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Issue Date: 26 September 2019

Case No.: 2018-AIR-00032

In the Matter of

BRIAN DOLAN

Complainant

v.

AERO MICRONESIA, INC. d/b/a

ASIA PACIFIC AIRLINES,

Respondent

DECISION AND ORDER AWARDING RELIEF

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. *See* 49 U.S.C. § 42121. The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure. Implementing regulations are at 29 C.F.R. Part 1979, published at 68 Fed. Reg. 14,100 (Mar. 21, 2003). 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

On November 25, 2016, Complainant filed an AIR 21 complaint with the Occupational Safety and Health Administration ("OSHA") concerning protected activity, which allegedly occurred in August to November 2016.¹ On June 27, 2017, Complainant filed a second OSHA complaint.² In its March 19, 2018 letter, OSHA made the following determinations:

¹ RX 1 (which contains only the 11/25/16 OSHA complaint).

² The administrative record reflects that on June 27, 2017, Complainant filed a second OSHA complaint. The second complaint alleged that Respondent terminated his employment on June 12, 2017 after Respondent placed him on the schedule for zero flight hours in May and June 2017. This second OSHA complaint is contained in the administrative record; Complainant attached it in his response to the Tribunal's Notice of Assignment and Pre-hearing Order. However, this second OSHA complaint was not offered as an exhibit at the hearing, no evidence has been offered that OSHA has issued its finding in this matter, nor is there evidence that Complainant appealed any finding concerning this second OSHA complaint. The only reference in the record concerning a June 26, 2017 complaint occurred during a

Complainant timely filed his complaint; Respondent is an air carrier and Complainant is a covered employee. OSHA found Complainant engaged in protected activity in August 2015, and again in August and September 2016. OSHA found Respondent's issuance to Complainant of a letter of warning on March 28, 2016 and its termination of Complainant's employment in June 2017 to constitute adverse employment actions. However, OSHA found the timing of the adverse actions did "not lend [themselves] to temporal proximity" as the adverse actions took place seven and ten months, respectively, after the occurrence of the protected activity. Accordingly, OSHA dismissed the complaint. RX 7; CX 23. On April 25, 2018, Complainant objected to OSHA's findings and requested a formal hearing before the Office of Administrative Law Judges ("OALJ").

Subsequently, this matter was assigned to the undersigned. On May 22, 2018, this Tribunal issued the Notice of Assignment and Conference Call. Complainant responded to the Notice of Assignment by letter dated June 1, 2018, and attached his statement, which was originally transmitted as part of his complaint to OSHA. Respondent submitted Initial Disclosures pursuant to 29 C.F.R. § 18.50(c)(1)(i) by letter dated June 12, 2018. Following a pre-hearing teleconference with the parties on June 14, 2018, this Tribunal issued a Notice of Hearing and Pre-Hearing Order on June 21, 2018, and set the hearing for December 4 to December 7, 2018 in Guam. Both parties submitted their pre-hearing statements on November 26, 2018.

This Tribunal held a hearing in this matter in Hagåtña, Guam from December 4 to December 6, 2018.³ Complainant and Respondent's representative were present during all of these proceedings. At the hearing, this Tribunal admitted Joint Exhibits ("JX") A – C; Respondent's Exhibits ("RX") 1 – 14, 18, 20, 22 and 23; Complainant's Exhibits ("CX") 1 – 79 and 81.⁴ At the hearing the Tribunal had the parties address Complainant's Motions to Compel. As for the admission of certain exhibits, the Tribunal asked the parties to renew any objections should the testifying witness not resolve the outstanding objection. The Tribunal further addressed the order of witnesses, and Complainant's right to present documents not offered to OSHA. Tr. at 7-19. At the close of Complainant's case, the Respondent made an oral motion to dismiss which, after hearing oral argument, the Tribunal denied. *See* Tr. at 688-97.

Complainant submitted its closing brief on March 1, 2019. Respondent submitted its closing brief on April 5, 2019. Complainant filed his reply brief on May 6, 2019. This decision is based on the evidence of record, the testimony of the witnesses at this hearing, and the parties' arguments.

discussion by counsel that this occurred. Tr. at 661. In short, this second complaint is not ripe for adjudication by this Tribunal. Accordingly, the complaint before this Tribunal is limited to the 11/25/16 OSHA complainant and therefore the Decision and Order that follows does not materially discuss Complainant's allegations in his 6/27/17 OSHA complaint.

³ The transcript of the Guam proceedings will hereafter be identified as "Tr." Both parties provided brief opening statements. Tr. at 24-41.

⁴ Tr. at 22, 23, 99, 331, 352, 416, 553, 595, 599 and 754. The Tribunal also identified administrative exhibits ALJ 1 – ALJ 3. Tr. at 781, 784. These were documents that the Tribunal did not admit or allow the Respondent to refer to because of its failure to disclose them during discovery. *See* Tr. at 773-85.

II. FACTUAL BACKGROUND AND EVIDENCE

A. Stipulated Facts

At the hearing the parties stipulated that:

- Respondent hired Complainant on April 22, 2003 and terminated his employment on June 12, 2017. Tr. at 6; *see also* CX 22.
- Respondent's termination of Complainant's employment was an adverse action.⁵ Tr. at 21.
- The parties are subject to the Act. Tr. at 20.

B. Facts Adduced From Testimony⁶

The following witnesses testified at the hearing:

- **Adam Ferguson.**⁷ Ferguson, who holds no FAA certificates or ratings, came to Respondent in September 2015, became Respondent's President on July 1, 2017,⁸ and is the accountable executive⁹ for the airline. Prior to that he was Respondent's Vice President for Marketing. Tr. at 441. He has worked in aviation since 1996 and his role in the business is to grow the company. Tr. at 42-44.
- **Joseph San Agustin.** Captain San Agustin holds an Airline Transport Pilot ("ATP") certificate with eight type ratings, including the Boeing 707, 727, 757 and 767, and has approximately 13,000 hours total flight time with 12,000 being in jets.¹⁰ He has worked for Respondent since 1999.¹¹ He has served at various

⁵ The Tribunal explained that the Complainant was free to present evidence of other adverse actions if he so wished. Tr. at 21.

⁶ The Tribunal heard testimony concerning alleged incidents prior to 2015 as well as other incidents involving other pilots that it viewed as irrelevant, immaterial and collateral to the issues it must decide. *See, e.g.*, Tr. at 77, 314-15, 491, 528-29, 607-09, 660. The Tribunal also notes that neither party addressed these matters in their briefs. Accordingly, the Tribunal does not find it necessary to address these tangential facts in its decision.

⁷ Mr. Ferguson was also Respondent's corporate representative for these proceedings.

⁸ Tr. at 117.

⁹ Tr. at 57. *See* 14 C.F.R. § 5.25.

¹⁰ The Tribunal finds the types of certificates an airman holds and an airman's flight time is generally relevant to what weight to give the airman when testifying about aviation related matters. In general, an airman that holds an ATP certificate will be given greater weight than an airman that holds a commercial certificate. Similarly, an airman that holds a type rating in the aircraft being discussed will be given greater weight than an airman that does not hold a type rating in that aircraft. Finally, an airman with more total time will be given more weight than an airman with much fewer hours of flight time.

¹¹ Captain San Agustin has known Complainant since Complainant joined Respondent in 2003. Tr. at 166. He has flown with him many times over the years. Tr. at 167. He testified that in 2015, a few pilots

times as Respondent's Director of Safety, Chief Pilot and Director of Operations¹² and is a check airman¹³ for the Boeing 727 and 757. At the time of the hearing he was a line captain with line check airman status.¹⁴ Tr. Tr. at 156-63.

- **Darren Kossen.** First Officer ("FO") Kossen holds an ATP certificate and has 3,850 hours of flight time, over 1,700 hours being in jets. Tr. at 337, 427. He came to Respondent in October 2016 and left on January 12, 2017,¹⁵ but his last flight for Respondent occurred on January 1, 2017.¹⁶ Respondent hired him as a first officer but he also worked as an International Relief Officer.¹⁷ He currently flies inter-island flights for an air carrier based in Hawaii. He is type rated in the

(3 to 5) went on the record, before he did, saying that they did not want to fly with Complainant. Tr. at 168. The reason given by these pilots was Complainant's stints of outbursts, and he did not treat his crewmembers with dignity and respect. Tr. at 168-69. In 2017, Captain San Agustin, with some regret, wrote a letter (RX 9) to the chief pilot stating he did not wish to fly with Complainant. Tr. at 169. RX 11 is a May 2016 email from Captain Brown to several of Respondent's management referencing five pilots that did not want to fly with Complainant. Tr. at 829.

¹² Part of Captain San Agustin's testimony concerned an incident that occurred when he was the Director of Operations. However, the Tribunal finds this incident not particularly relevant or probative to the issues it must decide. See Tr. at 170-74. Complainant adamantly denied the alleged acts ever occurred and has never been shown the memorandum Captain San Agustin allegedly prepared about the incident. Tr. at 502-03. When asked on cross-examination about the whereabouts of this memorandum, Captain San Agustin said that Respondent could not locate it. Tr. at 206-07.

¹³ A check airman is a "person who is qualified, and permitted, to conduct flight checks or instruction in an airplane, in a flight simulator, or in a flight training device for a particular type airplane." 14 C.F.R. § 121.411(a)(1).

¹⁴ Captains Dennis Nutting and Sergei Rabokov were Respondent's other line check airman at the time of the hearing. Tr. at 164-65.

¹⁵ FO Kossen testified that he had given his notice of resignation on November 22, 2017, that was to be effective December 9, 2017, because he had been offered another job in Hawaii. See RX 14, Tr. at 310, 353. However, upon the advice of Mr. Freeman that transferring to a small airline would hurt his career and that he was next in line to be promoted to captain, FO Kossen rescinded his notice of resignation. Tr. at 310, 356. Respondent accepted the withdrawal of his notice of resignation on December 2, 2017, and he received an email from Mr. Freeman on December 3, 2017 stating that Respondent was glad that he was staying with them. Tr. at 311-12.

However, FO Kossen had reported issues with Respondent allegedly fudging flight times for pilots that did not have enough flight hours in Part 121 operations as a first officer to serve legally as captain. Tr. at 313-15; see also CX 78 (Bates pages CRPOD-SS and CRPOD-TT). The Tribunal notes that, per 14 C.F.R. § 121.436(a)(3), to serve as pilot in command of a Part 121 flight, the pilot must have 1,000 hours of flight time as a first officer in Part 121 operations. FO Kossen associates these facts with Respondent a month later, on January 10, 2018, "accepting" his previously withdrawn resignation with an effective date of January 12, 2018. Tr. at 309-21; CX 78 (Bates page CRPOD-AA). See also Tr. at 386. Testimony and exhibits were offered relating to the issue of violations of § 121.436 and Respondent not following crew resource management issues raised by FO Kossen. However, the Tribunal only considered any such testimony or evidence adduced for the limited purposes of impeachment or rehabilitation of certain witnesses, including Captain San Agustin and Mr. Ferguson. See Tr. at 376-414.

¹⁶ Tr. at 347.

¹⁷ In general, an international relief officer is another pilot used during the flight because the flight can exceed the flight and duty time limitations of the flight crew so the crews needs to rotate to obtain crew rest while en route. See 14 C.F. R. §§ 117.11(a) and 117.17.

CL65, ATR 42 and Boeing 757,¹⁸ but not the 727. Tr. at 290-91, 302, 338, 426. He has never flown with the Complainant. Tr. at 340.

- **Randall Kohler.** He was a furloughed employee of Respondent. He worked for Respondent from January 19, 2016 until March 29, 2018. He provided Complainant with a letter of support stating that he had flown with Complainant and he found him to be a good pilot, a good captain, and possessed very good crew resource management (“CRM”) skills. Mr. Kohler had flown with Complainant in the Boeing 727 between ten and twenty times. Tr. at 432-33. Mr. Kohler has between 500 and 600 hours flying the Boeing 727. Tr. at 434.
- **Complainant.** He holds an ATP certificate with type ratings in the Boeing 727, 757/767 and the ATR 42/72. He has over 13,000 hours total flight time with over 9,000 hours being in jets. Tr. at 445. Complainant worked for Respondent from April 2003 until his termination on June 12, 2017. Tr. at 446, 525. He started out as a first officer but was promoted to captain in 2010 and later was promoted to check airman. Tr. at 447, 526; *see* CX 1; RX 8.
- **Bernard Untalan.** Untalan was a flight engineer for Respondent. He holds a commercial multi-engine plane pilot certificate and at one time could act as a second-in-command for the Boeing 727; he also is a Boeing 727 flight engineer. He has about 1,080 hours pilot flight time, 300 being in jets, and about 4,000 hours of flight engineer time. Tr. at 600. He worked ten years for Respondent, but left its employ in April or May 2016. Tr. at 603. He acted as a second-in-command of Boeing 727 flights for Respondent until 2013, when the law changed requiring co-pilots for Part 121 operators to hold ATP certificates. *Id.*; *see also* Tr. at 313.
- **Baltazar Atalig.** He joined Respondent as its Director of Maintenance in 2006 and holds a repairman certificate.¹⁹ Tr. at 699-701.
- **Ralph Freeman.** Freeman serves as Respondent’s Director of Operations. He holds an ATP certificate with type ratings in the Boeing 727, 737, and Airbus 300. He has approximately 25,000 hours total flight time with 15,000-17,000 hours being in jets. Tr. at 716-17. He last flew commercially in 2013. Tr. at 795. He began working for Respondent in September 2014. Tr. at 723.
- **Richard Brown.** Brown is Respondent’s Director of Safety. He has in excess of 20,000 hours total flight time. He flew for Respondent from 2000 until early 2003, when he turned 60 and had to retire. Tr. at 825-26.

¹⁸ FO Kossen testified that he has flown from Majuro to Hawaii many times, but only in a Boeing 757.

¹⁹ *See* 14 C.F.R. §§ 65.101 and 65.103. Mr. Atalig testified that he does not hold a mechanics certificate. Tr. at 699. A repairman certificate is different than a mechanics certificate. *Compare* 14 C.F.R. Part 65, subpart D, *with* subpart E.

The Tribunal notes that Mr. Atalig’s holding of a repairman certificate does not meet the requirements to be the Director of Maintenance for a Part 121 air carrier unless Respondent had obtained a deviation to employ him as such from the FAA. *See* 14 C.F.R. § 119.71(e). As there has been no evidence to the contrary, the Tribunal assumes that Respondent obtained the required deviation authority.

General Facts in the Case

Respondent is a Part 121 all cargo air carrier. Tr. at 160, 578, 822; *see also* Tr. at 42. It flies to and from numerous islands in the South Pacific.²⁰ Respondent's aircraft haul fish, mail, and cargo. Tr. at 525-56, 706. At the time of the hearing the company had 56 employees; 22 were pilots. Tr. at 73. At the time of the allegations at issue, it operated both the Boeing 727 and 757, which are two different types of aircraft. The Boeing 727 has "steam operated gauges"²¹ while the Boeing 757 is totally automated; [it is] a "glass cockpit."²² Tr. at 163. Captain San Agustin believed that larger Part 121 air carriers would say that these two aircraft should not be on the same certificate, or at least the same pilots should not be operating two separate type certificated aircraft at the same time, but that is not his view. Tr. at 163. In his view it is not a safety issue, but it is a challenge. Tr. at 198.

FO Kossen flew with Captain San Agustin when he worked for Respondent.²³ According to FO Kossen several of Respondent's captains struggled with the automation transitioning from the Boeing 727 to the 757. Tr. at 291-95. In FO Kossen's opinion, having pilots continually rotate between flying the 727 and 757 is very unsafe.²⁴ The 727 is a triple engine aircraft with old technology that requires a different skill set than the 757 which is more automated. Tr. at

²⁰ See <http://www.asiapacificairlines.com/network/>. From the testimony, Respondent flies at least to the islands of Majuro, Chuuk, Pohnpei, Koror and Oahu. Tr. at 50-53. The Tribunal notes that the transcript incorrectly spells Chuuk as Chuke.

²¹ No aircraft actually has steam operated gauges. This is an aviation term that refers to old fashioned analog flight instruments that resemble a steam pressure gauge. They are usually round with calibrated scales printed on or in them and have a needle which points at a current value. *See generally, Decisions, Decisions: Glass or Steam? Instructors Debate One of Your First Choices as a Student*, AOPA Flight Training Magazine (Mar. 1, 2017), available at <https://www.aopa.org/news-and-media/all-news/2017/march/flight-training-magazine/decisions>; William Dubois, *As the Gyro Spins: Behind the Curtain of Steam Gauges*, FAA Safety Briefing (Sept./Oct. 2015), at 17, available at https://www.faa.gov/news/safety_briefing/2015/media/SepOct2015.pdf.

²² The Boeing 727 requires a minimum crew of three while the Boeing 757 requires at least two crewmembers. *Compare* type certificate data sheet (TCDS) A3WE for the Boeing 737, with TCDS A2NM for the Boeing 757. The documents are available at www.faa.gov. *See also* Tr. at 54 and 14 C.F.R. § 121.385.

²³ Captain San Agustin considered Mr. Kossen an average pilot. Tr. at 270.

FO Kossen also flew with then FO Nutting, who has since become a captain and is currently Respondent's Chief Pilot. Tr. at 299.

²⁴ It is the Tribunal's understanding that it is commonplace for an air carrier to have two or more different type of aircraft on an air carrier's certificate. What FO Kossen is referring to is having pilots continually rotating between two different types of aircraft on the same certificate. If an air carrier has more than one type of aircraft, it is typically that a pilot flies exclusively that specific type of aircraft for the air carrier. If a change occurs, then the pilot would transition to a different type aircraft but then fly the different aircraft exclusively for the air carrier. *See* Tr. at 300-02.

299-300. It is FO Kossen's belief that Respondent is the only Part 121 air carrier in the United States that has approval to rotate its pilots between the Boeing 727 and the Boeing 757. Tr. at 300.

Respondent views Complainant as a competent pilot who flies well and has very good piloting skills. Tr. at 47, 69, 167. Complainant's evaluations in 2013 and 2014 demonstrate that he has "excellent CRM" and "excellent crew handling." Tr. at 49-51, CX 3, CX 4, *see also* CX 2 and CX 5 – CX 8;^{25, 26} *see also* Tr. at 202-05. However, after 2016, Respondent rated him very low in his CRM skills so, according to Mr. Ferguson, they opted not to move him into the Boeing 757. Tr. at 69. According to Mr. Ferguson, Complainant had issues concerning interpersonal skills; the development of such skills is very important for the type of pilot Respondent requires. Tr. at 117. Respondent's aircraft tend to take seven to eight-hour flights, or are island hopping with short runways and unpredictable weather so CRM "has to be at its peak" and interpersonal skills are important factors for these types of operations. Tr. at 199-202. For the most part, Complainant's flight hours from about September 2015²⁷ until Mr. Ferguson took Complainant off the schedule in May 2017, remained fairly consistent – 30 to 50 hours per month. Tr. at 120, *see also* RX 12. Mr. Ferguson believed that, following the Majuro to Honolulu incident in March 2016, which is discussed in detail below, Respondent removed Complainant's check airman status Tr. at 120. However, Respondent's payroll records establish that it continued to pay Complainant \$300 per month for check airman pay until March 2017. RX 8; Tr. at 654-55.

The Tribunal will now address specific incidents alleged by Complainant.

The August 2015 Ferrying of a Boeing 757 from Arizona to Honolulu

In August 2015, Respondent had purchased a Boeing 757 that was located in Goodyear, Arizona and obtained a ferry permit²⁸ to bring the aircraft under Part 91 rules from there to Honolulu, landing in Honolulu on August 14, 2015. CX 53; Tr. at 56, 448. Respondent was transitioning from the Boeing 727 to 757 aircraft and this was the first 757 it intended to add to its fleet. Tr. at 185-86, 705.

Respondent selected Complainant and Captain Yoder as the "initial cadre" for this aircraft. At that time, Complainant was the only pilot in Respondent's employ type rated in the Boeing 757. Tr. at 531-32, 723-24. According to Mr. Ferguson, the term initial cadre "just means that they're able to fly the aircraft." Tr. at 66. According to Captain San Agustin it meant

²⁵ Captain San Agustin, who administered many of Complainant's line checks on behalf of Respondent, described Complainant as having excellent flying skills. Tr. at 270.

²⁶ Captain San Agustin testified that CX 8 has his signature. However, the same record located at CX 10-8, has the entry "needs improvement." That is not Captain San Agustin's writing or entry. Tr. at 276.

²⁷ Mr. Ferguson testified that Complainant's hours remained the same since he started working for Respondent, which was in September 2015. Tr. at 42.

²⁸ A "ferry permit" is more properly called a special flight permit. A ferry permit is an authorization by the FAA to operate an aircraft that may not currently meet the applicable airworthiness requirements, but is capable of safe flight under certain conditions. *See* 14 C.F.R. § 21.197(c); *see also* FAA Form 8130-6.

that Complainant was one of the very few selected and qualified people to fly that aircraft for Respondent to bring it initially on to Respondent's certificate.²⁹ Complainant was a logical choice because he already held the type rating. Tr. at 186-88. After being selected, Respondent sent Complainant to a one-day refresher training course for the 757 type certificate. Tr. at 188, 533-34, 539; JX C at 72.

The aircraft's ferry permit limited the flight to operate during day time visual meteorological conditions ("VMC").³⁰ Tr. at 60, CX 53. The aircraft made an interim stop in Victorville, California. Tr. at 56, 448. On the flight from Arizona to Victorville were: Complainant (who was in the left-seat), Captain James Young (who was in the right-seat), Mr. Quinn, and Manny Sabu, a mechanic.³¹ Tr. at 448, 536. Respondent wanted Complainant to fly the aircraft to Honolulu. Tr. at 65. Captain Young is an experienced Boeing captain³² that tests out aircraft and Respondent retained his services after work was performed on the aircraft in Arizona. Tr. at 65. The flight from Arizona to Victorville was the first time that Complainant actually operated a Boeing 757.³³ Tr. at 448. At Victorville, Complainant performed his required three touch and go landings. Tr. at 449; *see* 14 C.F.R. § 121.439(a). Mr. Quinn, Respondent's then President, despite not being type rated in the aircraft, conducted touch and go landings in the aircraft prior to the flight to Honolulu. This was done over Complainant's objection but with Captain Young's acquiescence. Tr. at 450-51. Complainant then flew the aircraft, in the left seat from Victorville to Honolulu. Tr. at 540. After Complainant landed the aircraft in Honolulu, he flew a separate aircraft commercially to Guam. Tr. at 451, 542.

About a week after the aircraft landed in Honolulu, Captain Freeman, Respondent's Director of Operations, asked Complainant and Captain Yoder to fly the aircraft from Honolulu on another ferry permit to Respondent's maintenance facility in Guam. Tr. at 63, 191, 451; *see* CX 55 at 1. After learning that Captain Young would not be accompanying him on the flight to Guam, Complainant expressed concern about flying only with Captain Yoder who possessed no actual flight time in the Boeing 757. Complainant felt that he should have a more seasoned pilot in the right-seat. Tr. at 188, 542; RX 13. At the time of the request, Complainant only had eight hours of actual flight time in a Boeing 757³⁴ and Captain Yoder had none.³⁵ Tr. at 452-54. RX

²⁹ For the FAA's view of initial cadre, *see* FAA Order 8900.1, vol. 3, chap. 20, ¶¶ 3-1427 and 3-1438.

³⁰ VMC is conducted under visual flight rules ("VFR") under Part 91. For a description of these conditions *see* 14 C.F.R. §§ 91.155 and 91.205. *See generally* PILOT'S HANDBOOK OF AERONAUTICAL KNOWLEDGE, FAA-H-8083-25B (2016), Chapter 15, available at https://www.faa.gov/regulations_policies/handbooks_manuals/aviation/phak/media/17_phak_ch15.pdf.

³¹ Mr. Ferguson testified that there were four persons aboard the flight but that the fourth person on the flight was Captain Scott Yoder, one of Respondent's pilots also rated on the Boeing 757. Tr. at 63, 67. However, Mr. Ferguson was not on the flight and Captain Yoder did not testify. Given that Complainant was one of the pilots on this flight—and therefore had firsthand knowledge—the Tribunal finds that the fourth person aboard was the mechanic.

³² Complainant testified at his deposition that Captain Young "had over 30,000 hours in this type of airplane." JX C at 74.

³³ The Tribunal infers from Complainant's testimony that all of his prior Boeing 757 experience was simulator flight training.

³⁴ This flight time was accumulated during the trip from Phoenix to Victorville to Honolulu. *See* Tr. at 31.

13 and CX 55 are emails that reflect Complainant's reservations.³⁶ Captain Freeman made the decision not to force the flight. Tr. at 192; RX 13-2.

As a result, the aircraft remained in Honolulu for ten months waiting to be placed on Respondent's certificate³⁷; it had not passed its conformity inspection and Respondent needed to apply for and eventually received Extended-range Twin-engine Operational Performance Standards ("ETOPS") approval.³⁸ Tr. at 62. Between arriving in Honolulu and it ultimately departing for Guam, the aircraft was operated in the vicinity of Hawaii for testing purposes. Tr. at 66.

About a month after Complainant expressed his concerns about ferrying the Boeing 757 to Guam,³⁹ he saw the flight schedule and noticed that he was not listed on the Boeing 757 program.⁴⁰ Tr. at 490-94, 549; CX 20. Flying the Boeing 757 rather than the outdated Boeing 727 makes a pilot more marketable. Tr. at 492. On September 14, 2015, Captain Freeman wrote an email to Complainant where he informed Complainant that he was "refraining from scheduling you on the [Boeing 757] at this time." RX 13 at 2. On September 26, 2015, Complainant met with Captain Freeman about being able to fly the Boeing 757, but Captain

³⁵ The fact that Complainant expressed reservations flying with Captain Yoder on the flight from Honolulu to Guam appears to have bothered Captain Yoder greatly. In an email dated September 14, 2015, which is shortly after this incident, Captain Yoder asked not to fly with Complainant because he believed that Complainant's reservations about taking the flight placed at issue Captain Yoder's flying skills. CX 29; CX 81.

³⁶ FO Kossen, who is type rated in the Boeing 757, testified that Complainant's reservations were completely reasonable. Tr. at 341-42. He called it "green on green" which is a concept of putting two inexperienced ("green") pilots together for a given flight increases the probability of an accident or incident, and that the proposed flight with such inexperienced pilots, although type rated, was a classic "green on green" situation. Tr. at 340-42. In his opinion a far better option would have been to hire someone with more experience to accompany Complainant on the flight from Hawaii to Guam. Tr. at 343.

³⁷ Tr. at 62.

Forty-nine U.S.C. § 44701 requires each air carrier certificate to include the terms, conditions, and limitations reasonably necessary to ensure safety in air transportation. Included in FAA certificates issued to air operators conducting operations under part 121 is a stipulation that those operations must be conducted in accordance with the provisions and limitations specified in the operations specifications ("OpSpecs"). Per 14 C.F.R. § 119.5(l), no air carrier can operate an aircraft in violation of its OpSpecs. *See also id.* at § 119.45. The FAA issues to an air carrier OpSpecs specific to that air carrier's approved operations. For standardization purposes, the FAA has created templates to the same topic areas for OpSpecs. An air carrier's OpSpec D085 contains the list of aircraft that it is authorized to use in the conduct of its operations. *See* FAA Order 8900.1, Vol. 3, Chap. 18, section 6, available at <http://fsims.faa.gov/PICResults.aspx?mode=EBookContents&restrictcategory=all~menu>.

³⁸ ETOPS is a certification that a twin-engine aircraft can operate for a specified period of time away from an adequate airport for it to land, while under certain conditions with one engine inoperative. 14 C.F.R. § 121.7. In Micronesia, the aircraft must be able to operate at least 120 minutes under those conditions. *See* 14 C.F.R. Part 121, App. P.

³⁹ Complainant testified this occurred in the September or October 2015 timeframe. Tr. at 549.

⁴⁰ Complainant testified during his August 23, 2018 deposition that the only reason he was taken off the 757 program was because of his Marshallese descent. Tr. at 551-53; JX C.

Freeman was adamant that Complainant was not going to fly the aircraft.⁴¹ Tr. at 491, 494; RX 13 at 4. On September 28, 2015, Complainant sent an email to Captain Freeman summarizing their meeting. RX 13 at 4. In the email Complainant reported that Captain Freeman told him that he was “being removed from the 757 cadre because I brought up safety concerns in ferrying the 757 from Honolulu with my seven hours and Yoder’s zero hours....” RX 13 at 4. Furthermore, Complainant contemporaneously wrote that Captain Freeman relayed “in the event I’m ever put back on 757 I’ll be in the right seat.”⁴² *Id.* Complainant testified at his deposition that he believed the reason for this action was his Marshallese descent. JX C at 80.

The March 22, 2016 Flight from Majuro to Honolulu

On March 22, 2016,⁴³ Complainant operated Respondent’s Boeing 727 on a flight from Guam to Honolulu with stops at Chuuk, Pohnpei and Majuro. Tr. at 102, 457; RX 17. While the flights to Chuuk, Pohnpei and Majuro are relatively short, the leg from Majuro to Honolulu is a long flight.⁴⁴ Tr. at 457. This flight occurred two months after Complainant had passed a line check. Tr. at 100, CX 8. Captain/First Officer Scott Davis was the other crewmember on that flight; Mr. Ando Hiroshi was the flight engineer.⁴⁵ Tr. at 101, 459. The day of the flight, the mechanic in Guam briefed Complainant that the aircraft had a fuel leak. Nevertheless, the mechanics signed off on the discrepancy on the minimum equipment list (“MEL”). Tr. at 463-64; CX 36.

⁴¹ The record contains evidence that in March 2015, Respondent’s then chief pilot found that Complainant’s conduct was such that he was “not qualified for transition to the Boeing 757 as originally planned” and further recommended that Respondent terminate Complainant’s employment. JX C at Exhibit 2; Tr. at 582-86. However, Complainant testified at his deposition that he was not aware of that recommendation and disputed that the author of the letter was the then chief pilot. JX C at 91; Tr. at 586.

⁴² In fixed wing aircraft, the right-seat is where a first officer sits, not the captain.

⁴³ Two days prior to this flight, the aircraft was in Honolulu and had maintenance performed on it because of a fuel leak. According to Complainant, they then had to “baby” the aircraft back to Guam via Lihue, and Majuro. According to Complainant, they had to stop in Lihue because they did not have enough fuel to fly direct to Majuro. Tr. at 458-60.

Lihue is an airport on Kauai (an island that is part of the State of Hawaii) and is approximately 102 miles from Honolulu. Lihue is approximately 2,218 miles from Majuro. *See* www.aircalculator.com. Neither party clearly explained why the aircraft could make the 2,279-mile flight from Majuro to Honolulu on March 26, 2016, but could not make the flight from Honolulu to Majuro non-stop just two days prior and had to make an intermediate stop at Lihue when the net flight difference was only 61 miles (2,279 – 2,218). The Tribunal infers that a reference to “they are going to MEL that airplane” somehow impacted the amount of fuel the aircraft could carry. *See* Tr. at 459, 469. Regardless, Complainant’s testimony was the aircraft did not leak fuel during the trip back to Guam. Tr. at 460-61.

⁴⁴ Although obvious at the hearing that Respondent’s operations were in remote portions of the South Pacific, the testimony never clearly identified the distances involved between the islands themselves. Accordingly, per 29 C.F.R. § 18.84, the Tribunal takes official notice that the distance between Guam and Chuuk is about 634 miles. The distance between Chuuk and Pohnpei is 438 miles. Complainant testified that this was about an hour and five-minute flight, at the most. Tr. at 467. The distance from Pohnpei to Majuro is about 896 miles. Complainant testified that this was about an hour and 40-minute flight. Tr. at 467. The distance between Majuro and Honolulu is about 2,279 miles. *See* www.aircalculator.com.

⁴⁵ Of note, neither of these crewmembers testified at the hearing nor did either party provide written statements from these individuals.

During the first leg, from Guam to Chuuk, the autopilot malfunctioned in-flight.⁴⁶ Tr. at 464-65, 558-59.⁴⁷ After landing, the flight engineer called Guam and obtained an MEL number for the aircraft's autopilot.⁴⁸ Because the aircraft had an inoperative autopilot,⁴⁹ which was on its MEL, the aircraft was not authorized to operate in Reduced Vertical Separation Minimum (RVSM) airspace—at or above 29,000 feet.⁵⁰ Tr. at 102. Complainant was contacted by Respondent's dispatch to remind Complainant that the aircraft could no longer operate in RVSM airspace, and so dispatch sent Complainant a new flight plan. Tr. at 465; *see also id.* at 244, 743-44, CX 36. During the subsequent legs, from Chuuk to Pohnpei and from Pohnpei to Majuro, Complainant noticed nothing peculiar about the fuel levels. Tr. at 468. On the flight leg from Majuro to Honolulu, given the distance of the flight, fuel was an issue because the aircraft's auxiliary fuel tank was not working; therefore, they were limited to using 52,500 pounds of fuel. Tr. at 468; *see also* CX 36.

The route from Majuro to Honolulu included five waypoints.⁵¹ At the last waypoint—one hour and 45 minutes from the destination—Complainant noticed a fuel issue. Tr. at 470-71. According to Captain Freeman, the last way point was likely within Honolulu's radar coverage and Honolulu is surrounded by Class B airspace. The flight route calls for the pilot to begin the descent an hour from Honolulu, which is a busier air traffic area.⁵² Tr. at 796-97. Although Complainant recognized the fuel issue, he testified that flying higher is not always the best recourse because excessive winds may become a factor at high altitudes. Tr. at 474-75, 568, 572; *see also* JX C at 124. At that time the aircraft was enjoying a tail wind at its current altitude. Tr. at 574. According to Complainant, when climbing, the aircraft loses speed and

⁴⁶ Complainant indicated in his testimony that, prior to this flight, the autopilot was a continuing issue and was placed on the aircraft's MEL. *See id.* at 460-61, 466-67, CX 40, CX 72.

⁴⁷ *See also id.* at 174-75.

⁴⁸ CX 36; *see also* CX 4, CX 73.

⁴⁹ CX 36, Tr. at 244.

⁵⁰ Tr. at 141. 14 C.F.R. Part 91, appx. G requires that an aircraft have an operative autopilot to operate in RVSM airspace which is defined as being between Flight Level 290 and 400 (29,000 – 40,000 feet MSL) inclusive. *Id.* at § 1. The regulation applies to all civil aircraft operating in this airspace, including those conducting Part 121 operations. *Id.* at §§ 1 and 3. *See* AC 91-85B, Authorization of Aircraft and Operators for Flight in Reduced Vertical Separation Minimum (RVSM) Airspace (Jan. 19, 2019). *See also* Tr. at 466.

⁵¹ Complainant testified that the flight plan was on airway Romeo 584. This airway is marked by five buoy points, (presumably transmitting some sort of navigational signal) between Majuro and Honolulu. Tr. at 470.

⁵² Class B airspace is the airspace around the busiest airports in the United States and can extend from the surface to 14,000 feet MSL. *See* 14 C.F.R. § 71.41; FAA Order JO 7400.11C (Aug. 13, 2018); *see generally*, AERONAUTICAL INFORMATION MANUAL, chap 3, § 2 (2013). Operation within this airspace is limited to aircraft with certain equipment, operating within certain speed limitations and only when authorized by the controlling air traffic control authority. *See* 14 C.F.R. §§ 91.117, 91.131, 91.215, and Part 91 Appx. D.

climbing requires added power, which burns more fuel; they also could have lost the benefit of the tail wind.⁵³ Tr. at 475, 573-74; JX C at 126.

The route from Majuro to Honolulu typically involves landing with between 8,000 and 10,000 pounds of fuel remaining. Tr. at 567. According to the flight log, the aircraft landed in Honolulu with 5,000 pounds of fuel remaining.⁵⁴ Tr. at 175. That equates to 20 to 25 minutes of fuel remaining on the aircraft.^{55, 56} Tr. at 178. At that point, a pilot should consider declaring a low fuel emergency situation.⁵⁷ Tr. at 772.

After landing in Honolulu, FAA inspectors performed a ramp inspection and noticed evidence of a possible right-engine fuel leak. Tr. at 702, 709-10. However, the FAA inspectors

⁵³ FO Kossen corroborated Complainant's thought processes. FO Kossen has experience requesting a higher altitude in the United States when operating a non-RVSM aircraft because of something on an MEL. Tr. at 368. He is based out of Honolulu. Tr. at 374. Honolulu ATC would not allow him to fly higher because it is generally busy airspace and that is generally the procedure coming in to Honolulu. According to FO Kossen, to determine the best course of action for a non-RVSM flight when a low fuel situation exists, one has to check the weather, the winds and the availability of that airspace. Tr. at 368-70, 374.

⁵⁴ According to Bernard Untalan, a Boeing 727 flight engineer that worked for Respondent and has also flown with Complainant, landing a 727 with 5,000 pounds of fuel on board would be extremely dangerous and, if he was a captain operating a 727 into Honolulu with such low fuel, he would declare an emergency. Tr. at 624-25. He did recall a flight from Majuro to Honolulu where it was a non-RVSM flight and when they called ATC to enter that airspace, ATC denied the request; but that flight was not low on fuel. Tr. at 626.

⁵⁵ At a minimum, when operating under instrument flight rules – and a Part 121 flight must operate under these rules – absent an emergency, an aircraft is expected to land with *at least* 45 minutes of fuel on board. See 14 C.F.R. § 121.643. And this assumes that no alternative airport was required in the dispatch release. Here, Captain San Agustin testified that the fuel required for this specific flight was enough to fly to Honolulu, the alternate airport, fuel for a hold, and then thirty additional minutes. Tr. at 179. This testimony is consistent with the requirements of § 121.643 when an alternate is required.

The remote nature and the risks associated with Respondent's flights are best described by Captain San Agustin:

The 727 was really never designed to fly long legs over the water with no alternates. And guess what? Your alternate between Majuro and Honolulu, you got nothing except Wake Island that's up north, and Midway. Johnson Island is closed. So, you're really limited. So, you got to watch yourself. Everybody knows that.

Tr. at 183.

⁵⁶ The testimony about the aircraft's fuel burn was unclear. Mr. Ferguson initially testified that the aircraft burned 1,350 to 1,375 pounds per hour (Tr. at 102), but corrected his testimony later to 1,350 to 1,375 *gallons* per hour. Tr. at 142-43.

⁵⁷ Mr. Ferguson, a non-pilot, testified that another option would have been to land at Hilo, instead of Honolulu, which was supposedly closer. Tr. at 106. However, looking at a map, Hilo is over 200 nautical miles further away from Majuro than Lihue and one would even fly past Honolulu on this route of flight to reach Hilo; so this option makes little sense to the Tribunal. See www.aircalculator.com. Instead, Captain Freeman credibly testified that an alternate would be Lihue (Tr. at 774-75) which is along the Hawaiian Island chain but west of Honolulu and therefore a shorter distance from Majuro than Honolulu.

did not ground the aircraft.⁵⁸ Respondent's maintenance personnel found a leak, which was described as either a light seep or a heavy seep. Based on this finding, Respondent's maintenance determined that Respondent would just ferry the airplane back to Guam and fix it there.⁵⁹ Tr. at 702-03, 749. Respondent's Director of Maintenance, Mr. Atalig, said "the aircraft was airworthy to do a ferry flight." Tr. at 704, 708-09. Respondent eventually retired this aircraft in July 2016. Tr. at 705, 713-14.

Respondent had two captains look into this incident: Captain San Agustin and Captain Freeman. According to both Captain San Agustin and Captain Freeman, after this flight Mr. Hiroshi, the flight engineer, quit Respondent's employ out of fear caused by the incident.⁶⁰ Tr. at 176, 744-48, RX 23. Mr. Hiroshi resigned a week or two later with his last flight occurring on March 22, 2016. RX 23; Tr. at 747-48. However, there was no written statement by Mr. Hiroshi offered by either party during these proceedings. Nor was the Tribunal provided any statement about this incident from the flight's first officer.

Captain San Agustin was concerned because when a captain elects to remain at FL 270⁶¹ rather than FL 290, he has to know that he is going to burn more fuel, yet Complainant refused to request a higher altitude from ATC. *Id.* Noting that a captain has discretion when making such decisions, Captain San Agustin asked Mr. Hiroshi why Complainant stayed at FL 270. According to Captain San Agustin, the flight engineer told him that Complainant said that "he wanted to teach the Company a lesson." Tr. at 177; *see also* Tr. at 102, 141. Complainant, however, adamantly denied saying that. JX C at 127. Captain San Agustin looked at the flight's fuel log sheet and was perturbed with the numbers; it reflected that at every way point, the fuel

⁵⁸ Complainant testified that following the flight Respondent eventually found out that the aircraft had another fuel leak and the FAA grounded the aircraft for three or four days. Tr. at 472, 667. However, Mr. Atalig, Respondent's Director of Maintenance, credibly testified that the FAA did not ground the aircraft after this incident; Respondent made the decision to remove the aircraft from service. Tr. at 703.

⁵⁹ Respondent's Director of Operations, Captain Freeman, first testified that the aircraft did have a fuel leak but it was within the limits of the MEL. Tr. at 733. The Tribunal notes that evidence of deferred maintenance for a fuel leak does not appear to be in the aircraft logs admitted at this hearing for this flight. *See* Tr. at 735-37, CX 36. Further, the Tribunal seriously questions the accuracy of this statement because, if it was within MEL limits the aircraft can operate revenue flights. It makes little sense for Respondent's maintenance department to ferry the aircraft back to Guam rather than to use it for revenue operations. However, Captain Freeman then testified that they did discover that the fuel leak exceeded what was allowed. Tr. at 738.

⁶⁰ Captain San Agustin referred to him as Horishi Ando. Tr. at 176-77, 208-09. *See also id.* at 745. However, later in the hearing, Complainant identified the flight engineer as Ando Hiroshi. Tr. at 458. *See also* Tr. at 668. The Tribunal finds that the parties are referring to the same individual.

Additionally, on cross-examination, Captain San Agustin clarified that the flight engineer flew for Respondent for several weeks after this flight and this was one of the reasons why he left Respondent. Tr. at 208-09. Mr. Ferguson's testimony corroborated the fact that the flight engineer on that flight later resigned. Tr. at 101.

⁶¹ FL stands for Flight Level and 270 represents 27,000 feet mean sea level.

burn was high, which indicated the aircraft's throttles were open. This meant that Complainant was going faster than the projected flight plan, and therefore he burnt more fuel.⁶²

Captain San Agustin understood that Complainant intended to operate the aircraft at a non-RVSM altitude. If Complainant knew this, then the flight should have had two flight plans;⁶³ one that would keep Complainant at non-RVSM air space and another to enter RVSM air space with the approval of the controlling agency. The controlling agency in this case was Oakland Center. Tr. at 177-78. Very few airplanes fly from Majuro to Honolulu, those being Respondent's and United's. In Captain San Agustin's opinion and experience in making such requests to go higher, when one asks for a higher altitude, air traffic will try to work with the aircraft. The pilot just needs to inform air traffic control that the aircraft is non-RVSM. Tr. at 181-82, 258-60; RX 9. Based on his review of the incident, Captain San Agustin thought that flight constituted a dangerous operation of an aircraft. Tr. at 182-84; RX 9-3.

Captain Freeman conducted an investigation about the events of this flight and met with Mr. Hiroshi after the incident.⁶⁴ As part of his investigation he had Complainant submit a written statement. CX 30; Tr. at 662-65, 758-59. But he did not obtain a written statement from the rest of the flight crew. Tr. at 804. Complainant stated in his report that he was concerned about the leg of the flight even before departing Guam because of the fuel limitation with the aircraft because the crew could not use the auxiliary fuel cell as it had been placed on the aircraft's MEL. *Id.* He wrote that, 300 nautical miles from Honolulu, the aircraft was down to 11,100 pounds of fuel when he should be on the ground with 10,000 pounds remaining.⁶⁵ *Id.*

Captain Freeman reviewed the actual flight plan Complainant used; it was sent to him by Complainant. The crew was doing the work they should do at each way point, but the notes were a little sloppy. Tr. at 750. In his review of the flight plan, the notes on it reflect that "the negative fuel was ... increasing ... along the way."⁶⁶ Tr. at 762-63.

⁶² Mr. Ferguson testified that the flight landed in Honolulu 30 minutes earlier than the flight plan expected because Complainant flew too fast. Tr. at 102. The other crewmembers asked Complainant if they wanted to go to a higher altitude, but Complainant stated that he did not want to because he wanted to "give [Respondent] a lesson." Tr. at 102, 141.

⁶³ Captain San Agustin testified that the requirement for two flight plans in this situation was pursuant to Respondent's flight operations manual. Tr. at 279; *see* RX 20, ¶ 6.17.3 and RX 22.

⁶⁴ Captain Freeman testified that Mr. Hiroshi was very scared because they landed with such low fuel. Tr. at 744-45. Mr. Hiroshi resigned a week or two later with his last flight occurring on March 22, 2016. RX 23; Tr. at 747-48. In Captain Freeman's opinion Mr. Hiroshi quit because of this incident. Tr. at 747-48; RX 23. However, there was no written statement by Mr. Hiroshi offered by either party during these proceedings.

⁶⁵ However, at the hearing Complainant testified that the aircraft had approximately 33,000 to 35,000 pounds of fuel remaining at that point. Tr. at 471. Complainant also stated that he did not believe that it was an emergency situation because that aircraft burns 10,000 pounds of fuel per hour and they were less than two hours from Honolulu. Tr. at 473. Flight Engineer Untalan corroborated this rate of fuel burn and that the aircraft flies on average around 500 miles per hour. Tr. at 636-37.

⁶⁶ The Tribunal understands this to mean that the aircraft was using more fuel than planned.

Captain Freeman opined that Complainant exercised poor CRM. According to his understanding, members of the flight crew asked Complainant to go higher but he refused. Tr. at 769. Complainant adamantly denied this.⁶⁷ Tr. at 467, 477. Captain Freeman also believed, based upon the aircraft arriving into Honolulu 15 minutes early, that Complainant flew the aircraft too fast which explains the low fuel at landing. Tr. at 765-66. He opined that Complainant acted negligently during that flight (Tr. at 766) and should have declared an emergency. Tr. at 771-72. He also disputed FO Kossen's testimony that the air space between Majuro and Honolulu was very busy and, in his experience having flown the Majuro to Honolulu route over the course of 18 years, there is no traffic out there and Complainant would have had no problem getting permission to operate in RVSM airspace. Tr. at 742-43, 773. Had he had the ability to decide it alone, he would have assessed some sort of discipline upon Complainant for his actions or inactions on this flight. Tr. at 769, 806.

Following this incident, Captain Freeman testified that he did not thereafter use Complainant as a line check airman. Tr. at 807. However, as the discussion below shows, this testimony is inaccurate. When asked if Complainant was provided any type of written letter of reprimand, letter of correction or even retraining, given Captain Freeman's opinion that Complainant allegedly acted carelessly and recklessly on at least two occasions,⁶⁸ Captain Freeman was unaware of any.⁶⁹ Tr. at 807-08. Captain Freeman acknowledged that Respondent continued to pay Complainant line check pay for a year after this, but he "had nothing to do with the pay." Tr. at 819. Captain Freeman was unclear if he even recommended to Respondent's Principal Operations Inspector that Complainant's letter of authorization to act as a check airman be removed. Tr. at 809. When asked why he did not demote Complainant to first officer, Captain Freeman replied, "that's a good point. I didn't.... I don't have a good answer for you...." Tr. at 819-20. Mr. Brown testified that although the FAA was aware of Complainant's "willful and intentional acts" and the matters "was brought up" to the FAA, he had no evidence anyone from Respondent had submitted a report about the incident to the FAA, and the FAA did not conduct a 44709 re-examination⁷⁰ of Complainant. Tr. at 852-53.

⁶⁷ Bernard Untalan, a Boeing 727 flight engineer, testified that Complainant was a good pilot, "he's one of the pilots I can say, he's by the book" and follows procedures. Tr. at 605-06. For example, Mr. Untalan testified that some pilots would not record mechanical problems with their aircraft, but Complainant "wrote up everything—he didn't hide anything." Tr. at 646. According to Mr. Untalan, the difference between working at his current air carrier and Respondent is at Respondent "you know, you're going to [fly] no matter what." Tr. at 631.

⁶⁸ The occasions referenced were the Majuro to Honolulu flight and the line check of Captain Goodman, discussed *infra*, where Complainant covered the windshield with the sun visor. Tr. at 819.

⁶⁹ OSHA's March 19, 2018 letter dismissing Complainant's complaint states that "[o]n March 28, 2016, Respondent issued Complainant a written warning regarding his operation of a Boeing 727 on March 22, 2016." RX 7-2. However, neither party appears to have provided testimony or documentary evidence of the existence of this written warning.

⁷⁰ This is a reexamination by the FAA of the airman's qualifications and abilities under its authority under 49 U.S.C. § 44709. Under this authority, the FAA can at any time conduct a reexamination of a certificate holder's qualifications. See FAA Order 8900.1, vol. 5, chap. 7. Should a certificate holder refuse to submit to the reexamination, FAA policy is to immediately suspend the airman's certificates on an emergency basis until they submit to an examination. FAA Order 2150.3B, chap. 6.

Mr. Ferguson and Captain Freeman both testified that they had wanted to terminate Complainant's employment following the March 2016 incident where Complainant's crew reported he wanted to teach Respondent a lesson. Tr. at 79-81, 806, 838. Mr. Ferguson testified that a reason Complainant had not been fired sooner is there is a world-wide shortage of pilots and the situation is getting worse. It has become very difficult for small air carriers to find qualified pilots willing to move from the continental United States to more remote areas like Guam.⁷¹ Tr. at 66, 79, 116-17; *see also id.* at 165-66. Therefore, Respondent tries to work with its pilots to reconcile problems before they undertake any serious employment actions. Tr. at 79, 116-17, 130. Second, Complainant had filed an EEOC complaint⁷² and Respondent's counsel advised them not to terminate Complainant out of fear of a retaliation complaint by Complainant. Tr. at 80, 109, 839-40. So, according to Mr. Ferguson and Captain Brown, despite their safety concerns,⁷³ they did not terminate Complainant's employment but minimized his hours⁷⁴ and scheduled him for routes where Respondent "knew we'd be able to help regulate what he's doing. And then we monitored him very, very carefully and advised the FAA" of their actions. Tr. at 82, 853. However, all these communications were oral and the FAA never conducted a 44709 reexamination. Tr. at 82-83.

August 23, 2016 Cancelled Flight

On August 23, 2016, there was a scheduled flight from Guam to Koror, Palau using a Boeing 727. CX 31; RX 1-7; Tr. at 53, 114. Complainant and FO Kohler were the pilots scheduled for this flight. Tr. at 434. Complainant cancelled the flight due to inclement weather, because Guam, Saipan and Yap were all below minimums for the approach if the flight needed to return for any reason. Tr. at 434-35. Captain Yoder and Captain Freeman supported the decision,⁷⁵ but Mr. Ferguson wanted the flight to proceed as scheduled. Tr. at 436. Mr. Ferguson told the crew that if they refused to fly, then the crew would have to stay at the airport until either the weather cleared, or their flight time timed-out. Tr. at 53-54, 436, 440; CX 32. The crew found this an unusual action because Captain Yoder initially said that he would support Complainant's decision. Tr. at 436-37. Ultimately, the flight did not depart on August 23, 2016, but did depart the following morning. Tr. at 116, 441. However, because Complainant was scheduled to fly to the Philippines for his airman medical examination the following day,⁷⁶ Captain Davis piloted the flight. Tr. at 116, 441, 446, 516-17.

⁷¹ However, FO Kossen disputed this noting that Respondent "ha[s] never gone to a recruitment event for pilots. They have never advertised in anything besides 'Climb to 350,' besides word of mouth." Tr. at 325. He believed that what pilots Respondent did obtain were usually King Air pilots "which are vastly under-qualified to come into a 757...." *Id.* He noted that "Guam is an amazing place" and "it is not hard to recruit pilots to come here." *Id.*

⁷² *See* the facts about Complainant's EEOC complaints, *infra*.

⁷³ Tr. at 120.

⁷⁴ Respondent's pilots were salaried. Therefore, "if you flew 10 hours in a month, you got the same salary as if you flew 40 hours." Tr. at 672; *see also id.* at 120.

⁷⁵ *See* CX 31.

⁷⁶ Mr. Ferguson testified that Complainant "just did not show up." Tr. at 116.

September 26, 2016 Line Check Incident

On September 26, 2016, Complainant conducted a line check on Captain Randy Goodman during a revenue flight and did not pass him. Instead, he informed Captain Freeman to give Captain Goodman another chance to pass using a different check airman. Tr. at 266, 272-74, 497. A line check is an annual evaluation required by the FAA regulations and Respondent's General Operations Manual ("GOM"). Tr. at 266, 497; *see* 14 C.F.R. § 121.440. Captain Goodman was very upset over how Complainant conducted the checkride.⁷⁷ Tr. at 272. At Captain Freeman's request, Complainant provided him with a report of the checkride. Tr. at 789. Complainant submitted a statement to Captain Freeman sometime in early October 2016.⁷⁸ CX 34.

During Captain Goodman's line check—while on the approach into Palau—Complainant used the pilot's shade to block Captain Goodman's view out of the cockpit window. Tr. at 268, 274, 790; CX 34 (Complainant's email report concerning the line check). Palau has a non-towered airport where there is no radar coverage, but not necessarily a lot of other aircraft.⁷⁹ It does have a common traffic advisory frequency.⁸⁰ Tr. at 790, 834-35. Complainant testified that this technique had been used by Respondent's check airman in the past during check rides and he was aware of no policy or regulatory prohibition on doing that. Tr. at 576-78. In his report to Captain Freeman, Complainant stated that "the weather conditions were VFR and as a check airman an [sic] safety pilot, I was watching outside, I wanted to check his instrument skills." CX

⁷⁷ As further evidence of Captain Goodman's animus towards Complainant, Complainant also alleged that Captain Goodman refused to fly with him because Complainant refused to allow him to smoke in the aircraft during flights. Tr. at 497-98, 579. Complainant asserted that smoking is prohibited on an aircraft; however, he knew that other pilots smoked in Respondent's airplanes. Tr. at 498. While it appears that the regulatory prohibition on smoking on an aircraft only applies to passenger carrying flights (*See* 14 C.F.R. §§ 121.317 and 252.4), Respondent's employee handbook (albeit effective after the dates of these incidents) reflects Respondent's smoking policy that "[s]moking is prohibited at all times on [Respondent] aircraft and stations." RX 18 at 17. In addition, as the pilot in command, Complainant carried the authority to regulate the conduct of the flight crew during any given flight. 14 C.F.R. § 91.3.

⁷⁸ Unfortunately, the Tribunal cannot tell the exact date the email was sent because the copy of the email provided to the Tribunal has most of the date darkened apparently from previously highlighting. It appears to be dated October 6, 2016, but the Tribunal cannot state this with certainty.

⁷⁹ When pressed about the flight being into a remote airport, Mr. Brown stated that Palau has "quite a few private aircraft" stationed there. Tr. at 845-46.

⁸⁰ Although it is common that an aircraft of this complexity would have aboard it a Traffic Collision and Avoidance System (TCAS), the record does not inform the Tribunal whether this was, in fact, the case. As described by the FAA:

TCAS is a family of airborne devices that function independently of the ground-based air traffic control (ATC) system, and provide collision avoidance protection for a broad spectrum of aircraft types. All TCAS systems provide some degree of collision threat alerting, and a traffic display.

FAA Booklet, Introduction to TCAS II version 7.1 (Feb. 28, 2011) available at https://www.faa.gov/documentLibrary/media/Advisory_Circular/TCAS%20II%20V7.1%20Intro%20booklet.pdf.

34. Complainant testified that he had seen Captain San Agustin and other check airman at Respondent do the same thing to Captain Goodman during check rides previously. Tr. at 578. He similarly stated this in his report. CX 34. Captain San Agustin confirmed that this technique had been used in the past at Respondent. Tr. at 268-69.

In Captain Freeman's opinion pulling the shade to simulate Instrument Flight Rule ("IFR") conditions when maneuvering at a non-controlled airport was not appropriate for a line check. In his view, one should not do this during a commercial flight for it was not a training environment. Consequently, he viewed Complainant's actions as careless and reckless conduct. Tr. at 789-91.

Mr. Brown, Respondent's Director of Safety, recounted that when he was the chief pilot for an airline in Berlin, Germany, he was informed by the Principal Operations Inspector ("POI") assigned to the company that his predecessor had been doing checks on line or revenue flights and that "was considered a no-no." Tr. at 833. It was his opinion that doing a line check on a revenue flight was not a safe practice. Tr. at 832-33.

After this incident, Respondent never again used Complainant as one of its check airman. Tr. at 806, 808, 810, 819. However, Respondent continued to pay Complainant check airman pay until March 2017. Tr. at 810. Captain Brown testified that Complainant retained his check airman status. Tr. at 835. When Captain Freeman was shown the line check evaluation form and asked how a line check airman could evaluate a pilot on an IFR flight in VFR conditions, he could not explain; he maintained his opinion that it was inappropriate to evaluate a pilot using vision limiting devices during a commercial flight. When asked, Captain Freeman could not reference a regulation that states such. Tr. at 821-22. The Tribunal asked a similar question of Mr. Brown and he stated: "If you're instrument meteorological conditions, obviously there's not going to be any outside visibility.... However, if you're in visual meteorological conditions, there is the possibility that you have other VFR traffic in the area that you're much more likely to have ... uncontrolled VFR traffic in the area. And therefore, being able to see outside the airplane is worthwhile." Tr. at 845.

In October 2016 Respondent did not include Complainant on its November 2016 flight schedule, purportedly for scheduled teleconference training. Tr. at 500; CX 20.⁸¹ However, Complainant later learned that no teleconference training had been scheduled for him. Tr. at 501. When he talked to Mr. Brown and Respondent's POI about the schedule, within two days Complainant was added to the November 2016 schedule. Tr. at 500, 502, 504; CX 21. See Tr. at 695-96. Although Complainant did fly in November 2016, he asserts that being placed on the schedule later in time resulted in him being given less favorable routes and more onerous conditions and times. Tr. at 500-01.

⁸¹ At the bottom of CX 20 it contains the following note "[p]ending a teleconference, Dolan is not scheduled."

Complainant's EEOC Complaints at the Time Complainant Filed His November 26, 2016 Complaint⁸²

Complainant filed an EEOC complaint on November 9, 2015, alleging discrimination because of nationality. In this claim he asserted that he was being “excluded from the Boeing 757 training which is a demotion in my career path.” He also alleged that “every time I bring up a safety concern, I am being harassed for it. These are Federal Aviation Administration safety regulations and vital to daily operations of the company.” The alleged discrimination occurred on September 15, 2015. RX 2; Tr. at 108, 555. On April 8, 2016, Complainant filed a second EEOC complaint referencing the first complaint and asserting as a new basis of his complaint retaliation that occurred between March 10, 2016 and March 22, 2016. RX 3; Tr. at 110-12. On January 17, 2017, the EEOC dismissed the complaint. RX 2; CX 24.

III. ISSUES

The Decision and Order discusses the following issues:

- Was the OSHA complaint timely filed?

⁸² Complainant also contends that his filing of a Title VII complaint in U.S. District Court on April 17, 2017 was protected activity because it raised air safety concerns. Compl. Br. at 10. Complainant's District Court complaint is located at RX 5. This filing occurred after Complainant filed his November 25, 2016 AIR 21 complaint with OSHA. In this complaint, Complainant does reference “safety concerns” about operating the Boeing 757 with little flight experience in August 2015 and the events around his March 22, 2016 flight to Honolulu and the cancelled flight on August 23, 2016, and his line check of Captain Goodman. RX 5 (compl. ¶¶ 34, 47-52, 55-57, 63-64, 71-77, 79-88).

Complainant's filing in U.S. District Court that includes alleged violations outside the required reporting period cannot be used to circumvent the statutory requirement to file his complaint timely. *See* 49 U.S.C. § 42121(b)(1). Complainant's argument attempts to bootstrap time barred allegations by claiming such a filing resets the clock. The Tribunal finds this argument without merit.

The underlying purpose of the Act is the protection of aviation safety related reporting. In looking at Complainant's District Court complaint, the Tribunal finds it striking in several respects. First in the jurisdiction section, there is no mention of any safety related matter, only allegations of employment discrimination and retaliation based on Complainant's national origin. It is clear that the purpose of this suit was to pursue remedies for discrimination because of national origin and race, *not* to report aviation safety related matters. *See* RX 5-12. Complainant does make reference to events raised in this claim, but only within the context of discrimination based on national origin and race. Any references to safety are made in passing within the overall context of Complainant's national origin and race complaints. *See Ferguson v. Boeing, Co.*, ARB No. 04-084, ALJ No. 2004-AIR-00005 (Dec. 29, 2005). Furthermore, in the remedies sought, there is no mention of requesting the Court to require the Respondent to cease aviation safety related violations or purported violations. Complainant only seeks compensatory and punitive damages for violations that alleged occurred based on his status as Marshallese.

While, if true, these allegations are repugnant, they have nothing to do with aviation safety. If anything, this is a *post hoc* argument crafted in an attempt to revive the untimely allegations addressed above. Accordingly, even assuming that the complaint in this matter extended to these post-complainant matters, this Tribunal finds that Complainant's filing of his suit in U.S. District Court was not a protected activity because it is not objectively reasonable that his suit pertained to violations or potential violations of aviation safety law, regulations, orders or standards.

- Are the parties covered under the Act?
- Did the Complainant engage in protected activity?
- Did the Respondent take an unfavorable personnel action against Complainant?
- Was the protected activity a contributing factor in the unfavorable personnel action?
- In the absence of the protected activity, would the Respondent have taken the same adverse action?

A. Complainant's Position

Complainant contends that Respondent punished him for exercising his discretion to conduct a safe flight, and Respondent's Vice President of Marketing, Mr. Ferguson, pressured him to reverse his decision and fly in dangerous conditions. Compl. Br. at 4, 7; Compl Reply Br. at 4-5. In another instance, one month later, and following a line check on a co-pilot, Respondent's Director of Operations, Captain Freeman, removed Complainant from the check airman schedule. Compl Br. at 4, 8-9; Compl Reply Br. at 5-7. Complainant also asserts that, after filing a Title VII action in U.S. District Court on April 17, 2017 which contained concerns about air safety, Respondent retaliated by removing him from the flight schedule for the months of May and June 2017.⁸³ Compl. Br. at 9-10; Compl Reply Br. at 1-4. Essentially, he argues the temporal proximity between the lawsuit and this adverse action establishes a retaliatory motive. Compl. Br. at 10; *see also* Tr. at 694. Complainant also maintains that Respondent cannot establish by clear and convincing evidence that it would have taken the same adverse actions even if Complainant had not engaged in protected activity. Compl. Br. at 11-12; Compl. Reply Br. at 7-8.

In his Amended Reply Brief, in addition to reasserting his arguments in his initial brief, Complainant posits that Respondent "omits critical statutory language from its definition and hence its analysis." Compl. Repl. at 1.

B. Respondent's Position

Respondent asserts that many of Complainant's allegations are untimely. It posits that Complainant filed his OSHA complaint on November 25, 2016. Thus, any alleged violations of the Act prior to August 27, 2016 are be time barred. Resp. Br. at 24-26. Respondent asserts that, of the allegations that remain, the August and September 2016 incidents do not constitute protected activity. Resp. Br. at 26-27. Respondent also argues that the EEOC suit filed by Complainant in April 2017 is not protected activity as it is entirely grounded upon violations of Title VII of the Civil Rights Act. Furthermore, the filing in U.S. District Court was insufficient to put Respondent on notice that Complainant was asserting a claim under AIR 21. Resp. Br. at 27-30. Respondent maintains that it would have taken the same employment actions in the absence of any protected activity. Resp. Br. at 30-32.

⁸³ As discussed above at footnotes 2 and 82, *supra*, those events are not the subject of this decision.

IV. 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 engaged in activity protected; (2) Respondent took unfavorable personnel action against him; and (3) the protected activity was a contributing factor in the unfavorable personnel action. See *Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, slip op. at 6 (Nov. 26, 2014) (citing 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a)). 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 employment action in the absence of the protected activity. *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 impact on the record contentions. See *Fraday v. Tennessee Valley Authority*, Case No. 1992-ERA-00019, slip op. at 4 (Sec'y Oct. 23, 1995).

The ARB has stated its preference that ALJs “delineate the specific credibility determinations for each witness,” though the ARB does not require such an assessment. *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). 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-00024 (Jan. 31, 2007); *Altemose Construction Co. v. NLRB*, 514 F.2d 8, 14 n.5 (3d Cir. 1975).

This Tribunal finds Mr. Ferguson’s testimony merits little weight. First, much of his testimony related to hearsay and multiple hearsay about what happened on a given flight. Second, many of his statements about how events occurred were inconsistent with the testimony of other witnesses with either direct knowledge of the event or who possessed additional experience (*i.e.*, being a pilot operating the aircraft at issue). Third, it became clear to the Tribunal during the hearing that Mr. Ferguson had some animosity towards the Complainant.

The Tribunal found the testimony of Mr. Atalig credible concerning maintenance issues related to the Boeing 727 aircraft. The Tribunal found his testimony consistent and within the scope of his area of expertise.

The Tribunal found portions of FO Kossen's testimony credible. It was clear to the Tribunal that FO Kossen was unhappy about the manner in which he was separated from Respondent's employ. The Tribunal also notes that FO Kossen never flew the Boeing 727 so his opinion on what happened during that aircraft's operation is given little weight. Additionally, he had little direct evidence about the incidents involved. However, FO Kossen did provide credible evidence about the safety culture at Respondent. Mr. Untalan supported FO Kossen's statements with his own credible—though narrow in scope—testimony. Further, FO Kossen credibly testified about the likelihood of getting an ATC clearance into RVSM airspace when operating a non-RVSM capable aircraft

The Tribunal did not find all of Captain Freeman's testimony credible. In particular, while serving as a Director of Operations, the Tribunal finds it not credible that he would conclude that one of his pilots acted carelessly and recklessly on two occasions, yet took no disciplinary action against the pilot. It is simply not credible that he would not even recommend that his line check airman letter of authorization be removed from him. And then the Respondent continued to pay Complainant essentially premium pay. The logic does not follow, so Captain Freeman's credibility is lessened.

Second, the Tribunal has difficulty understanding both his and Captain San Agustin's assertion that Complainant was "going to teach" Respondent a lesson. The Tribunal finds it curious that none of the flight crew who allegedly made these oral statements testified, nor did Respondent even produce a written statement from the affected crewmembers reflecting this attitude. Instead it relied upon the hearsay testimony proffered by members of Respondent's management. No sane pilot would deliberately place himself, his coworkers, and his passengers in a critically low fuel situation, especially when over the open ocean. The Tribunal does not doubt that the crew was scared about whether they would make landfall with such low fuel, but that is a far cry from doing so for the purpose of teaching Respondent a lesson, especially when the "lesson" entails placing one's own life in jeopardy. It is illogical to conclude that Complainant was willing to place his own life and the lives of his crew at risk to provide Respondent with "a lesson," and that the lives that he risked were thereafter unwilling to document this purported homicidal and suicidal act. Because Respondent relied on hearsay evidence only for this point, and such evidence is illogical in nature, the Tribunal finds Captain Freeman's testimony not credible.

The Tribunal found Captain Brown's testimony to be mostly cumulative of the testimony of other witnesses. The Tribunal finds no reason to give him more or less weight than other witnesses.

Finally, the Tribunal found the Complainant's testimony to be generally credible. While the Tribunal has questions about his stated rationale for not climbing higher during the Majuro to Honolulu incident, his testimony is unrebutted by any person that was actually in the aircraft. Further, the Tribunal found Complainant's concerns about actions being taken against him because of his ethnicity less credible, the Tribunal did find credible his representations concerning the events during the 2015 ferrying flight as well and the incidents in August and September 2016 to be credible.

B. Are Complainant's complaints timely?

To be timely, an AIR 21 complaint must be filed within 90 days of the date on which the alleged adverse action occurred; *i.e.*, when the adverse employment action was made *and* communicated to the complainant. 29 C.F.R. § 1979.103(d); *McAllister v. Lee County Board of County Commissioners*, ARB No. 15-011, ALJ No. 2013-AIR-00008 (ARB May 6, 2015). This 90-day period begins to run the day that an employee receives “a final, definitive, and unequivocal notice” of an adverse employment action. *Lempa v. Hawthorne Global Aviation*, ARB No. 2018-0046, ALJ No. 2017-AIR-00007 (ARB July 23, 2019); *Peters v. American Eagle Airlines, Inc.*, ARB No. 08126, ALJ No. 2007-AIR-00014 (ARB Sept. 28, 2010) (citing *Swenk v. Exelon Generation Co.*, ARB No. 04-028, ALJ No. 2003-ERA-00030, slip op. at 4 (ARB Apr. 28, 2005)); *Rollins v. American Airlines, Inc.*, ARB No. 04-140, ALJ Case No. 2004-AIR-00009 (Apr. 3, 2007). “The time for filing a complaint begins when the employee knew or should have known of the adverse action, regardless of the effective date.” *Peters*, slip op. at 5. It is the date that a complainant discovers that he has been injured by a discriminatory act—not the consequences of that act—that starts the 90-day period in which an AIR 21 complaint must be filed. *Id.*

In addition, “[n]o particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.” 29 C.F.R. § 1979.103(b) (emphasis added). For the reasons that follow, this Tribunal finds that many of the allegations in Complainant's complaint are untimely.

It is uncontested that Complainant filed his OSHA complaint on November 25, 2016 concerning alleged protected activity, which occurred between August and November 2016. To constitute a timely complaint, a complainant must assert a violation of the Act's whistleblowing provision within 90 days of the Respondent's alleged discriminatory action, or 90 days of the complainant's knowledge of the alleged discriminatory action, whichever occurs later. 29 C.F.R. 1979.103(d). Therefore, in this case, absent application of equitable tolling or evidence that the discriminatory decision was not contemporaneously communicated to the complainant, any alleged violations of the Act's whistleblower protection provision that occurred prior to August 27, 2016 is time barred.

Even though not raised by Complainant, the Tribunal has considered whether equitable tolling applies in this case. The ARB has articulated four instances in which tolling may be proper:

- (1) the respondent has actively misled the complainant respecting the cause of action,
- (2) the complainant has in some extraordinary way been prevented from asserting his rights,
- (3) the complainant has raised the precise statutory claim at issue but has mistakenly done so in the wrong forum, or
- (4) the employer's own acts or omissions have lulled the employee into foregoing prompt attempts to vindicate his or her rights.

Selig v. Aurora Flight Sci., ARB No. 10-072, ALJ No. 2010-AIR-00010, slip op. at 4 (Jan. 28, 2011). Complainant bears the burden of justifying the application of equitable tolling. *McAllister v. Lee County Board of County Comm.*, ARB Cast No. 15-011, ALJ Case No. 2013-AIR-00008, slip op. at 5 (May 6, 2015); *see also McGhee v. Guam Cmty. College, Bd. Of Trs. (Members)*, 2008 U.S. Dist. Lexis 27346 (D. Guam 2008); *Lau v. Fernandez*, 2017 U.S. Dist. LEXIS 117359 (D. Guam 2017).

As an initial matter, the Tribunal expressed concerns at the conclusion of the hearing about the timeliness of certain portions of Complainant's complaint and strongly encouraged Complainant to address that issue in his brief. Tr. at 863-64. For whatever reason, Complainant opted not to heed the Tribunal's suggestion, but Respondent did address the issue of timeliness in its brief. Resp. Br. at 24-26.

There is no evidence that Respondent misled the Complainant concerning the cause of action, nor is there evidence that Respondent prevented Complainant from asserting his rights. Complainant did not assert his claim was filed in a wrong forum.⁸⁴ Finally, there is no evidence that Respondent's acts or omissions lulled Complainant into foregoing prompt attempts to vindicate his rights. For these reasons, Complainant has not justified an application of equitable tolling in this case.

Three incidents that occurred prior to August 27, 2016 raised by Complainant warrant brief discussion: his refusal to ferry the aircraft to Guam in August 2015 and thereafter not being placed on Boeing 757 flights, the March 2016 Majuro to Honolulu flight, and the August 23, 2016 cancelled flight incident.

As for the incidents in September 2015, the evidence is clear that Complainant was fully aware that he was not flying the Boeing 757 after refusing to ferry it back to Guam in October

⁸⁴ Complainant did file EEOC complaints with the assistance of counsel. *See* RX 2-3 (service of dismissal of complaint to counsel); RX 5. The first occurred in November 2015. RX 2. However, in looking at the EEOC complaint, his allegations are only that Respondent excluded him from Boeing 757 training, and that Respondent did not schedule him to fly the Boeing 727. He states "every time I bring up a safety concern, I am being harassed for it", but he provides zero evidence of what safety issues were involved and it is clear to this Tribunal that the focus of his grievance was discrimination because of his nationality. 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 v. Air Evac EMS, Inc.*, ARB No. 08-071, slip op. at 9 (July 2, 2009). Finally, Complainant had counsel during this process. Counsel is "presumptively aware of whatever legal recourse may be available to [his or her] client." *Sysko v. PPL Corp.*, ARB No. 06-138, slip op. at 5 (ARB May 27, 2008); *see Sparre v. U.S. Dep't of Labor*, 2019 U.S. App. Lexis (7th Cir., May 10, 2019) (explaining complainant's attorney's failure to timely file is not extraordinary circumstances warranting equitable tolling of the Federal Rail Safety Act filing deadlines). Here, it is clear that Complainant's counsel knew about the OSHA complaint process because Complainant told OSHA when he filed his complaint that he became aware that he could file a complaint with them through his attorney. RX 1-8. Finally, even the allegation of discrimination because of his nationality is true, it is not an air carrier safety issue and thus not within the purview of the Act involved in this litigation.

2015. It is also clear that Complainant viewed this as an adverse action. The Tribunal agrees that this was an adverse action. Yet he took no affirmative steps to file a complaint concerning this issue. The Tribunal finds that Complainant was on definitive and unequivocal notice of this adverse employment action no later than the end of October 2015. Accordingly, the Tribunal finds this allegation time barred.

Concerning the March 2016 Majuro to Honolulu flight, there is no doubt that a serious safety event occurred. There is evidence that, upon inquiry, Complainant reported the events of the flight and those reports are protected activities. But there is little if any evidence that Respondent took any type of adverse action against Complainant for this incident. There is evidence that there were *recommendations* to take adverse action including terminating his employment, but Respondent did not act upon those recommendations. Mere recommendations are not adverse actions. Indeed, Respondent opted to retain him. There is testimony by Captain Freeman that he did not thereafter use Complainant as a check airman, but the September 2016 incident concerning Captain Goodman's failed line check directly contradicts his testimony. The issue of Complainant's line check airman status did not manifest itself until Complainant did not pass Captain Goodman during a line check. The Tribunal also notes that Respondent never stopped paying Complainant as check airman. And there is no evidence that Complainant ever objected to receiving pay while not being utilized as a check airman. Check rides for pilots of any Part 121 operator are required and occur on a regular basis. Given there were only one or two other check airmen for Respondent,⁸⁵ Complainant either knew or should have known about his non-use as a check airman within a couple of months. Thus, assuming under these facts that Respondent's non-use of Complainant as a check airman is an adverse action, the Tribunal finds that Complainant surely would have known or inquired about his non-use as a check airman within three months at most. Complainant continued to receive premium pay for essentially doing nothing and he cannot thereafter cry foul for not raising any concerns he might have had for his non-use. Accordingly, the Tribunal finds that, assuming these facts rise to the level of an adverse action, Complainant would have had knowledge of the adverse action by June or July 2016—well before the August 27, 2016 deadline to file a timely AIR 21 complaint.

The August 23, 2016 cancelled flight also requires brief discussion. First, Complainant's brief asserts that the flight occurred on August 30, 2016; it did not. Compl. Br. at 7. The citations for this proposition in Complainant's brief do not reference the date of the occurrence. *Id.* (citing to Tr. at 434-35). More importantly, the evidence establishes that Complainant filed his report about the incident with Captain Freeman on August 30, 2016. (CX 31; *see also* RX 1-7). However, the protected activity disclosure occurred on August 23, 2016. And Respondent already knew about this incident because Mr. Ferguson was the person directly involved. Complainant knew about the adverse action that day because the adverse action involved a requirement to stay at the airport until his duty time timed out. Therefore, the timeliness clock began to run on August 23, 2016. As this date is prior to the August 27, 2016 deadline, it is time barred. Finally, Complainant's brief contains no cognizable argument that Respondent took him off the flight schedule due to the August 23, 2016 incident.

⁸⁵ Tr. at 649. Captain San Agustin testified that Respondent currently has three check airman. Tr. at 163.

Accordingly, the alleged adverse employment actions that occurred prior to August 27, 2016 are time barred and will not be further considered by this Tribunal. Thus, the only event that warrants further discussion is Complainant's allegations concerning the September 2016 check ride incident.⁸⁶

C. Complainant's Prima Facie Case

1. Are the parties covered by the Act?

As the parties have stipulated that they are subject to the Act (Tr. at 20), the Tribunal finds that Complainant has established his first element.

2. Did the Complainant engage in 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, “[a]s 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, slip op. at 7-8 (Feb. 13, 2015) (citing 49 U.S.C. § 42121(a)) (emphasizing that “an employee need not prove an *actual* FAA violation to satisfy the protected activity requirement”) (emphasis in original)). Thus, the “complainant must prove that he reasonably believed in the existence of a violation,” which entails both a subjective and an objective component. *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, slip op. at 5 (Jan. 21, 2016). To prove subjective belief, a complainant must show that he “held the belief in good faith.” *Id.* To determine whether a complainant’s subjective belief is objectively reasonable, an

⁸⁶ Again, this decision only addresses the allegation contained in the OSHA complaint filed in November 2016, and does not address allegations raised in June 2017 and apparently still pending before OSHA.

ALJ must assess his 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.* (internal quotation marks omitted) (evaluating the reasonableness of a pilot’s belief in light of his training and experience).

Discussion of Protected Activity

- a. Complainant held a subjective and objective belief that Captain Goodman violated a standard of the FAA related to air safety. His decision to not pass Captain Goodman during the line check constituted protected activity.

A line check is where a “check airman” flies with another pilot to evaluate that pilot’s performance. A check airman is a pilot that has been designated by the Respondent’s FAA designated principal operations inspector (“POI”) to perform certain inspections on its behalf; the check airman has demonstrated ability to evaluate and to certify the knowledge and skills of other pilots.⁸⁷ “The role of the check pilot ... is to ensure that the flightcrew member has met competency standards before the check pilot ... releases the flightcrew member from training and to ensure that the flightcrew member maintains those standards while remaining in line service.”⁸⁸ Once determined to be qualified and trained to be a check airman, Respondent’s POI issues a letter of approval addressed to the Respondent.⁸⁹ In the cultural hierarchy of professional pilots, being a check airman tends to reflect favorably on the pilot’s skills and competency.⁹⁰

A Part 121 air carrier cannot allow a pilot to act as pilot in command of one of its aircraft unless, within the preceding 12 calendar months, that pilot has *passed* a line check in one of the types of airplanes he flies. 14 C.F.R. § 121.440. The line check is to occur over a part of a federal airway to which the pilot may be assigned. *Id.* The purpose of a line check is to demonstrate crew resource management and operational skills. “Line checks are necessary to test the pilot’s ability to operate in the National Airspace System (NAS), coordinate with the ground operations at airports used by the operator, and ensure the pilot’s compliance with company procedures and operations.”⁹¹ In short, the check airman represents the eyes and ears of the FAA to ensure the pilot being observed operates the aircraft in a safe manner. Respondent provides its line check airman with checklists to use when conducting line checks. *See, e.g.*, CX 8. The evaluated airman’s performance is then identified as satisfactory, unsatisfactory or not observed. Part of the checklist includes approach and landing and the checklist indicates what type of approach was evaluated (IFR or VFR) and which pilot was evaluated (PIC or SIC). *Id.*

⁸⁷ See 14 C.F.R. § 121.411; FAA Order 8900.1, vol. 3, Chap. 20. § 1, ¶ 3-1388(A), *see also* 14 C.F.R. § 125.295.

⁸⁸ FAA Order 8900.1, vol. 3, Chap. 20. § 1, ¶ 3-1389.

⁸⁹ *Id.* at § 2, ¶ 3-1426(A).

⁹⁰ See generally, Chip Wright, *Line Checks* AOPA Blog (Nov. 8, 2011), available at <https://blog.aopa.org/aopa/2011/11/08/line-checks/>.

⁹¹ FAA Order 89800.1, vol. 3, Ch. 19, § 3, ¶ 3-19-13-1(A).

As a Part 121 operator and one that operates at flight levels above 18,000 feet, Respondent conducts its operations under Instrument Flight Rules (“IFR”). *See* 14 C.F.R. § 91.135. When operating under IFR the primary means of navigating the aircraft is by use of instruments and not by reference to the environment outside of the cockpit. When operating under IFR, a flight plan must be filed describing the route and altitude of flight; the pilots are not allowed to deviate from the flight plan unless authorized by ATC. *See generally*, FAA Document FAA-H-8083-15B, INSTRUMENT FLYING HANDBOOK (2012). When flying under IFR, there is the real possibility that a pilot would have to make an instrument approach. This too is done solely by reference to the aircraft navigational instruments. *Id.*; *see also* FAA Handbook, INSTRUMENT APPROACH HANDBOOK (2017).

A pilot’s ability to fly by instrument reference alone is a critical safety skill. Tr. at 273-74. Certain pilot skills degrade over time, in particular the ability to perform under instrument meteorological conditions.⁹² It is for this reason that the FAA has established mandatory recurrency training when a pilot has not flown for a certain time period.⁹³ Thus, it is imminently reasonable for a check airman to want to access a pilot’s instrument flight skills.

There are certain standards that an instrument rated pilot, let alone an ATP rated pilot, is expected to meet when operating under instrument flight rules for an instrument approach.⁹⁴ For example, precision is important during a flight under IFR and especially during an instrument approach. “Significant speed and configuration changes during an approach can seriously degrade situational awareness and complicate the decision of the proper action to take at the decision point.”⁹⁵ The Instrument Approach Procedures chart sets forth the requirements to land an aircraft safely in instrument meteorological conditions. The approach procedures authorized for Respondent’s flight crews must be contained in its operations manual⁹⁶ and provided to its pilots.⁹⁷ In short, there is no doubt that a pilot’s ability to fly under the mandated flight rules—in

⁹² *See generally*, Fanjoy and Keller, *Flight Skill Proficiency Issues in Instrument Approach Accidents*, 3 J. Aviation Tech & Eng., 17-23 (2013), available at <http://docs.lib.purdue.edu/jate>. *See generally*, Sitterly, Zaitzeff and Berge, *Degradation of Learned Skills: Effectiveness of Practice Methods on Visual Approach and Landing Skill Retention*, NASA Report D180-15082-1 (Oct. 1972), available at <https://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/19730014359.pdf>.

⁹³ For example, a pilot cannot carry passengers or operate an aircraft requiring more than one crewmember, even when operating small aircraft in general aviation, when they have not conducted three take-off and landings within 90 days. 14 C.F.R. § 61.57(a). At nighttime, those landings must occur to a full stop. *Id.* at § 61.57(b). If a pilot does not fly under instrument flight rules in the preceding 6 months, they may be required to take an instrument proficiency check ride. *Id.* at § 61.57(d).

⁹⁴ *See generally*, FAA-S-ACS-8B, Instrument Rating – Airplane Airman Certification Standards (June 2018), at 15. These standards generally include compliance with clearance instructions and complying with instructions contained on an Instrument Approach Procedure chart. Approach charts contain procedures pilot’s use on approaches during IFR flights. They contain instructions such as altitude, airspeed and heading requirements of the approach. A pilot is expected to follow those instructions with some accuracy, such as plus or minus 10 knots for airspeed or no more than a ¾-scale deflection on the course direction indication (one of the instruments used during a approach).

⁹⁵ FAA Document FAA-H-8083-16B, INSTRUMENT PROCEDURES HANDBOOK (2017) at 4-36.

⁹⁶ 14 C.F.R. § 121.135(b)(8)(i).

⁹⁷ 14 C.F.R. § 121.443(b)(6).

this case instrument flight rules—relates to air carrier safety. By failing to pass Captain Goodman, Complainant communicated his concern to Respondent that Captain Goodman did not currently meet the safety standards necessary to operate a Part 121 aircraft.⁹⁸ 14 C.F.R. §§ 121.440(a); *see also id.* at 121.441(a).

Here, Complainant administered a line check of Captain Goodman; Complainant did not pass him, but recommended that another check airman perform another check ride at a later date. Tr. at 497. No testimony has been presented that Captain Goodman operated in violation of 14 C.F.R. § 121.440 after this line check, or that Complainant communicated to anyone that it would be a violation for Captain Goodwin to operate Respondent's aircraft after the line check. In fact, Captain San Agustin testified that if a pilot failed the line check, "you re-test. You re-examine. Or you send the candidate back to more simulator training." Tr. at 274. But protected activity extends beyond violations or alleged violations of the Federal Aviation Regulations. Protected activity includes violations or alleged violations of *any* order or standard of the Federal Aviation Administration relating to air carrier safety. 49 U.S.C. § 42121(a)(1). The un rebutted evidence before this Tribunal is Captain Goodman had difficulty during an instrument approach when his ability to reference information outside the cockpit was impaired by placing the shade over the windshield to simulate Instrument Meteorological Conditions. Tr. at 268. According to Complainant, Captain Goodman's performance was below the standard expected of him and thus he did not pass him. Respondent provided no evidence to contradict Complainant's assessment of Captain Goodman's performance during the line check. It matters not whether Complainant "did not pass him" or actually failed him. The key point is Complainant, while acting as an agent of the FAA as a designated check airman, identified that Captain Goodman violated a "standard of the Federal Aviation Administration" relating to air carrier safety, to wit: he did not pass his line check. 14 C.F.R. §§ 121.440(a) and 121.441(e). By not passing him, it triggered a regulatory requirement upon Respondent; it could not thereafter utilize Captain Goodman until he actually passed the line check. Therefore, the Tribunal agrees that the action of reporting the results of Captain Goodman's not fully favorable line check constituted protected activity. As a check airman, Complainant held both a good faith subjective belief—and also an objectively reasonable belief—that his decision to not pass Captain Goodman during the check ride constituted protected activity.

⁹⁸ The Tribunal finds it eminently reasonable that a line check airman would want to evaluate a pilot's ability to perform an instrument approach in simulated conditions where he serves as the aircraft's safety pilot. *See* 14 C.F.R. § 91.109. Further, Respondent provided no evidence that the regulations prohibited the technique Complainant employed. In fact, there would be nothing wrong with doing this as part of flight training. The regulations permit the check airman to stop the evaluation and conduct training during the course of the proficiency check itself. 14 C.F.R. § 121.441(e).

At best, Respondent presented some evidence the practice was not a preferred technique. However, Complainant and Captain San Agustin credibly testified that line check airmen for Respondent have used the technique during prior line checks. For these reasons, the Tribunal finds that Complainant's use of this technique during a line check was reasonable. But similarly, the Tribunal sees no violation or potential violation by Complainant by conducting an observation in this fashion. Complainant himself testified that he did not find this to be contrary to any practice at Respondent and this was corroborated by Captain San Agustin.

Conclusion Concerning the Protected Activity Element

The act of reporting a failed line check constitutes protected activity under the text of the Act. 49 U.S.C. § 42121(a)(1). Complainant held a subjectively and objectively reasonable belief that he reported a violation of an FAA standard. Accordingly, Complainant has succeeded in his burden to establish protected activity by a preponderance of the evidence.

3. Did Respondent engage in any adverse employment actions?

The Act provides, “[n]o 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, however, 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, slip op. at 13-14 (Sept. 28, 2011); *see also Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, 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, slip op. at 10-11 n.51 (Dec. 29, 2010)). The Board elaborated, “[u]nder 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. 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.” *Id.* at 14 (citing *Van Der Meer v. Western Ky. Univ.*, ARB No. 97-078, slip op. at 4-5 (Apr. 20, 1998) (holding in an Energy Reorganize Act claim 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)).

Discussion of the Adverse Action Element

The parties have stipulated that Respondent’s termination of Complainant’s employment on June 12, 2017 was an adverse action. Tr. at 21. Accordingly, Complainant has established

this element. However, Complainant also claims that his removal from the November 2016 flight schedule⁹⁹ was an adverse action. This action warrants only brief discussion. The Tribunal finds that initially Complainant was not placed on the November 2016 flying schedule. However, when Complainant presented his concerns, Respondent immediately corrected the issue prior to the occurrence of any November flights. Complainant asserts that the flights he was given were not favorable, however he provided no explanation to support this contention. Nor has he established that his actual flight hours were reduced. To the contrary, the evidence establishes that Complainant flew 41.42 hours in November 2016. Tr. at 499; RX 12-4. Accordingly, the Tribunal finds that this was not an adverse action.¹⁰⁰

The Tribunal also finds that Complainant suffered adverse action when, following the September 2016 line check of Captain Goodman, Respondent did not thereafter use Complainant as a line check airman. Tr. at 807. Respondent is a small air carrier. Tr. at 107. Thus, it employs a limited number of check airman. Complainant testified that at one point (2015) he was only one of two check airman in Respondent's employ. Tr. at 649. Even now, Respondent only lists three check airman on its certificate. Tr. at 169. Respondent acknowledged that it had difficulty obtaining and retaining pilots for its operations. Tr. at 166. Therefore, it had every incentive to ensure that nothing interfered with its ability to utilize fully the pilots it could retain. This combined with the fact that a check airman did not pass a captain and thereafter was never used again as a check airman, it sends a clear message to other check airmen not to fail any pilot during a check ride. This chilling effect runs contrary to the promotion of air safety; the Act's very purpose. 49 U.S.C. § 44701(d)(1)(A). Granted, Respondent never officially removed Complainant as one of its check airman until April 2017,¹⁰¹ and in fact continued to pay him his check airman pay.¹⁰² But there is also no evidence that these facts were known by the other check airmen. It would be just as reasonable to assume that the other check airmen would believe that Complainant lost his check airman appointment and pay because he was no longer being utilized as such. Under these circumstances, the Tribunal finds Respondent's non-use of Complainant as a check airman was an adverse action. Finally, on April 7, 2017, Captain Freeman officially revoked Complainant's position as a check airman.¹⁰³ There is no question that Complainant's removal as a check airman on April 7, 2017 was an adverse action.

⁹⁹ Complainant also asserted that his removal from the May and June 2017 flight schedules were adverse actions. Compl. Br. at 9-10. However, these actions occurred seven months following the filing of the complaint before this Tribunal, and are not part of the complaint currently before the Tribunal. And even if they were, and assuming it was an adverse action, they have no nexus to an activity protected under the Act.

¹⁰⁰ The Tribunal finds the immediacy of Respondent's correction of Complainant's omission from the flight schedule strong evidence that Respondent acted with no malice when setting the initial schedule.

¹⁰¹ Mr. Ferguson testified that he believed that Complainant was removed as a check airman after the March 2016 incident. Tr. at 124. However, this is clearly not the case for Respondent used Complainant as a check airman six months later during Captain Goodman's check ride. Mr. Ferguson probably was referring to Complainant's removal at the end of March 2017, after Captain Goodman's check ride.

¹⁰² RX 8; Tr. at 654-55.

¹⁰³ Tr. at 650, 654-56. See RX 8; compare CX 12 at ¶ 101 ("On April 4, 2017, Freeman purported to Revoke [Complainant's] position as [Respondent's] check airman.") with CX 13 and CX 14 at ¶ 50 ("[Respondent] admits the allegations contained in paragraph 101 of the Complaint.").

Adverse Action: Conclusion

Complainant has successfully established he suffered adverse employment actions when Respondent:

- stopped utilizing the Complainant as a check airman in September 2016; and
- terminated Complainant's employment in June 2017.

Because Complainant has successfully established the foregoing adverse actions, the Tribunal must determine whether Complainant's protected activity was a contributing factor in that unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a).

4. Did Complainant's protected activities play any role in the adverse employment actions?

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-52, slip op. at 5 (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*, 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-00020, slip op. at 8 (May 31, 2013). Put another way, a trier of fact must find the contributing factor element fulfilled when the following question is answered in the affirmative: did the protected activity play a role, *any* role whatsoever, in the adverse action?" *Palmer*, ARB No. 16-035, USDOL Reporter, page 52 (emphasis in the original).

A complainant may prove this element through direct evidence or circumstantial evidence. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, 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, slip op. at 7 (Dec. 31, 2007); *see also Powers*, ARB No. 13-034, slip op. at 23 (explaining that at times, temporal proximity alone may be sufficient to demonstrate the element of contributing factor). "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, 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, slip op. at 56.

To succeed in a whistleblower action, a complainant must also show that the employer had knowledge of the protected activity. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). This requirement stems from the statutory language prohibiting employers from taking adverse action against an employee “because” the employee has engaged in protected activity. *Id.* (citing 49 U.S.C. § 42121(a)). Accordingly, a complainant bears the additional burden of showing that the person making the adverse employment decision knew about the employee’s past or imminent protected activity. *Id.*

Discussion of the Contributing Factor Element

The record establishes that Respondent terminated Complainant’s employment in June 2017, seven months after Complainant filed his initial OSHA complaint. The firing occurred shortly after Complainant filed his EEOC suit in U.S. District Court. The record also establishes that after September 2016 Respondent did not use Complainant as a line check airman. The record establishes that Respondent continued to pay Complainant the \$300 per month for his availability to serve as a line check airman; Respondent did not revoke Complainant’s line check airman status until April 2017, just prior to his termination of employment in June 2017.

The record does not establish that Complainant’s protected activity in reporting Captain Goodman’s failure of the September 2016 check ride had anything to do with any of the adverse actions that occurred seven to nine months later. The ten month gap between the September 2016 checkride and the June 2017 termination of employment does not lend itself to an inference of temporal proximity. No other evidence of record establishes the required causal nexus. Accordingly, the Tribunal finds that Complainant’s protected activity in not passing Captain Goodman during the September 2016 checkride was not a contributing factor in Respondent’s decision to terminate his employment.

However, the Tribunal finds by a preponderance of evidence that Complainant’s protected activity in not passing Captain Goodman during the September 2016 checkride was a contributing factor in Respondent’s decision to no longer utilize Complainant for future checkrides. The un rebutted testimony by Captain Freeman, and to some extent by Mr. Ferguson, is Respondent did not want to use Complainant as a check airman after March 2016 and did not use him after September 2016 following this incident. The proximity of these events—in concert with the totality of events in this case—leads the Tribunal to conclude that Complainant’s failure to pass Captain Goodman was at least one factor, if not a primary factor, in Respondent’s decision to no longer use Complainant’s services as a check airman.

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

Complainant and Respondent are subject to the Act. Of the allegations that are timely and ripe for adjudication, Complainant’s reporting to Respondent that Captain Goodman did not pass his checkride constituted a protected activity. Further, and as stipulated by the parties, Respondent terminating Complainant’s employment as a pilot was an adverse action. However, Complainant’s protected activity currently before this Tribunal had nothing to do with these adverse actions. On the other hand, Complainant’s protected activity was a contributing factor in Respondent’s decision not to utilize Complainant as a check airman thereafter. Accordingly,

Complainant has established a *prima facie* case as to the sole protected activity of reporting to Respondent that Captain Goodman did not pass his checkride; the burden thus shifts to Respondent to establish by clear and convincing evidence that it would have taken the same unfavorable action absent the protected activity.

D. Respondent's Case-in-chief

1. Has Respondent proven by clear and convincing evidence that it would have taken the same adverse employment action absent Complainant's protected activities?

Once Complainant establishes a *prima facie* case, the Act provides, “[r]elief may not be ordered . . . 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. § 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, slip op. at 11 (May 26, 2010). The Board further explained, “[t]hus, 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 Links, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 4-5 (ARB Dec. 30, 2004); *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070 and 08-074 (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, at 16. Disparate treatment may also constitute evidence of pretext where similarly situated employees 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 . . . thus preclude any determination that [the employer] could establish by clear and convincing evidence that it would have fired [the complainant] absent his protected activity”).

Respondent argues that Complainant’s performance during the March 2016 flight from Majuro to Honolulu was careless and reckless such that Respondent could have fired Complainant then. Resp. Br. at 31. It also asserted that Complainant possessed poor CRM skills (several pilots refused to fly with him); it also cited Complainant’s “unwillingness to be part of [Respondent’s] team” as another factor in his termination. *Id.* at 32. The Tribunal is unconvinced such rationales fully explain Complainant’s termination, let alone explain Respondent’s decision to stop using him as a check airman. Again, the Tribunal finds that the termination had nothing to do with the safety related matters before this Tribunal. Issues concerning his alleged retaliatory termination for raising national origin is, moreover, for another

forum to decide. The sole issue that remains for this Tribunal at this stage of the analysis is whether Respondent can establish it would have taken the same action of not using Complainant as a check airman in the absence of his decision not to pass Captain Goodman during a checkride and to report that decision to Respondent.

The Tribunal finds that Respondent cannot meet its burden. Respondent spent much time presenting generalities about Complainant's "poor CRM", and not being a "team player", but provided little credible evidence to support its claims from first hand witnesses. Most notably, Respondent provided no evidence to document contemporaneous "poor CRM" events or actions. In contrast, Complainant presented contemporaneous documentary evidence that he exhibited good CRM skills. *See* CX 4 ("excellent CRM"); CX 5 ("excellent crew handling"). There was also testimony from Captain Kohler who had flown with Complainant between ten and twenty times and considered "very good" Complainant's CRM skills. Tr. at 433. Flight Engineer Untalan, who the Tribunal found to be very credible, had flown with Complainant a great deal and had confidence when Complainant was captaining the plane and felt safe. Tr. at 604. Importantly, he commented that Complainant was one of the pilots that was "by the book" a reference to following proper safety and operating procedures; a check airman should have such a propensity. Tr. at 605.

It is the duty of an air carrier "to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. § 44701(d)(1)(A). That duty involves precluding the careless or reckless operations of its aircraft. Respondent presented no documentary evidence of counselling or performance issues with Complainant even after the March 2016 flight. And most of Respondent's witnesses were not present when the events of concern occurred. It is simply inconsistent for Respondent to claim that Complainant acted in a careless and reckless manner yet continue to use him as a pilot, much less as a check airman, for another six months. Check airmen are supposed to set the standard for an air carrier's pilot corps. If Respondent felt so strongly about Complainant's removal after this incident, surely it would have taken some action against Complainant following the March 2016 flight. At a very minimum it would have had those that experienced the "poor CRM" to document what actually occurred. Respondent's use of its management personnel to recount rank hearsay that is not even documented by those who actually experienced Complainant's alleged shortcomings does not meet Respondent's burden of proof. And Respondent's own actions—or rather inaction—in not firing Complainant, and using Complainant as a pilot for six months thereafter belies its stated concerns represented at the hearing. The evidence, therefore, fails to clearly and convincingly show that Respondent would have removed Complainant's check airman status but for his protected activity of reporting Captain Goodman's failed line check.

V. CONCLUSION

In sum, Respondent has failed to establish by clear and convincing evidence the existence of legitimate, nondiscriminatory grounds for its non-use of Complainant as a check airman. This Tribunal has analyzed all the evidence and testimony of record; when considered as a whole, this Tribunal concludes that Respondent engaged in an adverse employment action with discriminatory intent. Further, the proffered reasons for Respondent's actions do not clearly and convincingly establish that Respondent would have taken the adverse employment actions

suffered by Complainant even in the absence of his protected activity. Accordingly, Complainant has prevailed in his claim and is entitled to relief.

VI. RELIEF

The Office of Administrative Law Judges “Rules of Practice and Procedure”, 29 C.F.R. Part 18, Subpart A, apply in this case. 29 C.F.R. §1979.107(a). Under those rules, the complainant is obligated, within 21 days of entry of an initial notice or order acknowledging the case has been docketed (29 C.F.R. §18.50(c)(i)(iv)), and without awaiting a discovery request (29 C.F.R. §18.50(c)(1)(i)), to disclose to Respondent, *inter alia*:

A computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under §18.61 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered.

29 C.F.R. §18.50(c)(1)(i)(C). Furthermore, under 29 C.F.R. §18.53, the complainant has a continuing duty throughout the litigation to supplement or correct that disclosure if, at any time, the complainant learned it has become incomplete or incorrect in some material respect.

AIR 21 provides that if a violation is found, the administrative law judge shall order the person who committed the violation to: (1) take affirmative action to abate the violation; (2) reinstate the complainant to his former position together with compensation, including back pay, and restore the terms, conditions, and privileges associated with his employment; and (3) provide compensatory damages. 49 U.S.C. § 42121(b)(3)(B); *see also Evans v. Miami Valley Hospital*, ARB No. 07-118 (Jun. 30, 2009), slip op. at 19; 29 C.F.R. § 1979.109(b).

A. The Parties’ Arguments

Despite this Tribunal’s admonition at the end of the hearing that Complainant had provided very little information about damages,¹⁰⁴ Complainant continued in this vein by providing almost no argument in either his initial brief or reply brief concerning the relief he seeks.¹⁰⁵ However, during the hearing, Complainant testified that he did not wish for reinstatement. Tr. at 682, *see id.* at 25. Complainant’s counsel in his opening also represented that Complainant seeks as damages removal of the letter of termination, “any related

¹⁰⁴ Tr. at 865.

¹⁰⁵ Complainant’s complete argument for damages in its brief consists of the following statements: “Complainant respectfully requests that the Court [sic] enter judgment in favor of Complainant, holding that Respondent unlawfully discriminated against Complainant for engaging in protected activity pursuant to 49 U.S.C. § 42121 and ordering Respondent to pay Complainant his back pay and attorney’s fees and costs incurred.” Compl. Br. at 12. In his Amended Reply Brief, Counsel states “judgment should be entered in [Complainant’s] favor for backpay, damages, punitive damages, attorney’s fees and costs incurred in this appeal.” Reply Br. at 9. As an aside, despite counsel’s request, this Tribunal is without authority to impose punitive damages under the Act.

communications with any federal authorities, back pay, and some form of compensation for attorneys' fees, costs, and his mental health and well-being." Tr. at 25. Respondent's brief did not address damages except to conclude that the Tribunal should "not award him anything." Resp. Br. at 33.

B. Reinstatement

Although the Act envisions reinstatement as an automatic remedy, neither party raised this as a remedy at the hearing or in their briefs. To the contrary, Complainant asked not to be reinstated.¹⁰⁶ Tr. at 682. It is also gleaned from the hearing that Respondent is not interested in having Complainant return to work. The Tribunal finds that it would not be in the interest of either party for that to occur in this case. Therefore, this Tribunal finds that reinstatement is not a desirable remedy to either party.

C. Back Pay

Complainant has the burden to prove the back pay he has lost. The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 99STA-5, slip op. at 13 (Dec. 30, 2002). An award of back pay must completely redress the economic injury, and therefore should account for salary, including any raises which the employee would have received, sick leave, vacation pay, pension benefits, and other fringe benefits that the employee would have received but for the discrimination. *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983).

Here back pay is not warranted for several reasons. First, as mentioned above, Complainant's termination had nothing to do with the protected activity Complainant engaged in or the adverse action he experienced. Second, Complainant did not lose pay during the period at issue. Specifically, Complainant continued to receive check airman bonus pay for seven months after the protected activity. Granted, eventually Complainant lost his check airman pay, but the Tribunal finds that loss was in concert with matters not within the jurisdiction of this Tribunal. Third, Complainant provided no evidence of per diem, medical benefits, pay raises, bonuses, vacation pay, contributions to retirement plans or evidence of any other sort of fringe benefit. Complainant bears the burden to establish back pay and having providing no evidence of these types of pay and benefits, the Tribunal cannot and will not award them.¹⁰⁷

¹⁰⁶ See *Rooks v. Planet Airways, Inc.* ARB No. 04-092, ALJ No. 2003-AIR-0035 (June 28, 2006).

¹⁰⁷ The only evidence of back pay exists in RX 8 which reflects that Complainant's check airman pay was \$4,506.48 every two weeks. Complainant agrees that RX 8 reflects what he was actually paid during the period 2015 – 2017. Tr. at 670. Complainant was on salary so the number of hours he flew per month did not determine his salary. Tr. at 671. Complainant testified that his per annum salary with Respondent was between \$105,000 - \$108,000 at the time Respondent terminated his employment. Tr. at 673. Complainant also testified that after his termination, he worked for Cape Air for three months with a \$54,000 per year salary, but that position ended on May 31, 2018 when the company went out of business. Tr. at 674.

D. Compensatory Damages

“Compensatory damages are designed to compensate discriminatees not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering.” *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (Feb. 9, 2001). Complainant has the burden to prove that he has suffered from mental pain and suffering and that the discriminatory discharge was the cause. *Evans v. Miami Valley Hospital*, ALJ No. 2006-AIR-22, slip op. at 52 (Jun. 30, 2009) (citing *Crow v. Noble Roman’s Inc.*, ALJ No. 95-CAA-8 (Feb. 26, 1996)); *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009STA-047, slip op. at 7 (Aug. 31, 2011) (citing *Smith v. Lake City Enters., Inc.*, ARB Nos. 09033, 08-091, ALJ No. 2006-STA-032 (Sept. 24, 2010)) (affirming ALJ’s award of \$50,000 in compensatory damages for emotional distress); *Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, -033, ALJ No. 2012-FRS-012, slip op. at 2-3 (Apr. 22, 2013). Reasonable emotional distress damages may be based solely upon the employee’s testimony. *Ferguson*, ARB No. 10-075, slip op. at 7-8. Nonetheless, a key step in determining the amount of non-economic compensatory damages is a comparison with awards made in similar cases. *Hobby*, ARB Nos. 98-166, -169, slip op at 32.

In the light most favorable to Complainant, the Tribunal assumes his reference to “mental health and well-being” refers to a request for compensatory damages. Complainant has the burden to prove that he has suffered from mental pain and suffering and that the unfavorable personnel action caused the harm. *Luder v. Continental Airlines, Inc.*, ARB Case No. 13-009, 2008-AIR-009, slip op. at 6 (Nov. 3, 2014).

Here, Complainant has offered no expert testimony—from, for example a psychiatrist, psychologist or other mental health professional—concerning the impact on Complainant’s mental well-being of Respondent’s failure to utilize him as a check airman. Tr. at 25. Further, he has offered no evidence of a mental health diagnosis nor has there been any evidence that his mental well-being resulted in the denial of a first class medical certificate, a certificate which is the prerequisite to serve as a pilot in Part 121 operations. See 14 C.F.R. §§ 61.23(a)(1)(i) and 67.107. However, reasonable emotional distress damages may be based solely upon the employee’s testimony. *Ferguson*, ARB No. 10-075, slip op. at 7-8; *Evans v. Miami Valley Hospital*, ALJ No. 2006-AIR-22, slip op. at 52 (Jun. 30, 2009) (\$100,000) (citing *Smith v. Littenberg*, 92-ERA-52 (Sec’y Sept. 6, 1995)); *Lockheed Martin Corp. v. Admin. Rev. Bd.*, 717 F.3d 1121, 1138 (10th Cir. 2013) (\$75,000); *Anderson v. Timex Logistics*, ARB No. 13-016, ALJ Case No. 2012-STA-11 (Apr. 30, 2014) (\$50,000); *Carter v. Marten Transport, Ltd.*, ARB Nos. 060101, 06-159, ALJ Case No. 2005-STA-35 (June, 30, 2008) (\$10,000); *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-35 (Jan 31, 2008) (\$5,000); *Bell v. Bald Mountain Air Services*, ALJ No. 2016-AIR-00016 (Oct. 10, 2018) (\$10,000); *McMullen v. Figeac Aero North America*, ALJ No. 2015-AIR-00027 (Jan. 13, 2017) (\$5,000). The Tribunal finds that any emotional distress Complainant suffered was minimal and therefore finds that \$5,000—an award at the lowest end of comparative cases—is the appropriate award for the emotional distress Complaint suffered due to Respondent’s discriminatory actions.

E. Non-economic Compensatory Damages

The Tribunal finds that any damages to Complainant's reputation as a professional pilot also warrants some discussion. The non-use of Complainant as a check airman telegraphed to the other pilots that Complainant either lacked the skills to be a check airman or something happened that warranted his removal. As FO Kossen testified a "check airman is supposed to be the best of the best." Tr. at 298. Respondent's unwillingness to use Complainant as a check airman in retaliation for not passing one its captains communicates to other check airmen that, if you fail a pilot during a check ride, you may lose your check airman status and its associated additional pay. As mentioned previously, line check airmen are generally recognized as setting the safety standards for other pilot's to emulate and it comes with a certain amount of prestige and generates a level of respect among a pilot's peers.¹⁰⁸ The loss of that status does harm to a pilot's reputation within the professional pilot community. The professional pilot community is a small one¹⁰⁹ and a pilot's reputation plays an important role in his or her climb up the aviation job ladder. Any damage to that reputation is of some value. Given the lack of expert testimony and the lack of any testimony of significance that addressed the damage to his reputation—and recalling that Complainant bears the burden to establish damages—the Tribunal finds that \$1,000 adequately compensates him for any harm to his reputation in this case.

The Act authorizes the Department of Labor, in part, "to take affirmative action to abate the violation." See 49 U.S.C. § 42121(b)(3)(B)(i). In this vein, the Tribunal finds two other matters warrant mention. First, Respondent shall expunge from its records any mention of Complainant being removed as a line check airman and shall not comment upon it in any future inquiries, whether made by potential future employers of Complainant or the news media. Second, deterrence of future discriminatory acts includes educating the violator's employees of the discriminatory act. Accordingly, Respondent shall distribute—by email—a copy of this decision to each current employee, officer, and/or director.

¹⁰⁸ See generally, Chip Wright, *Line Checks*, AOPA Magazine (Nov. 8, 2011), available at <https://blog.aopa.org/aopa/tag/check-airmen-line-check-airmen/>.

¹⁰⁹ In the context of how word spread at Respondent, a small air carrier, Captain San Agustin described what would happen if a pilot were to fail a line check:

[I]f you don't pass your line check, you're probably not going to fly in that position the next day. You're probably going to be put -- if you're a captain, you're probably going to be put in the right seat, or you're probably going to be put in what they call conditional -- conditional pass. You may -- you may have to be retested, and nobody wants to go through that. It's too embarrassing. The Company is too small. Everybody will know and -- and you don't want to do that. The -- the line check I conducted with Brian, he's on his best behavior. Everybody would be.

F. Attorney Fees and Costs

Complainant may submit a Fee Petition within thirty (30) days of this decision detailing the aggregate amount of all costs and expenses that were reasonably incurred by Complainant in this case. Supportive documentation must be attached. Thereafter, Respondent shall have twenty-one (21) days within which to challenge the payment of costs and expenses sought by Complainant; and Complainant shall then have fourteen (14) days within which to file any reply to Respondent's response.

VII. ORDER

This Tribunal **ORDERS** Respondent to:

- Pay Complainant \$5,000 for emotional distress damages;
- Pay Complainant \$1,000 for loss of reputation damages;
- Expunge any reference to Complainant's removal as a line check airman from his personnel file and Respondent is to make no reference to his removal as a line check airman in any inquiries from prospective employers;
- Transmit via email copies of this Decision and Order to all of its employees, officers, and directors in furtherance of the Respondent's duty to provide additional training in AIR 21's whistleblowing protections to all of its employees;
 - the required email transmission shall occur within 21 days of the date of this Order; and
 - within 14 calendar days of the transmission, provide to this Tribunal an attestation by a corporate officer that it has accomplished the above duties and requirements.
 - Failure to complete the foregoing requirements within 21 days of the issuance of this Decision and Order will subject Respondent to provide Complainant with an additional \$300 for each day it is in violation of this Tribunal's Order until compliance is achieved; and,
- Pay Complainant's attorney fees and costs, the exact to be later determined by this Tribunal in a future, separate, order.

SO ORDERED.

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) an