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Issue Date: 15 February 2012

Case No: 2011-AIR-7

In the Matter of:

VERNON JONES,
Complainant,

v.

UNITED AIRLINES, INC.,
Respondent,

Appearances:

Vernon Jones,
Pro Se

Tracy Billows, Esq.
Marc Jacobs, Esq.
For Respondent

Before: MICHAEL P. LESNIAK
Administrative Law Judge

DECISION AND ORDER DENYING RELIEF

This matter arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (hereinafter "AIR 21" or "the Act"), as implemented by 29 C.F.R. § 1979.100-114 (2003). This statutory provision, in part, prohibits 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).

FACTUAL BACKGROUND

Vernon Jones, a flight attendant for United Airlines, was discharged on October 29, 2010. Jones filed a complaint under AIR 21 on December 11, 2010, alleging retaliation for his protected activity. By a Findings and Order issued May 3, 2011, the Assistant Secretary of the Occupational Safety & Health Administration (OSHA) dismissed this complaint because Jones

failed to demonstrate that his protected activity was a contributing factor in his discharge.¹ Jones objected to OSHA's findings and requested a hearing before an Administrative Law Judge (ALJ). I held a trial in this matter in Chicago, Illinois from September 19-20, 2011, at which all parties presented evidence and argument. Complainant Jones was not represented by counsel. At the close of the trial, I set January 1, 2012 as the final date for the parties to file closing briefs. I have considered the parties' briefs in rendering my decision.

As the evidence below will explain fully, Respondent claims that it terminated Jones for "repeated violations of United's Articles of Conduct, leading up to his failure to update his [Flight Attendant Operations Manual (FAOM)] with the July 1, 2010 revision while on a Level 4 disciplinary warning." (Respondent's Closing Brief).² Jones has a history of disciplinary infractions over his tenure at United, receiving disciplinary suspensions of three, ten, and thirty days in 1999, 2006, and 2007, respectively, for violations of various provisions in United's Articles of Conduct. He also received a formal warning letter in 1995 for a continually unacceptable dependability record. In March of 2009, Jones received a Letter of Warning-Performance Level 4, after settlement of a dispute involving his misuse of a Japanese immigration permit. The Level 4 Warning was put into effect for a period of 24 months.

Jones admits to failing to insert the July 1, 2010 revision into his FAOM and that he flew on multiple occasions in July and August of 2010 without the correct revision, in violation of Federal Aviation Administration (FAA) regulations and United's policy. On August 17, 2010, Jones requested a loaner manual and a copy of the revision from a desk coordinator at Chicago's O'Hare airport, where he was participating in training. This request triggered a series of communications regarding his failure to have inserted the revision at the appropriate time, ultimately leading to the notification his supervisor in Narita, Tokyo, Ms. Kaneko.

On August 18-19, 2010, Jones travelled as a passenger on Flight 881 from O'Hare to Narita, during which an inebriated passenger directed profanities and racial epithets at Jones and other crew members, an event that led to an internal United investigation. At the end of this flight, Supervisor Kaneko, who had been informed of his failure to update his FAOM, obtained Jones' out-of-date FAOM from him. An August 23, 2010 audit confirmed that it did not contain the July 1 revision, and Jones does not contest the validity of that portion of the audit.

After a disciplinary hearing held on October 21, 2010, at which Jones was given the opportunity to speak, Jones' supervisor, Quentin Koch, terminated Jones' employment by decision dated October 29, 2010.

Jones alleges that, while he was on vacation, United purposefully withheld the July 1 revision from flight attendants in an effort to target them, a complaint that he made to the FAA

¹ As the OSHA report was not admitted into the record, I cannot consider the contents of Jones' complaint to OSHA, which is contained therein.

² The following abbreviations, which are also explained in the forthcoming text, frequently appear in this decision: FAOM = Flight Attendant Operations Manual, NRT or Narita = Narita, Tokyo airport, "NRTSW group" or GRP-NRTSW = the email group for all domestic staff based in Narita, FASRS = Flight Attendant Safety Reporting System, RET or R.E.T. = Recurrent Emergency Training, PIRC = Passenger Incident Review Committee, MCLP = Multiple Crew Landing Permit.

on or before September 15, 2010. He also states that he complained to the FAA on or before October 15, 2010 that Supervisor Kaneko had interfered “with the post-flight investigation of the alleged felony hate crime and air rage that occurred by confiscating [his] handbook right in the middle of the post-flight investigation, and also ordering [him] off the aircraft.” Because of the temporal proximity between his complaints and his termination, he argues that his termination was the result of retaliation and that he is thus protected under AIR21.

APPLICABLE LAW AND ISSUES FOR ADJUDICATION

AIR 21 protects employees who provide information (to their carrier employer or to the FAA) related to any alleged, objectively reasonable perceived violation of federal laws or standards “relating to air carrier safety.” *Fader v Transportation Security Administration*, 2004-AIR-27, 4 (ALJ June 17, 2004), citing *Taylor v. Express One International*, 2001-AIR-2, 26 (ALJ February 15, 2002). “[P]rotected complaints must be specific in relating to a given practice, condition, directive or event, which the complainant must reasonably, and objectively rather than merely subjectively, believe to be a violation related to air carrier safety.” *Fader*, 2004-AIR-27 at 4; see also *Peck v. Safe Air International*, ARB 02-28, 2001-AIR-3 (ARB January 30, 2004); *Parshley v. America West Airlines*, 2002-AIR-10 (ALJ August 5, 2002). Merely raising the mantra of “safety” — a term used, and expected to be used, by every flight crew member every day — is not “protected activity” under AIR 21. See *Stoneking v. Avbase Aviation*, 2002-AIR-7 at 11 (ALJ March 17, 2003) (“[t]he whistleblower statutes do not protect every incidental or superficial suggestion that somehow, in some way, may possibly implicate a safety concern.”); *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997).

The Act and its implementing regulations require that a whistleblower discrimination decision resolve specific issues. Claimant must first make a prima facie showing, by a preponderance of the evidence, that: 1) Respondent is an air carrier subject to AIR 21; 2) Complainant engaged in activities protected by AIR 21; 3) Respondent actually or constructively knew of, or suspected, such activity; 4) Complainant suffered an unfavorable personnel action; 5) Complainant's activity was a contributing factor in the unfavorable personnel action. 49 U.S.C. § 42121(b)(2)(B)(i), (iii) (2003); 29 C.F.R. § 1979.104(a-b), (2003); see also *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101–02 (10th Cir. 1999). Once Complainant has established the prima facie elements of his claim, the burden shifts to the Respondent to demonstrate by clear and convincing evidence that it would have taken the unfavorable personnel action irrespective of Complainant's having engaged in protected activity. *Id.* at 1102.

If I find that discrimination has indeed occurred, then I must decide what relief, if any, is appropriate. 29 C.F.R. §1979.109(b) (2003) states that appropriate relief may include: “[R]einstatement of the complainant to that person’s former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages.” *Id.* At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including attorneys’ and expert witness fees) reasonably incurred.

The parties stipulated at the hearing that they are both subject to the provisions of AIR 21 and that Jones was subject to an adverse employment action when he was terminated from his employment on October 29, 2010. (TR 5-7). The parties further stipulated the Complaint in this case was filed within 90 days of the adverse action and that it is timely. *Id.* at 7.

Issues

The above considered, I conclude that the issues before me for adjudication are:

1. Whether Complainant engaged in protected activity within the definition of the Act.
2. Whether Respondent actually or constructively knew of, or suspected, the protected activity.
3. Whether the protected activity was a contributing factor to the Respondent imposing the unfavorable personnel action on the Complainant.
4. Whether the Respondent has demonstrated, by clear and convincing evidence, that it would have taken the same unfavorable personnel action regardless of Complainant's having engaged in the protected activity.
5. Whether Complainant is entitled to relief and, if so, what relief is appropriate.

Testimony

Complainant's Case

Testimony of Vernon Jones

Jones was hired in May of 1995, and he filed a complaint with the Secretary of Labor on December 11, 2010 alleging that United had discriminated against him violation of AIR21. (TR 31-32).³ Jones testified that he had made a report to Suzy Midnight, a Denver-based FAA employee, around September 15, 2010. *Id.* at 35. The report stated that, while Jones was on vacation, United had intentionally failed to distribute revision number three of the work update manual, due to be inserted in the work manuals on July 1, 2010, which Jones alleged was a safety violation. *Id.* at 33-34. Ms. Midnight responded to his complaint by email dated October 7, 2010, which was admitted into the record as Complainant's Exhibit 1. *Id.* at 35-37.

Jones stated that he made a second complaint to Ms. Midnight on or about October 15, 2010, reporting that Supervisor Kaneko had "interfer[ed] with the post-flight investigation of the alleged felony hate crime and air rage that occurred [on Flight 881] by confiscating [his] handbook right in the middle of the post-flight investigation, and also ordering [him] off the

³ The following abbreviations will be used in this decision to refer to exhibits in evidence: TR = Transcript of the September 19-20, 2011 hearing, CX = Complainant's Exhibit, RX=Respondent's Exhibit, ALJ = Administrative Law Judge's Exhibit. I also refer to the prior deposition of Jones, taken on July 21, 2011.

aircraft.” *Id.* at 37-39.⁴ He also sent Ms. Midnight a packet explaining what happened on the flight, but did not receive a response from her. *Id.* at 42. Jones did not have a copy of this second complaint, but he did have a copy of a response from Al Westrom, the whistle blower protection program acting manager for the FAA, which was ultimately admitted as Complainant’s Exhibit 2. *Id.* at 39, 45; (CX-2).⁵ Jones averred that Mr. Westrom was clearly given misinformation because “he had been informed that [Jones] was not one of the witnesses involved on Flight 881.” *Id.* at 38. Although he was not sure of the exact date of his complaint, he was “a hundred percent sure it was before [he] was terminated.” *Id.* at 40.

Jones produced a third document, which was admitted as Complainant’s Exhibit 3, documenting that he had submitted a report on September 15, 2010 with the Flight Attendant Safety Reporting System (FASRS). *Id.* at 43-44, 57. When asked about the contents of his report, which were not contained in the exhibit, Jones responded that “during the discovery process I asked for a copy of the complaint that was filed, and [counsel for Respondent] told me that [it was] an untimely request.” *Id.* at 44. He did not otherwise testify as to the contents of his FASRS report. Jones agreed that he received a response email from Mr. Koch, who must have known about whatever complaint Jones made to FASRS, because he responded on September 16, 2010. *Id.* at 57.⁶

When asked if he was “already discriminated against by the time he received Mr. Westrom’s response, Jones stated “oh, yeah, because when you apply to the whistle blower protection program, you have to say [you were] fired or . . . harassed in some way.” *Id.* at 41-42. He further explained that he “complained to the whistle blower protection program *after* termination [but] before the termination, [he also] filed a complaint with the FAA, [as well as] a report with the flight attendant safety reporting system, which is also a cross functional report, to the FAA, the company and the flight attendants’ Union.” *Id.* at 42. He stated that although he never received a response about his second complaint, he could verify that he actually made it “by saying that [he] also reported it to the flight attendant safety reporting system, and that’s the cross functional report to the FAA, the company, the Union, and any other relative law enforcement, so . . . that kind of confirms that it was reported already.” *Id.* at 43.

Jones testified that he was fired by the base manager at Narita, Quentin Koch. *Id.* at 54-55. Jones didn’t know whether Mr. Koch knew about his communication with Ms. Midnight. *Id.* at 55. Jones testified “that it is standard operating procedure in Narita Tokyo that the work revision updates are placed in our mail files. And it was agreed that this particular insert was not placed in our mail file.” *Id.* at 55-56. He also had no information about whether Mr. Koch was aware of his second communication to Ms. Midnight, but “stress[ed] that he was aware of the safety reporting report of what happened with his subordinate in Narita when it came to interfering . . . with the post-flight investigation.” *Id.* at 56.

⁴ Later, Jones testified that he made the second complaint through FASRS, as well as to Ms. Midnight. (TR 42).

⁵ Although counsel referred to this as the “December 11” letter, it is dated December 7. (TR 41; CX-2).

⁶ During the hearing, Jones testified that he was alleging obstruction of justice, evidence tampering, witness intimidation and continued harassment. (TR 11). He also listed “Obstruction of Justice: 1) evidence tampering; 2) witness intimidation/harassment on his pre-hearing submission. However, Jones never established during the hearing that he had made a complaint to this effect to United or to the FAA.

Cross examination

When asked if he had notified anyone at United that he had filed a report with the FAA, Jones stated that “if a flight attendant files a flight attendant safety reporting system, it’s a cross functional report, and that the FAA does get a copy of it.” *Id.* at 60-61. For purposes of impeachment, opposing counsel read an excerpt from Complainant’s deposition. “Question: You said you filed the FAA charge before the end of your employment. Did you notify United that you had filed that charge? Answer: No.” *Id.* at 64, citing Jones’s prior deposition at 13:16-20.⁷ When asked again whether he knew if anyone at the FAA notified United of the charge or complaint, Jones responded “I am under the impression that the flight attendant safety reporting system is a cross functional report, which the FAA requires. And during discovery, I asked you the same question and had not received a response.” *Id.* at 64-65. He later stated that Ms. Midnight had not contacted him again after he sent information to her Denver office, and that he did not know whether the FAA notified United as “they did not advise me one way or another.” *Id.* at 65.

Jones agreed that he was trained on the flight attendant operations manual at United. *Id.* at 70. Jones believed that the Articles of Conduct were contained in his flight attendant operations manual. *Id.* at 66. He also agreed that the flight attendant operations manual governed his conduct as a flight attendant at United, and that a flight attendant is “absolutely” responsible for following its contents. *Id.* at 74. Jones “absolutely” agreed that “if management at United knows of a violation of [the] flight attendant operations manual, [that will] result in the discipline of the flight attendant.” *Id.* at 75. Jones concurred that United issues periodic updates of the FAOM, which the flight attendants are responsible for updating, as it is a violation of the FAA regulations for an attendant to be flying with an out-of-date FAOM. *Id.*

Jones admitted that he flew as a flight attendant for United in July and August of 2010 when his FAOM was out-of-date, and that he did not have a loaner FAOM at those times. *Id.* at 76. He understood that if the FAA audited an attendant’s handbook and found him to be flying without an up-to-date FAOM, this could result in a fine of “something like \$1000.” *Id.* at 76-77. He knew that flying without an up-to-date FAOM was grounds for discipline at United. *Id.* at 77. Jones stated that he was not aware of any United flight attendant who flew with an out-of-date manual who was not disciplined, but that since he was not a Union grievance officer, he would not have access to that knowledge. *Id.* at 68. Jones questioned opposing counsel’s statement that United terminated his employment for failure to insert update his FAOM, but agreed that, during deposition, he had affirmatively stated that he was terminated because he “failed to insert revision number three, dated July 1, 2010.” *Id.* at 68-69, citing Jones’ prior deposition at 37:15-17.

Opposing counsel directed Complainant’s attention to a letter of decision that Jones received in March 1999, which was ultimately admitted as Respondent’s Exhibit 2. *Id.* at 82, 88. Jones agreed that a letter of decision is a procedure that United uses to formally discipline a flight attendant. *Id.* at 82. He agreed that the letter charged him with a violation of the Articles

⁷ I have admitted Jones’ July 21, 2011 deposition for the purposes of confirming testimony cited for impeachment purposes. (TR 304-06).

of Conduct for deviating from his scheduled assignment without authorization. *Id.* at 88. He also agreed that he had been subject to a hearing and found guilty of that charge, and that the letter said that he had received a three day suspension. *Id.* at 88-89.⁸ Jones also agreed that he had received RX-3, a formal letter of warning, and RX-4, a letter of decision, in July 2005 and May 2006 respectively. *Id.* at 91-92. When opposing counsel asked whether Jones worked at least one flight in January 2006 in violation of United’s policy regarding flying with an up-to-date FAOM, which was one of the findings set forth in RX-4, he said he did not recall. *Id.* at 97-98. He conceded that, during deposition, he had said that he thought that was correct, but was not 100 percent sure. *Id.* at 98, citing Jones’ prior deposition at 99:18-24. Jones also agreed that he had received RX-5, another letter of decision, on or about December 18, 2007. *Id.* at 100. Jones stated that a 30 day suspension is not generally, but can be, the final step of discipline prior to discharge. *Id.* at 102.⁹

Jones admitted that he received a performance letter of warning – level four on March 29, 2009, a document entered into the record as RX-6. *Id.* at 102-104. During deposition, Jones stated that paragraphs two and three of RX-6 were factually correct. *Id.* at 107-109, citing Jones’ prior deposition testimony at 135:24 – 137:17. Jones agreed that, as had been explained to him by the Union, a level four performance level warning is the highest level of discharge prior to termination. *Id.* at 109. He did not know if level five was termination. *Id.* Jones and the Union filed a grievance regarding the performance level four warning, resulting in a meeting between him, Mr. Koch, and Ricardo Gonzalez, the local union president, regarding the grievance. *Id.* at 111. He participated in a settlement resulting in the level four warning, the results of which are outlined at RX-7. *Id.* at 111-12. Mr. Gonzalez thoroughly explained to him that the level four warning would be in effect for two years from March 29, 2009. *Id.* at 112. Immediately after the meeting, he met with Mr. Gonzalez to review the terms of the settlement. *Id.* at 113. “He explained it to me and I understood it, and he explained that any further violation could, I think he also used the word could, result in termination. But I’m not a hundred percent sure one way or another.” *Id.*

Opposing counsel brought Complainant’s attention to Respondent’s Exhibit 8, the introductory section to the flight attendant operations manual. *Id.* at 114. Jones disagreed that “there is nothing in the flight attendant operations manual that requires distribution of a revision to the [FOAM] to be placed in a flight attendant’s mailbox.” *Id.* at 115. He quoted language from the second chapter stating “the revisions or a notification of revisions will be placed in flight attendant’s mailbox.” *Id.* at 117-18.

Jones again agreed that flying with an out-of-date FAOM is a safety violation, and that passenger and crew safety are the first duties of a flight attendant. *Id.* at 128. He did not know of any United flight attendant who did not receive notice of the July 1, 2010 revisions to the FAOM. *Id.* He claimed that the “Narita management team [failed] to place the July 1, 2010

⁸ When asked if the contents of the letter were true, Complainant responded “I characterize it as being confusing for reasons stated, and additionally for the reason that there will be no financial penalty associated with this action and I would not be removed from the schedule and how a person could characterize that as being a three-day suspension who speaks the English language, I don’t understand it.” (TR 89-90). However, he agreed that, during deposition, he had stated that the contents of the letter appeared correct. *Id.* at 90.

⁹ Jones was a little more certain of this point during his prior deposition. (Jones’ prior deposition at 139:16-19).

revisions in the flight attendants' mail slots, as is standard operating procedure." *Id.* at 130. He was not confirming whether or not they were available at the coordinator's office. *Id.* He agreed that, during deposition, he had stated "The Narita staff failed to issue the revisions to the flight attendants based in Narita. By issue the revisions, what I mean is to provide them in our mail slots. They distributed the revisions, upon request, via the coordinator." *Id.* He testified that "there have been irregularities as to how often the updates have been issued" but concurred that "every July, as far as [he could recall] there would have been a revision issued." *Id.* at 131. Jones agreed that Anthony Wetterer, Secretary of Local Union 38, sent an email on June 22, 2010, while he was on vacation, reminding flight attendants based on Narita to update the FAOM with the July 1, 2010 revisions. *Id.* at 131-32.

Opposing counsel directed Jones' attention to RX-9. *Id.* at 135. He confirmed that it was a must read email from Mr. Koch to Narita personnel dated June 17, 2010, and that flight attendants are required to read must read emails from management. *Id.* He stated that the email was sent but could not confirm whether he had received it as he was on vacation from about June 14 to about July 1. *Id.* at 135-36. He believed that he was home in Bangkok at this time. *Id.* at 136. He confirmed that there was generally internet access where he was but "the problem is, if you're away from the office for too long, your password cancels, and you have to call to have it reset. And so, when I was on vacation, my password may or may not have expired, and I did not, and would not have called to have it reset." *Id.* at 136-37. When asked if he did or did not check his emails while in Bangkok, he replied "I would most likely say no to that. I'm not a hundred percent sure, but most likely I would not have." *Id.* at 137. When asked if there came a time that he actually saw RX-9, he first replied that "after 30 days, the emails drop off the system" and later stated that his "assumption would be [he] did not see it." *Id.* at 137-38. However, he admitted it would have been his responsibility to see it. *Id.* at 138.

Jones could not confirm that Internet Technology (IT) had determined that he had in fact received the email and opened it. *Id.* Jones' attention was also directed to the second email admitted as RX-10. *Id.* at 139. He confirmed that his email was part of the NRTSW group and that he "was sure" he would have received the email. *Id.* at 139-40. He noted that it was sent in a period during which he was on vacation. *Id.* at 140. Mr. Jones agreed that there is a Hotboard at the Narita domicile, which is located right when one enters the flight attendant area and which flight attendants are required to check before each flight. *Id.* at 140-41. He could not confirm that RX-11 was posted on the Hotboard. *Id.* at 141-42. He did agree that he was responsible for reviewing the bulletin board and updates at the domicile. *Id.* at 143. Jones noted that the board updates admitted as RX-12 did not instruct flight attendants to pick up revisions at the coordinator's desk. *Id.* at 144.

Jones testified that he flew twelve flights between July 1, 2010 and August 10, 2010 without an updated FAOM. *Id.* at 146. He confirmed that he had attended a RET training in Chicago on August 17, 2010. *Id.* When he arrived at O'Hare on that date, his FAOM was not up-to-date because he had not inserted the July 1 revision. *Id.* at 146-47. Prior to entering the training, he went to the O'Hare domicile coordinator's desk to obtain a loaner FAOM. *Id.* at 147-48. He was given the July 1 revision for his FAOM at the time he was given the loaner manual. *Id.* at 148. He also confirmed that he flew Flight 881, O'Hare – Narita, while not a member of the crew or working as a flight attendant. *Id.* at 163. Jones agreed that United investigated the

events on Flight 881, and that he provided a statement to the PIRC. *Id.* at 168. He understood that several other United employees also filed reports. *Id.* at 168-69.

Supervisor Kaneko boarded Flight 881 when it landed and spoke to Jones soon thereafter. *Id.* at 163-64. Jones stated that she then confiscated his manual. *Id.* at 165. Jones agreed that Ms. Kaneko took his FAOM because she had been informed that he was flying with an out-of-date manual. *Id.* at 163. However, he later explained that, “I was upset, I was kind of in shock, and I couldn’t really figure out what she was asking me for my manual for, because of what happened on the flight. We had been sitting on a jet bridge for some time, and I was a little bit confused as to what she was doing.” *Id.* at 165.

Jones identified RX-15 as the result of the August 23, 2010 audit of his FAOM, performed by Flight Attendant Coordinator Ogino. *Id.* at 172. He also agreed that his FAOM was out-of-date when it was audited, and that the audit was accurate. *Id.* at 172-73. He noted that there was no union sign off on the audit. *Id.* He was not present during the audit, nor was any Union official. *Id.* at 176. He agreed with the audit but the only part he checked was that the July 1 revision was not in it; he did not double check the 102 pages that were allegedly missing. *Id.*

Jones agreed that he attended a meeting with Ms. Kaneko, the United supervisor, and Tony Wetterer, the Union secretary, on August 23, 2010. *Id.* at 177. At the meeting, he was informed that his FAOM, with which he had been flying since July 1, 2010, was out-of-date, and he was shown a copy of the audit report. *Id.* at 177. He confirmed that he was instructed during the meeting to answer questions from Ms. Kaneko answering her questions, and that he was obliged to answer them truthfully. *Id.* at 177-78. His answers are contained in RX-6. Jones confirmed that his Letter of Charge Hearing ultimately took place on October 21, 2010. *Id.* at 186. Mr. Koch conducted the hearing, at which he was present, along with Ms. Kaneko, Michael Short and Maga Gibatoe, the union grievance chairs. *Id.* at 187-88. Ms. Kaneko presented the facts that Jones flew six round trip flights between July 1 and August 10 with an outdated manual, and Jones was given an opportunity to respond, although he said very little. *Id.* at 188. He received the Letter of Charge Conference Decision terminating his employment on or about October 29, 2010. *Id.* at 189.

Direct examination of Sandra Ingram

Ms. Ingram is a Manager in Flight Safety at United Airlines. *Id.* at 203. She is aware that these proceedings are derived from the Whistleblower Protection Act, although she is not very familiar with it. *Id.* at 204. She stated that United does have a Whistle Blower Protection Program, but that it is referred to by another name. *Id.* at 206. United also has an Ethics & Compliance Office. *Id.* at 210.

Cross examination of Sandra Ingram

Ms. Ingram testified that she was hired by United on January 7, 2008, and that her previous title was that of Manager On Board Safety and Security. *Id.* at 217. She became the Manager of In Flight Safety on or about June of 2011, although her duties remained primarily the

same. *Id.* As part of her duties, she has responsibilities related to the FAOM, which she described as “the document that United provides under the direction of the FAA to all flight attendants [that] houses their safety and security policies and procedures.” *Id.* at 218. Every flight attendant is required to have an up-to-date FAOM with him at all times while flying, as mandated by the FAA. *Id.* The Federal Aviation Regulations (FARs) mandate that United and other airlines provide all flight attendants with FAOMs, which must be kept up to date. *Id.* at 219. There is no regulation mandating how updates, revisions, or changes to the manual must be distributed to the airline employee. *Id.* FAA inspectors engage in spot inspections of FAOMs from time to time, and there is potentially a fine for working without an up-to-date manual. *Id.* Flying without an up-to-date FAOM is also grounds for discipline or discharge of a United flight attendant. *Id.* at 219-20.

Counsel directed Ms. Ingram’s attention to RX-8, which she identified as an excerpt from the FAOM. *Id.* Specifically, he pointed out the section, previously read by Jones, stating that “revisions, or any notification of a revision will be placed in a flight attendant’s mailbox, approximately two weeks prior to the effective date.” *Id.* Ms. Ingram testified that an employee’s electric mailbox, i.e. email, and their hardbox are considered the same, for purposes of this policy, and that she is responsible for the application and interpretation of the FAOM in her position. *Id.* at 221.

Ms. Ingram explained that United has a Passenger Incident Review Committee (PIRC), which is program used to investigate and respond incidents where customers engage in abusive or non-compliant conduct. *Id.* at 221. It is a way to “provide the employees with another level of protection against inappropriate behavior.” *Id.* at 222. She explained that the program is a collaborative across divisions, so in flight may participate, depending on the incident, or a complaint could be filled out by another employee, for example if a passenger engaged in misconduct at the gate. *Id.* Once the company is notified of an incident, it will establish an investigator, who will contact witnesses and compile the reports. *Id.*

Ms. Ingram was aware that a PIRC complaint was filed regarding an incident on Flight 881 on August 18-19, 2010. *Id.* at 223. The passenger involved was a regular and substantial customer of United, but he was banned from flying the airline after the PIRC review of his conduct. *Id.* The PIRC considered the submissions from Jones and other personnel on Flight 881 in determining its course of action. *Id.*

Respondent’s Case

Direct examination of Quentin Koch

Mr. Koch is currently a Director of Sales and Marketing at United Airlines, for which he began working in 1997, and he was previously the flight attendant domicile or base manager at the Narita Airport. *Id.* at 232-33. He held this position for approximately three years. *Id.* at 233. As the domicile manager of Narita, he oversaw the administrative and operation side for the base for the flight attendants reporting to Narita. *Id.* He was also responsible for flight attendant safety. *Id.* He explained that the domicile is where a flight attendant starts and ends his trip, his “home base.” *Id.* at 234. A flight attendant need not live in his or her domicile. *Id.*

Mr. Koch testified that, in 2010, when he was the Narita manager, Toshi Hioki and Mako Kaneko, flight attendant supervisors, reported to him. *Id.* at 235. Their job was to handle the HR side of the flight attendants and monitor daily operations. *Id.* They also supported flight attendants, of whom there were approximately 500 in Narita at that time. *Id.* at 235-36. Yasunobu Ogino was a coordinator at Narita. *Id.* at 236. Mr. Koch's office was located in the domicile office, which was in the Narita domicile base at the airport. *Id.* The desks of the flight attendant supervisors were also in this area. *Id.* at 237. The coordinator's desk, which was present when the flight attendants first entered the domicile, was staffed at all times. *Id.* at 236-37. Each flight attendant had a small mailbox for paper documents located in the domicile, as well as an electronic or email box, which he could access at all times by signing in with a file number and pass code. *Id.* at 237-38.

Mr. Koch stated that United considers electronic mailboxes to be the same or equivalent to the paper mailboxes for delivery of notice and other information. *Id.* at 238. He explained that he and other United supervisors sent periodic emails, some of which were entitled "must read," to flight attendants domiciled at Narita. *Id.* Attendants were expected to read "must read" emails before briefing. *Id.* Specifically, flight attendants are "actually paid five minutes before and that's the time that they have to read the must read emails before they go to briefly to make sure that they're prepared to safely fly that flight." *Id.* at 239. Flight attendants who fail to read these emails or comply with the instructions in them are subject to discipline. *Id.* Mr. Koch further explained that the Narita domicile has what's called a "Hotboard," a big red board immediately to the left when attendants walked in. *Id.* at 239-40. It contains information about the most up-to-date FAA revisions or requirements or any security concerns. *Id.* at 239. Flight attendants are required to read the Hotboard upon arriving at the domicile and to comply with its notices, and failure to do so would subject them to discipline. *Id.* at 240. Mr. Koch described the FAOM as "the rules and regulations to safely conduct business onboard the aircraft." *Id.* at 240. He entered the July 1, 2010 revision into his own FAOM prior to that date. *Id.* at 241. He agreed that flying without an up-to-day FAOM is grounds for discipline or discharge at United. *Id.*

Counsel directed Mr. Koch's attention to the Articles of Conduct, which were previously admitted as RX-1. *Id.* He agreed that they were the Articles contained in the FAOM, and that Article 21, "failure to comply with oral or written instructions from a member of company management or other person of authority" was one of the Articles that Jones violated that resulted in his termination. *Id.* at 241-42. Jones also violated Article 23, "any negligent or unsafe action which results in or has the potential of resulting in injury to the employee or other or damage to company property or the property of others," also resulted in his termination. *Id.* at 242. Specifically, flying without an updated FAOM is considered an unsafe action. *Id.*

Mr. Koch stated that Jones was a flight attendant when he was the Narita base manager and he was the person that terminated Jones' employment. *Id.* at 244. He terminated Jones' employment because "after reviewing his prior discipline, it seems like it was already on a last chance level four. And, in lieu of flying 12 flights with an outdated manual and violating the company policies 21, 23, and 30, it resulted in his termination." *Id.* He explained further that "we look at [a flight attendant's] past disciplinary record if [he] happen[s] to be on a level four at that time." *Id.* He confirmed that he considered Jones's prior disciplinary records, already

admitted into the record, in making his decision to terminate Jones' employment. *Id.* at 245. Counsel next directed his attention to RX-6, which he identified as a performance level of warning four. *Id.* Mr. Koch explained that an MCLP ("multiple crew landing permit") is the visa that allows non-residents of Japan, working as crew members, to enter and exit the country, and that the MCLP would have included Mr. Jones. *Id.* at 245-46. He confirmed that Jones' conduct, as set forth in RX-6, violated United policy and Japanese immigration law. *Id.* at 246.

Mr. Koch testified that performance warning level four is that last step in a performance track before termination, and that level five, the last step, is termination. *Id.* He stated that he was aware of no flight attendant under his management who was on a level four disciplinary warning and was not terminated after then engaging in misconduct. *Id.* at 247. Counsel directed Mr. Koch's attention to RX-7, and he confirmed that it was his signature at the bottom. *Id.* He explained that, because of articles 30 and 35, Jones could have been terminated at that time, but that they settled on a level four in an agreement with the Union. *Id.* at 248. He identified the other signatory of the document as Rick Gonzalez, the president of the FAA local for the Narita domicile. *Id.* Mr. Koch had to explain the situation to the Japanese immigration officials and to write an official apology on behalf of the company. *Id.* at 248-49. He also testified that the Japanese officials had threatened to take away the MCLPs for United's crew members and that, had they done so, United would have had to close the Narita domicile base. *Id.* He also testified that he had reviewed the terms of the settlement with Jones and Mr. Gonzalez, communicating that further discipline would lead to termination. *Id.* at 249-50.

Counsel drew Mr. Koch's attention to the exhibit marked RX-20 for identification. *Id.* at 251. Mr. Koch explained that it was an electronic correspondence between Mr. Koch and Mr. Ogino, the coordinator, when Mr. Koch was in Chicago. *Id.* Mr. Koch testified that Mr. Ogino was informing him that he received the revisions and needed him to send out a must read email to the Narita base to advise them to pick up the revision. *Id.* He further explained that Mr. Ogino could not send the email himself because he lacked the authority. *Id.* at 251-52. He also confirmed that RX-9 was the email he sent after Mr. Ogino notified him that the revisions were in place. *Id.* at 252. The email group GRP-NRTSW-domestic staff all included all flight attendants based at Narita, including Jones. *Id.* at 252-53.

Mr. Koch testified that flight attendants need to read "must read" emails before going to briefing, and that they must pass the coordinator's desk when coming into the Narita domicile. *Id.* at 253. He also explained that, as part of the investigation leading up to Jones' termination, United's IT security checked on the delivery of RX-9. *Id.* He testified that he was informed that the email was sent and received. *Id.* He further testified "we did test but it did come into Mr. Jones' account. And, we actually had the Union people check their accounts as well and it came into their accounts as well just to triple verify that it was received." *Id.* at 254. He also identified RX-10 as the second correspondence that he sent out for revision #3 and confirmed that this email was sent to groups that would include Jones. *Id.* at 255.¹⁰ Mr. Koch then identified RX-11 as a notice placed on the Hotboard showing the current revision and date. *Id.* He explained that normally such notices are posted about two weeks before, so it would have been around the middle of June. *Id.* Mr. Koch also identified RX-12 as weekly onboard updates from July 2, until August 13. *Id.* He explained that these updates are electronic communications used to

¹⁰ Mr. Koch erroneously referred to revision number 30. (TR 255).

communicate with flight attendants, which the attendants are required to read. *Id.* at 255-56. They are also posted on “sky net” and made available in hard copy at the coordinator’s desk. *Id.* at 255.

Counsel directed Mr. Koch’s attention to RX-8, specifically the second heading, “Revision” at 1.30.5. *Id.* at 256. Mr. Koch testified that United complied with this provision by posting a bulletin, posting a notice in the electronic mailbox, and posing the item on the Hotboard. *Id.* He further testified that Jones had failed to comply with the “Revision and Bulletin Insertion” section because he failed to put in his revision. *Id.* This failure was a violation of the Articles of Conduct. *Id.* at 257. To Mr. Koch’s knowledge, no other flight attendant or employee based in Narita complained of not having received the July 1 revision, or notice thereof. *Id.* He was not aware of any other Narita based flight attendants who did not update their manuals, but, had he been aware of any, “they would have been held accountable.” *Id.* at 258.

Mr. Koch testified that, if a person had been on a level two warning, minimum discipline for failure to insert an updated manual would probably be a level four, depending on mitigating circumstances. *Id.* at 259. The minimum would be one step up, but “most likely with something this egregious it’d be two steps up.” *Id.* He explained that “safety is our number one priority at United Airlines and anything violating safety is very egregious.” *Id.* When asked if there are other factors he would consider in deciding the level of discipline for this violation, he responded “maybe [if a flight attendant] never flew a flight and never endangered customers, then possibly it would have been a different circumstance, if they would have noticed it during briefing or before they got onto the aircraft.” *Id.* at 259-60.

Mr. Koch testified that he made the decision to terminate Jones’ employment and that there was an investigation that was conducted under his direction. *Id.* at 268. He identified RX-13 as an email from Latonya Jackson to Mako Kaneko, which he saw on or about August 17, 2010 after Ms. Kaneko forwarded it to him. *Id.* at 269. He believed that Jones was in Chicago at this time, attending a Recurrent Emergency Training (RET). *Id.* Upon receiving the email, he instructed Ms. Kaneko to contact her supervisor, Ms. Jackson, obtain more information, and follow up with Jones in Narita, a directive with which she complied. *Id.* He identified the exhibit marked RX-14 as the email that he received from Ms. Northcutt with follow-up information. *Id.* at 270.

Mr. Koch explained that there is a system for flight attendants to obtain loaner FOAMs. *Id.* at 273. At Narita, the flight attendant is required to check with the coordinator and sign the manual out. *Id.* There is a system that records whether a flight attendant requests a loaner. *Id.* Mr. Koch testified that Jones requested a loaner on or near August 17. *Id.* at 274. Jones returned from his training at O’Hare on August 19, 2010 on Flight 881. *Id.* Mr. Koch was aware that there was an incident on that flight, but stated that the investigation had been handled by the Chicago base. *Id.* at 274-75. Mr. Koch further testified that Ms. Kaneko had met the Flight 881 and communicated to Mr. Koch that she had obtained Jones’ manual at that time. *Id.* at 275. Counsel directed Mr. Koch’s attention to RX-15, which he identified as the audit form used when they audit manuals. *Id.* He identified the signature on the first page as that of Mr. Ogino, one of the

coordinators. *Id.* The audit found that manual to be out of compliance with FAA regulations, and he confirmed that Mr. Ogino's conclusion was correct "through [Jones'] self declaration." *Id.*

After the audit, Mr. Koch held a hearing conference regarding Jones. *Id.* at 277. He explained that the hearing date was delayed because Jones "made himself not available for two of the first scheduled hearings." *Id.* Present at the Letter of Charge conference, which occurred on October 21, 2010, were Mr. Koch, Vernon Jones, Michael Short, representing the grievance chair for LECAFA, and Meg Kabota, a chairperson with the Union. *Id.* at 278. Supervisor Kaneko presented the case for United. *Id.* Mr. Koch confirmed that Ms. Kaneko presented the emails admitted as RX-13 and RX-14. *Id.* Mr. Koch testified that Jones was given an opportunity to speak at the hearing, and that he had admitted to flying these flights with an outdated manual, agreed that he needed an updated manual in order to fly, and also admitted to getting a revision at the Chicago desk "and he could have had his manual updated before he got back to Tokyo." *Id.* at 280. Mr. Koch further testified that he decided to terminate Jones' employment "because he was clearly on a level four and his past discipline track record, with the severity of the safety violation . . . resulted in termination." *Id.* He then prepared and issued the letter of conference decision and discharge letter in the record as RX-19. *Id.* at 281. He testified that he did not take action against Mr. Jones for any discriminatory or retaliatory purpose, and he would have discharged Jones for flying with the outdated FAOM while on level four regardless of whether or not he had filed any complaints. *Id.*

Cross examination of Quentin Koch

Mr. Jones directed Mr. Koch's attention to CX-3, Jones' FASRS report. *Id.* at 283. Mr. Koch agreed that Jones had reported what he felt was a safety violation. *Id.*¹¹ Mr. Koch testified that "as the standard protocol, any time there's a safety violation, we instruct the flight attendants to fill this out as with their union representatives." *Id.* at 284. He further explained that a FASRS report goes to Ms. Ingram, manager onboard safety and procedures, who previously testified. *Id.* at 286. Mr. Koch recalled that Jones was trying to seek information as to how to sue the passenger on Flight 881, and that he had sent the response contained at CX-3. *Id.* at 288. He further explained that "suing the passenger was nothing related to safety [so] I did not rely on this form and just said come and see us. Because this form is to be used for safety related incidents." *Id.* at 289.

Jones then directed Mr. Koch's attention to a three page report by purser Niki Reppert, which is not in evidence. *Id.* at 289. With respect to the report, he asked Mr. Koch if he knew who deleted passenger records and why. *Id.* Koch responded that he didn't need to read the report to answer, as "anytime there is [a] flight incident via a crash, security concerns, or anything like that, it's United's internal policy to lock the security of all the passenger names on any flight for safety and security reasons [so people] can't access those names." *Id.* at 290. Mr. Koch testified that he knew nothing about anybody interfering with an investigation of the incident on Flight 881. *Id.*

¹¹ Mr. Koch erroneously referred to the date on this report as June 16, not September 16. (TR 283).

Mr. Koch testified that he had not seen CX-1 prior to the hearing, and that he didn't know anything about Jones filing a complaint with the FAA on or before October 7, 2010. *Id.* at 291. He stated that the statement alleging that United had deliberately failed to deliver the revised manual in an effort to target flight attendants was false. *Id.* at 292. He reiterated that, per FAA policy, disciplinary action is taken when a flight attendant flies with an outdated manual. *Id.* Contrary to Jones' assertion however, disciplinary action was not taken against any other flight attendants under his supervision in 2010, as all of their FAOMs were compliant. *Id.* at 292-93.

Exhibits

Complainant's Exhibits

CX-1 was identified for the record as an e-mail from Ms. Midnight to Jones, sent on Thursday, October 7, 2010. (TR 35-7). It references a complaint made by Jones to FAA Customer Service, and asks him to verify the statements that he reported, namely that 1) He is a United Airline Flight Attendant based in NRT; 2) The NRT base staff failed to deliver FOAM rev. #3/July 01 to NRT based Flight Attendants; 3) This was a deliberate omission in order to target Flight Attendants; 4) Disciplinary actions were taken against Flight Attendants because their FAOM was non-compliant. (CX-1).¹² Ms. Midnight posed several follow-up questions to Jones and stated that a written report with additional information would be appreciated. *Id.* CX-1 was admitted into the record at TR 37.

CX-2 was identified for the record as a response, dated December 7, 2010, from Al Westrom to Jones' second complaint. (TR 39-41). The letter acknowledges Jones' complaint to the FAA alleging violations of the Whistleblower Protection Program. (CX-2). The letter explains that Jones was not the primary witness in the incident [on Flight 881], as he had indicated, that the FAA fully investigated this incident, contrary to Jones' opinion that it had been "swept under the rug," and that, "in the unlikely event that United Airlines intentionally did not distribute a require change to [his] flight attendant manual, then that would more likely be a matter for criminal investigation, not for the FAA." *Id.* Therefore, Jones' submission did "not indicate that [he] made a safety submission that resulted in discrimination against him," and, as a result, his complaint was not accepted. *Id.* CX-2 was admitted into the record at TR 45.

CX-3 was identified for the record as a response from the Flight Attendant Safety Reporting System (FASRS) to Jones, referencing report number 17777 submitted by Jones on September 15, 2010 about Flight 881. (TR 43). The response email, dated 9/16/10 and submitted by Mr. Koch, states that the company, including the PIRC committee, reviewed the situation on Flight 881 and took action with the passenger. (CX-3). Jones was invited to see Mr. Koch or a supervisor if he wished to pursue personal action against the passenger. *Id.* CX-3 was admitted into the record at TR 57.

¹² During the hearing, Jones explained that "NRT" stands for "Narita, Tokyo", which is "the same kind of pairing" as "Chicago, O'Hare", and that "FAOM" stands for "flight attendant operations manual." (TR 36-37).

Respondent's Exhibits

RX-1 was identified for the record as United's Articles of Conduct. (TR 82). RX-1 was admitted into the record at TR 82.

RX-2 was identified for the record as a letter of decision sent to Jones in March of 1999. (TR 82). It outlines the charge that he violated Article 20 of the Articles of Conduct by deviating from his schedule without authorization, summarizes the hearing held in the matter, and sets forth the company's decision to impose a three day disciplinary suspension. (RX-2). The letter states that "There will be no financial penalty associated with this action and you will not be removed from schedule. However, you should not take this to mean that the action is any less serious than actual suspension from service." *Id.* Jones was informed that "continued failure to fulfill any and all job responsibilities could result in further disciplinary action, up to and including discharge." *Id.* RX-2 was admitted into the record at TR 89.

RX-3 was identified for the record as a formal letter of warning in United's discipline process, sent to Jones in or about July 2005. (TR 90-91). The letter states that Jones' dependability record remained unacceptable and stated that "continued failure to fulfill flight attendant responsibilities in any area will likely result in more severe disciplinary action." (RX-3). RX-3 was admitted into the record at TR 91.

RX-4 was identified for the record as a letter of decision received by Jones in May 2006, which sets forth Jones' violation of Articles 21, 30 and 31 of the Articles of Conduct. (TR 93; RX-4). Because he had already received a Letter of Warning and had violated multiple articles, he was given a 10-day suspension. (RX-4). The letter again states that "There will be no financial penalty associated with this action and you will not be removed from schedule. However, you should not take this to mean that the action is any less serious than actual suspension from service." *Id.* The letter informed Jones that he had reached a "precarious position in the disciplinary process" and that "it [was] entirely possible that [his] next violation of Company rules [would] result in [his] discharge." *Id.* RX-4 was admitted into the record at TR 93.

RX-5 was identified for the record as a letter of decision issued to Jones on or about December 18, 2007, which issued him a 30-day suspension for violating the Articles of Conduct. (TR 100). Again, the letter states "There will be no financial penalty associated with this action and you will not be removed from schedule. However, you should not take this to mean that the action is any less serious than actual suspension from service." (RX-5). Jones was again informed that he had reached a "precarious position in the disciplinary process" and that "it [was] entirely possible that [his] next violation of Company rules could result in [his] discharge." *Id.* Later, the letter states "continued failure to fulfill job responsibilities in this or any other area likely will result in discharge." *Id.* RX-5 was admitted into the record at TR 102.

RX-6 was identified for the record as a performance letter of warning level four, issued to Jones on March 29, 2009. (TR 102). The letter, which outlines Jones' misuse of the MCLP in

violation of Japanese immigration law, among other issues, also states that no personal penalty was implied against Jones. (RX-6; TR 107). RX-6 was admitted into the record at TR 104.

RX-7 was identified for the record as a settlement arising from a grievance that Jones and/or his Union filed in response to **RX-6**. (TR 111). The settlement indicated that Jones' warning level four would be in effect for two years from March 29, 2009. *Id.* at 112. RX-7 was admitted into the record at TR 112.

RX-8 was identified for the record as the introductory section of the flight attendant operations manual. (TR 114). Section 1.30.5 contains a subsection entitled "Revision and Bulletin Distribution." (RX-8). Under this heading, it states, in relevant part, that:

- Revisions (or notification of a revision) will be placed in flight attendant mailboxes approximately two weeks prior to the effective date to allow time for review, insertion, and recording.
- A Hotboard posting will advise flight attendants when a new revision or bulletin has been issued.

Section 1.30.5 also contains a subsection entitled "Revision and Bulletin Insertion", which states, in relevant part:

- Regardless of personal schedules, a flight attendant is required to review and update their FAOM with a revision or bulletin on or before its effective date. Flight attendants who return to work from extended days off, sick leave, a Leave of Absence (LOA), vacation, etc., must insert all revisions and bulletins that have reached their effective date before attending briefing.

RX-8 was admitted into the record at TR 120.

RX-9 was identified for the record as a must read email from Mr. Koch to Narita personnel dated June 17, 2010. (TR 135). The email is addressed to: grp-NRTSW-all and the subject line reads: "Must Read – FAOM REVISION #3". (RX-9). The body of the email states that the revision, effective July 1, 2010, was available at the coordinators' desk. *Id.* RX-9 was admitted into the record at TR 138.

RX-10 was identified for the record as a second email to grp-NRTSW-all, also informing recipients of the July 1 update and revision to the FAOM. (TR 39; RX-10). RX-10 was admitted into the record at TR 140.

RX-11 was identified for the record as a notice of the July 1 revision of the FAOM, which was posted on the Hotboard. (TR 142, 255). RX-11 was admitted into the record at TR 142.

RX-12, a group exhibit, was identified for the record as a series of board updates, a weekly document given to United flight attendants, for the period July 1 through August 13. (TR

143). I generally admitted this document to show what board updates are and that they come out weekly, not necessarily for the content of each document. *Id.* at 145. I also admit the text in the lower left corner of each page, which reads “Is your FAOM current?” and lists “Latest Revision #3 July 1, 2010.” *Id.* at 145-46. RX-12 was admitted into the record at TR 145, subject to the caveats previously addressed.

RX-13 is an email dated August 17, 2010 from Latonya Jackson to Masako Kaneko. (RX-13). It states that Jones had requested a Loaner Manual for RET on August 17, 2010 and that he “stated to coordinator, Elizabeth Northcutt, he’d not placed the July revision in his [manual].” *Id.*¹³ During the hearing, Mr. Koch testified that Ms. Kaneko forwarded him the email. (TR 269). RX-13 was admitted into the record at TR 163.

RX-14 is an email from Ms. Northcutt, discussing Jones’ actions prior to entering his training.¹⁴ During the hearing, Jones objected to the contents of RX-14, which he stated were incorrect. (TR 159-160). However, I admitted RX-14 based on the testimony of Mr. Koch, who laid a foundation that he was one of its recipients. (TR 270). RX-14 was admitted into the record at TR 271.

RX-15 was identified for the record as the result of the August 23, 2010 audit of Jones’ FAOM by Mr. Ogino, a Flight Attendant Coordinator at the Narita domicile. (TR 172). Jones confirmed that his FAOM was not up-to-date with the July 1, 2010 revision when it was audited. *Id.*¹⁵ RX-15 was admitted into the record at TR 174.

¹³ Jones objected to admittance of RX-13 because he was never introduced to Ms. Jackson or Ms. Northcutt and could not identify them as the people with whom he spoke. (TR 153-54). However, Jones stated during deposition that their recollection appeared to be correct. *Id.* at 156, citing Jones’ prior deposition at 83:3-4. Also, it is not necessary for Respondent to establish the identities of these people or to introduce evidence addressing how Ms. Kaneko learned that Jones’ manual was out-of-date, as Jones has admitted that it was.

¹⁴ In full, the email reads: “Jones came to the coordinators desk around 7:45am on August 17 and requested a loaner manual. I asked him why he needed the manual and where he was based, and he was hesitant to answer my questions. After a few times of asking he finally said he was missing pages. I then asked him where his manual was, I would help him with the missing pages. He did not give me his manual and said he wanted to take a loaner manual. Then I asked him if he was on any kind of leave, and he did not answer so I asked him if he was flying this month. Then all of a sudden he asked for the number 3 revision for the month of July. I checked his training record and it had said he had completed his training so I gave him the loaner manual and Annella gave him the revision number 3. After he left, I pulled up his TSO report for this lines of flying for the month of July. I printed out his lines of flying for August from Unimatic, and I proceeded to check the Skynet FAOM Tracking System if he had loaner manuals for those flying months, and I did not find any record for loaner manuals so I reported to Supervisor LaTonya Jackson.” Jones testified that the email is misleading because he did not request the revision “all of a sudden.” (TR 160). In his own words, he was “standing at the coordinator’s desk, another flight attendant came up, asked for a revision, and then I asked if I could have one as well. So, it’s misleading that all of a sudden, suddenly, I’m asking for a revision, when it was clear that I was asking for a loaner manual. So, it’s just misleading, and I think it’s intentionally misleading.” *Id.* He also said that he could not confirm or deny what Ms. Northcutt did after he left the desk. *Id.* However, it does not matter under what circumstances Jones received the revision, only that he didn’t have one prior to August 17, more than six weeks after the July 1 deadline.

¹⁵ During the hearing, Respondent explained the procedure for checking off compliant and non-compliant sections of the FAOM. I have disregarded these details, as, for the purposes of the case before me, Respondent need only establish that Jones’ July 1 revision was missing, a fact to which he has admitted.

RX-16 was identified for the record as a handwritten report given by Jones to Ms. Kaneko answering questions about his FAOM. (TR 178). RX-16 was admitted into the record, in limited part, at TR 182. Specifically, I admitted only questions 6, 8, and 9 and the answers to them. *Id.* at 181. The questions and answers are as follows:

- Question 6: Did I insert the July Rev? Answer: A ridiculous question in light of the audit report - showing it was not inserted.
- Question 8: Did I fly Jul/Aug w/o July Rev? Answer: Yes.
- Question 9: Is there a reason I failed to insert July Rev? Answer: Oversight. Explain? A) I was on vacation in June; B) I was preparing for R.E.T. in July; & C) The updates were NOT placed in our mail files – S.O.P. [standard operating procedure]. (RX-16).

RX-17 was identified for the record as an R10-10 Letter of Charge, issued by United on September 13, 2010, regarding Jones' flying without an updated FAOM in July and August 2010. (TR 183). The letter states that Jones' prior record will be subject to review at the conference. (RX-17). RX-17 was admitted into the record at TR 185.

RX-18 was identified for the record as an amended Performance Letter of Charge issued to Jones on October 20, 2010 and hand delivered to him, changing the date of his hearing after Jones informed United that he was unavailable on two previously scheduled dates. (TR 185-87). RX-18 was admitted into the record at TR 187.

RX-19 was identified for the record as the Letter of Charge Conference Decision, issued by Mr. Koch, terminating his employment with United, which he received on or about October 29, 2010. (TR 189). RX-19 was admitted into the record at TR 190.

RX-20 was identified for the record as an electronic correspondence between Mr. Koch and Mr. Ogino. (TR 251). Mr. Koch testified that Mr. Ogino was informing him that he received the revisions and needed him to send out a must read email to the Narita base to advise them to pick up the revision. *Id.* He further explained that Mr. Ogino could not send the email himself because he lacked the authority. *Id.* at 251-52. The email is dated June 17, 2010. (RX-20). RX-20 was admitted into the record at TR 252.

ALJ's Exhibits

ALJ-1 was identified as a statement by a person who at the time [of the incident on Flight 881] was an employee of United. (TR 301). Counsel for Respondent stated his understanding that it was submitted by the purser as part of the investigation. *Id.* **ALJ-1** sets forth the details of the incident on Flight 881, during with an inebriated passenger used profanities and racial epithets, at least one of which was directed at Jones. (ALJ-1). ALJ-1 was admitted into the record at TR 301.

Findings of Fact and Conclusions of Law¹⁶

The above considered, I make the following Findings of Fact and Conclusions of Law:

1. I find that Jones was disciplined numerous times for violating United's Articles of Conduct. I base this finding on the disciplinary record introduced by Respondent, containing a series of letters that Jones testified as to having received:¹⁷
 - a. March 1999: Jones received a three day disciplinary suspension for deviating from his schedule without authorization. (RX-2).
 - b. July 2005: Jones received a formal letter of warning for a continually unacceptable dependability record. (RX-3). He was cautioned in writing that "continued failure to fulfill flight attendant responsibilities in any area will likely result in more severe disciplinary action." *Id.*
 - c. May 2006: Jones received a ten day disciplinary suspension for multiple violations of the Articles of Conduct. (RX-4). The ten day suspension was given because he had already received a Letter of Warning and had violated multiple articles. *Id.* Jones was also informed that he had reached a "precarious position in the disciplinary process" and that "it [was] entirely possible that [his] next violation of Company rules [would] result in [his] discharge." *Id.*
 - d. December 2007: Jones received a thirty day suspension for violating multiple provisions of the Articles of Conduct. (RX-5). Jones was again informed that he had reached a "precarious position in the disciplinary process" and that "it [was] entirely possible that [his] next violation of Company rules could result in [his] discharge." *Id.* He was also told that "continued failure to fulfill job responsibilities in this or any other area likely will result in discharge." *Id.*
 - e. March 2009: After settlement, Jones received a level 4 warning, in effect for 24 months. (RX-6; RX-7). He was on notice that any further infractions during this time period could lead to termination. (TR 112-13).
2. Despite his being on vacation from approximately June 15 – July 1, 2010, I find that Jones was responsible for receiving notification of the July 1, 2010 deadline and for updating his FAOM accordingly. I base this finding on the following:

¹⁶ In general, I note that, because Complainant is *pro se* in this case, I must "construe [his] papers . . . 'liberally in deference to [his] lack of training in the law' and with a degree of adjudicative latitude," while nevertheless remaining impartial. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, Slip Op. at 19 (ARB Jan. 30, 2004)(citing *Young v. Schlumberger Oil Field Serv.*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-10 (ARB Feb. 28, 2003)).

¹⁷ I note that, even where Jones testified that he could not recall the facts leading up to his being disciplined, he did not dispute that he received the letters and the disciplinary warnings contained therein. *See generally* TR 82-113.

a. Section 1.30.05 of the FAOM states:

- Regardless of personal schedules, a flight attendant is required to review and update their FAOM with a revision or bulletin on or before its effective date. Flight attendants who return to work from extended days off, sick leave, a Leave of Absence (LOA), vacation, etc., must insert all revisions and bulletins that have reached their effective date before attending briefing. (RX-8).

b. While on vacation, two “must read” emails were sent to Jones’ work-based email account stating that the July 1, 2010 revisions were available for pick up at the coordinator’s desk. (RX-9; RX-10). Jones admitted that he was responsible for seeing the first and that he “was sure” he would have seen the second. (TR 138-40). Jones also testified that he was responsible for reviewing the bulletin board at the domicile, as well as the board updates, both of which contained reminders about the upcoming deadline. (TR 143; RX-11; RX-12).

- i. Therefore, Jones knew or should have known that there was a July 1 revision that he was obliged to insert into his FAOM upon his return from vacation (and before he attended his first briefing).

3. I find that United complied with the provisions of Section 1.30.05 of the FAOM and properly notified Jones of the July 1 revision. I base this finding on the following:

a. Section 1.30.05 of the FAOM states:

- Revisions (or notification of a revision) will be placed in flight attendant mailboxes approximately two weeks prior to the effective date to allow time for review, insertion, and recording.
- A Hotboard posting will advise flight attendants when a new revision or bulletin has been issued. (RX-8).

b. Koch and Ingram testified that United considers electronic boxes to the same as physical boxes for purpose of the FAOM, and this testimony was not contradicted. (TR 222, 238).¹⁸ Additionally, Jones was unable to refute Koch’s otherwise credible testimony that RX-11, a notice advising attendants of the new revision, was posted on the Hotboard. (TR 141-42, 255).

- i. Therefore, United complied with the above-quoted requirements by placing notifications of the revision in Jones’ e-mailbox on June 17 and 18, 2010, approximately two weeks prior to the July 1 deadline, and by posting notice of

¹⁸ Given this testimony, I find that United had no obligation to put a hard copy of the July 1 revision in Jones’ physical mailbox, whether or not doing so was “standard operating procedure,” as Jones have argued. (TR 55-56; Complainant’s closing brief).

the revision on the Hotboard “around the middle of June.” (RX-9; RX-10; RX 11; TR 255).

4. I find Jones’ contention that United purposefully withheld the revision in order to target flight attendants to be unsubstantiated.¹⁹
 - a. I base this finding on the fact that Jones failed to present any evidence supporting his allegation. Furthermore, United widely disseminated notification of the new revision, informing flight attendants by email, through onboard updates, on by posting on the Hotboard. (TR 256; RX-9; RX-10; RX-11; RX-12).
 - i. Additionally, neither Jones nor Koch could identify another Narita-based flight attendant who did not obtain the updated manual in a timely fashion, or who was disciplined for failure to do so, and there is no contrary evidence in the record. (TR 68, 258).
5. I find that, by his own admission, Jones did not insert the July 1 revision into his FAOM by the deadline, and that he flew multiple flights in July and August 2010 without the updated FAOM. (RX-16; TR 146).
6. The evidence is uncontroverted that Jones attended R.E.T. training at Chicago’s O’Hare airport on August 17, 2010. (TR 146; RX-13).
 - a. I find that, prior to entering the training, he asked someone at the coordinator’s desk for a loaner manual. (TR 147-48). He also obtained a July 1, 2010 revision at some point during that interaction. *Id.* at 148. I base these findings on Jones’ own testimony.²⁰
 - b. I also find that, as a result of Jones’ request, Supervisor Kaneko eventually became aware that he had not previously inserted the July 1 revision. I base this finding on Mr. Koch’s testimony that Ms. Kaneko followed up with Jones in Narita, as corroborated by Jones’ testimony agreeing that Ms. Kaneko “had been notified that [he was] flying with an out-of-date manual.” (TR 163, 269).
7. The evidence is undisputed that Jones travelled as a passenger on Flight 881 from Chicago, O’Hare to Narita, Tokyo, during which flight a serious incident involving an inebriated passenger occurred. (TR 163; ALJ-1). This passenger used profanities and racial slurs, at least one of which directed toward Jones. (ALJ-1).

¹⁹ I note that Complainant need not establish that his complaint was substantiated in order to prevail under AIR21, only that he objectively believed there to be a violation of air carrier safety. *Fader v. Transportation Security Administration*, 2004-AIR-27 (ALJ June 17, 2004). I have nevertheless addressed the merits of his contention for the purposes of completeness.

²⁰ I so finding, I also recognize Jones’ objections to the contents of RX-13 and RX-14. However, even though he contested the version of events contained therein, he nevertheless testified to the essential facts stated above.

8. Regardless of how the interaction is characterized, Jones agreed that Supervisor Kaneko met Flight 881 and ultimately obtained his FAOM from him. (TR 165). The evidence is also undisputed that the August 23 audit revealed that his FAOM was not up-to-date and was missing the required July 1, 2010 revision. *Id.* at 172-73.²¹
9. I find that Jones made a complaint to FAA customer service prior to October 7, 2010, stating that United had failed to deliver the FAOM revision in a deliberate effort to target flight attendants, and that they had been disciplined as a result.²²
 - a. I base this finding on the contents of CX-1, the response email from Ms. Midnight, which summarized the contents of the complaint:
 - i. 1) The NRT base staff failed to deliver FOAM rev. #3/July 01 to NRT based Flight Attendants; 2) This was a deliberate omission in order to target Flight Attendants; 3) Disciplinary actions were taken against Flight Attendants because their FAOM was non-compliant. (TR 35; CX-1).
10. I find that, sometime prior to December 7, 2010, Jones made a second complaint to the FAA, stating, at least in part that 1) he was a primary witness to the incident occurring on Flight 881; 2) that the FAA had not fully investigated the incident, but rather had “swept it under the rug.” (CX-2).
 - a. I base this finding on the contents of CX-2, the FAA response dated December 7, 2010, which stated that Jones was not a primary witness on Flight 881 and that the investigation had not been “swept under the rug.” *See* the summary of CX-2, *supra*.²³

²¹ In his closing brief, Jones says that it is a violation of company policy to confiscate and audit a manual without union representation. (Complainant’s Closing brief). Even if this is true, it is not relevant to the elements of his AIR21 complaint. Furthermore, Jones testified during the deposition that he did have Union representation during the process. (TR 169, citing Jones’ prior deposition testimony at 148:10-21).

²² Jones testified that he made this report on or around September 15, 2010. (TR 35). I find this testimony to be somewhat credible considering that Jones also made his FASRS report on that day. (CX-3). However, as Jones’ overall testimony regarding the dates and contents of his various complaints was neither clear nor comprehensive, I decline to make a specific finding as to the date of this complaint. Instead, I find only that it was filed prior to October 7, 2010, the date of the response email.

²³ Because Jones did not produce this second complaint, it is not possible for me to definitively determine its contents in their entirety. Mr. Westrom’s December 7 response referred to Jones’ allegation regarding the manuals, as well as to his complaint regarding the Flight 881 investigation, but it is not clear whether Jones addressed the issue about the manuals in his second complaint as well, or if Mr. Westrom had also received Jones’ first complaint, considering that Jones testified that he sent *both* complaints to Ms. Midnight. I am also unable to definitively determine the date of Jones’ second complaint. Jones initially testified that he made this complaint on or around October 15 and definitely before his October 29 termination; however, he later testified that he “complained to the whistle blower protection program [from which he received the December 7, 2010 response] *after* termination, [but] before the termination, [he also] filed a complaint with the FAA, [as well as] a report with the flight attendant safety reporting system, which is also a cross functional report, to the FAA, the company and the flight attendants’ Union.” (TR 37- 42). When asked for proof that he made the second complaint, he simply explained that FASRS is cross-functional, and that he had filed his FASRS report on September 16, 2010, well before his termination. *Id.* at 43. However, this response was non-responsive, as the FASRS report apparently only addressed a potential suit against the passenger. *Id.* at 288.

11. I find that Jones made a query through the Flight Attendant Safety Reporting System (FASRS) on September 15, 2010. (CX-3).

- a. I base this finding on the contents of CX-3, the response email dated September 16, 2010, in which Koch informed Jones that the incident on Flight 881 had been investigated and that he should see his supervisor about pursuing a personal claim against the passenger. *Id.*

12. Considering the facts on the whole, I do not find that Complainant engaged in protected activity within the meaning of AIR21.

- a. “AIR21 protects employees providing information related to any alleged, objectively reasonable perceived violation of federal laws or standards touching on or ‘relating to air carrier safety,’ regardless of whether the allegation is ultimately substantiated.” *Fader v. Transportation Security Administration*, 2004-AIR-27, at Slip. Op. 4 (ALJ June 17, 2004) (citing *Taylor v. Express One Int’l, Inc.*, 2001-AIR-2, 26 (Feb. 15, 2002)).
- b. “Protected activity under AIR21 has three components: (1) a report or action involving a purported violation of a federal law or FAA regulation, standard, or order relating to air carrier safety, and at least touching on air carrier safety; (2) the complainant’s objectively reasonable belief about the occurrence of the purported violation; and (3) the complainant communication of his safety concern either to his employer or to the Federal Government.” *Id.* (citing 49 U.S.C. §4212(a)(1)).
- c. “To constitute protected activity under AIR21, a complainant’s complaints must relate to a regulation or order, must be specific, and must be reasonably believed by the complainant.” *Simpson v. United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008).
 - i. I find that Jones has not met his burden in establishing that his complaints to the FAA or FASRS related to an objectively reasonable perceived violation of federal laws or standards. I base this finding on the following:
 1. Jones’ closing argument that withholding the manual is a violation of FAA safety regulations is undercut by the text of Section 1.30.05, which sets forth no requirement that the airline place a hard copy of the manual in attendants’ physical mail slots.²⁴

²⁴ Also, even if Jones had established that United’s Standard Operating Procedure requires the company to provide attendants with a hard copy of the manual, a failure to do so would not necessarily be a violation of a *federal* law or standards.

2. Jones has not identified any specific federal law or standard that he believes United violated in its handling of the Flight 881 investigation.
3. Although I cannot confirm Koch's testimony that the September 15 FASRS report addressed a potential personal lawsuit against the passenger on Flight 881, not a safety issue, Jones offered no evidence substantiating that he had reported safety concerns through FASRS. (TR 288).²⁵ Therefore, I do not find that the FASRS report implicated a safety concern, even if it was cross-reported to the company or to the FAA.

13. Assuming, *arguendo*, that Complainant did engage in a protected activity, I find no evidence that Respondent actually or constructively knew of, or suspected, the complaints.²⁶

- a. I base this conclusion on Koch's credible testimony that he had never seen CX-1, the response from Ms. Midnight regarding Jones' first FAA complaint, and that he did not know about a complaint filed by Jones to the FAA prior to October 7, 2010. (TR 291).
 - i. Additionally, I find that, contrary to Jones' position, Koch's September 16 response to the FASRS query does not show that United had personal knowledge of the other complaints that he had filed, even if the FAA and/or the company were notified of this report.²⁷

14. The evidence is undisputed that, after an investigation and hearing, Koch terminated Jones' employment by letter dated October 29, 2010. (RX-19). This is an adverse employment action within the meaning of AIR21.²⁸

²⁵ As previously stated, I can only establish that Jones' second FAA complaint stated that he was a primary witness on Flight 881, and that the investigation had been "swept under the rug." (CX-2). These allegations do not implicate a *specific* regulation or order. See *Simpson, supra*.

²⁶ In his closing brief, Jones noted Ethics & Compliance Report No: UA10-09-0049 as proof that United knew of his complaints. However, he never introduced this report into evidence or discussed it during the hearing. Additionally, as previously addressed, the record does not clearly establish that Jones filed the second complaint prior to his termination. Jones testified that he made this complaint on or about October 15, 2010, and stated that he was certain that he did so prior to his termination. (TR 37-39). However, he later made a contradictory statement, testifying that he "complained to the whistle blower protection program *after* termination [but] before the termination, [he also] filed a complaint with the FAA, [as well as] a report with the flight attendant safety reporting system, which is also a cross functional report, to the FAA, the company and the flight attendants' Union." (TR 42). As the only document in evidence is a response dated December 7, 2010, the complaint *could* have been made between October 29 and December 7, 2010. (CX-2).

²⁷ As previously explained, Jones testified that he also made the second complaint through FASRS, but this assertion was not substantiated. (TR 42).

²⁸ In his closing argument, Jones addressed other adverse actions that he believed Employer to have taken: "In fact, Respondent [has] continued with unfavorable personnel actions; cover-up of Felony Hate Crime. By refusing to provide documents, witness[es], and answer interrogatories – during Discovery. . . . Respondent willingly and knowingly provided false and misleading information to ALJ Michael P. Lesniak (during the hearing)." He then

15. Even assuming, *arguendo*, that Respondent knew about Complainant's protected activity, if there was one, I do not find that it was a contributing factor to the Respondent imposing the unfavorable personnel action on the Complainant.

- a. Contrary to Jones' position, an inference of causation based on temporal proximity is not necessarily dispositive.²⁹
 - i. "While a temporal connection between protected activity and an adverse action may support an inference of retaliation, the inference is not necessarily dispositive." *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, ALJ No. 2004-AIR-12 (ARB Dec. 31, 2007) (citing *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005)).
 - ii. "For example, if an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action." *Id.* (citing *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-019, slip op. at 6-7 (ARB Apr. 28, 2006)).
- b. I find that United has established a legitimate reason for terminating Jones' employment, namely his violation of the Articles of Conduct while on a level four warning.
 - i. Jones has set forth no other evidence of causation beyond temporal proximity.

alleged numerous other unfavorable personnel actions, including obstruction of justice with respect to the Flight 881 investigation, interfering with Complainant's treatment/consultation of Post Traumatic Stress, refusal to provide terminated employee with transportation to his country of citizenship, in "malicious violation of international [and Japanese] law," and willfully and knowingly violating the Federal False Claims Act. As these claims are completely unsubstantiated, they cannot be considered in adjudication of this claim.

²⁹ In his pre-hearing summary, Jones cited 29 C.F.R. 1979(b)(2), which states in full that: "*For purposes of determining whether to investigate*, the complainant will be considered to have met the required burden if the complaint on its face . . . alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, i.e., to give rise to an inference that the named person knew or suspected that the employee engaged in protected activity and that the protected activity was a contributing factor in the unfavorable personnel action. *Normally the burden is satisfied, for example, if the complaint shows that the adverse personnel action took place shortly after the protected activity, giving rise to the inference that it was a factor in the adverse action.* If the required showing has not been made, the complainant will be so advised and the investigation will not commence." (italics mine). However, this provision relates to standard for establishing a *prima facie* case, not the standard required to prevail at hearing. See *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006)(distinguishing "the procedure followed at the OSHA investigatory stage and at the hearing stage before the OALJ and the ARB, with the essential difference being that to secure an investigation, a complainant needs only to raise an inference of unlawful discrimination (i.e., establish a *prima facie* case), while at the adjudicatory stage a complainant must prove unlawful discrimination.").

1. Therefore, I find that the temporal inference alone is insufficient to establish causation by a preponderance of the evidence.
16. The hearing stage of an AIR21 case requires Complainant to establish, by a preponderance of the evidence, that he engaged in a protected activity that contributed to the adverse action. *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006) (It is not enough at the hearing phase for a complainant merely to establish a rebuttable presumption that the employer discriminated. Rather, a complainant must prove by a preponderance of the evidence protected activity, adverse action and causation).
- a. The above considered, I find that Complainant failed to establish, by a preponderance of the evidence, that he engaged in a protected activity that contributed to the adverse action against him. As such, his claim for relief under AIR21 must be denied.
17. Even if Jones had met his burden, Respondent has demonstrated, by clear and convincing evidence, that it would have taken the same unfavorable personnel action regardless of Complainant's having engaged in the protected activity.³⁰
- a. "Clear and convincing evidence or proof denotes a conclusive demonstration; such evidence indicates that the thing to be proved is highly probable or reasonably certain. Thus, in an AIR 21 case, clear and convincing evidence that an employer would have fired the employee in the absence of the protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability." *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-11 (ARB May 26, 2010).
 - i. In this case, I find that Jones' termination was "highly probable or reasonably certain" because he was on a level four warning when he violated the Articles of Conduct by failing to update his FAOM.
 1. I base this finding on Mr. Koch's testimony, which was not refuted, that the minimum discipline for failure to insert an updated manual would be one step up, but "most likely with something this egregious it'd be two steps up." *Id.* at 256.³¹

³⁰ In his closing argument, Jones stated that, contrary to my finding, that Respondent offered no evidence to support that it would have taken the same adverse action. (Complainant's closing brief). To support his contention, however, he explained further alleged unfavorable actions taken by Employer *after* termination, facts, that, even if true, would not negate Employer's position that it justifiably terminated Jones' employment.

³¹ When asked if there are other factors he would consider in deciding the level of discipline for this violation, he responded "maybe [if a flight attendant] never flew a flight and never endangered customers, then possibly it would have been a different circumstance, if they would have noticed it during briefing or before they got onto the aircraft." *Id.* at 259-60. These factors are obviously irrelevant to the case at bar, as Jones flew twelve flights without updating his manual.

- a. Additionally, the evidence has established that Jones failed to update his FAOM while in the 24 month period established during his Level 4 settlement. (RX-7).
 - i. Even prior to the level four warning, Jones was notified that future infractions would result in more serious disciplinary measures, including possible termination. (RX-2; RX-3; RX-4; RX-5).
2. I also base my finding on Koch's credible testimony that he reached the decision to terminate Jones' employment without considering any complaints that he may have filed. (TR 281).
 - a. Therefore, I find that Employer has proven by clear and convincing evidence that it would have terminated Jones' employment regardless of any complaints that he made.³²

Conclusion

Considering the facts on the whole, I find that Complainant did not engage in protected activity within the meaning of AIR21. Even if he did engage in protected activity, I find that Respondent did not know or suspect of this activity. Furthermore, even if Respondent did know of this activity, it was not a contributing factor to Respondent imposing the unfavorable personnel action on Jones. Therefore, Complainant has not established by a preponderance of the evidence that his protected activity contributed to his termination. Even if he had, I find that Respondent has demonstrated, by clear and convincing evidence, that it would have taken the same unfavorable personnel action regardless of Complainant's having engaged in the protected activity. Therefore, Employer is not liable under AIR21.

Order

The claim of Vernon Jones for relief under AIR21 is hereby **DENIED**.

A

MICHAEL P. LESNIAK
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

³² See *Burne, supra* (A respondent's burden upon a complainant's establishment of a prima face case is one of *production*, not proof -- the respondent needs only to articulate some legitimate, non-discriminatory reason for its actions -- the respondent's 'clear and convincing evidence' burden of proof only arises if the complainant has proven discrimination by a preponderance of the evidence.").

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).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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).

