



Issue Date: 08 June 2017

Case No. 2013-AIR-7

IN THE MATTER OF

**JEFFREY BONDURANT,
Complainant**

vs.

**SOUTHWEST AIRLINES, INC.,
Respondent**

DECISION AND ORDER ON REMAND

This matter arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the Twenty-first Century (AIR 21).¹ The Secretary of Labor is empowered to investigate and determine “Whistleblower” complaints filed by employees who are allegedly discharged or otherwise discriminated against with regard to the terms and conditions of their employment for taking any action relating to the fulfillment of safety or other requirements established by AIR 21.

FACTUAL BACKGROUND

Complainant was a long time employee of Respondent and in charge of its cargo operations in Houston along with a number of smaller stations in his region. In the fall of 2010 and 2011, Complainant was issued disciplinary letters for his behavior at two golf outings held by Respondent for its cargo customers. In August 2010, December 2011, and February 2012, Complainant was involved in discussions of hazardous or possibly hazardous cargo that either originated or terminated at his station. In March 2012, Complainant’s supervisor flew to Houston to visit Complainant’s station and then reviewed various documents. Respondent terminated Complainant in April 2012.

¹ 42 U.S.C. § 42121 *et seq.*

PROCEDURAL HISTORY

Complainant initially filed a complaint with the Occupational Safety and Health Administration (OSHA). OSHA dismissed the complaint² and Complainant objected and requested a hearing. Respondent then filed a motion for summary decision to dismiss the complaint, which Complainant opposed. I granted the motion for summary decision and dismissed the complaint, ruling that Complainant had failed to establish any protected activity.³ Complainant appealed and the Administrative Review Board vacated the dismissal, remanding the case for an evidentiary hearing.⁴ Respondent then filed another motion for summary decision, which I denied.⁵ From 2 Aug 16 through 4 Aug 16, a hearing was held with both parties represented by counsel. They were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based on the entire record, which consists of the following:⁶

Witness Testimony of

Complainant
Elden Allen
Vic Zachary
Amy McKinney
Matt Buckley
Mark Grigg
Walter Devereaux
Elizabeth Bondurant

Exhibits⁷

Complainant's Exhibits (CX) 2-50, 54-59, 64-66
Respondent's Exhibits (RX) 1-17, 19-20
Joint Exhibits (JX) 1-44

² RX-1; As this is a de novo hearing, the OSHA decision was considered only for procedural matters.

³ *Bondurant v. Southwest Airlines Inc.*, 2013-AIR-7 (ALJ May 17, 2016).

⁴ *Bondurant v. Southwest Airlines Inc.*, ARB No. 14-049 (February 29, 2016).

⁵ *Bondurant v. Southwest Airlines Inc.*, 2013-AIR-7 (ALJ April 4, 2014).

⁶ I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

⁷ Counsel were cautioned that since a number of exhibits appeared to be *en globo* collections of records, Counsel must cite during the hearing or in their post-hearing briefs to the specific page of any exhibit in excess of 20 pages for that page to be considered a part of the record upon which the decision will be based. Tr. 22.

STIPULATIONS⁸

Respondent is an air carrier within the meaning of the Act and Complainant started working for them in May 1989. He held a variety of positions within the ramp and operations departments during his first 17 years with Respondent. In February 2006, Complainant was transferred into Respondent's cargo department as a Cargo Customer Service Manager (CCSM). His base was in Houston, but he also had responsibility for cargo operations at several other stations.

CCSMs are responsible for coordinating all air cargo activities and ensuring safe and efficient operations at their base station and assigned outstations. That includes hiring and training supervisors and agents at their base stations; overseeing staffing, scheduling, discipline, and deficiencies of the base station staff; developing and maintaining constructive working relationships with local station management at each station within their region; ensuring that all cargo operations comply with policy and procedures and product service levels are met; championing the responses to all internal and external customer irregularities at their location, including interfacing with customers as needed; and interacting with all departments to promote consistent application of established cargo policies and procedures.

An important CCSM duty is to address issues that arise when something is wrong with a shipment, such as when a package is damaged, leaking, or discovered to contain cargo that is inconsistent with the shipment documentation. That would include situations where Respondent may have inadvertently shipped materials that were regulated but may have not been ascertainable as such when accepted for shipment.

In those instances, the CCSM is expected to inform others within cargo management about the situation and to coordinate with other departments to ensure the matter was properly handled pursuant to cargo policies and FAA procedures and requirements. That would include making sure Safety and Security was involved in cases which could potentially involve FAA reporting obligations.

In the event that Respondent was concerned about customers tendering potentially hazardous cargo, CCSM duties included engaging in discussions with the customer about how cargo should be properly labeled, packaged, and shipped. Complainant was personally involved in such conversations on many occasions.

Respondent does not accept fully regulated hazardous materials for shipment from external cargo customers. The only type of fully regulated hazardous material it will ship is its own company material. Respondent will transport quasi-regulated materials, such as biological samples (blood or tissue samples), dry ice, and lithium batteries, if they are properly labeled and packaged.

⁸ The parties agreed that they could stipulate to the facts in paragraphs 1 through 35 found at pages 3 through 7 of Respondent's prehearing statement. Tr. 28. The stipulations are hereby incorporated by reference in their entirety, albeit summarized in the accompanying text above.

Respondent's hazardous materials program is overseen by its Safety and Security Department (formerly known as Safety and Environmental). The department is headed by John Andrus, Director of Promotion, Policy, and Programs. Todd Hargrove holds the position of Hazardous Materials Lead and reports to Andrus. The specific policies and procedures for that program are found in Respondent's Safe Transportation of Regulated Materials (STORM) manual, which is maintained by Safety and Security.⁹ Safety and Security is responsible for determining whether a particular issue involving the shipment of cargo must be reported to the FAA and completing and submitting such reports to that agency. Safety and Security works closely with Respondent's General Counsel Department in determining whether a particular situation is reportable.

After Safety and Security learns of a potential discrepancy regarding hazardous material in a cargo shipment, it decides whether an irregularity report (IR) should be completed through Respondent's online system (SOPI). If necessary, it then directs the cargo department to complete an IR and what information should be included in it. Occasionally, an employee will submit an IR regarding a potential cargo discrepancy without having first contacted Safety and Security.

The fact that a particular shipment is deemed reportable to the FAA does not necessarily mean that Respondent has done anything wrong. Not every report to the FAA subjects Respondent to possible penalties. Even if a shipment need not be reported to the FAA, Respondent may still elect to use an IR in order to address follow-up with a customer, the need for additional training, possible modification to labeling and shipping procedures, or possible corrective action if Respondent's procedures were not properly followed.

Respondent provides for employee travel on its flights by three categories of travel passes: must ride, positive space, and space available. Must ride passes give employees priority over space available and positive space employees. Positive space passes allow employees to fly ahead of anyone on space available, but behind paying customers and employees on must ride passes. Space available allows the employee to fly only if there are available seats on the aircraft after accommodating all revenue passengers and employees flying on positive space or must ride passes.

As a CCSM, Complainant had direct oversight of about 17 cargo service agents and supervisors in the Houston station. He also had indirect oversight over the agents and supervisors at the outstations within his region.

From early 2007 to early 2011, Complainant reported to senior manager Mark Grigg. Grigg reported to Jay Hollingsworth, the Director of Cargo Operations, who reported in turn to Matthew Buckley, Senior Director for Cargo and Charters. In early 2011, Grigg was promoted to Director of Cargo Customer Service as Hollingsworth became Director of Cargo Programs and Compliance, both of which were newly created positions. At the same time, Elden Allen, a former CCSM, was promoted to senior manager and Complainant began reporting to him. Allen reported to Grigg, who reported to Buckley, who had been named Vice President for Cargo and Charters, also a newly created position.

⁹ RX-2.

In October 2010, Complainant was given a written warning for engaging in inappropriate and unprofessional conduct at a company sponsored golf outing the previous month. Complainant acknowledged receipt of the warning letter by signing it and added a note that it would not happen again. In November 2011, Complainant was issued a final letter of warning and last chance agreement for engaging in inappropriate and unprofessional conduct at a company sponsored golf outing the previous month. He signed the last chance agreement on 10 Nov 11.

On 1 Dec 11, a cargo agent in Houston completed an IR about a urine specimen that had leaked while in transit from Nashville to Houston. Safety and Security reviewed the IR and Hargrove reported the leaking urine incident to the FAA on 5 Dec 11. The FAA neither fined nor penalized Respondent as a result of the incident.

In February 2012, Respondent accepted at its Houston station a bulk shipment that was transported to Austin and discovered there to be lithium batteries. Complainant believed the FAA would be investigating and warned the customer to expect to hear from that agency.

Prior to Complainant's termination, Matthew Buckley was not aware of Complainant's involvement in the August 2010 incident involving the shipment of a gas cylinder, the shipment of leaking urine, or the February 2012 lithium battery shipment. Neither Doherty, nor Andrus, nor Hargrove were consulted about or involved in any way in the decision to terminate Complainant.

Respondent terminated Complainant's employment on 18 Apr 12. Prior to that date, Complainant had never informed the FAA that he believed Respondent was violating any Federal law or regulation and had only on one occasion reported to Respondent that he believed Respondent was violating a federal law or regulation regarding the reporting of hazardous materials. That one occasion was his meeting with Allen on 29 Mar 12. After he was terminated, Complainant did inform the FAA that he believed Respondent should have reported a gas cylinder shipment to them. He filed the instant whistleblower complaint on 18 May 12.

ISSUES IN DISPUTE AND POSITIONS OF THE PARTIES

Complainant argues that he engaged in protected activity: (1) on 2 Dec 11 when he alerted his superiors that, in relation to an improper shipment of urine, Respondent needed to demonstrate to the FAA that it was being proactive and taking corrective action with employees who missed the labeling discrepancy on the paperwork; (2) on 22 Feb 12 when he raised the issue related to the transportation of improperly packaged and labeled lithium batteries; and (3) on 29 Mar 12 when he raised to Elden Allen Respondent's failure to report the transportation of hazardous materials to the FAA.¹⁰ Complainant further argues that those protected activities were a contributing factor to his termination and seeks damages.

¹⁰ Complainant at hearing withdrew his allegation that his communications related to the gas cylinder constituted protected activity. Tr. 30. He also specifically disavowed that he was raising any complaint that Respondent was actually transporting hazardous material in violation of federal law or regulation, since there was no evidence that it had knowingly done so. Tr. 32.

Respondent counters that Complainant did not engage in any protected activity, but even if he did, it did not contribute to the decision to terminate him, which was based on unrelated misconduct and poor performance. Respondent continues that even if any protected activity was considered in the decision to terminate him, clear and convincing evidence shows that it would have terminated Complainant even in the absence of any protected activity. Respondent further contends that Complainant's calculation of his damages is incorrect in both law and fact.

LAW

To prevail on a whistleblower complaint, the complainant must prove by a preponderance of the evidence that (1) he engaged in activity protected by the Act, (2) an unfavorable personnel action was taken against him, and (3) the protected activity was a contributing factor in the unfavorable personnel action taken against him.¹¹

An employee is defined by the Act to have engaged in protected activity if he provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States.¹²

Therefore, "an employee engages in protected activity any time he provides or attempts to provide information related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, where the employee's belief of a violation is subjectively and objectively reasonable."¹³

The complainant's belief of a possible violation need not be accurate and he need not prove any violation actually existed. Nor must a complainant actually convey the reasonableness of his belief to his employer. "The reasonable belief standard requires an examination of the reasonableness of a complainant's beliefs, but not whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities."¹⁴

Once a complainant is able to establish protected activity and adverse action by the employer, he then must prove by a preponderance of the evidence that the protected activity played some role in the adverse personnel action. In determining whether or not the complainant carried that burden, the fact finder may consider any admissible and relevant evidence, including evidence that the adverse action was taken for other reasons.¹⁵ A factfinder may determine that

¹¹ *Bondurant v. Southwest Airlines Inc.*, ARB No. 14-049 (February 29, 2016) (citing 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a)).

¹² 49 U.S.C. § 42121(a)(1).

¹³ *Bondurant v. Southwest Airlines Inc.*, ARB No. 14-049 p.4 (February 29, 2016) (citing 49 U.S.C. § 42121(a)(1)).

¹⁴ *Id.* at 5 (citing *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-39, slip op. at 15 (ARB May 25, 2011)(citation omitted)).

¹⁵ *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154 p.18 (ARB Sept. 30, 2016) (en banc), *reissued with full separate opinions* (Jan. 4, 2017), *erratum with caption correction* (Jan. 4, 2017).

evidence of temporal nexus is sufficient to carry the complainant's burden of proof.¹⁶ He may also consider evidence such as shifting or false explanations for the adverse action as evidence that the reasons offered by the employer were pretextual, making it more likely that the protected activity contributed to the adverse action.¹⁷

If the complainant proves that protected activity was a contributing factor in the adverse personnel action, the ALJ must then ask if, hypothetically, whether clear and convincing evidence shows that Respondent would have taken the same adverse action in the absence of the protected activity. It is not enough for the employer to show that it could have taken the same action; it must show that it would have.¹⁸ The clear and convincing standard requires that the ALJ find that it is "highly probable" (perhaps in the order of above 70%) that the employer would have taken the same adverse action in the absence of the protected activity.¹⁹

EVIDENCE

*Complainant testified at hearing in pertinent part.*²⁰

He lives in San Marcos, Texas with his wife, who works at Federal Express. They have been married for 36 years. He is currently a facility manager for Bradford Airport logistics. They handle internal logistics and security for items entering into the Austin International Airport. He has been in that job for one year.

He started working for Respondent in 1989 as a ramp agent. He was a ramp agent for about twelve years and during that time was an elected union representative for nine years. He went on to become a ramp supervisor and after about two years applied and was selected for the manager in training program. After he completed the training program he was selected for additional training.

When he first started with Respondent, they were operating through the ticket counter and receiving small parcels and overnight letters. It was a great source of ancillary revenue and something that helped keep the airline profitable. As a result, there was a large expansion in the cargo business and frequency of flights. The growth was kind of overwhelming. He believes Matt Buckley was the Senior Director of Cargo. Along with Jay Hollingsworth and Art Allison, who were senior cargo managers, he organized the country into districts for management of cargo and mail. Eventually they dropped the mail part of it as unprofitable.

Respondent asked him to go to Seattle to help manage the ramp there, because they had significant union issues and hoped his union experience would help. While he was in Seattle, he maintained a residence in Texas and commuted. He would work ten days on

¹⁶ *Vieques Air Link, Inc. v. USDOL*, No. 05-01278 (1st Cir. Feb. 2, 2006) (per curiam).

¹⁷ *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 7 (ARB Feb. 29, 2012).

¹⁸ *Palmer* at p.57.

¹⁹ *Id.*

²⁰ Tr. 60-430.

and four days off, unless there was something that required his presence. He was in Seattle for about two years before he got a job as a regional cargo and mail manager. He went into the regional CCSM job in February 2006 with Houston as his home base. At the time, he was living in San Marcos with his family. San Marcos is about 280 miles from Houston. JX-7 is the job description of a Senior CCSM. It does not indicate that a CCSM must live in his base city.

JX-25 is the ground operations handbook. It states that employees are not allowed to reside in one city and commute to another by way of passes. It requires any deviations to be approved by the vice president, who was Mr. Buckley. He does not recall ever discussing commuting with Mr. Buckley. JX-26 is the page for the employee website. The website stated that department heads had the authority to grant positive space or ride priority for business travel. JX-27 is a different page that states commuting from another city is not considered company business travel. He was aware of those policies and signed JX-29, which indicated so. He was also aware of Respondent's policy against sexual harassment.

He discussed the fact that he did not live in Houston with his supervisor, Art Allison. At first, Allison expected him to move to Houston. JX-5 and JX-6 are emails that show the discussion he had with Allison about where he would live. He kept a crash pad in Houston for the times that he had to stay there, but did not move his household or family to Houston.

Initially, his district included New Orleans, Jacksonville, Orlando, Palm Beach, Fort Myers, Fort Lauderdale, and Tampa. Some places, like Fort Myers, were operated by contractors and required special attention. The CCSMs were responsible for training at those locations. It was not easy to get in and out of the Florida cities, so he would fly into Orlando, rent a car, and then visit all of the Florida stations with the exception of Jacksonville. That would take about a week. New Orleans was a big operation and took a lot of his time. He didn't think the way the stations were allocated by region made much sense and told management so. He repeatedly told them that he thought he should have Austin and San Antonio.

He told Allison that since there was so much traveling involved anyway he might as well operate out of his home and fly out of Austin or San Antonio. In the alternative, he could drive to Houston and start trips there. Eventually, Allison said he could live anywhere he wanted to, as long as the numbers stayed good. Their understanding was that he would be a weekend commuter and fly to Houston on Monday and back to Austin on Friday, but not go back and forth on a more frequent basis. That was the last time they talked about relocating and he kept the numbers good.

Since he was living in San Marcos, he would fly either out of San Antonio or Austin to get to Houston. If it looked like seats were not available, he would just drive to Houston. Employees could fly on aircraft in a number of ways. They could use a space available pass, which allowed them to sit in a seat that would have been empty otherwise. A positive space pass would move them up in front of other space available riders. A must

ride pass is the same as a full fare ticket. It was to be used by employees only in emergencies. Even at that, if the flight was oversold, employees on must rides generally gave up their seats.

Early on, around 2007, he had been authorized to sit in the cockpit. He probably only actually did it twice. There was some concern about too many people having cockpit access and within a year they no longer allowed that.

He complained about the problems they were having trying to get in and out of a lot of locations. Eldon Allen told them sometime in 2011 or later, that they could use must ride or positive space passes at their discretion, as long as they followed the appropriate guidelines. They needed to be able to do that because some of the bases they supervised were very difficult to get in and out of. They had a computer program they could use to book flights. JX-39 is a printout from that system.

He understood that was for business travel only. However, whether or not commuting would qualify as business travel would depend on the circumstances. He lived near Austin, but his work station was Houston. If his schedule required him to go straight from home in Austin to an outlying base, he considered that company business travel, even if it went through Houston. If he were to take a flight from Austin through Houston to Raleigh, he would consider that business travel. The same would be true for a trip from Austin through Houston to Harlingen.

If he had a meeting in Houston that required a specific time, he would consider the flight from Austin to Houston to be a business trip rather than a personal commute. If he had to go from home in Austin to Houston for specific business meeting, he might use a must ride. Most of the time, he was able to use space available or positive space. He does not believe he was using must ride to commute. Whenever he traveled between Austin and Houston on a must ride, it was related to company business that had to be attended to.

He knows some of the other managers also commuted. One commuted from Los Angeles to Las Vegas. Allen was allowed to stay in Phoenix for quite a while before actually moving to Baltimore. As far as he knows, Sean Moody still commutes from Philadelphia to Baltimore. Patty Sinclair commuted out of Jacksonville to Orlando. He was not the only CCSM who did not live in his base city. Some of the longer commutes, like Phoenix to Baltimore were not on a daily basis, but rather going home for the weekend. He does not know if any of them used must ride passes.

Allison left Respondent in late 2007 or early 2008. At that point, he began reporting to Jay Hollingsworth for a short period and then reported to Mark Grigg. When Grigg left, Elden Allen became his supervisor. None of them ever told him to relocate to Houston.

CX-58 shows his area of responsibility at the time he was fired. Houston was his largest city, but he also had New Orleans and Nashville. Corpus Christi was a contract city, as was Jackson, Mississippi. He also had Charleston, Harlingen, Raleigh-Durham, Charlotte, and Greensboro. Charlotte and Greensboro would accept cargo and take it to Raleigh-Durham on trucks. Houston Intercontinental also sent cargo to Houston by truck.

At first, they talked about him making a minimum of quarterly visits at each of the stations. There was no hard and fast rule about how much time he needed to spend in any one city. It depended on what was going on and largely left to his discretion. At one time, there had been direction indicating they should be at home station 80% of the time. There was also a formula to help calculate allocation of time. But the formula wouldn't even work for a 52 week year. When they did their reviews, he and Mr. Grigg would discuss how he could best spend his time. He had an office to work out of in the Houston facility and spent about half of his time there. The rest of his time was scattered out over a wide area. He believed that was consistent with Respondent's expectations.

He had quite a bit of turnover at his stations. Even the small ones might require a monthly visit. He had no direct report employees at any station other than Houston. He had oversight of the outstation employees, but they reported to the local management. The vast majority of his cargo went through Houston and it was important for him to develop a relationship with station personnel in Houston. He had three cargo supervisors who reported to him in Houston. They also had cargo agents to accept, process, receive, and ship cargo. The ramp agents who actually loaded cargo onto aircraft reported to the station manager. His supervisors and agents in Houston were self-sufficient, but it was his job to oversee them. He could do that by phone, email, or blackberry when he was out on the road.

He received a number of different awards while he worked for Respondent.²¹ His stations won a number of awards as high performing stations. He was selected for the manager in training program and received a certificate of appreciation for opening Charleston.

CX-57 is his 2009 performance evaluation by Grigg. He was rated as a solid and consistently sound performer. Grigg did tell him to be careful about beating a dead horse. That referred to his suggestions to more accurately assign grade and pay levels to the cargo managers. He believed Respondent was unfairly treating him and some of the other managers and they deserved to be moved to the next grade level. He had frequently raised his concerns with Grigg and Hollingsworth. He thought he was done doing it with him, but Grigg felt the need to mention it in his evaluation. After the evaluation from Grigg, he dropped the issue.

²¹ CX-46.

CX-54 explains Respondent's policy in terms of setting clear expectations and giving timely and candid feedback. They would try to identify shortfalls, create a performance improvement plan, specifically set forth steps for improvement, and then follow-up with feedback. Performance improvement plans were designed to communicate expectations to employees.

Respondent had a manual for cargo handling. It was called the STORM manual and contains procedures to follow in the case of a potential hazardous material incident or discrepancy.

An air waybill is a document assigned to a shipment for identification purposes. It identifies the shipper, the consignee, the originating station, the destination, the weight, the dimensions, number of separate pieces, time tendered, time picked up, and whether or not it contains dangerous goods. CX-3 and CX-5 are copies of the same air waybill. He specifically recalls that airbill. It had a shipper of Cap Logistics going to Houston for EXTRANS. It was marked as a clinical pathology lab shipment, but that was because someone entered the wrong code. The object was described as a cylinder, but never mentioned hazardous gas.

He was in his office when Glenn Vaughan asked him to come out and look at something that had been shipped in. The object was an anvil box, which is very hard reinforced plastic, lined on the inside with cushioning material. It was probably about 40 inches long and contained a cylinder with two gauges. CX-59 are photographs of the cylinder. Each gauge read approximately 180 pounds pressure. That was a red flag because they don't except pressurized material, except for in-house company material. They will accept cylinders, but the cylinders have to be evacuated and under no pressure. The other problem was that the sticker on the bottom of the box indicated flammable gas, which they also do not accept from third-party shippers.

They reported the issue to his supervisor, Jay Hollingsworth.²² Hollingsworth asked them to send him as much information as they could on the airway bill.²³ Vaughan emailed Hollingsworth and him to ask if they needed to complete a SOPI report, which communicates irregularities.²⁴ That question was forwarded to John Andrus and Todd Hargrove, who were at Safety and Environmental.

He understood that Brad Rush from the originating station at LAX was going to investigate what happened and believes that eventually a corrective letter was issued to some of the cargo staff at LAX for improperly accepting materials. Eventually, Safety and Environmental authorized the release of the shipment. When he saw that, he made a joke about releasing the gas and asked Hollingsworth if the FAA got a "woody." That was his way of asking how upset the FAA was to hear about the cylinder shipment.²⁵ He

²² CX-6.

²³ CX-7.

²⁴ CX-10.

²⁵ CX-4.

was told that they decided not to report the incident to the FAA. At the time, he really didn't know why they made that specific decision.

If the cylinder was ascertainable and did not require reporting, they still should have furnished a note tag to the pilot about the hazardous material, giving him location description and a context phone number for a responsible party. He believes he had further conversations about that with Hollingsworth, but can't detail them. Maybe there were several small conversations about the cylinder. He knows the conversations went beyond just the "woody" comment. He thinks maybe there were a couple of telephone conversations not long after the shipment. However, at his deposition he testified that he never discussed it with anyone else after the "woody" email.

The first time he may have complained about not reporting the cylinder would have been his 29 Mar 12 meeting with Allen. However, he doesn't recall if he actually discussed the specifics of the cylinder or talked in general about not reporting hazardous situations.

Hollingsworth had said at various times that not everything had to be reported by everybody and even sent him an email telling him it wasn't his job to decide what to report. Over the years, he had been making and keeping copies of paperwork for shipments that he thought were questionable, in case something happened. The file wasn't secret; it was just a backup for his reference.

Eventually, after he filed his whistleblower complaint, the FAA did look into the cylinder incident. They determined that it did not have any gas under pressure and did not penalize Respondent. That was based on a document created by the shipper on the day after the shipment.

Respondent conducted golf outings as an opportunity for Operations and Sales to reward their customers. They typically invited their biggest shippers to build relationships and have a lot of fun. The idea was that they would work hard and play hard. They had one such gathering in October 2010 in Panama City, Florida. Respondent's cargo department leadership was there. There was a lot of drinking involved, starting with a cooler on the van going from the airport to the hotel. There was also a hospitality room with unlimited beverages and a cooler on every hole of the golf course.

In the bus from the airport to the resort, everyone was drinking beer and there was a karaoke machine. There were customers and other senior leaders from Respondent. People were singing risqué songs. One of the senior sales managers was singing a song about oral sex. Karen Rutledge, who was secretary to Matt Buckley, the vice president of cargo, was sitting next to him and got up to go to the back of the bus to retrieve some beers. When she sat down, he put his hand on the seat so she sat on his hand. He thought it was a playful exchange, but it apparently didn't sit well with Amy McKinney, who was a marketing manager for cargo. It was adolescent and silly, but was not meant to be anything of consequence. He had known Rutledge for quite a long time and at the time did not think it was inappropriate or might have offended customers or other people that

were there, even if they were not aware of the relationship he had with Rutledge. He was not drunk.

Everybody was drinking and having a good time. They had a luau at the hotel. He saw Amy McKinney sitting in the lap of a customer with her arms around his neck. There was a bonfire with the band and he saw her sitting in a customer's lap kissing him affectionately, telling people "we're getting married."

In the evening, almost everyone had retired to the hospitality room and there were fifty or so customers from all over the country. He was sitting at a table talking to a person he thought was a customer, engaging in idle chat. He had been drinking, but could not say whether he was legally intoxicated. When he went back to the bar, John Atwood, who was a sales manager, asked why he was bringing a stranger into the hospitality room. Atwood was aggressive and confrontational. He told Atwood he did not bring the person in and thought he was a customer. He tried to be professional with Atwood, but Atwood did not let it go and started cursing him. He responded in kind and then left.

A little after midnight, he finally went to his room. He had already gone to bed when Elden Allen and Bill Merda knocked on his door. They were his counterparts in the Baltimore and Chicago areas. They told him Amy McKinney had a problem with the way he acted on the bus from the airport. He did not know what they were talking about and asked what they meant. They said she was unhappy with some interaction between him and Karen Rutledge. He concluded that the problem was what happened on the bus.

He sent an email to Hollingsworth to give him a heads-up that he had spoken to Elden and Bill about it.²⁶ As far as he knows, Karen never complained to anyone about it and he and Karen remain on friendly terms. She told him she was not offended. In the email he asked Hollingsworth what Amy's problem was.

The next day on the way to the airport to leave, Hollingsworth told him that they had to do some due diligence to look into it and would get back to him. After they got back, Hollingsworth sent him JX-8. Hollingsworth said he had looked into the situation, talked to several of his coworkers, and concluded that some of his actions were inappropriate and unprofessional. The letter also mentioned the incident with Atwood, saying that he had been argumentative and overly intoxicated.

He felt the letter was an overreaction. He called Hollingsworth to discuss the letter and tried to explain what actually happened with Atwood, noting that he had had plenty of hard liquor and acknowledging that he should not have responded to Atwood the way he did. He asked a little bit about what investigating had been done, but Hollingsworth wouldn't elaborate. He signed the letter and said it would not happen again. It was the first negative letter he'd ever had in his personnel file.

²⁶ RX-15.

He understood the letter would stay in his file for one year.²⁷ He thought the best course of action was just to go ahead and accept the letter. There was really no avenue to complain about it or challenge it. No one mentioned that the next step would be a last chance agreement. He also thought the letter was just something they did to cover themselves in a very sensitive environment. What he had done certainly wasn't offensive to Rutledge.

At the time, he did not connect the letter and his involvement in the gas cylinder incident. However, now looking back on the way everything happened, he sees a connection. He does not have any evidence of that and it's just a gut feeling.

During the next year, Respondent promoted two CCSMs to senior cargo managers. He applied, but Allen and Stone were selected. He didn't have any trouble working with either of them and was happy for Allen.

The next year they had another golf outing. Once they got to the hotel, Allen and Stone had a meeting reminding everyone to behave professionally. Then they started drinking. He had recently gotten a third degree burn on his calf and was taking hydrocodone.

He is not a very good golfer and got frustrated. After he finished 18 holes, he took his putter and hung it up in the branches of a tree, hoping someone else might find it and use it with a better result. Because of the burn on his calf, his leg was swollen by the end of their round. He asked the staff if he could take the golf cart to his hotel and park it.

Allen came up to his room about two hours before the awards dinner and told him that he shouldn't go. When he asked why, Allen told him he was intoxicated and shouldn't come. He didn't think that was fair but did not attend the dinner. He does not recall Seth Keffas coming up to talk to him, not liking it, and calling Allen to complain.

Hours later that evening, since he was bored he got cleaned up, went down, and walked out on the pier for a while. As he was coming back, he ran into Matt Buckley, who was Vice President of Cargo. He asked Matt if they could talk for a few minutes. Matt said they could and he explained that he was feeling kind of picked on. Matt told him to stay on point and stay on task and everything would be fine. He does not recall the entire conversation. He knows he mentioned feeling picked on for a number of reasons and being disappointed that he didn't get an in person interview for the job that Allen got.

When they got home he was presented with a last chance agreement by Grigg and Allen on 10 Nov 11.²⁸ The letter said he had appeared intoxicated and exhibited improper behavior by placing his putter in a tree and cornering several coworkers to complain that he was being picked on. It added that he exhibited unprofessional inappropriate behavior in front of customers and placed the company in a bad light. They told him that some consideration had been given to firing him as a result of his conduct. The last chance agreement did not mention anything related to his job performance, how much time he

²⁷ CX-11.

²⁸ CX-9.

spent in Houston, if he was using must ride passes, or failing to build a working relationship in Houston.

He understood there was no recourse and had seen Respondent use last chance agreements as a way to build a case against managers. It was a very broad document and he had never seen any manager survive a last chance letter. Since he was a manager, he was not subject to the collective bargaining agreement. However, the progressive discipline system had been used with managers before, although even under the collective bargaining agreement it was possible to skip steps in discipline, depending on the severity of the misconduct.

The agreement required him to get alcohol counseling through the Employee's Assistance Program (EAP). He acknowledged that he might have a problem with alcohol, went through the employee assistance program, and had a number of counseling sessions. He did not feel like he needed to do the program, but completed the counseling successfully and has had no more alcohol related problems. He never had any work or production problems related to alcohol.

They did end of month reports to keep their managers in the loop as to what was going on at their stations. For example, he would do the report for December in January. That was in part so he could get the statistics from the previous month and include those in his report. RX-13 is an end of month report to Allen for November 2011. The second page deals with a customer issue resolution with Air Net. He is pretty sure it relates to an incident that took place in November rather than early December.

They did a lot of business with diagnostic specimens for Air Net. Air Net was a third-party carrier serving large diagnostic companies. It was a big part of their business. They provided next flight guaranteed service, which was their highest priced product and highest priority. They typically involved biological samples of tissue or blood that were picked up from locations all over the country and shipped to a main hub for diagnosis with results returned within 24 hours. They normally travel in red boxes for easy identification.

If a biological shipment is discovered to be leaking a substance, they are supposed to contact Safety and Environmental. They look at the packing slip to determine what the substance might be. They can also go online for specific information and direction as to the substance. Notification could be by phone or email, but would need to occur fairly quickly. He's not aware of any specific deadlines with regard to him. Human urine is considered a human exhibit specimen and has different reporting obligations. According to Respondent's operating procedures Safety and Environmental is responsible for communicating with the FAA.

They had two incidents involving leaking urine boxes and both arrived from Nashville. It was not an unusual occurrence. When he filed his original OSHA complaint²⁹, he was confused and said that they were in December and 11 Feb 12. He filed a supplemental OSHA complaint as a follow-up to his initial meeting with the OSHA investigators.³⁰ He made the same mistake in his deposition testimony. The leaks actually occurred in November and December.

The specific shipment in November 2011 was a box that came into Houston with one of the corners soaking wet. It did not have the proper biohazardous label. The shipment originated in Nashville, which was one of his cities. They called his sales manager for Nashville and told them about the problem. When they subsequently opened the package, they found the proper guidelines for packaging had not been followed. The samples should have secondary containment, be separated, and include absorbent material. Generally, they trust known shippers to correctly package and label cargo, but he asked the staff in Nashville to do some spot checks. He wanted them to open the box, look inside, and see if the packing was appropriate. As far as he knows, there was no reporting done on that shipment.

RX-14 is the report he prepared for Allen in January covering December. In December, they once again had a package arrive with a wet corner.³¹ George Gonzales came into the office and asked him to come out and look at another problem out of Nashville. There was a red box that was also soaked in one corner and had a biohazardous label on it. He told Tracy Pfeifer, who was one of the cargo agents in Houston, to report it.³² She was also the union representative for cargo and very active in safety concerns. CX-12 is the SOPI report on that shipment. It was submitted electronically and at that time, he believed that the report would be accessible by the FAA. At one point he had a telephone conversation with Doherty and Doherty wanted to know how the report got electronically filed. When he told Doherty he had ordered his staff to do it, Doherty wanted to know what the hell he did that for. He is not sure when that happened, but he knows it was within a day or two of Pfeifer filing the electronic report. He eventually mentioned Doherty's admonition in his OSHA complaint, but reported that it happened around 11 April 12.

FAA agent Bill Streb came down to give them training on how to handle the shipments. The training included his three Houston-based cargo supervisors. He asked Streb to do the training because he felt he was not getting the direction he needed to handle the conflict between having to move time sensitive material and holding material for the FAA to examine.

²⁹ JX-2.

³⁰ JX-3.

³¹ When he eventually filed his own OSHA complaint, he somehow got the dates wrong and told them the shipment was in February.

³² RX-4.

In his deposition, he testified that Doherty became upset when told that Streb had instructed them not to release cargo until cleared by the FAA. He also testified that conversation took place in February, after the training from Mr. Streb.

He emailed Nashville, Hollingsworth, Grigg, Allen, Jim Doherty, and Patty Sinclair to report the problem.³³ He followed up by sending Jim Doherty the information he requested. He believes Doherty was manager of Cargo Problem Programs. Doherty then emailed Andrus and Hargrove that he noticed the shipper did not declare on the airbill that the cargo was Category B, even though the box was properly marked and the cargo was entered into their system as Category B. Doherty wondered if the FAA would come after them for not catching the paperwork discrepancy. Andrus replied that that was possible and they needed to see how common a problem that was and do something to ensure compliance. Andrus also indicated that they would need to complete a report for the FAA. Doherty is the one responsible for communicating with Safety and Security. That led to the decision by Safety and Security to report to the FAA.

He doesn't know if they had the electronic report at that point or had independently elected to report to the FAA. He knows that the electronic report would put an extra level of emphasis on those shipments.

He then contacted the Nashville staff and asked them to figure out what happened and take corrective action, so they could show the FAA that they had addressed the situation. He also asked Andrus if he should complete the FAA reporting form. Andrus said that Hargrove normally completes the form, but would need his help to make sure that the information was accurate. He sent that information to Hargrove the same day.³⁴ The report showed that the shipper of the package was One Source Toxicology.

He got a message from Grigg asking how they handled the problem³⁵ and he responded, explaining that they reinforced the shipping requirements with the third party shipper and the Nashville staff had been conducting spot checks.³⁶

The December 2011 monthly report³⁷ referenced an Air Net shipment. He thinks it refers to a separate shipment from the one in November. It explained that Air Net had apologized and said they would fix the problem. It also noted that FAA agent Bill Streb came by to ask that if it happened in the future, the shipment not be released until FAA had had a chance to investigate. He told the agent that could be a problem given the nature of the cargo and asked if they could provide photos instead. He did discuss the FAA's request with Doherty and Hollingsworth. They started doing spot checks of shipments from that shipper. No one criticized him for talking to the shipper.

³³ CX-14.

³⁴ CX-13.

³⁵ CX-17.

³⁶ CX-18.

³⁷ RX-14.

He discussed the problem with Tom Stanley, who was a safety representative.³⁸ He explained that they were meeting with the FAA as well as following up with One Source. It was unusual for the FAA to follow up with a shipper. It happened with some shipments out of Harlingen and normally took an egregious violation for them to do it.

At one point, he got feedback from the Nashville cargo people that they had been told not to continue to inspect the boxes. He believed that direction came from Wally Devereaux through either Bill Parker or Seth Keffas.

At his deposition he testified that there was a specimen that arrived in January or February that one of the cargo employees picked up and ended up with urine on his clothes. He also testified that he got an earful about it from George Gonzales that they were at it again, but did not have anyone file an electronic report and released the shipment. He also testified that it was not inappropriate to release the shipment. He thinks maybe that deposition testimony was about the first urine sample. He also testified that it took place at least two weeks before the FAA training by Mr. Streb.

He did not order anyone to report a February shipment. Sometimes boxes would come in soaking wet from being in the rain on the ramp. Based on his review of CX-13 and CX-17, it looks that they both refer to report number 1705. He doesn't know, but it's possible that Air Net could have been the one who prepared the specimen that was then picked up and shipped on One Source's account.

In retrospect, it does not appear the company did anything wrong in how it handled the reporting to the FAA of leaking urine. He cannot say what the resolution was on every shipment, but is not aware of any leaking biological specimens that should've been reported to the FAA, but were not. What he can say is that the comment by Doherty was one of many that he had heard to give him concern that they were discouraging agents to electronically file incidents. However, he is not aware of any leaking specimens that should've been reported and were not or any biological specimens that were not reported because of pressure from sales. There were some phone calls made and at some point Bill Parker called to tell him they couldn't be holding the shipments up and people were getting pissed. However, he never instructed anyone to release something prematurely because of pressure from sales.

JX-24 is his end of month report for January 2012. It reports that Mr. Streb came by on 4 Jan 12 to discuss the leaking shipment from Nashville.

CX-2 is a monthly report that breaks down cargo revenue and pounds. It's one of the metrics to evaluate performance. By the end of 2011, they had some stations drop, but the majority were up. Houston was number four in the system and their revenue numbers were up as well. It was a good year in terms of performance. In early 2012, there was an opening for the station manager position in Austin, but he was not selected to interview for that job.

³⁸ CX-20.

His 2011 performance evaluation was completed by Allen.³⁹ It is dated closed then approved as of 3 Apr 12. That was fifteen days before he was fired. The performance evaluation was outstanding overall. It was better than the one he had gotten from Grigg.

When he asked why it did not include anything about the last chance agreement, Allen said that was about his alcohol problem and not about job performance. His job performance was outstanding. The evaluation contains no mention of not spending enough time in Houston, commuting improperly with must ride passes, problems with Houston station leadership, or keeping a daily calendar. It states that he is a very passionate person, living the Southwest way, and doing a very good job. It notes he has had some challenges with the health of his supervisor, Vaughan, but his service heart is as big as Texas. He was very happy with his evaluation for 2011.

JX-24 is his end of month report for January 2012. He reported that Bill Streb with the FAA came back to his station to discuss the leaking urine shipment from Nashville. Streb talked about how he would like to see things happen in the future and they had some follow-up discussions on how to balance the FAA's desire to investigate with the need for prompt diagnosis of the lab specimens. There were concerns that holding the samples would also have an impact on revenue.

There are concerns about improperly packaged lithium batteries working apart and starting fires. Battery shipments had caught fire and brought down aircraft, so it was a very grave concern. In February, he received an email from Cheryl Hawman, a cargo supervisor in Austin, about a certified cargo screening facility package that had arrived from Houston containing a bulk shipment of lithium batteries, but was not shipped according to requirements.⁴⁰ The package broke open when it fell off of a cart after sitting in the rain. The freight came from CEVA, which is a huge freight forwarder and one of Respondent's largest customers. They were also part of a pilot program that allowed them to prescreen cargo at their facility and required no screening by the airline.

He responded to Hawman by sending her the manual requirements.⁴¹ He has no idea why that email is dated 21 Feb 12. He copied Jim Doherty and Elden Allen. They did not criticize him for forwarding that information to them. He also sent a note to his counterpart for sales, Bill Parker,⁴² since CEVA was such a valuable customer. Hawman and Austin had released the shipment, but gotten him involved because it involved Houston. Hawman also mentioned they had a similar problem the previous week between Houston and Austin, although with a different shipper. He did not forward the information to Safety and Security.

³⁹ CX-39.

⁴⁰ JX-10.

⁴¹ CX-23.

⁴² JX-12.

Doherty responded that he agreed the batteries were improperly packed and would refuse the shipment. He told Doherty that the package had already been accepted for transportation and sent to Austin via Dallas. Doherty indicated he understood that and suggested they make sure they educated the shipper.⁴³ Hargrove added that everyone needed to be aware that if the FAA were to see it, it would be a really serious issue.⁴⁴

He sent an email asking who needed to take the lead on educating the customers.⁴⁵ Grigg said he could communicate to the office that tendered the shipment.⁴⁶ He did call CEVA and told them they would probably hear from the FAA, because he hoped and expected that would happen, because Safety and Security had all the information they needed to do so. Once he saw Hargrove's response, he had an uncomfortable feeling that they were not going to report the battery transport. He felt that there was an error about the operation where reporting things was discouraged. He was nervous about being the one who is not a team player. Given the context, he believes that when he pointed out the battery had actually shipped, he was telling them that it had to be reported.

He never jumped back into the email conversation to say anything about not reporting to the FAA. He does believe that at some point he had a verbal conversation with Hollingsworth to inquire about status of looking into the shipment, but cannot recall any details. He does not recall discussing the lithium battery problem with any of the Houston Station management. If he did it would have taken place in their ops briefing.

He recalls being deposed and testifying that at the time he read Hargrove's email he thought the battery shipment was automatically going to be reported to the FAA and did not complain to anyone with Respondent that it had not been reported. When he was asked about any other conversations, he did not mention talking to Hollingsworth. It was quite a while ago. It is possible that his memory slipped a little bit on that. He cannot specifically recall a date and substance of any conversation with Hollingsworth about the lithium battery incident after the emails.

As of the date of his termination, he had no way of knowing whether or not the battery shipment had been reported. He suspected it had not based on Hargrove's email. He did talk about Respondent's failure to report incidents at his 29 Mar 12 meeting with Allen, but did not recall specifically mentioning the batteries. After he was terminated, he reported the failure to OSHA and the FAA.

Based on all of the email communications,⁴⁷ he has no doubt that senior management were aware that the lithium batteries had actually flown and originated in Houston. The FAA did open an investigation into the transportation of the lithium batteries and he was privy to communications between Respondent and the FAA.

⁴³ JX-15.

⁴⁴ JX-16.

⁴⁵ JX-17.

⁴⁶ JX-18.

⁴⁷ CX-27-32; 34-38.

He traveled a couple of times to Corpus Christi for business in the first quarter of 2012. His son and grandson happen to live in Corpus Christi, which is a day trip from Houston. He traveled overnight for both of those trips, but in order to cover all three employees for training, he would need to stay overnight because of the shifts they work.

He occasionally works from home, but not very often. He had some health issues, but even if he was using sick time, he could still work from his desk top or blackberry. Whenever he works from home, he made sure he had permission from Allen.

A couple of days before 29 Mar 12, Allen told him he wanted to come down for a station visit to look at a proposed site for a new cargo facility. They had a daily operations briefing at 10:00 AM and then another at 2:00 PM. After one such meeting, he was approached by Vic Zachary and Rick Justice. Zachary is the station manager in Houston and Justice is the assistant station manager. The station manager oversees both passengers and, from a support point of view, cargo, but is not his supervisor.

Zachary and Justice took him into the back office and Zachary asked who he had pissed off. They said they were at a station managers meeting in Dallas and were approached by Allen and Grigg. They were asked how he was doing and what was going on in Houston. They were just giving him a heads-up. He is sure that conversation took place before he met with Allen. It might have been a couple of weeks or maybe a month. He doesn't recall reaching out to Allen or Grigg to ask about what Zachary and Justice told him.

When Allen showed up on 29 Mar 12, he was apprehensive. At first, it was standard pleasantries and looking around the facility. They got back to his office and Allen closed the door. Allen said they needed to talk about some issues with his performance and that Zachary had complained that he was hardly ever in Houston. Allen was under the impression that Justice and Zachary were not happy with their working relationship with him, which was a surprise to him. Allen thought it was important that he work on his relationship with Zachary and Justice and mentioned a problem with on the job injuries and other issues. Allen also mentioned needing to be present to set an example for the agents and supervisors.

He does not recall Allen mentioning having gathered information about his flight activities. They might have discussed how much time he had spent on the road. He believes they did discuss using must ride tickets between Austin and Houston. He does not recall ever using a must ride to return to Austin, but typically it was a round-trip type thing.

He remembers discussing missing carts, but is not sure if that took place during this meeting. He does not remember leaving the meeting to go out and find the carts. They had ordered new carts and they did find some that were still at the maintenance facility. There were in excess of 100 carts and they would bring in new ones and take out old ones.

He did bring up the subject of the pay levels again. Allen had come up with an approach where he would be given a new level but without the compensation package. He didn't think that made any sense and declined it.

He was a little rocked by the accusatory nature of the meeting and told Allen that they should look at his numbers, which were good. He also said that if they wanted to talk about performance, they should start with hazardous shipments that had been moving and possibly endangering the public, but had not been reported as required. Allen did not respond except to say that was not what they were there to talk about. He also told Allen he felt that he, like everyone else, should be able to flex his time and spend more time at home, because of being out on the road so much.

He cannot recall specifically mentioning the batteries, urine, or cylinder. Allen said he didn't know what he was talking about. He responded that nothing was being done about substantial and serious issues with moving regulated or nonregulated materials and not following through and reporting. That appeared to anger Allen, who said he wanted him to relocate to Houston. It was the first time he ever heard that from Allen. He had never heard anything about a problem with must ride passes before that meeting, either.

JX-41 is his end of month report for March 2012.

After the meeting, Allen sent him an email asking him to account for his whereabouts on specific days⁴⁸ and he did so.⁴⁹ One of the days Allen asked about was 3 Feb 12. He told Allen he flew from Houston to Austin that day. He made that trip because he had worked the evening shift. Sometimes he would actually work a triple shift so he could cover all of the employee groups. Another day was 13 Mar 12. He was coming back from the Nashville with the flu. He told Allen that on 15 Mar 12, he flew to Houston, worked, and then flew to Corpus Christi. He doesn't know if that's accurate, since it was four and a half years ago. He doesn't recall if in fact he had worked in Houston and flown to Corpus Christi on 14 Mar 12. Allen also asked about 20 Feb 12 and 20 Mar 12. He doesn't know that he emailed an answer about those days. During that time, he had sick days and personal days, as well as vacation time available. Respondent could have docked him some of those days if he had done something wrong.

After the meeting, he flew to Austin, got his truck, and drove right back to Houston, where he worked that morning. He started looking for a place to live in Houston, anything that would allow him to comply with the request. While he was looking, he got a phone call from Allen who asked what he was doing. He told Allen he was going to look at a trailer to buy. Allen told him not to buy, lease, or do anything. He didn't take that as a good sign.

He took some vacation time after that meeting and when he came back Allen called again to meet him in Houston. He asked Allen what the meeting was for and Allen said he would tell him at the meeting. On 18 Apr 12, he met with Allen and Vic Zachary in

⁴⁸ JX-36.

⁴⁹ JX-37.

Zachary's conference room. Allen presented him with a resignation letter that stated he was leaving Respondent in exchange for \$30,000 in severance pay and that he knew of no wrongdoing on the part of any of Respondent's employees, officers, or contractors.⁵⁰

They said they were firing him because of his failure to develop a quality working relationship with Houston leadership; failure to spend enough time in Houston, using must ride for nonbusiness travel; being unable to account for days worked and paid; violating his last chance agreement; and performing his job in a careless, negligent, and unsatisfactory manner.

He refused to sign the letter because he knew that Respondent had failed to report the transport of hazardous materials to the FAA as they were required to do. He might have told them the letter was bullshit and that he thought it was because of the golf outings and that he had complained about pay levels. He might have said something about how Buckley and Grigg were getting their way. It seemed like a witch hunt and that Allen was put in a difficult position by Buckley and Grigg to take him out. Allen told him he felt that he had sold his soul to the devil, the devil being Buckley. He and Allen had been close friends. It was a long meeting and he does not remember everything.

There was a point that he asked Zachary to step out and it was just him and Allen. He told Allen about the file he had kept on problem cargo and suggested that he needed another zero added to the resignation buyout. He still doesn't think he would have signed it because of the clause absolving Respondent of any wrongdoing.

He believes Buckley had the last say on his firing, but Allen and Grigg also had a hand in it. He had been involved in terminating some employees for careless or unsatisfactory work, but he never saw anyone offered a severance package. Those were all union terminations.

He was told to talk to an attorney about it and given thirty days to reconsider his decision, but was told in the meantime he must sign a letter acknowledging he had been terminated.⁵¹ He could not make himself sign the resignation letter, so he signed the termination letter.

He had been with Respondent for 23 years and much of his identity was with Respondent. Losing his job was pretty much an atomic bomb. Life froze and he was deflated because he worked very hard to get where he was. It was a wretched experience and he felt that he had been targeted and dismissed unfairly. He did not believe that any of the reasons they gave were reflective of his time of loyal and faithful service to Respondent. He prided himself on being available 24/7 and did whatever it took to be successful.

⁵⁰ JX-1.

⁵¹ JX-4.

He was 56 years old and had to start looking for another job, which he did right away.⁵² He couldn't sleep and was depressed and anxious. He ended up going to see his doctor.⁵³ The insomnia lasted for months. He would be exhausted, go to sleep, and then wake up and 30 minutes later start working again. He lost his appetite and lost weight. The Hydrocodone and Zolpidem he was prescribed on 17 May 12 were drugs that he had been using for years before being fired. Dr. Ramirez never specifically or formally diagnosed or treated him for depression.

Job hunting was difficult because the process had changed so dramatically since he started working for Respondent. He was selected for a job with TSA but failed the pre-hire physical when they found blood in his urine. It turned out that he had low-grade hepatitis that was triggered with the anxiety and stress of losing his job. Eventually he was cured of the hepatitis.

There was a time when he didn't think he would ever get hired and kind of threw his hands up. He started a business with his son in Corpus Christi and bank rolled it with a large portion of his retirement. Unfortunately, they did not have a good business plan and were not prepared for the competitive nature of that business.⁵⁴ However, he eventually did obtain his current job as a facility manager for a logistics company. He was out of work for about 3 years.

He figures he was making right around \$93,000 per year when he was fired by Respondent. He's currently making \$57,000 a year.⁵⁵ He tried to calculate how much money he lost because of being fired. He based that on a retirement age of 62 ½, although he doesn't know that he would have retired at that point, since he really loved the job. He received decreased pay and lost stock options, retirement contributions, and capital gains by being forced to cash out stock because of his lost job.

He would love to return to work for Respondent. He still chooses to fly on their aircraft and buys tickets to do so. Notwithstanding his current disagreement, he thinks it's the best airline there is and has a role for people to try to keep it on an even keel, making sure things are done appropriately. He thinks that sometimes some people working for Respondent in the cargo department, Allen for example, push sales and put profit over safety. He is not saying that happened with lithium batteries, but is saying Allen did not participate in getting it reported. The gas cylinders were another example, even though he would agree that not everything has to be reported and he has no specific evidence.

⁵² CX-56.

⁵³ CX-55.

⁵⁴ CX-64.

⁵⁵ CX-65.

*Todd Hargrove testified at hearing in pertinent part:*⁵⁶

He joined the Air Force in 1982 and served for 23 years. He was a cargo specialist and received training in handling hazardous materials.

He joined Respondent in 1996 as a computer programmer in the Finance Department. In 2006, he joined the Safety and Security Department. He works in Respondent's Safety and Security Department as the hazardous materials lead. He reports to John Andrus. They decide whether or not materials are hazardous. They are also responsible for reporting issues to the FAA and either one of them can do so. The rules that define hazardous material and reporting requirements are in the Federal Regulations at 49 C.F.R. However, even the rules have gray areas. They have a good working relationship with the FAA and DOT regulators.

Respondent's employees get hazardous material training every year. Respondent also has different hotlines to call and checklists to execute. However, if there is any question, he and Andrus decide whether or not something is reportable.

There may be times when they are supposed to hold onto materials in order to allow FAA to inspect them. Sometimes, those materials are time sensitive to the shipper, biological specimens, for instance. What they try to do in those cases is to let the FAA know that there are medical reasons the cargo needs to be released and ask if they can take pictures or get an immediate inspection. His office is in charge of having those discussions with the FAA.

He has never gotten any pressure from the cargo department to release shipments. Under the regulations, there are incidents and discrepancies. Discrepancies are items that are improperly marked, labeled, or undeclared. They require a discrepancy report. An incident, on the other hand, involves a list of specific things that happen with cargo while in commerce and would require a report to the National Response Center within as soon as 12 hours, depending on the circumstances. They would normally also try to inform the FAA. CX-2 is a copy of their internal handling manual. It references the C.F.R.

Ascertainable refers to cargo which is either marked or otherwise identifiable as hazardous material. If the cargo has nothing to indicate that it is hazardous, it is not ascertainable. Transporting unascertainable cargo is reportable. Transporting ascertainable cargo is not. If they accept unascertainable hazardous material cargo and discover it later, they would have the station fill out a company report and then investigate to determine whether or not they needed to report it outside of the airline. That process is set out in their internal manual. Everyone gets recurrent hazardous material training and their cargo manual has been reviewed by the FAA.

⁵⁶ Tr. 431-488.

Their policy is to not accept fully regulated hazardous material from external customers. They will transport company hazardous materials, but not anyone else's. They haven't done the training or put in place the administrative support to transport hazardous materials as a part of their cargo business. They do accept from customers some quasi-regulated materials. Those would include biological samples. There are some exempt human specimens, such as urine. A leaking urine sample would not have to be reported.

If someone gave them hazardous material to transport, but didn't tell them it was hazardous and they didn't know, they would not have to tell the FAA, and couldn't anyway because they wouldn't know. However once they discover they had done so, they would have to report to the FAA. The cargo department has no role in determining whether an event is reportable. Who the shipper is has no bearing on whether or not something is reportable.

On 22 Feb 12, he took part in an email discussion⁵⁷ including Jim Doherty, who was senior manager of cargo programs. Doherty would bring them issues, and they would decide whether or not reports needed to be made, based on the regulations. Doherty forwarded to them an email from Cheryl Hawman to Complainant regarding the shipment of lithium batteries out of Houston. Doherty indicated he thought the batteries were improperly packaged and that he would refuse to ship them. He responded that they needed to notify the shipper of the requirements and everyone should understand that the FAA would take it very seriously if they were aware of it.⁵⁸ Lithium batteries were a potentially deadly cargo. However, if they refused to accept it from the shipper, no reporting to the FAA was required. He did not see the other email from Complainant indicating that the batteries had already been shipped or Doherty's response to that information. If he had understood that it had been shipped, they would have reported it.

He had no other involvement with that shipment of batteries until he received the FAA's letter of investigation. He helped to work on Respondents reply to the letter of investigation. So did legal. He is not sure if cargo management was brought into it. He believes that Respondent ultimately was penalized with a \$15,000 fine for failing to report the shipment. He ended up being disciplined with a counseling session by Andrus for his involvement in the failure to report. Andrus told him to make sure that he completely read email correspondence.

He recalls an incident involving the shipment of a gas cylinder in August 2010. They got an email from Hollingsworth asking about filling out a report on the cylinder. He believes the cylinder was some type of petroleum material under pressure. As he recalls, the issue was that the cargo was labeled as hazardous material and had a little bit of pressurized gas. It should not have been accepted for shipment. However, they decided that since it was ascertainable as hazardous material it was not reportable. If they do ship hazardous material, they should provide notice to the pilot in command. That was not done in this case, because there is no mechanism for doing so, since it is never supposed to happen.

⁵⁷ JX-13.

⁵⁸ JX-14-15.

RX-7 is related to the shipment of a package of urine that arrived in Houston with leaking urine soaking part of the package. Urine is a human exempt cargo under the regulations, but the package had been marked as Category B. Even though a leaking package of urine would not have to be reported, they decided to report this cargo anyway, since it was marked as Category B.⁵⁹ The FAA took no corrective action as a result of the urine incident.

Elden Allen testified at hearing in pertinent part:⁶⁰

He started with Respondent as a ramp agent loading bags in 2001. He moved up to ramp supervisor after about three years, with oversight and hiring authority over twenty ramp agents. After a couple years of doing that, he went into operations as a cargo agent for about five years. Then he went back to the station side working flights as a gate agent. He became an operation supervisor, went through Manager in Training I and II and was asked to be the manager of cargo in Phoenix. Then he got a job as a regional cargo manager. Eventually Mark Grigg asked him to be a director. His current job is as Senior Manager of Cargo for the western half of the United States. Matt Buckley is his vice president, Wally Devereaux is his senior director, and Mark Grigg is his director. He reports to Grigg.

Respondent has a lot of different and unique cargo customers. For instance, SOS Global ships a lot of communication equipment for third parties like the NBA and ESPN. They carry mail for shipping agents, computers for Dell, flowers for Mother's Day, live tropical fish, animals for zoos, and a lot of seafood.

Any cargo weighing more than a pound requires the shipper to be identified as a known shipper, or work through a known third-party shipping company. Known shippers go through a bidding process with TSA. Their shippers must tell them exactly what it is that is being shipped by properly labeling and packaging the cargo. They then check the cargo by swab, dog, or x-ray. Certified cargo screening facilities go through extra vetting by the TSA. Cargo from those facilities does not have to be verified.

Cargo agents actually accept the packages from the shippers. They confirm the weight and dimensions and look at the airbill to make sure it is properly completed and verify the shipper's status as a known shipper. That information is entered into Respondent's system and the cargo verified by examination. The cargo is then taken to the flight line and loaded onto the aircraft by ramp agents. They use the excess capacity after passengers and luggage.

At destination, ramp agents unload cargo onto carts and freight runners drive it to the freight or cargo facility to be logged in. The customer then comes to pick up the cargo. Respondent has twelve stations with managers like Complainant. Those managers oversee their home station along with a number of smaller stations. At the smaller

⁵⁹ RX-8.

⁶⁰ Tr. 488-653; JX- 32-33, 42-45; CX-66.

stations, any cargo staff works for the station manager and not the regional cargo manager. Some of the stations rely on contractors to do the cargo work. It is important that the cargo staff work as a team with the passenger side. Stations have weekly, monthly, and daily meetings.

As a regional manager, he spent about 80% of his time at his home base. He believes that at least three quarters of a regional manager's time needs to be spent at home to nurture that relationship. Even without a specific required percentage, they understood that was necessary and it had been communicated to them.

He and Complainant used to be colleagues. They went through Manager in Training together and became friends. They both became regional managers in 2006 or 2007. He considered Complainant to be one of his closest friends and they had visited each other's houses. In spring of 2011, he became Complainant's supervisor. That changed the nature of the relationship and was awkward. He did not want to micromanage Complainant. He wanted their friendship to continue and tried to be as supportive and encouraging as he could.

In the fall of 2011, Karen Rutledge came into his office to ask why he was allowing Complainant to travel on must rides to commute. He said he was sure Complainant wouldn't do that, but she said he was, because Houston administration had called her voicing concerns about it. He told her he would take care of it. Company policy did not allow commuting by must ride or positive space.

He called Complainant immediately and told him, man to man, he could not travel must ride for his commute. Complainant responded in a joking fashion that it was really hard to get back and forth because the flights were full. He told Complainant that he didn't want to be hard-assed about it but, he should be living in Houston, even though the company was allowing him to commute. However, if he was going to commute it was on him to drive or fly nonrevenue space available. Complainant said he would take care of it and he assumed that they would never have to have that discussion again.

Complainant wasn't shy about voicing his concerns. He complained about the grade level structure. He was always unhappy that he was a 23, when he thought he should be a 24. At one point, he finally told Complainant he was getting tired of hearing about it and it was not going to change. Eventually, they offered to make him a 24, but he did not want to do that if there was no pay increase involved. Eventually, after Complainant was fired, they did make all of that level of cargo manager a 24. They did not change their pay rates.

Complainant was also unhappy that they would not give him San Antonio and Austin to oversee as part of his region. At one point, San Antonio had been assigned to Complainant's region. He asked Complainant, if he got those cities, how long it would be before Complainant asked to make one of them his home office. Complainant chuckled and said that wouldn't be a bad idea. He complained about those things many times, probably every regional meeting.

Before they had the 2011 golf outing, they had decided that it needed to be more customer oriented. He met with the cargo managers, including Complainant to tell them that the event was for customers and no one better get intoxicated. He told them they could have a couple of drinks, but made his expectations clear to everyone in the room. The next day they went out and played golf.

That night, they had cleaned up from the golf and were heading downstairs for the customer dinner. Seth Keffas came up and told him that Complainant was pretty intoxicated and he had told Complainant to go to his room. He talked to Complainant on the phone and Complainant said he felt like he was getting picked on. He went up to see Complainant, who appeared extremely intoxicated. Complainant had a burn on his leg, had been taking pain medication and drinking all day, and was in pretty bad shape. He told Complainant as a friend and leader to not come back downstairs, but go to bed and head home tomorrow.

When he went back down from talking to Complainant, he heard about the golf club up in the tree and some other things. He went over to the bar to get a coke and saw Complainant. Complainant was engaged in conversation, but it didn't appear to be confrontational, although someone told him later it was a confrontation between Complainant and John Atwood. He doesn't know if John Atwood was disciplined over the incident. When he saw Complainant in the bar it wasn't more than five or ten minutes after he had told Complainant to stay upstairs. Complainant told him it was bullshit and he was not going to stay in his room. He told Complainant that was his decision to make, but he would be held accountable.

He saw a couple more customers and decided to go to bed. As he was walking toward his room, he saw Complainant and Matt Buckley engaged in what appeared to be a heavy discussion. He just shook his head and went to his room, thinking Complainant was just going to get Matt riled up. He did not get any complaints from any customers about how Complainant behaved and the golf outing is supposed to be fun, but Complainant's behavior was inconsistent with the image they were trying to present to their customers.

The next morning, he told Mark that he had told Complainant to stay in his room, but he didn't. They flew home and when they landed, Buckley asked him if they had a problem with Complainant. Buckley said that they had had a pretty frustrating conversation the night before and asked if he needed to get someone to take care of the problem. He told Buckley he would take care of it.

When he got back to his office, he had a conversation with Mark and learned more. The golf clubhouse was four or five miles from the hotel and they had a shuttle to run them back and forth. Complainant drove his golf cart to the hotel and left it there. The golf staff was unhappy that they had to go get the golf cart. He was not under the impression that the resort had given Complainant permission to drive the golf cart back to the hotel.

He also learned that Complainant had gotten a letter of warning from the previous golf outing.⁶¹ Apparently, Complainant's conduct at the golf outing in October 2010 led to Amy McKinney complaining, although she also said she felt that a customer was coming onto her too aggressively. He had not been involved in any of that, but it was frustrating that Complainant had problems two years in a row.

He and Mark asked Matt to join them to discuss their options. They also consulted HR and legal. There were at least two people who were adamant that Complainant should be terminated. He doesn't know if it was because of his friendship with Complainant, but he wanted to give him one last chance. He thought a lot of it was related to alcohol and was worried what would happen if Complainant didn't get help. They ended up deciding to give Complainant a last chance agreement.⁶²

The last chance agreement was pretty wide and covered poor judgment and inappropriate conduct. They meant to tell him how important it was for him to walk a straight line and get his act together. They felt that he needed a strong letter so that he would understand things had to change. Mark Grigg was with him when he gave Complainant the last chance agreement. When they gave it to Complainant, he said that he was being singled out and had to walk a straight line or he could get fired for anything. He told Complainant, not to screw up and mentioned again that Complainant was not to use must ride passes to commute. If no space was available, he would just have to drive.

The last chance agreement focused on the golf outing conduct and didn't mention anything about how much time he spent in Houston or using must ride passes to commute from his home. He thought the verbal correction would be sufficient to correct the abuse of must ride passes.

After receiving the last chance agreement, Complainant complied with its terms and sought assistance from the Employee Assistance Program. Complainant also completed counseling related to alcohol abuse. Complainant corrected the problems that were identified in the last chance letter.

It was after that that he wrote Complainant's 2011 annual performance evaluation.⁶³ After a supervisor writes an evaluation, there is an opportunity for the employee to respond before it is closed out. He signed the evaluation on 20 Jan 12 and it was closed and approved on 3 Apr 12. That was about fifteen days before they fired Complainant.

He believed in setting clear expectations for his employees. He also believed in candid and timely feedback to those employees about their performance. In the evaluation, he stated that Complainant was very passionate and living the Southwest way of life, doing a very good job. He added that Complainant was determined to make Houston cargo the best it could be and has shown a heart as big as Texas in dealing with a coworker's illness. He gave Complainant an outstanding rating. At the time he believed that

⁶¹ JX-8.

⁶² JX-9.

⁶³ CX-22.

Complainant had a positive influence on his team and the other managers he worked with, including the station leadership at Houston. Complainant was one of the few managers to meet over time and hours-paid-per-trip goals for the majority of the year.

The evaluations are very subjective. He was new to supervising and it didn't seem fair to include the golf misconduct in his evaluation, because that had already been accounted for in the last chance agreement. He also did not mention anything about using must ride passes because he thought that had been taken care of when he talked to Complainant about it. He didn't even go back to check on it, because he didn't know there was a way to do that. He should have.

He did not do the performance appraisal correctly. Based on the objective measurables, everything was going great and he was separating behavior from output. He rated Complainant on the output. Since then, he has learned that those go together. At the time he had four managers under his supervision. He would say that Complainant was slightly exceeding expectations. He would have put Complainant behind Sean Moody and Bill Merda, making him three of four in rank order. Complainant was a good performer, but after he did not get picked for the Austin job, he became upset and performance went down the tube.

He does not specifically recall emails about some leaking urine shipments in late 2011 or early 2012. In the time Complainant worked for him, he assumed that Complainant, along with the rest of the company, thought it was important to be forthright and upcoming, doing the right thing. He does not recall talking to Complainant about reporting shipments to the FAA.

He was copied on a bunch of emails that related to a lithium battery shipment from Houston to Austin in February 2012. What he recalls is that the supervisor in Austin sent an email to tell everyone that they got a shipment with lithium batteries that had broken open. However, because of the email train and language used, there was some confusion as to whether or not the package had actually been refused at origin or did travel.

In situations like that, the customer service manager should report the facts to his supervisor and the safety team, who could then make a decision on how to respond and whether or not it was a reportable or non-reportable incident. He thinks a number of people thought that it was rejected at origin, so nothing needed to be done. Complainant stepped in to try to clear up that confusion and make sure everyone understood the package had actually been shipped. After he saw Complainant's email he understood that to be the case.

Complainant did exactly what they expected him to do and his actions had absolutely nothing to do with his termination. He thought the case was closed and the subject never came up in his discussions with Grigg or Buckley or anyone in the context of deciding whether or not to fire Complainant.

In February or early March 2012, he was at a meeting and happened to ask in casual conversation with station leader Vic Zachary how Complainant was doing in Houston. Zachary said things were not going well and Complainant seems to try to manage by phone, so there's not much teamwork and it feels like it's him against them. He was surprised by the answer. It was the first reason he had to suspect something wasn't going right in Houston. That prompted him to decide to go to there and see what was going on. Before he did that, he talked to Mark Grigg.

Grigg suggested he look into the database to review Complainant's flight activity. The initial reason to look at the flight records was to see how much time Complainant was spending at home. It was incidental that they discovered that Complainant was using must ride instead of space available. He pulled up all of Complainant's January, February, and March travel and charted them in a calendar format.⁶⁴ He also looked at Complainant's end of month reports. No one had ever asked Complainant to document driving from his home near Austin to Houston. Eventually, he determined that Complainant was in Houston only 50% of the time, even though there was no standard percentage expectation. Plus, there were a number of days that he could not account for. He noticed that Complainant made two overnight trips to Corpus Christi in three months. He told Grigg about what he had found and Grigg suggested he travel to Houston and ask Complainant about it. He had not been in Houston for several months and had assumed from Complainant's reports that things were going great.

He went to meet with Complainant on 29 Mar 12. When he walked into the cargo facility, it was a mess. There was paper everywhere and it was dirty at the point-of-sale. He walked into the office that Complainant shared with the local supervisors. He noticed a pipe coming out of the roof with mold growing on it, something making a low hum, and dust and dirt. He had told Complainant to fix the noise problem months before. It was like going into someone's garage after it had set for a month or two after a dust storm. There was a film over everything, like no one had been there. There was a broken table and a messed up couch in the break room. He told Complainant that employees deserved at least a clean place for their break. They started talking about a way to remodel and rehab the office space and he told Complainant to move into sales in the meantime.

He was shocked by the appearance of the facility and surprised when Complainant mentioned that they never got any of the covered carts, because he thought he had shipped those months earlier. They had ten or twenty spare covered carts in Atlanta that they moved to Houston. He told Complainant that they needed to clean it up and shouldn't be working in mold. He asked Complainant how long it had been like that. Complainant said it had been like that for a while and he had complained, but no one had done anything. He called facilities and within ten or fifteen minutes the facility guy arrived. The facility guy said he had no idea this was going on and no one had ever told them. The facility guy also said that they had gotten the covered carts months ago.

⁶⁴ JX-42.

He walked out of the back of the freight facility and saw eight brand-new carts lined up. Complainant didn't know they were there. That could have been an honest mistake or just another example of him not knowing what's going on in his own facility. Complainant kind of chuckled and said he guessed he had missed those. He told Complainant that he needed to spend more time in Houston and get everything taken care of and cleaned up.

He showed Complainant the flight sheets from the beginning of the year and noted that March showed him only flying to Houston three times, but traveling to Nashville Raleigh-Durham, and Corpus Christi, leaving 17 possible days for work, since he called in sick from 5 Mar 12 to 9 Mar 12.

He also told him this was serious and he needed to go back and talk to Mark about what he had found. Complainant said that was bullshit, he and Zachary were good friends with a great relationship, and Zachary wouldn't say anything about him not spending enough time in Houston. Complainant also mentioned that it had been a tough month with some illness. He told Complainant that Houston should be his main focus and he needed to spend about 80% of his time in Houston.

Complainant answered that he needed more time with his family and the commute had really become difficult. Complainant thought he should be able to work from home on Monday and Friday and commute in. He told Complainant that leaders have to be present and lead by walking around. Complainant asked if he should get a Houston address or trailer, but he told Complainant to hold off on that and not sign any contracts until he talked to Mark, because this was serious. He reminded Complainant that the commute either had to be by space available or driving.

Complainant then revisited the pay level issues and whether or not he should have Austin and San Antonio in his region. He asked Complainant how moving those cities would help Respondent. Complainant said it would help him. Complainant was frustrated, but he explained to him that they needed to get the facility cleaned up. Complainant never raised any issues about not reporting shipments of hazardous materials. Complainant never said that if they were going to talk about performance issues, they should talk about the company's performance as it related to the shipment of hazardous materials. He had not had any discussions with Complainant related to Respondent not being safe or safety issues.

The object of him going to meet with Complainant was to find out what was going on in Houston. When they met, the conversation was about the office, the warehouse, and the condition of what was going on. No decision had been made about firing Complainant. He does not recall discussing any issues about the hazardous material or safety.

He turns in the information for pay based on what his managers give him. He would ask them to tell him about any days that were not regular pay days, but sick or vacation days. On 3 Apr 12, he called Complainant and asked him to account for a number of days. He gave Complainant a couple of days to respond, which he did.⁶⁵ Complainant explained that he was away from home so much that he took time to catch up on family issues. He is not aware of any practice that allows managers like Complainant to take a day off here or there as informal compensation for all the travel they do. He has never done it. He did not respond to Complainant on that issue. His experience was that Complainant was always available by phone.

He then met with Grigg and they tried to put all the information they had into a three month period.⁶⁶ He had some confusion about Complainant having called in sick, but either way there was a problem with either 3 Jan 12 or 9 Jan 12 being unaccounted for. Complainant did email him on 13 Jan 12 to confirm that 9 Jan 12 was a sick day.⁶⁷ He is confused but guesses he could agree that neither 3 Jan 12 nor 9 Jan 12 were actually unaccounted for. On the other hand, his pay record for that week does not show any sick leave.⁶⁸

16 and 17 Jan 12 had no documentation. Complainant had a roundtable with union workers on Tuesday, 17 Jan 12. Complainant did say in his end of month report that on that day he went in to prep on Monday and had the meeting on Tuesday. Based on that, he could agree that those days are accounted for. However, he left at 8:41 AM on 3 Feb 12, a workday, to fly from Houston home to Austin.

He had asked Complainant about Monday 12 Mar 12 and Tuesday 13 Mar 12. On Wednesday, Complainant told him he was in Houston all day on the 12 Mar 11 and worked at home on 13 Mar 12. Complainant's monthly report indicated he had been sick that day.⁶⁹

Complainant's end of month report for March indicates he flew to Houston on 15 Mar 12, worked there for the day, and then flew to Corpus Christi. It also reports he met with Signature Flight Support on the 15 Mar 12. Flight records indicated he flew to Corpus Christi on 14 Mar 12 and JX-37 says the meeting took place on 16 Mar 12. Based on that he might agree that 15 Mar 12 was not unaccounted for, but there is still an extra day in Corpus Christi, where Complainant had family. He did not believe Corpus Christi warranted two visits in a quarter. In his mind, Corpus Christi would be one day a quarter or maybe even twice a year with the rest on the phone.

Having had an opportunity to review everything, he would not disagree that the days unaccounted for were actually 20 Feb 12, 16 Mar 12, and 20 Mar 12. Complainant never responded with any information about what he was doing on 20 Feb 12 or 20 Mar 12.

⁶⁵ JX-42.

⁶⁶ JX-43.

⁶⁷ JX-34.

⁶⁸ CX-21.

⁶⁹ JX-41.

JX-32 is a summary of the meeting they had on 29 Mar 12. He also created a summary of the last chance agreement at the same time. He did that just so that they would have the timeline for reference.

The decision to fire Complainant was made a week or two later. He and Grigg met first to review all the information and help decide what to do. Grigg asked him what he thought would happen if they gave Complainant another chance. He told Grigg he thought they would be right back where they were then. Complainant had continued to use must ride passes to commute, even when he was told not to. He did not believe Complainant was taking a leadership by example role. At that point he suggested to Grigg they should let Complainant go and Grigg agreed. Then they went to Matt Buckley for approval and Legal and Labor Relations for procedure. Firing Complainant was one of the hardest things he has ever done.

Once they decided to fire Complainant, he flew to Houston. Complainant still had not done anything to move out of the office into sales. He first went to Vic's office and briefed him on what they were going to do. Then they went to a conference room and met with Complainant. He read part of the letter to Complainant and laid it down for Complainant to read and explained to him what was going on. Complainant said it was bullshit and the real reason for what was going on was that Matt and Mark did not like him and wanted to get rid of him after the golf tournament issues. He told Complainant this was not about the golf tournament but his performance in his job.

Complainant asked Zachary to step outside. Once it was just the two of them in the office, it was like Complainant changed gears. Complainant said he had a secret file that he had been saving and if they did not add another zero to the severance package, he was not going to go away and he was going to take some people down with him. Complainant indicated that the file was about moving hazardous materials that they shouldn't be moving. That was the first time he had had any communications with Complainant about safety concerns.

He was taken back by that, told Complainant he was not going to negotiate, and brought Zachary back in. They then went over the severance package and his choices. Complainant said he was going to take his grace period to have an attorney look at it. Zachary got Complainant a flight home and he let Complainant keep the company cell phone so he could communicate with his wife, although he did turn off the company email. Within a couple of hours, Complainant was screaming at him for turning his phone off.

Part of the severance agreement they gave Complainant required him to state that he was not aware of any unethical or fraudulent activity by Respondent. That was prepared by Legal and he was told it was just standard language. At the time, he had only fired one person before, a ramp agent on probation. Complainant was the first person he knew of who was fired for unacceptable job conduct, but offered a severance package.

Vic Zachary testified at hearing in pertinent part:⁷⁰

He has been Respondent's station manager for Houston since before 2011. As the station manager for a large base, he has both passenger and cargo operations. He had some oversight and support responsibilities for Complainant, even though Complainant did not report to him. They had a lot of interaction. He wasn't responsible for tracking Complainant's whereabouts or time on the job and knew Complainant had other stations to oversee. His performance evaluation was not tied to the performance of cargo.

When he started in Houston in late 2006, Complainant was already there and they worked together until he was fired in April 2012. His dealings with Complainant were professional and they had a good working relationship. They had daily station briefings twice a day. Complainant would occasionally come to those and participated in some of the monthly ramp supervisor meetings. Complainant also attended his senior manager meetings maybe every other or third month.

At the time, he would estimate that Complainant was around 30 to 40% of the time. Because of their shared responsibilities, he was having to do things because Complainant wasn't around to do them. His managers did not have a very good relationship with Complainant. They respected him because he was a manager, but were not eager to work with him. He had a very forceful approach. He was very good friends with Glenn Vaughan, who was one of Complainant's supervisors. Vaughan was a very senior supervisor and reliable. Complainant had Vaughan do a lot of things for him when he wasn't around. He recalls testifying at his deposition that he and Complainant did not have any problems that they could not work through.

In early 2012, his senior admin person told him Complainant was going back and forth between Austin on must ride passes. She occasionally would write the e-ticket passes for him. That was not a permissible use of must ride passes, so he told her to keep him posted on how often he was doing that. He did not report what Complainant was doing to senior management, but she did.

In late February or early March 2012, he was at a station managers meeting. There were also a number of department managers, including Eldon Allen. During a break, Allen approached him and asked how things were going and how Complainant was doing. He told Allen that Complainant was doing okay when he was there. It was a quick conversation, but he intended to communicate to Allen that Complainant wasn't around much. He would not have been surprised to hear that Allen would have looked into it further.

After he got back home, he mentioned to Complainant that they were asking about him. Eventually, Allen called him to say he was coming down to see Complainant and asking if he could join them. The day that Allen came down, they met first without Complainant and Allen showed him the termination letter and severance letter that were going to be offered to Complainant. Then they met with Complainant and Allen gave the letter to

⁷⁰ Tr. 654-674.

him. Complainant started to read the first letter and Allen mentioned that there was another one as well, which Complainant started to read.

Complainant said that was bullshit and complained that he never had a performance plan or letter of expectation. Complainant said it all came from the golf tournament and all he did was hang up a putter. Allen told Complainant that they were not there to negotiate and Complainant asked if he needed to be in there with them. Allen said he could leave, so he left Complainant and Allen in the room alone.

About 10 or 15 minutes later he went back in and there was conversation about logistical things like Complainant's company cell phone and laptop. His impression was that Complainant was disappointed, but not necessarily surprised. In his role as station manager, he has been involved in firing employees. He has never offered a severance package when firing an employee for unacceptable work.

Complainant was replaced by Steve Langheart. Things improved significantly when he took over because it was a more cooperative and productive relationship. It was an adversarial relationship under Complainant. Langheart spent 70 to 80% of his time in Houston. That helped a lot.

Amy McKinney testified at hearing in pertinent part:⁷¹

She has been in Marketing for Respondent for the past fifteen years. Respondent has handbooks and policies related to sexual harassment. They included a specific procedure to follow to report sexual harassment situations.

Respondent conducts yearly golf outings for its cargo customers. The outings are also attended by sales and cargo managers. She has attended four of them, including the ones in 2010 and 2011. At the time, her supervisor was Wally Devereaux.

At the 2010 golf outing, she rode in the party bus from the airport to the resort with Complainant and Karen Rutledge. She does not recall if Collin Rogers was on the bus. She had only met Complainant once before, but the other women on her team warned her that he was friendly and touchy with women. When they met, she tried to shake his hand, but he said we don't shake hands here, we hug. He put his hand on the small of her back and pushed her into him, which was not a welcomed interaction.

Rutledge was trying to get the customers and employees to do karaoke, but was having a tough time of that. She went to sit down on the seat next to Complainant and he had his hand where she sat down, so it went up her skirt. Rutledge jumped and giggled. Her reaction seemed to be more uncomfortable rather than playful. Her impression was that Rutledge did not welcome what he did.

⁷¹ Tr. 675-691.

She thought it was inappropriate, particularly in front of customers, and talked to Rutledge afterward, but Rutledge said that's just Complainant being Complainant. She mentioned it anyway to her supervisor, Elden Allen, Bill Merda, and Tracy Asher. She did not make a formal sexual harassment report.

During that outing, she was on the pier walking back from dinner with a customer, when he tried to kiss her. She wriggled out of his arms. She does not recall his name or where he was from. She told his supervisor about it. The customer apologized to her the next morning. She also observed Complainant walking on the pier with Allen and being sufficiently intoxicated to fall off the pier. His coworkers had to help him out of the water. She also saw him later that night in the hospitality suite and he still appeared intoxicated. It was in the suite that she told Allen, Bill, and Tracy about the bus incident with Rutledge.

Matt Buckley testified at hearing in pertinent part:⁷²

He started with Respondent loading bags on the ramp. He is now Respondent's Vice President of Cargo and Charters. He runs Respondent's cargo operation. He started in that position in 2011. Before that, he was Senior Director of Cargo and Charters. He reports to Jack Smith, who is the Senior VP of Operations.

He has known Complainant for more than twenty years. He would say that Complainant has a hard charging personality, almost to a fault. He was involved in the decision to terminate Complainant. He understood that in a casual conversation Eldon Allen asked the station manager how Complainant was doing and was told by the station manager they never see Complainant. After they looked into it, Allen and Grigg came to him with a recommendation to terminate and he agreed. He was the final approval authority, after coordinating with Legal and HR.

He understood that the termination was for all the things that were in the last chance agreement. Complainant didn't have the relationships they needed to have in Houston, was riding on must ride passes to commute to work, and had behavior problems at the golf tournaments. He is not aware of documentation about the problems with must ride passes or relationships in Houston, because that was discovered after the station manager raised the issue.

Respondent's custom and practice is to give employees notice of the opportunity to remedy complaints before being terminated, unless they are on a last chance agreement. He doesn't know that it was easier to terminate Complainant because of the last chance agreement. It might have been easier to terminate him before the last chance agreement, but he, Grigg, and Allen stuck their necks out and decided to give Complainant one more chance, since he had an alcohol problem. They got a lot of opposition from Legal on keeping him. They were majorly disappointed when they found out about the other things afterwards.

⁷² Tr. 692-721.

In 2010, they did not require Complainant to get help through the Employee Assistance Program. They encouraged him, but they didn't require him. The last chance agreement did require him to go get help and he completed alcohol counseling.

He would say that Complainant was successful in meeting his production goals as to HPPT and overtime. However, he has learned since Complainant left from the staff in Houston that Complainant made those goals by strong-arming his supervisors and denying overtime before it ever happened.

He would expect that managers like Complainant would spend more than half of their time in their base city. Respondent relied on them to use their discretion on how to spend their time. However, in some of the regions there is little need to spend much time at all away from the base city. In Houston, Complainant had 25 or 30 employees reporting up to him. They needed him there. A regional manager with seven cities should be at home 80 to 90% of the time.

Whether or not a cargo manager should get to take a day off in exchange for having to travel or work extra hours would be between the manager and his boss. There was no formal guideline about that.

During the 2011 golf outing he had a private conversation with Complainant. Complainant appeared to be intoxicated, melancholy, and depressed. Complainant said he was persona non grata and was feeling picked on. They had been friends for a long time and he just listened. They were far enough away from any customers that he felt no need to tell Complainant to go back to his room. He is not aware of any problems with alcohol after the 2011 golf outing or with offensive conduct toward females after the 2010 golf outing.

As a senior leader for Respondent for many years, he knows Respondent uses severance agreements in particular for long-term employees who are terminated to give them a transition to the next job. He has personally been involved in those situations. He thought it was the right thing to do for Complainant, given the circumstances with alcohol and long-term tenure. It was not an attempt to buy silence and the language about that topic is boilerplate provided by the legal department. They could have simply given Complainant \$30,000, but they have never done anything like that. He has not ever fired an employee who performed in a careless and unacceptable manner and offered them a severance package.

The first time he heard anything about a February 2012 shipment of lithium batteries was when Respondent received the letter of investigation from the FAA. He considered that to be a very serious issue and would be very concerned to know that anyone had failed to read emails related to that shipment.

Mark Grigg testified at hearing in pertinent part:⁷³

He is Respondent's director of cargo customer service. Before that, he was a senior manager for cargo. He was Complainant's direct supervisor from 2006 until some point in 2011.

He was Complainant's manager during the 2010 golf outing. He vaguely recalls being on the bus and remembers karaoke and drinks, but does not recall any incident between Complainant and Karen Rutledge. He does not recall any karaoke song about oral sex. If there was such a song, it would be inappropriate. The bus incident at that outing was reported to Hollingsworth by Wally Devereaux. They felt it was sufficiently serious for Hollingsworth to issue the corrective letter. He did review the draft letter Hollingsworth had written and provided suggested changes.⁷⁴ He did not think it was appropriate to call the letter a letter of instruction, because that implied there would be a letter of warning and final letter of warning before termination, based on Respondent's normal disciplinary process. That process does not specifically apply to managers. His understanding is that Hollingsworth did all the investigation into the incident.

He believes Complainant's performance appraisals accurately reflect the things he did well and the things he needed to improve. One of the things he needed to improve was beating a dead horse. He asked Complainant to stop doing that on more than one occasion. The items he referred to were the pay level, and authorization to fly in the cockpit, and allocation of San Antonio and Austin into his region. When he told Complainant to let it go, it would die for a little while, but it did not go away. However, that really didn't have anything to do with why Complainant was terminated.

Houston was a top five station in terms of volume and revenue for cargo. Complainant, like all of the other regional managers, also had outstations. After about a year in his job, he observed that not all out stations required the same attention. For example, Charleston has only one employee and not much activity. The shuttle providers weren't even an airport facility and probably only needed one annual visit.

Part of the regional manager's annual performance plan would be to propose a number of visits to each out station and they would agree on the time they would spend away from their base. He would think that the managers would have to be at their base station 75% of the time. When he found out Complainant was only in Houston 50% of the time, that seemed low and explains in part why Complainant was fired. He cannot think of a reason Complainant should've been spending half of his time out of town.

Complainant always kind of did just enough to keep his head above water. Complainant typically ran behind frantically trying to meet deadlines and would miss them. His peers referred to him as the canary in the coal mine, meaning that if he was still employed, they were certainly safe. His evaluations of Complainant were never really better than a solid overall rating. He would say that Complainant was on the lower end of performers. That

⁷³ Tr. 722-765.

⁷⁴ RX-17.

doesn't mean he was poor, just that he fell behind his peers and was just doing enough to keep his head above water. He understands that Respondent was the only manager who consistently met HPPT and overtime goals for the year. Houston's revenue and volume numbers were satisfactory in 2011. However, volume and revenue are more of a function of sales than cargo staff. Of course, if the cargo staff fails, it will eventually show in decreased volume.

Once Complainant was fired, it was like night and day. It seemed that they could not realize how much better it could have gotten until they saw the change. The goal for meeting the time standard for getting a piece of cargo from a parked flight to available for pickup at the facility is 80 or 90%. Under Complainant they were struggling at 50 or 60%. Complainant's replacement is consistently over 90%. Houston won the top performer award for 2014.

After Eldon Allen gave Complainant's last performance evaluation, he explained that he did not include the things in the last chance agreement because they were related to the golf tournament. He thinks that was before they fired Complainant. Allen should have included everything in the evaluation, but was trying to build Complainant back up and not rub his face and it.

When they discussed the last chance agreement, no one really considered the fact that the corrective letter from the 2010 golf tournament was due to be pulled from Complainant's file in five days. He wasn't aware of any alcohol-related problems outside of the two golf tournaments, but the 2011 golf outing was kind of a repeat offense and justified termination. However, Allen had a hard time firing Complainant and felt that they could get him some help and turn him into a productive employee. Allen went to bat for Complainant and supported some option other than termination. That's how they settled on the last chance agreement. The last chance agreement was intended to be very broad and Complainant observed that it seemed that he could be fired for any reason.

Transporting lithium batteries is a serious safety issue. Complainant informed several managers that Respondent had transported lithium batteries on 22 Feb 12. Respondent should not have shipped the batteries. However, they were labeled as computer parts and until the package broke open, no one could know they were actually batteries. He was not involved in responding to the FAA investigation and was not involved in the verbal counseling that Hargrove received. He's not aware of any other discipline that was given as a result of the lithium battery shipment. He doesn't specifically recall any remedial training in that regard.

When Complainant forwarded the Austin station notice about the lithium batteries, he was doing exactly what he was expected to do. The same is true of Complainant's email that told everyone the batteries had actually shipped. He was not copied on those emails. In JX-18 he told Complainant to talk to the shipper about the problem. He was a little frustrated that Complainant even had to ask about it. The shipment originated in Complainant's city and the problem was right there. He had the most knowledge of what was going on and was clearly the person who should go talk to the customer.

He did nothing to dissuade Complainant from reporting anything to the FAA. He assumed that Hargrove would handle it appropriately and figured that once Complainant did talk to the shipper it was a resolved issue. In their discussions about whether or not to terminate Complainant the batteries never came up and played no role in the ultimate decision.

It's unusual to have the FAA come in and provide training to direct the cargo employees, but he thought it was a good thing when Complainant set it up. He wasn't sure it would work for everyone.

He was involved in the decision to terminate Complainant. He understood that the 2010 letter and the 2011 last chance agreement related to conduct at the golf outings, with the exception of the paragraphs in the last chance agreement that covered all the other performance related issues. The last chance agreement did not mention using must ride passes or accounting for time. At that point, they were not concerns. However, Complainant expressed frustration with the last chance language that included other items beyond alcohol, because he said he hated the fact that he could be fired for anything.

Respondent's employees understand that the violation of pass policy can get them fired quickly, as can miscounting time. He has seen a lot of people terminated for that. It was Complainant's responsibility to get from his home to Houston every day, just like he has to drive to the office every morning. It doesn't make any difference if there is an important meeting in the morning in Houston. Complainant still cannot use a must ride pass. He thinks that was just a way for Complainant to justify using a must ride pass. Complainant might have been justified in using a must ride pass to return from an outlying base to Houston, but was not allowed to continue on home to Austin on the same must ride pass, even if that meant breaking the trip up into two reservations.

Respondents personnel management policy is that employees should be told when they fail to meet standards and have an opportunity to correct the behavior. For example, it appeared that Complainant had not given the supervisors who reported to him feedback for an entire year.

Complainant's situation was the first time he had seen an employee fired for unacceptable job performance, but also offered a severance package. Typically, terminations for cause would not involve severance. He doesn't know if Respondent could have just written Complainant a check instead of requiring him to sign a severance agreement.

Walter Devereaux testified at hearing in pertinent part:⁷⁵

He works for Respondent as Senior Director of Cargo and Charters. Before that, he was Director of Cargo Sales and Marketing. He attended the 2010 golf outing. Jay Hollingsworth asked him to look into an incident that involved Amy McKinney. John

⁷⁵ Tr. 771-781.

Atwood also came to him to talk about some things that Complainant had done in the hospitality suite. Atwood was Senior Manager of Cargo Sales.

He does not recall McKinney having come to him to complain about anything, but he did go to her to talk about what had happened on the bus. He had not been on that bus. McKinney said she saw Complainant put his hand under Rutledge's skirt or bottom when she sat down. He did not ask McKinney if she had been drinking, but would suspect that she had. McKinney also told her that a customer had come onto her and made her feel uncomfortable. He did not do anything about the complaint about the customer. No one mentioned anything to him about Collin Rogers misbehaving on the bus.

Atwood told him that he had had words with Complainant in the hospitality suite, because Complainant had brought an uninvited guest from the bar. When Atwood asked Complainant to have the guest leave, they exchanged words. Atwood said Complainant was drunk and refused to leave, but did not mention whether or not there was inappropriate language used. He did not do anything else to look into the hospitality suite incident between Atwood and Complainant. He did not ask Atwood if he had been drinking, but Atwood typically drinks at the golf outings.

He went back and told Hollingsworth what he had learned. That resulted in a letter of warning for Complainant.⁷⁶ He is not aware of any action against Atwood or if anyone asked Complainant for his side of the story.

Elizabeth Bondurant testified at hearing in pertinent part:⁷⁷

She has been married to Complainant for 36 years. Complainant loved working for Respondent and it was like his family. He and Eldon Allen were close friends. When Allen was promoted and Complainant was not, Complainant was happy for Allen and didn't get frustrated or start pouting. She doesn't recall Complainant being frustrated and not being fairly treated in regard to the job in Austin.

When Complainant was fired it was a total shock. They could not believe it. It came out of the blue and Complainant was very depressed and could not function. He was normally happy and outgoing, but became just the opposite. He had trouble sleeping and was sad. He would cry and had trouble eating. He lost a lot of weight. That lessened over the months but it lasted for a good eight months.

Complainant's OSHA complaint indicates in pertinent part:⁷⁸

He filed a complaint on 14 May 12. He noted Respondent has a duty to disclose to the FAA when it discovers that it has transported air cargo that does not comply with safety requirements. He has personal and direct knowledge that Respondent failed in its obligation of self-disclosure in the past and is concerned that the safety of the traveling

⁷⁶ JX-8.

⁷⁷ Tr.782-758.

⁷⁸ JX-2-3.

public could be in jeopardy if Respondent continues its pattern of failing to report the transportation of hazardous cargo to the FAA as required.

There were numerous instances of regulated but undeclared cargo traveling into and out of cities within his region. Several of these shipments posed a substantial risk to safety of flight and the traveling public. Some incidents were reported, however there were numerous instances when reporting required by the FAA was discouraged, suppressed, or consciously ignored by upper management.

Specifically, in August 2010, Respondent discovered that it had transported a cylinder of pressurized flammable gas. He reported the incident to management so that it could be properly reported to the FAA, but was later instructed to release the cylinder to the customer and told that the FAA had not been notified.

On or about 11 Feb 12, Respondent discovered a box from a laboratory that ships biological substances was leaking fluid suspected to be urine. He instructed his employees to report that incident to the FAA. He was admonished by management for having done so and told, contrary to the FAA's requirements, that not every incident needed to be reported.

As a result of the report that was made, on 14 Feb 12, an FAA investigator conducted training with his staff to discuss FAA expectations in terms of reporting, photographing, documenting, and handling cargo. The investigator instructed them not to release cargo until it had been cleared by the FAA. That direction seemed to upset management, because Respondent has large profit accounts relying on 24 hour diagnosis of biological samples.

On 22 Feb 12, Respondent discovered it had transported a box of lithium batteries that was not safely packaged. He reported the incident to upper management, but they failed to report to the FAA as required.

After he directed the urine report to the FAA, he began to be targeted and criticized for conduct that had previously been acceptable. On 18 Apr 12, he was asked to sign a resignation statement denying any knowledge of wrongdoing by Respondent or be terminated. The only reason Respondent had for its decision to terminate him was his desire to report to the FAA as required. He feared that public safety would be endangered if Respondent continued to ignore its safety obligations as hazardous cargo is at times improperly packaged and transported on passenger aircraft. He believes he was terminated due to his efforts to comply with those reporting requirements.

Respondent's records indicate in pertinent part:

Respondent's Ground Operations Employee Handbook (2010 and 17 Oct 11) instructs that employees are not allowed to reside in one city and commute to another city using passes. Any deviation from that policy must have prior approval from the Vice President

for Ground Operations.⁷⁹ Respondent's employee website directed employees to fly on company aircraft whenever possible for business travel. Such travel should be done by presenting the completed four-part ticket authorized by the department head. Commuting from home to work is not considered business travel. On 29 Jan 07, Complainant reviewed Respondent's policies for ground operation employees, including its policy against unwelcome verbal or physical sexual behavior.⁸⁰

On 30 Jan 07, in an email exchange with Art Allison, Complainant asked if there was a time limit for him to move to Houston. Allison told Complainant to get some sort of lease by 1 Mar 07 and that he could not be flying out of Austin or San Antonio during the week and should not be going through Austin when making station visits from Houston, although if making Monday outstation visits, he could go direct to the outstation from Austin.⁸¹ Complainant asked if, since he had to move to Houston, San Antonio could be moved into his region.⁸²

On 16 Aug 10, Respondent accepted for shipment from Los Angeles to Houston cargo from CAP LOGISTICS to EXATRANS. The shipment was described as machine parts and the nature and quantity of goods was described as a cylinder, but the account name was clinical pathology laboratories.⁸³ The package had labels affixed indicating Class II hazardous materials (flammable gas), but the labels were not discovered and the cargo was flown from Los Angeles to Houston.⁸⁴

Upon arrival in Houston, the nature of the cargo was discovered and cargo management was informed. Jay Hollingsworth asked for photos and complete information and instructed Houston cargo manager Glenn Vaughan not to release the shipment.⁸⁵ Vaughan asked if he should fill out an incident report and Hollingsworth asked Andrus and Hargrove for their opinion.⁸⁶ Later in the day, Hollingsworth said that Environmental and Safety had authorized the release of the shipment. Complainant asked Hollingsworth if the FAA got a "woody" when they were informed of the shipment. Hollingsworth replied that Environmental and Safety, acting on advice from Legal, decided not to report to the FAA.⁸⁷ Hollingsworth emailed Andrus and Hargrove to make sure that Houston did not release the cargo until he told them to.⁸⁸

At 1:41 AM on 23 Sep 10, Complainant emailed Hollingsworth asking what was up, because Elden and Bill told him Amy was upset with him. He continued that he hadn't had two words to say to her and wondered if she was a little whack about something or

⁷⁹ JX-25.

⁸⁰ JX-26-31.

⁸¹ JX-5.

⁸² JX-6.

⁸³ CX-3, 5.

⁸⁴ CX-9.

⁸⁵ CX-6.

⁸⁶ CX-10; RX-20.

⁸⁷ CX-4; RX-3.

⁸⁸ RX-19.

just weird.⁸⁹ Later that night, Wally Devereaux emailed Hollingsworth and Grigg to tell them that both nights of the golf outing, Complainant got very drunk. He added that Atwood got upset with Complainant when he brought an outsider to the bar and they had a few words which did not go very well, after which Complainant refused to leave.⁹⁰

On 14 Oct 10, Grigg sent an email to Hollingsworth to say that the proposed letter for Complainant was fine, but should not be a letter of instruction, since that would imply he could still get a letter of warning and final of letter of warning before termination.⁹¹

On 20 Oct 10, Jay Hollingsworth issued Complainant a letter of warning for his inappropriate and unprofessional behavior with a coworker on the afternoon of 21 Sep 10 and his actions on the evening of 22 Sep 10, when he appeared to be intoxicated and was involved in an argumentative confrontation with a coworker over the presence of a possible party crasher in the hospitality suite. Hollingsworth noted that on 27 Sep 10, during a telephone conversation, Complainant had acknowledged his actions were inappropriate and was going to swear off the hard stuff (alcohol). Hollingsworth encouraged him to seek assistance through the Employee Assistance Program if it would help. He closed by cautioning Complainant that failure to correct his behavior would result in severe disciplinary action. Complainant signed the letter and added a note that it would not happen again.⁹² On 21 Oct 10, Hollingsworth emailed Complainant to tell him the letter would remain in his file for one year.⁹³

On 10 Nov 11, Allen issued Complainant a last chance agreement letter for inappropriate and unprofessional conduct on 5 Oct 11 at the Cargo Classic Golf Tournament. Specifically, Complainant appeared intoxicated and placed his putter in a tree and left it there. Complainant also cornered several coworkers and complained of being picked on and accused of being intoxicated. Complainant exhibited this unprofessional and inappropriate behavior in front of customers and placed the company in a bad light. The letter noted that the day prior to the tournament Complainant attended a meeting and was told that the tournament was a customer event and team members were expected to behave in a professional manner, but Complainant had failed to heed the warning. The letter also mentioned the conversation on 5 Oct 11, observing that Complainant had had a similar conversation with Jay Hollingsworth a year earlier.

The letter further cautioned Complainant that it was a very serious matter, his behavior was unacceptable and a violation of Respondent's principles of conduct, which provide that conduct on or off the job that is detrimental to the company or adverse conduct reflecting on the Company, whether on or off duty, may be cause for immediate dismissal. It continued that although there was cause to terminate his employment, Respondent was willing to offer him one final letter of warning and last chance agreement in lieu of termination. However, Complainant must change his behavior

⁸⁹ RX-15.

⁹⁰ RX-16.

⁹¹ RX-17.

⁹² JX-8.

⁹³ CX-11.

immediately, comply with all policies and procedures, seek assistance from Respondent's Employee Assistance Program for alcohol use, and comply with and complete any treatment as outlined by that program's staff. The letter closed by noting it was his final warning and any further incidents would result in his termination.⁹⁴

On 30 Nov 11, Respondent accepted for shipment from Nashville to Houston cargo identified as biological substances/laboratory specimens shipped by One Source Toxicology.⁹⁵

On 1 Dec 11, Tracy Pfeiffer submitted an online report that a twenty piece shipment arrived into Houston consisting of biological specimens shipped in cardboard boxes. The boxes contained urine samples without requisite absorbent material.⁹⁶

On 2 Dec 11, Complainant emailed Hollingsworth, Doherty, Grigg, Allen, and Keffas, informing them about the mislabeled urine soaked box arriving in Houston. Doherty asked Complainant if the shipper had been contacted and advised of the problem. Complainant responded that Pfeiffer had talked to the driver and he was going to contact the shipper with Keffas. Andrus instructed that they would need to complete a report for the FAA, since it was a regulated package. Complainant asked if he should do the report, but Andrus told him Hargrove historically completed those and had it down to a science.⁹⁷

Doherty noted that the airway bill did not indicate the shipment as Category B, even though the boxes were marked as Category B and entered into the system is Category B. Doherty wondered if the FAA would come back on Respondents for not catching that paperwork discrepancy. Andrus replied that that was a possibility and something would need to be done. Andrus also said it would be worth auditing to determine how common a problem it is and ensure compliance with how it is defined in company procedures. Complainant replied that they would need to do some fact finding to determine where the failure was and to issue appropriate discipline. Complainant noted that they had to disclose and would need to be prepared to show the FAA that they had taken corrective action.⁹⁸

On 5 Dec 11, Respondent reported to the Department of Transportation a hazardous material incident. The report noted that the package arrived in Houston with the outside soaked in urine. Upon inspection, it appeared that the internal packaging did not contain any cushioning material or any absorbent material. The shipment was actually exempt human specimens, but had been shipped as BS Category B. Respondent noted they had advised the shipper of their requirements and regulatory requirements for the proper shipment of exempt human specimens and BS shipments.⁹⁹

⁹⁴ JX-9.

⁹⁵ CX-13.

⁹⁶ CX-12; RX-4.

⁹⁷ CX-15-16; RX-6.

⁹⁸ CX-14; RX-5.

⁹⁹ CX-13; RX-7-8.

Complainant's end of month report for November 2011 indicated that there had been a problem with Air Net shipping biological samples without proper packing and pieces arriving in Houston from Nashville with one box soaked in urine. Complainant reported the shipper had been contacted, apologized, and assured them that they would fix the problem.¹⁰⁰

On 14 Dec 11, Mark Grigg emailed Complainant and asked to be reminded how they had handled the urine shipments from 1 Dec 11.¹⁰¹ Complainant told him that he and Keffas had reinforced the shipping requirements with Air Net and the Nashville staff had been spot checking shipments, with no new problems discovered.¹⁰²

Complainant's end of month report for December 2011 reported issues with Air Net shipping biological samples without proper packing. It also noted FAA agent Bill Streb came to the office and requested that any time that happened in the future the shipment should not be released to the customer until FAA has investigated. Complainant reported he told Streb he would have to check before agreeing to hold up biological samples that have an immediate turnaround, particularly since it would take Streb a day or so to investigate.¹⁰³

On 3 Jan 12, Complainant took a vacation day.¹⁰⁴ He was also released for full unrestricted return to work, having completed four 50 minutes counseling sessions since 17 Nov 11. The clinician noted that Complainant's level of functioning was excellent prior to the first session of counseling and remained excellent after the last session. It also noted an improvement of 100% in routine work capacity and activities of daily living.¹⁰⁵

On 4 Jan 12, Complainant provided an update on the urine shipment, indicating that he and Keffas had detailed discussions with One Source to ensure compliance and that One Source had admitted to cutting corners because they ran out of proper packing material. Complainant also noted that FAA Agent Streb was meeting with him that day and would be following up with One Source.¹⁰⁶

On 5 Jan 12, Hargrove emailed Complainant to tell him that Streb had called to ask for the station report from the urine spill on 1 Dec 11. Complainant replied that he had no access to the online report, which was not done until the next day.¹⁰⁷

9 Jan 12, was a holiday for Complainant.¹⁰⁸

¹⁰⁰ RX-13.

¹⁰¹ CX-17; RX-9.

¹⁰² CX-18; RX-10.

¹⁰³ RX-14.

¹⁰⁴ CX-21.

¹⁰⁵ CX-19.

¹⁰⁶ CX-20; RX-11.

¹⁰⁷ RX-12.

¹⁰⁸ CX-21.

On 13 Jan 12, Allen asked his managers to send in their hours for the previous pay period and let him know if they took any vacation, sick, or holiday days. Complainant responded that he took 9 Jan 12 as a sick day and had a hole in his jaw to prove it.¹⁰⁹

On 20 Jan 12, Allen rated Complainant outstanding for living and working the Southwest way, along with thinking strategically as a leader. He rated Complainant solid for developing people as a leader and team building as a leader. He noted that Complainant is a very passionate person who lives the Southwest way of life and has a heart as big as Texas.¹¹⁰

Complainant's end of month report for January 2012 indicated that Bill Streb from the FAA had come to discuss the leaking shipment from Nashville and was satisfied with the way Respondent had handled it.¹¹¹

On 21 Feb 12, Respondent accepted from CEVA freight a shipment from Houston to Austin. Upon delivery, the consignee noted that the box was damaged.¹¹²

On 22 Feb 12, Cheryl Hawman sent Complainant and Jim Doherty an email, informing them that they had received a shipment from Houston that morning which contained loose lithium batteries. She noted that it was a certified facility shipment, so it had not been inspected and it was listed as computer parts. She also noted that they were denying those in Austin and asked for advice on what to do.¹¹³

Complainant forwarded the email to Doherty, saying that they came off of the shuttle last night from a certified shipper, but did not look like appropriate packaging and asked for Doherty's thoughts.¹¹⁴ Hollingsworth noted that it looked like a bulk shipment of batteries.¹¹⁵ Complainant also forwarded the email to Bill Parker with the comment that "this ain't good."¹¹⁶ Hawman also sent an email to Lisa Bible, noting that when they refused the shipment, the shipper insisted that he does it all the time in Houston.¹¹⁷ Doherty responded and copied Todd Hargrove, saying he agreed that they were improperly packed, providing the company manual rules on those shipments, and noting that he would refuse the shipment. He asked Hargrove if he agreed.¹¹⁸

Complainant interjected to Doherty, Hargrove, Allen, and Stone that the issue was that the shipment had already been accepted in Houston and transported to Austin via Dallas. He added that the cargo had been released by Austin before he was notified and that

¹⁰⁹ JX-34.

¹¹⁰ CX-22, 39.

¹¹¹ JX-24.

¹¹² CX-31.

¹¹³ JX-10.

¹¹⁴ JX-11; CX-28-29.

¹¹⁵ CX-30.

¹¹⁶ JX-12.

¹¹⁷ CX-24.

¹¹⁸ JX-13.

Austin called him because the shipment originated in Houston and they had had a similar issue between the same two cities with a different shipper.¹¹⁹ Doherty responded that he understood and suggested calling the shipper to educate them on the requirement for future shipments.¹²⁰ Hargrove added that they definitely needed to notify the shipper of the requirements, not just from Respondent's point of view, but from DOT standpoint. He added that the shipper should be made aware that if the FAA were to see it, it would be a really serious issue and was the very thing that put the lithium battery issue where it is today.¹²¹

Complainant asked if he should be the one to contact the shipper.¹²² Grigg responded that he should¹²³ and Complainant said that he would.¹²⁴ Complainant then contacted the shipper by email, telling him they had a serious problem with a lithium battery shipment and needed to talk about it.¹²⁵ Complainant also sent a copy of the original email message from Austin¹²⁶ and Doherty's guidance from the company manual.¹²⁷ Cheryl Hawman sent an email to Hollingsworth, Devereaux, and Grigg copying them on her earlier email with Complainant.¹²⁸

On 23 Feb 12, Wally Devereaux, Director of Sales and Marketing, asked if anything needed to be done about the battery shipment. Hollingsworth replied that he understood Complainant was calling the customer. Mark Grigg added that he had asked Complainant to do so, since the shipment originated in Houston.¹²⁹

On 14 Mar 12, Complainant took a morning flight from Austin to Houston. Later that night, he flew from Houston to Corpus Christi.¹³⁰

On 14 Mar 12, Allen asked his managers to send in any payroll exceptions for the previous pay period. Complainant responded that he was out sick 5 Mar 12 through 9 Mar 12, but was feeling 100% now. Allen responded by asking about 12 Mar 12 and 13 Mar 12. Complainant answered that he was in Houston all day 12 Mar 12 and worked at home 13 Mar 12. He added that he arrived into the office at 7:00 AM that day and would not leave until 8 o'clock that night and asked if Allen had any other questions.¹³¹

¹¹⁹ JX-14.

¹²⁰ JX-15.

¹²¹ JX-16.

¹²² JX-17; CX-26-27.

¹²³ JX-18.

¹²⁴ JX-19.

¹²⁵ JX-20.

¹²⁶ JX-21.

¹²⁷ JX-22; CX-23.

¹²⁸ JX-23; CX-25.

¹²⁹ CX-34-38.

¹³⁰ JX-38-40.

¹³¹ JX-35.

Complainant's end of month report for March 2012 indicated that the month had been difficult because of illness, which had prevented him from spending as much time in his base station as he would have hoped. He stated Houston would be his focus in April and May, with the exception of Raleigh-Durham and Atlanta during the second week in May and New Orleans on 30 April 12 and 1 May 12. He noted that a request for refurbishment on the offices in Houston had been submitted.¹³²

On 3 Apr 12, Allen emailed Complainant and asked him to account for 3, 16, and 17 Jan 12; 3, 10, 16, and 20 Feb 12; 13, 16, and 20 Mar 12.¹³³ On 5 Apr 12, Complainant responded that:

3 Jan 12 was a day at a time (DAT) vacation day and he apologized if he had not communicated that.

16 and 17 Jan 12 were drive in days and he had a superintendent's meeting on 16 Jan 12 to prepare for a union meeting on 17 Jan 12.

3 Feb 12 was a fly from Houston to Austin day.

9 Feb 12 was fly from Austin to Houston to Jackson day.

16 Feb 12 was a sick day to remove a foreign object from his eye.

17 Feb 12 was a DAT date to recover from the day before.

13 Mar 12 was a sick day.

15 Mar 12 was a fly to Houston to work and then fly to Corpus Christi day.

16 Mar 12 was a meeting in Corpus Christi and then drive home day.

Complainant added that he does not abuse the ability to be flexible with his schedule and the first three months of 2012 was a physical challenge for him. He noted that they had been tasked to visit each location quarterly with an emphasis on hot spots, but added that Houston was not a hot spot. He added that he always answers his phone after hours and on weekends and often spend several hours with customers looking for their cargo. He takes the obligation to be available 24/7 seriously, but since that means he is away from family for days at a time, there has to be time to catch up on family issues.¹³⁴

On 16 Apr 12, Respondent prepared a confidential agreement and release letter for Complainant which offered a lump-sum severance payment of \$30,000 within thirty days of acceptance. It required Complainant to release Respondent from any and all claims and affirm that he is unaware of any fraudulent or unethical activity by Respondent.¹³⁵

On 18 Apr 12, Complainant was given a letter of termination of employment. It cited Complainant's overall poor job performance. Specifically it noted his failure to develop a quality working relationship with Houston leadership; his failure to spend enough time in Houston; the use of must ride passes for nonbusiness travel in commuting from Houston

¹³² JX-41.

¹³³ JX-36.

¹³⁴ JX-37.

¹³⁵ JX-4.

to Austin, contrary to earlier instructions; and his inability to account for his complete work schedule. It further noted Complainant had been given a last chance agreement in November 2011, which warned him that any incidents of poor judgment, inadequate job performance, inappropriate or unprofessional conduct, or failure to adhere to the provisions of the last chance agreement would result in termination. Finally, it explained that since he had continued to perform his job in a careless, negligent, and unsatisfactory manner in violation of Respondent's basic principles of leadership and conduct, he was terminated.¹³⁶ On 20 Apr 12, Complainant was informed that he had thirty days to remove any files from Respondent's computer system.¹³⁷

On 21 June 12, Respondent was informed by the FAA that it was investigating alleged violations as to the failure to report the discoveries of an undeclared battery shipment on 22 Feb 12, a leaking urine shipment on 11 Feb 12, and a pressurized cylinder shipment on 16 Aug 10.¹³⁸

On 16 Jul 12, Respondent answered the FAA letter, noting that all three incidents were also cited by Complainant's pending whistleblower complaint against it. Respondent questioned Complainant's motives, since he had not raised any issue about the three shipments until he was terminated for job performance. It further noted that Complainant threatened to make the allegations unless Respondent increased its offer of severance pay.

As to the specific incidents, Respondent answered that:

1. Its leadership believed that the batteries were discovered before the shipment had been accepted for transport and therefore the incident was not appropriate for reporting.
2. It was unable to locate any records of a leaking urine shipment on 11 Feb 12, but was aware of such an event on 1 Dec 11. It noted that that incident, although deemed not reportable, was in fact reported.
3. The cylinder on 16 Aug 10, was marked and labeled as containing a pressurized cylinder, thus rendering it a declared and ascertainable hazardous material at the time of acceptance. As a result, the reporting requirements related to inadvertent shipment were not triggered. Nonetheless, the employee who accepted the shipment was subject to corrective action.¹³⁹

On 7 Nov 12, Respondent received from the FAA a notice of proposed civil penalty for accepting hazardous material for transportation that was not properly described,

¹³⁶ JX-1.

¹³⁷ CX-40.

¹³⁸ CX-42.

¹³⁹ CX-41.

packaged, or marked and for failing to report the lithium batteries once discovered. The FAA proposed a fine of \$16,200.¹⁴⁰ The penalty was subsequently reduced to \$15,000.¹⁴¹

DISCUSSION

The parties have relatively few fundamental factual disputes. The evidence is generally clear as to what things were said, who said them, and when they were said. Consequently, particularly as to the threshold issue, the real question is whether or not Complainant's actions qualify under the law as protected activity. As is almost always the case, direct evidence of the knowledge, motivation, and intent of the various individuals involved is limited to their subjective testimony and circumstantial evidence must be considered to determine whether or not protected activity contributed to the adverse action.

Protected Activity

When Complainant filed his original complaint with OSHA, he first provided a general overview, noting that Respondent has a duty to disclose to the FAA when it discovers that it has transported air cargo that does not comply with safety requirements. He added that he had personal and direct knowledge that Respondent failed in its obligation of self-disclosure in the past and he was concerned that the safety of the public could be in jeopardy if Respondent continued its pattern of failing to report the transportation of hazardous cargo. He further reported that there were numerous instances of regulated but undeclared cargo traveling into and out of cities within his region, several of which posed a substantial risk to safety of flight and the traveling public. He conceded that some incidents were reported, but noted that there were numerous instances when reporting required by the FAA was discouraged, suppressed, or consciously ignored by upper management.

Complainant then addressed the specific incidents of the cylinder, the urine shipment, and the lithium batteries, alleging that he had communicated his concern in each of those cases that Respondent had failed to report to the FAA. He told OSHA that after he directed his staff to report the urine to the FAA, he began to be targeted and criticized for conduct that had previously been acceptable and that the only reason Respondent had for its decision to terminate him was his desire to report to the FAA as required. He closed his OSHA complaint by sharing his fear that public safety would be endangered if Respondent continued to ignore its safety obligations as hazardous cargo is at times improperly packaged and transported on passenger aircraft and that he believes he was terminated due to his efforts to comply with those reporting requirements.

The parties then proceeded to litigate the case on the understanding that there were three alleged protected activities. Respondent's first Motion for Summary Decision discussed as protected activities only the three specific incidents cited in the complaint to OSHA. Complainant's response in opposition similarly focused on those three protected activities, although it also noted that at the 29 Mar 12 meeting he asked how his performance could be

¹⁴⁰ CX-43.

¹⁴¹ CX-44.

questioned in light of Respondent's shortcomings as to required FAA reports. However, that remark only had meaning within the context of the other specific activities. Consequently, my decision on that Motion for Summary Decision addressed only three alleged protected activities and specifically noted that Complainant was not alleging any protected activity related to the actual acceptance or transport of cargo, but only the failure to report.

On remand, the Board directed me to specifically address the 29 Mar 12 conversation. It also, notwithstanding the parties' then clear consensus as to the defined allegations of protected activity in this case, interceded to add its own.

Protection under the statute may be afforded to reports of information relating to air carrier safety—a complainant need not also report the air carrier's failure to report such information to the FAA. In the complaint dated May 14, 2012, Bondurant stated that he feared "that public safety will be endangered if Southwest Airlines continues to ignore its safety obligations imposed by the FAA as this hazardous cargo is at times improperly packaged and is being transported on passenger aircraft." In addition, in his opposition to summary decision, Bondurant raises the temporal proximity between his termination and reporting the shipment of the lithium batteries. Thus, it appears that Bondurant's actions of reporting the transportation of dangerous cargo may also be considered protected activity.¹⁴²

Mindful of the Board's direction on remand, at the hearing I specifically asked Complainant's Counsel (C/C) if her client intended to accept their invitation to add a new protected activity. Counsel clearly and unambiguously affirmed that his position remained unchanged, except that he was now alleging only two of the three incidents as his protected activity.¹⁴³

ALJ: As to the urine and the battery, are you alleging as protected activity, the failure to report to the FAA and/or the actual shipment of?

C/C: Failure to report.

ALJ: Failure to report, okay. ... [H]e wasn't complaining that they shipped the stuff. He was complaining that yeah, you didn't report it to the FAA?

C/C: Correct. ... Because I don't think there's any evidence that anyone knew they were shipping the lithium batteries until after it had already occurred and the package was accepted.

ALJ: Okay. I just have to make clear because you and the ARB have a different view of this case ... you know what your cause of action is. You know what you want to assert....

¹⁴² *Bondurant v. Southwest Airlines Inc.*, ARB No. 14-049 p.5 (February 29, 2016)(citations omitted).

¹⁴³ He withdrew the allegation related to the cylinder. Tr. 30.

C/C: My view of it, Your Honor, is very close. That raising the concern that these things needed to be reported is whistleblowing.

ALJ: ... I'm just saying that the whistleblowing that your [sic] alleging, as the protected activity, is when he goes, you guys are supposed to report that stuff to the FAA.

C/C: Right.

ALJ: All right. And he had a reasonable belief that they were supposed to. And by not doing it, they were breaking rules.

C/C: Correct.

ALJ: And that was his act of whistleblowing.

C/C: Correct.

ALJ: Okay. And I have to be really careful about that because based on the remand, the ARB included language like, well, he may have been worried that they were shipping this stuff in general and you need to look into that ALJ with a full evidentiary hearing. But, and I trust you, on behalf of your client, to go no, that's not what we're litigating. We're litigating the fact -- and that's been very consistent all along I want to note for the record. That's what your initial complaint to OSHA was. That's was your complaint in front of me was. All the time that's been consistent. So, we're clear that I'm not going to consider a general complaint about, you shouldn't be shipping materials that are illegal. It's, if you do, you need to report them to the FAA.

C/C: Correct.¹⁴⁴

However, in his post hearing brief, Complainant then included as proposed conclusions that he engaged in protected activity (1) on 2 Dec 11, when he alerted his superiors that Respondent needed to demonstrate to the FAA that it was being proactive in taking corrective action with employees who had missed the labeling discrepancy on the paperwork concerning the urine shipment; (2) on 22 Feb 12, when he raised the issue related to the transportation of the lithium batteries; and (3) on 29 Mar 12 when he raised to Allen Respondent's failure to report the transportation of hazardous materials to the FAA.

Respondent's answer brief objected that the 2 Dec 11 and 22 Feb 12 protected activities identified in Complainant's brief constituted new protected activities that had not been raised to OSHA, not been clearly alleged or litigated in the summary decision stage or at the hearing, and were contrary to representations made by Complainant at the hearing. Respondent argued that those allegations of protected activities should be disregarded as untimely.

¹⁴⁴ Tr. 32

In his reply, Complainant denied advancing new theories of protected activity, arguing that the FAA reporting requirements infer an improper shipment and complaints related to shipping or reporting are not always mutually exclusive. In regards to the lithium batteries, he argued that by saying the batteries had actually been shipped, he was telling Respondent that a report was required.

Given that background, the threshold step in determining whether or not Complainant carried his burden of establishing any protected activity is to identify what protected activities were properly alleged at OSHA for jurisdictional purposes and before the hearing to provide fair notice for discovery and record development. Although the Board's order of remand specifically observed that Complainant's communications about the transportation of hazardous cargo "may" be a protected activity, at hearing, Complainant specifically disavowed that as one of his allegations.¹⁴⁵

Hyper technical pleadings of protected activity are not required and the emphasis should be on notice and possible prejudice. Nevertheless, Respondent's position that I should not consider newly alleged protected activities that were neither previously identified as such nor subjected to full record development has merit. However, since Complainant explains that the significance of his email that the batteries had shipped is that it thereby told his managers that it was a reportable event, he has not raised a new adverse activity. The protected activity related to the lithium batteries remains his communication to his supervisors that they had not reported the shipment.

On the other hand, the same analysis does not apply to Complainant's shift from an allegation that he was complaining that a urine shipment was not reported to an allegation that he was complaining that Respondent needed to demonstrate to the FAA that it was being proactive in taking corrective action with employees who had missed the labeling discrepancy on the urine shipment. The latter is clearly a new allegation of protected activity that was not within the scope of the parties' understanding of the issues to be litigated at hearing. Moreover, it is an allegation that would require record development to adduce some evidence that Complainant reasonably believed that FAA regulations required Respondent to demonstrate it was being proactive in taking corrective action and the failure to do so would be a violation of law or regulation. Accordingly, I will not consider that allegation, but only the allegation that Respondent failed to report the urine sample.

As a result, the three protected activities I will consider are his communications relating to the December shipment of urine, the February shipment of batteries, and his communications concerning Respondent's failure to make required reports to the FAA.

The record clearly established that Respondent does not accept shipments of hazardous materials from external customers, although it may ship its own hazardous material for internal purposes. Respondent will transport quasi-regulated materials, such as biological samples (blood or tissue samples), dry ice, and lithium batteries, if they are properly labeled and packaged.

¹⁴⁵ Moreover, the agency, which could have intervened to prosecute that allegation pursuant to 29 C.F.R. § 1979.108(a)(1), declined to do so.

Respondent's procedures for handling shipments of hazardous materials are set forth in its STORM manual. Information about possible incidents involving the shipment of hazardous material is to be forwarded through management channels by cargo staff to Safety and Environmental, who is responsible for determining whether or not a hazardous material has been inadvertently transported and whether or not such an incident must be reported to the FAA.

*The December Box of Urine*¹⁴⁶

The factual background related to the shipment of urine is clear from the evidence. Respondent regularly accepted for shipment biological samples, which are considered quasi-regulated. Included in the biological samples accepted for shipment is human urine, which is considered an exempt human sample. Consequently, the discovery of a leaking shipment of urine is not required to be reported to the FAA.

Complainant was unable to independently clearly recall the specifics that related to the leaking urine shipment or shipments that were the basis for his first alleged protected activity. At trial, he testified that there were two incidents involving leaking urine boxes and both arrived from Nashville. He conceded that his original OSHA complaint and deposition testimony said that they were in December 2011 and February 2012, but now believes the leaks actually occurred in November and December 2011. Once he had an opportunity to review the exhibits, he testified that it was possible that documents he believed indicated two shipments actually referred to the same one.

The most reliable evidence is the shipping documents and emails. The documentation and corroborated testimony establishes a relatively straightforward factual background. On 30 Nov 11, Respondent's Nashville cargo staff accepted a shipment identified as biological substances/laboratory specimens. Although it was human exempt material, it was erroneously identified on the box as Category B biohazardous material, even though the airbill did not indicate it was Category B.

When the box arrived in Houston, it was soaked in one corner. Complainant was not aware of any specific deadline requirements for reporting urine shipments and understood that Safety and Environmental was responsible for making reports to the FAA. He directed one of the cargo agents in Houston to report the discrepancy. She did so by using an online reporting tool (IR) that he believed would be assessable to the FAA. Complainant then emailed management and told them about a mislabeled urine box that had arrived soaked in urine. Complainant was asked if the shipper had been advised and responded that they were in the process of doing so. Andrus announced that a report would have to be made to the FAA, since it was a regulated package. Complainant asked if he should do the FAA report, but was told that Hargrove would do it.

¹⁴⁶ Complainant also testified about an earlier, separate, urine shipment that soaked through onto an employee. However, he did not report that shipment and simply released it to the receiving party. I find it is likely his testimony was generally accurate in that regard, but it is not of great relevance, except as general background information, particularly since he did not allege he had been discouraged from reporting it.

Cargo management discussed whether the FAA would catch the inconsistency between the airway bill, which did not indicate Category B, and the box labeling and computer system, which did indicate Category B. Andrus remarked that they should conduct an audit to identify if it was a problem and ensure compliance. Complainant added that they would need to find out who was responsible for the error and be prepared to show the FAA that they had taken corrective action. Doherty asked why the hell Complainant had ordered his staff to make a report that would go to the FAA.

On 5 Dec 11, Respondent reported the incident to the Department of Transportation and noted they had advised the shipper of the applicable requirements. The FAA took no corrective action, although an FAA agent later asked Respondent to not release any such shipments in the future, so that he could investigate. That led to a discussion of whether or not biological samples with very short deadlines for diagnostic purposes could be held up pending his investigation.

Based on that factual background, the legal question is whether or not Complainant can be said to have held and communicated a reasonable concern that Respondent had or was going to violate an FAA regulation relating to mandatory reporting of the urine shipment. There is no suggestion that Respondent committed any such violation and in fact Complainant testified he is not aware of any leaking specimens that should have been reported and were not. As a result, the only question is whether Complainant could have reasonably concluded that Respondent was going to fail to report as required by the regulations.

It is clear that Complainant communicated his belief that the incident needed to be reported. However, merely encouraging compliance with the law does not constitute whistleblowing unless there is some reasonable concern about the possibility of noncompliance. It is significant that at the same time Complainant was voicing his opinion that a report to the FAA must be made, Andrus was saying the same thing. Complainant candidly testified at hearing that, in retrospect, it does not appear that Respondent did anything wrong in its handling of reporting the leaking urine to the FAA. He also conceded that he is not aware of any leaking biological specimens that were required to be reported to the FAA, but were not.

The only evidence supporting his argument that he had a reasonable concern that Respondent might not report the urine was his specific recollection about Doherty's anger that he had ordered the initial report to be made by IR and his general testimony that Doherty's remark was one of many that led him to be concerned that agents were being discouraged from electronically filing incident reports.

However, based on the fact that there was never any real resistance to the suggestion that the incident was reportable, it appears more likely that Doherty's anger was that using the IR tool was a breach of company protocol, since Safety and Environmental was responsible for making FAA reports. Indeed, Complainant specifically said that he was concerned about agents being discouraged from electronically filing incident reports and did not mention a broader approach that discouraged other means of reporting to the FAA. In any event, Complainant's relatively vague and general testimony did not provide any specific examples showing that it was Respondent's intention or practice to violate regulations, rather than just to follow company procedures.

I find Complainant has failed to carry his burden of proof showing that it is more likely than not that he communicated a reasonably held concern that Respondent was going to commit a violation of FAA reporting requirements as they related to the urine shipment. As a result, he has failed to establish his involvement with the urine shipment as a protected activity.

The February Batteries

The evidence as to the events surrounding the shipment of the lithium batteries is relatively consistent and establishes the factual background.

On 21 Feb 12, Houston cargo staff accepted a shipment listed as computer parts for transport to Austin. Since the shipment was from a certified freight facility, Respondent was not required to inspect it. When the shipment arrived on 22 Feb 12, Austin cargo staff discovered it contained loose lithium batteries. They notified Complainant and Jim Doherty that they had been refusing to accept those shipments in Austin and asked for advice on what to do.

Complainant commented that the package had come off of the ground shuttle from a certified shipper, but did not look like appropriate packaging and asked for Doherty's thoughts. Hollingsworth noted that it looked like a bulk shipment of batteries. Complainant also forwarded the email to Bill Parker with the comment that "this ain't good." The Austin staff noted that when they refused the shipment, the shipper insisted that he does it all the time in Houston. Doherty said he agreed that they were improperly packed, providing the company manual rules on those shipments, noting that he would refuse the shipment, and asking Hargrove if he agreed. Complainant interjected to Doherty, Hargrove, Allen, and Stone that the issue was that the shipment had already been accepted in Houston and transported to Austin via Dallas.

Doherty responded that he understood and suggested calling the shipper to educate them on the requirement for future shipments. Hargrove failed to fully read the email chain, missed Complainant's cautionary clarification, and mistakenly believed that the batteries had been refused for shipment by Austin. He agreed that they definitely needed to notify the shipper of the requirements make them aware that if the FAA were to see it, it would be a really serious issue. Complainant thought it was odd that Hargrove said it would be serious if the FAA saw it, rather than FAA saw it. Nevertheless, when he discussed the matter with the shipper he told them they would probably be contacted by the FAA, since he expected it would be reported. He never said anything else about making a report to the FAA. No report was filed.

At the time he was fired, Complainant still did not know whether or not Respondent had reported the battery shipment to the FAA. However, based on his post termination complaint, the FAA determined Respondent had violated its regulations in its failure to report and fined Respondent. Hargrove was disciplined for failing to fully read his emails.

As it was in the case of the urine shipment, timing is a critical factor in analyzing this alleged protected activity. Complainant obviously understood that there was confusion as to whether the batteries had actually traveled. His email was clearly intended to eliminate that

confusion and ensure everyone understood that Respondent had flown the batteries from Houston to Austin.

It is true that given the context, the consequential implication of his communication may have to correct a misunderstanding of fact that would have led to an erroneous conclusion that Respondent was not required to report the incident to the FAA. The law does not require that a whistleblower show he was concerned about an intentional violation of law and regulations. Communications are equally protected whether they are designed to complain about an intentional violation or warn of an inadvertent violation, whether based on a misunderstanding of the applicable rules or the pertinent facts. In this case, the evidence shows that it was more likely than not that the ultimate failure to report and subsequent violation was based on Hargrove's mistaken belief that the batteries had not flown, notwithstanding that his mistake was a result of his failure to make sure he had all of the pertinent information.

The problem is that, given the sequence of communications, the evidence discloses no real reason that Complainant might have had to believe or assume that Respondent, once aware that the batteries had flown, would nevertheless not make the required report. The most telling evidence in that regard is Complainant's own testimony that he told the shipper to expect a visit from the FAA, but then thought it was "odd" that Hargrove said it would be serious if the FAA saw it, rather when FAA saw it. That was the point at which Complainant appears to have had a reasonable concern that the reporting regulations would be violated. However, for whatever reason, he elected not to say anything and therefore did not engage in protected activity.¹⁴⁷

The March Meeting

The allegations related to the 29 Mar 12 meeting involve more directly disputed facts than any other issue. Complainant testified that he told Allen that if they wanted to talk about performance, they should start with the hazardous shipments that had been moving and possibly endangering the public, but were not being reported as required. Complainant did not recall specifically mentioning the batteries, urine, or cylinder. He further testified that when Allen denied knowing what he was talking about, he responded that nothing was being done about substantial and serious issues with moving regulated or nonregulated materials and not following through and reporting. He noted that his response appeared to anger Allen.

Allen testified that Complainant never said that if they were going to talk about performance issues, they should talk about the company's performance as it related to the shipment of hazardous materials or raised any issues about not reporting shipments of hazardous materials. Allen denied recalling discussing any issues about the hazardous material or safety. Not surprisingly, the after-the-fact memorandum summarizing the meeting created by Allen is

¹⁴⁷ To the extent Complainant argues that he communicated concerns about the batteries on other occasions, the evidence falls woefully short of establishing such allegations by a preponderance of the evidence. He testified at hearing that he believes that at some point he had a verbal conversation with Hollingsworth to inquire about status of looking into the shipment, but could not recall any details. At deposition when asked about any other conversations, he did not mention talking to Hollingsworth.

consistent with his testimony and does not mention anything about Complainant raising any issues regarding transporting or reporting hazardous materials.

In the absence of any other witnesses or corroborating documents, resolving the totally contradictory testimony of the two witnesses requires assessing their relative credibility. In that regard I note that Complainant appeared to have more gaps in his memory and more inconsistencies between his testimony at hearing and his deposition testimony and the documentary evidence. Allen appeared at hearing to be clearly troubled about having to testify against his friend and more than willing to tell the truth if it would help Complainant, notwithstanding his position with Respondent.

Based upon my assessment of the credible evidence, I conclude that while in the context of the discussion, Complainant may have told Allen in general terms that if he wanted to talk about poor performance, they should talk about Respondent's performance. Allen, already uncomfortable in that setting, likely immediately told Complainant they were there to talk about him and not about Respondent. It may well be that Complainant believes he raised the issue of Respondent's failure to comply with regulations related to hazardous material transport. However, if he had done so, Allen more likely than not would have recalled it.

Accordingly, I find that Complainant failed to carry his burden and establish that it is more likely than not that he complained to Allen on 29 Mar 12 about Respondent's failure to comply with hazardous material transport or reporting regulations.

Nexus to Adverse Action¹⁴⁸

Even if Complainant had been able to carry his burden and establish all of the various allegations of protected activity, he would then have had to show that they were more likely than not a factor considered in the decision to fire him. Respondent maintains that he was fired for a number of performance issues, none of which related in any way to his activities or communications concerning the urine or battery shipments.

Establishing that protected activity did or did not play a role in a decision to take adverse action against an employee, like most questions of *mens rea* or intent, presents evidentiary challenges. The decision makers can give direct testimony about what they considered, but that testimony is almost always more helpful to the employer rather than the employee.

As a result, it is very difficult for a whistleblower to present direct evidence that shows an employer considered his protected activity as a factor in deciding to take adverse action against him. Instead, employees typically must rely on circumstantial evidence. The law recognizes that and instructs factfinders that they may draw from any temporal nexus between the protected activity and the adverse action an inference that the protected activity was a factor.

¹⁴⁸ In recognition of the possibility that a reviewing authority may determine that the evidence establishes some sort of protected activity as a matter of law and in an attempt to avoid another remand, I also address causation, accepting as protected activity all those alleged by the Complainant and by the Board.

Conversely, employers are then faced with the problem of proving a negative by presenting evidence of the non-protected activity reasons for the adverse action. In response, whistleblowers present evidence to suggest that the explanation for the adverse action given by the employer is irrational or inconsistent with the employer's standard personnel practices. Whistleblowers then argue that the explanation is no more than a pretext, designed to camouflage the real reasons for the adverse action, at least one of which was the protected activity.

Direct Evidence

In this case, the parties stipulated that neither Doherty, nor Andrus, nor Hargrove had any involvement in the decision to terminate Complainant. The evidence is clear that the individuals who did have a role to play in deciding to fire Complainant were Mark Grigg, Matt Buckley, and Elden Allen.

Allen testified that his determination that Complainant should be fired had nothing to do with any discussions or communications relating to the transport of hazardous materials. He also testified that firing his friend was the hardest thing he had done and he was forced to make that decision by Complainant's substandard performance, including his abuse of Respondent's employee pass system, absence from his home office in Houston, and failure to maintain good working relationships. Grigg's testimony was consistent with Allen's and he specifically noted that the battery shipment never came up in the discussions about terminating Complainant. Buckley similarly testified that he understood the termination was for all of the things in the last chance agreement and noted that the first time he heard anything about the lithium battery shipment was after Complainant had been fired.

Vic Zachary was not involved in making the decision to terminate Complainant, but was present for the presentation of the termination and severance letters. Zachary testified that when offered the letters, Complainant responded that it was all bullshit, it all came from the golf tournament where all he had done was to hang up a putter, and Respondent had never given him a performance plan or letter of expectation.

Zachary's testimony was consistent with that of Allen, who also said that Complainant responded to the letters by saying it was all bullshit and the real reason was that Matt and Mark did not like him and wanted to get rid of him after the golf tournaments. Allen did add that once Zachary stepped outside at the request of Complainant, Complainant announced he had a secret file related to hazardous material violations that he would use to take people down with him, unless the severance package was increased tenfold. Allen added that was the first time he had had any communications with Complainant about safety concerns. I found the testimony of Allen, Grigg, Buckley, and Zachary to be credible and consistent both internally and with other evidence in the case. That testimony provided highly probative direct evidence that nothing Complainant did related to the urine or battery shipment played any role in the decision to terminate him.

Circumstantial Evidence - Timing

Complainant had worked for Respondent since 1989. He was enjoying a relatively successful career and according to his annual ratings was doing a very good job with an outstanding rating. However, Allen said he would have ranked Complainant number three of his four regional cargo managers and observed that after being passed over for the Austin station manager job, Complainant became upset and let his performance go down the tube. Grigg testified that Complainant was always doing just enough to keep his head above water and would have placed Complainant on the lower end of performers. In any event, the fact that his termination in April 2012 came not long after the urine incident in December 2011 and even more closely followed the battery shipment in February 2012 offers some circumstantial evidence of a link between the two.

However, the argument that the timing of the adverse action temporal nexus is circumstantial evidence of a link to any protected activity becomes less convincing if the same temporal nexus exists with the reasons offered by the employer. That appears to be true in this case.

The first golf tournament and letter of warning took place in fall of 2010. The second golf tournament was in October 2011 and Allen issued the last chance agreement to Complainant on 10 Nov 11. Although they had discussed Complainant's usage of must ride passes before, Allen mentioned it again at that meeting, but did not include it in the last chance agreement, because he thought the verbal correction was sufficient.

It was not until late February or early March that Allen was told by Vic Zachary that things were not going so well with Complainant in Houston. That prompted Allen to make his 29 Mar 12 office visit. The office visit in turn prompted Allen to seek advice from Grigg, who explained how he could review additional records and led to the determination that Complainant had continued to use must ride passes and was not adequately managing the Houston office. The weight of the evidence establishes that the vast majority of substandard performance Allen cited as a basis for his decision to fire Complainant either occurred, or became known to Allen, either contemporaneously or even later than any protected activity. Therefore, the timing of the adverse action provides equal support to an inference that the adverse action was related to any protected activity or the conduct cited by employer.

Circumstantial Evidence – Pretext

Although they were not specifically named as adverse actions, Complainant did suggest that the warning letter and last chance agreement were not consistent with Respondent's normal disciplinary system or common practice in dealing with managers. Of course, as a manager, Complainant would not be part of any union and protected by collective-bargaining provisions related to discipline.

More importantly, the earliest possible protected activity could not have happened until the urine shipment was initially reported on 1 Dec 11. Consequently, any irregularities or perceived injustices related to those earlier personnel actions could not be circumstantial evidence of pretext.

The evidence shows that while Respondent would have preferred for Complainant to live in Houston, it acquiesced and allowed him to commute from San Marcos. However, Respondent's written policy made it clear and he was repeatedly told that he could not use must ride passes to commute to his workplace in Houston. While there may have been some room for discretion in relation to travel to his outstations, Respondent expected him to understand that simply going from home to Houston to work was commuting and he was not allowed to use must ride passes. Complainant testified that he believed that if he had a specific meeting in Houston to get to from home, that was business travel and he was authorized to use must ride passes. It was not at all irrational that Respondent would disagree with his position and consider his refusal to follow its directions in taking disciplinary action against him. Moreover, even if Respondent's position was unreasonable, as long as it was honestly held, it was not a pretext.

The same analysis holds true for Complainant's schedule and involvement in the Houston office. Although the evidence indicates that Complainant was given great discretion in setting his work and travel schedule, he was expected to oversee Houston cargo operations and build and maintain the relationships at that station. The testimony from Vic Zachary and others supports a finding that he failed to meet those expectations. Allen was shocked and disappointed in the appearance and state of maintenance of the Houston station.

When Allen asked why something hadn't been fixed, Complainant said he had called to complain but got no response from the responsible department. However when Allen called, he got a response in minutes and was told no one had ever called them. Complainant mentioned that some cargo carts had never arrived. It turned out that they had arrived months earlier, but Allen still gave Complainant the benefit of the doubt and allowed that it could have been an honest mistake, instead of just not knowing what was going on in his station.

Of equal, if not even greater significance, is the context of the issuance of the last chance agreement, which was issued long before any alleged protected activity. There was serious consideration given to firing Complainant and at least two individuals were adamant about doing so. Nonetheless Allen made the case that Complainant deserved one last chance, since much of his problem was related to alcohol and a last chance agreement might force him to get help. Indeed, Buckley testified that he, Grigg, and Allen stuck their necks out for Complainant against a lot of opposition from Legal. He noted that he was very disappointed when they found out about the other issues related to Complainant's job performance.

Again, even if Respondent had somehow failed to adequately communicate its expectations to Complainant or correctly assess the situation in Houston, those failures would only be evidence of pretext if they were not honestly made but were a consequence of Respondent's reaction to protected activity.

From a broader perspective, the evidence paints a picture of Complainant as an employee who did not want to move his home from the Austin/San Marcos area to Houston. He had hoped to become station manager in Austin and was disappointed when he was not selected. He also hoped to have San Antonio and Austin moved into his region, but was equally unsuccessful in that regard. He took every opportunity to maximize his time at home, even to the point of misusing company travel passes and scheduling work trips to maximize opportunities to visit with his family. In the meantime, he was not an effective manager in the Houston station.

Complainant's supervisor and close friend had done everything he could to help Complainant succeed, giving him the benefit of the doubt and convincing others to do the same. It was happenstance that his supervisor finally became fully aware of Complainant's shortcomings not long after the urine and battery incidents and was forced to take an action he had hoped and fought to avoid.

Complainant has the evidentiary burden of showing that it is more likely than not that his involvement with the urine and battery shipments played some role in the decision to fire him. He has failed to carry that burden and I find it is far more likely that no consideration was given to any of the alleged protected activities in the decision to terminate him. Indeed, even if for some reason any alleged protected activity was considered, I would find that the evidence is clear and convincing that Complainant would still have been fired even in the absence of that protected activity.

The complaint is **DISMISSED**.

ORDERED this 8th day of June, 2017, at Covington, Louisiana.

PATRICK M. ROSENOW
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

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

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).