



**Issue Date: 23 December 2010**

CASE NO.: 2010-AIR-00019

In the Matter of

**JOSEPH LoVECCHIO,**  
Complainant,

v.

**US AIRWAYS,**  
Respondent

### **DECISION AND ORDER**

This matter involves a complaint concerning alleged violations of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR Act), 42 U.S.C. § 42121, (the “Act”) by the Respondent-employer, US Airways, (“Respondent”). This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee 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 (FAA) or any other provision of Federal law relating to air carrier safety. 49 U.S.C. § 42121(a).

The matter is ripe for Decision<sup>1</sup>, which is based upon the record of evidence, testimony of the parties, and argument, though limited to some degree, of the parties.

#### **I. ISSUES**

1. Whether Complainant engaged in activity protected under the Act; and if so,
2. Whether Respondent was aware of this activity, and if so,
3. Whether Complainant suffered an adverse employment action; and if so;
4. Whether Complainant’s protected activity contributed to Respondent's adverse action; and if so
5. Whether Respondent can state a legitimate business purposes for the adverse action; and if so
6. Whether Complainant can establish that the stated reason is a pretext for discrimination; and if so

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<sup>1</sup> In this Decision and Order (“D&O”), jointly submitted evidence shall be denoted as “JX-#”; Complainant’s evidence shall be denoted as “CX-#”; Respondent’s evidence shall be denoted as “RX-#”; and reference to the hearing shall be denoted as “Tr. at [page] #”.

7. Whether Respondent can demonstrate by clear and convincing evidence that it would have taken its action against Complainant even in the absence of the protected activity.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. PROCEDURAL HISTORY

On October 27, 2009, Captain Joseph LoVecchio (“Complainant”) filed a complaint against U.S. Airways (“Respondent”) with the Occupational Safety and Health Administration (“OSHA”), alleging that he had suffered an adverse employment action in violation of the whistleblower protection provisions of the AIR Act. By findings issued on March 9, 2010, OSHA dismissed Complainant’s complaint. On April 8, 2010, Complainant requested a hearing before the Office of Administrative Law Judges (“OALJ”). The case was assigned to me, and by Notice issued April 16, 2010, I scheduled a hearing in the matter.

On October 13, 2010, Respondent moved for a summary decision in its favor. On October 21, 2010, Complainant responded to that motion, and also moved for summary decision. In an Order issued October 25, 2010, I denied in part and granted in part both of the parties’ motions for summary judgment. Hearing commenced in the matter on Tuesday November 2, 2010. The parties appeared, represented by counsel. I admitted to the record the parties’ joint exhibits identified as JX-1 through JX-22, Complainant’s exhibits CX-1-3; CX-5, and Respondent’s exhibits RX 1-3; RX 5. I excluded both CX-4 and RX 4.

Although I had set a time for the submission of closing written argument, I later concluded that administrative expedience required that I vacate that determination. On December 13, 2010, I held a telephone conference with the parties and asked them to waive the filing of briefs, noting that the parties had provided argument at the hearing, as well as through pre-hearing motions for summary judgment. Respondent decline to waive the filing of a brief, and by Order issued December 20, 2010, I vacated my oral ruling allowing the filing of the briefs, noting that the parties would be able to offer additional argument, if necessary, on a motion for reconsideration.

### FACTUAL HISTORY

#### 1. Documentary Evidence

At the hearing, the parties submitted joint exhibits that are defined as follows:

- JX-1 ASAP Report 7/23/09
- JX-2 Email from D. Seymour to Y. Stawnychy 7/31/09
- JX 3 Email exchange between J. Corbusier and L. Hogg 8/21/09
- EX 4 ASAP Report 8/22/09
- EX 5 Letter from Stawnychy to Complainant 8/22/09
- JX 6 Email from Complainant to Stawnychy 8/23/09
- JX 7 Email from Stawnychy to Complainant 8/23/09

- EX 8 Letter from Umphenour to Stawnychy 8/28/09
- JX 9 Email from L. Hogg to E. Bular and B. Holdren 9/1/109
- JX-10 Letter from Stawnychy to Complainant 9/2/09<sup>2</sup>
- JX-11 Letter from Complainant to Stawnychy 9/5/09
- JX-12 Letter from Stawnychy to Complainant 9/5/09
- JX 13 Complaint from Complainant 10/26/09
- JX 14 Letter from J. Johnson to Complainant 3/9/10
- JX 15 Complainant's response to Interrogatories 6/25/10
- JX 16 Evidence regarding Complainant's Admissions 6/28/10
- JX-17 Minimum Equipment List Manual (portions)
- JX 18 Collective Bargaining Agreement (portions)
- JX 19-
- 22 Controlling regulations from FAA

Complainant submitted the following evidence:

- CX-1 email from R. Muise to J. Corbusier 8/21/09
- CX-2 letter from Complainant to M. Mulkey
- CX-3 letter from M. Mulkey to Complainant
- CX-4 DOL statement (excluded)
- CX-5 Chart of Pilots who gave statements

Respondents submitted the following evidence;

- RX-1 Meeting Minutes 8/31/09, 9/3/09
- RX-2 Aircraft Maintenance Precaution Statement 7/19/10
- RX-3 Complainant's supplemental discovery 9/15/10
- RX-4 Declaration of David Ciabattoni (excluded)
- RX-5 NTSB report re Flight 1549

In addition, the parties submitted evidence that was considered with their motions for summary judgment. That evidence is outlined in my Order issued October 25, 2010.

## 2. Testimony

*Joseph Lo Vecchio* (Tr. at 47-116; 419-424)

Capt. LoVecchio has been a pilot with U.S. Airways since 1988. Before that, he worked as a pilot for Braniff International for six years. In addition to piloting aircraft, Complainant has worked as a check airman, and helped to develop a crew resource management program for Respondent that deals with safety and communication skills of crews. He had developed and instructed a leadership development program for pilots employed by Respondent. Complainant is currently a captain on the Boeing 767 International. As captain, he has final authority for determining whether a flight will operate or not.

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<sup>2</sup> This letter is erroneously dated 8/22/09.

Complainant testified that he made the decision to deplane a flight to San Juan on August 21, 2009 because of safety concerns. Complainant explained that he found that the air temperature in the plane's cabin and cockpit was extremely hot and discovered that the left air condition pack switch showed that it was operable, although documentation on the minimum equipment list (MEL) showed that the pack was inoperative. Both customers and flight attendants reported that the aircraft was hot and one flight attendant felt faint. Complainant decided to deplane the customers until the situation could be rectified.

After deplaning the flight, Complainant reported to Captain Stawnychy's office and spoke with Captain Stawnychy by telephone. He explained the circumstances underlying his decision to deplane the flight. Complainant spoke with Captain Corbusier approximately fifteen minutes later, and was informed that he and the First Officer were removed from the flight, which was scheduled to be re-crewed. As Complainant was driving home, he received a telephone message from Captain Corbusier, informing him that he was removed from flight status until further notice, and advising him to look for a letter confirming that action. Complainant testified that he received the letter, and was removed from flight status.

Complainant was paid during the period of his removal from flight status, and did not suffer any financial loss. However, he explained that Respondent's computer scheduling system had flagged his name as removed from status, and so all of his peers knew that he had been removed until further notice. Complainant testified that it was intimidating to be removed from flight status, which had never happened during his long career as a pilot. He checked the computer system regularly to see if his status had been changed to active. Complainant stated that notice of his grounded status was available to all pilots who used the system, and he believed that the grounding cast aspersion on his professional reputation. He believed that other pilots would wonder what he had done wrong to merit grounding.

Complainant testified that he was upset and anxious, and did not know whether he would be terminated or suspended. He did not know how long he would be prevented from flying, or the reasons why. Complainant was anxious because he was uncertain about his future with Respondent. If he lost his job, he would lose the benefits of seniority, which would not carry over to another airline. Those benefits include having priority to name holidays and vacations and choose flight schedules. In addition, he estimated that his salary would also be reduced by about \$100,000.00.

Complainant recalled that on August 31, 2009, he received a letter from Captain Stawnychy dated August 22, 2009. Complainant did not receive the letter closer to the date it was issued because he had taken a trip to deflect his concern about his no-flight status. He returned home on Saturday, August 29, 2009, and could not retrieve the letter until the following Monday, August 31, 2009.

Complainant was aware that Respondent had asked him to provide a written statement explaining the circumstances of deplaning the San Juan flight because Capt. Stawnychy had previously instructed him to do so in a voice mail message. Complainant was aware that he was scheduled to appear at a hearing with the Chief Pilots, Stawnychy and Corbusier, on August 31, 2009. He did not provide a written statement as requested because he did not know what he was

charged with, and did not know what to say. On August 23, 2009, Complainant sent an email to Capt. Stawnychy and requested feedback or information from an investigatory hearing that had been held on August 6, 2009. Capt. Stawnychy replied that he would draft a letter shortly, but Complainant did not receive correspondence about that meeting.

Complainant also contacted his union representative, Captain Doug Burke to get some advice about what to do regarding the written statement. Complainant believed that the chief pilots had recommended that he seek union representation for the August 31, 2009 meeting. Complainant believed that the meeting could significantly affect his career and his life, and he wanted to assure that he proceeded in compliance with union procedures, and in a manner designed to protect his interests. Complainant had always enjoyed an open relationship with the chief pilots' office, and he had never been told before to consult a union representative.

Complainant attended the meeting on August 31, 2009 that was also attended by Capts. Corbusier, Stawnychy, Burke and Ciabattoni. The meeting opened with a dispute between the union representatives and the chief pilots about the requisite for a written statement before the meeting, and ended shortly thereafter. He recalled the issue of insubordination being raised, and the suggestion that he be allowed to provide a written statement at that time was rejected by Capt. Corbusier. Complainant testified that Capt. Stawnychy assured him that the dispute was between management and the union and that no charges would result. Complainant was reassured that the issue about the statement would be resolved without negative impact on him. A continuation of the meeting was scheduled for September 3, 2009. Complainant believed that the union's grievance chairman would consult with Captain Hogg by telephone and resolve the issue concerning the written statement.

On September 2, 2009, before the next meeting took place, Complainant received a letter confirming the new meeting, and again requiring him to provide a written statement. Complainant provided a written statement and attended the meeting, which resulted in him being returned to active flight status. Complainant described the meeting as "pretty intense" (Tr. at 65), with questions regarding the decisions he made regarding the San Juan flight of August 21, 2009. The authority of captains, and the economic impact of delay on the company were discussed. Complainant believed that his decision making ability was being questioned during the almost two hour long meeting. He did not recall any discussion of insubordination at that time. He was advised by Capt. Stawnychy that he would receive a letter, but Complainant had no idea what the letter would say. He was relieved that he had been returned to flight status, and he was under the impression that management was satisfied with their investigation into the San Juan flight.

In the middle of September, 2009, Complainant received a letter dated September 5, 2009 that constituted a letter of warning as the result of his insubordination. The letter discussed delays on flights that Complainant had piloted, and it culminated by advising him that he was not performing at the same level of professionalism as other pilots. The letter left Complainant with the impression that he should be careful not to cause any additional delays. Capt. LoVecchio had never before been cited for any disciplinary matter or insubordination.

The pilots' union informed him that the letter would be retained in his personnel file for disciplinary purposes for a period of 18 months. Complainant was also concerned that the letter would be kept for five years under provisions of the recently enacted Pilots Records Improvement Act. Complainant was concerned that his chances for a post-US Airways career could be jeopardized by the letter. He pointed out that if he was involved in an accident or incident, the FAA might have access to his personnel file, and the warning letter would put him in a bad light.

Complainant testified that the letter also cast a chilling effect on his reporting safety issues. He referred to a list of twenty-seven or twenty-eight events where a pilot is mandated to file a safety report. He was concerned that the warning letter would impose a chilling effect on his and other pilots' willingness to report these safety issues. He explained that he might not report marginal safety issues and risk incurring another discipline action. Complainant acknowledged that he could file reports anonymously, but he stated that sometimes safety complaints are examined by the event review committee and the FAA, and anonymity may not apply at those levels.

When Complainant encountered an irregularity on a flight, his practice was to give notice to the chief pilots by phone or email. However, he is now hesitant to bring up any issues on a voluntary basis unless he is required to do so. He thinks that all 5,000 pilots working for Respondent could be adversely affected by the chilling effect of risking a disciplinary letter. Complainant believed that the airline industry had developed a non-punitive error reporting system that encouraged the voluntary reporting of safety related issues. However, he thinks that the free exchange of ideas is now diminished, because he believes that he will no longer report safety concerns without worrying about retaliatory actions by Respondent.

Complainant acknowledged that one of the roles of the chief pilots was to review how pilots exercise their authority. Complainant was aware that Chief Pilot Corbusier disagreed with him about decisions he made involving a flight from Philadelphia to Orlando on May 20, 2009. Complainant recalled there was a delay on that flight. He also recalled a delay on July 16, 2009 on a flight scheduled from Philadelphia to Glasgow, which resulted in a meeting between Complainant and the chief pilots on August 6, 2009. Capt. LoVecchio had decided not to board the plane until the cabin had a chance to cool down. In addition, he had decided to run both engines while taxi-ing and waiting through a weather delay. Complainant was aware that single engine taxi is preferred to conserve fuel, but the heat in the cabin required the operation of both engines. The plane needed to return to the gate for fuel before it could take off. Complainant observed that while they waited for clearance, severe weather set in, thereby further delaying the flight. Although he normally would have shut down the engines during such a wait. However, on that date, the plane had an inoperative auxiliary power unit, and he could not turn off the engines, which provided the only source of air conditioning and electricity in those circumstances. When the plane returned to the gate to refuel, Complainant de-planed the passengers. Complainant admitted that he was not subjected to discipline as the result of either of these events, and that the meeting was conducted in a cordial manner.

Complainant testified that the August 21, 2009 flight to San Juan was delayed in Philadelphia due to a problem with the air conditioning pack. He de-planed the passengers, and

he and first officer Umphenour left the plane with their personal possessions. Complainant stated that he keeps his possessions with him due to heightened security concerns. He left the gate to respond to a voice mail message from Capt. Stawnychy. Complainant explained that he felt he needed to address that message, as he felt that he was “on the watch list” because of the “tone” of the August 6, 2009 meeting that questioned his flight authority decisions . Tr. at 84. Complainant described that meeting as intimidating. Complainant intended to return to the gate to resolve the situation with passengers left there. Complainant agreed that it might have been better to have instructed the First Officer to remain with the passengers, but he was focused on reporting to the Chief Pilot in response to the voice message.

Complainant acknowledged that a customer complained about his behavior that day, and admitted that he returned to the gate to apologize to the gate agent. He disagreed that he ranted and raved, though he admitted that both he and the First Officer were “upset over the lack of thoroughness so to speak on this operations”. Tr. at 104. Complainant was aware that the entire crew scheduled for that flight was replaced because of concerns that the original crew would exceed their maximum allowed flight time. Complainant explained that as a reserve pilot, he is paid a minimum monthly guarantee and is credited for flight time. He testified that he was credited for the San Juan flight, though he did not fly it. The new crew took the plane to San Juan and returned to Philadelphia without incident.

Complainant acknowledged that the letter of August 22, 2009 did not refer to insubordination or termination, but he observed that the reference in the letter to Section 19 of the pilots’ working agreement referred to investigation and discipline. He acknowledged that he was not threatened directly with termination by either chief pilot. He did not provide the written statement by August 28, 2009, and was not aware of any other pilot who refused to supply a written statement in other inquiries when directed by the chief pilot.

Complainant recalled that the focus of discussion at the September 3, 2009 meeting was the course of events on August 21, 2009, and not specific discipline for his decisions. He agreed that no one said that he would be disciplined because of the events of August 21, 2009. He acknowledged that the September 5, 2009 letter states specifically that the letter of warning was issued “as the result of [his] insubordination in not providing the written statement that [he] had been directed to provide on August 28...” Tr. at 93; JX 12. Complainant testified that he did not lose pay or benefits during the two weeks he was removed from active flight status.

Complainant testified that he is not an expert on the Pilot Record Improvement Act and did not know whether Respondent would be obliged to disclose the warning letter to a prospective employer. He agreed that it was his practice to report safety issues, but reiterated that he might be less likely to report marginal safety issues as the result of the warning letter. However, he admitted that he reported a safety issue since the letter was issued. He acknowledged that Respondent maintains a safety reporting program, referred to as “ASAP” that allows parties to electronically report concerns with anonymity. In addition, pilots can report safety issues to the Union Safety Committee and to the FAA through an anonymous filing. The FAA also maintains a safety hotline for reports that can be used anonymously. Complainant testified that safety issues are not always black or white, but are within his judgment to determine.

Complainant explained that in addition to his guaranteed minimum pay, he gets more money if he pilots more reserve flights. During the approximately two weeks that he was grounded, Complainant was paid for the trips that he would have flown had he not been grounded. He did not lose any kind of seniority due to his non-flight status.

Complainant explained in detail the issues involved in the May flight that was the topic of discussion with Chief Pilot Corbusier. He acknowledged that regulatory compliance concerns and not safety issues were involved.

*Roger Henriksson (Tr. at 117-133)*

Capt. Henriksson has been employed by Respondent for more than twenty-five years. He is a captain on the Airbus 30 aircraft, and he has flown as First Officer on other aircraft. Prior to working for Respondent, he worked for Jet Stream International Airlines for approximately three years. He is also vice chairman for the Philadelphia pilots' union and serves on a variety of committees. As vice-chairman of the union, his duties are to advocate for pilots and ensure that contractual obligations are met. He also represents pilots in investigation and disciplinary hearings, where his job is to review all the facts and prepare the pilot under investigation to participate in the proceedings. He estimated that he has attended fifty such meetings in his capacity as vice-chairman for the union.

Capt. Henriksson attended the August 6, 2009 hearing that addressed the flight delay on the Philadelphia to Glasgow flight. Captain Burke and Capt. Kublik attended the meeting, as did the chief pilots. Capt. Henriksson believed that at this meeting, management discussed economic impact caused by delay more than had been discussed in other meetings. He recalled a statement to the effect that the company could not afford to keep enough spares if they were to remain economically viable. He believed the meeting ended cordially, and he testified that no discipline action was taken against Complainant relating to the meeting or the events of August 5, 2009.

In Capt. Henriksson's experience, it is rare for a pilot to be removed from flight status. He believed that Respondent questioned Capt. LoVecchio's decision making processes more than the witness was accustomed to. Capt. Henriksson has flown with Complainant, and believed that he was very correct in all of his duties, whether operating the aircraft, dealing with the crew, or dealing with the passengers. He believed that co-pilots were comfortable knowing that things would be done right when Complainant was captain. Capt. Henriksson had never observed Complainant disobey a direct order.

The witness testified that the collective bargaining agreement requires that the company may no longer consider any discipline letter in a pilot's file after eighteen months. He was aware that Complainant was directed to provide a written statement and failed to do so. Capt. Henriksson was not aware of every instance where a pilot had been placed in no-flight status. He acknowledged that there are a number of venues at which pilots may lodge safety complaints. Capt. Henriksson could not recall whether Complainant was asked to give a written statement before the August 6, 2009 meeting. He testified that it is common for pilots to be asked to give a statement at some point during the investigation and estimated that they are requested to give a

statement in advance in about 50% of incidents that are investigated. There is no union rule regarding on this issue.

Mr. Henriksson was also present at the September 3, 2009 meeting with Complainant. He did not recall any discussion regarding Complainant's insubordination. He recalled that the majority of the discussion concerned the events involved in the San Juan flight. He did not understand that a discipline action would be taken against Complainant at the conclusion of that meeting, but he testified that no one advised that nothing would come of the investigation either.

*David Ciabattoni* (Tr. at 134-193)

Mr. Ciabattoni has worked for Respondent for more than 24 years. He is a captain on the Airbus 320 and has held various other jobs. He worked for Piedmont and Frontier Airlines as well. He is an assistant board member with the U.S. Airline Pilots' Association, and has held other positions with the union, including vice-chairman of the collective bargaining agent, where he was a local representative for pilots, keeping them informed about union activity and helping them understand contract compliance. He attended disciplinary hearings as part of his role in the union. At those meetings, Capt. Ciabattoni was the pilot's advocate, which required him to conduct his own investigation into the situation under investigation. He estimated attending 40 to 50 meetings in that capacity. In 2009 he served as executive vice president for USAPA.

Capt. Ciabattoni attended that August 31 and September 3, 2009 meetings as one of Complainant's representatives. The first meeting involved whether Complainant had prepared a written statement in advance. He described the meeting as being different from others that he had attended as a representative. He could recall only three other instances where a pilot was removed from flight status, and all of those involved an accident with an airplane or other equally serious matter. In addition, the witness could not recall many other circumstances where a statement had been required in advance, though statements were often used in lieu of a meeting. Capt. Ciabattoni could not determine the reason that Complainant was removed from flight status, referring to the many events that occurred regarding the flight at issue. He explained it was difficult to know what the company wanted written in a statement. He remembered that Capt. Stawnychy demanded to know everything that happened that morning.

Capt. Ciabattoni testified that the union made it clear that Complainant was willing to give a written statement, but they were uncertain what Respondent wanted him to report. He conveyed to the chief pilots that the union believed that Complainant should not be held insubordinate for not writing a statement, and that he was willing to write a statement at the meeting. During a break in the meeting, the union representatives talked to the head of the union's grievance committee to make sure that their position was justified. The meeting ended with Capt. Stawnychy advising the attendees that the meeting would resume it at another time. Capt. Ciabattoni kept contemporaneous notes of the meeting which he later transferred to a typed document.

The Captain also attended the meeting of September 6, 2009, which lasted an hour and 45 minutes. He did not recall any discussion of Complainant's insubordination. The meeting focused on the events surrounding the San Juan flight in August. Respondent did not identify

any specific event that led to Complainant's grounding. Capt. Ciabattone testified that it is not common to ground pilots, and he described instances where that action had been taken, which he characterized as extreme. The witness' assessment of Respondent's concerns about the San Juan flight was "why he packed his bag and walked off an airplane when an answer was ascertainable by a phone call..." Tr. at 155. Capt. Ciabattone asked the chief pilots questions about the company's actions on that flight, including why the crew wasn't told not to report in the face of a delay, and why the mechanics weren't instructed to check out the problems that Complainant reported. In addition, he did not know if the logbook documented why the equipment had not been properly marked as inoperable.

The September 3 meeting ended with Complainant being told he would be returned to active flight status, and Complainant expressing his relief about that. He had been distraught about his circumstances. Capt. Ciabattone expected a positive letter from Respondent, considering that they had concluded that he was competent to fly.

Capt. Ciabattone testified that he attended the meeting on Complainant's behalf because he was asked to, and had performed that duty in the past, though he acknowledged that it was not his regular duty at the time. Capt. Henriksson had taken over as representative, and from at least February, 2008, would have been familiar with how investigations were being conducted. He admitted that Complainant had not prepared a statement in advance of the August 31 meeting. Capt. Ciabattone was not sure if Complainant could have complied with the instruction to produce a statement given the time constraints involved. He did not believe that it was usual policy for Respondents to demand a written statement in advance of an investigation meeting. The witness could not recall whether statements were demanded in advance of other investigations where he represented pilots.

Capt. Ciabattone was aware of other instances where pilots had been cited for insubordination, but he was not familiar with the cases that he was asked about. He was issued a warning letter from Capt. Corbusier for showing a picture that offended the chief pilot.

The witness testified that the union was concerned that there appeared to be no resolution to the August 6 meeting, as Respondent did not issue a letter clarifying the investigation results, as was the usual practice. With respect to Complainant's actions on the day of the San Juan flight, Capt. Ciabattone testified that he believed Complainant acted appropriately. Even though the plane was left unattended, maintenance had been advised of the problem. The witness stated that he leaves planes unattended whenever he is finished flying.

Capt. Ciabattone believed that the removal from flight status represented a challenge to Complainant's ability to fly. Complainant was not told why he was removed from flying, and that uncertainty would weigh heavily on any pilot. The witness explained that it would be easy for other pilots to become aware of the removal from active status but he was not aware of any negative discussion among his peers about Complainant's grounding. He was aware that Complainant grieved the issuance of the warning letter, and Respondent's actions were upheld at initial grievance stages through Respondent's flight department. He also agreed that it was not common to de-plane an aircraft after boarding.

*Lyle Hogg (Tr. at 195-259)*

Capt. Hogg has been Vice-President of Respondent's flight operations for three years. He has worked for Respondent for more than 27 years, as a pilot, assistant chief pilot, chief pilot and Senior Director of Flight Operations. His current duties require him to manage the day to day operations from the perspective of pilots, including overseeing four crewed domiciles. He is also responsible for flight training and flight technical matters. In the fall of 2009, Capts. Stawnychy and Corbusier reported directly to him because the senior director position was vacant. Capt. Hogg described the various programs that Respondent maintains that allow pilots to report safety concerns, notably the Aviation Safety Action Program (ASAP), which allows for the anonymous reporting of errors and safety issues. Capt. Hogg believes that pilots have a duty of reporting safety or other concerns they have involving the operation of aircraft.

Capt. Hogg was informed of the circumstances surrounding the San Juan flight by Capt. Corbusier, who called on the day of the flight and reported an extensive delay. Although delays were not unusual, the witness believed that it was unusual for Complainant and his first officer to have left the plane rather than attempt to resolve the problems on the flight. In addition, Capt. Corbusier advised that the flight attendants and customer service agents were concerned because they were uncertain of the status of the flight after Complainant and co pilot Umpenour left the boarding area. Capt. Hogg advised Capt. Corbusier by email that management needed to get a statement from, and hold a meeting with, Complainant about the San Juan flight. Capt. Hogg testified that it was common to ground pilots while an investigation into their decision making process was under way. In these circumstances, management needed to understand why Complainant did not stay at the aircraft to work through the problem.

Capt. Hogg was aware that Complainant had not provided the written statement that he was asked to give, and the witness could not understand why he refused to help management understand what happened on the San Juan flight. He has overseen pilots for fifteen years, and cannot remember another instance where a pilot refused to provide a statement when asked. He was aware that the issue of the statement became a union-management dispute, and he let his supervisor and the director of labor relations know about the circumstances by email. He was familiar with the collective bargaining agreement, and knew that it did not preclude management from asking for a statement in advance of an investigation meeting.

Capt. Hogg did not know what discipline if any would have been meted out against Complainant for his actions concerning the San Juan flight. He believed that his refusal to cooperate with management by providing a statement constituted non-compliance with a directive from his chief pilot and warranted discipline. Capt. Hogg did not often see that kind of insubordination from a pilot, and management takes insubordination cases very seriously. Capt. Stawnychy believed a letter of warning for the insubordination was appropriate, and Capt. Hogg supported that decision. No discipline was issued for Complainant's actions on the day of the San Juan flight.

Under the collective bargaining agreement, a letter of warning expires eighteen months after it is issued. If other infractions of a similar nature occur within that time period, management can consider the issuance of the warning letter when determining what discipline to

impose for the subsequent action. The letter would have no impact on the determination of discipline for an action that involved a different kind of action.

Capt. Hogg testified that requests for information about pilots from prospective employers come through his office. In the instant circumstances, Capt. Hogg verified with legal staff that the warning letter was not something that was mandatory to disclose under the Pilot Record Improvement Act, as the letter related to Complainant's behavior, and not his operation of an aircraft. Capt. Hogg did not believe that the warning letter would dissuade a pilot from raising concerns about safety, because Complainant had not been disciplined for decisions he made as a pilot. In addition, most of the methods available to pilots to report safety concerns provide anonymity.

Capt. Hogg was not present at either meeting held regarding the San Juan flight and had no direct knowledge of what occurred at those meetings. However, he supported the decision of the chief pilots to issue the warning letter. He did not believe that Complainant's actions regarding the flight warranted discipline, but he believed that investigation was appropriate, considering that Complainant left the plane before the problem he reported was resolved. Capt. Hogg considered Complainant's failure to provide a written statement prior to the August 31 meeting to be insubordinate behavior, even accepting that Complainant did not receive the letter instructing him to prepare a statement until the day of the meeting. Although Capt. Hogg agreed that pilots are sometimes disciplined for their behavior while operating aircraft, Respondent does not discipline pilots for their decision making processes involving operating planes. Complainant's decision to walk away from a maintenance problem raised questions that Respondent needed to have answered. The witness acknowledged that the warning letter also related the events of the San Juan flight, but he maintained that Complainant was not disciplined for his actions that day.

Capt. Hogg testified that Respondent removed pilots from active flying status whenever they had a concern about their decision making processes. He does not consider grounding a pilot to be punitive, but believes that it is Respondent's obligation under FAA rules to satisfy itself that pilots make good decisions. An investigation is not a disciplinary action, but Capt. Hogg admitted that an investigation can lead to discipline.

The witness explained that after an ASAP report is submitted and discloses an error or highlights a safety concern or other procedural failure, an analyst categorizes the information and brings it to the attention of the director of flight safety and a union representative. The information is also forwarded to Respondent's Flight Operations Standards Board for review, or if serious issues are raised, to an Event Review Committee, which might recommend action such as training. Capt. Hogg testified that an ASAP report would not remain anonymous if it involved an incident that the company or FAA was aware of. In that case, the ASAP report could be investigated by Respondent or the FAA. These would relate to operational issues, and Respondent does not discipline pilots for errors or operational mistakes, but rather uses investigation findings on those issues to educate pilots. An ASAP report might not be accepted and indemnify a pilot if it relates intentional wrong acts or is untruthful. The ASAP program allows Respondent to collect data that it would not normally have access to in order to improve the company's service.

Capt. Hogg acknowledged that emails about the San Juan event referred to the economic impact of the delay, but he believed that customer service was just providing information to Complainant's supervisors about the extent of trouble that people went through to satisfy customers after the event. The witness averred that Respondent does not consider the costs of an event alone, but it is a factor to look at when delays are long and customers are inconvenienced. Although he believed that Complainant's conduct on the day of the San Juan flight was not typical, he denied that it was the basis for the warning letter. However, Complainant's behavior on that date was the basis for grounding him, which Capt. Hogg did not consider discipline. He acknowledged that Respondent disciplines pilots on rare occasions by removing them from flight status, but in those instances, they are given time off without pay. Complainant was not disciplined for his actions in the San Juan flight, which demonstrated to Capt. Hogg that the chief pilots accepted his explanations for his behavior that day.

*James Corbusier (Tr. at 266-366)*

Captain Corbusier has worked for Respondent for more than 25 years. He became chief pilot in Baltimore in 1999, transferred to Pittsburgh as chief pilot in 2002 and in 2008 became Chief Pilot for Domestic Operations in Philadelphia. His duties are to oversee pilot operation and assure compliance with FAA rules. He assures that pilot activity conforms to contractual, administrative and regulatory guidelines. Capt. Corbusier also flies on occasion. He works closely with Capt. Stawnychy, who is the Chief Pilot for International Operations, and they assume each other's duties when necessary. He also works with an assistant Chief Pilot, and he reports to Capt. Lyle Hogg.

Capt. Corbusier stated that a captain at U.S. Airways has unlimited responsibility to assure the safety of a flight. He testified that he made the decision to remove Complainant from active flying status on August 21, 2009. Capt. Corbusier was familiar with an incident involving a flight from Philadelphia to Orlando in May, where Complainant disagreed with maintenance about whether he could fly with an inoperative system that had been repaired but continued to malfunction. The witness explained that FAA allows flights to occur despite this kind of event, depending on the equipment. Conventional wisdom held that the equipment did not need to be repaired by the date Complainant believed was necessary. He discussed the situation with Complainant, and although he did not agree with Complainant, Capt. Corbusier deferred to Complainant's judgment, which caused a flight delay. No discipline was imposed on Complainant for the delay, and Corbusier believed he understood Complainant's point of view. Respondent does not discipline pilots for exercising operational judgments, as that would be counterproductive. The witness explained that pilots must make many decisions in compressed timeframes, and no good would come of disciplining them for errors.

Capt. Corbusier was familiar with Complainant's actions regarding the July 16 Glasgow flight, which involved a lengthy delay that was in part caused by Complainant's actions. Although delays do not generally pose concern for the Chief Pilots, but they have the right to see what causes delay and determine if the company can take corrective action to prevent delay. Capt. Corbusier considered the delay involved in this flight was significant and warranted investigation. He believed that some of the delay was caused by Complainant's decisions, which

he accepted, though he did not agree with all of his actions. Capt. Corbusier found Complainant's decisions to be rational and within the guidelines of his authority to fly, and discipline was not warranted.

Capt. Corbusier was made aware of the circumstances involved in the August 21 San Juan flight when he received a call from the airline's Operations Manager, who advised that Complainant refused to fly the plane because of the inoperative left air conditioning system and the weather. The Operations Manager considered the plane air-worthy, and wanted Corbusier to be involved in resolving the dispute with Complainant. Capt. Corbusier was not qualified to fly that aircraft, and so he involved Capt. Stawnychy, who was qualified. Capt. Corbusier received a call sometime later and learned that dispatch and Complainant had worked out the problem, and the flight was back on. The witness stated that he was surprised to learn an hour later that the passengers had been de-planed and the pilots could not be found. He called Stawnychy to find out what had transpired and then talked to the airport's maintenance coordinator and learned that the plane was emptied because Complainant believed it was too hot and believed that there was a non-compliance issue with equipment. Capt. Corbusier testified that the mechanical problem was not one that would have warranted de-planeing passengers. He was aware that the flight was completed using the plane that Complainant had rejected, because the air condition issue had been resolved. He was also concerned that Complainant had not stayed at the plane to resolve the issue. Capt. Corbusier believed that he would have felt better about the situation if Complainant had stayed with the plane until the mechanical issue could have been resolved. The plane would not have been used if the issue had not been resolved.

Capt. Corbusier was concerned about the lateness of the flight and the potential need to replace the crew, which he decided was the prudent thing to do. He advised Complainant that he and his crew were removed because of duty hour concerns.

Capt. Corbusier was informed by Richard Muise, Senior Manager of International Customer Relations that a customer service agent reported that Complainant was ranting and raving about safety issues in front of customers, which was a point of concern as it reflected potentially that Complainant could not handle a stressful situation. The witness spoke with Captain Hogg, who directed him to schedule a meeting with and get a statement from Complainant. Capt. Corbusier also decided to remove Complainant from active flight status, in consideration of three occasions in a four month period where the witness had some concerns about Complainant's actions. By removing Complainant from flying, Capt. Corbusier's intention was to look further into the situations. He did not intend to challenge Complainant's credibility or sully his reputation. Capt. Hogg agreed with Capt. Corbusier, and it was decided that Capt. Stawnychy would issue the letter. The decision to ground Complainant was entirely Capt. Corbusier's. At that time, Capt. Corbusier had no intention of disciplining Complainant, but wanted to look further into his decision making processes. However, he agreed that Complainant's actions in leaving the plane could have given rise to discipline action.

Capt. Corbusier generally asks for a statement in advance of holding an investigatory meeting because he finds it helpful. He could not say that he asks for one in every instance, but named a number of instances where he did so. He testified that First Officer Umphenour

provided a statement regarding the San Juan incident when Capt. Corbusier asked for it. He could recall no instance where a pilot refused to give him a statement when he asked for one.

The Chief Pilot was among the attendees at the August 31 meeting, which was suspended when he learned that Complainant had not produced a statement. He testified that there was a dispute between the union representatives and the chief pilots regarding whether Complainant should have had to produce a statement in advance. The witness testified that it is usual to suggest that pilots have union representation during an investigation meeting, but he personally did not invite Complainant to do so. He disagreed that Complainant should have been advised of what he was charged with before providing the statement. Capt. Corbusier believed that there were no charges, as the investigation was pending. Capt. Corbusier had already concluded on August 31 that Complainant was insubordinate, because he had been directed to provide a statement by August 28 and had not done so. The Chief Pilot did not recall anyone assuring Complainant that no discipline would be taken against him because the issue of the statement was between the union and management. He had left a message on Complainant's phone directing him to submit a written statement, and he held Complainant responsible for his decision not to, regardless of the union's advice.

Capt. Corbusier was asked why Claimant's failure to provide a written statement about events from weeks earlier was significant enough to end in a warning letter, and he explained that the insubordination was something that the Chief Pilots could not tolerate. Capt. Corbusier acknowledged that Complainant had requested guidance about the content of the written statement, but he could not recall when he saw Complainant's email. He recalled that his voice mail message to Complainant on August 21 advised that the Chief Pilots needed a statement to understand Complainant's actions surrounding the San Juan flight. He explained that the failure to have the meeting on August 31 required additional reallocation of resources, in terms of the Chief Pilots' schedules. In addition, three more days passed without Complainant's ability to fly.

After that meeting, Complainant produced a statement, and a meeting was held to discuss the San Juan flight on September 3. Capt. Corbusier testified that Complainant's insubordination was not discussed at that meeting, which focused on the flight events. At the end of the meeting, the chief pilots believed that Complainant's actions were justified, although Capt. Corbusier did not agree with all of them.

Following the meeting, Complainant was returned to flight status because the Chief Pilots were comfortable with his explanations. The Chief Pilots did not remove First Officer Umphenour from flight status because that pilot had no history of flights that raised concerns, as Complainant had. In addition, the captain of a flight is responsible for the decision making process, not the first officer. The witness explained that his investigation into Complainant's actions was not prompted by the fact of the delays, which he said are typical. Although weather or mechanical issues were involved in the three instances that concerned the Chief Pilot, Complainant's decisions contributed to the delays.

The decision to issue Complainant a warning letter was made jointly with Capt. Stawnychy. Both Chief Pilots felt it was important to convey that insubordination would not be

tolerated. He has issued other letters warning pilots about insubordination and lack of professionalism. Complainant would not have received a warning about insubordination if had provided a written statement about the events of the San Juan flight by the date instructed to do so. The witness confirmed that the warning letter could not be used as the basis for progressive discipline in any charge other than repeated insubordination. He was not certain what the Pilot Retention Information Act [sic] would require.

Capt. Corbusier testified that safety is paramount to him and to Respondent, and he believed that the anonymity aspect of reporting safety issues encourages pilots to report their concerns. He denied that his actions were motivated by any potential gain he might experience from preventing delays. The witness acknowledged that delays present an economic impact, but that safety can never be compromised. He also did not believe that it was reasonable for a pilot who was removed from flight status to be concerned about potential termination, although he admitted that many pilots who were removed from flight status were discharged. Although he had never been removed from flight status, Capt. Corbusier believed that he would want to understand the issues that led to the removal. He agreed that a pilot might feel anxious in Complainant's circumstances.

Capt. Corbusier testified that it is typical to summarize the results of an investigation meeting in a written letter. That was done so after the September 3 meeting. He did not know what happened after the August 6 meeting, as Capt. Stawnychy was the party responsible for that investigation.

Capt. Corbusier was unaware of any additional pressures on pilots in 2009 to meet on-time targets, and he knew of no change in operations that would have placed additional pressure on pilots.

*Yaroslav Stawnychy* (Tr. at 367 -418)

Capt. Stawnychy has been employed by Respondent since 1982. He served as line pilot, line check airman, first officer and pilot. He was assistant Chief Pilot in Philadelphia from 1996 to 2004, and then became Manager of Policies and Procedures in Pittsburgh; returning to Philadelphia in 2006 as Assistant Chief Pilot. He has been Chief Pilot of International Flight since February, 2008. He shares chief pilot duties with Capt. Corbusier, who is in charge of domestic flights. They work on issues together on a daily basis and fill in for each other in the absence of one or the other. Capt. Stawnychy stated that the primary responsibility of a pilot is to ensure the safe operation of the flight, and pilots have full authority to take any action to accomplish that goal.

Capt. Stawnychy described the meeting regarding Complainant's actions on July 16 involving the Glasgow flight. He concluded that Complainant's decisions were based on safety, and he had no operational concerns about Complainant's flight, though he might have made different decisions, such as taxied with one engine not two. Capt. Stawnychy testified that the meeting also covered announcements that Complainant had made from the public address system on his flight. The Chief Pilot had been told that Complainant advised passengers that they were

free to contact Respondent's Consumer Affairs office to complain about how the flight had been handled. No discipline was taken against Complainant in relation to that flight.

Capt. Stawnychy also became involved in Complainant's San Juan flight. He was not working on that date, but Capt. Corbusier called him and advised him about the situation, and asked the witness to call Complainant to discuss the problem. Capt. Stawnychy reached Complainant's voice mail and left a message asking him to call him, or his office, which would forward the call. He did not instruct Complainant to go to his office, as he was not in. Later on that day, he received a call from Complainant, who reported that he had de-planed the flight due to excessive heat in the plane. Complainant intended to return to the boarding lounge to speak with the passengers, but Capt. Stawnychy told him not to, as customer service would take care of them. The Chief Pilot learned later from his co-Chief that a new crew was brought in, and that Complainant had been placed in non-flight status. Capt. Stawnychy supported that decision, as the San Juan incident was the third involving delays that were more than routine. He sent a letter advising Complainant of that decision, and instructing him to provide a written statement about the San Juan flight by August 28. He also left a message on Complainant's voice mail with that instruction. Capt. Stawnychy confirmed that the First Officer provided a written statement.

Complainant sent an email on August 23 asking for assistance in preparing the statement. Complainant also described the Glasgow event and asked for Stawnychy's input. Stawnychy responded by telling Complainant that he was working on a letter regarding that incident. However, he never sent it, and instead, combined a discussion of the Glasgow and San Juan incidents in the September 5, 2009 letter that the Chief Pilots drafted.

Capt. Stawnychy was aware that Complainant acted on the union's advice when he failed to provide a written statement. However, he believed that Complainant was responsible for that decision. He did not see how the instruction for a written statement created a conflict for the union, as the labor agreement does not cover that issue. He confirmed that the August 31 meeting focused on the written statement, and much of the discussion was between the chief pilots and the union representatives. He was taken off guard by the union's discussion regarding the statement. Capt. Stawnychy expected to discuss the San Juan flight at the August 31 meeting. He rejected the offer of the production of a statement on that date because he did not believe it would be productive. Stawnychy did not tell Complainant that he would not be subject to discipline for failing to provide a statement. He recalled advising that the meeting was to discuss Complainant's actions respecting the San Juan flight. The statement was provided in advance of the September 3, 2009 meeting, and the meeting commenced to discuss the incident. Capt. Stawnychy testified that he would not have taken some of the actions that Complainant took, but he did not want to second-guess his decisions. No discipline for Complainant's decision making process was taken, though Stawnychy discussed his insubordination with Capt. Corbusier. They decided to issue a letter of warning for Complainant's decision not to comply with a direct instruction from his Chief Pilots.

Capt. Stawnychy acknowledged that the warning letter referred to Complainant's operational decisions as well as insubordination, but he did not intend the warning to relate to anything but insubordination. Capt. Corbusier also contributed to the content of the letter. Capt. Stawnychy did not believe that there was a pattern of practice regarding asking pilots for

statements before an investigation meeting commenced. The Chief Pilot agreed that an individual could perceive that the letter meant to warn him about all of the conduct that was discussed, and not only insubordination. He testified that he “probably would have written two separate letters”. Tr. at 409.

Capt. Stawnychy testified that he would not want to be taken off flight status, even with pay. However, being removed from active status would not dissuade him from raising safety concerns. He did not believe the average pilot would be dissuaded from making safety complaints because there are so many ways for them to report concerns anonymously. Pilots who are grounded are advised to consult their union representatives. He stated that he would not perceive removal from flight status to be punishment over decision that he had made. The witness did not believe that Complainant’s grounded status negatively impacted Respondent, other than Complainant was paid for flights that he did not fly.

## B. ANALYSIS

### 1. Entitlement under the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century, 29 C.F.R. Part 179, 49 U.S.C. § 40101 et seq.

The AIR Act states that it is a violation for any air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee: 1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) to the air carrier or the Federal government information relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal Law; 2) filed, caused to be filed, or is about to file (with any knowledge of the employer) a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal Law; 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. 29 C.F.R. § 1979.102.

In order to establish a prima facie case under the AIR Act the complainant must be an employee who demonstrates that:

He or she engaged in a protected activity or conduct;  
[Respondent] knew, actually or constructively, that the employee engaged in the protected activity;  
The employee suffered an unfavorable personnel action; and  
The circumstances were sufficient to raise the inference that the protected activity was likely a contributing factor in the unfavorable action.

29 C.F.R. § 1979.104(b)(1). In regard to the interpretation of the “contributing factor” requirement, in Taylor v. Express One International, 2001-AIR-2 (Feb. 2002), the ARB has adopted the definition in Marano v. Department of Justice, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1):

The words “contributing factor”...mean any factor, which alone or in connection with the other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule the existing case law, which requires a whistleblower to prove that his protected activity was a “significant”, “motivating”, “substantial”, or “predominant” factor in a personnel action in order to overturn that action.

Taylor, slip op. at 35.

After a complainant establishes a prima facie case of discrimination, the respondent then must produce legitimate, non-discriminatory, reasons for its employment decision, thereby rebutting the inference of discrimination. The burden of proof then shifts to complainant to demonstrate by a preponderance of the evidence that respondent’s proffered reasons are “incredible and constitute a pretext for discrimination.” Taylor, slip op. at 37, quoting Overall v. Tennessee Valley Authority, Case No. 1997-ERA-53, at 13 (ARB Apr. 2001). If complainant establishes that an adverse action was taken because of protected activity, the burden shifts to the respondent to demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the complainant’s protected behavior or conduct. 29 C.F.R. §1979.104(c).

## 2. Protected Activity

A protected activity occurs when an 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 [the Act] 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 [the Act] or any other law of the United States..."

49 U.S.C. § 42121; see also, 29 C.F.R. §§ 1979.102.

“While they may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive or event.” Leach v. Basin 3Western, Inc., ALJ No. 02-STA-5, ARB No. 02-089, slip op. at 3 (ARB July 21, 2003), citing Clean Harbors Env'tl. Serv. v. Herman, 146 F.3d 12, 19-21 (1st Cir. 1998). Although it does not matter whether the allegation is ultimately substantiated, the complaint must be “grounded in conditions constituting reasonably perceived violations.” Minard v. Nerco Delamar Co., 92-SWD-1 (Sec'y Jan. 25,

1995), slip op. at 8. The alleged act must implicate safety definitively and specifically and must at least “touch on” the subject matter of the related statute. Nathaniel v Westinghouse Hanford Co., 91-SWD-2 (Sec’y Feb. 1, 1995), slip op. at 8-9; and, Dodd v. Polysar Latex, 88-SWD-4 (Sec’y Sept. 22, 1994). Additionally, the subjective belief of the complainant is not sufficient, and the standard involves an objective assessment of whether the allegation constitutes protected activity. Kesterson v. Y-12 Nuclear Weapons Plant, 95-CAA-12 (ARB Apr. 8, 1997).

In my Decision and Order issued on October 25, 2010, I found that Complainant’s continued complaints about the APU in the Glasgow incident were not objectively reasonable, and I found that he did not engage in protected activity. I found that Complainant’s reports about his aircraft’s air conditioning units on Flight 1071 on August 21, 2009 constituted protected activity. It is undisputed that Respondent was aware of Complainant’s reports regarding safety issues.

### 3. Adverse Action

In defining an adverse action in a case brought under AIR 21, the Administrative Review Board (ARB) has adopted the view of the Supreme Court in Burlington Northern & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (June 22, 2006), that a complainant must show that a reasonable employee would find the employer’s actions to be “materially adverse”, which it defined as actions that are “harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” Hirst v. Southeast Airlines, Inc., ARB Nos. 04-116, 04-160 (January 31, 2007).

#### *Warning Letter*

Complainant contended that the warning letter issued to Complainant constituted an adverse action in that it represented the basis for progressive discipline for future potential transgressions. I find little support for Complainant’s position. In the first instance, although other actions by Complainant were discussed in the warning letter, the plain language of the letter clearly advises that Complainant was being warned about insubordination. Since the uncontroverted testimony supports finding that progressive discipline can occur only in relation to another similar transgression by an employee, I find that it would be unreasonable for Complainant to fear that the warning letter would be used against him in the future. I find it unlikely that Complainant would again defy a direct order of one of his supervisors, considering the outcome of his refusal to meet their demands in this instance. I further find that it would be unreasonable for Complainant to rely solely upon the advice of a union representative, thereby rendering it unlikely that he would be in a similar situation in the future.

Even crediting Complainant’s fears that the letter could be used as the basis for future discipline action, I find little support for his subjective concerns that it could become the foundation of a discipline related termination. Complainant’s employment record with Respondent was unblemished, but for this event. In addition, Complainant’s fear that the warning letter may be shared with potential future employers or the FAA is not reasonable in these circumstances. I credit Respondent’s uncontradicted evidence that Respondent is not required by statute to share disciplinary records pertaining to a pilot’s behavior that is not related

to his operation of an airplane. In this instance, Complainant was warned about insubordination, which fails to implicate operational concerns. Complainant's concern and anxiety about the effect of the letter on third parties is not reasonable. I find that Complainant's worry about theoretical future adverse actions does not constitute an adverse action in the instant matter.

I also find that the evidence fails to establish that the warning letter would deter Complainant from making safety complaints. Although there are instances where the anonymity of a complainant may not be totally protected, it is clear from Complainant's own testimony that he has many methods with which to make a complaint. He can go to the FAA, or to the Union Safety Committee, or file a complaint under Respondent's ASAP program. I credit Mr. Hogg's testimony that Respondent's ASAP program guards the anonymity of a complainer in all but a few discreet instances. Moreover, Complainant has admitted that he has raised safety concerns after the warning letter was issued, thereby undermining his own argument.

The record clearly establishes that Complainant was verbally instructed by both Chief Pilots to provide a written statement that detailed all that occurred with respect to the San Juan flight. I credit Complainant's concerns about the scheduled investigation and the potential for discipline, considering that he had been removed from flight status. However, I find that those concerns do not establish that the issuance of the warning letter constitutes an adverse action.

#### *Non-Flight Status*

Although I can appreciate Complainant's distress about being placed in non-flight status and find credible his concerns about why that action was taken, I ultimately find that he suffered no adverse consequences as the result of that action. Complainant testified that he was worried about damage to his reputation among his peers, who had access to information that clearly showed that he had been grounded. However, no evidence was adduced to support that any pilot other than his supervisors and union representatives were aware of his status. He suffered no pay loss as the result of being grounded, nor did he lose his seniority status with respect to selecting flights. And, as I have noted, Complainant has continued to raise safety issues despite being placed in non-flight status in August, 2009. As the ARB has noted, not every action that makes an employee temporarily unhappy constitutes an adverse action. In these circumstances, one might conclude that Complainant's concern about the effect of his non-flight status on his reputation is incongruous with his stated commitment to safety, as he had met with supervisors to discuss his actions on several previous occasions where his flights experienced long delays. Melton v. Yellow Transportation, Inc., ARB No. 06-052 (ARB Sept. 30, 2008),

Complainant has testified that he has suffered no economic loss, and he does not seek compensatory damages as the result of Respondent's actions. I therefore find that Complainant has not established that he suffered an adverse action.

#### 4. Legitimate Business Reason

Even if Complainant had established that he suffered an adverse action, Respondent has articulated a legitimate business reason for taking Complainant out of flight status and issuing a warning letter. Respondent reasonably wanted to question Complainant regarding an incident

that resulted in a flight that was delayed for a maintenance issue that may have been easily resolved. Respondent had legitimate reason to question Complainant's actions, which ultimately led to the replacement of a crew.

Respondent also legitimately issued a warning letter for Complainant's insubordination. I credit the testimony of the co-Chief Pilots, who reasonably believed that Complainant's deliberate refusal to provide a written statement as instructed constituted insubordination.

#### 5. Pretext

I find that Respondent's stated reasons for grounding Complainant and issuing a warning letter to him were not pretext for discrimination. Although the warning letter refers to other actions involved within the context of Complainant raising safety issues, I find that the clear language of the letter links the warning with the insubordination for failing to prepare a statement. I credit Capt. Stawnychy's testimony that he would have preferred separating the issues of the warning from the issues discussed at the inquiries into Complainant's decisions regarding two flights. Moreover, I note that Complainant's actions are not insulated from scrutiny merely because they involved safety issues to some degree. Respondent's concerns about Complainant leaving the plane despite being told to call Capt. Stawnychy are not related to a safety action by Complainant. Respondent's concern that Complainant failed to stay at the plane until the issue he raised was addressed by maintenance also does not involve safety. In fact, one might conclude that by leaving the plane with the maintenance issue unresolved, Complainant demonstrated disregard for whether a repair might be made. Complainant has failed to establish that Respondent's stated reasons for grounding him and for issuing a warning letter are pretext for discriminating against him for engaging in protected activity.

### **III. CONCLUSION**

Complainant has established that he engaged in protected activity under the Act, but has failed to establish that he suffered adverse action as a consequence of his protected activity.

### **ORDER**

The relief sought by JOSEPH LoVECCHIO is DENIED, and the complaint filed herein is DISMISSED.

So ORDERED.

A

Janice K. Bullard  
Administrative Law Judge

Cherry Hill, New Jersey

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, 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). In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov. 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).