



Issue Date: 15 February 2017

Case No.: 2015-AIR-00033

In the Matter of

BRETT DETWILER
Complainant

v.

SKYWEST AIRLINES
Respondent

Appearances: Jack Chen Min Juan, Esq. Todd Emerson, Esq.
For Complainant For Respondent

Before: SCOTT R. MORRIS
Administrative Law Judge

DECISION AND ORDER DENYING RELIEF AND DISMISSING COMPLAINT

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21” or “the Act”) which was signed into law on April 5, 2000. The Act includes a whistleblower protection provision, with a U.S. Department of Labor (“DOL”) complaint procedure. Implementing regulations are at 29 CFR Part 1979. The Decision and Order that follows is based on an analysis of the record, including items not specifically addressed, the arguments of the parties, and the applicable law.

I. PROCEDURAL BACKGROUND

Complainant filed an AIR 21 complaint with the Occupational Safety and Health Administration (“OSHA”) on April 21, 2014. In its July 30, 2015 letter, OSHA determined that Respondent is an air carrier and Complainant was a pilot for Respondent; therefore they are covered under the provisions of the Act. However, OSHA found insufficient evidence to establish Respondent retaliated against Complainant by removing his designation as a line check airman after voicing safety concerns, filing an ASAP report or filing his OSHA complaint. Further, Complainant admitted that he disclosed sensitive information during an internal investigation, which violated Standard Practice 53. OSHA found the evidence indicated Complainant’s protected activities were not a contributing factor in Respondent’s decision to suspend and subsequently terminate his status as a check airman. Accordingly, OSHA dismissed

the complaint. On August 28, 2015, Complainant objected to OSHA's findings and requested a formal hearing before the Office of Administrative Law Judges ("OALJ").

On September 9, 2015, this matter was referred to this Tribunal. On September 18, 2015, this Tribunal issued the Notice of Assignment and Conference Call. Complainant responded to the Notice of Assignment by letter dated September 28, 2015, and attached several documentary exhibits including a copy of his OSHA complaints. Respondent responded by letter dated October 2, 2015. Following a pre-hearing telephone conference on October 15, 2015, this Tribunal issued the Notice of Hearing and Pre-Hearing Order on October 22, 2015, and set the hearing for February 16, 2016 through February 18, 2016 in Las Vegas, Nevada.

At the request of the parties, on January 8, 2016, this Tribunal held a teleconference. Following this teleconference, the Tribunal issued an Order rescheduling the hearing for April 28 and 29, 2016, still in Las Vegas, Nevada. On April 19, 2016, the Tribunal granted the parties joint request to continue the hearing, and rescheduled the hearing to begin May 19, 2016. The hearing was held in this matter on May 19 and 20, 2016. At this hearing, this Tribunal admitted Joint Exhibits ("JX")¹ A – EEE,² Complainant's Exhibits ("CX") 1-4 and 6-8³, and Respondent's Exhibits ("RX") 1–9.⁴ This decision is based on the evidence of record, the testimony of the witnesses at this hearing, and the arguments by the parties.

At the hearing, Complainant did not make an opening statement. Tr. at 4. After Complainant rested its case-in-chief, Respondent did make a brief opening statement. Tr. at 309–12.

During the hearing an issue arose as to the whether CX 6 – CX 8 were documents in effect at the time of the flight at issue. Therefore, this Tribunal gave the parties leave post-hearing to address that issue. Tr. at 306. On June 10, 2016, Respondent moved to strike CX 8⁵ for it was published and in effect after the relevant time frame; Respondent did not object to CX 6 or CX 7. On June 16, 2016, Complainant responded opposing the motion and moved to require production of similar documents contained in CX 6 – CX 8 that were in effect at the relevant time. On August 1, 2016 this Tribunal issued an Order Granting Exclusion of CX 8 (OPS SPEC A009) and Denying Complainant's Motion to Produce Certain Document. Additionally, this Tribunal requested the parties in their post-hearing briefs to submit calculations relevant to the January 4, 2014 Aspen approach; they did. Tr. at 230-232 and 435.

¹ The following abbreviations are used in his Decision: "JX" refers to the parties' joint exhibits; "CX" refers to Complainant's exhibits; "RX" refers to Respondent's exhibits; and "Tr." refers to the transcript of the May 19-20, 2016 hearing.

² Tr. at 41-42.

³ See Tr. at 437. However, see discussion below concerning CX 8 which was ultimately excluded from the record. See Order Granting Exclusion of CX 8 (OPS SPEC A009, Amendment 11) and Denying Complainant's Motion to Produce Certain Documents, dated Aug. 1, 2016.

⁴ *Id.*

⁵ Respondent's motion referenced CX 6; however, in the substance of the motion it was obvious that it was referencing CX 8. See Order Granting Exclusion of CX 8 (OPS SPEC A009, Amendment 11) and Denying Complainant's Motion to Produce Certain Documents, dated Aug. 1, 2016.

Complainant submitted his closing brief on August 1, 2016. Respondent submitted its closing brief on September 30, 2016. Complainant submitted his reply brief on October 17, 2016.

II. FACTUAL BACKGROUND AND EVIDENCE⁶

A. Stipulated Facts

There are no stipulated facts in this matter.

B. Testimonial Evidence

The sworn testimony of the witnesses who appeared at the hearing is summarized below.

Neal McGurrell (pp. 5-81)

Captain McGurrell⁷ started working for Respondent in 2000 and while working for them became a line check airman (“LCA”) and then a designated line check airman (“DLCA”). A designated line check airman, unlike a line check airman, can operate on behalf of the Federal Aviation Administration (“FAA”) on certain training events. A DLCA is a position of some prestige and he takes pride in serving in this capacity because it means that he is helping Respondent meet standards. He puts his family on Respondent’s planes so he wants Respondent’s pilots to have the highest level of proficiency, skills, and judgment. Tr. at 5-7.

Prior to Complainant’s suspension, he too was an LCA. An LCA and/or a DLCA has the ability to earn additional income from Respondent. Trips or training assignments are assigned to him. He bids a normal schedule and then the training department will assign pilots on his schedule for training. Tr. at 7.

At one point in his career with Respondent he was a flight standard representative and he served as the line standard representative for the Gunnison, Colorado airport; but this position no longer exists at Respondent. However, back in January 2014 he was the flight standard representative for ASAP.⁸ Tr. at 8.

Briefing guides are information disseminated to flight crews flying to a particular airport up in the mountains that tend to present challenges to the crews such as those in Gunnison and Aspen, for example. Tr. at 8. These guides are part of Respondent’s approved manual system.

⁶ During the hearing, the parties agreed that this Tribunal could take official notice of any FAA published document. Tr. at 198 and 268. Thereafter, the Tribunal advised the parties that it would take official notice of certain specific documents as well. *See* Tr. at 198 (AC 120-66), Tr. at 306 (air carriers under Part 121 are required to comply with their OPS SPECS); *see also* Tr. at 270.

⁷ Captain McGurrell holds an Airline Transport Pilot certificate with type ratings in the CRJ, PL-65 and Boeing 737 aircraft. He has approximately 13,000 hours total time with about 10,000 hours in the CRJ. Tr. at 78-79.

⁸ ASAP stands for Aviation Safety Action Program, a program administered in partnership with the FAA. *See* Tr. at 64. *See also* FAA Advisory Circular (“AC”) 120-66B (Nov. 15, 2002).

Tr. at 64. As a pilot for Respondent, Captain McGurrell has to have access to the briefing guide in the cockpit while flying, accessible by an electronic tablet. The briefing guide is an important document for a pilot to review, and something that a pilot must be familiar with when flying into that particular airport. Tr. at 8-10.

As the flight standard representative for Gunnison at the time, if someone had to make a change or revision to the briefing guide, or had a concern about the briefing guide, there were a number of different pathways one could go to raise that concern. The back of the briefing guide lists three different names to contact. Specifically, the Gunnison briefing guide listed Captain McGurrell's name, as well as Captains Robin Wall and Brent Wilson, and the phone numbers for each of them. One could go to flight operations management. One could also go to the vice president for Respondent; Respondent has an open chain of command. Tr. at 11-12. However, as the flight standards representative, Captain McGurrell did not have complete oversight of the document; the document is owned by flight operations. Captain Brent Wilson is the Manager of Flight Operations and therefore the keeper of the written manual. Captain McGurrell, on the other hand, was more of a conduit of information which does not necessarily mean that all of the information passed on flowed back to him. Tr. at 16 and 66.

He has known Complainant for nine to ten years and came to know him by flying in the Aspen program. They have flown together as part of the same flight crew. In the past, Complainant had raised safety concerns to him. Captain McGurrell agrees that he is a company man. He has not filed an SCR⁹ with Respondent previously, but has filed ASAP reports. He could not recall a specific conversation with Complainant about a safety concern. But there were times when Complainant voiced safety concerns with which he did not agree. Tr. at 12-18.

He recalled an email (JX-N) that he sent to Captain Robert Graser on January 7, 2014 about Flight 5658 from Denver to Aspen piloted by Complainant and First Officer ("FO") Brouwer. In this email, he detailed events that occurred that day. Tr. 19-20. He heard a female voice on the radio that the flight crew for Flight 5658 accepted a clearance to start an instrument approach at AJAX¹⁰ at 16,000 feet, meaning they would not descend below 16,000 feet until they crossed AJAX. Tr. at 21, 60. At that time he believed that he was located a little bit south or aft of that airplane as Flight 5658 was heading north. *See* JX-JJ. Starting an approach at AJAX only gives the flight crew about 3.5 miles to go from an altitude where one cannot extend the aircraft's flaps to having the aircraft's flaps fully extended at LIFTT.¹¹ Tr. at 21-23. In the aircraft at issue,¹² per the requirements of the manufacturer, one cannot lower flaps until the aircraft is at or below 15,000 feet. Tr. at 61. At the time Flight 5658 crossed the LIFTT intersection, he did not see the aircraft visually but observed it on his aircraft's TCAS.¹³ Tr. at

⁹ A SCR is a safety concern report. *See* Tr. at 15.

¹⁰ AJAX is a fixed reference point for pilots. This is depicted on JX-JJ. Words with all capitalized letters hereafter represent points of reference on an instrument approach plate.

¹¹ The transcript uses the word "lift" instead of properly identifying this as LIFTT, a GPS point. This decision will hereafter use LIFTT.

¹² The aircraft was a Bombardier CRJ-700. Tr. at 63.

¹³ Traffic Collision Avoidance System is an instrument in the aircraft that depicts the relative position and altitude of other aircraft in the general vicinity. Tr. at 62. TCAS indicates the speed of other aircraft as groundspeed while the pilot flying an aircraft references indicated airspeed. Tr. at 27-28, 63. The

24-25. The LIFTT intersection and the aircraft's altitude is displayed using TCAS overlaid onto the flight crew's multi-function display; so one can actually see the aircraft cross that point on the screen. Tr. at 71, 79-80. Captain McGurrell found that it unlikely that Flight 5658 was fully configured at LIFTT because he has tried to replicate Flight 5658's approach he observed on January 4, 2014 in a flight simulator and could not get configured at LIFTT as required by Respondent. Tr. at 23-24. Configured means that the aircraft's landing gear is down and flaps are at 45 degrees. Tr. at 61. From the TCAS, he observed Flight 5658 cross the LIFTT intersection at 14,600 feet,¹⁴ and he did not believe that Flight 5658 could be fully configured by then. Tr. at 25.

Following the flight, Captain McGurrell thought that he would have a peer-to-peer chat with the captain of that flight, but he did not. Upon discovering that Complainant captained the flight, Captain McGurrell noted, "to put it bluntly, [we] don't have the best interpersonal relationship."¹⁵ Tr. at 26. He did not know the identity of the first officer. Instead, he elevated the matter to a management level and recused himself, as he wanted someone else to investigate the matter. *Id.* at 27.

Respondent requires its pilots to have additional training specific to Aspen before flying in and out of this airport. Aspen requires a lot more attention to detail as a lot more things can go wrong, magnified by the terrain. Tr. at 57. Captain McGurrell described the winds at Aspen as very strong and there can be a large change in direction between altitudes. Tr. at 60. Aspen presents a very steep approach. Tr. at 83. Because of the difficulty in flying into this airport, Respondent requires two pilots to operate the aircraft for this approach.¹⁶ Tr. at 32. Aspen airport's elevation is approximately 8,000 feet and has a narrow runway situated in a box canyon. Tr. at 57.

Captain McGurrell and Complainant have received that training. Tr. at 30. JX-JJ is part of the Aspen briefing guide¹⁷ and is the only instrument approach approved by the FAA that Respondent can use. Tr. at 57-58. This approach has to be flown with precision because of the 14,000 foot mountains that surround the airport. Respondent's pilots are not allowed to design their own approaches into Aspen. Tr. at 59.

TCAS display shows a down arrow if the aircraft on the display is descending at least 500 feet per minute, or up arrow if ascending at least 500 feet per minute. *Id.* at 29.

¹⁴ Captain McGurrell also testified that TCAS has a margin of error of plus or minus 30 feet and that it displays an aircraft's altitude in 100 foot increments. Tr. at 74, 77.

¹⁵ Captain McGurrell later explained that this animosity began after the two interviewed for the same position and he was offered the position over Complainant. Tr. at 33.

¹⁶ Regional Chief Pilot Graser later stated that Respondent requires the captain to fly the approach into Aspen. Tr. at 97.

Also, according to Captain McGurrell, Respondent does conduct some flight operations with a single pilot. Tr. at 32. However, the regional chief pilot said all of Respondent's operations use two pilots. Tr. at 96.

¹⁷ Tr. at 31.

In JX-N, Captain McGurrell wrote that the Flight 5658 crossed LIFTT at about 14,800 feet with a ground speed of 208 knots. He commented “Both numbers seem to point towards noncompliance, but are not conclusive.” Tr. at 42. A descent from LIFTT at that altitude is going to put the aircraft at a steeper approach and the stored energy at altitude converts to increased speed as altitude is lost. Until the pilot can extend the flaps to reduce speed, the pilot will not have much stability. Tr. 82. “There’s a reason why this is a special approach, is because it is a very steep approach. So I don’t want to be any higher than I absolutely have to be.” Tr. at 83.

The incident occurred on January 4, 2014, but Captain McGurrell did not send the email (JX-N) until January 7, 2014. In the interim, he contacted Captains Brent Wilson and Rob Graser, and he tried to contact Captain Robin Wall, but could not reach him.¹⁸ He also contacted Aspen Air Traffic Control to obtain data. Neither the line check manual nor Respondent’s standard operating procedures indicate whether one can conduct his or her own private investigation against another line check airman. At that time, Captain McGurrell knew that Complainant had concerns about the Gunnison briefing guide, but he did not know that Complainant had gone to the FAA. Tr. at 44-47.

Captain McGurrell recalls receiving a call from an FAA investigator regarding Complainant’s case and he directed the investigator to Respondent’s corporate office. He sent all of the information he gathered to Respondent and notified them that the FAA had contacted him. Tr. at 48-49.

Captain McGurrell did not know that Captain Wilson contacted Aspen Air Traffic Control for radar track data on Flight 5658. Tr. at 54, 71; *see also* JX-L.¹⁹ Aspen Air Traffic Control included him in an email between January 4, 2014 and January 7, 2014 concerning Flight 5658. Tr. at 55; *see also* JX-M. However, he did not recall where he obtained the radar track data; it could have been Aspen Air Traffic Control or Denver Center. Tr. at 55 – 56.

A line check airman’s job is to report any non-standard operations the LCA observes, which he did when he notified Captains Wilson and Graser. Tr. at 72.

Robert Graser (pp. 84 - 183)

Captain Graser²⁰ is currently the regional chief pilot for Respondent and held that job back in January 2014. He has known Complainant for about six years. He only remembers Complainant raising one safety matter to him and that concerned the Gunnison briefing guide. Tr. at 85. Prior to January 2014, Glenn [Brooks] was aware that Complainant had a safety concern with the Gunnison briefing guide. Tr. at 85.

¹⁸ Captain McGurrell later testified that he was not sure if he contacted Captain Graser prior to sending the January 7, 2014 email. Tr. at 45.

¹⁹ Captain Wilson requested from Aspen Air Traffic Control a copy of the radar data for Flight 5658 on January 4, 2014. JX-L.

²⁰ Captain Graser holds an airline transport pilot certificate and is type rated in a variety of CRJ aircraft, and has about 10,000 hours in the various CRJs. Tr. at 130-131.

JX-N includes an email from Captain McGurrell to him and based on this email Captain Graser believes that he started an investigation into Flight 5658. He received another email that provided radar data, but could not recall the sender; it came from either Captain McGurrell or Captain Wilson.²¹ Tr. at 86, 100. His investigation consisted of telephonically interviewing FO Brouwer, getting radar data, and pulling information from Flightaware.²² Tr. at 87. In general, Captain Graser has found the data on Flightaware to be very accurate.²³ Tr. at 137. He did not ask air traffic control for a copy of the voice recording because that would not be made available to him. Tr. at 102. In examining the data from Flightaware that he could print out, he determined that Complainant was fast and high during Flight 5658 on January 4, 2014. Tr. at 139. He used an E6B to make his speed calculations²⁴ finding that Flight 5658 had an indicated airspeed of 176 knots when it reached LIFTT; one can only initiate the last group of flaps at or below a speed of 170 knots. Tr. at 141. Complainant's approach speed should have been about 50 knots slower. Tr. at 142. JX-PP shows that just outside of LIFTT, Flight 5658 was at 16,100 feet. Tr. at 144. This information made Captain McGurrell's recitation of what he heard credible. *Id.* JX-PP, page 731 shows Flight 5658 over LIFTT at 14,600 feet; that's 1,000 feet over the approved approach altitude and just 400 feet under the point where a pilot can begin to put the aircraft's flaps down.²⁵ Tr. at 147.

When Captain Graser interviewed the first officer, the FO vaguely recalled that they had an issue during a flight, but she could not specify nor remember any details. Tr. at 89–90. He did not reprimand FO Brouwer, but used the incident as an opportunity to explain to her why the approach was designed as it is and her obligation to follow standard operating procedures, in essence a verbal warning. He did not document the verbal warning to the First Officer, which he also called coaching. Tr. at 94–95.

He recalled receiving a telephone call from an FAA investigator about the incident involving the Complainant. JX-EE. *See also* Tr. at 90.

²¹ The transcript reads “There was another email, I believe, that I received radar data from. I can't remember who that was from, if it was from Brett or from Neal that was forwarded to me.” This Tribunal presumes the transcript meant to refer to Captain Brent Wilson, not Complainant.

²² Flightaware is a website that inputs data that is transmitted from the airplane, picked up by radar and reproduced. Tr. at 104. *See also* www.flightaware.com. Complainant's counsel noted the terms of use of the data produced from the Flightaware website. Tr. at 105-08. Further, Respondent's counsel pointed out on cross-examination that the offered terms and conditions were from the website in March 2016, while the printout at issue was obtained in July 2014. Tr. at 135-36. While the use of the Flightaware data, allegedly in violation of the website's terms and conditions, may be a contractual one, it bears no weight on the admissibility of this evidence before this Tribunal.

²³ However, Captain Graser later testified that LIFTT is not displayed on the Flightaware plate. Tr. at 182.

²⁴ An E6B is a tool used by pilots to calculate 75 different aviation related calculations, including airspeed based on the ground speed. *See generally*, <https://en.wikipedia.org/wiki/E6B>. There are slide rule and software versions of the pilot tool. *See* Tr. at 139. Captain Graser used the software version to find his figures. Tr. at 140. *See also* Tr. at 168.

²⁵ Captain Graser also testified that Respondent's procedure dictated that the pilot first extend flaps and then extend the landing gear, even though the landing gear airspeed limitation was 200 knots compared to the 170 knots for the flaps. Tr. at 147-148; *see also id.* at 141-42.

On January 21, 2014, he had a meeting with Complainant in Captain Graser's office in Denver to give Complainant an opportunity to explain his operation of Flight 5658 on January 4, 2014. Tr. at 150. Complainant, a pilot union representative,²⁶ his assistant chief pilot, and Captain Graser were all present at this meeting. During this meeting, Captain Graser showed Complainant the radar data on his laptop. Tr. at 109. Complainant did not cooperate during this meeting, saying that the information did not concern his flight; he denied everything. Tr. at 114 – 115, 150 - 152. After this meeting, Captain Graser suspended Complainant for 90 days, or until such time that they could obtain feedback from flight standards and RVP.²⁷ Tr. at 111-112.

After the meeting with Complainant, Captain Graser had a separate meeting with Complainant's union representative. During this meeting they discussed the radar plots and the information available. The union representative told him that he thought the conduct of the meeting with Complainant was unprofessional. Tr. at 115-16.

A second meeting with Complainant followed. Tr. at 116. During this meeting, Captain Graser suspended Complainant as a line check airman for a flight from Denver to Aspen and then had Complainant fly the same route immediately after that meeting. Tr. at 117-18. Nobody from the line standards committee attended the second meeting. Tr. at 120. JX-II is the line check airman manual. It provides that the period of time for a line check airman suspension "will be set by the Manager of Flight Standards and the Director of Aircraft Operations." Tr. at 121. Neither of those persons was at this second meeting. Tr. at 120-22.

Captain Graser recalls a September 18, 2014 meeting regarding a particular pilot and Complainant concerning Standard Practice ("SP") 53, protective work environment. Tr. at 123–124. The meeting concerned an allegation of retaliation against a first officer pilot, which resulted in a letter of instruction for Complainant. Tr. at 126. A letter of instruction is a form of reprimand at Respondent. Tr. at 129.

Robin Wall is the Manager of Flight Standards and oversees check airmen, and he has authority to discipline check airmen. He is located in St. George, Utah. Tr. at 131. Captain Graser's job gives him the authority to issue a letter of instruction to someone who violated SP-53. Captain Graser oversees pilots and the associated safety concerns that he witnesses or hears about that need to be investigated. Complainant is a line pilot and he was also a check airman. Tr. at 132. Therefore, Captain Graser has disciplinary oversight of Complainant as a line pilot, but not as a check airman. Tr. at 132-33. The 90 day suspension ultimately came from Flight Standards, Robin Wall, and "our Vice President of Flight Operations, Glenn Brooks, [who] was in that conversation, as well." Tr. at 134-35.

The check airman manual (JX-II), ¶ 21(a) provides: LCA status "is at the discretion of Flight Operations management and removal will result that mars the character and/or lessens the reputation of a line check airman group, the company or fellow employees." Tr. at 153. Captain Graser temporarily suspended Complainant from line check airman duties prior to Flight Operations suspending him for 90 days. Tr. at 152; *see also* JX-II, ¶ 20(E). The company

²⁶ His union representative was Captain Bill Schleuter. Tr. at 111.

²⁷ The record does not explain the RVP acronym, although this Tribunal infers that it means a regional vice president.

expects the line check airman to follow the standards even when they disagree with those standards. Tr. at 154; *see also* JX-II, ¶ 19(B). Otherwise, if a line check airman deviates from company standards, it creates an unsafe environment where the company has no control over what it expects out of its pilots. Tr. at 154; *see generally* JX-II, ¶ 20.

As a line check airman, it was Captain McGurrell's obligation to report the non-standard operation he observed and would have been derelict in his duties if he merely had a peer-to-peer talk with Complainant. Tr. at 156.

FO Brouwer performed her IOE²⁸ into Aspen. This means that Complainant was specifically training her how to fly into that airport. It was important for Complainant to perfectly model approaches in and out of Aspen. In Captain Graser's opinion, Complainant did not do that on Flight 5658. Tr. at 155. The pilot in command, here the Complainant, has the final authority for the operation of the aircraft so Captain Graser held him to a different standard than he did the first officer. For Complainant, Captain Graser gave him a verbal warning, temporarily suspended Complainant, and turned the matter over to Flight Standards. Tr. at 157. The 90-day suspension came from Flight Standards. Tr. at 158.

The second event involved a pilot initially named Joshua Simms. FO Simms, born a male, prefers to be identified as a female; a transgender female. At the time Respondent hired FO Simms, she presented herself and appeared as a male. Somewhere along his career FO Simms made the determination to present herself as a female and changed her name to Jessie. FO Simms still works for Respondent. Tr. at 158-59. Other pilots were aware of FO Simms' gender transition. FO Simms filed a complaint with Respondent's human resources department concerning sexual harassment related to her gender transition. Tr. at 160. Ms. Cheryl Sache, a human resources manager, contacted Complainant during the investigation into that matter. After being instructed not to discuss the matter with others, Complainant reached out to FO Simms during the investigation and told FO Simms about what he told HR personnel. For this conduct, Complainant received a letter of instruction for violating Respondent's Standard Practice 53. Tr. at 161-64. A letter of investigation is a form of discipline at Respondent and Respondent can use it as evidence in future discipline if the violation "is along the same lines." Tr. at 129, 180.

Captain Graser again referred this matter to Flight Standards to determine whether Complainant should continue as a check airman. Tr. at 165. Sometime after September 18th Flight Standards, not Captain Graser, decided to permanently revoke his line check airman status. The incident at Gunnison had nothing to do with that decision. Tr. at 166.

Captain Graser acknowledged that he was not currently a line check airman, was not one in January 2014, and had never piloted a revenue flight by Respondent into Aspen. Tr. at 167 and 171. However, he had worked as a check airman for Respondent for about eight years earlier in his career. Tr. at 175. Captain Graser denied that Complainant was suspended for 90 days at the January 21, 2014 meeting, but confirmed that the suspension occurred after a conversation with Flight Standards, which occurred later that day. Tr. at 169.

²⁸ Initial Operating Experience. Tr. at 155.

Brett Detwiler (pp. 186 - 298)

Complainant is currently employed as a captain by Respondent, and has worked for Respondent for 28 years. Tr. at 187. He holds an ATP, multi-engine land and commercial single engine land certificate. He is a CFI²⁹, CFI-I, and holds type ratings in the Metro SA-227, EMB-120, and the Challenger aircraft. He has approximately 26,000 hours total flight time. CX 1 is his resume. Tr. at 191.

In January 2014 he was a designated line check airman. This position allowed him to generate additional income in two ways: by doing line checks scheduled by the training department and, more lucratively, by “pick[ing] up overcall FO time.” Prior to January 2014 he had never been reprimanded for his skills as a pilot with Respondent and had never been involved in a crash or accident; he had a clean record. He has conducted approximately 20,000 flights for Respondent, and approximately 2,500 of those flights were flown into Aspen. He is Aspen trained and at one time was the lead check airman for Aspen. He helped draft Respondent’s initial briefing guide to fly into Aspen. He felt honored to be selected as a designated line check airman for Respondent. Tr. at 187-190.

Over his 28 years with Respondent, he has voiced his opinion on various safety and operational matters on a regular basis. Respondent has a briefing guide for Gunnison³⁰ and over the years he has expressed his concerns about the Gunnison briefing guide many times starting in 2013. Tr. at 193. His primary concern related to a single engine departure after V_1 ³¹ following the loss of an engine during a departure. *Id.*

JX-D is an email exchange between himself and Captain McGurrell concerning the use of the ZACOR intersection as an initial approach concern. Tr. at 194. This does not concern the Gunnison airport.

JX-E is a certified letter Complainant received from Captain Brooks, the Vice President of Flight Operations on April 30, 2013. He was surprised to receive the letter. It addressed his concerns that the Gunnison briefing guides were out of date, which rendered the procedures obsolete and unsafe. Tr. at 195. JX-F is Complainant’s response to JX-E where he points out that the guide Captain Brooks described as current, yet featured out of date charts of over a year, and different take-off minimums, climb gradients and obstacle departure procedures than the currently effective charts.³² JX-I is an email exchange between Complainant and Captain Brooks concerning Gunnison, in which Captain Brooks told Complainant to address his concerns using Respondent’s established procedures called safety concern reports. Tr. at 196. Instead,

²⁹ Certified Flight Instructor. A CFI-I is a Certified Flight Instructor with an instrument rating. *See* 14 C.F.R. Part 61, subpart H.

³⁰ Complainant had no part in developing the Gunnison briefing guide, but he did help develop the Aspen briefing guide. Tr. at 250.

³¹ V_1 is the speed beyond which the takeoff should no longer be aborted. *See generally*, 14 C.F.R. § 1.1.

³² Complainant’s primary concern was the new chart lowered the take-off minimums from 600 feet into a quarter of a mile visibility, no ceiling. The old procedure required turning at the end of the runway to a specified heading, but there was no longer a way to identify the end of the runway. This created a risk of flying into a mountain. Tr. at 200; *see also* JX-LL, page CX-00033.

Complainant filed an aviation safety action report because the website instructed that, for safety concern reports for Title 14 C.F.R. issues, one should use the ASAP program. Tr. at 197. A safety concern report stays in-house whereas an ASAP report goes to the ASAP committee and the FAA. Tr. at 288.

There are two type of reports filed under ASAP. “Most of us refer to the ASAP program as a get out of jail free card.... [I]t’s a non-punitive environment where you can report [a] mistake.” Tr. at 197. The other would be to report safety concerns; Complainant’s report fell in the latter category. The FAA contacted Complainant concerning this report, and the FAA substantiated that a violation to an order, a standard or regulation, had occurred and that it was proceeding with enforcement action and/or corrective action against Respondent. Tr. at 198; *see also* JX-FF. Complainant was relieved when he received the letter (JX-FF) for he then knew that the issue would be addressed. Respondent thereafter revised the Gunnison briefing guide. Tr. at 199-202. After filing the ASAP he was concerned that the FAA would scrutinize Respondent. Tr. at 202. Complainant was afraid that he would be retaliated against because the ASAP program involves FAA oversight and so the FAA was now aware of the discrepancies in the briefing guide. Tr. at 202, 209.

Complainant feels that Respondent is going after his jugular for “[a]bout 100 reasons, but primarily because there’s no clear and convincing evidence that [he] did anything unsafe or nonstandard and the FAA agreed with [him]. The radar data was completely inconclusive. There were no calculations, no evidence presented to me. It goes on and on.” Tr. at 208. He feels the Gunnison ASAP report that he filed “was the straw that broke the camel’s back.” *Id.*

Concerning Flight 5658 on January 4, 2014, Complainant did not recall anything unusual about that flight. Tr. at 209. However, on January 21, 2014 he had a meeting in Captain Graser’s office about the flight. He learned about the meeting from a voice mail from Captain Graser; a telephone call which he returned. Complainant asked about the subject of the meeting, but Captain Graser refused to tell him, other than to indicate that it concerned Aspen. He walked into the meeting with Captain Schleuter. Captain Graser suggested that he could record the meeting, which he did. Tr. at 210. The meeting turned hostile and Captain Graser told him “I know there’s no way in hell you were configured at LIFTT.” *Id.* Captain Graser eventually showed Complainant the radar plots, but Complainant was not provided copies of them or any calculations. Tr. at 211. At the conclusion of that meeting, Captain Graser suspended him for 90 days. Tr. at 212. Complainant was not told that the suspension was conditioned upon other people agreeing with Captain Graser or upon a blind Standards Committee review. *Id.* Complainant left that meeting literally shaking; he was scared. Tr. at 214. Later, Captain Schleuter told Complainant that he thought that the meeting was unprofessional. Tr. at 215.

As for TCAS information, the screen will show an airplane two or three hundred feet above the aircraft when it is actually below it. The radar data lags and it does not accurately reflect what happens at the moment and that is exactly the scenario Complainant presented to Captain Graser. Tr. at 214. TCAS provides an approximate bearing and altitude reference to the aircraft. It does not reflect air speed at all. *Id.*

Complainant had a second meeting with Captain Graser, where he suspended him as a check airman. He recalled this meeting because he was scheduled for an observation by the FAA as a check airman. After some confusion, Complainant took a flight from Denver to Aspen. He found this odd because if Captain Graser thought that Complainant was unsafe, he would not turn around and send him back to the exact same place. Tr. at 217-18.

Subsequent to his meeting with Captain Graser, Complainant conducted “a substantial, significant, in-depth investigation” of Flight 5658, the flight on January 4, 2014. Tr. at 219. He contacted the Aspen tower and learned that Captain Wilson had obtained the radar data from AJAX to the runway. Complainant asked, and was provided, a copy of radar data. Tr. at 69, 222. He had conducted calculations about whether he was at the correct altitude and airspeed over LIFTT. He calculated his indicated airspeed was 164 knots. *Id.* Complainant talked to a technician concerning the PDARS³³ data for the January 4, 2014 flight. *See* CX 4. This technician told Complainant that he made a normal landing descent, compared to 40 other aircraft. Tr. at 224. When he made his calculations on the E6B, he used the information Respondent provided during discovery. Tr. at 226; *see also* JX-NN. Complainant received a single statement from Respondent with a single speed reference of 212 knots indicated airspeed at LIFTT, but did not receive Respondent’s calculations.³⁴ Tr. at 226-27. Initially, when he then ran the calculation, he too calculated 212 knots. Tr. at 227. But he realized this figure was an indicated airspeed at sea level. When he corrected for elevation, the speed was 163 knots, a speed below the maximum 170 knots airspeed allowed for the aircraft to be flaps full, and he was configured as required. Tr. at 228.

Complainant knows FO Simms. Complainant recalled receiving a telephone call from Ms. Sache, who he identified as Respondent’s manager of employee relations. She stated that she was conducting a safety investigation concerning FO Simms and Ms. Catherine Watson, and identified Complainant as a friendly witness for FO Simms. Complainant acknowledged his friendship with FO Simms. When asked about FO Simms as a pilot, Complainant described FO Simms as a model employee, for she worked for Respondent because she believes in the company. Ms. Sache instructed Complainant not to speak with anyone about the conversation. However, after flying that day Complainant did in fact contact FO Simms; he thought that it okay to talk to FO Simms since she identified Complainant as a friendly witness. Complainant relayed to FO Simms that, about halfway through the call with Ms. Sache, the questioning turned to FO Simms’ transgender status. FO Simms was very appreciative that Complainant let him know, but was upset about the content of the conversation. Days later FO Simms’ lawyers asked that Complainant write a summary of that conversation between himself and Ms. Sache; JX-X is that summary. Tr. at 23-35. Complainant did not send a copy of this letter to Respondent, in part because FO Simms said she was going to have her lawyers contact Respondent regarding the matter the following morning. Tr. at 245.

³³ This acronym was not explained during the testimony, but this Tribunal infers that the witness was referencing the Performance Data Analysis and Reporting System. *See generally*, https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/perf_analysis/perf_tools/

³⁴ *See also* JX-NN, page CX-00520, response to item 13.

After providing this letter, Complainant was notified of a meeting on September 18, 2014, at the Denver Operations office. When he arrived, present for the meeting were Ms. Sache, Captain Graser, Mr. Tracy Gallo, and Vice President of Flight Operations, Chief Pilot Shane Losee; Mr. Jeremy Peterson, Respondent's Pilots Association president, participated by telephone. They asked Complainant if he had communicated with FO Simms and provided the statement, JX-X. He told them he did. He acknowledged that he had received Ms. Sache's verbal request for confidentiality. At that point, Complainant read Standard Practice 53, Respondent's protected work environment rules, as directed at the meeting. Complainant was then given a letter of instruction, JX-Z. Complainant was told that it was an instruction moving forward and did not represent an admission of guilt. The letter did not mention any other discipline. Tr. at 235-36. JX-AA is the confidential agreement signed by Complainant, dated September 18, 2014.

During this meeting Ms. Sache and Complainant clashed about what occurred during the telephone conversation between the two of them earlier. She said she characterized the investigation as a sexual harassment claim, while he disagreed and recalled no mention of sexual harassment during their conversation. Instead, Complainant described the matter as a safety investigation. Tr. at 237.

JX-T is the grievance statement by Complainant to Respondent about his concern of retaliation. Despite Standard Practice 53's statement that reports of retaliation will be investigated immediately and thoroughly, to his knowledge, his grievance was never investigated. Tr. at 241. Complainant felt that Captain Hall terminated his line check airman status in retaliation for his reporting at Gunnison. Tr. at 242.

Complainant filed JX-T on March 18, 2014.³⁵ In this complaint he alleged that he was removed as a check airman because he had made the complaints therein. Tr. at 243. The following month Complainant filed his AIR21 complaint. Complainant did not learn until months later that Respondent had responded to his AIR21 complaint, which formed the basis of his original grievance. Tr. at 244. Complainant found OSHA's findings incredible; particularly that that procedures required Respondent's pilot to follow and have in the airplane were outside of the company's manual system, and thus the FAA would not have oversight of it, and that his claims were not substantiated. Tr. at 263; *see also* JX-EE. *But see* JX-FF and Tr. at 265-66. After receiving that letter, he conducted some research and found that the general operations manual does require the briefing guides, and is part of the general operations manual; if the briefing guides were out of date, that would constitute a violation. Tr. at 266.

JX-C is a letter Complainant sent to Mr. Chris Brown, Captain Wall's boss. Captain Wall has oversight of all of Respondent's check airmen. Tr. at 269.

CX 2 is an email exchange between Complainant and Captain McGurrell about a pilot frightened by the high winds in Aspen. Tr. at 273. He viewed Captain McGurrell's comment about wanting to know "who went to the Feds" as a threat to every pilot who makes a report to the FAA. Tr. at 273-74. Complainant reported that, to his knowledge, the pilot that filed that

³⁵ Respondent's counsel's question referenced Exhibit 7, but he clearly was referencing JX-T. *See* Tr. at 242-43.

report to the FAA was not disciplined. Tr. at 275. However, this pilot had been an Aspen pilot “for quite some time” and tried to become a check airman, and Respondent did not make him one. Tr. at 287-88.

As for TCAS, Complainant maintains that LIFTT “does not appear on TCAS. It appears on the MFD. And TCAS relays an approximate bearing. So, that accuracy is very limited. And so can [Captain] McGurrell actually know when [Flight 5658] cross[ed] LIFTT intersection based on the published accuracy of the TCAS system? No.” Tr. at 283.

Complainant said that he did not perform calculations based on the Flightaware data because Respondent did not have its calculations, and the Flightaware data was not accurate enough to determine what Respondent had alleged. Tr. at 284.

Nicole Chapman (Tr. at 313 - 344)

Ms. Chapman has a bachelor’s degree in business administration, and joined Respondent in 2005. She is the Lead Manager, Employee Relations and has worked in employee relations since 2008. She has obtained the Professional Human Resources credential. Her general duties are to verify and investigate policy infractions or perceived policy infractions, and to ensure due diligence and consistency within the company. Tr. at 314-15.

In her experience, safety is paramount at Respondent and is a cornerstone of everything that it does. It has many safety related programs in place, most notably the ASAP program. Respondent has a safety department independent of flight operations. The safety department provides safety analysis if a concern is brought forward. The head of the safety department does not report to the Vice President of Flight Operations; he reports directly to the Chief Operating Officer. Tr. at 315-16.

Ms. Chapman has been involved with or seen employees file ASAP reports, a common occurrence as every year more than one thousand are filed. If someone was retaliated against for filing an ASAP, that person could come to Employee Relations to address it. In her eleven years at the company, other than the present case, she is not aware of anybody else at Respondent who complained of retaliation as a result of filing an ASAP. Tr. at 317.

Ms. Sache used to work at Respondent and Ms. Chapman was her supervisor; however, Ms. Sache retired. Ms. Chapman did correspond with Ms. Sache on the FO Simms matter. On August 26, 2014, FO Simms, a first officer for Respondent based in Denver, made a harassment complaint based on her transgender status. Tr. 318; *see also* RX 2. On August 29, 2014, FO Simms reported concerns that her confidential report had been breached by a third person. Ms. Sache was not available so Ms. Chapman contacted FO Simms and FO Simms relayed that questions were asked of her about certain personal matters that she felt encroached on her HIPPA³⁶ protected rights. Tr. at 321-23; *see also* RX 2.

³⁶ Health Insurance Portability and Accountability Act, Pub.L. 104-191, 110 Stat. 1936 (Aug. 21, 1996).

It is important when one conducts an investigation that one gives a confidentiality instruction and ensure that the witness interviewed maintains confidentiality to protect the investigation and to prevent collusion, bias, or corroboration. Tr. at 323. Ms. Chapman has seen Respondent discipline employees for violating their confidentiality obligations. Tr. at 325. It would not surprise her if Respondent disciplined Complainant for violating his confidentiality agreement as a result of that investigation. Tr. at 326. She characterized Complainant's removal as a check airman as a result of violating his confidentiality agreement as appropriate. *Id.*

Ms. Chapman does not know what Ms. Sache said to Complainant during her call to him; Ms. Chapman only knows what is contained in Ms. Sache's summary notes. Tr. at 328. Ms. Chapman was aware of Complainant's March 2014 grievance, although it did not appear in Respondent's standard grievance format. Tr. at 329. She did not know who, if anyone, conducted an investigation into that allegation. Tr. at 329-30.

A letter of instruction is a form of written corrective action, not a disciplinary document. JX-Z appeared to be such a document. Tr. at 331. Ms. Chapman did not know of any other pilot who had received a letter of instruction and then had his or her line check airman status permanently revoked. Tr. at 333-36.

Robin Wall (Tr. at 344 – 386)

Captain Wall has flown for 36 years, 35 with Respondent. He holds an Airline Transport Pilot certificate with SA-227, EMB-120 and CRJ series ratings. He is also a CFI. His total flight time is 8,000 to 9,000 hours. He was a check airman from 1984 until around 1993. Tr. at 345-46. However, he is not a check airman for the CRJ, is not Aspen trained and has never flown a revenue flight for Respondent into Aspen. Tr. at 366. In about 1984, he transitioned from line pilot to management and for a period of time was Chief Pilot -- until 1991 when he returned to the line. He re-entered management in December 2003 and has been there since. He is currently the Manager of Flight Standards. His duties include oversight of the standard operating procedure manuals for both fleets as well as the check airman program. He is the manager of the line check airman and he decides who becomes and remains a check airman for Respondent. Tr. at 346-47.

JX-II is the line check airman manual. Respondent expects its check airman to uphold the highest levels of professionalism and leadership at all times, practice standard operating procedures in all aspects of their operation, uphold the company policies and procedures manuals, and report safety concerns as they relate to things they observe directly or that are reported to them. Tr. at 348; *see also* JX-II, ¶¶ 19(b) and 20(b). “[A] check airman’s conduct is highly visible and subject to scrutiny.” Tr. at 349. “Our airline is built on safety and standardization in our operating procedures, especially is the foundation of that safety.” Tr. at 350.

At some point Captain Wall became aware of an incident involving Flight 5658 piloted by Complainant on January 4, 2014. There was a report of a check airman that might have been involved in a non-standard approach into Aspen. Chief Pilot Graser, who is located in Denver, led the investigation. Captain Wall was not involved in the fact gathering, but he did make the

decision about whether Complainant would remain a check airman. Tr. at 351-53. He knew that a meeting occurred in Denver with the Complainant on January 21, 2014 and he discussed the potential outcomes with Chief Pilot Graser in advance of the meeting. Tr. at 355. Captain Wall did not think it inappropriate at all to temporarily suspend Complainant when he had received a statement from Complainant that gave Chief Pilot Graser pause. Tr. at 354-55.

The decision to suspend Complainant for 90 days was partly his decision. Captain Wall typically provides input to the Vice President of Operations and the Director of Aircraft Operations. The three of them conferred and agreed that a 90-day suspension would be appropriate. They typically authorize 180 days for a temporary suspension, so 90 days is considered light. Ultimately Complainant was reinstated. Tr. at 356-57.

RX 3 is a letter, dated April 19, 2014, that Captain Wall sent to Complainant regarding his reinstatement as a line check airman. He had used this form, or a form similar to this, previously to suspend a check airman's status in excess of fifteen times. The reasons for the prior suspensions varied. Tr. at 358-59.

Later in 2014, an issue arose regarding Complainant's compliance with Standard Practice 53 and how he comported himself during an employee relations investigation. Specifically, Complainant had gone against a direct order given to him by an employee relations manager. Ms. Sache conducted that investigation. Captain Wall found it fairly obvious, given the description Ms. Sache had provided, that Complainant had not maintained the level of professionalism and leadership that Respondent expects of its check airmen. Tr. at 360-62. That incident and the prior incident drove the decision to permanently revoke his check airman privilege. Tr. at 362. Complainant was not demoted from captain to first officer, his flight hours were not limited, and he still flies at the top of the pay scale. It is possible that he could be reinstated at some point as a check airman. *Id.* JX-CC is the letter he sent to Complainant revoking Complainant's check airman status.

On cross-examination Captain Wall acknowledged that none of the discussions concerning Complainant or his granting of authority to Captain Graser to temporarily suspend Complainant were in writing, not even in an email. Tr. at 366. He agreed that being a line check airman at Respondent was an honor. Tr. at 368. He could not recall if the radar data information for Flight 5658 was ever presented to him. Tr. at 371. He relied on subject matter experts for Aspen such as Captain McGurrell, Chief Pilot Graser, Brent Wilson and others to provide him the information to help him make the decision to suspend Complainant. Tr. at 373. When the FAA called about its investigation into the FO Simms matter, Captain Wall refused to speak with the person who called because those requests should go through Respondent's Principal Operations Inspector, as Respondent was in litigation.³⁷ Tr. at 376-77; *see also* JX-EE, page CX-00178. When asked, he denied knowing that Complainant had filed an ASAP report concerning the Gunnison briefing guide. Tr. at 382. He reiterated "that it is the responsibility of

³⁷ An air carrier's principal operations inspector is one of several FAA inspectors assigned to the local FAA Certificate Management Office whose primary responsibility is oversight of that air carrier. *See generally*, FAA Order 8900.1; OPM Position Classification for GS-1825series available at <https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/standards/1800/gs1825.pdf>.

a line check airman to set and maintain the highest levels of professionalism and leadership at all times and always promote and practice standardization in all of their operations.” Tr. at 384-85. Captain Wall could not identify comparatives in which he revoked a line check airman for similar actions such as non-standard approaches, but he could do so for non-standard conduct or failure to follow company policy or procedures. Tr. at 385.

Brett Detwiler (pp. 387 – 395) (recalled by Respondent)

Complainant believes that the aircraft does not need to be configured at LIFTT and that it is actually an operational hindrance. Instead Complainant felt it safer to have the aircraft configured later in the approach based on the section in the airport briefing guide that specifically addresses that issue. The normal place for aircraft configuration is the final approach fix, an opinion shared by the FAA and Respondent’s training department. Tr. at 387-88. However, although he thinks configuration at the final approach fix is safer than configuration at LIFTT does not mean that he did not comply with the latter. Tr. at 388. In his opinion, if one’s indicated airspeed was 50 knots too fast at LIFTT and 1,000 feet too high, the situation would require a delay vector or a missed approach, period. Tr. at 390. Complainant has had to do so many times when operating into Aspen. *Id.*

Complainant had earlier testified that he has had no mark on his record until the January 4, 2014 incident. When asked if he had been accused of departing Aspen on January 24, 2011, without first getting the plane he was flying de-iced (because there was contamination on the aircraft’s wings), he denied that the event ever occurred or that he filed an ASAP report concerning the incident. Tr. at 392-95.

Robert Graser (pp. 396 – 428)

RX 4 is the flight release form for Flight 5658 on January 4, 2014 containing certain information about the flight. The report shows that the weather was below visual approach criteria. The winds at ZACOR, a fix fairly close to LIFTT, show winds at 270 degrees at 23 knots and the temperature at minus 36 degrees Celsius. Tr. at 397-99.

RX 5 is the email that came with the radar plots that provides instruction on how to read it and the data contained in JX-PP. Tr. at 400-01. RX 6 is a page out of the aircraft flight manual that prohibits flight with slats and flaps extended at altitudes above 15,000 feet. Tr. at 402.

Captain Graser stated that it is possible to see whether Flight 5658 crossed the LIFTT intersection at 14,600 feet on its approach into Aspen via the CRJ-700’s multi-function display with the TCAS output overlaid on the multifunctional display map. Tr. at 403. RX 7 is a depiction from one of Respondent’s training manuals showing an example of the TCAS information overlaid on the map shown on a multi-functional display. Tr. at 404.

Captain Graser recalled having a meeting with Complainant concerning Flight 6232 from Aspen to Denver on March 24, 2011. He was forwarded pictures in an email where a member of Respondent's safety department³⁸ who was on that flight expressed concerns about why that flight would take off in the snow. *See* RX 8 and RX 9. Captain Graser also received phone call from the station manager at Aspen expressing concerns that an airplane did not stop at the de-icing station before departing. Tr. at 406-08. The substance of that conversation was recorded and played into the record.³⁹ Tr. at 413-14. When he confronted Complainant about this incident, Captain Graser described him as defensive and Complainant denied that deicing the aircraft was necessary prior to departing. Tr. at 410.

Complainant's credibility came into play on January 21, 2014, when he came into Captain Graser's office and denied that his flight required de-icing and indicated that his flight was fully configured. Complainant's reaction to the March 2011 incident and his denial of the January 2014 incident damaged his credibility. Tr. at 418.

On cross-examination, Captain Graser did not believe that Complainant was disciplined for the March 2011 de-icing incident at Aspen, but recalled that Complainant filed an ASAP. Tr. at 420 - 21; *see also id.* at 408-12 and RX 8. JX-VV shows that TCAS is accurate to plus or minus 15 degrees, but has a margin of error of plus or minus 40 degrees of the tail when that area is not visible from the cockpit.

Brett Detwiller (pp. 429 – 434) (called in rebuttal)

Complainant found Captain Graser's testimony about the January 2011 matter rather inflammatory. He denied Captain Graser ever giving him any evidence and stated that the picture Captain Graser produced is not in his file. He has never seen those pictures before. Further, one does not have to necessarily de-ice the wings in the case of precipitation, as long there is no contaminant on the wings. Moreover, weather conditions at Aspen rapidly change. Tr. at 429-30. Captain Graser has a history of accusing him, but not providing him with evidence to support the accusation. Tr. at 431. When at fault, Complainant readily accepts blame, but he will not admit to guilt for something that he did not do. He encouraged the Tribunal to listen to JX-P. Tr. at 433.

C. Summary of the Key Documentary Evidence⁴⁰

In support of their respective cases, the parties submitted the following key Joint Exhibits:

³⁸ This person was also a pilot. Tr. at 425.

³⁹ The actual videotape was not admitted into evidence, for the recording was offered for the limited purpose of impeachment.

⁴⁰ While this Tribunal has reviewed each exhibit offered carefully, it is not necessary that it recount the details of every exhibit admitted.

| Exhibit | Description |
|----------------|---|
| JX-C | Complainant's September 24, 2011 Threat Error Management letter |
| JX-D | February and June 2013 emails addressing use of ZAKOR intersection at Aspen |
| JX-E | April 30, 2013, letter from Respondent's VP Flight Ops to Complainant, re: concerns about use of ZAKOR fix at Aspen, evacuation procedures, and the Gunnison briefing guide |
| JX-F | May 7, 2013 email from Complainant to VP Flight Ops responding to JX-E |
| JX-I | December 2013 email between VP Flight Ops and Complainant, re: operational safety concerns at Gunnison |
| JX-J | Complainant's December 9, 2013 ASAP report concerning Gunnison briefing guide |
| JX-L | January 4, 2014 email from Aspen ATC Manager to Captain Wilson, re: radar data plot request |
| JX-M | January 6, 2014 email chain between Captain Wilson and FAA representative |
| JX-N | January 7, 2014 email from Captain McGurrell to Captain Graser concerning Complainant's January 4, 2014 flight into Aspen |
| JX-P | Recorded conversation of January 24, 2014 meeting with Complainant, Captain Graser and others |
| JX-T | Complainant's March 18, 2014 Grievance Statement concerning his suspension as check airman on January 21, 2014 |
| JX-X | Complainant's September 1, 2014 letter provided to FO Simms per his request |
| JX-Y | Recorded conversation of the September 18, 2014 meeting with Complainant concerning FO Simms |
| JX-Z | September 18, 2014 Letter of Instruction |
| JX-AA | September 18, 2014 Confidential Agreement |
| JX-CC | Captain Wall's September 29, 2014 letter to Complainant, re: permanent suspension |
| JX-EE | FAA memorandum, dated February 11, 2015, re: re-investigation of Complainant's retaliatory claim #EWB14595 |
| JX-FF | FAA letter, dated March 2, 2015, re: substantiation of violations concerning case #EWB14595 |
| JX-HH | Transcript of videotaped deposition of FO Brouwer, dated April 12, 2016 |
| JX-II | Respondent's Line Check Airman Manual, Standard Practice 2900, dated September 17, 2012 |
| JX-JJ | Respondent's Aspen briefing guide, dated October 4, 2013 |
| JX-LL | Respondent's Gunnison briefing guide rev. # 7 thru # 13 |
| JX-NN | Respondent's discovery responses |
| JX-PP | January 4, 2014 radar plot data |
| JX-VV | Advisory Circular 20-151B, dated March 18, 2014 |
| JX BBB | FAA publication, Introduction to TCAS, dated February 28, 2011 |

In support of his case, Complainant presented the following evidence, as summarized below:

| Exhibit | Description |
|----------------|--|
| CX-1 | Complainant's resume |
| CX-2 | Emails between Captain McGurrell and Complainant in November 2010 concerning crosswind limitations at Aspen. |
| CX-3 | Transcript of January 21, 2014 ⁴¹ meeting. |

⁴¹ This Tribunal presumes that the January 1, 2001 date on the transcript date is in error.

| Exhibit | Description |
|----------------|---|
| CX-4 | July 2014 email between ATC contract personnel and Complainant concerning the January 4, 2014 flight. |
| CX-6 | Respondent's OpSpec C081, concerning Special Terminal Instrument Procedures for certain airports, including Gunnison and Aspen |
| CX-7 | Respondent's OpSpec C050, concerning Special Pilot-in-Command training requirements when operating into certain airports, including Gunnison and Aspen. |

In support of its position, Respondent presents the following key documentary evidence, as summarized below:

| Exhibit | Description |
|----------------|--|
| RX-1 | Flightaware tracking log for Flight 5658 on January 4, 2014. |
| RX-2 | FO Simms ethics and compliance hotline complaint on August 26, 2014 and subsequent internal HR emails as to the complaint dated September 2014, re: harassment of FO Simms related to her gender transition. |
| RX-3 | April 18, 2014 letter from Captain Wall to Complainant re: Line Check Airman Reinstatement as of April 22, 2014. |
| RX-4 | Respondent's dispatch release of Flight 5658 on January 4, 2014. |
| RX-5 | January 9, 2014 emails between Captain Graser, Captain McGurrell and FAA representative concerning radar track data request and discussing recent jet crash at Aspen. |
| RX-6 | CRJ air flight manual, systems limitations extract, concerning slats/flaps altitude extension limitations. |
| RX-7 | Picture of TCAS overlay on aircraft multi-functional display |
| RX-8 | March 25, 2011 email to Captain Graser from a member of Respondent's safety department concerning a March 24, 2011 departure from Aspen with wing contamination. |
| RX-9 | Two pictures of an aircraft wing |

III. ISSUES IN DISPUTE

- Were any of Complainant's actions were protected activity?
- Was Complainant subjected to an adverse action?
- Was the protected activity a contributing factor in the unfavorable personnel action?
- If so, whether Respondent would have taken the same adverse action in the absence of the protected activity?
- What remedies, if any, are warranted?

A. Complainant's Position

Complainant maintains that he engaged in protected activity by filing an ASAP report expressing safety concerns with Respondent's Gunnison briefing guide. He maintains that Respondent knew that Complainant filed an ASAP report and that Respondent suspended Complainant's line check airman status temporarily for 90 days based on a false accusation concerning a January 4, 2014 flight into Aspen, and later did so permanently following a letter of instruction concerning his conduct during an employee relations investigation. Complainant

maintains that his filing of the ASAP report was a contributing factor to both suspensions and that Respondent would not have imposed the same suspension in the absence of the ASAP report.

Complainant argues that the FAA substantiated his safety concerns about the Gunnison briefing guide (JX-FF) and the findings match AIR21's language as to what constitutes a protected activity. Compl. Br. at 4. He cites the pictorials featured in the Gunnison brief guide, which designates Gunnison as a special airport as part of Respondent's Operations Specifications ("OpSpec"). Complainant raised concerns with the briefing guide's pictorials and he argues that his warning about such non-compliance constituted a safety report under 14 CFR §§ 121.135 and 121.445, rendering this report a protected activity.⁴² Complainant argues that there can be little question that he suffered an unfavorable personnel action, or that Respondent was aware that Complainant had filed an ASAP concerning the Gunnison briefing guide. He notes that on April 30, 2013, he submitted a formal letter of concern about the Gunnison briefing guide to the Vice President of Flight Operations, Glen Brooks, who eventually told Complainant to address his safety concerns in detail using Respondent's established procedures. *Id.* at 4-5; *see also* JX-D, F and I.

Complainant relies on JX-P, a recording of the January 21, 2014 meeting between Chief Pilot Graser and himself to support his contributing factor argument. He cites Chief Pilot Graser's "hostile tone, yelling and unprofessionalism towards [Complainant] exemplifies Graser's anger and retaliation against [Complainant]." Compl. Br. at 5, 12. Further, JX-HH refutes Chief Pilot Graser's claims that FO Brouwer admitted non-compliance with the flight requirements at LIFTT. In arguing that Respondent had knowledge of his protected activity, Complainant notes that when Chief Pilot Graser started his investigation, he consulted and received input from Mr. Brooks, who had instructed Complainant to file a report regarding his safety concerns. *Id.* at 6. Complainant also asserts that Chief Pilot Graser kept information about Complainant of an alleged icing incident back in 2011 because he felt that Complainant should have been punished and was not. *Id.* at 10.

Complainant also maintains that Captain McGurrell had animus towards Complainant because Complainant elevated his concerns above Captain McGurrell, the flight standards representative for Gunnison at the time. Further, Captain McGurrell admitted that he goes after

⁴² § 14 CFR 121.135(a) Each manual required by § 121.133 must --

- (1) Include instructions and information necessary to allow the personnel concerned to perform their duties and responsibilities with a high degree of safety;
- (2) Be in a form that is easy to revise;
- (3) Have the date of last revision on each page concerned; and
- (4) Not be contrary to any applicable Federal regulation and, in the case of a flag or supplemental operation, any applicable foreign regulation, or the certificate holder's operations specifications or operating certificate.

§ 14 CFR 121.445(a): The Administrator may determine that certain airports (due to items such as surrounding terrain, obstructions, or complex approach or departure procedures) are special airports requiring special airport qualifications and that certain areas or routes, or both, require a special type of navigation qualification.

See also the discussion at footnote 52 and its accompanying text.

people's "jugular" when he feels he is confronted. *Id.* at 7-8; *see also* CX 2. Complainant asserts that Captain Wall did not know that the Aspen ATC and even Captain McGurrell felt that the radar track data was inconclusive. Further, Captain Wall relied solely on information provided by Ms. Sachse in one meeting concerning Complainant's actions during the FO Simms investigation. Compl. Br. at 13.

Complainant asserts disparate treatment because he was suspended for his action on Flight 5658, but FO Brouwer received no sanction. He maintained that Respondent never investigated his March 18, 2014 grievance statement that led to his AIR 21 filing. *See* JX-T. He notes that he is the only pilot to be suspended as a line check airman after signing a letter of instruction. *See* JX-Z. Furthermore, Captain Wall admitted that he has never suspended a line check airman for any employer relations or standards practice violations. Compl. Br. at 13-14.

Complainant argues that Respondent suspended Complainant because of incorrect calculations it used during the Flight 5658 investigation. He maintains that the calculations and parameters provided by Respondent that a 212 knot indicated airspeed with a 224 knot ground speed is impossible. Compl. Br. at 16. According to his calculations Respondent's calculations are in error. He deduces from the calculations and from the data provided by Respondent contained in JX-NN and JX-N, that Flight 5658 was fully configured as required and that Flight 5658 crossed LIFTT at between 155 and 167 knots indicated airspeed. Compl. Br. at 17-18; *see also id* at 19.

B. Respondent's Position

Respondent maintains that the only reason Complainant was suspended for 90 days was his failure to follow the required approach into Aspen as supported by three sources. His check airman designation was later revoked after he again broke company rules of confidentiality during an August 2014 human resources investigation.

Respondent argues that at a critical junction known as LIFTT along the Aspen instrument approach, Complainant's aircraft was 1,000 feet too high and 62 mph too fast. It notes Aspen's hazardous terrain surrounding this airport, requiring the pilot to conduct this approach with precision and without deviation due to mountainous terrain and regular presence of strong winds that surround the airport. Resp. Br. at 2.

Respondent argues that if it attempted to silence Complainant, the adverse action was "remarkably light." *Id.* Complainant was not terminated, demoted, or even suspended from flying. He retained his line flying privileges, and he continued to fly and earn pay at Respondent's captain's pay scales. His seniority and bidding rights were not touched. Respondent notes that Chief Pilot Graser had an arsenal of disciplinary options available to him but decided to refer the matter to the Manager of Flight Standards, Captain Wall. *Id.*

Respondent denied that Complainant engaged in protected activity. It argues that Complainant merely reported errors he found in the Gunnison briefing guide; an internal company publication that is not part of Respondent's FAA approved or accepted manual system. All parties agree that this guide is not an FAA approved or accepted manual. *Id.* at 3 and 9 - 11.

Respondent maintains that even if Complainant engaged in protected activity, it has shown that its disciplinary decisions were appropriate and would have occurred irrespective of Complainant's safety concerns. *Id.* at 11. Characterizing the ASAP as unremarkable and wholly unrelated to the adverse action, Respondent maintains that the thousands of ASAP reports it receives each year is a testament to the comfort crews feel in using the safety system without fear of repercussion. The ASAP report at issue was solicited by Respondent's top management. One of Respondent's line check airmen observed that Flight 5658 was too high in real time; radar and flight aware data corroborated this information. *Id.* at 12-15. Chief Pilot Graser concluded that the flaps were not fully extended as required because Flight 5658's airspeed left limited time below 15,000 feet before arriving at LIFTT to deploy them, or Complainant deployed his flaps at LIFTT and exceeded the operational limits of the aircraft. In either case, Complainant conducted a non-standard procedure. *Id.* at 15. When asked about his conduct during Flight 5658, Complainant offered no explanation for the variance. Chief Pilot Graser had further reason to question Complainant's credibility given his interaction with Complainant in a matter back in 2011. *Id.* at 20-21. Thus, Chief Pilot Graser acted in good faith when he temporarily suspended Complainant's line check airman designation and turned this evidence over to the Manager of Flight Standards to evaluate whether the suspension should continue. *Id.* at 16.

Complainant's suspension was appropriate, proportional and consistent with similar infractions. Respondent references JX-II as the standard expected of its line check airmen and also states that failure to meet those standards can result in suspension of one's line check airman designation. Respondent points to Complainant's status as line check man, as well as the pilot in command of Flight 5658 as a basis to distinguish the treatment the first officer and Complainant received. *Id.* at 16-17.

Respondent acknowledges that the revocation of Complainant's line check airman status is largely uncontested and was an adverse action. Respondent notes that the human resources investigation concerned a transgender pilot that had yet to publically announce her decision to transition. Consequently, the nature of the investigation was very sensitive and there was an obvious need to maintain confidentiality. Complainant acknowledges that Ms. Sachse, the human resources manager who conducted the investigation, provided him with confidentiality instructions during their telephone conversation. Complainant also admits that, despite the instructions from Ms. Sache, he subsequently contacted Mr. Simms about the questions posed to him by Ms. Sache. Respondent asserts that Complainant's misunderstanding of the confidentiality instruction only reinforces its decision to revoke Complainant's line check airman designation and described such revocation as appropriate under these circumstances. *Id.* at 18-19.

In sum, Respondent believes that Complainant's complaint is a transparent attempt to avoid responsibility for the non-standard manner in which he operated Flight 5658 on January 4, 2014. Complainant's attempt to tie his ASAP filing with his suspension and revocation of his line check airman designation is "a non-starter." *Id.* at 21.

C. Complainant's Reply

In Complainant's reply brief, Complainant reiterates that his ASAP report communicated aviation safety concerns protected under the Act as recognized by the FAA's letter dated March 2, 2015. Reply Br. at 1-4; *see* JX-FF. Respondent argues that no retaliation occurred because Respondent itself encouraged Complainant to file the Gunnison briefing guide safety report. However, Complainant argues that Respondent's personnel were upset because instead of filing an internal report, Complainant filed an ASAP report, a report that could and was investigated by the FAA. Complainant also notes that his ASAP report differed from the "thousands of other ASAP reports" filed by Respondent pilots. The vast majority of ASAP reports are concerned pilots conveying their own mistakes. Here, Complainant reported not his conduct, but the conduct of Respondent in not correcting the Gunnison briefing guide. Reply Br. at 4-5.

Complainant argues that there is a link between his ASAP filing and the revocation of his line check airman status for calling Mr. Simms. Complainant signed a letter of instruction that should have ended the matter, but "people [who] knew about and were upset with [Complainant's] ASAP filing pushed for his LCA revocation." He notes that no other line check airmen lost their status after signing a letter of instruction or for performing a non-standard approach. *Id.* at 6.

Complainant asserts that Respondent's whole defense concerns credibility, and the questionable conduct and shifting testimony of Respondent's witnesses. Respondent argued that Complainant was guilty or not trustworthy because he did not admit anything during the January 12, 2014 meeting. But this premise assumes that Complainant did something wrong. Complainant is a very senior captain and had never been reprimanded prior to that incident. The incident concerns an approach into Aspen. Unlike most of Respondent's witnesses, he is Aspen trained and helped draft the Aspen briefing guide. He was the pilot at the controls at the time and in the best position to determine the approach. Further, the first officer's testimony essentially corroborates Complainant's and refutes Chief Pilot Graser's claims. *See* Reply Br. at 7-11. Complainant maintains that between the first officer's deposition and the recording of Chief Pilot Graser yelling at Complainant during the January 2014, there is ample evidence of "deep anger and retaliation against [Complainant]." Reply Br. at 12.

Complainant argues that JX-P demonstrates that Complainant's ASAP report was a contributing factor to his suspension and later revocation of his line check airman status. *Id.* Complainant also alleges that Captain McGurrell's conduct demonstrates that he wanted to retaliate against Complainant for reporting the Gunnison brief guide as he is responsible for that document. *Id.* at 9-11. Complainant also argues that had Captain Wall known that the Flight 5658 allegations were based on inconclusive data, he would not have suspended or revoked Complainant's line check airman status. Complainant cites to erroneous calculations, a lack of

understanding of the radar plots, and the inaccuracy of TCAS as support for this position. *Id.* at 14-23.

As for the relief sought by Complainant, he requests reinstatement as a line check airman, compensation for lost wages as a line check airman during this period, reinstatement of time lost such as vacation in preparation of the case, an Order directing Respondent to provide a productive work environment, attorney's fees and litigation cost, and whatever other relief this Tribunal deems fair and just. *Id.* at 23-24.

CONCLUSIONS OF LAW

To prevail on his whistleblower complaint under AIR 21, Complainant bears the initial burden to demonstrate the following elements by a preponderance of the evidence: (1) he is a person protected by the Act; (2) he engaged in protected activity; (3) Respondent took unfavorable personnel action against him; and (4) the protected activity was a contributing factor in the unfavorable personnel action. *Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, slip op. at 6 (Nov. 26, 2014) (citing 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a)).⁴³ If Complainant establishes this *prima facie* case, the burden shifts to Respondent to demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable action in the absence of the protected activity. *Palmer v. Canadian National Railway/Illinois Central Railroad Company*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip. op at 52 (Sept. 30, 2016)(en banc)⁴⁴; *Mizusawa v. United States Dep't of Labor*, 524 F. App'x 443, 446 (10th Cir. 2013) (citing 49 U.S.C. § 42121(b)(2)(B)(iv)).

A. Credibility

In deciding the issues presented, this Tribunal considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, this Tribunal has taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative

⁴³ See also *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-006 (Jan. 31, 2006), slip op. at 15 (once Complainant reaches the hearing, "he must prove protected activity, adverse action, and causation by a preponderance of evidence, not merely establish a rebuttable presumption that the employer discriminated."); *Palmer v. Canadian National Railway/Illinois Central Railroad Company*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip. op at 16, n. 74 (Sept. 30, 2016); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028 ALJ No. 2001-AIR-003, slip op. at 8-9 (Jan. 30, 2004).

⁴⁴ See also *id.* at USDOL Reporter at 60. "We think it may thus help cement this crucial aspect of [the test] to refer to [it] as the 'same-action defense,' not as the 'clear and convincing' defense." *Id.*, slip op. at 22; see also *id.* at USDOL Reporter at 23-24.

At the time this Tribunal wrote this decision there were two versions of *Palmer* on the OALJ DOL website; one is the slip opinion and the other is for the USDOL Reporter. Therefore this opinion attempts to cite to both versions. The published opinions are the same but there is a difference in pagination. Compare

http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/FRS/16_035.FRSS.pdf#search=Palmer 2016 *with*
http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/FRS/16_035.FRSP.pdf#search=Palmer 2016.

impact on the record contentions. See *Frady v. Tennessee Valley Authority*, Case No. 1992-ERA-19 at 4 (Sec’y Oct. 23, 1995).

The ARB has stated its preference that ALJs “delineate the specific credibility determinations for each witness,” though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses’ interest in the outcome of the proceedings, the witnesses’ demeanor while testifying, the witnesses’ opportunity to observe or acquire knowledge about the subject matter of the witnesses’ testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006).

Credibility of witnesses is “that quality in a witness which renders his evidence worthy of belief.” BLACK’S LAW DICTIONARY 440 (4th ed. 1951). As the court further observed:

Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe... Credible testimony is that which meets the test of plausibility.

Indiana Metal Products v. NLRB, 442 F.2d 46, 52 (7th Cir. 1971).

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness’s testimony, but may choose to believe only certain portions of the testimony. *Johnson v. Rocket City Drywall*, ARB No. 05-131, ALJ No. 2005-STA-024 (Jan 31, 2007); *Altomose Construction Co. v. NLRB*, 514 F.2d 8, 14, n. 5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, this Tribunal has observed the behavior, bearing, manner, and appearance of witnesses which have garnered impressions of the demeanor of those testifying. These observations and impressions also form part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, this Tribunal based its credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

This Tribunal finds all of the witnesses presented at the hearing to be credible and sees no reason to give one witness more weight than the other, with one exception. This Tribunal does find that certain portions of Complainant’s testimony to be less credible. Complainant’s version of events concerning the March 2011 incident contrasts with the weight of the evidence presented. Complainant attempted to bolster his credibility by referencing the absence of prior issues with his piloting conduct, and Respondent presented credible impeachment evidence to counter Complainant’s position. This tends to lessen the credibility of the Complainant to the extent that he made similar representations during his testimony.

B. Complainant's Prima Facie Case

1. Whether the Parties are Subject to the Act

AIR 21 applies only to air carriers, or contractors or subcontractors of air carriers. 49 U.S.C. § 42121(a). Respondent is an air carrier that conducts its operations under 14 C.F.R. Part 121 and the Complainant is a captain for Respondent. Further, Respondent concedes that it is subject to the Act. Resp. Br. at 3. Thus, there is no question that the parties are subject to Act and Complainant has established this element.

2. Protected Activity

Under the Act, no air carrier, or contractor or subcontractor of an air carrier, may discriminate against an employee because the employee:

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (3) testified or is about to testify in such a proceeding; or (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a)(1)-(4).

The Board has explained, “As a matter of law, an employee engages in protected activity any time [h]e 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.” *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, ALJ No. 2013-AIR-009, slip op. at 7-8 (Feb. 13, 2015) (citing 49 U.S.C.A. § 42121(a)) (emphasizing, “an employee need not prove an *actual* FAA violation to satisfy the protected activity” provided that “the employee’s report concerns a federal law related to air carrier safety and the employee’s belief that the violation occurred is subjectively and objectively reasonable”) (emphasis in original).⁴⁵

⁴⁵ Moreover, that “management agrees with an employee’s assessment and communication of a safety concern does not alter the status of the communication as protected activity under the Act, but rather is evidence that the employee’s disclosure was objectively reasonable.” *Benjamin v. Citationshares Mgmt., LLC*, ARB No. 12-029, ALJ No. 2010-AIR-001, slip op. at 5-6 (Nov. 5, 2013); *see also Sewade*, ARB No. 13-098, slip op. at 8 (“When an employee makes a protected complaint, the employer’s response (positive or negative) does not change that AIR 21 protected activity has occurred”).

Thus, the “complainant must prove that he reasonably believed in the existence of a violation,” and the reasonableness of this belief has both a subjective and an objective component. *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, ALJ No. 2013-AIR-016, slip op. at 5 (Jan. 21, 2016). Regarding the former, “To prove subjective belief, a complainant must prove that he held the belief in good faith.” *Id.* Regarding the latter, the Board explained: “To determine whether a subjective belief is objectively reasonable, one assesses a complainant’s belief taking into account the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Id.* (evaluating the reasonableness of belief of the *Burdette* complainant, a pilot, against that of a pilot with similar training and experience) (internal quotation marks omitted). However, the Board observed, “mere words do not create an FAA violation when the parties’ actual conduct does not violate FAA regulations.” *Hindman v. Delta Air Lines, Inc.*, ARB No. 09-023, ALJ No. 2008-ALJ-013, slip op. at 6 (June 30, 2010). Though the complainant “need not cite to a specific violation, his complaint must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety).” *Malmanger*, ARB No. 08-071, slip op. at 9.

Similarly, “once an employee’s concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation, and activities initially protected lose their character as protected activity.” *Id.* at 8 (internal quotation marks omitted) (holding that the complainant did not engage in protected activity since he knew that his concerns had already been resolved at the time he complained to management and “did not reasonably believe that safety violations existed at the time [the complainant] made his complaint”). *Id.* at 10.⁴⁶

The communication of safety related issues to “other authorities” can constitute a protected activity only if the employee has a subjectively and objectively reasonable belief that a violation occurred. *Seward v. Halo-Flight, Inc.*, ARB No. 13-098, ALJ No. 2013-AIR-9, slip op. at 7-8 (Feb. 13, 2015)(citing 49 U.S.C. § 42121(a)). Further, the Act does not require Complainant to have actually communicated with the FAA prior to sending the email, in order for this action to constitute a protected activity. Title 49 U.S.C. § 42121(a)(1) extends protection to those who are *about to provide* information relating to any violation of the FAA.

Discussion of Protected Activity⁴⁷

Here, Complainant alleges that he engaged in protected activity on December 9, 2013 when he filed an ASAP report expressing his concerns about Respondent’s Gunnison briefing guide.⁴⁸ See JX-J; see also Compl. Br. at 2. Complainant filed this report after he sent an email

⁴⁶ See also *Carter v. Marten Transp., Ltd.*, ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-063, slip op. at 9 (June 30, 2008); *Williams v. U.S. Dep’t of Labor*, 157 Fed. App’x 564, 570 (4th Cir. 2005); *Patey v. Sinclair Oil Corp.*, ARB No. 96-174, ALJ No. 1996 STA-20, slip op. at 1 (Nov. 12, 1996).

⁴⁷ Unlike the standard for a motion for summary decision, evidence introduced at the hearing is no longer entitled to be looked at in the light most favorable to Complainant, who has the burden of placing evidence of protected activity in the record. See Tr. at 184, 436.

⁴⁸ There was also testimony that Complainant allegedly filed an ASAP concerning a de-icing incident that occurred at Aspen in January or March 2011 (Tr. at 392-95 and 406-416), an incident that was

to Respondent's vice president of flight operations expressing his concerns. JX-I; Tr. at 196. In response to this email, Respondent's vice president of flight operations directed Complainant to file a Safety Concern Report, an established procedure under Respondent. Following this guidance, Complainant reviewed the SCR guidelines which indicated that this type of incident should be filed as an ASAP. Tr. at 197-98.

ASAP reports are reviewed by a committee comprised of representatives from the FAA, Respondent, and the pilots' union's representative. Tr. at 64-65; *see also id.* at 197. In essence, under this FAA program, if a pilot submits an ASAP report, he cannot be punished for committing the alleged violations of the Federal Aviation Regulations.⁴⁹ Tr. at 197; *see AC 120-66.*

Respondent argues that the Gunnison ASAP filing is not a protected activity because the briefing guide is not a part of any Federal order, regulation or standard. It argues that the Gunnison briefing guide "is an internal company document that is not approved or accepted by the FAA or otherwise part of [Respondent's] operating specifications or regulated manual system." Resp. Br. at 10. It further argues that briefing guide does not supplement the Aircraft Flight Manual emergency procedures and the FAA does not require the briefing guide to be in the cockpit. *Id.*; *see also JX-EE.*

The Tribunal finds this argument unpersuasive. As an initial matter, Respondent's argument fails because Complainant is not required to show an actual violation of a regulation or order. The Act extends its protections to "information relating to any violation *or alleged violation* of any order, regulation, or standard of the [FAA]. 49 U.S.C. § 42121(a)(1). Complainant need only demonstrate that he provided 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." *Sewade*, ARB No. 13-098, slip op. at 7-8. The evidence before the Tribunal is Respondent required the pilot to use the briefing guide as part of Respondent's operations into Gunnison. Tr. at 64; *see also JX-LL.* In fact, Respondent itself later took action against Complainant when he failed to follow the briefing guide, albeit at the Aspen airport. Tr. at 132-33, 351-57.

specifically discussed during the January 21, 2014 meeting between Complainant and Captain Graser. *See JX-P.* However, despite Captain Graser's testimony that Complainant filed an ASAP in this matter and that he kept records of that incident (Tr. at 425-26; RX-8, RX-9), Complainant adamantly testified that he did not file an ASAP report concerning the 2011 de-icing incident. Tr. at 394-95. Had Complainant filed an ASAP report relating to the 2011 Aspen incident, it may well have been considered a protected activity, and the record establishes that Respondent (*vis a vis* Captain Graser) did consider that incident when determining the credibility of Complainant's version of events in the January 2014 incident. Tr. at 418. However, as Complainant bears the burden to establish that he performed a protected activity and *affirmatively denied* filing an ASAP report in that incident, this Tribunal finds no protected activity surrounding the 2011 Aspen incident.

⁴⁹ There are certain specific exceptions to this requirement, but they are beyond the scope of this decision. *See generally AC 120-66.*

From a subjective viewpoint, Complainant's testimony credibly shows that he repeatedly shared his concerns regarding the Gunnison briefing guide starting in 2013 by phone and email with various management personnel. Tr. at 193-94. It is unlikely that Complainant would alert his superiors and the FAA "many times over many years" and not truly perceive the exigency of the situation. Complainant's repeated warnings to Respondent demonstrates his subjective belief that the Gunnison briefing guide, as written at that time, posed a danger to air safety.

Further, "[t]here's a reason why this is a special approach. . . ." ⁵⁰ Tr. at 83. Gunnison is listed on Respondent's operations specifications ("OPS SPECS") as requiring use of special terminal instrument procedures. CX 6. OPSPEC C050 lists Gunnison as an airport requiring "special qualification by the pilot-in-command." CX 7. In particular, Respondent's aircraft must use ILS DME (FMS) Rwy 6, AMDT 0 when conducting its operations. CX 7 (OPSPEC C050) makes reference to 14 C.F.R. § 121.445, which provides in part:⁵¹

- (a) The Administrator may determine that certain airports (due to items such as surrounding terrain, obstructions, or complex approach or departure procedures) are special airports requiring special airport qualifications and that certain areas or routes, or both, require a special type of navigation qualification.
- (b) Except as provided in paragraph (c) of this section, no certificate holder may use any person, nor may any person serve, as pilot in command to or from an airport determined to require special airport qualifications unless, within the preceding 12 calendar months:
 - (1) The pilot in command or second in command has made an entry to that airport (including a takeoff and landing) while serving as a pilot flight crewmember; or

⁵⁰ It should be noted that this quote from Captain McGurrell was in the context of the Aspen approach, not the Gunnison approach. Tr. at 83.

⁵¹ See also 14 C.F.R. § 121.443(a), which extends the requirements of § 121.445 to include those items set forth in § 121.443(b). Section 121.443(b) provides in pertinent part:

- (b) No certificate holder may use any person, nor may any person serve, as pilot in command unless the certificate holder has provided that person current information concerning the following subjects pertinent to the areas over which that person is to serve, and to each airport and terminal area into which that person is to operate, and ensures that that person has adequate knowledge of, and the ability to use, the information:
 - (1) Weather characteristics appropriate to the season.
 - (2) Navigation facilities.
 - (3) Communication procedures, including airport visual aids.
 - (4) Kinds of terrain and obstructions.
 - (5) Minimum safe flight levels.
 - (6) En route **and terminal area arrival and departure procedures, holding procedures and authorized instrument approach procedures for the airports involved.**
 - (7) Congested areas and physical layout of each airport in the terminal area in which the pilot will operate.
 - (8) Notices to Airmen.

Emphasis added.

(2) The pilot in command has qualified by using pictorial means acceptable to the Administrator for that airport.

In reviewing these requirements, it is clear that Gunnison is not a typical airport and that both the FAA and Respondent have taken additional steps for purposes of safety in requiring additional training of the pilots and have developed a guide regarding these more challenging airports. Those additional steps included, at least in part, promulgation of the Gunnison briefing guide. Given the increased scrutiny in place for these special airports, this Tribunal finds it quite reasonable that Complainant believed that deficiencies in the briefing guide would be a violation of the Federal Aviation Regulations. Finally, it is a violation of the Federal Aviation Regulations for a Part 121 air carrier to operate in violation of its operations specifications. *See* 14 C.F.R. 119.5(g) and (l).⁵² It would be a violation by a flight crew not to follow the approved instrument approach procedures in its operations specifications as set forth in CX 6.⁵³ Complainant reported that Respondent's Gunnison briefing guide contained a chart that was "outdated for over a year" and referred to "a new instrument departure procedure and takeoff minimums," which led Complainant to believe that a crew "would be unable to safely or legally start service." JX-J.

It is objectively reasonable that an experienced line check airman such as Complainant would conclude that operating into a special airport with outdated approach plates would be a violation of the Federal Aviation Regulations.⁵⁴ A pilot conducting Part 121 operations is required to have current instrument charts available to him on the aircraft. 14 C.F.R. § 121.549(a). Such a requirement is commonly known in the aviation community and is even required when conducting operations using instrument flight rules under Part 91. *See* 14 C.F.R. § 91.503(a)(4). Moreover, Respondent's LCA manual instructs that "It is the responsibility of each LCA to maintain all manuals issued by the Company and the department with the most current revision, as indicated by the applicable...Flight Operations Revision Checklist" and "All applicable manuals must be current when conducting any training or checking event." *See* JX-II at ¶¶ 14(C) and (D). This directive, coupled with the Federal Aviation Regulations cited above, suggest that not only may LCAs alert Respondent as to archaic provisions of a briefing guide, but that they have an affirmative responsibility to do so. Thus, any LCA wishing to meet his or her obligations under these provisions would have reasonably alerted Respondent to outdated information in the briefing guide as Complainant did. Because an LCA would have acted

⁵² 14 C.F.R. 119.5 provides in pertinent part:

(g) No person may operate as a direct air carrier or as a commercial operator without, or **in violation of**, an appropriate certificate and **appropriate operations specifications**. No person may operate as a direct air carrier or as a commercial operator in violation of any deviation or exemption authority, if issued to that person or that person's representative.

...

(l) No person may operate an aircraft under this part, part 121 of this chapter, or part 135 of this chapter **in violation of an air carrier** operating certificate, operating certificate, or appropriate **operations specifications** issued under this part. (emphasis added)

⁵³ As Respondent did not object to CX 6, this Tribunal presumes that it is identical to the one in effect during the relevant time period.

⁵⁴ In general, instrument approach plates are contained in the terminal procedures publication and are updated every 56 days. *See* https://www.faa.gov/air_traffic/flight_info/aeronav/productcatalog/ifrcharts/TerminalProcedures/

similarly in comparable circumstances, Complainant's concern over the outdated instrument approach chart constituted an objectively reasonable belief.

Respondent notes that the FAA purportedly found the Gunnison briefing guide to be outside Respondent's manual system and argues *Chevron* deference to the FAA's determination of its own jurisdiction and regulatory interpretations. Resp. Br. at 10-11. Respondent's argument about deference to an FAA inspector's investigation findings also is without merit.⁵⁵ *Chevron* deference might be appropriate if the FAA had issued a formal published interpretation in the matter; it has not.⁵⁶ Further, the very issue of whether this matter was a protected activity is subject to *de novo* review and this Tribunal is not bound to the informal decision-making of even the Department of Labor in a particular case. 29 C.F.R. § 1979.107(b). Plus a real question exists about whether the FAA actually found that no violation occurred.

Respondent cites to JX-EE, a Memorandum to AFS-1, dated February 11, 2015, as support for the proposition that Complainant's allegations of a violation were not substantiated. *Id.* at 10. However, JX-FF is a letter from the FAA's Office of Audit and Evaluation, dated March 2, 2015, notifying Complainant that "[t]he investigation substantiated that a violation of an order, regulation or standard of the FAA related to air carrier safety occurred."⁵⁷ The FAA's Office of Audit and Evaluation is within AFS-10, which provides program advice and staff support, and serves as the point of contact for the Safety Issues Reporting System for AFS-1. See FAA Order FS 1100.1C, Flight Standards Service Organization Handbook (Feb. 4, 2013).⁵⁸ In its brief, Respondent also questions the authenticity of this exhibit. Resp. Br. at 11, n. 3. However, Respondent waived the issue of the authenticity of this document by not objecting to it at least seven days prior to the hearing. 29 C.F.R. § 18.82(d).

⁵⁵ While the FAA's February 11, 2015 memo in JX-EE is addressed to Mr. Duncan, the Director, Flight Standards Service located in Washington, D.C., it was prepared by an Operations Specialist assigned in the FAA's Alaska Regional Flight Standards Air Carrier Technical Branch. One can discern this from AAL-240 designation on the Memorandum. See FAA Order FS 1100.1C, Flight Standards Service Organization Handbook (Feb. 4, 2013). The Operations Specialist's correspondence to the Director of Flight Standards Service suggests the internal nature of the memo, and that it was not intended as guidance available to the entities it regulates.

⁵⁶ See *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 915 (11th Cir. 2007) (declining to give *Chevron* deference to an EPA guidance letter because there was "no indication that the . . . letter was the product of a 'formal [agency] adjudication,' 'notice-and-comment rulemaking,' or 'any other circumstances reasonably suggesting that Congress ever thought of [guidance letters] as deserving . . . deference'" (quoting *United States v. Mead Corp.*, 533 U.S. 218, 230-31, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001) ; *White & Case LLP v. United States*, 89 Fed. Cl. 12, 21 (Fed. Cl. 2009) (declining to give *Chevron* deference to an interpretation that did not involve "a formal adjudication with a hearing, published findings, internal appeals[,] and the like," but was promulgated under a process that was "much less formal than the adjudications of tribunals or independent agencies to which the Supreme Court has deferred"). See also *McLean v. Crabtree*, 173 F.3d 1176, 1184 (9th Cir. 1999) (denying full *Chevron* deference to a rule that was published in the Federal Register but not in the Code of Federal Regulations).

⁵⁷ In its brief, Respondent also questioned the authenticity of this exhibit. Resp. Br. at 11, n. 3. This Tribunal notes the inconsistency of Respondent's questioning the authenticity of a *joint* exhibit. Furthermore, any issue of the authenticity of a document should have been raised prior to, or at the hearing. See 29 C.F.R. § 18.82(d). Thus, this issue is waived.

⁵⁸ The current version of this Order is FAA Order FS 1100.1E , chg 1 (Sept. 29, 2016).

Finally, there is the underlying tenet of the ASAP program itself.

An ASAP provides a vehicle whereby employees of participating air carriers and repair station certificate holders can identify and report safety issues to management and to the FAA for resolution, without fear that the FAA will use reports accepted under the program to take legal enforcement action against them, or that companies will use such information to take disciplinary action. These programs are designed to encourage participation from various employee groups, such as flight crewmembers, mechanics, flight attendants, and dispatchers.

FAA Advisory Circular 120-66B, Aviation Safety Action Program (ASAP) (Nov. 15, 2002), at ¶1.b.

The fact that Complainant used this program elevates the credibility of his concern that he thought the Gunnison briefing guide issues concerned a violation of a federal aviation regulation.

Complainant has demonstrated his credible subjective and objective belief that he was reporting an air safety violation. Complainant also used the proper channels to communicate his air safety concern regarding an airport that presented unique challenges to the operation of aircraft. Therefore, the weight of the evidence supports a finding that Complainant's ASAP filing concerning the Gunnison briefing guide was a protected activity.

3. Adverse Action

The Act provides, "No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee" engaged in protected activity. 49 U.S.C. § 42121(a). In *Vannoy v. Celanese Corp.*, the Board observed, "An adverse action is simply an unfavorable employment action, not necessarily retaliatory or illegal. Motive or contributing factor is irrelevant at the adverse action stage of the analysis." ARB No. 09-118, ALJ No. 2008-SOX-064, slip op. at 13-14 (Sept. 28, 2011); *see also Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-005, slip op. at 14 (Sept. 13, 2011) (explaining that use of the "tangible consequences standard," rather than the standard articulated by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), was error). However, the Board has clarified, "*Burlington's* adverse action standard, while persuasive, is not controlling in AIR 21 cases," but that it is "a particularly helpful interpretive tool." *Menendez*, ARB Nos. 09-002, 09-003 at 15.

The Board has held "that the intended protection of AIR 21 extends beyond any limitations in Title VII and can extend beyond tangibility and ultimate employment actions." *Menendez*, ARB Nos. 09-002, 09-003 at 17 (citing *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 10-11 n.51 (Dec. 29, 2010)). The Board elaborated: "Under this standard, the term adverse actions refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Id.* at 17 (internal quotation marks omitted). Ultimately, an employment action

is adverse if it “would deter a reasonable employee from engaging in protected activity.” *Id.* at 20.⁵⁹ Accordingly, the Board views “the list of prohibited activities in Section 1979.102(b) as quite broad and intended to include, as a matter of law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference of potential discipline.” *Williams*, ARB No. 09-018 at 10-11. The Board further observed that “even *paid* administrative leave may be considered an adverse action under certain circumstances.” *Vannoy*, ARB No.09-118, at 14. (emphasis in original) (citing *Van Der Meer v. Western Ky. Univ.*, ARB No. 97-078, ALJ No. 1995-ERA-038, slip op. at 4-5 (Apr. 20, 1998) (holding that although an associate professor was paid throughout his involuntary leave of absence, he was subjected to adverse employment action by his removal from campus). However, this does not mean that every action taken by an employer that renders an employee unhappy constitutes an adverse employment action.

Discussion of Adverse Action

Respondent initially imposed a 90-day suspension of Complainant’s line check airman status on January 21, 2014. Tr. at 135, 158; *see also* RX 3. Respondent permanently suspended Complainant’s line check airman status on September 29, 2014. Tr. at 239, 362; JX-CC. Respondent concedes that Complainant’s suspension of his line check airman status on September 29, 2014 was an adverse employment action as contemplated by the Act. Resp. Br. at 9, 18-19. Respondent also acknowledged that the temporary suspension of Complainant’s line check airman status in January 2014 constituted an adverse action. *Id.* at 9.

On January 21, 2014, Captain Graser met with Complainant to discuss Flight 5658. Following this meeting Captain Graser suspended Complainant as a line check airman reportedly until he could report his findings to Captain Wall. Tr. at 133-34, 157. Captain Wall later determined that the suspension was appropriate and informed Complainant in a letter. At the end of the 90-day period, Respondent reinstated Complainant as a line check airman. RX 3; Tr. at 158, 355-359.

The position of line check airman holds some status within the pilot community. Tr. at 6. A line check airman can operate on behalf of the FAA on certain training events and it enables the pilot to earn additional income. Tr. at 5-7, 187. Line check airmen also help set and promote the practice of standards for Respondent. Tr. at 6; JX II, ¶ 20(B). These are pilots who provide

⁵⁹ *See also Williams*, ARB No. 09-018, slip op. at 15 (definitively clarifying the adverse action standard in AIR 21 cases: “To settle any lingering confusion in AIR 21 cases, we now clarify that the term ‘adverse actions’ refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged. Unlike the Court in *Burlington Northern*, we do not believe that the term ‘discriminate’ is ambiguous in the statute. While we agree that it is consistent with the whistleblower statutes to exclude from coverage isolated trivial employment actions that ordinarily cause de minimis harm or none at all to reasonable employees, an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity. The AIR 21 whistleblower statute prohibits the act of deliberate retaliation without any expressed limitation to those actions that might dissuade the reasonable employee. Ultimately, we believe our ruling implements the strong protection expressly called for by Congress.”).

oversight of other pilots' skills. As such, Respondent places certain expectations on their conduct. For example, the line check airman manual (JX-II) provides in part that "removal will result that mars the character and/or [sic] lessens the reputation of the line check airman group, the company or fellow employees." Tr. at 153. Thus, removal from this position indicates to others that a pilot removed as a line check airman did not meet those expectations. It is reasonable that this would impact the reputation of that pilot within the pilot community. Logically, it follows that the stigma associated with the loss of line check status, which comes with highly sought after prestige, would reasonably deter a pilot from engaging in protected activity under the *Williams* test. As such, this Tribunal finds that the involuntary suspension or removal of a pilot as a line check airman is an adverse action. Whether the adverse action actually stemmed from protected activity in this case is a separate issue addressed below.

4. Contributing Factor Analysis

Finally, Complainant must demonstrate that the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). The Board has held that a contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams v. Domino's Pizza*, ARB 09- 092, ALJ No. 2008-STA-052, slip op. at 6 (Jan. 31, 2011). The Board has observed, "that the level of causation that a complainant needs to show is extremely low" and that an ALJ "should not engage in any comparison of the relative importance of the protected activity and the employer's nonretaliatory reasons." *Palmer v. Canadian National Railway/Illinois Central Railroad Company*, ARB No. 16-035, ALJ Case No. 2014-FRS-154, slip op. at 15 (Sept. 30, 2016). Therefore, the complainant "need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected activity." *Hutton v. Union Pacific R.R.*, ARB No. 11-091, ALJ No. 2010-FRS-020, slip op. at 8 (May 31, 2013)(internal quotation marks omitted). Put another way, "did the protected activity play a role, any role whatsoever, in the adverse action?" *Palmer*, ARB No. 16-035, at USDOL Rptr, page 21.

A complainant may prove this element through direct evidence or circumstantial evidence. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6-7(Feb. 29, 2012). Though "[t]emporal proximity between protected activity and adverse personnel action 'normally' will satisfy the burden of making a *prima facie* showing of knowledge and causation," and "may support an inference of retaliation, the inference is not necessarily dispositive." *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, ALJ No. 2004-AIR-012, slip op. at 7 (Dec. 31, 2007). "Also, where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action." *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-019, slip op. at 6-7 (Apr. 28, 2006). "The ALJ is thus *permitted* to infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity." *Palmer*, ARB No. 16-035, at USDOL Rptr, page 56.

Discussion of Contributing Factor Analysis

In response to the question “why do you feel that your termination of line check airman by Robin Wall is retaliation for Gunnison?” he responded:

A: Well, again, there was no evidence, company policy wasn't followed, and it all came back to – it was just a continuation of the ASAP that I filed in Gunnison. It just seemed like it just kept going, just more and more.

Tr. at 242.

Besides the filing of the ASAP in December 2013, intervening incidents occurred between that protected activity and the adverse actions; including Flight 5658 and contact between Complainant and the subject of a sensitive investigation.

While close temporal proximity alone may be sufficient to show a causal connection, the administrative law judge is not required to so find. Instead, one must look at the totality of events that transpired during this time period. The issue around Flight 5658 concerns whether the Complainant conducted a stabilized approach into Aspen on January 4, 2014. In January 2014, approaches into Aspen were a particular concern because the day after Flight 5658 there was a fatal private jet crash at the Aspen airport while that aircraft was attempting to land.⁶⁰ Thus, it is highly likely that the safety of operations into Aspen was on the forefront of the minds of Respondent's personnel.

Captain Graser, the Denver Chief Pilot, conducted the investigation of Flight 5658 after receiving a report of a possible non-standard approach “observed” by another line check airman, Captain McGurrell. Tr. at 24, 86; *see also* JX-N. Captain Graser is an experienced pilot, qualified in the aircraft at issue, and has more than 10,000 hours of total flight time. Tr. at 131. Complainant argues that Captains Graser, McGurrell, and Brooks all knew that he filed an ASAP report prior his suspension. In the course of conducting the investigation that led to Complainant's temporary suspension, Captain Graser consulted with the latter two captains, as did Captain Wall prior to permanently suspending Complainant. Compl. Br. at 6. Even assuming each of these three individuals were aware of the ASAP, Complainant fails to provide evidence that their knowledge of the ASAP report played a role in either suspension, which stemmed from his non-standard approach.

Complainant also asserts that Captain McGurrell ignored his safety concerns, which prompted Complainant to bypass Captain McGurrell and escalate his concerns to the next management level. Complainant maintains that this upset Captain McGurrell, who declined to have a peer-to-peer chat with him. *Id.* at 7-8. At the time of Flight 5658, Captain McGurrell

⁶⁰ The crash is referenced in RX 5. This accident also was alluded to during the January 21, 2014 meeting between Captain Graser and Complainant. JX-P. Information about the private jet crash at Aspen the following day can be located at http://nts.gov/_layouts/nts.aviation/brief2.aspx?ev_id=20140106X95024&ntsbn=CEN14FA099&akey=1. *See also*, <http://aspenjournalism.org/2014/01/05/aspen-jet-crash-photos/>; <http://aspenpublicradio.org/post/nts-releases-preliminary-report-aspen-plane-crash#stream/0>.

operated a different aircraft near Aspen. Tr. at 20. Captain McGurrell observed on his aircraft's multifunctional display Complainant's aircraft cross the LIFTT intersection at 14,600 feet, just 400 feet below the altitude where Complainant's aircraft could deploy his aircraft's flaps. Tr. at 79-80, 147. At that time, Captain McGurrell did not know who was operating Flight 5658 but regardless, as a line check airman, he felt obligated to report the incident. Once Captain McGurrell discovered that Complainant was the captain of that flight, he recused himself from conducting the investigation because of their public disagreements in the past. *See* Tr. at 26-27, 44 and 72; JX-N. Although Captain McGurrell elevated the matter to a higher level, it was he who actually observed Complainant's non-standard approach at the center of the investigation. Thus, it follows that Captain Graser would seek his input as to what he observed. However, Complainant does not aver that Captain McGurrell's involvement in the investigation touched on his protected activity. Indeed, it appears that the scope of Captain McGurrell's involvement was limited to what he observed on January 4, 2014. Complainant does not provide evidence to the contrary. Although the two may have held a personal grudge against one another, nothing in the record suggests that Captain McGurrell cited or considered Complainant's ASAP report when he conveyed information about the incident to Captain Graser.

Captain Graser gathered evidence about Flight 5658 from a variety of sources: FAA radar data (JX-PP); the aircraft's dispatch release (RX 4); flight data from Flightaware (RX 1); and information from the flight crew. Tr. at 106. However, he still needed information about the aircraft's indicated air speed at the time Complainant's aircraft crossed the LIFTT intersection. Tr. at 139. LIFTT is an important point for this instrument approach and Respondent requires that its aircraft be fully configured at that point. Fully configured means landing gear down and flaps fully extended. Tr. at 23, 61.

Captain Graser was able to calculate Complainant's airspeed using an E-6(b) computer, concluding that Complainant crossed LIFTT at 176 knots. The aircraft has an operating limitation to not extend flaps above 170 knots. Tr. at 139-142. Captain Graser concluded that Complainant's aircraft was too high and too fast for the approach, and thus not a standard approach. *See* Tr. at 390.

Complainant further contends that Captain Graser's anger toward him grew with the ASAP filing and used the LIFTT intersection issue as a means of retaliating against him for both the ASAP filing and the 2011 de-icing incident. Compl. Br. at 10. However, he does not cite any evidence for this supposition. Complainant takes issue with Captain Graser's use of radar data from Complainant's approach, Flightaware information, lack of airspeed calculations, and his choice to disregard FO Brouwer's testimony favorable to him. *Id.* at 11. None of these objections relate to his protected activity. In addition, as discussed above, the 2011 de-icing incident is not at issue here.⁶¹

On January 21, 2014, Captain Graser interviewed Complainant. JX-P. Complainant denied that the data he was shown related to his flight. Based on the information he gathered during his investigation and Complainant's lack of explanation, other than denying the data was his aircraft, Captain Graser temporarily suspended Complainant's line check airman privileges, a

⁶¹ *See supra* note 48.

suspension later made 90 days in part by Captain Wall.⁶² Tr. 150-52, 356. Complainant also points to Respondent's instruction that he pilot a flight from Denver to Aspen even after having temporarily suspended him for safety reasons. Complainant characterized this apparent contradiction as a pre-determined condemnation of him. Compl. Br. at 12. Here, Complainant seems to argue that "safety reasons" constitutes pretext for the true reason that Respondent suspended him. However, Complainant stops short of asserting that the true reason for the suspension was his ASAP report. Again, because Complainant did not invoke his protected activity as a contributing factor in his suspension, he has not proven that the ASAP report contributed to the adverse action.

The meeting between Captain Graser and Complainant was candid. *See* JX-P. The tone and inflection in Captain Graser's voice from the audiotape indicates a lack of belief of Complainant's explanation, and he told Complainant directly that he did not believe him. Captain Graser also took umbrage of Complainant's comments about Complainant's concern for safety; specifically referencing a prior incident at that airport in 2011 where Complainant allegedly departed in one of Respondent's aircraft with contaminated wings. Captain Graser commented that Complainant should have been disciplined for that incident but was not. *See* JX-P. The audiotape of that conversation clearly shows that Captain Graser had concerns about the credibility of Complainant's assertions. But the concerns Captain Graser expressed pertained to Complainant's conduct in a 2011 incident and the non-standard approach in 2014, not Complainant's filing of an ASAP for the Gunnison briefing guide just a month prior. Indeed, Complainant himself does not even indicate that his ASAP arose as a topic of discussion during the recorded meeting, only that Captain Graser spoke to him in a "hostile tone." Compl. Br. at 5-6. Other than temporal proximity, there is no objective evidence to link Complainant's December 2013 ASAP report to his later line check airman suspensions.

Complainant makes several arguments alleging disparate treatment. Compl. Br. at 13-14. He claims that, although the flight was a two pilot operation, only he was suspended for the alleged non-standard approach. He claims that Respondent never investigated his March 18, 2014 Grievance Statement. He asserts that he was the only pilot to be suspended as line check airman after signing a letter of instruction and that Captain Wall had never suspended a line check airman for a standards practice violation.

The argument concerning the dissimilar treatment of a captain versus a first officer is meritless because the captain bears ultimate responsibility for the conduct of the flight. Custom dictates that the captain be held to a higher standard and must shoulder greater responsibility than a first officer, even if the first officer flew the aircraft.⁶³ Complainant's argument that

⁶² Complainant's disparate treatment argument based on other first officers not being similarly punished lacks merit. Complainant was the captain of the flight, the aircraft's pilot in command, and the flying pilot. Complainant fails to cite a single comparator in which Respondent investigated a pilot for a non-standard approach and chose not to similarly suspend that pilot. Further, Complainant's status as a line check airman places him at a higher level of care as compared to a first officer.

⁶³ *See Administrator v. Austin and McCall*, NTSB SE-18616, SE-18607, 2010 NTSB Lexis 48 (June 14, 2010)(For the same flight, the Captain's pilot certificate suspended for 180 days while first officer's certificate was suspended for 90 days), *remanded on other grounds*, NTSB EA-5583, 2011 NTSB Lexis 92 (May 4, 2011); FAA Order 2150.3B, Compliance and Enforcement Program, w/ CHG 11, Ch. 7, ¶4.c

Respondent did not investigate his grievance is equally without merit. Failing to investigate a grievance does not amount to disparate treatment. Complainant provides no evidence that Respondent investigated similar types of grievances, let alone cites an example where Respondent elected not to suspend a line check airman for a similar violation. Finally, the mere fact that no pilot lost his line check airman status as a consequence of prior misconduct does not automatically make the action disparate; every type of discipline has to have an initial occurrence.

Complainant closes his contributing factor argument by questioning the evidence gathered by Captain Wall that formed the basis of his decision to permanently terminate Complainant's LCA status. Particularly, Complainant suggests that Captains Brooks, McGurrell, and Graser shared false information and that Captain Wall did not listen to his side of the story regarding the human resources investigation. Compl. Br. at 13. Even assuming that the principals involved did as Complainant asserts, Complainant never made the logical leap that proves a relationship between his ASAP report concerning the Gunnison briefing guide to Respondent's decision to suspend and terminate his LCA status for his conduct during the January 4, 2014 Aspen flight or during the human resources investigation.

The evidence in this case does not demonstrate that Complainant's ASAP report filing concerning the Gunnison briefing guide was a contributing factor in the suspension of Complainant's line check airman status. There is no evidence before this Tribunal that Respondent considered it when initially imposing the temporary, and later the permanent, suspension of his line check airman status. Unquestionably, the initial suspension occurred shortly after Complainant's ASAP Gunnison briefing guide report. However, this Tribunal finds that the temporal nature of the suspension in this case is not sufficient to establish that it constituted a contributing factor, particularly in consideration of the intervening issues of Complainant's non-standard approach into Aspen and conduct during the human resources investigation.

5. Conclusion: Complainant's *Prima Facie* Case

Complainant and Respondent are subject to the Act. Complainant's filing of an ASAP concerning the Gunnison airport briefing guide constitutes a protected activity. Further, Respondent suspending Complainant as a line check airman was an adverse action. However, Complainant has failed to establish that his ASAP filing pertaining to the Gunnison briefing guide represented a contributing factor to suspension of his line check airman status. Thus, Complainant's complaint fails and this Tribunal must dismiss it.

However, in the alternative, should it be determined that the ASAP filing was a contributing factor, this Tribunal will continue its analysis and assume for the rest of this decision that Complainant has presented a *prima facie* case of a violation of the Act. Thus, the burden now shifts to Respondent to establish by clear and convincing evidence that it would have taken the same unfavorable action absent the protected activity.

(Feb. 24, 2016) (FAA considers the level of experience when determining an appropriate sanction for certificate actions.). See generally, *Occhione v. PSA Airlines, Inc.*, 886 F.Supp. 2d 736 (S.D. Ohio 2012); *Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, ALJ Case No. 2011-AIR-012 (Nov. 26, 2014).

C. Whether Respondent Would Have Taken the Same Unfavorable Action Absent Complainant's Protected Activity

Assuming Complainant has proven all of the elements of an AIR21 complaint, the Act provides, "Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C.A. § 42121(b)(2)(B)(iv). "Clear and convincing evidence or proof denotes a conclusive demonstration; such evidence indicates that the thing to be proved is highly probable or reasonably certain." *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 11 (May 26, 2010). The Board further explained, "Thus, in an AIR 21 case, clear and convincing evidence that an employer would have fired the employee in the absence of the protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability." *Id.*

However, where an employer proffers shifting explanations for its adverse action, or engages in disparate treatment of similarly situated employees, the employer's "explanations do not clearly and convincingly indicate that it would have" taken the same unfavorable action absent the protected activity. *See Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ 2003-AIR-010, slip op. at 8 (Dec. 30, 2004); *see also Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070 and 08-074, ALJ No. 2006-AIR-014 (Sept. 30, 2009). "An employer's shifting explanations for its adverse action may be considered evidence of pretext, that is, a false cover for a discriminatory reason." *Douglas*, ARB Nos. 08-070 and 08-074, slip op. at 16. Disparate treatment may also constitute evidence of pretext where similarly situated employees, employees involved in or accused of the same or similar conduct, are disciplined in different ways. *Id.* at 17; *see also Clemmons*, ARB No. 08-067, slip op. at 11 (finding that the administrative law judge's credibility determinations and "factual findings regarding temporal proximity, pretext, and shifting defenses . . . preclude any determination that [the employer] could establish by clear and convincing evidence that it would have fired [the complainant] absent his protected activity").

Discussion of Respondent's Same Decision Defense

Respondent presented evidence of two distinct incidents that explain why it suspended Complainant as a line check airman: Complainant's actions during the January 2014 flight and his actions during a human resources investigation involving sexual harassment.

Complainant was the captain of Flight 5658 into Aspen on January 4, 2014. Captain McGurrell, who is also a line check airman, observed what he perceived as a non-standard approach into Aspen on his aircraft's multi-function display with a TCAS overlay. As a line check airman, he had a duty to report such non-compliance with Respondent's operating procedures into Aspen. Tr. at 72. Captain Graser conducted an investigation, gathering evidence from witnesses, air traffic control, dispatch and Flightaware. He concluded that Complainant's flight was not "fully configured" at LIFTT as required by Respondent's procedures. When Captain Graser eventually confronted Complainant about the flight, Complainant denied that the data pertained to him, or that his flight that day did not comply with Respondent's approach

procedures. Captain Graser did not find Complainant's explanations credible, and at one point discussed Complainant's 2011 de-icing incident. Consequently, Captain Graser temporarily suspended Complainant, a suspension later formalized for 90 days by Captain Wall. Captain Wall testified that a typical temporary suspension lasted 180 days and considered Complainant's 90-day suspension light. Tr. at 357. These interactions tend to support the position that Respondent did not retaliate against Respondent for his ASAP report. Rather, they reinforce Respondent's position that Complainant's non-standard approach and subsequent evasion when confronted about it, along with his actions during the sexual harassment investigation, prompted the permanent suspension of his check airman status.

Much of the focus in this case revolved around the calculations on whether Flight 5658 was properly configured at LIFTT. Both parties, at this Tribunal's request, discussed this matter in their briefs. However, upon further reflection, the accuracy of these calculations is not particularly germane to the decision. Even if Captain Graser later miscalculated the point at which Complainant's crossed LIFTT, whether Respondent would have taken the same action given the facts that it knew at the time of the adverse action is the crux of the matter. This Tribunal concludes that it would have. Captain Graser knew of a prior episode at Aspen in 2011 involving Complainant. He was also aware that there had been a recent jet crash at Aspen. Based on these events, and the information he gathered during his investigation into Flight 5658, Captain Graser determined that Complainant operated into Aspen on January 4, 2014 when not properly configured for the approach. This flight was conducted by a line check airman who is expected to set an example for flight operations into and out of these dangerous airports. As noted by Captain Wall, "a check airman's conduct is highly visible and subject to scrutiny." Tr. at 349. The line check airman manual unambiguously states that Respondent holds line check airman to standards higher than its other pilots. *See* JX-II.

Respondent is a large air carrier responsible for the safety of its passengers, crew and equipment. A line check airman plays a critical role in the overall safety for the air carrier, a particularly acute concern when flights land and depart from special use airports, such as Gunnison and Aspen. CX 6. Therefore, it is incumbent upon Respondent to ensure that its flight crews operating into and out of these airports function with predictable precision. Respondent had information about Complainant conducting a non-stabilized approach and Captain Graser in particular had concerns about a prior incident at that airport in 2011. Even if Captain Graser was wrong in his conclusions, caution dictated that Respondent take the safer course of action by temporarily suspending Complainant. In sum, this Tribunal finds it highly probable the Respondent would have suspended a line check airman in such a situation, absent any protected activity engaged in by that line check airman.

Complainant asserts that Captain Wall relied upon erroneous information from others, primarily Captains Graser and McCurrell, in his decision to permanently suspend Complainant's line check airman privileges. Even assuming Captain Wall relied upon inaccurate or erroneous information, such reliance does not equate to retaliation. Captain Wall was informed of these incidents and made a decision based upon the information provided at that time. Complainant likewise notes that Captain Wall previously had never suspended a line check airman for any human resources or Standards Practice violation. Compl. Br. at 13. However, that Captain Wall had never taken this adverse action before in and of itself does not connote nefarious actions or

that he did so because of Complainant's protected activity. Even if Captain Graser miscalculated the point at which Complainant crossed LIFTT, the decision-maker did not know of this miscalculation at the time the decision to suspend the Complainant was made. Tr. at 370. Captain Wall's decision must be viewed in light of the information he had in his possession at the time he made it. Most tellingly, Captain Wall credibly testified that he was not even aware that the Complainant had filed an ASAP report pertaining to the Gunnison briefing guide. Tr. at 382.

The second incident involved Complainant violating Standard Practice 53. Human resource personnel conducted an investigation into sexual harassment allegations involving a transgender pilot. Sexual harassment investigations by their nature are very sensitive matters requiring discretion and confidentiality. On August 27, 2014, a human resource manager, Cheryl Sache, called Complainant about a safety concern involving FO Simms. JX X. Ms. Sache specifically told Complainant not to speak to anyone about the conversation she had with him. Tr. at 233, 236; JX X; JX Y. Confidentiality instructions are standard investigatory procedures at Respondent. Tr. at 323-24. However, Complainant did contact the alleged subject of the sexual harassment to discuss his conversation with Ms. Sache. Tr. at 234-36; JX Y. As a result of Complainant's call to FO Simms, FO Simms reached out to Ms. Sache expressing a loss of trust with the human resource personnel. Tr. at 322; *see also* JX Y. On September 18, 2014, Complainant received and signed a letter of instruction, a form of discipline, for failing to follow those instructions. Tr. at 129, 338; JX Z. Based upon this letter of instruction, Captain Wall permanently suspended Complainant's line check airman privileges. JX CC. Captain Wall explained his rationale as follows:

...[A]ccording to our check airman manual [Complainant] did not exhibit nor maintain the level of professionalism and leadership that we expect of our check airmen....[H]e had violated a company policy, which is expected of our check airmen to uphold. And with that, and the nature of the previous situation, the culmination of the two was the decision -- was what drove the decision to permanently revoke that privilege.

Tr. at 362.

By "previous situation", Captain Walls referenced the January 4, 2014 Aspen incident where Complainant's line check airman status had been suspended for 90 days. Respondent also presented evidence through Ms. Nichole Chapman, Lead Manager, Employee Relations, that it has disciplined employees in the past for violating their confidentiality obligations. Tr. at 325.

Respondent has determined in its written policy that designation as line check airman has certain requirements. Its manual contains the criteria for removal: "removal will result from any conduct that mars the character and/or lessens the reputation of the line check airman group, the Company, or fellow employees." JX II, ¶ 21(A). Given Respondent's findings that Complainant conducted a non-standard approach into Aspen on January 4, 2014 and that Complainant failed to follow specific guidance on not communicating with persons during a sensitive sexual harassment investigation, this Tribunal finds it highly probable that Respondent would have acted consistent with its published policy and removed Complainant as a line check airman.

Taken as a whole, all of the evidence in this case surrounding the suspension of Complainant's line check airman privileges makes it highly probable that Respondent would have suspended those privileges absent Complainant's earlier protected activity. Thus, in light of Respondent's perception of Complainant's actions in Aspen, in concert with its perception that Complainant violated SP 53, and the evidence demonstrating the high standards expected of line check airman in combination with the low threshold for removal from this position as reflected in the line check airman manual, Respondent has demonstrated by clear and convincing evidence that it would have removed Complainant as a line check airman absent his protected activity.

IV. CONCLUSION

This Tribunal finds that the Complainant is an employee protected by the Act and the Respondent is an air carrier. Complainant has established that he engaged in protected activity, and that he was subject to an adverse action. However, Complainant failed to establish that the protected activity was a contributing factor to the adverse action. In the alternative, even if a link can be made between the protected activity and the adverse action, Respondent has demonstrated by clear and convincing evidence that it would have suspended Complainant's line check airman status in the absence of that protected activity. Accordingly, I hereby dismiss Complainant's complaint with prejudice.

ORDER

The Complaint of Brett Detwiler is hereby **DISMISSED**.

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, 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).