate reasons for its treatment of Complainant.

This proceeding involves three basic issues:

(1) Did Respondent suspend Complainant, thereby preventing him from flying a twenty-one (21) hour scheduled trip and issuing him an eighteen (18) month termination warning to him, because he reasonably believed and wrote in aircraft # 304's maintenance log that, "Prior to boarding the inbound F.O. (Solsberry) told my F.O. (Wofford), the captain (LeMaire), flew through severe turbulence," thereby grounding aircraft # 304 under Respondent and FAA rules until the aircraft could be inspected; or rather, as claimed by Respondent, it took disciplinary action against Complainant because he failed to follow Respondent's policies and procedures in a professional and respectful manner when he wrote up, and thereby grounded, aircraft # 304;

(2) Did Respondent retaliate against Complainant by making him undergo a line check and simulator training because of his protected described in issue # 1 above; and

(3) Did Respondent subject Complainant to a subsequent Qualified Domestic Relations Order (QDRO) investigation for pension fraud because of his protected activities as described in items # 1 and # 2 above.

The record shows Respondent hired Complainant as a first officer/co-pilot on June 3,

use his judgment to ensure the safety of customers, crew and cargo. Safety is the single objective that cannot be compromised. (JTX-22, p. 299). A captain must review the aircraft maintenance logbook as part of his preflight responsibilities. In the event the captain questions the acceptability of an aircraft to conduct a flight operation, he should immediately contact the operations director in SOCC. The captain, dispatcher, maintenance control and operations director will then consult to assess the captain's objections and evaluate corrective measures. The captain has the authority to defer a flight when the conditions of the aircraft are unsuitable for starting or continuing an operation. (JTX-22, p. 318). All employees are responsible for using good judgment and to communicate with others in a courteous and businesslike manner. (JTX-22, p. 145).

³ F.O. Wofford testified that he did not tell Complainant that the aircraft was good and thus need not be written up. (Tr. 342-43).

1985. On November 1, 1998, Respondent assigned Complainant to the position of captain on a 737 aircraft. (CX-3; 5). In September 2007, Complainant flew one scheduled trip⁴ from Miami, Florida, to Houston, Texas, on flight 391; called in sick; had jury duty; and then went on vacation. (JTX-6; 8).

On September 15, 2007, Captain LeMaire and F.O. Solsberry flew flight 1826, (aircraft # 304) from McAllen, Texas, to Houston, Texas, and then to Miami, Florida (Flight 1690). Complainant and F.O. Wofford met aircraft # 304 at the Miami gate to fly the aircraft back to Houston, Texas (Flight 391). Captain LeMaire and Complainant had flown for Respondent for twenty (20) and twenty-two (22) years respectively. F.O. Wofford and F.O. Solsberry were probation employees, having been hired by Respondent in November and December 2006 respectively. (JTX-7; 8).

Complainant waited at the Miami departure gate to greet Captain LeMaire, but LeMaire exited the aircraft through an external jet bridge to get to a designate smoking area. Neither Complainant nor F.O. Wofford spoke to Captain LeMaire before he left the aircraft. F.O. Wofford preceded Captain Luder down the jet bridge, and met F.O. Solsberry as he was walking off the aircraft. F.O. Wofford had known F.O. Solsberry casually before, and began a conversation with him. F.O. Solsberry told F.O. Wofford that Captain LeMaire and he had flown through a pink echo on the radar that nearly “shook wings off,” or “ripped the wings off” the airplane. F.O. Solsberry additionally said one of flight attendants had gone to the hospital, or clinic, for medical care, but the aircraft was a 300 and was “good”.⁵ F.O. Wofford immediately repeated F.O. Solsberry’s comments to Complainant, but never mentioned the aircraft was still in good condition and did not need to be written up. (JTX-6, 9, 10; Tr. 342-43; 1146).

Complainant told F.O. Wofford it sounded like Captain LeMaire and F.O. Solsberry had flown through severe turbulence. F.O. Wofford did not reply, but instead went outside to begin his walk around. Complainant proceeded to check the aircraft’s log book and found no entry stating that the aircraft having undergone severe turbulence. In turn, Complainant contacted maintenance control in Houston, and spoke to Senior Maintenance Controller, Larry McClure (McClure). Complainant told McClure what F.O. Wofford had said, and requested an aircraft inspection. McClure initially did not call for an inspection, but instead asked why the captain who flew the aircraft previously not reported it.⁶ Complainant replied that he did not know, but since F.O. Wofford reported the incident, he felt obligated to have the plane checked before flying it.

Shortly after speaking with McClure and before a maintenance inspection had commenced, someone from Respondent’s System Control Office (SOCC) spoke with Complainant, and advised that the passengers were to be boarded without delay and the aircraft to depart on schedule. Following this conversation, Complainant contacted maintenance control and informed them that he had written up the aircraft in the maintenance log book. (JTX-4).

⁴ This trip occurred on September 15, 2007 and is the trip where the complainant initially grounded aircraft # 304.

⁵ In a statement prepared on October 11, 2007, F. O. Solsberry classified the turbulence as moderate, but confirmed that flight attendant Pam Montgomery had hurt her wrist and was taken to a clinic to be checked out. Further, F.O. Solsberry admitted telling F.O. Wofford that he had flown through “pink and red” cells, got bounced around pretty good, and nearly had the wings ripped off. (JTX-9).

⁶ CX-8 shows McClure ordering the maintenance inspection at 2:26 pm.

Complainant wrote up the aircraft, saying: “Prior to boarding, the inbound F.O. told my F.O. the captain flew through severe turbulence.” (JTX-11).

Respondent’s Operations Director, Ed Gubitosa (Gubitosa) arranged a conference call involving Director of Maintenance Control, Jim Sunberry (Sunberry), Assistant Chief Pilot Kip Komidor (Komidor), and Complainant. Komidor questioned Complainant about the need for an inspection. Complainant relayed what he had been told. Komidor tried to convince Complainant to take the plane without the inspection, saying that Captain LeMaire had told them the turbulence was only moderate, when in fact no one from flight operations, including Komidor, had talked to LeMaire to confirm moderate turbulence.⁷ When Complainant refused to accept LeMaire alleged statement, Sunberry said Respondent did not ground planes on hearsay. Complainant then hung up the phone. Komidor again called Complainant, who handed the phone to F.O. Wofford. After speaking to Komidor, Wofford passed the phone to Complainant, who told Komidor he would report Komidor to the FAA if he were ordered to fly the aircraft without an inspection. (JTX-18).

McClure eventually called a contract mechanic to inspect the aircraft. The mechanic found no defects. (JTX-11; 12). The inspection took approximately thirty (30) minutes. (JTX-13). Flight 391 left the gate in Miami thirty-seven (37) minutes late. (JTX-6).

On October 11, 2007, an investigatory meeting into the incident was held. Complainant did not attend an earlier meeting scheduled for October 4, 2007, due to the fact he was on a scheduled vacation and did not receive notice of the October 4, 2007 meeting until October 3, 2007, when he was out of state. Present at the October 11, 2007 meeting were Complainant, ALPA union officials Peter Schnur (Schnur) and Tom Morris (Morris), Captain LeMaire, F.O. Solsberry, F.O. Wofford, Lou Bass (Bass), Sunberry, Gubitosa, Komidor, and Chief Pilot Andrew Jost (Chief Pilot Jost or Jost). At the end of the meeting, Jost concluded that: (1) Complainant grounded an aircraft and delayed a departure flight without reasonable cause and outside the normal parameter set forth in Respondent’s flight operations manual, based upon second hand, un-verified information; (2) Complainant’s attitude was inappropriate and disrespectful, for which he was suspended without pay for a twenty-one (21) hour scheduled trip and received a termination warning; (3) Complainant was further being disciplined for failing to follow Respondent’s flight operations policies and procedures, and his unprofessional and disrespectful conduct. (JTX-19). Complainant is currently not on flight status due to his request for medical leave.⁸

⁷ See LeMaire testimony at Tr. 134-36 wherein he denied talking to anyone in flight operations, including Komidor, regarding not flying through severe turbulence. In fact, LeMaire talked about the lack of severe turbulence to only an unnamed mechanic prior to the October 11, 2007 meeting, when he was finally confronted about the issue from Komidor. Komidor talked with Solsberry about the lack of severe turbulence on two occasions during the afternoon of September 15, 2007. The exact times of these conversations are unknown. (Tr. 242).

⁸ Respondent’s maintenance manual requires an aircraft inspection after undergoing severe turbulence, with the captain required to make the decision if an inspection is necessary. (JTX-13). Respondent’s flight operations manual requires reporting and entry in the maintenance logbook of severe turbulence, “only if in the captain’s judgment a severe structural load has been imposed on the aircraft.” (JTX-22). Respondent uses a captain’s irregularity report to report incidents to the FAA and NTSB. Respondent requires its captains to use their authority to ensure customers, crew, and cargo safety. Respondent’s operations manual requires a captain who questions the acceptability of an aircraft to contact Operations Director in SOCC. The captain, dispatch, maintenance control, and operations director then consult to assess the captain’s objection and evaluate alternative courses of action. However, the captain has the final authority to defer a flight when the condition of the aircraft is unsuitable for starting or continuing operation. (JTX-22, p. 318). All discrepancies must be addressed prior to dispatch. The captain must review the aircraft

Following the termination warning, Complainant was required to undergo routine line and simulator training as part of his continuing flight qualification on November 10, 2007. Examiner Steven Casner (Casner) administered the line training, which Complainant passed. Instructor John Walker (Walker) put Complainant through certain maneuvers in a simulator at a later date. After the simulation, Walker concluded Complainant needed additional training for all phases of “engine inoperative flight,” concentrating on basic aircraft control. Complainant did not complete the simulator training, calling in sick on the second day of training. In turn, Respondent removed him from qualified status. (JTX-15, 16, 17).

On November 27, 2007, Complainant sought treatment from Respondent’s Employee Assistance Program for medical problems associated “with working in a hostile work environment.” This included treatment from psychiatrist Dr. Vitaliy Shaulov, who saw Claimant commencing on January 3, 2008. Complainant presented with concentration and attention difficulties, and paranoia manifested by fear of facing representatives of Respondent. These symptoms combined with panic attacks, making it difficult for Complainant to travel for a meeting with Respondent in Atlanta, Georgia, scheduled for March 12, 2008. Dr. Shaulov diagnosed Post Traumatic Stress Disorder (PTSD) with lack of sleep, lack of confidence, low self esteem, fear, worry for future, anxiety, panic attacks, tachycardia, hyperventilation, lightness, stomach turmoil, and diarrhea, which Claimant attributed to the interrogation by the Chief Pilot’s office prior to a simulator check ride. (CX-4, p. 207. Dr. Shaulov also diagnosed major depression, panic disorder, anxiety nos. with a global assessment of 35-40, indicating serious functional impairment. (CX-4, p. 182-184).

On May 12 and 13, 2008, Respondent had Complainant evaluated by psychologist, Dr Robert Elliot, who diagnosed Complainant with major depressive disorder, moderate with psychotic features. Dr. Elliot found Complainant unfit for duty, due to his symptoms and need of further treatment. Dr. Elliot’s report indicates the initiating incident was the reported incident on September 15, 2007. Dr. Elliot performed comprehensive psychological testing of Complainant, after which he described the incidents of September 15, 2007; October 11, 2007; and the subsequent retraining were followed by severe symptoms described by Dr. Shaulov and his assessment of significant depression, anxiety, paranoia, suspicion, tangential thinking, pre-psychotic thinking and delusions.(CX-4, pp. 221-231). Thereafter, Complainant sought multiple psychological treatments by Dr. Sandra Jorgenen from August 17, 2008, through March 31, 2009. (CX-4, p. 359).

Chief Pilot Jost scheduled a March 12, 2008 meeting to discuss Complainant’s QDRO issues. Jost advised him of possible disciplinary action and his right for union representation by an ALPA representative. (CX-1, p. 1-13). QDRO is a qualified domestic relation order which becomes part of a divorce decree, whereby an alternative payee (e.g. divorce wife) receives a portion of her husband’s pension following a divorce. (CX-14). Respondent apparently had about thirty (30) employees under investigation for undergoing fraudulent divorces in order to obtain pension funds. Complainant was allegedly one of these employees who underwent a fraudulent

maintenance logbook to ensure all prior discrepancies have been corrected. The captain is required to insure that all irregularities occurring during a flight are entered into the aircraft’s maintenance log. (JTX-22, p.473).

divorce. Complainant divorced his wife on January 26, 2007. Complainant alleges the QDRO investigation, like the simulator training, constituted further harassment because of his protected activity. Claimant testified since the divorce, he has continued to live at the same address as his ex-wife, but on a different floor. He chooses to live like this for the benefit of his only child, and has never resumed familial relations with his ex-wife.

III. TESTIMONY OF THE FLIGHT CREWS OF AIRCRAFT # 304⁹

III. 1.) COMPLAINANT¹⁰

On the day in question, Complainant was making his way towards the aircraft when he saw the in-bound flight crew in the galley. (Tr. 990). Amongst the in-bound crew were F.O. Solsberry and F.O. Wofford, who were talking and looking very serious. (Tr. 990). Complainant testified he did not see Captain LeMaire on the day in question, and did not speak to Solsberry. (Tr. 989). Complainant further testified he was first made aware of the severe turbulence when F.O. Wofford approached him, stating the comments that Solsberry had made about “flying through pink,” and having the “wings ripped off” the airplane. (Tr. 991). Complainant testified F.O. Wofford also made Complainant aware that Captain LeMaire was on the co-pilots’ no-fly list. Complainant immediately went to see if there was an entry in the logbook for the airplane, but found no such entry regarding any turbulence. (Tr. 992).¹¹ After hearing F.O. Wofford’s description, Complainant asked him several questions in an attempt to verify Solsberry’s story. (Tr. 996). Complainant testified he was never told that Solsberry was merely joking around. (Tr. 995). Complainant further testified he was never told by F.O. Wofford to not get the inspection of the plane. Upon finishing his conversation with F.O. Wofford, Complainant determined the plane had gone through possible severe turbulence, and decided to call maintenance for an inspection. (Tr. 992).

Complainant testified he spoke to Bass at dispatch, and asked to talk to maintenance control promptly, due to the fact that he did not know how long a severe turbulence inspection would take. (Tr. 993). Complainant was transferred to McClure, to whom he relayed what he had been told in requesting an inspection. McClure placed Complainant on hold, and thereafter never confirmed or denied he would comply with Complainant’s request. (Tr. 1104-05). Complainant further explained that after talking to McClure, a ground supervisor spoke with him and F.O. Wofford in the aircraft’s cockpit, stating SOCC had spoken to him and had ordered Complainant

⁹ The flight operations manual specifies the following operating priorities: “All crewmembers will, in the course of flight operations, utilize the following operational priorities: operate safely, operate comfortably, operate on time, and operate efficiently in that order. Pilots will see every attempt being made in flight planning stages to keep the airline on time to the minute. Pilots are asked, at the same time, to operate as efficiently as possible to minimize cost. The two messages may seem in conflict; however, ultimately they are not. On each leg they fly, pilots are requested to maximize all these elements with our priorities in mind. (JTX-22, p. 299).

¹⁰ As specified in Respondent’s flight operational manual (FOM) “The Pilot-In- Command of an aircraft is ultimately responsible for the safe conduct of the flight... the captain has the authority to defer a flight when the condition of the aircraft is unsuitable for starting or continuing an operation.” (JTX-22, pp. 327, 368).

¹¹ The FOM in “Post-flight Aircraft Maintenance Procedures” states: “The captain will ensure that all mechanical irregularities occurring during a flight a flight as well as any irregularities noted during preflight inspections and checks are entered into he aircraft’s maintenance log. Although verbal discussions with maintenance personnel are encouraged, verbal reporting of maintenance irregularities is not acceptable. The date placed in the logbook should be the local date at the location where the entry is being written. The captain is required to sign e ach entry in the maintenance logbook...” (JTX-22, p. 473).

to push for time and board passengers without an inspection. (Tr. 997). Complainant testified the ground supervisor also told Complainant that his authority for inspection was going to be overridden. (Tr. 997).¹²

Complainant testified he was then asked to take a call at the podium near the boarding gate where customers were waiting to board the plane. (Tr. 1000). Complainant testified someone on the phone told him that the plane would not be written up based solely on hearsay. (Tr. 1000). Upon hearing this, Complainant hung up the phone, as customers were beginning to look in his direction. (Tr. 1001).¹³ After this call, Complainant immediately contacted maintenance and wrote up the aircraft. (Tr. 1001). After ordering the inspection, Complainant received a call on his cell phone from Komidor, who apparently was upset with Complainant for ordering an inspection (Tr. 1002).¹⁴

Complainant admitted to giving the phone to F.O. Wofford, who talked for about forty-five (45) seconds before giving the phone back to Complainant. (Tr. 1002). At some point in the conversation, Complainant allegedly told Komidor he would report him to the FAA if ordered to fly the aircraft without an inspection. (Tr. 1003). Complainant testified during the conversation, F.O. Wofford told him that, "They're going to fire me ... told me to bring in my manuals." (Tr. 1002). Complainant testified a mechanic showed up for inspection approximately five (5) to ten (10) minutes before push time, and the inspection took around fifteen (15) to twenty (20) minutes. (Tr. 1009). Upon completion of the leg, Complainant and F.O. Wofford called Solsberry to have Solsberry describe the turbulence again. Complainant testified Solsberry described the turbulence similar to the description he gave to F.O. Wofford at first. (Tr. 1014).

Complainant admits to being very upset during the whole incident in question. (Tr. 1007). Complainant further admits he was very agitated on the phone, and he hung up on someone during a conversation, but not on Komidor. (Tr. 1007). Complainant explained the person he

¹² The FOM in "Captain Responsibilities" states "The Pilot-In-Command of the aircraft is designated as captain and has full responsibility for the following:

Final authority as to the safe and efficient operation of the airplane in accordance with the Airplane Flight Manual, company policy, and the FARs

Safety of the crew, customers, cargo, equipment and overall safe conduct of flight consistent with good judgment.

Maintenance of schedule, promotion of customers comfort and service, and enhancement of company image.

Training and development of crewmembers in techniques, methods and day to day activities in accordance with Continental policy and procedures.

Counseling of crewmembers as necessary.

Act as In-flight Security Coordinator when dealing with security matters. (JTX-22, p. 609)

¹³ The FOM in "Company Affairs and Confidentiality" states "At no time shall a pilot discuss in the presence of customers or outsiders any matter which would cast doubt on the safety of the operation of a flight. If a customer approaches the pilot, he/she give a clear description of weather conditions expected or the nature of a maintenance delay. At the same time, the customer must be assured that the flight will not depart if there is any uncertainty to its safety. (JTX-22, p. 593).

¹⁴ Komidor admitted initially talking with Complainant and trying to convince him to fly the plane without an inspection on the basis that Captain LeMaire had already explained the aircraft had not flown through severe turbulence. Komidor also told Complainant Solsberry had already confirmed the fact that the aircraft had not flown through severe turbulence (Tr. 916-936). In fact, Komidor did not speak to LeMaire until the October 11, 2007 investigatory meeting. (Tr. 135-36; 242)

hung up was raising their voice and trying to be very authoritative, but that person was not Komidor. (Tr. 1008). Complainant testified no one ever told him to remove the write up. (Tr. 1014). Complainant further testified no one asked him to call Captain LeMaire or Solsberry. (Tr. 1014).

Complainant testified he learned about the first investigatory meeting on October 3, 2004, the day before from a friend who was dog-sitting while Complainant was on vacation. (Tr. 1016). Complainant explained the friend read the letter to him over the phone. (Tr. 1016). Complainant further testified he e-mailed Komidor and his union representative that same evening. (Tr. 1018). Upon returning home, Complainant discovered that he had been taken off of a four (4) day trip, and was asked to attend another meeting on October 11, 2007. (Tr. 1018). Prior to being contacted for this second meeting, Complainant had not spoken to any official from Respondent regarding any investigatory meeting. (Tr.1018).

Complainant testified the second meeting was held by Komidor, Jost, and David Mulnar (Mulnar), a human resources manager with Respondent. (Tr. 1020). All four pilots involved in the incident attended, along with Pete Schnur (Schnur), a union representative. Complainant explained each pilot preceded him into a room, talking to the three (3) Respondent officials for fifteen (15) to twenty (20) minutes, exiting the room to retrieve paper, and then going back into the room for another ten (10) to fifteen (15) minutes. (Tr. 1022). Complainant further testified upon entering the room, Komidor spoke to him first. According to Complainant, Komidor talked down to him, threatening him, while leaning over the table and cracking his knuckles. (Tr. 1023). Complainant testified Komidor also challenged Complainant's experience as a pilot, and kept mumbling to Jost while Complainant talked. (Tr. 1025, 1029). Complainant further explained Jost also became very angry during the meeting, and questioned Complainant's aviation judgment. (Tr. 1027-28). Complainant stated Komidor was unwilling to allow Complainant to have a break during the meeting, but Jost did allow Complainant to step outside when needed. (Tr. 1025).

Complainant testified he received discipline, marked "Time Served," in the form of twenty-one (21) hours of flight time that was previously taken away from Complainant and an eighteen (18) month termination warning. (Tr. 1026). Complainant testified the twenty-one (21) hours being docked resulted in a loss of over three thousand dollars (\$3,000.00). (Tr. 1026). Complainant further testified Jost explained that the fine was for a combination of things: missing the first meeting; for time served; and for writing up the aircraft. (Tr. 1029). After this meeting, Complainant had no further conversations with Komidor or Jost. (Tr. 1030).

Complainant received a line check ride from Casner on a trip from John F. Kennedy Airport in New York, New York, back to Houston, in early November 2007. (Tr. 1032, 1194-97). Complainant found this check ride odd because he was not due for a check ride for another eight (8) months. (Tr. 1033, 1199). During the check ride, Complainant discussed the event in question with Casner. Complainant testified Casner suggested he file a Phase II grievance under Section 19. (Tr. 1033). Complainant further testified Casner, after hearing that Complainant was due to go in for simulator training, stated "if they put an instructor in the right seat, they're going to fire you." (Tr. 1034).

Complainant underwent scheduled simulator training on November 10, 2007. (Tr. 1035). Complainant testified during this training, the simulator felt like it was broken and as if it had been manipulated. (Tr. 1035). Complainant further testified to several odd occurrences during the simulator training, including being told to mark a box on a form that stated he was “affected by outside factors.” (Tr. 1039). Complainant also testified he was told that when he returned the next day for more training, an instructor would be in the right seat during the training. (Tr. 1040). After returning to the hotel that night, Complainant began having anxiety problems, and went to the hospital. (Tr. 1041-43). Complainant explained he notified Respondent that he would not be coming in the next day for more training due to his hospital visit.

Complainant testified he contacted the Employee Assistance Program (EAP) for Respondent when he returned home, and further saw his family doctor and a cardiologist. (Tr. 1044-45). Complainant further testified EAP sent him to a psychiatrist, who placed Complainant on medication. (Tr. 1046-48). Complainant continued to see a psychiatrist up to the date of hearing and continuing thereafter. (Tr. 1048). Complainant testified he was contacted by a representative of Harvey Watt, the disability insurer for Respondent, who sent Complainant to see a doctor in Los Angeles, California. (Tr. 1054). Complainant explained this doctor, Dr. Elliot, stated Complainant was not fit for duty as a pilot. (Tr. 1055). Complainant remained unfit for duty up to the date of hearing and continuing, and has continued with his treatment and counseling. (Tr. 1055). Complainant testified he did not have any psychological or psychiatric issues prior to the incidents in question. (Tr. 1056).

Complainant is currently divorced and has not reconciled or re-married with his former spouse. (Tr. 1065). Complainant testified he lives on a separate floor of his two-story house, and that he remains in the same home as his former spouse for the best interest of the child. (Tr. 1066). Complainant also spends a lot of time in Phoenix, Arizona. Complainant further testified there is no chance for reconciliation. (Tr. 1066).

On cross Complainant admitted technically his vacation ended on October 1, 2007, and thus he was not on vacation on October 4, 2007, when the original disciplinary meeting was scheduled. However, he was out of state during his vacation, and received notice of the meeting on October 3, 2000, which did not give him adequate time to attend. (Tr. 1084-86). Complainant described the October 19, 2007 letter of discipline as inaccurate, stating he had acted in a professional manner, followed company policy, and used good judgment in insisting upon an aircraft inspection. Specifically, he believed he acquired as much information as he could prior to writing up the aircraft. In fact, he made the requisite calls to SOCC (5 calls to dispatch and maintenance controls). (Tr. 1100, 1101). Complainant became upset when he heard Komidor’s testimony because he knew Perkins’ visit to the clinic was directly related to aircraft turbulence (Tr. 1089, 1117, 1119).¹⁵ Complainant became further upset when his request to delay boarding were disregarded; Respondent’s Miami boarding supervisor told him that SOCC told him to get off the gate as scheduled; and Sunberry advised Complainant that Respondent did not write up an aircraft on hearsay. (Tr. 1097, 1113, 1125-1128, 1130-32). Following these confrontations, Complainant wrote up the aircraft. (Tr. 1118).

¹⁵ Complainant listened to what Komidor had to say in which he told Complainant he had spoken to both LeMaire and Solsberry and confirmed the aircraft had not flown through severe turbulence and the flight attendant, Pamela Montgomery Perkins had gone to the clinic on an unrelated matter.

Complainant admitted arguing with Komidor, who he believed was attempting to get him to accept the aircraft without an inspection. He further admitted to telling Komidor he would take him to the FAA if he continued to insist he fly the aircraft without an inspection. (Tr. 1118, 1147-50, 1180). Complainant felt his authority was being overridden. (Tr. 1155-57). Komidor became very angry during the exchange and told Complainant he wanted him to come to the chief pilot's office after the trip was over. Complainant replied he was going to be on vacation. (Tr. 1147-50). After the incident, Complainant filed a complaint with the FAA. (Tr. 1153). In writing up the aircraft Complaint said he was getting inconsistent information and elected to call for the safest course of action, which was an inspection. (Tr. 1193) Complainant further delayed boarding because it was hot in Miami and the aircraft had only a small jet engine to cool the aircraft (Tr. 1113, 1137, 1181).

III. 2.) F.O. JOHN WOFFORD

At the time of the alleged incident, F.O. Wofford was a probationary pilot with Respondent, having been hired on December 2, 2006. (Tr. 335). F.O. Wofford testified about his conversation with F.O. Solsberry, wherein they first exchanged pleasantries, having known each other casually before. F.O. Solsberry then said, "Hey man, have you ever flown through a pink echo on a radar?" F.O. Wofford replied, "No, I generally try to avoid those." F.O. Solsberry then said, "Well, we did today, damn near shook the wings off the airplane, one of our girls went to the clinic." F.O. Wofford asked, "Was the plane okay? Is there anything wrong with the airplane, anything we need to know about?" F.O. Solsberry replied, "Oh, no, everything's fine." At that point, the conversation ended, and F.O. Solsberry walked off from the front part of the jet way. (Tr. 337-38). F.O. Wofford then told Complainant about the aircraft nearly having its wings ripped off, flying through pink, and having a cabin attendant going to the clinic, to which Complainant responded: "It sounds like severe turbulence to me." At that point, F.O. Wofford began his pre-flight walk around of the aircraft. After the walk around, F.O. Wofford learned Complainant had written up the airplane for severe turbulence and had called maintenance control. (Tr. 339).

At that point, the gate agent came down to the plane and informed Complainant he had a call at the top of the jet bridge. Complainant left to take the call, and returned extremely upset, telling F.O. Wofford, "They're trying to make me take an unsafe aircraft." F.O. Wofford admitted never telling Complainant the airplane was good and that he did not need to write it up. (Tr. 342-43). Further, F.O. Wofford admitted telling Complainant that F.O. Solsberry reported a "compelling story." (Tr. 344, 347, 348). F.O. Wofford also admitted telling Complainant he had the right to write the plane up and have it inspected for safety. (Tr. 353).

According to Wofford, several minutes later, Komidor called Complainant on Complainant's cell phone. Complainant handed F.O. Wofford the cell phone, whereupon F.O. Wofford told Komidor what F.O. Solsberry said. Komidor told F.O. Wofford he needed to talk to Complainant. F.O. Wofford testified after Complainant received the phone, F.O. Wofford heard Complainant telling Komidor that Complainant was going to report him to the FAA. (Tr. 354). Upon his arrival back in Houston, F.O. Solsberry and F.O. Wofford talked on a speaker phone, where F.O. Solsberry again told F.O. Wofford the same story that he had originally told.

At this point, F.O. Wofford became concerned about what took place and the consequences of his actions (Tr. 359-62).

On cross, F.O. Wofford testified Complainant was loud, argumentative, and shaking while talking to Komidor (Tr. 374). Complainant allegedly told F.O. Wofford that Respondent was out to get him. F.O. Wofford also stated he never had a problem with the aircraft's safety. (Tr. 376-77). However, F.O. Wofford said he would have had the aircraft inspected just to have it inspected in that scenario. (Tr. 378-379).

III. 3 CAPTAIN JOHN LEMAIRE

Captain LeMaire was hired in 1987, as a Second Officer on a 727 aircraft. Later, he was promoted to First Officer, and flew the Airbus 300s, the 727 aircrafts, and the 737 aircrafts. Currently, he is a captain on the 737 aircrafts based out of Houston, Texas. Captain LeMaire began his testimony by describing the aircraft he flew in question on September 15, 2007, and the turbulence he encountered, with the radar showing green, yellow, red, and magenta, or pink colors, which indicated the lightest-to-heaviest area of turbulence. Magenta indicated intense or extreme turbulence. (Tr. 63). Captain LeMaire also has an FAA license called an A and P mechanic license, which authorizes him to work on aircraft as a power plant and airframe mechanic. However, Captain LeMaire cannot, under FAA regulations, work on Respondent's aircrafts.

Captain LeMaire testified Respondent professes safety as its number one priority, with the safe operation of the aircraft vested in the aircraft captain, as the captain has final authority on whether to fly or not. (Tr. 75, 76). Captain LeMaire is also charged with the responsibility to avoid delays. The aircraft flight manual and the FAA regulations work together to ensure proper operation of the aircraft, with the pilot required to follow more restrictive guidelines. Respondent expects its captains to be the final decision maker in the operation of his/her aircraft (Tr. 79). Captain LeMaire admitted Respondent has no set way to fill out a logbook (Tr. 84).

Captain LeMaire flew aircraft # 304 on the day in question from McAllen, Texas, to Houston Intercontinental Airport, and then to Miami, Florida. Ground conditions in McAllen consisted of rain and drizzle. Flying conditions were bumpy. (Tr. 88). Captain LeMaire testified prior to leaving McAllen, he advised flight attendants of possible turbulence in accord with Respondent's guidelines to avoid injury to themselves and others. (Tr. 89, 90).

Captain LeMaire testified during the flight from McAllen to Houston, he encountered turbulence for ten (10) to fifteen (15) seconds, which bounced the plane around a little bit. The turbulence caused the airplane to lose about fifty (50) feet in altitude, and caused a stewardess to allegedly injure her hand and seek medical at Respondent's clinic. (Tr. 101).¹⁶ When Captain LeMaire got to Houston, he made a quick inspection on the outside of aircraft # 304. (Tr. 102).

Captain LeMaire also testified if he had flown through severe turbulence, he would have

¹⁶Montgomery appears not to have been seriously injured (Tr. 115).

had to write up aircraft # 304 upon landing in Houston to allow maintenance to be able to inspect the aircraft prior to its next departure. Captain LeMaire acknowledged if he failed to write up the aircraft and flown through severe turbulence, he would have violated Respondent's policy, and been subject to FAA investigation and Respondent's discipline. (Tr. 106, 107). Captain LeMaire further testified the young pilots on probation do not want to make their captain mad, and will tell other first officers things they will not say to the captain's face. (Tr. 109-110).

Captain LeMaire admitted to not being disciplined over this incident by Respondent; not always carrying his cell phone; not talking to Complainant on the day in question; not remembering if he talked to F.O. Solsberry on that day; and not being expected by Respondent to talk to Complainant. (Tr. 131, 134). Captain LeMaire made no effort to call Complainant. (Tr. 141-142).

Regarding the meeting of October 11, 2007, Captain LeMaire never received any letter about the meeting, but rather was orally informed by Assistant Chief Pilot Komidor about the meeting, without any mention of possible discipline or union representation. At that meeting, Captain LeMaire, for the first time, advised Respondent, including Komidor, that he did not fly through severe turbulence. In fact, Captain LeMaire told no one of not flying through severe turbulence except a mechanic. (Tr. 135-36). Captain LeMaire did admit the nose of airplane had pink on the radar screen. (Tr. 144). Captain LeMaire admitted Complainant did the safest thing by having the aircraft inspected before resuming flight on that aircraft. Respondent apparently never suggested to Captain LeMaire that he should have called Complainant. (Tr. 146).

On cross, Captain LeMaire testified had Complainant called him, he would have received a different story about not flying through severe turbulence. (Tr. 164). Captain LeMaire further testified in a reverse situation with Complainant, he would have called Complainant, and if Complainant denied flying through severe turbulence, he would have dropped the issue at that point. (Tr. 167). On re-cross, Captain LeMaire described the radar from McAllen to Houston as showing strong echoes, which require avoidance by Respondent's aircrafts by twenty (20) miles. However, Captain LeMaire was unable to avoid these echoes by twenty (20) miles. Further, Captain LeMaire stated the flight operations manual says nothing about one captain calling another captain to ask what had occurred. (Tr. 182).

III. 4.) F. O. THOMAS SOLSBERRY

F.O. Solsberry, a pilot for Respondent since November 14, 2006, testified on September 15, 2007, he was still on probation for Respondent and without union representation. On September 15, 2007, F.O. Solsberry stated the weather was overcast. It started to rain shortly after F.O. Solsberry got into aircraft # 304. Neither F.O. Solsberry nor Captain LeMaire told the flight attendants to stay seated. (Tr. 208).

F.O. Solsberry testified upon initial take off, the aircraft incurred a light turbulence. As the aircraft broke out of the clouds, F.O. Solsberry was able to see two turbulent cells on either side of the aircraft, such that a right or left turn would have put them in either cell. At that point, rather than declaring an emergency, the pilots decided to go between the cells. (Tr. 212-13). Fifteen (15) to twenty (20) seconds later, the aircraft was in turbulence, which F.O. Solsberry

described as green, yellow, red, and magenta or pink (light to intense or extreme). (Tr. 215-218). According to F.O. Solsberry, the cells were about twelve (12) to fifteen (15) miles apart. It took about fifteen (15) to twenty (20) seconds to fly through the turbulence. About fifteen (15) minutes after flying through the turbulence, a call came through to the cockpit, indicating one of the flight attendants, Pamela Perkins, had hurt her wrist when they flew between the cells (Tr. 219).

F.O. Solsberry estimated the turbulence to have made standing and walking by oneself difficult. When aircraft # 304 landed, Captain LeMaire left the cockpit for the hotel. F.O. Solsberry completed his checklist, left the cockpit, and greeted oncoming pilot, F.O. Wofford. During their conversation, F.O. Solsberry told F.O. Wofford to be careful leaving Miami because it was bumpy. F.O. Solsberry also asked F.O. Wofford if he had ever flown through pink. When F.O. Wofford said he had not, F.O. Solsberry said they had and nearly got the wings ripped off. F.O. Wofford then stated that it sounded like Solsberry “had a bad day.” F.O. Solsberry agreed, but when asked if the plane was in good shape, he responded affirmatively. (Tr. 231-33).

When asked why he had said “almost ripped the wings off,” F.O. Solsberry explained his comments by saying he had gone through an extremely bumpy turbulence coming out of McAllen. (Tr. 234-235). Like Captain LeMaire, Solsberry admitted he would have violated federal regulations had he not had the plane inspected once it had flown through severe turbulence. (Tr. 235, 36). F.O. Solsberry also admitted talking to Komidor twenty-five (25) minutes later that evening about the incident, and initially talking to F.O. Wofford about the incident in the conversation. (Tr. 242). F.O. Solsberry also admitted routinely not answering his phone if he did not recognize the number calling, and talking to Captain LeMaire about the incident only later that evening at dinner, even though Captain LeMaire and Komidor had talked about it previously. (Tr. 239, 254). F.O. Solsberry also admitted to using inappropriate language in this situation. (Tr. 255).

F.O. Solsberry also admitted never being counseled or disciplined about the incident by Respondent. F.O. Solsberry admitted being told by Komidor that he had done nothing wrong. (Tr. 259). Respondent did not notify F.O. Solsberry in mail about the October 2007 investigatory meeting. Rather, Respondent contacted him by phone. (Tr. 262). F.O. Solsberry also admitted that, under the circumstances of this case, Complainant took action F.O. Solsberry believed was prudent at that time.

III. 5.) PAMELA MONTGOMERY PERKINS

Ms. Pamela Perkins (Ms. Perkins), who was a flight attendant on aircraft # 304 from McAllen to Houston, and then Miami, testified that the initial flight from McAllen to Houston was undertaken amid a thunderstorm. At about ten-thousand (10,000) feet, Ms. Perkins began to experience heavy jolts and grabbed a metal handle on a bar cart. Several moments later, she was jerked around again and twisted her wrist. (Tr. 186, 195). When the flight reached Houston, Ms. Perkins went to Respondent’s clinic, where she received Ibuprofen and muscle relaxers, and returned to complete her flight. (Tr. 187).

Ms. Perkins was not advised on the McAllen to Houston flight to stay in her seat, and

was not told by other flight attendants to remain seated. (Tr. 188). Moreover, after the flight, none of the flight attendants told her she should have remained seated, although the procedure with Respondent is to do so if the flight is bumpy. (Tr. 188). Ms. Perkins classified the turbulence as moderate, lasting less than one minute. (Tr. 189). Further, contrary to what others might say, Ms. Perkins does not have a record of airline injuries, having had only a finger broken in the past. (Tr. 194). Ms. Perkins testified prior to her testimony in court, no one from Respondent spoke to her about the incident in question. (Tr. 196).

IV. TESTIMONY OF COMPLAINANT'S EXPERT, CAPTAIN MITCHELL WHATLEY¹⁷

Captain Mitchell Whatley (Whatley), a captain with American Airlines, served as an expert witness at hearing. Whatley started flying in 1976, and in 1982, he entered the military. Whatley underwent Air Force undergraduate pilot training and flew the F-4 and F-15 Eagle aircrafts. In June 1986, he was hired by American Airlines as flight engineer on the 727 aircraft, and as copilot on the Super 80, 7576, and Foker F-100 aircrafts. Whatley was later promoted to captain on the 7576 aircraft, after which he went to law school. Upon finishing law school, Whatley was promoted to first officer and then captain on the 737 aircraft. (Tr. 394-98). Whatley was also responsible for updating the American Airlines flight manual, and creating a backup flight planning system for American Airlines in the event of a computer failure. (Tr. 404-05). In his last position, Whatley worked with flight operations management daily. (Tr. 406). American Airlines, like Continental, is a scheduled FAA-121 carrier that is governed by part 91 of the FAA. (Tr. 407-08). Whatley has a B.S. Petroleum Engineering and a J.D., which he received in 2005. (Tr. 409).

In the past, management at American Airlines has relied upon Whatley for his expertise on check airmen procedures, implementation of rules for the carriage of the armed and prisoners, maintenance issues, and backup flight planning systems. (Tr. 415-16, 423). Concerning the route structure and equipment of the 737 aircraft, the Respondent and American Airlines are quite similar, with Whatley having many years of direct contact with Respondent's pilots and with management officials in making manual changes and setting policy. (Tr. 432). In this case, Whatley testified about the accuracy of Complainant's log book entry, his alleged poor judgment in not talking to Captain LeMaire, and Complainant's disrespectful and uncooperative attitude towards his fellow employees. (Tr. 438).

¹⁷ At the hearing and in its brief, Respondent objected to Whatley being allowed to testify as an expert. Respondent contended under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588 (1993), Whatley had no airline management or official safety experience so as to allow him to testify as an expert about industry standards. Contrary to Respondent, I find him qualified to testify about industry standards, based upon his years of professional and technical airline experience, in which he has flown similar aircraft (737s) under similar operations manual procedures and the same FARs. Further, Whatley had assisted American Airlines, his employer, in updating its flight manual. In turn, American has relied upon Whatley expertise in dealing with check airmen, carriage of prisoners, and maintenance issues. Contrary to Respondent's argument I found, Whatley, by his flying experience and contact with management at American Airlines and pilots from other airlines, to possess specialized knowledge of industry standards to testify about such in accord with 29 C.F.R. § 18.702 (2000). See *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-0 62, ALJ No 1999-STA-21 (ARB, July 31, 2001). In allowing him to testify however, I have not relied solely, or even primarily, upon him in making factual determinations, but rather relied upon the record as a whole and the testimony of other credible witnesses. Captain Whatley did assist me in the understanding the issues, based upon his technical knowledge and years of professional flying experience in which he has dealt with industry standards on a continuing basis.

As to whether Complainant acted according to federal aviation regulations, Respondent's policy, and airline industry standards when he reported in the aircraft maintenance log and verbally to Respondent's maintenance personnel and chief pilot his belief that the aircraft in question had flown through severe turbulence, Whatley testified as follows:

“Respondent has a policy as stipulated by the parties at JTX-22 at 266 whereby, ‘Safety is paramount for employees and customers.’ This policy tracks the mission of the FAA. (Tr. 442). Respondent also has a similar policy to American Airlines of pilots contacting headquarters (SOC) when something out of the ordinary happens to an aircraft, such as a hard landing, so the plane can be inspected for airworthiness prior to dispatch. (Tr. 443-44, 447). With respect to the flight manuals, those for American and Respondent have been approved by the FAA and have the force of an FAA regulation. Both American and Respondent have a policy and requirement whereby an aircraft which has flown through severe turbulence is required to be written up and inspected (Tr. 445-46).”

Whatley testified that the FAA requires paperwork on the aircraft establishing its airworthiness. (Tr. 448). Regarding the acceptability of an aircraft to conduct flight operations, Respondent has the following requirement, which is similar to American Airlines and reads as follows:

“In the event that a captain questions the acceptability on aircraft to conduct a flight operation, the captain should immediately contact the operations director and SOCC. The captain, dispatcher, maintenance control, and operations director will consult to assess the captain's objection and evaluate corrective measures or alternative courses of action. The captain has the authority to defer a flight when the condition of the aircraft is unsuitable for starting or continuing operation.”

Further, Whatley testified when there is a disagreement between the captain and management on what is to be done, the pilot in command, or the captain, has the ultimate authority under federal aviation regulations (FARs 91.3-91.7; Tr. 449-51). If a deficiency is not on the minimum equipment list, it is not deferrable, and the aircraft is grounded until that item is fixed. Whatley further testified when a captain receives conflicting information about a major issue of safety, such as a plane going through severe turbulence, he is required to take the conservative approach and adopt the most prudent course of action to ensure the safety of the passengers, cargo, and aircraft, regardless if the captain is under pressure to avoid delays leading sometimes to heated discussions between dispatch and a captain. (Tr. 455). Whatley further testified if a captain bows to pressure and flies an airplane that the FAA later discovers was not airworthy, the captain who was on notice of the aircraft's lack of airworthiness can face disciplinary action from the airline and the FAA. (Tr. 456). Further, Whatley stated investigations can, and do, result from passenger inquiries about improper maintenance. (Tr.

457). Disciplinary actions by the FAA for flying unsafe aircraft, which include pulling the pilot's certification, occur on a frequent basis. (Tr. 458-59).

Concerning the captain's responsibilities,¹⁸ Respondent's responsibilities and policies are similar to American Airlines. Whatley stated these responsibilities tract the federal aviation regulations, with all pilots required to follow the federal regulations, then the airplane flight manual, and then the non-conflicting company policy. (Tr. 460). If a company's flight manual is more restrictive than the federal regulations or company policy, the captain is bound to follow the more restrictive flight manual. (Tr. 461). Further, the FAA can take action against a pilot for careless and reckless operation. (FAR Part 91.13), even if the pilot action does not violate a specific FAA regulation. This regulation is referred to as a punishment, or catchall regulation, allowing the FAA to take action against a pilot if they later do not like something the pilot did. (Tr. 462).

Whatley testified after reading the depositions in this case, he opined that the regulations involved in Complainant's situation were related to safety (Tr. 463). Those regulations involve whether Complainant had a reasonable belief that the aircraft in question had been flown through severe turbulence, or had been overstressed, requiring an inspection. Whatley explained that transport aircraft, such as those involved in this case, have low G tolerances, which can be fairly easily exceeded when encountering turbulence requiring inspection. (Tr. 464, 465). For a 737 aircrafts with the flaps up, the G limits are plus 2.5 and minus 1 G. Whatley explained Respondent's turbulence chart¹⁹ has a sliding scale of turbulence, shading one area of turbulence into another, with moderate to severe described as causing standing or walking to be difficult, or impossible without holding onto a part of the aircraft. (Tr. 468). Whatley testified the level of turbulence in this case, based on the flight attendant's description, could easily have exceeded moderate levels. (Tr. 470). Whatley explained that turbulence levels vary in length, with some being only momentary, but still requiring a write-up and inspection. (Tr. 473-74). Respondent's and American Airlines' policy on thunderstorms are similar, with pilots of both airlines instructed to stay away from such because of the turbulence associated with them. (Tr. 480).

Given the facts of this case, Whatley testified he would suspect the aircraft had gone through severe turbulence, and because of the low G limits of the aircraft, the aircraft in question would have exceeded those limits and been over stressed. (Tr. 483).²⁰ Whatley further opined with the conversation in question between two probationary officers, along with Complainant's lack of knowledge with what Captain LeMaire had done previously, Complainant was placed in a difficult position under FARs 91.3, 91.7, and 121.533, regarding safety. Whatley further opined that under these circumstances, he would have had the aircraft inspected. (Tr. 485-86). Whatley further testified if Captain LeMaire flew through severe turbulence, and then flew another leg afterwards, or Respondent told Complainant they did not want him to inspect the plane, but to push on time, then either of these situations would be in violation of federal regulations. (Tr. 486).

¹⁸ These responsibilities are outlined in JTX-22, pp. 609-610.

¹⁹ This turbulence chart can be found at JTX-22, p. 823.

²⁰ This opinion was based off the following facts: (1) Complainant did not talk to the off-bound captain because he was not present when Complainant arrives; (2) One first officer telling another first officer that he flew through pink on the radar and had the wings almost ripped off; and (3) A flight attendant requiring medical treatment.

Whatley testified if Captain LeMaire neglected or forget to work up the aircraft, then he would be highly motivated to down play the severity of that event, and Complainant would have to consider that possibility in ordering an inspection. (Tr. 490-91). Whatley further testified if Complainant had flown the aircraft with the conflicting information he possessed, and the aircraft was later found to be unsafe, FAA would have come after Complainant with violations. (Tr. 492). By calling for an inspection, Complainant was protecting all interests, including the passengers, crew, and cargo. (Tr. 493). Whatley further testified he would be “pissed off” if he had ordered an inspection and was told he was “not to write up an aircraft on hearsay.” Whatley said that comment was laughable because aircraft are written up all the time. (Tr. 496).

Concerning check rides, Whatley stated airlines have the right to use check airman to evaluate a pilot’s performance. Simulators are often use for this purpose. (Tr. 498-500). Whatley testified check rides are stressful by their very nature. (Tr. 501, 504). Whatley further testified an airline can send messages to pilots by giving them difficult simulator rides. (Tr. 505). Whatley testified at American Airlines, he has never known of a pilot receiving a termination notice on the first offense of these check rides. (Tr. 508).²¹

Concerning Complainant’s warning letter, Whatley noted Jost accused Complainant of making a false entry. Whatley testified he disagreed because Complainant made his decision to call for a maintenance inspection upon a reasonable belief that the aircraft may have in fact flown through severe turbulence. (Tr. 514-16).²² Whatley opined that had Captain LeMaire called for an inspection in Houston, no delay would have resulted, as Houston was Respondent’s maintenance base, and the plane was there for a one and a half hour layover. Further, Whatley testified pilots have no obligation or procedures for calling other pilots that have left the airport, and it was rare for pilots to possess other pilots’ cell phone numbers. (Tr. 518-19).²³ Whatley further testified it is not uncommon for pilots to delay passengers boarding in the summer, so as to avoid hot airplanes associated with extended ground delays. (Tr. 521).

Whatley testified it seemed strange that Complainant was required to call Captain LeMaire, but Captain LeMaire had no obligation to call Complainant. (Tr. 527-28). Further, Whatley believed that had Captain LeMaire received a letter similar to what Complainant received, it would cause Captain LeMaire to consider that he had done something extremely wrong and was in deep trouble. (Tr. 534-37). Further, the letter would have had a chilling effect, reminding Captain LeMaire of his duties to write up aircraft as he is required to do under FARs 91.3, 91.7, 121.533, and 121.535. (Tr. 538).

On cross, Whatley admitted to not reviewing JTX-22, p. 266, concerning Respondent’s methods for dealing with safety, wherein it says:

²¹ Respondent uses a AQP program, (JTX-17), which puts pilots through non-canned, more realistic maneuvers, in going through a check ride from point A to point B. (Tr. 592, 593).

²² American and Respondent use similar maintenance manuals.

²³ Whatley described Complainant’s log entry as accurate because by indicating severe turbulence, he told maintenance an inspection was necessary. (Tr. 636). Complainant did not exercise poor judgment in not talking to Captain LeMaire. Concerning the issue of disrespect, it appeared that Respondent was demanding he talk with individuals who could not assist him in making a correct decision. (Tr. 637). Complainant followed Respondent procedure by reporting the situation to dispatch, talking with SOCC personnel and complying with Respondent’s policy on severe turbulence. As to Complainant’s lack of cooperation, Whatley believed it could be in reference to Complainant’s refusal after the flight to discuss the issue with Captain Komidor. However, a pilot has a right not to be required to come in while on vacation (Tr. 647-61).

“Flight crew safety concerns can be reported to the respective Chief Pilots office and resolved through the Flight Operations Division, time permitting. For immediate reporting of flight safety issues, contact the Operations Duty Director at SOCC, who will relay the concern to appropriate parties for resolution. Any safety concern can be directly relayed to the Safety and Regulatory Compliance Department to initiate resolution.”

(Tr. 543-44).

Further, Whatley noted under Respondent’s safety policy, a pilot is required to report severe turbulence only if, in the captain’s judgment, a severe structural load has been imposed on the aircraft. Whatley described severe turbulence he had experienced as abrupt changes in altitude and attitude (rock forth in pitch, yaw, and roll). (Tr. 547-48). Whatley admitted in most cases, severe turbulence is not anticipated, and causes unsecured items tossed or thrown about the cabin. (Tr. 549).

In this case, Whatley said the situation that Complainant was put in by Respondent was not one of cooperation, but rather one of contention, whereby Respondent questioned Complainant’s judgment, asking him to call Captain LeMaire, which in turn led to Complainant being frustrated. (Tr. 556-57, 596). In that situation, Whatley said if he was getting angry, he would have hung up like Complainant, so as to allow him to calm down and then later rejoin the conversation. (Tr. 566). Further, Whatley testified in the situation presented in this matter, Complainant could easily be justified in getting loud and angry on the telephone. (Tr. 572-73). Whatley testified such a situation, with emotions running high, occurs daily at American Airlines. (Tr. 573-74). Further, Whatley testified Complainant had no reason to think F.O. Solsberry was merely joking when he told F.O. Wofford he had flown through pink (Tr. 578).

Whatley testified when a pilot uses the term “ripped the wings off,” such terms refer to a severe event, and could refer to a plane experiencing such an event that could easily have pushed its G limits. (Tr. 581). Further, Whatley believed the denials by Captain LeMaire or F.O. Solsberry after the fact would not be helpful to Complainant in making his decision to have the plane inspected, because of the potential actions that could be brought against both for not reporting severe turbulence. (Tr. 584-85; 597-600). Whatley had no difficulty with the way Complainant wrote up the aircraft. (Tr. 586-87).

On re-direct, Whatley testified if both Complainant and Captain LeMaire had made questionable judgments, Respondent held only one, Complainant, responsible for so doing. (Tr. 608-09). Complainant received resistance from Respondent to inspect the plane, which would normally be frustrating. (Tr. 613). F.O. Solsberry, in Whatley’s opinion, exercised poor judgment in telling F.O. Wofford what had occurred without understanding the implications of what he was saying. (Tr. 613). Whatley further testified Jost’s actions, having Complainant rely on Captain LeMaire’s judgment with respect to the safety of the plane, were unreasonable under the circumstances. (Tr. 619). On re-cross, Whatley opined although Jost claimed that he wrote up

Complainant for failure to further discuss the situation with maintenance control, Complainant had all the information necessary for a proper judgment call. (Tr. 623-25).

V. TESTIMONY OF RESPONDENT'S WITNESSES

V. 1.) EDWARD GUBITOSA

Edward Gubitosa is Respondent's operations director of the Systems Operations Coordination Center, commonly referred to as systems control or SOCC. (Tr. 666). SOCC is located in Houston, Texas. Gubitosa's duties include overseeing Respondent's floor operations and managing Respondent's assets and personnel, which he has done since 1993. In that role, he frequently speaks to pilots through a dispatcher or crew coordinator. (Tr. 667). On a typical day, he will speak to four (4) to five (5) pilots. Flight operations are divided into maintenance, crew scheduling, dispatch, weight and balance with individual supervisors and fleet operations managers who report to Gubitosa. Respondent operates three-hundred and fifty-eight (358) aircraft flying between one-thousand (1000) and twelve hundred (1200) flights per day. Operations managers supervise crew coordinators and customer service coordinators. (Tr. 678, 679). Maintenance control personnel and dispatchers answer to the operations managers.

Regarding the incidents of September 15, 2007, Gubitosa had no independent recollection until his memory was refreshed by Jim Sunberry. (Tr. 668). Gubitosa admitted from time to time, pilots and dispatchers engage in heated conversations. Gubitosa admitted one of his priorities is to keep airplanes moving efficiently and on time. (Tr. 670). Further, he admitted pilots and maintenance will take opposite positions on plane inspections, but safety is always the most important priority. He explained if a pilot knows, or in his judgment believes, there is something wrong with an airplane it is his responsibility to enter it into a logbook. (Tr. 671, 72). Respondent follows both FAR's and its flight operations manual, abiding by the most stringent of the two which is generally Respondent's flight operations manual. (Tr. 673).

In the present case, Gubitosa testified if complainant thought the safest thing to do was to write up an aircraft then that is what he should do. Gubitosa admitted if an airplane flew through severe turbulence and was later dispatched without a maintenance write-up or inspection and flew another leg, it would be in violation of both company policy and the FARs. (Tr. 674). Gubitosa testified when a captain questions the acceptability of an aircraft, he should immediately contact the operations director at SOCC, after which the captain, dispatcher, maintenance control, and operations director will consult to assess the captain's objections (Tr. 681). However, a captain who has flown through severe turbulence can write-up the aircraft without first consulting Mr. Gubitosa. (Tr. 681, 82).

Gubitosa testified on September 15, 2007, he arranged a conference call with Sunberry, Komidor, and Complainant to assess Complainant's side of the story. Gubitosa remembers Complainant being defensive, believing someone was out to get him. (Tr. 684, 85). During the conversation, Sunberry said, "We don't write up airplanes on hearsay. (Tr. 687). Complainant responded he was tired of being pressured, which Gubitosa testified was not the intent of the call. According to Gubitosa Complainant then hung up the telephone. (Tr. 688).

V. 2.) JAMES ANDREW SUNBERRY

Sunberry, who works for Respondent in its Maintenance Control Division, is an A & P mechanic, with a license issued by the FAA. For the past few years, Sunberry has worked as a manager of maintenance control for Respondent. Before that, Sunberry worked as a senior maintenance controller on Respondent's fleet desk. Sunberry currently supervises McClure, the senior maintenance controller. (Tr. 281). Maintenance Control consists of A & P mechanics, all of whom act as supervisors in Respondent's Houston Office, assisting mechanics by arranging for immediate repairs, or deferring repairs at a later date. In this case, Sunberry testified about the need for airworthiness inspections before a plane is allowed to fly again in situations where the plane in flight is hit by lightning or a bird. (Tr. 285). This is mandated by both Respondent and the FAA to ensure safety. (Tr. 286).

Regarding severe turbulence, Sunberry testified if a pilot suspects a plane has flown through severe turbulence, even if the pilot in question did not fly the plane in such condition, they have a duty to make sure the plane is airworthy. (Tr. 287). Sunberry admitted Complainant got conflicting information from various sources, and to make sure the aircraft was in fact airworthy, Complainant wrote the plane up and had it inspected. Thus, Sunberry believed he chose the safest course of action. (Tr. 290). Sunberry further described the questioning of Complainant, in which Sunberry and Komidor asked Complainant why he reported the incident based upon third-hand information. Sunberry testified Complainant became defensive and said he was tired of being pushed around. Sunberry testified that had Complainant been more polite and said he was unsure and would like an inspection for his own satisfaction, the course of action would have been acceptable to Respondent. (Tr. 298). However, Sunberry admitted to saying to Complainant, "You don't write airplanes up on hearsay." (Tr. 304).

Sunberry also admitted when he talked to Complainant, Complainant was at the desk in front of the gate, but was unaware of Respondent's policy about not talking about sensitive subjects in front of passengers. (Tr. 308). Further, Sunberry admitted a flight attendant could report a missing inspection panel, and the captain of plane could write up the plane without actually seeing it. (Tr. 307-08). When questioned by Respondent's counsel, Sunberry said Complainant hung up the phone in an agitated state, in the midst of Respondent's investigation. Sunberry was not a part of any following conversations with Complainant. (Tr. 320).

V. 3.) CAPTAIN ANDREW JOST

Andrew Jost (Jost or Chief Pilot Jost) is currently the Manager of International Flying with Respondent. (Tr. 778). Formerly, Jost was the Houston Area Chief Pilot for Respondent. As Chief Pilot, Jost was in charge of approximately two thousand (2,000) pilots, ensuring that they could perform standard procedures, followed regulations, and were properly trained. (Tr. 778).

Chief Pilot Jost was involved in the investigation into Complainant's actions on October 11, 2007. (Tr. 780). Jost admitted he was the ultimate decision-maker with regards to discipline for Complainant. (Tr. 780). Complainant was docked twenty-one (21) hours of flight time and received an eighteen (18) month termination warning. (Tr. 784). Jost testified he determined discipline for Complainant based on several reasons: poor judgment, flawed decision-making,

and unprofessional behavior. (Tr. 782, 846). Jost also testified he believed Complainant had violated Respondent's policies and the provisions in Respondent's flight manual, which led to Jost believing that discipline was necessary. (Tr. 847-48). Jost explained that Captain Luder violated company policy by submitting inaccurate or untruthful statements for a company record or proceeding; failing his responsibility of making sure all crewmembers contribute to the decision-making process to ensure the best decisions are made; and by engaging in unprofessional conduct by hanging up on phone conversations, refusing to take phone calls, and failing to appear at the first investigatory meeting. (Tr. 848-50). Jost admitted part of the reason he disciplined Complainant was because Complainant wrote up an airplane that he had not yet flown. (Tr. 782-83, 841). Jost also admitted no discipline was handed down to Captain LeMaire, F.O. Wofford, and F.O. Solsberry. (Tr. 785). Jost further admitted Sunberry was never disciplined. (Tr. 895). Jost stated that he was unaware if Sunberry was hostile while on the phone with Complainant, but was aware that Sunberry was talking when Complainant hung up the phone during the first conversation.

With regards to the fact-finding meeting, Jost admitted he did not obtain the flight data recorder to see if anything could be determined from it regarding turbulence. (Tr. 786). Jost further admitted he never spoke with the injured flight attendant, Ms. Perkins, or anyone else that was in-flight from McAllen to Houston about their injuries. (Tr. 787). Jost only spoke briefly with Gubitosa at SOCC, and admitted Gubitosa was supposed to provide a summary e-mail, but never sent any e-mail regarding the matter. (Tr. 788). In making his final disciplinary decision, Jost relied on Komidor and the comments of both crews. (Tr. 798).

Jost testified the top priority at Respondent is the safety of its customers and crew. (Tr. 788). Jost further testified all airlines do not like delays in their flight times because delays ultimately cost money. (Tr. 788). Respondent does track all delays. Jost agreed that delays could occur due to a safety issue. (Tr. 789). Jost further admitted had Captain LeMaire flown through severe turbulence between McAllen and Houston, and then flew to Miami without writing the plane up in Houston, there would have been a violation in federal aviation regulations. (Tr. 790). If this had occurred, Captain LeMaire would be subject to discipline. Jost further believed if Captain LeMaire had done this, the FAA would question Captain LeMaire's certification. (Tr. 790). Jost reiterated many times during his testimony if the plane had gone through severe turbulence and was not written up before traveling another leg, the plane and pilots would be in violation of federal regulations and company policy until the plane was written up. (Tr. 793).

Jost believes Complainant wrote the plane up without contacting SOCC, the duty director, maintenance, or the in-bound crew to find out all the facts. (Tr. 794). By doing this, Jost believes Complainant used poor judgment by not availing himself to all of his. (Tr. 795). Jost admitted he did not know of how many conversations Complainant had with different parties involved prior to his decision to write up the airplane. (Tr. 802).

Jost admitted that "ripped the wings off" indicates some form of turbulence that needs to be questioned. (Tr. 796). Jost further stated follow up on this comment is necessary. (Tr. 796). Jost also admitted he did know what Complainant and McClure had discussed prior to speaking with Complainant on the day in question. (Tr. 797). Jost agreed that as a captain, when you cannot get anymore information on a situation, you are to make the most conservative judgment

possible. (Tr. 800). However, Jost testified he did not believe Complainant made the most conservative judgment under the circumstances, as he did not gather all available information before making his decision. (Tr. 800, 810, 816). Jost further testified Respondent expected its captains who run into these situations to gather as much information as possible before making a decision. (Tr. 802-03). Jost believed Complainant took the most convenient course of action with regards to the situation in question, but Complainant did not take the most conservative action. (Tr. 816-17). Jost admitted, according to Respondent's policies, the captain of the plane has the final choice to get an aircraft inspected. (Tr. 809).

Jost testified Complainant was not disciplined because of the outcome of getting the plane inspected, but rather was disciplined because he did not live up to his responsibilities as a captain during the process. (Tr. 817). Jost further testified Complainant was disciplined because of his unprofessionalism. (Tr. 817). Jost further explained Complainant was suspended from his flight time because he missed the first fact-finding meeting scheduled in this matter and was unprofessional in his explanation of his absence. (Tr. 818). Jost explained Complainant was suspended from his flight time based on Jost's interpretation that Complainant was not "buying into" Respondent's policies and procedures during the second fact-finding meeting. (Tr. 818). Jost explained the discipline measures as being a tool to compel Complainant to follow formal procedures. In regards to missing the first meeting, Jost explained if Complainant had contacted Respondent sooner, a new date for the meeting probably could have been scheduled. (Tr. 862). Jost acknowledged that all of the other pilots and copilots involved in the first investigatory meeting were personally called, but had no knowledge as to why Complainant was not called. (Tr. 868). Jost interpreted Complainant's e-mail at 3:00 am on the day of the meeting to be a sign that Complainant was "blowing off" the meeting. (Tr. 869). Jost admitted he had no knowledge of when Complainant received the letter that advised him of the first meeting. (Tr. 873).

Jost testified he believed there were inaccuracies in the way Complainant wrote up the aircraft in question into the logbook. (Tr. 825). Jost disagreed that "severe turbulence" should have been used in the logbook to describe the aircraft in question. (Tr. 825). Rather, Jost explained the word "suspected" should have been used. (Tr. 826). Jost further explained that the write up would have been more appropriate if it had begged further inquiry from the mechanic staff in the Miami airport. (Tr. 828). Jost testified his belief that the plane did not go through severe turbulence was based in part on Captain LeMaire not writing the plane up in Houston. (Tr. 829). Jost explained the fact that Captain LeMaire did not write the plane up led him to believe that the plane did not fly through severe turbulence. Jost further testified the duty to write up a plane lies with the pilot that currently captains the plane, but that duty shifts with the presence of hard evidence that the plane needs to be written up before it leaves the airport. (Tr. 838). Jost admitted Respondent's manuals do not state that a pilot needs hard evidence to take care of a problem with a prior flight. (Tr. 884). Jost reiterated that all the facts are still necessary to make the kind of decision that Complainant did.

Jost admitted the delay of the flight from Miami would have been shorter had the mechanic crew been called out for inspection immediately after Captain Luder asked for the inspection. (Tr. 830). Jost further admitted the mechanic crew was not called right away after Captain Luder wrote the aircraft up in the logbook. (Tr. 830). Jost explained this delay was due to the need for discussion about the need for the inspection. (Tr. 831). Jost further explained that

just because a pilot requests an inspection does not mean that there will be no discussion into the request for an inspection. (Tr. 831). Jost testified Respondent expects its pilot to get as much information as possible to make the best decisions, and are expected to engage in the discussion and consulting processes. (Tr. 856).

Jost testified a level of turbulence that a pilot experienced is always up for interpretation. (Tr. 836). Jost explained that federal aviation regulations rely on the captain of the airplane to use his own interpretation as to the level of turbulence that the airplane has flown through. (Tr. 837).

V. 4.) CAPTAIN KIP KOMIDOR

Kip Komidor (Komidor or Assistant Chief Pilot Komidor) is the Assistant Chief Pilot for Respondent's Houston base, and the manager of Respondent's Triple Seven Sub base in Houston. (Tr. 899-900). Komidor has also been a check airman for Respondent for over twelve (12) years. (Tr. 900). Komidor does not currently fly the 737 aircraft, but he has been type rated on the aircraft.

On the day in question, Komidor was contacted by Gubitosa, who informed him of a situation in Miami, Florida. (Tr. 900). Komidor proceeded to talk to both Gubitosa and Sunberry. Komidor was told Complainant was trying to have a plane that he had not flown a leg on yet inspected, based on information received by F.O. Wofford from Solsberry. (Tr. 901). Komidor testified he was asked to help get Complainant to cooperate in the discussion process. (Tr. 901). Prior to contacting Complainant, Komidor was aware Complainant had contacted dispatch and spoke to McClure. Komidor testified he was unaware of what McClure had told Complainant regarding inspection, as Komidor did not speak with McClure on that day. (Tr. 906).

Komidor testified during his first conversation with Complainant, he was trying to find out why Complainant would not accept Captain LeMaire's explanation that the aircraft did not go through severe turbulence. (Tr. 916). Komidor testified from the first call, Complainant was very confrontational. (Tr. 917). Komidor explained Complainant accused Respondent of trying to make him fly an unsafe aircraft. (Tr. 917). Komidor further explained Complainant did tell him what Solsberry had said about the leg from McAllen to Houston, and what had happened to one of the flight attendants. Komidor testified after hearing what Complainant had to say, Komidor began trying to get Complainant to accept that the airplane was safe to fly based on the information that they had gathered. (Tr. 924). Komidor admitted that during this process, Sunberry, who was on the phone call as well, was speaking in a higher voice, but Komidor did not believe Sunberry was yelling. (Tr. 918). Komidor further admitted Sunberry told Complainant that Respondent did not write up planes on hearsay, and that Complainant hung up after hearing this statement. (Tr. 918).

After Complainant hung up, Komidor suggested they try to contact F.O. Wofford to assess the validity in Complainant's statements. (Tr. 925). Komidor further contacted Solsberry before calling Complainant for a second time. Komidor testified during this second call to Complainant, he tried to explain that he had talked to Solsberry, who told him that the plane did not go through severe turbulence. (Tr. 936). Komidor testified upon hearing that, Complainant

told him that he had already written the plane up. (Tr. 936). Komidor explained that at that point, he believed that maintenance was already starting to “get the ball rolling.” (Tr. 937). Komidor was not aware of when the inspection was actually ordered. (Tr. 926). Komidor was further unaware of when maintenance was actually called out to the airplane. (Tr. 933).

After hearing of the write up, Komidor testified he suggested to Complainant to come into the Houston office to discuss the incident on Monday. (Tr. 939). Komidor explained upon hearing this, Complainant told him that he could not because he was going on vacation. (Tr. 939). Komidor further explained Complainant was agitated and started claiming that he would report Komidor to the FAA. Complainant then handed the phone to F.O. Wofford. After talking to F.O. Wofford briefly, Complainant got back on the telephone with Komidor, and told Komidor that the plane would return to Houston safely. (Tr. 940).

After the conversation with Complainant, Komidor contacted Solsberry again, who told him that he was surprised that things had gotten to the level that they had reached based solely on what he had said. (Tr. 947). Komidor further was contacted by F.O. Wofford that evening, who told Komidor that he did not mean to cause a problem. (Tr. 949). Komidor testified both first officers were obviously worried about causing trouble. (Tr. 949).

After scheduling an investigatory meeting, Komidor sent a letter by Federal Express to Complainant, advising him of the date of the meeting. Komidor explained he sent a letter rather than calling Complainant personally due to the confrontation that had occurred in Miami. (Tr. 958). Komidor admitted all of the other pilots at the meeting received phone calls and letters at the meeting as a formality. (Tr. 957).

Komidor testified he was unaware of when Complainant received the letter concerning the first investigatory meeting. (Tr. 951). Komidor admitted he had no reason to doubt Complainant’s contention that Complainant had received the letter only a day before the meeting. (Tr. 952). Komidor further admitted he never contacted Complainant to find out why Complainant could not attend the first meeting. Komidor also admitted he was unaware of anyone contacting Complainant to assess why Complainant missed the first meeting. (Tr. 954-55).

Komidor testified he was the author of the discipline letter to Complainant. (Tr. 908). Komidor testified he drafted the letter based on Complainant’s inability to follow company policy with respect to contacting dispatch and maintenance for an inspection. (Tr. 909). Komidor explained Complainant was further disciplined because he did not cooperate and was disrespectful and insubordinate, even though the letter did not mention insubordination. (Tr. 965). Komidor explained he interpreted the letter to signify that insubordination had occurred. (Tr. 966). Komidor later testified he believed that the intent of the letter was to discipline Complainant for failing to follow company policy; for exhibiting poor judgment; for exhibiting disrespectfulness; and for being insubordinate, regardless if the letter stated those exact things. (Tr. 974). Komidor further testified that the maintenance request and the order of inspection, along with Complainant’s threats of reports to the FAA, had nothing to do with the discipline letter. (Tr. 975).

Komidor testified he believed that no one ever told Complainant that he could not have an inspection on the day in question. (Tr. 912). Komidor admitted it was a possibility that McClure may have told Complainant that he could not have an inspection on the plane. (Tr. 912). Komidor admitted Complainant believed he was taking the safest course of action on the day in question. (Tr. 962).

Komidor admitted no timeline of the actual events was researched or created for the disciplinary process. (Tr. 913). Komidor explained he gathered enough information for an investigatory meeting prior to handing down discipline. Komidor further admitted the information used to reach the disciplinary decision had been destroyed due to company policies. (Tr. 913). Komidor further testified the delay of the plane and the timeline of the events were not important. (Tr. 975).

Komidor admitted there is a process at Respondent to bid around pilots if a copilot does not want to fly with a certain pilot. (Tr. 919). Komidor had no knowledge of Captain LeMaire's reputation. Komidor agreed that pilots tend to learn about the reputations of other pilots, and further learn about their judgment based on their reputations. (Tr. 921). Komidor further agreed Complainant may have analyzed Captain LeMaire's credibility after hearing Solsberry's story, using his knowledge of Captain LeMaire's past reputation. (Tr. 922).

V. 5.) CAPTAIN STEVEN ERIC CASNER

Steven Casner (Casner) is an airport ground designated examiner in the training department for Respondent. Casner is also a captain for Respondent, specializing in flying the 737 aircraft. (Tr. 702). Casner has been a flight instructor since 1993, and has been employed with Respondent in various capacities for twenty four (24) years. (Tr. 703). Casner's main roles as an examiner are to teach primary students their syllabus trainings, and to issue type ratings on 737 aircrafts. Casner also routinely performs line checks of pilots for Respondent.

Casner explained each pilot for Respondent is schedule for a line check every two (2) years. (Tr. 704). Pilots may also undergo random line checks, as line checks have increased since the fall of 2007 to allow Respondent to ensure its standards. (Tr. 704). Casner further explained it is possible that a pilot may receive a line check more often than every two (2) years, and in fact, a pilot could receive line checks for several years in a row. (Tr. 705).

Casner testified during a line check, he is responsible for evaluating a pilot's flying of a plane. Line check pilots ensure that the pilot is flying safely and performing standard operating procedures to ensure compliance with FAA regulations. (Tr. 705). Casner also performs crew resource management analysis to see how the flight crew and pilots work together. Casner testified he provides no instruction during his line checks. (Tr. 706).

Casner testified he performed a line check on Complainant in the fall of 2007. (Tr. 706). Casner specifically denied telling Complainant during the line check that, "if you're in the simulator program and they put an instructor pilot in the right seat, it means they are going to fire you." (Tr. 707). Casner further testified he does not know of any situation where a captain was specifically put into a situation where, after failing a simulator ride, Respondent would terminate

him. (Tr. 707). Casner admitted to being one of the pilots that controls the simulator for Respondent. (Tr. 710). Casner testified when controlling the simulator, the instructor can adjust the parameters of how the simulator flies. (Tr. 710). Casner further testified that the lesson plans dictate the parameters for the flights.

Casner stated he believed Complainant to be a safe pilot. (Tr. 708). Casner explained if he were in the same situation as Complainant on the day in question, he would have tried to contact the other flight crew; if he could not contact them, Casner agreed he would have gotten the aircraft inspected. (Tr. 712-13). Casner explained Respondent has a policy for contacting the prior flight crew if there is conflicting information being received about a prior flight. (Tr. 716). Casner further admitted to not knowing of any situation where a captain was told that he absolutely could not write up an airplane. (Tr. 716). Casner agreed if Captain LeMaire has flown through severe turbulence and had not written the plane up, Captain LeMaire would be in trouble. (Tr. 717).

V. 6.) CAPTAIN JOHN WALKER

John Walker (Walker) is a flight instructor for Respondent. (Tr. 718). Walker is also a captain for Respondent, specializing in flying the 737 aircraft. As a flight instructor, Walker teaches basic training to new pilots and conducts periodic evaluations. (Tr. 718). Walker further places pilots through continuing qualifications, which is a two (2) day program consisting of practicing maneuvers and conducting a standard flight. (Tr. 720). Walker is also a check pilot for Respondent.

Walker conducted the continuing qualifications training for Complainant, which consisted of a Maneuvers Validation course and a standard COE flight. (Tr. 722). In order for a pilot to be successful in their continuing qualifications, the pilot must score a three (3) or lower on all maneuvers validation tasks. (Tr. 723). Any score that is higher than a three results in the pilot having to retry the task, or be assigned for re-training for certification purposes. (Tr. 723). A pilot cannot continue to the second day of continuing qualification until all maneuvers validation tasks are completed with a passing grade.

Walker testified Complainant did not earn a passing grade for several of his maneuvers validation tasks on the first day of continuing qualification training. (Tr. 722). Complainant did not earn a passing grade on the Engine Failures at V-1, the Single Engine Manual ILS Approach, and the Single Engine Missed Approach tasks. (Tr. 725-26). Walker explained that after the maneuvers validation, he determined that Complainant needed additional training for all phases of engine and operative flight, concentrating on basic aircraft control. (Tr. 735-36). Walker opined that Complainant needed further training on QRH, checklist discipline and engine diagnosis. (Tr. 736).

Walker testified Complainant had determined that outside influences were affecting his ability to perform during the maneuvers validation tasks. (Tr. 737). Walker further testified Complainant believed that scheduling, hotel, and transportation problems were affecting his ability to perform. (Tr. 737). Walker advised Complainant his training would continue before Complainant left for the day. (Tr. 740).

Walker testified Complainant was originally scheduled for re-training on the next day for each of these tasks, and then was to come back later to finish his COE flight. (Tr. 727). Walker further testified Complainant missed his re-training day due to illness. (Tr. 731-32). Walker advised at the point when Complainant missed his second day of training, Complainant was unqualified to fly. (Tr. 742). Walker explained Complainant had to get all tasks back up to qualification grade before he would be able to fly an aircraft again. (Tr. 743).

Walker admitted to never have hearing of any situation in which an instructor would get into a first officer's seat during simulation and that would automatically mean the pilot would be getting terminated. (Tr. 740). Walker further admitted to never hearing of anyone having their check ride purposely altered. (Tr. 748). Walker was also not sure of why Complainant was originally marked "UNSAT" on his tasks instead of "RETRAIN." Walker believed that the terms were easy to get confused and believes that "RETRAIN" was the proper designation for the tasks. (Tr. 749-754).

VI. TESTIMONY OF CYNTHIA ERNST AND JAY ELLIS

In an effort to support its allegation that Respondent discriminated against Complainant by its untimely line check ride, altered simulator training schedule, and its QDRAAO investigation, Complainant called former CAL pilots Cynthia Ernst and Jay Ellis. Ms. Ernst had been employed by Respondent as a chief pilot on the 777 aircraft for about ten (10) years before which Respondent utilized her as a flight engineer (Tr. 1263, 1279).

On one occasion in 2003, Ms. Ernst served as a relief pilot on a flight from Houston to Tokyo. During the course of the flight, the aircraft had to divert to Anchorage to pick up more fuel caused by flying additional miles to avoid inclement weather in Texas. (Tr. 1264) Upon arriving in Anchorage, it became necessary for the planes' crew to extend their duty day so as to arrive in Tokyo without further delays. All crew members, with the exception of Dan Wells, agreed to extend their duty day. As a result, the crew had an apparent layover in Anchorage. When the crew arrived back in Houston, Komidor was involved in the investigation that led to Wells termination. (Tr. 1291, 1292).

Komidor was also instrumental in disciplining Ms. Ernst by taking her off of flying, and requiring her to go through check rides and take crew management classes. (Tr. 1267). According to Ms. Ernst, the classes were not designed to teach, but rather to interrogate her about Wells' conduct. (Tr. 1281-83). Komidor encouraged Ernst to cooperate because her job was on the line. In addition Komidor scheduled extra simulator training for Ernst "out of the blue." (Tr. 1268-70). Ernst subsequently had a check airman assigned to one of her flights. Ernst passed all testing. (Tr. 1271-72). Subsequently, Ernst was terminated in a QDRO investigation, wherein she allegedly divorced her husband because he was addicted to pain killers. In the divorce proceedings, Ernst gave her ex-husband 90% of her pension benefits. (Tr. 1275-76).

Jay Ellis is a sixty-two (62) year old former pilot of Respondent who was terminated two (2) weeks before his mandatory retirement age of sixty (60) because of a sham divorce, wherein

he prematurely withdrew his entire pension fund and gave it to his ex-wife. In the divorce settlement Ellis claimed he split his property 50/50 with his wife, but admitted placing a very high value on some oil property he earned. About six (6) months later, he re-married his ex-wife in order to better care for a diabetic, alcoholic, and blind thirty-three (33) year old son. (Tr. 1304, 1307). By cashing in his pension about a year early, Ellis received less money than he would have received had he waited until his normal retirement age. (Tr. 1308).²⁴

Concerning the issue of line checks and simulator training, Ellis described two (2) weeks of check rides with a check airman in the right seat following an incident in Mexico City twenty (20) years earlier, wherein his scheduled runway was changed at the last moment to a wet surface unbeknown to him. When he landed, his plane hydroplaned. Ellis was able to successfully recover, but following this incident, he underwent an abnormally difficult check ride with the instructor appearing to deliberately “screw up.” (Tr. 1298-1302, 1303-06).

VII. DISCUSSION

VI. 1.) CONTENTIONS OF THE PARTIES

Respondent contends Complainant did not engage in protected activity because he did not reasonably and objectively believe a purported violation of federal law had occurred, citing *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB, July 2, 2009). Further, Complainant did not communicate his concerns to either his employer or the government, but merely made a maintenance log entry, a routine function, which standing alone does not constitute a safety report contemplated by AIR 21, citing *Hindsman v. Delta Air Lines, Inc.*, 2008-AIR-00013; *Sievers v. Alaska Airlines, Inc.*, ARB 05-109, ALJ No. 2004-AIR-28 (ARB Jan. 30, 2008).

Complainant, on the other hand, contends he had more than ample evidence to reasonably and objectively believe a violation of the FAR's had or could have occurred when and if he had flown from Houston to Miami without ordering a maintenance inspection. Further, he did more than perform a routine function of making a log book entry. Rather, he: (1) reported to Respondent on several occasions an alleged and specific violation of FAA and Respondent operational manual safety rules (operation of an aircraft after a possible severe turbulence encounter without an inspection) in his contact with dispatch, SOCC, and the chief pilot; (2) refused to operate the aircraft when it could not be conclusively established that the aircraft had not been flown through severe turbulence without an inspection; (3) placed the necessary aircraft logbook entry, which constituted a report to both Respondent and the FAA since the logbook has to be maintained for FAA inspection thereby insuring the aircraft was airworthy pursuant to FARs before it was operated again; (4) told Komidor if he ordered or pressured him to fly the aircraft without the inspection he would report him and Respondent to the FAA; (5) continued to oppose Respondent's conduct during his grievance meetings with Respondent; and (6) filed the AIR 21 complainant with the FAA and DOL on January 3, 2008.

²⁴ Respondent introduced a System Board of Adjustment arbitration decision, finding Respondent had just cause for disciplining, but not unconditionally discharging Ellis on October 24, 2007.

Respondent further contends it had legitimate reasons for its discipline of Complainant (poor judgment in not utilizing all resources available to him in making his inspection decision ; being unprofessional, disrespectful, and insubordinate, and failed to appear at the October 4, 2007 investigatory meeting), and would have taken the same action it did in the absence of Complainant's protected activity, if any, citing *Kinser v. Mesaba Aviation, Inc.*, 2003-AIR-7 (ALJ Feb. 9, 2004); 49 U.S.C. § 42121 (b)(2) (B). Further, Complainant's warning letter did not constitute adverse action under *Simpson v. United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-31

Complainant replies, arguing there is no evidence to support any of these assertions. Rather, there is abundant evidence of Respondent's adverse action in issuing a termination warning letter under the materially adverse standard set forth and adopted by the ARB in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). See e.g. *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, slip op. at 6, 7 (ARB, Dec. 30, 2004); *aff'd sub. nom. Vieques Air Link, Inc., v. U. S. Dept. of Labor*, ___F.3d___ (1st Cir. 2006). Complainant contends the eighteen (18) month termination warning was the next step to termination, and created substantial and credible anxiety resulting in substantial physical and mental symptoms, leading to the termination of long and unblemished flying career.

Respondent apparently admits the one trip suspension was apparently adverse, but neither the line check or simulator training or QDRO investigation constituted adverse action. The line check and simulator training constituted part of Complainant's duties as an airline pilot routinely administered in normal fashion. The QDRO investigation was conducted on Complainant and thirty (30) other pilots because of suspicious circumstances involved with their respective divorces.

VII. 2.) CREDIBILITY

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc., v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

In this case, I find Complainant generally to be a credible witness regarding his write-up of aircraft # 304 and Respondent's reaction. It is clear to me he had a reasonable and objective belief in ordering an inspection of aircraft # 304 because he believe that the aircraft had been, or could have been, subjected to severe turbulence which required an inspection that had not been ordered as required under FAA and Respondent's rules and regulations. He had received what appeared, from all outward appearances, to be a report that aircraft #304 had flown through

severe turbulence and did not have an inspection after it landed and before it resumed flying operations to Miami. This report received by Wofford from Solsberry indicated aircraft #304 had flown through turbulence severe enough to almost have the wings ripped off, causing a flight attendant to seek medical attention, and to show magenta or pink on the radar screen. His insistence on an inspection in the face of opposition is a testament to his belief that safety was indeed of paramount concern which is synonymous with a protected activity. In insisting upon an aircraft inspection he lived up to his obligation as an airline pilot, and adopted the most prudent action he could have given the circumstances and information provided him. I do not credit Wofford that he did not tell Complainant that LeMaire was on a no fly list or that Complainant acted in an insubordinate manner when talking to Komidor. I find it significant that no one except Complainant received any discipline for their actions on September 15, 2007, when it was Solsberry's statements that caused Complainant to believe a FAR violation could have occurred. Wofford's comments to Complainant neglected to include the fact that despite the alleged turbulence the aircraft was "good" also produced no discipline, when such comments led Complainant to believe aircraft 304 could have been subject to severe turbulence.

Regarding his line check and simulator training, I do not credit Complainant's assertion that such exercises were out of the ordinary or constituted harassment of Complainant. In like manner I do not credit Claimant's assertion that his QDRO investigation to which he and thirty (30) other pilots were subjected constituted harassment. Indeed, the fact that he continued to live in the same house with his ex-wife could easily have led Respondent to question his divorce decree. The line check and simulator training appear to be nothing more than routine training exercises imposed on Complainant and other pilots either on a random basis (line check) or scheduled basis (simulator training). I credit Casner and Walker concerning the fair administration of these tests. I also credit Ernst and Ellis' testimonies but find nothing in their testimony to convince me that Respondent was harassing Complainant by requiring him to take said tests. However, I credit Whatley and Complainant in that the termination warning created huge anxiety with substantial physical and mental symptoms prior to the administration of these tests to such an extent Complainant was not able to successfully pass them as he had apparently done in the past without incident.

I also credit Complainant's expert witness, Whatley concerning: (1) Complainant's compliance with FAA regulations and industry standards in using the aircraft maintenance log to report what he reasonably believed to be a potential safety violation in not writing up aircraft #304 after flying through severe turbulence; (2) Complainant's obligation to write up aircraft #304 when he received conflicting information as to aircraft safety; (3) Complainant's obvious concern about Respondent's reaction to his inspection request; (4) the coercive effect of Respondent's letter of discipline to Complainant; (5) the contentious nature of Respondent's reaction to Complainant's request for an inspection and Complainant's reasonable response thereto in hanging up the phone; (6) Complainant had all the information he needed to make a proper judgment call seeking aircraft inspection; and (7) Complainant had a valid basis for not believing what he was told by Komidor about LeMaire and Solsberry denying severe turbulence because if they had admitted going through such they could have been subject to FAA sanctions.

On the other hand, I cannot credit Gubitosa where he differs from Complainant because of his lack of independent recollection, and find it hard to believe that he and Komidor were

merely trying to “help” Complainant make the right decision, when all of Respondent’s managers indicated an overriding desire to have flight 391 leave on time rather than be inspected. Respondent’s managers all, or almost all, agreed having the plane leave on time was the prudent thing to do. In fact, I note Respondent did not pull flight 391’s black box which would have indicated whether flight 391 had in fact been subjected to severe turbulence. While a thirty (30) minute mechanical inspection detected no obvious structural defects, the fact remains that no one from Respondent attempted to rule out whether flight 391 had been subjected to stress turbulence and non obvious defects associated with such stress when in fact it was apparent that the aircraft had encountered at least, or up to, moderate turbulence. Sunberry’s comments about not writing up a plane on hearsay combined with SOCC determination to have flight 391 leave on time, and so instructing its boarding agent to have passengers board without delay, combined with Komidor’s failure to timely contact LeMaire prior to talking to Complainant, convince me that contrary to Komidor’s assertion, he was attempting to pressure Complainant into foregoing a timely inspection. Thus, Complainant was justified in threatening to report Komidor to the FAA.

VII. 3.) LEGAL PROVISIONS OF THE AIR 21 STATUTE

The employee protective provision of AIR21 is set forth at 49 U.S.C. § 42121. Air 21 prohibits air carriers, contractors, and their subcontractors from discharging or otherwise discriminating against, any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provides 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 carriers safety” under subtitle VII of title 49 of the United States Code or any other law of the United States.

49 U.S.C.A. § 42121(a) states:

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

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

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or

any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

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

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

49 U.S.C.A. § 42121(a).

VII. 4.) BURDEN OF PROOF UNDER AIR 21

The evidentiary or burden of proof requirements of the complaint procedure embodied in subsection (b)(2)(B) of AIR 21 require Complainant to establish ". . . a *prima facie* showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C.A. § 42121(b)(2)(B). To prevail in an AIR 21 adjudication Complainant must demonstrate or prove his *prima facie* case by a preponderance of the evidence. *Clemmons v. Ameristar Airways et al.*, ARB Nos. 05-048, 95-096, (ARB June 29, 1007; 2004 AIR-00000 (ALJ Jan. 14, 2005). Preponderance of evidence is the greater weight of evidence or superior evidence weight 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. *Brune v. Horizon Air Industries, Inc.* ARB Case No. 04-037, slip. op. at 13 (ARB Jan. 31, 2006).

After Complainant has established his *prima facie* case by a preponderance of the evidence, an employer is then required to demonstrate ". . . by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(b); 29 C.F.R. § 1979.104(c); *see also Kinser v. Mesaba Aviation, Inc.*, 2003-AIR-00007 (ALJ Feb. 9, 2004). Thus, Respondent may avoid liability under AIR21 by producing sufficient evidence that clearly and convincingly demonstrates a legitimate purpose or motive for the personnel action. *Taylor v. Express One International, Inc.*, 2001-AIR-00002 (ALJ February 15, 2002). If Respondent meets this burden, the inference of discrimination is rebutted and complainant then assumes the burden of proving by a preponderance of the evidence that Respondent's proffered reasons are "incredible and constitute pretext for discrimination." *Id.*

VII. 5.) PRIMA FACIE CASE FOR DISCRIMINATION UNDER AIR 21

No employer, subject to the provisions of the AIR21 Act may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions or privileges of employment because the "employee . . . engaged in any [protected activity]." 29 C.F.R. § 1979.102(a) (2004). Accordingly, to establish a *prima facie* case of discrimination under AIR21, the complainant must show by a preponderance of the evidence that:

1. The employer is subject to the act and the employee is covered under the act;
2. The complainant engaged in protected activity as defined by the act;
3. The employer took adverse action against the employee;
4. The employer knew or had knowledge that the employee was engaging in protected activity; and
5. The adverse action against the employee was motivated by the fact that the employee engaged in protected activity.

Peck v. Safe Air Int'l., Inc., ARB 02-028 (January 30, 2004) slip op at 8-9; *Svendsen v. Air Methods, Inc.*, ARB 03-074 (August 26, 2004) slip op at 7; *Taylor*, 2001-AIR-2, slip op at 33. The fifth *prima facie* element can be shown by proving that the protected activity on the part of a complainant was a contributing factor to his adverse action bestowed by respondent. *Hirst*, ARB No. 04-116, 04-160, slip op. at 7; *see also Lanigan v. ABX Air, Inc.*, 2007-AIR-00010 (ALJ April 30, 2008).

In order to more suitably address the issues in this matter, the undersigned shall address each of these *prima facie* elements separately. The undersigned notes that all *prima facie* elements must be proven by Complainant by a preponderance of the evidence.

Regarding the first element of a *prima facie* case under AIR 21, there is no contention or argument that both Complainant and Respondent are subject and covered respectively by the AIR 21 statute. This element is therefore deemed proven by stipulation.

VII. 6.) PROTECTED ACTIVITY

A protected activity under AIR 21 has three elements. First, the complaint must either: a) involve a purported violation of an FAA regulation, standard or order relating to air carrier safety, or any other provision of Federal law relating to air carrier safety; or, b) at least "touch on" air carrier safety. Second, the complainant's belief about the purported violation must be objectively reasonable. Third, the complaint must be made either to the complainant's employer or the Federal Government. *Svendsen*, slip op. at 48; *see also Weil v. Planet Airways, Inc.*, 2003-AIR-18 (ALJ Mar. 16, 2004) (finding the FAA's announced intention to implement a rule is sufficient to establish protected activity).

Additionally, protected activity under AIR21 must raise safety definitively and specifically. *Kinser*, slip op at 22; *Fader v. Transportation Security Administration*, 2004-AIR-27 (ALJ June 17, 2004) (violations of the Privacy Act, abuses of the junior workforce, nepotism and fraud did not involve safety and did not constitute protected activity under the Act). "While they may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive or event. A complainant reasonably must believe in the existence of

a violation." *Peck*, slip op at 13; *Leach v. Basin Western, Inc.*, ALJ No. 02-STA-5, ARB No. 02-089, slip op. at 3 (ARB July 21, 2003).

In this case, there is no question Complainant's complaint dealt directly and specifically with aircraft safety. Complainant had an objective and reasonable belief that aircraft #304 had flown through severe turbulence, and so informed Respondent in his communication with McClure and Komidor. When this failed to illicit a supportive response from Respondent, Complainant threatened to, and eventually reported, Respondent to the FAA and DOL. To the extent Respondent's contests Complainant's objective and reasonable belief, or the fact such belief was communicated to Respondent, such assertions are incredible and unfounded as detailed above. Complainant thus engaged in a protected activity with his write-up and subsequent order of an inspection of aircraft #304.

VII. 7.) ADVERSE EMPLOYMENT ACTION

Section 42121(a) of AIR 21 proscribes employer retaliation, stating that no air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because of the employee's protected activity. These provisions are the statutory foundation for the requirement that a complainant must show an adverse employment action. The implementing regulations specify that it is a violation of the act for an employer "to intimidate, threaten, coerce, blacklist, discharge or in any other manner discriminate against any employee" for engaging in protected activity. 29 C.F.R. § 1979.102(b).

In *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008), the ARB adopted the "materially adverse" deterrence standard of *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). The majority for the ARB wrote:

"*Burlington Northern* held that for the employer action to be deemed "materially adverse," it must be such that it "could well dissuade a reasonable worker from making or supporting a charge of discrimination." For purposes of the retaliation statutes that the Labor Department adjudicates, the test is whether the employer action could dissuade a reasonable worker from engaging in protected activity. According to the Court, a "reasonable worker" is a "reasonable person in the plaintiff's position."

USDOL/OALJ Reporter at 19-20. The majority further stated that "the purpose of the employee protections that the Labor Department administers is to encourage employees to freely report noncompliance with safety, environmental, or securities regulations and thus protect the public. Therefore, we think that testing the employer's action by whether it would deter a similarly situated person from reporting a safety or environmental or securities concern effectively promotes the purpose of the anti-retaliation statutes." *Id.* at 20. Moreover, the majority believed that that both ARB and federal case law demonstrated that the terms "tangible consequences" and "materially adverse" are "used interchangeably to describe the level of severity an

employer's action must reach before it is actionable adverse employment action." *Id.* The majority summarized:

“The Board has consistently recognized that not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action.... Actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms, conditions, or privileges of employment. Therefore, the fact that the *Burlington Northern* test is phrased in terms of "materially adverse" rather than "tangible consequence," or "significant change," or "materially disadvantaged," or the like, is of no consequence. Applying this test would not deviate from past precedent.”

Id. at 23. Consequently, the finding of an adverse action in an AIR 21 statute will be based on the standards set forth by *Burlington Northern. Hirst v. Southeast Airlines, Inc.*, ARB No. 04-116, 04-160, ALJ No. 2003-AIR-0004, slip op. at 7 (ARB January 31, 2007). Further, suspensions and transfers have been found to constitute an adverse employment action under the *Burlington Northern* standard. *See, e.g., Negron v. Vieques Air Link, Inc.*, ARB No. 04-021 slip op. at 6-7 (ARB December 30, 2004).

Recently, the ARB has held that a “warning letter” issued to an employee does not constitute adverse action. *Simpson v. United Parcel Service*, ARB No. 06-065 (ARB: Mar. 14, 2008) Here, there is no question that the suspension and letter of an eighteen (18) month termination warning were designed to be materially adverse, depriving Claimant not only of pay for a twenty-one (21) hour scheduled trip, but the right to legitimately question airline safety. This was accomplished by placing Complainant in a situation wherein he would be extremely reluctant to question airline safety because of the notice he received that for eighteen (18) months if he engaged in any similar unacceptable behavior, he could be terminated.²⁵ The termination warning was so effective it along with Respondent’s other discipline including the meeting of October 11, 2007, it produced substantial psychological symptoms prevented Complainant from successfully completing his training. Thus, Complainant has suffered an adverse action in this case.

VII. 8.) KNOWLEDGE OF PROTECTED ACTIVITY

The Complainant is required to establish, by a preponderance of evidence, that the Respondent had knowledge of his protected activity. *Jeter v. Avior Technologies Operations, Inc.*, ARB Case No. 06-035 (ARB: Feb. 29, 2008), slip op. at 8-9; *Rooks v. Planet Airways, Inc.*, ARB Case No. 04-092 (ARB: June 29, 2006), slip op. at 6-8. In general, it is not enough for a complainant to show that the employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the decision makers who subjected him to the alleged adverse actions or hostile work environment were aware of his protected activity. *Peck v. Safe*

²⁵ Respondent defined termination warning letters as follows: “A termination warning letter makes clear that if performance does not improve, the employee will be discharged. Employees with active termination warning letters are ineligible for voluntary transfer to another position within the company....” (JTX-21, p. 1154).

Air Int'l, Inc., ARB Case No. 02-028 (ARB: Jan. 30, 2004), slip op. at 11. The ARB has stated that “[k]nowledge 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).

Alternatively, a complainant may establish this element by showing that, although the manager who ultimately took adverse action was unaware of the protected activity, another individual who had substantial input into the alleged adverse action knew of the protected activity. *Kester*, slip op. at 4.

In this case, there is no question that the two persons responsible for Complainant’s discipline, Jost and Komidor, were aware of his actions in raising safety complaints dealing with aircraft #304 and its operation in potential unsafe severe turbulence. Thus, Respondent had knowledge of Claimant’s protected activity.

VII. 9.) CONTRIBUTING FACTOR

Under 49 U.S.C. § 42121(b) and 29 C.F.R. § 1979.109, to establish that a respondent has committed a violation of the employee protection provisions of AIR21, a complainant must prove by a preponderance of the evidence that an activity protected under AIR21 was a contributing factor in the unfavorable personnel action alleged in the complaint. *Taylor*, slip op at 33; *Hirst*, slip op. at 7.

A complainant need not establish that the employer’s adverse action was “due to” or “because” of the protected activity. *Clark v. Airborne, Inc.*, ARB Case No. 06-082 (ARB: Mar. 31, 2008), slip op. at 2. The Board has emphasized that a “contributing factor” is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Sievers v. Alaska Airlines, Inc.*, ARB Case No. 05-109 (ARB: Jan. 30, 2008), slip op. at 4, *quoting Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993); *see also Clark*, slip op. at 2. The ARB has recognized that a retaliatory motive may be inferred when an adverse action closely follows protected activity. *Kester*, slip op. at 10.

However, temporal connection alone is not necessarily dispositive. *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, (ARB: Dec. 31, 2007), slip op. at 7. When the protected activity and the adverse action are separated by an intervening event that independently could have caused the adverse action, the inference of causation becomes less likely because the intervening event also could have caused the adverse action.” *Keener v. Duke Energy Corp.*, ARB No. 04-091, (ARB: July 31, 2006), slip op. at 11. The Board has noted that “if an intervening event that independently could have caused the adverse action separates the protected activity and the adverse action, the inference of causation is compromised.” *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, (ARB: Nov. 30, 2006), slip op. at 12-13. Indeed, 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 to demonstrate that his protected activity was a contributing factor in the adverse action." *Barker*, slip op. at 7.

However, at least one Circuit Court has held that temporal proximity was sufficient to show the requisite causal relationship to establish that a complainant's protected activity was a contributing factor in the adverse employment action that he suffered. *See, e.g., Vieques Air Link, Inc. v. USDOL*, No. 05-01278 (1st Cir. Feb. 2, 2006) (per curium).

In this case, Complainant has shown, by a preponderance of evidence, that not only temporal proximity, but direct and circumstantial evidence shows that Complainant's protected activity was at least a contributing, if not the sole cause, for his suspension and warning. Direct evidence came from Jost, who admitted that at least part of the reason for Complainant's discipline was his action in writing up aircraft #304. (Tr. 782-83, 841, 1219, 1220). Indeed, Complainant was the only one to be disciplined when, if there was culpability, it would have at least been on Solsberry, who according to Respondent exaggerated the severity of the turbulence, and Wofford, who neglected to tell Complainant the entire story about the condition of the aircraft as related by Solsberry. While admitting the above, Jost claimed he disciplined Complainant because of the manner in which he wrote up the aircraft, which demonstrated a lack of professionalism, good judgment, and flawed decision making. Jost described Complainant's action in writing up the aircraft as constituting a untruthful statement, although Jost admitted never pulling the flight data recorder to determine if the aircraft had flown through severe turbulence. (Tr. 786). By writing up the aircraft as having flown through severe turbulence, Complainant was describing, in essence, what he had been told by Wofford, and in so doing, forced the safety inspection of the aircraft. All witnesses except Jost agreed that forcing the safety inspection was the most prudent thing to do. The inspection would serve to protect the interest of all concerned, including Respondent and its plane and passengers.

Jost described Complainant's write up as exercising poor judgment and flawed decision making because he allegedly did not talk to all crewmembers to insure they contributed to the process and did not contact SOCC prior to his write up to find all the fact. However, Jost admitted he did not know the number of conversations Complainant had with those involved in the aircraft's operation. (Tr. 794-95, 802). In fact, Complainant contacted SOCC before writing up the aircraft, and had listened to Komidor's explanation. Komidor incorrectly and untruthfully claimed he talked to LeMaire and Solsberry prior to talking to Complainant. Complainant had all the information he needed, which at best was conflicting, and exercised the most prudent decision which Jost claimed was an example of poor judgment.

Jost described Complainant's action in hanging up the phone on Komidor as unprofessional. However, Jost ignored the fact that Komidor was attempting to get Complainant to accept the plane without an inspection, and that someone in SOCC had overridden Complainant's verbal request for an inspection by ordering passenger loading on time. Jost further ignored the fact that Sunberry told Complainant that Respondent did not order inspections upon hearsay and incited an argument without all of the facts. Respondent apparently relies upon the fact that Complainant could have used other methods of recording his concern by contacting Respondent's regulatory and compliance department and issuing a captain's irregular report. (Tr. 1217). However, there is no evidence to suggest that any of those

actions could have brought about a timely plane inspection inasmuch as the aircraft was within minutes of a scheduled departure. The weight of the evidence supports the finding that Claimant's reasonable protected activity of ordering a safety inspection led to the adverse action on the part of Respondent.

VII. 10.) RESPONDENT'S AFFIRMATIVE DEFENSES

If a complainant proves by a preponderance of the evidence that the employer has violated the statute, the complainant is entitled to relief unless the employer establishes, by clear and convincing evidence, that the same adverse action would have been taken in the absence of the protected activity. 29 C.F.R. § 1979.109(a); *see also Barker*, slip op. at 5; *Hafer v. United Airlines, Inc.*, ARB No. 06-017 (ARB: Jan. 31, 2008), slip op. at 4. In asserting this affirmative defense, the burden of proof at the clear and convincing level rests with the respondent. Although there is no precise definition of clear and convincing, that evidentiary standard falls above preponderance of the evidence and below a reasonable doubt. *See Yule v. Burns Int'l Security Serv.*, 93-ERA-12 (Sec'y May 24, 1995).

Here, Respondent contends Complainant used poor judgment in not utilizing all resources available to him. Further, Respondent accuses Complainant of being unprofessional, disrespectful, and insubordinate when he hung up on the coordinating team attempting to provide him with essential information to make a decision on the need for an inspection. However, Respondent ignores the fact that Complainant was in contact with SOCC. Respondent purported to know that Solsberry and LeMaire were denying severe turbulence occurred, when in reality, Respondent was yet to contact both pilots. Respondent was also aware Complainant was also aware he had a conflicting report from Solsberry. Under the circumstances, Complainant took the most prudent course of action in ordering an inspection based on conflicting information. Respondent was apparently upset with the fact that Complainant would not accept Solsberry and LeMaire's yet to be obtained denials, when such individuals would likely deny severe turbulence because to admit otherwise would subject them to severe discipline. Respondent also ignores the fact that Complainant hung up only when it became apparent his authority was being overridden and passenger were going to be boarded against Complainant's directive.

The warning letter issued was extremely coercive, and Claimant was docked pay for failing to attend an investigative meeting with only a one day written notice, as opposed to other individuals who were notified orally earlier. In essence, I find no legitimate reason for any adverse action by Respondent, including the termination warning letter and the suspension of Complainant's pay. Under the circumstances of this case, it was Respondent who was unprofessional and exercised poor judgment in disciplining Complainant. While Complainant could have used other means to contact Respondent about its safety concerns (direct contact with chief pilot's office, filling out a captain's irregularity report, or calling the SOCC director), this does not negate the fact that he did have direct contact with SOCC about his safety concerns and that in using a maintenance log entry, he was using a quick and most prudent method of informing Respondent of the need to take immediate action so as to protect the life and property of all concerned.

In essence, I find Complainant proved, by a preponderance of evidence, the presence of a protected activity, knowledge of that protected activity by Respondent, and adverse action because of said protected activity. Further, the reasons asserted by Respondent were pretextual, with Respondent failing to show any legitimate defense. Complainant has thus proved the merits of his AIR complaint. In turn, Respondent has failed to prove by the presentation of credible testimony or evidence that it would have disciplined Complainant in any event notwithstanding his credible testimony.

VII. 11.) REMEDY

As to the appropriate remedy, the AIR 21 provides:

“If...the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to—

- i. take affirmative action to abate the violation;
- ii. reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment, and
- iii. provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary of Labor, at the request of the complainant, shall assess against the person whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys’ and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing the complaint upon which the order was issued.”

49 U.S.C. § 42121 (b)(3)(B)

As Complainant has proven the merits of his AIR 21 claim, I direct him to receive appropriate remedy, as detailed in my Order Below

VI. ORDER

Accordingly, I find:

1. Complainant seeks and is entitled to reimbursement of all lost income from the trip he was not allowed to fly, amounting to \$3,418.26 plus interest (21.03 hours of lost flight scheduled at \$157.00 per hour, and \$116.55 in lost per diem). Prejudgement interest on backwages is calculated in accordance with 29 C. F. R § 20.58 (a), at the rate specified in the Internal Revenue Code, 26 U.S.C. § 66 21.

2. In addition, Complainant seeks and I find it appropriate, to order Respondent to remove and expunge from Complainant's personnel file the eighteen (18) month termination warning Respondent issued to Complainant in this matter.

3. Respondent will also reimburse Complainant for all reasonable attorney fees, expenses, and costs he incurred in prosecution of this matter. Counsel for Complainant will submit an application for said fees and expenses within thirty (30) days from the date of this decision and serve all parties, including Complainant, with a copy of this application. Respondent will have twenty (20) days following receipt of said application to file objections thereto.

4. Respondent did not violate AIR 21 by subjecting Complainant to either line checks, simulator training, or a QDRO investigation. However, I am convinced by Complainant, Whatley, and Dr. Shaulov's credible testimonies that Complainant experienced such anxiety following the September 15, 2007 incident, followed by the October 12, 2007 investigatory meeting, and subsequent disciplining, that he was not able to successfully complete his simulator training and suffered thereafter with disabling PTSD, depression, and anxiety, causing him to be unable to fly. As a result, Claimant has experienced a 50% loss of income. This loss of income has apparently forced Complainant to sell a condo. (JTX-4, page 251). Accordingly, Respondent will make Complainant whole by paying Complainant his monthly salary, plus interest, commencing when he ceased to fly because of the PTSD, to present and continuing, until he has sufficiently recovered from the PTSD to continue flying or to perform other suitable alternative employment.

5. Meanwhile, Respondent is to be given a credit for any long term disability monies paid to Claimant since he ceased working for Respondent. If Complainant is never able to resume flying but is able to perform other work, Respondent will be given a credit for such income from suitable alternative employment.

6. Further, Respondent shall make Complainant whole for any loss of benefits he may have suffered, commencing with his cessation of flying for Respondent.

SO ORDERED this 6th day of November, 2009.

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**CLEMENT J. KENNINGTON
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).